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NEW JERSEY SCHOOL LAW DECISIONS

Indexed

January 1, 1985 to December 31, 1985

Vol. II

SAUL COOPERMAN
Commissioner of Education

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State of New Jersey

OFFICE OF ADMINISTRATIVE L

INITIAL DECISION
OAL DKT. NO. EDU 3736-85
AGENCY DKT. NO. 169-6/85

A. M. L. AS FATHER AND NATURAL GUARDIAN OF T. L. v. BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF SCOTCH PLAINS-FANWOOD, UNION COUNTY

A. M. L., petitioner, pro se

Casper Boehm, Esq., for respondent
(Boehm and Campbell, attorneys)

Record Closed: June 19, 1985 Decided: June 26, 1985

BEFORE **SYBIL R. MOSES**, ALJ:

This matter comes before the Office of Administrative Law as the result of a petition for declaratory judgment and expedited hearing filed by A. M. L., as the father and natural guardian of T. L., against the Scotch Plains-Fanwood Board of Education. The petition was filed on June 15, and a hearing was held on June 19, 1985.

After a review of the testimony given by A. M. L. and Dr. Riegel, principal of the Scotch Plains-Fanwood High School, I make the following findings of fact: T. L. is a 16-year-old girl who is finishing her third year of high school in a presently constituted four-year high school run by the Scotch Plains-Fanwood Board of Education. She will be

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attending the University of Pennsylvania in September 1985, having been accepted after completing three years of high school. The high school at this time requires each student to fulfill certain course requirements and to amass 100 credits in order to graduate. Subject to check, it is stipulated that T. L. has amassed 100 credits and has fulfilled all the requirements to graduate with the exception of four years of English, which is in issue before me.

T. L. entered high school in September 1982. In December 1981, when T. L. was in the eighth grade, her parents received a notification from either the guidance department, the Board of Education (Board) or the principal of the high school asking that they attend a meeting to be held on January 7, 1982, wherein the high school course requirements and course offerings for students who would be entering the high school in September 1982 would be discussed. Mr. and Mrs. L. did attend such a meeting. There was no testimony concerning whether the child attended the meeting. At this meeting there was a complete discussion of all graduation requirements imposed on students in this high school by the Board. That discussion was led by the principal of the high school, Dr. Riegel, and the head of the guidance department, Mr. Broady. Overhead transparencies were displayed to the parents and students indicating all requirements. Those transparencies are no longer in existence. The parents and the children were told, through the transparencies and through the words of Dr. Riegel, that four years of English would be required to graduate, starting with this class. The class entering the high school in 1982 was the first class that would attend grades 9, 10, 11 and 12 in this high school. The prior classes had entered after the ninth grade because it was a three-year high school. In 1982, either just prior to entering the school or simultaneous with entry, each child, including T. L., was given a copy of P-1 in evidence, Program of Studies, Scotch Plain-Fanwood High School, 1982-83.

In the spring of 1985, the L.'s and their daughter apparently made a family determination that she would apply for admission to college after three years in high school. T. L. had some discussion with the guidance department to see if she could get her diploma, even if she was no longer in attendance at the high school in 1985-86, by forwarding a transcript for her English course at college. She was told she could not get a

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diploma in 1986 by relying on the English course she took during her first year of college. At that point in February 1985, the father, Mr. L., came to school and discussed alternative methods of resolving the issue with the principal. The alternative of T. L.'s attending summer school was rejected by the father and by the child as well. A solution was suggested by Mr. L., which was agreed to by the principal of the high school, wherein T. L. would drop French and pick up a half-year course for two credits in the theater or art areas, and complete two independent study programs, one in the third marking period and one in the fourth marking period, which would give her four credits, which would equal a fourth year of English. Dr. Riegel did make good-faith efforts to implement this proposal. The plan was discussed with T. L., but was not acceptable because she did not want to drop French and have a hiatus between January 1985 and her freshman year of French in September 1985. It was at that point that Mr. L. decided to pursue his appeal process.

The Scotch Plains-Fanwood High School agreed to apply the credits from the calculus course T. L. was taking in Kean College to graduation credits so that she could have the required 100 credits. It is the policy of the high school that college credits are accepted for the purpose of graduation if the student is matriculated as a high school student while taking the college credits.

Three important pieces of information are contained in P-1 in evidence, the Program of Studies, the most relevant piece of evidence here. Requirements for graduation are set forth on Page 4 of that document. Those requirements are bifurcated. The first portion of the bifurcated requirements indicates that those students who will be graduating in June 1982, June 1983 and June 1984 have to complete three years of English. Since the high school was a three-year high school prior to September 1982, that would apply to the students who had matriculated in the tenth grade, as opposed to the ninth grade. The second part of the bifurcated requirements indicates that students who will be graduating in June 1985 and thereafter have to have one credit year of English or language arts for each year of enrollment. Page 14 of the Program of Studies (P-1) is entitled English Department-Course Title and clearly indicates that English I, II, III, and

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IV are required subjects by the designation (R) after each course designation. The document clearly states, on the top line of the page, that (R) means required.

Given the foregoing facts, I now have to consider the appropriate law. The particular question in issue is whether T. L. received appropriate notification in September 1982 that four years of English were required, or whether her knowledge at that time and whether the intent and requirements of the Board at that time were that one could graduate from the high school if one had amassed the appropriate number of credits and had taken a year of English for each year enrolled. (It is stipulated that T. L. has been enrolled for three years.) The applicable law in this matter is clearly set forth in a recent Appellate Division case, Parsippany Troy Hills Ed. Ass'n v. Bd. of Ed., 188 N.J. Super. 161 (App. Div. 1982). In that case, which dealt with another area of study, Drivers Education, the Appellate Division held that the choice of which courses to offer, and necessarily the content of those courses, is a discretionery decision left to the local boards of education, subject only to the periodic review of the Commissioner and State Board of Education. The court pointed out that it is the general rule that the decision of a board of education is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable, citing Thomas v. Morris Tp. Bd. of Ed., 89 N.J. Super. 327, 332 (App. Div. 1965). ". . . action of a local board which lies within the area of its discretionery powers may not be upset unless patently arbitrary, without rational basis, or induced by improper motive." Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288, 294 (App. Div. 1960).

Given that rule of law, it is my conclusion that the requirements of the Scotch Plains-Fanwood High School Board of Education that four years of English must be completed in order to graduate from its high school, in addition to amassing 100 credits, is not patently arbitrary, without rational basis or induced by improper motive. I find as fact that T. L. and her parents had adequate and ample notice of this requirement in the pamphlet "Program of Studies" (P-1). Mr. L. relies on the language that one credit year of English language arts for each year of enrollment is required to graduate. If that were the only language in P-1, I would rule in his favor and against the Board of Education

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because three years would be sufficient for T. L. to graduate if, in fact, she had amassed all the other credits. But that language cannot be considered in a vacuum. Immediately above the cited language, the Board made it very clear that three years of English are required for children who will graduate in 1982 through 1984. If the words "one credit year for each year of enrollment" is considered in light of the fact that those children who were in the three-year high school had to take three years of English, it is entirely rational and reasonable to draw the conclusion that the Board of Education meant that children who were in the four-year program had to take four years of English. That is not to say that it could not be interpreted another way, but I am only entitled to disturb the reasoning of the Board if it is irrational or unreasonable. Further basis for the reasonableness of the Board's interpretation of its own requirements is found on Page 14 of P-1, where it is clearly indicated that four years of English are required.

It is conceded T. L. received this booklet and that she and her parents had an opportunity to review it. Therefore, they certainly had an opportunity to review Page 14 where the letter (R) for required appears next to English I, II, III and IV. This language, when considered with the uncontroverted fact that in January 1982 the principal of the high school specifically and directly spoke to the parents of the eighth graders, including the within petitioner, indicating that four years were required, weighs heavily against any ambiguity of language. All the foregoing facts lead me to conclude that Mr. L. has not carried the burden of proof by a preponderance of the evidence and has not shown that the Board acted without a rational basis or was patently arbitrary.

I have reviewed the case relied upon by Mr. L., J. S. as Guardian of K. S. v. Bd. of Ed. of the Town of Philipsburg, OAL DKT. EDU 2232-84 (May 17, 1984) aff'd Comm'r of Ed. (July 5, 1984), aff'd State Bd. of Ed. (Jan. 2, 1985), which dealt with the standards for admission into the National Honor Society. I do note that the administrative law judge did not review everything in pari materia as I am doing today. The reason he did not is because the two areas suggested for inclusive review, revised policy for class average and class rank, did not deal with eligibility for the National Honor Society, the issue in that case. I think that difference must be stressed because the materials which I have considered all do specifically deal with requirements in the English area.

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For all the foregoing reasons I am denying Mr. L.'s requests for declaratory judgment and for an order directing the Board to allow T. L. to graduate on June 20, 1985. I am ordering the Board, however, to issue a diploma to T. L. if she completes, during the course of this summer, either an independent study program or a summer school program. I am asking the Board to be as cooperative and flexible as possible with T. L. and Mr. L. in arranging for an independent study program so that she can receive a high school diploma. T. L. is the type of child that any high school would be proud to have as a graduate.

It is hereby **ORDERED** that the request for Declaratory Judgment and for an Order directing the Board to allow T. L. to graduate on June 20, 1985 be, and is, hereby **DENIED**; and

It is further **ORDERED** that the Board issue a diploma to T. L. at the end of the 1985 summer upon successful completion of summer school or an independent course of study designed to satisfy the requirement of four years of English.

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

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

June 26, 1985
DATE

SYBIL R. MOSES, ALJ

Receipt Acknowledged:

JUN 27 1985
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

June 28, 1985
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

amn/e

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A.M.L., as father and natural guardian of T.L.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF SCOTCH PLAINS-FANWOOD, UNION COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

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

Upon examination of the record in this matter, the Commissioner does not accept the recommendation of the Office of Administrative Law denying petitioner's request for declaratory judgment directing the Board to issue a diploma to his daughter for the following reasons.

The language of the graduation requirements for the Scotch Plains-Fanwood School District contained in Exhibit P-1, "Program of Studies," is clear and unambiguous that "one credit year of English/Language Arts is required for each year of enrollment (at p. 4). As stated by the New Jersey Supreme Court in Duke Power Company, Inc. v. Edward J. Patten, Secretary of State et al., 20 N.J. 42, 49 (1955), where the wording is clear and explicit on its face, the policy must speak for itself and be construed according to its own terms.

The language of the graduation requirements for English/Language Arts is similar to that of the State requirements, namely "[o]ne credit year of communication for each year of enrollment...." N.J.A.C. 6:8-4.2(c)(1)(i)1. In the July 1980 State Department of Education document, Guidelines for High School Graduation Requirements, under the section dealing with "Local Decision-Making," it is clearly stated that the law and regulations pertaining to graduation requirements are

> "***presented in general terms to provide a framework of authority and guidance in the local decision-making process. The regulations, for example, do not say 'four years of English,' nor do they specify what is to be included in these courses. Rather, they say 'one credit year of communications for each year of enrollment...'

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> Thus, local districts can decide what requirements in the communication area are best suited for their students as a group as well as for the needs of individual students.***" (Emphasis in text.)(at p. 2).

Despite the guidance provided by the department's Guidelines, the Board herein did not act to use the language it had previously used in its graduation requirements. Such language would have dictated a statement that "four years of English/Language Arts were required for those graduating in 1985 and thereafter." Rather, it acted to alter the language in the manner cited above.

Consequently, the Commissioner determines the requirements mandate 4 years of English/Language Arts only if a student is enrolled for 4 years in the district's high school. The Commissioner does not reach this determination in a vacuum. He is fully cognizant of the fact that "[i]n ascertaining the meaning of a policy, just as of a statute, the intention is to be found within the four corners of the document itself." Romeo v. Board of Education of Madison Township, 1973 S.L.D. 102, 106 He, therefore, carefully examined page 14 of the district's "Program of Studies" (P-1) which contains a chart pertaining to the English course offerings and requirements. That chart is reproduced in pertinent part below:

ENGLISH DEPARTMENT

		GRADES:			
COURSE TITLE	(R) - REQUIRED	9	10	11	12
Advanced Placement English					x
Culmen				x	x
English I	(R)	x			
English II	(R)		x		
English III	(R)			x	
English IV	(R)				x
Journalism			x	x	x
LIFE			x	x	
Nature of Man				x	x

As can be seen, English IV is required in grade 12. Had petitioner's daughter been enrolled in grade twelve, this would constitute a fourth year of enrollment and she would, according to the district's graduation requirements, be obligated to take English IV. Such is not the case herein however. Petitioner's daughter has been accepted at the University of Pennsylvania at the end of her junior year, her third year of enrollment. Having completed one-year of English/Language Arts for each of her three years of enrollment and all other state and local requirements for graduation, she is thus entitled to receive a diploma.

Accordingly, it is ordered that T.L. be awarded a diploma by the Scotch Plains-Fanwood Board of Education for the reasons expressed herein.

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In light of the factual circumstances of this case, the Commissioner wishes to express that the high school graduation requirements are intended to assure that the graduates of New Jersey's public schools have attained knowledge, skills, and proficiencies at a level and quality we may be proud of as they enter the world of work or post-secondary schooling. They are not intended, however, to serve as rigid, inflexible barriers to extraordinary student achievement and accomplishment. As correctly noted by the judge, T.L. appears to be a student any high school would be proud to have as a graduate, having acquired a level of knowledge, skills and proficiencies sufficient for acceptance at the University of Pennsylvania after only three years of high school preparation in one of New Jersey's schools. The Commissioner is confident that T.L.'s teachers, the Board and her parents have every reason to be proud, given this outstanding achievement.

COMMISSIONER OF EDUCATION

JULY 29, 1985

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INITIAL DECISION
OAL DKT. NO. EDU 2046-85
AGENCY DKT. NOS. 84-4/85 and
85-4/85

IN THE MATTER OF THE
ANNUAL SCHOOL ELECTION
HELD IN FAIRFIELD TOWNSHIP,
CUMBERLAND COUNTY.

Joyce Miller, Esq., and **Patricia DeCarlo**, Esq., for petitioners Dickens and T. Wright

Cosmo A. Giovinazzi, III, Esq., for respondents Weber and Krasnov (Gruccio, Pepper, Giovinazzi & Butler, DeSanto & Mann, attorneys)

Yoshitaka Hanzawa, Esq., for respondent Mackie (D'Arrigo & Hanzawa, attorneys)

Allan H. Harbert, Esq., for respondent Fairfield Board of Education (Harbert & Maitland, attorneys)

Harold U. Johnson, Jr., Esq., respondent, pro se

Record Closed: April 29, 1985 Decided: June 12, 1985

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

Pursuant to a letter complaint filed by candidate Betty J. Dickens and an application for inquiry into alleged violations signed by ten qualified voters of the school district in accordance with N.J.S.A. 18A:14-63.12, the Commissioner of Education determined to conduct an inquiry in the annual school election held on April 2, 1985, in the Fairfield Township, Cumberland County, school district.

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The matter was transmitted to the Office of Administrative Law pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. An inquiry was conducted by the undersigned on April 26 and 29, 1985. Thirty-two persons were heard and twelve documents were admitted into evidence.

The announced results of the balloting for the election of school board members in the Fairfield district, as announced late on the night of April 2, 1985, were as follows:

FOR 3-YEAR TERMS
(3 SEATS TO BE FILLED)

Barbara Weber	332
Tonya E. Wright	224
Betty J. Dickens	218
Harold Steward, Jr.	213
John C. Mackie	200
Wanda A. Adams	53

FOR UNEXPIRED 2-YEAR TERM
(1 SEAT TO BE FILLED)

Harold U. Johnson	307
Anna R. Wright	221
John C. Mackie	15

From the voluminous testimony adduced, it is clear that the school election conducted on April 2, 1985, in the Fairfield school district was rife with irregularities. Despite the irregularities that will be discussed below, there has been no showing that the will of the electorate was thwarted and, therefore, the results of the election will be allowed to stand.

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I.

PERTINENT TESTIMONY

The chairman of the County Board of Elections testified that he received several calls from persons in the Fairfield district during the course of April 2. Among other things, he was told that an election worker was demonstrating use of the voting machines to voters, a prohibited activity. He called the person who was acting as Judge of the Election for polling districts one and three located at the Fairfield Township municipal building.

He instructed her not to do any demonstrations involving a regular voting machine. He suggested that she use the model machine face which is supplied to each polling place. She responded that the model did not have any illustration appropriate to a write-in vote. The chairman then instructed the Election Judge to illustrate how to write in a candidate's name by use of the sample ballot. The Judge replied that there were no sample ballots at the voting place. She did state that there was an extra voting machine in the room. The chairman then advised her to use the spare machine for demonstration of the write-in process.

The chairman also testified that this was the only complaint he knew of concerning the election. Persons on his staff tried to reach the County Superintendent of Schools but he was out of the county. His staff was not able to reach the Fairfield Township Board of Education secretary until she returned a call to his office after the polls had closed.

The witness further testified that the Election Judge was conscientious, attends instructional sessions regularly and knows the laws governing elections. He stated further that his office received no calls concerning voting machine malfunctions. He did advise the Judge to demonstrate procedures on an unused machine but acknowledged that there is no express provision in Title 19 of the New Jersey Statutes covering such a situation.

The Board secretary testified that she did all paperwork preparatory to the election, prepared absentee ballots for printing and selected election workers for approval by the Board. Because she had been on the job only a few months before the election, she

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went through Board records and found the names of four persons who had served as election officials in the past. One of the four persons the Board approved as an election official called in ill the day before the election. The Board secretary secured a substitute, who was subsequently approved by the Board.

The witness testified that on the day of the election she went to the polling place as a result of a telephone call from her assistant. The message she received was, in essence, that the County Board of Elections had received calls alleging irregularities. The Board secretary arrived at the municipal building at approximately 4:40 p.m. Shortly after her arrival, she received word of three additional phone calls to her answering machine concerning the election.

When she arrived at the polling place, she noted that the room was crowded and that much loud talking was taking place. She went to a registration table at which the Board president was sitting. At this point, the Election Judge stated that candidates had no right to serve as challengers but were doing so. Various persons also asked why candidates Mackie and Weber were allowed to be in the polling place. The Board secretary testified that she told the candidates that they were not allowed to electioneer within 100 feet of the polling place. She actually observed candidates Mackie and Weber shaking hands with voters and stating, "Thank you for coming out. Thank you for your vote."

The Board secretary testified that she left the room briefly twice thereafter but, in the main, stayed until the polls closed and the votes were counted. She observed election officials allowing chaos and argument, allowing demonstration of the write-in process and failures to check signatures in the signature registers.

The Board secretary noted that the Election Judge was speaking in terms of position numbers, not candidates' names, in her instructions to voters who sought aid. The Board secretary questioned this practice and was told by the Election Judge that the explanation was proper, the people just did not understand.

By 8:00 p.m., the Election Judge was being called to consult on every second or third vote.

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Betty Dickens and Anna Wright stated that they were present as challengers. They had no certificates from the Board secretary pursuant to N.J.S.A. 18A:14-15 and -16. Nonetheless they maintained that they had a right to be there. Candidates Mackie and Weber still questioned the propriety of Ms. Dickens and Ms. Wright to act as challengers.

At approximately this time, the Board attorney entered and stated that candidates could act as challengers. The Board secretary then told candidates Mackie and Weber as well as the Election Judge that candidates could act as challengers.

The Board secretary stated that the Board solicitor informed her about electioneering within 100 feet of the polling place and, further, that anyone electioneering was to be instructed to stop and police were to be called if necessary. At this point, other candidates left but candidate Mackie did not.

The Board secretary and Board attorney went to the police station, which is located in the same building. There was only one officer on duty. The officer stated he would check the polling place hourly.

The Board secretary and attorney returned to the polling place. Candidate Mackie was showing a group of voters on a model how to write in his name. The Board secretary instructed him to stop. She testified that he said to her, "You'll need someone with more authority." The Board secretary turned to leave the room and found the Board attorney and a policeman at the entrance. They escorted Mackie from the polling place.

Approximatley 20 minutes later, the Board secretary spoke to the Election Judge and suggested that the persons working this election should have attended training programs provided by the County Superintendent of Schools. Candidate Mackie, who had returned, told the Board secretary that she couldn't require the election workers to attend those sessions. The Board secretary replied that she certainly could require election workers to attend training sessions. Candidate Mackie continued to protest. Candidate Johnson intervened and asked Mackie to stop.

The witness testified that she saw candidates Betty Dickens, Tonya Wright, Anna Wright, James Krasnov, Harold Johnson, John Mackie and Barbara Weber in the polling place during the course of voting hours. She further testified that she saw no

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solicitation attempted by candidates Dickens, Tonya Wright, Johnson or Krasnov. It was her clear testimony that candidate Weber did twice solicit votes even after being warned not to.

The Board secretary further testified that upon her arrival, she observed election workers assisting voters. The Election Judge entered the closed booth with certain voters. Later, a more prudent course was adopted and, if help were asked, the Election Judge entered the booth while a second person looked on.

The Board secretary had provided sample ballots in envelopes to both polling places. The Board secretary had opened the election in polling district number two. Her assistant had opened the election in the municipal building for polling districts one and three. Not until after 8:00 or 8:30 p.m. did the Board secretary notice that the sample ballot was not posted. The Election Judge told her that there had not been time to post the ballot. Voters were present and demanded to start voting promptly at 2:00 p.m.

The Board secretary testified that members of the general public complained about heat in the room, arguments between candidates and election workers, the length of time required to cast a vote, being approached by candidates immediately outside of the building and also about how to cast a write-in ballot.

As to the election workers, the secretary stated she sent them notice of a training session at the office of the County Superintendent of Schools prior to the election.

It was also the Board secretary's testimony that the Election Judge had to leave the signature register table 30 to 45 times during the course of voting hours. She also stated her belief that the Election Judge's instructions concerning the model machine were wrong. The Judge should clearly have told the voters to cast a write-in vote last. Many voters apparently cast a write-in vote first, thereby locking the levers that would be thrown to vote for candidates on the printed ballot.

The Board secretary reiterated that candidate Mackie returned approximately 20 minutes after he had been asked to leave but that he did not again demonstrate how to cast a write-in ballot on the model machine. He did, however, again electioneer.

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The Board secretary stated that she had not advised the Board to adopt a resolution concerning a sample ballot, she did not provide any person a certificate or other identification as a challenger, and she gave election workers an instructional booklet delivered to each polling place and had before the election asked the designated workers to attend the instructional session presented by the office of the County Superintendent of Schools. She did not discuss with anyone the question of whether it was necessary for poll workers to get only the names rather than names and addresses of the voters.

The military and civilian absentee ballots (J-5) were not set up in the same manner as the face of the voting machine.

The office of the County Superintendent of Schools made available the poll lists for districts one and three (J-6). It was the Board secretary's testimony that the numbers on the poll lists did not necessarily indicate the order in which the voters cast their ballots. There was "so much chaos" on April 2 that sequence was not observed. Some 50 or 60 persons were jammed in the room when she arrived. Some were election workers, some were challengers, and some were candidates. Some persons apparently left after receiving voter authorization slips and returned later to actually cast their ballots.

It was also the Board secretary's testimony that she recommended the person to be Judge of the Election to the Board. On April 2, the Election Judge was overwhelmed, not that she did not know what to do but rather that she did not have enough help.

A resident and registered voter of the district testified that he arrived at the polling place at about 7:00 p.m. When he arrived, he saw candidates Mackie and Weber. Mackie approached his car as the witness parked it. Mackie asked if the witness were a resident and proceeded to explain the write-in procedure. He said he was a write-in candidate and would appreciate any support the witness could give.

When the witness arrived at the polling place, the room was quite full and the line of prospective voters extended well out into the hall.

Another resident and registered voter of the district testified that she arrived at the polling place somewhere after 4 p.m. on April 2. She saw candidate Mackie in the hall outside the polling place explaining to a group how to write in his name.

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Another resident and registered voter of the district testified that he was not familiar with the candidates when he arrived. He was in a line of approximately 15 persons. Mackie shook hands with him, demonstrated on a model voting machine how to cast votes for listed candidates and how to cast a write-in vote. While the witness was present, candidate Dickens intervened and said, "Mr. Mackie, you can't do that." The witness further stated that he did not know Mackie before he arrived. Mackie did not ask directly for a vote. The witness did not ask Mackie to demonstrate the model voting machine.

Another resident and registered voter of the district testified that she arrived at the poll at approximately 4:15 p.m. She knows candidates Dickens, Tonya Wright, Mackie and Weber by sight. She observed Dickens sitting near the Fairfield Township voter registration table and Tonya Wright sitting near the Cumberland Regional table. Weber was near the door. Mackie was confronting Dickens. Mackie had a paper in his hand and told Dickens that she, as a Board member, could not be in the polling place. Mrs. Dickens replied that if someone from the Board of Elections were to tell her that she would leave. The witness testified that she did not see Mackie after that exchange. She did observe candidate Weber standing between the line of voters and the machine while one Kenneth Sheppard was in the voting booth. Weber told the voter, through the closed curtain, how to cast a write-in ballot. Dickens and Wright protested. The Election Judge told Weber that she could not do what she was doing. Weber protested that the voter was handicapped, a fact the Election Judge denied.

A member of the Township Committee testified that he voted at the polling place arriving at approximately 5 p.m. As he entered the building he noticed many persons in line. He got his voter authorization slip and remained in line for a while but left the line and went downstairs before actually casting his ballot.

He saw Weber, Mackie, Tonya Wright and Dickens in the room. Mackie was in front of a registration table speaking to voters in line. Weber was immediately inside the room to the right of the entrance near the voting booth. The witness stated he could not hear any conversations at that point. He observed Dickens and Tonya Wright sitting near voter registration tables but did not observe either of them talking.

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After the witness had been in line for a brief time, he went downstairs and discussed with other persons some of the voting problems they had observed. The discussion lasted from 30 to 45 minutes. The witness later saw Weber in the doorway. He was in line to vote for another 30 minutes or so. He heard Mackie ask persons if they knew how to use the machine and how to cast a write-in vote. Mackie said to the witness, "I know you don't need instructions."

The Committeeman further stated that he did not leave as soon as he cast his ballot. He received a message that he had been called at home concerning problems at the polling place. He decided to remain there. He heard no one ask Mackie for help. Mackie was offering advise gratuitously. The witness then spoke briefly to Dickens. He stated that he felt it his duty to remain at the polling place in case he were to be needed as a witness at some future time. He did not stay until the polls closed however. It was his testimony that he saw a police officer escort Mackie from the polling place. He also stated that he did not hear Mackie asking for votes but rather heard him thank people for their votes.

Candidate Tonya Wright testified that she voted at approximately 2:30 p.m. Upon arriving at the polling place she introduced hereself to election workers as a candidate and challenger. She did not know the election workers' names at that time. She sat near the Cumberland Regional registration table for nearly the entire time the polls were open.

The witness recognized Exhibit J-2, the Petition received by the Commissioner of Education on April 8. As to the specifics of the complaint, the witness stated that she observed election workers showing voters how to cast write-in ballots once they were inside the voting booth curtains. She saw Weber, Mackie, and Krasnov soliciting voter support. She was not sure, however, that Mackie obstructed election workers by standing near the sample ballot amd instructing voters how to write in votes because she could not hear what he said. She observed Mackie shaking hands with voters.

The witness also testified that no sample ballots were taken from the election workers' envelope until approximately 8:45 p.m. Throughout the day she had challenged poll workers going into voting booths to help voters. She had also challenged the right of Mackie and Weber to instruct voters. The witness called the County Board of Elections

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several times during the day. On one occasion she asked if it were legal for election workers to enter a booth with a voter. She had seen the Election Judge enter the voting booth with a voter and challenged the action. The Election Judge entered the booth anyway but told Wright she could use the phone to call the County Election Board. Upon calling the County Board she was told clearly that election workers were not allowed to enter the booth with any voter. Wright returned to the room in which the voting was being conducted and relayed this message to the Election Judge. The Election Judge protested that she could help as long as two persons assisted.

The witness also observed election workers at the registration table. She stated that some voters merely were asked to sign the poll list while others were asked their full names and addresses and had to wait for a check of the register book before being given a voting authorization slip.

When the witness observed an election worker demonstrating how to operate one of the voting machines that was in use on that day, she called the County Board of Elections. She contacted a Mr. Parent. Mr. Parent asked to speak to the Election Judge and told her that she could not use operative machines to demonstrate to voters how to cast ballots.

The witness also stated that, at the outset of the election, voters registered for the regional election first and for the Fairfield Township election second. However, some got confused and went to the Fairfield Township election first. This was exacerbated by the crowded conditions in the room. The voting lines were so long that they either doubled back on themselves or extended out into the hallway.

When Wright challenged a vote, her challenges were not acknowledged. Occasionally, election workers would make a remark to the effect that "we've always done it that way."

The witness testified that she associated herself with two other candidates. She helped draft several flyers and pamphlets. She saw all campaign materials before they were printed. When shown Exhibit M-1, she stated that she did not help to formulate that particular handout but that she had approved of it prepublication. The witness

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acknowledged that the handout makes a statement concerning candidate Krasnov facing possible indictment by a Grand Jury. She did not know that on February 26, more than one month before the election, the charge against Krasnov had been downgraded and eventually dismissed.

Another resident and registered voter of the district testified he arrived at the poll at approximately 4:55 p.m. He observed candidates Mackie, Weber, Dickens, and Tonya Wright in the room. Mackie was at a table in the middle of the room near the sample ballot machine. Mackie asked the witness if he needed help with the machine. The witness replied that he did not. Mackie did, however, demonstrate use of the machine to other persons in the line. His only other observation was that he saw candidate Weber near the side door of the building, approximately 50 feet from the building, shaking hands with and talking to persons entering the polling place.

The witness reiterated that Mackie attempted to demonstrate the voting process to him. He did not, however, hear Mackie ask for a vote. The witness further stated that if solicitation is asking a person for support and nothing more, Mackie did solicit votes. As a candidate, Mackie should not have offered to help voters.

Candidate Betty J. Dickens testified that she was defeated in the April 2 election for a seat on the Fairfield Township Board. She is a member of the Cumberland Regional District Board. Because of her place of residence, she voted at polling district number two. She arrived at the municipal building at approximately 2:30 p.m. with Tonya Wright. She came to be a challenger and an observer. The Election Judge told her to sit at the district three table. The Election Judge was responsible for the signature registers. The Election Judge said, however, that she knew many people and did not have to check their signatures.

Dickens registered a complaint with the Commissioner of Education (J-1). She stated clearly that the Election Judge was instructing prospective voters on how to cast a write-in ballot using specific candidate numbers as examples. Dickens' number was not one of the numbers the Election Judge used in her explanation. When the Election Judge did put on view the sample voting machine, she added to it a written instruction as to write-in ballots. The Election Judge instructed prospective voters to cast the write-in ballot first, then vote for the candidates for three-year terms and, finally, to vote for candidates for the two-year term.

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The witness testified that while a Mr. and Mrs. Hickman were present, Mrs. Hickman asked for aid after she had entered the voting booth. The Election Judge entered the booth and Dickens objected. The Election Judge came out of the booth but was angry.

Another group consisting of a man, his wife, his father and his mother appeared to have some difficulty. The elder woman entered the Regional voting booth but apparently believed she was in the Fairfield Township booth. The Election Judge entered in order to render assistance. Her son stated that she could not read. The voter loudly and clearly stated from within the voting booth that she could read. The younger man then stated that his father could not read or write and asked if he could assist his father in voting. No one expressed any objection to that procedure, and, apparently, that was done.

Upon exiting the voting booth, the younger man spoke to Mackie. He said that Mackie's name appeared to be written on the plastic tab on the machine. He said Mackie had lost votes because his name was not there. He stated that, indeed, he had written Mackie's name on the plastic tab rather than on the paper underneath the tab. At this point, the Election Judge entered the machine and tried to erase Mackie's name from the plastic tab.

The witness also testified that no sample ballots were posted until approximately 8:30 p.m. One of the election workers challenged Dickens' right to challenge the Election Judge assisting voters. The worker stated, as did the Election Judge, "We've been doing this for 16 years and it's O.K." Dickens observed this same worker pick up the pencil hanging on the inside of the booth and hand it to at least two voters. She did not, however, hear either of the voters ask for the pencil.

This witness gave an account of the Sheppard vote essentially the same as that given above.

The witness stated that she later saw Mackie and Weber in the doorway. The Election Judge went over to them and spoke to them. They challenged Dickens' presence. She refused to leave even though they showed her what proported to be a copy of Title 18A of the New Jersey Statutes. Still later, after the sample machine model had been set

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up and the comment had been made by a voter about Mackie's losing votes, Mackie began to introduce himself to voters and ask if they needed help. Even if the answer were no, he proceeded to demonstrate how to use the voting machine, especially as to casting write-in votes. It was at this point that Mackie was ejected. He returned some 20 to 30 minutes later and began again to introduce himself and to demonstrate the model voting machine. The Election Judge asked him to stop but he did not.

At approximately 6:30 p.m. Dickens left the building. She saw Weber, Krasnov, and Johnson at the side of the building greeting voters as they arrived. She also saw one Harold Wright at the parking lot entrance some 100 feet distant from the building.

On cross-examination, the witness stated that she did help produce some campaign literature for herself and three other candidates. As to Exhibit M-1, she was in California when it was distributed. She did not approve its distribution. She learned of its existence after April 1. Nor did she contribute any money to the preparation of this handout. Her testimony was that whatever money she gave was for newspaper space only.

James Parent, deputy registrar, Cumberland County Board of Elections, also testified. He stated that the signature registers are actually signed by voters only in primary and general elections. For school board elections, they are used merely for signature comparison purposes. A voter must have a page in the book in order to be considered a registered voter. The books are constantly updated. If no page can be found for a particular person who presents himself to vote, an election worker should call the County Board of Elections immediately.

The witness was shown Exhibit J-6, the poll list for districts one and three. As to voter number 35, Lillian W. Wilson, he stated that her name does not appear in a register book. Rather, she is in what is referred to as a book of permanently disabled voters. This simply means that because of disability she is allowed to vote by absentee ballot. When she appeared at the April 2 school election there was no page for her in the voter register. The witness stated that at this point, the election worker should have immediately called the County Board of Elections. He also stated that voter number 338, Brenda M. Nedohan, had not been registered long enough to qualify to vote in the school election. She had registered on March 9, 1985. A page for this voter should not have been in the register book on April 2.

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The Deputy Registrar also stated that the proper procedure would be as follows:

1. The name of the prospective voter should be called out by an election worker.

2. The prospective voter's address must be stated.

3. The register books must be checked to see if the person is a duly registered voter.

4. Assuming everything is in order, the voter would then be given a voting authorization ticket and proceed to the voting booth.

In school board elections, a separate poll list (such as J-6) is kept of voters' signatures. Election workers must compare the signatures on the poll lists with the signature registers.

The witness also testified he received several calls from Fairfield Township on the day of the election but none of the calls came from election workers. Election workers must assure that the election is conducted properly. Challengers must wear a badge or have some other form of identification. No campaigning or electioneering must be allowed within 100 feet of the polling place. If a voter is unsure of how to operate a voting machine, an election worker can demonstrate on a model machine. An election worker can enter a voting booth with a voter only if the voter is handicapped or illiterate. As a matter of practice, the Deputy Registrar has always suggested, in general elections, that one Democrat and one Republican enter the booth whenever a handicapped or illiterate person requests help. Although school board elections are non-partisan, a sense of discretion would suggest that two persons rather than one should render assistance if assistance is actually needed by a voter.

On cross-examination the Deputy Registrar stated that if Lillian Wilson had appeared at the polls, she should have been required to vote by absentee ballot because her name appeared in the list of those persons permanently disabled. He also

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acknowledged that it was a mistake on the part of his office that a page appeared in the register book for Linda M. Needohan, who had not been registered a full 30 days before the school election.

It was also the witness's testimony that his office has responsibility for malfunctioning machines. If a machine malfunctioned he would try first to determine by telephone what the problem was. Usually, what appeared to be a malfunction was a voter error, that is, the voter tried to vote for too many candidates or cast a write-in vote before voting for listed candidates. Lifting the plastic tab over the space for a write-in, whether a name is written in or not, locks that column. This could create an apparent malfunction but is actually voter error.

Another resident and registered voter of the district testified similiarly to the other witnesses with the additional testimony that she was voter number 79, her husband was voter number 80, and Mackie was voter number 81, but he was not with them in the voter line. She does not know when Mackie voted. She did not, however, hear Mackie or any candidate ask for votes.

Another resident and registered voter testified that he arrived at approximately 3:45 p.m. and was voter number 97. He stood in the voting booth line until he realized it was not the line leading to the poll lists. When he did arrive and sign the poll list the election worker looked up his name in the signature register and allowed him to sign the poll list. However, he observed several voters sign the poll list in the absence of an election worker. He could also see an election worker next to the voting booth. As voters entered the booth, she handed them a pencil under the curtain some four or five times. He did not hear any of these voters request the pencils.

Harold R. Wright testified that he arrived at the polling place at approximately 6:00 p.m. but remained outside the building. He saw Mackie, Weber, and Krasnov talking to people arriving to vote. He began to speak to arriving voters himself and handed out campaign literature. He stated that he and the three candidates were all on the sidewalk at the south side of the building. Exhibit M-1 is a copy of what he was handing out on that evening.

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Wright stated that he did this for ten or fifteen minutes giving out three to five cards in all. He was then approached by a policeman who told him he was not more than 100 feet from the polling place. He asked the policeman where the limit was. The policeman indicated vaguely a point across the driveway at the entrance to the parking lot. The policeman did not speak to Mackie, Weber, or Krasnov. Wright heard Mackie tell people walking up that he was a write-in candidate and that his name would have to be written in. After the policeman talked to Wright, Wright put the campaign literature in his car, and removed himself to the entrance to the parking lot after observing for a few more moments.

Wright testified that he is the husband of Anna Wright, who was an unsuccessful candidate for a two-year unexpired term in the election. He and his wife were both signatories of the petition to the Commissioner of Education (J-2). He acknowledged that exhibit M-1 does not specify who paid for that particular piece of campaign literature. Wright further stated that he was not sure of the disposition of the charge against Krasnov that was referred to on exhibit M-1.

Still another resident and registered voter of the district testified that she arrived between 5:30 and 6:00 p.m. on the evening of April 2. She parked in the rear parking lot and approached the building. She saw a crowd on the sidewalk. Mackie and Weber were greeting people and handing something out, but she could not see what was being distributed. The candidates did not greet her. Upon entering the building, she observed a good deal of crowding. She found that she was in the wrong line at first but then entered the correct line and, eventually, signed the poll list. Her signature was checked against the signature register. She saw in the room Tanya Wright, Anna Wright, Krasnov, and Weber, and later Mackie and Johnson. Mackie and Weber were mingling with prospective voters.

The witness was in line for approximately 30 minutes. She was facing the voting machine all of that time. She noticed that she could see the pencil attached to the machine move up and down as voters used it. She stated, "If the pencil moves, you vote's not private anymore." The witness concluded by stating that she heard no actual solicitation of votes.

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A resident and registered voter of the district who is also an attorney testified that he voted at the municipal building between 5:00 and 5:45 p.m. He saw candidate Johnson leaving the room and spoke briefly to him, but not concerning the election. He observed Mackie demonstrating the model machine. He spent approximately 20 minutes within sight and earshot of Mackie. He did not hear Mackie ask for a vote. He saw no electioneering by anyone at any time.

The school board attorney was called as a witness. He stated that he has been board attorney since 1975. On April 2, he received two telephone calls. The first was from the Office of the County Superintendent of Schools and the second was from the County Board of Elections. Both calls dealt with problems at the municipal building polling place.

He tried to contact the Board secretary. She was not at her office and he left a message on her home answering machine. He proceeded to the municipal building and arrived just after 5:00 p.m.

He entered the polling place looking for the Board secretary. He saw Dickens and asked her to come out into the hall and talk to him and to indicate the nature of problems attending the election. He went to the police department because of the allegation that electioneering was going on. He met the Board secretary on his way to the police station. He asked the officer on duty to stop those persons who were electioneering and, if necessary, remove them from the polling place.

He then spoke to the Board secretary and advised her that it was proper for candidates to be at the polling place as challengers but that they could not electioneer in any way. He also told the Board secretary he believed she was in charge of the election. Upon returning to the polling place, the Board secretary stated, "He's doing it again," in reference to Mackie.

The Board attorney then took Mackie outside the building to talk. He noticed that a police officer was walking behind them. He did not ask the policeman to remove Mackie. Johnson, Weber and Krasnov were also present. The Board attorney advised all of these persons that it was not proper to electioneer in any manner. Acting as a challenger was proper but was different from electioneering. Candidate Johnson

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expressed agreement on this point. The Board attorney then told the Board secretary if there were any further problems that she could call him. He then left the building. As he was leaving Krasnov asked him where candidates could properly electioneer. He repeated the 100-foot requirement. When asked if the end of the driveway were 100 feet away, the Board attorney replied that it would seem so. He left the building at approximately 5:50 p.m. He stated he did not see any electioneering and that he was concerned about the general conduct of the election.

A member of the staff of the County Court's office testified that she is familiar with the List of Permanently Totally Disabled Voters. Lillian Wilson is on that list. The County Clerk's office maintains the list and, for each election, mails to the persons on the list (W-2) an application for an absentee ballot (W-3). Any person who wishes to vote then sends an application to the County Clerk. An absentee ballot then is forwarded to that person.

Lillian Wilson did not apply for her civilian absentee ballot. She is a registered voter but she does not appear in the regular register book.

Other registered voters testified that they voted on that day. They voted in the Regional District election first. As moving forward in the Fairfield Township line, they heard voices raised and challenges going on. Older persons could be heard saying they did not know how to cast write-in votes. Dickens stated that voters, once in a booth, could not be helped. The person in the Fairfield Township booth at the time, however, was not asking help. One witness asked Dickens how these persons could vote a write-in ballot. The Election Judge went to the Regional District machine, not then in use, and showed a few persons how to cast a write-in vote. Dickens protested. The model machine was present on the register table, but had no write-in space. Four or five people asked for assitance in this regard.

This witness said she was going to the courthouse to locate rules as to how this election should be run. She did go to the County Board of Elections office and was told that Title 18A of the statutes, not Title 19, governs school elections. The witness returned to the polling place and said she was unable to get the rules and would leave. She did so.

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Yet another witness testified that he arrived at approximately 6:15, saw Mackie, Weber, and Krasnov outside the building, entered the building and, because it was crowded spent nearly one hour in the voting process. As far as he could observe all was orderly and no electioneering was taking place.

Still another resident and registered voter stated that he and his wife arrived at approximately 5:30 p.m. He parked on the grass next to the rear parking lot because the lot was full. He saw Krasnov, Weber, Mackie and Howard Wright standing next to the side parking lot. Howard Wright was on the top step of the entrance to the police department. Wright approached the witness in a friendly manner, said his wife was a candidate, and handed the witness a copy of exhibit M-1. The witness kept going and entered the building. Mackie, Krasnov and Weber made no approach to him or his wife.

The witness and his wife entered the building, voted, saw no irregularities, and left.

Santo D'Agostino testified that he voted at the municipal building with his wife, mother and father, arriving a little after 3:00 p.m. All four persons signed the poll list. The witness's father does not know how to read and write. As they stood in line, the father in front, the father entered the voting booth first. The witness wanted to enter and assist his father. One of the challengers challenged and said that as long as the father could write his name the witness could not go into the booth with him. The witness stated that the challenger also said, "If he can't read, I can't help it." Ultimately, the witness was allowed to assist his father. He had helped his father in prior elections when the same election workers were present.

The witness further stated that he believed that he was voter number 67 or 68. His mother can read. Nevertheless he told his wife to assist his mother. He saw an election worker he recognized behind the register table. No election worker said anything to him or gave him permission to enter the booth with his father. He does not recall any previous election in which a write-in candidate was involved. He did receive literature before this election concerning the write-in candidacy of Mackie. When challengers objected to his assisting his father, he protested but sought no help of the election workers. The witness stated that he knows challengers are permitted at elections. He also stated that he asked his wife to assist his mother because his mother is losing her hearing.

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Mary R. D'Agostino testified similarly to her husband. She stated that her mother-in-law had signed the poll list first. She mistakenly entered the Regional District booth. While the witness was signing the poll list, her mother-in-law became confused because she did not recognize any of the names on the voting machine. The mother-in-law then stated, "I don't know how to get out of here." The witness stated that she then said, "Mama, come out." At this point a challenger said, "Tell her to close that curtain. She can't come out that way." Still another person yelled at the witness when she tried to open the curtains on the Regional District booth so that her mother-in-law could exit.

The witness stated that her mother-in-law never cast any vote on the Regional District machine. She then put her mother-in-law in line in front of her to vote in the Fairfield Township election. A voter in front of the witness' mother-in-law complained that she did not know how to cast a write-in vote. The Election Judge demonstrated on the model machine. Four or five voters in addition to the voter who had asked the question could hear the Election Judge's explanation.

Between the time of the incident with her mother-in-law in the Regional District booth and their Township vote, the witness went out into the hall. She saw Mackie and asked him what was going on. When she did vote, she could not get the curtains on the booth to open. When she did exit the booth, she spoke to Mackie and said, "You just lost four votes." It appeared to this witness that people attempting to cast a write-in ballot were writing on the plastic tab rather than pulling the tab up and writing on the paper underneath, which is the proper procedure. This witness also stated that she saw no electioneering.

On cross-examination, the witness stated that the election worker demonstrated the write-in procedure before this witness voted. This witness has voted before and has used voting machines before. However, she could not understand the Election Judge's explanation of the write-in process. She did not tell the Election Judge that the Election Judge's explanation was not understandable.

The Election Judge testified that she has been an election worker for more than ten years. She has attended many training sessions over that period.

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The witness stated that she knows Title 19 of the statutes applies to the use of voting machines. She knew a month before the election, by letter from the Board secretary, that she was being asked to be an election worker. On the day before the election, the Board secretary asked her to serve as Election Judge.

The witness has worked in three prior school elections. On election day she arrived at the polling place at approximately 1:30 p.m. When she arrived, voters were waiting to cast their ballots. She entered the polling place and received keys for the voting machines from the Assistant Board secretary.

The Election Judge stated it takes approximately ten minutes to open voting machines. It takes approximatley another 20 minutes to check the registers. She also stated that she did not open the envelope provided by the Board secretary until about 2:30 p.m.

The witness stated that she normally did not check the envelope immediately. She knows it contains Title 18A election rules, sample ballots and result sheets. She could not review the rules at the outset of the election because of the press of business. Further, there was no break in voting as the turnout was exceptionally heavy. Therefore, it was not until much later in the evening that she had an opportunity to open the envelope.

The witness stated that she had glanced at Exhibit W-1, Instructions to Judge of Elections and Election Board, issued by the Cumberland County Office of the New Jersey Department of Education. She got as far as the statement that a candidate for Board membership cannot be in the polling place except to cast a ballot or, if previously approved as such, to act as a challenger. The witness also stated that there may have been another set of instructions in the packet but she did not see them.

Shortly after the poll opened, Tonya Wright and Dickens came in and announced themselves as challengers. The Election Judge was at the Regional District table. Dickens sat at the end of the table to the witness' right. Dickens proceeded to make many objections and challenges. She spoke often to voters.

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Several voters asked this witness how to cast write-in votes after entering the voting booths. The witness answered the voters' questions. Dickens objected, stating that assistance could not be offered to voters after they had entered the booth.

Either Dickens or Tonya Wright called a person at the County Board of Elections. He called the witness to the telephone and informed her that she could not help voters after the voting booth curtain had closed.

The witness also stated that she could not keep up with the press of voters on that day. There was considerable confusion in the poll. Voters did not know how to cast write-in ballots. Voters were talking and challengers were constantly talking out. The witness did state that the challengers challenged voters and not the election workers. The Election Judge did not question the challengers as challengers.

It was the witness' testimony that challenges should be made to the election workers. The election workers would then decide the correct procedure in a given case. The witness also stated that the challengers seemed to confuse some older voters.

The Election Judge entered a voting booth twice. In the first instance, a voter had trouble with a lever. The Election Judge asked one of the election workers to come around to the front of the machine and act as an observer as she, the Judge, rendered assistance. She did this because under Title 19, two persons must attend whenever an election official enters a closed voting booth. Upon entering the booth, the witness asked the voter if she had cast a write-in ballot because a particular lever was locked out. The voter denied having cast a write-in vote. The Judge then told the voter to cast a "pacifier vote." The witness stated that these are write-in votes for persons on the ballot. She further stated that they do not count in the vote tally.

In the second instance, the Judge entered a booth when the pencil provided for write-in votes jammed the booth curtain track. The Judge fixed the problem and left the booth.

The Election Judge also testified that she was responsible for the district three registration book. Another election worker was in charge of the district one registration book. The witness was also in charge of the Regional District voting

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machine. Voters went to the Township tables first. They came to her table if they were in district three or if they wanted to vote in the Regional District election. If they signed the poll list and were given a voting authorization ticket at the district one table, this witness did not recheck their names and addresses. She believed she had to check the poll list signature against the signature registers but, if the election worker at the district one table had done so, this witness did not. She also did not check persons well known to her as voters from prior years. Perhaps 50 or 60 persons were allowed to vote in that manner.

When voters asked her about write-in votes, she used the mock machine with levers to demonstrate the voting process. She says she stated clearly that write-in votes must be cast last. There was not a write-in slot on the mock machine. The witness knew she hadn't gotten the write-in idea across to all voters. She then showed on the unused Regional District machine how to cast a write-in vote. Dickens challenged the use of an operative machine for demonstration purposes. One of the challengers called the County Election Board. A person from the Board spoke to the Election Judge and told her that she could not use an operative machine for demonstration purposes. She ceased to do so.

The witness also stated she was never asked to allow assistance by one voter to another. She also stated that instances of this were never brought to her attention. She recalls seeing the D'Agostino family but does not know about an incident with Mr. D'Agostino's father. The Election Judge stated that she did not allow assistance to Mr. D'Agostino's mother while the mother was in the Regional District booth or in the Township booth.

On occasion, voters would be unable to open the booth curtain after voting. On those occasions, the witness merely reached in and pushed up the write-in slot. That would release the curtains. This occurred six or seven times. It is not an unusual event and does not require a call for a mechanic from the County Board of Elections.

The witness also testified that she knows Weber and Mackie. She did not know Krasnov. She saw or heard no electioneering. She did see and hear Mackie attempting for thirty minutes to one hour to show on the model machine how to use the write-in procedure. He did not ask her permission or discuss the demonstration with her before performing it.

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This witness also told voters that candidates were arranged horizontally on the voter machine face. They were numbered from one to at least twenty. Some were for three-year terms, some were for a two-year unexpired term and there was the provision for write-in ballots. The witness says she clearly instructed voters that they must cast ballots for persons whose names were printed on the machine's face before casting any write-in vote. She said, for instance, "If you vote number two, number four and number six, you can cast write-ins for three, five and seven but not two, four and six."

She saw the Board secretary some time after 4:00 p.m. The Board secretary told the Election Judge that the Judge was having problems with write-in votes. She also told the Judge that the Judge could demonstrate at the machine if another person were with her. The Judge then told the Board secretary it was her understanding that she could not do that. She asked the Board secretary to secure more help. The request was denied. The polls closed at 9:00 p.m. and the last vote was cast at approximately 9:15 p.m.

The Election Judge and the poll workers then closed the machines, took out the ballot certification and took out the write-ins. Every column was checked. It was nearly 11:00 p.m. before the process was finished. All materials were put into an envelope, sealed and given to the Board secretary. Dickens and Tonya Wright were present throughout.

On the next day, the Election Judge called the Board secretary and stated that Certificate #2 from the back of the machine had to be amended (J-3). The Election Judge said that she had inadvertently listed two write-in votes for Mackie under the two-year unexpired term when they should properly have been credited to the three-year term.

The witness stated that voters were writing in Mackie's name on the plastic tab just above the budget question because they did not know how to cast a write-in vote. She erased his name from the plastic tab some ten or twelve times during the day.

On cross-examination, the witness testified as to a "pacifier vote." She stated that if a voter pushes up the write-in slot above any candidate's name, he or she cannot vote for the stated candidate on that column. If a voter locked out a column, he or she was allowed to write in the name of the candidate he or she wanted to vote for, but the vote did not count if that name appeared on the printed ballot on the machine face.

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The witness also testified that she asked Mackie twice not to demonstrate the voting procedure and to leave. He did not leave.

The witness further stated that she had read school board election instructions in the past but is more familiar with Title 19 elections. The witness also stated that she knows Lillian Wilson. She does not recall checking Wilson's signature. She probably would not have checked the signature because she knows Wilson and has worked with her on elections in the past. The witness stated that the failure to check this signature was a mistake.

The witness also stated that she did not tell Dickens to direct challenges to her, the Election Judge.

The Election Judge also stated that she did not attend a training session for the school board election this year or at any time in the past.

As to the Sheppard incident, the witness stated that she did not know if Weber was there at the same time as Sheppard. She did, however, ask Weber to make a telephone call concerning something in her Title 18A instructions. If she, the Election Judge, had gone downstairs, she could have had Mackie removed when he refused to stop demonstrating the voting machine, but she could not leave the polls for that long. She was legally in control of the polls but not actually in control because of the confusion attendant to the election. There could have been two voters in a booth at one time.

As to the length of the chain on which the pencil for write-in votes was suspended, the witness stated that the length is always the same and that the pencil always shows beneath the lower edge of the voting booth curtain. She testified further that a reporter called her on the day following the election and she stated the election should be held again. However, the witness testified that she was angry and upset when she made that statement.

The witness further testified that she did not know until the election was over that an election worker had inadvertently given two voter authorization slips to one voter. It would be possible for two persons to be in the booth at one time but it is the machine operator's responsibility to see that this does not happen. At the close of the evening, she thanked Dickens and Tonya Wright.

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Another election worker testified. She did not recall receiving a letter from the Board secretary concerning serving as an election worker. She does recall a telephone call from the Board secretary at some time before the election. She has worked approximately five years at primary and general elections in this township. She recalls that she was a worker at the 1984 school election. She has attended five or six training sessions for Title 19 elections but none for Title 18A elections.

The election worker stated that she arrived with the Election Judge on April 2 at the polling place. She did not receive an envelope from the Board secretary. The envelope may have been at the end of her registration table.

The Fairfield machine was on the front wall of the room and the Regional District machine was located at the rear wall. This witness and the Election Judge opened one machine at a time. They started voting immediately because many voters were waiting.

Shortly after 2:00 p.m. they learned that Tonya Wright was a challenger. Wright came to this witness' table and said to persons in the room generally that she was a challenger. She sat at the end of the table. Dickens did not come to this table.

None of the challengers presented any identification. This witness testified that Tonya Wright stood up several times and shouted across the room during the course of balloting. This witness could not see across the room because of the number of people. Wright objected to things this witness did not see.

The witness also stated that she had charge of the district one register. As voters entered, she asked their names, checked to see if they had a page in the register and asked them to sign the poll list. She did not compare signatures on the poll list with signature register pages. She did not check the register book for certain persons known to her.

The witness testified that she knows Lillian Wilson, who once was a poll worker. She saw Wilson on April 2 and knows that Wilson voted.

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The witness also stated that she saw candidates Weber, Mackie and Johnson on election day. She did not know candidates Krasnov and Anna Wright; therefore, she cannot say whether they were present. The witness saw no electioneering by anyone. She recalls only one problem on the Regional District voting machine--the one having to do with Mrs. D'Agostino. During the course of voting she had to check the register book at the other table several times. She never entered or saw any other election worker enter a voting booth.

The witness talked with the Board secretary concerning the poll lists. Three people came in, signed the poll lists and left. The witness told the Board secretary she was voiding those three voter authorization slips. The Board secretary later asked the witness why she had not gone through the instruction envelope.

On cross-examination, the witness stated that the voting authorization slips were collected by machine operators. Before she came from the Regional table to the Fairfield table, six voters were on the poll list. She began with number seven and required addresses to be given as well as signatures placed on the poll list. Later, the Board secretary told her that she did not have to get addresses. After receiving a voting authorization slip, the voter would get in the machine line to vote. This witness tried to get voters to vote in the Regional election first.

The witness had no recall of a letter concerning training for the election. She stated that even if she had received such a letter she was not well enough to attend training. She did not attend training in 1984 either. During the course of the day, she could only see the Election Judge when she stood up. She saw Mackie enter but could not hear what he said. She saw Weber enter but could not hear what she said. The witness did not see Mackie operate or demonstrate the mock machine or hear him describe the write-in process. The witness did recall that someone got two voter authorization slips. Tonya Wright asked the witness if she had given out two cards. The witness denied it. Before she could discover her mistake, Tonya Wright brought back the second slip to the registration table.

The witness also testified that the Election Judge did most of the post election activities. All materials the Board secretary had left, as well as paper rolls from the backs of the voting machines, had to be removed from the building that night.

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Another election worker testified that she worked as machine operator for the Fairfield Township voting machine. She had attended three training sessions sponsored by the County Board of Elections over the years. Some three or four days before the election she received a letter notifying her that she would be a poll worker. She arrived, alone, at 1:30 p.m. on April 2. She was in the polling place until 11:00 p.m. She did not assist in voting machine set-up. She received no information packet.

As each voter gave her an authorization slip, she would unlock the machine and allow the person to vote. She recalled machines jamming if voters tried to cast write-in votes before voting for stated candidates. The witness stated she never allowed two persons in a voting booth. She heard no electioneering, she heard no challenge of votes and she never entered a voting booth. The witness also stated that she kept the authorization slips in a box and kept them in sequence. She asked for the correct number if the wrong number had been presented. The witness also stated she had had no training for a Title 18A election. She could not recall her last training session for general elections. She did not recall the Election Judge entering a machine to unjam curtains.

Barbara Weber testified that she was a candidate for a seat on the Board for the first time in April 1985. She did not go to the polls with the intent of acting as a challenger because she felt no need to do so. She arrived at 2:15 or 2:30 p.m. with Mrs. Mackie. As she entered she saw Tonya Wright hurry across the hall towards the police department saying, "I'll call and ask him."

Weber then entered the polling place and voted. This took approximately 45 minutes. She observed the machine placement, Dickens seated at a table, the D'Agostino controversy and Tonya Wright and Dickens challenging certain actions.

Weber left the building and took Mrs. Mackie to her husband's place of business. While there, several persons entered and phone calls were received. The visits and the telephone calls concerned confusion about the write-in process at the polling place. Mackie said he had not yet voted and asked Weber to take him to the polls. Weber called Mr. Parent concerning challengers. Mr. Parent advised her that the question was out of his jurisdiction but that he would find out if he could and get an answer to her.

Weber returned to the polls with Mackie at approximately 3:30 p.m. They entered the room and encountered the D'Agostino family. Weber recalls much confusion

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and raised voices. Mrs. D'Agostino stated she could not vote until someone explained the write-in procedure to her.

Weber stayed until approximately 11:30 p.m. She recalls the Sheppard incident. Weber was between Dickens and the voting booth. Sheppard called out from inside the booth, "I can't find the pencil." Dickens protested any assistance to him. Sheppard again stated, "I need help with the write-in." Weber started to explain the process to him. Dickens objected, stating that Sheppard was not handicapped. Weber looked at the booth and said, "No, I guess he's not."

Weber again called Parent. He had no further information. She approached the Election Judge. The Election Judge gave her what seemed to be a paper containing certain parts of Title 18A dealing with school elections. She and Mackie looked at the reproduced statutes. They then had a heated discussion with Dickens since they believed that Dickens, as a Board member, should not have been present at the polls. Dickens maintained that as a candidate she had a right to be present.

Weber spent time in several areas in and around the building. She went out for coffee at least once. She did no electioneering. She never said, "Thank you for your vote." Weber stated that she spoke to people she knew. She shook hands. She stated, "That's what people do when they are congenial." She spoke to a former kindergarten teacher but did not ask for a vote.

Many people approached her while she was present. There was much personal, general talk. She handed out no literature at any time inside or outside the building.

At approximately 5:30 p.m., Weber spoke to the Board attorney. She was with Krasnov and Johnson. The Board attorney and Mackie came out of the polls. The attorney gave an interpretation of the statutes, saying that each candidate may be a challenger. However, electioneering must be more than 100 feet away from the polls.

Weber stated she saw Mackie inside the polls and did not hear him solicit any votes. He did attempt to demonstrate the model voting machine for write-in votes over a period of approximately 30 minutes. Weber heard no electioneering by Krasnov and did not see Mackie interfere with the election in any way.

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The witness stated that she had heard the Election Judge's testimony. Weber said Mackie did not interfere with the voting process. However, she also stated she did not hear the Election Judge speak to Mackie.

The witness identified a copy of a flier mailed by Krasnov, Weber, Johnson and Mackie to registered voters in districts one and three (P-1). Weber stated she doesn't know if district two received this flier. Side one contains copies of news articles. The witness stated she had no knowledge of some headlines inserted that were not on the original articles. One headline does refer to a 12-year-old incident. She doesn't know if any present Board member was then on the Board. Portions of the reproduced articles were deleted.

Weber stated she spoke to many persons on April 2 both in and out of the building. Some mentioned the election. Some who spoke to her wished her well. She did not tell anyone that she was a candidate. She did not tell the Election Judge that she was a challenger. She never acted as a challenger. She was never introduced to anyone as a candidate.

John Mackie testified that he was a write-in candidate in the 1985 school election. The date for filing a nomination petition had passed when he became interested in Board membership. He did not come to the polls on April 2 with the intent to challenge. After the polls had opened, he received calls at his place of business concerning voting problems. Some persons came to his place of business with similar complaints. He did not do anything at first. His wife and Weber voted and, on their return, reported to him problems with noise and challenges to write-in votes.

Mackie came with Weber to vote and observe at approximately 3:30 p.m. On entering the room, he saw long lines. He came to the table nearest the railing in the room and signed to vote in the Regional District election. He first spoke to the D'Agostinos. They complained that their parents could not cast write-in votes. Mackie then voted in the Regional District election.

Mackie then went to the end of the Fairfield line, which now extended out the door. Several people came up and greeted him. He shook hands if hands were offered. This lasted for approximately 30 minutes. There was still some argument between the

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D'Agostinos and Dickens and Tonya Wright. Mackie observed Dickens' upset concerning problems inside the Fairfield booth. When he reached the center of the room, he asked the Election Judge how to cast a write-in ballot. Her explanation was not clear and there were no instructions on the machine. Ten or fifteen minutes later, he had a discussion with Dickens concerning her presence at the polls. It was his opinion that a candidate could be a challenger but a Board member could not. Dickens, as an incumbent, could not be a challenger. He told Dickens to refrain from acting as a challenger until they could get clarification.

The witness stated he observed Tonya Wright keeping the Election Judge busy. He believed that a Mrs. Fortune would signal Tonya Wright or Dickens to challenge whenever anyone asked about a write-in vote.

When Krasnov arrived, Mackie and Krasnov left the building and talked. Mackie returned. He watched the Election Judge instruct on the sample voting machine and get called away. He picked up the mock machine and demonstrated how to cast a write-in vote. He did this for no more than 30 minutes. He demonstrated the process to voters who asked the Election Judge when she was busy or when voters asked him directly. He never solicited votes. He did not obstruct the Election Judge. Rather, he tried to help her. He demonstrated the write-in process to 15 or 20 people.

Mackie stated he did not see Weber electioneer. At approximately 5:20 p.m., the Board attorney appeared at the door and beckoned to Mackie. He and Mackie talked about problems outside the polls. Mackie stated he was not escorted from the room by the police. He saw Krasnov and Weber outside. Johnson arrived. The Board attorney spoke of reports of electioneering. Mackie stated that the problem was Dickens and Tonya Wright. The Board attorney informed him that a candidate can be a challenger. The Board attorney also discussed campaigning more than 100 feet from the polling place. Mackie stayed at the polls until the voting was over.

Mackie also stated there was no campaign literature handed out by him or any member of his group. He did not hear Weber electioneer. Many people came up to him, greeted him and asked how to cast a write-in vote. Some shook hands. He thanked them for coming out to vote. When he voted, he saw his name on the clear plastic tab. He erased it.

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The Election Judge showed him how to cast a write-in vote. He showed others what the Election Judge had showed him. He never indicated for whom they should vote. He said, "If you wish to vote write-in, here's what to do."

The witness also testifed that that no other person received write-in votes at the April 2 election. He testified that he did not hear the Election Judge tell him not to instruct on the model machine.

During the course of the day, he called Krasnov concerning problems at the polls. Krasnov made some calls and then came to the polls himself. Mackie also testified that he did not recall the testimony of an earlier witness who said she did not ask him for instruction but that he demonstrated the write-in process to her.

Mackie stated he did not take it upon himself to do the Election Judge's job but merely helped her "because she was being kept busy." Mackie also stated he had no recall of the discussion with the Election Judge concerning Title 18A. He recognized Exhibit D-1. The flier was sent by Weber, Krasnov, Johnson and himself to voters in all districts. He had no knowledge of any material being added to Exhibit D-1. He recalls hearing Weber say that the fliers were mailed to the public. The fliers were mailed by Krasnov or his mother. He saw a list of the persons to whom the fliers were sent and believes all persons on the list to be registered voters.

James Krasnov testified that he arrived at the poll at approximately 4:45 p.m. and stayed until 8:30 p.m. Mackie had called him at about 4:30 p.m. concerning disruptions. He called the County Board of Elections to find out who was in charge of a school election. He had spoken to someone at the office of a Superior Court Judge before coming to the polls. The judge had advised preparation of an injunction or restraining order if a genuine problem existed.

On entering the poll, Krasnov saw the Mackie-Dickens discussion. He got Mackie aside. Weber joined them. She had some portions of Title 18A. Their question was whether an incumbent Board member could serve as a challenger. They saw County Clerk Nardelli come in. They showed him the Title 18A statute concerning Board member noninvolvement. The County Clerk stated he had no jurisdiction in the matter.

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Krasnov and Weber left the polls. Johnson arrived. They discussed the question of a temporary restraining order or injunction. They soon saw the Board attorney and Mackie. All spoke. The Board attorney advised that any candidate could be a challenger and Dickens' presence was appropriate. A general discussion followed concerning challengers and what they could do and electioneering within 100 feet of the polls. Krasnov was in and out of the building during the time he was there. He was usually with Weber outside although sometimes he was with Mackie. There was no solicitation or electioneering done by him or any of the others in his group. No literature was distributed that night. He spoke to many people who came to the polls but these were general discussions. He voted while he was at the polls and saw no irregularities. During the Mackie-Dickens discussions, Weber was nearby but did not participate.

Concerning the Grand Jury action against him raised in Exhibit M-1, Krasnov testified that the "victim" was indicted for theft and other illegal acts. His charges against Krasnov were dismissed with prejudice.

Harold U. Johnson, Jr., testified on his own behalf. He stated that on April 2, he received a call from Krasnov at approximately 4:45 p.m., concerning irregularities. Krasnov asked him to get a temporary restraining order against Dickens and Tonya Wright. Krasnov read a part of Title 18A to Johnson over the phone. Johnson, however, being an attorney, looked at the whole Title and saw the challenger statute. He came to the polls, saw Weber and Krasnov and told them of the challenger statute. Mackie and the Board attorney arrived. All agreed that candidates could be challengers. Electioneering within 100 feet would be prohibited. The Board attorney said that 100 feet was at some point away from the building but that he was not going to pace it off.

Johnson stayed for the balance of the evening except for a few breaks. He saw no irregularities while he was there. He admitted that he had asked Mackie to "cool it" with the Board secretary. Johnson left the polls at approximately 11:00 p.m., after votes had been counted. Weber, Krasnov, Tonya Wright, Dickens, Anna Wright, several election workers and the Board secretary were there at the conclusion of the vote count.

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II.

School election campaign materials must be properly identified. The name and address of the printer must appear on the face of campaign materials. Campaign materials also must contain the name and address of either the person causing the material to be printed, copied, or published or the person who has paid for the materials. This applies to any circular, statement, handbill, advertisement, broadside or other printed matter. This requirement does not apply to a bona fide news item or editorial comment published in a newspaper. N.J.S.A. 18A:14-97, -97.3. If the material is printed or paid for by an organization, the name and address of the organization may be used provided the name of at least one person in authority and acting for the group is also given. N.J.S.A. 18A:14-97.2.

Each polling place must be suitably equipped with booths, chairs, tables, lights and other appropriate equipment. N.J.S.A. 18A:14-20. If the Board so desires, it may use voting machines in annual or special school elections provided machines are used in their districts in the general or municipal elections. N.J.S.A. 18A:14-6. Elections with voting machines are conducted as far as possible in the same manner as general and municipal elections. N.J.S.A. 18A:14-40. The superintendent of elections and the county board of elections perform the same duties as they perform in general and municipal elections, except that they may not be required to prepare, challenge or strike out lists for use at school elections. N.J.S.A. 18A:14-42.

At a regular meeting at least 40 days before the election, the Board must appoint such election officers as are necessary. The officers must be chosen from the members of the district election boards comprised within the boundaries of the polling districts insofar as practicable. N.J.S.A. 18A:14-6. The secretary must furnish to the officers having control and custody of the voting machines, at least seven days before the election, official ballots for use in voting machines. N.J.S.A. 18A:14-41.

Polls must be open between the hours of 5:00 and 9:00 p.m. and during any additional time which the Board may designate between the hours of 7:00 a.m. and 9:00 p.m. and as much longer as is necessary to permit those present to cast ballots. N.J.S.A. 18A:14-45. A Board member, or in his absence the judge of the election, or in the absence of both, the secretary of the board declares the polls open at each polling place at the time fixed by the Board. Voting continues without recess from then until the time the polls close. N.J.S.A. 18A:14-46.

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Each candidate nominated by petition may act as a challenger and may appoint one challenger for each municipal election district included in each polling place. N.J.S.A. 18A:14-15, -16. Names of challengers and their assigned polling places shall be filed with the secretary not later than five days before the election. Ibid. All challengers must be legal voters in the district. Ibid. The secretary must give to each challenger a certificate which shall be submitted by the challenger to the election officer at the designated polling place. Ibid.

The Board must provide, and one of the election officials must keep, a poll list at each polling place. N.J.S.A. 18A:14-48. Each voter must sign his or her name and state his or her address prior to receiving an official ballot. N.J.S.A. 18A:14-50. The number of each voter's ballot must be recorded opposite his or her name. Ibid. The voter's signature in the poll list must be compared with the signature found in the signature copy register before the voter is given a ballot (emphasis added). N.J.S.A. 18A:14-51.

Immediately after the close of the polls, the election officials must count the votes for each candidate and for and against each public question. The counting must be opened and public. The election officials must keep tally sheets of the votes as counted, which are to be signed by the judge and clerks of the elections. N.J.S.A. 18A:1457. The judge of elections must announce each result publicly. N.J.S.A. 18A:14-59. A candidate may secure a certified statement of the count upon request made in writing to the members of the election board, which certificate shall be issued before the closing of the polling place. N.J.S.A. 18A:14-60. The tally sheets, poll lists and ballots for each polling place are placed in a package and sealed by the inspector of elections. The judge of elections delivers the sealed package to the secretary of the board accompanied by a statement of the result of the election signed by the election officers. The secretary adds to the tally the canvas of the absentee ballots as certified to him or her by the county board of elections. The secretary then combines the reports from all polling places and announces the result of the election. N.J.S.A. 18A:14-61.

The secretary of the board must forward to the county superintendent of schools, within five days, a statement of the results of the election, the ballots, the poll lists and tally sheets. The county superintendent must preserve these records and make the poll lists available for public inspection for one year. N.J.S.A. 18A:14-62.

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Any person interfering with the orderly conduct of a school election shall be guilty of a misdemeanor and shall be punishable by a fine not exceeding $500.00, or by imprisonment not exceeding one year or both. N.J.S.A. 18A:14-65. Any officer or employee of any board of education or any person designated as an election officer to hold any election who shall willfully fail to perform or enforce any provision of this title, or shall willfully destroy any record directed to be kept thereby, or any person who shall willfully or fraudulently register to vote shall be guilty of a misdemeanor. N.J.S.A. 18A:14-67. If a person shall on election day tamper, deface, or interfere with any polling booth or obstruct the entrance to any polling place, or obstruct or interfere with any voter, or loiter, or do any electioneering within any polling place or within 100 feet thereof, he shall be considered a disorderly person and shall be punished by a fine not exceeding $1500.00 or by imprisonment not exceeding one year, or both. N.J.S.A. 18A:14-72.

No person shall within the polling place or within 100 feet of the polling place loiter, electioneer, or solicit any voter or prompt a voter in answering any questions required to be answered by such voter in connection with the election. N.J.S.A. 18A:14-73. If any person writes, pastes, or otherwise places upon any official ballot any mark, sign or device of any kind as a distinguishing mark to indicate to any officer holding any election or any other person how any voter has voted at any election, or if any person shall induce or attempt to induce any voter to write, paste or otherwise place on his ballot any mark, sign or device of any kind, such person so offending shall be a disorderly person and shall be punished by a fine not exceeding $500.00 or imprisonment not exceeding one year, or both. N.J.S.A. 18A:14-76.

N.J.S.A. 18A:14-77 prohibits certain fraudulent conduct as to voting. It speaks to persons not entitled to vote who engage in certain activities in or near the poll. Since there is no challenge to the right to vote of any of the persons in this case, N.J.S.A. 18A:14-77 does not apply.

If a person distributes or displays any circular or printed material or offers any suggestion or solicits any support for any candidate, party or public question to be voted upon at an election within the polling place or room or within a distance of 100 feet of the outside entrance to such polling place of room, he shall be a disorderly person. N.J.S.A. 18A:14-81.

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III.

As the Commissioner of Education has often stated, a great responsibility rests with school officials for the proper conduct of all elections. See, In the Matter of the Annual School Election Held in the School District of the City of Camden, 1977 S.L.D. 927. From the above testimony it is clear that more careful preparation with respect to the appointment of election officials and their training would have avoided many problems. Since election officials have a great responsibility for the integrity of the election, they must be familiar with all facets of their duties and responsibilities and the specific statutes that control loitering, electioneering and other violations. Ibid.

In In the Matter of the Annual School Election Held in the Township of Hillsborough, 1965 S.L.D. 74, the Commissioner stated:

> The Commissioner must point out that once a school election has been declared open the responsibility for its conduct rests with the election board appointed for that purpose. Local law enforcement officials have the right and duty to preserve order and to exercise authority when there is a violation of the election laws. That authority does not extend, however, to intervention in controversial questions or matters of judgment with respect to the election proceedings. Such decisions lie within the discretionary authority of the officials appointed to conduct the election. This would include what signs or instructions, if any, are permitted. [at 76-77]

In In the Matter of the Annual School Election held in the Township of Dover, 1967 S.L.D. 52, the Commissioner stated:

> It is plainly the duty of election officials to see to it that the election is conducted in an orderly manner, that there is no interference with the voting or canvassing of the votes and that there is no electioneering in the building in which the election is being conducted. R.S. 18:7-35, 18:7-40. Such activities fall within the discretion of the election officials who may require unauthorized persons to leave the polling place. [at 55]

In consideration of their own testimony, I **FIND** that the election officials were not adequately trained to perform their duties at the annual school election held on April 2. I further **FIND** that the Board secretary did not notify the election workers sufficiently in advance of the election date that they would be serving as election officials on that day. Nor did the Board secretary follow up on the election training

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session provided by the County Superintendent of Schools and assure that the election workers attended it.

I **FIND** that all persons who served as challengers at the election failed to comply with N.J.S.A. 18A:14-15, above. They were not appointed in writing, signed by the candidate, specifying their names and addresses and the writing was not filed with the secretary of the Board five or more days preceding the election. N.J.S.A. 18A:14-16 requires the secretary of the Board to make a certificate of the appointment of the challengers which shall be submitted by the challengers to the election officers of the respective polling places. Since the Board secretary here had no knowledge that certain persons would act as challengers, she could not make the certificates required by the statute. I so **FIND.**

Having heard the testimony and having observed the witnesses as they testified, I **FIND** that insufficient evidence has been presented to show that Barbara Weber, James Krasnov, Harold Johnson, Jr., Betty Dickens or Tonya Wright interfered with the orderly conduct of the election. I **FIND** that John Mackie, by his unsolicited demonstration of the write-in process, both before and after the Election Judge directed him not to do so, did interfere with the orderly conduct of the school election as proscribed by N.J.S.A. 18A:14-65.

Testimony was introduced tending to show that Weber solicited votes while in or near the polling place. Other testimony was adduced tending to show that she did not. I **FIND** credible the testimony that Weber did not solicit votes in or near the polling place.

I **FIND** that insufficient evidence was introduced to show that James Krasnov solicited votes in or near the polls. I further **FIND** that there has been no showing at all that Harold Johnson, Jr., engaged in any prohibited activity in or near the polling place.

I **FIND** that Harold Wright electioneered within 100 feet of the polling place in violation of N.J.S.A. 18A:14-72. Although this violation had no effect on the outcome of the election, it is a violation of the statute nonetheless. The cumulative testimony that Mackie introduced himself to voters and demonstrated the write-in process to them whether they requested that information or not is credible. I **FIND** that John Mackie thereby electioneered within a polling place in violation of N.J.S.A. 18A:14-72.

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The irregularities revealed by this inquiry are deplorable but they do not require that the election results be set aside. Elections are to be given effect whenever possible. Wene v. Meyner, 13 N.J. 185 (1953). Irregularities, even when gross, when not amounting to fraud do not vitiate an election. Stone v. Wyckoff, 102 N.J. Super. 26 (App. Div. 1968). It is only when the irregularities are so gross as to produce illegal votes that would not have been cast or to defeat legal votes that would have been cast, so as to make impossible a determination of the will of the electorate, that an election will be set aside.

The Law Division in Wene set forth the rule:

> The rule in our State is firmly established that if any irregularity or any other deviation from the election law by the election officials is to be adjudged to have the effect of invalidating a vote or an election, where the statute does not so expressly provide, there must be a connection between such irregularity and the result of the election; that is, the irregularity must be the producing cause of illegal votes which would not have been cast or of defeating legal votes which would have been counted, had the irregularity not taken place, and to an extent to challenge or change the result of the election; or it must be shown that the irregularity in some other way influenced the election so as to have repressed a full and free expression of the popular will. [26 N.J. Super. 363, 383 (Law Div. 1953)]

It cannot be said on this record that the will of the electorate was thwarted. Mackie may have lost some write-in votes because of poor preparations and confusion. There is no adequate showing that he was denied enough votes to make a difference in this election.

I **CONCLUDE** that, although the irregularities in this election were not sufficient to require that a new election be held, they still must be addressed. Therefore, it is **ORDERED** that:

1. The Cumberland County Superintendent of Schools shall confer with the Fairfield Township Board of Education and its secretary, well in advance of the next school election, to review the plans and preparations for that election.

2. Persons selected to be poll workers at the annual school election for 1986 in the Fairfield Township school district are required to attend any

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training session provided by the Office of Cumberland County Superintendent of Schools.

3. A copy of the final decision in this matter shall be forwarded to the Cumberland County Prosecutor for investigation and, in his discretion, prosecution of violation of the statutes with respect to interference with the conduct of school elections, N.J.S.A. 18A:14-65, electioneering, N.J.S.A. 18A:14-73, distribution of literature, N.J.S.A. 18A:14-81, and failure to properly identify campaign materials, N.J.S.A. 18A:14-97 et seq. These violations carry punishments of fines or imprisonment, which the Commissioner may not invoke.

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

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

12 JUNE 1985
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

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OAL DKT. NO. EDU 2046-85

JUN [illegible] 1985
DATE

Received/Acknowledged:
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Mailed To Parties:

June 12 1985
DATE

OFFICE OF ADMINISTRATIVE LAW

bc/ij

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IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
TOWNSHIP OF FAIRFIELD, CUMBERLAND : DECISION
COUNTY. :
:

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

It is observed that counsel representing Candidates Betty Dickens and Anna Wright has filed exceptions to the initial decision. Page 1 of the initial decision which indicates counsel's appearance on behalf of Candidate Tonya Wright is corrected herein by reference. Counsel also points out that page 2 of the initial decision fails to indicate the total number of votes cast for Candidate James V. Krasnov who ran for a full three-year term or the Board.

The initial decision is hereby corrected for that purpose.

	At Polls	Absentee	Total
James V. Krasnov	300	5	305

Counsel for Candidates Anna Wright and Betty Dickens argues that while the findings in the initial are instructive with regard to those many violations of the statutory provisions of the school election laws, N.J.S.A. 18A:14-1 et seq. and N.J.S.A. 19:1 et seq.,the recommendations reached therein do not go far enough to insure that they will not recur in the future.

In this regard, additional steps are requested of the Commissioner to be implemented prospectively. They are summarized below:

1. That each polling place is staffed by an equal number of black and white school election officials.

2. That the Judge of Elections' duties not be confined to duties to the extent that she is unable to supervise and direct all activities for which she is responsible during the conduct of the school election, e.g. electioneering within 100 feet of the polling place.

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3. That all voters (black and white) have their name and address written on the school's poll lists and that they be compared with the appropriate signature copy register.

4. That a sufficient number of school election workers be employed by the Board and properly trained in accordance with law to be responsible for the conduct of school elections.

5. A county special monitor should be designated to insure the integrity of the school election in Fiarfield Township.

Finally, counsel urges the Commissioner to order a new election by virtue of the electioneering that occurred at the polls and also because of the problems experienced by some of the voters in casting their votes for write-in candidates on the voting machines.

The Commissioner, upon review of these exceptions as well as the detailed and lengthy report of the findings and conclusions set forth in the initial decision, has determined that the will of the voters who attempted to cast write-in ballots for candidates of their choice was thwarted at the annual school election held in Fairfield Township on April 2, 1985.

The record of the testimony of the Board Secretary and the Election Judge clearly supports the above finding and determination. The testimony of these witneses reveals the following irregularities with respect to the confusion which resulted at the polls with the voters who wanted to cast write-in votes:

1. No sample ballot was placed on the voting machine until 8:30 p.m. on April 2, 1985.

2. The model voting machine did not contain instructions pertaining to casting a write-in vote.

3. The Election Judge improperly and illegally demonstrated the manner in which a write-in vote should be cast by using the voting machine in operation at the polls.

4. Despite verbal instructions to the voters, a considerable number of them did not understand how to cast a write-in vote.

5. A number of voters wrote the name of the write-in candidate of their choice on the plastic tab of the write-in slot which invalidated their vote.

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6. Many voters who cast their write-in vote first were unable to vote for other candidates of their choice because they were unaware that the write-in votes were to be cast last.

(See Initial Decision, ante.)

In arriving at this determination the Commissioner also relied on the Court's decision in Wene, supra, and the decision rendered by the State Board of Education in re: In the Matter of the Annual School Election Held in the District of Green Brook, Somerset County, decided January 5, 1985. In Green Brook the State Board held in pertinent part:

> "***The Commissioner has consistantly (sic) emphasized, that because school elections are no less important than other elections, they are to be conducted with careful regard for and in strict compliance with every requirement of law. See, e.g., In the Matter of the Election Inquiry in the School District of the Borough of South River, 1974 S.L.D. 1040; In re Annual Election in Palisades Park, 1963 S.L.D. 99. Those requirements include proper preparation of voting machines, In the Matter of the Annual School Election Held in the School District of the Borough of Pompton Lakes, 1977 S.L.D. 586, and the requirement that, where instruction to the electorate is provided with respect to write-in votes, such instruction must be proper. In the Matter of the Annual School Election Held in the School District of the Borough of Helmetta, 1977 S.L.D. 695. In the instant case, neither of those requirements were met. Moreover, because those failures were combined with the other irregularities in this case, there is no doubt in our minds that the outcome of the election was affected.***"
>
> (Slip Opinion, at pp. 6-7)

It is hereby determined that in accordance with N.J.S.A. 18A:12-15(d) the election of candidates for Board membership at the annual school election held in Fairfield Township on April 2, 1985 be set aside.

The Commissioner also cannot ignore many of the findings which support the conclusions reached by the judge with regard to the Board's failure to insure that the procedures prescribed by law were, in fact, complied with by its school election officials. Had this been the case, effective measures for those problems encountered by the voters upon entering the polling place and casting their votes could have been implemented by the school election officials.

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Similarly, the Board itself cannot avoid its responsibility to employ a sufficient number of election officials in a timely manner and to provide for their training in accordance with statutory prescription.

Those comments made by way of counsel's exceptions to the initial decision with regard to the supplemental steps recommended for future school elections in Fairfield Township are noted. However, the Commissioner finds and determines that compliance by the Board with the existing laws pertaining to school elections is what is essentially required in order to safeguard the conduct of future elections in the Fairfield Township School District.

Therefore, it is ORDERED that:

1. The Cumberland County Superintendent of Schools shall confer with the Fairfield Township Board of Education and its secretary, well in advance of the next school election, to review the plans and preparations for that election.

2. All interested persons selected to be poll workers at the annual school election for 1986 in the Fairfield Township school district are required to attend any training session provided by the Office of Cumberland County Superintendent of Schools.

A copy of the final decision in this matter shall be forwarded to the Cumberland County Prosecutor for investigation and, in his discretion, prosecution of violation of the statutes with respect to interference with the conduct of school elections (N.J.S.A. 18A:14-65), electioneering (N.J.S.A. 18A:14-73), distribution of literature (N.J.S.A. 18A:14-81), and failure to properly identify campaign materials, (N.J.S.A. 18A:14-97 et seq.).

Finally, the Commissioner hereby orders the Fairfield Township Board of Education to conduct a special election pursuant to the provisions of N.J.S.A. 18A:12-15(d) and N.J.S.A. 18A:14-1 et seq. for the purpose of filling the three currently unexpired three-year terms on the Board and the one remaining unexpired two-year term on the Board.

Until such time as the results of the special election for Board membership are so certified, the present Board members shall continue to serve in these positions in order to avoid undue disruption to Board operations.

IT IS SO ORDERED this 29th day of July 1985.

COMMISSIONER OF EDUCATION

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INITIAL DECISION
OAL DKT. NO. EDU 0167-85
AGENCY DKT. NO. 502-12/84

BOARD OF EDUCATION OF
THE BOROUGH OF PAULSBORO,
GLOUCESTER COUNTY,
Petitioner,
v.
ROBERT FERENZ,
Respondent.

Eugene P. Chell, Esq., for petitioner

Steven R. Cohen, Esq., for respondent (Selikoff & Cohen, attorneys)

Record Closed: May 14, 1985 Decided: June 13, 1985

BEFORE **LILLARD E. LAW,** ALJ:

The Board of Education of the Borough of Paulsboro (Board) filed charges of conduct unbecoming a teaching staff member before the Commissioner of Education, certifying that the charges, if proved, would be sufficient to warrant dismissal of respondent as a teacher in the School District of the Borough of Paulsboro. On January 9, 1985, the Commissioner transmitted the matter to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. On February 26, 1985, a prehearing conference was conducted at which the single issue to be determined was agreed upon by the parties, together with a discovery calendar and dates established for hearing. A hearing was held on May 13 and 14, 1985, at the City of Woodbury Municipal Court. The record in this matter closed on May 14, 1985.

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UNDISPUTED FACTS

The relevant and material facts of this matter are not in dispute and, therefore, the following are hereby adopted, by reference, as **FINDINGS OF FACT.**

Respondent, a tenured teaching staff member, has been in the Board's employ for approximately 17 continuous years. During the 1984-85 school year, respondent was assigned to teach, among other things, the Board's high school graphic arts program during the daily scheduled eighth and last period from 1:45 p.m. to 2:36 p.m. Respondent's eighth period graphic arts class is composed of eleventh and twelfth grade male and female students, the majority of whom are noncollege bound. The graphic arts curriculum involves, among other things, the use of printing and graphic reproduction devices including photography, i.e., operation of various cameras, films and developing techniques.

Respondent was suspended without pay subsequent to a determination by the Board on December 11, 1984, which reads, in part, as follows:

> There is probable cause to believe that Mr. Robert Ferenz, a graphic arts teacher at Paulsboro High School, engaged in conduct unbecoming a teacher when he permitted a female student to sit on his lap while conducting a class at the Paulsboro High School on Friday, November 16, 1984, which action took place in view of several of the students in his class. It further appears that on previous dates during the present school term he had permitted female students to sit upon his lap during regular classroom periods in view of a number of students in the class.

It is further undisputed that respondent was the subject of prior disciplinary proceedings by the Board where, on January 25, 1983, the Board passed a resolution which is set forth in toto hereinbelow as follows:

> RESOLUTION AUTHORIZING WITHHOLDING OF
> LONGEVITY INCREMENT OF ROBERT FERENZ
> PURSUANT TO N.J.S.A. 18A:29-14
>
> WHEREAS, N.J.S.A. 18A:29-14 authorizes Boards of Education to withold the employment increment of teaching staff members for such cause;
>
> and

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WHEREAS, the Board of Education has considered certain allegations of misconduct as to Robert Ferenz, a teaching staff member, and has offered Mr. Ferenz to appear at a duly authorized meeting to present his explanation;

NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the Borough of Paulsboro:

1. It is determined as a matter of fact that Robert Ferenz demonstrated conduct unbecoming a teacher in that he knowingly printed and distributed copies of a document containing ethnic material which was offensive and distasteful. This material was distrubuted by Mr. Ferenz to students and staff during the school year 1982-83.

2. It is further determined as a matter of fact that Mr. Ferenz was insubordinate in that he was given specific directions by his building principal by written memorandum dated April 28, 1981, that all material prepared by the print shop would be approved in advance by the principal.

3. For the causes enumerated herein the Board, by a roll call vote of a majority of its full membership, directs that the longevity increment of Robert Ferenz as provided in the 1983-84 salary guide at $2100.00 be permanently withheld.

4. Further, that any future misconduct or insubordination will result in the immediate consideration of Certification of Charges to the Commissioner of Education for the purpose of removing Robert Ferenz from his teaching position and dissolving his tenured status.

4. [sic] The Secretary of the Board is directed to forward a copy of this Resolution to Mr. Ferenz within ten days.

ADOPTED at a special meeting of the Board of Education of the Borough of Paulsboro held on January 25, 1983.

[P-2]

Respondent did not appeal the Board's action or the penalty imposed upon him in paragraph 3 in P-2 above. As a consequence of the Board's resolution respondent was placed on notice, pursuant to paragraph 4, that any further misconduct or insubordination would give rise to the Board's consideration of filing tenure charges against respondent with the Commissioner, pursuant to N.J.S.A. 18A:6-10 et seq. The Board's determination of December 11, 1984, setting forth the alleged misconduct of respondent, together with its notice to respondent by way of resolution dated January 25, 1983, form the basis of the herein controversy.

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Respondent does not deny the Board's allegation with respect to the incident that occurred on November 16, 1984.

CONTESTED FACTS

Respondent objects to and contests the Board's bare assertions that respondent permitted or allowed other female students to sit on his lap during regular classroom periods. Without more information and absent the Board's specification to that portion of the charge as to dates, time and the names of the female students allegedly involved, respondent contends that he has not been properly served notice of the charges and is denied his procedural due process rights to defend against those charges adequately and affirmatively.

The Board admitted that it was not in a position to prove the certified charge that respondent allowed (other) "female students" to sit on respondent's lap on prior occasions; however, it asserted that it would prove that respondent permitted the female student who is the subject of the herein charge to sit on his lap on one or more occasions prior to November 16, 1984.

Having heard arguments and representations of counsel, the undersigned issued an oral order limiting the charges against respondent to be the single charge of the alleged incident of November 16, 1984. This determination was grounded and conditioned, in part, upon the vagueness of the secondary charges in that they lacked specificity of time and event against which respondent had an opportunity to defend or prepare his defenses.

Respondent also, by way of oral motion, contests the Board's action to certify the herein charges against him alleging, among other things, that such action was tainted by virtue of a conflict of interest. Respondent asserts that the Board's chief witness against him, whose statements gave rise to the herein tenure charges, is married to a member of the Board and there is nothing in the record to show that the Board member in question disqualified himself when the Board determined to certify the tenure charges. As a consequence, respondent contends the actions by the Board were tainted and compromised absent the Board member's disqualification to participate in the Board's discussion and ultimate determination to vote on the resolution which certified the herein charges to the Commissioner. Respondent cited Tp. Committee of Tp. of Hazlet v. Morales, 119 N.J. Super. 29 (Law Div. 1972) wherein Judge Merritt Lane, J.S.C., said:

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> A public officer has the duty of serving the public with undivided loyalty, uninfluenced in his official actions by any private interest or motive whatsoever. He holds a position of public trust. He is under an inescapable obligation to serve the public with the highest fidelity, good faith and integrity. The law tolerates no mingling of self-interest: it demands exclusive loyalty.
>
> A member of a municipal governing body may be disqualified from voting on a matter in which he is personally interested.
>
> Generally, whether a particular interest is sufficient to disqualify is factual, depending upon the circumstances of the particular care. The question is always whether the circumstances could reasonably be interpreted to show that they had the likely capacity to tempt the official to depart from his sworn public duty. Actual proof of dishonesty need not be shown.
>
> The interest which disqualifies is a personal or private one, not such an interest as the public officer has in common with all other citizens. [at 33, 34]

And further cited by respondent are the words of the Appellate Division of our Superior Court in its per curiam decision in Aldom v. Borough of Roseland, 42 N.J. Super. 494, where it said at 502 that:

> The interest which disqualifies is not necessarily a direct pecuniary one, nor is the amount of such an interest of paramount importance. It may be indirect; it is such an interest as is covered by the moral rule: no man can serve two masters whose interests conflict. Basically the question is whether the officer, by reason of a personal interest in the matter, is placed in a situation of temptation to serve his own purposes to the prejudice of those for whom the law authorizes him to act as a public official. And in the determination of the issue, too much refinement should not be engaged in by the courts in an effort to uphold the municipal action on the ground that his interest is so little or so indirect. Such an approach gives recognition to the moral philosophy that next in importance to the duty of the officer to render a righteous judgment is that of doing it in such a manner as will beget no suspicion of the pureness and integrity of his action. [citations omitted]

Respondent argues that based upon these stated judicial principles taken together with the facts set forth hereinbefore, a conflict of interest was extant and, therefore, requests that the herein tenure charges and proceedings be dismissed.

Counsel for the Board opposes respondent's oral motion grounded, in part, upon its lack of opportunity to prepare for oral argument. In any event, the Board contends that there is no conflict with respect to the facts of this matter which forms the basis of

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the Board's charges against respondent. The nature of these proceedings is that of a screening process, much the same as a grand jury, where the Board has determined there to be probable cause to believe that respondent's actions gave rise to the allegation of unbecoming conduct of a teaching staff member. The final and ultimate determination, after a factual hearing, is that of the Commissioner of Education where he has the opportunity to weigh the proffered proofs of the parties to the litigation. The Board further argues that no self-interest has been shown here and, therefore, no conflict of interest was present.

Having considered arguments of counsel, the undersigned issued an oral order to deny respondent's motion to dismiss the tenure charges and to terminate the herein proceedings. This determination was grounded, in part, upon the Board's representation that its action to certify the charges against respondent was unanimous, by an affirmative vote of all nine Board members, without a single dissent. That is not to say that the Board member who is alleged to have shown an "interest" in the proceedings should not have disqualified himself from the vote and abstained to certify the charges. However, his vote notwithstanding does not give rise to a circumstance which would vitiate the Board's action as found in Jones v. E. Windsor Reg. Bd. of Ed., 143 N.J. Super. 182 (Law Div. 1976). The factual context in Jones is clearly distinguishable from the facts in the instant matter. In Jones, Mrs. Friedman had served as the president of the regional board of education and was defeated at the polls at the annual school board election. Prior to the school election, a member of the regional board resigned; however, his resignation had come too late to have his seat filled at the annual school board election. Mrs. Friedman, while still in office and prior to the annual reorganization of the regional board, announced that the board would interview interested citizens to fill the vacant seat on the board. Mrs. Friedman's husband, Richard Friedman, was one of 26 interested citizens to submit his resume and was interviewed by the Board in executive, closed, session. As a result of other contentions not pertinent here, three of the remaining eight regional board members refused to participate in the proceedings. In any event, the remaining five board members agreed that the first nominee (out of five nominees) to receive five affirmative votes in open session would be the person to be seated to fill the vacancy. The reported opinion of the court in Jones shows the following:

> Richard Friedman was the fourth nominee. Votes were taken on the first three and none of these persons received five affirmative votes. When it came time for voting on Friedman, six members other than Mrs. Friedman voted. There were four affirmative and two negative.

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> At that point the suggestion was made from somewhere-the record isn't clear; it simply states 'A voice,' and whether that was a member of the school board or one of the local citizens in attendance it was impossible to tell. In any event, the suggestion was made that Mrs. Friedman would be in a conflict of interest if she voted on behalf of seating her husband. Regardless of that suggestion or criticism, Mrs. Friedman did vote affirmatively and Richard Friedman therefore received five votes. After the meeting had adjourned he was sworn in as a member of the board. [at 186]

As a consequence, the court in Jones had no difficulty in determing that Mrs. Friedman's vote was in conflict of interest and vacated the seat on the board of education held by Richard Friedman, declaring his election to the position null and void.

The contention in the instant matter that the Board member who is the husband of the teaching staff member who is the chief witness against respondent is so remote and attenuated as to be implausible as a reason for a conflict of interest. Wilson v. Long Branch, 27 N.J. 360 (1958). While "remoteness" of interest is a factor for consideration in determining whether a conflict of interest is extant, a key element is whether the public officer ". . . by reason of a personal interest, is placed in a situation of temptation to serve his own purposes, to the prejudice of those for whom the law authorizes him to act. . . ." S and L Associates, Inc. v. Washington Tp, 61 N.J. Super. 312, 329 (App. Div. 1960). There has been no showing here that the husband Board member served his own personal interest to the prejudice of the school community for which he is authorized to act.

Accordingly, respondent's motion to dismiss the herein proceedings founded upon the allegation of conflict of interest is without merit and is hereby **DENIED.**

TESTIMONIAL EVIDENCE

In order to place the situs of the alleged incident in proper perspective, at hearing a diagram of respondent's graphic arts classroom was drawn on a chalkboard to aid the undersigned and the various witnesses as they testified. A brief description of the diagram is in order here. The graphic arts classroom is rectangular in shape and, for the purposes of this description, its longitudinal plane rests east to west. Its interior is divided by a fixed wall, approximately mid-way on the south longitude wall, continuing northward approximately five-sixths of the distance to the north wall. Two doors are

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located on the south wall on either side of the fixed wall, which exits to the corridor. Upon entrance by way of the easterly or right-hand door, one is in the graphic arts classroom, which contains, among other things, student tables and chairs in the center of the room. On the north wall are placed a series of printing presses or printing machines. To the left of the fixed wall is the photography laboratory with an enclosed darkroom on the westerly section, running the complete width of the room from south to north. Just inside the laboratory section on the north wall and to the left of the opening in the fixed wall are placed the teacher's desk and chair. The teacher's chair is located on the right-hand, or easterly side of the desk where the classroom to the right can be observed by the teacher while sitting at the desk. The view of the right-hand classroom door, however, is not in full unobstructed view from the teacher's desk and chair. The doors to the classroom and laboratory are kept locked at all times for security reasons.

Christina Manzoni, school nurse and wife of a member of the Board, testified that on November 16, 1984, she appeared at respondent's classroom door between 2:25 p.m. and 2:30 p.m. and when she attempted to enter, she found the door to be locked. Thereupon, Ms. Manzoni knocked on the door and it was opened by a female student. Several students, estimated to be ten in number, were seated around the tables in the classroom anticipating the dismissal of the school day at 2:37 p.m. After she entered the classroom, Ms. Manzoni proceeded to respondent's desk where she observed respondent seated in his chair at the desk with a female student, T.P., seated on his lap. Ms. Manzoni also observed another female student, L.P., sitting on respondent's desk. Ms. Manzoni announced to respondent the purpose of her visit was to pay her fee for the faculty coffee club whereupon, Ms. Manzoni testified, respondent stated, "this is my daughter," placed his hand on T.P.'s back and T.P. got off respondent's lap to stand up beside the desk. Ms. Manzoni asserted that she knew that T.P. was not respondent's daughter because T.P. and Ms. Manzoni's daughter were friends. Ms. Manzoni also observed another student to the left of respondent's desk in the laboratory section. After respondent arose from his chair, he removed his wallet, received Ms. Manzoni's coffee fund money and recorded her name on a paper. Ms. Manzoni left respondent's classroom and immediately proceeded to the principal's office to report her observations. The principal was not available; therefore, Ms. Manzoni reported her observations to the assistant principal. Thereafter, the principal arrived and Ms. Manzoni described the events and incident with him. Subsequent to her leaving the school house and her arrival at her home, Ms. Manzoni discussed the incident with her Board member husband.

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C.T., a twelfth grade female student enrolled in respondent's eighth period graphic arts class, was called by the Board to testify concerning the November 16, 1984 incident involving respondent and T.P. C.T. testified, among other things, that she was in the laboratory area at the time of the incident, going in and out of the darkroom developing prints for her graphic arts project. C.T. asserted that T.P. requested of respondent to take a camera home for the weekend and that T.P. asked respondent to help T.P. load and prepare the camera. T.P. was directed to the camera locker where she picked out a camera and proceeded to respondent's desk when respondent stated, "Come here and I'll show you how to load it." T.P. took the camera to respondent, who was seated in a chair beside his desk, and sat on his lap. Respondent thereupon proceeded to instruct T.P. with the use of a check list for the operation of the camera with T.P. C.T. returned to the darkroom, where five or six other students were working, and, subsequently returned to the laboratory area when, she asserted, she observed T.P. standing beside respondent's desk. C.T. did not see Ms. Manzoni at any time. C.T. did observe the female student, L.P., sitting on respondent's desk at the various times she was in the laboratory area on November 16, 1984. L.P. was not enrolled in the graphic arts program for the 1984-85 school year. Having been enrolled in the course the previous academic year, L.P. was acquainted with the respondent and was in the classroom at the invitation of C.T. on November 16, 1984.

C.T. testified she had observed T.P. sit on respondent's lap on previous occasions during the period from September to November 1984. C.T. could not recall, nor could she testify with any certainty, on how many other occasions she had witnessed such episodes, but believed it to be two or three occasions during classroom periods when other students were present.

On cross-examination, C.T. asserted she was employed by the Board in a clerical/secretarial capacity two hours per day, five days per week at the rate of $3.35 per hour. C.T. also proffered testimony as to respondent's reputation and character asserting that respondent had a good reputation with the student body as someone with whom the students could discuss their problems. Respondent has a good relationship with students and, as C.T. characterized, he is a lighthearted individual with a joking personality. Some students consider respondent to be their friend and refer to him as "Ferenz".

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The Board called T.P., a 17-year-old female student enrolled in respondent's eighth period graphic arts class who was alleged to have been sitting on respondent's lap and who was observed by Ms. Manzoni on November 16, 1984. T.P. freely admitted that she sat on respondent's lap, doing so by impulse and of her own compulsion rather than by any invitation or initiative on the part of respondent. Respondent was to instruct T.P. in the preparation of a camera that T.P. was to use over the weekend for T.P.'s graphic arts semester project when, T.P. testified, she sat across respondent's lap while he was seated at his desk. Subsequently, Ms. Manzoni arrived. Neither respondent nor T.P. "jumped up" when Ms. Manzoni appeared and shortly thereafter respondent eased T.P. off his lap and carried on a conversation with Ms. Manzoni while T.P. stood beside respondent's desk. T.P. could not recall the essence of the conversation that took place between respondent and Ms. Manzoni.

T.P. testified that she had sat on respondent's lap on prior occasions between September and November 1984. T.P. could not recall the occasions when she did so, nor could she recall with any degree of certainty whether it was once or twice. Respondent never advised nor instructed T.P. not to sit on his lap or to remove herself after she had done so. T.P. offered her opinion that respondent was a good teacher who appeared to enjoy his work and that he treated his students as his friends.

Dr. Richard Strauss, Superintendent of Schools, testified that in November 1984 he was in receipt of a complaint with respect to respondent's alleged behavior and activity on November 16, 1984. Thereafter, on November 19, 1984, the Superintendent had a meeting in his office with respondent, respondent's union representative and the high school principal at which respondent admitted that a female student had sat on his lap, across his knees, during a classroom session.

The Superintendent testified at length concerning respondent's prior disciplinary record which resulted in the Board's adoption of the resolution on January 25, 1983, to withhold permanently respondent's longevity increment as provided by the Board's 1983-84 salary policy (P-2). The event which occasioned the Board to take such action was respondent's admission that he had prepared in the school printshop and distributed to faculty and students a form entitled "Nigger Application for Employment." The racial composition of the high school is between 36 percent and 38 percent minority students comprised of blacks and Hispanics. As a consequence of respondent's distribution of the form, the Superintendent and Board were in receipt of a variety of complaints, one of

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which was from the United States Department of Education, Division on Civil Rights. Respondent, high school faculty members and others were interviewed by agents of the Division on Civil Rights. Consequently, the Division on Civil Rights issued a letter to the Board, which, among other things, recommended alternative actions to be considered by the Board, together with suggestions for respondent's future conduct in the school-community. In January 1984, the Superintendent personally discussed the Civil Rights letter with respondent, in the presence of others. When confronted as to the purpose of the "application," respondent opined that it was a "joke." The Superintendent testified that there was no detection of a malevolent attitude by respondent with respect to the distribution of the "application."

The Board, in its deliberations with respect to the "application" incident, did not find probable cause to certify tenure charges against respondent but, rather, took the action to withhold his longevity increment permanently (P-2). This Board action was apparently satisfactory to the Division on Civil Rights in that it determined it to be an appropriate penalty and did not recommend any further disciplinary action against respondent.

Subsequent to the Board's adoption of the Resolution on January 25, 1984, the Board was in receipt of two complaints initiated by citizens of the school district arising out of the same incident. The Board responded to the citizen complaints that it had taken action against respondent and no further action with respect to the "application" incident was required.

Respondent did not testify on his own behalf but, rather, he offered a series of fellow teaching staff members and one female student to testify as to respondent's good character, demeanor and reputation in the school-community. The teacher character witnesses included two white males, one black male and one white female. In summary, the teaching staff members opined that respondent is a good teacher, albeit somewhat unorthodox, with good to excellent rapport with students under his direction and control. Respondent exhibits good communication with fellow faculty members and with students. He has complete control over his classroom activities and is knowledgeable with regard to the subject matter and materials that he teaches.

Respondent is characterized as a good, fun-loving person with an outgoing, pleasant personality who enjoys life and enjoys working with people. A profile of the

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typical student enrolled in respondent's classes would be a non-college bound student who would immediately go out into the work force upon graduation from high school. It was opined that the students enrolled in respondent's classes would be more likely to have in-school discipline problems and that respondent handled these students and their disciplinary problems effectively.

Respondent is known to use the school facilities to perform printing jobs for the school district, some of for which he is financially compensated while for others there is no compensation. The printing jobs include, among other things, letterheads, forms, and photographs for the annual yearbook and the high school football programs. Respondent is also known to use the school print shop and its attendant equipment to print jokes, some of which contain obscenities or are otherwise offensive to certain people. One of these documents deemed to be offensive was the "Nigger Application for Employment," which respondent printed and distributed to students and faculty members during the 1982-83 school year, for which the Board took action to discipline respondent by its duly adopted resolution, dated January 25, 1983 (P-2). The teaching staff members who testified on respondent's behalf, a Black among them, asserted that respondent is not a racist, nor could he be characterized as such, because he neither exhibited nor demonstrated any malice toward the Black race. The Black teaching staff member testified further that while the "Application" was not personally offensive to him, he would not distribute it to his students or to anyone else.

At this juncture in the proceedings, respondent advanced an offer of proof that six additional character witnesses subpoenaed to testify on respondent's behalf would constitute cumulative testimony with respect to respondent's good character and reputation in the school community and, therefore, spread their names, gender and ethnic composition on the record with the approval of the administrative court. (See Inventory of witnesses attached hereto.)

A 17-year-old female student, F.T., testified on respondent's behalf asserting, among other things, that she was present in respondent's classroom on November 16, 1984; however, she was in the graphic arts darkroom when student T.P. sat on respondent's lap and, therefore, did not observe the incident. Subsequent to the alleged incident, F.T. talked with T.P. where T.P. related to F.T. that the act was impulsive and spontaneous on T.P.'s part. F.T. asserted that the student body discussed the incident and that all realized that it was a joke and was not to be taken seriously. Subsequent to the Board's

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action to certify tenure charges against respondent, F.T. and another female student circulated petitions among the student body requesting the Board to reconsider its action to suspend respondent and requested the Board to reinstate respondent.

FINDINGS OF FACT

Having carefully considered the entire record including all of the testimony and other evidence offered in this matter, and having given fair weight thereto and having observed the demeanor of the witnesses and assessed their credibility, I **FIND**, together with those Uncontested Facts set forth hereinbefore, the following **FACTS:**

On November 16, 1984, respondent allowed and permitted a 17-year-old female student to sit on his lap during the eighth period of respondent's regular graphic arts class. This incident was observed by Ms. Christina Manzoni, the high school nurse and teaching staff member. Ms. Manzoni is the wife of a member of the Board. Subsequent to Ms. Manzoni's observing the female student sitting on respondent's lap, Ms. Manzoni reported the incident to the high school assistant principal and later discussed the incident with the high school principal. Ms. Manzoni also discussed the observed incident with her Board member husband.

The student, T.P., who sat on respondent's lap during the eighth period graphic arts class, which activity was observed by Ms. Manzoni on November 16, 1984, did so in the presence and full view of other students assigned to the classroom. T.P. sat on respondent's lap on her own initiative and by impulse without the inducement or invitation of respondent, while she sought advice and instruction with respect to the use of a camera she intended to remove from the school for a weekend. T.P. admitted she had previously sat on respondent's lap on at least on one occasion, during a classroom period when other students were present. T.P.'s testimony was both believable and credible. Close v. Kordulak, 44 N.J. 59 (1965); Jackson v. Concord Co., 54 N.J. 113 (1969); Garden State Farms v. Mathis, 61 N.J. 406 (1972).

Respondent's character, reputation and demeanor are described to be those belonging to a fun-loving, joking and lighthearted individual. Respondent is well-liked by his peers and the student body, possessing the necessary skills and competence to teach the subject matter to which he is assigned. Respondent has the reputation as a fair and impartial disciplinarian with the ability to deal with student discipline problems in an evenhanded manner.

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Respondent did not testify on his own behalf and, therefore, neither denied nor rebutted the gravamen of the charge with respect to the November 16, 1984 incident.

DISCUSSION

In administrative proceedings such as this, the burden lies with the charging party to establish the truth of the charges by the quantum of a preponderance of the believable and credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). The Board herein has met its burden to prove the charge that respondent did, in fact, permit a "female student to sit on his lap while conducting a class at the Paulsboro High School on Friday, November 16, 1984, which action took place in view of several of the students in his class" (Board's Certification of Determination). The question now for consideration is whether respondent's act gives rise to conduct unbecoming a teaching staff member or, alternatively, whether it was merely an exercise of poor judgment. The concomitant issue is what penalty, if any, is warranted in view of the proofs which sustained the Board's charge. In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967).

The facts adduced at hearing demonstrate that respondent conducts his graphic arts class in an unorthodox manner, i.e., in a manner which is apparently successful for respondent but, however, deviates from the standard pedagogical norm. Respondent's apparent unorthodox method extends to his treatment of the students in his classroom as "friends" rather than young people under his direction and control who are of tender and impressionable age. It is apparent that the distinction here between teacher and student is diminished to such a degree that the student does not recognize or, rather, may be confused as to the outer limits or bounds of the relationship. T.P. credibly testified that she felt no constraints, albeit a compulsive act, to sit upon respondent's lap in the presence of her classmates, nor was she moved to change her position by Ms. Manzoni's presence on the scene. Similarly, respondent took no action to dissuade nor disturb T.P. after T.P. had sat on his lap until such time as respondent had to rise from his sitting position to reach for his wallet in order to make change for Ms. Manzoni. Respondent's behavior under these circumstances may not be excused by a claim of unorthodoxy. The Commissioner has held on numerous occasions that those persons who enter the teaching profession exercise a significant influence upon those they teach and, consequently, must exhibit a high degree of exemplary behavior. The Commissioner's oft-repeated admonition found in In the Matter of the Tenure Hearing of Jacque L. Sammons, School Dist. of Black Horse Pike Reg., 1972 S.L.D. 302, where he said at 321 that:

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> ***Of***concern to the Commissioner is the situation where the teacher, who should set the good example, assumes that some higher right justifies activities, which are inimical to the public interest and which are designed to impede the orderly process of public education. ***He is constrained to remind the teachers of this State, however, that they are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a type of self-restraint and controlled behavior rarely requisite to other types of employment. As one of the most dominant and influential forces in the lives of the children, who are compelled to attend the public schools, the teacher is an enormous force for improving the public weal. Those who teach do so by choice, and in this respect the teaching profession is more than a simple job; it is a calling.***
> [emphasis added]

The Commissioner observed in the matter of Ruth Schroeder v. Bd. of Ed. of the Tp. of Lakewood, 1960-61 S.L.D. 37, 45 that a teacher is more than an instructor in subject matter but, also, an exemplar. The Commissioner then quoted the language of the Supreme Court of Wyoming in Tracy v. School Dist. No. 22, 70 Wyo 1, 243 P.2d 933 (1954), where it said:

> The peculiar relationship between the teacher and his pupils is such that it is highly improper that the character of the teacher be above reproach. . . . The Court of Appeals of Kentucky has said, both parents and pupils regard the teacher as an exemplar whose conduct might be followed by his pupils and the law by necessary intendment demands that he should not engage in conduct which would invite criticism and suspicion of immorality. Grover v. Stovall, 237 Ky. 172, 35 S. W. 2d 24, Even charges or reputation for immorality, even though not supported by full proof, might in some cases be sufficient ground for removal. Not merely good character but good reputation is essential to the greatest usefulness of the teacher in the schools. [at 45]

Respondent's failure to act, on November 16, 1984, to immediately remove T.P. from his lap when she determined, under impulse, to sit thereon does not demonstrate the degree of "self-restraint" or "controlled behavior" requisite to his professional standing. Respondent's acquiescence to T.P.'s impulsive act goes beyond the boundaries of impropriety and poor judgment to confirm the Board's charge that such behavior constitutes conduct unbecoming a teaching staff member.

As to the penalty to be imposed upon respondent, the Board seeks respondent's removal from his tenured teaching position. The Board contends, in support of its

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position, that respondent's prior disciplinary record together with the Board's notice to respondent that any future misconduct by respondent might result in the certification of tenure charges to remove him from his teaching position and dissolve his tenure status, coupled with the herein proved charges can only result in respondent's removal.

The Board cites the case of In re Williams, 1974 S.L.D. 820, which, it purports, holds for the high standard of duty the teaching staff member owes to the profession. However, the facts in Williams may readily be distinguished from the facts in the instant matter. The Commissioner summarizes the relevant material facts in Williams and said that:

> Respondent admittedly accompanied to lunch, away from the school premises, a female pupil who had illegally absented herself from her classes. This act of respondent as a teacher is directly contrary to the spirit of the New Jersey Constitution's mandate that requires a thorough and efficient program of education. By his actions, respondent encouraged and assisted the female pupil to illegally absent herself from the school. Additionally, respondent, after being counseled by school officials, promised on three separate occasions to the principal, Superintendent, and Board President to desist from seeing the aforementioned female pupil at least until she graduated at the end of the school year, a period of less than three months. However, he failed to act in accord with that which he had solemny agreed to do and persisted in continuing activities with the female pupil which resulted in a serious rift between the pupil and her parents. [at 828]

Respondent herein committed no offense as blatant and irresponsible as that found in Williams. In contrast with the activities in Williams, the herein respondent's conduct would be considered tame and unobtrusive by comparison, notwithstanding that it was unbecoming. It is noted, moreover, that the Commissioner held in Williams that dismissal was unduly harsh and not warranted.

The facts in the instant matter clearly demonstrate that the Board imposed a substantial penalty against respondent for his prior offense. In addition, it is said that respondent made a public apology for this prior indiscretion. Consequently, respondent has paid and continues to pay his penalty. To suggest, as does the Board herein, that respondent's subsequent offense is of such character or magnitude to warrant his dismissal is without merit. Notwithstanding the Board's duly executed resolution which placed respondent on notice that "any future misconduct or insubordination" would give rise to the certification of tenure charges against respondent, such a resolution and notice does

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not grant the Board license to "find" any alleged misconduct or insubordination to ground its certification of charges to the Commissioner. The Board's resolution at paragraph No. 4 preordained respondent's removal from his teaching position, dissolving his tenure status without consideration of the nature or degree of the "misconduct or insubordination" or a lessor appropriate penalty. Such a predetermination by the Board ignores the gravity of the alleged offense and the statutory duty of the Commissioner to set the penalty against the alleged offender based upon the facts of the particular case.

This administrative tribunal is constrained to weigh the facts and other evidence in the record with respect to the charge asserted and proved in the assessment of an appropriate penalty. While it has been said by our courts that, "Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but it might also be shown by many incidents," Redcay v. State Bd. of Ed., 130 N.J.L. 369 at 371 (1943), aff'd, 131 N.J.L. 326 (E.&A. 1944), I **CONCLUDE** that the present charge is not sufficiently flagrant to warrant respondent's dismissal. I further **CONCLUDE** that although respondent has been penalized for his prior offense, the prior offense cannot be ignored here. Redcay.

ORDER

Accordingly, it is hereby **ORDERED** that respondent be reinstated to his teaching position commencing with the 1984-85 academic year at the same annual salary at which he was compensated during the period of his suspension. It is further **ORDERED** that respondent forfeit the 120-day loss of pay exacted by the Board during the term of his suspension from his tenured teaching position, pursuant to N.J.S.A. 18A:6-14. (In the matter of the Tenure Hearing of Robert Hay, Hunterdon Central Reg. H.S. Dist, Hunterdon Cty., OAL DKT. EDU 5312-81, decided, Comm'r of Ed. July 19, 1982).

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

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OAL DKT. NO. EDU 0167-85

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

13 June 1985
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

June 19, 1985
DATE

Ronald J. Parker/k.s.
OFFICE OF ADMINISTRATIVE LAW

bc

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IN THE MATTER OF THE TENURE :
HEARING OF ROBERT FERENZ, SCHOOL : COMMISSIONER OF EDUCATION
DISTRICT OF THE BOROUGH OF : DECISION
PAULSBORO, GLOUCESTER COUNTY. :
:

The record of this matter including the initial decision rendered by the Office of Administrative Law has been reviewed by the Commissioner. It is observed that the Board's exceptions to the initial decision and respondent's reply to those exceptions have been filed with the Commissioner in accordance with the provisions of N.J.A.C. 1:1-16.4a, b, and c. However, it is determined that respondent's cross-exceptions are in fact untimely exceptions to the initial decision as filed and will not be considered by the Commissioner in his final determination of this matter.

Although the Board agrees with the findings in the initial decision which support the conclusion that respondent is guilty of conduct unbecoming a tenured teacher, it excepts to the penalty recommended by the judge to be imposed against respondent. The Board argues that the weight of credible evidence in support of the tenure charge of unbecoming conduct warrants a penalty to be imposed by the Commissioner causing his dismissal from employment in the Paulsboro School District. In support of this contention the Board relies on the testimony of T.P. and C.T. which establishes that respondent, on more than one occasion, permitted T.P. to sit on his lap during a regular classroom period. In this regard the Board challenges the oral Order issued by the judge limiting the scope of the tenure charge involving the pupil, T.P., to the incident of November 16, 1984.

Moreover, the Board argues:

> "***It should also be emphasized that the Respondent did not testify on his behalf, and therefore, did not deny either the November 16th, 1984 [incident] nor was he able to clarify or deny the statements by the student witnesses that he had permitted this conduct on earlier occasions during the 1984 Fall school semester.
>
> "The Administrative Law Judge also, at page 12, made the following findings, summarizing the Respondent's own character testimony:
>
> > 'Respondent is also known to use the school print shop and its attendant equipment to print jokes, some of which contain obscenities and are otherwise offensive to certain people. One of

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> these documents deemed to be offensive was the "Nigger Application for Employment," which respondent printed and distributed to students and faculty members during the 1982-83 school year, for which the Board took action to discipline respondent by its duly adopted resolution, dated January 25, 1983 (P-2).***'***"
>
> (Board's Exceptions, at pp. 2-3)

Additionally, the Board argues:

> "***It is interesting to note that the Administrative Law Judge recited testimony of all of the witnesses in his discussion, except for that of Russell Stetser, the President of the Paulsboro Board of Education. Mr. Stetser testified that the community outcry following the 'Nigger Application' incident was substantial. He further indicated that in particular the black community was mobilized into action and the Board met on several occasions with representative groups from the black community concerning the 'Nigger Application.' It is important to remember that the Paulsboro School District population and the community population, as testified to by Superintendent Strauss, is a racial composition of between 35% and 36% minority students.
>
> "Mr. Stetser also testified that there was considerable community outcry following the incident of November 16, 1984, with the student, T.P. In conclusion, Mr. Stetser testified that in view of this community reaction it would be impossible for Mr. Ferenz to be an effective member of the teaching staff at Paulsboro High School.***"
>
> (Board's Exceptions, at p. 4)

Respondent in his reply to the Board's exceptions urges the Commissioner to apply Fulcomer (93 N.J. Super. 404 (App. Div. 1967)) to the instant matter. It is observed in Fulcomer that the Court stated in pertinent part:

> "***Although such conduct certainly warrants disciplinary action, the forfeiture of the teacher's rights after serving for a great many years in the New Jersey school system is, in our view, an unduly harsh penalty to be imposed under the circumstances. *** [C]onsideration should be given to the impact of the penalty on appellant's teaching career, including the difficulty which would confront him, as a teacher dismissed for unbecoming conduct, in obtaining a teaching

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> position in this State, with the resultant jeopardy to his equity rights in the Teacher's Pension Fund accruing from his 19 years credit.***" (at 421)

In Fulcomer, the teacher physically grabbed a pupil in efforts to maintain discipline. Fulcomer had been in the Board's employ for 23 years and, until the time of the incident giving rise to the tenure charge of unbecoming conduct certified against him, his record of service as a teacher was unblemished. The Court held that the penalty imposed therein was disproportionate to his conduct.

Moreover, respondent rejects the Board's argument to the effect that the judge erred in failing to consider the testimony of the Board President regarding respondent's continued fitness to teach with the administrative staff. Respondent maintains that the testimony of the Board President was not based upon first-hand knowledge and, further, that the record reveals that the subject matter of his continued fitness to teach was never discussed with the school district's administration.

Respondent further contends that the judge properly limited the scope of the instant tenure proceedings to the single charge of the alleged incident of November 16, 1984 inasmuch as it had been determined that the other claims made by the Board "lacked specificity of time and event against which respondent had an opportunity to defend or prepare his defenses." (Initial Decision, at p. 4)

Respondent urges the Commissioner to affirm the judge's determination not to allow other incidents alleged by the Board similar to those of November 16, 1984 precisely for those reasons stated in the initial decision and further supplemented in his reply exceptions.

Finally, respondent further argues as follows in his reply exceptions:

> "***While the Board claims that Judge Law did not give appropriate weight to Respondent's prior offense, which resulted in the withholding of his salary increment (P-2), it is clear that the prior offense was included within Judge Law's formulation of a penalty. See Initial Decision at 17. That the Board's argument in this regard is totally specious is evidenced by the following: 1) Notwithstanding the prior offense, Respondent continued to teach without interruption until the instant charge was certified, and as noted above, did so successfully; 2) At the time of the prior offense, the Board did not consider it serious enough to even find that probable cause existed to certify tenure charges

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- See Initial Decision at 11; 3) The Superintendent testified that he had interviewed Respondent at the time of the prior incident, and 'there was no detection of a malevolent attitude by respondent, with respect to distribution of the "application".' Moreover, Judge Law properly determined that the prior incident, which was never certified as a tenure charge, could not be utilized to elevate the status of the instant tenure charge to an offense warranting forfeiture of a tenure position. This is particularly so where the Board has failed to demonstrate any diminution in Respondent's overall effectiveness in the classroom, or that there is any credible evidence in the record to suggest that Respondent would be unable to effectively carry out his teaching duties if reinstated. Exhibit P-2 alone does not establish that Respondent engaged in 'unbecoming conduct'; that can only be accomplished in a full evidentiary hearing before the Commissioner of Education in strict compliance with the procedures contained in N.J.S.A. 18A:6-10 et seq. Particularly with respect to what sort of penalty would be appropriate for circulating ethnic jokes in the classroom, such an issue is a complex one requiring a careful analysis of the intent of the teacher and all the surrounding circumstances. See In re Tenure Hearing of Mark Blasko, 1980 S.L.D. 987, State Board Decision of 4/1/81 reversing Commissioner and reinstating Initial Decision of A.L.J. Masin. It is noteworthy that the penalty imposed upon the respondent in Blasko amounted to two weeks' pay whereas Respondent Ferenz suffered a far more substantial penalty, i.e. an increment withholding. Furthermore, not a scintilla of evidence was presented by the Board at hearing to demonstrate that Respondent has engaged in any repitition (sic) of this conduct.***" (Emphasis in text.)

The Commissioner has reviewed the respective positions argued by the parties herein.

In the Commissioner's judgment it is apparent that the tenure charge against respondent herein is that of unbecoming conduct. The pivotal issue argued by the parties herein is whether the judge erred in limiting the scope of the tenure proceedings against respondent to the single incident of November 16, 1984 in which the tenure charge of unbecoming conduct involved a female high school student whom respondent had permitted to sit on his lap during a regular classroom period.

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Upon further review of the tenure charge of unbecoming conduct including the Superintendent's sworn statement of evidence in support thereof and the Board's certification of determination, the Commissioner finds and determines that the judge's procedural ruling in this regard was correct for the reasons stated in his findings in the initial decision.

The record of this matter firmly establishes that respondent is guilty as charged by virtue of the preponderance of credible evidence produced by the Board with respect to the incident involving his unbecoming conduct on November 16, 1984.

It is observed that the penalty to be imposed upon respondent, as recommended herein by the judge, is grounded upon the Court's ruling in Redcay, supra. Such penalty includes another prior incident of proven misconduct by respondent which occurred during the 1982-83 school year and is memorialized in a Board resolution of January 15, 1983 (P-2) in which it acted to permanently withhold his longevity increment. The incident upon which the Board took action at that time pertained to respondent's having "printed and distributed copies of a document containing ethnic material which was offensive and distasteful*** during the 1982-83 school year.***" (P-2)

It is observed that respondent did not challenge the action taken by Board resolution on January 25, 1983. It is also undisputed that respondent did, in fact, publicly apologize thereafter for his misconduct.

In relying upon Redcay for the assessment of an appropriate penalty to be imposed upon respondent the judge made the following comments with respect to the Board's action of January 25, 1983 against respondent involving the occasion of his prior misconduct during the 1982-83 school year:

> "***The facts in the instant matter clearly demonstrate that the Board imposed a substantial penalty against respondent for his prior offense. In addition, it is said that respondent made a public apology for this prior indiscretion. Consequently, respondent has paid and continues to pay his penalty. To suggest, as does the Board herein, that respondent's subsequent offense is of such character or magnitude to warrant his dismissal is without merit. Notwithstanding the Board's duly executed resolution which placed respondent on notice that 'any future misconduct or insubordination' would give rise to the certification of tenure charges against respondent, such a resolution and notice does not grant the Board license to 'find' any alleged misconduct or insubordination to ground its certification of charges to the

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> Commissioner. The Board's resolution at paragraph No. 4 preordained respondent's removal from his teaching position, dissolving his tenure status without consideration of the nature or degree of the 'misconduct or insubordination' or a lessor appropriate penalty. Such a predetermination by the Board ignores the gravity of the alleged offense and the statutory duty of the Commissioner to set the penalty against the alleged offender based upon the facts of the particular case.
>
> "This administrative tribunal is constrained to weigh the facts and other evidence in the record with respect to the charge asserted and proved in the assessment of an appropriate penalty. While it has been said by our courts that, 'Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but it might also be shown by many incidents,' Redcay v. State Bd. of Ed., 130 N.J.L. 369 at 371 (1943), aff'd, 131 N.J.L. 326 (E.&A. 1944), I CONCLUDE that the present charge is not sufficiently flagrant to warrant respondent's dismissal. I further CONCLUDE that although respondent has been penalized for his prior offense, the prior offense cannot be ignored here. Redcay.***"
>
> (Initial Decision, at pp. 16-17)

The Commissioner concurs with the legal premise upon which the judge considered the assessment of a penalty to be imposed herein against respondent. However, the Commissioner is not persuaded that the judge did, in fact, weigh both incidents of respondent's misconduct. Instead, it appears from a reading of the above-cited language in the initial decision that the judge preemptorily made a determination with respect to the tenure charge prior to weighing both incidents of respondent's misconduct before such a determination was made. Redcay, supra Therefore, the Commissioner does not agree with the judge's finding that the nature and gravity of circumstances related to the incidents of respondent's unbecoming conduct warrant the imposition of a penalty less than his dismissal from tenured employment. In arriving at this finding and determination the Commissioner finds that Fulcomer, supra, is distinguishable from the arguments presented in these proceedings with regard to the appropriateness of the penalty to be imposed upon respondent herein. In Fulcomer, respondent had served in the Board's employ for 23 years with an unblemished record of service until the time of the incident resulting in the tenure charge against him.

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Respondent's conduct complained of in the instant matter involves two serious incidents which occurred within a period of less than three years. These incidents of misconduct as stated in the record of this matter are, in the Commissioner's judgment, "sufficiently flagrant" to establish that respondent is deemed to be "unfit" to continue in his tenured position as a teacher in the Board's employ. Redcay, supra

In the Commissioner's view respondent cannot argue that he was unaware of the gravity of the circumstances related to his misconduct during the 1982-83 school year. Nor could respondent misinterpret the Board's action on January 25, 1983 (P-2) with regard to the serious nature of his misconduct at that time and the resultant effect it specifically had upon minority residents of the Paulsboro School District.

The record reveals, however, that respondent again allowed himself to be involved in an incident on November 16, 1984 with a female pupil during a regular class period in which his conduct and professional judgment as a tenured teacher would be criticized and condemned by another teaching staff member, the school administration and the Board.

In the Commissioner's opinion the Board exercised undue restraint on January 25 1983 when it took punitive action against respondent for his misconduct short of certifying tenure charges against him. While the Commissioner does not substitute his judgment for the Board's lawful exercise of its discretionary authority on that occasion, it must be presumed that petitioner's unblemished prior record of employment service as well as his continued effectiveness as a classroom teacher were factors which affected the Board's determination. Therefore, the Commissioner concludes that respondent was aware of the consequences and the impact that any further incident involving his alleged misconduct would have on his continued employment as a tenured teacher in the Paulsboro School System.

The Commissioner hereby finds and determines that respondent is guilty of conduct unbecoming a tenured teacher resulting from the incident of November 16, 1984 giving rise to the Board's certification of the tenure charge of unbecoming conduct against him.

The Commissioner affirms those findings and conclusions in the initial decision in determining that respondent has been found guilty of unbecoming conduct as a tenured teacher resulting from the incident which occurred on November 16, 1984, when he permitted a female student to sit on his lap in view of other students during a regular classroom period.

However, in assessing a penalty to be imposed upon respondent herein the Commissioner also relies upon Redcay, supra, and hereby takes into consideration the prior incident of

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respondent's misconduct during the 1982-83 school year for the purpose of determining an appropriate penalty.

Accordingly, the Commissioner finds and determines that the two incidents involving respondent's unbecoming conduct as a tenured teaching staff member are of such a nature and magnitude to be deemed sufficiently flagrant to warrant his dismissal from tenured employment in the Paulsboro School System. To the extent that the initial decision in this matter recommends a lesser penalty to be imposed against respondent, it is hereby reversed.

The Board is directed to terminate respondent's tenured position of employment in the Paulsboro School System as of the date of filing of the Commissioner's decision herein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 1, 1985

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8525-84
AGENCY DKT. NO. 459-11/84

EDWARD F. BARANOSKI,

Petitioner

v.

BOARD OF EDUCATION OF THE BOROUGH OF WOODCLIFF LAKE,

Respondent

Paul E. Griggs, Esq.
(McConnell, Norton and Smith, attorneys)

Walter T. Wittman, Esq.
(Beattie, Padovano, Breslin & Dunn, attorneys)

Record Closed: June 13, 1985 Decided: June 19, 1985

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

Petitioner, Edward F. Baranoski, alleged he was employed by the Woodcliff Lake Board of Education (Board) as Acting Board Secretary and Director of Business Affairs by contractual arrangement, which the Board breached when it terminated his employment, and seeks damages for the alleged breach.

The Board avers that no contract existed; petitioner was only temporarily employed; and that petitioner was properly terminated.

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The matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. on November 27, 1984. A prehearing conference was held on February 4, 1985 and a plenary hearing was held at the Office of Administrative Law, Newark on May 14 and 16, 1985. Post-hearing submissions were filed in a timely fashion, and the record closed on June 13, 1985, the date established for final submissions.

The scenario in this matter began with the November 2, 1983 notice of retirement of the then Board secretary, Katherine F. Clement, with the intention of completing her active employment on June 30, 1984 and with an effective retirement date of January 31, 1985. Clement testified that she assisted the Superintendent in the interview process and screening of candidates seeking to replace her; utilized a questionnaire as a guideline in the process; met with 10 to 15 candidates; and met with petitioner Baranoski on June 11, 1984. She stated that no discussion took place at the Baranowski interview concerning any budgetary crisis in Garfield, the school district where Baranoski was a tenured Board secretary and school business administrator. She further testified the full Board interviewed Baranoski on June 26, 1984; the Board utilized a questionnaire similar to that used by her and the Superintendent in the interview process; no mention was made of any crisis in Garfield; the Board authorized by resolution the employment of either of two finalists, Baranoski or a Patricia Giannotti; and the Superintendent would try to make the selection of her replacement over the weekend, prior to her scheduled admission into the hospital on the first Monday in July.

Clement further testified the interview process included questions of Baranoski about his prior experience, but nothing directly involved with Garfield finances. She also stated that she met with Baranoski in an orientation meeting on July 10 after he and the Superintendent had agreed on terms of employment and advised him that no written contract document had been prepared because it needed Board approval.

The Superintendent, Dr. Adrienne Vogrin, testified the search for Clement's replacement began in December 1983; more than 40 candidates had been screened; the

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vacancy was readvertised in May 1984 and for a third time at a later date due to an inability to find a suitable replacement, after which Baranoski made application. She stated she requested and received the Garfield audit report on June 11, and that no budget deficit problems were raised in questions asked of Baranoski.

The Superintendent further testified the full Board was provided with all documents she had requested of Baranoski and interviewed him on June 26; the Board met on June 28 and selected Giannotti and Baranoski to replace Clement in that order with a salary range up to $35,620; the Board would next meet in August and would determine the next step if neither candidate accepted the offer of employment. The Superintendent stated she did not call any references requested of Baranoski; offered the position to Baranoski after Giannotti rejected it; it was critical that Baranoski start work in the district; Baranoski did begin on August 1, 1984; and she had not mentioned to Baranoski that his employment was temporary.

The Superintendent finally testified that she read a newspaper article concerning a financial crisis in the Garfield school district on August 10; she called the Garfield auditor who allegedly told her that Baranoski had miscalculated surplus but he (auditor) had not discussed it with Baranoski; and that her concern resulted in a request for an appearance by Baranoski at the Board's August 14 meeting.

Board President Stanley Goldberg testified that he and the Board met with Baranoski on June 26 and had asked some 14 questions of him, the thrust of most being to ascertain the qualifications of the candidate concerning financial matters and was impressed with the responses of the candidate; no mention was made of any problems in Garfield; and the Board acted to authorize the Superintendent to employ either Giannotti or Baranoski. He further testified that he and the Board again met with Baranoski on August 14 to ask questions of him concerning Garfield; gave credence to responses; and the Board withdrew the offer of employment to Baranoski.

Baranoski testified he responded to a newspaper advertisement concerning the vacancy in Woodcliff Lake; applied for the position; responded to all questions asked of

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him in the June 11 and 26 interviews; provided all documents requested; responded in the affirmative to the terms of employment offered for the position of Acting Board secretary and director of business affairs by the Superintendent in a telephone conversation on Sunday, July 1; resigned from his tenured position on Garfield; and began work in Woodcliff Lake on August 1. He further testified that he was advised that his services were no longer required in Woodcliff Lake after the August 14 Board meeting, and that he did not secure employment elsewhere until March 11, 1985, when he became school business administrator at Old Tappan.

The resolution adopted by the Board on June 28, 1984 by unanimous roll call vote of all members present states:

> BE IT RESOLVED that the Woodcliff Lake Board of Education does hereby authorize the Superintendent of Schools to negotiate an employment contract for the position of Board Secretary/Director of Business Affairs at a salary within the range stipulated by the Board; and further,
>
> BE IT RESOLVED that the final contract of employment shall be acted upon by the Board at the August Public Business Meeting. (J-5)

A confirming letter of the employment offer was sent to Baranoski by Superintendent Vogrin on July 2, 1984 and is reproduced in full:

> It was a pleasure to speak with you on Sunday, July 1st, 1984. This letter will serve to confirm that conversation. At that time, with the authorization of the Board of Education, I offered you employment in the Woodcliff Lake School District as Acting Board Secretary/Director of Business Affairs until January 31, 1985, and Board Secretary/Director of Business Affairs beginning February 1, 1985 at a per annum salary of $35,620.00. You accepted this position, and you agreed on a start date of August 2, 1984, unless you were released earlier by your Board of Education. Since you had not had an opportunity to speak with your Superintendent, we agreed that if a problem arose with the August 2, 1984 date, you would call me at 391-4669.
>
> We are all looking forward to having you join our staff. (J-1)

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The termination of employment notice was a letter to Baranoski from the Superintendent under date of August 17, 1984 and states:

> Following your further job interview with the Woodcliff Lake Board of Education on August 14, 1984, the Board of Education considered those aspects of your former employment record that you had not previously disclosed and determined not to proceed with negotiations on your application for employment as Board Secretary/Director of Business Affairs.
>
> Under these circumstances, as you know, I decided to terminate the temporary services that I had previously asked you to perform and to compensate you for those services rendered on a per diem basis. (J-2)

A review of all testimonial and documentary evidence results in the following adopted FINDINGS OF FACT:

1. Baranoski began his employment in Woodcliff Lake as Acting Board Secretary/Director of Business Affairs on August 1, 1984 at an annual salary of $35,620 with the authorization of the Board as represented by the Superintendent and the Board's resolution.

2. Acting would be deleted from his title on February 1, 1985 upon the full retirement of Katherine F. Clement.

3. The term of employment, by implication, was no less than August 1, 1984 to June 30, 1985.

The Board argues that Baranoski was not appointed by the Board pursuant to N.J.S.A. 18A:17-5; no contract existed and therefore no breach could occur; no agent of the Board can legally bind the Board; and if a contract is determined to have existed, the Board's damages should be limited to 60 days, the usual notice incorporated in many contract termination clauses.

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The Board also relies on case law, namely, Nicholas Campanile v. Bd. of Ed. of the Twp. of Middletown, 1982 S.L.D. ____ (decided March 24, 1982); Cheryl Dorrington v. North Bergen Bd. of Ed., 1982 S.L.D. ____ (decided March 24, 1982); Anna Brennan v. Bd. of Ed. of the City of Plesantville, 1977 S.L.D. 1059; and Esther Boyle Eyler, et al. v. Bd. of Ed. of the City of Paterson, 1959-60, S.L.D. 68.

Baranoski pleads for the Commissioner to assert his broad authority and responsibility as outlined by the Supreme Court in Jenkins et al. v. Bd. of Ed. of Morris Township, 58 N.J. 483 (1971) to mold "appropriate relief based on valid principles of law and equity to fit the circumstances of the cases." Rockenstein v. Bd. of Ed. of the Borough of Jamesburg, 1975 S.L.D. 191 at 192.

It appears that the uniqueness of this dispute resulted from the desire of the Board to avoid any meeting between June 28 and August as well as the anxiety of the Superintendent to resolve the Clement replacement problem prior to her hospitalization July 2.

It also appears that both the Superintendent and the Board now wish to transfer its responsibility, for its negligence in not fully investigating the background of a candidate, to the candidate himself by charging him with a duty to reveal details of an experience not asked of him. The record does not indicate that any calls were ever made to the Garfield Superintendent or any other agent of that Board prior to or after the offer of employment to Baranoski.

The instant matter is also distinguished from those cases cited by the Board in that this Board passed a resolution by roll call vote to authorize the employment of the replace of Clement.

I am of the opinion that the Board would have appointed either Giannotti or Baranoski by roll call vote on June 28 if certain of acceptance and salary. The title of Acting was not intended to convey the position to be temporary but solely to avoid

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compensating two persons for the same position until Clement's retirement became effective on January 31, 1985. It also appears that the Board's interest is clearly memorialized in its own resolution "that the final contract of employment shall be acted upon by the Board at the August Public Business Meeting." (J-5, emphasis supplied)

It is well established in law that a contract need not be in writing to be valid. N.J.S.A. 18A:17-5 states:

> Each secretary shall be appointed by the board, by a recorded roll call majority vote of its full membership, for a term to expire not later than June 30 of the calendar year next succeeding that in which the board shall have been organized, ...

The elements of a contract were present in a letter written to Baranoski by the Superintendent on behalf of the Board. The intention of the Board to employ either Giannotti or Baranoski was clear. The offer of employment was indeed made with a consideration and accepted. The acceptance of Baranoski's services beginning on August 1 constitutes a ratification of the contract. The anticipated August written contract execution was to be pro forma. I **FIND** it reasonable for Baranoski to have relied on the good faith intent of the Board and its Superintendent and relinquish his tenured position in Garfield. Baranoski held to his committment. The Board did not.

It is not the intention here to force a Board to continue to employ one it chooses not to. I **FIND** the Board breached its employment agreement with Baranoski. The intention here is to compensate Baranoski for that breach in the interest of fundamental fairness.

I **CONCLUDE**, therefore, that Baranoski is entitled to compensation from August 15, 1984 through June 30, 1985 at the annual rate of $35,620, mitigated by his earnings at Old Tappan from March 11, 1985 through June 30, 1985 and the unemployment compensation received, for which the Division of Unemployment Compensation shall be reimbursed. **IT IS SO ORDERED.**

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

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

19 June 1985
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

June 24, 1985
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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EDWARD F. BARANOSKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WOODCLIFF LAKE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

The Board's exceptions and petitioner's reply exceptions have been filed with the Commissioner pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b, and c.

The Board's exceptions to the initial decision are incorporated herein by reference and summarized below:

1. The Board contends that the initial decision does not fully and fairly state the evidence upon which the findings of fact are based. In this regard the Board argues that the judge has in many instances within the initial decision, improperly summarized or erroneously stated essentially what occurred which ultimately resulted in petitioner's temporary employment on August 1, 1984 and his subsequent dismissal by the Board August 14, 1984.

2. The judge erroneously stated or totally ignored the relevant statements contained within the joint exhibits entered into evidence in this matter. (J-1, J-3, J-4, J-6, J-8 and J-9)

3. Contrary to those findings made by the judge regarding the Board's resolution of June 28, 1984, (J-5) the Board only authorized its Superintendent to negotiate an employment contract with petitioner upon which it would take final action at its meeting in August 1984.

4. The decision errs as a matter of law in concluding that a one year contract existed between petitioner and the Board. Such determination is contrary to the provisions

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> of N.J.S.A. 18A:17-5 as well as the specific language related to the Board's action of June 28, 1984 (J-5) and its policy pertaining to the "Employment of Staff" (J-6).

In this regard the Board also relies upon Paul McCormick v. Board of Education of the Hunterdon Central Regional High School District, 1978 S.L.D. 160 wherein the Commissioner held:

> "***A policy once adopted and spread on the minutes of a board of education may not be so lightly disregarded.***" (at 168)

Finally, the Board argues that the initial decision is in error by relying upon alleged equitable principles which are unwarranted by virtue of petitioner's conduct. More specifically, the Board argues in its exceptions as follows:

> "***The Decision states that the Superintendent and the Board '... now wish to transfer responsibility, for its negligence in not fully investigating the background of a candidate, to the candidate himself by charging him with the duty to reveal details of an experience not asked of him.' Respondent strongly excepts to both the substance and the tenor of this observation.
>
> "Let it be said that the Respondent questions the morality of a concept that would seem to exculpate a job applicant who certifies in writing that he is making a full and complete disclosure of his work experience and then defends the non-disclosure of a material fact by saying 'I didn't tell you because you never asked me.'
>
> "But even if one assumed, arguendo, that there is a presumption of negligence against the public employer who does not ferret out the concealed fact, this Decision fails totally to address itself to the fact that when the questionable financial performance of the Petitioner still pending in Garfield was drawn to his attention, and he was offered the opportunity to explain the details, he chose on August 13 to disclose only a portion of the discrepancy (Exhibit J-8) and then on August 14 admitted the discrepancy with no explanation for it when confronted with the question of why he had not made a full disclosure. (Exhibit J-9).

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> "This conduct combined with any self-imposed hardship does not warrant the Initial Decision's unprecedented dispensation of 'equity'.***"
> (Board's Exceptions, at p. 6)

Petitioner, categorically rejects the arguments advanced by the Board in its exceptions and urges the Commissioner to apply those findings and conclusions set forth in the initial decision in rendering a final determination in his favor.

The Commissioner upon review of the respective positions taken by the parties with regard to those findings and conclusions in the initial decision hereby reverses the initial decision and denies the relief recommended to be granted to petitioner.

The Commissioner's determination is grounded, in part, upon his concurrence with those exceptions filed by the Board as supplemented below.

In the Commissioner's judgment the judge erred in construing the clear language in the Board minutes of June 28, 1984, wherein it resolved in pertinent part the following:

> "BE IT RESOLVED that the Woodcliff Lake Board of Education does hereby authorize the Superintendent of Schools to negotiate an employment contract for the position of Board Secretary/Director of Business Affairs at a salary within the range stipulated by the Board; and further,
>
> "BE IT RESOLVED that the final contract of employment shall be acted upon by the Board at the August Public Business Meeting.***"
> (Emphasis supplied.)(J-5)

The word "negotiate" as defined in Black's Law Dictionary Revised Fourth Edition, 1968 reads:

> "NEGOTIATE. To transact business, to treat with another respecting a purchase and sale, to hold intercourse, to bargain or trade, to conduct communications or conferences. It is that which passes between parties or their agents in the course of or incident to the making of a contract and is also conversation in arranging terms of contract. Werner v. Hendricks, 121 Pa. Super. 46, 182 A. 748, 749."(Emphasis supplied.)(at 1188)

It is clear from a reading of the Board's resolution (J-5) that the superintendent was authorized to negotiate or discuss the terms of an employment contract with petitioner. Such negotiation or communication with petitioner by the superintendent may not be construed herein to grant her authority to effect a contract of

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employment between petitioner and the Board. Only the Board is vested with authority in law provided it complies with the provisions of N.J.S.A. 18A:17-5. Contrary to the judge's finding on page 7 of the initial decision, the Board never acted pursuant to N.J.S.A. 18A:17-5 on June 28, 1984 to conclude an employment contract with petitioner. It is evident from a further reading of its resolution that its action in this regard would be taken at the August 1984 Board meeting, subsequent to the negotiation it authorized its superintendent to conduct with the two candidates.

The Commissioner finds that the Board's action in this regard is entirely consistent with its policy regarding the Employment of Staff (J-6) during the interim period of negotiations with prospective employees and the time a duly executed employment contract is approved by the Board.

The pertinent language in the Board's policy for the "Employment of Staff" reads as follows:

> "***A prerogative of the Superintendent shall be to recruit and nominate for temporary employment the necessary professional and non-professional staff members required to fill all vacant positions which occur between Board meetings within the district. These employees remain in a temporary status until the next meeting of the Board at which time their status will be determined.
>
> "Any employee's misrepresentation of qualifications for employment or for the determination of salary shall be considered by this Board to constitute grounds for dismissal.
>
> "No person who is not tenured shall be considered to be employed by this Board until that person has signed an employment contract. Each such contract shall include:
>
> a. the term for which employment is contracted, including beginning and ending dates
>
> b. the kind and grade of certificate held by the employee and the date upon which the certificate will expire, if any
>
> c. the salary at which the person is employed and the intervals at which it shall be paid
>
> d. a provision for termination of contract on notice duly given by its parties

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e. such other matters as may be necessary to a full and complete understanding of the contract.

"All new nonprofessional employees shall be considered temporary employees, until offered a contract by the Board. The employee may be discharged without notice, during this time." (Emphasis supplied.)(J-6)

The record of this matter further supports the Board's position insofar as there were two finalists for the position of Board Secretary/Director of Business Affairs whom the Board had authorized the superintendent to negotiate with for the position. Consequently, the Board could not formally act upon the employment of a successful candidate pursuant to N.J.S.A. 18A:17-5 until it at least knew which of the two candidates selected was to be recommended by the superintendent.

It was appropriate therefore under the circumstances described in the initial decision to employ petitioner on a temporary basis in accordance with Board policy (J-6) until a contract between petitioner and the Board could be formally concluded.

Accordingly, it is found and determined that, absent formal Board action employing petitioner or the existence of a duly executed contract effected between the Board and petitioner, it therefore follows that no breach of contract by the Board was, in fact, committed. The Commissioner so holds.

Petitioner's employment was that of a temporary employee from August 1, 1984 until he was notified of the Board's action of August 14, 1984 to terminate his employment pursuant to its policy (J-6) to that effect.

Finally, the facts of this matter reveal that both parties had a responsibility to each other to share certain essential information related to the position the Board was seeking to fill. Namely, the superintendent was remiss in not initially making petitioner aware of the specific conditions set forth in the Board's policy (J-6) with regard to the "Employment of Staff". Such information was subsequently alluded to by the superintendent on August 17, 1984 after petitioner's meeting with the Board on August 14, 1984 at which time his employment was terminated.

Petitioner, however, did render employment service to the Board as of August 1, 1984 and was compensated for his services by the Board. However, it is clear that he was less than candid with regard to certain aspects of his former employment in Garfield which should have been initially disclosed at the time he was requested to provide information to the Board regarding his prior employment experience.

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In weighing the interests of both parties pertaining to the matter herein controverted, the Commissioner finds and determines that the Board, while not guilty of a breach of contract, is not entirely absolved from failing to properly and fairly communicate the provisions of its employment policy to petitioner in the instant matter. Accordingly, the Board is hereby directed to compensate petitioner 60 days' pay from August 15, 1984 at the annual rate of $35,620 without mitigation, as if such contract of employment with a 60-day termination clause was in effect between the parties during the period controverted herein.

The initial decision in this matter is hereby reversed and the relief to be granted petitioner is limited to the Commissioner's decision herein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 5, 1985

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6532-84

AGENCY DKT. NO. 237-6/84

OLD BRIDGE EDUCATION ASSOCIATION, MYRA DANIEL, FAY GHISOLFI, MARGARET KENNEDY, THERESA NASON, ROSEANNE P. NOWICKI, LENORE PEARLMAN, MARY ANN REINERT, DENISE SHELL, CHERYL UNGLART,

Petitioners, (CONSOLIDATED)

v.

BOARD OF EDUCATION OF OLD BRIDGE TOWNSHIP,

Respondent.

MARILYN JACLIN, JULIE ANN SUCHCICKI, SYLVIA MARCIN, ROSE A. DAGANYA, ALISON GALLAGHER, BARBARA BORRETSKY,

OAL DKT. NO. EDU 8987-84

AGENCY DKT. NO. 482-11/84

Petitioners,

v.

BOARD OF EDUCATION OF OLD BRIDGE TOWNSHIP,

Respondent.

Richard Kaplow, Esq., for six Jaclin petitioners (Weinberg & Kaplow, P.A.)

Steven J. Tripp, Esq., for respondent (Wilentz, Goldman & Spitzer, attorneys)

Richard A. Friedman, Esq., for all other petitioners (Ruhlman, Butrym and Friedman, P.A.)

Emil Oxfeld, Esq., for intervenors (Oxfeld, Cohen & Blunda, attorneys)

Record Closed: May 17, 1985 Decided: June 11, 1985

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OAL DKT. NOS. EDU 6532-84 and 8987-84

BEFORE **NAOMI DOWER-LaBASTILLE**, ALJ:

The Old Bridge Education Association (OBEA) and 15 individual petitioners filed a petition alleging that the Board of Education of Old Bridge Township (Board) violated their tenure and seniority rights under N.J.A.C. 6:3-1.10 by terminating their employment at year end 1983-84, while retaining less senior teaching-staff members. The Commissioner transmitted the matter to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1.

Notice was given to teaching-staff members whose positions might be adversely affected by the claim and 25 of them intervened. The intervenors include:

Sandra Ashkenas	Marcia Greenhouse
Louise Bernbaum	Susan Lynch
Rosalie Brazinsky	Linda Messenger
Monica Cronin	Virginia Murphy
Christopher Donoghue	Barbara Nice
Paula Eisen	Julie Phillips
Joyce Gralewicz	Barbara Stanley
Joan Higgins	Daniel Wall
Carol Johnson	Barbara Weinstein
Nancy Alfieri	William Breen
Genella Gerardi	Arthur Otchy
Clarie Pollack	Carl Schavio
Richard Fornadel	

In November 1984, after the prehearing had been held in EDU 6532-84 six of the original petitioners (the Jaclin petitioners) filed another and different cause of action seeking a similar remedy, alleging that the president of their teachers' association and the Board had conspired to arbitrarily or improperly assign them, prior to their termination, to positions in which they would not earn the seniority credit needed for them to retain employment and to the end that other teaching-staff members, including the wife of the OBEA president and daughter of a Board member, would retain positions. The new petition raised conflicts in representation and the six Jaclin petitioners withdrew from representation through Richard Friedman and retained Richard Kaplow. Since the six Jaclin petitioners still maintained their claim in the first petition and a lengthy stipulation had already been prepared which pertained to their initial claim, I consolidated

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the cases to ensure that all claims for the same positions would be adjudicated at one time.

This case involves the difficult question of seniority under the new rule where teachers with elementary endorsement have served, (sometimes for only brief periods) subsequent to September 1, 1983 in departmentalized grades 7 and 8 or in the high school under a common branch authorization as against other teachers with elementary endorsement who may have more tenured time but little or no actual service in grades 7-12. It also involves the question of how far and to what end common branch authorizations of elementary endorsed teaching staff may extend. There are a number of other issues touching only one or two petitioners but one issue which appeared of minor import subsequently assumed importance, namely whether or not the Board could fill positions vacant at or prior to the beginning of school in September with substitutes or other temporary appointments so as to hold these positions open for persons on a preferred list who were not immediately free to take them.

On March 5, 1985 I issued a partial summary judgment adverse to the Jaclin petitioners, concluding that it was too late for them to contest the transfers and reassignments which were allegedly discriminatory as to them and under which they and others had served and accrued seniority. I also concluded that even if all the facts they alleged were true, there would be no remedy since N.J.A.C. 6:3-1.10 is based on service in categories not on service which could have occurred or service which should be deemed to have occurred.

Other elements of the procedural history should be noted. Originally this case was scheduled for hearing on November 19, 1984, but due to the pendency of interventions and attorney conflicts, it was not rescheduled prior to January 2. The parties requested an adjournment on the basis that a stipulation would be filed and a hearing would probably be unnecessary. Adjournment to January 14 was granted, but again the parties asked for adjournment on grounds that a comprehensive stipulation was imminent. Petitioner's general seniority brief was filed late in February, however. At that point counsel for the

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Board sought more time to answer. On March 5, I directed the parties to file a stipulation, if any, by March 18 and set down a peremptory hearing for April 8 and 9. I also directed that if the all-encompassing proposed stipulation could not be agreed to, it should be treated as an admissions request, and all parties should state their disagreement with it by March 25 so that I could review the remaining factual issues prior to the hearing date. Subsequently, I learned that petitioners' counsel (Mr. Friedman) already had a peremptory hearing scheduled for April 8 and 9, so I rescheduled the hearing to begin April 16.

By letter dated March 14, I reiterated that the final draft of the stipulation should be circulated no later than March 22 and all parties should specify the extent of their disagreement with it. I stated, "what is not stipulated as of April 8 will go to hearing . . . **SEND ME A COPY OF THE FINAL DRAFT STIPULATION** when sent to all counsel, then send the executed stipulation. If I don't get an executed stipulation by April 8, we will try the whole case no matter how long it takes." Mr. Friedman followed my directives, submitting a draft stipulation and specifying his difference with it. Notwithstanding my directives, Board counsel, by letter of April 11, proposed that additional stipulated items would be forthcoming concerning the high school's Communications Skills course for C.E. pupils. Meanwhile, I began review of the proposed stipulation (60 pages long) to see if it contained all facts needed for a determination. I noted that the form of the facts stipulated was inadequate for my purposes and wrote to Board counsel asking for a demonstrative exhibit showing the Boards' seniority calculations. I also noted certain gaps in employment history of specific teachers which I wanted filled, particularly with respect to whether certain teachers were offered positions and declined them, and why a number of teachers (at least eight) were hired effective November 26, 1984. As to the last group, I noted that answers to certain questions were needed such as, what the actual service of these teachers was between September and December 1984, when and how the positions they filled became vacant, who filled them at the beginning of the school year and if the positions were new, when they were established. Counsel for the Board was directed to present evidence to fill these gaps in the facts needed unless they were covered by a stipulation on the record. I noted, "It will prooably be necessary to have the superintendent testify concerning this."

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The day before the hearing I had not received a calculation from the Board in the form requested. Board counsel left a message with my secretary that since petitioners have the burden of proof he would not supply the exhibit requested, but would merely dispute any calculation of petitioners with which he did not agree. He also noted that he anticipated further stipulations or corrections of the extant stipulation to foreclose certain issues. I requested via my secretary that he bring the superintendent to the hearing since I was concerned about the failure of the stipulation to explain some of the employment history.

On the morning of the hearing, at a conference with counsel, I noted that a portion of the additional stipulation proposed in Board counsel's letter of April 11 would be ignored in that it stipulated law, not fact (that the high school English courses for C.E. students could be taught by teachers with English or elementary certification). I also advised both at conference and subsequently on the record that in light of the allegations of the Jaclin petitioners that there was collusion between the Board and controlling person in the teacher's union to preserve jobs for certain favored teachers as against others, I intended to seek through testimony facts relating to the seniority claim issues sufficient to satisfy myself that all educational statutes, rules and policies were being adhered to rather than relying upon minimal fact stipulations. Sufficient facts were obtained from the witnesses to fill in some of the gaps in the stipulation and if the Commissioner, in the exercise of his general supervisory powers desires a more extensive record on the problems which surfaced, the options of an investigative hearing or administrative investigation are within his discretion.

BOARD PRACTICES AFFECTING OPERATION OF THE SENIORITY RULE

In order to be able to assess the adequacy of the voluminous stipulation and the testimony, I first address practices of the Board which affect both the reemployment prospects of RIFed tenured teachers toward the bottom of the preferential lists and the maintenance of sound educational policies for the benefit of children. These facts were obtained almost parenthetically from the testimony of individual teachers such as Messenger, Gallagher and others, and from stipulations or admissions of counsel. Messenger is the daughter of the president of the Board whose authorization to teach

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mathematics and seniority were questioned by the Jaclin petitioners. She was RIFed effective June 1983, declined a comp ed position in Old Bridge in favor of a mathematics position in another town for 1983-84, was granted a personal leave for that year, was RIFed again in June 1984, and was hired October 22, 1984 to teach seventh grade mathematics. Although she refused the Board's offer for 1983-84, she and others in the similar circumstances were nevertheless kept on the preferential list either as a result of the Board's failure to record the offer and refusal or by permitting the teacher to receive personal unpaid leave while he or she was teaching elsewhere. Prior to September 1, 1984, a full-time mathematics position became vacant or was established which the Board held open, using two substitute teachers until Messenger could begin work in October. In short, teachers were permitted to remain on the list as long as they expressed a desire to be on it even if they had refused full-time employment and personal leaves were apparently granted to anyone with no questions asked even though it was known that some of these teachers simply preferred a job in another district. See, for example, the record of petitioner Kennedy in the stipulation: unpaid leave from 1981-82 (3 months), 1982-83, 1983-84, refused position 1984-85. Similarly, Ghisolfi was on personal leave March-June 1981, 1981-82, and 1982-83. How much of leave time was spent teaching elsewhere is not known. Nason was also offered reemployment on November 26, 1984, did not accept it and was granted a leave of absence for the entire year. Reinart had six entire years of unpaid leaves of absence.

Gallagher, one of the Jaclin petitioners, in reliance on the Board's advice to her that she was tenured adhered to sound educational policy and professionalism to her detriment; after a discussion with her elementary school principal, she determined that it would be unfair to the children to start work in September knowing she would have to go on maternity leave in October 1975. She did not attain tenure at that time as a result. In September 1984, the Board apparently held a position open for a teacher who started work in October (Nowicki) and went on maternity leave in November (some first grade students may have had three teachers before Christmas).

On November 26, 1984, the Board rehired or offered to rehire at least eight petitioners, according to the filed stipulation. Since most of the hirings were for grades K-6, on April 10 I asked that the Board explain the circumstances:

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"the following questions need to be answered concerning the statement that a number of staff members were "rehired by the Board effective November 26, 1984," for example, Borretsky, Gallagher, Ghisolfi, Kennedy (offered and declined), Marcin, Nason (offer), Reinert, Suchcicki.

1. As to each, what was their actual service, if any, between 9/1/84 to 12/1/84?

2. When and how did each position they filled become vacant?

3. If any positions became vacant prior to 9/1/84, who filled said position until 12/1/84 if not these petitioners? Substitutes?

4. If any were new positions, when were they established?

Mr. Tripp is directed to be prepared to present evidence on this at hearing if the parties cannot stipulate it on the record on April 16, since the information is within the Board's possession. It will probably be necessary to have the superintendent testify concerning this."

When it became apparent that Board counsel did not intend to present testimony addressing these questions, the hearer questioned a witness on the subject. It developed that in November, the Board created four new elementary classes by splitting existing classes. The Board gave no explanation as to why it waited until almost December to reorganize these classes when the September monthly enrollment report would have shown the class requirements. Presumably the superintendent could have explained the reason for the delay. Facts as to what the actual employment was, September-November 1984, of the rehired teachers or those offered rehire would have permitted a determination on whether delay was related to granting teachers on the preferred list time to give notice to another district. No administrator was presented to explain unpaid personal leave policy. Counsel at one point stated that the Board had no policy.

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Based on the entire record, I **FIND:**

1. The Board addresses unpaid personal leave requests on an ad hoc basis, has granted such leaves for successive years up to six (Reinert) which permits teachers to remain on a preferred reemployment list, does not require that the reasons for the leave be recorded and is aware that persons seeking such leaves have done so in order to teach in other districts unless and until the Board offers them a more desirable position.

2. The Board holds open vacant or new positions from the beginning of the school year, staffing them with one or more substitutes or non-enured teachers and in 1983-84 created positions as late as three months after school began which would allow those on preferential reemployment lists or on leaves of absence time to arrange for taking these positions.

3. The Board makes offers of employment to preferential list teachers and obtains declinations verbally and does not always memorialize the offer in writing so that a declination can be recorded. It has granted personal leaves of absence to keep teachers on the list subsequent to receipt of information that the position offered would be declined by the teacher.

4. The Board transferred the following intervenors with elementary endorsement only and elementary K-6 experience (as little as 3 years) to high school C.E. assignments or subject assignments 7-8 in 1982-83 or 1983-84: Ashkensas, Lynch (served only one month, September 1983 in 9-12), Alfieri, Brennan, Fornadel, Girardi, Otchy (after 13 years of grade 6), Pollack (after 11 years of grades 1 and 2), Schavio (after 9 years of grades 5 or 6), Wall (after 12 years of grade 5). A majority of these were assigned to the secondary level on or after September 1, 1983.

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Conclusion

Although the Jaclin petitioners have no individual remedy on their claim of conspiracy between the Board and the Teacher's union resulting in favoritism to others, their allegations of manipulation of the seniority system, and arbitrariness on the part of the Board are clearly well-founded. On the elementary list alone as of August 15, 1984, there were 57 teachers. Petitioners on the list are claiming preference for high school and middle school, as well as K-6 positions. Petitioners' names start about half way down the list; Jaclin is eleventh from the bottom.

When the Board waits for a teacher (on unpaid leave or otherwise) to take a position offered, the following can occur. First, teacher A leaves a classroom in another district within 60 days of the start of school. While waiting for A, substitutes or untenured teachers fill in. Alternatively, teacher A is offered a full-time position and declines because he or she prefers a different assignment, but the declination is not recorded or else the teacher is granted a personal leave while continuing to teach in another district. In these circumstances, teacher B (one down on the list) is offered the position. B has to make the same determination A did, if B is working in another district, with similar possibilites. Now, assume A, B and C refuse the position but remain on the list. Teacher D must now make a choice. Perhaps the Board will refuse to give D a personal leave or will put its offer in writing so as to record a declination and strike D from the list. What is to preclude this favoritism when there is no leave policy on the subject? In these circumstances, D takes the position offered. The following year there are two desirable full-time positions available. Teachers A and B opt to take these positions. D is RIFed. The following year, there is another full-time position available. C asks to continue leave because he or she prefers the position in another district. D takes the position. C asks for the next full-time position. D is out again, assuming D had substantially less seniority than C initially.

The above scenario illustrates not only the unfairness and discriminatory possibilities, but assuredly shows an improper operation of the seniority and preferential hiring law calculated to guarantee job insecurity for teachers down the list and maximize

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discontinuity of instruction. It is possible, if all districts were to operate in this manner, for a musical chairs game to take place in three or more districts as each teacher accepts a more desirable position in the district in which he or she originally had tenure.

Unfairness and the possibility of favoritism among teachers on the preferential hiring list is by no means the principal perversion apparent in this Board's operation: this Board actually promotes discontinuity of classroom instruction. That discontinuity is educationally unsound is not open to question. It has long been accepted that continuity of instruction is a valid educational goal important enough to support, for example, limitations on choice of dates for maternity leave as against claims of sex discrimination. Cleveland Bd. of Ed. v. LaFleur et al and Cohen v. Chesterfield County School Board, et al, 1414 U.S. 632, 94 S. Ct. 791, 39 L. Ed 2d 52 (1974); Castellano v. Linden Board of Ed, 79 N.J. 407(1979); Dyson v. Bd. of Ed. of Montvale, (N.J. App. Div. Feb. 8, 1982, A-3132-80T1), (unreported). In the Dyson case, the Commissioner and State Board agreed with the administrative law judge and the Appellate Division quoted:

> The practice of permitting a teacher to start teaching for several weeks at the commencement of a new school year, stop teaching for a few months and then start teaching again would have an unnecessarily disruptive import on the continuity of the children's education. [at 6].

Dyson cited Gilchrist v. Bd. of Ed. of Haddonfield, 155 N.J. Super. 358 (App. Div. 1978) on a similar issue:

> [4] We deem it a perfectly rational goal for the Board to be vitally interested in avoiding, where possible, the interruptions in the continuity of classroom instruction that would arise from teaschers' absences. Moreover, we deem it to be nondiscriminatory treatment, if it be the Board's policy, not to renew the contract of any nontenured teacher, male or female, who gives the Board advance knowledge of an anticipated absence of substantial duration in the coming school year for any reason. The avoidance of a detrimental interruption in the continuity of classroom intruction is an admirable goal whether the interruption be caused by pregnancy, laminectomy, orchiectomy, prostatectomy or any nonmedical reason. [Dyson at 4; emphasis supplied].

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The importance of continuity of instruction is further bolstered by the Commissioner's decision in Angelucci et al v. Bd. of Ed. of West Orange, 1980 S.L.D 1066 where the issue was denial of increments for excessive absence.

> [The Commissioner] must however call to the attention of the Board the need for the application of consistent standards by administrators in granting approved absences for teachers. If, as contended herein, frequent teacher absences adversely affect pupils and a teacher with an already established record of absences requests an approved absence, such request must be considered and weighed carefully. [at 1078].

The above opinions of authority weigh continuity of instruction as against unavoidable leaves and absences and determine that even in such situations limitations to preserve continuity of instruction are warranted. Of much greater concern is the Board's deliberate provision for discontinuity for the sole purpose of affording certain teachers the opportunity of choosing the job most advantageous to each. Within this category is the failure to make permanent assignments for vacancies known to exist at the beginning of the academic year (assigning substitutes or other temporary staff) and belated establishment and staffing of new positions known to be needed after school begins. Additionally, the stipulation shows numerous unpaid leaves, not identifiable as to purpose, granted for portions of academic years; e.g. Kennedy (April to June 1982), Ghisolfi (March to June 1981), Nason (March-April 1984), Lynch (December to June 1978), Nice (November 1975 to February 1976 and February to April 1982), Phillips (May to June 1983). I have not included in these examples unpaid leaves of absence labeled maternity, child care or medical.

Petitioners specifically complained that it was a violation of their seniority rights to staff vacancies with substitutes while holding them open for specific individuals and while qualified tenured teachers on the preferential reemployment lists were available for assignment to such positions. The Board has cited no law which supports such exceptions to N.J.S.A. 18A:28-12 which says a RIFed teacher shall "remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal, if and when such vacancy occurs." (emphasis added). The Board argues in its

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brief, at least as to intervenor Greenhouse that she asked and was granted a leave until she could gain release from work in another district, which she obtained October 9, 1984. The Board thus argues that there was no vacancy which petitioners could fill, but rather, that the regular teacher was simply on a brief leave. The stipulation does not, however, state that Greenhouse asked for and was granted a personal leave by vote of the Board prior to September 1, 1984. The facts are as stated in the stipulation: Greenhouse asked the Board to hold the position open. The Board has not supplied facts as to when the position fell vacant or when it was established, if it was a new position. A position was held open for Messenger under similar circumstances.

Non-Jaclin petitioners argue that the two positions "became vacant pending the return of two recalled teachers . . . neither of whom were on leaves of absence" . . . and therefore no vacancy existed pursuant to N.J.S.A. 18A:16-1.1. It should be noted that this argument, if accepted by its terms, would preserve the practice of discontinuity by use of personal leaves for the purpose of holding on to preferential hiring rights while working elsewhere. The OBEA's argument suggests that these two teachers (Messenger and Greenhouse) needed only to obtain an official leave of absence to preserve their rights. OBEA counsel then argues that the educationally sound practice would have been to recall a teacher from the preferred list, not hire a substitute or nontenured personnel. While this may be true, it ignores the fact that the sound educational practice of providing for continuity of instruction has been rejected by this Board in favor of preserving the rights of favored personnel. I use the term "favored" because the lack of a clear personal leave policy adopted by the Board leaves all RIFed teachers vulnerable: without it, they cannot be assured of a grant of such leave. Worse, it leaves the children vulnerable, for absent an adopted personal leave policy dealing with leaves for part of a school year or for the purpose of teaching elsewhere, it is not possible for the Commissioner to review whether or not that adoption conforms with sound educational policy and with the intent of the statutes and regulations.

Recent changes in the seniority rule show increased concern with maintenance of sound educational policy. Thus, although the question is one of first impression, I **CONCLUDE** that a Board must utilize the preferred employment list when a position falls

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vacant or is created and should do so by offering the position in writing and stating the date employment commences therein. (It would be most helpful if the procedure and time frame for acceptance were embodied in a rule). Making an offer in writing need not cause delay, since a copy of the letter can be sent to all those on the same list, alerting them to the possibility of an offer if more senior teachers decline. On the facts of this case, I **CONCLUDE** that holding a vacant position open by the use of substitutes for a recalled teacher, whether or not the Board has granted that teacher an unpaid leave of absence, is a violation of the seniority rights of less senior teachers on the same preferred list under N.J.S.A. 18A:28-12. I also **CONCLUDE** that granting unlimited unpaid leaves to a senior listee to whom an offer of full-time employment has been made, for the purpose of guaranteeing retention on the list after a declination, is contrary to the intent of the statutory scheme. It may well be that continuity of instruction can best be assured by a personal leave policy that limits leave for the purpose of teaching in another district to no more and no less than an entire academic year, which would avoid discontinuity in all districts. Usually, it would be most helpful if such matters were addressed by a rule. Absent some controls, the seniority rule could readily be applied in a discriminatory manner. At the very least, it is arbitrary and unreasonable for the Board to have no policy with respect to limiting personal leaves in the facts and circumstances of this case and I so **CONCLUDE.**

It should be clear that my conclusions above do not apply to the offer of a lesser position than the listee held when RIFed, that is, the offer of a parttime position to one who held a full time position, or a 1/2 position to one who held a 5/8 time position. Vexler v. Red Bank Borough Bd. of Ed., 1 N.J.A.R. 196 (1980) aff'd by Commissioner March 18, 1980. The offer must be made, but it is only the refusal of an offer for a position at least equivalent to that held before the RIF which must be considered an abandonment of a place on the preferred employment list. Clark v. Rosen and Bd. of Ed. of Margate, 1974 S.L.D. 678; DeSimone v. Bd. of Ed. of Fairview, 1966 S.L.D. 43. The fact that N.J.S.A. 18A:28-8 mandates that a teacher give 60-day notice before relinquishing his employment provides no excuse for holding a position open. This section is for the benefit of the Board and the public, to guarantee the Board time to arrange for a suitable replacement. Evaul v. Camden Bd. of Ed., 65 N.J. Super. 68, 76 (App. Div. 1961). It is not for the benefit of

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the teacher and should not be used as a rationale for permitting planned discontinuity of instruction, contrary to sound educational policy.

I have concluded that vacant positions must be offered forthwith to those next on the seniority list and that the position remains vacant if the preferred list teacher next in line is not ready, willing and able to accept the full-time position offered. I have not concluded that teachers on preferred lists must be offered short term substitute work, so that if it is determined by higher authority in the agency jurisdiction that positions can be held open and substitutes hired to fill them until a recalled teacher is available, then the positions cannot be regarded as vacant. There is no intention here to conclude that the emergent needs of the Board to to fill a position for a month or several months must be constrained by the need to resort to a seniority list. It would be fair, appropriate and perhaps wise to do so but a mandate to do so would introduce litigation possibilities into an area already overburdened with litigation and, more importantly, an area where Boards' management prerogatives to meet emergent problems should remain untrammeled.

Whether or not the seniority rights of specific petitioners were violated by the Board's actions in holding open two positions can only be determined upon consideration of the rights of each to specific positions, as determined below and to whether or not the petitioners would have accepted the offer of a position. Damages cannot be based upon theory, but must be based upon fact. At the hearing, the Board noted that the Jaclin petitioners (at least) had not provided mitigation information and counsel for these petitioners promised to provide it. In fact, no party presented evidence as to where, if at all, the petitioners hired or offered hire after the school year began in 1984 had been employed or if they were employed. The parties had many months to obtain this information. The hearer requested specifics in advance of the hearing. Petitioners did not even allege they were ready, willing and able to work on September 1, 1984 (or such subsequent date as a particular position became vacant) and assuredly some were not, since they refused positions offered. For example, petitioner Kennedy was on unpaid leave of absence from April 3, 1982 through 1982-83 and 1983-84 and declined an offer of employment made November 26, 1984. Petitioner Theresa Nason declined an offer to begin teaching on November 26, 1984 and instead requested and was granted a leave of absence. Petitioner Lenore Pearlman declined to accept a position offered January 25,

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1985. In such circumstances, future violations will be enjoined but back pay or damage will not be assessed except upon sufficient evidence. I **CONCLUDE** that absent proof that a complaining petitioner was ready to work on the date the position sought had to be filled, no back pay is appropriate. The fact that certain petitioners declined jobs offered in 1983-84 is sufficient to infer that they were not ready, willing and able to work but what is more important, petitioners have the burden of proof and that burden, I **CONCLUDE**, extends to back pay entitlement.

Back pay is synonymous with damages in this context and cannot be determined in a vacuum. Proof that petitioners were ready, willing and able to accept a position when it fell vacant is one aspect. Mitigation is a long accepted principle in the jurisidiction of the Commissioner of Education, and thus petitioners are required to supply this information. Sporn v. Celebrity, Inc., 129 N.J. Super. 449 (Law Div. 1974) is not persuasive, for it concerns mitigation of damages recoverable for a wrongful (bad faith) breach of employment contract, analogized to tort action damages whereas here the Board acted in good faith to interpret a new seniority rule. There is another element, however. A number of petitioners here have sought a few positions, for example the claim here is to two positions open until recalled teachers started work on October 9 (Greenhouse) and October 22 (Messenger). If it is determined that nine or more petitioners were correct in alleging that they should have been granted two positions, back pay can only apply to the two most senior properly certified for the positions and ready to work on September 1, 1984. If it is determined that certain positions should have been offered to petitioners, back pay cannot properly be awarded for more positions than were available and I so **CONCLUDE.**

Linda Messenger

Petitioners complained that the Board had held open the position of math teacher, grade 7 for Messenger from September 1, 1984 to October 22, 1984, when she obtained release from her position in another district. I have concluded above that this action was improper if there were other qualified teachers on the preferred reemployment list for that position. Her employment history is stipulated and **I FIND** it to be true. Under elementary endorsement only, she served in grades 9-12 (C.E. math) .35, then 1.3 year K-

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6. She obtained a teacher of social studies endorsement in 1978 and taught in that subject area in grades 7-8 for 1 year. She then taught math in grades 7-8 under her elementary endorsement until the end of 1982-83 school year, as is found below. Messenger received a teacher of mathematics endorsement in July 1983. She was RIFed and sought work in another district for 1983-84. In summer 1983, she was offered a comp ed position, and requested and was granted leave. In 1984, she was again sent a RIF notice. She was rehired in 1984-85 to teach 7th grade mathematics.

I FIND:

5. In August 1983, within a period of a week after she received a copy of her teacher of mathematics certificate, Messenger was interviewed for a position in Freehold and got a call from Old Bridge offering her a comp ed math position.

6. She preferred a regular mathematics position to the comp ed work, so she accepted the Freehold job and applied for a leave "for personal reasons" for 1983-84 which was granted by the Old Bridge Board.

7. In late summer 1984, she received an offer of a middle school math position in Old Bridge, to begin September 1 and accepted it on the basis that she would start work as soon as she was released by the other district where she resigned her position. She was released on October 22, 1984.

8. Concerning her teacher of mathematics certificate, Messenger had completed all the courses she believed were required to obtain a math certificate, receiving her grade in differential equations from Middlesex County College on May 12, 1983.

9. Subsequently, State staff of the Bureau advised her that three of the courses she had taken as shown on her transcripts were not from approved institutions.

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10. From someone (she could not recall whom) she learned about "credit banking," a method of obtaining from an approved four-year college a single transcript of that school which includes courses taken at other institutions.

11. In June, after sending records of courses she had taken to Thomas A. Edison State College in Trenton, she obtained a transcript from that college which she submitted to the State Department of Education and which resulted in her certification as a teacher of Mathematics.

12. Edison State College is an approved four-year college although it does not offer any classes itself and merely serves as a facilitator for converting credits, study or experience into credits on its own transcript.

N.J.A.C. 6:11-3.18(c), stating what professional preparation will be accepted toward teacher certification was amended effective January 23 1981 to provide that two year college course credits may be used if they "are accepted toward meeting the requirements for certification by a college approved for the preparation of teachers by the State Department of Education and such courses do appear on the official transcript of approved colleges." (Emphasis added). When proposed at 12 N.J.R. 452(e) the accompanying explanation stated: "The proposed revision is intended to clarify the application of community college credits toward certification. Community college credits can be accepted by four year colleges into their certification programs." (Emphasis added). I **CONCLUDE**, assuming that Edison State College is approved for the preparation of teachers, that is, for a certification program in mathematics, that Messenger did not fulfill the requirements for certification until the Edison transcript issued, which was no earlier than about the time the school year ended in June 1983 and no later than prior to issuance of a certificate in July 1983. The date assumes significance because Messenger and the Board list her as having .20 of one year of seniority in middle school mathematics on grounds that she was qualified for certification in mathematics on May 12, although she taught in 1982-83 under her elementary

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certification. Since I **CONCLUDE** here she had not fulfilled all the requirements for certification prior to issuance of the Edison transcript, I **CONCLUDE** she could not accrue .20 seniority in middle school mathematics.

I **CONCLUDE** that even if Messenger had been eligible for a mathematics endorsement in May 1983, she did not gain .20 credit in the teacher of mathematics category that year because she was assigned under her elementary endorsement, which was all that was required for the position. The determination of an analogous situation in Berl v. Bd. of Ed.of Oceanport, 1984 S.L.D. (January 19, 1984), aff'd State Board, September 5, 1984) supports that conclusion. In that case, the petitioner at all times was assigned under an elementary K-8 endorsement to the basic skills program. She was authorized to teach reading under her elementary endorsement and no teacher of reading endorsement was required for her assignment, therefore her possession of a reading endorsement was highly desirable but did not change the category in which seniority was accrued to one other than elementary. (ALJ decision, page 10).

The issue of certification is within the purview of the State Board of Examiners, but I note that there is a question of compliance with N.J.A.C. 6:11-3.18(e). Nowhere in the manuals New Jersey Regulation and Standards for Certification and State Approved Teacher Education Programs in New Jersey (1984 edition) do I find a statement that Edison State College is approved for the preparation of teachers or that it maintains a program approved for the certification of mathematics teachers or any other kind of approved certification program. The cited rule proposed by the Commissioner in 1980 and adopted by the State Board in 1981 clearly intends that academic authorities of a State approved teacher preparation program assess community college credits offered. It appears the examiners may not be interpreting the rule in this manner. On the other hand, it may be that the rule is not considered applicable to teachers who already hold instructional certification.

The hearer does not suggest or even intend to suggest that intervenor Messenger is not generally well qualified to be a mathematics teacher. This section deals only with her failure to acquire any secondary seniority in that category. Petitioners who hold only

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elementary certification and some of whom have no experience teaching mathematics seek middle school or high school mathematics positions on the basis of authority to teach common branch subjects. Their claims are considered below.

Marilyn Jaclin - the 5/8th Credit Issue

Jaclin alleges that a number of other teachers were given credit for a 5/8th position in 1977-78 whereas all compensatory education positions were 1/2 time and she received only 1/2 time credit for the same work. On this subject Jaclin and Robert Henderson, the director of the basic skills improvement program, testified. **I FIND:**

13. In 1977-78, a group of teachers including Nason, Brazinsky, Eisen, Johnson and Stanley, were hired for 1/2 time Comp Ed positions, but their schedules were such that although they taught four class periods, they were at the school five periods and had one period free of classes during the five. It was not required that they stay in the school for the free period.

14. During the same year, and in subsequent years, other teachers with 1/2 time positions were assigned four consecutive teaching periods and had no free periods.

15. Those required to be at the school through a 5th period filed a grievance and on June 14, 1978, they and the Board agreed to a settlement in which the teachers were granted 56 percent of salary and 5/8th seniority credit for the work.

16. After 1977-78, all such teachers were scheduled for four straight periods with 1/2 time credit and salary.

I CONCLUDE that this Board is legally obligated to credit 5/8th time for the teachers who settled their grievance on that basis. Even if such credit had been granted

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other than through settlement, the fact that these teachers had to be present five periods instead of four would require a 5/8th rather than 1/2 credit since the credit granted is by portion of time spent not by number of classes taught. The local Board determines what is fulltime and what is parttime. N.J.A.C. 6:3-1.13. The salary statutes N.J.S.A.18A:29-6 et seq. refer to State Board rules for a definition of fulltime. The context of these statutes and rules show that the number of classes taught as distinguished from time spent at school has no bearing on what is fulltime or a fraction of full-time work. The negotiated contract controls terms and conditions of employment assuming it is not inconsistent with statutes and rules. The grievance proceeding and resulting time credit was pursuant to that contract. Swartcz and Parisi v. Bd. of Ed. of Little Ferry, 1983 S.L.D. (May 26, 1983) aff'd Comm. 1983 S.L.D. (July 18, 1983). **I CONCLUDE** that the Board properly credited the five teachers with 5/8th time in 1977-78 and the other teachers with 1/2 time.

Alison Gallagher's Tenure Determination

This issue was not included in the prehearing order. Questions later arose concerning the date Gallagher attained tenure, but I am unable to determine what possible relevance that date has for seniority purposes here since she clearly had attained tenure prior to the effective date of the RIF on July 1, 1984, having been employed fulltime for four full years 1980-81, 1981-82, 1982-83, and 1983-84. Once tenure is attained, "full recognition shall be given to previous years of service within the district" for seniority purposes. N.J.A.C. 6:3-1.10(c). It is undisputed, and **I FIND** it to be true, that Gallagher worked from the first day of school to the last day from September 1973 to July 1, 1984 except for school years 1975-76 and 1979-1980, during which she was on unpaid maternity leave for the entire year. She never resigned and therefore there was no break in service which could result in eliminating her first four years of service from seniority credits. **I CONCLUDE** that she had tenure when RIFed and had nine years of elementary seniority, K-6 when she was reemployed as a grade 4 teacher on November 26, 1984 for 1984-85.

Aslanian v. Bd. of Ed. of Fort Lee, 1980 S.L.D. 1475 (State Board) aff'd Superior Court, Appellate Division, Docket A-4745-79T. (March 27, 1981) (unreported) and King v. Bd. of Ed. of Keansburg, 1984 S.L.D. (Commissioner's decision, May 21, 1984) do not

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mandate a different result. The first limited seniority credit to tenure which was obtained in a 4/5 time position; in the second, tenure in the position sought had never been attained, therefore there was no seniority accrued in that position. In fact, in the latter case, where the Commissioner adopted the ALJ's determination, the ALJ stated: "petitioners' argument that all tenurable service in the employ of a board of education counts toward seniority is a valid argument." King at 7. Gallagher did obtain tenure in a full-time position and all service was as an elementary teacher K-6 which was tenurable service. To deny her credit for any of her years of service would be contrary to the plain language of the seniority rule. Stachelski v. Bd. of Ed. of Oaklyn, (N.J. App. Div. April 10, 1981), A-1114-79, (unreported); Service Armament Co. v. Hyland, 70 N.J. 550, 556 (1976).

Denise Shell - Claims to Assignment to Family Life Classes

Shell holds a home economics endorsement and claims seniority to teach family life classes now being taught by physical education teachers. The stipulation reveals that Shell taught family living and food preparation classes to grades 7 and 8 for four years 1979 to 1982 and in 1983-84, taught family life education and food preparation classes: Shell and two P.E. teachers testified. The Board also presented as a witness Principal Joseph Wydra of Carl Sandburg Middle School in which all three teachers served.

I FIND:

17. Shell was on the committee which met with community representatives and drafted a family life curriculum in 1981 in response to State requirements.

18. The curriculum which she drafted and which was approved was simply a restatement of the family living course she had taught for four years; it was adopted and Shell taught family life education in 1983-84 until she was RIFed effective July 1, 1984.

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19. Early in 1984, both middle school principals were told that they were to RIF six teachers due to a decline in enrollment. After discussing the matter with the assistant superintendent, Wydra decided to recommend the RIF of four core teachers and two special field teachers.

20. Wydra determined he would prefer to keep two P.E. teachers, Lamb (with eight years seniority) and Mucinski (with sixteen years seniority) rather than Shell (with five years seniority).

21. To this end Wydra determined to assign the family life sections to the P.E. teachers, one of whom had previously taught 7th grade health and to designate it as a health class on the basis that there was some overlap, specifically with respect to effects of alcohol, other drugs and tobacco.

22. The rationale for making a curriculum change to include family life in the health-P.E. curriculum, namely the slight overlap in health class content and the facilitation of pupil-teacher confidentiality by informal P.E. contacts for the purpose of improving class climate for handling sensitive subjects did not motivate the change but rather, was subsequently generated to bolster the decision.

23. Family life is not a full semester course, but consists of about 16 class sessions, given successively throughout the year to different groups. In 1983-84, Shell taught it to two homerooms at a time for about one month, and then moved on to a new group.

24. The family life block of time is now integrated with scheduling P.E: the 7th grade is divided into three teams with five classes in each. The principal likes the flexiblity of the team approach because the gym teachers have different specialities. Lamb, for example, can teach

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gymnastics whereas another might teach basketball. P.E.team scheduling would have to be changed to give Family Life classes to Shell and, in fact, one P.E. teacher might have to be RIFed.

Discussion and Conclusion

This is not a situation where a carefully prepared family life total program led to a determination that in order to implement the change, the teacher assigned to the superceded program had to be RIFed as was seen in Werner-Chamberlin v. Warren Cty. Vocational School Bd. of Ed., 1983 S.L.D. ____ (August 11, 1983). In that case, the subject was integrated into the health and P.E. curriculum and petitioner was not certified to teach health. Here, Shell had taught family life in blocks and scheduling those blocks to be taught as health by P.E. teachers in a team format was basically a physical change, not a considered curriculum and program change. Both new teachers of family life have more seniority than Shell, however.

Under N.J.A.C. 6:3-1.10l(15), I CONCLUDE that experience in grades 7-8 in schools with departmental instruction is secondary and seniority in the secondary category for those with subject area endorsements is limited to subject areas in which a teacher has served. Under N.J.A.C. 6:11-6.2, there is no endorsement for family life, therefore the contenders' seniority is five years secondary home economics (Shell); sixteen years and eight years secondary health and physical education (Mucinski and Lamb, respectively). Family life education is not a subject area, but merely a subject which, pursuant to N.J.A.C 6:29-7.1(e), persons holding nine different endorsements are authorized to teach. There is no seniority achievable as a teacher of family life eudcation under the above-cited rules. Time served in teaching these classes is subsumed in seniority under Shell's subject endorsement, which is home economics. See, Aslanian, where art teacher was assigned duties as testing teacher, but her seniority was in art. The petition of Denise Shell must therefore be dismissed.

Communication and Computation Skills Courses in the High School

Petitioners with elementary endorsements and service claim seniority, inter alia, as

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against teachers holding certain compensatory education positions in the high school on the basis of common branch experience. The Board utilized elementary endorsed teachers for some of these positions on the basis that they had service in such positions in the past and thus had seniority credit for them. The director of compensatory education testified and some facts were obtained from teacher witnesses. Certain petitioners claimed that the communications skills course was essentially a remedial reading course and that elementary teachers thus had a claim to it. The Board and some other petitioners took the position that either elementary or subject endorsed teachers were authorized to teach these courses. In fact, the Board wished to stipulate to that legal conclusion, yet in its post hearing brief, the Board specifically upholds its assignment of teachers of English to these classes and says they are best qualified. In any event, **I CONCLUDE** that, while they could stipulate to facts, I would disregard a stipulation of law, since by their agreement they cannot bind the Commissioner in his determination of law which would be applicable to parties other than those before the agency in this docket. This precept has long been recognized, Schulz v. State Bd. of Ed., 132 N.J.L. 345, 349 (E. & A. 1944).

The Board requested that the record be held open to receive pages from a State Department of Education review and approval of the District including the high school which, it was represented, would show that all teachers had the certifications appropriate to their assignments. I agreed to accept such evidence, but advised that the actions of departmental personnel cannot bind the Commissioner into a determination of law in a contested case. This evidence was never supplied.

I FIND:

25. Pupils receive high school English credit for the communication skills courses as their required high school English courses, which are taken each year in grades 9-12.

26. English classes on each grade level are intended to be homogenous: the sections are labeled "Honors, academic, prep., skills, and C.E." Those pupils who fall below a certain level in the State's basic skills tests are required to take C.E. English.

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27. Since C.E. pupils (and others) may move vertically among the five groupings upon approval of teaching staff, the same basic areas are covered in each. The C.E. pupils have smaller classes and more individualized instruction but the C.E. English course is not a remedial reading course. Exhibit R-6 shows a broader range of typical high school English content.

28. Although the computational skills C.E. course is not listed in the course offerings (R-4) as a mathematics course for credits, the testimony was that it is a mathematics course for credits and that, whereas in prior years it may have been limited to arithmetic, due to the high school proficiency test requirements for graduation, the C.E. course now contains pre-algebraic and pre-geometic concepts.

Discussion and Conclusions

At some point a line must be drawn between common branch subject matter and secondary subjects requiring subject area endorsement in a high school, grades 9-12. The parties rely on Departmental publications stating the certification requirements for Basic Skills Improvement and Compensatory Education programs:

> Elementary teachers are eligible to teach reading, mathematics and language arts in grades K-12. They are eligible to teach all subjects in grades K-8 and may teach the common branch subjects such as reading, writing, mathematics and spelling on the secondary level, grades 7-12.
>
> Teachers of mathematics are eligible to teach only in their subject area in grades K-12.
>
> Teachers of reading are eligible to teach only in their subject area in grades K-12.
>
> Teachers of English are authorized to do vocabulary building, reading reinforcement, and to provide books and opportunities to read. They are not authorized to teach how to read or to provide remedial instruction in reading.

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> Teachers holding English certification and who were employed as teachers of reading on February 4, 1976 are eligible to teach reading. (Emphasis added).
>
> Guidelines for Approval of Application for Basic Skills Improvement Program. 1981 and Basic Skills Preventive and Remedial Programs Using State Compensatory Education Funds. 1979

It is the revised rules, N.J.A.C. 6:3-1.10 (effective at the time of the RIF) and N.J.A.C. 6:11-6.1 et seq. which control, however. N.J.A.C. 6:11-6.2(a) includes the following endorsements and authorizations:

> 6. Elementary education: This endorsement authorizes the holder to serve as elementary school teacher in grades kindergarten through eight in all public schools. Teachers with elementary endorsements are not permitted to devote more than one half time to teaching art, music, health, home economics, industrial arts, or physical education in the elementary grades. Teachers with elementary endorsements are authorized to teach the common branch subjects such as reading, writing, arithmetic, and spelling in the secondary school;
>
> 7. English: this endorsement authorizes the holder to teach English in all public schools:

There have been clear policy changes toward recognition of experience in subject areas and toward firmer showings of academic subject area competence in teacher training in recent years. The revised seniority rule, with its emphasis upon experience in teaching under an endorsement is indicative of this change, as are recent proposals and revisions in teacher training requirements (N.J.A.C. 6:11-5.1 et seq. effective September 1, 1985). It should also be noted that teachers of English may not teach reading (unless they taught it prior to February 1976). N.J.A.C. 6:11-6.1(c).

The parties desire a conclusion that both teachers of English and elementary certified teachers may teach the communication skills course in the high school. Yet if the course contains remedial reading instruction, teachers with English endorsements

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alone are not authorized to teach it. On the other hand teachers with only an elementary endorsement are not authorized to teach high school English courses. Given these rules and the policy behind them, I see no way in which I could conclude that teachers with either endorsement may be assigned to the course for the future even though departmental evaluations may have resulted in a general approval of personnel assignments. Though pressed to do so by petitioners, witness Henderson did not testify that these high school courses were remedial reading courses. The question is a close one; in determining it I recognize the most recent policy and intent of the Commissioner and State Board in promoting subject area competence on the secondary level. **I CONCLUDE** on the facts here, that only teachers with English endorsements may be assigned to communication skills 9-12 as it presently exists. The Board is, of course, free to change the course to one in remedial reading, writing and spelling rather than secondary English, but so long as it does not include such specific remedial work and C.E. English is planned to articulate with other English courses in the same grade in a continuum of achievement levels, the course is clearly high school English.

I strongly suspect that the C.E. math course for credit in the high school requires teacher of mathematics endorsement since it now includes more than arithmetic, which, under the cited common branch rules may be taught under elementary endorsement. The witness testified that the course now includes pre-algebra and pre-geometry in response to the needs of students to pass a high school proficiency test. There is no other information in the record concerning the computational skills course, however. A course of study analogous to the one submitted for the English course (R-6) and appropriate notation in the bulletin (R-4) would have permitted a determination of whether or not the content goes beyond arithmetic. **I, therefore, CONCLUDE** that, absent more, teachers with elementary endorsement were authorized to continue to teach computational skills in 1984-85. It is respectfully recommended, however, that department personnel with the appropriate expertise review the course content for purposes of determining the appropriate endorsement and that the Board undertake its own review of the authorization needed given the revised course content. The seniority of those who taught or seek these positions in grades 9-12 is addressed below.

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Margaret Kennedy

Kennedy, a non-Jaclin petitioner, was employed exclusively in K-6 positions for a total of 8.9 years; her history of leaves of absence was noted above in discussion on the back pay remedy. All facts concerning her were stipulated and **I FIND** them to be true. Between January 1973 and April 3, 1982, Kennedy had one four month leave of absence. She has been on unpaid leaves of absence from April 4, 1982 through June 1984. No leave of absence was stipulated for time subsequent to June 1984. Nevertheless, the Board offered her employment on November 26, 1984, which she declined in writing.

I CONCLUDE that Kennedy abandoned her preferential standing first, by failing to obtain a leave of absence after the end of school year 1983-84 and secondly, (which I would conclude even if she obtained such leave) by failing to accept a position offered on November 26, 1984. Further, Kennedy presented no evidence that she was ready, willing and able to work in a full-time position on September 1, 1984 and she had the burden of proof. Finally, there is no evidence of the reason why the Board granted leaves of absence for two years and four months, of whether Kennedy was working in another district, and of whether or not she was offered positions during the period in question. Numerous other persons including a number of petitioners were further down on the preferential list. As to them, and particularly to the Jaclin petitioners who charge collusion, the granting of leaves of absence without good cause or for a cause contrary to the intendment of the seniority statute and rules or contrary to sound educational practice would be vulnerable to an arbitrariness charge as previously discussed herein.

Lenore Pearlman

Pearlman is a non-Jaclin petitioner who served principally in the 7th and 8th grade teaching C.E. math, English and reading. She holds only an elementary endorsement. She did serve as a K-6 teacher about 6 and 1/2 months in 1982-83 and in 1984 served as a C.E. math teacher in grades 9-12. She was offered a C.E. English position on January 25, 1985 and declined to accept. All the above facts were stipulated and **I FIND** them to be true.

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Despite the stipulation, which was not revised, counsel stated at the hearing that the Board was not going to claim that Pearlman had abandoned her position because "we knew she wanted to stay on the list," or words to that effect. No evidence of grant of a leave for 1983-84 was presented and no evidence that Pearlman was ready, willing and able to accept the position had it been offered on September 1. What occurred is subject to arbitrariness questions and symptomatic of the collusive favoritism possible under the Board's loose practice.

From the facts above and lack of facts which petitioner had the burden to prove, I **CONCLUDE**, as I have concerning Margaret Kennedy above, that Pearlman is not entitled to back pay and, having refused a position, she has abandoned her preferential standing.

Theresa Nason

Nason holds an elementary endorsement and has taught only in the middle schools. During 1983-84, she taught C.E. math and remedial reading; she was on paid leave for two months and unpaid leave of just over one month during last year. (She has a claim pending in another docket for this period.) In prior years she taught math and science. She was offered reemployment on November 26, 1984 and did not accept it, but instead asked for and was granted an unpaid leave of absence. These facts are stipulated and **I FIND** them to be true.

Nason did not testify that she was ready, willing and able to accept the position she refused had it been offered September 1, 1984. The record does not disclose whether or not she was working in another district or what the reason was for grant of the leave. Essentially her circumstances are similar to those of Pearlman, less favorable, in fact, since she was offered employment three months after school began. The difference appears to be that Nason was officially granted leave and Pearlman was not.

From the facts above and lack of facts which petitioner had the burden to prove, I **CONCLUDE**, as I have concerning others similarly situated, that Nason is not entitled to back pay and, having refused a position, her claim for 1984-85 is moot. Were it not for the official grant of leave, I would conclude she abandoned her preferential standing.

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Sylvia Marcin, Barbara Borretsky, Fay Ghisolfi, Roseanne Nowicki, Mary Ann Reinert and Julie Ann Suchcicki

These six petitioners possess only an elementary endorsement except for Nowicki who also holds nursery school endorsement. They claim seniority for all K-6 positions, all 7th and 8th grade positions except for foreign language and separate categories (art, music, P.E., etc.) for all reading positions over teachers of English and all common branch assignments grades 9-12. All of their employment histories have been stipulated and I **FIND** them to be true.

Ghisolfi has taught remedial reading only at the K-6 level. She was rehired November 26, 1984 for grade 6.

Nowicki has been employed only in grades K-6 as a classroom teacher and was rehired in that capacity on October 1, 1983. She then taught until November 26, after which she took paid and unpaid maternity leave for the rest of the year. Any back pay claim would therefore be limited to one month (September 1984).

Sylvia Marcin has taught only in the elementary schools K-6 as a regular classroom teacher. Marcin was rehired November 26, 1984 for grade 1.

Barbara Borretsky has taught only in the elementary schools K-6 as a regular classroom teacher except for one year when she was assigned to remedial reading K-6. Borretsky was rehired November 26, 1984 for grade 1.

Julie Ann Suchcicki has taught only in the elementary grades and was assigned exclusively to remedial reading until she was rehired on November 26, 1984 for grade 2.

Mary Ann Reinert taught only in the elementary grades as a regular classroom teacher. She was on an unpaid leave of absence in 1983-84 and for the entire period September 1977 to June 1984, she was on unpaid leave of absence except for 1982-83 and 3 months in 1979. She was rehired November 26, 1984 for an elementary C.E. math

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position. (Absent an unusual explanation, the leave practice exhibited by these facts is clearly arbitrary).

The claims of these six petitioners all involve the same interpretation of the revised seniority rule. All are elementary certified teachers whose experience is entirely on the elementary level, K-6. Under N.J.A.C. 6:3-1.10(b)16, their service is exclusively in the elementary category. They have no claim against any position in the secondary category. Even those teachers who had experience in grades 7 and 8 departmentally before and after September 1, 1983, gain secondary credits only for time subsequent to September 1983 and only in the specific subject actually taught. The preSeptember 1983 elementary K-6 experience is not somehow converted to secondary experience. In re Seniority Rights of Certain Teaching Staff Members Employed by the Old Bridge Bd. of Ed. and Edison Twp Bd. of Ed., August 6, 1984 aff'd State Board January 4, 1985 ("Declaratory Judgment"). That this is true has been made clear by a newly proposed rule addressed specifically to clarification of that problem. 17 N.J.R. 1033(b), May 6, 1985.

The fact that Ghisolfi and Suchcicki taught remedial reading does not give them seniority in the category of teacher of remedial reading at all levels, since they did not need and did not possess a Teacher of Reading endorsement to teach that subject in the elementary schools. Their category is thus not the specific subject field of reading. Berl v. Bd.of Ed. of Oceanport, 1984 S.L.D. ____ (January 19, 1984) aff'd State Board (September 5, 1984). Even if their category had been that of a teacher of reading, under the new rule, seniority is counted on the level of service, which here is elementary. Revision of Seniority Regulations: A Position Statement of the N.J. State Dept. of Education, (June 1983), page 3; Hill v. Bd. of Ed. of West Orange,1985 S.L.D. ____ (January 21, 1985).

I CONCLUDE that Marcin, Borretsky, Ghisolfi, Nowicki, Suchcicki and Reinert have elementary category seniority only and have no claim upon any positions in grades 7-12 pursuant to N.J.A.C. 6:3-1.10(b)16, since instruction in the middle schools is departmentalized.

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Myra Daniel and Cheryl Unglert

These petitioners also held only elementary endorsements, and claim the same positions as the six discussed above. Their employment histories were stipulated and I **FIND** them to be true.

Myra Daniel's service was as follows:

9-12	1977-78	C.E. Math	.1
9-12	1978-79	C.E. Math	.5
9-12	1979-80	C.E. Math	.5
9-12	1980-81	C.E. Math	.5
9-12	1981-82	C.E. Math	.5
9-12	1982-83	C.E. Math	.5
9-12	12/83-6/84	C.E. Math	.56
9-12	12/84	Eng. as a second language.	

(The record does not reflect an endorsement for the 1984-85 position).

Chery Unglert's service was as follows:

9-12	1978-79	C.E. Math	.4
9-12	1979-80	C.E. Math	.5
9-12	1980-81	C.E. Math	.5
9-12	1981-82	C.E. Math	.5
9-12	1982-83	C.E. Math	.5
7 & 8	2/84 - 3/84	C.E. Math	.16
9-12	4/84 - 6/84	C.E. English	.24
9-12	1/85	C.E. English	

Discussion of Competing Policies

The seniority calculations resulting from review of the above experience before the

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RIF and the reasons for and sources for them are these.

Elementary Seniority Only

Pro: No experience can be construed as within a departmentalized mathematics or English department since such service at grades 9-12 would require subject area endorsement (advisory panel opinion). It would be a narrow interepretation of the rule to bar a teacher who has spent years teaching at the secondary level from claims to K-6 classes and limit the teachers' entitlement to secondary C.E. math or reading. (By analogy to those who have experience only in grades 7-8 departmentalized subject assignments, Commissioner's declaratory judgment, pages 9 to 11).

Contra: These teachers have experience principally or entirely with older adolescents and none with younger children. They were not caught within the changed seniority categories since their experience was secondary both under the old and the revised seniority rule (N.J.A.C. 6:3-1.10 pre September 1, 1983). The intent of the revised rule was to grant seniority in the specific subject or category actually taught. (Declaratory judgment).

Corollary: If all the expereince is elementary, then all teachers with only elementary experience should have a claim to C.E. math and reading positions in grades 7-12, but this corollary appears to have been rejected by the Commissioner in case law concerning interpretation of the new rule. The corollary would cure the claims of favoritism or apparent unfairness when a teacher with only elementary endorsement and experience has been assigned a secondary position on or after September 1, 1985. Numerous such instances appear in the fact record here.

Elementary seniority plus secondary seniority for appropriate service on and after September 1, 1983.

Pro: Granting additional secondary seniority for service after September 1983 would parallel the treatment of 7th and 8th grade departmentalized subject teachers as

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recently as clarified. 17 N.J.R. 1034, N.J.A.C. 6:3-1.10(l) 16 iv. These teachers could thus continue to serve in positions in which they have actual experience, in accordance with the intent of the new rule.

Contra: Although their service has never been within a departmentalized subject area such as social studies or mathematics, as were the examples given by the Commissioner in the Declaratory Judgment, these teachers could benefit over their all-elementary experienced peers with years of seniority by virtue of a Board appointment of them to remedial work 7-12 on and after September 1, 1983. This has happened with teachers other than these petitioners, some of whom were appointed to grades other than K-6 for the first time in September 1983.

Corollary: The secondary seniority granted should be limited to the subject area taught (advisory panel and Declaratory Judgment, by analogy). The corollary raises an additional question. While Unglert's post September 1983 secondary seniority would be limited to C.E. math, nothing in the certification rule prevented the Board from subsequently appointing her to a secondary remedial reading position (or, as here, C.E. English, if it consisted of remedial reading and writing). Under subject area endorsement secondary service, reassignment to a different subject area would result in tacking. Application of the same principle would result in tacking of Ungler's secondary C.E. English to C.E. Math experience to reward versatility (an intent of the seniority rule on tacking articulated by the Commissioner and State Board).

Secondary seniority only, limited to subject taught or common branch only.

Pro: Experience in grades 9-12 was in the secondary category under the old rule and is so under the revised rule. Experience in grades 7-12 is secondary under the revised rules, with an exception for continuation of the accrual of elementary seniority for teachers with 7-8 departmentalized subject experience. This interpretation would preclude those with experience with older children only from competing for self-contained K-6 positions which they never taught.

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Contra: Since these teachers have no subject area endorsements they should be limited to claim only remedial classes where the level of work is purely elementary and they may be limited to the specific subject area, such as C.E. math or remedial reading. This result would run contrary to the Commissioner's concern with too narrow an interpretation of the rules.

Corollary: Absent a change in the certification rules, limitation to C.E. Math would have little meaning, since there is no such limitation or real definition of common branch subject areas. In fact the same problem exists for grade 7-8 subject assignments post September 1983. Two intervenors who had taught only K-6 were assigned science in grades 7-8 and are now accruing seniority, post 1982, in those positions. At 17 N.J.R. 1034, in the first full explanatory paragraph, there is a statement of the purpose of the grades 7-8 clarification: "Further, the Commissioner's decision provided that those persons who continued to serve under elementary endorsement in departmentalized grades seven and eight after September 1, 1983 would begin accruing seniority in the secondary category limited to grades seven and eight and to the specific subject taught." (Emphasis added). The words "continued to serve" have little meaning without a certification rule change limiting subject assignments in grades 7-8 to those with the appropriate subject area endorsements.

Conclusions

In discussing the need to set some boundary between common branch reading and writing and high school English, I noted recent policy change toward recognition of experience in subject areas and firmer showings of academic subject area competence in teacher training (page 26, supra). It was stated at 17 N.J.R. 1034, published May 6, 1985.

> . . . the State Board directed the Commmissioner to review the rules pertaining to certification and to advise the Board of any amendment that would be required in order to insure consistency of intent and purpose between the rules governing seniority and certification. Rule changes related to defining the scope of the elementary authorization are presently under review, but will not be considered at this time.

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Absent anticipated rule changes, inconsistencies and competing policies at this stage of changing emphasis force me to make policy choices which are not within my authority but which are needed to interpret the revised rules and recent decisions.

Based on the most recently articulated policies of the Commissioner and State Board and giving due weight to the concern for subject competence and experience in departmentalized subject assignments and to retention of full credits for elementary endorsed teachers with only common branch experience, **I CONCLUDE** that under the new rules, teachers serving under elementary endorsements accrue seniority only in the elementary category for common branch assignments in grades 7-12. Common branch assignments in this context do not include grades 7-8 subject area assignments such as math, English and social studies, seniority for which is controlled by the revised rule as clarified in the May 6, 1985 publication. **I CONCLUDE** those with only elementary endorsements and common branch assignments do not accrue secondary seniority for service in these positions on and after September 1, 1983. Such teachers may claim seniority for any elementary position and any common branch assignment in grades 7-12 in reading and arithmetic. But for the belief that I am precluded from doing so by prior expressions of authority, as discussed above, I would also adopt the corollary that all teachers with elementary seniority may claim common branch assignments in grades 7-12.

I do not conclude that those with common branch experience should be restricted to the remedial work in which they had prior experience. The problem lies not in the lack of a bifurcation of seniority into two common branch elements but in the failure of the system to preclude elementary endorsed teachers from teaching subjects at the secondary level. It is clear on this record that common branch authorization is being extended to give elementary endorsed teachers subject area positions in grades 9-12. If this practice were monitored to assure that only elementary level classes of reading and arithmetic were assigned under common branch authorization 9-12, there would be no need for limitation of seniority to specific common branch elements such as C.E. Math and reading. Monitoring requires more resources and old practices die hard, however. It would probably be simpler and fairer, and would avoid additional litigation if common branch authorization were limited to grades K-8, with the possible exception of courses clearly labeled and consisting of remedial reading and arithmetic grades 9-12. High

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school transcripts might also be more meaningful if this were done.

There is one other reason why I resist common branch seniority bifurcation: as can be seen by the stipulated employment histories in this case, many teachers with elementary experience were reassigned to grades 7-12 positions on or after September 1, 1983, sometimes serving for only a short period and thereby possibly gaining tack on rights. The present situation is rife with possibilities of favoritism and is clearly perceived as unfair by a number of petitioners here. It is unfair. To bifurcate common branch seniority would exacerbate the problem. The unfairness that remains is preclusion of teachers with elementary only experience from claiming all common branch, as distinguished from subject area, assignments. It would be entirely consistent with the scheme to let them claim such positions unless and until all common branch 9-12 authorization is removed or limited by changes in the certification rule.

If the above policies were adopted by higher authority, the remaining problem of unfairness in applying the new seniority rule would be one which the grade 7-8 clarification appears to settle, but does not. Specific changes in the certification rules and parallel clarification in the seniority rule would be needed. I have no way of prognosticating whether it is the intention of the Commissioner and State Board to require subject area endorsements for all departmentalized subjects such as English, math and science in grades 7-8. Since such a rule did not exist effective September 1, 1983, as can be seen in this record, teachers with over 10 years experience K-6, were placed in science, grade 8 or math, grade 7 and 8 on September 1, 1983. Their accrual of secondary seniority henceforth as against those not given such new assignments is perceived as unfair. If the higher authorities in their discretion prohibit nonsubject area endorsed teachers from assignment to grade 7-8 departmentalized subjects for the future, then it would cure the unfairness and support the intent of the clarification of the seniority rule as applied to service in grades 7-8, to further clarify that it is for those elementary endorsed teachers who served in grades 7 and 8 pre September 1, 1983 that continuity of seniority accrual in these positions is preserved under the rule clarification. The intent was not to preserve the fortuitous new assignments September 1, 1983 and thereafter by granting secondary seniority credits for those who never previously taught in these subjects. This could be done by granting secondary seniority for service on and after

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September 1, 1983 only to those who taught that specific subject prior to September 1, 1983, all others accruing only elementary seniority, and by grandfathering those holding 7-8 subject positions prior to September 1, 1983 if and when a revised certification rule were to limit present common branch authorization and require subject area endorsements for grade 7-8 departmentalized subject positions. Grandfathering was adopted for English teachers with teacher of reading experience and may be helpful in reconciling competing policies. Present law and rules appear to preclude any ruling other than that elementary endorsed teachers who never taught in 7th and 8th grade subjects such as science or math prior to September 1, 1983 nevertheless may accrue secondary seniority (limited to their new subject assignments) for time on and after September 1, 1983 whereas all other elementary endorsed teachers who are not assigned to 7th or 8th grade subjects by a Board, may never claim them on a RIF since they cannot obtain secondary seniority.

Based on my conclusions above, I **CONCLUDE** Myra Daniel accrued 3.16 years elementary seniority prior to the RIF in June 1984 and may claim against those with all common branch (remedial reading and arithmetic) positions 7-12 as well as all elementary positions. Cheryl Unglert accrued 2.8 years elementary seniority and can claim against the same positions.

Rose Daganya

Daganya holds Health and P.E. K-12 endorsement and contends with Virginia Murphy who holds the same endorsement. Their employment histories are stipulated and **I FIND** them to be true. Prior to the RIF at year end 1983-84, their experience, all within that subject field, was as follows:

Daganya	K-6	1.8 years
	9-12	1.
	7-8	3 pre 9/1/83
	7-8	1 1983-84

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Murphy	9-12	4.5
(simultaneous)	K-6/9-12	1 (each category)
	K-6	.3 (1983-84)
	7-8	.4 (1983-84)

In his Declaratory Judgment, the Commissioner clearly set forth the effect of the revised seniority rule upon teachers in Daganya's circumstances. He determined, at 14, that those serving under subject field endorsements, once transferred from elementary to secondary category (and vice versa, by logical extension) may not count all time on a district-wide basis. By applying the tack on provision of N.J.A.C. 6:3-1.10(h), **I CONCLUDE** Daganya has 6.8 years elementary P.E. seniority and 5 years secondary seniority. These results are consistent with the determination in Hill v. Bd. of Ed. of West Orange, 1985 S.L.D. ____ (January 21, 1985).

Since Murphy began her service at the high school, **I CONCLUDE** that all subsequent service must be tacked on, giving her 6.2 years secondary P.E. seniority. Her K-6 experience in 1982-83 and 1983-84 of 1.3 years also requires tacking of the subsequent .4 secondary experience in 1983-84 in grades 7 and 8, giving her 1.7 years elementary P.E. seniority. Murphy was rehired for 1984-85 for a grade 7-8 position, which is secondary under the revised rule. **I CONCLUDE** that Murphy has more secondary seniority than Daganya and the Board correctly preferred her over Daganya for that position.

I note that the Board's preferential list calculations do not appear to be entirely consistent with mine. (See Jaclin calculations below). The list includes no elementary credits for Murphy. The list states that tacked on time is indicated by a single asterisk, yet neither Murphy nor Daganya's names are designated in that manner. Furthemore, the facts the Board gave to the advisory panel and those stipulated here show different experience for both of these two teachers. It would have been possible to determine the source of the differences in calculation if Board counsel had supplied a list in accordance with my request, showing the tacked time and basis of all calculations. Counsel instead advised that minor discrepancies should be ignored. Since some differences in seniority counts are .1 of a year or less the list should state the basis of calculations (e.g. number

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of days constituting a ten month year or the like). Teaching staff members should be able to assess the accuracy of the list; this is particularly important where allegations of collusion and favoritism have been made.

Marilyn Jaclin

It was determined above that this petitioner properly received credit for one-half time in 1977-78 while those teachers who settled their grievances were credited with 5/8 time. In all other respects, Jaclin's employment history was stipulated and **I FIND** it to be true. She holds only an elementary endorsement.

Jaclin's experience was as follows:

1977-78	1/2 time	K-6	.5
1978-79	1/2 time	K-6	.5
1979-80	1/2 time	K-6	.5
1980-1981	1/2 (less 2 weeks)	K-6	.5
1981-1982	1/2 C.E. Math	7-8	.5
1982-1983	1/2 Reading	9-12	.5
1983-84	(various)	K-6	.79
1984-85	Rehired December 3, 1984	K-6	

The Board's list credits Jaclin with 4.09 years K-6 seniority. I calculate, at most, 3.8 total years and, due to the tacking provision of N.J.A.C. 6:3-1.10(h), and the clarification concerning teachers of grades 7 and 8 ((b)16), **I CONCLUDE** that Jaclin's total service is properly credited to the elementary category. **I CONCLUDE** that Jaclin has no secondary seniority, since all her secondary grade experience was common branch, but that she can claim against those who hold reading and arithmetic positions under common branch authority in grades 7-12 because she has had actual experience in those positions as distinguished from the group of petitioners who had no experience above K-6 in common branch assignments.

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Linda Messenger

Linda Messenger's employment history for seniority purposes was discussed above in the section determining that she had no seniority under a teacher of mathematics endorsement. It was as follows:

9-12 C.E. Math	.35
K-6	1.3
7-8 Soc. St.	1.
7-8 Math	3. (pre Sept. 1983)

Since she taught social studies under that subject area endorsement in a secondary assignment and was then reassigned to another subject area, N.J.A.C. 6:3-1.10(l)15ii requires that her subsequent subject assignment be credited to social studies seniority. The fact that the subsequent three years of mathematics assignments were served under her elementary endorsement should not bar application of the rule. **I CONCLUDE** that Messenger was correctly credited with four years seniority as a secondary teacher of social studies. Since all her math assignments were pre September 1983, she accrued elementary credit for them. Under the tacking rule, she therefore has 5.65 years credit in the elementary category, since all subsequent employment must be credited to any category in which she was previously employed. She was employed under common branch authorization for .35 years, in K-6 for 1.3 years and was then reassigned to 7-8 under her social studies endorsement in the secondary category, therefore all subsequent time after the K-6 assignment must be added to the elementary credit. I so **CONCLUDE.**

Intervenor Marcia Greenhouse

Messenger and Greenhouse were the two teachers for whom the Board held positions open. Messenger was rehired as a mathematics teacher in grades 7 and 8 on October 22, 1984 under her teacher of mathematics endorsement. It appears there were no petitioners qualified for that position nor were there any on the preferential list more senior than she. Thus no petitioner has any back pay remedy for September 1 to October 22 as a result of the Board's action. Greenhouse, whose employment history **I FIND** to be true as

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stipulated, holds endorsements in social studies (June 1969), English (April 1977), and Reading Specialist (September 1982). She was rehired effective October 9, 1984 for three periods of 9-12 C.E. English and two periods 7-8 remedial reading. All her service was in grades 9-12 C.E.English (3.12 years) which she taught under her English endorsement. She was RIFed and not rehired for the prior year (1983-84.)

I have already **CONCLUDED** above that the appropriate endorsement for 9-12 C.E. English is an English endorsement. There is no petitioner with that endorsement and appropriate seniority to claim Greenhouse's three period C.E. English assignment for 1984-85. Since the Board assigned both English and elementary endorsed teachers to C.E. English and I have determined that my conclusion that the proper authorization should be English endorsement be prospective only, there is no reason to disturb this Greenhouse assignment for 1984-85 or to find elementary endorsed teachers could have claimed it in that year. Schmidt v. Bd. of Ed. of Weehawken, 1982 S.L.D. ____ (August 19, 1982), aff'd State Board, (May 6, 1983) rev'd after remand (N.J. App. Div., June 4, 1984, A-4842-82T5) (unreported) determined that the endorsement of reading specialist was appropriate for a remedial reading assignment. In keeping with my prior conclusion that petitioners who hold only elementary endorsements, but have experience in common branch assignments 7-12, may claim common branch positions 7-12, **I CONCLUDE** the two period common branch reading assignment in grades 7-8 given to Greenhouse for 1984-85 should have been offered to the most senior of petitioners with common branch 7-12 experience on September 1, 1984. Jaclin had 3.8 years elementary seniority, had taught common branch reading 9-12 and C.E. math 7-8 and was rehired December 3, 1984 for a reading position K-6. Daniel and Unglert who also had common branch experience 7-12 had less seniority. Jaclin should therefore receive back pay for the two period assignment given to Greenhouse between September 1, 1984 and December 3, 1984 when she was rehired, less mitigation since **I CONCLUDE** her seniority rights were violated by failure to offer her that assignment.

Seniority Credits for Military Service

Three of the intervenors whose service is stipulated have periods of military service or military leave reported. They are Richard Fornadel, Arthur Otchy and Daniel Wall.

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No party addressed this issue. The Board's preferential reemployment list does not state the seniority credits of these three, probably because they were not RIFed, so that it is not possible to determine whether or not the Board has correctly credited their service. It appears that their credits may not be correctly counted since Fornadel's record lists two years of military service prior to his commencing employment in Old Bridge. There would be no reason to list this if it had not been considered creditable time.

Pursuant to Meyer v. Bd. of Ed. of Wayne, 1984 S.L.D. ____ (December 20, 1984) and Corrado v. Bd. of Ed. of Newfield, 1984 S.L.D. ___ (May 24, 1984), no military credit is allowable for time prior to employment in a district. Meyer overruled Corrado's holding that military time should be credited only if the teaching staff member attained tenure prior to being required to serve in the armed forces. **I CONCLUDE** Fornadel cannot be credited for military service in 1970-71 and 1971-72 since he was not employed by the Board until 1972-73. Wall appears to be within the Meyer interpretation of the law in that he was employed by the Board in 1968-69, spent two years in "military service" and then was reemployed in 1971-72. His time is thus credited. Otchy was employed by the Board in 1967-68, spent three years on "military leave" and was reemployed in 1971-72. The record does not disclose the meaning of the different language used in the stipulations military service versus military leave. For purposes of this determination, I assume that both are the same and should be credited under the Meyer holding.

Summary and Order

Based on the entire record here, including its omissions and inadequacies which Board counsel had an opportunity to cure but did not, it is quite clear that the number of issues and volume of litigation engendered in this district cannot be attributed merely to a revision in the seniority rule. Questionable assignments and transfers have been observed: the C.E. English ones were at least arguable. Recent law concerning military service credit appears to have been ignored. The tenure status has been carelessly calculated in at least one instance (Gallagher). Curriculum guidance has sometimes been lacking (middle school, health, pre 1984-85 see testimony of P.E. teachers) and curriculum determinations have been motivated by desire to keep one teacher rather than another in a RIF instead of based upon appropriate study (Family Life).

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Seniority calculations have attained incredible complexity due to the Board's lack of a personal leave policy, unlimited leaves, failure to make full-time employment offers in writing to recalled teachers, failure to make prompt determinations whether or not those RIFed have abandoned preferential status and too frequent or brief shifts of assignment mainly in the past few years. Such shifts in assignment are suspect as the Jaclin petitioners have charged, and in addition to making seniority calculations unduly complex, the split academic year assignments and plethora of unpaid leaves for unspecified reasons during school years result in discontinuity of instruction. A number of teachers with only elementary endorsements are assigned to the high schools on common branch authorizations when subject area endorsements are more appropriate.

The principles determined here may be applied to the experience of intervenors not specifically addressed above. It is clear that the experience needs careful review because of the number of questions which have arisen concerning the preferential lists.

Board counsel claims that the undersigned administrative law judge has no authority to address any point which is not specifically brought into issue by a party. The administrative law judge's duty is to make a record for the Commissioner, however, and the Commissioner has broad supervisory powers which he may exercise in his discretion. Sound educational practices are surely within his purview as is enforcement of the Board's duties to adhere to State Board rules. N.J.S.A. 18A:11-1 and N.J.S.A.18A:1-.1. Thus, the first three orders below are offered under the aegis of the general supervisory powers

It is **ORDERED** that the Board:

1. Adopt a personal leave policy which defines and delimits unpaid leaves and the acceptable reasons therefor and minimizes discontinuity of instruction.

2. Offer recalled teachers specific positions in writing and require answers in writing.

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3. Fill vacant or new positions promptly with those on the preferential lists who are ready to work when needed.

4. Assign only teachers with endorsements in English to the high school C.E. English classes for years subsequent to 1984-85.

5. Review C.E. math content in grades 9-12 to determine if it contains subject matter beyond arithmetic, and if so, assign teachers of mathematics to these classes.

6. Recast seniority and the preferential hiring list in accordance with the findings and conclusions above including therewith a specification of the method of calculation used and designating all time tacked as to each teaching staff member on the list in a form clear enough for each teacher to determine its accuracy.

7. Pay petitioner Jaclin for the two period position September 1, 984 to December 3, 1984 less mitigation, if any, in accordance with the conclusions above concerning the employment of Greenhouse.

8. Recognize certain petitioners' claims to common branch grade 7-12 positions in accordance with the conclusions herein.

9. Record the preferential rights of certain petitioners as abandoned in accordance with this decision;

and further **ORDERED** that all the claims of petitioners to employment in 1984-85 and back pay other than those in point seven above be **DISMISSED** and that a copy of this decision and the Commissioner's be served personally upon each member of the Board of Education within 5 days of receipt by counsel for the Board, so that all members may be fully apprised of the facts.

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

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

June 11, 1985
DATE

Naomi Dower-LaBastille
NAOMI DOWER-LaBASTILLE, ALJ

JUN 14 1985
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:

June 12, 1985
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

jrp

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OLD BRIDGE EDUCATION ASSOCIATION ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
MARILYN JACLIN ET AL.,	:	
PETITIONERS,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by the Board, the non-Jaclin petitioners, and the intervenors within the time prescribed by N.J.A.C. 1:1-16.4a, b, and c. Exceptions submitted by the six Jaclin petitioners (Jaclin, Suchcicki, Marcin, Daganya, Gallagher and Borretsky) were untimely pursuant to this regulation.

The Board's exceptions are summarized below. The intervenors in this matter rely on the Board's exceptions and adopt them as their position.

1. The Board contends that the findings, conclusions and portions of order pertaining to its practices and policies not at issue herein are arbitrary and without basis whatsoever in the record. It strenuously objects to the judge's orders regarding affirmative steps to be taken with respect to personal leave, staffing and recall of teachers, matters it avows were not at issue and were, therefore, not properly before her. The Board takes exception to the

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judge's finding that the Jaclin petitioners' allegations justify an inquiry into its practices and policies when her order granting partial summary judgment determined that allegations of bad faith were immaterial and the only issue to be decided herein was whether the reduction in force comported with the revised seniority regulations.

2. The Board argues, inter alia, that, without any evidence to justify either her inquiry or conclusions, the judge (a) resorts to improper methods of analysis; (b) disregards the standard of review articulated in Thomas, supra, and Kopera, supra; (c) arbitrarily and unfairly casts aspersions on the actions of the Board and its counsel; and (d) exceeds the bounds of judicial propriety in her use of harsh and incriminating language in the absence of any evidence whatsoever.

3. The Board contends that the judge incorrectly concluded that it violated the seniority rights of other teachers on the preferred eligibility list by holding positions open.

4. It agrees with the judge that Petitioner Shell has no seniority entitlement to family life position but it does not understand the rationale provided.

5. It agrees with the determination that elementary certified personnel with service exclusively in grades K-6 have no seniority entitlement in grades 7-12.

6. It contends that the judge incorrectly determined elementary certified staff assigned to common branch subjects in grades 7-12 accrue seniority in all common branch subjects for all their service both prior and subsequent to September 1, 1983.

The exceptions submitted by Old Bridge Education Association and non-Jaclin petitioners (Daniel, Ghisolfi, Kennedy, Nason, Nowicki, Pearlman, Reinert, Shell, and Unglart) are summarized as follows:

1. The decision suggests that to prevail in a seniority case, the petitioners must show they are willing, able, and ready to report

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to work on September 1, 1984. They believe this to be absurd because they had been riffed and were not offered employment on that date.

2. Petitioners allege the judge erred when concluding that granting leaves during 1983-84 (a point neither party questioned) somehow suggests certain of them were not willing to accept employment in 1984-85.

3. The judge erred in concluding that seniority cannot be acquired as a teacher of family living.

4. The judge erred in concluding elementary certified teachers cannot teach the compensatory education communication skills course in grades 9-12. They argue, inter alia, that it was improper for her to address this issue because it had been withdrawn and each party agreed that both English and elementary endorsed teachers could teach it. Further, there was testimony that State Department of Education approval had been granted for the assignments and a review of the course itself indicates it essentially involves reading and writing (common branch subject matter) which may be taught by elementary certified personnel. (N.J.A.C. 6:11-6.2; Berl, supra)

5. While the judge agreed with petitioners that Cheryl Unglart and Myra Daniel had seniority rights in common branch subjects 7-12, she erred in failing to conclude that their rights were violated when less senior teachers were retained to teach common branch subjects. In addition, she should have determined that Petitioner Daniel became entitled to the common branch classes taught by Petitioner Greenhouse together with back pay from December 3, 1984 to June 30, 1985 when Petitioner Jaclin was assigned to a full-time K-6 position. (The judge determined Petitioner Jaclin was entitled to Greenhouse's position and was thus entitled to pay up to December 3, 1984.)

6. The judge erred in determining Petitioners Pearlman and Kennedy had abandoned their positions.

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7. The judge erred when failing to conclude that teachers with elementary certificates acquired seniority for all of their service in the district in all subjects, grades 7 and 8, and common branch subjects, grades 7-12.

Board Practices Affecting Operation of the Seniority Rules

Upon a comprehensive review of the record, the Commissioner concludes that the Board by its practice of granting leaves routinely to those on preferred eligibility lists, some of which were several years in duration, has abused its discretionary authority. While the Board vigorously argues its liberal practice in granting such leaves was intended to permit teachers to stay on the eligibility list, thus protecting their seniority rights not violating them, the fact remains that the practice served to give rise to allegations of manipulation and arbitrariness as happened in the present case. While the Board believes it was motivated by good faith, the practice must be seen as mitigating against and contrary to a fair and just application of the seniority system and such practice must be discontinued immediately. Leaves of absence should be granted only for legitimate illness or other extraordinary circumstances. Any staff member not eligible to receive leave on this basis, who is offered reemployment for a comparable position held prior to being riffed and who does not accept such offer, must be deemed to have declined employment and thus has relinquished his or her tenure and seniority entitlement in the Old Bridge School District.

The issue of holding a position "open" until a recalled teacher is freed from a contractual obligation in another district will be addressed next. The Commissioner does not concur with the judge's determination that such action violates N.J.S.A. 18A:28-12 for the following reasons. Staff who have been subject to a reduction in force are under an obligation to actively secure employment. Thus, accepting employment in another district while on the preferred eligibility list of the Old Bridge District is an appropriate action. When a position becomes "open" or available, the Board must take into consideration the mitigating circumstance of staff so situated and it is not arbitrary or unreasonable for the Board to grant sufficient time (60 days maximum) to an individual to meet his or her contractual obligation in the current district of employment before requiring that the person assume the position being offered in Old Bridge. To do otherwise would place the staff member in a precarious, unfair situation because he or she would be subject to revocation of certification if the contract in effect at the time of recall were not honored. N.J.A.C. 6:11-3.7 Further, this determination is consistent with Edison Twp. Ed. Association et al. v. Bd. of Ed. of Edison, decided by the Commissioner December 29, 1983, aff'd State Board August 8, 1984, wherein it was held that, absent a true emergency, a board of education cannot insist on immediate response to the acceptance of a position. Thus,

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it is determined that the Board herein acted within its authority and was not in violation of N.J.S.A. 18A:28-12 when it allowed Intervenors Messenger and Greenhouse to fulfill their contractual obligations in other districts prior to assuming positions in its employ.

Denise Shell - Claims to Assignment to Family Life Classes

The exceptions filed with respect to the family life claim raised by Denise Shell have been reviewed. While the Commissioner is in agreement with the judge's determination that this claim should be dismissed, clarification is needed as to why she has no seniority entitlement to the grade 7 family life assignment. The record reveals that as part of a reorganization of its middle schools, the Board acted to place its family life education program for grade 7 within its health/physical education curriculum rather than in home economics. Such action falls within its general discretionary powers granted by N.J.S.A. 18A:11-1 and also by N.J.A.C. 6:29-7.1. As was recently determined in Hart v. Bd. of Ed. of Ridgefield, decided by the Commissioner, June 7, 1985, where a board of education designates that specific portions of its family life program will be taught by staff with health/physical education endorsements rather than home economics, such as likewise occurred herein, those who taught this subject under their home economics endorsement did not have seniority entitlement to such assignments. As stated in Hart:

> "***N.J.A.C. 6:29-7.1 authorizes individuals with nine different types of endorsements to teach in a district's family life education program. The intent of the State Board in so acting was to allow local boards flexibility in implementing their family life program and to permit an interdisciplinary approach to such programming. The regulation is clear and unambiguous that a diversity of individuals may teach family life education. A board of education is under no obligation to assign family life instruction to staff members with any one type of endorsement; nor must the implementation of its program be controlled by seniority claims.
>
> "If seniority claims were controlling for family life assignments, severe constraint would result in a board's designation of which discipline it deems appropriate to teach specific portions of its family life curriculum. It could also create a burdensome strain in the scheduling of instruction not only for pupils but teachers as well. The Commissioner firmly believes that acceptance of petitioner's arguments to the contrary would lead to results far beyond the contemplation of the Legislature and State Board and it would be to the detriment of both the

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> orderly administration of the public schools of this State and the effective implementation of family life education.
>
> "A board of education must be accorded a presumption of correctness in assigning a particular discipline(s) to teach various portions of its family life education program. The Commissioner will not overturn a board's action unless (1) such assignment is not deemed to be based on educational reasons; (2) it was done in bad faith; or (3) it contravenes the family life education regulations***."
>
> (Slip Opinion, at pp. 13-14)

Abandonment and Forfeiture of Tenure and Seniority Status

The issue of abandonment or forfeiture of tenure and seniority status will now be examined. The judge determined that Petitioners Kennedy and Pearlman abandoned such status because they declined offers of employment on November 26, 1984 and January 25, 1985 respectively. Petitioners strongly object to this determination because, inter alia, the issue was never raised as an affirmative defense by the Board. The Commissioner is unpersuaded by the legal arguments put forth by petitioners that the judge erred in examining this issue. In view of the nature of this case, particularly the allegations impugning the Board's recall practices, the judge had an obligation to address forfeiture of tenure and seniority when the issue of declining employment was brought to the record. The fact that the Board did not raise the issue does not serve as a barrier to the judge examining and rendering a determination with respect to said issue.

Petitioner Kennedy's service in the Old Bridge School District was entirely in K-6, thus any seniority entitlement she accrued was in the elementary category. Any bumping rights she accrued are therefore strictly limited to grades K-6 in Old Bridge because its grades 7 and 8 are departmentalized. Service in grades 7-12 falls within the secondary category, thus she has no entitlement to any position to which she lays claim. N.J.A.C. 6:3-1.10(1)15

The record reveals that Petitioner Kennedy was on an unpaid leave from April 4, 1982 through June 30, 1984. The judge found that no leave of absence was documented for the 1984-85 school year. It was stipulated that she declined in writing an offer of reemployment on November 26, 1984. Consequently, the Commissioner concurs with and adopts as his own the determination that she did, in fact, forfeit her tenure and seniority status on the basis of declining said offer, Hagens v. Bd. of Ed. of Princeton, decided by the Commissioner January 26, 1982 and Cerra v. Bd. of Ed. of North Hunterdon Regional High School District, decided by the Commissioner May 6, 1983, subject to the following qualification.

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The record does not specify what position Kennedy was offered and declined. If such position was not a comparable position, then her tenure and seniority rights to a comparable position remain intact. Vexler, supra, and Boguszewski v. Bd. of Ed. of Demarest, 1979 S.L.D. 232

Pursuant to In the Matter of the Seniority Rights of Certain Teaching Members, supra, Petitioner Pearlman's entire service up through the 1982-83 school year accrued in the elementary category. Her service from November 28, 1983 to January 8, 1984 as a compensatory education mathematics teacher in grades 7 and 8 (4/5 time) and from January 9, 1984 to June 30, 1984 as a high school compensatory education mathematics teacher (grades 9-12) falls within the secondary category limited to the subject matter assignment taught. She continued to accrue elementary seniority pursuant to the "tack on" provision of N.J.A.C. 6:3-1.10(h) as well. The record reveals that Petitioner Pearlman did not in fact have seniority entitlement to any positions to which she lays claim given her .68 years secondary seniority* limited to the subject matter assignment taught. As such the issue of back pay is moot.

Petitioner Pearlman strenuously objects to the determination that she abandoned her tenure and seniority status because it was found she declined to accept an offer of reemployment on January 25, 1985. She argues that she documented the inaccuracy of this stipulation of fact which demonstrates the judge erred in finding that said fact went unrevised. The record does document herobjection to this stipulation of fact. Nonetheless, the Commissioner notes that in her exceptions she does acknowledge declining a position in midyear 1984-85 because of employment in another district and that "return to Old Bridge for the last three months was virtually impossible." (Non-Jaclin Petitioners' Exceptions, at p. 6) Subject to the same qualification stated for Petitioner Kennedy, the Commissioner finds and determines that Lenore Pearlman did forfeit her tenure and seniority status for the same reasons articulated in the Kennedy determination.

N.J.S.A. 18A:28-12 states that a riffed teacher "shall *** remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal, if and when such vacancy occurs***." (Emphasis supplied.) As already stated herein, it is within the discretionary power of a board to afford a reasonable period of time (60 day maximum) for an individual to meet a contractual obligation in another district when recall occurs. Petitioner Pearlman did not request that this be done. Edison Twp. Ed. Assoc., supra, states that a board of education may not limit recall to natural breaks in

*1 month 10 days at 4/5 time = 1.07 months seniority
5 months 23 days full-time = 5.73 months seniority

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objection to this stipulation of fact. Nonetheless, the Commissioner notes that in her exceptions she does acknowledge declining a position in midyear 1984-85 because of employment in another district and that "return to Old Bridge for the last three months was virtually impossible." (Non-Jaclin Petitioners' Exceptions, at p. 6) Subject to the same qualification stated for Petitioner Kennedy, the Commissioner finds and determines that Lenore Pearlman did forfeit her tenure and seniority status for the same reasons articulated in the Kennedy determination.

N.J.S.A. 18A:28-12 states that a riffed teacher "shall *** remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal, if and when such vacancy occurs***." (Emphasis supplied.) As already stated herein, it is within the discretionary power of a board to afford a reasonable period of time (60 day maximum) for an individual to meet a contractual obligation in another district when recall occurs. Petitioner Pearlman did not request that this be done. Edison Twp. Ed. Assoc., supra, states that a board of education may not limit recall to natural breaks in the school year but must recall when a position is available. In the Commissioner's judgment, the same principle must be applied to a teacher's response to a recall as well, provided a reasonable period of time is accorded to the individual as articulated herein.

Petitioner Nason's entire service in Old Bridge is credited to the elementary category. In addition, she accrued secondary seniority for the service rendered during 1983-84, less the 4 calendar days unpaid leave in excess of 30, secondary seniority is limited to the specific subjects taught. The record reveals that she did have entitlement to the position held by Intervenor Weinstein giving her .799 year seniority* in compensatory education math as opposed to Weinstein's .747 (9 months 10 days at 4/5).

Petitioner Nason was offered reemployment effective November 26, 1984. She requested and was granted an unpaid leave of absence effective on that date. As such, the Commissioner determines that Nason is entitled to back pay and emoluments, less mitigation, from September 1, 1984 to November 26, 1984, the effective date of her leave. The Commissioner cannot assume that, because she requested an unpaid leave of absence in November, she would have done so had she been offered the full-time position to which she was entitled on September 1, 1984.

*2 months 18 days at 4/5 = 2.08 months seniority
1 month 12 days full-time = 1.40 months seniority
1 month 27 days at 4/5 = 1.52 months seniority
1 month at 4/5 = .80 months seniority
2 months 22 days at 4/5 = 2.19 months seniority (4 days unpaid leave excluded pursuant to N.J.A.C. 6:3-1.10(a))

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Petitioners Marcin, Borretsky, Ghisolfi, Nowicki, Suchcicki, Reinert, and Gallagher

The Commissioner concurs with and adopts as his own the judge's determination that Petitioners Marcin, Borretsky, Ghisolfi, Nowicki, Suchcicki and Reinert, having served exclusively in grades K-6, have accrued seniority in the elementary category only and have no claim upon any positions in grades 7-12 pursuant to N.J.A.C. 6:3-1.10(1)15 and 16 since departmentalized instruction in the middle school falls within the secondary category. The same determination is reached with respect to Alison Gallagher who is similarly situated. The Commissioner agrees with the judge's determination that she was tenured at the time she was riffed and has nine years seniority in the elementary category.

Petitioners Daniel and Unglert

The Commissioner does not, however, accept the judge's determination that Petitioners Myra Daniel and Cheryl Unglert accrued seniority in the elementary category. Both petitioners' service prior and subsequent to the effective date of the revised seniority regulations falls within the secondary category. They are not individuals caught between the change of definitions for the elementary category since their service was secondary both under the old and the revised seniority rules. Therefore, it is determined that Myra Daniel has accrued, as of June 30, 1984, 3.16 years secondary seniority limited to compensatory education math. Cheryl Unglert has accrued, as of June 30, 1984, 2.8 years of secondary seniority limited to compensatory education math and .24 years of secondary seniority limited to compensatory education English. Neither petitioner has entitlement to any K-6 position since no elementary seniority has been accrued. Any bumping rights vested by virtue of their seniority is limited strictly to the secondary category in the subject matter taught. It is abundantly clear that the thrust of the revised seniority regulations is to define seniority entitlement on the basis of actual experience and not by scope of endorsement.

It is thus determined that Myra Daniel did have entitlement to a full-time secondary compensatory education mathematics position on September 1, 1984, having greater seniority in that category subject matter than Intervenors Weinstein and Ashkenas. She is, therefore, entitled to back pay and emoluments, less mitigation, from September 1, 1984 to the time she assumed an English as a Second Language (ESL) position in Old Bridge.

The Commissioner notes that the record does not reveal the basis upon which Myra Daniel was assigned to this ESL position as only elementary certification was stipulated. He therefore directs that the county superintendent of schools review this assignment to ascertain its appropriateness whether or not Daniel was appropriately certified to hold such position.

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The record reveals Cheryl Unglert was likewise entitled to a full-time secondary compensatory education mathematics position on September 1, 1984. Of those positions claimed she clearly has, at a minimium, seniority over Intervenors Brazinsky, Johnson, Stanley, Lynch, Weinstein and Ashkenas. She is thus entitled to back pay and emoluments, less mitigation, from that date to January 25, 1985 when she was recalled.

Petitioners Daganya and Murphy

As regards Petitioners Daganya and Murphy's seniority as health/physical education teachers, for the reasons expressed in the initial decision, the Commissioner concurs with and adopts as his own the judge's determination that Daganya has accrued 6.8 years elementary seniority and 5 years secondary seniority while Murphy has accrued 6.2 years secondary and 1.7 years elementary seniority.

Petitioner Jaclin

The Commissioner is not in agreement with the seniority determination reached by the judge for Marilyn Jaclin. Her employment history is repeated below:

1977-78	1/2 time	K-6	.5
1978-79	1/2 time	K-6	.5
1979-80	1/2 time	K-6	.5
1980-81	1/2 less (2 weeks)	K-6	.5
1981-82	1/2 C.E. Math	7-8	.5
1982-83	1/2 Reading	9-12	.5
1983-84	(various)	K-6	.79
1984-85	Rehired December 3, 1984	K-6	

The judge determined that Petitioner Jaclin's entire seniority is credited to the elementary category. However, during 1982-83 she served as a compensatory education reading teacher in grades 9-12 which falls under the secondary category. She thus has accrued, as of June 30, 1984, 1.29 years secondary seniority limited to compensatory education reading and 3.79 years of elementary seniority. The only secondary positions to which Jaclin had possible claim are thus limited to secondary compensatory education reading. A review of the records indicates that she has less seniority in that subject area than any whose position she claims. (Intervenors Bernbaum, Cronin, Higgins, Greenhouse) The Commissioner does concur with and adopts as his own the judge's determination with respect to the 5/8 seniority credit issue for the reasons expressed in the initial decision, ante.

Intervenor Messenger

The Commissioner is not in agreement with the seniority determination reached with respect to Linda Messenger and corrects it as follows. Her employment history is repeated below.

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1977-78	9-12 C.E. Math	.35	
1977-78/1978-79	K-6	1.3	
1979-80	7-8 Soc. St.	1.0	
1980-81/1982-83	7-8 Math	3.0	(pre-Sept. 1983)

Intervenor Messenger began her service under her elementary certificate as a compensatory education mathematics teacher in grades 9-12. Such service falls under the secondary category. She therefore has 5.65 years secondary seniority limited to compensatory education math. Because she served under her social studies endorsement in 1979-80 in grades 7-8 she has also accrued 4 years secondary seniority in social studies. Her elementary seniority credit is 5.3 years. The Commissioner concurs with and adopts as his own the judge's determination that Messenger did not accrue .2 years secondary math seniority because her service as a compensatory education mathematics teacher up to June 30, 1983 was by virtue of her elementary certificate, not the mathematics endorsement she subsequently obtained in July 1983.

In view of the fact that Intervenor Messenger was rehired as a mathematics teacher in grades 7 and 8 under her mathematics endorsement with no other petitioners qualified for that position nor any on the preferred eligibility list more seniority than she, the Commissioner concurs with the judge's determination that no petitioner herein had any entitlement to that position nor any back pay entitlement.

Intervenor Greenhouse

Intervenor Greenhouse, whose position is claimed by several petitioners, served as a compensatory education communication skills teacher grades 9-12 under her English endorsement from 1977-78 through the 1982-83 school year in a .5 time position. She thus accrued 3.5 years secondary seniority in English. The Commissioner concurs with and adopts as his own the judge's determination that Greenhouse had seniority entitlement to the three periods of high school compensatory education communication skills. He also agrees with the determination that she did not have seniority entitlement to the two periods of middle school remedial reading but not for the reasons stated by the judge.

Intervenor Greenhouse was subject to a reduction in force at the end of the 1982-83 school year, thus her seniority is controlled by the seniority regulations in effect prior to September 1, 1983. Under the prior seniority regulations, N.J.A.C. 6:3-1.10(k)27 stated that:

> "***Any person holding a secondary certificate shall have seniority in all subjects or fields covered by his certificate, except those subjects or fields for which a special certificate has or shall be required by the State Board of Education. However, if a person has held

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> employment in the school district in any special subject or field endorsed on his secondary certificate, such special subject or field shall, for the purposes of these regulations, be regarded as any other subject or field endorsed upon his certificate.***." (Emphasis supplied.)

Although Marcia Greenhouse obtained a reading specialist certificate on September 1, 1982, her service as a compensatory education communication skills teacher was by virtue of her English certificate, not the special certificate of reading specialist. Consequently, she accrued no seniority as a remedial reading teacher and thus has no seniority entitlement to the grade 7-8 remedial reading position although she possesses the appropriate certificate for it.

The judge has concluded that Petitioner Jaclin had seniority claim to the two periods of grades 7-8 remedial reading because of her 3.8 years of elementary seniority. This is an erroneous determination in that elementary seniority vests no rights to a position in the secondary category. Any entitlement Jaclin has to the secondary remedial reading position is due to her 1.29 years secondary seniority limited to compensatory education reading.

It must now be determined whether the back pay award granted by the judge is warranted. In the Commissioner's judgment the Board did not violate Petitioner Jaclin's tenure and seniority rights when assigning Intervenor Greenhouse the two periods of remedial reading. On the basis of Fitzpatrick et al. v. Bd. of Ed. of Weehawken, 1980 S.L.D. 595, aff'd State Board of Education, March 4, 1981, aff'd Superior Court of New Jersey, Appellate Division, A-3278-80T3, June 16, 1982 and Dorothy Godwin Davis v. Bd. of Ed. of Ewing, decided by the Commissioner, April 29, 1985, it is determined that the Board was under no obligation to bifurcate Greenhouse's position to create 2 part-time positions in order to maximize Jaclin's tenure and seniority. Consequently, the Commissioner rejects the judge's determination with respect to back pay for Jaclin from September 1, 1984 to December 3, 1984 when she was recalled by the district.

Seniority Credit for Military Service

In view of the fact that none of the positions held by individuals whose stipulated service in Old Bridge lists military service or leave, the Commissioner finds no need to reach a determination with respect to the issue of seniority credit for them. He, therefore, does not adopt the judge's findings and conclusions regarding this issue.

Communication and Computation Skills Courses in the High School

There has been strenuous objection raised by the parties in this matter regarding the judge's examination and conclusions with respect to who is authorized to teach the high school compensatory

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education communication skills courses entitled English I (CE) 310, English 2 (CE) 320, English 3 (CE) 330, and English 4 (CE) 340. (R-5) The Commissioner is unpersuaded by the parties' arguments that the judge should not have examined this issue. The judge is entirely correct in stating that "***while [the parties] could stipulate to facts, I would disregard a stipulation of law, since by their agreement they cannot bind the Commissioner in his determination of law which would be applicable to parties other than those before the agency in this docket.***"(Initial Decision, ante) Both compensatory education communication skills positions and mathematics positions were claimed by petitioners, thus the judge had the obligation to examine and determine what teachers are authorized to teach such courses.

The Commissioner can well understand the judge's need to scrutinize the high school communication skills courses entitled CE (Compensatory Education) English 1, 2, 3, 4, etc. The courses are entitled and described in testimony such that they may appear to fall out of the domain of Basic Skills Preventive and Remedial Programs.

Certification becomes an issue because the State Department of Education has determined that teachers authorized to teach compensatory education programs include:

> "Elementary teachers are eligible to teach reading, mathematics and language arts in grades K-12. They are eligible to teach all subjects in grades K-8 and may teach the common branch subjects such as reading, writing, mathematics and spelling on the secondary level, grades 7-12.
>
> "Teachers of mathematics are eligible to teach only in their subject area in grades K-12.
>
> "Teachers of English are authorized to do vocabulary building, reading reinforcement, and to provide books and opportunities to read. They are not authorized to teach how to read or to provide remedial instruction in reading.
>
> "Teachers holding English certification and who were employed as teachers of reading on February 4, 1976 are eligible to teach reading.
> (Emphasis added).
>
> "Guidelines for Approval of Application for Basic Skills Improvement Program, 1981 and Basic Skills Preventive and Remedial Programs Using State Compensatory Education Funds. 1979"
> (Initial Decision, ante)

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The judge has succinctly summarized the essence of the problem being confronted in this matter of the secondary compensatory education program when she states:

> "The parties desire a conclusion that both teachers of English and elementary certified teachers may teach the communication skills course in the high school. Yet if the course contains remedial reading instruction, teachers with English endorsements alone are not authorized to teach it. On the other hand teachers with only an elementary endorsement are not authorized to teach high school English courses. Given these rules and the policy behind them, I see no way in which I could conclude that teachers with either endorsement may be assigned to the course for the future even though departmental evaluations may have resulted in a general approval of personnel assignments. Though pressed to do so by petitioners, [the director of compensatory education] did not testify that these high school courses were remedial reading courses. The question is a close one***." (Initial Decision, ante)

The judge has concluded that the compensatory education communication courses in question may be taught only by English endorsed teachers because, inter alia, pupils receive English credit to meet the high school graduation requirements; they are not remedial reading courses and the course description (R-6) shows a broader range of typical high school English content.

The Commissioner, upon a careful review of the record, is not prepared to render a determination with respect to this issue at this juncture. There is a need to acquire more detailed information as to exactly what instruction is provided in these courses and to undertake a careful review of not only the written curriculum but the classroom practices as well. Without such scrutiny, it is not possible to determine what is the appropriate certificate required for the courses in question. He therefore, directs that the Division of Compensatory/Bilingual Education in conjunction with the county superintendent of schools review the curriculum in compensatory education communication skills courses at the secondary level to ascertain specifically what certification is required to teach such course offerings. N.J.A.C. 6:1-3.6(b) The Commissioner does not perceive a need to review the compensatory education mathematics courses as stated by the judge in that pre-algebra and pre-geometry skills fall within the scope and sequence of mathematics traditionally associated with the upper grades of K-8.

The Commissioner retains jurisdiction in this matter as it pertains to the appropriate certification requirements for those compensatory education communication skills courses which are the subject of controversy herein and will render a final determination

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upon receipt of the report issued by the Division of Compensatory/ Bilingual Education and the county superintendent.

Summary and Order

Upon review of the judge's determinations in this section of the Initial Decision, ante, the Commissioner reaches the following determinations.

The Commissioner agrees with the Board's exceptions that the judge uses harsh language not only in this portion of the decision but other portions as well. However, he finds that much of what she states has merit. Despite the Board's protestation, a review of the stipulation of facts reveals numerous transfers into short-term assignments which raise questions as to the soundness of such practices, particularly as it relates to continuity of instruction. It certainly is true that the seniority calculations are unduly complex because of the number of transfers and reassignments overall and for particular individuals even within the confines of single academic years. He does not find, however, from the record that curriculum determinations were motivated to keep one teacher rather than another in regard to Family Life. The Commissioner did not reach a determination concerning military service credit, nor does the stipulation of facts state what seniority credit if any was given. Therefore, he passes no judgment on the judge's statement. The testimony of the physical education teachers does raise questions, however, as to the lack of a written health curriculum pre-1984-85.

As such, the Commissioner orders the Board to do the following.

1. Adopt a personal leave policy which defines and delimits the bases upon which unpaid leaves of absence are granted specifically as it relates to persons on preferred eligibility lists.

2. Offer recalled teachers specific positions in writing and require answers in writing.

3. Fill available positions promptly in accordance with N.J.S.A. 18A:28-12 and in accordance with this decision.

4. Recast seniority and preferred eligible list in accordance with the findings and conclusions of this decision including therewith a specification of the method of calculation used and designating all time tacked on as to each teaching staff member on the list in a form clear enough for each teacher to determine its accuracy.

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5. Pay Petitioners Daniel, Unglart, and Nason found to have been deprived of positions, less mitigation, if any, in accordance with this decision. Credit seniority as though each had served during the period of time in question.

6. Record the preferential rights of Petitioners Pearlman and Kennedy as abandoned in accordance with this decision.

7. All claims of petitioners to employment in 1984-85 and back pay other than those in point 5 are hereby dismissed.

8. Inform the Board of this decision in the manner ordinarily used by the district for such purposes.

Further, the Commissioner directs the following:

1. The Division of Compensatory/Bilingual Education in conjunction with the county superintendent review the curriculum of the secondary compensatory education communication skills courses to ascertain appropriate certification.

2. The County Superintendent review Petitioner Daniel's assignment to English as a Second Language (ESL) to ascertain whether she and others similarly situated were and are properly certificated.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 8, 1985

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9260-84
AGENCY DKT. NO. 478-11/84

DANIEL WOODSIDE,

Petitioner

v.

BOARD OF EDUCATION OF THE CITY OF BAYONNE,

Respondent

Linda E. Johnson, Esq., for petitioner
(Greenberg, Kelley & Prior, attorneys)

Merritt T. Viscardi, Esq.
(Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: June 24, 1985 Decided: June 26, 1985

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

Daniel Woodside, a tenured mathematics teacher employed by the Board of Education of the City of Bayonne (Board), alleged the Board arbitrarily, capriciously and improperly withheld his salary increase for the 1984-85 school year. The Board denied the allegations and contended its action was a lawful exercise of its discretionary authority pursuant to N.J.S.A. 18A:29-14.

The matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on February 19, 1985, and a plenary hearing was held at the Office of Administrative Law, Newark, on

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June 10 and 11, 1985. The record was closed on June 24, 1985, the date established for the filing of post-hearing submissions.

The Board acted on August 23, 1984 to withhold the 1984-85 salary increase of petitioner Woodside in adopting the recommendation of the Superintendent to do so. Woodside was so advised in a letter under date of August 30, 1984 from the Superintendent, which incorporated six reasons for said action:

1. Incorrect listing of mid-term averages on computer Turn Around Document (TAD).

2. Unprofessional comments to Principal in letter dated February 10, 1984.

3. Failure to comply with absent policy in grading procedures.

4. Failure to submit third marking period grading records to Mathematics Director. Thereafter, submitted on improper form.

5. Continued refusal to revamp inconsistent/incomprehensible grading system.

6. Failure to follow suggestions listed for "Implementation Responsibility," February 16th, 1984 and June 13th, 1984 individualization of objectives. (See 1983-84 observation forms: February 1984, page one and June 1984, page two). (P-3)

N.J.S.A. 18A:29-14 provides:

> Any board of education may withhold, for inefficiency or 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. The member may appeal from such action to the Commissioner under rules prescribed by him . . . .

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In Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288 (App. Div. 1960), the court said:

> Under this view of the substantive law the Commissioner could not properly redetermine for himself whether petitioner had in fact been unsatisfactory as a teacher: the issue would be irrelevant as a matter of law. The only question open for review by the Commissioner would be whether the board had a reasonable basis for its factual conclusion . . . [Id. at 295-6].

In Colavita v. Hillsboro Twp. Bd. of Ed., 1983 S.L.D. ____ (decided Nov. 3, 1983), an administrative law judge said:

> . . . The reason for an increment withholding action need only be supported by a showing the board had reasonable bases to take the controverted action. There is no need to prove, by a preponderance of credible evidence, that the allegations against petitioner are true. To do so would convert an increment withholding action into a tenure case and, accordingly, shift the burden of proof to the board. Such is not the purpose of an appeal to the Commissioner under provisions of N.J.S.A. 18A:29-14 . . . . Upon the principle that the board need not prove the truth of the allegations against petitioner while petitioner must show that he earned the withheld salary increment I find that petitioner failed to show that he earned the controverted salary increment and I further find that the board had, in all circumstances, a reasonable basis to take the controverted action . . . (slip op. at 13).

At issue in this matter is whether the Board's withholding action was arbitrary or capricious.

It is uncontroverted that the Board's action represented the fifth consecutive year that Woodside's salary increase had been withheld. It is also uncontroverted that neither the Director of Mathematics, senior vice-principal, or principal recommended a withholding action; said recommendation having been made by the Superintendent who never observed Woodside.

The Director of Mathematics, Audrey Langan, is Woodside's primary evaluator. The senior vice-principal, James J. Merriman, is Woodside's secondary evaluator.

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There is an obvious strained relationship between Woodside and Langan, which began in 1979 when Langan inherited supervisory jurisdiction over Woodside upon his transfer from Science to Mathematics. Salary increases have been withheld from Woodside since then. It would appear from a review of the testimony of each that a reasonable characterization of their differences is Langan's belief that Woodside is text-oriented rather than pupil-oriented. Langan testified she recommended Woodside's transfer from her department, but concurred with the Superintendent's withholding recommendation when hers was rejected. Langan did state that her February 16, 1984 evaluation of Woodside was one of the better evaluations in a year in which Woodside made the most improvement. See P-4.

Merriman testified he observed Woodside in 1983-84; prepared the 13-page evaluation of Woodside (P-7); and would rank Woodside between the upper and middle layer of staff members.

The principal testified he was critical of alleged errors made by Woodside in a "turn around document" (TAD) utilized for recording pupil grades for computerization; considered said errors as legitimately made by Woodside, although his langauge in P-1 appears to be to the contrary; corrections were made by Woodside and the grades went out on time; and disputed Woodside's role in a misapplication of the pupil attendance policy.

The Superintendent, James H. Murphy, testified he recommended the increment withholding and wrote P-3 based on his review of documents provided by Langan and the principal. He stated he never made a formal observation of Woodside, but detected a continuation of Woodside inefficiencies and recommended the withholding action to the Board in executive session on August 21, 1984. He further testified he had recommended the withholding action on Woodside for five consecutive years; the Board was familiar with Woodside and affirmed without reference to the supportive documents which they were privy to.

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Langan was the only witness who testified on behalf of the Board in this matter. She testified that Woodside was assigned 94 pupils in 1983-84 and all passed with the exception of four. On cross-examination she testified that Woodside usually has a low number of failures.

A review of the entire record in this matter along with the observation of the demeanor of witnesses reveals that there is considerable room for Woodside to improve his personal relations with his supervisor and principal. Whether such improvement is possible or probable in light of five consecutive annual withholdings is conjectural.

Since the gravamen of this dispute is the Board's withholding action, the only testimony concerning said action came from the Superintendent. Although he clearly testified his recommendation was based on his review of documentary evidence provided by subordinates, he also stated the Board did not make reference to such evidence because they knew of the Woodside situation from previous withholdings. It is my firm belief that the Board gave no consideration to Woodside's 1983-84 performance, but gave summary approval of the Superintendent's recommendation based on the Woodside history from 1979 up to the 1983-84 school year. **I FIND** this to be arbitrary, capricious, and unreasonable.

I CONCLUDE therefore, that the Board's action in withholding Woodside's salary increase for the 1984-85 school year shall be and is hereby **SET ASIDE.**

The Board is hereby **ORDERED** to compensate petitioner Woodside for the salary differential between what he received in 1984-85 and what he would have received had the Board not acted to withhold his increase.

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

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OAL DKT. NO. EDU 9260-84

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

26 June 1985
DATE

WARD R. YOUNG, ALJ

JUN 28 1985
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

DATE

Mailed To Parties:
FOR OFFICE OF ADMINISTRATIVE LAW

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DANIEL WOODSIDE,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The Commissioner has reviewed the record of the controverted matter herein including the initial decision rendered by the Office of Administrative Law, Ward R. Young, ALJ.

The Commissioner observes that exceptions were filed in a timely fashion pursuant to N.J.A.C. 1:1-16.4a, b, and c.

The Board takes exception to the ALJ's conclusion that its action in withholding petitioner's increment for the 1984-85 school year was arbitrary, capricious and unreasonable. In support of such exception, the Board cites as follows what it characterizes as erroneous conclusions reached by the ALJ:

> 1. The Director of Mathematics did not recommend a withholding action. Instead, she recommended transfer of petitioner from the mathematics department, which she testified she considered more severe action against petitioner than mere withholding.
>
> 2. The principal did not recommend withholding but recommended instead a more severe action, the bringing of tenure charges.
>
> 3. The senior vice principal did not recommend a withholding action; rather, he stated he did not evaluate petitioner in his professional capacity as a mathematics teacher. His sole evaluation was of petitioner as an assistant on cafeteria duty, a job function unrelated to withholding considerations.
>
> 4. The mathematics director was the only witness who testified on behalf of the Board.
>
> 5. The ALJ's summary of the director's testimony regarding the number of students assigned to petitioner was erroneous and misinterpreted.

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6. The ALJ misinterpreted the comments of the Board's witnesses regarding petitioner's improvement.

7. An obviously strained relationship existed between petitioner and the director.

The Board takes further exception to the ALJ's failure to take into account petitioner's response to the superintendent's memo, said response being the basis of unprofessional comments by the Board and one of the reasons provided to petitioner for the withholding action.

Finally, the Board's exceptions contend that the sole basis for the ALJ's decision rests upon the fact that the Board relied upon the superintendent's oral summary of the record rather than the members reviewing it themselves. Said finding, argues the Board, flies in the face of the Kopera standard, that a board must have a reasonable basis for its factual conclusion to withhold an increment. Kopera v. West Orange Board of Education, 60 N.J. Super. 288 (App. Div. 1960)

Petitioner, in reply exceptions, essentially argues point by point in support of the findings of fact and conclusions of law rendered by the ALJ.

Based upon a review of the record including the initial decision and the exceptions of the parties, the Commissioner adopts as his own the findings of fact as set forth in the initial decision, as well as the ALJ's conclusions which stem from such findings. In so doing, the Commissioner notes that neither party to this dispute has sought to discredit those findings by specific reference to a transcript of the proceedings. In the absence of such transcript in the record, the Commissioner must rely upon the findings of fact as contained within the initial decision, as well as on the inferences drawn by the ALJ from such findings of fact.

However, having reviewed the evaluations tendered by the Director of Mathematics, which are part of the record, the Commissioner finds they are constructive, balanced reviews of petitioner's job performance during the year in question. Absent reference from ALJ Young to the transcript or the record the Commissioner does not discern evidence of an "obvious strained relationship" between petitioner and the director.

Having reached the above conclusion regarding the differences between the parties as to the testimony, the Commissioner must now address the central issue, namely, whether the failure of the Board to specifically examine the record as concluded by the ALJ and its reliance solely upon the summary of that record by the superintendent constituted a failure to meet the "reasonable basis" standard as contained within Kopera, supra.

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In its exceptions the Board contends that the sole basis for the ALJ's decision was that, allegedly, the Board did not specifically review the written documentation of reports concerning petitioner's job performance during the year, relying instead upon the oral summary thereof made by the superintendent. The Board avers that the superintendent had petitioner's files present and available for any inspection desired by the Board. It further contends that the superintendent's expert opinion, based on his summary review of the petitioner's documents, was adequate for determining good cause to find that petitioner had not earned an increment.

In challenging the Kopera reasonable basis standard, petitioner bears the burden of proof in demonstrating that the Board's decision to withhold his annual increment was unreasonable. See Colavita v. Hillsborough Township Bd. of Ed., decided by the Commissioner November 3, 1983, aff'd State Board May 2, 1984, rev'd/rem'd N.J. Superior Court March 28, 1985. In the opinion of the Commissioner, petitioner has failed to meet that burden.

It is undisputed that a superintendent may rely upon information he receives from his subordinates provided he has knowledge as to the information upon which those recommendations were made. Goldstein v. Wyckoff Board of Education, decided by the Commissioner September 2, 1982. It is also undisputed that, where discretionary authority is vested in the Board to arrive at an independent conclusion regarding its action, it may rely on the superintendent, as chief school administrator, to make such evaluations as the Board deems appropriate in helping it to arrive at its determination. N.J.A.C. 6:3-1.12

The Board's duty is to consider the evidence of petitioner's performance during the year in question and to make a reasoned decision based upon review of that performance. Having considered the superintendent's expert opinion on the issue of petitioner's performance, the Board had a reasonable basis for its factual conclusion to withhold petitioner's increment. Further review of the documentation by the Board was entirely at its discretion.

It is the conclusion of the Commissioner that the Board's action in withholding petitioner's salary increment for the 1984-85 school year was appropriate. Accordingly, the recommended conclusions of law in the initial decision are hereby reversed and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 12, 1985

Pending State Board

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INITIAL DECISION
OAL DKT. NO. EDU 165-85
AGENCY DKT. NO. 495-12/84

WATCHUNG HILLS REGIONAL HIGH SCHOOL EDUCATION ASSOCIATION, ON ITS OWN BEHALF AND ON BEHALF OF ALICE RICHMOND AND ALL OTHER SIMILARLY SITUATED EMPLOYEES,

Petitioners,

v.

BOARD OF EDUCATION OF THE WATCHUNG HILLS REGIONAL HIGH SCHOOL DISTRICT,

Respondent.

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

William S. Jeremiah, Esq., for respondent (Buttermore, Mullen, Jeremiah & Phillips, attorneys)

Record Closed: May 27, 1985 Decided: July 3, 1985

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

The Watchung Hills Regional High School Education Association and specifically Alice Richmond, who is employed by the Watchung Regional High School Board of Education (Board) as a teaching staff member, allege the Board improperly fixed Richmond's salary for 1984-85, by its failure to prorate her earlier part-time service into full-time years for salary guide purposes. After the matter was transferred to the Office

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of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., a prehearing conference was conducted during which the parties agreed to have the matter adjudicated by way of cross motions for summary decision. The record closed May 27, 1985, upon receipt of the Board's reply.

BACKGROUND FACTS

According to a stipulation of fact executed and submitted by the parties, the facts of the matter are as follows:

1. Between the school year 1965-66 through 1973-74, Alice Richmond was employed by the Board as a full time teacher. After a five month leave of absence, Richmond returned to the employ of the Board on a 50 percent of full time basis (part-time) and continued that employment through 1983-84. Commencing with 1984-85 through the present year, Richmond has been employed on a full-time basis.

2. The petition of appeal addresses Richmond's salary, and all others similarly situated, between January 25, 1975 when Richmond commenced her part-time employment through 1983-84, the last year of Richmond's part-time employment.

3. Prior to 1984-85, the Board advanced half time teachers one-half of one step on the salary guide for each academic year of employment and paid half-time teachers one-half of the step on which they were placed. Following negotiations between the Association and the Board for 1984-85 and 1985-86, part-time teachers are now advanced one full step on the salary guide for each academic year of teaching, regardless of the amount of time that the teacher teaches. The negotiated change was intended by the parties to be applied prospectively, commencing with 1984-85. Ms. Richmond has been placed on the appropriate step of the salary guide for 1984-85 and thereafter pursuant to the negotiated agreement.

4. The advancement of one-half time teachers on the salary guide was the subject of an arbitration dispute which was decided in favor of the Board on November 29, 1979.

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5. The advancement of one-half time teachers on the salary guide was the subject of prior litigation before the Commissioner of Education, the State Board of Education, and the Appellate Division of New Jersey Superior Court by the Watchung Hills Education Association on behalf of one-half time teachers, and specifically Alice Richmond, in the matter captioned Watchung Hills Regional Education Association, et al. v. Watchung Hills Regional High School Board of Education, OAL DKT. EDU 1901-79 (Feb. 21, 1980) (finding for the Association and the teachers) aff'd Comm. of Ed. (Apr. 10, 1980); reversed, St. Bd. of Ed. (Feb. 9, 1981), reversal affirmed, N.J. Sup. Ct. App. Div., Dkt. A-2906-80T3 (Jan. 12, 1982).

This concludes a recitation of the stipulated facts of the matter.

The Board seeks summary decision in its favor on the grounds of res judicata and it relies upon prior litigation between the parties. While petitioners admit to the prior litigation, they contend the matter here puts into issues statutory rights of petitioners to specific movement on the salary guides.

DISCUSSION

Despite the arguments of petitioners, this matter has been litigated before an arbitrator and before the State Board of Education and the New Jersey Superior Court Appellate Division. Petitioners have had their opportunity to persuade both fora of the propriety of their position that a board is not authorized to award one-half time teachers only one-half of a full-time teacher's salary increment following acceptable performance. Petitioners' arguments did not prevail before the arbitrator, and while petitioners were temporarily successful before the administrative law judge and the Commissioner of Education, the State Board of Education soon reversed both lower rulings and held that it is proper for the Board to negotiate salaries for part-time employees. The State Board of Education, noting the absence of a statutory provision or applicable State Board rule in regard to part-time employees, held "* * * these terms [establishment of salary for part-time employees] of employment are governed by duly adopted board policies or by negotiated agreements between the employer and the employees * * *" at p. 3. The Appellate Division agreed with the State Board of Education substantially for the reasons expressed by the State Board.

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Between the dates of the State Board of Education opinions and the Appellate Division affirmance thereof, there has been no statutory change at N.J.S.A. 18A:29-1 et seq. in regard to salaries for part-time employees, nor has any other provision of Education Law been changed so as to provide part-time employees with a statutory right to a certain amount of salary. Consequently, the issue of salaries for part-time employees of a board of education is left solely as a matter of negotiation between the board and the affected employees as it was the first time the issue was litigated between the parties. See also, Hyman, et al. v. Teaneck Township Board of Education, State Board of Education (Aug. 15, 1983) holding that

> * * *[T]he statutes governing compensation apply only to full-time teaching staff members and, therefore do not confer the right to placement on any salary guide to part-time teachers * * * at p. 10.

Res judicata, the policy which holds that once a party has been afforded a fair opportunity to litigate a claim or cause of action in a court with jurisdiction over the parties and the subject matter, and that party suffered a final judgment adverse to him on the merits, the party in whose favor the judgment was entered may assert that judgment as a bar in a subsequent action on the same claim or cause of action, is applicable in administrative proceedings. City of Hackensack v. Winner, 82 N.J. 1, 32-33 (1980).

In view of the foregoing, I **CONCLUDE** that the issue of salaries for part-time employees of the Watchung Regional High School District Board of Education between the period 1975-76 through 1983-84 has been finally adjudicated and petitioners are barred by the doctrine of res judicata from seeking to relitigate the very same issues in ths proceeding particularly in light of the fact the parties are identical, the legal issues are the same, the facts are the same, and there has been no intervening statutory nor administrative rule changes which would affect differently the outcome here from the outcome earlier. Ms. Richmond's salary for 1984-85 is fixed at the appropriate step of the guide following negotiations with the Board and the Association. Accordingly, summary decision is **GRANTED** the Board and the matter is, accordingly, **DISMISSED WITH PREJUDICE.**

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

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

July 3, 1985
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

JUL - 8 1985
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

July 12, 1985
DATE

OFFICE OF ADMINISTRATIVE LAW

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WATCHUNG HILLS REGIONAL HIGH SCHOOL EDUCATION ASSOCIATION ET AL.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE WATCHUNG HILLS REGIONAL HIGH SCHOOL DISTRICT, SOMERSET COUNTY,	:	
RESPONDENT.	:	

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

Watchung Hills Regional High School Education Association (petitioner) has filed three pages of exceptions while also relying on its post-hearing brief previously filed before the ALJ. The Commissioner shall address only those points of argument petitioner developed in its three pages of exceptions to the initial decision, which are summarized below.

Petitioner asserts that its members who are part-time teachers have a statutory right, as opposed to a contractual right, to advance one full step on the salary guide for each year of part-time teaching. Relying on Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982) and Lichtman v. Ridgewood Board of Education, 93 N.J. 362 (1983), petitioner argues that the Supreme Court has considered the statutory rights for less than full-time teaching staff members since the decision of the Appellate Division in the prior litigation between respondent and petitioner. Based on these more recent cases, petitioner urges that part-time teachers are statutorily entitled to parity with full-time teachers in determining not only tenure and seniority status, but also placement on the salary scale.

While seeking to distinguish Hyman et al. v. Teaneck Board of Education, decided by the Commissioner of Education August 15, 1983, from the instant matter, petitioner cites the State Board's decision aff'd in part/rev'd in part State Board March 6, 1985, for support of its proposition:

> "***However, although the adoption of a separate guide is not in itself a violation of the school laws, we emphasize that each guide must conform to requirements imposed by those laws and that supplemental teachers, like other teaching staff

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> members, are entitled to appropriate salary guide placement as provided by statute and contract.***"
> (Slip Opinion, at p. 13)

Finally, by asserting that its members have statutory right to movement on the salary guide, petitioner suggests that the issue presently at bar is not the same or substantially the same as that which was previously addressed by the courts. Thus, petitioner argues, res judicata is inapplicable.

Upon review of the post-hearing brief and petitioner's exceptions, the Commissioner finds and determines that the arguments advanced by petitioner are without merit for those reasons set forth in the initial decision and more specifically for those reasons set forth in the Board's reply to petitioner's exceptions, which are summarized below:

1. Prior litigation between the petitioner and the Board determined that there is no statute giving part-time teachers any right to advance on the salary guide. The only rights part-time teachers have are contractual rights.

2. While the Supreme Court has considered the statutory rights for less than full-time teaching staff members since the decision of the Appellate Division in the prior litigation between the Board and petitioner, none of the cases has changed the law relevant to advancement of part-time teachers on a salary guide. In Spiewak, supra, the Court addressed the tenure rights of certain remedial and supplemental teachers working less than full-time. Tenure of part-time teachers has nothing to do with their advancement on a salary guide. The issue of advancement of part-time teachers on a salary guide was not resolved in Spiewak, but the Supreme Court made note of the fact that the salary to which part-time teachers would be entitled would have to be decided based upon the collective bargaining agreements in question, not the salary guide statute. The Court, in footnote 3, said:

> "[3]We do not decide what, if any, additional benefits the teachers in these cases are entitled to, either retroactively or prospectively. That is primarily a matter of contract and the relevant collective bargaining agreements are not part of the record. Further, the parties for the most part did not brief this question and the Appellate Division did not address it. We therefore remand to the Commissioner of Education to make that determination in accord with the principles laid down in this opinion." (at 84)

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Based upon this clear statement by the Supreme Court, the controlling factor in determining how part-time teachers are to advance on the salary guide is the collective bargaining agreement and it is admitted by petitioner in the instant case that the Board has placed part-time teachers on the salary guide exactly in accordance with the collective bargaining agreement negotiated by petitioner.

Lichtman, supra, was a case concerned with the computation of seniority for part-time teachers, not salary guide advancement and because it deals solely with the way seniority is computed and not with the issue of salary guide placement, the case neither supports nor detracts from the instant case. The earlier litigation between the parties, Watchung Hills Regional Education Association v. Watchung Hills Board of Education, supra, however, held that, absent a statutory right to placement on a salary guide, part-time teachers hold only a contractual right to advance on the guide. The Commissioner finds that, in light of the earlier case holding, res judicata does bar further review of this issue between these parties.

3. Finally Hyman, supra, is relevant to this case in that it stands for the proposition that part-time teachers have no statutory right to be placed on a salary guide. The State Board of Education reaffirms in Hyman that the statutes applicable to compensation, N.J.S.A. 18A:16-1 and 18A:29-1 et seq., do not apply to part-time teachers and that compensation for part-time teachers is a matter for negotiation. Although the Hyman case did not involve a determination of how part-time teachers are to be advanced on a salary guide, the holding of the case is supportive of the Board's position in this litigation and goes even further than the holding of the State Board in the prior litigation involving Watchung Hills by holding that, theoretically, a board of education need not even have a salary guide for full-time teachers but, if it does, all full-time teachers must be on such guide. Part-time teachers are not required by law, absent specific negotiation, to be placed on such salary guide if there is one. The State Board in Hyman, relevant to the issues in the instant case, said:

> "***In sum, the statutes governing compensation apply only to full-time teaching staff members and, therefore, do not confer the right to placement on any salary guide to part-time teachers.***
>
> "***[N]either the tenure statutes nor those governing compensation confer on teaching staff members the right to placement on any particular salary guide. Nor does the decision in Spiewak create such right. We therefore conclude that supplemental teachers are not entitled by law to placement on the salary guide for full-time classroom teachers.

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"Further, we emphasize that compensation is a term and condition of employment within the contemplation of the New Jersey Employer-Employee Relations Act. N.J.S.A. 34:13A-5.3. As stated by the New Jersey Supreme Court in Bd. of Education of Englewood v. Englewood Teachers, 64 N.J. 1 (1973):

> '[Hours and compensation] along with physical arrangements and facilities and customary fringe benefits would appear to be the items most evidently in the legislative mind. It is undisputed that the Board could not agree on hours or compensation in violation of specific terms of the education laws or in violation of specific departmental rules or regulations;.... Where the Legislature sets forth minimum schedules of compensation (N.J.S.A. 18A:29-7; N.J.S.A. 18A:29-12) and minimum increments (N.J.S.A. 18A:29-8; N.J.S.A. 18A:29-12), the board may not go below but may go above. Similarly it may not depart from any statutes or regulations which fix hours though it may go above prescribed minimums. Cf. N.J.A.C. 6:3-1.13.'

Id., at 7.

Thus, boards and teachers are free to negotiate terms of compensation within the parameters set by the education laws and specific department rules or regulations.***"
(Slip Opinion, at pp. 10-11)

If, as the State Board holds in Hyman, part-time teachers have no statutory right to be placed on the same guide as full-time teachers and compensation of part-time teachers is to be controlled only by negotiations, petitioner in this case has no basis to seek relief. The Board has negotiated with petitioner and it has advanced part-time teachers in accordance with such negotiation.

Accordingly, the Commissioner hereby adopts the findings and conclusions set forth herein and in the initial decision as his own.

The Board's Motion to Dismiss the inquiry into this matter on the basis of res judicata is granted.

IT IS SO ORDERED.

AUGUST 19, 1985

COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7560-84
AGENCY DKT. NO. 380-8/84

FRANCIS P. PAYTON,
Petitioner,
v.
THE BOARD OF EDUCATION,
CITY OF CAMDEN,
Respondent.

Barbara Riefberg, Esq., for petitioner (Selikoff & Cohen, attorneys)

Karen Bulsiewicz, Esq., for respondent (Murray & Granello, attorneys)

Record Closed: May 21, 1985 Decided: July 8, 1985

BEFORE **JOSEPH LAVERY,** ALJ:

This is an appeal by Francis P. Payton (hereinafter "petitioner"). She demands that the Board of Education, City of Camden (hereinafter "Board") assume responsibility for certain monies required to satisfy a judgment entered against petitioner in the Superior Court of New Jersey, as well as for associated appeal costs. The judgment issued in favor of the sportswear manufacturer which sold jackets to petitioner. This apparel was obtained in the course of a "fundraiser" on behalf of cheerleaders for whom petitioner acted as a "sponsor." Petitioner asserts that she should be shielded from this judgment by the Board because it is attributable to the exercise of her professional responsibilities. The Board denies that this is so.

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PROCEDURAL HISTORY

This appeal was initiated by a Petition of Appeal filed with the Division of Controversies and Disputes on August 31, 1984. Timely answer followed on September 26, 1984, and the dispute was declared a contested case by the Commissioner of Education. He filed it with the Office of Administrative Law on October 9, 1984, and the matter was then calendared for hearing before the Honorable August E. Thomas, Administrative Law Judge. After adjournments for cause, the case was transferred to this Administrative Law Judge and scheduled for prehearing conference on December 13, 1984. The matter convened on that date and an Order issued on December 18, 1984. Following an adjournment thereafter due to illness of counsel, the hearing convened on February 25, 1985, and April 3, 1985. Briefs followed, the last of which were received on May 21, 1985. On that date, the record closed.

ISSUES

The general issue for resolution is whether petitioner should be saved harmless by the Board for all financial loss stemming from the aforementioned judgment. More particularly, it must be determined whether petitioner acted on behalf of the Board when she bought jackets from Scholastic Wear, Inc. If so, it must then be determined whether the Board must assume that debt, now borne solely by petitioner under a District Court Wage and Execution Order.

BURDEN OF PROOF

Petitioner must carry the burden of proof by a preponderance of the credible evidence.

Undisputed Facts:

This dispute has its roots in petitioner's relationship to the cheerleading squad at Woodrow Wilson High School. Petitioner has been a paid, full-time English teacher at the school since 1975. However, she guides the cheerleaders as an advisor, or "sponsor" of that extracurricular activity. She has served in this function from 1979 to the present day. The title is not accompanied by authorization to purchase anything.

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About three and one-half years ago, in December of 1981, petitioner engaged in preliminary contacts which were to end in a business transaction with a certain Mary Beth Quinn. Ms. Quinn worked for Scholastic Wear, Inc., a subsidiary of NASCO Corp. Among other things, Scholastic Wear manufactured school jackets. The financial responsibility for agreements which arose from the conversations between petitioner and Ms. Quinn is greatly in dispute. Yet, the key events and associated documents are mostly accepted. Some time before Christmas, 1981, Ms. Quinn approached petitioner in the high school. Ms. Quinn tried to interest petitioner in the jackets which her company offered for sale. In the course of a subsequent phone call and another visit in January 1982, petitioner concluded an agreement with Ms. Quinn. She agreed to purchase 15 jackets to be worn by the cheerleaders during a "promotional period." Afterward, according to this agreement, a full order of 100 jackets emblazoned with the Woodrow Wilson "Tiger" logo would follow. This contract was memorialized on the company "jacket order form" of scholastic wear (P-2). The forms were signed by petitioner in the school office. During or after the signing (precisely when is contested) petitioner called over the vice-principal, Charles Jones, and made him aware of what was done.

The forms which petitioner signed, three pages in number, were variously dated. Two pages were marked January 8, 1982, while a third was dated January 12, 1982. Petitioner had signed each page. A shipment order had also been prepared with an "order date" of December 8, 1981, and an "appointment date" of January 12, 1982. These documents, at least in part, generated delivery of the goods. Although 15 jackets were sent ahead for the promotional period, a later shipment of six boxes containing 100 jackets were sent to the school. Despite disagreement over what transpired between petitioner and Mr. Jones, petitioner concedes that neither the principal nor the Board secretary had given petitioner permission to sign the jacket order forms. Petitioner had never filled out Board requisition forms, or obtained price quotations from vendors. This responsibility reposes in the Board Purchasing Agent, who reports to the Board secretary.

In any event, the jackets arrived in full force sometime after completion of the promotion period. They were then offered for sale to the students, on school premises, in the fashion normally employed with "fundraisers." Fundraisers were used to obtain items for the school or school related endeavors, where official budget appropriations were not available for that purpose. Unfortunately, not all the jackets were purchased. Of those bought, not all were paid for. Only $1,270 of the total price

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was actually conveyed to Scholastic Wear. Some jackets without logos were returned, adding a credit of $254. Nevertheless, a considerable shortfall remained. Three invoices and an interest charge brought to the debt to Scholastic Wear to a total of $2,863.53 (P-4).

Eventually, the company sued to recover that amount (P-6 through P-15). The litigation concluded with a default judgment against petitioner. Even though the Board was a defendant in the suit, no judgment was recovered against it. Instead, a wage execution order issued from the Camden County District Court, on May 14, 1984. On the effective date of the order, June 15, 1984, the Board began deducting $91.53 semi-monthly from the salary of petitioner. That garnishment continues today, and will persist until the full Scholastic Wear bill is repaid (P-12, P-13). It is this financial burden from which petitioner seeks relief, and for which the Board denies liability.

Adversary Arguments:

Petitioner's Argument:

Overall, **petitioner** contends that the Board should assume responsibility for her dilemma. She acted in the course of her employment and, consequently, on behalf of the Board. The steps she took were approved beforehand.

More specifically, petitioner highlights the fact that all conversations with Ms. Quinn were on school property. The fundraiser which followed was conducted with the verbal permission of assistant principal Jones. Verbal authority was sufficient under the procedures governing at the time. The policy requiring completed forms and written approval was not in place until after petitioner signed the scholastic wear jacket order forms of in January 1982. Consistent with this underlying regularity was the support of school officials which the fundraiser enjoyed. Numbered among those backers was the principal, Mr. Gottschall, who himself bought a jacket. Significantly, the final, dispositive signing of the order forms took place just outside the main office of the high school. This binding transaction was witnessed by Mr. Jones. The latter made no adverse comment, even after petitioner introduced Ms. Quinn, and explained what was occurring. In contrast, **Charles Jones,** though called by petitioner to testify, denied that he witnessed the signing. He recalled speaking to the two women only after the forms were completed. He told petitioner directly at that time, in the presence of Ms. Quinn, that she should not

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have signed without approval from the principal. He then went in to inform Mr. Gottschall. Mr. Jones contradicted other testimony of petitioner. He recalled seeing cheerleaders wear the 15 "promotion" jackets as early as before Christmas, during December 1981. He thought at the time they were free. Finally, as assistant principal, he had no authority to approve purchases by any teacher, for any reason.

Still, in petitioner's view, the Board had assumed liability for her actions in other ways, as well. For example: Afterward, petitioner had observed routine school practice. She turned over the monies collected from the sale of jackets to Kim Carter, the school treasurer. After much prompting, Ms. Carter confirmed this with a receipt, which contained an itemization of each deposit. The total is $1,270 (P-3). Petitioner never gave, nor was she told to give, the monies to the athletic director, Mr. McColgan. Later, Millie O'Farrell, an authorized school employee, had acknowledged receipt of six boxes of the jackets delivered by UPS on May 4, 1982 (P-5). When the boxes were left outside the school, a school employee brought them inside. When only three boxes were sold, and a "past due statement" (P-4) arrived from NASCO, Inc., on December 31, 1982, she discussed the problem with Mr. Jones. He agreed that the remaining jackets would have to be sold. The summons to appear in Camden County District Court (P-7) was delivered to the school, and served on her by a vice-principal, Ms. Cook. The amended complaint and the application for wage execution were delivered to her school mailbox. When petitioner discussed the summons and amended complaint with vice-principal Cook however, Ms. Cook responded that the jackets were petitioner's, and that she should concentrate on selling them.

Responding to testimony by Board witnesses, petitioner denied she was involved in any improprieties with respect to money on other occasions. She did recall that she had personally ordered paperback books for her students in 1976, without clearing that sale with the school. The reason she had not was because she ordered and paid for them herself. Additionally, as a joint sponsor of the class of 1980, she had been responsible for monies placed in a related activity account, with another teacher, Mr. Ash. Some $7,000 of that money was unaccounted for at the end of the year. An investigation followed, with the county prosecutor becoming involved. However, neither she nor Mr. Ash were ever disciplined as a result. Moreover, at that time, neither Mr. Gottschall nor Mr. Gunning, deputy superintendent and Board secretary, ever directed her to avoid activities thereafter which would involve money. Mr. Gotschall made no mention that this was Mr. Gunning's wish until after she had spoken with him about the Scholastic Wear

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jackets which remained unsold in 1982. However, the jacket company ultimately complained to the school about the partially unpaid bill. At that point, Mr. Gotschall did caution her that she was hazarding serious discipline.

Turning to her legal argument, petitioner, through brief, urges that her appeal be considered timely within the meaning of N.J.A.C. 6:24-1.2. Her first notice of the "order, ruling or other action appealed from" came with the garnishment of her pay. That occurred effective June 15, 1984, pursuant to the District Court's order. As to the substance of the case, N.J.A.C. 18A:16-6 applied. Petitioner made the disputed purchase in the course of the performance of her duties as a cheerleader advisor. These duties were carried out on behalf of the Board. In addition to this section of the school law, the fundamental tenets of the law of agency control. The Board's failure to repudiate petitioner's action, together with its subsequent assistance in the fundraiser, amount to ratification.

The Board's Argument:

In sum, the Board argued that petitioner did not act as agent for the school. Rather, she independently ignored well-publicized policy governing both fundraisers and requisitions. Consequently, the Board is without any obligation to absorb the debt for jackets which she brought on herself.

The Deputy Superintendent and Secretary to the Board, **Preston H. Gunning,** stated that he had supervised financial matters for the Board, in varying capacities, since 1967. He and **Angeline D. Ferranti** described the accounts for handling Board monies as falling into three categories: (1) general activities, (2) athletic account, and (3) cafeteria fund. Monies for extra-curricular activities, such as the cheerleading squad, were deposited and removed from the general account (R-6). Mr. Gunning noted that the Board, through published policies, has amply cautioned its employees about purchasing goods in the course of their duties. The thrust of its instructions uniformly has been that employees who commit themselves to purchases without following procedures must absorb the costs (R-3). In his 15 years as Board Secretary, Mr. Gunning has watched the Board enforce this rule on every occasion that an employee has departed from Board policy. As a precaution, vendors dealing with the school are routinely warned that purchases not made through procedures officially established by the Board will be the responsibility of the individual buyer only.

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With respect to fundraisers, Mr. Gunning stated that since August of 1981, the Board has made its formal approval prerequisite (R-4). The in-school chain of command must be followed beforehand with prior authorization coming from the principal and superintendent. In the alternative, if monies are not obtained by a fundraiser, requisitions must be submitted. This too is a published Board policy (R-5). Requisitions must also be approved by the superintendent, under guidelines established by the Board's secretary. Significantly, if a purchase exceeds $100, bids or, at the least, quotations must be sought through the school business administrator and his purchasing agent. Any such purchases must be accomplished through this purchasing agent, who reports to the Board secretary, Mr. Gunning. The latter is also responsible for business administration (R-7). Mr. Gunning and **Robert N. Gottschall,** petitioner's principal at Woodrow Wilson High, both testified that petitioner had not at any time sought their permission to hold a fundraiser. Neither had she followed any other Board-mandated procedure for purchasing which was then in place. The two officials were certain petitioner had actual notice of the controlling policies. Board policies were, as a matter of practice, posted permanently throughout the district in every school. The unions also discussed these policies with their members. Mr. Gottschall added that he held informative faculty meetings two to three times monthly. At the beginning of every school year, he held a day-long (sometimes longer) opening session with faculty, giving a thorough overview of new or continuingly important Board policies.

Recounting how he learned of the school jacket problem, Mr. Gunning stated that he first became aware during the District Court suit and judgment procedures. Mr. Gottschall remembered that Mr. Jones had informed him after petitioner had contracted with Scholastic Wear. He recalled that he was very upset. This was not his first encounter with petitioner's indiscretion in the management of school activity finances. In 1976, she had arranged the sale of paperback books to her class without requisition or approval. As a result, she had to pay for the books personally. A more serious incident occurred while co-sponsoring the 1980 or 1981 class with another teacher, a Mr. Ash. There, her stewardship of the class account had come into question. Some $7,000 had been lost from that account by the end of the year. Investigations, audits and referral to the county prosecutor were a consequence. When the prosecutor, in October of 1981, sent a letter concluding his involvement in the affair, Mr. Gunning gave precise instructions to Mr. Gottschall. The latter was to assure that neither petitioner nor Mr. Ash were ever assigned duties which would be accompanied by financial responsibility. Mr. Gottschall recalled that he so informed the two teachers immediately thereafter.

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Sometime later, Mr. Gunning remembered, he had expressed concern to Mr. Gottschall after seeing petitioner supervise cheerleaders at a basketball game. Mr. Gottschall at the time assured Mr. Gunning that she would not handle money in this capacity. It was this background which contributed to Mr. Gottschall's alarm when Mr. Jones informed him of petitioner's unilateral commitment to Scholastic Wear, Inc. He then decided to take control of the ongoing school jacket fundraiser. The school's name and reputation had become inextricably a part of the predicament. He commissioned the athletic director to oversee the entire effort and to displace petitioner. He was unaware at the time that petitioner later continued to sell jackets.

Describing how he had complied with Mr. Gottschall's directive, **Joseph McColgan** stated that he first paid part of the outstanding debt to Scholastic Wear, Inc. with funds which were available. After moving monies which had been deposited in the general account to his own athletic account, he prepared the necessary voucher (R-9). This voucher initiated payment to Scholastic Wear, Inc. of $1,270. Mr. McColgan never handled any money himself. That task fell to Angeline D. Ferranti, who drew a check in that amount on the athletic fund account (R-1, R-2). Mr. McColgan did not personally sell jackets or collect money from students for those which were sold.

By way of legal briefs, the Board contends that petitioner did not act in the course of the performance of her duties. Therefore, there can be no indemnification under N.J.S.A. 18A:16-6. Since she was specifically ordered to refrain from handling money in 1981, the law of agency is without relevance. The school's participation was motivated by and limited to the need to protect its own interest. It was not designed to accord ratification to petitioner's unauthorized actions. More fundamentally, however, petitioner did not meet the requirements of timely filing imposed by N.J.A.C. 6:24-1.2. This 90 day filing period should be measured from receipt of Scholastic Wear, Inc.'s first "past-due statement." That date was no more recent than December 31, 1982 (P-4) and probably earlier. Petitioner's unconscionable delay until August 31, 1984 in submitting a petition of appeal also subjects her claim to the bar of laches. Finally, indemnification would be inconsistent with the legislative intent of N.J.S.A. 18A:18A-3. That statute directs that contracts of purchase using school funds may only be entered into by an authorized purchasing agent.

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FINDINGS OF FACT

Therefore, after considering the testimony previously set forth, and independently assessing the credibility of witnesses and parties, as well as reviewing the record as a whole, I make the following **FINDINGS OF FACT:**

As to **UNDISPUTED** facts, I **FIND** those designated on pages 2 through 4 of this opinion.

As to matters which are disputed or **CONTESTED,** pursuant to N.J.A.C. 1:1-16.3(c)7, I **FIND:**

1. While in the main office area of Woodrow Wilson High School, petitioner did sign the jacket order forms provided by Mary Beth Quinn of Scholastic Wear, Inc., but not in the presence of Charles Jones, Assistant Principal.

2. Petitioner called Mr. Jones over to view the forms, after they had been signed. While Ms. Quinn looked on, Mr. Jones told petitioner she should not have signed the forms without first getting necessary approval.

3. Assistant Principal Jones lacked authority to permit fundraisers or approve requisitions to purchase anything.

4. Shortly thereafter, Mr. Jones alerted the school Principal, Mr. Gottschall, who was upset by the information.

5. Neither Mr. Jones nor Mr. Gottschall told petitioner she could purchase the jackets or hold a fundraiser. Nevertheless, when the jackets arrived, they tried to assist in their sale for the good of the school.

6. Mr. Gottschall eventually sought to exclude petitioner from the jacket sale by transferring its supervision to the Athletic Director, Joseph McColgan.

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7. Petitioner had actual notice of Board policy concerning fundraisers and requisition for goods (R-4 through R-7). The fundraisers, including the one precipitated for the cheerleaders by petitioner, could proceed only after Board approval. This authorization depended on preliminary approval by the school principal and the superintendent of the district.

8. Petitioner was not disciplined or formally adjudicated as culpable for the loss of $7,000 from the activities account of the class of 1980, which she co-sponsored. Nevertheless, as a result of that incident, deputy superintendent and board secretary of the district Preston H. Gunning directed Principal Robert N. Gottschall to inform petitioner she could no longer handle money while conducting school activities. This occurred in October 1981, when the prosecutor ended his role in the investigation.

9. Mr. Gottschall, immediately after this order from Mr. Gunning, told petitioner she should never engage in school activities which were accompanied by responsibility for money handling.

10. Petitioner, when she ordered the school jackets from Mary Beth Quinn knew she was violating the instructions of Mr. Gunning and Mr. Gottschall to avoid handling money while conducting school activities.

ANALYSIS

Although the Board interposed a number of defenses, there was one issue, in the main, for which a record was compiled at hearing. This question, articulated in the prehearing order, was: Whether the Board should save petitioner harmless from a default judgent prompting a Wage Execution Order against her. The factual record discloses that the Board should not save petitioner harmless. Analysis of that record explains why:

N.J.S.A. 18A:16-6 and its Application to the Facts:

The more particular school law, not the general law of agency, must hold sway here. Both parties address the pertinent statutory section, N.J.S.A. 18A:16-6. Yet each interprets it differently. If the contested and uncontested findings of fact supra are

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accepted, only one construction is possible: petitioner is not entitled to indemnification. She acted on her own up to and including the signing of Scholastic Wear's binding jacket order forms. Petitioner was precluded from this conduct by an unambiguous order of the Board secretary and deputy superintendent, conveyed by her principal in October, 1981. Even absent that prohibition, Board policy requiring its prior approval for a fundraiser, the vehicle which petitioner employed for sale of the jackets, had been in effect since the previous August of 1981. Mr. McColgan's referral of Mary Beth Quinn to petitioner in December of 1981 cannot fairly be thought to have negated these two pronouncements. More affirmatively, the testimony of Messrs. Jones, Gottschall and Gunning is replete with their credible expression of concern upon learning, after the contract, that petitioner had made a commitment which required her to handle money. Mr. Gottschall and Mr. Gunning were especially believable in describing their dismay on hearing what petitioner had done. Petitioner plainly acted outside the scope of her duties, without the prerequisite school approval. It has been held that testimony to be believed must not only proceed from the mouth of a credible witness, it must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances. In re Perrone, 5 N.J. 514, 522 (1950). These three witnesses on behalf of the Board satisfied that standard with forthright and consistent testimony. Petitioner, on the other hand, vacillated considerably in the content of her testimony. In balance, she was not as credible. Giving credence to the testimony of the school witnesses of necessity removes petitioner from the reach of N.J.S.A. 18A:16-6. A facial reading of that statute supports this view. (The factual settings of Young v. Bd. of Ed., Downe Tp., 1973 SLD 671, as well the cases cited therein, are so dissimilar as to render them inapposite here).

Although the foregoing school law disposes of this issue, even resort to agency law in hopes of proving ratification would be unavailing. The efforts of Woodrow Wilson High officials to promote the jacket sale, once the die was cast, did not signal acceptance of petitioner's actions. These officials simply tried to put the best face on a situation which could harm the school's reputation. This was even more understandable as petitioner became increasingly embroiled with Scholastic Wear, Inc. Under these circumstances, the school's efforts did not constitute ratification. Neither does the record reveal silence on the part of the school, amounting to consent. Petitioner conceded that vice principal Cook had bluntly told her that the school jackets belonged exclusively to her, the petitioner. Mr. Gottschall also convincingly stated that he believed petitioner well knew, from the time school officials became aware of the signed contract, that the school was distancing itself from any liability for these goods.

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The Board's Defenses:

(a) The Timely Filing Requirement of N.J.A.C. 6:24-1.2 and the Doctrine of Laches:

Reasonably interpreting the facts, petitioner must be considered to have filed timely. Neither would her filing be barred by Laches. When the "past due statements" from Scholastic Wear, Inc. arrived, both petitioner and the school were struggling to sell the full order. The outcome remained in doubt even with the advent of the lawsuit. The first clear-cut, conclusive notice of a final order, ruling or other action was the wage execution order dated May 14, 1984. Delivery of that notice appears to have been accomplished through the school, as with prior court papers. The school placed a cover letter on the wage and execution order. That letter was dated June 1, 1984. It was addressed to petitioner's residence. There is no confirmation that the order or the letter were mailed on that date. Thus, the record gives insufficient evidentiary assurance for a date of mailing to established. Consequently, the June 15 effective date for attachment of petitioner's wages should be considered the date of notice, North Plainfield Education Assoc. v. Bd. of Ed., Borough of North Plainfield, 96 N.J. 587 (1984). Since the verified petition was filed August 31, 1984, it is within the 90-day period prescribed by N.J.S.A. 6:24-1.2.

The Board's apprehension over timeliness which apparently prompts its reliance on tbe Doctrine of Laches, is misplaced. The Board seems to argue that a ruling of timeliness here would invest the power of precedent in future defenses of negligence by teachers in litigation. These teachers could rely on this case to gain indemnification under N.J.S.A. 18A:16-6 for an accomplished court judgment. Boards of Education, in these hypothetical circumstances, having no prior notice of moving papers, then will have been denied their inchoate option to defend in the suits underlying such judgments.

The Board here need not be concerned. Future citation of the ruling in this case for such purposes would be futile. Here, the school officials knew of the Scholastic Wear, Inc. contract almost from its inception. The Board itself was a party to the subsequent suit, and in fact, successfully defended against it. It was the school which delivered the moving papers and final court order to petitioner. The Board obviously had full knowledge of what was transpiring. It was in no way disadvantaged by surprise. Petitioner did not delay unreasonably under the circumstances, nor did she prejudice the

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other party, within the meaning of West Jersey Title Co. v. Industrial Trust Co. 27 N.J. 144, 153 (1968). Rejection here of the defense of Laches is not the precedent which the Board suggests. It can hardly be seen as countenancing failure by Board employees to give it ample notice of litigation which could warrant indemnification under N.J.S.A. 18A:16-6.

(b) Application of N.J.S.A. 18A:18A-3

This defense need not be ruled upon, in light of the foregoing rationale.

CONCLUSION

I **CONCLUDE** from my review of the entire record, including the credibility of witnesses, that:

Petitioner did not act within the scope of her employment when she contracted with Scholastic Wear, Inc. for the purchase of school jackets to be paid for through a "fundraiser." She consequently is not entitled to indemnification under N.J.S.A. 18A:16-6. She did, however, file her appeal in a timely fashion, during the 90 day period directed by N.J.A.C. 6:24-1.2.

ORDER

I **ORDER,** therefore, that the relief sought by petitioner Francis B. Payton, be, and hereby, is **DENIED.**

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

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

July 8, 1985
DATE

Joseph Lavery
JOSEPH LAVERY, ALJ

JUL - 8 1985
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:

July 10, 1985
DATE

OFFICE OF ADMINISTRATIVE LAW

bc

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FRANCES P. PAYTON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Exceptions to the initial decision and reply exceptions have been filed by petitioner and the Board respectively in accordance with the applicable provisions of N.J.A.C. 1:1-16.4a, b, and c.

The Commissioner observes that both parties rely extensively on the testimony in the transcripts of these proceedings to either refute or support those findings and conclusions in the initial decision regarding the chronology of events that occurred subsequent to the Board's adoption of its policy of August, 1981 pertaining to fundraisers. Petitioner's exceptions to the initial decision and the Board's reply to exceptions are noted and they are incorporated by reference herein.

The thrust of petitioner's exceptions to the initial decision attempt to establish the following:

1. Petitioner was not informed of the Board's policy of August 1981 regarding fundraisers.

2. The Assistant Principal (Mr. Jones) viewed the signing of the order form for jackets that she executed with a representative of Scholastic Wear on January 12, 1982. However, he failed to say anything at that time to apprise her or the Scholastic Wear representative that the action taken by her was unauthorized.

3. The subsequent failure of Mr. Jones or the Principal (Mr. Gottschall) to notify Scholastic Wear of their position regarding

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petitioner's lack of authorization to conduct a fundraiser amounts to ratification of the agreement by the school administrators of Woodrow Wilson High School on behalf of the Board.

4. The involvement of the Athletic Director in the collection of funds for the sale of the jackets was authorized by Mr. Gottschall and is further evidence that the fundraiser was adopted by the Board as its own.

5. The record establishes that Mr. Jones was not apprised of the internal procedures developed by Woodrow Wilson High School to implement the Board's policy of August 1981 until after petitioner signed the agreement ordering jackets from Scholastic Wear. Consequently, neither petitioner nor Mr. Jones had actual notice of such policy on January 12, 1982.

6. The record does not support the judge's finding of fact that Mr. Gottschall ever informed petitioner that she should not engage in fundraising activities requiring the handling of monies prior to the time she signed the agreement with Scholastic Wear.

Moreover, petitioner in her exceptions draws the following conclusions:

"***The response of both of these administrators is significant because it is an established principle of agency law that 'the intent to ratify an unauthorized transaction may be inferred from a failure to repudiate it'. Johnson v. Hospital Service Plan of New Jersey, 25 N.J. 134, 141 (1957). Furthermore, in the Johnson case, our Supreme Court cited several applicable provisions of McQuillin on Municipal Corporations as follows:

'McQuillin states a city may be bound by inaction and that mere silence, the performance of the contract, or the acceptance of benefits under it can constitute ratification. 10 McQuillin, supra at sec. 106.' (McQuillin, Municipal Corporations (3d Ed. 1950))

Similarly, see City of East Orange v. Board of Water Commissioners of East Orange, 73 N.J. Super. 440, 464 (Law Div. 1962), aff'd 40 N.J. 334 (1963).

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> "In the instant matter, it is clear that both administrators remained silent as to the agreement with Scholastic Wear and intended to make efforts to continue to perform under the contract. Had the sale of the jackets succeeded as originally anticipated, there can be no doubt but that the benefits of the fundraiser would have been accepted and utilized for the cheerleaders, not turned over to Petitioner.
>
> "Essentially, Respondent's position is that while it was willing, through its administrators, to become involved in the fundraiser once the agreement was signed by Ms. Payton, it was unwilling to accept responsibility for the financial obligation. It is a settled principle of agency law that 'a principal must either ratify the entire transaction or repudiate it entirely, and cannot pick and choose only what is advantageous to him'. Thermo Contracting Corp. v. Bank of New Jersey, 69 N.J. 352, 362 (1976). Furthermore, 'the general rule is that a principal is accountable for the conduct of his agent acting within the scope of his authority even though the conduct is unauthorized and the principal receives no benefit from it'. Ross Systems v. Linden Dari-Delite, Inc., 35 N.J. 329, 338 (1961).***"
>
> (Petitioner's Exceptions, at pp. 3-4)

According to petitioner, the judge's failure to apply the legal principles of agency law to this matter places undue restrictions without justification upon the statutory language of N.J.S.A. 18A:16-6.

The Board, in its reply to petitioner's exceptions, urges the Commissioner to affirm those findings and conclusions in the initial decision precisely for those reasons stated therein by the judge.

The Board categorically rejects the arguments advanced by petitioner on the following grounds.

> 1. The record establishes that petitioner was, in fact, informed of the Board's policy of August 1981 (R-4) which requires each student activity fundraiser to be approved by the Board. This policy was discussed with the faculty in September of the 1981-82 school year by Mr. Gottschall and was not contested by petitioner. The Board policy (R-4) in question became effective upon adoption unless expressly stated otherwise.

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2. The record reveals that Mr. Jones explained it was not the Board policy (R-4) itself that he was implementing on January 12, 1982, but rather the internal procedures developed at Woodrow Wilson High School for compliance with said policy when he advised petitioner that she was without authority to sign the agreement with Scholastic Wear.

In this regard the Board relies on the judge's finding that petitioner's testimony was contradictory and vacillating on direct and cross-examination with respect to the directive she was given by Mr. Gottschall not to be involved with the collection of funds for the jacket sales and, further, that petitioner's testimony lacked credibility with regard to her actions and the events that occurred between December 1981 and January 12, 1982 entering into an agreement with a representative from Scholastic Wear.

3. Contrary to petitioner's assertions, the record establishes that petitioner had already signed the agreement for the sale of jackets with a representative of Scholastic Wear on January 12, 1982, before Mr. Jones had an opportunity to either advise her or comment upon its lack of authorization. Petitioner therefore was solely responsible for her action with respect to the agreement that she signed. The Board was given no right of approval or rescission of the agreement prior to the time it was signed. Moreover, petitioner was not identified as an agent in the agreement acting on the Board's behalf.

4. The judge's finding that Mr. Gottschall eventually sought to exclude petitioner from the jacket sale by transferring supervision to the Athletic Director does not constitute ratification of her actions.

Mr. Gottschall's testimony clearly reveals he felt committed to protect the high school against petitioner's unauthorized action, by taking remedial measures to protect the interest of the Camden School District.

Finally, the Board in its reply to petitioner's exceptions argues as follows:

"***The doctrine of ratification cannot be applied unless the alleged agent has entered a contract on the alleged principal's behalf.

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Capano v. Borough of Stone Harbor, 530 F. Supp. 1254, 1267 (D.N.J. 1982) (applying New Jersey decisional law); Schlessinger v. Forest Product Co., 78 N.J.L. 637 (E & A 1910). The doctrine of ratification does not apply when one makes a contract for himself. Brown Realty Co. v. Myers, 89 N.J.L. 247 (E & A 1916).

"Attention is again drawn to Exhibit P-2. Absolutely nowhere on this document is there any indication that Petitioner entered this agreement 'on behalf of' the Board of Education of the City of Camden. The agreement does not purport to bind the Board. It does not purport to benefit the Board. It does not even mention the Board. It is nothing more than a simple contract between the Petitioner and the vendor.

"Here is the fundamental fallacy of Petitioner's 'ratification' argument. One does not act on another's 'behalf' simply because one's actions may possibly indirectly redound to that person's benefit. For agency principles to apply, one must at least purport, while acting for another, to have bound that other by contract to receive a stated benefit in exchange for a stated obligation. Brown Realty Co., supra. Nothing in Exhibit P-2 entitles the Board of Education of the City of Camden to receive and take possession of jackets. Nothing in Exhibit P-2 obliges the Board of Education of the City of Camden to pay for jackets. Exhibit P-2 is exactly what it purports to be, a separate contract between purchaser and the vendor, with the Board receiving no rights and incurring no obligations thereby.

"Nor was any evidence produced to indicate that Petitioner held herself out as an agent with authority to bind the Board in contract. Quite the contrary! Petitioner herself testified that she did not intend to have the Board of Education of the City of Camden purchase these jackets. (1T 162:9 to 163:1). How can Petitioner state this, on the one hand, while on the other assert that she held herself out as an agent authorized to make purchases on the Board's behalf?

"Even if one assumes that Petitioner was acting as an agent, albeit without authority, a contract which is contrary to law is illegal and cannot be ratified. Jacklyn, Inc. v. Edison Brothers Stores, Inc., 170 N.J. Super. 334, 359 (Law Div. 1979).***"

(Board's Reply to Exceptions, at pp. 7-8)

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The Commissioner has reviewed the respective arguments of the parties regarding the matter controverted herein. He is not persuaded by petitioner's exceptions to the initial decision that a reversal of the findings and conclusions reached by the judge in the initial decision is warranted. In the Commissioner's judgment the facts of this matter cannot be construed to grant petitioner the relief she is seeking pursuant to the provisions of N.J.S.A. 18A:16-6.

Upon thorough review and consideration of the transcript of the testimony of the witnesses and evidence adduced at the hearings conducted in the instant matter, the Commissioner adopts as his own the findings of fact rendered in the initial decision, ante. The record establishes that petitioner acted outside the scope of her duties solely on her own up to and including the time at which she signed a binding order form for jackets with a representative of Scholastic Wear, Inc. Petitioner's conduct in this instance was without full knowledge of the Board's policy of August 1981 (R-4) prohibiting fundraisers with prior Board approval and with further disregard for the admonition conveyed to her by her principal in October 1981.

In the Commissioner's view, the evidence adduced in the record of this matter including the testimony of the witnesses convincingly establishes that the relief requested by petitioner herein pursuant to the provisions of N.J.S.A. 18A:16-6 must be denied.

The standard of review applied by the judge in finding petitioner's testimony lacking in credibility is consistent with those administrative procedures previously enunciated by the Court in Mayflower Securities v. Bureau of Securities, 64 N.J. 85 (1973) wherein the Court held as follows:

> "***The thoroughly established scope of judicial review of administrative adjudications is limited to determining whether the findings made could reasonably have been reached on sufficient credible evidence present in the record considering the proofs as a whole, with due regard to the opportunity of the one who heard the witnesses to judge their credibility.***"
> (at 92-93)

In summary, the Commissioner affirms as his own those findings in the initial decision, ante, recited below:

> "1. While in the main office area of Woodrow Wilson High School, petitioner did sign the jacket order forms provided by Mary Beth Quinn of Scholastic Wear, Inc., but not in the presence of Charles Jones, Assistant Principal.

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2. Petitioner called Mr. Jones over to view the forms, after they had been signed. While Ms. Quinn looked on, Mr. Jones told petitioner she should not have signed the forms without first getting necessary approval.

3. Assistant Principal Jones lacked authority to permit fundraisers or approve requisitions to purchase anything.

4. Shortly thereafter, Mr. Jones alerted the school Principal, Mr. Gottschall, who was upset by the information.

5. Neither Mr. Jones nor Mr. Gottschall told petitioner she could purchase the jackets or hold a fundraiser. Nevertheless, when the jackets arrived, they tried to assist in their sale for the good of the school.

6. Mr. Gottschall eventually sought to exclude petitioner from the jacket sale by transferring its supervision to the Athletic Director, Joseph McColgan.

7. Petitioner had actual notice of Board policy concerning fundraisers and requisition for goods (R-4 through R-7). The fundraisers, including the one precipitated for the cheerleaders by petitioner, could proceed only after Board approval. This authorization depended on preliminary approval by the school principal and the superintendent of the district.

8. Petitioner was not disciplined or formally adjudicated as culpable for the loss of $7,000 from the activities account of the class of 1980, which she co-sponsored. Nevertheless, as a result of that incident, deputy superintendent and board secretary of the district Preston H. Gunning directed Principal Robert N. Gottschall to inform petitioner she could no longer handle money while conducting school activities. This occurred in October 1981, when the prosecutor ended his role in the investigation.

9. Mr. Gottschall, immediately after this order from Mr. Gunning, told petitioner she should never engage in school activities which were accompanied by responsibility for money handling.

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10. Petitioner, when she ordered the school jackets from Mary Beth Quinn knew she was violating the instructions of Mr. Gunning and Mr. Gottschall to avoid handling money while conducting school activities."

Similarly, the Commissioner finds and determines that the provisions of N.J.S.A. 18A:16-6 rather than the application of agency law is controlling herein. Petitioner's argument in support of the application of agency law is determined therefore to be without merit. Moreover, the Board's defenses relying upon the application of the provisions of N.J.A.C. 6:24-1.2 and the Doctrine of Laches is misplaced given the sequence of events set forth in the initial decision which occurred prior to the filing of the instant Petition of Appeal.

Accordingly, for all of the reasons set forth in the initial decision as supplemented above the instant Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

AUGUST 22, 1985

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

ORDER

OAL DKT. NO. EDU 5187-85

AGENCY DKT. NO. 282-8/85

E.B., AN INFANT BY HER PARENT AND GUARDIAN AD LITEM, S.B.,

Petitioners[1],

v.

NORTH HUNTERDON REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION and ROBERT HOPEK,

Respondents.

Anne P. McHugh, Esq. (Pellettieri, Rabstein & Altman, attorneys) and **P. Kay McGahen,** Esq. (McGahen, Young, Dempsey & Casey, attorneys), co-counsel for petitioners

James P. Granello, Esq., for respondent (Murray & Granello, attorneys)

Michael J. Herbert, Esq., for intervenor, New Jersey State Interscholastic Athletic Association (Sterns, Herbert & Weinroth, attorneys)

Record Closed: August 20, 1985 Decided: August 20, 1985

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

Petitioner, E.B., a 15 year old female student enrolled in the eleventh grade at the North Hunterdon Regional High School, seeks interim relief in the form of a temporary restraining order which would allow her to compete, try out, and qualify for

---

[1] As a general rule only initials of pupils are used in captions and in decisions to protect their privacy regarding disputes with local school boards. The general rule is being followed here despite the fact E.B. has been identified in the news media regarding this dispute she has with the Board.

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membership on the boys' high school football team. Petitioner's claim is simple and straightforward. She alleges she has been denied the opportunity by the North Hunterdon Regional Board of Education (Board) and its athletic director, Robert Hopek, to try out for the football team solely upon the fact she is a female rather than a male, and that a sex-based determination of that sort violates her right to the equal protection of the laws. The New Jersey State Interscholastic Athletic Association (NJSIAA) has been permitted to intervene on the Board's motion to have it named an indispensable party. The NJSIAA is a statutorily authorized[2] voluntarily association of 441 public and parochial schools for the express purpose of governing the conduct of interscholastic athletic competition, including football, between and among its member schools. NJSIAA rules are considered binding upon its member schools, one of which is the North Hunterdon Regional School District.

The Verified Petition and an application for interim relief with supporting brief was filed before the Commissioner of Education on August 16, 1985 and service of process was completed upon the Board during the forenoon of August 19, 1985. In the meantime, the entire matter was immediately declared a contested case by the Commissioner and was, accordingly, transferred to the Office of Administrative Law for adjudication under N.J.S.A. 52:14F-1 et seq. Oral argument on petitioner's application for immediate interim relief was scheduled and heard August 19, 1985 at 2:00 p.m. at the Office of Administrative Law, Mercerville.

BACKGROUND

For purposes of petitioner's application for interim relief, the facts as can be discerned from the Verified Petition are these. The Board provides high school pupils the opportunity to participate in various athletic competition during the fall, winter and spring seasons. Males and females may be on the same team in cheerleading.[3]

---

2 See N.J.S.A. 18A:11-3.

3 Petitioner disputes the classification of cheerleading as a "sport".

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The Board also provides eight sports designated as "girls'" teams[4], and ten teams designated as "boys'" teams[5]. There is no football team for females. The boys' football team has a no-cut policy. That is, all males who sign up and are determined physically fit by the school medical inspector are automatically on the team without regard to skill, ability, intelligence, size, or weight. Petitioner told the boys' high school football coach during March 1985, of her intention of trying out for the boys' football team for the 1985 season. Football equipment is to be distributed to male football players Saturday, August 24, 1985. Each male player has already been declared physically fit by the school medical inspector to engage in football for the upcoming season. Petitioner has not been given the opportunity to be physically examined by the school medical inspector as were the male participants. During May 1985 the athletic director, who presumably is in charge of the school's athletic teams, advised petitioner she could not try out for the boys' football team. No reasons were afforded petitioner.

Though the Board has no present written policy governing the participation of females on athletic teams it designates as "contact sports"[6], petitioner certifies that during the 1984 spring season she was allowed to try out for the designated boys' lacrosse team and that unnamed females had been allowed to try out at unspecified times for the designated boys' wrestling team.

---

4 Girls' field hockey, girls' tennis, girls' cross-country, girls' indoor track, girls' fencing, girls' basketball, girls' softball and girls' track.

5 Boys' football, boys' cross-country, boys' indoor track, boys' fencing, boys' wrestling, boys' basketball, boys' baseball, boys' lacrosse, boys' track and boys' tennis.

6 The Board relies in this regard upon Title IX of the Educational Amendments of 1972, 20 U.S.C. s. 1681 et seq. and the regulations thereunder, referred to in petitioner's brief as appearing at 45 C.F.R. s. 106.41, while in fact the regulations appear at 34 C.F.R. s. 106.41 since the creation of the United States Department of Education. This rule identifies "contact sports" as boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purposes or major activity of which involves bodily contact.

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It appears that after the athletic director refused petitioner the opportunity to try out for the boys' football team, the Board introduced for consideration a written policy governing athletic program participation. (Exhibit A). If the proposed policy is adopted by the Board at a meeting scheduled one week hence, August 26, 1985, it would provide in part as follows:

> Where the board of education provides both a boys and comparable girls team, students must participate on the team designated for their sex. However, in contact sports such as football, wrestling, lacrosse, and in any other sports as defined by Title IX, where "'the purpose or major activity of which involves bodily contact,'" girls may not participate.
>
> The Board of Education feels that to foster athletic opportunities for girls and to protect the integrity and success of the athletic programs in the North Hunterdon District, boys will be restricted from participating in specifically designated girls' sports. In establishing this policy, it is the Board's intent not to limit the athletic opportunities available to both boys and girls.

Earlier, on April 15, 1985, the NJSIAA adopted a resolution (I-1) containing rules for general applicability to its member schools, including North Hunterdon, which provide as follows:

> 1. Males shall be excluded from female athletic teams although there are no teams for boys in the same sport until such time as both sexes are afforded overall equal athletic opportunity.
>
> 2. A member school has the discretion to exclude participation in contact sports on the basis of gender where it can substantiate that its overall sports program does not limit athletic opportunities to girls.
>
> 3. Female athletes are not entitled to participate on boys' teams where there are girls' teams in the same sport.
>
> * * *

The NJSIAA, as part of the same resolution, conditioned the effective date of the rules upon the approval of the Commissioner under N.J.S.A. 18A:11-5. No such approval, nor disapproval, has been granted as of the date of this ruling. It appears that at a time when the present dispute between petitioner and the Board was reaching the stage of likely litigation, school authorities sought advice from the NJSIAA regarding the validity of its position prohibiting petitioner from trying out for the boys' football team. The NJSIAA advised that its proposed rule No. 2 would support the prohibition but that

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until and if the Commissioner approved the rules, the rules were merely guidelines to follow. It should be noted that NJSIAA takes no position on the merits of the present dispute; it does, however, urge that petitioner not be granted interim relief until at least Monday, August 26, 1985, which would afford the Commissioner more time to act on the proposed rules.

This concludes a recitation of the essential facts of the matter for purposes of petitioner's application for interim relief. Petitioner alleges other "facts" in the Verified Petition which address the money spent on boys' sports as compared to girls' sports, band performance at only the boys' football team games, the absence of cheerleaders at any girls' sports events, yearbook coverage devoted to boys' football and wrestling as compared to other sports events, the number of coaches assigned boys' teams compared to the number assigned girls' teams, and so on. These alleged facts are more appropriate to be considered following proofs submitted at a plenary hearing than on an application for interim relief.

Petitioner contends that the Board and its athletic director are prohibiting her from trying out for the boys' football team for one reason; she is female. Such gender based discrimination, petitioner argues, is in violation of N.J.S.A. 18A:36-20 and the State Board rule at N.J.A.C. 6:4-1.5. And, petitioner urges, because she is prohibited from trying out solely because she is female, such a per se rule fosters unlawful discrimination under the New Jersey and United States Constitutions absent evidence of a substantial relationship of the rule to a legitimate governmental interest. Petitioner cites in this regard Leffel v. Wisconsin Interscholastic Athletic Ass'n., 44 F. Supp. 1117 (1978); Hoover v. Meiklejohn, 430 F. Supp. 154 (D.C., Colo. 1977); Force v. Pierce City R-VI School District, 570 F. Supp. 1020 (W. D. Mo. 1983) and cases cited therein; and, Darrin v. Gould, 85 Wash. 2d 859, 540 P. 2d 882 (1975).

Finally, petitioner contends that under these facts and under the law she will suffer irreparable injury in the denial of her constitutional right of equal protection unless immediate relief is not granted and that she is so entitled such relief because the likelihood of success on the merits is great and no harm will befall the Board, its agents, officers or employees, the football team members or the public if the requested relief is granted.

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The Board opposes petitioner's application for interim relief on several grounds. First, it contends that being served with the Verified Petition, application for interim relief and supporting brief during the morning of the day oral argument was heard afforded it inadequate time to prepare its defense. Second, the Board contends interim relief should not be granted absent a plenary hearing. Third, the Board argues it is in full compliance with N.J.S.A. 18A:38-20 and N.J.A.C. 6:4-1.5 because it affords females comparable sports to those it affords males. The Board contends there is no requirement in rule or statute for it to afford females identical sports to those of males. Hence, the Board says it may lawfully prohibit petitioner from trying out for the boys' football team without first having a girls' football team. Fourth, the Board contends that its determinations are always made in the best interest of the pupil involved with an overriding concern for their safety. While the Board denies it prohibited, or continues to prohibit, petitioner from trying out for the boys' football team based solely on her sex, it does admit her sex, her physical well-being, the likelihood of its liability should petitioner be injured, the inherent, though unspecified handicap or physical condition of females, and the absence of medical evidence from petitioner she is physically fit to play football were all elements in its decision not to allow her to try out. Finally, the Board urges it should be allowed to consider the proposed policy (Exhibit A) on August 26, 1985 without outside interference from this forum or from the Commissioner of Education. For all the foregoing reasons, the Board opposes petitioner's application for interim relief.

LAW

The New Jersey Constitution (1947), Article VIII, Section 4, para. 1 provides:

> The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and 18 years.

The right of children to a thorough and efficient system of education is fundamental under our State Constitution. Robinson v. Cahill, 69 N.J. 133, 147 (Robinson IV), cert. den. subnom. Klein v. Robinson, 423 U.S. 913, 96, S. Ct. 217, 46 L. Ed. 2d. 141 (1975), injunction vacated 69 N.J. 449 (Robinson V), 70 N.J. 155 (Robinson VI) (enjoining expenditure of funds for public schools), amended 70 N.J. 464, injunction vacated 70 N.J. 465 (1976). That is not to say there is a fundamental right for pupils to participate on athletic teams, in this case petitioner on the football team. The ultimate goal of a free

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public education as embodied in the constitutional provision is to equip children to function economically, socially and politically in a democratic society. D.S. v. East Brunswick Tp. Bd. of Ed., 188 N.J. Super. 592, 605, cert. den. 94 N.J. 529 (1984).

In addition to the foregoing, our State Constitution provides at Article I, para. 5, as follows:

> No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin.

N.J.S.A. 18A:36-20, passed into law as L. 1973, c. 380, ¶ 1, effective January 14, 1974, provides in full as follows:

> No pupil in a public school in this State shall be discriminated against in admission to, or in obtaining any advantages, privileges or courses of study of the school by reason of race, color, creed, sex or national origin.

In Hinfey v. Matawan Reg. Bd. of Ed., 147 N.J. Super. 201 (App. Div.) rev'd. on other grounds, 77 N.J. 514 (1978), it was held that this statute, which proscribes discrimination in public schools by reason of sex, is intended to extend the constitutional bases of proscribed discrimination in respect of student opportunities to include sex. Consequently, the constitutional proscription against discrimination by reason of sex applies to an activity sponsored by the public schools in this state and such a guarantee is a cognizable fundamental right which requires strict scrutiny notwithstanding that participation in such extracurricular activities is itself not to be so classified. Once the Board decides to allow such participation it must do so on a basis which does not unlawfully discriminate against male or female pupils based solely on sex absent some compelling governmental interest.

N.J.A.C. 6:4-1.5, first adopted by the State Board of Education in 1975 which has remained substantially unchanged since that time, provides in full as follows:

> a) No student shall be denied access to or benefit from any educational program or activity solely on the basis of race, color, creed, religion, sex, ancestry, national origin or social or economic status.

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d) Public school students shall not be segregated on the basis of race, color, creed, religion, sex, ancestry, national origin or social or economic status.

f) The athletic program, including but not limited to intramural, extramural, and inter-scholastic sports, shall be available on a equal basis to all students regardless of race, color, creed, religion, sex, ancestry, national origin or social or economic status. The athletic program as a whole shall be planned to insure that there are sufficient activities so that the program does not deny the participation of large numbers of students of either sex.

1. The activities comprising such athletic program shall receive equitable treatment, including but not limited to staff salaries, purchase and maintenance of equipment, quality and availability of facilities, scheduling of practice and game time, length of season and all other related areas or matters.

2. A school may choose to operate separate teams for the two sexes in one or more sports and/or single teams open competitively to members of both sexes, so long as the athletic program as a whole provides equal opportunities for students or both sexes to participate in sports at comparable levels of difficulty and competency.

While not argued nor relied upon by petitioner in her moving papers, I would be remiss not to mention the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq. The fact that the Verified Petition and the application for interim relief was brought under Education Law, the Commissioner and the Director of the Division on Civil Rights have concurrent jurisdiction of discrimination complaints involving public schools. Jamison v. Bd. of Ed. of Rockaway Tp., 171 N.J. Super. 549 (App. Div. 1979). The legislative policy underlying the Law Against Discrimination is stated at N.J.S.A. 10:5-3 and is fully consistent with the cited provisions of our State Constitution and N.J.S.A. 18A:38-20 and N.J.A.C. 6:4-1.5. That underlying policy provides in part as follows:

> The Legislature finds and declares that practices of discrimination against any of its inhabitants, because of * * * sex * * * are a matter of concern to the government of the State, and that such discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundations of a free democratic State; provided, however, that nothing in this expression of policy prevents the making of legitimate distinctions between citizens and aliens when required by Federal law or otherwise necessary to promote the national interest.

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> The Legislature further declares its opposition to such practices of discrimination when directed against any person by reason of the * * * sex * * * of that person * * * in order that the economic prosperity and general welfare of the inhabitants of the state may be protected and ensured.

Finally, federal regulations, 34 C.F.R. s.106.41 implementing Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681, et seq., provide at s. 106.41(a) and (b) as follows:

> (a) General. No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intermural athletics offered by a recipient [of federal funds], and no recipient shall provide any such athletics separately on such basis.
>
> (b) Separate teams. Notwithstanding the requirement of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competetive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously be limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball, and other sports, the purpose or major activity of which involves bodily contact.

In Force v. Pierce City R-VI School District, supra., it was held that these two regulations, together with Title IX, take a neutral stand on the issue of whether females must be, or may be, allowed to participate in contact sports otherwise exclusively reserved for males.

The foregoing law shows that New Jersey is intent upon eradicating gender based discrimination in our public schools and that in instances where a prima facie case of such discrimination is made out the board must demonstrate some compelling interest the complained of conduct will substantially serve. But even if strict scrutiny is not to be applied the fact that N.J. Const. (1947), Art. I, Sec. 5 prohibits discrimination in our public schools on account of sex, the board must demonstrate some rational relationship between the complained of conduct and some interest to be served.

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FINDINGS, DISCUSSION AND CONCLUSION

The essential finding is made that the Board has demonstrated no valid reason other than petitioner's sex for it to have approved its athletic director's determination not to allow her to at least try out for the high school football team. While the Board's assertion that pupil safety is its overriding concern in regard to determinations it is called upon to make is accepted as true, there is no reason to believe its stated concern is any greater for females than it is for males. It cannot be disputed that boys as well as girls run the risk of physical injury in high school football. Yet, the risk of injury to a boy who is on the North Hunterdon High football team by virtue of the no-cut policy as opposed to being a team member by virtue of skill, ability, intelligence, size, and weight is not used as a reason for denying boys the opportunity to compete, try out, or qualify for membership on the high school football team. Moreover, petitioner has been denied the opportunity by the Board to be declared physically fit or unfit by its school medical inspector to try out for the team solely on the basis of her sex. Consequently, no judgment can be made whether petitioner is qualified for team membership on the same criteria as is applied to males because petitioner was deprived of the opportunity to be individually evaluated on the same criteria as is applied to boys; a medical examination by the school medical inspector. Yet, the Board posits that one of the elements why it denied petitioner was because she failed to submit medical evidence that she was physically fit to participate in football. There is nothing in this record to suggest that the Board required the boys to submit medical evidence as to their physical fitness other than the medical examination by the school medical inspector.

The Board's concern with petitioner's phyiscal well-being and inherent, though unspecified handicaps or physical conditions of females as bases to deprive petitioner the opportunity to qualify for membership on the football team are, in my view, based on outdated stereotypes of the nature of males and females. At best, the Board's argument in opposition to petitioner's application for interim relief suggests a predisposition to think about petitioner based solely on the fact she is female. The evidence further suggests that the Board has denied petitioner the opportunity to compete, try out and qualify for membership on the high school football team based upon an outdated belief that girls, by their nature, cannot compete with boys rather than its independent evaluation of her individual ability. At the very least, public school pupils who desire to participate on school sponsored interscholastic athletic teams must have their eligibility determined based upon an individualized determination of their ability to play regardless of their sex.

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In short, the Board prohibits petitioner from the high school football team for the solitary reason of the fact she is female. Such conduct is unlawful discrimination by reason of sex under the laws of the State of New Jersey and, as such, can serve neither a compelling, legitimate interest nor ordinary interest. The Board has no girls' football team and there is no evidence to remotely suggest any of the so-called girls' sports is comparable to football. Thus, the mandates of N.J.S.A. 18A:38-20 and N.J.A.C. 6:4-1.5 are not met here.

Given emphatic New Jersey law which governs the issue, I cannot accept the invitation of the NJSIAA to withhold ruling on petitioner's application for interim relief pending some action by the Commissioner to approve or disapprove the proposed rules it submitted him for consideration. Nor can I accept the Board's admonition that it should be allowed to consider the policy it has under consideration without outside interference by this forum or by the Commissioner. Petitioner has more than amply demonstrated she has been subjected to unlawful discrimination based solely upon her sex in the Board's refusal and its athletic director's refusal to allow her to compete, try out, and qualify for membership on the high school football team which, to this date, has been limited solely to boys. Nor am I persuaded by the Board's argument that it was given inadequate time to prepare a defense to the application for interim relief by being served with petitioner's moving papers on the morning of the oral argument. Petitioner has not been granted her rightful opportunity to be physically examined by the school medical inspector for participation on the football team and equipment is scheduled to be distributed this Saturday, August 24, 1985 and it is presumed that actual practice shall commence August 26, 1985. There is nothing in the record to persuade me that the Board could not have produced adequate legal arguments to overcome petitioner's application for interim relief if such arguments were available to it. I am persuaded that given the facts of this case for purposes of this application, the Board has available to it insufficient legal arguments to overcome its complained of conduct. It is, nonetheless, acknowledged that the Board may produce at plenary hearing sufficient evidence to establish the existence of a substantial relationship to a compelling interest it intends to secure by attempting to prohibit girls from participating with boys in a contact sport. At the present time, however, the likelihood of success on the merits falls more heavily towards petitioner than it does towards the Board. No reasons were afforded petitioner why she was denied the opportunity to participate on the high school football team and, consequently, the inference is extremely strong that the sole reason is because of her sex.

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The strong New Jersey public policy underlying the attack upon gender based discrimination obviates the need to consider the federal cases from outside this jurisdiction, or the Federal Constitution, to grant the relief requested.

Accordingly, petitioner's application for interim relief in the form of a restraining order by which the Board, its agents, officers and employees and all others who have direct personal knowledge of this Order to prohibit them from denying petitioner the opportunity to compete, try out and qualify for membership on the North Hunterdon High School football team is hereby **GRANTED.** The North Hunterdon Board of Education is specifically **DIRECTED** to immediately arrange for E.B. to be physically examined by the school medical inspector for a determination on her fitness to participate on the high school football team and it is further **DIRECTED,** upon the presumption E.B. is physically fit, to ensure that she receives football equipment in the same manner as do male football players on Saturday, August 24, 1985. The Board is further **DIRECTED** to ensure that its athletic director and head football coach, and assistant football coaches and all employees under its charge do nothing to prevent E.B. from participating in actual football practice which is to commence on Monday, August 26, 1985. Such interim relief shall remain in effect until and if the Order is vacated at the close of the plenary hearing which is to commence on September 9, 1985.

This order may be reviewed by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** either upon interlocutory review pursuant to N.J.A.C. 1:1-9.7 or at the end of the contested case pursuant to N.J.A.C. 1:1-16.5.

August 20, 1985
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

bc

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OAL DKT. NO. FDU 5187-85

E.B., an infant by her parent and guardian ad litem, S.B.,	:	COMMISSIONER OF EDUCATION
PETITIONERS,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE NORTH HUNTERDON REGIONAL SCHOOL DISTRICT, AND ROBERT HOPEK, HUNTERDON COUNTY,	:	
RESPONDENTS.	:	
	:	

The Commissioner has reviewed the initial recommendation of the administrative law judge as well as the tape of the oral argument presented at the hearing. The Commissioner notes that each of the parties to this matter has been provided with opportunity to file briefs and/or written memoranda in support of their respective positions. The Commissioner takes special notice that the respondent Northern Hunterdon Regional School District by letter received on August 22, 1985 indicated its determination not to supplement the record and its willingness to rely upon the Commissioner's determination. Petitioner E.B., on her part, relied upon arguments previously presented in her initial moving papers, expressing concern, however, as to the possible implications of a resolution from NJSIAA presently pending before the Commissioner.

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Based upon his review of the record before him the Commissioner finds and determines that the recommendations contained within the ALJ's temporary restraint seem to effectively comport with the statutory and regulatory scheme presently existing in the State of New Jersey. His careful review of the arguments presented by the parties to this point in the proceedings leads him to conclude that petitioner has effectively demonstrated that she has a significant possibility of ultimately prevailing upon the merits and that failure to restrain the Board from preventing her from trying out and competing on the football team at the same time as all other individuals seeking to play football would result in irreparable harm to petitioner's right to compete without discrimination.

Consequently, and for the reasons contained herein and in the ALJ's recommendation, the Commissioner agrees that the Board has not to this point refuted petitioner's allegations and proofs that the sole reason for refusing to permit her to participate is based upon consideration of her sex. The Commissioner therefore adopts the recommendations of the administrative law judge and makes them his own. The Northern Hunterdon Regional Board of Education is therefore directed to immediately take those steps necessary to permit petitioner to participate in full equality and opportunity with all other individuals seeking to play football in the district schools. Further hearings as required in this matter may continue as directed by the ALJ.

IT IS SO ORDERED.

AUGUST 22, 1985

COMMISSIONER OF EDUCATION

DATE OF MAILING - AUGUST 23, 1985

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INITIAL DECISION
OAL DKT. NO. EDU 8994-84
AGENCY DKT. NO. 468-11/84

ANTHONY P. CHIRICO,
Petitioner,
v.
BELLEVILLE BOARD OF EDUCATION,
ESSEX COUNTY,
Respondent.

Jeffrey A. Bartges, Esq., for petitioner

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

Record Closed: May 22, 1985 Decided: July 3, 1985

BEFORE **SYBIL R. MOSES,** ALJ:

I
Procedural History

This matter comes before the Office of Administrative Law (OAL) as a result of a petition of appeal filed on November 20, 1984, pursuant to N.J.S.A. 18A:6-9, which vests the Commissioner of Education with jurisdiction to hear and determine all controversies and disputes arising under the school law. The Belleville Board of Education (Board) filed a verified answer on December 10, 1984. The matter was transmitted to the OAL for

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determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq., on December 17, 1984.

A prehearing telephone conference was held on February 5, 1985. It was agreed there were two issues in dispute.

1. Is Dr. Chirico entitled to a 1984-85 increment?
2. Is Dr. Chirico entitled to restoration of his 1983-84 increment because of the terms of the negotiated settlement?

As a result of negotiations during that conference call, a settlement was reached in regard to Issue No. 1. My Initial Decision adopting the partial settlement concerning Issue No. 1 is attached to this Initial Decision and incorporated herein as if set forth at length.

Two further conferences were held on April 9 and May 6, 1985. It was determined that Issue No. 2 could not be resolved. Accordingly, cross-motions for summary decision and responses thereto were timely filed. The record closed on May 22, 1985.

II

Stipulation of Facts

The parties have agreed that the following facts are stipulated and accepted as uncontroverted and established for the record as if proven at the time of hearing.

1. Petitioner, Anthony P. Chirico, is a tenured teaching-staff member of respondent, Belleville Board of Education.

2. Petitioner has been employed by respondent as the Director of Special Services since 1978.

3. Since 1978 there have been four Directors in the Belleville School system: Director of Athletics, Director of Pupil Personnel Services, Director of

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Performing Arts and Director of Special Services. Beginning in the school year July 1, 1979, by negotiated agreement, there was "parity of salary to the full salary of Directors" for the four director positions such that each of the four Directors receives the same salary.

4. A Stipulation of Agreement was entered into and executed by petitioner on July 26, 1983 and the Board on August 15, 1983, a copy of which is attached hereto. Pursuant to this Stipulation of Agreement, the Board of Education withheld Dr. Chirico's employment increment for the year 1983-84 in the amount of $2,707.00, which represents the difference between his 1982-83 salary of $36,092.00 and what would have been his 1983-84 salary pursuant to negotiations in the amount of $38,799.00. In accordance with this Stipulation of Agreement therefore Dr. Chirico's 1983-84 salary was $36,092.00. The salary of the three other Directors was $38,799.00. At the Board meeting held August 15, 1983, the Board took official action in accordance with the Stipulation of Agreement.

5. Prior to Board action, a letter was forwarded to Colleen Meyer, Esq., attorney representing Dr. Chirico dated August 1, 1983, a copy of which is attached hereto. In this letter, for purposes of clarity the following was stated and specifically agreed to: "the percentage increase for the School year 1984-85 is what is subject to negotiation and no way is the restoration of the withheld salary increment subject to negotiations process. Whether or not the Board wishes to reinstate the increment in the future is solely a Board's prerogative." The response on the part of the attorney representative was "I have discussed the above with Dr. Chirico. We have no objection to the inclusion of this letter in the Stipulation of Agreement."

6. At the Belleville Board meeting of Monday, August 27, 1984, the Board of Education voted to deny restoration of the 1983-84 denied increment/increase to Dr. Chirico such that any salary increase to him for the 1984-85 school year shall be the percentage increase established through the negotiation process

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with the representative association based upon the salary received by Dr. Chirico during the 1983-84 and 1982-83 school years.

7. Subsequent to this action, a Petition of Appeal was filed on or about November 16, 1984 with the Commissioner of Education. The Answer was duly filed by the respondent and the matter referred to the Office of Administrative Law. On February 5, 1985 a conference call was held in which it was agreed that there were two issues in dispute: 1- Is Dr. Chirico entitled to restoration of his 1984-85 increment?; 2- Is Dr. Chirico entitled to restoration of his 1983-84 increment because of the terms of the negotiated settlement? As a result of negotiations among the parties, a Settlement was reached in regard to issue number 1 and a Consent Order mutually executed and filed with the Court on or about April 10, 1985. See attached. Issue number 2 remains viable for disposition by the Court.

III
Evidence

The following items are evidence in this case and are incorporated herein as if set forth at length.

1. Signed Stipulation of Agreement
2. Letter by Board's attorney, August 1, 1983
3. Letter by Administrative Law Judge Sybil R. Moses, February 6, 1985
4. Consent Order resolving Issue No. 1

IV
Arguments of Counsel

Counsel for petitioner urges that it was the intention of Dr. Chirico and the Board, when they entered into the Stipulation of Agreement withholding Dr. Chirico's increment for the 1983-84 school year, to withhold the increment for that year only and to return

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Dr. Chirico to the top of the salary guide for 1984-85, subject to the Board's right to withhold his increment de novo for cause, pursuant to N.J.S.A. 18A:29-14. Counsel urges that case law requires reinstatement of Dr. Chirico to the top of the guide since that is where he was when the increment was withheld. Therefore, the action taken by the Board on August 17, 1984 was a de facto increment withholding, taken too late and not in compliance with the statute, since Dr. Chirico had started his service for that school year. Counsel further argues that principles of fundamental fairness and equity mandate that an employee with excellent evaluations should not be penalized every year after a disciplinary withholding if he had been at the maximum step of the guide for five years prior to the withholding. Counsel urges that Dr. Chirico's 1984-85 salary should be the percentage increase reached through negotiations with the bargaining unit, added to the base salary which all other directors received in 1983-84.

Counsel for the Board argues that it was always the determination of the Board that Dr. Chirico should not catch up with the other directors, all of whom are paid the same salary regardless of length of service, but that he should not be further penalized by the loss of total increment and adjustment. It was the Board's intention to pay Dr. Chirico a salary in 1984-85 based upon the percentage increase which was that agreed upon by collective bargaining for all directors times his 83-84 salary, which, in effect, is the same as his 82-83 salary due to the withholding of the increment. The Board wanted to penalize Dr. Chirico over a two-year period. Counsel argues that the withholding of an increment does not constitute an improper reduction of salary. While a Board is prohibited from freezing a salary permanently or from passing a resolution which states that an employee will permanently lag a step behind on the salary guide from that point forward, in making future salary decisions the Board always has the option to either restore or continue the withholding on a year-by-year basis.

The Board argues that Masone v. Rutherford Bd. of Ed., 1984 S.L.D. ___, Comm'r of Ed. Decision (June 28, 1984) which indicates that since a board cannot permanently withhold an increment and, in the year subsequent to the withholding it must place that individual back on the maximum step of the guide if that person had been on the maximum step of the guide prior to the withholding, is not applicable to the case at bar, because

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there is no particular salary guide with steps for the directors employed by the Belleville Board. There has been negotiated "parity" among the Directors, such that each of the four directors is paid the same salary regardless of length of service, degrees, etc., with the exception of a longevity stipend. Counsel argues that the general law regarding increment withholding should be applied to this case, as denial of an increment for a particular school year is permanent for subsequent years unless a future board affirmatively acts to reinstate it. See, In re Tenure Hearing of Theodore Augustine Burns, Jr., School District of the City of Newark, OAL DKT. EDU 3128-83 (Jan. 23, 1984), aff'd Comm'r of Ed. (March 8, 1984), aff'd State Bd. of Ed. (October 24, 1984). Therefore, in the absence of action reinstating the withheld 1983-84 increment to the 1984-85 salary, Dr. Chirico is not entitled to receive the $2,707 in dispute and must remain behind all others similarly situated.

Counsel for the Board argues that the August 1, 1983 letter from the Board attorney, countersigned by Dr. Chirico's attorney, indicated clearly that Dr. Chirico understood that it was solely within the Board's prerogative to decide whether to reinstate his increment. Therefore, the salary to be paid Dr. Chirico for the 1984-85 school year should be calculated by the negotiated percentage increase times the salary Dr. Chirico received in 1983-84, which salary was the same as he had received in the 1982-83 school year due to the withheld increment. Counsel asserts that the 1983 Stipulation of Agreement between Dr. Chirico and the Board consists of two parts, the Stipulation of Agreement and the clarifying attorney's letter, which make it clear that it was the Board's intent to retain to itself full discretion in regard to petitioner's salary increase for the 1984-85 school year.

Counsel for Dr. Chirico responded that as a matter of law there must be a salary guide applicable to him and that the Board cannot use its acknowledged noncompliance with the law to disadvantage him. See, N.J.S.A. 18A:29-4.1 and 4.3. The Board counter-responded that a salary policy must be mutually agreed upon through negotiations. Therefore, if the Belleville Administrators Association has demanded and continues to demand parity, refusing to accept a salary-schedule guide, it cannot argue that due to a lack of a guide, an employee should not be disadvantaged.

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V

Conclusions of Law

The only issue in dispute is whether Dr. Chirico is entitled to restoration of his 1983-84 increment because of the terms of the negotiated settlement. It is not in dispute that the Board has a statutory right, which it cannot bargain away, to withhold salary increments for inefficiency or other good cause. Clifton Teachers Ass'n, Inc. v. Bd. of Ed. of Clifton, 136 N.J. Super. 336 (App. Div. 1975). It is further uncontroverted that the 1983-84 salary increment and adjustment increment normally due Dr. Chirico was withheld in a procedurally and substantively correct matter. It is not mandatory upon a board of education to restore any denied increment in any future year and an employee may remain a step behind other similarly situated employees for the balance of his employment with the district. See, Garibaldi v. Toms River Regional School District Bd. of Ed., 1977 S.L.D. 192. Each subsequent board has the option to either restore or continue to withhold the increment if inefficiency or other good cause is present. Therefore, the general rule is that unless a board affirmatively takes action to reinstate an increment, the affected individual is not entitled to receive it and remains behind all others similarly situated. The question in the case at bar is whether the Stipulation of Agreement and/or the attorney's letter changes the applicability of the general rule concerning withholding of increments.

Petitioner is a tenured teaching-staff member employed by respondent as the Director of Special Services since 1978. Petitioner is one of four Directors in respondent's school system. Since July 1, 1979, by negotiated agreement, there has been "parity of salary to the full salary of Directors" for the four director positions so that each of the four Directors receives the same salary. In the summer of 1983, petitioner and respondent entered into a Stipulation of Agreement, pursuant to which respondent withheld petitioner's employment increment for 1983-84. As a result, petitioner's 1983-84 salary was the same as his 1982-83 salary, while the 1983-84 salary of the three other Directors reflected an increment of $2,707.00.

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The Stipulation of Agreement stated that petitioner's salary for the 1984-85 school year "will be that which is agreed upon by and between the representative association and the Board, and as to be set forth in the negotiated contractual agreement between said parties for the 1984-85 school year." In a letter dated August 1, 1983, however, the Board's attorney stated that "the percentage increase for the school year 1984-85 is what is subject to negotiation and no way is the restoration of the withheld salary increment subject to negotiations process. Whether or not the Board wishes to reinstate the increment in the future is solely a Board's prerogative." Petitioner's attorney indicated he had no objection to the inclusion of this letter in the Stipulation of Agreement. On August 15, 1983, the Board took official action in accordance with the Stipulation of Agreement. On August 27, 1984, respondent Board voted to deny restoration of the 1983-84 denied increment to petitioner so that any salary increase to him for 1984-85 would be the percentage increase established through the negotiation process, applied to the salary received by petitioner during the 1983-84, which was the same as the 1982-83 school year.

N.J.S.A. 18A:29-14 provides:

> Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year . . . . It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment.

The Commissioner of Education has interpreted this statute in a number of cases. Under this statute, when a board denies an annual increment, the denial is permanent for subsequent years unless a future board affirmatively acts to reinstate it. North Plainfield Education Ass'n. v. Bd. of Ed. of North Plainfield, 96 N.J. 587 (1984); Cordasco v. Bd. of Ed. of East Orange, OAL DKT. EDU 7690-83, (May 10, 1984), rev'd, Comm'r of Ed. (June 28, 1984), aff'd, State Bd. of Ed. (Dec. 5, 1984) (citing Burns). If the increment is not reinstated by means of an adjustment increment, the employee will continue to lag behind a step on the salary guide. Cordasco, Commissioner of Education, at 10-11.

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In Cordasco the petitioner challenged the failure of the board to advance her two steps on the salary guide in 1983-84, after withholding her increment in 1982-83. The administrative law judge found that the board's failure to advance petitioner two steps was arbitrary, capricious, unreasonable, and in violation of N.J.S.A. 18A:29-14, reasoning that the board in 1982-83 "did not intend to withhold petitioner's increment ad infinitum. . . ." Cordasco at 6. The Commissioner agreed that the board had not intended to leave petitioner permanently behind on the salary guide. Cordasco at 9. Nevertheless, the Commissioner determined that pursuant to the statute and case law, it was within the discretionary powers of the board to advance petitioner only one step on the salary guide in 1983-84 rather than granting her a two-step advancement. Cordasco at 10. The Commissioner emphasized that "[t]he discretionary authority to decide whether to advance a staff member two steps in any year subsequent to a withholding action is the sole prerogative of the boards of education succeeding the board which originally withheld an increment." Cordasco at 10. The State Board affirmed, stating clearly that "a denial of increment is permanent for subsequent years unless future board affirmatively acts to reinstate it." Cordasco at 1-2.

See also, Gallitano v. Bd. of Ed. of Ridgefield, OAL DKT. EDU 7576-82 (April 4, 1983), aff'd Comm'r of Ed. (May 23, 1983), aff'd State Bd. of Ed. (October 5, 1983), where a tenured teacher whose salary increment had been withheld in 1982-83 contested the board's failure to advance her one step on the salary guide. The administrative law judge concluded that the board had acted within its discretionary authority when it froze petitioner's salary at the same level as the prior year's, thus denying a contractual increase as well as a salary increment (i.e., moving up a step on the salary guide). Gallitano at 8. The Initial Decision stated that when a board withholds an employment increment, thereby precluding an annual movement to the next step on the salary guide, the employee may "catch up" with the salary step which would be applicable had the original denial not occurred, only if a future board grants both the annual salary increment and an adjustment increment. Gallitano at 6-8. [emphasis added] The administrative law judge relied on Garibaldi where the local board was permitted to continue to withhold the increment in petitioner's advancement on the teacher's salary guide in years subsequent to the original withholding of that increment.

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A board's discretion to withhold an annual increment is limited to the extent that the board may not make that withholding binding on future boards. Borrelli v. Bd. of Ed. of Rutherford, OAL DKT. EDU 8756-82 (Aug. 9, 1983) at 12, reversed on other grounds, Commissioner of Education (September 26, 1983) at 17, 18. However, subsequent boards must take affirmative action to restore a withheld increment.

In the present case, petitioner argues that by executing the Stipulation of Agreement, the local board "agreed to certain restraints." Specifically, petitioner claims that respondent, in effect, agreed to put petitioner's salary "back in line with his peers" in 1984-85, limited only by its right to withhold salary increments for inefficiency or other good cause. Assuming that the Stipulation of Agreement stood alone, without the clarification found in the August 1, 1983 letter, it could be interpreted to mean the board had agreed that petitioner's 1984-85 salary would be equal to that negotiated for the other directors by the representative association and the board. Such an interpretation would be contrary to the principle that a board may not bind a successor board with regard to restoration of a withheld increment. Petitioner somewhat inaccurately characterizes the board's prerogative as simply the right to again withhold petitioner's increment if it has good reason to do so. I conclude that respondent did not intend to so limit itself, and made its intention clear by its August 1 letter, included and made part of the Stipulation of Agreement.

It is true that a board's discretion is limited since it may not act to permanently withhold an increment or retain an employee one step behind on the salary guide where that employee had met the requirements for placement at the maximum step on the salary guide prior to the year of withholding. Masone v. Rutherford Bd. of Ed., OAL DKT 10723-82 (May 10, 1984), modified, Comm'r of Ed. (June 28, 1984) at 25-26. In Masone the board had added a new maximum step to the salary guide subsequent to the year in which petitioner's increment had been withheld. The Commissioner reasoned that, having been at maximum prior to the withholding action, there was no longer any step for petitioner to lag behind. Masone at 26.

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Masone is distinguishable from the case at bar. In the present matter, petitioner and three other directors are apparently not on any kind of salary guide. Since their salary is determined pursuant to negotiated agreements rather than according to salary steps, petitioner cannot argue that he must be replaced at any "maximum step." It is true that prior to the withholding of his increment, petitioner was at the same salary level as the other three directors. The concern in Masone, however, was with whether that individual was placed on the maximum salary step prior to the increment withholding, not with the actual level of salary received by that individual.

Somewhat in the alternative, petitioner argues that the very fact that he is not on a salary schedule or guide should make the law concerning withheld increments inapplicable to him. I note that the denial of petitioner's increment does not, in fact, translate into his lagging behind a step on a salary guide since there is no guide. N.J.S.A. 18A:29-14 refers to the employment and adjustment increment itself, rather than advancement on a salary guide. Case law, too, refers to the effect of "denial of increment." See for example, Cordasco, State Board of Education #61-84, at 1.

Therefore, I conclude that petitioner is not entitled to have his withheld increment restored unless and until the local board affirmatively acts to reinstate it. Since a board may not bind successor boards to a determination of whether or not to reinstate a withheld increment, nothing in the Stipulation of Agreement can be read as controlling the exercise of the board's discretion in regard to petitioner's employment increment for 1984-85.

For all the foregoing reasons, it is hereby **ORDERED** that the petition to restore Dr. Chirico's 1983-84 increment be, and is, hereby **DENIED**; and

It is further **ORDERED** that his salary for 1984-85 should be $36,092 plus the percentage increase currently being negotiated between the Board and petitioner's bargaining unit.

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

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

July 3 1985
DATE

SYBIL R. MOSES, ALJ

Receipt Acknowledged:

JUL - 9 1985
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

July 10, 1985
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

amn/e

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ANTHONY P. CHIRICO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF BELLEVILLE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The Commissioner has reviewed the record of this controverted matter including the initial decision rendered by the Office of Administrative Law, Sybil R. Moses, ALJ. The Commissioner observes that exceptions were filed by the parties pursuant to N.J.A.C. 1:1-16.4a, b and c.

Petitioner's exceptions contend that the 1979 negotiated agreement establishing "parity of salary to the full salary of Directors" (Initial Decision, ante) flies in the face of N.J.S.A. 18A:29-4.3, 18A:29-4.1 and 18A:29-14. To allow the Board to disregard the statutory mandates, petitioner argues, would be to endorse the practice of agreeing to terms and conditions of employment without reference to contrary statutory language. Petitioner contends that to disregard the holding of Hyman v. Board of Education of Teaneck, Bergen County, decided by the Commissioner August 15, 1983, rev'd State Board March 8, 1985, as well as the statute, would create a situation of unrestrained autonomy of boards which would overturn the established law applicable to salary establishment, withholding and contract formation.

In the alternative, petitioner argues that in accord with Masone v. Rutherford Board of Education, decided by the Commissioner June 28, 1984, following the withholding of his 1983-84 increment, which petitioner agreed to by Stipulation Agreement, he must be returned to the same 1984-85 negotiated salary position as the other three directors occupy because there is no other step, higher or lower, on the "guide". Petitioner further avers that the 1983 Board resolution creates a salary figure unique to petitioner and found nowhere on the "guide".

Finally, petitioner contends that the ALJ erred in deciding that he is not entitled to have his 1983-84 increment restored unless and until the local board affirmatively acts to reinstate it because there was insufficient credible evidence on the record to determine whether good cause was present to deny restoration of his increment.

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The Board's exceptions mirror those arguments submitted in its brief filed before the hearing. The Board's reply exceptions add that petitioner should be stopped from arguing that the ALJ erred in arriving at a decision to uphold the Board's decision not to restore petitioner's 1983-84 increment. The Board argues that petitioner brought a Motion for Summary Judgment based upon stipulations of fact mutually agreed upon as being all the sufficient credible evidence necessary in the record to support an initial decision.

The Board concurs with the ALJ that the 1983 Stipulation Agreement and clarifying attorney's letter establish that it was the Board's intent to retain discretion with regard to petitioner's salary increase for the 1984-85 school year, in accord with N.J.S.A. 18A:29-14. The Board cites North Plainfield Education Association v. Board of Education of North Plainfield, 96 N.J. 587 (1984) for the proposition that denial of an annual increment is permanent for subsequent years unless and until a future board acts affirmatively to restore it.

The Commissioner has carefully reviewed the record and determines that the negotiated salary agreement between the Board and the four directors exists in contravention of N.J.S.A. 18A:29-4.3 and 18A:29-4.1. The plain language of 18A:29-4.3 mandates that:

> "The board of education of every school district employing one or more teaching staff members having full-time supervisory or administrative responsibilities shall adopt salary schedules for each school year that begins after the effective date of this act for all such members, except that for a superintendent of schools the board may adopt a salary schedule. Such salary schedules shall be subject to N.J.S.A. 18A:29-4.1."

The rules of statutory construction require that legislation be construed, whenever possible, as a harmonious whole. Exxon Corp. v. Hunt, 97 N.J. 526 (1984). In construing a statute, words must be considered in context of an entire section and given common-sense meaning which advances legislative purpose. State v. Stern, 197 N.J. Super. 49(App. Div. 1984) Thus, while N.J.S.A. 18A:29-4.1 reads:

> "A board of education of any district may adopt a salary policy, including salary schedules for all full-time teaching staff members which shall not be less than those required by law. Such policy and schedules shall be binding upon the adopting board and upon all future boards in the same district for a period of two years from the effective date of such policy but shall not prohibit the payment of salaries higher than those required by such policy or schedules nor

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> the subsequent adoption of policies or schedules providing for higher salaries, increments or adjustments [Emphasis added]***"

statutory construction requires, and case law supports, the conclusion that if a board of education adopts a salary schedule for its full-time teaching staff members, all full-time teaching staff members must be placed on a salary guide. Hyman, supra

Under 18A:1-1 "teaching staff member" means:

> "[A] member of the professional staff of any district or regional board of education, or any board of education of a county vocational school, holding office, position or employment of such character that the qualifications, for such office, position or employment, require him to hold a valid and effective standard, provisional or emergency certificate, appropriate to his office position or employment, issued by the state board of examiners and includes a school nurse."

Petitioner, as a director, is a teaching staff member under the statutory definition and, as such, is entitled to be placed on a salary guide if one exists for any other group of full-time teaching staff members. Further, N.J.S.A. 18A:29-6 defines "salary schedule" to mean "a schedule of minimum salaries fixed according to years of employment" (emphasis added). Thus, to meet the statutory requirement, the salary schedule of the four directors must, at a minimum, provide salary gradation in steps, according to years of employment, in order to provide certainty in projecting expected compensation in the future. See N.J.S.A. 18A:29-7, "Salary Schedule" for an illustration of the statutory requirements regarding a minimum salary schedule.

Also by way of clarification, the Commissioner notes the distinction between salary increment and adjustment increment. The former is that which one is entitled to by virtue of a year's satisfactory performance. The latter is the difference between the same step on the guide from one year to the next.

The Commissioner notes that the 1979 negotiated agreement establishing "parity of salary to the full salary of Directors" (Initial Decision, ante) is not part of the record. However, the stipulations of fact in the record indicate that the agreement provides that each of the four directors receive the same salary. The record further reveals that the four "receive the same salary regardless of the length of service with the exception of a longevity stipend." (Petitioner's Brief, at p. 2)

Having agreed by stipulation agreement and clarifying attorney's letter that his 1983-84 salary increment would be withheld, the issue to be determined becomes what petitioner's status is

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for the 1984-85 year in light of the fact that he is on a no-step salary schedule which does not comport with the requirements of N.J.S.A. 18A:29-4.3, 18A:29-4.1 and 18A:29-14.

Since no salary schedule exists which provides for years of experience and fixed salary increments, the Board has no way to implement the provisions of N.J.S.A. 18A:29-14. If the Board applies the "parity" principle and gives him a percentage equal to the percentage increase for all other directors, then that percentage increase would be applied to his 1982-83 salary, not the negotiated 1983-84 salary, since he received no salary increment for that year. Therefore, the amount withheld would increase in absolute terms for each subsequent year that the increment was not restored.

The following hypothetical no-step salary schedule illustrates the disparate result:

Year	Petitioner	Other Directors	Difference between Petitioner's Increment and that of Other Directors
1982-83	$36,092.	$36,092. (2,707.)	-0-
1983-84	36,092. (.05)	38,799. (.05)	$2,707.
1984-85	37,896. (.10)	40,738.95 (.10)	$2,842.
1985-86	$41,685.	$44,813.	$3,128.

The Commissioner recognizes that the 1983 Stipulation of Agreement and clarifying attorney letter between petitioner and the Board clearly established the Board's intent to preserve its statutory prerogative under N.J.S.A. 18A:29-14 to not restore petitioner's withheld increment. The Commissioner concurs with the ALJ that under N.J.S.A. 18A:29-14, when a board denies an annual increment, the denial is permanent for subsequent years unless a future board affirmatively acts to reinstate it. North Plainfield, supra. Further, the Commissioner agrees that if the increment is not reinstated by means of an adjustment increment, the employee will continue to lag behind a step on the salary guide. Cordasco v. Board of Education of East Orange, Essex County, decided by the Commissioner June 28, 1984, aff'd State Board December 5, 1984, citing In re Tenure Hearing of Theodore Augustine Burns, Jr., School District of the City of Newark, decided by the Commissioner March 8, 1984, aff'd State Board October 24, 1984.

However, the Commissioner disagrees with the ALJ that Masone, supra, is inapposite. Masone holds that unless a board acts

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affirmatively to restore an increment previously withheld, a board may permanently withhold the increment. It also stands for the proposition that in the year subsequent to the withholding, the board must place an individual back on the maximum step of the guide if that person had been on the maximum step of the guide prior to the withholding. In the instant case, petitioner, like the other three directors, was at the "top" of the no-step salary schedule before the increment withholding. Thereafter, there were no higher steps from which he could be held nor any lower steps from the previous year at which he could be retained since the entire no-step salary schedule was renegotiated each year.

Thus, since there is only the illegal salary policy, which the Board has implemented with no steps for experience and training, petitioner must be presumed to be at the top of the schedule. The top of the guide is that which was negotiated for the 1984-85 year.

While the Commissioner does not agree with petitioner's contention that the salary was that which was addressed in the stipulation passed in 1983, the fact that the Board did not have a salary schedule as contemplated by statute has created, in effect, that which petitioner contends, namely, that having withheld the difference between his salary in 1982-83 and what he would have received in 1983-84, the Board had no choice but to restore him to parity with all other directors for the 1984-85 year.

The Commissioner cannot condone the Board's action in negotiating its "parity" salary agreement with the four directors. As a matter of fundamental fairness, the Commissioner finds that the Board's failure to establish a proper salary guide for the directors should not deprive petitioner of the protections due him pursuant to the provisions of N.J.S.A. 18A:29-4.3, 18A:29-4.1, 18A:29-6, and 18A:29-7.

Accordingly, the Commissioner hereby orders the Board to return petitioner to the same salary "step" as the other three directors held for the 1984-85 year. Further, the Board is hereby directed to adopt a salary schedule for full-time employees, including the four directors mentioned in the instant case, in compliance with N.J.S.A. 18A:29-4.1 and 18A:29-4.3.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 23, 1985

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INITIAL DECISION
OAL DKT. NO. EDU 730-85
AGENCY DKT. NO. 5-1/85

SOUTH ORANGE-MAPLEWOOD
BOARD OF EDUCATION,
Petitioner,
v.
NANCY SIMONIC,
Respondent.

Sidney A. Sayovitz, Esq., for petitioner (Greenwood and Sayovitz, attorneys)

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

Record Closed: May 31, 1985 Decided: July 3, 1985

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

Charges of conduct unbecoming a teacher and corporal punishment were certified to the Commissioner of Education against Nancy Simonic (respondent), a tenured teacher in the employ of the South Orange-Maplewood Board of Education. The complainant Board of Education certified that the charges would be sufficient, if true in fact, to warrant dismissal or reduction in salary.

The matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. Following a prehearing conference, control of the matter was transferred to me. The matter was heard on May 2 and 3, 1985 at the Office of Administrative Law, Newark. Posthearing submissions were timely filed by both counsel.

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I.

RELEVANT TESTIMONY

R.G., a pupil, testified that she was in the metal shop on October 16, 1984, the date in question. At the opening of class, the respondent instructed a group to go to the sand-casting area in the right rear corner of the room to clean it. The group went to the area. The respondent then asked them to come back but they apparently did not hear her request. The respondent was in the area of her desk which according to exhibit P-1 and this tribunal's own observation is at the front of the shop room.

The respondent repeated her request that the group in the sand area return to their seats perhaps three times. She then picked up a pair of pliers and threw it toward the sand-casting area. The pliers struck R.S. in the eye.

R.G. testified clearly that the respondent did not slip while throwing the pliers. R.G. had a clear vision of the respondent throughout the entire incident. R.G. heard someone say, "Watch out." She then heard someone say, "Ow!, my eye." R.G. did not see either pupil but did see the teacher throughout the incident.

R.G. also described and demonstrated the motion the respondent used in throwing the pliers and testified as to the line and arc in which the pliers traveled. The witness indicated on exhibit P-1a where the respondent was standing at various points during the incident. She also indicated the locations of shop tables, machinery and a welding screen.

After the incident, another teacher entered the shop through the rear door and slipped on the floor approximately two feet from where R.S. was hit. R.G. also testified that the floor of the shop was not slippery in any other area.

Over the objection of the respondent, a statement that R.G. wrote within one week of the incident at the request of the Industrial Arts Department Chairman was entered into evidence. Her testimony was generally consistent with the statement which is marked P-2. The last sentence in the statement refers to the pliers opening up in midair. The witness stated that she did not actually see this happen but rather had heard from other pupils that the pliers had opened while in midair.

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D.S. testified that he, too, was in the room during period six on October 16, 1984. Pupils who had worked in the sand-casting area the day before went to the area to clean it up. The respondent told all to come to the front of the room for attendance. The pupils in the sand-casting area did not respond. The respondent called them three or four times from behind her desk. She then threw a pair of pliers toward the back of the room. The respondent was standing when she threw the pliers. She threw them with her right hand and the throw was an overhand throw.

The witness stated that he had an unobstructed view of the respondent from approximately seven feet away. While the pliers were in midair, another pupil, E.L., called out, "Watch out." The pliers then hit R.S. in the eye. This witness saw the pliers hit R.S. He testified clearly that the pliers did not strike anything while in flight between the respondent's hand and the pupil who was struck. The witness also testified that the respondent did not slip while throwing the pliers. He did not see the respondent waving her arms before the throw. On exhibit P-1b, the witness indicated where the respondent was standing when she threw the pliers.

D.S. wrote a statement concerning the incident approximately two weeks later in a school administrator's office (P-3). The administrator said nothing to him about the incident before he wrote his statement. He had talked about the incident with other pupils between October 16 and the day he wrote the statement. It is uncontroverted that the statement contains a conclusion on the part of D.S. that the respondent threw the pliers as the result of the failure of the pupils in the sand-casting area to heed her requests to come forward for attendance taking purposes.

D.S. also described the line and arc in which the pliers traveled between the respondent's hand and R.S. He also testified clearly that the respondent did not stumble or slip. Immediately after the pliers struck R.S., the respondent ran to the back of the room. When she reached R.S. she said, "I'm sorry, I'm sorry."

The respondent took R.S. out the back door of the shop room which is located near the sand-casting area. Another shop teacher then came in and took control of the class while the respondent took R.S. to the nurse's office.

E.W.L. testified that he was in the respondent's shop class during period six on October 16, 1984. On exhibit P-1c he identified where he was standing some 15 to 20 feet

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from the sand-casting area. Upon entering the room, he had asked the respondent if he should turn on a furnace. He proceeded to the furnace and began to make it ready for operation. Four or five boys went to the sand area to clean it. The witness heard the respondent call three or four times to the boys in the sand area. They did not hear her, but he did. The respondent then picked up the pliers, started toward the pupil seating area and threw the pliers, striking R.S.

This witness stated that he saw the respondent throw the pliers. He said, "Watch out! She's going to throw something." He called this out before the respondent threw the pliers. All boys in the sand area turned around. R.S. turned last and was immediately struck in and near his eye.

E.W.L. also testified that the respondent did not wave her arms before throwing the pliers and that the pliers did not ricochet or strike anything while in flight between her hand and R.S.

Exhibit P-4 is a statement written by E.W.L. at the request of the principal of the school. He wrote the statement a few weeks after the incident and gave it to the principal. He reiterated that he called out before the respondent threw the pliers.

The witness also testified that the respondent generally wore sneakers while in the shop room but that he could not recall specifically what her clothing or footwear were on October 16. His testimony was clear that the respondent did cock her right arm, her left arm remaining in a normal walking position. He watched the flight of the pliers. The top of the arc was perhaps three or four feet about his head. After the pliers struck R.S. the respondent came up to R.S. at a fast walk. She said twice, "I'm sorry." The respondent wiped blood from R.S.'s eye with her thumb and took R.S. out through the back door of the shop room.

S.S. testified that she was in the shop room during the sixth period on October 16, 1984. She arrived on time and went to her seat near the teacher's desk. She was in her seat at all times until the incident. On exhibit P-1d she identified where she was sitting, where she saw the respondent and the approximate point from which the respondent threw the pliers.

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S.S. had no recall of what the respondent said while she was trying to take attendance. S.S. does recall that the room was not coming to order. She recalls that several boys were in the sand-casting area for cleanup purposes and that E.W.L. was at a furnace on the far right hand side of the room.

The witness stated that she had an unobstructed view of the respondent throughout the incident. She heard E.W.L. exclaim, "Look out." The witness looked up, saw the pliers in the air but did not see them strike R.S. The witness stated she did not believe the respondent slipped as she began her throwing motion. The witness could not say whether the respondent was waving her arms immediately before the throw because she was not looking at the respondent at all times.

The witness also indicated on exhibit P-1d the approximate locations of E.W.L., two hexagonal shop tables and certain machinery. S.S. also stated she believed the pliers were traveling "pretty fast" but that she could not judge the height of the path the pliers followed.

When the respondent left through the rear door with R.S., the witness could not see if the respondent touched R.S. A teacher from another shop entered almost as soon as the respondent left with R.S. He was running. He slipped as he came through the sand area.

Approximately one week later, S.S. wrote a statement (P-5) concerning what had happened on October 16. The exhibit is generally consistent with her testimony at hearing.

R.S. testified. On exhibit P-1e, he indicated where he was in the sand area at the time of the incident. Upon entering the class, he went to the sand-casting area. The respondent had told him and other pupils to clean up the area. He put his books on his desk and proceeded to the area. The witness identified the pupils who were with him in the casting area.

R.S. stated he was pushing dirt onto a piece of sheet metal when he heard a cry, "Watch out." He looked up and was struck by an object he did not see coming. He had been in the sand area perhaps ten minutes when the incident occurred. He did not hear the respondent call the group to the front of the room for attendance. He did not know who threw the object. He put his hand over his eye and started yelling.

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The respondent took him by the arm, through the rear door of the shop and to the nurse's office. The respondent told R.S. to relax. The nurse put ice on his eye after wiping away blood from the area.

Exhibit R-1 is a two-page statement made by R.S. on November 20, 1984. This statement was given to a Maplewood Police Department detective. R.S. testified that the pliers struck his right eye. He suffered two lacerations around the eye, one above it and one below. There were three lacerations on the cornea. He was out of school for a week and three days because of the injury.

The Columbia High School vice principal testified over the objection of the respondent to a prior incident. In October 1983, a pupil claimed that the respondent had thrown a metal bar at him. The vice principal testified that this particular pupil had had disciplinary problems before. When he heard the pupil's story, he questioned the pupil and sent him on to his next class. He then checked with the respondent. She said she had merely thrown away a scrap and had not thrown it at anyone. The vice principal advised her that no matter the reason she threw the metal piece, it was an unwise action and should not be repeated. He believes she did throw the object because she said she did. However, he had no opinion as to whether she threw it at the pupil who made the complaint.

At this point, respondent's counsel renewed his objection to the line of questioning. I ruled that the witness himself gave the warning about throwing objects. Therefore, that portion of his testimony was not hearsay. Even if the earlier incident did not occur, it is a fact that the vice principal warned the respondent about throwing objects and it is a fact that she admitted throwing objects in the class although she did not admit throwing them at pupils.

Following cross-examination of the vice principal, the respondent moved to dismiss the charges. Having heard the parties' arguments on the motion, I found that there could be a finding of no intent to injure but still enough to call into question the teacher's comportment such that a penalty might be invoked. Making all inferences that might fairly be made in favor of the party not the maker of the motion I denied the motion to dismiss.

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The respondent testified. She has been a teacher at Columbia High School since September 1980 in the shop and home economics area. She is appropriately certified to teach those subjects and holds supervisory certification as well.

On the day in question, respondent says she wore high heels, stockings and a dress. She usually wore heavy slacks, sneakers and a shop coat in the shop area. However, she had to give a presentation to a home economics class in the third period and she dressed in a manner she thought appropriate to that presentation.

She shopped for home economics groceries early in the day, returning to the school at appoximately 11:00 a.m. She went to her lunch and at 11:16 a.m. went to the shop room. She did not change her clothing. The class had some 19 pupils enrolled. She went to her desk, put down the groceries and reminded one pupil to clean up the sand-casting area. She also told him to tell the others involved. As pupils entered the class she spoke to them from behind her desk. She discussed an upcoming field trip. She did not at any time go to her office located at the left rear corner of the room. Five pupils in all were involved in the cleanup of the sand-casting area.

The respondent testified that she normally takes attendance at approximately 11:20 a.m. On October 16, she was seated on a stool behind her desk. Some pupils were still talking to her and some pupils were still in the casting area at about 11:20 a.m. There was a high noise level in the room. The respondent called to the pupils in the back of the room. She waved both hands at them. She called four or five times but received no response. As she began to leave the area of the stool, her heel hooked on a rung but she extricated herself.

On exhibit R-3 the respondent indicated where she was at various points during that period. As she moved from behind the desk to a point between the desk and the sand-casting area, she picked up a pair of pliers that she intended to use to rap for attention. However, she believed they would not make enough noise to get the attention of the pupils in the sand-casting area. While at point B on exhibit R-3, she was still calling to the pupils in the sandcasting area. She proceeded to point N on the exhibit. At that point, she grabbed a chair because she was slipping on the floor. She did not fall, however. She was still calling to the group in the sand-casting area and waving. She received no response from the group. She continued to point O on the diagram. At this point the lift came off the heel of one of her shoes. She was calling to the pupils and

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waving her hands. One pupil had begun packing a mold with a mallet which increased noise in the area. While still moving toward the pupils in the sand-casting area and waving both hands over her head, the pliers left her hand. The pliers described a high arc, perhaps 15 feet off the floor, and landed on R.S.'s right eye.

The respondent did testify that E.W.L. said, "She's going to throw something." The witness saw the pliers hit R.S. She immediately ran toward him. She had difficulty running but did not fall. R.S. was bleeding in the area of his right eye. She stated, "I'm sorry, I'm sorry." R.S. said, "My eye's hurt."

The witness placed one arm around R.S. and one hand on his eye. She got him out the rear door of the room to a parking area. She saw an automobile shop teacher. She called to him and he ran over to where she and R.S. were standing. The witness stated, "[R.]'s been hurt. Cover my class. I'm taking him to the nurse."

The respondent took R.S. to the nurse and tried to calm him down while keeping his eye closed. While in the nurse's office she tried to joke with R.S. because he was crying. She said she would not leave him and would tell him anything the nurse said about the injury.

The witness stated she was not angry at the sand-casting group. "They did not even flinch at my level of voice." The witness stated that was how she knew they did not hear her. She saw her own physician on October 17.

The witness testified as to the October 1983 incident with a pupil, C.D. The witness stated that C.D. was disassembling a pupil desk during a lecture. She stopped him and he "offered verbal abuse," but agreed to stop. However, he did not stop. C.D. then displayed the disassembled desk to her. She ordered him to the vice principal's office. He handed her a three-eights inch metal rod approximately ten inches long. She tossed the rod into a metal trash can approximately six feet away. C.D. was to the right of her at this time. The rod never touched C.D. or any other pupil.

The vice principal brought up the incident with the respondent and asked her to describe what happened. He explained that he followed up any incident in which C.D. was involved. There had been prior problems with C.D. and the witness had sent C.D. to the vice principal's office before. No reprimand or any notation of any kind concerning this incident appears in her personnel file (R-4).

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The witness stated she had made no determination to throw the pliers at any time. She merely released them from her hand when she lost her balance.

On cross-examination the witness testified as to her earlier testimony in the Maplewood Municipal Court on January 21 and about observations and evaluations of her teaching generally.

As to the incident, the respondent testified that when the pliers left her hand, she did not call out. She had not fallen. She saw the pliers in flight but did not say anything.

She had called to the group in the sand-casting area many times. Her voice got louder the last few times she called to them. The pliers were in her hand when she got off the stool near her desk. She does not know why she did not put the pliers down. She could have put them down in any of several places. There were some inconsistencies between the witness' testimony here and in Maplewood Municipal Court.

The respondent further testified that she was having trouble walking yet continued to wave her arms at the same time she was calling to the group in the back of the room. She did, at one point, grab onto a desk. The witness indicated her progress on exhibit R-3. When she reached point O, she stated, "I couldn't believe they weren't listening to me." The room was noisy. Since one pupil looked at her, she believed at least he was ignoring her.

The witness was not sure if the pliers still were in her hand at this point. During her walk toward the sand-casting area, she asked the pupils perhaps three more times to come to the front for attendance taking purposes. Although her voice was as loud as it can get, she was not angry. She slipped before she leaned on a table. She is not sure the pliers left her hand before she leaned on the table. She did not hold onto anything when she slipped and let the pliers go. She did not fall when she slipped and let the pliers go. Her right foot went forward and her right ankle went outward. Her body shifted to the right. She had stopped waving when her ankle slipped. Her hands were still over her head at this time. At point O, her right ankle twisted, her body went to the right and the pliers went forward traveling some 25 feet.

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The witness identified exhibit P-6, a report of pupil accident dated October 17, 1984. She identified her signature on the document and stated she completed part of the document.

An industrial arts teacher who was entering the adjoining classroom at the approximate time of the incident testified. He stated that he was on his way to a study hall and locking his outside door. The respondent called to him and he ran over. She was holding R.S. R.S. was bleeding in the area of the right eye. The respondent was trying to calm him down.

The teacher stated he ran into her classroom and went through the sand-casting area. He went 10 to 15 feet into the room, slipped and fell. He observed that the area was clean. There was no dirt on the floor. He got up, proceeded more slowly and got some paper towels. He believed the floor in the area of the pupil desks was slippery.

He also testified to a memorandum circulated at the beginning of the school year stating that floors would be swept with a sweeping compound. The witness testified that on October 15, his shop had been swept with the compound.

On cross-examination the witness stated that he ran into the room through the rear door and proceeded through the sand-casting area. He stepped on the sand that was on the floor in the area and continued to run into the room. He was within 15 feet of the door when he slipped. In the Municipal Court proceeding he had stated he was between 10 and 15 feet from the door. He reiterated here that he was within 15 feet of the door.

II.
BOARD'S ARGUMENTS

The Board contends that it presented student eyewitnesses whose testimony was remarkably consistent. All witnesses heard the respondent speak with a raised voice to the students in the sand-casting area. All heard repeated requests by the respondent that the students come forward in the classroom for the taking of attendance. All saw the respondent pick up a pair of pliers from her desk. They demonstrated her throwing motion in winding up and throwing the pair of pliers. Three of the four student witnesses actually saw the pliers released from the respondent's hand. The fourth student, S.S.,

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noted that the respondent was angry when she picked up the pliers and engaged in the throwing motion. E.W.L. testified that he called out, "Watch out. She's going to throw something."

Although the four pupil witnesses placed the respondent in slightly different places at or about the teacher desk, all had an unobstructed view of her. All saw her wind up and engage in a throwing motion with the pliers. All testified that she did not slip when she threw the pliers. All testified that she did not wave while walking carrying the pliers. All testified that the floor in the area from which the respondent threw the pliers was not slippery.

Although the respondent stated she spoke to the pupils in the sand area in a progressively louder voice, she testified that at all times she was not angry. She also testified that she picked up the pliers and got up from the desk waving the pliers above her head. She testified that her right ankle gave way and that she fell toward the right. Yet, she testified that the pliers flew forward. She testified that her slip was such as to cause the pliers to leave her hands, but she did not fall to the floor or grab onto any object. Based on the respondent's testimony, the pliers flew approximately 24 feet. The respondent never called out with any form of warning to the pupils in the rear of the room.

There were some inconsistencies between the respondent's testimony at the hearing at Maplewood Municipal Court and at the hearing in this proceeding. In the Municipal Court, the respondent testified that she picked up the pliers because she wanted to make a loud noise by banging them on the desk. She testified that she did not hammer them on the desk because the desktop was new and she did not want to hurt it. Yet, in the present proceeding, she testified that she did not use the pair of pliers because it would not make any noise and that she had obtained the desk before the start of the school year.

The respondent also testified at the Municipal Court proceeding that she was waving her arms in a "come up here" motion and demonstrated that she was essentially waving both of her arms above her head in a beckoning manner. At the present hearing, she testified that she was just waving her hands above her head in no particular manner.

Importantly, the respondent has not answered questions such as why she picked up the pliers, why she did not put them down on her desk or why she did not put them

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down on some other object as she was walking. Still unanswered is the question of how one can wave pliers in a random fashion above one's head, walk, slip and yell all at the same time but not give any warning.

Perhaps the most serious question is how pliers can accidentally fly such a long distances. According to the respondent, the distance was approximately 24 feet. According to the pupil witnesses the distance was approximately 40 feet. It is incredible that a pair of pliers could fly such a distance as a result of an ankle twist.

Although the respondent claims she was not angry, she also stated that she saw the pupils looking directly at her without reacting to her loud voice and gyrations. It seems clear that the respondent lost control of herself and threw a pair of pliers at students some 40 feet distant. As a result of her action, a pupil was seriously injured and required medical attention.

The Board urges it should be noted that one incident of behavior may prove the unfitness of a teacher to remain in a classroom if the incident is sufficiently flagrant. Redcay v. State Bd. of Ed., 130 N.J.L. 369 (Sup. Ct. 1943), aff'd 131 N.J.L. 326 (E. & A. 1944). There can be no question in this action that the throwing of pliers is a dangerous act. In In the Matter of the Tenure Hearing of Thomas Tiefenbacher, OAL DKT. EDU 978-81 (Jan. 6, 1982), mod. Comm'r of Ed. (Feb. 22, 1982) mod. St. Bd. of Ed. (Aug. 6, 1982), remanded, App. Div. (Dec. 5, 1983), St. Bd. decis. on remand (Sep. 5, 1984), the State Board looked at several factors in determining a penalty in a corporal punishment case. Among those factors to be considered is whether an action by a teacher against a pupil occurred during "the heat of a contest," such as in a physical education class or in an athletic event. These circumstances just do not exist in the present case. In addition, the State Board referred to an analysis of provocation by a student as a mitigating factor. Again, there is no such circumstance in the present situation.

The respondent failed to deal adequately with a discipline problem. Her response to the discipline problem was unprofessional. She picked up a dangerous object and threw it. Whether or not she actually intended to strike R.S. or any student is immaterial. The act of throwing a pair of pliers across a classroom toward a crowd of pupils is a dangerous and reckless act. The respondent failed to exercise the self-control that a board may rightfully expect from a teacher. She failed to control her anger. Instead, she threw a dangerous object.

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The Board contends that the respondent had been warned not to throw objects in a previous incident. The vice principal testified that he warned her in 1983 not to throw objects in a classroom. What is more, the respondent admitted that she had thrown a metal bar while in class during the 1983 incident.

The Board states it is concerned about the respondent's continued ability to teach. Although she appears to be a calm and rational person, there seems to be a point at which she loses control. In the present case, she threw a pair of pliers and nearly inflicted a blinding injury. The Board urges this tribunal not to return the respondent to the classroom. The throwing of a pair of pliers is by itself a sufficiently flagrant act to warrant dismissal. Teachers who deal with discipline by throwing objects are incompetent because they fail to exhibit the appropriate behavior of a teacher and because they lack the self-control necessary to deal with everyday problems in a classroom.

Although there may be some hesitancy to dismiss a teacher for what appears to be a single incident, this incident was so egregious as to endanger the health and safety of pupils. The Board has proven that the respondent intentionally threw metal pliers between 24 and 40 feet across a classroom into a group of pupils who were misbehaving. The pliers struck and seriously injured a pupil. The Board has an obligation to insure the health and safety of its pupils. The respondent is a threat to her pupils because of her inability to control herself when a discipline problems arises. The Board respectfully urges that this tribunal find the tenure charges proven and dismiss the respondent.

III.
RESPONDENT'S ARGUMENTS

The respondent argues that the Board's burden is to prove every aspect of its allegations. When charges of intentional, reckless, grossly negligent, negative, incompetent and unbecoming conduct have been preferred, all aspects must be affirmatively proven for the charge to be upheld. Tenure Hearing of Nies, 1963 S.L.D. 172. (Twenty-eight separate charges dismissed for a lack of proof of the specific allegations made in the charges). The Board has made the charges against the respondent presently under consideration. Therefore, it has the burden of establishing the truth of these charges by a preponderance of the credible testimony. See, Tenure Hearing of Grossman, 127 N.J. Super. 13 (App. Div. 1974); N.J.A.C. 1:1-15.1.

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The decision in Nies, above, makes clear that if the Board chooses to charge the respondent engaged in "intentional, reckless or grossly negligent conduct," then the Board bears the full burden of proving such conduct. The respondent states that the Board has not met this burden and the charges should be dismissed.

The Commissioner of Education has established the general rule that the testimony of children is to be examined with great care. Tenure Hearing of Cortese, 1972 S.L.D. 109, 118. The most frequently cited authority in this regard is found in Palmer v. Audubon Bd. of Ed., 1939-49 S.L.D. 183, 188:

> It is the opinion of the Commissioner that the testimony of children, especially of those ten years of age, against a teacher, whose duty it is to discipline them, must be examined with extreme care. It is dangerous to use such testimony against a teacher; it is likewise dangerous not to use it. The necessities of the situation sometimes make it necessary to use the testimony of school children. If such testimony were not admissible, the children would be at the teacher's mercy because there is no way to prove certain charges except by the testimony of children.

See also, Tenure Hearing of Connolly, 1971 S.L.D. 305, 313.

The Board's case relied almost entirely on the testimony of five pupils witnesses. Contrary to the assertion of the Board, however, the pupils were anything but remarkably consistent. Each witness was provided the opportunity to physically outline the location of furniture and equipment in the metals shop and to denote the locations of the principle actors during the incident of October 16, 1984. Pupils variously testified that the respondent was in front of her desk or still behind it when the pliers were thrown. Some of the pupils recall the presence of a welding frame, some did not. The pupils were inconsistent in their testimony as to the path the respondent traveled after coming out from behind her desk. One pupil claimed the respondent first went to her office as opposed to immediately locating herself at the front desk.

All of the pupils had different descriptions of the path the automobile shop teacher traveled when arriving at the scene. One claimed he did not fall. Those who did recall seeing him fall identified different locations as to where the fall occurred.

Each of the pupils recalls hearing the respondent call to the students in the sand-casting area. None, however, recalled the exact number of times or the exact

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language used. Only one pupil claimed that the respondent appeared angry. One pupil recalled the respondent coming within the vicinity of his chair and touching it. None of the other pupils identified this fact or had any recall when the question was put to them.

All of the pupils had differing recollections of which pupils were working in the sand-casting area. Most of the pupil witnesses failed to recollect the respondent's manner of dress. Those that did claimed she wore a smock and overalls. The respondent's own testimony was to the contrary. None of the pupils recalled the respondent's footwear, although that is a material fact in issue. The pupil witnesses also differed on the path that the pliers traveled through the air.

The respondent also contends that this tribunal must evaluate the pupils' ability to perceive, to understand to relate and their sincerity. When one views their testimony, a great many inconsistencies and discrepancies can be explained by the fact that none of them was ever completely tuned in to the event. Certainly, each saw pieces of the puzzle at varying times. None, however, could present the whole picture in a manner legally consistent with the testimony of the others or the testimony of the respondent.

There is no dispute that a great deal of activity was going on both in front of and in back of the room. One pupil claims she was seated next to another and that both were speaking and working on homework. Still another pupil was also speaking with friends. A third was apparently preoccupied with turning on a furnace. R.S., of course, did not know what was going on until he was injured. All of the pupils admitted to having either blocked vision at some point or to not witnessing the complete path of the pliers from the time they left the respondent's hand to the time it hit R.S.

Only the respondent's testimony could consistently describe the events which transpired from beginning to end. Even though the Board urges a wholesale adoption of the pupil testimony, it is clear that such a result is fraught with the very dangers the Commissioner has warned against.

The respondent testified that she entered the metal shop after coming from lunch and having shopped for groceries for her home economics class. Upon entering the room, she placed the groceries on her desk and located herself behind the desk. Because of the time, she did not go to her office to change her clothing. Instead, she remained in

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her dress and high heels. The lifts on the heels were either worn or loose. Respondent did not put on a work smock as was her usual practice.

Upon entering the shop earlier that day, respondent slipped on sand which was located on the floor in or about the sand-casting area. This area had not been cleaned properly the day before by those metals shop students using it. Accordingly, as those pupils entered the room on October 16, the respondent directed them to go to the sand-casting area to clean it up. She then began answering questions of certain other pupils relating to a planned field trip and required permission slips associated with the trip.

A few minutes later, the respondent determined to take attendance. She was still behind her desk when she called to the pupils in the back of the room to come forward. The pupils did not hear her, so she called a few more times. There still was no response.

There was a pair of aluminum pliers on the desk. The respondent picked them up to rap the desktop and make a noise which would attract the pupils' attention. She did not actually rap the desktop because she felt it would not make a loud enough noise and because the desktop was new. The respondent explained that she usually hit the desktop with a rubber malet, and therefore did not want to chip the desk with the pliers.

The respondent then went around her desk and toward the sand-casting area (R-3). She stated she was having difficulty walking in her heels and at one point had to touch a pupil's chair for support.

While proceeding toward the back of the room, the respondent continued to call to the pupils. She states she was beckoning them forward by waving her hands above her head. While always in control, she could not understand why the pupils could not hear her, especially since at one point one pupil appeared to be looking directly at her. Nevertheless, there came a point at which, with her hands still above her head and the pliers in one hand, the respondent's right ankle slipped, causing her to lose balance. While she did not fall, the pliers left her hand. The pliers traveled a distance of approximately 20 feet in a high arc. At the time the pliers left her hand, one pupil noticed what was happening and called a warning to the pupils in the back of the room. All of the pupils heard the warning and as R.S. turned to see what was happening, he was hit by the pliers in the area of his right eye.

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The respondent immediately went up to R.S., assisted him out the rear door of the room and repeatedly apologized. After securing class coverage from the automobile shop teacher, she took R.S. to the nurse's office and remained with him to calm him and give whatever aid and comfort she could. The respondent candidly and forthrightly admits that the pliers left her hand and traveled a distance, coming in contact with R.S. From her point of view, however, the facts disclosed that the act was entirely accidental and not in the manner characterized by the Board.

The respondent again urges that the Board's proofs failed completely to establish intention, reckless action. At hearing, the respondent pointed out that case law does not define such terms. In the civil arena, cases distinguish between intentional, reckless or negligent conduct and how in the Law of Torts those concepts are applied in this State. The respondent maintains, and I agree, that there is no such cause as "gross negligence" in this jurisdiction. See, Draney v. Bachman, 138 N.J. Super. 503 (Law Div. 1976); Foldi v. Jeffries, 93 N.J. 533 (1983).

The respondent also submits that the Board failed to prove any measure of incomptence as that term has been defined by the Commissioner. Tenure Hearing of Sokolow, OAL DKT. EDU 6440-81 (Nov. 5, 1982), aff'd Comm'r of Ed. (Dec. 20, 1982).

At hearing and over the respondent's objection, the Board was permitted to allow the vice principal to testify about an incident involving a pupil, C.D., in respondent's classroom the year before. While the respondent still objects to the line of testimony, it is now submitted that absolutely no weight should be accorded to the incident. Not only are the incidents not comparable in nature, but by the vice principal's own admission, C.D. was an habitual troublemaker. The vice principal had no personal knowledge of the event and thus the residuum rule of legally competent evidence requires the testimony be disregarded.

The Board, in its brief, for the first time suggests that the respondent was faced with a disciplinary situation. This, in the respondent's view, is a novel suggestion because the charges fail to allege the existence of a disciplinary matter. No testimony addressed a claim of discipline. In reality, the "bootstrap" danger of allowing the testimony about C.D. in 1983 has manifested itself in the Board's posthearing submission.

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The range of remedies available in a tenure matter is wide. To the extent that a violation is determined to have occurred, the remedies may include censure, censure with forfeiture of salary for a period of time, a letter placed in the teacher's personnel file, a fine, no penalty other than anguish and humilitation, or dismissal. The respondent contends that the facts of this case support a conclusion that an unfortunate accident occurred. At best, the Board has demonstrated an unintentional oversight or an error of judgment. Tenure Hearing of Maratea, 1966 S.L.D. 77. Such an isolated event in an otherwise unblemished career is not sufficient to warrant dismissal of a tenured teaching staff member. There was absolutely no evidence of provocation or premeditation. Indeed, R.S. admitted that he did not think the respondent intended to hit him. The respondent did not come before this tribunal and deny what occurred. To the contrary, she demonstrated that she is not an incompetent teacher and that her conduct should not be characterized as intentional, reckless, negligent or unbecoming.

The respondent is not unable to control herself. Nothing snaps in her mind when she fails to get a response she desires. If her propensity for violence is as strong as the Board contends, the Board clearly failed to reveal this alleged character trait at hearing.

Furthermore, if the respondent intended to do that which is claimed, she could simply have thrown the pliers in the first place. She did not have to call to the pupils six or eight times and she did not have to move in their direction.

The respondent has had not only to defend herself in this proceeding. She was acquitted of assault charges in the Maplewood Municipal Court arising out of the same set of facts. In that proceeding, she faced the humilitation and pain of not only having to face the pupils, but the community at large. She has, in essence, been run through the gamet of the criminal justice system only to have the whole process repeated in an administrative forum. She was suspended from her position without pay and witnessed the Board's termination of the metal shop class because it failed to obtain a replacement teacher or substitute. Thus, her actions have not only caused her extreme financial hardship, she has experienced the disappointment of seeing all her planning and effort go for naught.

The respondent is not the intense, excitable individual that the Board would have this tribunal believe. The pupils failed to show any fear of the respondent or fear of

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retribution in the event they testified. This tribunal must realize that a dismissal based on tenure charges is a death knell for any teacher's career. Weighed against the respondent's background, dismissal is unwarranted.

IV.

Having heard and observed the witnesses as they testified, I **FIND** the testimony of the pupil witnesses to be credible. In contrast to Palmer, above, we deal here with children of 14 years of age and more. Their testimony was consistent but not identical. This enhances rather than detracts from credibility. The witnesses, other than R.S. himself, all stated clearly that the respondent cocked her arm immediately before throwing the pliers. Although they stood at different vantage points within the room, a fact that helps to explain some of the minor inconsistencies in their testimony, all testified clearly and directly as to the throwing motion.

Common sense dictates that the respondent's version of the incident, although not patently incredible, is much less likely to have happened. I so **FIND.** I note nothing in corroboration of her testimony is offered. No physical evidence, such as the allegedly defective high heels, or supporting testimony is presented.

The testimony of the vice principal establishes that the respondent had been admonished in the prior year not to throw objects in the classroom. While not admitting that she had done anything more than throw a metal rod into a trash can, the respondent admitted the discussion between the vice-principal and herself did occur. Even if the earlier incident involving C.D. did not occur, it is a fact that the vice principal warned the respondent about throwing objects in the classroom and it is a fact that she admitted throwing objects in class. I so **FIND.**

Having considered all the evidence in this matter, particularly the testimony, I **FIND** that the South Orange-Maplewood Board of Education has proven the charge of conduct unbecoming a teacher against respondent. The tenure charges allege that she intentionally, recklessly or with gross negligence threw a pair of pliers across a room occupied by a class of pupils. It must first be noted that the charge is worded disjunctively, that is, the action was intentional or reckless or grossly negligent. The respondent makes much in her brief of the legal meanings attached to these words and the quantums of proof that are necessary to establish each.

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Under the present circumstances, this is a semantic quibble. The Board has shown that the pliers were thrown intentionally and that alone establishes conduct unbecoming a teacher.

I **FIND** that Nancy Simonic did, on October 16, 1984, intentionally throw a pair of pliers across the metals shop classroom, a distance of nearly 40 feet, and that the pliers struck and injured a pupil, R.S. I **CONCLUDE** that the establishment of these charges requires the dismissal or reduction in salary of the respondent.

V.

In Tenure Hearing of Appleby, 1969 S.L.D. 159, the Commissioner stated:

> While the Commissioner understands the exasperations and frustrations that often accompany the teacher's functions, he cannot condone resort to force and fear as appropriate procedures in dealing with pupils, even those whose recalcitrance appears to be open defiance. The Commissioner finds in the century-old statute prohibiting corporal punishment (N.J.S.A. 18A:6-1) an underlying philosophy that an individual has a right not only to freedom from bodily harm but also to freedom from offensive bodily touching even though there be no actual physical harm. In the Matter of the Tenure Hearing of Frederick L. Ostergren, 1966 S.L.D. 185, 186. The Commissioner said further, In the Matter of the Tenure Hearing of David Fulcomer, 1962 S.L.D. 160, 162, remanded State Board of Education 1963 S.L.D. 251, decided by the Commissioner 1964 S.L.D. 142, affirmed State Board of Education, 1966 S.L.D. 225, reversed and remanded 93 N.J. Super. 404 (App. Div. 1967), decided by the Commissioner 1967 S.L.D. 215,
>
> > That such a philosophy with its prohibition of the use of corporal punishment or physical enforcement does not leave a teacher helpless to control his pupils. Competent teachers never find it necessary to resort to physical force or violence to maintain discipline or compel obedience. . . .
> >
> > The Commissioner cannot find any justification for, nor can he condone the use of physical force by a teacher to maintain discipline or to punish infractions. Nor can the Commissioner find validity in any defense of the use of force or violence on the ground that "it was one of those things that just happened". . . . While teachers are sensitive to the same emotional stresses as all other persons, their particular relationship to children imposes upon them a special responsibility for exemplary restraint and mature self-control.

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> Thus, when teachers resort "to unnecessary and inappropriate physical contact with those in their charge [they] must expect to face dismissal or other severe penalty." Ostergren, above, Appleby at 172-173.

In Tenure Hearing of Miller, 1973 S.L.D. 409, the Commissioner cited Tenure Hearing of Kittell, 1972 S.L.D. 535, 542, stating:

> [R]espondent has suffered the mental anguish of . . . a hearing which could result in the loss of his livelihood. In addition, respondent's professional reputation has been damaged and he will be required to exert himself to reestablish his reputation and standing because of his error.

After careful consideration, I **CONCLUDE** that summary dismissal of the respondent is an unnecessarily harsh penalty. This conclusion can in no way condone the respondent's intemperate behavior and loss of control no matter how momentary that loss may have been. Nevertheless, and in consideration of all the circumstances of this case, I determine that an appropriate penalty for the respondent will be the loss of her salary increment for the 1985-86 academic year in addition to the loss of salary previously withheld during her suspension. Therefore, I **ORDER** that Nancy Simonic be reinstated to her position as a teacher with a tenure status in the South Orange-Maplewood School District and further that she be paid a salary during the 1985-86 academic year which shall be the same as she received for the 1984-85 academic year.

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

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OAL DKT. NO. EDU 730-85

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

3 JULY 1985
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

JUL - 9 1985
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE TENURE	:	
HEARING OF NANCY SIMONIC, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF SOUTH ORANGE-	:	DECISION
MAPLEWOOD, ESSEX COUNTY.	:	
	:	

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

It is observed that exceptions to the initial decision filed by the parties as well as the Board's reply to respondent's exceptions have been filed with the Commissioner pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

The thrust of respondent's exceptions to the initial decision appears below:

> "1. THE DECISION BELOW ERRS IN CONCLUDING THAT RESPONDENT INTENTIONALLY THREW THE PAIR OF PLIERS ACROSS THE CLASSROOM."
>
> (Respondent's Exceptions, at p. 1)

Contrary to those findings in the initial decision, respondent maintains that she never intended to throw the pliers across the industrial arts room which struck the pupil, R.S., causing two lacerations around one of his eyes and three lacerations on the cornea of the eye. Respondent claims that the act she stands accused of by the Board was entirely accidental. She further claims that the judge, in concluding that she intended to throw the pliers across the industrial arts room, completely ignored or rejected her attempts to show in the alternative that her conduct with regard to this incident was reckless or negligent rather than intentional. Respondent, in support of this contention, relies on the interpretation of "reckless conduct" given by the courts in re McLaughlin v. Rova Farms Inc., 56 N.J. 288 (1970) and Draney v. Bachman, 138 N.J. Super. 503 (Law Div. 1976) to distinguish between her conduct and that defined as "knowing" or "purposeful" in the New Jersey Criminal Code, N.J.S.A. 2C:2-2(b)(1-4) and supporting case law.

Additionally, respondent argues as follows:

> "***Conspicuously absent from this case are any findings that respondent's acts were provoked or committed with premeditation. Indeed, it is significant that even R.S. admitted that he did not think respondent intended to hit him with the pliers. (Exhibit R-1)

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> "If in fact she intended to do that which is claimed why walk from in back of her desk to the point at which the pliers ultimately slipped from her hand? (R-3) Why not just throw the pliers in the first place instead of calling to the students six to eight times? All of the facts point to an accidental occurrence, or at best a negligent act on respondent's part. There was clearly no intent as found.***"
>
> (Respondent's Exceptions, at pp. 3-4)

Respondent's next exception to the initial decision reads:

> "2. THE DECISION BELOW GAVE UNDUE WEIGHT TO THE TESTIMONY OF STUDENTS." (Id., at p.4)

In this regard respondent relies on those prior decisions of the Commissioner in Cortese and Connolly, supra, which are also discussed by the judge in the initial decision in arriving at a contrary finding and conclusion.

Respondent argues further in her exceptions (at pp. 4-6) that there were sufficient discrepancies in the testimony of the Board's five pupil witnesses upon which the judge relied to constitute reversible error in the instant matter.

Respondent's concluding exceptions to the initial decision are as follows:

> "3. THE PENALTY IMPOSED IS TOO HARSH UNDER THE CIRCUMSTANCES.
>
> * * *
>
> "4. IT WAS ERROR TO PERMIT THE BOARD TO INTRODUCE EVIDENCE OF 'ALLEGED PRIOR ACTS'.***"
>
> (Id., at p. 6)

With regard to the recommended penalty to be imposed upon her, respondent argues that in the event that the Commissioner affirms the initial decision, the penalty recommended by the judge, constituting loss of the first 120 days' salary during the pendency of the tenure proceedings and the loss of her salary increment for the 1985-86 school year, is excessive and unwarranted.

In support of this contention respondent urges the Commissioner to consider the humiliation and pain she has previously suffered in successfully defending herself against assault charges related to this incident in Maplewood Municipal Court; her prior unblemished record of employment service; and the fact that she faced further humiliation and pain confronting her pupils and the community at large as the result of the unfortunate incident that occurred in her classroom. Finally, respondent strenuously objects to the judge's determination during the hearing in this matter which

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permitted the Board to introduce evidence of "alleged prior acts" involving an incident with a pupil in her classroom a year before the incident in question.

Conversely the Board urges the Commissioner to affirm those findings in the initial decision for the reasons stated therein. However, the Board disagrees with the penalty recommended by the judge to be imposed against respondent. It is the Board's position that it has proven the charge of unbecoming conduct against respondent which therefore warrants dismissal from her tenured teaching position.

In its exception to the penalty to be imposed the Board states the following:

> "***In essence, Judge Campbell has concluded that respondent has a history of throwing objects, has been warned about throwing objects, and has intentionally thrown a pair of pliers seriously injuring a student. Nevertheless, Judge Campbell has recommended that she be given still another chance. The Board is concerned about endangering the health and safety of the students who may in the future be subjected to respondents behaviour. While Judge Campbell notes that his recommended penalty 'in no way condones the respondents intemperate behaviour and loss of control,' Judge Campbell's initial decision would give Ms. Simonic other opportunities to throw objects in the classroom. It is urged that pupils must not be subjected to the risks associated with the attendance in Ms. Simonic's classroom again. Already one student has been seriously injured. Already she has been warned. The gravity of this situation requires only one result - Ms. Simonic must never be permitted to teach in a classroom. Although it may seem harsh to punish Ms. Simonic for one or two incidents, it seems clear that the seriousness of these incidents requires that pupils not be subjected to the risk of serious injury in Ms. Simonic's classroom.
>
> "In the October 16, 1984 incident, Ms. Simonic admitted that she progressively raised her voice to youngsters who were ignoring her instructions. She lost control and intentionally threw a pair of pliers nearly forty feet. A pupil was seriously injured. It seems that the events leading to the injury constitute a typical discipline problem. These (sic) can be no question that if Ms. Simonic were permitted to return to the classroom, she will face other discipline problems. One can only wonder whether

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> Ms. Simonic, when faced with another discipline problem, will throw objects again. The Board requests that students not be placed at risk. As an industrial arts teacher, Ms. Simonic has access to dangerous objects. Judge Campbell found that she has already intentionally thrown pliers. One cannot imagine a more flagrant situation requiring that a teacher not be permitted to teach again. The risks are too severe.***" (Board's Exceptions, at pp. 2-3)

Moreover, the Board in opposing respondent's exceptions to the initial decision makes the following rebuttal:

> "***The Board wishes to comment however upon some of the claims made by the respondent on page 3-4 of its exceptions. Respondent claims that "Conspicuously (sic) absent from this case are any findings that respondent's acts were provoked or committed with premeditation." Indeed, it is significant that even R.S. admitted that he did not think that respondent intended to hit him with the pliers.' Initially, the Board wishes to note that R.S. is the victim of respondent's act and testified that he did not see her throwing the pliers. Any opinion by him as to whether she intended to hit him is of no value. Moreover, respondent's acts were admittedly not provoked by any threat by students. Rather, respondent's acts were intentional and as a result of her inability to control the pupils at the rear of the room.
>
> "Much of the remainder of respondent's exceptions concerns so-called inconsistencies in the student testimony. Respondent has chosen to magnify minor inconsistencies so as to question the credibility of students. This tactic should not be permitted to obliterate the consistent testimony of students in this proceeding. Four students saw Ms. Simonic cock her arm and engage in a throwing motion. One student observing this motion actually warned other students about her intended throw - even before the pliers left her had. If the pliers had left her hands as a result of an accident, it is inconceivable that a student could actually have predicted this accident take place.***"
>
> (Id., at pp. 2-3)

Upon review of the respective positions advanced by the parties in the instant matter, the Commissioner is not persuaded by the exceptions taken by respondent to those findings of fact set forth in the initial decision.

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Initially it must be pointed out that the tenure charge of which respondent has been found guilty herein is that of unbecoming conduct pursuant to the applicable provisions of N.J.S.A. 18A:6-10 et seq. In this regard the Commissioner finds and determines that respondent's reliance upon those definitions set forth in the New Jersey Criminal Code, N.J.S.A. 2C:2-2(b)(4) and other case law to refute the judge's findings that she intentionally threw the pliers across her metal shop classroom is misplaced and without merit. The Commissioner is not required to apply the same standard of review employed in criminal proceedings for the purpose of reaching a final determination of the tenure charge against respondent.

Moreover, while it is true that great care must be given to the examination of the testimony of those pupils who testified against respondent at the tenure hearing, nevertheless, upon examination and review of the entire record before him, the Commissioner finds and determines that it would be "***dangerous not to use it.***" Palmer, supra at 188; Cortese, supra at pp. 118-119

In affirming those findings of fact reached by the judge in the initial decision, the Commissioner relies upon the standard of review laid down by the court in Mayflower Securities v. Bureau of Securities, 64 N.J. 85 (1973), wherein the court held as follows:

> "***The thoroughly established scope of judicial review of administrative adjudications is limited to determining whether the findings made could reasonably have been reached on sufficient credible evidence present in the record considering the proofs as a whole, with due regard to the opportunity of the one who heard the witnesses to judge their credibility.***"
> (at 92-93)

What remains for the Commissioner's determination is the penalty to be imposed upon respondent who has been found guilty herein of conduct unbecoming a tenured teaching staff member. The facts of this matter establish that respondent had previously been admonished by the vice principal about throwing objects in the classroom. Respondent admits to this prior conduct. Having been forewarned that such conduct was unacceptable, respondent did, in fact, intentionally throw a pair of pliers approximately 40 feet across her classroom in metal shop occupied by pupils. The consequence of this action resulted in a serious eye injury to one of the pupils for whom she was responsible. It must be noted at this juncture that the regulations promulgated by the State Board of Education pertaining to school safety (N.J.A.C. 6:29-5.1 et seq.) mandate that the following procedures be implemented and complied with by shop teachers:

> "***(c) Shop equipment shall not be used for any purpose other than shop instruction. The shop teacher shall be held responsible for the condi-

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tion of shop tools and equipment, and he shall have full authority for its use for instructional purposes only.***" (Emphasis supplied.)
(N.J.A.C. 6:29-5.2(c))

The above-cited regulation is unequivocal insofar as it specifically places the responsibility upon all shop teachers including respondent to insure the safety of pupils enrolled in courses such as metal shop where the possibility of a serious accident is more prevalent without proper instruction as to the use of school shop equipment.

Respondent, by her own action, violated the provisions of N.J.A.C. 6:29-5.2(c) and thereby caused a serious injury to one of her pupils. The Commissioner finds respondent's conduct intolerable for the reason stated herein and, further, because her action presents a totally unacceptable standard for pupil behavior under similar circumstances.

Accordingly, the Commissioner finds and determines that respondent's conduct with regard to the single incident controverted herein was sufficiently flagrant and of such magnitude to warrant her dismissal from her tenured teaching position. The Commissioner relies on Redcay, supra, in support of this determination.

In view of the above, respondent is hereby dismissed from her tenured teaching position in the School District of South Orange-Maplewood as of the date of the filing of this decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 23, 1985

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5928-84
AGENCY DKT. NO. 303-7/84

WILLIAM F. CARROLL, JR.,
Petitioner,
v.
BOARD OF EDUCATION OF THE SUSSEX-WANTAGE REGIONAL SCHOOL DISTRICT, SUSSEX COUNTY,
Respondent.

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

R. Webb Leonard, Esq., for respondent
(Clark & Leonard, attorneys)

Record Closed: June 21, 1985 Decided: July 10, 1985

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

STATEMENT OF THE CASE

Petitioner, William F. Carroll, Jr., is a tenured teacher of physical education employed by the respondent, Board of Education of the Sussex-Wantage Regional School

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District. In April 1984, the Board resolved to withhold Carroll's salary and adjustment increments for a variety of reasons set forth in a notice letter timely sent to him (Exhibit P-1). See, N.J.S.A. 18A:29-14. In July 1984, Carroll filed a petition of appeal with the Commissioner and after the Board filed its answer the matter was transmitted as a contested case to the Office of Administrative Law pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

STIPULATED FACTS

Some allegations of the petition were admitted by respondent and they can be considered stipulated facts. These are: (1) that the petitioner is a tenured teaching staff member employed by the respondent; (2) in a letter dated April 25, 1984, petitioner was advised that the Board had voted to withhold his 1984-85 increment; and (3) the reasons given to him were: (a) petitioner's alleged failure to carry out the duties and responsibilities assigned to him with regard to training of playground/cafeteria aides; (b) petitioner's alleged failure to follow a certain directive to escort students to and from his adaptive physical education classes even though time was provided in his schedule to permit him to carry out that function; (c) petitioner's alleged failure, after repeated directives, to meet with a parent who had requested a conference with him; and (d) petitioner's alleged failure to properly follow directives given to him with respect to supervision of students during recess.

TESTIMONY

The bulk of the testimony in this case was presented by petitioner since he called the superintendent of schools and the principal of his school as his witnesses. A relation of their testimony with respect to each of the four reasons cited by the Board for the withholding of Carroll's 1984-85 increment follows.

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A. ALLEGED FAILURE TO CARRY OUT DUTIES AND RESPONSIBILTIES WITH REGARD TO TRAINING PLAYGROUND/CAFETERIA AIDES

Testimony with respect to this reason was provided by Anthony J. Mistretta, principal of the elementary school where petitioner works, and by petitioner himself. Beginning in September 1983, if not earlier, Mistretta discussed with petitioner a program to train lay persons as playground aides to assist physical education and health teachers in organizing student activities during recess. The program was designed to avoid problems of "student interaction" which occurred during that period. In December 1983, Mistretta dispatched a memorandum to petitioner and a health teacher specifically advising them that when the outdoor portion of the recess period is limited to 15 minutes, they should, "utilize the remaining available time [approximately 10 minutes] to review games and procedures with the aides." (Exhibit R-4). The purpose of the directive, according to the principal, was to provide time for teachers to assist the aides to become competent to actually teach games to the students, and to make them aware of ways to deal with various circumstances which might arise during the course of the playing of the games. Not long after the memorandum was sent, the 1983 Christmas vacation intervened. After school started in January 1984, the principal held a meeting with petitioner concerning the same subject. This meeting was preceded by a memorandum, dated January 6, 1984, to petitioner and the health teacher in which Mistretta set forth that each of them, "will be responsible to train the aide(s) in their respective sections." (Exhibit R-3). According to Mistretta, this item was discussed with petitioner at the meeting and he was reminded of his obligation.

On January 16, 1984, and again on January 20, 1984, Mistretta said he observed petitioner failing to use available recess time to carry out training. Mistretta felt that on both occasions Carroll had the time to engage in the training activity, but was doing other things. Since the very reason, he said, for reducing outside recess time from 25 to 15 minutes was for the particular purpose of assuring that more time could

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be devoted to working with the aides to make recess more meaningful, Mistretta was disturbed when, on January 16, 1984, he did not see the petitioner engaging in any training at all, and again, on January 20, 1984 when he said he found Carroll sitting in the gymnasium during the recess period filling in a book. Mistretta said that when he confronted Carroll on the first occasion and told him that he should be working with the aides, Carroll told him that she had gone into a faculty room which Carroll believed to be limited to female employees and that she never came out in time for him to do any training.

On January 23, 1984, Mistretta sent a letter to Carroll specifically setting forth his observations concerning Carroll's failure to train the aides (Exhibit R-8). Mistretta pointed out that when he observed no training taking place on January 16, and inquired about it, Carroll was vague with respect to when he intended to have a discussion with the aide. With regard to the events of January 20, 1984, Mistretta pointed out that it was Carroll's obligation to provide training that involved more than simply going over the rudiments of the rules of kickball.

When petitioner testified with respect to the allegation that he failed to train playground aides he agreed that the matter was the subject of a discussion with the principal in December 1983. However, he claimed that Mistretta told him that the health teacher would be the "head supervisor" with regard to the training and it was to be Carroll's job essentially to develop a list of activities. Thus, Carroll assumed that it would be the other teacher, and not himself, who would do the actual training. Even after the January meeting with Mistretta, Carroll still felt that the actual training was to be the health teacher's responsibility. In any event, he pointed out that during January 1984, the only game played outside, because of weather conditions, was kickball, and that he did go over the rules and regulations of that acitivity with the aide. Carroll also claimed he told the aide that if she ever had any questions; she should feel free to raise them with him at the end of the period. He felt, therefore, that the aide was knowledgeable about the recess activity and ample support was available to her during recess because of the presence of either the health teacher or himself. Moreover, Carroll said he did speak

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briefly to the aide on January 16 and he told her that he would like to talk to her after she came out of the faculty room. He did not go into the room because he considered it to be limited to female employees only. He also maintained that on January 20 he did discuss games with the aide as they came in to the school building and that he then went on to the gymnasium in order to do additional work. In short, Carroll did not believe he was required to do any more than he did, and if he was expected to equally share the training responsibility he did not fully understand that to have been his obligation. Beyond that, he insisted that it was never his understanding that all of the time that was not spent outside had to be used exclusively for training.

B. **ALLEGED FAILURE TO FOLLOW A DIRECTIVE TO ESCORT STUDENTS TO AND FROM ADAPTIVE PHYSICAL EDUCATION CLASSES EVEN THOUGH TIME TO CARRY OUT THIS FUNCTION WAS PROVIDED PETITIONER IN HIS SCHEDULE**

The testimony with respect to this was also provided by Mistretta and Carroll. According to Mistretta, he met with petitioner in September 1983 when school opened and told him that he was expected to pickup students assigned to his adaptive physical education classes and to escort them to the gymnasium. It was also Carroll's responsibility to personally escort the students back to their next class following conclusion of the period. Indeed, according to Mistretta, a discussion he had with Carroll in May 1983 to go over the program resulted in an agreement to modify the timing of the period for the sole purpose of allowing this escorting to be done. As Mistretta explained, although the adaptive physical education period was to be 30 minutes in length, he told Carroll he need not spend more than 18 to 25 minutes in actual instruction, thereby allowing him 5 to 12 minutes for escorting.

On October 21, 1983, Mistretta heard noise in the building and discovered students on their way to Carroll's class totally unescorted. On that day he sent Carroll a memo about it (Exhibit P-9). Mistretta conceded that that the October incident was the sole instance of Carroll's failure to escort students to the class. He further conceded that

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he was aware of no instance when petitioner failed to take students back to their class following completion of adaptive physical education instruction.

Carroll testified that the adaptive physical education program did not actually begin until October 12, 1983, since the previous month was devoted to screening and selecting students. He acknowledged, Mistretta told him that he was to be responsible for escorting students to and from the class. After he received the October 21, 1983, memorandum from Mistretta, which asked him to provide the principal with a list of the times and days when he was picking students up, as well as when he was not, Carroll sent a reply to the effect that the teachers had been sending children to the gymnasium (Exhibit P-9). Although he further informed the principal that he did not have enough time to carry out this procedure, Carroll nevertheless did make sure to escort students both to and from the class.

C. ALLEGED FAILURE DESPITE REPEATED DIRECTIVES TO MEET WITH A PARENT WHO HAD REQUESTED A CONFERENCE

Testimony with respect to this allegation was provided by Superintendent Robert Clark, as well as by Mistretta and Carroll. According to Clark, in January 1984 a parent had complained about Carroll's failure to arrange a conference with her in November 1983. Clark had no notes of that conversation, nor did he ever discuss it with Carroll.

The bulk of the testimony on behalf of the Board was provided by Mistretta. He had learned in November 1983 that Carroll was reluctant to meet with a mother of a male student because that parent had once complained about Carroll's alleged sexual advances toward female students. Mistretta met with Carroll on November 2, 1983, to discuss the situation, and Carroll told him that he would only meet with the mother if either a lawyer or a union representative was also present. Mistretta consulted the Board attorney and was told that while Carroll had no right to insist upon such a representative, Mistretta ought to be there. On November 4, 1983, Mistretta conveyed this information to Carroll and left it to him to arrange the meeting.

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On November 8, 1983, when Mistretta was in the building during teacher conference time, the parent in question told him that she wanted to arrange a meeting with Carroll. Mistretta had learned that the parent previously had cancelled a conference originally scheduled for that date. Mistretta told the parent that although he would speak to Carroll to have him arrange a meeting, Carroll probably could not meet with her on that particular night because he was busy with other scheduled conferences. According to the principal, on November 18, 1983, he asked Carroll whether a meeting had been set up and Carroll said it had not. Mistretta said he directed Carroll to arrange a meeting. On January 4, 1984, Mistretta again confronted Carroll about the matter and was distressed to learn that no meeting had yet been arranged. Mistretta told petitioner that since the marking period had ended, there would no longer appear to be any point in the meeting (See also Exhibit R-8). However, on January 7, 1984, Carroll actually did have the meeting, without Mistretta or anyone else being present.

Carroll testified that he did not want to meet in a "one-on-one" situation with the child's mother, since the previous school year she had accused him of "touching" little girls. Carroll expressed his concern to Mistretta on November 2, 1983, and said he wanted someone present when he has this conference. Mistretta told him that he would have to check it out with the Board attorney. Two days later, Mistretta told Carroll that either Mistretta or Superintendent Clark could be present, but not a lawyer or a union representative. Since the meeting was still scheduled to occur on November 8, Carroll decided to go ahead with it anyway. However, on that date the student handed him a slip which had a pretyped section for a parent to indicate that he or she could not meet at the scheduled time and that a new conference should be arranged. (Exhibit P-7). This cancellation was signed by the child's father. When the mother came to Carroll that night, he pointed out to her that he understood the appointment to have been cancelled and explained that he did not have time to see her that evening. Carroll made no further effort to establish another meeting date because he was under the impression that the parents were to get back to him concerning rescheduling of a the conference.

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Carroll denied that Mistretta ever directed him to meet with the parent, although he did admit that he had a discussion both on November 18, 1983 and January 4, 1984, with Mistretta concerning the situation. On neither of those occasions was he ordered to see the parent. In fact, it was his belief that the student's mother did not want any conference since she had never come back to him after November to make any appointment. He explained that he eventually had a conference on January 7, 1984, because he happened to see the parent in school that day and he had time to conduct such a session.

D. ALLEGED FAILURE TO FOLLOW DIRECTIVES RELATING TO SUPERVISION OF STUDENTS DURING RECESS

The bulk of the testimony in respect to this allegation was again provided by Mistretta and Carroll. The sole incident giving rise to the charge took place on December 19, 1983. Mistretta said that during a recess period on that day he saw Carroll standing on a hill, a substantial distance away from the children whose activities he was to supervise. When Mistretta asked Carroll about it, petitioner said that since it was very cold he was seeking to shelter himself in the lee of the building. Mistretta was aware that Carroll did have certain health problems, including "gouty arthritis," and admitted he was aware of a medical report which indicated that Carroll would suffer from extreme cold (Exhibit P-3). However, Mistretta said that on the day in question Carroll never told him that he was unable to exercise close supervision, nor did he make any alternative arrangements to have someone else do so.

Carroll agreed that on December 19, 1983, which he described as a bitterly cold day, he was standing on a hill overlooking the field where the boys were playing football. However, he felt perfectly capable of exercising proper supervision over them from that location since he had full command of the area from that spot. Also, since his ankles were beginning to swell from the cold, he wanted to use the building as a wind-break.

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In addition to the foregoing testimony, which related directly to the four reasons given for the withholding, there was additional testimony by both Clark and Carroll with respect to tangential matters. A good deal of that testimony was devoted to the procedures which led up to the Board's determination to withhold the increment, including meetings of the Board and letters which went from Carroll and/or his representative to the Board, and vice versa (See, Exhibits P-5, R-1, R-2, R-5 and R-6). However, none of this is particularly relevant since no allegation of any procedural deficiency with respect to the withholding action has been pursued.

Finally, during the testimony of Clark, the annual evaluation prepared by Mistretta with respect to Carroll's performance during the 1983-84 school year was admitted in evidence (Exhibit P-2). That evaluation noted that: (a) the Professional Improvement Plan had been completed in a satisfactory manner; (b) Carroll demonstrated strength with respect to coordination and presentation of field days; (c) his students were noted to have performed satisfactorily; and (d) that since April 1984 there had been improvement in Carroll's planning and the manner in which he performed his duties and responsibilities during the recess period. Thus, based upon what Mistretta described as petitioner's "recent improvement of your performance," Carroll's overall rating for the 1983-84 school year was described as "satisfactory."

FINDINGS OF FACT

1. Petitioner is a tenured staff member employed as a physical education teacher in grades three to five by the respondent.

2. In April 1984, the respondent resolved to withhold petitioner's salary and adjustment increments for 1984-85 for the following reasons:

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a. Your failure to carry out the duties and responsibilities assigned to you with regard to training playground/cafeteria aides.

b. Your failure to follow the directive to escort students to and from the adaptive physical education classes. Time was provided in your schedule to carry out this assignment.

c. Your failure, after repeated directives, to meet with a parent who requested a conference.

d. Your failure to properly follow directives relative to the supervision of students during recess periods.

3. In July 1984, petitioner timely filed his petition challenging the respondent's effort to withhold his increments.

4. Petitioner did during December 1983 and January 1984, discuss with his playground aide the essential rules of kickball and certain aspects of that game.

5. Prior to September 1983, petitioner had a discussion with his principal respecting a change in the time allowed for the adaptive physical education program to allow him to escort students to and from that class.

6. Students began to come to the adaptive physical education class in mid-October 1983. During the first few days of the program, teachers were sending the students to the class unescorted and petitioner spoke to the teachers about it.

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7. On October 21, 1983, some students came to the class unescorted. This was the last such time this occurred. Also, at no time did petitioner fail to escort students back to their classes after his class ended.

8. In early November 1983, a parent of a male student in one of petitioner's classes scheduled a conference for November 8, 1983, to speak with petitioner. Since that parent had, in or about May 1983, accused petitioner of "touching little girls," petitioner was reluctant to meet alone with this parent.

9. On November 2, 1983, petitioner told his principal that he wanted a lawyer or a union representative to be present at any meeting with the parent. On November 4, 1983, the principal told petitioner that he, the principal, or the superintendent of schools would be available to attend a meeting with the parent.

10. Petitioner then decided to go ahead with a meeting without anyone else being present. However, on the morning of November 8, 1983, petitioner was advised that the conference was cancelled

11. On November 18, 1983, petitioner's principal directed petitioner to schedule a new conference date with the parent.

12. On January 4, 1984, the principal learned that petitioner had not yet had the conference and told petitioner that since the marking period had ended, there was no longer any need to have a conference. At that time he also told petitioner his behavior was insubordinate.

13. On January 7, 1984, petitioner did meet with the parent as he happened to see her in the school that day.

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14. Petitioner suffers from "gouty arthritis" and extremes of weather are deleterious to his health. In December 1983, petitioner was taking medication for his health problem.

15. December 19, 1983, was a very cold day and petitioner, on that day, was outside supervising a football game. Because of the cold weather, he was standing on a hill, overlooking the playing field area, using the school building as a windbreak. The cold weather was causing his ankles to stiffen and swell.

16. Despite his location, petitioner was in a position whereby he could exercise adequate supervision over the students.

DISCUSSION

The law is well-settled that with respect to actions challenging a withholding of increment, the Commissioner will not substitute his judgment for that of the board, absent a showing that the board has been arbitrary, capricious or unreasonable. See, e.g., Kopera and West Orange Board of Education, 60 N.J. Super. 288 (App. Div. 1960). Since actions of this sort by boards carry with them a presumption of being correct, the burden is upon the teacher to demonstrate the absence of a sound basis for the withholding. In this case, except for the petitioner's failure to reschedule a conference with a parent, despite an oral directive to do so, I believe the teacher has successfully carried that burden.

Plainly, the petitioner did discuss kickball with the playground aide, perhaps on more than one occasion. While petitioner, equally plainly, did not spend all of his available time in this activity there was no showing that he was expected to do so. Indeed, the actual parameters of the instruction function were largely undeveloped, with much discretion left to the teacher. The only written directive in evidence (Exhibit R-3) described the duty as having "to train the aide." The proofs in this case support Carroll's

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contention that he did give such assistance to the aide, at least insofar as the rudiments of kickball were concerned. No greater responsibilities were spelled out.

With regard to the alleged failure by petitioner to escort students to and from the adaptive physical education class, the proofs demonstrate that a failure to escort to the class did occur on one occasion. However, this took place during the start-up of the program and was due, as petitioner noted, to the fact that the teachers were sending the students and did not know that petitioner was to collect them. No evidence was offered to establish that petitioner ever failed to escort students back to their class. Thus, the one incident was explained to have occurred in such a way that no culpability should be placed upon petitioner in this case.

The charge concerning petitioner's alleged failure to supervise students during recess, despite directives to do so, involved one incident only. The evidence respecting that occurrence convincingly demonstrated that petitioner was, in fact, satisfactorily carrying out his duty that day. His location away from the field of play was due to his undisputed medical ailment—not to any desire to shirk his obligations.

On the other hand, the proofs regarding Carroll's failure to obey a directive to meet with a parent, did establish his failure to carry out the same. While the conference originally scheduled for November 8, 1983, was canceled by the parent that day, and although the mother of Caroll's student had previously charged him with improper conduct, there is no doubt that: (1) the parent did want to meet with Carroll; (2) the principal told this to Carroll; (3) the principal directed Carroll to arrange a meeting; and (4) Carroll failed to do so until after the principal told him his failure was tantamount to insubordinate conduct.

It is true that the principal's original insistance that he met with Carroll on November 7, 1983, proved to be faulty. However, there is no dispute that they did have a discussion on November 8, 1983, and that they did meet on November 18, 1983. Having heard the testimony regarding those meetings, I am convinced that the version given by

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Mistretta was true. Carroll's claim that the principal merely asked him if there had been a meeting, and not that he was told to have one, does not ring true. I believe that after being told on January 4, 1984, that there was no longer any point in a meeting to discuss a marking period that had ended, Carroll's belated conference, just three days later, was an effort on his part to "close the barn door after the cow escaped." In short, Carroll was directed by Mistretta to have a meeting, he knew it, and yet he failed to carry out the directive in an appropriate and timely fashion. This was not proper conduct.

PENALTY

In view of my finding that three of the four reasons given by the Board for withholding the increment are not supported by the evidence, there remains the question of what penalty is appropriate for the one charge which I did sustain. Given the understandable trepidation which Carroll legitimately had toward meeting alone with this particular parent, the consequences of his failure to vigorously pursue the rescheduling of a conference should be somewhat ameliorated. Further, it does appear as if he did plan to have a meeting on November 8, 1983, but the parent cancelled. Under all of these circumstances, and bearing in mind that the Board's vote to withhold the increment was based upon its finding that four charges, not just one, were involved, I believe that the penalty must be modified. Since, for the full school year, Carroll's overall performance was found to be satisfactory, I recommend that he be given a written reprimand for his action and that his increment be restored to him, without interest.

Accordingly, I **CONCLUDE** that only that reason involving petitioner's failure to comply with a directive to schedule a conference with a parent has been proven in this case. The three other reasons relied upon by the Board were not sustained by the evidence. Therefore, petitioner's increment should be restored to him, without interest and he should be given a written reprimand only.

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

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

July 10, 1985
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

JUL 11 1985
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

DATE

FOR OFFICE OF ADMINISTRATIVE LAW

par/e

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WILLIAM F. CARROLL, JR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SUSSEX-WANTAGE REGIONAL SCHOOL DISTRICT, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law. The Board's exceptions to the initial decision and petitioner's reply exceptions have been filed with the Commissioner pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

In its exceptions, the Board argues that the judge erred in his findings and conclusions in the initial decision for the following reasons:

1. While the ALJ found petitioner was in a position whereby he could adequately supervise students on the playground (Initial Decision, ante), the evidence indicates that the principal observed petitioner and found his supervision to be inadequate and unsatisfactory. (Tr. 108-109)

2. While the ALJ concluded petitioner's single discussion of kickball with the playground aide was all that was required (Initial Decision, ante), the evidence indicates that the principal had detailed at length what was expected of petitioner and the aides and that the principal had made his expectations clear to petitioner. (Tr. 93-95) The Board avers petitioner knew of and yet disregarded those directives, excusing his omission by saying he was unable to contact the aides while they were in a women's faculty lounge. (Tr. 154-155)

3. Petitioner admitted that it was his responsibility to pick up and return adaptive physical education students to class and yet he did not comply with the principal's directive to do so. (Tr. 122-123)

Petitioner's extensive reply exceptions urge the Commissioner to affirm the findings and conclusions in the initial decision. In support of his position, petitioner annexed his post-hearing brief and adds the following arguments:

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1. Petitioner explains, in response to the allegation that his supervision of the playground was inadequate, that he suffers from 'gouty arthritis' and that extremes of weather are deleterious to his health. (Initial Decision, Findings of Fact 14 and 15) Petitioner further indicates that on the one occasion when his supervision was allegedly found to be inadequate (Id., ante), it was bitterly cold and his ankles were swelling. (Tr. 124-125) Petitioner further alleges in his reply exceptions that the ALJ's discussion stated that petitioner's location away from the field of play was due to his undisputed medical ailment, not to any desire to shirk his obligation. (Initial Decision, ante)

2. Petitioner asserts that the ALJ allowed hearsay evidence as to the basis of principal's personal information which led him to believe that petitioner did not carry out his duties in training playground aides. (Tr. 75) Petitioner contends that Findings of Fact 4 negates that evidence by stating that petitioner did, during December 1983 and January 1984, discuss with his playground aide the essential rules of kickball and certain aspects of that game. Petitioner also contends that the ALJ, in the discussion section of the initial decision, states that "petitioner did discuss kickball with the playground aide, perhaps on more than one occasion." (Initial Decision, ante) As to whether the playgound aides were available for instruction, petitioner offers testimony that on two occasions he spoke with one of the aides relative to the games that had been and were to be played before she subsequently went into a room he believed to be a women's faculty room. (Tr. 129-130)

3. Regarding his alleged failure to escort adaptive physical education students to his class, petitioner cites Findings of Fact 5, 6, and 7 of the Initial Decision, as well as the ALJ's discussion, which indicate that while the proofs demonstrate that a failure to escort to the class had occurred on one occasion, at no time did petitioner fail to escort students back to their classes after his class ended. The ALJ concluded, so petitioner points out, that the one incident was explained to have occurred in such a way that no culpability should be placed upon petitioner in this case. (Initial Decision, ante)

4. Petitioner asserts in reply exceptions that questioning of the principal by the court further indicates that the principal could recall only one incident in the month of October 1983 when students were unescorted by petitioner from their class to the adaptive physical education room (Tr. 59), and that the principal could recall no incident where, after petitioner completed instructing the students, he did not bring the students back to their regularly assigned classes. (Tr. 60) Petitioner, in reply exceptions, offers further evidence from the transcript (at pp. 121-124) of incidents whereby he tried to rectify other faculty members' sending adaptive education students to the gym unescorted, and of his attempts to properly implement the adaptive education program and procedures.

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Upon careful review of the record and the judge's analysis of the matter, the Commissioner concurs with the findings of fact as determined by the ALJ and is in full agreement with Judge Weiss that Kopera v. West Orange Board of Education, 60 N.J. Super. 288 (App. Div. 1960) sets the standard for review of actions challenging a withholding of increment. In this case, however, the Commissioner disagrees with the ALJ's conclusion that petitioner has successfully carried the burden of proving the absence of a sound basis for the withholding.

There is no question that petitioner repeatedly failed to obey a directive to meet with a parent, despite a warning from the principal that if petitioner continued to avoid complying with the directive to confer with the parent, he would face possible charges of insubordination. (Tr. 162; Initial Decision, ante) Further, petitioner admits that on at least one occasion he failed to escort students to their adaptive gym classes, despite a written directive from the principal that he do so. (Tr. 123) Petitioner also concedes that he failed to carry out, on a regular basis, the duties and responsibilities assigned him with regard to training playground and cafeteria aides (Tr. 126-127), although he asserts the aides removed themselves to a women's faculty lounge, thereby preventing their instruction. Finally, in regard to the issue of improper supervision of students on the playing field, petitioner admits he was evaluated by the principal as standing at a distance remote from the students playing football, contrary to the written and verbal discussions he had had with the principal regarding proper supervision. (Tr. 124) Further, nowhere in the record does it appear that petitioner sought to be excused from duty on the day in question because of his infirmities.

The Commissioner finds on the basis of these admissions alone that the Board had a reasonable basis for withholding petitioner's increment. Leaving pupils unsupervised on one occasion is good cause for withholding an increment. Tenny v. Bd. of Ed. of the Borough of Palisades Park, decided by the Commissioner November 24, 1982, aff'd State Board May 4, 1983. (See also Rock v. Sayreville Bd. of Ed., decided by the Commissioner December 2, 1980, aff'd May 6, 1981; petitioner's refusal to honor directives to meet with administrator is insubordination and constitutes just cause for Board to withhold increment.)

In the instant case the ALJ looked to a satisfactory year-end evaluation, the corrective measures petitioner took following evaluations and memos from the principal as well as petitioner's affirmative actions in compliance with his duties and responsibilities and decided that a written reprimand was sufficient penalty. The ALJ ordered the restoration of petitioner's increment without interest.

Neither the ALJ nor the Commissioner is empowered to invoke a penalty in lieu of or in addition to withholding an increment.

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Neither may the ALJ order withholding of a specific sum or a partial increment but must withhold either the full amount of the increment or nothing. Janice Golonka and Bernard Chidiac v. Hawthorne Board of Education, Passaic County, decided by the Commissioner June 28, 1984

Further, a satisfactory year-end evaluation does not preclude the Board's making a separate determination regarding an employee's performance so long as the independent grounds upon which it makes its determination are reasonably predicated. See John Dumansky v. Leonia Board of Education, decided by the Commissioner June 4, 1982 wherein it is stated:

> "In the opinion of the Commissioner, there is nothing within the law which supports petitioner's arguments that the process for observation and evaluation of teaching staff members must find such staff members' performance uniformly unsatisfactory in all assigned instructional areas before it can take action to withhold an increment pursuant to N.J.S.A. 18A:29-14.***" (Slip Opinion, at p. 8)

The Commissioner finds that although there were many positive aspects to petitioner's performance, including a satisfactory review at year end, petitioner has failed to establish by a preponderance of competent and credible evidence that it was unreasonable, arbitrary or capricious for the Board to withhold his increment for the 1983-84 year. However, the Commissioner cautions boards that if the conduct of an employee is severe enough to warrant consideration of increment withholding by the board, it should be consistent with and be documented by evaluations and comments brought before the board.

Accordingly, the findings and conclusions of the ALJ are set aside. The Board herein did not act arbitrarily or capriciously; on the contrary, it took action to withhold petitioner's increment pursuant to the statutory authority granted by N.J.S.A. 18A:29-14 as amended. The decision of the Board to deny petitioner's salary increment for the 1983-84 school year is reinstated and the petition is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 26, 1985

Pending State Board

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5939-84
AGENCY DKT. NO. 266-7/84

DONALD D. UJHELY,
Petitioner,
v.
BOARD OF EDUCATION
OF THE CITY OF LINDEN,
Respondent.

Anthony N. Gallina, Esq., for petitioner
(Aronsohn & Springstead, attorneys)

Leo Kahn, Esq., for respondent
(Magner, Orlando, Kahn, Schnirman, Hamilton, Kress & Charney, attorneys)

Record Closed: July 9, 1985 Decided: July 10, 1985

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

Statement of the Case

This is an appeal by a tenured secondary school teacher dismissed from employment by respondent Linden Board of Education ("Board") as the result of a reduction in force and rehired by the Board three months later. Petitioner Donald D. Ujhely ("Ujhely") raises three separate issues relating to his seniority status and his

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placement on the salary guide. First, Ujhely contends that the Board violated his seniority rights under N.J.S.A. 28A:28-9 et seq. by failing to recognize his prior service as a "permanent substitute" during the 1972-73 school year. Second, he claims that the Board failed to give him proper seniority credit under N.J.S.A. 18A:29-12 for military training in the United States Army National Guard. Third, Uhjely argues that he is entitled to credit on the salary guide for his military service, under the statutory requirements of N.J.S.A. 18A:29-11.

Procedural History

On July 9, 1984, Ujhely filed his petition with the Commissioner of Education. The Board filed its answer on July 31, 1984. Subsequently, on August 8, 1984, the Commissioner transferred the matter to the Office of Administrative Law for handling as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. Thereafter, on October 23, 1984, Ujhely served notice of the pendency of this case on other teachers whose interests might be adversely affected.[1] A hearing before the Office of Administrative Law was held on February 19, 1985. Witnesses who testified and documents marked as exhibits are listed in the appendix. Upon receipt additional of written submissions from both parties, the record closed on July 9, 1985.

[1]Only one person, Jane S. Kologi, moved to intervene in the present proceeding and to consolidate it for hearing together with another case she had previously filed with the Commissioner of Education. Kologi v. Linden Bd. of Ed., OAL Dkt. No. EDU 7773-84 (filed September 24, 1984). Prior to the hearing, however, Kologi entered into a settlement with the Board and withdrew her request for intervention.

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Findings of Fact

All the relevant facts are undisputed. I **FIND:**

Donald D. Ujhely first began working for the Board on January 2, 1973. At the time of his initial employment, he possessed a New Jersey certificate as a "secondary school teacher of social studies." During the last six months of the 1972-73 school year, he was assigned on a full-time basis "to fill a vacant position" in the district's social studies department. His title was "permanent substitute." Although the record does not disclose the amount of his compensation, it is clear that Ujhely was not covered by the standard teacher's contract and, consequently, did not receive the same salary and benefits as those who were. In calculating service for seniority purposes, the Board did not give Ujhely any credit for his experience as a "permanent substitute."

Starting in September 1973, the Board employed Ujhely as a regular teacher under contract. For eleven successive years (1973-74 to 1983-84), Ujhely taught social studies to students in the Middle School. The Board recognized his seniority credit for each of those eleven years. On April 11, 1984, the Board adopted a resolution terminating Ujhely's employment for 1984-85 because of a reduction in force. It retained another social studies teacher with eleven years service at the secondary level. If Ujhely's prior service as a "permanent substitute" from January to June 1973 were counted, he would have six more months of seniority than this other teacher. As of December 10, 1984, the Board rehired Ujhely for the balance of the 1984-85 school year with uninterrupted rights of tenure. Ujhely accepted the offer of reemployment "without prejudice to any of his claims" in this pending case.

Much of the proofs relate to Ujhely's prior military service. Ujhely served in the United States Army National Guard, from which he was honorably discharged in February 1976.[2] Three specific time periods are involved in this case. Between June 5, 1970 and October 2, 1970 (a total of 120 days), Ujhely received six to eight weeks of "basic training"

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followed by nine to eleven weeks of "advanced individual training" in his field of speciality. Basic training at Fort Dix, New Jersey consisted of learning the skills of a soldier, such as the use of weapons and drill practice. Advanced training for Ujhely consisted of attendance at cook school. Thereafter, Ujhely participated in two "annual training" programs conducted at Fort Drum in New York. Each program lasted 18 days: the first from May 27 to June 13, 1971; the second from May 17 to June 3, 1973.[3] Actual training for each program took only 15 days. In his capacity as cook, Ujhely arrived three days early to arrange for "setting up the mess" for the entire unit.

According to the uncontradicted testimony, Ujhely served on "active duty" throughout the initial 120-day period and the two subsequent 18-day periods, or a total of 156 days. While on duty, Ujhely was under the jurisdiction of federal rather than state military authorities. (In contrast, Ujhely remained under the jurisdiction of state authorities when fulfilling his responsibility for weekend service once per month.)[4] During such "active duty," Ujhely was eligible for military health benefits, housing allowance and full commissary privileges.

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[2]Later, Ujhely reenlisted in the Army National Guard. Currently he holds the rank of staff sergeant.

[3]There is an overlap between the time that Ujhely worked as a "permanent substitute" (January 2 to June 30, 1973) and his second "annual training" program (May 17 to June 3, 1973). For seniority purposes, Ujhely claims credit for either his "permanent substitute service" or his military service in 1973, but not both.

[4]No claim for credit is made for such weekend service or for any military duty occurring after June 3, 1973.

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Any claim for salary lost as a result of his dismissal is limited to the approximately three-month period that Ujhely remained unemployed. Ujhely's sole income during that period was unemployment compensation benefits in the amount of $1,768. He also incurred various medical and dental expenses for himself and members of his family. These expenses consist of doctors' bills totalling $143; dentists' bills totalling $390; and prescription drug bills totalling $9.99. None of these expenses have been reimbursed by his health insurance, apparently because of a break-in-coverage attributable to his dismissal. If Ujhely's health benefits had continued in effect, his Major Medical policy would have paid 80% of his medical bills. Dental insurance would have paid 100% of his dental bills. The prescription drug program would have paid his prescription costs minus a deductible of $1.50 per item. Additionally, Ujhely had to pay a premium of $287.87 to continue his Blue Cross/Shield coverage. After return to work on December 10, 1984, Ujhely was placed on step 11 of the 1984-85 salary guide for teachers with a master's degree plus 32 credits. He did not receive any credit on the guide for his "permanent substitute" service or his military service.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the Board failed to recognize seniority credit to which Ujhely was entitled for his service as a "permanent substitute;" that Ujhely has greater seniority in the category of secondary social studies teacher than another teacher employed by the Board for the full 1984-85 school year; and, that Ujhely is entitled to placement on the current salary guide at a step commensurate with his military service.

Seniority provides a mechanism for ranking all tenured teaching staff members so that reductions in force and reemployment can be effected in an equitable fashion and in accordance with sound educational policies. N.J.S.A. 18A:28-9 et seq. Lichtman v. Ridgewood Bd. of Ed., 93 N.J. 362, 368 (1983); Howley v. Ewing Twp. Bd. of Ed., 1982 S.L.D. ___ (Comm'r of Ed. 1982). Dismissals resulting from a reduction in force "shall be

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made on the basis of seniority according to standards to be established by the commissioner with the approval of the state board." N.J.S.A. 18A:28-10. Under N.J.S.A. 18A:28-13, the Commissioner is authorized to establish "fields or categories" for accrual of seniority "upon the basis of years of service and experience within such fields or categories of service as well as in the school system as a whole, or both." Newly amended seniority regulations adopted by the Commissioner, effective September 1, 1983, set forth the various categories. Here Ujhely earned seniority in the category of social studies teacher at the secondary level. N.J.A.C. 6:3-1.10(1)(15).

On the issue of seniority credit for "permanent substitute" service, both sides acknowledge that Sayreville Ed. Ass'n v. Sayreville Bd. of Ed., 193 N.J. Super. 434 (App. Div. 1984) is controlling. The Board is content to rely on the filed stipulation of facts, without arguing against petitioner's interpretation of that case. Like our own situation, Sayreville involved a local board of education which attempted to fill teaching staff vacancies by appointing substitute teachers for the balance of the school year. In Sayreville, the board denied its substitute teachers the statutory and contractual benefits available to regular teachers, including eligibility for tenure. Distinguishing between a temporary "absence" and a permanent "vacancy," the Appellate Division held that a school board may not circumvent the school laws by hiring long-term substitutes for unoccupied positions. Hence, the court ruled that teachers hired to fill a vacancy for the substantial balance of an academic year were entitled to "teaching staff membership . . . and consequently to all of the rights and benefits of that status." 193 N.J. Super. at 434.

Application of the Sayreville analysis to our own facts produces the same conclusion. The Board has stipulated that Ujhely was filling a "vacant position" in the social studies department. At the time of Ujhely's appointment, six months remained in the 1972-73 school year. Thus, the appointment was for the "substantial" balance of the unexpired term. Ujhely is entitled to all "rights and benefits" of teaching staff member status, including seniority credit. Crediting Ujhely with the extra six months of seniority puts him ahead of the next closest teacher in the category of secondary social studies teacher.

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Insofar as Ujhely now seeks salary credit on the 1984-85 guide for past service as a "permanent substitute," his claim is untimely. N.J.A.C. 6:24-1.2 mandates that petitions must be filed with the Commissioner "within 90 days after receipt of the notice by the petitioner of the order, ruling or other action concerning which the hearing is requested." Salary guide placement is not a matter of statutory right and, hence, is subject to the time bar provided in the regulation. North Plainfield Ed. Ass'n v. North Plainfield Bd. of Ed., 96 N.J. 583 (1984). Ujhely's claim arose when he first received notice of his placement on the guide in or about June 1973. Misplacement on the guide is not regarded as a continuing violation. "[T]he time bar of the original action also precludes the dependent action for relief in future years." 96 N.J. at 595. Failure to institute action in 1973 prevents Ujhely from litigating the issue eleven years later in 1984. School law decisions have uniformly dismissed similar late claims for relief. Reilly v. Kearny Bd. of Ed., 1985 S.L.D. ___ (Comm'r of Ed., 1985); Shulman v. Morris Bd. of Ed., 1985 S.L.D. ___ (Comm'r of Ed. 1985).

Next, Ujhely maintains that he is entitled to a seniority credit of 156 days for military service. In support of his contention, he relies on N.J.S.A. 18A:28-12, which provides:

> . . . in determining seniority . . . the time of service by such person spent in or with the military or naval forces of the United States or of this state, subsequent to September 1, 1940 shall be credited to him as though he had been regularly employed in such a position within the district during the time of such military or naval service.

Given the determination of the "permanent substitute" issue in Ujhely's favor, it is unnecessary to reach petitioner's alternative theory of greater seniority based on military service. Nonetheless, it is worth noting that recently the State Board and the Commissioner have clarified that time spent in military service prior to employment by a school district does not count toward seniority. Corrado v. Newfield Bd. of Ed., 1984 S.L.D. ___ (Comm'r of Ed. 1984), aff'd as modified, 1985 S.L.D. ___ (St. Bd. 1985). See also, Meyer v. Wayne Bd. of Ed., 1984 S.L.D. ___ (Comm'r of Ed. 1984). Clearly, Ujhely

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would be ineligible for seniority credit for any military service which pre-dated his initial hiring by the Board in January 1973. At best, Ujhely might assert a claim for his 18-day military service from May 17 to June 3, 1973. But Ujhely has expressly disclaimed any intention of seeking "double credit" for the period in which his "permanent substitute" seniority has already been recognized.

With regard to Ujhely's claim for salary credit based on his military service, N.J.S.A. 18A:29-11 provides:

> Every member who, after July 1, 1940, has served or hereafter shall serve, in the active military or naval service of the United States or of this state, . . . in time of war or an emergency, or for or during any period of training, or pursuant to or in connection with the operation of any system of selective service, shall be entitled to receive equivalent years of employment credit for such service as if he had been employed for the same period of time in some publicly owned and operated college, school or institution of learning in this or any other state or territory of the United States, except that the period of such service shall not be credited toward more than four employment or adjustment increments.

As interpreted by the New Jersey Supreme Court, the legislative purpose of this statute is "to reward veterans for service to their country." Lavin v. Hackensack Bd. of Ed., 90 N.J. 145, 151 (1982). Benefits do not depend on performance as a teacher, but constitute "a reward or bonus for service in the military." Ibid. By the statutory language, the employment credit is available not only to those who served "in time of war," but also to those engaged in active military service "during any period of training." Accordingly, Ujhely's 156 days of military training qualify for translation into "equivalent years of employment credit." The issue is how much credit and for what period of time.

Employment credits are expressed in full rather than fractional years. N.J.S.A. 18A:29-7. Unfortunately, N.J.S.A. 18A:29-11 is ambiguous on how to treat military service for less than a full year. In Union Twp. Teachers Ass'n v. Union Twp. Bd. of Ed., 90 N.J. 161, 162 (1982), the Supreme Court approved the formula whereby "military service of six

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months or more shall be construed to be one year of salary credit," but left open the question of what to do about five months of military service. That question was answered by the Commissioner of Education in Blue v. Linden Bd. of Ed., 1981 S.L.D. ___ (Comm'r of Ed. 1981), where military service in excess of five months (or the equivalent of half an academic year) was translated into a full year of employment credit. To the extent that N.J.S.A. 18A:29-11 requires treatment of the veteran "as if he had been employed for the same period of time" in some public school, the approach taken by the Commissioner is consistent with the existing practice in the district. Article XXIV, Section 4a, of the collective negotiating agreement provides that a teacher is entitled to a salary increment "if he/she shall have been in employment with the Linden Board of Education on or prior to February 1st of the preceeding school year."[5] In other words, a teacher working at least five months in the district gets a full year of employment credit on the salary guide. If Ujhely is entitled to "equivalent years of employment credit" for his military service, he too should be given a full year of employment credit for five months of military service. Therefore, Ujhely is entitled to one additional step on the salary guide for his 156 days of military service.

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[5]Article XXIV, Section 6b, of the same agreement purports to reduce the employment credit for military service of less than six months:

> . . . Partial [military] service of one-half (1/2) of a year or more, will be rounded off to the next whole year to determine [employment] credit, except in those cases where the total active duty service did not exceed six (6) months, in which case one-half (1/2) year [employment] credit will be given.

Identical language was declared invalid in Blue, supra. As noted above, employment credits are measured in units of whole years. While the parties can agree to more generous benefits than those granted by statute, they cannot contract to provide less than the statutory minimum. Wright v. East Orange Bd. of Ed., 99 N.J. 112 (1985).

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Ujhely seeks military service credit not for 1984-85 alone, but for all prior years since the date of his initial employment. Because military service credit is a matter of statutory entitlement, relief is not barred by the 90-day rule or similar period of limitation. Lavin, 90 N.J. at 151. Where the financial integrity of a public body is concerned, however, the Supreme Court has applied the doctrine of laches to preclude claimants from obtaining retroactive damages. For cases involving military service credit, the Court has adopted the "bright line" approach of permitting prospective relief only. Lavin, at 154-55. See also, Union Twp., 90 N.J. at 162. Consequently, Ujhely's salary claim for military credit is limited to the 1984-85 school year. Damages caused by an employer's wrongful discharge of an employee are not subject to mitigation or abatement for unemployment compensation benefits. Sporn v. Celebrity, Inc., 129 N.J. Super. 449 (Law Div. 1974). The Board is not entitled to any offset for unemployment compensation benefits received by Ujhely. Lastly, Ujhely requests imposition of pre-judgment interest on any award. The Commissioner of Education possesses the authority to grant both pre-judgment and post-judgment interest. Newark Bd. of Ed. v. Levitt, 197 N.J. Super. 239 (App. Div. 1984). Allowance of pre-judgment interest is an act of discretion "to be exercised in accordance with equitable principles and considerations." Levitt, at 244. When the debtor is a governmental agency, "a showing of overriding and compelling equitable reasons must be made in order to justify the award." Ibid. Such circumstances are absent in the present case. Indeed, the delay in asserting the military service claim is largely attributable to Ujhely's own inaction. Ujhely's request for pre-judgment interest is denied.

Order

It is **ORDERED** that the Board place Ujhely on step 12 of the salary guide as of the commencement of the 1984-85 school year.

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It is further **ORDERED** that the Board promptly compensate Ujhely for loss of salary and all other statutory and contractual benefits for his period of unemployment ending on December 10, 1984.

It is further **ORDERED** that the Board promptly reimburse Ujhely for out-of-pocket medical expenses of $114.40, dental expenses of $390 and prescription drug expenses of $8.49.

And it is further **ORDERED** that the Board promptly reimburse Ujhely for Blue Cross/Shield premiums of $287.87.

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

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

July 10, 1985
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

JUL 11 1985
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

DATE July 12 1985

Mailed To Parties:
FOR OFFICE OF ADMINISTRATIVE LAW

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DONALD D. UJHELY,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

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

It is observed that the exceptions to the initial decision filed by the parties as well as the Board's reply to petitioner's exceptions were filed in accordance with the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner argues that the judge erred in concluding that his placement on the Board's salary guide for the 1984-85 school year is at step 12. Petitioner maintains that he is entitled to be placed on step 13 of the Board's salary guide for the 1984-85 school year by virtue of the findings and conclusions set forth in the initial decision.

This is so, petitioner argues, because the judge has found (a) that his employment service rendered from January 2, 1973 through June 1973 was that of a regular teacher rather than as a substitute teacher and (b) petitioner is entitled to receive one year of salary credit for prior military service pursuant to N.J.S.A. 18A:29-11; Blue v. Linden, supra; and Article XXIV, Section 4a of the negotiated Agreement (P-3). Consequently, petitioner claims that because of his total years of teaching experience and prior military service credit of 1 year, as determined herein, his salary placement should be reconstructed on the Board's salary guide (P-3) as follows:

School Year	Step
1972-73	0
(Employment as regular teacher Jan.-June 1973)	
1973-74	1
1974-75	2
1975-76	3
1976-77	4
1977-78	5
1978-79	6
1979-80	7

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1980-81		8
1981-82		9
1982-83		10
1983-84		11
1984-85	(a)	12
	(b)	13

a. Employment as of 12/10/84 through 6/30/85
b. 1 year of prior military service credit with prospective application as of 1984-85 school year (Lavin, Union Twp., Blue, supra)

The Commissioner observes that petitioner's initial period of military service in the United States Army National Guard was from February 24, 1970 through February 23, 1977. (6 years) However, only those two periods of active duty training from June 5, 1970 to October 2, 1970 (4 months) and from May 27, 1971 to June 13, 1971 (.6 month) prior to his initial employment by the Board on February 2, 1973 are under consideration herein for the purpose of salary credit pursuant to the provisions of N.J.S.A. 18A:29-11.

In applying the above-cited statutory provisions and the Commissioner's prior determination in Blue, it is found and determined that petitioner's 4.6 months of prior active duty military service training does not comply with the minimal 5 month prerequisite in order to declare him eligible for prospective military service credit on the Board's salary guide as of the 1984-85 school year.

That portion of the initial decision which holds that petitioner is to be credited with one step on the Board's salary guide by virtue of his prior military service experience is hereby reversed.

Conversely, the Commissioner affirms that finding in the initial decision which relies on Sayreville, supra, in concluding that his employment status as of the 1972-73 school year was that of a regular teacher in the Board's employ from January 2, 1973 through June 1973. According to Article XXIV, Section 4a of the agreement (P-3), petitioner is entitled to a full year of employment credit on the Board's salary guide for the 1972-73 school year inasmuch as he had been employed as a regular teacher prior to February 1st of that school year for a minimal period of 5 months. It is for this reason that petitioner's salary guide placement for the 1984-85 school year is determined to be at step 12.

Upon review of those findings with regard to petitioner's seniority entitlement, the Commissioner concurs with the conclusion reached by the judge that the Board illegally terminated petitioner's employment at the conclusion of the 1983-84 school year by virtue of its failure to recognize him as a regular teacher, with seniority to be credited for his employment service during the last half of the 1972-73 school year.

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Although the Board subsequently reemployed petitioner during the last half of the 1984-85 school year, the Commissioner is constrained to caution the Board with regard to the following as it pertains to any future reductions in force involving a further calculation of petitioner's seniority:

1. Petitioner by virtue of the Board's illegal termination of his employment at the conclusion of the 1983-84 school year, must be granted seniority credit for the first half of the 1984-85 school year (September, 1984 to December 10, 1984) as though he were actually employed by the Board for that period of time.

2. Effective June 29, 1985, all tenured teaching staff members must be credited up to four years for any prior military service for the purpose of computing seniority pursuant to the newly enacted provisions of N.J.S.A. 18A:28-11.1 and N.J.S.A. 18A:28-12, as amended.

Finally, it is noted that petitioner, in excepting to the initial decision, has requested that he be reimbursed by the Board for dental expenses ($15) and expenses for eye examination and treatment ($50) which he personally paid on behalf of his daughter during the months of January and February 1985. (Petitioner's Post-hearing Brief, para. 2, at p. 7; Counsel's Letter of July 8, 1985, attached to Petitioner's Unexecuted Certification) The Commissioner hereby grants petitioner's request and directs the Board to reimburse him an additional amount of $65 for said expenses.

One further remaining exception to the initial decision filed by the Board will now be addressed by the Commissioner. The argument advanced by the Board in its exception reads as follows:

> "***II. We object to the determination by Judge Springer that the Board of Education is not entitled to any off set for unemployment compensation benefits received by Petitioner. The Court states that damages caused by an employer's wrongful discharge of an employee are not subject to mitigation or abatement for unemployment compensation benefits and cites, Sporn v. Celebrity, Inc., 129 N.J. Super 449 (Law Div. 1974). Such an interpretation would give the Petitioner a windfall at the expense of the public.
>
> "The decision referred to discusses whether unemployment compensation should diminish a contract damage award, and in giving reasons against requiring such damage mitigation in an employment contract, discusses the private employer situation.

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> "The Court specifically says, 'That in addition to providing compensation, there is a "punitive" aspect where a defendant has wrongfully, though not necessarily willfully, breached a contract and that defendant must pay, rather than the general public.' (Emphasis added.)
>
> "In this particular case, it is in fact the general public that would pay twice. It would be unconscionable, in our opinion, for the Petitioner to retain both the unemployment compensation and receive payment from the School District in the same amount. This is specifically true in a case of this nature in which the Board of Education had strong arguments in favor of all its positions and in fact prevailed on many of them before the Administrative Law Judge.***"
>
> (Board's Exceptions, at pp. 3-4)

The Commissioner concurs with the arguments presented by the Board for those reasons expressed. Therefore, that portion of the initial decision which denies mitigation by the Board of petitioner's salary by an amount of $1,768 that he received through unemployment compensation benefits is hereby reversed.

Accordingly, the Commissioner affirms those specific findings and conclusions in the initial decisions except as modified in part and reversed in part.

In summary, therefore, IT IS ORDERED that the Board place petitioner on step 12 of the salary guide as of the commencement of the 1984-85 school year.

IT IS FURTHER ORDERED that the Board promptly compensate petitioner for loss of salary and all other statutory and contractual benefits for his period of unemployment ending on December 10, 1984. The Board, however, is entitled to mitigation in the amount of $1,768 previously received by petitioner through unemployment compensation benefits.

IT IS FURTHER ORDERED that the Board promptly reimburse petitioner for out-of-pocket medical expenses of $164, dental expenses of $405 and prescription drug expenses of $8.49.

AND IT IS FURTHER ORDERED that the Board promptly reimburse petitioner for Blue Cross/Shield premiums of $287.87.

COMMISSIONER OF EDUCATION

AUGUST 26, 1985

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5560-84
AGENCY DKT. NO. 263-7/84

ERICA A. COHEN,
Petitioner,
v.
EMERSON BOARD OF EDUCATION,
Respondent,
and
SUZANNE CARTER,
Intervenor.

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

Irving C. Evers, Esq., for respondent
(Parisi, Evers & Greenfield, attorneys)

Alfred F. Maurice, Esq., for Intervenor

Record Closed: June 3, 1985 Decided: July 18, 1985

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

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Statement of the Case

This case involves the application of the new seniority standards for teaching staff members, which became operative on September 1, 1983. N.J.A.C. 6:3-1.10. [See 15 N.J.R. 464 (adopted June 1, 1983)]. Petitioner Erica A. Cohen (Cohen), a speech correctionist employed part-time by the Emerson Board of Education (Board), claims that the Board violated her tenure and seniority rights by reducing her hours of employment for the 1984-85 school year. Several issues are raised: First, Cohen contends that under the new regulations she is entitled to district-wide seniority credit in the category of speech correctionist starting in September 1975 or, alternatively, in September 1978. Second, she argues in the alternative that under the new regulations she is entitled to district-wide seniority credit from the date of her initial employment in January 1974. Third, Cohen maintains that the new regulations operate only prospectively and do not affect rights accrued prior to September 1, 1983. Fourth, she urges that the language of the new regulations preserves rights granted under prior regulations. Last, she insists that the Board's action deprived her of a "vested right" guaranteed under the Federal and State Constitutions.

For the reasons which follow, Cohen has district-wide seniority credit as a speech correctionist starting in September 1978. Since Cohen has greater seniority at the secondary level than the intervenor Suzanne Carter, it was improper for the Board to reduce Cohen's employment to less hours than those offered to Carter during 1984-85.

Procedural History

On July 6, 1984, Cohen filed her verified petition with the Commissioner of Education in which she sought a three-fifth teaching position, together with back pay and other lost benefits. The Board filed its answer on July 12, 1984. Subsequently, on July 26, 1984 the Commissioner transferred the matter to the Office of Administrative Law for handling as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et

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seq. Suzanne Carter (Carter) applied under N.J.A.C. 1:1-12.1 for leave to intervene in the proceedings. Her application was granted on September 25, 1984. A hearing before the Office of Administrative Law was held on November 19, 1984. After receipt of additional papers from the parties, the record closed on June 3, 1985.

Undisputed Facts

Many of the underlying facts are undisputed. Erica Cohen started working for the Board as a speech correctionist on January 7, 1974. She was assigned to an elementary school on a part-time basis for two days per week during the last six months of the 1973-74 school year. In 1974-75, the Board increased her employment in the same assignment to a full-time position of five days per week. The parties agree that in 1975-76 Cohen worked at the elementary school level at least four days per week. There remains a dispute as to whether Cohen's duties in 1975-76 also extended to the secondary school level and whether she actually worked four-and-a-half rather than four days per week. Next year (1976-1977), Cohen continued working at an elementary school for four days per week until January 10, 1977. Again there is a dispute as to whether she performed any services at the secondary school level during this period.

From January 11, 1977 to January 30, 1978, Cohen was on a maternity leave of absence. Returning to work on February 1, 1978, Cohen worked at an elementary school four days per week for the the rest of the 1977-78 school year. In 1978-79, Cohen worked at an elementary school for two-and-a-half days per week. Additionally, Cohen contends that the Board hired her to deliver speech services for another one-and-a-half days per week to students attending Kindergarten through eighth grade at a local parochial school. But the Board responds that its personnel records do not show any parochial school service; and, even if Cohen's assertions are true, the Board nonetheless maintains that such service does not count toward her seniority in the district-wide or secondary category.

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During the first six months of the 1979-80 school year, until March 3, 1980, Cohen worked two-and-a-half days per week at the elementary level. For the last four months of 1979-80, Cohen's employment at the elementary level increased to three-and-a-half days per week. Between September 1, 1980 and January 31, 1981, Cohen was absent on maternity leave. Except for nine days of accumulated sick leave, Cohen was unpaid during the entire five months of maternity leave. Upon her return on February 1, 1981, Cohen worked two-and-a-half days per week for the last five months of 1980-81. The Board acknowledges that Cohen's assignment from February to June 1981 included secondary as well as elementary school students. Consequently, the Board recognizes Cohen's seniority in a district-wide category from February 1, 1981 onward. In each of the succeeding three years, 1981-82, 1982-83 and 1983-84, Cohen worked for two-and-a-half days per week exclusively at the elementary level. On May 21, 1984, the Board adopted a resolution reducing Cohen's employment for 1984-85 to one-and-a-half days per week (i.e., from a half-time to a three-tenths position). Currently Cohen is assigned to an elementary school.

Cohen claims seniority entitlement over Suzanne Carter, another speech correctionist in the district. The parties have stipulated Carter's entire employment history. Apart from prior service which does not count toward seniority because of a voluntary resignation, Carter's present employment by the Board began on January 21, 1980. Until the middle of 1980-81, Carter worked full-time in a district-wide capacity. As of February 2, 1981, the Board changed Carter's assignment to the secondary level and reduced her employment to two-and-a-half days per week for the rest of 1980-81. Throughout 1981-82, 1982-83 and 1983-84, Carter remained at the secondary level, but her employment increased to three days per week (i.e., from a half-time to a three-fifths time position). Carter holds the same position for 1984-85.

At all relevant times, both Cohen and Carter possessed an educational services certificate endorsed as "speech correctionist." Such certificate authorizes its holder to serve as a speech correctionist in any grade from Kindergarten through the senior year of high school. Cohen, who has only a three-tenth position in the district for 1984-85, claims

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that she is entitled to the three-fifths position now occupied by Carter. Besides her three-tenth position in Emerson, Cohen also presently holds a two-fifth position in another school district. Adding together the amount of time spent on both jobs, Cohen is working seven-tenth of a normal school week. Last year, while working half-time for Emerson, Cohen held a three-tenth position in another district.

Disputed Facts

As noted, the factual dispute is limited to the nature of Cohen's assignments during three school years.

(a) 1975-76 School Year

Although the minutes of the Board's meetings reflect that Cohen was assigned to an elementary school for 1975-76, Cohen testified that she worked with two high school students in addition to her regular caseload. One of the students, identified at the hearing as J.D., was an eleventh or twelfth grader, in need of remediation in language development and articulation. According to Cohen's testimony, Lillian Sokel, director of the district's child study team, asked her to "fill in" for another speech correctionist because of a scheduling conflict. Cohen recalled that she spent approximately one hour per week rendering speech therapy to J.D. in February through June of 1976. These sessions took place in a vacant office at the high school. While Cohen remembered keeping a logbook on her sessions, a search of J.D.'s student records revealed no progress reports prepared by her.

A second high school student whom Cohen claims to have helped during 1975-76 was designated as D.L. Cohen said that she was regularly consulted about how to treat D.L., whose speech problem was caused by a cleft palate. Responsibility for actual delivery of services to D.L. belonged to another speech correctionist. Cohen's own involvement was strictly on a consulting basis. The other teacher sought her advice because Cohen had written her master's thesis on the subject of cleft palate

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rehabilitation. Without benefit of accurate time sheets, Cohen could only estimate that she devoted "more than an hour per week" on the case for "some part" of the year and "considerably less" time the rest of the year. She attended several conferences and observed D.L. "from time to time." All reports regarding D.L.'s performance were prepared by someone else.

Nothing on the record suggests that the Board ever gave its express approval to either of these two assignments. It is customary in the district for the superintendent of schools to make specific assignments of staff with district-wide responsibilities. However, Dr. Serge Angiel, the current superintendent, does not consider covering for another professional or giving advice in one's field of expertise as equivalent to an actual assignment for seniority purposes. Instead, Angiel regards an assignment as requiring full responsibility for delivery of services, evaluation of student performance, and preparation of an end-of-year report.

I **FIND** that in 1975-76 Cohen's services were performed in the category of speech correctionist at the elementary level. The Board assigned her to an elementary school at the outset of the school year and the superintendent of schools never enlarged her duties. Cohen's work with J.D. was an isolated event which occurred because of a scheduling conflict. For a temporary period lasting no more than five months, Cohen substituted for another speech correctionist with respect to one particular student. But she did not assume general responsibility for grading J.D.'s performance or preparing his progress reports. Nor did she participate in the delivery of speech therapy to any other high school student. Contact so limited as to scope and duration does not constitute a change in the original assignment of duties made by the Board. Rather, it falls into the category of professional courtesy, or temporarily helping out a colleage in an emergency situation. Similarly, Cohen's more limited involvement with D.L. did not broaden the extent of her duties. Taken at face value, Cohen's own testimony does not establish that she performed any of the duties of speech therapist for D.L. By her own admission, her

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role was limited to giving advice and exchanging information with the speech correctionist at the secondary level. Insofar as her hours of employment are concerned, there was a lack of proof to substantiate Cohen's recollection that she worked four-and-a-half days per week in 1975-76. Cohen has failed to prove that the Board's business records showing only four days per week are inaccurate.

(b) 1976-77 School Year

Cohen does not contend that she worked directly with any secondary-level students in 1976-77. In the prior year (1975-76), she had provided speech services to a sixth grader whose initials are A.K. When A.K. entered junior high school in 1976-77, Cohen made herself available "on a consulting basis" to those persons who took over responsibility for delivery of rehabilitative services. During the first two weeks of the new school year, she attended "several conferences" at which A.K. was discussed, but did not herself render any therapy to A.K. As the year continued, her role as a consultant decreased. A.K.'s file for 1976-77 does not contain any screening results or final reports written by Cohen.

I **FIND** that in 1976-77 Cohen did not perform services at the secondary level. Her involvement with A.K. was nothing more than what any elementary staff member would do to ease the transition of a former student from sixth grade to junior high school. Neither the Board nor anyone else regarded Cohen's duties in 1976-77 as extending beyond the elementary grades.

(c) 1978-79 School Year

All parties agree that in 1978-79 Cohen worked two and one-half days per week at a public elementary school. At the hearing, Cohen testified that in 1978-79 the Board also hired her to provide therapeutic intervention to eligible students at the Assumption School, a parochial school located within the district. She conducted her sessions either on a one-to-one basis or in small groups of no more than four students. Cohen estimated that she devoted one and one-half days per week to these additional duties, including

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preparation, parent conferences and actual pupil contact. Among her other duties, Cohen submitted reports on her students to the administration in charge of Assumption School. The Board paid her at the hourly rate of $7.00 for working with Assumption School students, but not for any preparation or conference time. Screening of students from Assumption School started in September 1978. Treatment began in October of the same year and ended in late May or June 1979.

Unlike the public school system where her caseload consisted exclusively of elementary school students, her caseload at Assumption School ranged from Kindergarten through eighth grade. Specifically, Cohen recalled providing speech services to "approximately six" seventh or eighth grade students. Assumption School utilized departmental instruction rather than self-contained classes in seventh and eighth grades. Some of her students from Assumption School came to a public school building for her services.

The Board maintained that Assumption School must be regarded as an elementary school, although it did not deny that Assumption School included classes up to the eighth grade. Moreover, the Board relied on its resolution of June 27, 1978, which assigned Cohen to the elementary grades for 1978-79 without any mention of her duties for Assumption School students. At petitioner's request, the Board produced its payroll records for 1978-79 which show that Cohen was paid a total of $1,699 above her regular salary for "other" services totaling 242.5 hours. Presumably such "other" services were her additional assignment to provide speech therapy to Assumption School students. These payroll records substantiate Cohen's testimony that she rendered speech services to Assumption School students in 1978-79 and that the Board paid her for doing so.

I **FIND** that Cohen was employed as a speech correctionist for four days per week during the 1978-79 school year. In addition to two and one-half days per week at the public elementary school, Cohen spent one and one-half days per week on duties related to

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Assumption School students. The Board arranged and paid for her services as part of its obligation to provide special education to all children in the district. Cohen's caseload included six students who were in seventh or eighth grades in a departmentalized school. Therefore, Cohen's assignment in 1978-79 was district-wide rather than restricted to elementary grades alone.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that Cohen has 3.15 years of seniority and Carter has 3.08 years of seniority in the category of speech correctionist on a district-wide basis.

Seniority provides a mechanism for ranking all tenured teaching staff members so that reductions in force and reemployment can be effected in an equitable fashion and in accordance with sound educational policies. N.J.S.A. 18A:28-9 et seq. Lichtman v. Ridgewood Bd. of Ed., 93 N.J. 362, 368 (1983); Howley v. Ewing Twp. Bd. of Ed., 1982 S.L.D. ___ (Comm'r of Ed. 1982). Dismissals or cutbacks in hours resulting from a reduction in force "shall be made on the basis of seniority according to standards to be established by the commissioner with the approval of the state board." N.J.S.A. 18A:28-10. Under N.J.S.A. 18A:28-13, the Commissioner is authorized to establish "fields or categories" for accrual of seniority "upon the basis of years of service and experience within such fields or categories of service as well as in the school system as a whole, or both." It is now well established that part-time service by a tenured teaching staff member counts toward calculation of seniority rights. Simply put, ". . . part-time service affects only the arithmetic computation of seniority; it serves to quantify, not qualify, seniority." Lichtman, at 366.

Newly amended seniority regulations adopted by the Commissioner, effective September 1, 1983, set forth the various categories in which seniority accrues. N.J.A.C. 6:3-1.10(1)(15). Generally, the new rules base seniority on actual experience and draw a clear distinction between service at the elementary or the secondary levels. Someone who has taught only at the elementary level is not entitled to seniority at the secondary

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level, and vice versa. Compare N.J.A.C. 6:3-1.10(l)(15) to N.J.A.C. 6:3-1.10(l)(16). This distinction applies not only to holders of instructional certificates but also to holders of educational service certificates, such as speech correctionists. However, the rules expressly provide that "[p]ersons employed and providing services on a district-wide basis under a special subject field endorsement or an educational services certificate shall acquire seniority on a district-wide basis." Ibid. See also the official publication entitled Revision of Seniority Regulations: A Position Statement of the New Jersey State Department of Education (June 1983), wherein it is noted:

> Additionally, the Commissioner's proposal also applies the distinction between secondary category and elementary category to special subject teachers such as art, music and physical education, as well as noninstructional service personnel such as school nurses and librarians. Thus, a person hired by a local board for service in the elementary schools will not acquire seniority at the secondary level even though his or her certificate endorsement is for grades K-12. Those who have served at both levels will obtain seniority at both levels. (at page 3).

Initially, Cohen urges that she is entitled to district-wide seniority dating back to 1975-76 because of her minimum contacts with J.D. and, to a lesser extent, with D.L. and A.K. She points out that the Board recognized her district-wide seniority as of 1980-81, despite the lack of any formal resolution giving her district-wide duties and a caseload of only five secondary students. Cohen suggests that the circumstances in 1975-76 are indistinguishable from 1980-81. Significant differences do exist. On April 28, 1975, the Board passed a rsolution assigning Cohen to the elementary level for 1975-76. Her work with J.D. was of a temporary nature. Both the scope and duration of her duties were limited. She functioned as a short-term substitute rather than a permanent replacement. Sayreville Ed. Ass'n v. Sayreville Bd. of Ed., 193 N.J. Super. 424 (App. Div. 1984). Such a narrow role does not constitute employment "on a district-wide basis" within the meaning of N.J.A.C. 6:3-1.10(l)(15) or (16). With even greater force, the same reasoning applies to Cohen's more limited involvement with D.L. in 1975-76 and A.K. in 1976-77.

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More persuasively, Cohen argues that she should be credited with district-wide seniority beginning in 1978-79. Notwithstanding the absence of any formal resolution assigning her to the secondary level, the Board's own payroll records verify that Cohen was actually assigned to deliver services to students attending Assumption School. N.J.A.C. 6:3-1.10(l)(15) defines "secondary" to include "grades 7-8 in junior high schools, and grades 7-8 in elementary grades having departmental instruction." Uncontradicted testimony shows that grades 7 and 8 at Assumption School were departmentalized. Cohen's involvement with seventh and eighth grade students in 1978-79 was not just an isolated event or temporary occurrence. Six of her students from Assumption School were in seventh or eighth grades. The Board not only was aware of the situation, but paid Cohen extra money for performing these services. By its tacit approval of this arrangement, the Board expanded Cohen's duties to include secondary as well as elementary students. Thus, Cohen earned district-wide seniority in 1978-79. Pursuant to the "tacking-on" provision, N.J.A.C. 6:3-1.10(h), a staff member continues to earn seniority in all categories "in which . . . she previously held employment," even after she has moved to a different category. After 1978-79, therefore, Cohen continued to acquire district-wide seniority as a speech correctionist for subsequent years of service at the elementary level.

A related issue is the amount of credit Cohen should receive for 1978-79. Assuming that her service counts toward district-wide seniority, the parties still cannot agree on how much credit is due. On the one hand, Cohen emphasizes that the total time spent on Assumption School duties, including preparation time, was one and one-half days per week for the entire 1978-79 school year. On the other hand, the Board stresses that it only paid her for pupil contact time, averaging about one day per week. Further, the Board indicates that the Assumption School academic year, which began sometime in mid-September 1978 and ended in late May or early June 1979, was shorter than the ten-month academic year in the public schools.

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Regardless of the negotiated method for calculating Cohen's rate of pay, her job required more than just working directly with the children. Part of her responsibility was to prepare for individual instruction, meet with parents and teachers, and write progress reports on her students. If she had not performed these other services, she would not have been doing her job properly. The Board does not deny that Cohen did all these things. No good reason has been given why Cohen should not receive credit for everything she did in connection with her Assumption School assignment. By the same token, Cohen was ready to do any assignment which the district might give her throughout the full 1978-79 school year. She should not suffer a loss in seniority credit due to the mere happenstance that the academic year at Assumption School was somewhat shorter than the normal academic year. See Middlesex Cty. Ed. Servs. Comm'n. v. Middlesex Cty. Ed. Servs. Comm'n. Bd. of Dirs., 1984 S.L.D. ___ (Comm'r of Ed. 1984).

Another dispute concerns how much seniority credit, if any, Cohen should receive for her maternity leave from September 1, 1980 through January 31, 1981. Credit for leaves of absence is governed by N.J.A.C. 6:3-1.10(b), which provides:

> . . . The periods of unpaid absences not exceeding 30 calendar days aggregate in one academic or calendar year, leaves of absence at full or partial pay and unpaid absences granted for study or research shall be credited toward seniority. All other unpaid absences or leaves of absence shall not receive seniority credit.

Cohen's basic contention that this language entitles her to a minimum seniority credit of 30 days must be rejected. Leaves of absence count automatically toward seniority only if the length of the absence is less than 30 days. Where, as here, the absence is for more than 30 days, credit is allowed only if the leave is at "full or partial pay" or is for purposes of "study or research." Cohen's own proofs show that she was paid for only nine accumulated sick leave days during this five-month period. Before and after her maternity leave, she was working a half-time position. Consequently, her seniority credit for the period of her maternity leave is 9/180 x .5 = .025 years.

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In sum, the seniority credit calculation is illustrated in the following table:

District-wide Seniority

School Year	Portion of the School Year		Portion of a Full-time Position	Seniority Credit
		Cohen		
1978-79	Public School	1x	.50	.50
	Assumption	1x	.30	.30
9/1/79-3/3/80		.6x	.50	.30
3/4/80-6/30/80		.4x	.70	.28
9/1/80-1/31/80		.05x	.50	.02
2/1/81-6/30/81		.5x	.50	.25
1981-82		1x	.50	.50
1982-83		1x	.50	.50
1983-84		1x	.50	.50
			Total	3.15
		Carter		
1/21/80-6/80		.53x	1.00	.53
9/80-2/1/81		.5x	1.00	.50
2/2/81-6/81		.5x	.50	.25
1981-82		1x	.60	.60
1982-83		1x	.60	.60
1983-84		1x	.60	.60
			Total	3.08

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Cohen's remaining contentions may be quickly put to rest. It would be wrong to interpret the new seniority rules as granting district-wide seniority from the date of initial employment to anyone who subsequently serves on a district-wide basis at any time during her career. Applied to her own case, Cohen's approach would reach the anomolous result of giving her district-wide credit as of January 4, 1974, even though she did not perform any services at the secondary level until September 1978 at the earliest. One purpose behind the change in rules was to base seniority on actual experience in a particular position. Revision of Seniority Regulations (June 1983). Lichtman, at 368. Cohen's reading of the new rules would thwart the very reason for which they were proposed. Nothing in the regulations themselves lends any support to her strained interpretation.

Likewise, Cohen's arguments that her seniority rights vested under the old rules and that the Board's action violates her constitutional rights are without merit. Identical points have already been fully considered and rejected by both the Commissioner and the State Board of Education in Hill v. West Orange Bd. of Ed., 1985 S.L.D. ___ (Comm'r 1985), aff'd 1985 S.L.D. ___ (St. Bd. 1985). Hill held that a person's seniority rights are governed by the regulations in force on the date that the board of education took its action. In Hill as well as the current case, the controlling rules are those which became effective on September 1, 1983. Presently, the final agency decision in Hill is pending on appeal before the Appellate Division [Docket No. A-4355-84-T1 (filed May 24, 1985)].

To the extent that a different outcome is suggested by the Commissioner's decision in Felper v. West Orange Bd. of Ed., 1985 S.L.D. ___ (Comm'r of Ed. 1985), that case is distinguishable from our own on its facts. Felper involved a tenured art teacher who was terminated as a result of a reduction in force in June 1983, placed on the preferred eligibility list for reemployment, recalled to service on April 1, 1984 and then terminated for a second time on June 30, 1984. Given this unusual sequence of events, the Commissioner determined that Felper's seniority rights were fixed as of the first reduction occurring in June 1983. An unfortunate side-effect of the Felper analysis is that someone previously terminated because of low seniority prior to September 1, 1983 now receives an advantage over other teachers who survived the original reduction because

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of their greater seniority. The practical result is to turn the seniority regulation on its head. Unless absolutely unavoidable, the Felper ruling should not be extended to the present case where Cohen has suffered prior cutbacks in hours but has never been dismissed from employment.

Finally, the question of damages will be addressed. When measuring damages, Cohen starts with the fact that in 1984-85 her combined hours of work were equivalent to a seven-tenth position (i.e., a three-tenth position in Emerson and a four-tenth positionin another district). In 1983-84, she worked a combined total of an eight-tenth position (i.e., a half-time position in Emerson and a three-tenth position in another district). Comparing her 1984-85 to her 1983-84 hours, she arrives at a loss of one-tenth position (i.e., eight-tenth minus seven-tenth). Despite the appeal of her logic, Cohen appears to have understated her actual loss in 1984-85. The correct method of measuring her damage is to ascertain the difference between what she should have received and what she actually received in 1984-85. Then the Board is entitled to an offset for earnings Cohen ought to have made in mitigation of her damages. If Cohen's seniority had been correctly calculated, she would have received a three-fifths rather than a three-tenth position for 1984-85. The difference is a three-tenth position. Her outside employment during 1984-85 amounted to a four-tenth position. But the Board cannot claim the full amount of outside earnings as an offset. Since Cohen's outside employment in 1983-84 was already a three-tenth position, the amount of extra earnings attributable to the wrongful cutback in her hours in 1984-85 was only one-tenth of a position (i.e., four-tenth minus three-tenth). Hence, the final measure of her damages is three-tenths of her 1984-85 salary for a full-time position at Emerson minus one-tenth of her salary for a full-time position at her outside job. Mathamatically, the amount of damages is $9,029 - (.1 x $25,000) = $6,529.

Order

It is **ORDERED** that the Board adjust its records to reflect Cohen's correct seniority for assignments in the upcoming 1985-86 school year.

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It is further **ORDERED** that the Board promptly pay to Cohen the sum of $6,529 for lost salary in 1984-85.

And it is further **ORDERED** that the Board promptly restore to Cohen all other lost benefits and emoluments she would have received if she had occupied a three-fifth position during 1984-85.

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

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

July 18, 1985
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

JUL 18 1985
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:

July 22, 1985
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

al

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ERICA A. COHEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF EMERSON, BERGEN COUNTY,	:	DECISION
RESPONDENT,	:	
AND		
SUZANNE CARTER,	:	
INTERVENOR.	:	
	:	

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

The Board excepts to that portion of the initial decision which states that it recognizes petitioner's seniority in a district-wide category from February 1, 1981 onward. With respect to her assignment involving the Assumption School, the Board excepts to the determinations that (1) petitioner acquired district-wide seniority by virtue of the fact that this nonpublic school was departmentalized; (2) time spent in the Assumption School is to be included to calculate her seniority; and (3) she should receive seniority credit for not just pupil contact time but also for preparation and conference time as well. In addition to the foregoing, the Board excepts to those portions of the initial decision which determines petitioner appeared to have understated her actual loss for 1984-85 and that she is entitled to the sum of $6,529 for lost salary during that period.

Intervenor Carter's exceptions also object to the judge's determination that petitioner accrued district-wide seniority due to her service at the Assumption School during 1978-79. She also contends, inter alia, that the judge erroneously applied the "tacking-on" provision of N.J.A.C. 6:3-1.10(h) when he credited her with district-wide credit for years of service subsequent to 1978-79.

Petitioner avows that the Commissioner should adopt the judge's conclusion that her seniority rights were violated by the Board but she also believes that he erred in several respects in his findings and conclusions. She contends that there was sufficient credible evidence to establish district-wide responsibilities during

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1975-76 and that the judge inaccurately credited her seniority time between September 2 and October 24, 1980 when she was on maternity leave. More specifically, petitioner argues that for the period September 2 to September 23, 1980 she should be credited with .038 of a year's seniority, not .025, and that she is entitled to .05 of a year's seniority credit for the 30 day period September 24 to October 24, 1980 because the judge mistakenly interpreted N.J.A.C. 6:3-1.10(b).

The remainder of petitioner's exceptions relate to the judge's rejection of the Commissioner's decision in Felper, supra. (Initial Decision, ante) She argues that this decision requires the conclusion that in light of her series of pre-September 1, 1983 reductions in force, it must be determined that all of her employment within Emerson School District should be viewed as district-wide service.

A review of petitioner's employment history reveals that she commenced her service in the Emerson School District on January 7, 1974 in a part-time assignment (2 days per week). For the 1974-75 school year she served in a full-time position. During the 1975-76 school year her assignment was again part-time (4 days per week). She continued in a part-time position of 4 days per week (exclusive of maternity leave) through the 1977-78 school year. In 1979-80, her position was reduced to 2.5 days per week until March, 1980 whereupon the assignment was increased to 3.5 days. Upon returning from maternity leave in February 1981 she assumed a 2.5 days' position in which she remained through the 1983-84 school at which time she was reduced to 1.5 days per week..

The record supports the fact that petitioner was subject to a reduction in force as early as 1975 when her full-time position was reduced to a part-time position. However, at that time she had not yet acquired tenure, thus her seniority rights did not come into play. The next reduction to which petitioner was subject was in 1978 when her assignment was decreased from 4 days per week to 2.5 days. Such reduction may be properly seen as the abolishment of a 4/5 position to a half-time position. Kauffman et al. v. Bd. of Ed. of Lower Alloways Creek, decided by the Commissioner November 12, 1981. It is, therefore, at this point in time that petitioner's seniority first came into play. Determination of her seniority entitlement should thus have been calculated in accordance with N.J.A.C. 6:3-1.10 in effect at that time. Hence, she is entitled to credit for K-12, district-wide seniority from the initial date of her employment and including all service in the district subsequent to the reduction in force.

It is noted that petitioner claims and was granted seniority credit by the judge for the service rendered during 1978-79 to pupils in the Assumption School, a parochial school. This, however, is inappropriate because that service was not by virtue of her regular contractual assignment with Emerson School District. Her service was over and above or in addition to her

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regular teaching assignment, similar to that of staff who have coaching or extracurricular assignments. Compensation for the service to Assumption School was not based on her regular contracted salary with the district but was in addition to her regular salary and she was compensated by way of vouchers (C-5). Such service cannot be construed as creditable for seniority purposes. Having reached this determination, there is no need to address the myriad legal arguments raised with respect to whether or not her service to a nonpublic school can or should be credited for seniority purposes.

The Commissioner concurs with petitioner's legal argument that the judge should have credited her with .05 of a year seniority credit for the first 30 days of her unpaid leave in 1980, pursuant to N.J.A.C. 6:3-1.10(b). See Old Bridge Teachers Assoc. v. Bd. of Ed. of Old Bridge, decided by the Commissioner August 8, 1985 (at pp. 57, 58). As regards her exception with respect to the nine days accumulative sick leave in September 1980, the Commissioner notes that those days were credited as disability sick leave until September 23, 1980. (C-2(f)) Thus, it would appear that the 9 sick days should be credited as .03 of a year seniority (9/30 days = .03 year).

With respect to damages owing to petitioner, the Commissioner finds the judge's analysis well reasoned and accurate. Accordingly, the Commissioner adopts as his own the recommended orders of the Office of Administrative Law as modified by the determination rendered herein in regard to petitioner's district-wide seniority and seniority credit for the leave period in 1980.

COMMISSIONER OF EDUCATION

SEPTEMBER 3, 1985

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9143-84
AGENCY DKT. NO. 490-11/84

JOHN H. CHAMBERS, JR.,
Petitioner,
v.
NEPTUNE TOWNSHIP
BOARD OF EDUCATION,
Respondent.

Thomas W. Cavanagh, Jr., Esq., for petitioner (Chamlin, Schottland, Rosen, Cavanagh & Uliano, attorneys)

Andrew J. Wilson, Esq., for respondent (Laird and Wilson, attorneys)

Record Closed: June 5, 1985 Decided: July 22, 1985

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

This case presents the issue whether John H. Chambers, Jr. (petitioner), a teaching staff member with a tenure status in the employ of the Neptune Township Board of Education (Board), is entitled to relief because the Board failed to appoint him assistant varsity football coach for 1984-85 despite the fact he submitted a written application for the appointment, he is a teaching staff member employed by the Board, he is properly certificated, and despite the fact he was the sole in-district applicant for the position. The Board admits it appointed a person assistant varsity football coach who had recently been graduated from college, without prior public school teaching experience but who had been approved by the Board to perform as a substitute teacher in its school during the same meeting it appointed him coach, on the grounds that that person was better qualified than petitioner. After the matter was transferred to the Office of

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Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., a plenary hearing was scheduled and conducted April 8, 1985 at the Marlboro Township Municipal Building, Marlboro. The record closed June 5, 1985 upon the receipt of simultaneous briefs of the parties.

BACKGROUND FACTS

Certain basic facts have been stipulated by the parties and are as follows:

1. Petitioner, who possesses an endorsement of physical education on an instructional certificate, began his employment with the Board as a teacher of physical education during September 1978.

2. During the course of his employment with the Board, petitioner accumulated six years experience as an assistant coach of the Neptune Township High School track and field team. Petitioner has no experience as a coach in football.

3. The vacancy for an assistant football coach was posted in the Neptune schools during March 1984. Petitioner applied for the vacancy shortly thereafter. Neither a written policy nor guideline existed at the time for the selection of athletic personnel.

4. Petitioner and Thomas Walsh, the recent college graduate, were the only two persons interested in the vacancy for assistant football coach. While not stipulated as fact, it appears Walsh may have been employed in some capacity by a nonpublic school.

5. The head varsity football coach, Joseph Bongiovanni, and the athletic director, Lewis Grob, recommended Walsh as the assistant football coach to the superintendent. Walsh, it is noted, was not employed by the Board at the time of that recommendation.

6. The superintendent did not support the recommendation that Walsh be appointed the assistant football coach over petitioner.

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7. The superintendent, at a meeting conducted by the Board on August 29, 1984, recommended petitioner be appointed to the position assistant varsity football coach. The Board rejected that recommendation. At the same meeting, the Board approved the appointment of Walsh as the assistant varsity football coach for 1984-85 at a stipend of $1,810.

8. Walsh, while eligible for an endorsement in physical education upon his graduation from college, did not acquire physical possession of the document until September 1984.[1]

In addition to the foregoing basic facts, the record shows the following to be additional relevant facts of the matter. Petitioner is a graduate of Neptune Township High School and Seton Hall University. At both institutions, petitioner participated in track and was named All-American during his high school and college years. For the past six years petitioner has been an assistant track coach at Neptune which has been the Group IV South champions. Several of the track team members have been named All-State, All-Shore, and All-County. Petitioner was motivated to apply for the assistant varsity football coach vacancy during March 1984 because he was aware of no black coaches, save for himself, in the Board's employ. His goal was to assist black athletes, football players particularly, to gain entry into colleges. While petitioner admits he has no experience playing football, he did have academic courses in football at Seton Hall University as part of his study in physical education. He presently teaches flag football in his adaptive physical education classes.

Petitioner admits to having no knowledge of the intricacies of football but he insists he was willing to learn necessary skills to impart to the football team members. Petitioner proffered that his skill and expertise acquired as a track star and as an assistant track coach provide him with expertise in physical conditioning of football team members, and with knowledge of how to increase the speed of wide receivers, running backs, and ostensibly the whole football team. Petitioner intended to learn playmaking from other coaches for the Neptune Township team.

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[1] Physical possession of a certificate is not required for initial appointment by a board; eligibility for such certificate is sufficient. Kane v. Hoboken Bd. of Ed., 1975 S.L.D. 12, 17.

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After petitioner filed his application for the football vacancy, the head coach and the athletic director both advised him of their view he was not qualified to coach football because of his lack of experience playing football. Later, petitioner learned near the end of April 1984, that the coach and athletic director were attempting to secure the services of Walsh for the vacancy.

The head football coach, Joseph Bongiovanni, explained that the controverted vacancy occurred upon the departure of the former assistant coach whose assignment was to coach running backs and defensive ends. The skills necessary for coaching defensive ends include tackling, shedding blocks, zone defenses, lead blocks, hook blocks and defensive pass drops. Bongiovanni did not have the time necessary to teach petitioner the kinds of football skills a defensive end coach must teach athletes. Bongiovanni was concerned that because petitioner did not possess the football skills necessary to be taught, the school district would be legally liable for injuries to defensive ends or to others who may be injured by their play.

After Bongiovanni advised petitioner he needed an assistant coach with football experience, Bongiovanni began calling other area coaches in an effort to secure someone for the vacancy who had football experience. Sometime thereafter, Bongiovanni learned that Thomas Walsh returned, or was to return, to the Neptune Township area after having been graduated from Seton Hall. Walsh inquired of him whether any coaching positions were open. Without having filed a written application for the vacancy, Walsh was interviewed by both Bongiovanni and Grob sometime during May 1984.

Walsh, it is noted, was a running back for the Neptune Township High School football team and he played outside linebacker during college. Petitioner does not dispute Walsh's football playing experience nor does he dispute the assertion made by Bongiovanni that Walsh was a power weightlifter which is an important conditioning factor for football players. Both Bongiovanni and Grob concluded that because Walsh actually played a position, outside linebacker, very similar to the position of defensive end for which a coach was sought, Walsh was the better qualified applicant for the position assistant coach of the Neptune High School football team. It was not until July 5, 1984 that athletic director Grob advised the superintendent:

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> A problem[2] exists regarding the open football position as Mr. Bongiovanni and myself are hesitant to recommend a staff member [Chambers] with questionable qualifications. A nonstaff member is interested in the position and I feel we should discuss this matter in detail.

It is recognized that the superintendent was hospitalized during the first two weeks of July 1984. When Grob advised of the reluctance to appoint Chambers because of an asserted lack of qualifications, the superintendent directed Grob to take the matter up with the Board's athletic subcommittee which consists of four Board members. Grob was to have reported his concerns as early as May or June 1984 to the Board's subcommittee regarding petitioner's asserted lack of qualifications and the fact that he was looking further. It is curious that Walsh was interviewed by Grob and Bongiovanni during May 1984, but that the superintendent was not advised of their judgment made of petitioner's lack of asserted qualifications until July 5, 1984. In the meantime, the superintendent was of the view that petitioner should be the nominee for the position because of the district's past practice of hiring coaches from within and that the element of actual experience in the sport to be coached had not been a factor in the selection of coaches.

On July 17, 1984 Grob met with the Board's athletic committee and the application of petitioner and Walsh were discussed. On July 23, 1984, athletic director Grob advised the superintendent as follows:

> Please note the enclosed interview reports [Exhibit B,[3] attached to J-3]. Mr. Bongiovanni and I concur that Tom Walsh should be recommended for the open Assistant Football coaching position.

---

[2] The "problem" to which reference is made presumably was Grob's view that petitioner was not qualified for the vacancy in contrast to the superintendent's view that petitioner was qualified for the vacancy under the Board's past practice and policy, as well as under State Board rules.

[3] The interview reports were completed following personal interviews of petitioner and Walsh. Athletic director Grob interviewed petitioner, while he and Bongiovanni interviewed Walsh. Grob noted petitioner does not have playing or coaching experience in football and because football is a contact sport which requires a coach experienced with the game to teach the skills in a safe manner, petitioner was found not to have the experience or background in football to teach proper fundamentals. Both Grob and Bongiovanni noted that Walsh has eight years experience as a football player and Grob noted he himself coached Walsh during high school. Both Grob and Bongiovanni concluded Walsh was the applicant to be appointed to the vacancy.

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> Staff member, John Chambers, does not have experience or qualifications in the area of football and would have to be taught everything by Mr. Bongiovanni. This creates an almost impossible working situation.
>
> Tom Walsh has played for eight years and has the experience to come in and teach immediately given the proper guidance of Mr. Bongiovanni.
>
> Please process the recommendation of Tom Walsh to the board of education.
>
> [Exhibit C, attached to J-3]

At a Board meeting held August 29, 1984, Board member Weber, who is a member of the Board's athletic subcommittee, presented in resolution form the recommendation of the superintendent that petitioner be appointed assistant football coach for 1984-85. The Board defeated that resolution by a vote of three ayes, five nays. Board member Weber then offered a resolution, seconded by Board member Beekman, who also is a member of the athletic subcommittee, to appoint Thomas Walsh as assistant football coach for 1984-85.[4] That resolution was approved five ayes, three nays.

At the same meeting, the Board adopted as policy, Guidelines for Hiring Coaches, which, for the first time, states in written form that

> * * *
>
> 3. Applications will be screened to insure that applicants' qualifications include playing and/or coaching experience in the sport or a strong related coaching or physical education background.
>
> * * *

Prior to August 29, 1984, the Board had no such written policy nor did the superintendent, nor did the athletic director. In fact, the requirement of playing or coaching experience in the sport sought to be coached by applicants was made part of the Guidelines for Hiring Coaches to avoid similar disputes as herein in the future. The superintendent is clear in his testimony that prior to August 29, 1984, playing or coaching the specific sport was not a prerequisite for appointment as coach. (IT-58). Nonetheless,

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[4] It is agreed that the Board appointed Walsh assistant coach after having consulted the Monmouth County Superintendent of Schools and then forming a good faith belief that such appointment was within its authority.

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the athletic director says he always considered playing or coaching experience in a particular sport as an integral part of the qualifications necessary to be appointed a coach in the Neptune Township school district. Curiousiy, during the 1983-84 year, four persons were appointed to coaching positions in field hockey, football, soccer and wrestling, none of whom had playing experience nor did any of the persons coach the specific sport prior to their appointment. The athletic director explains these appointments on the grounds that those four were the only applicants for the respective positions. It is also noted that the athletic director advised an out of district applicant for a position of assistant girls' track coach on March 13, 1984 that

> Rules and regulations of the State Department of Education require we use a staff member to coach whenever possible. A Neptune teacher has been recommended to the superintendent for the open position of girls' assistant track coach * * *
> (P-1)

Finally, on August 29, 1984, during the same meeting the Board approved Walsh to be the assistant coach, it also approved him to act as a substitute teacher in its schools for 1984-85 under authority of N.J.S.A. 18A:16-1. It is noted Walsh had filed an application for employment as a teacher with the Board on August 10, 1984. No teacher vacancies existed however. While the superintendent explained Walsh was appointed one of four permanent substitutes as of January 1, 1985, there is no evidence to show how many days, if any, petitioner performed as a substitute teacher in the Board's schools from September 1, 1984 through December 31, 1984. Nonetheless, neither substitutes nor permanent substitutes in the Board's employ are considered teaching staff members under N.J.S.A. 18A:1.1 and, consequently, neither are such employees teaching staff members for purposes of tenure acquisition at N.J.S.A. 18A:28.5.

ARGUMENTS

Petitioner contends that the Board failed to comply with N.J.A.C. 6:29-6.3 in regard to is appointment of Walsh because Walsh was not in possession of a certificate until September 1984, because Walsh was not employed by it as a teacher but as a substitute; and, because the Board failed to declare to the county superintendent of schools that an emergency existed in order to seek an out-of-district person for appointment to the position of coach. Furthermore, petitioner contends the Board violated its own past practice when it required of him experience in coaching or playing football for appointment to the position when the preceding year it appointed at least four

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persons to be coach, none of whom had experience as a participant in or a coach of the sport they were assigned to coach. Furthermore, petitioner points to the fact that not until August 29, 1984 did the Board ever adopt the policy in regard to requiring coaching or playing experience of an applicant for a particular coaching position. Petitioner contends that the issue is not who would make a better football assistant coach but whether the Board violated N.J.A.C. 6:29-6.3 or its own unwritten policy in regard to its failure to appoint him to the controverted position.

The Board contends that it merely selected the better qualified candidate, Walsh, for the position assistant football coach and that that judgment had been made by its athletic director based on Walsh's football playing experience. The Board contends that the four persons who were employed in 1983-84 as coaches for sports in which they neither had playing nor prior coaching experience were the sole applicants for such vacancy and, as a consequence, the Board was placed in the position of having to accept them as legitimate appointments to the positions. The Board also contends that recent amendments to N.J.A.C. 6:29-6.3 removes a former prohibition which required a board to appoint coaches, in the first instances, from their own full time regular teaching staff member pool. In this case, the Board contends Walsh is "employed" by it as a substitute teacher and, consequently, that asserted employment satisfies the amended provisions of the administrative rule.

LAW

State Board rules which govern the employment of athletic personnel, including coaches, are found at N.J.A.C. 6:29-6.3, as amended effective November 7, 1983.[5] The present rules provide as follows:

> (a) No person not certified as a teacher and not in the employ of a board of education shall be permitted to organize public school pupils during school time or during any recess in the school day for purposes of instruction; or coaching or for conducting games, events or contests in physical education or athletics.

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[5] See, 15 N.J.R. 1152(b); 15 N.J.R. 1860(c).

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(b) School districts shall be permitted to employ any holder of a New Jersey teaching certificate to work in the interscholastic athletic program provided that the position has been advertised.

(c) In the event there is no qualified and certified applicant, the holder of a county substitute certificate is authorized to serve as an athletic coach in the district in which he or she is employed for a designated sports season, provided that:

1. The district superintendent demonstrates to the county superintendent that:

   i. The vacant coaching position had been advertised; and

   ii. There was no qualified applicant based on the written standards of the district board of education.

2. The district superintendent will provide a letter to the county superintendent attesting to the prospective employee's knowledge and experience in the sport in which he or she will coach;

3. Approval of the county superintendent shall be obtained prior to such employment by the district board of education. * * *

The rule prohibits at paragraph (a) a board from employing as a coach any person (1) not certified as a teacher and (2) any person who may be certified, or eligible for certification, but who is not in the employ of a board of education. Paragraph (b) authorizes a board to employ any holder of a New Jersey teaching certificate to be a coach in its interscholastic athletic program provided that the position has been advertised. Finally, in the event that the board fails to locate a person who is certified as

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a teacher and in the employ of a board, the searching board may then look to its own substitute teachers, who hold a county substitute certificate, to coach a specific sport so long as prior approval of the county superintendent of schools is secured.

Prior to the amendments of the administrative rule, a board was duty bound under N.J.A.C. 6:29-6.3(a) to appoint coaches from within its own professional teaching staff. Newmark v. Woodbridge Tp. Bd. of Ed., 1983 S.L.D. _____ (Aug. 8, 1983); Rancocas Valley Regional High School Ed. Assn. v. Rancocas Valley Regional Bd. of Ed., 1983 S.L.D. _____ (Sept. 26, 1983). If a board could not locate such a person among its staff prior to the amendment, the board could then turn to constituent or sending school districts or a vocational school within the same county to work part time in the interscholastic program providing the local superintendent certified the existence of an emergency to the county superintendent.

Nonetheless, persons employed as coaches, even those employed from within the employing district, do not acquire tenure in such positions. Dallolio v. Vineland Bd. of Ed., 1965 S.L.D. 18. Thus, persons employed as coaches are subject to reappointment each year at the sound discretion of the board. In instances when a board determined not to reappoint an incumbent in-district teacher as coach, and replaced the person with an out-of-district teacher, even when the board determined in good faith the incumbent engaged in conduct not suitable for a coach in its employ, the Commissioner set aside such action. See, as examples, Newmark, supra and Rancocas Valley, supra. In Barry Hamlin v. Bd. of Ed. of the Borough of Dunellen, 1981 S.L.D. — (June 15, 1981), aff'd St. Bd. 1981 S.L.D. — as clarified (Nov. 10, 1981), the Commissioner held the Dunellen board violated, prior to amendment, N.J.A.C. 6:29-6.3 by appointing a coach from outside the district in spite of a valid application from Hamlin, its own employee, whom it had employed for the prior ten years in an assistant coaching position. In that case, the Dunellen board contended the out-of-district teacher was more qualified than Hamlin, the in-district teacher. On the other hand, persons who were coaches, but not reappointed in favor of another in-district person, have not been successful in showing an enforceable claim to the job.

Paragraph (a) of N.J.A.C. 6:29-6.3 was not changed by the amendment. Rather, that section has been in full force and effect since before the commencement of the publication of the New Jersey Register in 1970. Consequently, the essential qualifications of certification and employment as a teacher by a board of education exists

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today as they existed more than 15 years ago. Paragraph (b) must, accordingly, be interpreted in light of paragraph (a), otherwise a professional football player who acquired a baccularеate degree in physical education while in college, as an example, and who retires from professional football, could merely apply for a teaching certificate on the strength of his degree and without being employed as a teacher be assigned by any board of education to coach the varsity football team. In light of the fact New Jersey soil is home ground for three professional football teams, only one of which, however, refers to itself as a New Jersey team, and our southern borders are adjacent to another professional football team, such an occurrence is not remote. In Arthur Barber v. Kearny Bd. of Ed., 1975 S.L.D. 58, the Commissioner said

> It must be borne in mind that all persons who serve as coaches of interscholastic athletics in public schools in this State are first and foremost teaching staff members. Their academic preparation, training and experience are centered upon teaching. The knowledge that these teaching staff members possess in regard to various types of athletic events is usually derived from their own participation in amateur athletics during their secondary schooling and undergraduate college careers. They are professional teachers and not professional coaches * * * [T]he purposes of [N.J.A.C. 6:29-6.3 before amendement] are twofold. These are to avoid the evil of having local boards of education employ professional athletes or other uniquely qualified persons on a minimal part-time basis as a guise for securing their coaching talents, and also to ensure that boys and girls in the public schools will be coached by teachers who have been trained to foster the development of the mind, body and character of each pupil as the foremost goal.

Turning to the facts of this case, the Board, its athletic director and its football coach assert Walsh is the better qualified to be an assistant coach of the Neptune varsity football team based solely on the strength of Walsh's playing experience in that sport. However, it is clear Walsh does not have the teaching experience petitioner accumulated during his seven years employment with the Board. Furthermore, Walsh has not been a coach in any sport with public school pupils prior to his appointment by the Board. Petitioner, on the other hand, has been a coach for six years, albiet an assistant coach for the varsity track team. Still, petitioner by virtue of his academic training and experience as a teacher is presumed to have carried over that training and experience to his duties as an assistant track coach. The point, nonetheless, of this discussion is not to compare qualification of petitioner with Walsh. Rather, the point is to test the assertions that petitioner is not "qualified" to be an assistant coach to the football team by virtue solely of his lack of playing the sport.

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It cannot be disputed that one who has actively participated in the sport of football, as Walsh, for eight years acquired football skills which were not acquired by someone, as petitioner, who has not participated in the sport.[6] But beyond that, it cannot be said that mere possession of football skills translates into a better qualified person to be a coach in interscholastic athletics under N.J.A.C. 6:29-6.3. As noted earlier, the qualifications for appointment as a coach by a local board of education are (1) certification as a teacher and (2) employment by a board of education. When one looks to the Summary which announced the proposed rule amendments in the New Jersey Register on July 18, 1983 the announcement is made that the rule changes are to amend "* * * the process for hiring athletic personnel to coach interscholastic athletics." A discussion then follows of the procedural hurdles local boards had to go through to find an out-of-district person to fill coaching positions when the board could not locate one from its own staff. Thus, the amendments to N.J.A.C. 6:29-6.3 are not intended to relax the well-established rule that boards of education are required to appoint persons from among its own staff to be coaches and only when it is impossible for boards to meet that obligation, it may then proceed to consider out-of-district personnel. The rule amendments relax the procedural hurdles boards of education were obligated to follow in terms of advertising for applications to fill coaching vacancies. Prior to the amendment, a board having failed to secure the services of one of its own staff members to be a coach, had to first get a declaration from the county superintendent of schools that an emergency existed. Following that declaration, the board was then authorized to advertise for applications from out-of-district personnel. The rule amendment changes that process. Now, boards of education may initially advertise coaching vacancies as far and as wide as it deems reasonable. Such advertising, however, does not change the basic principle that coaches must first be sought from the board's own teaching staff. Only when that pool is exhausted and no suitable applicant has been found, may the board then consider the appointment of an out-of-district teacher. Suitability, however, is still to be determined upon the State Board rule at N.J.A.C. 6:24-6.3.

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[6] There are exceptions to that general statement. Rinaldo Nehemiah, who did not play college football in favor of track, presently plays professional football for the San Francisco 49'ers of the National Football League. Coincidentally, Nehemiah is a well-known athlete from the shore area in the vicinity of Neptune Township.

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In this case, petitioner is a certificated teacher and he is employed by the Neptune Township Board of Education. Thus, petitioner meets two basic requirements of N.J.A.C. 6:29-6.3(a) to be appointed to the position of coach. Turning to the position of assistant coach for football, the question arises is petitioner qualified under the rule for that appointment. In my view, petitioner is, in fact, and under the rule, qualified to be an assistant coach for the Neptune Township varsity football team. Petitioner has been an exemplary track team member at both the high school and college level, he has been an assistant coach for the track team for six years, and he has an apparent desire to be an assistant coach for the football team. It is recognized that the desire alone does not equate with qualification nor does petitioner's desire to assist black athletes to get into college qualify him. However, petitioner's personal lack of football skills pales into insignificance when one considers his academic training and experience as a teacher and as a coach, coupled with his training and experience as an athlete. Shedding blocks, blitzing, defensive zone coverage, deep pass play coverage, man-to-man coverage and other related football skills need not be in the actual possession of petitioner, or any coach, to be qualified as an assistant football coach.[7] True, he must understand the terms used in football and he must be able to convey a knowledge and understanding of such terms and skills to the athletes he coaches. They are the ones who, in the final analysis, must actually possess the football skills necessary. Petitioner's job is to teach and one who presumes to teach need not personally possess all the skills intended to be conveyed to pupils. It is not unheard of for teachers to teach through vicarious experiences. In sum, the proofs in this case demonstrate petitioner is qualified to be an assistant football coach for the Neptune Township football team contrary to the assertions made by the Board, the athletic director and the football coach. Furthermore, four coaches appointments were made by the Board during 1983-84 to contact sports, including football and wrestling, and in each case the person appointed had neither playing nor coaching experience in the sport assigned. Finally, it must be recognized that the criteria of experience in the sport sought to be coached was not adopted by the Board as policy until the time it rejected petitioner's nomination.

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[7] It cannot be seriously disputed that high school football coaches attend clinics on a regular basis to sharpen their coaching skills.

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But even beyond the question of petitioner's qualifications, the more basic issue to be addressed is whether the Board, when confronted with in-district and out-of-district applications for coaching positions, has authority to add greater qualifications for persons to be employed as coaches than those qualifications of (1) certification as a teacher and (2) employment by a board of education as required at N.J.A.C. 6:29-6.3(a). Prior to the amendments, it was established that an in-district applicant who applied for a coaching position and who was qualified under the State Board rule may not be rejected by the board in favor of an out-of-district applicant whom the board deemed to be better qualified. Hamlin, supra; Newmark, supra. If paragraph (b) of N.J.A.C. 6:29-6.3, as amended were intended to be read in isolation from paragraph (a), the board's authority to establish greater qualifications would be clear. This is so particularly when one considers paragraph (c), subsection 2 which requires the local superintendent, to attest to a prospective employee's knowledge and experience in the sport he or she will coach when the person possesses only a county substitute certificate. However, the whole of the rule, particularly in consideration of the absence of amendment to N.J.A.C. 6:29-6.3(a), and prior Commissioner's decisions interpreting that section, lead to the inescapable conclusion that the basic requirements of (1) certification as a teacher, and (2) employment by a board of education as a teacher, with the initial obligation of boards of education to search its own staff first for coaches, has not been changed. Consequently, I can find no basis upon which a board of education may, finding a qualified teacher in its own staff, add greater qualifications for appointment to the position of coach to justify the appointment of an out-of-district applicant. It was said in Hamlin, supra, that "There is no room for subjective assessment of applicants' respective skills in the art of coaching in a situation where there are applicants from within the district and another applicant from without the district * * *", initial decision in Hamlin, pp. 4-5. This situation is identical to that of Hamlin. Petitioner meets the State Board rule qualifications for appointment to coach but the Board, believing it was authorized to exercise its discretion, found Walsh to be the better qualified. Such discretion, I **CONCLUDE**, is not provided boards of education within the scope of N.J.A.C. 6:29-6.3. If such discretion were provided, the evil of having local boards of education employ professional athletes as a guise for securing their coaching talents as deplored by the Commissioner in Barber, supra, could run rampant throughout the State. Interscholastic athletics are but a part of the total educational program offered in our public schools for young people. This does not mean a board may not require greater qualifications than those in the State Board rule to distinguish and select one of several

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applicants from its own staff; it does mean a board, having at least one qualified applicant from its own staff, may not on the premise of seeking greater qualifications reject the in-district applicant in favor of an out-of-district applicant.

But even if it could be found petitioner was not qualified to be an assistant football coach and even if authority existed for the Board to exercise discretion in determining who, among these two applicants, were better qualified for the position assistant football coach, Walsh does not meet basic administrative requirements for such appointment. While Walsh is certificated as a teaching staff member, and the fact he received physical possession of the certificate in September 1984 does not invalidate his appointment on August 29, 1984, the fact that he is approved by the Board to act as a substitute does not satisfy the second requirement of "employment" as a teacher by a board of education. A person who performs as a substitute is not "employed" by a board of education on a continuous basis. Rather, a person who is a substitute teacher can be likened to an independent contractor who would, for consideration, make his services available to district A on one day, district B on another day, and so on. The mere fact this Board approved the placement of Walsh's name on its substitute list does not carry with it an employment status for Walsh. Placement on a substitute list is no guarantee of any employment by a board. Consequently, Walsh is not "employed" by the Board by virtue of its placing his name on its approved substitute list on August 29, 1984. Thus, Walsh is not minimally qualified to be a coach in the Neptune Township school district.

Accordingly, petitioner John H. Chambers, Jr., having been found to be qualified under N.J.A.C. 6:29-6.3 for the position of assistant football coach for the Neptune Township High School varsity football team for 1984-85 and, having found the Board improperly rejected the superintendent's nomination of petitioner in favor of one found not to be minimally qualified, petitioner is entitled to the stipend of $1,810 he would have received had he been appointed to the position.

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

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

22 July 85
DATE

Daniel B. Mc Keown/ae
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

JUL 22 1985
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

July 24, 1985
DATE

OFFICE OF ADMINISTRATIVE LAW

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JOHN H. CHAMBERS, JR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law, Daniel B. McKeown, ALJ.

The Commissioner notes that the Board filed exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b, and c.

The Board avers in its exceptions that Mr. Walsh met the requirements of subsection (a) of N.J.A.C. 6:29-6.3 because he was both a certified teacher and employed by the Board by virtue of the fact that he was hired as a substitute teacher on the same day that he was hired as a coach. The Board also contends that Walsh's employment as a substitute was on a regular basis, further supporting his allegation that he met the requirements of "employment under N.J.A.C. 6:29-6.3."

The Board's exceptions state, in the alternative, that Walsh qualifies as "employed" under the definition of 18A:1-1 because it was the State Board's intent in adopting the 1983 revision to subsection (b) of N.J.A.C. 6:29-6.3 "***to simplify the procedure and broaden the pool of athletic personnel available to coach in school districts." (Exceptions, at p. 2) The Board argues:

> "The State Board specifically eliminated the previous requirement that persons appointed to coach 'shall be a certified member of a school faculty in that same district and shall be employed full time during the regular school day when classes are in session.' *** The [State] Board, in specifically omitting this language intended to broaden the scope of coaches available and remove the requirement of 'employment' in the district.***"
>
> (Exceptions, at p. 2)

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Finally, the Board avers that Mr. Walsh's qualifications to teach the fundamentals of football were better than petitioner's. The Board argues that the ALJ assigned more weight to the fact that petitioner had six years' of experience as a classroom teacher than was appropriate considering Mr. Walsh's superior expertise and the Board's good faith decision to recognize that expertise based on the recommendations of the athletic director and the varsity football coach.

The law is well-settled that, absent a clear showing that a board of education acted unreasonably or beyond the scope of its discretionary authority. N.J.S.A. 18A:11-1 gives broad general powers to boards to make, amend, and repeal rules not inconsistent with the law or with the rules of the State Board, for their own government or for the government of the public schools.

In the instant case, the Board acted inconsistently with State Board rules as embodied in N.J.A.C. 6:29-6.3 when it defeated a resolution recommended by the superintendent to appoint petitioner assistant football coach for the 1984-85 year. Instead of choosing the certified, tenured teacher within the district who had experience coaching another sport, the Board adopted a resolution appointing to the position the other candidate, a newly-hired substitute teacher who was certified and had experience in the sport of football. The Board breached its duty of good faith in relying on policy adopted immediately after the hiring which specified, for the first time in the district, written guidelines for hiring coaches. To wit:

> "***Applications will be screened to insure that applicants' qualifications include playing and/or coaching experience in the sport or a strong related coaching or physical education background." (Initial Decision, ante)

The Commissioner agrees with the ALJ that the amendments to N.J.A.C. 6:29-6.3" are not intended to relax the well-established rule that boards of education are required to appoint persons from among its own staff to be coaches and only when it is impossible for boards to meet that obligation might they then proceed to consider out-of-district personnel." (Initial Decision, ante) The priority in hiring coaches is set forth in N.J.A.C. 6:29-6.3(a):

> "No person not certified as a teacher and not in the employ of a board of education shall be permitted to organize public school pupils during school time or during any recess in the school day for purposes of instruction; or coaching or for conducting games, events or contests in physical education or athletics."

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Thus, two threshold qualifications determine appointment as a coach by a local board of education. They are:

1. certification as a teacher

2. employment by a board of education.

While it is undisputed that both candidates for the position are certified teachers, petitioner challenges whether Mr. Walsh, the candidate selected by the Board, was "employed" within the use of the term in N.J.A.C. 6:29-6.3(a). Petitioner also avers that he is qualified to coach football within the use of the term in N.J.A.C. 6:29-3(c) which reads:

> "In the event there is no qualified and certified applicant, the holder of a county substitute certificate is authorized to serve as an athletic coach in the district in which he or she is employed for a designated sport season provided that:
>
> i. The vacant coaching position had been advertised; and
>
> ii. There was no qualified applicant based on the written standards of the district board of education.
>
> 2. The district superintendent will provide a letter to the county superintendent attesting to the prospective employee's knowledge and experience in the sport in which he or she will coach;
>
> 3. Approval of the county superintendent shall be obtained prior to such employment by the district board of education. The 20-day limitation noted in N.J.A.C. 6:11-4.7(c) shall not apply to such coaching situations."

The Commissioner notes for the record that the ALJ's interpretation of the word "employed" as it pertains to N.J.A.C. 6:29-6.3(a) is misplaced. The ALJ holds that a person approved by the Board to act as a substitute does not satisfy the second requirement of "employment" as a teacher because he is not employed on a continuous basis. The ALJ likens a substitute teacher to an

> "***independent contractor who would, for consideration, make his services available to district A on one day, district B on another day ... with[out benefit of acquiring] employment status." (Initial Decision, ante)

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The term "employment" as it is used in N.J.A.C. 6:29-6.3(a) correctly relates to the hiring priority of coaches. That priority establishes that the coaching position must first be offered to one already employed in the district as a teacher. If no such candidate is available, then, under the provisions of N.J.A.C. 6:29-6.3(b), the board may hire a person with a teaching certificate who may or may not be a regular employee of the district. Finally, if there is no certified person in the district or from without, then, under the provisions of N.J.A.C. 6:29-6.3(c), the board may hire holders of substitute certificates to serve as coaches. Only after it is determined that the hiring priorities established in N.J.A.C. 6:29-6.3(a) cannot be met does the priority shift to selecting a candidate "employed" not as a teacher, but as a coach.

Discussion of the provisions of N.J.A.C. 6:29-6.3(c) is not necessary in deciding whether petitioner in this matter is the appropriate choice to be assistant coach. Neither is it necessary to determine whether Mr. Walsh was "employed" under the rule because petitioner, a tenured employee within the district with coaching experience, certainly was certified at the time he applied for the position. Since petitioner meets both threshold criteria, that is, he is a certified teacher and is employed by the Board, the only other inquiry is whether the Board had written policy regarding qualifications for the position.

In the instant matter, the ALJ noted that there was no such written policy at the time the selection was made, but rather such rules were adopted following the approval of the resolution hiring Mr. Walsh. The superintendent testified that prior to August 29, 1984, the time that Mr. Walsh was hired, playing or coaching the specific sport was not a prerequisite for appointment as coach. (Tr.58; Initial Decision, ante) Further, past practice established during the 1983-84 year indicates that four persons were appointed to coaching positions, none of whom had playing experience nor did any of the persons coach the specific sport before his/her appointment. (Initial Decision, ante) Finally, there is clear evidence in the record that the athletic director had acknowledged as recently as March 13, 1984, that district policy as well as the rules and regulations of the State Department of Education require using a staff member to coach whenever possible. (Initial Decision, ante)

The primary concern in hiring coaches, which the ALJ aptly points to in citing Barber et al. v. Kearny Bd. of Ed., 1975 S.L.D. 58, is that

> "***all persons who serve as coaches of interscholastic athletics in public schools in this State are first and foremost teaching staff members.***" (at 62)

This concern is expressed in N.J.A.C. 6:29-6.3(a), which was not altered by the 1983 amendments. Since there was an in-district teacher who duly applied for the coaching spot, no other

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out-of-district candidates should have been considered except pursuant to written rules specifically setting forth qualifications as set out in N.J.A.C. 6:29-6.3.

Accordingly, the Commissioner affirms the decision of the ALJ except as herein modified. The Commissioner finds the Board improperly refused to employ petitioner as assistant football coach for the Neptune Township Varsity Football Team for the 1984-85 school year despite his having met the requirements of N.J.A.C. 6:29-6.3(a).

The Board is therefore ordered to pay petitioner the stipend of $1,810 which he would have received had he been duly appointed to the position by the Board.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 5, 1985

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8990-84

AGENCY DKT. NO. 479-11/84

SOUTH RIVER EDUCATION ASSOCIATION, ON BEHALF OF R. ARLENE HAYDEN, ARLENE STRUGALA, BARBARA EPPINGER, and CARLINE KLOSKOWSKI,[1]

Petitioners,

v.

SOUTH RIVER BOROUGH BOARD OF EDUCATION,

Respondent.

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

Steven J. Tripp, Esq., for respondent (Wilentz, Goldman & Spitzer, attorneys)

Record Closed: June 11, 1985 Decided: July 26, 1985

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

The South River Education Association (Association), on behalf of individually named petitioners R. Arlene Hayden, Arlene Strugala and Barbara Eppinger, each of whom had been employed by the South River Board of Education (Board) until a reduction in force but who presently are on the Board's preferred eligibility list in the elementary category, claims the petitioning teachers are entitled to employment in the position of elementary computer literacy teacher which was created and staffed with an out-of-

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1. Carline Kloskowski was dismissed as a party petitioner by Order dated May 6, 1985. A copy of the Order is attached hereto and incorporated herein as if set forth in full.

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district person by the Board at the beginning of the 1984-85 academic year. The Board denies any named petitioner has entitlement to the controverted position on the grounds no one of the petitioners is qualified for the job. After the matter was transferred to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., a hearing was scheduled and conducted on May 13, 1985 at the Milltown Municipal Court, Milltown. The record closed June 11, 1985 upon receipt of the Board's reply letter memorandum.

UNCONTESTED BACKGROUND FACTS

Each individually named petitioner had been employed by the Board as an elementary school teacher[2] a sufficient amount of time to have acquired a tenure status. Each petitioner is and was in possession of an elementary endorsement to an instructional certificate for such assignment. The employment of each named petitioner was terminated[3] by the Board at a time prior to the 1984-85 academic year following a reduction-in-force which is not in issue here. As of September 1, 1984, each named petitioner had the following seniority credit in the elementary category: petitioner Hayden, 6.29 years; petitioner Strugala, 4.67 years; and, petitioner Eppinger, 4.11 years.

On June 26, 1984, the Board adopted the recommendations of two study committees, organized sometime during 1983 for the purpose of determining the most effective mode of introducing and teaching computer literacy to pupils in grades kindergarten through five (elementary) and grades six, seven and eight (middle school). The committees recommended that computer literacy be taught and that it be taught independent of the regular curricula in the elementary self-contained classrooms and independent of the separate subject matter courses in the departmentalized middle school. In addition, the Board adopted the committees' recommendation that the persons selected to teach computer literacy in the elementary schools and the middle schools be in possession of an appropriate endorsement, elementary and elementary and/or secondary, together with the requirement that the selected teacher be in possession of nine college credits of computer science. (J-1) (J-2). Despite the written request of the

[2] The Board's school district consists of two elementary schools, one middle school and one high school.

[3] Petitioner Hayden was reemployed by the Board sometime in October-November 1984; petitioners Strugala and Eppinger have not been reemployed by this Board.

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superintendent for approval from the Middlesex County superintendent of schools for the creation of the middle school and elementary school positions, computer literacy teacher, as is required by N.J.A.C. 6:11-3.6(b) when an "unrecognized position title" is used, the superintendent has received no written response from the county superintendent.

When the superintendent posted the notice of vacancy, particularly for the elementary school computer literacy teacher on July 10, 1984, a cover letter was attached to the Board adopted policy regarding the qualifications and duties of that position. While applicant qualifications on the written policy include "Minimum of 9 credits in Computer Science from an accredited university * * *" (J-9, at p. 2), the superintendent in his cover letter said the following:

* * *

> Please note:
>
> QUALIFICATIONS:
>
> Item D. Willingness to accumulate a minimum of 9 credits in Computer Science from an accredited university. (J-9)

The superintendent testified that the nine college credits was an objective standard established by the Board in its effort to ensure a minimum level of competence of the person selected to teach computer literacy in its schools. The superintendent explained that because his recruitment efforts to secure such a person for 1984-85 may not have been successful, he conditioned the nine college credits in computer science with the "willingness" to accumulate such credits to an otherwise qualified applicant. Nonetheless, the superintendent and the Board were successful in securing an applicant for the elementary computer literacy teacher position who was in possession of an elementary endorsement on an instructional certificate and at least nine college credits in computer science. That person, Gail A. Berger, an out of district applicant who was then employed as a consultant to a computer firm. Ms. Berger continues in her employment with the Board as its computer literacy teacher in the elementary schools. It is noted that petitioner Hayden, although in possession of an elementary endorsement to an instructional certificate, has no experience, academic or practical, with computers nor does petitioner Strugala. Petitioner Eppinger, who also possesses an elementary endorsement to an instructional certificate, has no college course credit in computer science although she claims her present employment at the Middlesex County Vocational

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Technical School as a remedial reading teacher requires her to use computers as a diagnostic and testing tool. Petitioner Eppinger further testified that she attended computer workshops offered at Rutgers University, at a private computer company, and has "taken a comprehensive computer course offered by the Educational Television Network, Channel 13." (Pb. p. 7).

This concludes a recitation of the uncontested background facts of the matter.

ARGUMENTS

The Association and the individually named petitioners Hayden, Strugala and Eppinger contend that they meet the requirements for appointment to the elementary computer literacy position by virtue of their seniority in the elementary category and that the Board improperly imposed the requirement of nine college credits in computer science. The named petitioners contend that because of their seniority in the elementary category, they individually have a superior claim to each and every elementary teaching position over a nontenured person. Furthermore, petitioners individually contend that because their elementary endorsements authorizes at N.J.A.C. 6:11-6.2 the teaching of any and all courses offered at the elementary level the Board's attempt to add the requirement of nine college credits in computer science is in violation of their seniority rights. Petitioners individually conclude that they are entitled, by virtue of seniority, to the position of computer literacy teacher at the elementary school.

The Board contends it properly imposed requirements for the elementary computer literacy teacher position and that because petitioners do not possess the minimum requirements it established for that position they are not entitled to the position by virtue of seniority.

LAW AND DISCUSSION

It has been recognized by the Commissioner of Education that boards of education have authority to establish greater requirements for positions than the minimum standards for teacher certification in the particular area. Van Os v. Board of Education of Cinnaminson Township, 1977 S.L.D. 1040, 1043. Eagan, et al. v. Old Bridge Township Bd. of Ed., 1983 S.L.D. — (May 19, 1983), aff'd St. Bd. of Ed., 1983 S.L.D. — (Nov. 2, 1983); aff'd Superior Court of New Jersey, App. Div. Dkt. No. A-1706-83T3

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(Feb. 4, 1985). Greater requirements established by a board for a particular position may not be unreasonable and may not be in contravention of any statute or regulation. Tirico v. Little Ferry Bd. of Ed., 1984 S.L.D. — Oct. 21, 1983).

In this case, the Board recognized the critical importance of providing its pupils with instruction in computers beginning at the very level of kindergarten so that in the future years their pupils will not be computer illiterate. The Board recognized, as did its professional staff and superintendent, that computer science could be most effectively taught as a separate subject. The requirement of nine college credits was adopted by the Board as a prerequisite for appointment to its computer literacy positions in an effort to secure the services of one who was minimally qualified to teach the science in its schools. The philosophy of the computer skills program in the Board's elementary schools, as stated in the committee report (J-2) to the Board, is that

> All students in the South River Elementary Schools will have an opportunity to become computer literate. Students will come to understand computers and how they apply in the world around them. They will develop skills that are needed to communicate with computers and recognize the computers' capabilities and limitations. Computer terminology and concepts will be introduced within a framework of exploration, enjoyment and challenge to enhance the total learning climate.

In order to implement that philosophy, the Board and the superintendent sought an applicant who had some formal training, by way of nine college credits, in computer science in order to translate the philosophy of its computer program into actual instruction. In that context, it can hardly be said that the Board's requirement of nine college credits in computer science is unreasonable. But, given the seniority status of each individually named petitioner does that status render an otherwise reasonable action of the Board to require nine college credits in computer science unreasonable because the course is being taught in the elementary school and each named petitioner is in possession of an elementary endorsement on an instructional certificate.

Present regulations governing teacher certification and the issuance of endorsements at N.J.A.C. 6:11-6.2, Authorization, does not contemplate the teaching of computer science in elementary schools. Rather, an elementary endorsement is contemplated as authorization for the holder to teach grades kindergarten through eight.

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The elementary curricula is generally limited to reading, writing, arithmetic, social studies, general science, physical education and other related courses to those basic areas. Computer science is not of the general class of common branch subjects generally taught in elementary schools. Rather, computer science is a separate discipline which had not been standard fare for college students studying to be teachers until recently. In fact, no one of petitioners lay claim to having any college credit in computer science. Computer science is a discipline unto itself. Consequently, petitioners' seniority in the elementary category does not translate into a superior claim over a nontenured teacher for the position of computer literacy teacher in the elementary schools. It has already been demonstrated that it is reasonable for the Board to have required nine college credits in computer science for the application to the controverted position. Mere possession of an elementary endorsement, without the nine college credits, falls short of petitioners' burden to demonstrate a superior claim to the position.

Turning to the subject of the absence of approval for the creation of the position computer literacy teacher by the Middlesex County superintendent of schools and the superintendent's statement on his cover letter that applicants for the position must have a "willingness" to secure nine college credits in computer science, the absence of specific approval from the county superintendent is not fatal to the Board's employment of Berger as its computer literacy teacher. The superintendent made good faith efforts to secure such approval from the Middlesex County superintendent of schools and for whatever reason no response was received thereto. Beyond that, the Board and the superintendent have demonstrated through his proceeding that its requirement of nine college credits, together with an elementary endorsement on an instructional certificate, is required for its computer literacy teacher at the elementary level as proper qualifications for such an unrecognized title. In regard to the superintendent's statement that a "willingness" to secure nine college credits would be sufficient for an applicant to demonstrate, the fact is the "willingness" must be seen in light of the superintendent's apprehension that prior to the commencement of 1984-85 he would not be successful in securing an otherwise qualified applicant. That the superintendent secured the services of an applicant qualified under the Board's criteria renders his "willingness" to acquire nine college credits in computer science moot. The fact is the superintendent selected the person whom he considered to be the best qualified for the position.

Petitioners' reliance upon prior case law to demonstrate an enforceable seniority claim to the position computer literacy teacher at the elementary level are

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inapposite to the facts in this case. In Edith Berl v. Oceanport Bd. of Ed., 1984 S.L.D. — (Jan. 19, 1984), aff'd St. Bd. of Ed. (Sept. 1984), the question was which category Berl acquired seniority; not, as here, the propriety of board imposed additional requirements to an elementary position. Eagan, supra, addressed a claim by physical education department chairpersons who claimed superior rights in areas in which they did not possess proper certification. Nor was the issue of additional qualifications imposed by the board, as here, the issue in Tirico, supra. It is important to note that the issue here has to do with the Board adding greater requirements other than basic certification requirements to a particular position. It is not a question of the Board asserting that an elementary endorsement does not authorize one to teach in the elementary school. Perhaps each petitioner could, in fact, teach computer literacy given the time to secure training and background in computers but that is not the determining factor. The determining factor is the requirement imposed by the Board for the computer literacy teacher to be in possession of nine college credits in computer science. Because that requirement is found to be reasonable and not otherwise employed by the Board in bad faith to avoid legitimate seniority claims of petitioners, the Board's choice of Gail A. Berger to be the teacher in its elementary computer literacy program as opposed to any of the named petitioners herein, is found to be proper.

Accordingly, the South River Education Association, petitioners Hayden, Strugala, and Eppinger, have failed in their burden to establish by a preponderance of credible evidence that (1) the Board acted improperly in establishing the requirement of nine college credits in computer science for the controverted position and (2) that the seniority rights of the individually named petitioners herein have been violated. The petition of appeal is **DISMISSED.**

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

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OAL DKT. NO. EDU 8990-84

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

DATE

DANIEL B. MC KEOWN, ALJ

JUL 26 1985

DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

July 30, 1985

DATE

OFFICE OF ADMINISTRATIVE LAW

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SOUTH RIVER EDUCATION ASSOCIATION ET AL.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	
	:	

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

Petitioners except to the judge's conclusion that the Board acted properly in not naming one of them to the computer literacy course for the elementary grades, avowing that the pertinent regulations state that all elementary teachers are authorized to teach every course, without exception, at the elementary level. They argue, inter alia, (1) it is irrelevant that the Board may have acted in good faith in imposing the requirement of nine college credits in computer science; (2) that the judge has attempted to carve an exception into the clear regulations; and (3) no requirements in addition to an elementary certification can be imposed on an applicant for an elementary staff position.

The Board contends that the judge correctly determined that the Board's imposition of additional criteria beyond elementary certification was a reasonable exercise of its authority and urges that this determination be upheld.

Upon review of the record in this matter, the Commissioner concurs with the judge's determination that the Board's action to require 9 college credits in computer science, in addition to elementary certification, for the elementary computer literacy course was a reasonable exercise of its authority. In Van Os, supra, the Commissioner addressed the issue of criteria/standards for a position that exceed those for certification. It states:

> "***A board may establish higher standards of an applicant to be considered for employment as a teaching staff member beyond those minimum standards for teacher certification in the applied for area." (Emphasis supplied)(at 1043)

In addition, the Van Os decision articulates that a board cannot be wholly arbitrary in its quest and that additional requirements, if developed for a particular position, must be based upon

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established needs and/or purposes. It is quite clear in the instant matter that the Board's desire for an elementary certified individual with 9 college credits in computer science is a reasonable, rational criteria for the computer literacy program based upon the established needs of the district and the purposes for setting such additional requirement.

Consequently, the Commissioner affirms the judge's conclusion that the Board's action did not violate the tenure and seniority rights of petitioners herein. The fact that the superintendent's cover letter for the vacancy notice added the statement, "willingness to accumulate a minimum of 9 credits in computer science from an accredited university," does not alter the above determination. It was reasonable to include such an alternative in case the Board was unable to attract a candidate who met the criteria that had been set by Board policy. The Commissioner does wish to point out, however, that if the board had been unable to secure an individual who met the criteria set by its policy and subsequently had to revert to the alternative requirement (willingness to accumulate the desired credits), the Board in that circumstance would have been obligated to look to its preferred eligibility list of elementary certified staff who met said alternative criteria.

Accordingly, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

September 9, 1985

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 0732-85
AGENCY DKT. NO. 4-1/85

ROBERT P. YRIGOYEN,
Petitioner,
v.
BOARD OF EDUCATION OF THE WARREN HILLS REGIONAL SCHOOL DISTRICT,
Respondent.

Richard D. Fifield, Esq., for petitioner

David A. Wallace, Esq., for respondent

Record Closed: June 17, 1985 Decided: July 26, 1985

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

Statement of the Case

This is an appeal by a former teacher who seeks back pay for the four-month period between his suspension from duties and his sentencing for a criminal offense. Petitioner admits that he automatically forfeited his public office for conviction of a crime of the third degree. N.J.S.A. 2C:51-2(a)(1). Nonetheless, he claims that his

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temporary suspension without pay was illegal because the board of education failed either to bring tenure charges against him or to accept his offer of resignation prior to its withdrawal. Respondent board of education raises several defenses. First, the board contends that the suit is barred by the doctrines of estoppel or laches. Second, the board argues that the petition was untimely under the 90-day rule, N.J.A.C. 6:24-1.2. Third, in the event that its procedural defenses are unsuccessful, the board maintains that its action was authorized by N.J.S.A. 18A:6-8.3, which permits suspension without pay of teachers subject to criminal indictment.

Procedural History

On January 9, 1985, petitioner Robert P. Yrigoyen filed his petition with the Commissioner of Education. The board of education filed its answer on February 4, 1984. Subsequently, on February 7, 1985, the Commissioner of Education transferred the matter to the Office of Administrative Law for handling 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. Both parties waived the opportunity for hearing. Instead, the parties filed cross-motions for summary decision, together with a joint stipulation of facts. Additionally, the board filed a certification in support of its motion. Oral argument on the cross-motions was heard before the Office of Administrative Law on June 17, 1985.

Findings of Fact

All of the relevant facts have been stipulated or are uncontested. I **FIND:**

Prior to January 14, 1984, Robert P. Yrigoyen was a tenured junior high school teacher employed by respondent board of education. On January 14, 1984, the Warren County Prosecutor filed a criminal complaint accusing Yrigoyen of various acts of criminal sexual contact and of endangering the welfare of children. A few days later, on January 17, 1984, the superintendent of schools, with the consent of the president of the board of education, placed Yrigoyen on suspension pursuant to N.J.S.A. 18A:25-6. By

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letter dated January 18, 1984, the superintendent notified Yrigoyen that his suspension would be discussed by the full board of education at its meeting on January 24, 1984. At that meeting, the board of education voted to continue the suspension without pay "pending further investigation." Up to then, Yrigoyen had still been receiving his salary even though he was not working. On January 30, 1984, the board wrote to Yrigoyen advising that his "suspension without pay began January 25, 1984."

Meanwhile, Yrigoyen waived indictment and his right to trial by jury on the criminal charges. On February 1, 1984, the Warren County Prosecutor filed a two-count accusation against him. That same day, Yrigoyen appeared before the criminal court and pleaded guilty to both counts. Afterwards, on February 3, 1984, Yrigoyen tendered his resignation from his teaching position "for personal reasons."[1] Sentencing took place on May 25, 1984. Yrigoyen received a term of five years at the Avenel Adult Diagnostic and Treatment Center and a concurrent prison term of five years. The seriousness of his offenses is indicated by the judgment of conviction. In ordering incarceration, the sentencing judge noted that,

> . . . On various dates between January 1, 1980 and January 1, 1984, Mr. Yrigoyen gave children between the ages of 13 and 16 alcoholic beverages in his home, encouraged them to pose for nude photographs, and took nude photographs of them which depicted and exposed their sexual organs. . . . On various dates between January 1, 1982 and January 1, 1984, the defendant committed aggravated sexual assault on children between the ages of 13 and 16 while they were in his home by intentionally touching them on their intimate parts, either directly or through clothing, for the purpose of sexually arousing or gratifying himself.

These events took place over a period of years and involved approximately 30 to 40 boys. After sentencing, the Board of Education applied to the Commissioner of Education for a declaration that Yrigoyen had forfeited his position by operation of law.

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[1] More than ten months after submitting his resignation, on December 21, 1984, Yrigoyen sent a letter informing the board that his resignation was "herewith withdrawn, nunc pro tunc." The board had never formally accepted the resignation.

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On January 24, 1985, the State Board of Examiners issued an order which revoked Yrigoyen's teaching certificate. No tenure charges were ever filed by the board of education against Yrigoyen. He has not been paid any salary since January 25, 1984.

Although Yrigoyen did not enter his guilty plea or offer his resignation until February 1984, he had already reached the decision to do so earlier in January 1984. Through defense counsel, Yrigoyen communicated his intentions to his employer sometime around the latter part of January. Originally the date of sentencing had been set for March 16, 1984, but the date was postponed for preparation of a presentence report. When deliberating on what course of action to take, the board was aware that Yrigoyen intended to plead guilty to a crime of the third degree and that he would forfeit his position immediately upon sentencing.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that petitioner is barred from asserting his claim by the doctrines of estoppel and laches; and, further, that the board of education acted properly when it suspended petitioner without pay pending the outcome of his criminal accusation.

Before reaching the merits of the case, the board's procedural defenses must be resolved. Estoppel is an equitable doctrine designed to prevent a person from repudiating prior conduct where an injustice would result. Simply stated, "estoppel connotes a change in position by a person to his detriment in reliance upon the word or conduct of another." Rossum v. Jones, 97 N.J. Super. 382, 390 (App. Div. 1967). Four elements must exist before an estoppel can be invoked: (1) There must be some conduct by the wrongful party amounting to a misrepresentation or concealment of material facts. (2) The party being estopped must have known or expected that the other side would rely on his words or conduct. (3) An innocent party must have reasonably relied on what the wrongdoer said or did. (4) As a result of such reasonable reliance, the innocent party must have suffered loss or harm. Feldman v. Urban Commercial, Inc., 70 N.J. Super. 463, 474 (Ch. Div. 1961).

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Applied to the present facts, these elements establish that the board is entitled to the benefit of an estoppel. By pleading guilty to a third degree crime and offering to resign from his teaching job, Yrigoyen deceived board members into thinking that he was relinquishing any claim for reinstatement or salary. He either knew or should have known that his conduct would induce the board to rely on his voluntary resignation. Instead of pursuing more active remedies to remove him from employment, the Board was content to allow events to take their normal course. Under the circumstances, such reliance by the board was totally reasonable. It would have been senseless to initiate tenure charges against someone who would soon forfeit his employment by operation of law. Months later, long after Yrigoyen had actually forfeited his public office, he suddenly retracted his resignation and demanded payment for work never performed. If Yrigoyen had made known his claim earlier, undoubtedly the board would have filed tenure charges or accepted his resignation. Yrigoyen's apparent willingness to save the district from further embarrassment lulled the board into a false sense of security.

Laches has been defined as "inexcusable delay in asserting a right." Atlantic City v. Civil Service Comm'n, 3 N.J. Super. 57, 60 (1949). Unlike periods prescribed by statutes of limitations, the time constraints of laches "are not fixed but are characteristically flexible." Lavin v. Hackensack Bd. of Ed., 90 N.J. 145, 151 (1982). Whether or not to impose the doctrine depends on such considerations as "[t]he length of delay, reasons for delay, and changing conditions of either or both parties during the delay." Lavin, at 152. Pavlicka v. Pavlicka, 84 N.J. Super. 357, 368-69 (App. Div. 1964). Generally, the change in conditions or relations of the parties coupled with the passage of time becomes the primary determinant. Lavin, at 153. Here the circumstances are appropriate for application of the doctrine. As previously noted, Yrigoyen waited ten months from February to December before giving the slightest hint that he might seek back pay. During the interval, the board missed its opportunity to avoid exposure to an unnecessary expense. Yrigoyen attempted to excuse the delay by attributing it to his preoccupation with his criminal case and subsequent applications for post-conviction relief. Nothing in the proofs substantiates this contention, which relies entirely on facts outside the record. Insofar as the evidence bears on the issue, the proofs suggest that

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Yrigoyen decided comparatively early in the proceedings that he would not contest the criminal charges. Even if the unsupported assertions of Yrigoyen are accepted as fact, they would still not justify his failure to act sooner to preserve whatever rights he might have against the board. His suspension arose out of the same set of incidents which gave rise to his criminal accusation. Merely because his involvement had more than one legal consequence does not allow him the luxury of sleeping on his rights.[2]

Last, Yrigoyen would be denied any recovery even if his claim was not barred. N.J.S.A. 18A:25-6 authorizes the superintendent of schools, with the approval of the school board president, to "suspend any . . . teaching staff member and . . . report such a suspension to the board . . . forthwith." This provision is silent as to whether such temporary suspension can be with or without pay. It does not really matter in the present context, since Yrigoyen continued to receive his salary until the board of education voted to extend the suspension and added that such suspension be without pay. Given the nature of the charges and the board's prior knowledge that Yrigoyen planned to admit his guilt, the board had little other choice. Authority for the board's action is found in N.J.S.A. 18A:6-8.3, which provides that an employee suspended from employment "other than by reason of indictment" shall receive full pay or salary during the period of suspension. In re Fridy, (N.J. App. Div., Jan. 26, 1983, A-4470-80T3) (unreported). For this purpose, a criminal accusation must be regarded as the functional equivalent of an indictment. See R. 3:7-2. At the time of its action, the board was aware that a criminal accusation was imminent and that Yrigoyen would be entering into a plea bargain. The board cannot be criticized for acting quickly to remove Yrigoyen from the classroom rather than waiting one more week until the accusation was formally delivered. Romanowski v. Bd. of Ed. of Jersey City, 89 N.J. Super. 38 (App. Div. 1965).

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[2]In light of the disposition of the estoppel and waiver arguments, it is unnecessary to consider the board's additional defense that Yrigoyen's claim is also precluded under the 90-day rule.

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Order

It is **ORDERED** that respondent's motion for summary decision is granted and the petition is hereby dismissed.

And it is further **ORDERED** that petitioner's motion for summary decision is denied.

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

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

July 26, 1985
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

JUL 29 1985
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

July 30, 1985
DATE

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ROBERT P. YRIGOYEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WARREN HILLS REGIONAL SCHOOL DISTRICT, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision have been reviewed. No exceptions were filed pursuant to N.J.A.C. 1:1-16.4a, b, and c.

While the Commissioner concurs with the ALJ that petitioner's claim is barred by the common-law doctrine of laches and also by the Commissioner's 90-day rule (N.J.A.C. 6:24-1.2), it would appear that the Board acted in a manner not strictly in compliance with the law in suspending petitioner without pay one week before he waived indictment and pled guilty to the accusations made against him by the Warren County Prosecutor on February 1, 1984.

N.J.S.A. 18A:6-8.3 establishes two circumstances under which a board might suspend a tenured teacher without pay: first, by reason of indictment; or second, following the filing of tenure charges. The relevant language states:

> "18A:6-8.3. Suspended employee or officer of board of education; compensation; exceptions
>
> "Any employee or officer of a board of education in this State who is suspended from his employment, office or position, other than by reason of indictment, pending any investigation, hearing or trial or any appeal therefrom, shall receive his full pay or salary during such period of suspension, except that in the event of charges against such employee or officer brought before the board of education or the Commissioner of Education pursuant to law, such suspension may be with or without pay or salary as provided in chapter 6 [18A:6-1 to 6-74] of which this section is a supplement.***"

Neither of these two conditions existed on January 25, 1984, when the Board decided to continue petitioner's suspension without pay. The Board acted precipitously in relying upon petitioner's attorney's oral statements that petitioner would plead

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guilty to the accusations made against him and further that petitioner would tender his resignation upon so pleading in recognition of forfeiture of his employment by operation of law upon sentencing for the offenses for which he would plead guilty. (N.J.S.A. 2C:51-2)

The Commissioner cautions boards to comply strictly with the letter of the law in suspending tenured teachers; however, in the instant matter, petitioner's claim is barred notwithstanding any procedural deficiencies on the Board's part under the aforementioned doctrine of laches and also under N.J.A.C. 6:24-1.2, the 90-day rule for filing a petition with the Commissioner of Education.

Accordingly, for the reasons set forth in the initial decision, as modified herein, the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 11, 1985

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INITIAL DECISION
OAL DKT. NO. EDU 486-85
AGENCY DKT. NO. 487-11/84

PETER J. ROMANOLI,
Petitioner,
v.
WILLINGBORO TOWNSHIP
BOARD OF EDUCATION,
Respondent.

Jeffrey A. Bartges, Esq., for petitioner

Robert P. Martinez, Esq., for respondent (Richards, Martinez & Mullaney, attorneys)

Record Closed: June 19, 1985 Decided: August 1, 1985

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

Peter J. Romanoli (petitioner), the superintendent of schools in the Willingboro public school district, alleges the Willingboro Board of Education (Board) failed to act pursuant to N.J.S.A. 18A:29-14 to withhold a salary increment from him for 1984-85 and, consequently, he seeks an Order by which the Board would be directed to grant him a salary increment retroactive for the whole of the 1984-85 school year. While the Board admits the factual allegations underlying petitioner's legal claim, it claims petitioner fails to state a cause of action upon which relief may be granted and it contends petitioner is barred from seeking relief through the application of the doctrines of collateral estoppel, res judicata and issue preclusion. After the matter was transferred 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 during which the parties agreed to submit the matter on cross motions for summary decision. The record consists of the pleadings, agreed upon material facts of the matter, and letter memoranda in support of the parties' respective positions.

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BACKGROUND FACTS

The following facts are agreed to by the parties. The Board, at a special meeting conducted October 20, 1982, fixed petitioner's salary for the then existing 1982-83 school year at $63,945 and it determined that petitioner's salary for the following school year, 1983-84, would be $68,741. On June 27, 1983, the Board determined to withhold petitioner's scheduled salary increase and to continue petitioner's salary for 1983-84 at $63,945, not $68,741. Petitioner challenged that action before the Commissioner of Education in a Petition of Appeal by which he alleged the Board's failure to grant him the agreed upon salary increment for 1983-84 was arbitrary and unreasonable, a reduction in his salary, and that it violated the provisions of N.J.S.A. 18A:29-14 through an asserted failure to afford him written reasons why such action was taken within ten days of June 27, 1983. The Board's determination to withhold petitioner's salary increment for 1983-84 was affirmed in all respects. See, Romanoli v. Willingboro Tp. Bd. of Ed., 1984 S.L.D. — (Nov. 13, 1984), appeal pending, St. Bd. of Ed., Dkt. No. 118-84. It is agreed that the Board has taken no affirmative steps "* * * to set or adjust petitioner's salary for the 1984-85 school year." (Board's initial letter memorandum, January 21, 1985). Petitioner's salary for 1984-85 is $63,945, the same amount he received in 1982-83.

This concludes a recitation of the agreed upon background facts of the matter.

PETITIONER'S MOTION FOR SUMMARY DECISION

Petitioner contends that, as a matter of law, once a salary level is determined for a "tenured" employee an enforceable claim to that salary level is thereby established subject only to formal Board action to withhold an increment under the provisions of N.J.S.A. 18A:29-14 or through a disciplinary proceeding under N.J.S.A. 18A:6-10, the Tenure Employees Hearing Law. Petitioner contends that the refusal of the Board to establish his 1984-85 salary at $68,741, the amount which had been fixed and established for him during October 1982 and in the absence of formal Board action under N.J.S.A. 18A:29-14, is contrary to established law and must be set aside.

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The Board, to the contrary, argues that its action on October 20, 1982 to set petitioner's salary for two years from an effective date of July 1, 1982 through June 30, 1984 is nothing more than a "salary plan", which expired prior to the 1984-85 school year, and that no entitlement now exists for a salary higher than what petitioner now receives. Consequently, the Board reasons that because the "salary plan" expired and because it took no action to renew the plan or to extend its effective date or to adopt a new one, petitioner cannot now seek to have the Board obligated to pay him $68,741. The Board recognizes that a tenured employee's salary may not be reduced except in a manner provided by law. However, the Board contends that the absence of a "salary plan" applicable to petitioner for 1984-85 defeats his claim that he is entitled $68,741, the salary he was originally scheduled to receive for 1983-84.

THE BOARD'S MOTION FOR SUMMARY DECISION, BY WAY OF DISMISSAL ON THE MERITS, THROUGH THE APPLICATION OF COLLATERAL ESTOPPEL, RES JUDICATA, AND ISSUE PRECLUSION

The Board seeks summary decision by way of a dismissal of the petition on the merits on grounds that any cause of action he had regarding the salary scheduled for him by way of the Board resolution on October 20, 1982 was required to have been presented in the complaint he earlier filed surrounding the Board's increment withholding of a salary increment from his 1983-84 salary. The Board suggests that in the interest of judicial economy and fairness to the parties, litigation must be settled all at once and be then permanently put aside. Consequently, the Board contends that because petitioner did not prevail on the merits in his earlier complaint against the Board he is now barred through the equitable doctrines of collateral estoppel, res judicata and issue preclusion from seeking to relitigate again the very same facts already litigated.

Petitioner opposes the Board's motion for summary decision on the grounds that his salary has remained the same since 1982-83, despite the October 1982 resolution and the denial of the Board to establish his salary at $68,741 for 1984-85 is a new cause of action as distinguished from the 1983-84 increment withholding action. Petitioner points to North Plainfield Education Association v. Board of Education of the Borough of North Plainfield, 96 N.J. 587 (1984) in support of the proposition that increment withholding actions involve an annual process keyed to the annual evaluation of employees and that each and every year that an increment is withheld constitutes a new cause of action.

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DISCUSSION

I find it curious that neither party to this action refers to the substance of the Board's resolution on October 20, 1982 by which it fixed petitioner's salary for 1982-83 and 1983-84 as a salary schedule. The Board refers to it as a salary plan, while petitioner asserts that the Board "* * * has paid him in an unauthorized fashion, since they do not currently have him positioned on a formal salary guide." (Petitioner's letter memorandum, pg. 3). Historically, salaries for superintendents of schools have been set following personal negotiation between the superintendent and the employing board. The adoption of L. 1973, c. 364, para. 1, effective January 7, 1974, and as codified at N.J.S.A. 18A:29-4.3, does not change nor alter the historical approach for the fixing of salaries for superintendents of schools. The cited statutes requires that

> The board of education of every school district employing one or more teaching staff members having full-time supervisory or administrative responsibilities shall adopt salary schedules for each school year that begins after the effective date of this act for all such members, except that for a superintendent of schools the board may adopt a salary schedule. Such salary schedules shall be subject to the provisions of N.J.S.A. 18A:29-4.1 * * *.

The Commissioner has acknowledged the plain meaning of the statute to exclude as a requirement the adoption of a salary guide for a superintendent. In Joseph R. Bolger v. Keansburg Bd. of Ed., 1979 S.L.D. 94, aff'd St. Bd. of Ed. 1979 S.L.D. 99, aff'd N.J. Superior Court (App. Div.) 1980 S.L.D. 1478, the Commissioner held that N.J.S.A. 18A:29-4.3 does not mandate a salary schedule for superintendents. 1979 S.L.D. at 96. Thus, the question emerges whether the action of this Board on October 20, 1982 constitutes a salary schedule and if so how is such schedule to be viewed in light of N.J.S.A. 18A:29-4.1. A common definition for salary is the reward or recompense for services performed.[1] A common definition of schedule is any list of planned events to take place on a regular basis.[2] Putting the meaning of both terms together, as in salary schedule, suggests a list of recompense for services performed which recompense is to take place on a regular basis. In this case, it is clear that the action of the Board on October 20, 1982 was to adopt a salary schedule, although a two-year schedule, for petitioner in his position as superintendent. That being so, one must then look to N.J.S.A. 18A:29-4.1 with which a salary schedule for superintendents must comply. That statute provides, in part, as follows:

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1 Black's Law Dictionary, 5th Ed., 1979, at pg. 1200.
2 Id. at p. 1206.

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> A board of education of any district may adopt a salary policy, including salary schedules for all full-time teaching staff members which shall not be less than those required by law. Such policy and schedules shall be binding upon the adopting board and upon all future boards in the same district for a period of two years from the effective date of such policy but shall not prohibit the payment of salaries higher than those required by such policy or schedules nor the subsequent adoption of policies or schedules providing for higher salaries, increments or adjustments. * * *

In Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn., 78 N.J. 1, the Court held that when a board adopts a salary schedule for one year that schedule is binding upon it for the next subsequent school year or until the schedule is modified as provided at N.J.S.A. 18A:29-4.1. If no new schedule is thereafter adopted by the board, the adopted salary schedule remains operative at the start of the third subsequent school year and the board is obligated to pay the salary increments specified therein subject to its right under N.J.S.A. 18A:29-14 to refuse to do so in individual cases. 78 N.J. at 51, 52.

In light of the Court's holding in Galloway Tp., the Board's argument that its action on October 20, 1982, is not a salary schedule and the "salary plan" expired by its own terms is wholly without merit. The Board's action on October 20, 1982 was indeed the adoption of a salary schedule, regardless of what it presently names it, and that salary schedule establishes a maximum salary of $68,741 for the position of superintendent of schools. The difference between $68,741 and $63,945, the salary petitioner presently receives, is $4,796. The $4,796 is a salary increment, despite Board protestations to the contrary, which may be withheld by the Board from petitioner under N.J.S.A. 18A:29-14. But, absent evidence that the Board took action under N.J.S.A. 18A:29-14 to withhold the salary increment from petitioner, petitioner is presumed to have earned the salary increment.

In regard to the Board's motion for summary decision by way of dismissal on the grounds of collateral estoppel, res judicata and issue preclusion, I find such arguments to be wholely without merit. Each time a board acts, or fails to act, in regard to the establishment of a yearly salary for an employee, a new cause of action may arise. In this case, petitioner earlier challenged the withholding of his 1983-84 salary increment and, on the facts and law of that matter, the Board prevailed. That is, petitioner failed to establish by a preponderance of credible evidence that the action of the Board to withhold his salary increment for 1983-84 under the provisions of N.J.S.A. 18A:29-14 was improper or contrary to law. In this action, the Board took a separate action, by nonaction, to

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continue petitioner's salary into 1984-85 at the same level he was paid in 1982-83. This present cause of action goes directly to his 1984-85 salary. If in the future petitioner perceives the Board to act improperly or unlawfully with some future yearly salary rate, he would then have a new and separate cause of action. That being so, neither collateral estoppel, res judicata, or issue preclusion would apply, nor do the doctrines apply in this case, to bar petitioner from seeking relief. These are different facts, under different circumstances, and the issues adjudicated here are entirely different then the issue adjudicated in petitioner's earlier case against the Board.

I **FIND** that the Willingboro Township Board of Education violated the provisions of N.J.S.A. 18A:29-14 by its failure to take affirmative action to withhold petitioner's salary increment for 1984-85. Consequently, I **CONCLUDE** petitioner, Peter J. Romanoli, is entitled to the salary of $68,741 for the school year 1984-85. Accordingly, the Board is **DIRECTED** to tender immediately to Peter J. Romanoli the amount of $4,796, the difference between the salary he did receive compared to the salary he should have received as superintendent of schools for the Willingboro Township school district during the school year 1984-85.

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

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OAL DKT. NO. EDU 486-85

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

August 1, 1985
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

AUG 1 1985
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

August 5, 1985
DATE

OFFICE OF ADMINISTRATIVE LAW

ij

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PETER J. ROMANOLI,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.		DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	
RESPONDENT.	:	
	:	

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

The Board excepts to the judge's determination that N.J.S.A. 18A:29-4.1 requires a salary schedule to be binding for a period longer than two years from its effective date. It contends that the judge erred in his interpretation of school laws, avowing that neither N.J.S.A. 18A:29-4.1 nor Galloway, supra, provides that a salary schedule be effective and binding for three years after its effective date. With respect to Galloway, the Board argues, inter alia, that the facts in the instant matter are not those in Galloway. Of this it states:

> "***[T]he Supreme Court faced a salary schedule adopted by the board in 1974 for the single 1974-75 school year, and it held, in the absence of any new schedule, that that schedule was binding for the 1975-76 school year, thus giving effect to the plain meaning of the statute [18A:29-4.1]***The facts of Galloway are simply not those faced here, and nothing in the Court's opinion supports the view that the Court would have given effect to a salary schedule beyond two years from its effective date.***" (Board's Exceptions, at p. 4).

As such, the Board argues that if the salary schedule was no longer binding upon respondent during the 1984-85 school year, then petitioner has no entitlement to an increment thereunder and a ruling to the contrary would run counter to N.J.S.A. 18A:29-4.1.

In addition to the above, the Board urges dismissal of the petition as time-barred under the 90-day filing provision of N.J.A.C. 6:24-1.2. Citing North Plainfield, supra, as support, it argues that notice has been determined to run from the date of the first paycheck in increment withholding situations. Thus,

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petitioner's appeal is untimely, having been filed with the Commissioner on November 29, 1984, while the first paycheck of the 1984-85 school year was issued in July 1984.

Petitioner urges affirmance of the initial decision granting him Motion for Summary Decision, avowing that the judge correctly determined, pursuant to N.J.S.A. 18A:29-4.3 and 4.1, that the setting of the salary level on October 20, 1982 was authorized by law, and was a proper Board action. Galloway, supra Further, the determination is correct since the Board was legally bound to the salary of $68,741 and it did not act pursuant to N.J.S.A. 18A:29-14 to withhold his increment.

Upon a review of the record in this matter including the arguments advanced by the parties in their exceptions, the Commissioner concurs with the recommendation of the Office of Administrative Law granting Summary Decision to petitioner. The judge is correct in his conclusions that (1) the Board's action of October 2, 1982 constituted the setting of a two year salary schedule for the superintendent; (2) the difference between the $63,945 salary established for 1982-83 and $68,741 for 1983-84 constitutes an increment of $4,796; and (3) absent evidence that the Board took action under N.J.S.A. 18A:29-14 to withhold said increment from petitioner during the 1984-85 school year, he is presumed to have earned the Board-adopted salary increment. Although the Board is correct in stating that N.J.S.A. 18A:29-4.1 does not require that a salary schedule be binding for a period longer than two years from the effective date of the schedule and that Galloway involved a one year schedule, not a two year schedule as herein, the Commissioner is unpersuaded that the judge erred in his determinations in the instant matter for the following reasons.

By virtue of the Board's October 1982 salary schedule, petitioner was to receive $68,741 for the 1983-84 school year which as noted above represents a $4,796 increment over his 1982-83 salary. The Board acted pursuant to N.J.S.A. 18A:29-14 to withhold the increment for 1983-84. This action was affirmed by the Commissioner and by the State Board of Education on March 6, 1985. Assuming that no further withholding action was taken by the Board pursuant to that statute for 1984-85, petitioner would have been entitled, at a minimum, to progress to the next salary level set by the Board-adopted salary schedule. Even assuming arguendo that the salary set by the Board in October 1982 expired on June 30, 1984, petitioner would still have been entitled to the $4,796 increment incorporated in that prior schedule because that prior schedule represents the status quo in terms of the issue of salary for the superintendent, given the fact the Board took no affirmative action to modify or alter for 1984-85 the salary schedule that existed prior to the commencement of the 1984-85 school year and it took no action to withhold the increment.

The Board sought the granting of Motion for Summary Decision on the grounds of collateral estoppel, res judicata, and issue preclusion. The Commissioner concurs with the judge's finding

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that its arguments are without merit for the reasons expressed in the initial decison. The Board did not raise the issue of time bar based on the provisions of N.J.A.C. 6:24-1.2 in its motion nor was it identified in the pre-hearing order. Therefore, the Board cannot now raise through its exceptions a defense that was not raised hitherto in its Motion for Summary Decision.

Accordingly, the Commissioner adopts the recommendation of the Office of Administrative Law granting Summary Decision to petitioner for the reasons stated in the initial decision and herein. The Board is hereby ordered to promptly pay petitioner $4,796, the amount of salary increment improperly withheld from him for the 1984-85 school year.

COMMISSIONER OF EDUCATION

SEPTEMBER 16, 1985

Pending State Board

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INITIAL DECISION
OAL DKT. NO. EDU 1395-85
AGENCY DKT. NO. 514-12/84

BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY,
Petitioner,
v.
BARBARA ANN GASTON,
Respondent.

James L. Jackson, Esq., for petitioner (Bertman, Johnson & Sahli, attorneys)

David Solomon, Esq., for respondent (Schneider, Cohen and Solomon, attorneys)

Record Closed: June 20, 1985 Decided: August 2, 1985

BEFORE **LILLARD E. LAW,** ALJ:

The Board of Education of the City of Pleasantville (Board) certified charges of incapacity, pursuant to N.J.S.A. 18A:6-10 et seq., against respondent, a teaching staff member with a tenure status in its employ, to the Commissioner of Education. Respondent, by way of Answer, denies the Board's allegation, setting forth four affirmative defenses requesting that the charges be dismissed and prays for her immediate reinstatement to her tenured teaching position.

On March 13, 1985, the Commissioner transmitted the herein matter to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. Thereafter, on March 27, 1985, a prehearing conference was conducted at the Trenton Office of Administrative Law (OAL)

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at which the parties agreed, among other things, to attempt to settle the matters in dispute. Absent an amicable settlement, the matter was scheduled to be heard on June 3 and 4, 1985. On June 3, 1985, a hearing was held, in the absence of respondent, at the Old Courtroom, Pleasantville City Hall, Pleasantville, New Jersey. Subsequent to the petitioner Board's proffered proofs, the record was closed on June 3, 1985. The matter was reopened at respondent's request with a hearing set down for June 20 and 21, 1985. Respondent failed to appear on June 20, 1985, and the record was considered closed on that date.

PROCEDURAL ASPECTS AND MOTIONS

Respondent failed to appear at the hearing on June 3, 1985, and failed to give any notice for her nonappearance.

Prior to the hearing date, and in anticipation of respondent's nonappearance, counsel for respondent wrote a letter addressed to the undersigned, dated May 29, 1985, whereby respondent's counsel represented, among other things, that counsel was unable to locate respondent, that respondent had failed to answer or return counsel's telephone calls, that respondent had failed to appear at scheduled meetings with counsel to prepare for the hearing and that respondent was uncooperative. Counsel for respondent, therefore, requested an adjournment of the proceedings scheduled on June 3 and 4, 1985, to afford him additional time in which to make contact with respondent and to prepare for hearing. As a consequence of respondent's counsel's letter request for adjournment, a telephone conference call was held on May 30, 1985, involving the attorneys for both parties and the undersigned. Counsel for the Board objected to any delay or adjournment contending that it was prepared to move forward with its proofs in support of its charge. The Board also contended that the matter needed to move expeditiously to a resolution in order that the parties would be placed in a position to plan and prepare for the opening of school in September 1985 for the 1985-86 academic year.

In considering the positions of the parties, together with the fact that respondent had in excess of two months in which to prepare her defenses to the charge, the undersigned ordered that the hearing move forward as scheduled on June 3, 1985, conditioned upon respondent's counsel providing this administrative tribunal with a certification or affidavit that respondent's unavailability for hearing was due, in fact, to respondent's hospitalization or institutionalization.

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Pursuant to the procedures established by the OAL, the undersigned delayed the opening of the record for one-half hour to determine whether respondent intended to appear and/or to provide notice for her nonappearance. Having received no notice and having observed respondent's nonappearance, the undersigned opened the record at 9:30 a.m. At hearing, respondent's counsel was unable to certify as to respondent's whereabouts or for the reasons for her nonappearance.

Counsel for respondent thereupon advanced an oral motion requesting that these proceedings be adjourned for those reasons expressed in the telephonic conference call held on May 30, 1985. The Board objected to an adjournment based upon its reasons as set forth on May 30, 1985. Respondent's motion was denied grounded, in part, upon the lack of an affirmative showing that respondent's absence and nonappearance was for good cause, grounded upon the showing that counsel has been diligent in his search for respondent, and that if located, there was no guarantee that respondent would cooperate in preparing for her defenses, and, finally, that respondent asserted she would not appear at any tenure hearing. Further, that respondent had due notice of these proceedings and in the interest of fairness and justice the hearing should move forward in order that both parties are placed in a position to plan and prepare for the future.

Counsel then propounded an oral motion to be relieved of representation for respondent. This motion was similarly denied grounded, in part, upon counsel's assertion that he had made such a request to respondent during one of the infrequent telephone contacts made with respondent and respondent had asserted that she wished to be represented by Mr. Solomon.

The record in the proceedings was, therefore, opened where the Board was required to set forth its proofs in support of the charge. The Board offered two witnesses: its high school principal and Superintendent, together with certain documents which were marked and accepted into evidence (See: Inventory of Exhibits attached hereto) and without any oral testimony offered in respondent's defense, the matter was considered closed.

Thereafter, on June 7, 1985, the undersigned was in receipt of a letter from respondent's attorney, dated June 5, 1985, asserting, among other things, that respondent had contacted counsel by telephone and counsel, therefore, made an application to reopen the proceedings. In accordance with the request to reopen, a telephone conference call

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with both counsel was held on June 11, 1985, at which, among other things, it was agreed that the matter would be reopened on June 20 and 21, 1985, and respondent would be afforded the opportunity to advance her defenses to the charges. Thereafter, on June 18, 1985, a telephone conference was held with both attorneys at which, among other things, counsel for respondent represented that respondent continued to refuse to cooperate with her legal counsel in the preparation of her defenses and, further, that respondent again asserted her refusal to appear at the reopened hearing. It was agreed and determined, nevertheless, that the record would be reopened to afford respondent her due process rights to an impartial hearing. Respondent again failed to appear at hearing or to give notice for the reasons for her nonappearance.

FINDINGS OF FACT

Having reviewed and considered all of the testimony and other evidence offered in this matter, and having given fair weight thereto, and having observed the demeanor of the witnesses and assessed their credibility, I **FIND** the following **FACTS** to be true in this matter.

Respondent is a tenured teaching staff member in the Board's employ assigned within the scope of her certification to teach home economics in the Pleasantville High School. In or about 1979, while in the employ of the Board, respondent became acutely ill, which required that she be hospitalized at the Ancora Psychiatric Hospital for a period of approximately two months. As a condition precedent to respondent's return to duty for the 1980-81 school year, respondent was required to be examined by Amedeo A. Barbanti, M.D., the Board's psychiatrist. Dr. Barbanti diagnosed respondent on August 11, 1980, as having experienced an acute psychotic episode which was that of paranoid schizophrenia. Dr. Barbanti opined that respondent was capable of resuming her teaching duties for the 1980-81 school year (P-2).

On or about August 9, 1984, the Pleasantville High School principal learned that respondent had again been admitted to the Ancora Psychiatric Hospital on or about August 7, 1984. The principal advised the Superintendent that respondent had been hospitalized and, further, that respondent was subject to a court appearance on August 27, 1984 (P-1). The principal, therefore, requested a substitute teacher to replace respondent for the opening of the 1984-85 school year in September 1984, pending a determination of respondent's fitness to return to duty.

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As a consequence of the information related to the Superintendent by the high school principal, together with the Superintendent's review of respondent's prior medical-psychological history, the Superintendent, with the approval of the Board, required respondent to be examined by the Board's psychiatrist before he would permit respondent to return to duty. Dr. Barbanti examined respondent on September 4, 1984, and submitted a confidential report of his examination to the Superintendent, dated September 10, 1984 (P-3). Dr. Barbanti's confidential report of his examination and evaluation is set forth hereinbelow as follows:

> The captioned patient, who was referred to me for psychiatric evaluation, was examined at my office on 9/4/84. She is 36 year [sic] old, well developed, well nourished, married Home Economics teacher, who comes to the interview in a somewhat tense and anxious state. She indicated that she had recently been released from the Ancora Psychiatric Hospital and that the school system required an evaluation before she could resume her teaching duties.
>
> Patient indicates that, while she had previously had a "nervous breakdown", she had been well since 1979 until July of 1984. At this time, she states, that she and her husband became involved in a "domestic problem" and that because of this, her husband had "engineered my admission to Ancora". She had apparently been emotionally upset, had been taken to the Atlantic Mental Health Center, where medication was prescribed. However, she did not continue with this and her husband continued to harass her and to abuse her. She state, [sic] "he had authority over me". "He was tryying [sic] to addict me to drugs; he used forced sex". Because of this she left the home and shortly thereafter was hospitalized. She alleges that her husband had accused he [sic] of trying to kill him and intimates that she was unjustly confined at the hospital. While there, she refused to sign permission for treatment but was given medication despite this. After a period of three weeks she was discharged and referred to the Atlantic Mental Health Center for continued treatment. However, she ceased to take her medication and has not, as yet, been seen at the clinic.
>
> At the time of this examination the patient is markedly tense and anxious. Her mood is that of mixed anxiety and depressiveness and her affect very restricted and invariable. Her psychomotor pressure is increased. Stream of speech and thought were relatively clear and coherent but her thought content indicates the persistence of paranoid delusions. She continues to deny that she has been ill in any way and believes that her problems were the result of a premeditated plot on the part of her husband.
>
> My diagnostic impression is that this patient has been experiencing an exacerbation of her paranoid schizophrenia, for which she was

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> hospitalized in 1979. Because she continues to be actively delusional, it is not felt that she is capable of resuming her teaching duties at this time. She required continued active treatment with medication and supportive psychotherapy and was advised to reactivate her contacts at the Mental Health Center for this purpose.
>
> [P-3]

On September 5, 1984, respondent appeared at the Board's high school asserting she was ready to report for duty. The Superintendent, with the Board's approval and authority, suspended respondent with pay pending receipt of Dr. Barbanti's evaluation and until such time as the Superintendent was satisfied that respondent would not be a risk to herself, to the pupils or to the school district. Subsequently, on September 21, 1984, respondent addressed a letter to the Superintendent asserting that she was able to return to duty on Monday, September 24, 1984 (P-4A), with an attachment purportedly executed by respondent's physician (P-4B). The physician, Edward Black, M.D., submitted a note, dated September 20, 1984, which reads as follows:

> Sirs:
>
> Based on an Exam on 9/20/84 it appears Barbara Gaston has fully recovered and is ready to return to work full time.
>
> Respectfully
> /s/ Black
> [P-4B]

The Superintendent refused to accept Dr. Black's note as sufficient grounds to return respondent to duty. The Superintendent contended that Dr. Black's note (P-4B) was unacceptable because it was inconsistent with Dr. Barbanti's evaluation and lacked the depth of analysis of respondent's present condition in view of Dr. Barbanti's diagnosis. The Superintendent reported the two physicians' contradictory opinions regarding respondent's ability to resume her teaching duties to the Board. The Board expressed its concern for the safety of the pupils under its direction and control and, consequently, recommended that a third psychiatric opinion be afforded before a decision was made to return respondent to the classroom. Respondent was so advised that a third opinion was required whereupon respondent recommended that David L. Johnson, M.D., of the Atlantic Mental Health Center, Inc. (AMHC) perform the evaluation.

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On October 25 and November 16, 1984, Dr. Johnson examined respondent at the AMHC, followed by a report to the Superintendent of his examination and diagnosis, dated November 20, 1984, set forth hereinbelow as follows:

> I have had the opportunity to examine Mrs. Barbara Gaston twice - on October 25th and November 16th, 1984 at the Atlantic Mental Health Center. The second visit was necessary as I had not yet received records of her hospitalizations this past summer at Bridgeton Hospital and Ancora State Hospital.
>
> Mrs. Gaston is on sick leave from her job as a teacher in the Pleasantville schools. I have been asked to comment on her readiness to return to teaching. She previously saw two psychiatrists who gave conflicting opinions.
>
> Hospital records indicate that Mrs. Gaston became acutely psychotic and was involuntarily committed on August 3rd, 1984. She had florid persecutory delusions and was assaultive. She was confused and engaged in bizarre behavior. Her diagnosis was paranoid schizophrenia.
>
> She was admitted to Bridgeton Hospital, transferred to Ancora and discharged August 24th. Throughout her hospitalization and since then, she has maintained that she suffered no psychiatric disorder and was committed unjustly. She was given antipsychotic medication, Haldol, at Ancora and when discharged was calm, coherent and able to care for herself. She stopped taking the medication shortly after discharge as she felt she did not need it.
>
> When I saw Mrs. Gaston, she maintained her position that there was nothing wrong with her. She believes her husband "railroaded" her into the hospital. I described to Mrs. Gaston some of the assaultive and bizarre behavior described in the hospital discharge summaries. She responded to this by denying any memory of it and saying it must have been because she was so angry at being committed. When further pressed, Mrs. Gaston stated she believes her husband puts drugs in her food and raped her in her sleep.
>
> Mrs. Gaston was quiet, coherent, cooperative and well-groomed but appeared quite tense and guarded. She denied any hallucinations. Her memory, orientation and intelligence did not appear impaired.
>
> I agree with the diagnosis of paranoid schizophrenia. Although Mrs. Gaston is not in a florid psychotic state as she was this summer she is certainly still paranoid and, I believe, emotionally fragile. I do not believe it would be in her best interest to return to teaching at this time.
>
> The prognosis is uncertain. If Mrs. Gaston accepts her illness and cooperates with treatment, probably requiring medication, she could potentially be ready to return to work within a few weeks or months. However, it is also likely that she could fail to improve or

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> regress. Mrs. Gaston has indicated that she will continue treatment here at Atlantic Mental Health with myself and Desmond Streete, PhD. If she wishes, we will be glad to keep you informed of her progress.
>
> [P-5]

Subsequent to the Superintendent's receipt of Dr. Johnson's report (P-5), there was no further communication between respondent and the Board or its agents. On December 18, 1984, the Board took action, by appropriate resolution, and voted to certify tenure charges against respondent to the Commissioner. The single charge alleges that respondent is "incapacitated from performing your duties as a teacher. . . ."

On or about March 5, 1985, respondent, through her attorney, filed her Answer to the Board's charge, together with four separate defenses, before the Commissioner. Thereafter, on or about April 2, 1985, Dr. Johnson sent a letter to the Superintendent which states, in part, as follows:

> Barbara Gaston has continued in treatment with myself and Dr. Desmond Street at the Atlantic Mental Health Center. She has cooperated fully with the treatment.
>
> Mrs. Gaston is doing well. She is free of any psychotic symptoms. She has been taking her medication regularly. There would be no contraindication to her returning to teaching at this time.
>
> I believe that as long as Mrs. Gaston continues with therapy and medication she is unlikely to have a relapse. I am concerned that at some point in the future, her resolve to take her medication may diminish. We have discussed this with her. It is of course impossible to predict her future compliance. I am convinced however that at this time she is committed to continuing her treatment.
>
> [R-1]

After receipt of Dr. Johnson's report (R-1), the Superintendent requested, through counsel, that respondent be examined by the Board's psychiatrist, Dr. Barbanti. The Superintendent expressed his concern that, based upon Dr. Johnson's observations, respondent would not continue with her medication and, consequently, be subject to a relapse to her former psychotic state. Respondent did not submit to the subsequent request for reexamination by Dr. Barbanti.

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This concludes the recital of the factual context of this matter and my findings thereto.

In addition to these findings of fact set forth hereinabove, I further **FIND** the testimony of the Board's high school principal, George William Reeves, and its Superintendent, Kenneth E. Weaver, to be trustworthy, believable and credible. Close v. Kordulak Bros., 44 N.J. 589, 598-599 (1965).

DISCUSSION

The first question to be addressed is whether the weight of the evidence supports the charge as proffered by the Board and, if so, what penalty, if any, is appropriate under the circumstances?

The facts in this matter clearly demonstrate that respondent was in such a florid psychotic state in August 1984 as to require her involuntary admission to Ancora State Hospital for custodial treatment for a period of approximately three weeks. Subsequent psychiatric evaluations in September (P-3), October and November 1984 (P-5) concluded that respondent suffered from paranoid schizophrenia and was emotionally fragile. As of November 20, 1984, it was the professional opinion of a psychiatrist that respondent was not able to return to her teaching duties with the Board at that time and that respondent's prognosis for improvement was uncertain (P-5). It was their professional opinion and diagnosis coupled with the earlier professional diagnosis (P-3) and history of respondent's mental disabilities that caused the Board to charge respondent with incapacity to perform her teaching duties.

The Commissioner has had the opportunity to consider and decide a number of teacher tenure cases grounded upon the charge of incapacity. In Schroeder v. Lakewood Bd. of Ed., 1960-1961 S.L.D. 37, the Commissioner removed the tenured teacher because the evidence demonstrated the teacher suffered from alcoholism and appeared at the schoolhouse to perform her teaching duties under the influence of alcohol. The State Board of Education reversed the Commissioner grounded upon the facts of the case which showed that the teacher was forced by the Board to take a two-year leave of absence to undergo alcohol rehabilitation and that it was fundamentally unfair to subsequently dismiss the teacher given her rehabilitation. 1961-1962 S.L.D. 236. The Appellate Division of Superior Court affirmed the State Board's decision on the same grounds. 1961-1962 S.L.D. 240.

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In other matters, the Commissioner has determined to terminate tenured teaching staff members where the evidence demonstrated the teacher incapable of performing the requisite teaching duties because of absence for more than one academic year. Tenure Hearing of Thomas Healy, S.D. of the Borough of Paulsboro, 1977 S.L.D. 876. A teacher was dismissed from the tenured position because of two full years of absence from duty within three academic years for medical reasons. Tenure Hearing of Sheets, 1979 S.L.D. 790.

Similarly, where the charging board of education lacks sufficient proofs to sustain a charge of incapacity, the Commissioner will dismiss the charge and reinstate the tenured teaching staff member to his/her entitled position. See: Tenure Hearing of Finkbiner, 1976 S.L.D. 393; Tenure Hearing of Baken, 1978 S.L.D. 776; Tenure Hearing of Paul H. Wells, 1982 S.L.D. _____. Alternatively, even where the Commissioner has found and sustained the charge of incapacity as true in fact, he may determine that dismissal is inappropriate and not warranted under the particular circumstances and hold that the tenured teaching staff member is ineligible for further teaching service pending satisfactory proof of recovery. Tenure Hearing of David Bernstein, 1967 S.L.D. 73.

The leading case with the most extensive and definitive discussion of incapacity is found in the Appellate Division of Superior Court decision in In re Tenure Hearing of Grossman, 127 N.J. Super 13 (App. Div. 1974). In that matter a male elementary music teacher underwent a surgical sex change procedure and sought to continue teaching as a woman in the school district. The Appellate Court rejected, among other arguments, respondent Grossman's arguments that the word "incapacity" as used in N.J.S.A. 18A:6-10 relates to the teacher's inability to teach in the classroom and not to his or her purported impact upon the "psyche" of the students as individuals. The Appellate Court compared the word "incompetency" with the closely allied term "incapacity" as used in the statute and found in its definition in Horosko v. Mt. Pleasant School Dist., 335 Pa. 369, 6 A. 2d 866 (Sup. Ct. 1939) cert. den. 308 U.S. 553, 60 S. Ct. 101, 84 L. Ed. 465 (1939) as follows:

> The term "incompetency" has a "common and approved usage." The context does not limit the meaning of the word to lack of substantive knowledge of the subjects to be taught. Common and approved usage give a much wider meaning. For example, in 31 C.J., with reference to a number of supporting decisions, it is defined: "A relative term without technical meaning. It may be employed as meaning disqualification; inability; incapacity; lack of

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> ability, legal qualifications, or fitness to discharge the required duty." In Black's Law Dictionary, 3rd edition, page 945, and in 1 Bouv. Law Dict., Rawle's Third Revision, p. 1528, it is defined as "Lack of ability or fitness to discharge the required duty." * * * Webster's New International Dictionary defines it as "want of physical, intellectual, or moral ability; insufficiency; inadequacy; specif., want of legal qualifications or fitness." Funk & Wagnall Standard Dictionary defines it as "General lack of capacity of fitness, or lack of the special qualities required for a particular purpose." 6 A. 2d at 869-870; [emphasis supplied]
>
> [In re Grossman at 29]

The Grossman Court considered the important question as to the fitness of the teaching staff member and the teacher's relationship with the students and other school employees in the school setting. There, the Court cited the language set forth by the California Supreme Court in Morrison v. St. Bd. of Ed., 1 Cal. 3d 214, 82 Cal. Rptr. 175, 461 P. 2d 375 (Sup. Ct. 1969), where it said that:

> In determining whether the teacher's conduct thus indicates unfitness to teach the board may consider such matters as the likelihood that the conduct may have adversely affected students or fellow teachers, the degree of such adversity anticipated, the proximity or remoteness in time of the conduct, the type of teaching certificate held by the party involved, the extenuating or aggravating circumstances, if any, surrounding the conduct, the praiseworthiness or blame-worthiness of the motives resulting in the conduct, * * * These factors are relevant to the extent that they assist the board in determining a teacher's fitness to teach, i.e., in determining whether the teacher's future classroom performance and overall impact on his students are likely to meet the board's standards. 82 Cal. Rptr. at 186-187, 461 P. 2d at 387-387; [emphasis supplied]

The court concluded:

> * * * Thus an individual can be removed from the teaching profession only upon a showing that his retention in the profession poses a significant danger of harm to either students, school employees or others who might be affected by his actions as a teacher. * * * Id. at 191, 461 P. 2d at 391; [emphasis supplied]
>
> [In re Grossman at 31]

Thus, the Grossman Court concluded that incapacity went beyond the teacher's ability to perform the teaching function to include the possibility of non-academic harm to pupils in upholding the local board of education, the Commissioner and the State Board of Education's determination to dismiss the tenured teaching staff member.

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Here, the Board is concerned not only with respondent's ability to perform her assigned duties, but also with the welfare of its pupils and the possibility of non-academic harm that might be visited upon them as a consequence of respondent's disability.

CONCLUSIONS

In the instant matter the Board has demonstrated, by a preponderance of the reliable and credible evidence, that respondent was and is incapacitated to perform or function in her professional duties and responsibilities. Although respondent is not required to testify or produce evidence on her own behalf, where, as here, the charging party has made out a prima facie case, respondent is required to successfully rebut or overcome the proffered evidence in order to prevail. Amerada Hess Corp. v. Quinn, 143 N.J. Super. 237 (Law Div. 1976); Bastas v. Bd. of Review Dept. of Labor and Industry, 155 N.J. Super. 312 (App. Div. 1978). Absent respondent's defenses and/or a presentation of mitigating circumstances to the charge, this administrative tribunal can only reach the conclusion that forfeiture of respondent's tenured teaching position is warranted.

Accordingly, I **CONCLUDE** the Board's charge that respondent is incapacitated and is no longer able to perform her teaching duties is true in fact. In re Grossman.

I further **CONCLUDE** that pursuant to N.J.S.A. 18A:6-9, respondent be and is hereby **DISMISSED** from her tenured teaching position with the Board of Education of the City of Pleasantville, effective December 18, 1984, the date the Board certified its charges against respondent to the Commissioner of Education.

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

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OAL DKT. NO. EDU 1395-85

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

2 August 1985
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

AUG 5 1985
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

DATE

Mailed To Parties:
OFFICE OF ADMINISTRATIVE LAW

bc

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IN THE MATTER OF THE TENURE	:	
HEARING OF BARBARA GASTON, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF	:	DECISION
PLEASANTVILLE, ATLANTIC COUNTY.	:	
_____	:	

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

It is observed that no timely exceptions to the initial decision have been filed with the Commissioner by the parties pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b, and c.

Upon examination of the record of this matter, the Commissioner finds and determines that respondent has failed to present any compelling evidence on her own behalf to warrant a reversal of those findings of fact and conclusions of law set forth in the initial decision. The Commissioner hereby affirms those findings and conclusion in the initial decision and hereby adopts them as his own.

Consequently, the Board's tenure charge against respondent of incapacity has been proven true, in fact, by a preponderance of credible and reliable evidence. Accordingly, it is found and determined that respondent has forfeited her tenured teaching position in the City of Pleasantville Public School System.

The sole modification to the initial decision herein is that the Board is hereby directed to dismiss respondent from its employ as of the date of the Commissioner's decision herein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 18, 1985

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INITIAL DECISION
OAL DKT. NO. EDU 7774-84
AGENCY DKT. NO. 407-9/84

DOROTHY LYDON,
Petitioner,
v.
HILLSBOROUGH TOWNSHIP
BOARD OF EDUCATION,
Respondent.

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

Louis C. Rosen, Esq., for respondent (Aron & Salsberg, attorneys)

Record Closed: June 20, 1985 Decided: August 5, 1985

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

Dorothy Lydon (petitioner), employed for two years by the Hillsborough Township Board of Education (Board) as a teacher of English assigned to the Hillsborough Township High School, claims in a two count Petition filed before the Commissioner of Education that the Board breached her third yearly employment contract for 1984-85 for which she seeks compensation and reinstatement. She also alleges that during her prior two years of employment, and the prospective third year of employment, the Board's salary policy unlawfully discriminated between females and males which resulted in her salary being established at a rate lower than that received by males with the same academic training and experience she possesses. Petitioner contends such policy is unlawful under N.J.S.A. 18A:6-6, N.J.S.A. 10:5-1 et seq., Law Against Discrimination, 42 U.S.C. ¶ 2000e-2(a)(1), the equal protection clauses of the federal and state constitutions, and 42 U.S.C. ¶ 1983. On this latter count, petitioner seeks the salary she would have

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received during her first two years of employment but for the alleged unlawful discrimination, interest, damages for pain, suffering and humiliation and, finally, she seeks attorney's fees. The Board denies the existence of an enforceable employment contract between it and petitioner for 1984-85 and it denies its salary policy unlawfully discriminated against females at any time. The Board seeks dismissal of both counts of the petition, with prejudice. After the matter was transferred to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., a hearing was scheduled and conducted on May 8, 1985 at the Watchung Municipal Building, Watchung. The record closed June 20, 1985 upon receipt of the Board's brief in support of its position.

BACKGROUND FACTS

On April 16, 1984, the superintendent advised petitioner in writing that the Board continued her employment for the third consecutive year, 1984-85 (P-3). The superintendent requested petitioner to "* * * sign all three copies of the enclosed employment contract and return them to my office by April 25,[1] 1984." (P-3). The written employment contract offer, in the form prescribed by the Commissioner,[2] provided that petitioner was to be employed by the Board as a teacher between September 1, 1984 through June 30, 1985 at a salary of $17,900. The contract offer also provided that that salary could have been increased depending upon the agreement to be negotiated between the Board and the Hillsborough Education Association.[3] There is no stated time within which the offer must be accepted or after which the offer shall be

---

[1]The return date, April 25, is set by the superintendent in order for him to know which teachers are returning for the subsequent school year. The administrative date of April 25 was set following an unsuccessful attempt by the Board to have another teacher's certificate suspended for having failed to report at the beginning of the 1982-83 year because the teacher took employment elsewhere. A return date for signed contracts did not then exist.

[2]See N.J.S.A. 18A:27-7.

[3]There is no evidence in the record to show whether, as the result of negotiations, petitioner would have been entitled to a higher salary.

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deemed revoked, although a 60 day written notice of termination by either party does exist. Petitioner disputed the stated salary amount which, she contended, did not recognize her teaching experience prior to employment by the Board.[4] Petitioner did not sign and return the three copies of the offered 1984-85 employment contract until June 27, 1984. By letter dated July 5, 1984, the superintendent, who had no prior knowledge that petitioner had not accepted in writing the contract offer by April 25, advised petitioner as follows:

> I am aware that you had a concern about receiving credit on the salary guide for teaching service prior to coming to Hillsborough. However, even after the facts in that matter were explained to you, you withheld your contracts (sic) until June 27.
>
> Therefore, I regret to advise you that because your acceptance of our offer of a contract was not received by June 1, 1984,[5] you have failed to comply with the provisions of N.J.S.A. 18A:27-12 and a contract between you and the Hillsborough Board of Education does not presently exist. I intend to inform the board of education of this matter at a closed work session on July 9, 1984, at 8 p.m. (P-6)

The evidence shows that this letter, presented after she manifested acceptance, is the first notice to petitioner that June 1, 1984 was the date the Board's 1984-85 offered employment contract offer expired, lapsed, or was considered by it to be revoked. On July 16, 1984, the Board determined at a meeting attended by petitioner, that because petitioner failed to comply with N.J.S.A. 18A:27-12, an employment contract did not exist and that her former position of employment was declared vacant.

---

[4]Petitioner testified that prior to her employment with this Board, she had been employed as a teacher for five years in two other school districts. Petitioner believed she was being compensated at a rate two steps below the step she believed her salary should have been established according to the Board's salary policy. In fact, from the time of her first employment for the 1982-83 academic year, petitioner has had a running dispute with the Board in regard to her yearly salary although she did not, at any time, formally grieve the issue.

[5]April 25, 1984 is not considered the critical date by the superintendent despite his adopted policy on return dates of signed proffered employment contracts. Indeed, the superintendent's testimony shows April 25, 1984 is not considered a mandatory date for the submission of written acceptances to employment contract offers (1T-139).

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ADDITIONAL FACTS

There is no dispute between the parties that the following events occurred surrounding the controverted employment contract for 1984-85. As noted earlier, petitioner began her employment with the Board during 1982-83. She was reemployed for 1983-84 and on or about January 4, 1984 petitioner signed and submitted a notice of intention to return form for 1984-85. The notices of intention to return are requested to be completed by each staff member for the superintendent to properly plan for the subsequent school year in regard to staff. When petitioner was advised by the superintendent on April 17 that the Board determined to continue her employment for 1984-85 and requested her to sign three copies of the offered employment contract, petitioner took the unsigned contract to her principal on or about April 24, 1984 to discuss with him her disagreement on the stated salary. Petitioner was upset at what she perceived to be a lesser salary than that to which she believed she was entitled and explained she had not yet signed the contract although she enjoyed teaching in Hillsborough and would like to return for 1984-85. The principal advised her to leave with him her unsigned contract and he would investigate the matter. Petitioner complained that other teachers had received salary credit for teaching experience prior to the commencement of their employment with Hillsborough while she was not receiving such credit.

The principal discussed the matter with the assistant superintendent of schools, Dr. George Gonzales, both of whom reviewed the records of the other teachers who were to have received credit for prior experience. They reached the finding that no one received salary credits for prior teaching experience and the principal advised petitioner of his discussions with the assistant superintendent, their joint investigation, and their finding. Petitioner persisted that other persons received such credit, at which the principal became annoyed and advised her " 'Dottie [petitioner] you do with this [the unsigned offered employment contract] what you want. I am not going to do anything else.' " Petitioner says the principal merely told her to investigate her salary claim herself before she submitted the signed proffered contract of employment for 1984-85.

When petitioner finally signed the offered employment contract on or about June 27 after, she says, unsuccessfully attempting to document her salary claim, she submitted her written acceptance, the signed contract, to the principal's secretary. The principal directed his secretary to forward the document to the assistant superintendent

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of schools.[6] It is noted that the assistant superintendent had no discussions with petitioner regarding the offered employment contract until July 2, 1984 when he advised her he recommended to the superintendent that her acceptance on June 27 be considered untimely in that she did not sign the contract before June 1, 1984.

Petitioner was fully aware of the superintendent's instruction to her on April 17 to sign and submit the three copies of the offered employment contract. Petitioner saw no problem in not returning the employment contract by that date because "everyone knew I was coming back. I knew I was coming back" (1T-55). In this regard, petitioner notes that she and the principal discussed her assignment for the 1984-85 school year during April 1984; that on or about June 15, 1984 petitioner was advised by the assistant superintendent, in a general memorandum to all teachers who were expected to return to satisfy an obligation of the Board under the negotiated agreement with the Hillsborough Education Assocation, of her assignment for the 1984-85 school year; that prior to June 30, 1984, petitioner worked with her department chairperson on the English program for 1984-85; and that the principal himself knew that she intended to return.

When petitioner was advised the Board declared her acceptance of its earlier contract offer untimely, and that the offer had lapsed, her position was declared vacant. She reapplied to the Board for employment as the teacher to fill that vacancy (P-7). On August 28, 1984, the assistant superintendent advised petitioner that another person had been appointed to fill the position for 1984-85 (P-8). Finally, it is noted that on or about October 11, 1984, petitioner was successful in securing another teaching position in an adjacent school district. She continued in that position through the conclusion of the 1984-85 year.

This concludes a recitation of the facts of the matter.

---

[6]The principal's secretary, upon the principal's direction, memorialized petitioner's statement to her at the time she submitted the signed contract in the following manner: "[Petitioner] said - I have been holding back on this contract - I was hoping to be put on step six but Mark Ulshouer [a teacher asserted by petitioner to have received disputed credit for prior experience] is not being cooperative." (R-3). Petitioner denies making such a statement to the principal's secretary (1T-47).

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ARGUMENTS OF THE PARTIES

Petitioner contends that given the facts of this case, N.J.S.A. 18A:27-12 is not applicable because the Board made a written offer of employment as opposed to a failure to take any action on the renewal of a nontenured teacher by April 30. But, she says, even if N.J.S.A. 18A:27-12 is applicable to written offers of employment as herein, June 1 is directory and not mandatory. Petitioner reasons that N.J.S.A. 18A:27-12 is but one of a series of statutes passed, L. 1971, c. 436, intended to give nontenure teachers timely notice when they are not to be reemployed in order that they may seek other employment. Petitioner points to the absence of prior notice by the Board that it considered June 1 to be the date which, absent her acceptance in writing of its written employment offer, the offer would lapse. Petitioner also relies upon the factual circumstances by which she says the Board, the superintendent, the assistant superintendent and the principal had constructive notice of her intention to return to work for 1984-85, and hence ostensibly a notice of her intention to accept the written offer, by virtue of her conversation with the principal surrounding her salary, and her work on the 1984-85 program prior to June 30, 1984. Petitioner also points to the asserted fact that the Board and the administrators knew of her intention to return by virtue of the assistant superintendent's notification to her on or about June 15, 1984 of her assignment for 1984-85. Finally, petitioner claims that because she had a valid, enforceable contract of employment for 1984-85, which the Board breached by its refusal to allow her to perform under the terms of the contract, she is entitled to full salary for the 1984-85 year, less mitigation, and she is entitled to reinstatement as a teacher in the Board's employ. Finally, petitioner seeks to withdraw, without prejudice, the allegation of unlawful discrimination regarding her salary during employment with the Board.

The Board alleges that by operation of law June 1 is the date all offers of employment for the subsequent school year must be accepted by teachers and absent a written acceptance of such offers the tendered offers lapse. But even if June 1 does not apply, the Board says that in this case petitioner failed to accept its offer of employment within a reasonable time and, consequently, the offer lapsed through her failure to accept within a reasonable time. Finally, the Board argues that even if a valid, enforceable contract of employment existed, the contract was terminated by it through a constructive exercise of the 60 day notice of termination clause. Consequently, if an enforceable employment contract existed between the Board and petitioner the Board says she is entitled to back pay only for 60 days. Finally, the Board demands petitioner's complaint

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of unlawful discrimination be dismissed, with prejudice, for failure to bring forth proofs to support the complaint.

DISCUSSION, LAW, CONCLUSIONS

I.
CONTRACT ISSUE

It is not disputed that the Board tendered to petitioner through the superintendent on or about April 16, 1984 an express offer to enter a bilateral employment contract for the 1984-85 academic year. The offer contained definite and certain terms including the duration of the proposed contract, a stated salary, the performance expected of petitioner, and a 60-day notice of termination clause. The administrative return date of April 25 is, according to the superintendent's own testimony, not mandatory. Consequently, April 25 cannot, in any sense, be considered a date by which petitioner was required to accept the offer. The offer remained valid after that date.

It is important to note that between April 17, 1984 when the superintendent advised petitioner of the Board's determination to renew her employment for 1984-85 and submitted to her three copies of the proposed contract offer asking her to sign and return them by April 25, no further communication was had by the Board or its administrators with petitioner with respect to the submission of her written acceptance of the offer. It must also be noted that nothing on the face of the written offer sets forth a specific time for acceptance.

Despite petitioner's failure to submit her written acceptance to the Board's offer, petitioner did make clear to the principal and through him to the assistant superintendent her disagreement in regard to the stated offer of $17,900 salary. The evidence discloses petitioner believed she was entitled to a higher salary by virtue of prior outside district teaching experience. Salary, of course, is a material term of the offer. I cannot find, however, based on the evidence of record that petitioner's disagreement with the proposed salary is a distinct refusal of the Board's offer or a counter-offer made to the Board by petitioner. Petitioner has had an ongoing dispute with the Board over salary credit for outside district teaching experience during the entire course of her employment with the Board. Yet, she had accepted employment with the Board notwithstanding the dispute the prior two years. The salary dispute this year, apparently, was no different

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than the dispute in prior years and yet petitioner performed, as did the Board, under the prior contracts.

In regard to the Board's position that its offer lapsed by operation of law on June 1, an analysis of the applicable statutes leads to a contrary conclusion. N.J.S.A. 18A:27-12 must be read in the context of the two preceding sections of Article V, Continuation and Termination of Employment, Notice, etc. N.J.S.A. 18A:27-10 requires boards of education to afford each nontenured teaching staff member by April 30 a written offer of a contract for employment for the following year or a written notice that such employment will not be offered. N.J.S.A. 18A:27-11 provides that boards who fail to give timely notice to nontenured teachers that their employment will not be continued for the following year are deemed to have offered such nontenured teaching staff members continued employment for the following year so long as, under N.J.S.A. 18A:27-12, that nontenured teaching staff member notifies the board of acceptance, in writing on or before June 1, of the offer of employment deemed to have been made by that Board. N.J.S.A. 18A:27-12 is clear and unequivocal that its application is to be only in those instances a board fails to notify nontenure teachers by April 30 of its intention not to continue their employment the following year. The statute, and particulary the June 1 date, does not apply in a situation where a written offer of employment for the following year is, in fact, tendered a nontenure teacher by the employing board.

It was earlier noted that the written offer to petitioner was made in a form written contract prescribed by the Commissioner at N.J.S.A. 27-7. The contract form used in this case contains the note "This is a specimen contract that should be modified in accordance with the terms of employment" (P-4). There is nothing that would prohibit the Board from including on the offer of the employment contract a date by which the offer must be accepted, manifested by the teacher's signature thereon, after which the offer would lapse or be considered revoked. But, the Board cannot now rely upon N.J.S.A. 18A:27-12 to impose the date of June 1 as the date its offer to petitioner lapsed because the statute simply does not apply.

It is basic contract law that "An unaccepted offer terminates, by lapse of time, at the expiration of the time limited for its acceptance, or, if no time is fixed in the offer, at the expiration of a reasonable time." (17 C.J.S. Contracts ¶ 49). In this case, no time was set by the Board within which its offer was to have been accepted by petitioner. The next question then is whether the offer lapsed at the expiration of a

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"reasonable time." Keeping in mind that the precise terms of the offer of employment provided that the employment shall commence September 1, 1984 and in consideration of the fact that the assistant superintendent, notwithstanding the motive for sending out the general announcement of assignments for the following year, included petitioner's name thereon, and in consideration of the superintendent's testimony that he had no knowledge prior to June 28 that petitioner had not returned her written acceptance, I cannot find that petitioner's acceptance of the offer was not within a reasonable time. That is, the Board's offer was enforceable by petitioner through her written acceptance of the offer absent an unreasonable delay in her written acceptance. The facts here fail to show an unreasonable delay in petitioner's acceptance, particularly absent evidence that school authorities changed their position by employing a replacement before petitioner accepted the offer. Petitioner accepted the offer on June 27 prior to the Board taking any action to revoke the offer. The offer was accepted before it was revoked.

I **CONCLUDE** a valid enforceable employment contract existed between the Board and petitioner for the school year 1984-85. I **FIND** the Board refused to allow petitioner to perform the services promised, to teach the 1984-85 academic year for the compensation of $17,900, without legal excuse. I **CONCLUDE** that the Board breached its contract with petitioner and I further **CONCLUDE** petitioner is entitled to relief.

The relief to be granted, however, is conditioned upon whether the Board's assertion is valid that if an enforceable contract existed between the parties it may be seen to have constructively invoked the 60-day notice of termination clause under the terms of the contract. In Bickford, et al. v. Elmwood Park Borough Bd. of Ed., 1978 S.L.D. 855, the Commissioner rejected a similar assertion made by the Elmwood Park board. In that case, a valid enforceable contract was found to have existed between the parties on May 11, 1973 for the following 1973-74 year. Bickford was thereafter notified on July 8 that the board determined not to reemploy him for the following year contrary to the contract. Though the board took no affirmative action at a public meeting to invoke the 60-day notice of termination clause, it asserted that its action on July 8 not to employ Bickford was equivalent to its exercise of the 60-day notice of termination clause. The Commissioner rejected that argument after having found that the board took no official action at a duly constituted public meeting to invoke the termination clause of the contract. The Commissioner awarded back pay, less mitigation, for the entire 1973-74 year. In this case, there is no evidence that the Board took affirmative action at a duly organized public meeting to invoke the 60-day notice of termination clause of the contract.

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The Board's argument that it constructively exercised the 60-day notice of termination clause is rejected because such termination clause must be exercised by an affirmative action taken at a duly organized public meeting, which the Board here failed to do.

The issue is thus reduced to what relief is petitioner entitled. Petitioner demands full back pay on the contract for the 1984-85 year and all other emoluments and benefits she would have received had the Board not breached the contract. In addition, petitioner demands reinstatement to her position of employment with the Hillsborough Township Board of Education. It was noted above that petitioner secured alternate employment with another board of education on or about October 11, 1984. To award petitioner full back pay in the amount of $17,900, not mitigated by outside earnings, would be to grant petitioner a windfall of public monies which is against public policy. Accordingly, while petitioner is entitled to $17,900 as back pay for the Board's breach of the valid employment contract, such amount shall be mitigated by petitioner's outside earnings between September 1, 1984 through June 30, 1985. In addition, petitioner is entitled to receive tangible employment emoluments and benefits she would have received had the Board not breached the contract, including whatever negotiated salary increase petitioner would have received during 1984-85 following negotiations between the Board and the Association.

Petitioner, however, is not entitled to reinstatement. As a nontenured teacher, petitioner had no claim to continuing employment with the Board. As the result of this administrative proceeding, petitioner is declared to be entitled to back pay on the 1984-85 employment contract. That contract expired through the passage of time. It is at the Board's discretion whether to continue the employment of a nontenured teacher until that person acquires the legislative status of tenure by meeting the precise conditions set forth in the statute. Petitioner, while prevailing on her contractual claim for 1984-85, is not entitled to reinstatement as a teacher in the Board's employ for 1985-86. Consequently, that portion of petitioner's requested relief is denied.

II.

THE UNLAWFUL DISCRIMINATION ISSUE

The original Petition of Appeal in this case was filed September 26, 1984 which pleaded only the contract issue. On or about November 16, 1984, an amended

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Petition of Appeal was filed which pleaded the unlawful discrimination issue. At a prehearing conference conducted December 4, 1984, the unlawful discrimination issue was agreed upon as an issue in the case to be tried April 15, 1985. Counsel to the parties further agreed at that prehearing conference that a joint stipulation of fact was to be executed and filed no later than December 31, 1984. On March 21, 1985, petitioner's counsel was specifically directed that " * * * absent the filing of a stipulation of fact as directed in the Prehearing Order, all issues in dispute will be tried during the hearing scheduled for April 15, 1985." (Letter, March 21, 1985). Crossing in the mail on March 15, 1985, was petitioner's counsel's letter advising "* * * I am in the process of attempting to prepare a Stipulation of Facts on the contract issue. In the event a stipulation cannot be reached, am I correct in assuming that the issue will be resolved through plenary hearing on the April 15 hearing date (the date set for sex discrimination hearing)?" (Letter, March 15, 1985). A stipulation of fact was not executed and filed by the parties because "* * * petitioner Lydon could not agree to certain material facts." (Letter, April 19, 1985).

In the meantime, petitioner's counsel represents that he requested the New Jersey Division on Civil Rights to exercise jurisdiction on the unlawful discrimination complaint. The Division refused that request ostensibly on the grounds of timeliness. It is now represented that a companion claim of unlawful discrimination has been filed by petitioner before the Federal Equal Employment Opportunity Commission. Petitioner now wishes to withdraw the unlawful discrimination complaint, without prejudice, before the Commissioner of Education while the Board takes the position that the unlawful discrimination complaint before the Commissioner of Education must be dismissed, with prejudice, for failure of petitioner to carry her burden of proof at hearing.

While N.J.A.C. 1:1-17.2 provides that a party may withdraw a request for hearing at any time until testimony commences, petitioner's counsel at the opening of hearing stated petitioner was prepared to withdraw the unlawful discrimination complaint so long as the Board consented (1T-4). Board counsel responded by advising the Board would not consent to a withdrawal of the unlawful discrimination complaint, without prejudice, particularly in light of a telephone conversation he was to have had with an associate of his adversary's law firm. (Letter, May 1, 1985.)

First, this record contains no competent evidence brought forward by petitioner to sustain a prima facie case of unlawful discrimination in regard to her salary.

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The issue of unlawful discrimination was specifically pleaded by petitioner through an amended Petition of Appeal. The issue of unlawful discrimination was agreed to at the prehearing conference conducted December 4, 1984. The unlawful discrimination issue was a viable issue between the time it was pleaded by the amended Petition of Appeal through the time the hearing commenced on May 8, 1985. At no time prior to May 8, 1985, did petitioner unequivocally seek to withdraw the unlawful discrimination complaint before this forum without the consent of the Board. Because the Board refuses to consent to petitioner's withdrawal of the unlawful discrimination complaint she now seeks to unilaterally withdraw the issue, without prejudice, notwithstanding the fact the issue remained viable through petitioner's case-in-chief.

I **FIND** in this record no basis upon which to allow petitioner to withdraw the unlawful discrimination complaint, without prejudice. The Board was prepared to defend at hearing the issue of unlawful discrimination. Because petitioner, for whatever reason, elected not to present her proofs to support her claim is an insufficient basis upon which to believe justice and fairness would be achieved by allowing a withdrawal without prejudice. Rather, justice and fairness demand that the unlawful discrimination complaint filed before the Commissioner of Education by petitioner should be and is **DISMISSED,** with prejudice, for failure of petitioner to present proofs at the time of hearing on May 8, 1985 to support that allegation.

In conclusion, the Hillsborough Township Board of Education is **ORDERED** to tender Dorothy Lydon back pay in the amount of $17,900, mitigated by her outside earnings between September 1, 1984 through June 30, 1985. It is further **ORDERED** that the Board tender petitioner Lydon all tangible benefits she would have received had her 1984-85 employment contract not been breached by the Board. No further relief is warranted under the facts of this case.

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

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OAL DKT. NO. EDU 7774-84

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

August 5, 1985
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

AUG 5 1985
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

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DOROTHY LYDON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSBOROUGH, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The Commissioner has reviewed the record including the initial decision rendered by the Office of Administrative Law, Daniel B. McKeown, ALJ.

It is observed that exceptions to the initial decision were filed pursuant to N.J.A.C. 1:1-16.4a, b, and c.

The Board filed exceptions to the Initial Decision and to petitioner's exceptions and avers, inter alia, that:

1. the ALJ erred in holding that petitioner's employment status did not terminate by operation of law when she failed to accept an offer of employment for the school year 1984-85 by June 1, 1984. Relying on rules of statutory construction stating that statutory provisions must be read in pari materia, petitioner avers that N.J.S.A. 18A:27-10, 11, and 12 read together unambiguously reveal the legislative intent to require boards of education to offer employment contracts by a certain date, i.e., April 30 and to compell nontenured employees to accept that contract offer by June 1. The Board's first exception also states that the only means by which petitioner could properly express her intent to return to her position in 1984-85 was by returning her signed contract by June 1;

2. assuming, arguendo, that the Board could not and/or did not require petitioner to accept employment by April 25 or June 1, 1984, the ALJ nevertheless erred in holding that petitioner accepted an offer of employment within a reasonable period of time and, hence, the offer did not terminate. The Board avers that petitioner was "on notice" that acceptance was requested by the chief school administrator on or before April 25, 1984, that the rest of her colleagues were tendering their signed contracts by that date, and that definite notice of acceptance by petitioner at an early stage was necessary to ensure a smooth-running educational program. Holding out her contract, unsigned, until June 27, 1984, the Board argues, created an unreasonable delay, and the Board was not arbitrary or capricious in determining that its offer had lapsed by virtue of petitioner's failing to return the signed contract until June 27, 1984;

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3. assuming, arguendo, that a contract existed between the parties when petitioner purportedly accepted an offer of employment on June 28, 1984, the ALJ erred by finding that the measure of damages consisted of one year's salary minus any monies earned for the 1984-85 school year. The Board's exceptions distinguish Bickford et al. v. Elmwood Park Borough Bd. of Ed., 1978 S.L.D. 855, and Lally v. Copygraphics, 173 N.J. Super. 162 (App. Div. 1980), aff'd o.b. 85 N.J. 668 (1981), stating that petitionerwas notified by letter dated July 6, 1984 that her contract employment status would be reviewed by the Board and, further, that petitioner had an open public hearing on the matter, as requested. The Board respectfully challenges the ALJ's finding that:

> "In this case, there is no evidence that the Board took affirmative action at a duly organized public meeting to invoke the 60-day notice of termination clause of [petitioner's] contract."
> (Initial Decision, ante)

Relying on Thomas v. Board of Education of Morris Township, 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd 46 N.J. 581 (1966), the Board avers that the Board's actions in not rehiring petitioner, following the lapse of its offer of reemployment, was entirely appropriate and, therefore, that petitioner is not entitled to reinstatement. In the alternative, the Board suggests that if its actions are deemed arbitrary, petitioner is only entitled to contractual damages, or no more than 60 days' pay, minus mitigation from other sources of income during that period, should a contract be found. The Board cites Armstrong v. Board of Education of the Township of East Brunswick, 1975 S.L.D. 112, rev'd State Board 117; Canfield v. Board of Education of Pine Hill Borough, 97 N.J. Super. 483, 492 (App. Div. 1967), rev'd 51 N.J. 400 (1968); and

4. petitioner had months to prepare for her sex discrimination case and failed to present it before the ALJ. Since the matter now resides before EEOC, petitioner has no basis for seeking dismissal without prejudice. N.J.A.C. 1:1-1.3, R. 4.37-1(a), Union Carbide Corp. v. Litton Prec. Prod., Inc., 94 N.J. Super. 315, 317 (Ch. Div. 1967) (R.4.37-1(a) has been adopted to protect a defendant from the duplication of the normal costs of litigation.)

Petitioner filed exceptions to the initial decision as well as filing exceptions to the Board's exceptions. Petitioner avers, inter alia, that:

1. while petitioner concurs with the ALJ's determination that her contract of employment was breached for the reasons articulated by the ALJ on pp. 8-9 of the initial decision, and that she is entitled to back pay and all other emoluments lost, the ALJ's determination should be modified to provide that she is entitled to salary for each day she was unemployed as a result of the Board's action, rather than by computing her salary on an annual basis.

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Petitioner relies on Levitt et al. v. Bd. of Ed. of Elizabeth, State Board, 1979 S.L.D. 847. Petitioner further excepts to the ALJ's failure to grant reinstatement, relying on Lally v. Copygraphics, 173 N.J. Super. 162 (App. Div. 1980), aff'd o.b. 85 N.J. 668 (1981) (Administrative agencies have the authority to order reinstatement) and on Mountain v. Fairview Bd. of Ed., 1972 S.L.D. 526, aff'd State Board 1973 S.L.D. 777 (Because Board breached an agreement to reinstate a nontenured teacher after a leave of absence terminated, petitioner was entitled to reinstatement); and

2. citing Bickford et al. v. Elmwood Park Borough Bd. of Ed., 1978 S.L.D. 855, petitioner further contends that the 60-day cancellation clause cannot be relied upon to limit petitioner's recovery because the Board did not substantively invoke the clause at its July 16 meeting; and

3. the ALJ erred in dismissing with prejudice the sex discrimination count of the petition. Petitioner asserts that, at most, the sex discrimination claim should have been dismissed subject to any applicable provision of N.J.A.C. 6:24-1.2. Moreover, petitioner relies on N.J.A.C. 1:1-17.2 and avers that she satisfied or substantially complied with the requirement of that rule by notifying both the Board's counsel and the ALJ before testimony was taken that petitioner was withdrawing the issue of sex discrimination because it was to be adjudicated in another forum. Petitioner avers that in these circumstances, the dismissal with prejudice was improper both in terms of fairness and procedure, and relies on Mayflower Industries v. Thor Corporation, 17 N.J. Super. 505 (1952) (recognizing that dismissal with prejudice is generally not to be invoked.) Petitioner seeks to have the order of dismissal reversed with an order granting petitioner's application to withdraw the sex discrimination claim granted without prejudice, subject to the applicability, if any, of N.J.A.C. 6:24-1.2.

The Commissioner agrees with the ALJ that, to effect legislative intent, N.J.S.A. 18A:27-12 must be read in pari materia with the two preceding sections of Article 5, Continuation and Termination of Employment, Notice, etc., N.J.S.A. 18A:27-10 and 18A:27-11. However, the Commissioner does not agree with the ALJ's conclusion that

> "N.J.S.A. 18A:27-12 is clear and unequivocal that its application is to be only in those instances [when] a board fails to notify nontenure teachers by April 30 of its intention not to continue their employment the following year."
> (Initial Decision, ante)

The Commissioner finds that N.J.S.A. 18A:27-12 and, in particular, the June 1 date specified as the deadline for nontenured employees to accept employment applies to both 18A:27-10 or 18A:27-11 employment offers and is an absolute, not a directive, deadline.

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The reasoning behind this holding is well-articulated in the Board's exceptions, which are summarized below:

> "It is without question that Petitioner was a nontenured teaching staff member employed on September 30, 1983 and that the Board offered her 'a contract for employment for the next succeeding year.' The analysis does not end here, however, for N.J.S.A. 18A:27-10 merely provides for 'a written offer of a contract for employment.' Said offer must be accepted. While N.J.S.A. 18A:27-10 puts an affirmative duty on boards of education to offer[1] employment by a date certain, another provision of the statute, which must be read in pari materia with N.J.S.A. 18A:27-10, must be consulted. Thus, 'If the teaching staff member desires to accept such employment, he (she) shall notify the board of education of such acceptance, in writing, on or before June 1 in which event such employment shall continue as provided for herein. In the absence of such notice of acceptance the provisions of this article shall no longer be applicable.' N.J.S.A. 18A:27-12. (Emphasis supplied.)
>
> "It is not without significance that N.J.S.A. 18A:27-12 refers to 'the provisions of this article' in the context of mentioning 'the absence of such notice of acceptance...' Article 5 of Chapter 27 of Title 18A contains N.J.S.A. 18A:27-10, as well as N.J.S.A. 18A:27-12. These provisions, when read together -- as they must --, reveal a totally unambiguous, integrated legislative intent. That intent is to set forth the substantive contracting terms of the parties concerned therein, i.e., boards of education and nontenure teaching staff members. Employees are protected in their expectations of employment by legislation requiring boards of education to offer employment contracts by a date certain, i.e., April 30 of each year. N.J.S.A. 18A:27-10. Boards of education following release of their offers of employment are protected in their legitimate expectations of receiving continued services from competent and needed staff members by legislation requiring nontenure

---

[1] N.J.S.A. 18A:27-11 is not relevant to this issue as there is no allegation that a written notice of employment did issue on or before April 30, 1984.

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teaching staff 'to accept such employment ... in writing, on or before June 1...' N.J.S.A. 18A:27-12. There is, thus, an attractive statutory scheme mutually benefiting the individual teacher, the public body and the general public which governs the substantive contractual rights of the parties. The clear and obvious import of the legislation is to compel both boards and the nontenure teaching staff member to act responsibly and with dispatch in settling their contractual status for the upcoming school year.

"The teaching staff member, it is submitted, is thus compelled by the mandatory language of N.J.S.A. 18A:27-12 to accept a contract offer of employment by June 1 or lose the benefits of 'the provisions of this article,' i.e., a 'written offer of employment ... providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board..." N.J.S.A. 18A:27-10.

"This analysis finds support in well-known principles of statutory construction. As was stated by the New Jersey Supreme Court in Harvey, supra, 30 N.J. at 391-392:

'In determining whether a statute is mandatory or directory regard shall be had to the purpose and intent of the Legislature. Mr. Justice Heher in Leeds v. Harrison, 9 N.J. 202, 213 (1952) stated:

'"May" is a permissive and not an imperative verb which is to be given its natural and ordinary meaning, barring a clear contextual indication of a different usage. The question is essentially one of legislative intent, to be gathered from the nature and object of the statute considered as a whole; and in that inquiry public and individual rights are sometimes factors to be regarded:

'The word "may" is ordinarily permissive or directory, and the words "must" and "shall" are generally mandatory. Said terms, however, have been held to be interchangeable whenever necessary to execute the clear intent of the Legislature. The problem is

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> primarily one of ascertaining the intent of the Legislature. 3 Sutherland, Statutory Construction (Horack, 3rd ed. 1943) 77. Such intent may be implied from the language used or inferred on grounds of policy and reasonableness.'
>
> "N.J.S.A. 18A:27-10 and 12, it is noted, use only the terms 'shall.' Moreover, it has been held that even where statutory provisions utilize only permissive terms, the word 'may' has been given 'a mandatory significance where it is employed in a statute to delegate a power the exercise of which is important for the protec- tion of public interests and where it can clearly be taken from nature and the object of the statute, a mandatory significance was intended.' Id. at 392. The acceptance of employment by a date certain is likewise obvious and substantial. The timelines of the statutes are, indeed, their raison d'etre. Thus, a contract of employment did not exist between Petitioner and Respondent on June 1, 1984, when Petitioner failed to accept same within the strictures of those timelines."
> (at pp. 13-17)

Thus, by first reading N.J.S.A. 18A:27-10, followed by the next relevant section, 18A:29-12 (since 18A:27-11 is inapplicable by virtue of the fact that the Board did tender a written offer of employment by April 30), it is clear that the requirement of N.J.S.A. 18A:27-12 refers of necessity to N.J.S.A. 18A:27-10. N.J.S.A. 18A:27-12 does not state that it applies only to the provisions of the immediately preceding section. "Such employment" refers to both 18A:27-10 and 18A:27-11. Further, N.J.S.A. 18A:27-12 speaks in terms of "the provisions of this Article" not merely the terms of N.J.S.A. 18A:27-11.

It is also clear from a plain reading of 18A:27-12 that the only way for petitioner to express her intention to accept the written offer of employment was by returning her signed contract by June 1. The June 1 timeline represents the legislative determination that thirty days after the April 30 deadline for boards to make offers is a reasonable amount of time for consideration of the offer. Here again, the Board's exceptions offer pertinent references. In Newark Publishers' Ass'n v. Newark Typographical Union, 22 N.J. 419, 427 (1956), the Supreme Court held:

> "We are not at liberty to introduce and effectuate some supposed unrevealed intention. The actual intent of the parties is ineffective unless make known in some way in the writing."

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Having reached the conclusion that petitioner was required, under N.J.S.A. 18A:27-12, to accept in writing the offer of employment made in a timely fashion by the Board, that the June 1 statutory date for return of the contract is indeed mandatory, and that the contract lapsed by operation by law when petitioner withheld the contract beyond June 1, it remains to be determined whether the Board's action in notifying petitioner that the contract offer had lapsed and in advertising the opening was unreasonable.

The standard of review applicable to the Commissioner's consideration of board actions is articulated in Thomas v. Morris Township Board of Education, 89 N.J. Super. 327 (App. Div. 1965), aff'd 46 N.J. 581 (1966):

> "***We are here concerned with a determination made by an administrative agency duly created and empowered by legislative fiat. When such a body acts within its authority, its decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable.***" (at 332)

The ALJ cites Bickford et al. v. Elmwood Park Borough Bd. of Ed., 1978 S.L.D. 855 for the proposition that because the board therein took no official action at a duly constituted public meeting to invoke the 60-day termination clause contained in the contract, the Commissioner awarded back pay, less mitigation, for a full year to the petitioner. The ALJ in the instant matter held that the Board took no affirmative action at a duly organized public meeting to invoke the 60-day notice of termination clause of petitioner's contract.

The record indicates that petitioner was notified by letter dated July 5, 1984, from the superintendent that the Board would review the matter of her employment status at a closed work session on July 9, 1984 and that the matter was, in fact, discussed, with petitioner present, for over an hour at that meeting. (Tr. 51-53) The record also indicates that petitioner was invited to and did apply for the opening, but that she was not rehired after due consideration by the Board. (Tr. 53)

The Board is entitled to a presumption of correctness in its actions unless such actions are arbitrary, capricious or unreasonable. The Commissioner finds no bad faith or breach of procedure in its actions to hire another after properly determining that petitioner's offer of employment had lapsed.

Accordingly, the Commissioner finds that petitioner is entitled to no damages at all in the instant matter. By withholding her contract not only beyond the April 25, 1984, timeline directed by the administration but also beyond the statutorily-mandated June 1 timeline, petitioner assumed the risk that the offer could lapse. She did so at her own peril.

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The Commissioner concurs, however, with the ALJ that the unlawful discrimination issue should be dismissed with prejudice for the reasons expressed in the initial decision and also because petitioner is entitled to only "one bite at the apple." Petitioner has chosen E.E.O.C. as the proper forum to hear the sex discrimination claim; thus, petitioner may not, if she does not prevail in that forum, reassert the claim before the Commissioner of Education. See, Riely v. Hunterdon Central High School Board of Education, 173 N.J. Super. 109 (1980).

Accordingly, the Commissioner reverses in part the decision of the ALJ regarding the employment status of petitioner in 1984-85 and finds and determines that the Board's offer of employment to petitioner expired on June 1, 1984 by operation of law when petitioner failed to accept the offer of employment by that date. The Commissioner further determines that without a legally binding contract of employment, petitioner is entitled to no relief whatsoever on the contract issue.

The Commissioner affirms that part of the initial decision withdrawing the unlawful discrimination complaint with prejudice, as petitioner has chosen E.E.O.C. to hear the issue in question.

Accordingly, for all of the reasons set forth in the initial decision as modified above, the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 19, 1985

Pending State Board

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INITIAL DECISION
OAL DKT. NO EDU 1716-85
AGENCY DKT. NO. 28-2/85

JOHN BAUER,
Petitioner,
v.
BOARD OF EDUCATION OF THE
PINELANDS REGIONAL SCHOOL
DISTRICT, OCEAN COUNTY,
Respondent.

Eli L. Eytan, Esq., for the petitioner

Milton H. Gelzer, Esq., for the respondent (Gelzer, Kelaher, Shea & Novy, attorneys)

Record Closed: July 1, 1985 Decided: August 14, 1985

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

This matter concerns the grading policy used by the staff of the Pinelands Regional High School during the 1983-84 school year. John Bauer alleged in his petition that this grading policy is arbitrary and unreasonable and that his grades for that year be reviewed and changed. The Board of Education of the Pinelands Regional School District (Board) denied the petitioner's allegations and the Commissioner of Education (Commissioner) referred the matter to the Office of Administrative Law for a determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

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At the prehearing conference held on May 8, 1985, the parties agreed that the issues are:

(a) Whether the Board's grading policy during the 1983-84 school year was arbitrary and unreasonable.

(b) Whether the petitioner is entitled to have the revised grade policy applied retroactively to his grades during the 1983-84 school year.

(c) Whether the petitioner's grades in the 1983-84 school year for geometry and physical education were properly determined.

The hearing in this matter took place on June 13, 1985, and after receipt of briefs, the record closed on July 1, 1985.

At the hearing, Eli L. Eytan, Esq., appearing on behalf of the petitioner, stated that Mr. Bauer was no longer pursuing issues (b) and (c) as identified at the prehearing conference, and that Mr. Bauer was no longer questioning his grade for physical education in the 1983-84 school year. Therefore, the only issue in this matter is whether the grading policy used to determine Mr. Bauer's geometry grade in the 1983-84 school year was arbitrary and unreasonable.

Based on the testimony and exhibits presented at the hearing, I **FIND** that the facts in this matter are not in dispute.

The Board adopted a grading policy (J-1) at its meeting on August 19, 1981 (J-2), and this grading policy was in effect during the 1983-84 school year. Pursuant to this policy, a student's grade for a full-year course was a grade average, mathematically determined by assigning a factor of 20 percent for the grade received for each of the four marking periods, a 10 percent factor for the midyear exam and a 10 percent factor for the final exam; provided, however, that if a student received a failing grade in the fourth marking period then that student failed the course notwithstanding said student's grades in the other marking periods or on the exams (J-1).

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During the 1983-84 school year, Mr. Bauer was a junior at the Pinelands Regional High School and his report card for that year (J-3) shows the following grades for geometry:

First Marking Period	B
Second Marking Period	B
Midyear exam	B
Third Marking Period	D
Fourth Marking Period	F
Final exam	F
Final Course Grade	F

Mr. Bauer's teacher for geometry, Ellen Hopp Metzger gave him a final grade of F based on the Board's grading policy in effect at the time. Based solely on the grade average portion of the Board's policy, Mr. Bauer would have received a D as his final grade for geometry.

Mr. Bauer was aware of the Board's grading policy prior to the initiation of his junior year even though this policy does not appear in the student handbook which was discussed at the hearing but not admitted into evidence.

After he received his final report card, Mr. Bauer discussed his geometry grade with his guidance counselor, the principal of the high school and Paul Snyder, who was the Superintendent of Schools during the 1983-84 school year and who is presently on a leave of absence.

It is Mr. Bauer's position that the grading policy in effect during the 1983-84 school year was unfair since it did not truly reflect the student's accomplishments during the school year.

In the summer of 1984, the grading policy was amended by the Board (J-5). The new grading policy which was in effect during the 1984-85 school year, sets forth the same mathematical formula for determining the average grade and also provides that in order to pass a course, the student must either get a passing grade for the fourth marking period or on the final exam (J-4). This revised grade policy also establishes a written

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procedure for appeals as to grade determinations (J-4). Pursuant to this revised grading policy, Mr. Bauer would still receive an F as his final grade for geometry in the 1983-84 school year.

By letter dated August 16, 1984, Mr. Snyder wrote Mr. Bauer to compliment the petitioner regarding his professional approach to the question regarding his 1983-84 grades and indicated that he hoped that the new grading policy adopted by the Board would provide for "greater equity" (J-6). Mr. Bauer was allowed to present his objections to his 1983-84 grades to the Board on November 14, 1984, and he was advised thereafter by Carol Hoeh, President of the Board that his grades would not be changed and that the revised grade policy would not be applied retroactively (J-7, J-8, J-9). Mr. Bauer graduated from high school in June 1985.

After the presentation of petitioner's case, Milton H. Gelzer, Esq., appearing on behalf of the Board, moved to dismiss the matter and argued that the petitioner had failed to establish a prima facie case. Mr. Eytan argued against the motion. I was initially inclined to grant this motion based on my misunderstanding of what was included in the fourth period grade. When it was established that the results of the final exam were not included in the grade for the fourth marking period, I denied the motion.

On behalf of the Board, Mr. Snyder testified that the grading policy in effect during the 1983-84 school year (J-1) was based on the Bloom theory of progressive education which recognizes that students learn at different rates, and that a substantial amount of staff discussion had preceded the adoption of this grading policy by the Board. Mr. Snyder stated that this grading policy was given to the students as an addendum to the student handbook. According to Mr. Snyder, who has had approximately 24 years of experience in education and who holds both a bachelor and master degree in education, this grading policy is not arbitrary or unreasonable.

Mr. Snyder stated that after Mr. Bauer raised the question regarding his grades for the 1983-84 school year, the Board decided to modify the grading policy, and that this action was taken not because the Board considered the policy to be improper or unfair but because the Board decided that the revised policy was a better way of determining the final grade.

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At the hearing and in his brief, Mr. Gelzer argued that the petitioner had not shown that the Board's grading policy was arbitrary or unreasonable. Mr. Gelzer stated that the school case law has clearly recognized the right of a board to determine its own school policies, that the Board's policies are entitled to a presumption of correctness and that the Commissioner will not override a board's policy unless there is a clear showing of arbitrariness, Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288 (App. Div. 1960), East Brunswick Bd. of Ed. v. Tp. Council of East Brunswick, 91 N.J. Super. 20 (App. Div. 1966), Thomas v. Morris Bd. of Ed., 89 N.J. Super. 327 (App. Div. 1965), aff'd, 46 N.J. 581 (1966).

In response, Mr. Eytan argued that it was not clearly shown that the grading policy in issue (J-1) was ever adopted by the Board since this policy was only referred to in the Board's minutes rather than reproduced in its entirety (J-2), and since the policy was not contained in the student handbook. Mr. Eytan argued that the policy was peremptory and left no discretion to the teacher, principal, superintendent or even the Board, and that it was arbitrary and unreasonable since it was possible for a student to get an A in each of the first, second and third marking periods as well as an A on the mid-term and final exam and still fail the course if said student receives an F in the fourth marking period. According to Mr. Eytan, the grading policy was established to avoid a "spring slump" by "forcing" students to study at the end of a school year.

In rebuttal, Mr. Gelzer noted that the grading policy in issue does not preclude review of the grades by any school administrator or Board (J-1). It should be noted that even though there was no written procedure, the Board gave Mr. Bauer the opportunity to present his objections at a Board meeting prior to its determination not to make any changes regarding the grades given to him for the 1983-84 school year (J-7).

I agree with Mr. Gelzer that it has been clearly established in this state that the Commissioner will not interfere with the exercise of the local board's discretion in the management of public schools unless there is a clear showing that the local board was arbitrary, violated the law or acted in bad faith, N.J.S.A. 18A:11-1 et seq., Kenney v. Montclair Bd. of Ed., 1938 S.L.D. 647, aff'd, State Bd. of Ed., 1938 S.L.D. 649, Parsippany-Troy Hills Ed. Ass'n. v. Parsippany-Troy Hills Bd. of Ed., 188 N.J. Super. 161 (App. Div. 1983), certif. denied, 94 N.J. 527 (1983). The establishment of grading policies is part of the local board's responsibility for the management of public schools, K.C. v. Collingswood Bd. of Ed., 1973 S.L.D. 347. Further, it has been well established that as to grading policies, the Commissioner will not overturn the local board's decision unless

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there is a clear showing that the grading policy was established to be a deterrent or a punishment, Wermuth v. Livingston Bd. of Ed., 1965 S.L.D. 121, Wetherell v. Burlington Tp. Bd. of Ed., 1978 S.L.D. 794, that the grading policy violates a statutory provision or is contrary to the requirements of thorough and efficient education, Dooner v. Bd. of Ed. of Toms River School District, 1976 S.L.D. 619, that there was bias or bad faith in the application of the grading policy, Talarsky v. Edison Tp. Bd. of Ed., 1977 S.L.D. 862, K.C. v. Collingswood Bd. of Ed., or that the grading policy is shown to be arbitrary or unreasonable, Talarsky, Rucker v. Kinnelon Bd. of Ed., 1979 S.L.D. 91.

Based on the facts in this matter as well as the legal arguments of the parties, I **CONCLUDE** that the petitioner has not shown that the 1983-84 grading policy was not properly adopted by the Board, that there was anything improper by the fact that the grading policy established specific rules governing the determination of a grade which were to be uniformily administered without any discretion by the teacher, or that there was no grade review procedure available during the 1983-84 school year.

Also, I **CONCLUDE** that the petitioner has shown that the grading policy in effect during the 1983-84 school year was arbitrary and unreasonable. This grading policy places an unreasonable emphasis on the students' performance in the fourth marking period and was clearly established as a deterrent against students' academic slump during the latter part of the school year and the application of this policy can in certain cases result in a student receiving an unreasonable and arbitrary grade for a subject.

Having concluded that the grading policy in effect during the 1983-84 school year was arbitrary and unreasonable, I now have to address the matter of the grade given to Mr. Bauer for geometry in the 1983-84 school year. As to the determination of this grade, I cannot accept the petitioner's argument that the grade should be determined by using only the grade averaging portion of the policy in effect during the 1983-84 school year. Such a determination would establish a new grading policy which is not consistent with the intent of the Board.

It is clear from the facts that after the Board was aware of Mr. Bauer's complaint, it decided to review its grading policy and thereafter adopted an amended grading policy which was used during the 1984-85 school year. Therefore, it seems appropriate to reconsider Mr. Bauer's grade for geometry in light of the new grading policy of the Board which has not been challenged by the petitioner as being arbitrary or

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unreasonable. As already stated, based on the 1984-85 grading policy, Mr. Bauer would still be entitled to an F in geometry. Such a grade does not appear inappropriate in view of the fact that he got failing grades in both the fourth marking period as well as in the final exam. Therefore, I **CONCLUDE** that the grade of F in geometry for the 1983-84 school year is appropriate and is not unreasonable or arbitrary.

Lastly, I **ORDER** that the petition in this matter be **DISMISSED.**

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

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

August 14, 1985
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

AUG 16 1985
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:
August 19, 1985
DATE

Ronald J. Parker /s
OFFICE OF ADMINISTRATIVE LAW

ij/ee

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JOHN BAUER,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE PINELANDS REGIONAL SCHOOL DISTRICT, OCEAN COUNTY,	:	
RESPONDENT.	:	

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

Upon review of the record in this matter, the Commissioner concurs with the findings and conclusions reached by the judge. He, therefore, adopts as the final decision in this matter the recommendation of the Office of Administrative Law dismissing the Petition of Appeal for the reasons expressed in the initial decision.

COMMISSIONER OF EDUCATION

September 20, 1985

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State of New Jersey

INITIAL DECISION
OAL DKT. NO. EDU 8643-84
AGENCY DKT. NO. 464-11/84

RICHARD FRANCIS BICKINGS,
Petitioner,
v.
BOARD OF EDUCATION OF CAMDEN COUNTY VOCATIONAL-TECHNICAL SCHOOLS, CAMDEN COUNTY,
Respondent.

Carl W. Cavagnaro, Esq., for the petitioner (Reuss, Cavagnaro & Kaspar, attorneys)

Robert F. Blomquist, Esq., for the respondent (Davis, Reberkenny & Abramowitz, attorneys)

Record Closed: June 26, 1985 Decided: August 6, 1985

BEFORE **AUGUST E. THOMAS,** ALJ:

Petitioner appeals the determination of the Board of Education of the Camden County Vocational-Technical Schools (Board), which denied his application for military service salary benefits pursuant to N.J.S.A. 18A:29-11.

The appeal, filed with the Commissioner of Education, was thereafter transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on January 23, 1985, in the Office of Administrative Law, Hamilton Township, and a hearing was conducted on June 10, 1985, in the Haddon Township Municipal Building, Haddon Township. Eight documents were admitted in evidence, and petitioner was the only witness. Letter briefs were filed by the

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litigants and the record was then closed on June 26, 1985. The salient facts are not in dispute and are set forth below as follows:

UNDISPUTED FACTS

Prior to his employment, petitioner was a member of the United States Marine Corps from July 20, 1953 to July 19, 1956 (P-1).

Petitioner was employed by the Board on September 1, 1975, as a teacher of handicapped children (P-2). During the school year 1980, petitioner first became aware of his possible eligibility for military salary credit. He learned from other teachers that he should submit a DD-214 form (P-1) and that such form should be submitted to the Superintendent's office. Petitioner submitted such a form.

At or about the same time, the Camden County Vocational-Technical Education Association (Association) on behalf of 59 named members filed a petition of appeal demanding, in part, that its members receive military service salary credit pursuant to N.J.S.A. 18A:29-11.[1] Petitioner was not made a part of that action and at that time was not a member of the Association. At the present hearing, petitioner testified he did not know that he had not been made part of the Association action; nevertheless, he was under the impression that the result of that action would affect his salary as it concerned military salary credit. By stipulation between the parties, it was stated that official notice would be taken of the Commissioner's decision in the Association matter.

Petitioner testified at the hearing that he became aware for the first time in the latter part of the 1984 school year that his name was not included on the list of teachers made part of the Association petition. As a result, he contacted the former Superintendent who advised him that the Board was interested in an interpretation of the law and that the decision in the Association matter would be determinative of the status

[1] Camden Cty. Voc.-Tech. Ed. Ass'n, et al. v. Bd. of Ed. of the Camden Cty. Voc.-Tech. Schools, Camden Cty. OAL DKT. EDU 4829-80, decided, Comm'r of Ed. (Sept. 30, 1983) aff'd, State Bd. of Ed. (Nov. 7, 1984). That decision is currently on appeal to the Appellate Division of the New Jersey Superior Court, filed by the Board on December 20, 1984.

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of all employees concerning military salary credit. The former Superintendent stated to petitioner that it did not matter if his name was on the list or not, and that provided he had submitted the necessary information, he would receive whatever benefits other similarly situated employees are entitled to receive. Petitioner had previously submitted his DD-214 form to the Superintendent's office and felt assured that benefits would be paid to him once the Association decision was finalized and once payment was made to the other teachers. Petitioner also testified concerning the conversations he had with the Board Secretary, who calculated how much petitioner would be entitled to receive and who advised petitioner that his form would be submitted to the Board for approval.

In July 1984, petitioner thought his retroactive military salary would be approved by the Board. However, he was advised that it would not be approved because his name was not on the list with the teachers in the Association decision matter. Petitioner appeared at the August 16, 1984 Board meeting, at which time he was told that since his name was not included on the list of Association teachers, he would be entitled to military pay only if he would waive all rights to military pay except for prospective salary adjustments, effective September 1, 1984 (P-8). Such a waiver was presented to petitioner (P-7), but he has not executed same.

On November 19, 1985, this petition was filed with the Commissioner.

In addition to the above Findings of Fact, the record shows as follows: Petitioner testified that although he was aware of the Association matter seeking military pay pending against the Board, he did not know whether or not he was included in that lawsuit. At the end of the 1984 school year, petitioner learned that the litigants in that lawsuit had received military service salary credit in their last pay check for the school year. When he failed to receive a similar check, he went to see the Board Secretary. The Board has offered to pay petitioner prospectively from September 1984 (P-7); however, on advice of its solicitor, the Board has refused to pay petitioner retroactively (P-8, pp. 17a & 26).

Under cross-examination, petitioner testified that his discussion with the former Superintendent took place in the 1984 school year. However, he was unable to specify any specific date or month when those discussions occurred. Although petitioner also testified that he learned about the Association appeal to the Commissioner in 1981,

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he did not take any specific steps to verify his status in that litigation. The record shows that he did not seek out a union representative to assure himself that he was included in the complaint; he had not talked to the former Superintendent during the period 1980-1984 concerning his eligibility for retroactive or prospective military salary credit; neither did he attempt to view that written complaint in the Board's business office or in the Office of Administrative Law. Consequently, it appears that petitioner relied solely on his conversations with the former Superintendent and the Board Secretary in the spring and summer of 1984 concerning his eligibility for retroactive military salary credit.

CONCLUSIONS OF LAW

One issue in the Camden Cty. Voc.-Tech. Ed. Ass'n et al. decision, supra, is reproduced here, in part, as it relates to the instant petition of appeal:

> "Are petitioners entitled to retroactive relief to June 9, 1979, when their asserted rights were made known to the Board; or, is their entitlement triggered by the filing of this appeal with the Commissioner?

The issue of retroactive relief was decided in accordance with the criteria set forth by the Supreme Court of New Jersey, which definitively established the eligibility of teaching staff members for military service credit in Lavin v. Hackensack Bd. of Ed., 90 N.J. 145, 154 where the Court stated as follows: "Petitioners should be granted credit for qualified military service in computing their salaries subsequent to making their claims."

In the Lavin decision regarding retroactivity, the Court defined the phrase "subsequent to making their claims." Citing Giorno v. Tp. of South Brunswick, 170 N.J. Super. 162, 166 (App. Div. 1979), the Court allowed the claim for military pay credit "only from the date of the filing of the complaint." Id. at 155. The Lavin Court set forth its reasons for establishing the date when a veteran's eligibility becomes effective.

In the Camden Cty. Voc.-Tech. Ass'n decision, the administrative law judge stated as follows:

> It is not disputed that the original petition of appeal was filed on June 24, 1980, and it is clear that Lavin bars any award of

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> retroactive salary payments. Id. at 154. Consequently, I **CONCLUDE** that the eligible petitioners are entitled to prospective relief from the date of filing their appeal with the Commissioner, June 24, 1980, and later, according to the dates of the several amendments to the appeal. [emphasis added]

The matter herein bears a similar background. Although petitioner filed his necessary armed services DD-214 form with the Board sometime during 1980, but at a time he was unable to specify, he rested on his rights for four years. Petitioner neither filed an appeal with the Commissioner on his own behalf, nor did he check with anyone in a position to help him make a definitive finding that he was included on the list of teachers who had appealed to the Commissioner.

As the Board stresses in its brief, if petitioner were able to establish proof that the former Superintendent promised him retroactive salary relief back to a certain date, this might provide a claim against the Board based on the theory of equitable estoppel. However, petitioner is unable to show that the doctrine of equitable estoppel should be applied in this matter because of the well-recognized doctrine of law that courts do not apply estoppel to governmental agencies and subdivisions where an administrative officer (Superintendent) makes a representation which goes against a point of policy or law established by the governmental agency. See, Omrod v. N.J. Dept. of Civil Service, 151 N.J. Super. 54 (App. Div. 1977) certif. den. 75 N.J. 534 (1977); Miller v. Teachers' Pension & Annuity Fund, 179 N.J. Super. 473 (App. Div. 1981) certif. den. 88 N.J. 502 (1981); Egg Harbor Bd. of Ed. v. Greater Egg Harbor Assoc., 188 N.J. Super. 92 (App. Div. 1982) certif. den. 92 N.J. 245 (1983).

If petitioner's argument should prevail as to his eligibility for retroactive military service credit, then all of the 59 petitioners in the Camden Cty. Voc.-Tech. Ass'n decision would have had their eligibility for military salary credit made retroactively to June 24, 1980. However, the Commissioner and the State Board have made it quite clear in that decision that eligibility for military salary credit is prospective as of the dates of the filing of the affected members' appeals with the Commissioner.[2] This is in accordance with the directive set forth in the Lavin decision and the same result must be reached here.

[2] That decision is on appeal to the Appellate Division on issues other than the dates when the 59 teachers became eligible for military salary credit.

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Consequently, I **CONCLUDE** that petitioner is entitled to prospective relief from the date of filing this appeal with the Commissioner of Education, which date was November 15, 1984. However, since the Board offered petitioner an opportunity for prospective salary adjustment beginning September 1, 1984 (P-7), I **CONCLUDE** that petitioner's eligibility should begin as of that date.

Accordingly, the Board is **ORDERED** to compute petitioner's entitlement and grant him military service salary credit prospectively beginning in the 1984-85 school year.

Except for the aforementioned relief, there is no further entitlement due petitioner. Therefore, the remainder of this petition of appeal is **DISMISSED WITH PREJUDICE.**

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

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

6 August 85
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

AUG 7 1985
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

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RICHARD FRANCIS BICKINGS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CAMDEN COUNTY VOCATIONAL-TECHNICAL SCHOOLS, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law. The Commissioner notes that exceptions were filed pursuant to N.J.A.C. 1:1-16.4a, b, and c.

In his exceptions, petitioner avers that the decision of the ALJ is incorrect and that he is entitled to receive the same military service credit pursuant to N.J.S.A. 18A:29-11 as received by the 59 members of the Camden County Vocational-Technical Association in their suit against the Camden County Vocational-Technical Board. Petitioner reiterates that he is entitled to the same benefits as the other 59 petitioners for the four reasons proffered in his post-hearing brief:

1. He believed he was included in that suit.

2. Upon request, he submitted his DD-214 form to the Superintendent of Schools which was uncontroverted and which placed the Board on notice of his military service credit rights.

3. Upon learning that his name was not included as a complainant in the petition by the Association against the Board of Education of Camden County Vo-Tech Schools, he approached the Superintendent of Schools, who advised him that any decision rendered in the pending case would be applied to him. Relying upon that, petitioner did not take any additional steps.

4. It appears that not only petitioner, but also the Board, acted under the impression that he was included in the suit, until the decision was made, and until the meeting of August 16, 1984 was held.

(Petitioner's Exceptions, at p. 2)

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Petitioner's exceptions also distinguish Lavin v. Hackensack Board of Education, 90 N.J. 145 (1982) from the instant matter. Petitioner states the school system in the instant matter knew that 59 petitioners had filed a claim for retroactive and prospective military credit, and that the superintendent and the Board Secretary also thought that petitioner was among the litigants in Association's action against the Board. Petitioner further avers that once Lavin was decided, which was subsequent to petitioner's filing his DD-214 form, the Board was aware of his statutory right to military service credit. Further, he avers that, in the instant matter, the retroactivity question arose from the date on which the Association filed its petition or, in the alternative, to the date of the Lavin decision. Petitioner asserts that the amount of money and the potential prejudice to the budgetary restraints of the Board is minimal, and that it is extremely unlikely that any similar set of circumstances will be presented to this Board or any board within the state. Petitioner avers that DeHay v. Town of West New York, 189 N.J. Super. 340 (App. Div. 1983) is apposite, not Lavin. In DeHay, petitioner argues, the court held that the financial argument was not applicable, since the amount of money was not comparable to the Lavin situation. Petitioner argues that the court further observed in DeHay that the parties were aware of the statute, but chose not to make payment, pursuant to the terms of the statute and that prejudicial effect upon the municipality was not comparable to the effort of the potential payors in Lavin.

Finally, petitioner avers that the ALJ erred in applying the principal of law that estoppel against the government is rarely granted. Petitioner distinguishes the facts of the instant matter from the three cases the ALJ cites and would have the Commissioner apply the estoppel principle in the case before him now.

Respondent Board's reply exceptions strongly assert that the ALJ did more than comport with petitioner's request that he be awarded the same relief as received by members of the Association because the ALJ granted him prospective relief to date not from November 15, 1984, the date petitioner filed his Petition of Appeal, but from September 1, 1984, the effective date when the Board gave him a waiver form to sign. The Board also asserts that it is irrelevant whether or not petitioner submitted his DD-214 form and that he believed he was included in the Association's suit. Relying on Lavin, the Board asserts the crucial legal event was the date of his filing of the complaint and that petitioner has received the same rights as were accorded to the other Association members by Judge Thomas' previous decision.

Respondent Board also contends that the Lavin decision must be applied in the instant matter by command of the New Jersey Supreme Court in order that all military service credit claims be treated alike. Further, the Board asserts it is illusory for petitioner to argue that the budgetary restraints of the Board are minimal in this situation because the rationale behind Lavin was that because of the nature of school board budgeting and desirability of having municipal government resolved on a predictable

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basis, all claims should be treated on a "bright line" basis. (Board's Reply Exceptions, at p. 4) The Board asserts that if petitioner were granted retroactive military service credit, he would be treated more favorably than his 59 fellow teaching staff members whose rights were resolved according to the date when the Association filed its Petition of Appeal. The Board finds DeHay, supra, inapposite because the challenge in the DeHay case arose under a different statute, N.J.S.A. 26:3-25.1.

Finally, the Board acknowledges that the principle of estoppel can be applied against government agencies in very limited situations, but suggests that the facts of the instant matter do not militate in favor of granting estoppel. It avers that the ALJ was influenced in his decision not to grant estoppel by petitioner's testimony that he let several years go by without following up the matter of whether he was named as a petitioner in the Association's appeal and that he rested on his rights in this matter. The Board further states that the ALJ was also influenced by the testimony in the proceeding which indicated that while the superintendent stated he would grant and did offer petitioner whatever rights the courts determined in the Association proceeding, petitioner rejected this offer. The Board avers that these facts do not point to the overreaching behavior that has motivated courts to allow the application of estoppel against a government agency.

Upon review of the record, the Commissioner notes the following chronology:

7/20/53 - 7/19/56 -

Petitioner served in the United States Marine Corps.

9/1/75 -

Petitioner employed by the Board of Education of the Camden County Vocational-Technical Schools.

1980 -

Petitioner learned of his possible entitlement to military service credit.

1980 -

Petitioner submitted an undated cover letter to the then Superintendent of Schools, Donald Springle, along with petitioner's DD-214 form, as requested by the Board to be included in the suit against the Board to acquire military service credit.

June 24, 1981 -

Petition of Appeal filed by 59 petitioners against the Board captioned, Camden County Vocational - Technical Education Association on behalf of John W. Almony, III, et al. v. Board of Education of the Camden County Vocational-Technical Schools, Camden County.

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September 30, 1983 -

Decision of case granting benefits to petitioners from date they filed their petitions.

On or about July 1, 1984 -

Petitioner discovered that his name had not been included on the complaint filed by the Association.

On or about July 1, 1984 -

Petitioner met with Superintendent Springle concerning petitioner's having been excluded from the list of petitioners in the above-named suit. The Commissioner further notes the conclusion of the ALJ that the superintendent told petitioner that regardless of whether or not his name was among the petitioners in the suit, he would receive whatever benefits others similarly situated were entitled to receive, so long as he had submitted the necessary information. (Initial Decision, ante)

August 16, 1984 -

Petitioner attended the Board meeting at which time he inquired as to why he had not received retroactive and prospective placement on the salary guide for the number of years he spent in the military.

August 16, 1984 -

Board presented petitioner with a proposed waiver, which petitioner did not sign, providing in pertinent part that petitioner's prospective salary adjustment would be effective September 1, 1984 on Step 19, column 1, with no retroactive salary.
November 15, 1984

Petitioner filed a verified complaint for adjustment on the salary scale and for military service credit. This concludes the chronology.

* * * *

There is no question that petitioner was entitled, as a non-member of the Association, to the same vigilant representation of his rights as enjoyed by the members of the Association. N.J.S.A. 34:13A-5.3 reads in pertinent part:

> "***A majority [or exclusive] representative *** shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership.***"

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The initial inquiry in this case, then, is whether petitioner might reasonably expect that he would be included in the suit against the Board along with all other similarly situated employees in the district who submitted a DD-214 form. A further issue to be resolved in the instant matter is whether the district was obliged to inform petitioner of his status in relation to those other petitioners in the suit against the Board, regardless of the fact that he was not, at the time, a member of the Association that sued the Board. A final matter to be resolved herein is whether petitioner knew or should have known that he was not among those petitioners who were included in the suit against the Board. If not, it must be resolved whether petitioner's reliance on the assurances of the superintendent and his attending the next Board meeting were adequate investigation to sustain petitioner's burden of proving that he did not rest on his rights after discovering he was not a petitioner in the Association's suit.

In the absence of a transcript in the record, the Commissioner must rely on the findings of fact as established in the initial decision. The ALJ indicates that petitioner testified that although he was aware of the Association matter seeking military pay pending against the Board, he did not know whether or not he was included in the appeal. (Initial Decision, ante) The ALJ also concludes that having done no more than submit his DD-214 form petitioner

> "***did not take any specific steps to verify his status in that litigation. The record shows that he did not seek out a union representative to assure himself that he was included in the complaint; he had not talked to the former Superintendent during the period 1980-84 concerning his eligibility for retroactive or prospective military salary credit; neither did he attempt to view that written complaint in the Board's business office or in the Office of Administrative Law.***" (Initial Decision, ante)

The ALJ concluded on the basis of the above, and relying on Lavin, supra, that petitioner "rested on his rights for four years," (Id., at p. 5) The Commissioner does not agree.

When petitioner submitted his DD-214 form, he complied with all the requirements made by the Board and the Association for inclusion in the suit. The Commissioner notes that while the Association's petition was posted thereafter in the Board's business office, individual affidavits signed by individual petitioners are not contained in the record of that case. Further, the record is silent as to when or if the Board released the names of those who were considered petitioners in the matter. Petitioner may have been lulled into believing that he was included among the others. Even if he hadn't investigated who was included among the petitioners, petitioner had every right to expect that the Association would rigorously represent his rights as well as those of its members and

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to inform him of his status regarding his grievance. Finally, upon learning that he had not received the same benefits as the other petitioners in his final pay check on or about July 1, 1984, petitioner immediately met with the superintendent to determine why he had not been included among those receiving military credit. Thereafter, he actively pursued all avenues available to him in settling the issue, including the filing of a petition on November 15, 1984, 84 days after the Board tendered a final settlement offer to him in the form of a waiver dated August 23, 1984. This date represents petitioner's receipt of notice of the Board's actual ruling, the triggering event of the 90-day period for filing a petition pursuant to N.J.A.C. 6:24-1.2.

Even if petitioner's appeal were not deemed timely on the basis of the August 23, 1984 triggering date, N.J.A.C. 6:24-1.9 confers on the Commissioner the authority to relax or dispense with the 90-day rule when there are compelling reasons justifying relaxation or where circumstances are such that strict adherence would be inappropriate, unnecessary or where injustice would occur. See Edward Brown v. Sussex County Vocational School et al., decided by the Commissioner August 11, 1983, rev'd State Board May 2, 1984, rev'd/rem. to Commissioner N.J. Superior Court, Appellate Division, April 4, 1985. See also Galligan v. Westfield Center Service, Inc., 82 N.J. 188, 192-95 (1980); White v. Violent Crimes Compensation Board, 70 N.J. 368, 381 (1978); Pfeiffer v. Board of Education of Willingboro, decided by the Commissioner, September 15, 1980, aff'd by the State Board of Education, June 31, 1981, dismissed by the N.J. Superior Court, Appellate Division, 1981.

The Commissioner finds that such circumstances are present in the instant matter. The record is clear that had petitioner been a member of the Association in 1980, he would have been included in the suit against the Board so long as he had submitted his DD-214 form. Petitioner did submit his form in a timely fashion, and believed he was duly made a part of the 1980 action.

Since petitioner should have been among those represented by the Association in the action against the Board, and since petitioner's verified petition was timely filed under N.J.A.C. 6:24-1.2 after learning that he was not included among the petitioners, he is entitled to receive the same benefits as those whose petition was filed in 1980 who were granted military service credit from the date the petition was filed.

Accordingly, the Commissioner reverses the findings and determination of the Office of Administrative Law and orders that petitioner be granted prospective military service salary credit from 1980, the date he originally filed his DD-214 form with the Board of Education.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

September 23, 1985 Pending State Board

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INITIAL DECISION
ON MOTION
OAL DKT NO. EDU 2896-85
AGENCY DKT. NO. 114-5/85

BOARD OF EDUCATION OF THE
TOWN OF WEST NEW YORK, HUDSON COUNTY,
Petitioner,

v.

CHARLES APKARIAN,
Respondent.

Joseph J. Ferrara, Esq., for petitioner
(Krieger, Ferrara, Flynn & Catalina, attorneys)

Sheldon H. Pincus, Esq., for respondent
(Bucceri & Pincus, attorneys)

Record Closed: July 28, 1985 Decided: August 13, 1985

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

The Board of Education of the Town of West New York, Hudson County, certified on April 22, 1985 and filed with the Commissioner of the Department of Education on April 30, 1985 six charges of unbecoming conduct against Charles Apkarian, a tenured

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teaching staff member employed by the Board, involving student incidents sufficient, if credited, to warrant dismissal or reduction of salary, in accordance with the Tenure Employees' Hearing Law, N.J.S.A. 18A:6-10 et seq. Respondent filed an answer in the Bureau of Controversies and Disputes of the Department of Education on May 16, 1985 denying the charges, alleging insufficiency thereof under N.J.S.A. 18A:6-11 and alleging affirmatively the charges were unlawful harassment against him for protected political activity on his part. Accordingly, the Commissioner transmitted the matter to the Office of Administrative Law on May 21, 1985 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, a prehearing conference was conducted in the Office of Administrative Law on June 17, 1985 and an order entered. It was admitted respondent is a tenured teaching staff member employed by the Board. Presently and for at least the last four school years, he has held the position of elementary art teacher in the district assigned to teach students in elementary grade levels ranging in age from six to approximately fourteen years. At issue in the matter generally, it was established, is whether the Board shall have proven by a preponderance of the credible evidence that respondent was guilty of conduct unbecoming a teaching staff member in the instances alleged, or one or more thereof; and if so, whether such conduct required his dismissal or reduction of salary. Before scheduled plenary hearing, however, respondent filed a motion before the Office of Administrative Law on June 17, 1985 for an order dismissing tenure charges based on the Board's failure to have complied with procedural requirements of N.J.S.A. 18A:6-11. Respondent's motion was supported by exhibits, certifications and memoranda of law and was countered by the Board's memoranda of law.

EVIDENCE ON MOTION

From certifications and documents comprising the transmitted proceedings, it appeared without dispute that the Board certified tenure charges against respondent on March 22, 1985 in the form of a "complaint pursuant to provisions of [N.J.S.A.] 18A:6-11," which was signed but not verified by the superintendent of schools. R-1. In a

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"statement of evidence pursuant to N.J.S.A. 18A:6-11," the superintendent certified on April 3, 1985 as follows:

> The undersigned hereby certifies that the exhibits annexed to this statement of evidence are true and complete copies of the reports submitted to the West New York Board of Education in connection with incidents involving teacher Charles Apkarian. [R-2].

Annexed to the "statement of evidence" were nine separate documents. R-3 through R-11. Respondent's position statement, dated April 18, 1985, received by the Board April 22, 1985, is marked R-12 in evidence. On April 22, 1985, the Board secretary certified the Board on that date "considered a charge, the statement of position and statement of evidence presented to it against [respondent] and determined by a majority vote of its full membership that there is probable cause to credit the evidence in support of the charge, and that the charge was sufficient to warrant suspension without pay and dismissal from the Board's employ." R-13.

No other documents were considered by the Board at the time its decision was made to certify tenure charges.

Purporting to support the charges were nine unsworn documents. R-3 was a letter from a principal to the superintendent saying he had been informed by a parent about an incident involving respondent and her son the previous day. It was unsworn. R-4 was an accident report by a principal, unsworn, dated February 13, 1985 concerning the same incident. R-5 was a letter to the superintendent from another principal on February 19, 1985, unsworn, concerning a parent's report to him about an incident involving her daughter and respondent on February 14, 1985. R-6 was an unsigned, unsworn accident report, dated February 15, 1985, concerning the February 14, 1985 incident. R-7 was a notice of claim for damages against the Board by the attorney for a parent concerned in

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the February 14, 1985 incident. It was unsworn. R-8 was a letter from a parent "to whom it may concern," unsworn, that he had been informed by his wife that an unidentified girl had been hurt through the negligence and incompetence of the "art teacher." R-9 was a letter to the Board, undated, unsworn, from a parent concerning incidents told to her by her son, one a year ago, and one on February 12, 1985. R-10 was a letter to the Board, dated March 28, 1985, unsworn, complaining of an incident involving her daughter, as the parent had been informed, that occurred in November 1984. R-11 was a letter to the Board in March 1985 from a parent, unsworn, concerning an incident she was told about by her daughter that occurred in November 1984.

DISCUSSION

From the above, it thus appeared that as presented to the Board the charges of unbecoming teacher conduct against respondent consisted of a "complaint pursuant to provisions of [N.J.S.A.] 18A:6-11" (R-1), signed but not verified by the superintendent and supported, purportedly, by unsworn documents (R-3 through R-11) that were merely certified by the superintendent (R-2) to be "true and complete copies of the reports submitted to the West New York Board of Education in connection with the incidents involving teacher Charles Apkarian."

Respondent's motion, therefore, presents the question whether the charge and "supporting evidence" as considered by the Board sufficiently complied with N.J.S.A. 18A:6-11:

> Any charge made against any employee of a board of education under tenure during good behavior and efficiency shall be filed with the secretary of the board in writing, and a written statement of evidence under oath to support such charge shall be presented to the board [emphasis supplied]. . . .

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The Board argued the "reports" in R-3 through R-11 were generally admissible in court proceedings under New Jersey Evidence Rules as a business records exception to the hearsay rule. Evid. R. 63 (13). The Board argued N.J.S.A. 18A:6-11 required admission of such documents and that the statute itself contained no legislative attempt to preclude introduction of such evidence. The Board argued, also, some of the exhibits recounted "admissions" by respondent.

The argument, in my view, as urged by respondent, misses the mark. The procedure outlined by N.J.S.A. 18A:6-11 is not itself a judicial procedure the requirements of which are regulable by rules of evidence about hearsay and exceptions to the rule excluding it in judicial proceedings. The procedure outlined by statute is a clear legislative expression serving to protect the rights of a tenured employee when charges against him/her looking to dismissal or reduction in salary are undertaken by a board of education. The statute expressly requires that "a written statement of evidence under oath to support such charge shall be presented to the board before it acts." It is plainly not enough, in my view, for a school official simply to swear or certify that unsworn documents containing information beyond the official's personal knowledge are contained in school records in raw state. The certification by the superintendent here in R-2 is plainly a certification merely that unsworn documents are true and complete copies of reports otherwise submitted to the Board by others. Upon its face, it may be seen, it falls short of a written statement of evidence under oath to support the charges in R-1. In In the Matter of Tenure Hearing of Loria, School Dist. of Newark, Essex County, 1984 S.L.D. —(Comm'r's dec. Nov. 29, 1984), respondent teacher moved to dismiss tenure charges against him for the Board's failure to have filed a statement of evidence under oath based on personal knowledge of the affiant. One affidavit was by a school administrator certifying merely that evidence of charges of alleged inefficiency consisted of a series of teacher evaluation reports, not authored by the affiant, and "such other exhibits as may become necessary at hearing." An administrative law judge ruled that when a board certifies tenure charges, in order to comply with N.J.S.A. 18A:6-11, there must be presented a statement of evidence under oath, which means that the statement

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under oath must be based on personal knowledge of the affiant and not based on hearsay. He dismissed the charges for legal insufficiency under the statute. The Commissioner agreed. Id., slip op. at 4; and see In the Matter of the Tenure Hearing of Demetrius, School Dist. of Bergen County Vocational High School, 1983 S.L.D. —(Comm'r's dec. Oct. 27, 1983).

CONCLUSION

Accordingly, based on the foregoing, I hereby **FIND** and **DETERMINE** respondent's motion to dismiss tenure charges against him for insufficiency of compliance with N.J.S.A. 18A:6-11 should be, and is hereby, **GRANTED.** I **FIND** none of the documents purporting to support the charges herein, R-3 through R-11, are themselves either sworn nor do they even upon their face purport to demonstrate the authors thereof were possessed of any personal knowledge of the events made subject of the charges. I **FIND** the certification by the superintendent (R-2) that the documents are true and complete copies of reports otherwise submitted to the Board to be in itself insufficient under the statute. It is **ORDERED**, therefore, tenure charges herein against respondent be, and they are hereby, **DISMISSED**, without **PREJUDICE**, nevertheless, to reconsideration by the Board of the matters therein raised. Finally, the Board is **DIRECTED** to reinstate respondent immediately with full pay from first day of suspension, such salary restoration to include the 120 days in which respondent received no salary pursuant to N.J.S.A. 18A:6-14.

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

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

August 13, 1985
DATE

JAMES A. OSPENSON, ALJ

AUG 15 1985

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

Aug. 16, 1985
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

js

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IN THE MATTER OF THE TENURE	:	
HEARING OF CHARLES APKARIAN,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF WEST NEW YORK,	:	DECISION
HUDSON COUNTY.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No timely exceptions were filed pursuant to N.J.A.C. 1:1-16.4a, b, and c.

The Administrative Law Judge cast the issue before him in the instant matter as being "*** whether the charge and 'supporting evidence' as considered by the Board sufficiently complied with N.J.S.A. 18A:6-11***." (Initial Decision, ante) The ALJ misreads the statute. The question to be resolved in the instant matter is properly stated as being whether the charge and written statement of evidence under oath, which was provided by the superintendent to support the Board's consideration of the facts related to the matter, sufficiently complied with N.J.S.A. 18A:6-11. The Commissioner finds that the nine documents filed by two principals and several parents and sworn by the superintendent as true copies of these records do provide a sufficient evidential basis upon which the Board might make a finding of probable cause to certify the tenure charges, if the evidence were credited.

N.J.S.A. 18A:6-11 reads, in its entirety:

> "18A:6-11. Written charges; written statement of evidence; filing; statement of position by employee; certification of determination; notice
>
> Any charge made against any employee of a board of education under tenure during good behavior and efficiency shall be filed with the secretary of the board in writing, and a written statement of evidence under oath to support such charge shall be presented to the board. The board of education shall forthwith provide such employee with a copy of the charge, a copy of the statement of the evidence and an opportunity to submit a written statement of position and a written statement of evidence under oath with respect thereto. After consideration of the charge, statement of position and statements of evidence presented to it, the board shall determine by majority vote of its full membership whether there is probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to

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> warrant a dismissal or reduction of salary. The board of education shall forthwith notify the employee against whom the charge has been made of its determination, personally or by certified mail directed to his last known address. In the event the board finds that such probable cause exists and that the charge, if credited, is sufficient to warrant a dismissal or reduction of salary, then it shall forward such written charge to the commissioner for a hearing pursuant to N.J.S. 18A:6-16, together with a certificate of such determination. Provided, however, that if the charge is inefficiency, prior to making its determination as to certification, the board shall provide the employee with written notice of the alleged inefficiency, specifying the nature thereto, and allow at least 90 days in which to correct and overcome the inefficiency. The consideration and actions of the board as to any charge shall not take place at a public meeting."

A written statement of evidence is not equivalent to supporting evidence. The difference between the two can be distinguished readily by reviewing the proper procedure for filing tenure charges pursuant to N.J.S.A. 18A:6-11.

Long before an ALJ makes a determination regarding the admissibility or non-admissibility of evidence submitted in a tenure hearing, an administrator of the district, usually the superintendent, must establish, in presenting the tenure charges for the Board's consideration, that the charges are predicated on actual reported information brought to his or her attention. Nowhere in the statute does it require, however, that each piece of evidence presented to the Board for its consideration need be taken under oath nor that the person bringing the charge must have personal knowledge of the facts. Neither is it the Board's duty to pass judgment on the weight or sufficiency to be accorded the evidence. That responsibility is the Commissioner's alone. It is the Board's duty to consider whether the evidence, if credited later, following a full hearing, would be sufficient to warrant dismissal or reduction in salary. See In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967). See also, Manalapan-Englishtown Education Association v. Board of Education of the Manalapan-Englishtown Regional School District, 1979 S.L.D. 505.

In the instant matter, the ALJ prematurely dismissed the petition before him, stating:

> "***It is plainly not enough, in my view, for a school official simply to swear or certify that unsworn documents containing information beyond the official's personal knowledge are contained in school records in raw state."
>
> (Initial Decision, ante)

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Were the proceedings in the instant matter at the plenary hearing stage, the ALJ's discussion of hearsay evidence would be relevant. See Colavita v. Board of Education of the Hillsborough Township School District, N.J. Superior Court, Appellate Division, March 28, 1985.

However, the instant matter is at the most preliminary stage of the tenure charge process. That the facts upon which the Board relies in certifying the charges may be predicated on hearsay is irrelevant at this juncture. Judgment as to the admissibility of the evidence occurs during the plenary hearing. Those who address their concerns in letters and reports will presumably be available at the hearing to testify and to be cross-examined or may be deposed as to the truth of the facts contained therein.

In making the determination that the statement of evidence in the instant matter was inadequate because the evidence was not based on the personal knowledge of the superintendent, the ALJ relied on In the Matter of the Tenure Hearing of Peter Loria, School District of Newark, decided by the Commissioner November 29, 1984 and In the Matter of the Tenure Hearing of Nicholas Demetrius, School District of Bergen County Vocational High School, decided by the Commissioner October 27, 1983.

The Commissioner has carefully reviewed appropriate case law and decisions concerning statements of evidence. Neither Loria nor Demetrius is helpful because neither sets forth what a statement of evidence, under oath, should contain. Demetrius is a stipulation agreement; there is no language in the decision related to the statement of evidence. Loria, relying on Demetrius, merely affirms the determination of the ALJ that the board failed to comply with the procedural requirement of N.J.S.A. 18A:6-11. The ALJ in Loria found that "no statement of evidence under oath was submitted based on the personal knowledge of the affiant." (Initial Decision, ante) The Commissioner agrees with the ALJ in that case that the absence of any statement of evidence was a fatal flaw warranting the dismissal of tenure charges. However, the Commissioner does not agree with the ALJ in Loria or herein that a written statement of evidence under oath must be predicated on the personal knowledge of the individual who is bringing the charge to the Board's attention for certifying tenure charges. Were such personal knowledge of the facts a prerequisite for preferring tenure charges, the burden placed upon a school district would be insurmountable since the actions providing the bases of the charges often occur outside the personal knowledge or purview of the individual bringing such charges to the Board's attention.

One other case which the Commissioner has examined, In the Matter of the Tenure Hearing of Carolyn Edwards, School District of the City of East Orange, decided by the Commissioner March 9, 1982, should be addressed. The ALJ in that case found, and the Commissioner concurred, as follows:

> "***A charge must be in writing and accompanied by a written statement of evidence, under oath,

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> to support it***. It is not enough simply to allege, as here, in a palpably conclusory fashion that one has been incompetent, insubordinate or conducted oneself in a manner unbecoming a tenured employee. Rather, a specific allegation which sets forth, in writing, the facts upon which the Board intends to rely must be served upon the employee, and be under oath."
> (Initial Decision, ante)

The Commissioner agrees that a board, in bringing tenure charges, owes the teaching staff member a clear statutory duty to fairly and comprehensively articulate in written charges just what specific conduct is alleged to give rise to the tenure allegations. However, the Commissioner, upon further review of the law, finds that the requirement of a certified oath extends only to the statement of evidence, not to the charges themselves. In arriving at this conclusion, the Commissioner relies on the clear and compelling language of the statute itself, N.J.S.A. 18A:6-11, which states, in pari materia:

> "Any charge made against any employee of a board of education under tenure during good behavior and efficiency shall be filed with the secretary of the board in writing, and a written statement of evidence under oath to support such charge shall be presented to the board.***"
> (Emphasis supplied.)

At the preliminary stage of presenting the record of the charges to the board, therefore, all the superintendent can be required to do is to present to the board a written statement of the evidence taken under oath which shall form the basis for the board to determine whether the evidence, if credited, is sufficient to warrant dismissal or reduction in salary.

Accordingly, the Commissioner reverses the findings and determination of the Office of Administrative Law and orders that the matter herein be scheduled for plenary hearing on the merits of the case.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

September 27, 1985

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8626-82
AGENCY DKT. NO. 344-8/82A

CRANBURY TOWNSHIP BOARD OF EDUCATION,
MIDDLESEX COUNTY,
Petitioner,

v.

LAWRENCE TOWNSHIP BOARD OF EDUCATION,
MERCER COUNTY,
Respondent.

Philip H. Shore, Esq., for the petitioner (Golden, Shore, Zahn & Richmond, attorneys)

Dennis J. Helms, Esq., and **Sheila F. Hordon,** Esq., for the respondent (Knipe & Helms, attorneys)

Record Closed: June 17, 1985 Decided: August 1, 1985

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

This matter concerns the petition filed by the Board of Education of the Township of Cranbury (Cranbury Board) requesting the Commissioner of Education (Commissioner) to issue an order terminating its sending-receiving relationship for grades 9 through 12 with the Lawrence Township Board of Education (Lawrence Board). This relationship was established by a five-year contract between the parties, dated June 29, 1978 (P-1), and was approved by the Commissioner on May 31, 1978.

In its petition, the Cranbury Board alleges that good and sufficient reasons exist to terminate its relationship with the Lawrence Board and lists the following specific reasons:

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(1) Princeton High School is closer to Cranbury Township (Cranbury).

(2) The bus routes to be used from Cranbury to Princeton High School involve fewer traffic hazards since there would be less travel on Route I.

(3) Cranbury has more significant community ties with Princeton Borough (Princeton) than with Lawrence Township (Lawrence).

(4) Student transition will be less difficult at Princeton High School since the Cranbury students would attend this school for grades 9 to 12 rather than attending grade 9 in Lawrence Junior High School and grades 10 through 12 in Lawrence High School.

(5) Princeton High School has a greater number and variety of advance placement courses.

(6) Participation in extracurricular activities will be facilitated since Princeton High School is closer.

(7) Princeton High School offers free attendance at Princeton University for qualified students.

(8) Princeton High School has a better computer program.

(9) Princeton High School offers greater opportunity to participate in sports because of its "no cut" athletic policy.

(10) Lawrence's projected growth in population may result in the termination of the sending-receiving relationship sometime in the future.

(11) The deletion of the Cranbury students will have a negligible effect on student population at the two Lawrence schools.

(12) The deletion of the Cranbury students will have no significant financial impact on the Lawrence Board.

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In its response, the Lawrence Board denies that good and sufficient reasons exist and specifically denies most of the 12 reasons set forth in the Cranbury Board's petition for the termination of the sending-receiving relationship.

The matter was transmitted to the Office of Administrative Law on September 16, 1982, for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

PROCEDURAL MATTERS

A prehearing conference was held on November 16, 1982, and the parties agreed that the only issue is whether or not the Cranbury Board has good and sufficient reasons for the termination of the sending-receiving relationship. During the prehearing conference, a question was raised as to whether N.J.S.A. 18A:38-21 or N.J.S.A. 18A:38-13 is applicable, and I requested the parties to reach an agreement or submit briefs on the issue of the applicable statute by December 15, 1982. I confirmed by letter dated December 21, 1982, that both parties had orally agreed that N.J.S.A. 18A:38-13 is the applicable statute.

The matter was initially scheduled for a five-day hearing to be held on April 25 through 29, 1983, and was later adjourned to give the parties additional time for discovery as well as to try to settle the matter. During the extended discovery period, both Philip H. Shore, representing the petitioner, and Dennis J. Helms, representing the respondent, alleged noncooperation by the other party. At the request of Mr. Shore, I issued an order on May 26, 1983, allowing an expert employed by the Cranbury Board to visit the Lawrence schools to observe certain classes and activities and to speak to the principals and department chairpersons regarding the courses and programs. At that time, Mr. Helms did not oppose this request apparently on the basis that he expected the Cranbury Board to arrange for a similar inspection of Princeton High School by the respondent's expert. When this did not occur, Mr. Helms filed a motion to join the Board of Education of the Princeton Regional Schools District (Princeton Board) as a third party petitioner and a motion to allow the respondent's expert to inspect the Princeton High School. The petitioner and the Princeton Board opposed both motions. After oral argument, the matter was resolved and the parties agreed to a consent order which denied the motion to join the Princeton Board as a party and allowed the respondent's expert to inspect Princeton High School subject to certain restrictions. I signed this order on August 9, 1983.

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On November 2, 1984, I received a motion from Mr. Shore for leave to add a third count to the petition. The proposed count alleged that the June 29, 1978 agreement between the Cranbury Board and the Lawrence Board was null and void pursuant to N.J.S.A. 18A:38-20 since the Lawrence Board had not complied with certain conditions set forth in the agreement. Mr. Helms opposed this motion. By order dated December 20, 1984, I denied the motion, and ruled that the motion was out of time since the contract had expired and in view of the lengthy discovery period, and that the petitioner had not shown that N.J.S.A. 18A:38-20 is applicable in this matter. By letter dated January 8, 1985, Mr. Shore requested the Commissioner to review this order and by letter dated January 14, 1985, Seymour Weiss, Director of the Bureau of Controversies and Disputes, indicated that the Commissioner would not review the order at that time since the determination did not have an ultimate bearing on the outcome in the matter.

As stated, I initially adjourned this matter in order to give the parties additional time to work out a settlement. It was represented by the parties that such a settlement was dependent on the outcome in another administrative matter which dealt with the request of the Washington Township Board of Education to terminate its existing sending-receiving relationship with the Upper Freehold Regional Board of Education (Washington Tp. Bd. of Ed. v. Upper Freehold Reg. Bd. of Ed., et al, OAL DKT. EDU 2710-80 (Feb. 23, 1981), adopted, Comm'r of Ed. (March 4, 1981), remanded, State Bd. (Sept. 2, 1981); on remand OAL DKT. EDU 6014-81 (August 3, 1982), adopted, Comm'r of Ed. (Sept. 20, 1982), remanded, State Bd. (Dec. 7, 1983); on remand OAL DKT. EDU 10120-83 (Oct. 9, 1984), adopted, Comm'r of Ed. (Nov. 19, 1984), aff'd, State Bd. (June 5, 1985)). Since at that time there was no final determination in the Washington matter, I placed this case on the inactive list until September 16, 1984, by order dated February 1, 1984. Thereafter, the order of inactivity was extended to December 9, 1984, by order dated September 13, 1984, and further extended until February 8, 1985, by order dated December 20, 1984. In December 1984, it was agreed by the parties that this matter should be scheduled for hearing notwithstanding the fact that at the time there was still no final determination in the Washington matter.

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The hearing in this matter took place on February 14, 15, 20, 21 and 22, 1985, and was concluded on March 1, 1985.* The parties were requested to submit briefs and there was a delay in the receipt of briefs because of a problem regarding the transcripts. The record in this matter closed upon receipt of the last brief by my office on June 17, 1985.

LEGAL ISSUE

At the end of the presentation of the petitioner's case, Mr. Helms moved to dismiss the matter on the basis that the Cranbury Board had not presented a prima facie case of "good and sufficient reason" pursuant to N.J.S.A. 18A:38-13, for the termination of the sending-receiving relationship (3T 127). Mr. Helms argued that the petitioner had not shown that the Lawrence Board had failed to meet the educational needs of the Cranbury students, had not shown any education-related reason to terminate the relationship, and had shown only a preference to send its students to Princeton High School. Mr. Shore opposed the motion and argued that it had been clearly established by the December 7, 1983 decision of the State Board of Education (State Board) in the Washington matter that the petitioner does not have to show that the Lawrence Board did not provide "thorough and efficient" education in order to terminate the relationship, and that in this matter, the petitioner was not questioning the quality of education offered by the Lawrence Board, nor was it alleging that the respondent's facilities were inadequate. Mr. Shore argued that the Cranbury Board has the right of self-determination and had presented during the hearing good and sufficient reasons to terminate the relationship. Also, Mr. Shore argued that the petitioner had the right to terminate the relationship since it had shown that the loss of the Cranbury students would not have an adverse educational or financial impact on the Lawrence Board's high school program.

At the hearing, I reserved decision as to the motion to dismiss and indicated that I would require the parties to submit briefs after the hearing as to the legal standards to be used to decide what is "good and sufficient reason" for the termination of a sending-receiving relationship pursuant to N.J.S.A. 18A:38-13 (3T 141). Both parties agreed to the continuation of the hearing.

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* Reference to the transcripts in this initial decision will reflect the day of the hearing; therefore, 2T will refer to the hearing on February 15, 1985. The transcript for February 14, 1985, appears in two volumes, which will be referred to as 1aT and 1bT.

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The briefs submitted after the hearing reiterated the disagreement of the parties as to what must be shown to establish "good and sufficient reason" pursuant to N.J.S.A. 18A:38-13. In his briefs, Mr. Shore argued that "good and sufficient reason" can be established by factors such as educational impact, financial impact, facility considerations, racial impact and population growth, Washington, supra., Far Hills Borough Bd. of Ed. v. Bedminster Tp. Bd. of Ed., OAL DKT. 6673-80 (July 14, 1981), adopted, Comm'r of Ed. (Aug. 31, 1981), aff'd, State Bd. (May 4, 1983), appeal dismissed (App. Div., Aug 3, 1983, A04620-82-T02); that self-determination is a factor, Kinnelon Borough Bd. of Ed. v. Riverdale Borough Bd. of Ed., OAL DKT. 5737-81 (Nov. 29, 1982), adopted, Comm'r of Ed. (Jan 31, 1983), rev'd, State Bd. (April 6, 1984), aff'd, (N.J. App. Div., Feb. 8, 1985, A3857-83T2), Maurice River Tp. Bd. of Ed. v. Buena Reg. School District Bd. of Ed., OAL DKT. EDU 7774-84 (Nov. 1, 1982), adopted, Comm'r of Ed. (Dec. 15, 1982), Branchburg Tp. Bd. of Ed. v. Somerville Borough Bd. of Ed., 173 N.J. Super. 268 (App. Div. 1980); and that community ties are a factor, Jenkins v. Morris Tp. Bd. of Ed., 58 N.J. 483 (1971).

In his briefs, Mr. Helms represented that the petitioner was incorrect when it argued that "good and sufficient reason" could be established by showing that the termination would not have any significant adverse impacts on the respondent's high school program. Mr. Helms argued that the lack of negative impact on the receiving district and community preference is not sufficient to establish "good and sufficient reason" (April 18, 1985 report of the Legal Comm. of the State Bd. in the Washington matter), and that the Cranbury Board must show that the respondent's program or facilities are defective or that the Cranbury students are at an educational disadvantage by attending Lawrence High School.

Also, Mr. Helms stated that it has been clearly established that great caution should be exercised in considering the possible termination of a sending-receiving relationship and that such a relationship should not be terminated unless there is an affirmative showing of "good and sufficient reason," Brielle Borough Bd. of Ed. v. Manasquan Borough Bd. of Ed., OAL DKT. EDU 8408-83 (Nov. 16, 1984), adopted, Comm'r of Ed. (Jan. 21, 1985).

Since the issuance of the December 7, 1983 State Board decision in the Washington matter, there appears to be some confusion as to what must be shown in order to terminate a sending-receiving relationship. The State Board in its June 5,

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1985 decision in the Washington matter gave some guidance as to what it considers to be "good and sufficient reason."

It should be noted that the briefs in this matter were submitted prior to the issuance of this State Board's decision. In this decision, the State Board reiterated its prior ruling (Dec. 7, 1983) that "[a]lthough the petitioning district need not prove that the receiving district is unable to provide a thorough and efficient education, it must demonstrate by a definite presentation of facts that there is good and sufficient reason to approve withdrawal" (State Board, June 5, 1985 at 5). The State Board recognized that good and sufficient reason may exist where a district decides to educate its own children in its own district and cost effectiveness is the only advantage to the continuation of the relationship, and cited the decision in the Kinnelon matter. Further, the State Board stated that "community dissatisfaction or preference may provide a basis for granting a withdrawal request, but only where the existence of such dissatisfaction or preference is clearly established, as well as the underlying reasons, and where those underlying reasons provide good and sufficient reason for terminating the sending-receiving relationship" (Id. at 7). Lastly, the State Board emphasized that lack of negative impact does not excuse a school board from the requirement that it must establish "good and sufficient reason" for the withdrawal (Id. at 7-8).

Based on my understanding of the decisions of the State Board in the Washington matter, as well as the other recent cases, I agree with Mr. Shore's argument that the petitioner does not have to show that the respondent's program or facilities are defective or that the Cranbury students are at an educational disadvantage as represented by the Lawrence Board; however, I do not agree with the petitioner's apparent position that self-determination and the absence of any negative impact on the receiving district is sufficient to establish "good and sufficient reason." It was clearly recognized in the Washington and Branchburg matters that self-determination is not a controlling factor.

Therefore, I **CONCLUDE** that the Cranbury Board must show that there is "good and sufficient reason" underlying its determination to terminate the sending-receiving relationship which outweighs any adverse impact on the respondent. Further, I **CONCLUDE** that the "good and sufficient reason" must be directly associated with the education and well-being of the students affected by the termination of the relationship. Based on this standard of proof, and the testimony and exhibits presented by the petitioner, I **CONCLUDE** that the motion to dismiss the matter at the end of the petitioner's case should be denied.

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FINDINGS OF FACTS

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

The Cranbury students had attended the Hightstown High School, which is operated by the East Windsor School District, until this arrangement was terminated because of an increase in school enrollment at the end of the 1977-78 school year (1aT 39). At that time, the Cranbury Board contacted a number of school boards, including the Lawrence and Princeton Boards, regarding the high school* education of the Cranbury students. The Lawrence Board was willing to take the Cranbury students and at that time, the Princeton Board did not offer to accept them.

Since September 1978, Cranbury has sent its high school students to the Lawrence schools, and from 1978 until the time of the hearing in this matter, there have been no significant problems as to this arrangement or the education of the Cranbury students (1bT 6-8). Prior to the initiation of this matter, there was a cordial relationship between the two Boards (1bT 4).

The contract entered into by the Lawrence and Cranbury Boards in 1978 provided that it would terminate on June 30, 1983, and that either party had to submit a notice by June 30, 1981, if it wanted to terminate the sending-receiving relationship at the end of the 1982-83 school year (P-1).

During the 1980-81 school year, the Cranbury Board asked Charles Argento, its chief school administrator, and its Long Range Planning Committee to consider whether or not the contract should be continued after the 1982-83 school year (1aT 34-5). Mr. Argento and this committee evaluated several high schools (P-26), and both the Lawrence and Princeton Boards expressed an interest in educating the Cranbury high school students (1aT 39). The committee recommended that the Cranbury students be sent to Princeton High School. The Cranbury Board, after a public hearing, decided to terminate the contract at the end of the 1982-83 school year.

By letters dated June 1, 1981 and December 24, 1981, the Cranbury Board notified the respondent of its intention to terminate the contract (P-2, P-3). The reasons

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* The use of term "high school" in this initial decision includes grades nine through twelve unless the context indicates a contrary meaning.

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for the Board's decision in 1981 are the same as those set forth in the petition filed with the Commissioner on August 26, 1982. The Cranbury Board did not conduct any supplemental study prior to the filing of the petition.

Upon receipt of these letters, the Lawrence Board passed a resolution on April 14, 1982, indicating that it was conditionally opposed to the termination of the sending-receiving relationship and indicated that if Washington Township were allowed to terminate its sending-receiving relationship and to send its students to the Lawrence schools that the Lawrence Board would not oppose this termination (P-4). Also at this time, the Princeton Board adopted a resolution indicating it would accept the Cranbury students at its high school (P-23).

At the hearing, the parties stipulated that any change in the sending-receiving arrangement in this matter would not have any racial impact. Also it was recognized that the Cranbury Board is recommending the phased withdrawal of its students from Lawrence High School starting in the first school year with the ninth grade students being sent to Princeton High School. Both parties recognize that it would be better for the students who have initiated their high school education at Lawrence to complete their high school education there. In addition, it was recognized that Lawrence High School will now be used for grades 9 through 12. Lastly, it was stipulated by both parties that the presentations at the hearing regarding future development and population growths were prepared without consideration of any growth which may result from the New Jersey Supreme Court decision in Southern Burlington Cty. NAACP v. Mount Laurel Tp., 92 N.J. 158 (1983).

It was evident at the hearing that not all the residents of Cranbury were in favor of terminating the sending-receiving relationship with the Lawrence Board in 1981 or at the time of the hearing. At the Cranbury Board's hearing in 1981, a number of parents and high school students spoke in favor of continuing the contract with the Lawrence Board.

At the hearing five Cranbury Board members (1aT 78, 1aT 103, 1aT 126, 2T5, 2T22) and one former Cranbury Board member (6T 129) testified as to the reasons why the Board decided to terminate the relationship with the Lawrence Board and their testimony reiterates the reasons set forth in the petition. In addition, the Cranbury Board presented the testimony of two Cranbury residents who were not satisified with having their children attend the Lawrence schools (6T 138, 6T 148).

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Also at the hearing, the Lawrence Board presented the testimony of five Cranbury residents who have or have had children attending the Lawrence schools. These residents have an affirmative opinion regarding the schools and are opposed to the termination of the relationship with Lawrence Township (3T142, 3T158, 3T173, 4T46, 4T65). Some of these witnesses stated that the Cranbury Board wanted its students to go to Princeton High School because of the prestige associated with Princeton rather than for any education reason. One of the Cranbury witnesses, Joseph M. Dulin, a board member, recognized that sending the students to Princeton Hish School had "snob appeal" (1aT 103).

It was also clear at the hearing that the Cranbury Board objected to the fact that the Lawrence Board had proposed the 1984 school bond referendum which was approved by the electorate. This 8.6 million dollar bond issue will provide funds for the repair and renovation of various schools, and for the high school, it includes new classrooms, a computer lab and an addition to the library. This project was undertaken after the Lawrence Board was notified of the petitioner's intent to end its sending-receiving relationship, and the Cranbury Board feels that its tuition money will be used to defray the cost of expanding the Lawrence High School to accommodate the anticipated increase in students from Lawrence.

TRANSPORTATION FACTORS

As to mileage and transportation time, the following calculations were presented by the Cranbury Board (P-6, 1aT 52-60):

FROM CRANBURY* TO LAWRENCE HIGH SCHOOL
(ONE-WAY TRIP)

BUS	TIME	MILES	MILES ON ROUTE I
1	45	23	10.3
2	45	22	3.5

* Does not include time or mileage for student pick-up within Cranbury.

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FROM CRANBURY* TO PRINCETON HIGH SCHOOL
(ONE-WAY TRIP)

BUS	TIME	MILES	MILES ON ROUTE I
1	28	14.1	1.1
2	34	16	only crosses Route 1

These calculations were not successfully disputed by the respondent. The only testimony offered by the respondent was that of John J. Harmon, a Lawrence Board member who recalled driving from Lawrence High School to Cranbury and also to Princeton High School, and he testified that he thought that Princeton High School was only about five minutes from Lawrence High School (4T 99-100).

However, there was conflicting testimony as to whether the distance between Cranbury and Lawrence has any effect on student participation in extracurricular activities. Several of the petitioner's witnesses concluded that the distance was a negative factor and two Cranbury residents, Robert Devine and Sally Edwards, stated that their children's participation in extracurricular activities at Lawrence High School was hampered by school bus schedules (6T138, 6T148).

In response, the Lawrence Board presented the testimony of two Cranbury residents, Ann Danser and Diane Leach (3T152, 3T165), who stated that their children had no problems participating in after-school activities at the Lawrence High School, and the testimony of three Cranbury students attending Lawrence High School, Holly Von Lutchen, Sherri Dey and Peter D. Nissen, who indicated that transportation was not a problem; however, two of these students drive their own cars to school (6T 108, 6T 115, 6T119). John Machulsky, the Lawrence Director of Guidance and Counseling testified that the student surveys show that a substantial number of Cranbury students participated in extracurricular activities at Lawrence High School (6T18-9, R-13).

* Does not include time or mileage for student pick-up within Cranbury.

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Several Cranbury Board witnesses concluded that it would be safer for school buses to travel to Princeton High School since the routes to that school involve less travel on Route I. The petitioner asked that I take judicial notice pursuant to N.J.A.C. 1:15-3 of the business and industry growth on Route I in the Princeton area and the corresponding increase of traffic on that road. However, the petitioner did not present any statistics or expert testimony regarding the number or probability of accidents on Route I as compared to the local roads to be used to Princeton High School. In response to this contention, the respondent presented a report of the State Department of Transportation which shows that during 1983 a low number of accidents occurred on Route I between the Penns Neck Circle and the Trenton Circle (R-1).

Based on the testimony presented, I **FIND** that the petitioner has not shown that the travel time has had any negative effect on Cranbury students participation in extracurricular activities at Lawrence High School nor has the petitioner shown that a 15 minute reduction in the travel time will result in more Cranbury students participating in extracurricular activities at Princeton High School. Further, I **FIND** that the petitioner has not shown any convincing evidence that travelling on Route I is more dangerous than on the local roads that would be used to reach Princeton High School. Although I recognize that substantial construction has been ongoing on Route I near Princeton, the petitioner has not shown that the corresponding increase in traffic will substantially increase the travel time or risks of accidents on Route 1.

COMMUNITY TIES

At the hearing, it was recognized that many Cranbury residents use the medical facilities and professional services available at Princeton and that many Cranbury residents shop as well as attend or participate in cultural programs and athletic activities in Princeton. Except for the fact that if the Cranbury students attend Princeton High School they would have access to the Princeton Youth Employment Service (2T 33), there was no showing by the petitioner as to how these community ties were significant to the question of whether the Cranbury students should attend Lawrence or Princeton High School. Apparently the issue of community ties was presented to establish a reason for the Cranbury Board's preference for Princeton High School and to support the petitioner's position that its students would have no difficulty adjusting to Princeton High School.

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In response, the Lawrence Board brought out the fact that when Cranbury and Lawrence entered into the sending-receiving relationship in 1978 both townships had a district factor grouping of H while Princeton had a J rating. The district factor grouping is a statistic intended to reflect the composite socio-economic status of the district for purposes of comparing minimum basic skills. The highest rating is J and the lowest is A. After the 1980 census, the rating for Lawrence was raised to I while the rating for Cranbury and Princeton remained the same.

A number of the respondent's witnesses, including Dr. Lois S. Goldberg, Mr. Machulsky, Terry Rosenfeld, the Lawrence Administrator for Pupil Services, and several of the Cranbury residents, questioned whether the Cranbury pupils would have difficulty adjusting in Princeton High School in view of the difference in the socio-economic factors (5T 206, 6T 98). In addition, these witnesses noted that Cranbury students were doing very well in Lawrence High School (R-11, R-12) and that they have been well integrated into the school population (R-13), and they questioned whether it was either desirable or necessary to change schools.

The Cranbury Board disputed this testimony and argued that if the Cranbury students do well in Lawrence High School there is no reason to believe they will not do well in Princeton High School. In addition, a number of Cranbury students are now attending Princeton High School and there was testimony by John Sakala, the principal of Princeton High School that these students have had no problem adjusting to that school (3T 105). Lastly, the Cranbury Board questioned the reliability of the district factor grouping as an indicator of whether or not students would adjust to a certain school environment.

Based on the testimony, I **CONCLUDE** that although the Cranbury Board has shown substantial community ties with Princeton, the respondent's witnesses have made a persuasive argument that some of the Cranbury students may have difficulty adjusting at Princeton High School as a result of the differences in the socio-economic factors.

ACADEMIC COURSES AND EXTRACURRICULAR ACTIVITIES

Although the petitioner indicated that it was not criticizing the educational and extracurricular programs at Lawrence High School (1aT 7), those Cranbury Board witnesses who participated in the 1981 evaluation, testified that Princeton High School

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had a greater number and variety of advanced placement courses, that it had a better computer program and that it offered a greater opportunity to participate in sports because of its "no cut" policy (1aT 29, 1aT 78, 1aT 103, 1AT 126, 2T 5, 2T 22, 6T 128). These same witnesses admitted that they had no information as to any changes that may have occurred at Lawrence or Princeton High Schools since the 1981 evaluation.

On behalf of the Cranbury Board, Dr. Paul Houston, the Superintendent of the Princeton Schools, and Mr. Sakala testified as to the program offered at Princeton High School; however, both of these witnesses indicated that they were not familiar with the program offered at Lawrence High School (3T 91, 3T 112).

One fact brought out during the hearing is that Princeton High School students have the opportunity, if they qualify, to take advanced placement courses at Princeton University (3T96). It was also shown that Lawrence High School has a similar program which allows its students to take advance courses in nearby colleges, including Princeton University (6T 11). Although the quality of its academic courses was not being challenged, the Lawrence Board presented the testimony of a substantial number of witnesses to show that there has been an expansion of the high school academic program, especially as to computer courses, since 1981 and to show that the respondent has an excellent academic program. Dr. Thomas Gallia testified that Lawrence High School has an excellent program in mathematics and science (4T 169). Dr. Mario Tomei testified that Lawrence High School has an excellent computer program (4T 180). Dr. Lois S. Goldberg testified that Lawrence High School has a comprehensive guidance and special education program (5T 34). Dr. Edward White testified that the staff members of Lawrence High School are well qualified for their respective positions (4T 193).

Based on the evidence presented, I **FIND** that both Lawrence and Princeton High Schools have excellent academic programs and I **CONCLUDE** that the Cranbury Board has not shown any educational advantage to sending its students to Princeton High School.

However, it should be noted at this time that Dr. Houston indicated that the recent reduction in school population at Princeton High School has not had any effect on its academic program but he recognized that the academic program could be affected if the student population continues to decrease as projected by the Princeton Board (P-24) and if additional out-of-district students are not admitted to the school. Therefore, it

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should be recognized that notwithstanding the small increase in school population that would be realized from the addition of the Cranbury students, there is a possibility that the academic program at Princeton High School will be curtailed in the future, which could be to the detriment of the Cranbury students.

As to the extracurricular programs offered by Lawrence and Princeton High Schools, I **FIND** that there was no evidence to show that either school has a superior program. Although it was established that Princeton High School has a "no cut" policy for athletics, I **FIND** that there was no proof that this policy allows more students to participate in athletics than the program at the Lawrence High School.

STUDENT POPULATION

There is no real dispute as to the student population projections for Cranbury and Lawrence. Although the Lawrence Board's witnesses questioned the petitioner's projections, there was no evidence submitted to challenge the conclusions as to the increase in housing or the projected increase in the number of Lawrence students. Obviously the Lawrence Board has anticipated an increase in student population and has provided for it by the expansion plan, which is part of the recently approved 8.6 million dollar bond issue.

Cranbury is not experiencing any residential growth and its student enrollment has been steady for the last five years and is expected to remain the same through the 1988-89 school year (P-13 1aT 66, 2T 13-24, 2T 171). There were approximately 93 Cranbury students* in grades 9 through 12 during the 1984-85 school year; specifically, there were 28 students in the ninth grade, 27 students in the tenth grade, 13 students in the eleventh grade and 25 students in the twelfth grade (P-13, 1aT 64). The Cranbury Board has advised the respondent that it will have approximately 28 students for the ninth grade in the 1985-86 school year and that there will be a total of 91 Cranbury students in grades 9 through 12 for that year (P-13, P-25, R-3, 3T 32). For the 1986-87 school year Cranbury estimates it will have 95 high school students, for the 1987-88 school year it will have 93 high school students and for the 1988-89 school year it will have 91 high school students (P-13).

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* It is recognized that there are school enrollment changes during a school year as students move in and out of the community.

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Lawrence, on the other hand, is experiencing a residential growth as a result of its location along Route 1 and the fact that it has available space, and sewage and water facilities available for residential development (3T 83).

On behalf of Cranbury, Dr. William Ramsay, an expert in demographics, school management and education, testified about his study and how he calculated the projected school population growth in Lawrence (2T 61, P-10, P-11, P-12, P-14). Dr. Ramsay's updated calculations (P-12) showed the following projections as to the number of Lawrence high school students:

1984-85 (actual figure)	804
1985-86	859
1986-87	899
1987-88	889
1988-89	895

During the 1984-85 school year, the total high school student population at the Lawrence schools was 897. Based on this number, the following chart reflects the effects on the projected high school population if the Cranbury students are withdrawn.

SCHOOL YEAR	TOTAL WITHDRAWAL OF CRANBURY STUDENTS (P-17)	PHASED WITHDRAWAL OF CRANBURY STUDENTS (P-18)
1985-86	-38	+26
1986-87	+2	+51
1987-88	-8	+16
1988-89	-2	-2

Therefore, I **FIND** that the Cranbury Board has clearly established that there will be no reduction of high school student population if there is a phased withdrawal of the Cranbury students as a result of the anticipated population growth in Lawrence. In addition, even if all of the Cranbury students were withdrawn starting in the 1985-86 school year, there would not be a significant impact on the student population since the Cranbury students represent less than ten percent of the Lawrence High School popula-

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tion. It was also not disputed that there would be no impact on the number of courses offered by the Lawrence Board since the Cranbury students are scattered among the approximate 135 courses (3T 109, P-5, P-7, P-8).

Even though the respondent is now opposing the termination of the sending-receiving relationship, the Cranbury Board expressed the concern that at sometime in the future the Lawrence Board may demand the terminatation of the relationship because of overcrowding at the high school due to the increase in Lawrence students. The Lawrence Board denied that this would occur and there is no evidence to dispute the respondent's representation that Lawrence High School can accommodate both the increased number of Lawrence students as well as the Cranbury students.

FINANCIAL IMPACT

As compared with the detailed analysis to support his conclusions regarding the effect on student population, Dr. Ramsay gave a terse summarization in support of his conclusion that the withdrawal of the Cranbury students would not result in any adverse financial impact on the respondent. The main thrust of Dr. Ramsay's position as to the financial impact is his conclusion that the new construction in Lawrence will create new tax ratables which will increase the amount of money available for school purposes and that the new Lawrence students will entitle the respondent to additional state aid (P-12, P-15). If the Cranbury students are withdrawn on a phased basis starting in the 1985-86 school year, Dr. Ramsay estimated that the Lawrence Board would lose $124,000 in tuition (28 students at $4,441 per student) (P-16, 2T 121), and that this loss would be offset by the increases in tax ratables and state aid. According to Dr. Ramsay, the increase in state aid for the 1985-86 school year would be $54,900 (P-19, 2T 124, 3T 10). This figure is based on the fact that state aid is $300 per student and is based on the fact that Dr. Ramsay's student population projection for Lawrence indicates that for the 1985-86 school year there will be an increase of 183 new Lawrence students attending grades K through 12 (P-12, 3T 9-11).

Assuming that the Lawrence Board has to increase its budget by $124,000 in the 1985-86 school year and assuming that there was no increase in the tax ratables, Dr. Ramsay concluded that there would be a .057 increase in the property tax for that year and that such an increase would result in an additional $14 in taxes on a home having an assessed value of $100,000 (P-16, 2T 129). As an alternative to increasing the property

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tax rate, Dr. Ramsay indicated that the Lawrence Board could make cuts in the school budget and he concluded that such cuts would not have to affect the educational programs (2T 181-3).

William D. Robinson, the Cranbury Board Secretary and Business Administrator and an expert in school finance, testified that the Lawrence Board's annual budget is approximately 12.5 million dollars and that the tuition for all of the Cranbury students represents less than 3% of that budget and further that the loss of the tuition for the ninth grade Cranbury students represents less than 1% of said budget. According to Mr. Robinson, the Lawrence Board could make adjustments to its budget to make up for any loss of tuition without adversely affecting its educational program (3T 43).

Mr. Robinson noted that the tuition paid by the Cranbury Board has been approximately $4,441 per student (P-20, 3T 26-29), that the Commissioner has recently approved a tuition increase and that as of the 1985-86 school year the tuition will be approximately $5,500 per student (R-3). The Commissioner has also approved of a change in the method pursuant to which the Cranbury Board pays tuition.

According to Mr. Robinson, for the 1985-86 school year the Lawrence Board will receive the full amount of the projected tuition of $515,144 for the 1985-86 school year as well as a payment of $69,055 for tuition still due for the 1983-84 school year (P-21). Mr. Robinson concluded that the phased withdrawal of the Cranbury students would not have any adverse financial impact on the Lawrence Board since in the 1985-86 school year the Lawrence Board would receive $358,848, if the ninth grade students are withdrawn, which is $1,581 less than the amount it received for the 1984-85 school year (P-22, 3T 37-39).

Dr. Leonard M. Harlan, a financial and real estate tax expert, employed by the petitioner, testified that even if the Lawrence Board were not to receive any additional monies, it could make up for the loss of the tuition for the ninth grade students by achieving savings in its budget which would not affect the educational program (3T 67-9). Both Mr. Robinson as well as Dr. Paul Houston were certain that the Lawrence Board would qualify for a budget cap waiver if that proved to be necessary (3T 44-5).

There was also testimony that in 1984, a consultant employed by the Lawrence Board suggested that the respondent could save $500,000 by reorganizing its elementary

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school system and eliminating some neighborhood schools, and that such a program was never implemented by the Lawrence Board (4T 119-20, 5T 135, 5T 151).

Dr. Ramsay, Mr. Robinson and Dr. Helms discussed the financial impact of the withdrawal of the Cranbury tuition on the total school budget of the Lawrence Board. In its disagreement with this presentation, the Lawrence Board witnesses questioned the calculations made by the Cranbury Board witnesses and also considered what impact the loss of the Cranbury tuition would have on the high school program. Obviously if the withdrawal of the Cranbury students is approved by the Commissioner, the Lawrence Board will have to decide which accounts should be reduced if a budget cut is required.

John J. Harman, the financial committee chairperson of the Lawrence Board, testified that the respondent has a "bare bone" budget because of prior cuts and prior applications for budget cap waivers and that any further cuts would affect the educational program (4T 89-90). Mr. Harman testified that any increase in property taxes would not be popular, that there are numerous groups, including senior citizens groups, who opposed any tax increases and that there was no guarantee that a tax increase would be approved by the electorate (4T 93-4). Although Mr. Harman admitted that the Lawrence electorate is generally supportive of its school system, he noted that there has been a property tax increase each year for the last five years and that the voters recently approved a substantial bond issue (4T 251). Therefore, Mr. Harman anticipated that there would be a greater reluctancy to approve any further increases in property taxes for school purposes.

In addition, Mr. Harman noted that althouth the Lawrence Board might qualify for a budget cap waiver, each time a waiver is approved, the Board loses some flexibility in deciding how best to spend its monies and, therefore, waivers are not really desirable (4T 107). Lastly, Mr. Harman stated that the 1984 suggestion by the Lawrence consultant was not accepted since the concept of neighborhood schools was very popular in Lawrence (4T 123).

Carole S. Deddy, the Lawrence School Board Administrator, disagreed with Dr. Ramsay's conclusion as to the amount of additional monies that might have to be raised by taxes (R-4, R-5, R-6a), and she estimated there would have to be an approximate 30.5 cent increase in property taxes in order to make up for the tuition loss of the ninth grade students in the 1985-86 school year and that this would mean a tax increase in the amount of $22 on a house with an assessed value of $103,578 (R-6a, 5T 5).

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Both Ms. Deddy and Mr. Harmon noted that if there was a phased withdrawal of the Cranbury students that the loss of tuition would increase each year for a four year period and that in the fourth year the tuition loss would be approximately $500,500 (91 students at $5,500 a student) (R-3, 5T 237).

During the hearing, there was some dispute as to the position of the Lawrence Board witnesses regarding the effect of withdrawal of the Cranbury students on the educational program. Having reviewed the testimony, it appears clear that the Lawrence Board witnesses agreed with the petitioner that from the prospective of student population, the withdrawal would not have an adverse effect on the educational program at the Lawrence High School. However, Melvin L. Klein, the Lawrence Interim Supertendent of Education and Dr. Bruce R. McGrow, the Lawrence Administrator for Curriculum Instruction testified that the loss of the Cranbury tuition could have a substantial effect on the high school educational program if it were not offset by additional revenues from new ratables or by an increase in the property tax rate (5T 117-124, 5T 139-147). Since the financial impact would increase over a four-year period, the affect of this tuition loss on the education program could also increase over the same period of time. The Cranbury witnesses discounted any such negative impact on the educational program on the basis that the Lawrence residents have in the past supported their school program and the possibility that the Lawrence Board would be able to get any additional monies needed to replace the Cranbury tuition.

Based on the testimony, I **FIND** that in the first year of a phased withdrawal of the Cranbury students, there would be a reduction in the amount paid by the Cranbury Board of approximately $154,000 (28 students at $5,500), that this the loss of tuition will increase over a four-year period and that in the fourth year the total annual loss will be approximately $500,500 per school year. Also, I **FIND** that this loss would be partially offset by the additional State Aid for the new Lawrence students at the high school. Although I **FIND** that it is reasonable to expect that there will be an increase in the tax ratables because of the new construction in Lawrence during the next several years, there was no evidence submitted to show how much additional monies would be available to the Lawrence Board from this source. Lastly, I **FIND** that if the increase in State Aid and the increase from the new ratables is not sufficient to make up for the loss of the Cranbury tuition, the Lawrence Board would have to either request an increase in property tax or would have to make cuts in its budget which might effect its educational program at the high school. Therefore, I **CONCLUDE** that the Cranbury Board has not shown that there

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would not be any adverse financial impact and further that the Cranbury Board has not shown that such a financial impact would not affect the educational program of the respondent.

CONCLUSION

Having reviewed all the facts, I **CONCLUDE** that the Cranbury Board has not shown that there are good and sufficient reasons underlying its preference to send its students to Princeton High School and that the Cranbury Board has not shown that there would not be an adverse impact on the respondent as a result of such a withdrawal. Therefore, I **ORDER** that this matter be **DISMISSED WITH PREJUDICE.**

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

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

August 1, 1985
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

AUG 1 1985
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:

August 5, 1985
DATE

Ronald J. Parker
OFFICE OF ADMINISTRATIVE LAW

bc

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BOARD OF EDUCATION OF THE TOWNSHIP OF CRANBURY, MIDDLESEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAWRENCE, MERCER COUNTY,	:	
RESPONDENT.	:	

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

The Cranbury Board contends that the judge enunciated and applied an incorrect legal standard by requiring that it prove there was an educational advantage to severing its sending-receiving relationship with Lawrence. More specifically, it points to the judge's conclusion found in the initial decision, ante, which states, "***I conclude that the Cranbury Board has not shown any educational advantage to sending its students to Princeton High School." The Board argues that this conclusion improperly burdens it with having to prove that deficiencies exist in the educational program at Lawrence High School or that it could be to Cranbury's educational advantage to send its pupils to Princeton High School.

The Cranbury Board asserts that the initial decision is not in conformance with the legal standard enunciated by the State Board in Bd. of Ed. of Brielle v. Bd. of Ed. of Manasquan, decided by the Commissioner January 18, 1985, rev'd State Board August 7, 1985. It believes that the Brielle decision provides proof that (1) the judge misapplied the standard enunciated in Washington Twp., supra; (2) Lawrence does not have a statutory right to continue as Cranbury's receiving district; and (3) it need not show positive benefits will accrue to its pupils sufficient to overcome Lawrence's claim. Further, it avows that the community preference may constitute good and sufficient reason for termination where such preference is based upon a definite presentation of fact (Brielle, at p. 11) and that it has met the requirement for such presentation. It also believes the judge "egregiously misstated" its position when she says that it argued self-determination, coupled with absence of negative impact, constituted good and sufficient reason.

In its next exception the Cranbury Board asserts that the judge improperly set forth findings of contested fact in conclusory language in violation of N.J.A.C. 1:1-16.3(c)7. It argues that:

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> "Under Findings of Fact, the ALJ improperly intertwined 'findings' and 'conclusions'. She buried, in discussion, items which should have been set forth as Findings of Fact and she commingled her Findings of Fact with the analysis of educational and financial impact such that it is impossible to tell the difference between her factual findings and legal conclusions.***"
> (Cranbury Exceptions, at p. 9)

Further, Cranbury argues that as set forth in the Prehearing Order, there is only one issue in the instant matter; namely, whether it has good and sufficient reasons for the termination. It avers that the specific reasons for the termination alleged in its Petition of Appeal need not have been recited by the judge in the initial decision (p. 2) and it was under no obligation to prove each and every such item. Rather, it only had to prove the factual basis for so many of those items, even just one, as would constitute good and sufficient reason.

Cranbury also argues that the judge failed to consider and analyze the accumulation of reasons offered by Cranbury in support of its petition, avowing that her factual analysis and discussion is disjointed and disregards entirely that good and sufficient reason may lie not in one factor, but in an accumulation of factors. With respect to the transportation factor, the Board claims that the judge erred in requiring that Cranbury prove that the travel time had a negative effect on Cranbury pupils' participation in extracurricular activities at Lawrence or that a reduction in time travel would result in more pupils participating in such activities at Princeton. Further, she erred in concluding that the time and distance advantage cannot constitute in whole or part good and sufficient reason in requiring the Board to prove that a congested Route 1 is a less desirable route for its pupils to travel.

As regards community ties, the Cranbury Board contends that it is not burdened with having to prove a tangible educational reason for why these community ties are significant. It cites the New Jersey Supreme Court decision in Jenkins v. Township of Morris Bd. of Ed., 58 N.J. 483 (1971) as support that community ties are recognized as a basis for maintaining a sending-receiving relationship. In reference to academic course and extracurricular activities factors, it avows that it was unnecessary, irrelevant and prejudicial to Cranbury for the judge to conclude that Cranbury did not show any educational advantage to sending its pupils to Princeton and she misread the testimony relative to the "no cut" athletic policy at Princeton. It asserts that the point of this policy is that a greater percentage of pupils can participate in interscholastic sports.

The Board points out the judge found that (1) there will be no reduction of Lawrence High School population if a phased withdrawal occurs because of the anticipated population growth in

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Lawrence; (2) there would not be a significant impact even if all Cranbury pupils were withdrawn since they represent less than 10% of the Lawrence High School population; and (3) it was not disputed that there would be no impact on the number of courses offered by Lawrence since Cranbury pupils are scattered among the approximately 135 courses. It further asserts that the initial decision ultimately rested upon the judge's conclusion that Cranbury did not prove the absence of adverse financial impact and a resulting adverse educational impact due to the absence of Cranbury tuition.

With respect to the issue of financial impact the Cranbury Board argues that the judge's analysis is "woefully inadequate" in that it omits and fails to consider numerous relevant facts. The summary of exceptions to financial impact considerations are enumerated below:

1. The Cranbury tuition revenue loss in the first year of a phased withdrawal amounts to less than 1% of Lawrence's school budget for 1985-86, a loss which, under any standard, cannot be said to be significant.

2. The loss at the end of four-year withdrawal period represents only some 3% of the 1985-86 Lawrence school budget, even disregarding all alternate sources of revenue such as additional state aid and tax revenues. This loss, too, the Board considers insignificant.

3. Assuming no growth in Lawrence and no increase in ratables, neither of which is likely, the $22 increase in yearly school tax to a owner of a home valued at $103,578 is not a significant impact nor is the increase significant even if all Cranbury pupils were withdrawn.

4. Even without additional state aid and tax revenues to make up for the tuition loss, the financial impact on Lawrence is not sufficient to outweigh the reasons, and facts to support those reasons, behind Cranbury's preference to send its pupils to Princeton High School.

5. Although the judge found that the tuition loss would be partially offset by additional State aid for new students at Lawrence High School, it was negligent of the judge not to have mentioned how much state aid would be since it would affect the $22 financial impact she found to be significant.

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6. P-10, the official Lawrence Township document listing residential real estate development upon which population projections were based, shows the construction of literally hundreds of housing units. Setting aside the tax revenue from commercial development, consider merely 90 dwellings that the 183 new Lawrence pupils are likely to occupy. Assuming a market value of $100,000 produces $9,000,000 in ratables (note that between 1983-84 and 1984-85 equalized valuation in Lawrence increased by approximately $156,000), and using Lawrence's 53% assessment rate, it will have an additional tax base of $4,770,000 in equalized valuation. With a school tax rate of $2.50 per $100, this produces $119,250 in additional tax revenue. This is a most conservative arithmetical calculation. Added to the additional State aid of $54,900, Lawrence will receive revenue of $174,150 which is more than the tuition lost by Cranbury's withdrawal.

7. As regards the budget cap waiver defense raised by Lawrence and discussed by the judge at p. 19 of the initial decision, such defense is "balderdash" and Cranbury's withdrawal is not the culprit; Lawrence should not be permitted to burden Cranbury with Lawrence's growing pains (the Commissioner's attention is drawn to p. 46 of Cranbury's Summation and p. 17 of Reply Summation for a detailed discussion of this point).

In addition to the exceptions summarized thus far, Cranbury avows that (1) based solely upon conjecture, the judge inferred that its pupils may have difficulty adjusting at Princeton High School; (2) she incorrectly permitted Lawrence to present expert testimony of witnesses whose identities had been withheld from it; (3) the court improperly permitted Lawrence to offer "expert" testimony which contradicted Lawrence's sworn answers to interrogatories; and (4) the judge improperly permitted Lawrence's expert witnesses to testify without having provided their reports to Cranbury (see Cranbury Exceptions, at pp. 30-47).

The Lawrence Board's exceptions rebut the arguments raised by Cranbury in its exceptions; such rebuttal is incorporated herein by reference. Further, it contends that the standards for withdrawal enumerated by the State Board in Brielle, supra, have not been met by Cranbury and that the Commissioner should adopt as his own the judge's order of dismissal in this matter.

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The Commissioner has carefully reviewed and considered the record in this matter, including the legal arguments advanced in the exceptions submitted by the parties. He will first address the exceptions which argue that the judge's standard of review was incorrect or erroneous. The State Board in its December 9, 1983 decision in Bd. of Ed. of Washington Twp. v. Bd. of Ed. of Upper Freehold et al. articulated the standard of review to be dealt with in petitions for withdrawal from sending-receiving relationships. That standard of review, and the State Board's application of it, bears repeating here.

In the above-cited decision, the State Board eliminated the requirement that a petitioning district prove that a receiving district was unable to offer a thorough and efficient education (at p. 4) and it affirmed that petitioning districts must demonstrate by a definite presentation of fact that it has satisfied the "good and sufficient reason test" (at p. 3). It stated regarding the Commissioner's review that:

> "Under [N.J.S.A. 18A:38-13], the Commissioner of Education must determine whether good and sufficient reason has been presented by the petitioning board and 'weigh all the relevant factors in reaching his conclusion.'*** The relevant factors bear repeating here. They include the educational impact, financial impact, facility considerations and racial impact upon all pupils and districts involved. These are the principal factors to be studied and must be dealt with in every sending-receiving inquiry. Petitioning districts, traditionally, have been required to demonstrate by a definite presentation of facts, that it has satisfied the 'good and sufficient reason' test. We continue to support these requirements.***" (at p. 3)

In its June 5, 1985 decision in Washington Twp., the State Board again addressed at length the standard of review for sending-receiving cases. In addition to reiterating the standard articulated above, the State Board provided further guidance on the issue of "good and sufficient reason." It stated that "[g]ood and sufficient reason may exist, for example, where a district desires to educate its children in its own district and cost effectiveness is the only advantage to continuation of the relationship. Bd. of Ed. of Kinnelon v. Bd. of Ed. of Riverdale, decided by the State Board, April 6, 1984, aff'd Docket No. A-3857-83T2 (App. Div., February 8, 1985)." (at p. 5) Further, it rejected the petitioning board's argument that the attrition rate showed community dissatisfaction with the sending-receiving arrangement and that such dissatisfaction justified granting the withdrawal request if the change could be accomplished without substantial detriment to the remaining districts (at pp. 5 and 6). It reemphasized the need for good and sufficient reason to be shown by a definite presentation of facts and concluded that:

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> "***although community dissatisfaction or preference may be considered in cases such as this, the reasons for dissatisfaction or preference must be clearly established by a definite presentation of facts and those reasons must provide good and sufficient reason for granting a withdrawal request." (at p. 6)

In assessing if the Washington Board had made a definite presentation of facts and if the reasons for community dissatisfaction provided good and sufficient reason, the State Board rejected the argument that a 44% attrition rate for public school attendance over a 5-year period was attributable to community dissatisfaction with the sending-receiving relationship on the basis that:

> "***[T]he only support in the record for this assertion, aside from the attrition rate itself, is a 1980 survey indicating that, at that time, twice as many high school students from Washington Township would attend public school if Lawrence was the receiving district.*** We emphasize that, even assuming that the attrition rate does reflect community dissatisfaction, Washington Township has not established the reason for such dissatisfaction aside from the implication that it is the result of inadequate facilities. ***Thus, whether community dissatisfaction provides a sufficient basis for granting the withdrawal request in this case depends on whether Allentown High School is overcrowded. In so concluding, we reiterate that community dissatisfaction or preference may provide a basis for granting a withdrawal request, but only where the existence of such dissatisfaction or preference is clearly established, as well as the underlying reasons, and where those underlying reasons provide good and sufficient reason for terminating the sending-receiving relationship.***" (Emphasis supplied.) (at pp. 6-7)

In addition to the above, the State Board addressed the issue of negative impact. Of this it stated, "***[W]e emphasize that lack of negative impact does not excuse it from the requirement that it must establish good and sufficient reason for the withdrawal***." (at pp. 7 and 8)

A review of the initial decision in the instant matter satisfies the Commissioner that the judge did not err in her understanding of the standard of review to be applied. The initial decision provides a sufficient discussion of the pertinent case law at the time the judge rendered the decision. She was correct in concluding "***that the Cranbury Board must show that there is 'good and sufficient reason' underlying its determination to terminate the

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sending-receiving relationship which outweighs any adverse impact on respondent*** [and] that the 'good and sufficient reason" must be directly associated with the education and well-being of the students affected by the termination of the relationship.***" (Initial Decision, ante) The judge assessed negative impact upon the receiving district for the "principal" factors at issue in this case, namely financial impact and impact on educational programs. Impact on racial balance was stipulated by the parties not to be negative. (Initial Decision, ante) Facilities was not raised as a relevant factor. Also assessed were other factors raised by Cranbury such as transportation, community ties and extracurricular activities factors.

At the time the judge rendered the initial decision in the instant matter, the State Board had not yet issued its decision in Brielle, supra (August 7, 1985). In that decision, the State Board elaborated on withdrawal standards. It reiterated that a receiving district does not have a statutory right to continue as a receiving district for a particular sending district indefinitely or in perpetuity (at page 8) and expressed that:

> "***Under the standard established by Washington Township [June 5, 1985], once good and sufficient reason has been demonstrated by a definite presentation of facts and negative impact is not shown, a petitioning district will be permitted to withdraw***. The reason asserted for withdrawal must be examined in each case to insure that it is supported by the facts and that it is a reason based upon the educational interests of the students in the petitioning district.***" (Emphasis supplied.) (at p. 8)

The State Board goes on to reiterate that "good and sufficient reason is present where it is established that overcrowding exists and no significant negative impact will result from withdrawal.***" (Id., at p. 9) Further, it emphasizes that the current standard represents a departure from the Commissioner's decision in Bd. of Ed. of Hawthorne v. Bd. of Ed. of Dumont, 1950-51 S.L.D. 42. Of this current standard it states:

> "***Although the current standard recognizes the need for stability in sending-receiving relationships and protects receiving districts who have expanded their facilities or erected buildings to provide for tuition students by its requirement that negative impact be assessed, the current standard does not require that 'positive benefits***accrue to the high school students sufficient to overcome the claims (emphasis in text) of the receiving district to these pupils.' Hawthorne, supra, at 43. Rather, as stated, if the petitioning district demonstrates a good and sufficient reason for withdrawal, one that is in

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> the educational interests of its students, withdrawal will be permitted if no significant negative impact is shown. Under this standard, the receiving district has no 'claim' to the sending district's pupils other than that their withdrawal must not result in significant negative impact on the other districts involved.***"
> (Emphasis supplied.) (at p. 9)

In the Commissioner's judgment, it is evident that the judge applied the correct legal standard in the instant matter despite the fact she did not have the benefit of the State Board's decision in Brielle, supra. She examined the reasons enumerated by Cranbury to ascertain if good and sufficient reason was established by a definite presentation of facts and also assessed whether negative impact was shown. While she does conclude in the initial decision, ante, that "Cranbury has not shown any educational advantage to sending its students to Princeton High School," this does not demonstrate that the judge applied an incorrect legal standard as alleged by Cranbury in its exceptions. Rather, the statement relates to her conclusion that Cranbury failed to provide a definite presentation of facts to support the educational advantages the Cranbury Board itself raised to justify withdrawal, such as Princeton High School having a greater number and variety of advanced placement courses, better computer program, ability to take advanced placement courses at Princeton University, etc. The judge found that based on the evidence, both Lawrence High School and Princeton High School had excellent programs. (Initial Decision, ante)

The Commissioner finds nothing in the record or in Cranbury's exceptions to warrant rejection of the judge's finding and conclusion with respect to the above.

Upon review of the initial decision and the record in this matter, the Commissioner is unpersuaded that the judge improperly set forth findings of contested fact in conclusory language in violation of N.J.A.C. 1:1-16.3(c)7. This regulations requires that the initial decision contain specific findings of contested fact which are designated as such and shall not be set forth in statutory or conclusory language. In the initial decision, ante, the judge has provided the facts in the matter that are not in dispute under the heading, Findings of Fact; she has provided the contested facts under categories headed: Transportation Factors, Community Factors, Academic Courses and Extracurricular Activities, Student Population, and Financial Impact, factors which are cited by Cranbury as reasons for terminating the sending-receiving relationship. Within each category of factors, except community ties, the judge sets out the disputed facts, summarizes relevant testimony and then expresses her findings. The community ties section does not contain the language "I find" as is contained in the other sections; however, the Commissioner does not deem this to be a fatal flaw because it is clear to

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the reader that the conclusion is counterbalancing findings of fact (i.e. Cranbury has shown substantial community ties vis-a-vis some Cranbury pupils may have difficulty adjusting at Princeton High School as a result of the differences in the socioeconomic factors) as argued by respondent's reply exceptions.

Further, the Commissioner finds the Cranbury Board's argument that the judge failed to analyze and consider the accumulation of reasons offered by it in support of its petition to be without merit. The Commissioner will now review the reasons offered by Cranbury for withdrawal and the findings and conclusions reached by the judge with respect to them.

The Cranbury Board puts forth as part of its good and sufficient reason for withdrawal that Princeton High School is much closer to Cranbury Township, thus time and money would be saved were Cranbury permitted to send its pupils to Princeton High School. (Petition of Appeal, at p. 3) Further, the transportation of Cranbury pupils to Lawrence would reduce the distance to be traveled on Route 1, thereby avoiding traffic hazards encountered on that route and providing a safer commute for its pupils. (Petition of Appeal, at p. 3) The judge stated that the calculations in terms of time and distance savings were not successfully disputed by Lawrence (Initial Decision, ante) and the Commissioner finds nothing in the record to warrant disturbing this determination.

As regards the safety hazard associated with travel on Route 1, the Commissioner is in agreement with the judge's finding that Cranbury has not shown any convincing evidence that travel on Route 1 is more dangerous than on local roads used to reach Princeton High School or that any increase in traffic anticipated with the substantial construction occurring on Route 1 will substantially increase the travel time or risk of accidents on Route 1. Further, the Commissioner finds the arguments raised by Cranbury regarding increased traffic on Route 1 due to new construction is unpersuasive because any increase in traffic that may result will undoubtedly overflow onto alternative routes/roadways as well.

With respect to Cranbury's allegation that the judge required it to prove time and distance had a negative effect on participation in extracurricular activities or that a reduction in time would result in more Cranbury pupils participating in such activities, a review of the record does not indicate the judge required this proof. Rather, the record indicates that Cranbury itself raised this as an issue. (Tr. I-10; Petition of Appeal, at p. 4) What the judge determined is that Cranbury failed in its proof with regard to these claims, a determination with which the Commissioner agrees.

Cranbury argues that community ties to Princeton constitute a reason for withdrawal from Lawrence. The record does support that Cranbury has demonstrated that it has substantial community ties to Princeton, such as cultural, social, and health care ties. However, the Commissioner does not agree with Cranbury's assertion that

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Jenkins, supra, is applicable since the relationship therein dealt with two municipalities which "constituted a single community" and which were "integrally and uniquely related to one another." (at p. 487)

The Commissioner can find no support in case law to determine that the community ties advanced in the instant matter would constitute good and sufficient reason to sever a sending-receiving relationship.

Notwithstanding the above, the Commissioner does not concur with the judge's conclusion that Lawrence's witnesses made a persuasive argument that some of Cranbury pupils might have difficulty adjusting at Princeton High School as a result of the differences in socioeconomic factors. Reliance on the Department of Education's district factor groupings is inappropriate in that such groupings are not intended to predict pupil adjustment or success in school of one grouping versus any other. Conclusions regarding difficulty in adjustment based on such factor groupings is deemed to be pure conjecture. In the absence of any substantive evidence that difficulty due to socioeconomic differences might be anticipated, the judge's conclusion is not warranted. Further, the Commissioner rejects any argument that socioeconomic factors should serve as a basis for determining where students should attend school. In the Commissioner's judgment, acceptance of such a premise flies in the face of the fundamental principles of public schooling.

The Commissioner has already addressed the academic/"educational advantage" reasons put forth by Cranbury which need not be repeated here.

Cranbury advances reasons justifying withdrawal which relate to extracurricular activities. Among these are the assertion that (1) closer proximity to Princeton High School (PHS) will facilitate participation in such activities, (2) the number and variety of extracurricular activities at PHS are greater than at Lawrence and (3) PHS's "no cut" athletic policy will afford greater opportunity for Cranbury pupils to participate in athletics than at Lawrence. (Petition of Appeal, at p. 4) A review of the record in this matter simply does not provide any proof of these assertions. Thus, the Commissioner adopts the judge's findings that there was no evidence to show that either school had a superior extracurricular program and that there was no proof that the "no cut" policy allows more pupils to participate in athletics at PHS than at Lawrence. (Initial Decision, ante)

With respect to the pupil population findings and conclusions reached by the judge, the Commissioner finds nothing in the record to warrant reversal of same and he adopts them as his own. Such findings and conclusions include the following:

> "***I FIND that the Cranbury Board has clearly established that there will be no reduction of high school student population if there is a

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> phased withdrawal of the Cranbury students as a result of the anticipated population growth in Lawrence. In addition, even if all of the Cranbury students were withdrawn starting in the 1985-86 school year, there would not be a significant impact on the student population since the Cranbury students represent less than ten percent of the Lawrence High School population. It was also not disputed that there would be no impact on the number of courses offered by the Lawrence Board since the Cranbury students are scattered among the approximate 135 courses (3T 109, P-5, P-7, P-8).
>
> "Even though the respondent is now opposing the termination of the sending-receiving relationship, the Cranbury Board expressed the concern that at sometime in the future the Lawrence Board may demand the termination of the relationship because of overcrowding at the high school due to the increase in Lawrence students. The Lawrence Board denied that this would occur and there is no evidence to dispute the respondent's representation that Lawrence High School can accommodate both the increased number of Lawrence students as well as the Cranbury students." (Initial Decision, ante)

By adopting the above, the Commissioner determines that there is an absence of negative impact on educational factors due to pupil population if Cranbury were permitted to withdraw from its relationship with Lawrence.

As previously stated herein, absence of negative impact on racial balance was stipulated by the parties and negative impact on facilities was not raised. The Commissioner will, therefore, review the fourth principal factor articulated by the State Board, namely financial impact.

Cranbury has advanced as an argument in support of its petition that no negative financial impact will result if it withdraws from Lawrence. The judge determined that:

1. In the first year of phased withdrawal of Cranbury pupils, a reduction of $154,000 in tuition revenue for Lawrence would result and that loss would increase over four years to $500,500.

2. The loss would be partially offset by additional state aid for new Lawrence pupils.

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3. It is reasonable to expect increase in tax ratables because of the new construction in Lawrence during the next several years.

4. There was no evidence submitted to show how much additional monies would be available to the Lawrence Board from an increase in ratables.

5. If the increase in state aid and increase in ratables is not sufficient to make up for the loss of the Cranbury tuition, the Lawrence Board would have to either request an increase in property tax or would have to make cuts in its budget which might affect its educational program at the high school. (Initial Decision, ante)

With respect to financial impact, the Commissioner has thoroughly examined the record in this matter, the parties' exceptions, and he also requested that the Department of Education's Division of Finance review this portion of the initial decision (Exhibit C-1). As a result of careful consideration of the issue, the Commissioner concurs with the judge's findings and conclusion that Cranbury has not shown that there would be an absence of negative financial impact if it were permitted to terminate its sending-receiving relationship with Lawrence. The record in this matter supports that withdrawal of Cranbury Township pupils and the concomitant tuition loss to Lawrence would require a substantial financial burden to be borne by the taxpayers of Lawrence in order to maintain the current level of educational programs and services being provided. In the Commissioner's judgment, the estimated loss at the end of the four-year phased withdrawal contained in Finding No. 1 enumerated above is very likely a conservative figure since it does not reflect an increase in the amount of tuition that will unquestionably occur over the four-year period; a more realistic tuition figure could conceivably be as high as $7,000 per pupil according to estimates derived from the department's financial data on Cranbury (C-1).

Lawrence argues that the tuition loss would affect its educational program and the judge has concluded that Cranbury has not shown that the financial impact would not affect Lawrence's educational program. The Commissioner, however, does not agree that there has been a showing by a definite presentation of facts that the tuition loss itself will have significant impact on educational offerings because the exact extent of such impact is only speculative at this point. There is no doubt, however, that the tuition loss would cause Lawrence to exert significantly greater financial effort or face budgetary restraints which might conceivably adversely affect programs. This is true particularly if projected increases in Lawrence's pupil population do not materialize. While Dr. Ramsey's projections might be borne out, the Commissioner cannot

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place heavy reliance on them when taking into account that Lawrence's cap waiver request to the department for 1985-86 estimates an increase of only 50 students (C-1). When coupling the above with the fact that the budgeted tuition for Cranbury pupils represents 4.3% of Lawrence's 1985-86 school year's current expense budget, a percentage which is not deemed insignificant, it cannot be said that there is an absence of negative financial impact.

In reaching a final determination in this matter, the Commissioner must be guided by the State Board's decision in Brielle, supra, which states the following:

> "***[T]he current standard does not require that 'positive benefits...accrue to the high school students sufficient to overcome the claims of the receiving district to these pupils.'*** Rather, as stated, if the petitioning district demonstrates a good and sufficient reason for withdrawal, one that is in the educational interests of its students, withdrawal will be permitted if no significant negative impact is shown.***"
> (Emphasis in text.) (at p. 9)

Upon a thorough and careful review of the record in this matter and the current standard of review articulated by the State Board, the Commissioner determines that Cranbury should not be permitted to sever its sending-receiving relationship with Lawrence because it failed to demonstrate an absence of significant negative financial impact. Further, in the Commissioner's judgment, Cranbury has also failed to demonstrate good and sufficient reason.

While Cranbury has demonstrated by a definite presentation of facts that (1) Princeton High School is closer to Cranbury than to Lawrence High School, (2) travel to Princeton High School would require less time/fewer miles on Route 1 than is currently required to reach Lawrence High School and (3) Cranbury has community ties to Princeton, the Commissioner does not agree that any one fact or a combination of all three rise to the level of good and sufficient reason because:

1. Cranbury failed to demonstrate by a definite presentation of facts that travel time/distance on Route 1 is more dangerous than on local roads.

2. While there is closer proximity to Princeton High School than Lawrence, this does not provide good and sufficient reason to sever a sending-receiving relationship because, in the Commissioner's judgment, the existing distance and time was not shown by Cranbury to be a negative factor on Cranbury pupils' education and there is no case law to sup-

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port the proposition that closer proximity may be the basis for termination of a sending-receiving relationship.

3. While community ties were demonstrated, such ties unto themselves, or even when coupled with travel factors, do not constitute good and sufficient reason to sever a sending-receiving relationship. In the Commissioner's judgment, Jenkins, supra, does not provide support for considering the community ties in this matter good and sufficient reason for terminating Cranbury's relationship with Lawrence, given the fact Cranbury and Princeton do not constitute a single community and they are not integrally related to one another, as was the circumstance in Jenkins.

Accordingly, the Commissioner adopts the Office of Administrative Law's recommendation denying permission for Cranbury to withdraw from its sending-receiving relationship with Lawrence for the reasons expressed herein.

Further, upon consideration and examination of Cranbury's exceptions with respect to discovery, expert testimony and reports (Exceptions seven through nine), the Commissioner is unpersuaded that the legal arguments contained therein compel reversal of the above determination.

COMMISSIONER OF EDUCATION

September 30, 1985

Pending State Board

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INITIAL DECISION
OAL DKT. NO. EDU 1482-85
AGENCY DKT. NO. 24-2/85

EDMOND CILENTO,
Petitioner,
v.
BOARD OF EDUCATION OF THE
TOWNSHIP OF HILLSIDE, UNION COUNTY,
Respondent.

Nancy Iris Oxfeld, Esq., for petitioner
(Oxfeld, Cohen & Blunda, attorneys)

Sanford A. Meskin, Esq., for respondent
(Goldhor, Meskin & Ziegler, attorneys)

Record Closed: August 2, 1985 Decided August 20, 1985

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

In February 1985 the petitioner, Edmond Cilento, a tenured teaching staff member employed by the respondent, Hillside Board of Education, filed a petition of appeal with the Commissioner of Education in which he maintained that although a charge of simple assault filed against him in the municipal court arising out of the performance of his duties had been dismissed, the Board had failed to honor his request for reimbursement of his costs and expenses as required by N.J.S.A. 18A:16-6.1. The ground

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relied upon by the Board for its refusal was that a charge of simple assault is not covered by the statute since it is a "disorderly persons offense," not a "criminal action" for which reimbursement would be required under the statute. The Board's answer to the petition of appeal also raised as separate defenses claims that the Board was deprived of the opportunity to give prior approval to the teacher's choice of attorney, that the amount of the legal fee charged to Cilento was excessive, and that some of the legal work for which reimbursement was sought had occurred before the Board even was notified that counsel had been engaged.

Following joinder of the issues, the matter was transmitted by the Commissioner to the Office of Administrative Law for plenary hearing pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

A prehearing conference was conducted before the undersigned administrative law judge in May 1985 and several issues were addressed in the prehearing order, including the applicability of the statute to the facts in this case, the reasonableness of the counsel fee, whether the additional costs of the instant action are also subject to reimbursement, whether the fees paid by Cilento to his attorney should first have been negotiated with the Board, and whether any portion of the fee which related to work done prior to notice of counsel's engagement is properly reimbursable at all.

STIPULATED FACTS

At the outset of the hearing, counsel agreed to a Joint Stipulation of Facts (Exhibit J-1) which set forth the following agreed facts:

1. A charge of simple assault pursuant to 2C:12-1(a)(1) was made against a teacher employed by the Hillside Board of Education in the Hillside Municipal Court. The charge pertained to the performance of his duties as a teacher.

2. The teacher, Edmond Cilento, retained the law firm of Oxfeld, Cohen & Blunda, Esqs. to represent him on these charges.

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3. That law firm notified the Hillside Board that they were representing the teacher by letter dated May 11, 1984. This notification was forwarded to the Board after two and seven-tenths(2-7/10) hours were expended by that law firm in the performance of their services for Mr. Cilento. Their representation of Mr. Cilento was stated to be pursuant 18A:16-6.1.

4. The charge was ultimately dismissed in the Roselle Municipal Court.[*]

5. Total hours billed to the Board were ten and one-tenth (10-1/10th) hours, or $750.50 in fees.

6. The Board of Education refused to pay the bill on the basis that the offense charged which was "simple assault" is not a "crime" and simple assault does not come within the purview of R.S. 18A:16-6.1 and attorney's fees for that offense is [sic] not reimbursable pursuant to such statute.

Counsel then stipulated on the record that the reasonableness of the legal fees incurred by Cilento with respect to defense of the municipal court action ($750.50) was no longer in issue. In addition, it was agreed that with respect to the question of whether the additional fees incurred by Cilento in connection with the instant appeal to the Commissioner were subject to statutory reimbursement that, in the event a finding favorable to petitioner occurred, counsel would make an effort to stipulate to the amount of the additional fees involved. In the alternative, one hearing day would be scheduled in order to receive evidence on the amount and reasonableness of those fees. Thus, by virtue of the filing of the Joint Stipulation of Facts, together with the additional stipulation stated for the record, no testimony was presented at the hearing. Both sides filed post-hearing briefs, and the matter may now proceed to an initial decision.

*The municipal court judge in Hillside disqualified himself for reasons not here pertinent and the case was transferred to and heard in Roselle. See, R. 7:4-3(b).

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DISCUSSION

The threshold issue is whether petitioner is entitled to the benefits of N.J.S.A. 18A:16-6.1 with respect to fees incurred by him in connection with his defense against a disorderly persons charge which was dismissed in municipal court. The Board's position, as noted, is that the Legislature deliberately restricted that statutory entitlement to successful defenses against "criminal actions," and since "simple assault" is statutorily defined as a "disorderly persons offense," and such offenses are not considered to be "crimes," no reimbursement is proper. For the reasons which follow I must disagree with the Board's position.

The statute, N.J.S.A. 18A:16-6.1, provides for reimbursement of costs, including reasonable counsel fees, to a teaching staff member who successfully defends against a "criminal action" brought against the member for any act or omission arising out of and in the course of the performance of his or her duties. It is a companion to N.J.S.A. 18A:16-6, which provides for such costs to be defrayed where a teaching staff member defends against "any civil action." While the Code of Criminal Justice specifically excludes "disorderly persons offenses" from the category of "crimes within the meaning of the Constitution of this State," N.J.S.A. 2C:1-4b, this is not dispositive of the issue at hand. Both disorderly persons offenses and crimes are considered to be "offenses" under the Criminal Code. See, N.J.S.A. 2C:1-14k; see also, State v. Kates, 185 N.J. Super. 226 (Law Div. 1982). The inherent relationship between a disorderly persons offense and a crime was recognized in State v. Mraovitch, 176 N.J. Super. 141 (App. Div. 1980). There, the Appellate Division held that an indictment for a crime which involves the same substantive underlying conduct that would also constitute a disorderly persons offense would not subject the employee to dismissal on that ground alone. In other words, conduct which gives rise to a disorderly persons offense can still be treated in appropriate situations as "criminal" even though it is not technically a "crime" under the State Constitution.

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The criminal action reimbursement statute was enacted in 1965. See, L. 1965, c. 205, §2. In an introductory statement, it was noted that the bill was intended to provide "legal help under limited circumstances in the event of a criminal action against an employee." Clearly, that observation articulates the logical conclusion that insofar as the Legislature was concerned, it was important that teaching staff members be given financial protection whenever they were made the subject of any legal action, be it civil or criminal, so long as the costs are reasonable and the conduct arose out of and in the course of the performance of their duties. Sensibly, reimbursement in non-civil cases was limited to dismissals or otherwise successful defenses. It is doubtful in the extreme that the Legislature intended that only those criminal offenses which called for indictment and jury trial were to be covered.

Statutes, of course, are to be read and construed in a sensible fashion. See, e.g., Suter v. San Angelo Foundry and Machine Co., 81 N.J. 150, 160 (1979). When one considers the total protection which N.J.S.A. 18A:16-6 and N.J.S.A. 18A:16-6.1 plainly are intended to provide for teaching staff members, it would not be sensible to conclude that disorderly persons charges, which represent a potentially large category of offenses which can be brought against teaching staff members in the local municipal courts, were intended to be excluded. Indeed, as petitioner accurately notes in his posthearing brief, a charge of simple assault by a student against a teacher is a circumstance which unfortunately may not be foreign to the student-teacher relationship. I cannot assume that in enacting N.J.S.A. 18A:16-6.1, the Legislature deliberately determined to confine the reimbursement benefit in such a narrow way as to knowingly exclude disorderly persons offenses from the ambit of "criminal actions."

By way of further support for the applicability of the statute to the instant case, consideration also should be given to the reason for the development of the category of disorderly persons offenses in the first place. As petitioner points out, there was no such category at common law, and simple assaults originally were treated just like more serious offenses, to include indictment and trial by jury. See State v. Maier, 13 N.J. 235, 241-242 (1953). Eventually, the categories of "high misdemeanor" and "misdemeanor"

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were constructed, and certain crimes which were thought to deserve a lesser penalty were placed into that latter category. Then, through case law and statutory development, the line between major and minor offenses became even more firmly fixed, vis-a-vis right to indictment, trial by jury and the potential penalty for violations. See, e.g., In re Buehrer, 50 N.J. 501 (1967); State v. Owens, 54 N.J. 153 (1969). Thus, the division of criminal offenses into "crimes" and "disorderly persons offenses" was not necessarily a functional, qualitative distinction; rather, it was a distinction built upon the recognition that certain types of anti-social conduct were less severe than others, and therefore deserving of separate treatment, insofar as a sanction was concerned. However, to one charged with the conduct, the distinction is not always so meaningful. In the circumstances of a case involving a teacher charged with an assault by a pupil, the fact that it is characterized as a "disorderly persons offense" offers little solace, since the engagement of an attorney and having to make a court appearance has a financial component and an emotional drain which can not lightly be disregarded on the ground that no "crime" was involved.

In summary, then, I believe that in enacting N.J.S.A. 18A:16-6.1, the Legislature did not intend to exclude from its protection circumstances involving disorderly persons offense charges leveled against teaching staff members. Thus, unless otherwise barred for reasons independent of the sort of offense involved, the dismissal of the charge of simple assault against Cilento in municipal court does give rise to his entitlement to be reimbursed by the Board for the reasonable costs and expenses incurred in defending the action.

The next issue raised by the Board is whether there is an obligation placed upon a teaching staff member first to negotiate the proposed fee before engaging counsel of his or her choice. In this respect, the Board points to the decisions of the Supreme Court and the Appellate Division in the following cases: (1) Van Horn v. City of Trenton, 80 N.J. 528 (1979); and (2) Tp. of Edison v. Mezzacca, 147 N.J. Super. 9 (App. Div. 1977). Both cases involved N.J.S.A. 40A:14-155, the statute respecting payment of legal expenses incurred by police officers in defending against criminal charges. In Mezzacca, the court pointed out that the municipality was entitled to exercise some control over the cost involved and, therefore, should have some idea, in advance, of what those costs would

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be. In Van Horn, which involved a claim for indemnification of legal expenses incurred as a result of a grand jury investigation, the court referred to the Mezzacca case and approved the view that a municipality ought to have an opportunity to determine whether the most appropriate method of meeting a statutory obligation is to provide the police officer with counsel it selects. According to the Board in the present case, there should be no distinction drawn between boards of education and municipal governing bodies, since both are called upon to expend tax moneys in response to a demand by a public employee who has to defend against a criminal matter. Thus, the Board asserts that it should at least have had the same opportunity to decide whether it could afford to pay the Oxfeld firm's fee, before it was incurred.

Neither the Van Horn nor the Mezzacca cases are applicable here. The statute pertaining to teaching staff members contains language quite different from that found in the statute involved in those two cases. The latter statute expressly provides that with respect to actions or legal proceedings against municipal police officers, it is the duty of the governing body in the first instance to provide the member with, "necessary means for the defense of such action or proceeding." This places an initial responsibility upon the governing body either to choose counsel or to at least review the member's alternate choice. The particular language used in N.J.S.A. 18A:16-6.1 neither expressly nor by implication introduces that concept. Instead, it places a responsibility upon the board to pay cost and expenses legitimately incurred, provided they are "reasonable." Nothing in the education statute supports the proposition that a teaching staff member cannot hire counsel of his or her own choice--the only limitation is that the potential reimbursement must be based upon a test of reasonableness.

In addition, since the Board has withdrawn its initial challenge to the reasonableness of the fee involved in this case, it can be argued that this also removes any other issue touching upon the petitioner's choice of counsel or the timing of the choice. The thrust of the Van Horn and Mezzacca cases had to do with protection of the municipal treasury. If, as here, there is no claim that the proposed fee is unreasonable in that

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respect, then it would seem to me that there is no need to consider a claim that the Board should first have reviewed the teacher's choice of attorney and the amount of the proposed fee.

So too, I see no merit in the Board's claim that consideration must be given to the fact that a portion of the fee related to work which was billed prior to the time that the Board was informed of the engagement of counsel. Here again, acceptance of the reasonableness of the total fee possibly can be construed as a waiver of that claim. Further, there very well may be circumstances in which a teacher simply does not have the luxury of time in which to first advise the Board of the attorney he or she has consulted and/or retained. In essence, given the facts and circumstances of this case, I cannot accept the Board's argument that the 2.7 hours of work incurred on Cilento's behalf before the Board was advised of counsel's engagement possibly need not be reimbursed.

The final issue has to do with the question of whether petitioner is entitled to reimbursement for the costs of pursuing the instant action against the Board. The statute provides that reimbursement is appropriate with respect to the cost incurred in pursuing "all appeals" from the original proceeding. According to petitioner, the instant action does fall within the scope of the statute since he was required to file a "petition of appeal" with the Commissioner in order to seek vindication of his rights. Since the statute does not specifically preclude appeals to the Commissioner, it is petitioner's position that it, too, must be considered to fall within the scope of the legislative scheme. Petitioner observes that if the cost of the instant case is not included, then situations easily may arise where in order to seek vindication of a valid claim which is met with a board's resistance, the teaching staff member will often incur expenses beyond those which he or she might recover in the initial action. This situation constitutes, in petitioner's view, a "chilling effect" on the exercise of the statutory rights vested by N.J.S.A. 18A:16-6.1 and argues that the Legislature could not have intended any such result.

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The Board, in response to the argument, maintains that a plain reading of the statute clearly indicates that costs and counsel fees are not to be reimbursed except where an appeal is taken to an appropriate forum from the original hearing or trial. Since the simple assault charge in this case was dismissed, there was no appeal—consequently, there was no basis for reimbursement under the statutes.

With respect to the instant issue, I agree with the Board and reject the petitioner's assertions. Interestingly, a similar claim was raised in the Van Horn case and in its decision the New Jersey Supreme Court pointed to the traditional rule that a prevailing litigant ordinarily is precluded from collecting an attorney's fee from the other party, except in specific cases that fall within the scope of a narrow court rule. Thus, reimbursement of counsel fees incurred by one forced to litigate his right to enforce a statutory claim will not be allowed, absent a showing of bad faith. See, Van Horn, at 538.

Having reviewed the particular circumstances in this case, I do not **FIND** that the Board's refusal can be attributed to any malevolent motive, or otherwise is tainted with any element of bad faith. The Board mustered what it believed to be a meritorious defense to the reimbursement claim, and it is entitled to the benefit of any doubts concerning the sincerity of its conviction about that claim. Finally, if the claim for counsel fees for the instant appeal is considered independent of the statute, and treated simply as a request for an award of counsel fees in the abstract, the Commissioner has had a longstanding policy of denying same. See, e.g., Bickford v. Bd. of Ed. of Elmwood Park, 1978 S.L.D. 855; Winter v. Bd. of Ed. of N. Bergen, 1975 S.L.D. 236; see also, Errington v. Mansfield Tp. Bd. of Ed., 100 N.J. Super., 130 (App. Div. 1968). Thus, no counsel fees are appropriate with respect to Cilento's present appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Joint Stipulation of Facts (Exhibit J-1) contains the essential facts upon which the decision in this case can be made and they need not separately be discussed herein. See, pp. 2-3, supra. In view of the foregoing discussion, when considered in the light of those stipulated facts, it is the opinion of the undersigned Administrative Law

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Judge that the petitioner is entitled to be reimbursed for the expenses he reasonably incurred in connection with his defense against the disorderly persons charge which was ultimately dismissed by the Roselle Municipal Court. The total of those expenses have been stipulated to be $757.50. The Board is, therefore, **ORDERED** to pay that amount to the petitioner upon proper presentation by him of proof that he actually has incurred that expense. In addition, it is further **ORDERED** that petitioner be denied reimbursement of any costs and expenses incurred in connection with the filing and pursuit of the instant petition of appeal.

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

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

DATE — **STEPHEN G. WEISS**, ALJ

AUG 21 1985

Receipt Acknowledged:

DATE — DEPARTMENT OF EDUCATION

Mailed To Parties:

August 22, 1985

DATE — FOR OFFICE OF ADMINISTRATIVE LAW

par/e

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EDMOND CILENTO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner concurs with the recommended decision of the Office of Administrative Law and adopts it as the final decision in this matter for the reasons stated in the initial decision.

COMMISSIONER OF EDUCATION

October 7, 1985

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2724-84
AGENCY DKT. NO. 52-3/84

BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY
Petitioner,

v.

PATRICK CAPORASO,
Respondent.

Lawrence S. Schwartz, Esq., for petitioner
(Schwartz, Pisano and Simon, attorneys)

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

Record Closed: June 28, 1985 Decided: July 22, 1985

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

The Board of Education of the Township of Belleville, Essex County, certified on March 12, 1984 and filed with the Commissioner of Education on March 14, 1984 charges of conduct unbecoming a teacher against Patrick Caporaso, a tenured teaching staff member, pursuant to N.J.S.A. 18A:6-10 et seq., in that respondent while employed by the Board had sexually assaulted a student and maintained contact with him for approximately six years and, further, that respondent is suspected of being involved in child sexual abuse and child pornography. Respondent was given notice of charges and a written statement

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of the evidence supporting them. He was suspended by the Board without pay on March 12, 1984. He filed an answer in general denial with the Commissioner on April 10, 1984. Accordingly, the Commissioner transmitted the matter to the Office of Administrative Law on April 17, 1984 for hearing and determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

On notice to the parties, a prehearing was conducted in the Office of Administrative Law on June 21, 1984 and an order entered. On motions by both parties jointly, an order was entered permitting the deposition to be taken of Board witness John Sileo, good cause have been shown pursuant to N.J.A.C. 1:1-11.3, with the condition that such deposition be concluded expeditiously thereafter. Consistently with N.J.A.C. 6:3-2.1, 2.5 and 2.6, respondent was directed to move on affidavit and/or certification of need for an order permitting access and review of mandated and/or permitted pupil records of Sileo in the custody of the Board of Education of the Town of Nutley, Essex County, and in particular any such pupil records as defined in N.J.A.C. 6:3-2.3(a)(iv). Any such records accessed or reviewed were directed to remain subject to confidentiality and privacy requirements of N.J.A.C. 6:3-2.6. An order was subsequently entered to that effect by the administrative law judge. The prehearing conference order established, finally, hearings in the matter to begin October 1, 1984.

Thereafter, respondent filed a motion to dismiss tenure charges against him (a sanction set forth in N.J.A.C. 1:1-3.5) on the ground the Board had failed to answer written interrogatories propounded upon it within time limits established in the prehearing conference order. Respondent further urged the deposition of Sileo had not been taken and the resulting prejudicial delay in preparation for defense of tenure charges required they be dismissed.

In answering certification, the Board noted that Sileo, an indispensable witness for the Board, had refused on advice of counsel to submit to deposition, for which he had been subpoenaed on August 13, 1984. Criminal charges were currently then pending against him in Essex County Superior Court. It was represented Sileo would

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cooperate in giving his deposition and would be available for testimony at hearing but only after disposition of criminal charges against him. The Board's inability to answer written interrogatories, it was said, was delayed because of unavailability of Sileo for interview.

The administrative law judge denied respondent's motion to dismiss tenure charges, the Board having conceded respondent's salary resumption rights under N.J.S.A. 18A:6-14 would not be prejudiced by continuance of the hearing of October 1 until such time as the Board's witness became available for testimony. Hearing was continued to December 18, 1984. The decision on motion was reduced to writing, filed in the cause and is made a part hereof by reference. It was not reviewed interlocutorily by the Commissioner under N.J.A.C. 1:1-9.7.

Thereafter, hearing scheduled for December 18,1984 was adjourned at request and/or by consent of the parties upon the same condition of continued salary resumption.

Hearings in the matter were conducted in the Office of Administrative Law on March 26,1985, March 27, 1985, April 2, 3, 11 and 16, 1985. On April 11, 1985, the administrative law judge, on motion by respondent, entered an order directing Sileo to submit to psychiatric examination by Seymour F. Kuvin, M.D., F.A.C.P., who, it was directed, was to be supplied with child study team files of Sileo (R-1 and R-2). The report was ordered to be filed with the parties and the administrative law judge, any dissemination of pupil records remaining subject to conditions and limitations of N.J.S.A. 18A:36-19 and N.J.A.C. 6:3-2.2(a)(3), (4). A written order so directing was filed in the cause and served upon the Commissioner on April 15, 1985, by whom it was reviewable under N.J.A.C. 1:1-9.7. The order and enclosing letter to the Commissioner is filed herein and made a part hereof by reference. The order was not interlocutorily reviewed. It was executed by the examining physician, whose choice was by stipulation of the parties. Two reports of Dr. Kuvin were entered into evidence by agreement of the parties as J-4 and J-5.

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On June 6, 1985, respondent moved to reopen the evidential record to receive testimony of the Belleville school superintendent, the proffer being he would testify the Nutley superintendent never told him of certain disclosures Sileo allegedly made to Nutley school personnel. The Board objected, arguing the proffer was of remote and irrelevant matters, was untimely and prejudicial to Board interests, presumably the Board's salary resumption obligations under N.J.S.A. 18A:16-14. For reasons given in a written opinion by the administrative law judge, respondent's motion was denied on June 25, 1985. The order was filed in the cause, served upon the Commissioner for interlocutory review under N.J.A.C. 1:1-9.7. It was not thereafter reviewed by the Commissioner and is made part hereof by reference. Thereafter, post-hearing submissions having been made, the record closed.

EVIDENCE AT HEARING

I

Called by the Board, John Sileo testified he was born in the Borough of Queens, New York and, at the age of three months, was adopted and taken by his adoptive parents to Newark, and, ultimately, to Belleville, New Jersey in July 1972. He attended no. 3 school in Belleville in the fifth grade where his teacher was a Mrs. Rinaldi. After two weeks in the sixth grade he was cleared to attend a neurologically impaired class in Belleville school no. 4 following evaluation by the child study team. He was 12 years old at the time. That was in September 1973. At no. 4 school, he said, respondent was his teacher in a neurologically impaired class, which in 1973-74 consisted of seven pupils and in 1974-75 of six pupils.

During the school year 1973-74, the sixth grade, he said, something of a sexual nature began. Respondent when taking him to a reading table would put his fingers on his legs and then fondle him in the groin area, saying "This will relax you." That occurred several times, he said. He did not see respondent do that with other students but said that

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other students later told him respondent had done so with them. Sileo said he did not report the actions to anyone because repondent was his teacher and, he said, he was in love with him. He saw no reason to tell his parents or the principal, a Mr. Niardiello, who was respondent's uncle, or anyone else. He started again in school no. 4 in September 1974 in a neurologically impaired class, again with respondent as teacher. In the classroom, from the door, a cubicle was positioned to one's right. Against the wall was a cloakroom, a teacher's closet, a bookcase and then windows. In front were four blackboards divided so one could walk through to another classroom. The reading table was near the teacher's desk. Photographs marked P-1, 2, 3, and 4 depicted the classroom, he said. The cloakroom was approximately 15 feet long and 8 feet high. There were four hinged doors, which, if closed, made depth of the closet some 3 1/2 to 4 feet.

Beginning in September 1974, he said, there were six pupils in the class. He experienced the same fondling by respondent that year a few weeks after start of the term. For the first six or seven months, he said, nothing else occurred.

In April 1975, Sileo said, when his family moved from Belleville to Nutley, he received permission to continue in the Belleville school district at no. 4 school. By then, he said, his behavior had become "sporadic." Respondent cautioned him, he said, that if he acted up three times more by the end of year, he would have to be disciplined "with my pants down." Sileo said he went along with the caution but did not like it. When he had used up the three times, the last by yelling down the hall, respondent reminded him of the caution. After lunch, respondent cleared the class by sending other students to another classroom. When alone, Sileo said, respondent told him instead of being spanked there was another way to do it. Taking him into the closet, Sileo said, respondent began to fondle him. Respondent took his own pants down and told Sileo to "s... my d..." They were both in the classroom closet at the time. Though the closet doors were opened, Sileo said, the classroom doors were closed. Respondent pulled his pants down and fondled Sileo. Sileo did as he was asked to by respondent, who was naked from the waist down. He did not experience orgasm, he said, because of a disturbance in the hallway that respondent went

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out to see. He then got other students from the bus, according to Sileo, and waited until they got their lunchboxes. After they left, according to Sileo, respondent said it would be nice to have other students do something (have sex) with him. Respondent said the students were all "his kids." After about 15 minutes in all, Sileo left the room and got on the bus at the rear of the school.

According to Sileo, nothing else occurred sexually during the rest of the 1974-75 school year. Sileo said he told no one else about the experience because, he said, he loved respondent, who was his special education teacher and he, Sileo, would have been embarrassed. He learned the notion of having sex only with loved ones from his parents, he said. Later, Sileo said, respondent called his house to ask if he would go out with him, for example, to a junior chamber of commerce carnival, or to eat, school having ended in June 1975. Sileo got the feeling his and respondent's relationship was to continue although, he said, at the time he had not intended to see respondent again. Respondent told him and other students at the end of the year, they were all his students and he intended to check up on them for a long time. He talked of a ten-year reunion.

In the Summer of 1975, during July (the second incident), Sileo said he received a call from respondent at his house asking if he would visit respondent. Respondent told Sileo he had a new camera to try out. Using his bicycle, Sileo went to respondent's house and was taken upstairs to respondent's bedroom to take polaroid pictures. Sileo described the bedroom as extremely small with two windows facing toward Mill Street. Respondent asked Sileo if he could take a picture of him in the nude. Sileo said he declined. Respondent asked if he could take Sileo's picture wearing underwear and socks. Sileo acceded. He took his underwear off, said Sileo, while respondent took his pants off. Photographs were identified in evidence as P-5, 6 and 7 as those taken. After the photographs were taken, Sileo said, each engaged in oral sex and respondent committed anal penetration upon him, said Sileo. Respondent experienced ejaculation; Sileo said he did not. Afterwards, he said, both dressed and Sileo returned home on his bicycle. Again, he said, he did not tell anyone about the experience because he found it too embarrassing. He was then only 14 years old, he said, and felt the matter was better left between them.

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The remaining incidents of sexual contact, said Sileo, were all confined to the Summer of 1975. The third incident occurred a week later on a Sunday when respondent called him at home and spoke to his mother and to him. On respondent's invitation, he said they went to a diner in Lyndhurst where respondent told Sileo he could order anything he wanted. Respondent then took him to the therapy office of a local doctor for whom he worked and to whose private office he had a key. Sileo said respondent wanted oral sex but Sileo refused because he feared they would be caught. The doctor lived next door to the office. Sileo said he played on a trampoline in the therapy office, after which respondent took him home. They did not undress, he said.

A fourth incident occurred a week or ten days later, again on a weekend. Sileo said respondent had picked him up and they went back to respondent's house where Sileo said he gave respondent oral sex and where respondent committed oral sex upon him. Sileo said respondent also performed anal sex upon him and ejaculated into his rectum, very quickly. That occurred, he said, on the first floor of the residence. No one was home at the time. Both undressed first. Respondent drove him home, Sileo said.

The next incident, the fifth, occurred some two weeks later when Sileo and respondent went to a glass recycling center operated by the junior chamber of commerce chapter at a site in Kearny across the Passaic Bridge. They went to smash or break glass to help in a glass recycling drive. Afterward they went across the bridge to respondent's then fiancee's house, which was located off Grand Avenue and Washington Street and where no one was home at the time. Sileo said respondent took him to Kathy's (his fiancee) brother's bedroom. He described positioning of the bed and placement of the room in the house. Sileo said respondent got K-Y jelly from the bathroom. Sileo performed oral sex on respondent after which he did the same to Sileo. That was followed by respondent's performing anal sex upon Sileo, he said. Respondent used the K-Y jelly and again, as before, according to Sileo, ejaculated quickly. After talking, respondent took Sileo home.

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In the sixth incident, Sileo said, respondent took him out again to break glass at the glass recycling center, after which they returned to respondent's brother's home, an apartment to which respondent had a key. According to Sileo, he first performed oral sex on respondent, and respondent performed oral sex on him. When respondent attempted to use K-Y jelly or vaseline for anal sex, Sileo said, he objected, whereupon respondent became nasty. Respondent gave him an ultimatum to perform a sex act or he would "f..." him in the "a.." Sileo said he complied. Respondent then performed anal sex upon him, which, Sileo said, hurt him physically. After that, he said, he determined to have nothing further to do with respondent.

Later, he said, he was upset and unhappy but said nothing because he retired into his shell to attempt to get over the experience. Sileo did not see respondent anymore that Summer. According to Sileo, during the Summer of 1975 he had both respondent's telephone number and that of his fiancee Kathy. Sileo identified P-8 (March 26, 1985) as a telephone index in Sileo's handwriting containing respondent's address on Mill Street, Belleville, and telephone number 759-3179. He identified Kathy's telephone number in Nutley as 667-0990.

In September 1975, Sileo said, he entered Franklin Jr. High School in Nutley in the seventh grade but was soon put into the eighth grade with four major courses. He identified his neurological impairment as a motor-hand defect affecting his typing, writing and working to some extent, as well as his eye-to-hand coordination. He graduated from Nutley High School in June 1980 and later attended one semester at Bloomfield College.

Between October 1975 and December 1975, he said, Margaret Murray was his Nutley junior high school guidance counselor. Eventually, they became close friends. At the time his mind was in turmoil about his potential for homosexuality as opposed to that for heterosexuality. Sileo said he told her of "someone, a friend" who had homosexual relations with an older person. Eventually, he said, he admitted to her he was the "friend." He told her the person with whom he had homosexual relations was respondent,

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known as "Mr. Cap." He ultimately also told his mother of the experiences, as well as a Mr. Patrick Antonelli of the child study team. (See R-2A). One member of the team felt respondent should be arrested, Sileo said, but Sileo said he felt he was still in love with respondent and thought the matters should be left as they were. The problem of "me" was still left open, he said.

Sileo said respondent called him once about the end of September 1975. He saw respondent every year afterwards at a junior chamber of commerce carnival and saw him about twice before he was arrested. He received a phone call from respondent in late 1978 when respondent said he had a surprise for him. According to Sileo, respondent gave him the photographs marked P-5, 6 and 7 in evidence. Although respondent propositioned him again, Sileo said, he declined. Another time, in 1980, Sileo said respondent called him to ask help in arranging a reunion.

Sileo admitted he has committed homosexual acts with others.

He admitted he was indicted by an Essex County grand jury on fourteen counts of sexual assault, endangering welfare of minors and/or uttering terroristic threats during January 1983 through November 30, 1983. He pleaded guilty to two counts of sexual assault under N.J.S.A. 2C:14-2, involving victims at least 13 years but less than 16 years old and one count of endangering the welfare of a minor. The pleas of guilty were subject to a plea bargain agreement approved by the court. At time of hearing respondent had not yet been sentenced on his pleas of guilty. Maximum sentence exposure is 21 and 1/2 years. As part of the plea-bargain, he said, he was required to testify truthfully under oath in present proceedings against respondent. No other promises were made to him, he said, except that of reducing potential maximum sentence from 95 years to 21 and 1/2 years. He presently hopes to be sentenced to New Jersey Psychiatric Rehabilitation Center in Avenel for evaluation and treatment.

From January 1983 until November 30, 1983, Sileo said, he belonged to and was a "pastor" of the "Fourth Satanic Church of the United States." Under tenets of the church, a cultist believes in a supreme being - himself: that is, each satanist is a god unto himself. Right and wrong is determined by the satanic bible and man's laws. The cult

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does not believe in ritual killings or sacrifices. Each member is a god, like an atheist. Sex with children or animals is forbidden under church dogma, as set forth in a chapter on sex in its bible. Respondent was not involved in his membership in the satanic church, Sileo said. Sileo himself founded the fourth satanic church but is now dissociated from it. He believed there were some eleven churches or cults. His, the fourth satanic church, is now defunct. At time of his arrest on November 7, 1983, he said, he was still its pastor. He denied having attempted to get other high school students to join it.

Sileo said his neurological impairment was a motor impairment, involving hyperactivity and dyslexia.

On cross-examination, Sileo recalled the second incident in July 1975 when respondent wanted to show him a new polaroid camera. He said he had been at respondent's home twice before, at an annual picnic and at a sailboat race in an aboveground pool. He was there a third time, he said, with respondent's younger brother in late June 1975 on an invitation to swim. At time of the July 1975 incident, he said, no one was home. Respondent gave him a soda in the living room on the first floor, he said, and they proceeded to respondent's bedroom, located to the far left of the stairwell. In it was a convertible bed, a fold-out type, that is, a twin bed. Shown P-5, Sileo identified the bed. He said he took a photo of respondent at the time but photos marked P-5, 6 and 7 were the only photos returned to him by respondent.

Concerning incident no. 3, Sileo said and respondent went to the doctor's office where respondent worked on a Sunday after lunch at a Lyndhurst diner. On that occasion, he said, the two did break glass at the junior chamber of commerce facility.

Concerning incident no. 5, in the Summer of 1975, he said, he and respondent went to his fiancee's brother's home. He described the premises. He had sex with respondent there, he said.

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All events described, Sileo said, occurred more than ten years ago. He said he tried in testimony to place them in the best and most accurate order he could.

Called by the Board, Antoinette Sileo, Sileo's mother, testified that during the Summer of 1975 her son had received telephone calls from respondent, who identified himself to her when she answered the phone. A few times during that time, she said, respondent picked her son up and they went off together. In the Fall of 1975 as well, she said, Sileo continued to get calls from respondent. Once, she said, the caller refused to give his name but she recognized respondent's voice.

At some time during the Fall or Winter 1975, she said, her son told her what had occurred between him and respondent. First he told her a boy had a problem, a friend who needed help. He told the problem involved a teacher and at first, she said, Sileo refused to say what had occurred. He was fourteen years old at the time. Finally, she said, she asked if he were the boy and Sileo replied that he was. Although he mentioned few details, she said, he did say it was a sexual problem. She knew respondent was her son's teacher and had been for two years. She said she and her son enjoyed a close relationship and he would tell her of his problems, for example, when other children called him names. He began to seem very withdrawn, she said, and at first she was not sure what troubled him. Respondent came to her home many times and often would take Sileo to swim at his home or out for the day or for lunch. The family moved from Belleville to Nutley in May 1975. At about this time her son told her his behavior was becoming uncontrollable. He seemed withdrawn. She was upset when during the Fall of 1975 her son told her about respondent and sexual problems. When he did, she said, she did not tell authorities because for many years her son had always been called names like "retarded" and had been made fun of. She did not want to see him hurt further. There was also a young daughter in the family, she said, who she felt would be unable to cope with the situation. Her son told her also he had told a guidance counselor in the Nutley school system about his problem. The guidance counselor was female; she was the first one he told. She said she did not tell her husband about Sileo's disclosures at first but did so ultimately. The father never reported the matter to the Belleville Board of Education, she said.

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Called by the Board, Margaret Murray testified she is currently employed by the Nutley Board of Education as a guidance counselor and was so employed in September 1975. One of her counselees was Sileo, she said, and, as she did with all her counselees, she established a relationship with him. In the early part of the 1975-76 school year Sileo told her of an incident in Belleville. He had transferred in as a seventh grader in September 1975. He said he had had sexual contact with a Belleville teacher whom he identified as "Mr. Cap." She felt the information belonged more properly in hands of higher authority and reported it verbally, though not in writing, to her principal and a school psychologist. She could not recall whether Sileo had reported one incident or more than one such incidents. She felt Sileo was discovering his sexual preferences and that he told her that experience in order to establish his preference. She formed no opinion as to truth of what Sileo said but felt that for protection of both it should be brought to the attention of school authorities. She denied Sileo had ever said to her at the time he was a member of a satanic group. She found he was not shy and withdrawn, nor was he an excessive talker. She made no report of the matter herself to Belleville school authorities. She did report the matter, however, to her Nutley building principal William Gilligan and to Nutley school psychologist Patrick Antonelli. She reported what Sileo said as soon he told her. (See R-2A).

Called by the Board, Det. Sgt. William Adelham of the Belleville Police Department, Detective Bureau, Juvenile Division, identified J-1 as a police report[1] of investigation he had authored. As stated in the report, he said, Sileo told him on interview he had homosexual relations with respondent several times in a classroom in Belleville school no. 4 in 1974-75. He denied Sileo had been mistreated in custody.

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1 The police report contained a reference to respondent's response to a subsequent request by investigating police officers to take a stipulated polygraph test. Normally, credibility may not be affected by showing a witness' willingness or refusal to submit to such a test. State v. Driver, 38 N.J 255 (1962); and cf. State v. Baskerville, 73 N.J. 230 (1977). No inference is drawn herein from such reference.

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Called by the Board, Det. Sgt. William Escott of the Belleville Police Department recalled interviewing Sileo concerning his experiences with a Belleville teacher. Referring to the police report (J-1 at 2), which contained a reference to Sileo's having spoken to a child study team, Escott testified the reference was to the Nutley child study team. He also recalled having interviewed respondent concerning his touching a child. He said respondent said he would touch students on the leg and the back to calm them. The officer denied having struck Sileo while in custody.

Through Richard W. Banas, Essex County Assistant Prosecutor, the Board made an offer of identification proof of certain objects seized by police in execution of a search warrant at respondent's premises in 1983. The objects included an adolescent-sized dildo, a tube of stay-hard cream and a tube of Kama-Sutra (sexual) cream. The administrative law judge sustained respondent's objection to the proffer on the ground there was no nexus or foundation laid in the Board's evidence in chief between events concerning respondent and Sileo in 1975 and those in the year 1983 when the search warrant was executed. On the evidence, it was held, the objects were equally as consistent with respondent's innocence of the unbecoming conduct charges as with his guilt thereof and, therefore, were prejudicial to respondent. The ruling was without prejudice, however, it was held, to rights of the Board on rebuttal.

The Board rested.

Respondent made a motion to dismiss the charges for failure of the Board to have establish a prima facie case, which was denied by the administrative law judge. Respondent also moved to strike such portions of the police report (J-1 at 2) as referred to respondent's alleged refusal to take a stipulated polygraph test. The motion to strike was denied as made, however, since previously the entire police report had been received into evidence by stipulation of the parties. (See also footnote 1 supra).

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II

Called by respondent, Eleanor Finnegan testified she was a classroom teacher employed by the Belleville Board of Education from 1960 to 1978 and is now retired. During the 1974-75 school year, she taught special education children whose ages ranged between six years and ten or eleven years. They were classified as mentally retarded originally in 1960. From 1975 to 1978, she said, there were received more neurologically impaired students and mainstreaming had begun. She knew respondent, she said, when both worked together on the faculty of Belleville school no. 4. Her classroom was on the second floor and was a big double room. Later the room was divided, with respondent on one side of the building doors and her classroom on the other. Asked whether respondent had ever put all his students in her classroom, she said he had never done so. If the classes were together, she said, both teachers were present. If there were an emergency, the principal would have advised them what to do.

Called by respondent, Sidney Lowry testified he has been employed as a police officer by the Kearny Police Department for the past four years. He said he has known respondent as a friend in the West Hudson Junior Chamber of Commerce and was familiar with the glass breaking activities at the glass recycling project sponsored by the Chamber. The activity usually took place on Saturday mornings, he said, and involved the gathering of members to load used bottles on a truck supplied by North Arlington. A run was made to North Arlington where a donated lot was used for the activity. The glass to be recycled would then be taken to a plant in North Bergen. Lowry said he was there most of the time in the Summer of 1975 during the activity because he had held several offices in the Chamber. Shown P-5, a photograph of Sileo, Lowry said never saw Sileo at the glass breaking activities or ever there in company of respondent. In 1975, he said, respondent held office in the Chamber, either as president or vice-president.

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Called by respondent, Harold Wiener testified he is an optometrist with offices at 64 Ridge Road, North Arlington. He knows respondent, he said, and employed him as a training assistant for patients with learning-related visual problems. Beginning in 1973,he said, respondent helped him with procedures and with children suffering such problems. He has continued to do so, he said, on a part-time basis. The premises as they did in 1975, he said, involve some 3,500 sq. ft. in a two-story structure. An orthodontist has the front portion of the building and Wiener the rest, including a big gymnasium as a training area. There are two entrances, one at the front and a side entrance to the training area. His office leads to the training area. A tenant who lives upstairs in a two-room apartment cleans the office. In 1975, he said, respondent had no key and did not receive one until some six and half years ago, a date he recalled as the time he left for a European trip. In the training area, he added, which occupies some 900 sq. ft., are training paraphernalia including a chalk board, rotators and a trampoline.

Called by respondent, William H. Gilligan, a retired principal of Nutley High School, testified he was principal of Franklin Middle School from 1959 to June 1977. He knew Margaret Murray as an English teacher and as guidance counselor at the middle school. Asked whether Murray had ever come to him with a report of a sexual relationship with a teacher from another school, he said he had no recollection of that. He said he was Murray's supervisor in 1975; Patrick Antonelli was head of the child study team.

Called by respondent, Gioia Crawford testified she has been a Belleville teacher since 1972 and knows respondent as a colleague. She said she taught in the next room to respondent for three years. In 1974-75 she was a teacher in a third grade departmentalized class teaching math and English. Her class, she said, was across the hall from respondent's class. Asked whether respondent had ever deposited his students in bulk in her class, she said he had not. On cross-examination, she said she conceded she could not say whether respondent had ever done that with any other teacher.

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Called by respondent, Catherine Miglionico testified she has been a Belleville teacher for 21 years. She now teaches a class of neurologically impaired students. In 1974-75, she said, she taught a class for educable mentally retarded students and knew respondent then. Her class was diagonally across the hall in school no. 4. Asked whether in 1974-75 respondent had ever placed his class in hers, she noted she and respondent did conduct joint teaching projects occasionally. Although she did not really recall whether respondent ever had left his class with her entirely, she noted that had respondent ever done so, it would only have been for a matter of minutes.

Called by respondent, Ann Lang said she has been a Belleville teacher since 1961. From 1973-75 she taught fifth grade at school no. 4 and knew respondent. In 1974-75, she said, her class was at the opposite end of the hall from respondent's. Asked whether respondent had ever left his class entirely in her room, she said she had not, although, she conceded, it might have happened.

Called by respondent, Joseph Burns said he has been a Belleville teacher since 1971. In 1973-75, he taught sixth grade at school no. 4 in a classroom down the hall from respondent's class. He did not remember respondent ever having left his entire class with him.

Called by respondent, Lucille D'Ambola said she has been a teacher in Belleville since 1970. In 1974-75 she taught third grade in school no. 4. At that time her classroom was separated from respondent's by one room. During that time, she said, respondent never left his entire class with her.

Called by respondent, Lillian Snow testified she has been a Belleville teacher since 1973. In 1974-75 she was an elementary music specialist K-6 and special education teacher. School no. 4 was part of her assignment. On occasion, for music classes, respondent left his entire class with her. She recalled John Sileo as a music student assigned to respondent's class. Music class met once a week, she said.

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Called by respondent, Marian Rubin said she has been a social worker and member of the child study team in Belleville since 1968. Until 1975, she was the only social worker in Belleville and was assigned all schools. She knew Sileo and was on the child study team when he moved to Belleville. Her impression of him over the years was that of a blond, curly-haired, very active student, who was extremely talkative. She formed no close relationship with him. He came back to visit after his family moved to Nutley. She recalled his having talked about being a member of a devil cult, which she and other teachers thought humorous and did not take seriously. Sileo, she said, was known to her and other teachers as having emotional problems. He never said to her he had ever had an improper relationship with respondent. She is a close colleague of respondent, who is an LDT/C.

Called by respondent, Mary Gialanella, a retired Belleville teacher, said she taught at school no. 4 for 47 years. In 1974-75 her class was two doors from respondent's class. She had no recollection at all of respondent's ever having left his entire class with her and then leaving. She thought respondent a fine teacher, pleasant and interested in students.

Called by respondent, Mary (May) Murray, a retired Belleville teacher recalled she taught fifth grade at school no. 4 in 1974-75. She knows respondent as a fellow-teacher in special education. Asked whether respondent had ever left his entire class with her and left, she said "Never, absolutely not."

Called by respondent, Anthony DiGuglielmo, known as "Todd," testified he knows respondent, his former teacher in a Belleville special education class. He also knows John Sileo, who was in his class. Asked whether respondent had ever massaged or fondled him in the groin area, he said respondent had never done such thing. He denied he had ever

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told Sileo respondent had done that to him. He presently works for ITT, he said, and has not seen respondent since he graduated from high school in 1980. He knew respondent's younger brother John when they were in school together. He said he had been to respondent's house a few times with three or four other students but respondent's mother was always present at the house. He said respondent had never taken him to another teacher and left, except for the odd occasion when respondent received an emergency phone call, which may have taken ten minutes. He said respondent had never touched him or anyone else except once when respondent threw him out of class for horsing around too much.

Called by respondent, Stephen Schwenk, now employed at A & P, said he was a former student of respondent's at school no. 4 (the parties stipulated after conference that another student, R.A., would have testified she was never in any way touched by respondent and was never deposited by respondent in any other classroom). Schwenk was a fourth grader special education student in respondent's class in 1974-75. He described the classroom. Respondent taught him reading individually on occasion, he said, and also with other students. Asked whether respondent ever rubbed his back, he replied yes, if he were nervous and sometimes in order to stop his leg from rocking nervously. He said he had a reading disability and suffered from dyslexia. He said respondent had never fondled his groin area, nor, indeed, did he ever do such things to other students. He knew John Sileo, who was a member of the same class. He said he had been to respondent's house for a house-warming party and at another time near the end of the school year. At those times, he said, respondent or his other brother or respondent's mother were present.

Called by respondent, H. Gordon Kimball testified he has known respondent through a junior chamber of commerce chapter in West Hudson. He and respondent participated in the chamber's glass recycling program. The activity occurred usually on Saturdays. Shown P-5, a photograph of Sileo, he said he never saw him at such activities or at chamber functions at all. Indeed, he said, he never saw respondent with any of his students. He conceded he was not present at every Saturday glass-breaking project, however.

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Called by respondent, Thomas Conlon said he has known respondent as a fellow-member of the junior chamber of commerce in the mid-1970's. Both he and respondent held various offices in the organization. Shown P-5, Sileo's photograph, he said he never saw him before and never saw him in company of respondent. He did not recall respondent ever having brought students to the glass-breaking projects.

Paul C. Wirth, respondent's brother-in-law (his sister is Kathleen Caporaso, respondent's wife), testified that in the Summer of 1975, when he was a recent graduate of Belleville high school, he resided with his parents at 2 Pomander Walk, Nutley, a single family residence. He had a summer job working the 4:00 to 12:00 p.m. shift and usually worked overtime. After work, he said, he slept at home until about 1:00 p.m. usually. He said he never saw respondent, who that summer was dating his sister, at the residence with one of his students. He described his bedroom as the first bedroom on the left down a hall and not, as was described by Sileo, the last room at the end of a corridor. The family kept a Norwegian elkhound that had the run of the house and, when someone was home, was kept in the house. From a log book kept by his present wife, whom he was then dating, he said, respondent and his sister accompanied them to shows or activities out of town on the following dates: June 20, June 21, July 19 and August 16, 1975. On June 6, 1975, he said, respondent, his sister and he went to a local restaurant together. On July 1, 1975, a Tuesday night, respondent, his sister and he went to a local restaurant. Respondent, he said, had no key to the family home in 1975. Only family members had keys. In September 1975, he said, respondent and his wife helped him clean up his apartment in Queens, New York. His father, who was then a teacher in another city, would return home usually in early afternoon during the summer. Respondent saw his sister frequently, he said, and was usually at the residence on Sundays during 1975.

Paul H. Wirth, Jr., respondent's father-in-law, a vice-principal employed by the Newark Board of Education, testified he was at home in the Summer of 1975, the first time in more than 20 years when he had no summer employment. His daughter Kathleen

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and his son Paul were home then too. During that summer, while respondent and his daughter were dating, he said, respondent had no key to his house. He gave respondent a key to the house on January 1, 1979 when the two returned from their honeymoon. During that summer, he said, his children belonged to a local pool, although he himself never visited it and stayed mainly at home. During the Summer, he said, he never saw respondent at his home with a male student. He described his bedroom as a large room with three windows, positioned to the left on a hall to the right of the front entrance. His daughter's bedroom was in the center. His son's bedroom was to the left. All rooms were on the first floor of the house, a one-family ranch.

Kathleen Caporaso, respondent's wife, testified she has been employed by the Newark Board of Education as LDT/C since 1973. The couple first met in November 1972 while she was student-teaching at Belleville school no. 4 in Mrs. Finnigan's class. They were married December 23, 1978. From the time they first dated in October 1973 until their marriage, she said, respondent never possessed a key to her family's home. During that time there was no key kept outside in the garage. During the Summer of 1975, because of a rash of recent local buglaries, the household kept a Norwegian elkhound as a pet, which had free run of the house. The dog was company for her father also, she said, following her mother's death. She and respondent took a 1975 summer school course at Paterson State College, which began in June and ran to the first week of August, four days a week except Friday. They took two courses together. Concerning various dates during the Summer, she recalled she and respondent attended an aunt's birthday on June 8, a bowling night on June 14, a birthday celebration on June 21 at the shore, and made a visit to a camp out of state on June 22. She was with her husband on June 28, a Saturday, and June 29 for a Jaycee baseball game. On July 1 they visited a local restaurant; on July 4 they went to an out-of-town swim club; on July 5 they went to respondent's uncle house; and on July 6 they went to the swim club.

She conceded she could not account for respondent's activities for 24 hours of every day of every weekend during that summer.

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She told of activities she and her husband participated in in 1975 on July 13, 20, 26, August 2 and 3, a weekend, August 9-10, another weekend, August 16-17, another weekend, August 23, 24 and Labor Day weekend, from August 30 to September 1. She said respondent never took Sileo to any of those events or to any circus sponsored by the junior chamber of commerce, so far as she knew. Respondent has three brothers, she said, none older than he. None owns his own apartment; they all still live at home.

Sileo had never been to her house, she said, but on occasion he called the house to speak to respondent. He called the house in September 1975 because he was starting school in Nutley. She denied ever owing a polaroid camera and denied respondent ever owned one. They never had a photo album with polaroids in it.

She conceded Sileo called her "Kathy." She conceded Sileo had called respondent's home and was given her telephone number by respondent's family, that is, 677-0990, her father's phone number, as appeared in Sileo's phone book. P-8.

She conceded she had frequent absences from her employment in the Newark school system. On cross-examination, she again conceded she was unable to account entirely for all of respondent's activities.

From records of the New Jersey School Register (J-2), the parties stipulated certain facts concerning the pupil attendance of Sileo in Dolores Pacelli's class for 1972-73 at Belleville school no. 3:

1. During the 1972-73 school year John Sileo is shown as being in a class of Dolores V. Pacelli, a fifth grade teacher at school no. 3 in Belleville.

2. Joseph Royal is shown as being in Mr. Caporaso's class during 1973-74 school year, but is not shown as being a student in 1974-75 school year.

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3. John Sileo is shown as being in Mr. Caporaso's class during both the 1973-74 and 1974-75 school year. Mr. Sileo was absent from school on April 29, 30, May 1 and 2, 1975. April 21 to April 25, 1975 was Spring vacation.

Respondent called Michael Lally, the proffer being to establish whether the present case was given notoriety in the press and whether other parents had come forward to complain about respondent's alleged conduct. The Board's motion to preclude such testimony as too remote, speculative and not probative of matters at issue was granted by the administrative law judge.

Respondent Patrick Caporaso testified he is a graduate in special education from William Paterson College. He holds certificates as teacher of the handicapped (neurologically impaired, mentally retarded, educationally retarded and emotionally disturbed), as LDT/C and as administrator and supervisor, qualifications for the latter having been met while a student at Kean College. He holds the masters degree in learning disabilities from William Paterson College in 1976. He was first employed by the Belleville school district in February 1972 as teacher of a neurologically impaired class at school no. 3. In 1972-73 he taught such a class at school no. 3 and had gone to school no. 4 in the Fall of 1972 with the same class, after which both neurologically impaired classes moved. A Mrs. Kernan taught the other class. In school no. 4 in 1973-74, his class was on the second floor of the school, as it was for 1974-75. John Sileo first entered his class, he said, in September 1973, having been referred by the child study team and, specifically, Mrs. Pacelli. He had the older group of children from ages 8 to 11 years.

"Mainstreaming" was a system by which classified children were moved into a regular class for a specific subject or subjects. Some of his students, he said, were so mainstreamed. Older boys went to a fifth grade gym class or to a sixth grade gym class. Stephan Schwenk, for example, was mainstreamed to Mrs. Crawford's class for reading in 1973-74. He also went to a third grade gym class but was not in respondent's class for 1972-73.

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In 1974-75, respondent was president of a local junior chamber of commerce and so served the organization for one year. The organization was of young men in the community engaged in civic activities. In 1974-75, his second floor classroom was next to a stairwell. Respondent described the interior of the classroom. There was no reading table, he said. There was a cloakroom on the left wall as one walked into the room. Frequently, he said, he would sit alongside each student's desk for reading. Respondent did not identify classroom photos marked P-2, 3 or P-4. He identified the photograph in P-1 as depicting the divider from Mrs. Finnegan's class.

Respondent taught in school no. 4 until September 1975 when he was transferred to school no. 7. In 1979, he said, he joined the child study team, home office of which was in school no. 4. At the time of present charges against him, he said, he was LDT/C at schools 5, 9, 10 and 8 and in charge of pre-school screening.

In the 1974-75 school year, respondent said, he never deposited his students in another class and then left them with its classroom teacher. On occasion, he said, he would leave his class with the principal if he had to go to the men's room. Later in that year he had a half hour break in schedule and then, he said, it became unnecessary for the principal to cover such an absences.

He recalled Sileo had told him his family was moving to Nutley because of difficulty with their Belleville landlord. Respondent described Sileo as a very hyper-active student, given to chattering, bouncing in his seat and constant movement.

He denied he had ever made any agreement with Sileo to spank his bare bottom if his nervous outburst continued. Once, he recalled, Sileo had presented an oral book report on the devil, which pertained to black and white devil worship. He recalled the book was taken from the public library.

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Respondent said his students knew he worked for an eye doctor. Some of his students had visited the doctor for visual training, for example, R.A. The doctor had a trampoline in the training room and some of the doctor's training techniques were adopted by respondent for his own classroom teaching. His students also knew of his glass breaking activities with the junior chamber of commerce because all, teacher and students, discussed out of school activities as part of educational therapy. Sileo appeared to enjoy such discussions, he said.

In a quiet, muted and generally dispassionate way, respondent denied ever having had anal sex or having committed fellatio with Sileo during the 1974-75 school year or thereafter in the Summer of 1975.

He conceded that on occasion he rubbed his students' necks because they were bouncing or hyper-active or experiencing uncontrolled vibrations of the leg. He admitted he had put his hand on Stephan Schwenk's leg for that purpose.

In 1974-75, he said, he attended William Paterson College with his wife Kathleen. R-3 in evidence is a copy of respondent's graduate transcript showing courses taken in the Summer of 1975. They attended six weeks starting June 1975, four days a week, from 9:00 a.m. to 12:30 p.m.

According to respondent, Sileo was at his home in Belleville at 685 Mill Street towards the end of the 1974-75 school year. As in previous years, 1972-73 and 1973-74, the occasion was a picnic and sailboat race in the backyard pool. Sileo attended two such parties, at least, respondent said. He was also at his house once in the Summer of 1975 when he came to swim with respodent's brother John, who was ten years old, and when Sileo was 12 or 13 years old. Respondent saw them at the time as he returned from graduate school, just as Sileo was departing on his bicycle. Respondent's mother, father, grandmother and brother were also there. In all, he said, Sileo was at his home three times. He said his own bedroom was on the second floor of the house and could not be

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seen from the top of the stair. He denied owning a polaroid camera then in 1975 or until the present time. He noted police did not find any such camera at time of execution of a search warrant at his home in 1983.

Shown P-5, 6 and 7, photographs of Sileo, respondent said he first saw them in court in the present matter some two weeks ago. He denied having taken the photographs and denied ever having had them in his possession or returning them to Sileo as was testified.

Respondent described the glass-breaking activities of the junior chamber of commerce as occurring usually on Saturdays. In the Summer of 1975, he said, he attended such activities two or three times but never took Sileo or any of his other students with him. He denied ever taking Sileo to a Lyndhurst diner but said once his entire class went to a local restaurant for luncheon specialties at the end of the 1974-75 school year. Two parents went with them on the field trip. He denied ever taking Sileo to Dr. Wiener's office but said all students knew he worked for the doctor and had described to them the trampoline. He denied having a key to the doctor's office. He denied having taken to a chamber-sponsored circus or carnival. He denied ever having taken Sileo to his wife's brother's apartment or bedroom. He denied ever having taken Sileo to his brother's house. He noted that in his own personal pocket phone book (R-4 in evidence) Sileo's telephone number was not listed, although several other students' numbers were listed.

He said he had given his telephone number to all his students. He was unable to explain, however, how Sileo had obtained his wife's telephone number.

Respondent denied suffering from what was characterized as "premature ejaculation." He admitted he kept a tube of "stay-hard" cream at his home, which had been found in an armoire by police. He kept it, respondent said, because he had experienced difficulty (the time was about 1983) in maintaining an erection. He admitted police found a dildo in his cellar. Respondent said he had himself placed it there. In explanation, respondent said he and his wife had gone to a sex counselor and later, while he was in an Atlantic City adult book store, he purchased it as a novelty.

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Respondent said he liked all his students, Sileo no more than the others. He never knew Sileo was in love with him until testimony at hearing. He last saw Sileo at a Nutley carnival only to say hello. He came to see respondent once after that in the Spring of 1979. He has not had any contact with him since then, he said.

Respondent could think of no reason for Sileo to be angry at him.

Asked whether photographs P-5, 6 and 7 bore any resemblance to Sileo at the age of 14 years in 1975 by way of age, size, hair, skin or other elements of physical demeanor, respondent conceded the photographs resembled Sileo as he was in 1975, and in particular his afro hair style.

Respondent rested.

III

Called by the Board on rebuttal, Dr. Patrick Antonelli testified he is presently employed by the Berkeley Heights Board of Education, Union County. He was formerly employed by the Nutley Board of Education as social studies teacher and JV baseball coach. From 1966 to 1969 he was on leave of absence. From 1971 to 1978 he was Nutley school psychologist and from 1978 to 1981 was director of guidance at Nutley high school.

He recalled that in September 1975, when he was school psychologist, he talked with Margaret Murray about John Sileo. She told him Sileo had just been transferred from Belleville and had told her he had sex with a teacher in Belleville named "Pat Cap." Sileo himself confirmed that to Antonelli later, within the week. In attempting to assess Sileo's credibility, he said, he thought Sileo had to be put into an intensive psychotherapeutic

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program. He told Murray to tell principal Gilligan and said he would take care of everything else. He went to Glenn Fowler, then acting Nutley school superintendant, concerning Sileo's statement. He reported Sileo was in need of psychotherapy and said Fowler told him he would take care of contacting the Belleville Board of Education concerning respondent. Fowler told him later he had done so. Antonelli proceeded to attempt to deal with Sileo and his family. The time then was just before Christmas, perhaps November.

Though Sileo appeared to be ambivalent, that is, in conflict about his homosexual or heterosexual proclivities, Antonelli said he gave credence to Sileo's statements. After consultation, Antonelli suggested to Sileo's parents that he be referred to the sexual dysfunction clinic of the New Jersey College of Medicine and Dentistry. With his family, he said, Sileo went once or twice but the parents found the facility unsatisfactory and the fee too high.

Antonelli was of the opinion that his concern at time was not so much to view what had been reported as a possible crime but to give credence to what Sileo said. R-2 in evidence was Antonelli's memorandum to Nutley school principal Gilligan concerning Sileo on June 10, 1976. The procedure required in such cases, now, he said, would involve preparation of a violence and vandalism report for the Division of Youth and Family Service concerning child abuse. At the time, he said, he did not make any such report of Sileo's statements.

Still on rebuttal, the Board called Kirimu Harvey, assistant counsel for the Newark Board of Education, who introduced Newark Board records concerning (P-8) an earnings report of Paul H. Wirth from January 1975 to December 1975 that reflected 1975 summer earnings and, during that time, that he was employed by the Board; and concerning (P-9) a time report for Paul H. Wirth from August 1, 1975 to August 25, 1975 showing he was in attendance at a school workshop from August 4 through August 19, 1975.

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IV

As appeared from a report of psychiatric examination of John Sileo by Seymour F. Kuvin, M.D., F.A.C.P., on April 22,1985 at Essex County Jail (J-4), an examination commissioned jointly by the parties here pursuant to order, the examiner noted he had seen Sileo on two previous occasions, December 17,1983 and November 25, 1983, at request of Sileo's attorney for purposes of assessing criminal capacity to be tried under N.J.S.A. 2C:4-4 and as to his mental state at the time of alleged criminal acts under N.J.S.A. 2C:4-1 (J-5). Diagnosis at the time was one indicative of a schizophrenic type type of disorder.

In examination on November 25, 1983, Kuvin noted among other things by way of history that Sileo said he had had sexual relations with "Mr. Caporaso," a Nutley special education teacher, in a closet in school or wherever he was taken, when he was thirteen years old. The examiner found orientation normal for time, place and person with no memory deficits for either recent or remote events, nor any evidence of organic brain disease. Thought processes were found bizarre with a considerable amount of distorted thinking present. The examiner deferred a finite diagnosis at the time, indicating merely many schizophrenic features in Sileo's illness. He found Sileo to have the capacity to be tried and to negotiate pleas. No opinion was offered as to Sileo's mental state at the time of alleged criminal acts until further review.

In examination on December 17, 1983, Kuvin noted Sileo appeared to be suffering from a psychotic disorder, namely, a schizophrenic disease. Sileo, it was found, was preoccupied with thinking about "Mr. Cap" and presented indications of suffering from olfactory hallucinations about lubricating cream when thinking of "Mr. Cap." The examiner found Sileo admitted to hallucinatory activity in speaking of satanism. He concluded Sileo was then suffering from a psychotic disorder and in need of intensive, in-patient hospital care.

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Kuvin's examination of Sileo some seventeen months later on April 22, 1985 (J-4) took note of the two prior examinations indicative of a schizophrenic type of disorder. His final diagnosis was this:

1. On the basis of history Sileo has a latent schizophrenic process with no evidence of symptomatology present at this time.

2. There is clear evidence of a gender identity disorder which needs psychiatric help. This is admitted to by Sileo. Sileo is not sure of his sexuality ("Am I bisexual or homosexual or heterosexual?"). He admits to suffering from various paraphilias.[2]

Kuvin noted by way of history that Sileo again said he had first sought out help "by telling Mrs. Murray about my friend" when he was in the eighth grade. The friend was actually Sileo. The examiner looked for evidences of schizophrenic disease inasmuch as Sileo exhibited hallucinatory behavior in 1983. He found no such evidence at this time (April 22, 1985) inasmuch as Sileo then was neither hallucinating nor delusional and acknowledged he had hallucinatory activity in the past. The examiner noted an average intelligent quotient level only slightly lower than normal and absence of mental retardation. Orientation was normal for time, place and person with no memory deficits for either recent or remote events nor any evidence of organic brain disease. Associative thought processes were found intact with no evidence of paralogia, tangentiality or thought disorder. Affective behavior was within normal psychiatric limits with no wide mood swings nor any inappropriateness of mood. Insight, judgment and reality testing functions were all intact with no hallucinatory or delusional behavior.

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2 Kuvin established final diagnostic classification under DSM III numbering as (1) 295.95, schizophrenic disorder, undifferentiated, in remission; and (2) 302.85, psychosexual (atypical gender identity) disorder. The numbering references are to Diagnostic and Statistical Manual of Mental Disorders, DSM-III, (3rd ed.), American Psychiatric Association, classifications, at 17-18. Evidence from such source is admissible under Evid. R. 63 (30) and is noticed herein, only to the extent of defining the examiner's diagnostic classifications and no further, pursuant to N.J.A.C. 1:1-15.3 and Evid. R. 12(3).

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In Kuvin's opinion, Sileo was lucid and conversant at the present time, fully cognizant of underlying difficulties, desirous of obtaining psychiatric help in an institutional facility. The examiner found Sileo during the course of examination to indicate he is a relatively trustworthy witness, able to observe events intelligently and remember them clearly, free of an emotional drive that may suppress or distort the truth, and articulate enough to describe it vividly. In opinions and recommendations, Kuvin said:

> This examiner is of the opinion that although Sileo has psychiatric difficulties, that in a psychiatric sense, he does have testimonial capacity and any statements given by him are not the result of hysteria, psychopathy, confabulations, mental defect or amnesia.
>
> This examiner is fully aware of the fact that accusers in sex cases are often hysterical; however, there is no evidence of hysteria present in Sileo.
>
> There is a past history of schizophrenic disorder, but this has subsided at the present time. There does not appear to be any evidence of persecutory ideation or litigious form of paranoia.
>
> Sileo is fully aware of the fact he is in need of psychiatric aid and that because of his gender identity confusion, he may act out in a dangerous fashion to others if left to his own devices. He was able to verbalize this, however, and express the idea to remain in an institution where he can obtain appropriate aid.
>
> The delusions of satanism in the past have disappeared.

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DISCUSSION

Charges of unbecoming teacher conduct against respondent here, it may be suggested, are of sufficient gravity, if proven, to warrant dismissal. Indeed, as specified and as presumptively established, the charges are of conduct so execrable as to parallel elements of the first degree crime of aggravated sexual assault under the New Jersey Code of Criminal Justice. N.J.S.A. 2C:14-2 provides:

> (a) An actor is guilty of aggravated sexual assault if he commits an act of sexual penetration with another person under any one of the following circumstances:
>
> . . . (2) The victim is at least 13 but less than 16 years old and
>
> . . . (b) The actor has supervisory or disciplinary power over the victim by virtue of the actor's legal, professional or occupational status. . .

"Sexual penetration," under N.J.S.A. 2C:14-1, means:

> (c) . . . vaginal intercourse, cunnilingus, fellatio or anal intercourse between persons or insertion of the hand, finger or object into the anus or vagina either by the actor or upon the actor's instruction. The depth of insertion shall not be relevant as to the question of commission of the crime. . .

In Schroeder v. Bd. of Ed., Lakewood, Ocean County, 1960-61 S.L.D. 37, the Commissioner noted:

> The peculiar relationship between the teacher and his pupils is such that it is highly important that the character of the teacher be above reproach . . . [Courts have] said that both parents and pupils regard the teacher as an exemplar whose conduct might be followed by his pupils, and the law by necessary intendment demands that he should not engage in conduct which would invite criticism and suspicions of immorality. . . Even charges of or reputation for immorality, although not supported by full proof, might in some cases be sufficient ground for removal. Not merely good character but good reputation is essential to the greatest usefulness of the teacher in the schools. . . . [at 45].

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In In the Matter of the Tenure Hearing of Pasquale, School Dist. of Elizabeth, 1984 S.L.D. — (State Bd. Sept. 7, 1984), the State Board emphasized its belief that in cases where charges of sexual assault on young students have been sustained, even the most stringent penalty permissible under tenure laws, that of removal, is inadequate. (Slip op. at 1-2).

Unfitness to hold a teaching position may be shown by a series of incidents or by one incident, if sufficiently flagrant. Redcay v. State Bd. of Ed., 130 N.J.L. 369, 371 (1943), aff'd 131 N.J.L. 326 (E. & A. 1944). Although the quantum of proof required to support tenure charges of unbecoming teacher conduct differs from that required for conviction of a crime, the certifying board nevertheless has the burden of proving tenure charges by a preponderance of the evidence. See, for example, In the Matter of the Tenure Hearing of Versocki, 1978 S.L.D. 677, 688. The standard is met where the evidence establishes "the reasonable probability of fact." In the Matter of the Tenure Hearing of Schaver, 1983 S.L.D. — (Comm'r's dec. Mar. 4, 1983, slip op. at 12). Testimony by children supportive of tenure charges, necessarily, must be considered with caution. See In the Matter of the Tenure Hearing of Birch, Dist. of W. Long Branch, Monmouth County, 1978 S.L.D. 63, 80; In the Matter of the Tenure Hearing of Matecki, School Dist. of New Brunswick, 1971 S.L.D. 566, aff'd State Bd. 1973 S.L.D. 773, aff'd Dkt. No. A-1680-72 N.J. Sup. Ct. (App. Div. Nov. 28, 1973); In the Matter of the Tenure Hearing of Connolly, School Dist. of the Borough of Glen Rock, 1971 S.L.D. 305. Equally clear, however, is that the issue of credibility with respect to testimony of pupil witnesses is the responsibility of the trier of fact. In the Matter of the Tenure Hearing of Grossman, 127 N.J. Super. 13, 26-7 (App. Div. 1974). In at least one recent instance an administrative law judge's finding of unbecoming teacher conduct based on pupils' testimony was reversed by the Commissioner principally because on review of the record he found their failure promptly to report offensive teacher conduct rendered their testimony "unreliable." See In the Matter of the Tenure Hearing of Ziobro, 1983 S.L.D. —(Sept. 28, 1983; slip op. at 29-31). Correlatively, it may be suggested, on the other hand, children of tender age may be viewed incompetent to consent to unlawful or improper touching of their persons and by their silence incapable of being considered to have given tacit consent thereto. The standard parallels N.J.S.A. 2C:2-10 of the Penal Code. Pasquale, supra, 1984 S.L.D. — (Jan. 9, 1984), (slip op. at 30), aff'd State Board, 1984 S.L.D. — (Sept. 7, 1984).

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Gravity of presumptive evidence supporting charges here, in my view, if true, is in no way diminished by passage of ten years since the conduct occurred. In the present case, some thirty witnesses were heard. The charges involved six separate incidents of alleged homosexual conduct in 1975 by respondent with John Sileo, one of his Belleville students, then a fourteen year old male, the Board's chief and only witness with direct personal knowledge of the alleged instances. They were said to have occurred in the Summer of 1975; by start of the 1975-76 school year, Sileo had transferred to the Nutley school district.[3]

Chief thrust of the defense to the charges here, beyond respondent's own denials, was impeachment of Sileo by a process of collateral contradiction of his descriptions of time, place and opportunity. To the extent such impeaching contradictions could be established, suggests the theory, to that extent the witness will have been shown either to have erred in or falsified those particular facts and, therefore, to have demonstrated his capability of error or propensity to falsify. The result is invited to the attention of the trier fact so as to negative the rest of his testimony. Respondent suggested, in that effort, applicability of the doctrine of falsus in uno, falsus in omnibus (respondent's brief at 12). The doctrine merely expresses, however, the common sense of selective judgment about the statements of others. In State v. Fleckenstein, 60 N.J. Super. 399 (App. Div. 1960), the court said:

> The maxim falsus in uno, falsus in omnibus [false about one fact, false about all] is not a mandatory rule of evidence, but rather a presumable inference that a jury [or judge sitting without a jury] may or may not draw when convinced that an attempt has been made to mislead them by a witness in some material respect [at 408].

---

3 Charges against respondent contained the assertion he was "suspected of being involved in child sexual abuse and child pornography." The evidential record is barren of any facts supportive of such a charge either currently or since the instances involving Sileo. To that extent, therefore, that portion of the charges against respondent is **DISMISSED.**

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Thus here, as respondent urged, for example, while Sileo testified he was first assaulted by respondent in a classroom during school hours in late April 1975 when both were alone after respondent had delivered the rest of the class to another teacher's classroom, respondent's witnesses Crawford, Miglionico, Lang, Burns, D'Ambola, Snow, Rubin, Gialanella, Murray and students DiGuglielmo and Schwenk were as one that in their experience respondent had never so delivered an entire class to another teacher in another room and then left. Similarly, respondent urged, to Sileo's assertion he was with respondent at glass breaking activities for a junior chamber of commerce project, several chamber witnesses testified they had never seen Sileo and never saw him in respondent's company at the activity. Again, as respondent urged, though Sileo testified to incidents at respondent's home and at his fiancee's home, family members in their testimony impliedly contradicted the testimony by negativing opportunity for it if not objectively demonstrating they could not have occurred. But inferences available from such collateral testimonial contradiction, as in Fleckenstein, supra, are but an invitation to the trier of the fact to discount the chief witness's total testimony. There is no immutable or inflexible requirement that such rejection be made. For such testimony is affected by another evidential truism, that of a differentiation between "positive" and "negative" evidence. In Honey v. Brown, 22 N.J. 433 (1956), the Supreme Court said:

> Testimony is affirmative or positive if it consists of statements as to what a witness has heard or seen; it is negative if the witness states he did not hear or did not see the phenomenon in question. While positive testimony is generally preferred to negative testimony, the determination of a dispute as to the relative weight of conflicting statements must take into account attending circumstances and the jury [or judge sitting without a jury] should be directed to consider the facts and circumstances of the case in order to prevent an unjust operation of the rule, particularly in a situation when negative testimony is given together with corroborating circumstances that add to its weight. [at 438].

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Thus, collateral impeachment by contradiction of witnesses, to the extent it is sought through testimony that the witnesses did not see the event or could not recall the events ever having happened to others, is in final analysis no more than what the testimony literally purports to say. That is, such testimony is never conclusive as to the non-happening of an event unless by its terms and under all circumstances the happening of the event is logically impossible of occurrence. Another example here, perhaps, an instance in which the Board employed collateral impeachment by contradiction, is in the testimony of Paul C. Wirth. He testified he was home during the Summer of 1975, the first time in many years he had been without summer employment. But the Board introduced employer work records to show, to the contrary, Wirth was not unemployed that Summer but received both summer pay and was specifically listed as having attended a summer workshop in August. The question arises, is Wirth's entire testimony thus discreditable? Not necessarily so, one may suggest.

A chief thrust of the Board's case was evidence elicited to dispel inference of recent fabrication by Sileo of the incidents of sexual contact. Thus, evidence was adduced that Sileo in 1975 told his mother about his experiences with respondent, a Nutley teacher and members of a Nutley child study team. There was elicited police testimony that in 1983, when Sileo was apprehended on criminal charges against him, he repeated disclosure of the experiences. Finally, there was evidence adduced in histories taken by Dr. Kuvin on examinations in 1983 and 1985 that Sileo identified respondent. Taken together, all such testimony is proper and admissible if only for the purpose of enhancing or supporting Sileo's credibility as a witness. Rule 20 of the Rules of Evidence provides:

> . . . [F] or the purpose of impairing or supporting the credibility of a witness, any party including the party calling him may examine him and introduce extrinsic evidence upon the issue of credibility. . . A prior consistent statement shall not be admitted to support the credibility of a witness except to rebut an express or implied charge against him of recent fabrication. . .

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N.J.S.A. 2A:81-12 provides:

> For the purpose of affecting the credibility of any witness. . . his conviction of any crime may be shown by examination or otherwise. . .

Here, Sileo's conviction of crimes is properly admissible on the issue of his credibility as a witness. But the fact of such conviction does not render him unbelievable per se. In considering prior convictions, the trier of fact may or may not conclude the credibility of the witness is affected. The ultimate decision as to credibility is the exclusive responsibility of the trier of fact. See State v. Knight, 63 N.J. 187, 194-5 (1973).

Similarly, the expert opinion evidence of an examining psychiatrist is likewise no precise litmus paper test of the examinee's credibility. Dr. Kuvin's report of examination of Sileo is but some evidence bearing on credibility, the examiner's conclusions remaining neither an absolute bar to a determination of credibility nor a mandate the witness be believed.

The result, one may suggest, is as respondent himself puts it:

> However, there is only one issue in this case. That issue is the credibility of John Sileo. For it is clear that without Mr. Sileo's testimony, there is absolutely no indicia of any improper conduct whatsoever attributable to Mr. Caporaso. Consequently, the entire matter and, in real sense Mr. Caporaso's future, rests with the judge's evaluation of the credibility of John Sileo, a convicted felon, devil cult leader, who has been determined by a competent psychiatrist as being both mentally ill and schizophrenic.

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While the credibility of Sileo may be principally at issue, one may suggest, so too necessarily is that of respondent. Their words are directly contradictory; they cannot both be truthful. The credibility of one is mutually exclusive of the credibility of the other.

In his brief, respondent argued generally that Sileo should be found incapable of belief because of his commitment to satanism, his criminal convictions, his established schizophrenia, his obvious motive to dissemble in fulfillment of plea bargain, the many inconsistencies and contradictions inherent and implicit in his own testimony and that of others, his failure promptly to complain of alleged sexual assaults, all of which, it was argued, conclusively demonstrated his testimony against respondent was hallucinatory, fantastic and delusional. The events Sileo described, moreover, it was urged, occurred ten years ago. The fact that Sileo was a young teenager in obvious throws of onset of mental disorder rendered his testimony suspect upon its face and unworthy of belief. And Sileo apparently lied, it was pointed out, when he swore he was beaten up by police, two police officers having testified he was not mistreated. By very nature of the charges, now ten years old, they are stale and pose problems making difficult respondent's defense. Finally, it was urged, the trier of fact should not find the testimony of a convicted felon, mentally ill schizophrenic, pastor of a satanic church, to be worthy of credence over that of a thirteen year public school teacher with an exemplary record, whose testimony in many respects was buttressed by that of other witnesses not themselves directly involved in the facts underlying the charges.

The Board argued generally that expert psychiatric opinion showed the accusing witness to have testimonial capacity and to be free of hysteria, psychopathy, mental defect, amnesia or hysteria. It argued the testimony of a Nutley guidance counselor was clear that Sileo revealed to her the sexual assaults by respondent as early as late 1975. The revelation, it was urged, was a fresh complaint that supported the witness's

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credibility.[4] The testimony of Sileo was urged as substantially well detailed as to time, place and surroundings. In all, it was argued, the evidence preponderately showed respondent's guilt of the charges and, therefore, violation of the public trust placed in him. For his unbecoming conduct, it was urged, respondent should be dismissed from his tenured position.

CONCLUSION

Assessment of testimony of Sileo and respondent in this case, a grave and difficult matter at best, must begin, in my view, with recognition of a pivotal circumstance: Sileo's report of sexual experiences to his mother and to Nutley school authorities in 1975. Disclosure then, on the evidence here, is plain and unchallenged and constitutes what in law is termed a fresh complaint of sexual abuse. It sufficiently serves to dispel, in my view, the inference his accusations are but recent fabrication. Indeed, the accusatory disclosure in 1975 has been consistently maintained until the present time, repeated at time of Sileo's arrest, in history given the psychiatric examiner and in testimony herein. That the disclosure in late 1975 when viewed in 1985 is nevertheless "fresh" is not offset by a contention the original disclosure was not indeed so fresh since it came some six months after the first sexual incident. I believe it to be important to remember that Sileo at the time of the alleged incidents was only fourteen years old, a minor in the eyes of the law, and by any measure a victim of sexual abuse by an adult standing in apparent tutorial authority over him. In short, I cannot ascribe the passage of

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[4] How "fresh" must a fresh complaint be? Evidence here, respondent argued, was that Sileo submitted to some six incidents of sexual assault upon him by respondent over a period of some months without complaint to authorities until, in the Fall of 1975, when he had moved to another school and had not seen respondent for some time, he finally disclosed the experiences to his parents and to school authorities in Nutley. Cf. In the Matter of the Tenure Hearing of Ziobro, supra, slip op. at 29-31.

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time from first incident to disclosure six months later in 1975 to either tacit consent or retrospective fabrication. To fail to give credence to the accusations, perhaps, is to believe Sileo both capable of and motivated to the colossal outrage of a false, gratuitous defamation directed upon respondent in 1985, with whom Sileo on the evidence has had no contact in intervening years. Given the psychiatric analysis in evidence here, I am impelled to the conclusion that, despite admitted schizophrenic symptomatology in the form of a gender identity disorder, there is no present evidence of persecutory ideation or litigious form of paranoia, which, one may suggest, would probably otherwise have been apparent to an experienced examiner. Dr. Kuvin's report overall, upon analysis, is telling. Although Sileo has psychiatric difficulties, it is said, he does have testimonial capacity and any statements given by him in examination were not the result of hysteria, psychopathy, confabulation, mental defect or amnesia. The examiner was quite plainly aware of potential for hysteria and paranoia in accusers in sex cases. Satanic delusions of the past, said the examiner, have disappeared. Sileo appeared free of emotional drive that might suppress or distort the truth and was articulate enough to describe it vividly. I conclude neither his mental state nor his convictions on sex abuse charges are a bar to his worthiness of belief. I **FIND** his testimony materially and substantially credible.

In another vein, in my view, collateral evidence suggestive of the inference Sileo lied or dissembled about details surrounding the incidents is similiarly not preclusive of his believability. I **FIND** none of the collateral evidence in totality is preponderately sufficient circumstantially to demonstrate the incidents never occurred, nor that where inconsistencies or contradictions became apparent, such inconsistencies or contradictions require he be totally disbelieved.

One cannot fail to be painfully aware that but for Sileo's accusations the evidential record here is clear that respondent otherwise is a well-educated, experienced teaching staff member of good reputation and accomplishment in school and at home in

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the community. Since it is obvious that to give credence to Sileo is to imply respondent's unworthiness of belief, one must of necessity view his categorical denials of involvement with care and caution. I have listened to respondent's phlegmatic denials under oath. I have observed the manner and the tone in which they were uttered. Not without regret, I **FIND** them unpersuasive and unworthy of belief.

In sum, I **FIND** the Board has proven charges of unbecoming teacher conduct against respondent in diverse instances of sexual assault upon John Sileo beginning with the first in the Spring of 1975 on school premises and on the several subsequent occasions during the following Summer at the times and in the places described. I **FIND** the incidents involved sexual assaults by respondent on the person of his handicapped student that involved unlawful sexual penetration, including anal intercourse and fellatio, both active and passive, upon a victim who was then but fourteen years old and over whom respondent had tacit if not actual supervisory or disciplinary authority by reason of his teaching status. Such conduct is unbecoming teacher conduct of the most reprehensible sort, its turpitude remaining undiminished by passage of time. The charges are **SUSTAINED.** Respondent is ordered removed from his tenured employment position as a member of the teaching staff of the school district of the Township of Belleville, Essex County, as of date of final agency decision herein.

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

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OAL DKT. NO. EDU 2724-84

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

July 22, 1985
DATE

JAMES A. OSPENSON, ALJ

JUL 22 1985
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:

July 24, 1985
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

js

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IN THE MATTER OF THE TENURE	:	
HEARING OF PATRICK CAPORASO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWN-	:	DECISION
SHIP OF BELLEVILLE, ESSEX COUNTY.	:	
	:	

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

It is observed that respondent's exceptions to the initial decision, as well as the Board's reply to those exceptions, were filed with the Commissioner pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b, and c. Each of these submissions is at least fifty typewritten pages in length. It must be noted, however, that both of these submissions, which rely heavily on the transcripts of the testimony taken at the six days of hearing conducted in this matter, appear to have been prepared and filed with the Commissioner prior to the time such transcripts were made part of the record. This observation is grounded upon the fact that the exceptions as well as the reply to exceptions make no reference to specific transcript pages.

The Commissioner requested and received an Order of Extension from the Office of Administrative Law to file his final decision in this matter on October 15, 1985. On September 16, 1985 the transcripts of these proceeding were made available to the Commissioner through the Office of Administrative Law. Counsel forrespondent had also previously filed a copy of the same transcripts with the Commissioner on September 15, 1985. The Commissioner has reviewed respondent's exceptions to the initial decision and the Board's reply to those exceptions, in addition to making a thorough review of the transcripts of these proceedings.

Essentially, respondent contests those findings of fact and conclusions reached in the initial decision which attach credence to the testimony of John Sileo, a former pupil and the Board's chief witness against him in these tenure proceedings. Respondent also complains that the judge improperly ignored much of his own testimony as well as the testimony of those witnesses who testified on his behalf with respect to those incidents of sexual misconduct pertaining to the Board's tenure charges against him.

Further issue is taken by respondent with the findings in the initial decision which hold that John Sileo's ability to testify as a credible witness was not impeached by his membership in the "Fourth Satanic Church of the United States" of which he has been its pastor from January until November 30, 1983 and, further, that Sileo was determined to be a competent witness despite those findings set forth in a psychiatric evaluation of him which respondent maintains attests to his mental incompetency.

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The Commissioner upon review of the transcripts of these proceedings finds and determines that respondent's exceptions to those findings and conclusions in the initial decision are his own inferences with regard to the relevant findings of fact in this matter and are deemed to be misplaced and essentially without merit.

In the Commissioner's judgment the findings of fact and the conclusions reached by the judge are sufficiently documented in the record of these proceedings and comply with the standard of judicial review initiated by the court in Mayflower Securities v. Bureau of Securities, 64 N.J. 85, 92 which holds in pertinent part:

> "***Finally, on the matter of the applicable law, the thoroughly established scope of judicial review of administrative adjudications should be briefly noted. As to state agency findings, the role of the appellate court is that of determining '"whether the findings made could reasonably have been reached on sufficient credible evidence present in the record," considering "the proofs as a whole," with due regard to the opportunity of the one who heard the witnesses to judge of their credibility *** and *** with due regard also to the agency's expertise where such expertise is a pertinent factor.' Close v. Kordulak Bros., 44 N.J. 589, 599 (1965).***" (at 93-94)

See also: Parker v. Dornbierer, 140 N.J.Super. 185 (App. Div. 1976). Accordingly, the Commissioner hereby affirms those findings and conclusions in the initial decision as his own for the reasons expressed therein.

The tenure charges of unbecoming conduct related to those incidents of sexual misconduct against respondent are sustained. The Board is directed to remove respondent from his tenured employment position as a teaching staff member effective as of the date of the Commissioner's decision herein.

COMMISSIONER OF EDUCATION

October 15, 1985

Pending State Board

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STEPHEN KRATT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF RANDOLPH, MORRIS COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

This matter was opened before the Commissioner by petitioner on July 10, 1985, alleging that the nonconsensual "transfer" from his tenured position as librarian/educational media specialist to the position of secondary school teacher in July 1985 was a violation of his tenure rights. Following the filing of an answer by the Board of Education, the matter was referred to the Office of Administrative Law for initial adjudication.

On August 19, 1985, petitioner moved before the Commissioner for entry of preliminary injunctive relief and/or summary judgment to prohibit the respondent Board of Education from transferring him, without his consent, from his tenured position as librarian to the position of teacher of social studies in the Randolph School District. The ALJ dismissed both motions, concluding that petitioner had not met his burden for issuance of preliminary injunctive relief. The ALJ concluded that an insufficient showing of irreparable harm had been made and that the law concerning transfers of tenured individuals was not sufficiently settled to conclude that petitioner had a likelihood of success on the merits. The Motion for Summary Judgment was denied in the presence of currently disputed facts that the ALJ deemed may be relevant.

Thereafter, on September 19, 1985, petitioner sought interlocutory review by the Commissioner which was granted, following receipt of an answer from the Board in opposition to petitioner's Motion for Summary Judgment.

The Commissioner agrees with the ALJ that there is no basis upon which he can grant injunctive relief. Petitioner is currently employed by the district as a social studies teacher and will remain employed throughout the course of the litigation of this matter. There is no compensatory loss accruing and it has not been shown to the Commissioner's satisfaction that the Board is reaping "interim economic rewards by hiring a new and untenured librarian to fill his position at a salary substantially less than Mr. Kratt would receive." (Petitioner's Exceptions, at p. 5) Thus, there is no irreparable harm to petitioner.

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Notwithstanding the fact that petitioner has failed to establish sufficient evidence to warrant issuance of a preliminary injunction, having reviewed the factual arguments raised by the Board in the accompanying affidavit of Robert Gordon, Assistant Superintendent of Schools, detailing the controverted factual issues upon which the Board relies in averring that summary disposition is precluded, the Commissioner is convinced that there are no genuine issues as to any material fact to prevent a decision on summary judgment.

In so deciding, the Commissioner relies on Shadel v. Shell Oil Co., 195 N.J. Super. 311 (Law Div. 1984) as follows:

> "***[A] Motion for Summary Judgment should be granted only if the pleadings, admissions and certifications show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.***"
>
> (at 316)

The Board argues vigorously that it remains a matter of factual controversy whether a transfer from a librarian's position to a teaching position constitutes "dismissal" within the meaning of the tenure laws. Absent proofs on the role of both teachers and librarians in the school district, the Board argues, it is impossible for the Commissioner to determine whether there has been a violation of petitioner's tenure rights. The Board relies on Stegemann v. Board of Education of the Township of Union, A-4737-79T2, New Jersey Superior Court, Appellate Division, October 7, 1981 and O'Hara v. Board of Education of the Vocational School in the City of Camden, A-1827-81T2, New Jersey Superior Court, Appellate Division, December 30, 1982, in opposition to petitioner's contention that Childs v. Union Township Board of Education, A-3603-80T1, New Jersey Superior Court, Appellate Division, July 19, 1982, is controlling in that it stands for the proposition that a teaching staff member may be transferred within his "position" but not to a new "position."

The affidavit submitted by Robert L. Gordon, Assistant Superintendent for Administration for the Board, indicates that petitioner was transferred from his position "as a librarian to a social studies teaching position at the intermediate school" on June 11, 1985. The affidavit goes on to say that

> ***
>
> "7. The primary function of a librarian in our school district is to educate pupils in the library sciences. This instruction includes, but is not limited to, instruction in the use of periodicals, the cataloging systems, and general library research.

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***

"9. Insofar as a librarian serves the school district primarily as a teacher, and not as a media technician, a transfer from a library position to another teaching position is no different than any other transfer between instructional assignments.

***

"13. Accordingly, it is clear that Mr. Kratt has not been dismissed from a teaching position. Rather, he is being asked to serve the school district by teaching in another subject area within the scope of his certificates.***"

The Commissioner notes for the record that there are three kinds of educational certifications in the State of New Jersey:

1. Instructional Certification - includes endorsements for classroom instruction in academic areas such as social studies, English, mathematics, physical education, etc. See N.J.A.C. 6:11-3.1 et seq.

2. Educational Services Certification - includes endorsements in such fields as librarian, school nurse, cooperative industrial education, etc. See N.J.A.C. 6:11-11.1 et seq.

3. Administrative and Supervisory Certification - includes endorsements in such areas as principal, chief executive officer, etc. See N.J.A.C. 6:11-9.1 et seq.

Petitioner holds both an instructional certificate with an endorsement in social studies (see N.J.A.C. 6:11-6.2(a)22) and an Educational Services Certification with an endorsement as an educational media specialist (see N.J.A.C. 6:11-12.21). On the basis of the affidavit of Assistant Superintendent Gordon, it is clear to the Commissioner that the Board has misconstrued the application of N.J.S.A. 18A:28-5 and 28-6 as they apply to petitioner. N.J.S.A. 18A:28-5 provides, in pertinent part:

"The services of all teaching staff members including all teachers*** and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners *** shall be under tenure during good behavior and efficiency***."

N.J.S.A. 18A:28-6 provides in pertinent part:

"Any such teaching staff member under tenure or eligible to obtain tenure under this chapter who

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> 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***."

Read in pari materia, these two statutes are designed to prohibit transfer or reassignment between separately tenurable positions without the consent of the affected individual. A school district may transfer an individual to any other assignment within the instructional area for which the individual holds an endorsement. However, a board may not, without the individual's consent, transfer him/her from one separately tenurable position, which may or may not include instructional duties, to another on the theory that the individual happens to hold a valid teaching certificate. Assume, arguendo, that petitioner herein an instructional certification, but hadn't taught in any particular endorsement area, yet had held a tenured position as an educational media specialist, under another certification. Clearly, under such circumstances, the Board would have no right to transfer him without his consent. Thus, simply because an employee holds more than one certification does not mean that he can be "laterally" moved without his consent from one separately tenurable position to another. Such a transfer is not lateral, but rather a "dismissal" from the former position, which requires compliance with the tenure laws regarding transfer.

The Commissioner does not agree that the case law is unsettled. Childs, supra, governs. In a fact pattern markedly similar to petitioner's, Ms. Childs, who held an instructional certification, acquired tenure as a classroom instructor, then acquired an educational services certification. Thereafter she gained tenure as a guidance counselor in the same district, but was "transferred" back, illegally, to a classroom instructional position. The Court in Childs held:

> "***What is important is that the certifications for teachers and for guidance counselors are based upon different qualifications.***"
> (Slip Opinion, at p. 8)

The Court held that it would be "pure sophistry" to assert that Ms. Childs' transfer was anything less than dismissal from her clearly tenured position. The Court held, "Such a view would render her statutory tenure in her 'new position' meaningless.***" (Id., at p. 8)

The Court in Childs, supra, disagreed with an earlier decision by the Appellate Court made on a similar set of facts, Stegemann, supra. The Commissioner likewise disagrees with the holding in Stegemann, which is a one-page conclusory decision lacking the extensive analysis the Court provided in Childs and altogether omitting discussion of N.J.S.A. 18A:28-6. Similarly,

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O'Hara, supra, is not precisely on point. That case involved a teacher, who, upon returning to her librarian's job following an illness, was transferred back to the classroom as a result of a reduction in force.

The Commissioner notes that another case, Spiewak et al. v. Board of Education of Rutherford, 90 N.J. 63 (1982), which was decided by the Supreme Court of New Jersey subsequent to Childs and O'Hara, sets forth the unmistakable formula for determining when tenure accrues in a "new position":

> "***We hold that all teaching staff members who work in positions for which a certificate is required, who hold valid certificates, and who have worked the requisite number of years, are eligible for tenure unless they come within the explicit exceptions in N.J.S.A. 18A:28-5 or related statutes such as N.J.S.A. 18A:16-1.1.***"
> (at 81)

If all the questions are answered yes and the individual does not come within any specific statutory exceptions, he or she is eligible for tenure. Under this rubric, petitioner was clearly tenured both in his position as educational media specialist and in his former position as a social studies teacher.

Yet, while there may be certain instructional duties and activities associated with the educational media specialist's position in Randolph Township, the presence of such duties does not detract at all from the fact that the position of educational media specialist is separately tenurable. Such duties do not rise to the level of sustaining the Board's decision to transfer petitioner without his consent based on its belief that both positions were "instructional."

Accordingly, the Commissioner reverses the findings and conclusions of the ALJ and grants summary judgment. The Commissioner orders the immediate reinstatement of petitioner to his position as educational media specialist with all due emoluments owing him.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

October 15, 1985

Pending State Board

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INITIAL DECISION
OAL DKT. NO. EDU 1188-84
AGENCY DKT. NO. 10-1/84

BOARD OF EDUCATION OF THE
TOMS RIVER REGIONAL SCHOOL
DISTRICT, OCEAN COUNTY,
Petitioner,
v.
PATRICIA MARSDEN,
Respondent.

Milton H. Gelzer, Esq., for the petitioner (Gelzer, Kelaher, Shea & Novy, attorneys)

Gaetano J. Alaimo, Esq., for the respondent

Record Closed: July 11, 1985 Decided: August 26, 1985

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

This matter concerns the tenure charges brought against Patricia Marsden, a teacher employed by the Board of Education of the Toms River Regional School District (Board) which were filed with the Commissioner of Education (Commissioner) on January 25, 1984. In these charges, the Board alleges that Ms. Marsden engaged in conduct unbecoming a teacher and that she lacked the capacity to teach based on respondent's alleged pattern of chronic absenteeism during her approximate 18 years employment. This pattern became allegedly more apparent during the immediate five years prior to her suspension. Also, the Board alleges that Ms. Marsden engaged in conduct unbecoming a teacher by failing to give timely notice of the fact that she would

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be absent for an operation in the fall of 1983. Lastly, the Board alleges that Ms. Marsden engaged in conduct unbecoming a teacher by expressing an indifference to her job responsibilities and by showing that her main concern was her salary.

In her answer, filed with the Commissioner on February 9, 1984, the respondent denies the charges and sets forth 17 affirmative defenses. Among these defenses, Ms. Marsden alleges that:

(1) All her absences were for legitimate purposes which were duly excused by the Board since her justifications were always accepted by the Board. The Board's administrators never counseled or warned the respondent that the number of her absences was not acceptable.

(2) Her absences did not have any adverse effect on her classes since she prepared plans and kept in touch with the substitute teachers.

(3) The charge of incapacity was really a charge of inefficiency and should be dismissed since the Board did not give the respondent the required 90 day notice pursuant to N.J.S.A. 18A:6-12.

(4) Since the charge is incapacity, then the Board should have applied for an involuntary disability pension on behalf of the respondent.

(5) The Board did not give the respondent proper notice of its meeting to consider the tenure charges in violation of the collective bargaining agreement.

(6) The Board's attendance records are not accurate.

(7) The Board discriminated against the respondent by initiating a disciplinary action against the respondent.

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PROCEDURAL HISTORY

The respondent requested a hearing and the matter was transmitted to the Office of Administrative Law for a determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on March 22, 1984, and at that time, the parties discussed the issues in the matter as well as a possible settlement.

After I issued a prehearing order on March 26, 1984, I received a letter from Mr. Gelzer requesting that Issue F as identified at the prehearing conference be deleted. During a subsequent telephone conference call, the parties agreed that the issues in this matter, as modified, are:

A. Whether the respondent has a record of excessive absenteeism, and if so, whether said record warrants her removal.

B. Whether the alleged manipulation of scheduled work days by the respondent constitutes conduct unbecoming a teacher.

C. Whether the respondent's actions show an incapacity to teach and, if so, whether the Board was under any obligation to initiate an involuntary disability pension application on behalf of the respondent pursuant to N.J.S.A. 18A:66-39.

D. Whether the filing of the tenure charges was motivated by unlawful discrimination.

E. Whether there were any procedural errors in the certification and filing of the tenure charges against the respondent.

Thereafter, both parties requested in writing that the matter be placed on the inactive list so that the parties could work out the terms of a settlement which involved an application by the Board for an involuntary disability pension. I issued an order on July 12, 1984, placing the matter on the inactive list for a period not to exceed six months. At the lapse of the six-month period, I received a letter from Mr. Gelzer requesting that the matter be listed for hearing and alleging that Ms. Marsden had not cooperated with the Board in its preparation of an application for an involuntary disability pension. Mr. Alaimo denied the allegation that Ms. Marsden was non-cooperative and requested that the matter be placed on the inactive list for an additional period so that a determination could be made regarding Ms. Marsden's eligibility for an involuntary

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disability pension. I made no decision regarding which party was at fault for the delay; however, in view of the Board's objection and the fact that Ms. Marsden was then receiving her full salary payments pursuant to N.J.S.A. 18A:6-14, I denied Mr. Alaimo's request by order dated March 13, 1985, and listed the matter for hearing. By the same order, I extended the discovery period until March 29, 1985.

Prior to the hearing, Mr. Gelzer presented a motion for summary judgment. He argued that there were no genuine disputes as to the material facts, and that based on the documents attached to the tenure charges, the Board had clearly established sufficient grounds for the removal of the respondent from her tenured position. In his response, Mr. Alaimo alleged that there were factual disputes in the matter. By order, dated March 13, 1985, I denied the motion to dismiss.

Thereafter, Mr. Alaimo filed a motion to dismiss the tenure charges based on the petitioner's alleged failure to comply with requests for discovery. I received this motion on May 2, 1985, and a supplement to the motion on May 6, 1985. Mr. Gelzer denied the allegation by memoranda, dated May 2, 3 and 6, 1985. I discussed this motion with the parties during a telephone conference call, and ordered the Board to give the petitioner certain additional documents and indicated that I would limit evidence regarding the respondent's record of absences at the hearing to the seven school years prior to her suspension (period in issue). I indicated that I would not allow the parties to submit testimony and evidence regarding the respondent's employment and absences during the entire 18 years of her employment and I indicated that the absences prior to the last seven years were too remote in time to be relevant in this matter. I denied the motion to dismiss by order, dated May 10, 1985. In this order, I also concluded that the respondent had not shown that the Board's responses to the interrogatories were inadequate or improper and I agreed with Mr. Gelzer's argument that the petitioner's interrogatory no. 88 was unduly burdersome.

The hearing took place on May 21, 28, 30, 31, 1985, and June 10 and 11, 1985. After receipt of briefs from the parties, the record in this matter closed on July 11, 1985.

At the end of the petitioner's case, Mr. Alaimo moved to dismiss the matter and argued that the Board had not presented a prima facie case. Mr. Gelzer disagreed. I

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denied the motion, however, I dismissed the issue that the respondent had manipulated her scheduled work days in a manner constituting conduct unbecoming a teacher (Issue B as identified in this initial decision). As to this issue, I agreed with Mr. Alaimo that the Board had not presented a prima facie case. The only testimony presented related to Ms. Marsden's gall bladder operation in November 1983, and there was no evidence to show that the respondent's doctors had not advised her to have the operation at that time or that she was out of work for any period beyond that recommended by her doctors or that she returned to work before she was able to perform her duties and responsibilities.

Also at the end of the petitioner's case, Mr. Gelzer renewed his motion for summary judgment and I again denied this motion. Mr. Alaimo also moved for a dismissal on the basis that the Board had acted improperly and I denied the motion.

TESTIMONY AT THE HEARING

It is not disputed that Ms. Marsden is a tenured teacher and has been employed by the Board since September 1966. Except for a brief period of time, Ms. Marsden has been assigned to the Toms River Intermediate School East. Also it is not disputed that the respondent is a competent teacher when she is present in the school (R-8 through R-15). In addition, it is not disputed that during her 18 years of employment, Mrs. Marsden has been out of work for periods of time due to the birth of her two children, two miscarriages, three automobile accidents, a one-half year sabbatical leave, and an injury at school covered by workers compensation, and has taken sick days due to her chronic bronchitis. For all of her absences, the respondent has presented the required documents and no administrator employed by the Board has ever questioned the legality of these absences. Prior to the tenure charges, no disciplinary action has been initiated against the respondent based on her record of absences.

Further, it is not disputed that Ms. Marsden has never been told that her absenteeism was a problem or that she had to improve her attendance record. In the evaluation reports for Ms. Marsden during the period in issue, the number of her absences was noted, however, there was no adverse comment regarding said absences except for the statement in the June 1983 evaluation report (R-15), and she was generally rated to be a good or excellent teacher (R-8 through R-15).

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During the hearing, there was a great deal of discussion regarding the accuracy of the Board's permanent attendance records for the respondent for the period of time in issue (P-11 through P-17), as well as the accuracy of the allegations regarding the number of her absences set forth in the tenure charges, the listing of her absences in her evaluation reports (R-8 through R-15) and the tabulation of her absences in the reports admitted into evidence (P-2, P-26, R-1).

Mr. Alaimo objected to the fact that the Board had not provided him with the respondent's color coded cards for the period in issue. It was established during the hearing that the teachers were required to submit cards indicating when they were going to be absent or had been absent, and the color of the cards signified the reason for the absence (R-7). The Board's witnesses indicated that these color coded cards were not part of the permanent attendance record and were used to prepare said permanent records. It was noted by the Board's witnesses that the teachers were requested to sign the permanent attendance records at the end of the school year and that the respondent signed her records for the period in issue except for the 1981-82 record which was signed by Ms. Marsden's husband (P-15), and the 1983-84 record since she was suspended before the end of that school year (P-17).

In response to Mr. Alaimo's request, the Board was able to locate some of the color coded cards submitted by Ms. Marsden. Mr. Alaimo had the opportunity to review these cards and he did not offer them for admission into evidence. During the hearing, both the respondent and her husband, Thomas E. Marsden reviewed the permanent attendance records for the respondent (P-11 through P-17) and they were able to identify the reasons for most of the long term absences reflected on these records as well as some of the absences that were due to her chronic bronchitis (R-18, R-19). Although Ms. Marsden questioned the accuracy of the records, neither she nor her husband could identify any specific errors.

Based on the information contained on the respondent's permanent attendance records (P-11 through P-13) and the testimony of Mr. and Mrs. Marsden, I FIND the following chart reflects Ms. Marsden's absences during the period in issue:

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SCHOOL YEAR	SICK DAYS	PERSONAL DAYS	MISCELLANEOUS DAYS[1]	TOTAL
1977-78	12	5	1	18
1978-79	38[2]	2 1/2	1	41 1/2
1979-80	1 1/2	3	79[3]	83 1/2
1980-81	27	3	0	30
1981-82	31	3	0	34
1982-83	53 1/2[4]	2 1/2	1	57
1983-84	48[5]	0	0	48
TOTALS	211	19	82	313

As to the 1983-84 school year, it was stipulated that Ms. Marsden's last working day before her gall bladder operation was November 4, 1983, that she returned to work on December 19, 1983, and worked until the Christmas recess which started on December 23, 1983. After this recess, Ms. Marsden returned to work on January 3, 1984, and continued to work until January 17, 1984, when she was suspended without pay. Ms. Marsden's salary payments resumed as of May 17, 1984.

Both John L. Gluck, the principal of Toms River Intermediate School East, and Margaret F. Bartlett, the supervisor of Instruction of Language Arts for the two intermediate schools, testified that Ms. Marsden's absenteeism has had an adverse effect on her students since these absences were a disruption of the learning process. They also stated that since many of Ms. Marsden's absences were for indefinite periods of time, it was difficult to arrange for adequate coverage by substitute teachers.

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[1]Includes legal holidays, death in family days off, workers compensation days off, leaves of absence

[2]Includes 24 days off because of injuries resulting from an automobile accident

[3]Includes 73 workman compensation days off

[4]Includes 48 1/2 days off because of injuries resulting from an automobile accident

[5]Absences prior to suspension, including 20 days for a maternity absence and 25 days off because of the gall bladder operation

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During the 1983-84 school year, Ms. Bartlett sent the respondent two memoranda criticizing her performance which were in part related to her absences. In a memorandum, dated October 24, 1983, Ms. Bartlett stated that Ms. Marsden was absent on several occasions when lesson plans were to be submitted for review and that she did not submit these lesson plans upon her return (P-20). Ms. Bartlett had sent a similar memorandum to the respondent during the 1981-82 school year (P-28). In addition, on November 2, 1983, Ms. Bartlett criticized Ms. Marsden's grade book for the 1982-83 school year (P-21), and reprimanded her for failing to follow the school policy as to grades (P-23). Ms. Bartlett indicated that although the grade books were collected from the teachers at the end of every school year so that they would be available for use by administrators if a parent questioned a student's grade during the summer months, she normally did not review these grade books. However, the teacher evaluation process was changed as of the fall of 1983, and Ms. Bartlett was required to review the grade books of the teachers under her supervision. According to Ms. Bartlett, the respondent's grade book was the worst of the 42 staff members under her supervision and there were no grades recorded for the third and fourth marking periods. Ms. Bartlett recognized that the respondent was absent for most of the third and fourth marking periods, however, she indicated that it was Ms. Marsden's responsibility to work with the substitute teachers and make sure that class grades were recorded in the grade book (P-23). It should be noted that the respondent's grade book for the 1982-83 school year contains a number of loose pages which apparently contain grades prepared by substitute teachers which were not recorded in the grade book (P-21). In addition, Ms. Bartlett disputed the respondent's statement that one of her 1982-83 classes did very well in the final examination. Based on her records for that school year (P-29 through P-31), Ms. Bartlett stated that the respondent's students in the 1982-83 school year, on an average, did not do as well as other students taking the same courses.

Edith Rich, who was the substitute teacher for the respondent's classes for the first three weeks of her maternity leave in the fall of 1983, testified as a witness for the respondent. Ms. Rich stated that Ms. Marsden told her generally what to cover in the classes and what books to use and that she felt she could have done a better job if Ms. Marsden had given her specific lesson plans.

Karen Elko, a witness for the Board, stated that she substituted for Ms. Marsden on a number of occasions and that she sometimes got lesson plans from the respondent. According to Ms. Elko, she prepared most of the lesson plans when she

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substituted for the respondent in the spring of 1983, and that she prepared the grades for the third marking period for the 1982-83 school year since Ms. Marsden was out for the entire period.

On her own behalf, Ms. Marsden testified that her absences did not have any negative effect on her students since she prepared lesson plans which were sent to the substitute teachers and she kept in touch with these teachers to assist them during her absences.

Bruce R. Conners,* a teacher employed by the Board, testified that while he lived near the respondent (1966 through 1978), he would bring material to the school from the respondent when she was out ill. Thomas Marsden, the respondent's husband, testified that after 1978 either he or the respondent's daughter would take material to the school for the respondent. However, neither Mr. Conners nor Mr. Marsden could state exactly what was in the material Ms. Marsden sent to the school.

According to Ms. Marsden, if her students were at a disadvantage during the 1983-84 school year due to her absences for the birth of her child and for her gall bladder operation, it was the fault of Mr. Gluck. Ms. Marsden stated that when she became aware that she would be absent for the birth of her baby and that there was a possibility that she would also be absent for a gall bladder operation, she asked Mr. Gluck to make her a permanent substitute teacher for the 1983-84 school year. After Mr. Gluck refused to consider this suggestion, Ms. Marsden asked that Ms. Elko be assigned as the substitute teacher for her classes since she had worked well with Ms. Elko in the past and considered her to be a qualified substitute teacher for her classes. During the four weeks Ms. Marsden was out after the birth of her child, Ms. Rick was the substitute teacher for the first three weeks and Ms. Elko was the substitute teacher for the last week. During the 1983-84 school year, Ms. Rick was a permanent substitute teacher.

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*When Mr. Conners and certain other teachers were served with subpoena to testify on behalf of the respondent, there was confusion as to whether or not the Board would allow these teachers time off with pay and would provide substitute teachers. The matter was resolved shortly thereafter and the teachers were told that the Board would pay their full salary for the day and would provide substitute teachers for their court appearances. There was no evidence that the Board was trying to influence the teachers or to prevent them from testifying for the respondent.

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On behalf of the respondent, Allen Colsen, the Assistant Principal at the Toms River Intermediate School East, testified that Ms. Marsden is a competent teacher and that she is concerned about the welfare of her students. However, Mr. Olsen indicated that Ms. Marsden's absences have had a detrimental effect on her students.

John R. Garrabrant, the Senior Assistant Superintendent of Schools, testified that he requested information regarding teachers with a pattern of above average number of absences (P-24, P-25, P-26), and that no other teacher employed by the Board had an attendance record comparable to Ms. Marsden. At the hearing, a great deal of attention was given to the record of absences of Leona Landon. Ms. Landon's permanent attendance record (P-25) does not indicate an unusually high number of absences prior to the time she had a stroke during the 1983-84 school year. Ms. Landon was given a leave of absence for the entire 1984-85 school year, and she has applied for a disability pension and will be retiring at the end of the current school year.

Although I dismissed the issue relating to the manipulation of scheduled work days by the respondent, it is appropriate to consider the testimony presented during the hearing regarding this issue since it was a factor in the decision to initiate tenure charges against the respondent.

Mr. Gluck testified that he recommended that disciplinary action be taken against the respondent based on his conclusion that her absences were excessive over a period of years, that she was deceitful regarding her November 1983 gall bladder operation and since she was more concerned about her salary than the welfare of her students. Also, Mr. Gluck stated that although he was aware that Ms. Marsden had a number of long term absences, he never looked into the matter prior to the time of her 1983 gall bladder operation.

Mr. Gluck stated that he was first informed during the summer of 1983 that the respondent had developed a gall bladder problem. Prior to this time, Mr. Gluck had been informed that Ms. Marsden was pregnant and that she would have the child sometime in the fall of 1983.

On the first day of school in September 1983, Mr. Gluck spoke with Ms. Marsden regarding her pregnancy and a possible gall bladder operation. At that time, Ms. Marsden stated that she would be out for four weeks after the birth of her baby and

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that. subject to the approval of her doctors, she would have the gall bladder operation after her pregnancy. Approximately one week later, about September 8, 1983, Mr. Gluck spoke to Ms. Marsden, who was in the hospital with false labor pains, and she told him that the gall bladder operation would not take place after her pregnancy and would probably be put off until sometime during the summer months. Mr. Gluck again spoke to Ms. Marsden about the gall bladder operation on September 17, 1983, and was told by Mr. Marsden that her doctors had decided that she should not have the operation after the delivery of the baby. Ms. Marsden again indicated that the operation would probably take place during the summer months.

Mr. Gluck stated that Ms. Marsden asked him in the beginning of the school year to designate her as a permanent substitute teacher for the 1983-84 school year, and that she repeated this request on September 15, 1983. According to Mr. Gluck, Ms. Marsden told him that he could place her anywhere within the school system so long as the Board paid her salary. Mr. Gluck felt that this statement showed that the respondent had an indifference to her work responsibilities and was more concerned about her salary than the welfare of her students.

According to Mr. Gluck, he did not honor the respondent's request to be a permanent substitute teacher since there were several teachers expecting babies during the 1983-84 school year and since Ms. Marsden had told him she would not have her operation during the school year. In addition, Mr. Gluck did not think that he was authorized to designate a teacher to be a permanent substitute teacher since this would necessitate the hiring of another full time teacher for the school year.

Mr. Gluck stated that on Friday, November 4, 1983, he received a letter written by Ms. Marsden, which was dated November 2, 1983, indicating that she would be absent starting on the following Monday for a gall bladder operation. In this letter, Ms. Marsden stated that she would be out for approximately five weeks and would return sometime in December 1983 (P-18). Mr. Gluck was upset because Ms. Marsden had given him short notice of this absence and he had only one day to arrange for a substitute teacher, and because her letter did not indicate a specific date on which Ms. Marsden would return to school. Also, Mr. Gluck was upset about the fact that in this letter the respondent noted that she would be absent on Election Day, Tuesday, November 8, 1983, and that this day should be counted as a holiday and not a sick day (P-18).

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Ms. Bartlett testified that she also had conversations with Ms. Marsden regarding the scheduling of her operation. Ms. Bartlett stated that on September 13, 1983, Ms. Marsden informed her that no decision had been made regarding her operation and that it would possibly take place during the summer months. After she returned to work after the birth of her child, Ms. Marsden told Ms. Bartlett, on or about October 17, 1983, that she would have the gall bladder operation in November 1983. Ms. Bartlett also stated that on October 25, 1983, she advised Ms. Marsden to notify Mr. Gluck regarding her scheduled operation and Ms. Marsden was uncertain at that time as to when the operation would take place and stated that she would notify Mr. Gluck once a decision had been made by her physicians.

On or about September 15, 1983, Mr. Gluck received a telephone call from Pamela K. Ball, the parent of a student in one of Ms. Marsden's classes, who expressed a concern about the amount of time Ms. Marsden would be absent during the school year. Ms. Ball told Mr. Gluck that her daughter informed her that Ms. Marsden had told the class that she would be out for four weeks after the birth of her baby, that she would return for a short period of time and that she would be again out for an operation, and that the class would have to get used to having substitute teachers. Based on his conversations with Ms. Marsden, Mr. Gluck assured Ms. Ball that Ms. Marsden had no fixed plan to be out beyond the four week maternity leave and suggested that Ms. Ball's daughter misunderstood the respondent. According to Mr. Gluck, he did not discuss this telephone call with the respondent since he was confident that Ms. Ball's daughter had misunderstood the respondent. Thereafter, on the Visit the School Night, which took place on October 6, 1983, a number of parents complained to both Mr. Gluck and Ms. Bartlett regarding the amount of time that Ms. Marsden would be out during the school year and that these parents had been told by their children that Ms. Marsden would have the gall bladder operation after the birth of her child. Notwithstanding the fact that he was concerned about the inconsistency between what the parents had told him and what was told to him by Ms. Marsden, Mr. Gluck did not personally speak to Ms. Marsden about the matter while she was absent on maternity leave nor upon her return to school. However, based on what was represented to him by the parents as well as the fact that Ms. Marsden had the operation in November 1983, Mr. Gluck concluded that Ms. Marsden had deceived him about the operation.

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Ms. Bartlett testified that she spoke to Ms. Marsden regarding the parents' comments regarding her operation on October 25, 1983, and Ms. Marsden indicated that she may have told her students that there was a possibility she would be out for an operation.

Both Ms. Ball and Linda L. Gillick, a parent whose son was in one of Ms. Marsden's classes during the 1983-84 school year, confirmed that they were told by their children that the respondent had told her classes that she would be out for an operation in the fall of 1983. In addition both parents indicated that they thought Ms. Marsden's absences had an adverse effect on their children's learning process and grades.

On her own behalf, Ms. Marsden stated that she never told her students prior to November 2, 1983, that she would definitely have an operation during the school year and she stated that she told her students that there was a possibility that she would be out for an operation. Ms. Marsden also stated that one of her doctors had recommended in October 1983 that she have the surgery in November but that the final decision was not made until she got the affirmative concurrence of her other doctors. Dr. Richard Aljian, in a letter dated December 15, 1983, stated that he recommended that Ms. Marsden have the operation before the end of the year and that when Ms. Marsden saw him on October 7, 1983, they discussed the operation and scheduled it for November 7, 1983 (R-16).

Mr. Gluck testified that he was aware that in July 1983, Ms. Marsden had written a letter to express a concern regarding the fact that she had not been paid for the spring recess period during the 1982-83 school year (P-19). In this letter, Ms. Marsden stated that she should have been paid for the spring recess period since she was on the payroll for a half of a day prior to the recess and that she should not have been docked for the entire month (P-19). Mr. Gluck thought that Ms. Marsden returned to work after her operation prior to the Christmas recess period so that she would be paid for the recess. Mr. Gluck was aware that Ms. Bartlett advised the respondent that it would be better for her students if she returned after the recess period. Based on these facts as well as the respondent's statement to him regarding her salary on September 15, 1983, and her concern that November 8, 1983, not be listed as a sick day, Mr. Gluck concluded that Ms. Marsden was more concerned about her salary than she was about the welfare of her students, and that she had manipulated her sick days.

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During the hearing, Mr. Alaimo made reference to statements allegedly made to the Board and by Board members during the executive session meetings at which the Board considered whether or not to certify tenure charges against the respondent (R-4, R-5).

On cross-examination, Mr. Gluck denied that he suggested to the Board that Ms. Marsden be used as an example or that he predicted that Ms. Marsden would resign if charges were filed against her. Mr. Gluck stated that he may have recommended to the Board that the respondent not be allowed to continue to work if the charges were certified. According to Mr. Gluck, he felt he was "on the spot" and was being questioned by the Board because of Mr. Alaimo's allegation that there were discrepancies as to the number of the respondent's absences. Mr. Gluck told the Board that the number of absences set forth in the evaluation forms reflected the information available at the time the report was prepared and that the designation given to days off can be changed; for example, sick days are often changed to workers compensation days. Also he told the Board that Ms. Marsden had sometimes requested a change in designation from a sick day to a personal day or visa versa. Mr. Gluck did not recall if he used the word "guilty" when he referred to Ms. Marsden's requests to change the designations as reflected in the Board's minutes (R-4 at 7), however, he indicated that he did not mean to imply anything other than the fact that she made these requests. Lastly, Mr. Gluck stated that he did not recall saying that the respondent was "raping" the school for money as reflected in the Board's minutes (R-5 at 7). This statement appears in the minutes of the Board after the Board's vote on the tenure charges (R-5).

Mr. Garrabrant denied that there was any conspiracy or attempt to single Ms. Marsden out for disciplinary action by the Board or any of its administrators.

Based on the testimony, I **FIND** that the pertinent facts in this matter are the uncontroverted facts as heretofore set forth and the following:

(1) Ms. Marsden's absences during the period in issue have had a detrimental effect on her students.

(2) Ms. Marsden has tried to mitigate the impact of her absences by providing some lesson plans and suggestions to the substitute teachers.

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(3) No other teacher employed by the Board has a pattern of absenteeism comparable to that of Ms. Marsden.

(4) Ms. Marsden told both Mr. Gluck and Ms. Bartlett that the timing of her gall bladder operation was a decision to be made by her doctors.

(5) As of October 7, 1983, one of the respondent's doctors recommended that the operation take place on November 7, 1983, and sometime thereafter the respondent's other doctors concurred.

(6) Ms. Marsden did not notify Mr. Gluck after October 7, 1983, that there was a possibility that the operation would take place on November 7, 1983.

(7) Ms. Marsden did not attempt to work out a date for her operation which would allow her to give a reasonable notice to Mr. Gluck.

(8) Ms. Marsden was concerned about her salary and has the right to question how her salary payments are calculated.

(9) Ms. Marsden's return to work before the Christmas recess in 1983 may have been prompted by her salary concerns; however, there was no showing that she was physically unable to perform her job responsibilities.

(10) Although the summary of Mr. Gluck's statements to the Board continued in the executive session minutes (R-4, R-5) attribute to him certain derogatory statements, there is no evidence to show that he made these statements or that he acted improperly when he discussed the tenure charges with the Board, and there is no evidence to show that the Board's decision to certify the charges was based on any factors not contained in the tenure charges or that any Board member was prejudiced by these allegedly derogatory statements by Mr. Gluck.

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LEGAL ARGUMENTS AND CONCLUSIONS

Mr. Alaimo in his closing brief conceded that there were no procedural errors as to the certification and filing of the tenure charges against the respondent (Issue E as identified in this initial decision). Based on the arguments contained in his brief, it is clear that Mr. Alaimo was referring to the statutory procedure contained in N.J.S.A. 18A:6-10 et seq., since Mr. Alaimo argued that the Board had not complied with Article IV, paragraph C of the Collective Bargaining Agreement (R-2, R-6) which he represented required the Board to notify the respondent prior to its initial consideration of the tenure charges. Mr. Alaimo stated that such a notification was not given to Ms. Marsden; however, Ms. Marsden was notified and was present with him when the Board considered the tenure charges at its executive session meeting on December 20, 1983 (R-4) and when it considered and voted on the tenure charges at its executive session meeting on January 17, 1984 (R-5).

At the hearing, Mr. Alaimo did not present any evidence to show that the provisions of Article IV, paragraph C, were applicable to tenure charges and in fact the respondent's own witness, Elizabeth Hickley, the president of the Toms River Education Association and a member of its contract negotiation committee indicated that this provision was not applicable to tenure charges.

Further, Mr. Alaimo argued that the Board had not complied with the requirement in Article XXXII of the collective bargaining agreement (R-2, R-6) that the principal notify a teacher of any parent or student complaint which is of consequence or merit and meet with said teacher regarding the matter. Mr. Gluck indicated that he did not mention Ms. Ball's telephone complaint to the respondent since he felt that there was a misunderstanding. However, after a number of parents told him that Ms. Marsden had indicated to her students that she would be out for a gall bladder operation, Mr. Gluck was concerned and upset about the alleged disparity in the statements made by Ms. Marsden and this was a factor in his recommendation that disciplinary charges be brought against the respondent. According to Mr. Gluck, he asked Ms. Bartlett to talk to Ms. Marsden regarding the parents' comments as to her absences.

Mr. Alaimo also argued that pursuant to Article XXXII, Mr. Gluck should have discussed with the respondent the complaints made by both Ms. Ball and Ms. Gillick

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regarding the respondent's teaching performances as reflected in their affidavits which are attached to the tenure charges.

Based on these facts, I agree with Mr. Alaimo and I **CONCLUDE** that Mr. Gluck should have discussed the representations made by the parents and the criticisms of Ms. Ball and Ms. Gillick with Ms. Marsden prior to the submission of this information to the Board as part of tenure charge and it is clear that Mr. Gluck had ample opportunity to do so. However, even though Mr. Gluck did not strictly comply with Article XXXII of the Collective Barganing Agreement, I **CONCLUDE** that there has been no showing that the respondent was prejudiced by this failure to comply or that this non-compliance has a direct bearing on the issues before me.

In addition, based on the facts, I **CONCLUDE** that Mr. Alaimo has not shown that the tenure charges should be classified as inefficiency rather than incompetency. See, Teaneck Bd. of Ed. v. Hogue, OAL DKT. 4598-82 (Nov. 30, 1982), aff'd, Comm. of Ed., Jan. 13, 1983.

At the hearing, Mr. Gelzer indicated that he wanted to have admitted into evidence the efforts made by the Board to initiate an involuntary disability pension application on behalf of Ms. Marsden, which I have already indicated was part of the proposed settlement agreement of this matter. Mr. Alaimo objected, and I indicated that the information regarding the attempt to settle the matter and the question as to who was at fault for the failure of the settlement negotiations were not relevant to the issues before me.

In his closing brief, Mr. Alaimo recited what actions were taken to initiate such an involuntary disability pension application and also argued that the Board was under an obligation to initiate an involuntary disability pension application pursuant to the provisions of N.J.S.A. 18A:66-39 since the respondent had been charged with incapacity. Based on my reading of this statute, I **CONCLUDE** that there is no requirement that a board file an application for an involuntary disability pension. Also, I **CONCLUDE** that a finding of incapacity as used in the tenure statute does not automatically mean that the person has an incapacity as used in the pension statute, See, In the Matter of Paula M. Grossman, 157 N.J. Super. 165 (App. Div. 1978).

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Further, I recognize that Ms. Marsden has the right to apply for a disability pension and it should be noted that at the hearing Ms. Marsden stated that she is not incapacitated or unable to work and has affirmatively asserted her ability to perform the duties and responsibilities of a teacher.

At the hearing and in his brief, Mr. Alaimo alleged that the Board discriminated against the respondent by filing the tenure charges. In support of his argument, Mr. Alaimo pointed out that the Board has never initiated any disciplinary actions against a teacher based on an alleged history of excessive absenteeism. He argued that the Board discriminated against the respondent because of her sex and that the Board's action violated the respondent's right to due process pursuant to the Fourteenth Amendment to the United States Constitution. Mr. Alaimo argued that there were a number of teaching staff members who had records of frequent absences and that one teacher, Leona Landon, has as many absences as the respondent. Based on the facts in this matter, I **CONCLUDE** that the respondent has not shown that there was any discrimination against Ms. Marsden nor has the respondent shown that the decision to initiate the tenure charges was an intentional selection of the respondent based on any arbitrary classification. It has been clearly established that the mere failure of initiating action against others is not sufficient to establish the defense of selective enforcement, State v. Boncelet, 107 N.J. Super. 444, 453 (App. Div. 1969), and that there must be a showing that the limited enforcement was based on an unjustifiable standard or classification in order to constitute a violation of a person's constitutional right of equal protection, State v. Saunders, 130 N.J. Super. 234 (Law Div. 1974), aff'd, 142 N.J. Super. 287 (App. Div. 1976), rev'd on other grounds, 75 N.J. 200 (1977), State v. Savoie, 128 N.J. Super. 329, 337 (App. Div. 1974), rev'd on other grounds, 67 N.J. 439 (1975), Hyland v. Smollock, 137 N.J. Super. 456 (App. Div. 1975), certif. den., 71 N.J. 328 (1976).

At the hearing and in his brief, Mr. Gelzer argued that the Board had shown that the respondent has a record of excessive absences and that based on this record she should be removed from her tenured position, In the Matter of the Tenure Hearing of Catherine Reilly, School District of Jersey City, 1977 S.L.D. 403, In the Matter of the Tenure Hearing of Consuelo Garcia Lifokes, School District of Midland Park, 1976 S.L.D. 816.

Based on the facts in this matter, I **CONCLUDE** that the Board has shown that Ms. Marsden has a record of excessive absences during the period in issue.

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In addition to the facts in this matter, it has been clearly established by school case law that excessive absenteeism causes a disruption in instruction and has a negative impact on the students. As to this impact, the Commissioner has stated:

> Frequent absences of teachers from regular classroom learning experiences disrupt the continuity of the instruction process. The benefit of regular classroom instruction is lost and cannot be entirely regained, even by extra effort, when the regular teacher returns to the classroom. Consequently, many pupils who do not have the benefit of their regular classroom teacher frequently experience great difficulty in achieving the maximum benefit of schooling. Indeed, many pupils in these circumstances are able to achieve only mediocre success in their academic program. The entire process of education requires a regular continuity of instruction with a teacher directing the classroom activities and learning experience in order to reach the goal of maximum educational benefit for each individual pupil. The regular contact of the pupils with their assigned teacher is vital to this process. [In the Matter of the Tenure Hearing of Catherine Reilly, at p. 414]

This rationale has been affirmed by the Commissioner in a number of cases, Kulik v. Montclair Bd. of Ed., 1983 S.L.D. ____ (Comm. of Ed., Oct. 3, 1983), aff'd, State Bd. of Ed., May 2, 1984, Meli v. Burlington Cty. Vocational-Technical School Bd. of Ed., 1984 S.L.D. ____ (Comm. of Ed., May 21, 1984), Newark Bd. of Ed. v. Burnes, 1984 S.L.D. ____ (Comm. of Ed., March 8, 1984), Newark Bd. of Ed. v. Marshall, 1984 S.L.D. ____ (Comm. of Ed., Aug. 20, 1984).

Also, it has been clearly established by school case law that a showing of a record of excessive absenteeism is sufficient grounds for the withholding of a teacher's salary increment even where legitimate medical reasons existed for said absences, Trautwein v. Bound Brook Bd. of Ed., 1978 S.L.D. 445, aff'd with modifications, State Bd. of Ed., 1979 S.L.D. 876, rev'd, 1980 S.L.D. 1539 (App. Div., unreported, April 8, 1980), certif. den., 84 N.J. 469 (1980), Kulik v. Montclair Bd. of Ed., Angelucci v. West Orange Bd. of Ed., 1980 S.L.D. 1077, aff'd, State Bd. of Ed., Feb. 9, 1981. However in recent decisions, the State Board of Education has stated that a disciplinary action should not be based solely on the number of absences and that the local board should also consider the reasons for said absences before making a determination regarding the withholding of a salary increment, Kuehn v. Teaneck Bd. of Ed., 1983 S.L.D. ____ (State Bd. of Ed., Feb. 1, 1983), Montville Tp. Ed. Assn. v. Montville Bd. of Ed., 1984 S.L.D. ____ (State Bd. of Ed., Nov. 7, 1984).

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In addition, it should be noted that in most cases where a tenured teacher was removed upon a showing of a record of excessive absenteeism there was also a finding that the underlying reasons for said absenteeism has not been abated and that there is a likelihood that the pattern of absenteeism will continue in the future, In the Matter of the Tenure Hearing of Peter Canzonier, School District of East Brunswick, 1981 S.L.D. ____ (Comm. of Ed., April 24, 1981), In the Matter of the Tenure Hearing of Claire DeKrafft, 1981 S.L.D. ____ (Comm. of Ed., Dec. 4, 1981), aff'd, State Bd. of Ed., May 6, 1982, aff'd (N.J. App. Div., May 4, 1983, 4641-81T2) (unreported), West New York Bd. of Ed. v. Tonnarillo, OAL DKT. EDU 7783-84 (March 29, 1985), adopted, Comm. of Ed., May 13, 1985.

In this matter, a review of Ms. Marsden's record of absenteeism during the period in issue shows that many of her absences were the result of traumatic events such as accidents, the birth of her children, and an operation. I recognize that Ms. Marsden does have a chronic bronchitis condition which was the reason for a substantial number of her absences during the period in issue; however, her absences because of this chronic problem and for other reasons were not inordinate and did not alone constitute a pattern of excessive absenteeism. Therefore, I **CONCLUDE** that the Boad has not shown that Ms. Marsden's record of absences established conduct unbecoming a teacher or incapacity to perform the duties of a teacher. Further, based on the facts in this matter, I **CONCLUDE** and **ORDER** that the Board should reinstate the respondent to her position but that the respondent is not entitled to any back salary for the first 120 days of her suspension.

The facts in this matter clearly establish that the Board's administrators have given tacit approval to respondent's absences over the years and that these absences have had an adverse effect on her students; therefore, I **ORDER** that the respondent be given a letter of reprimand regarding her record of absences and that said letter advise her that her attendance must significantly improve in the immediate future or else she may be subject to future disciplinary action.

In addition, I **CONCLUDE** that it has been established that the respondent did not give adequate notice to the Board of the fact that she was going to have a gall bladder operation and that this lack of notice adversely impacted the Board's ability to provide for a smooth transition of her teaching responsibilities to a substitute teacher. Although I have accepted Ms. Marsden's representation that she was uncertain regarding when the

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operation would occur until her doctors made the decision, it is also clear that Ms. Marsden did not attempt to convey this final decision to the Board's representatives as quickly as possible nor did she try to arrange a time for the operation with her doctors which would give Mr. Gluck reasonable notice, and I **CONCLUDE** her action is conduct unbecoming a teacher. Based on this determination, I **ORDER** that the respondent's salary increment be withheld for the 1983-84 school year.

Lastly, I **CONCLUDE** that the Board has not shown that the respondent's concern regarding her salary is conduct unbecoming a teacher nor has the Board shown that the respondent's concern regarding her salary was paramount to her concern about the welfare of her students.

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

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

August 26, 1985
DATE

BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE TENURE	:	
HEARING OF PATRICIA MARSDEN,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF TOMS RIVER	:	DECISION
REGIONAL, OCEAN COUNTY.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were timely filed by the Board pursuant to N.J.A.C. 1:1-16.4a and b. Correspondence was received from respondent on September 16, 1985 marked "Attention: Exception File." Said correspondence was untimely pursuant to the above-cited regulation but was timely in terms of a reply to the Board's exceptions pursuant to N.J.A.C. 1:1-16.4c. It is noted for the record that this correspondence raises exceptions to the initial decision which are not deemed to be cross-exceptions since the issues they address deal with matters not raised by the Board in its exceptions. N.J.A.C. 1:1-16.4c reads, "Within 5 days from receipt of exceptions, any party may file a reply with the agency head and with the clerk***. Such replies may include cross exceptions or submissions in support of the initial decision." (Emphasis supplied.) Respondent did not avail herself of the provisions of N.J.A.C. 1:1-16.4a and b wherein she could have raised her own exceptions to the initial decision. She is not allowed to raise by way of a reply to the Board's exceptions that which had to be addressed through N.J.A.C. 1:1-16.4a and b. Consequently, the Commissioner will consider only those submissions which counter/cross the Board's exceptions or are in support of the initial decision.

A summary of the Board's exceptions and respondent's reply is provided as follows. The Board contends, firstly, that it is difficult to understand how the judge concluded dismissal was not warranted in this matter given the fact that she concurred that: (1) respondent's behavior was unprofessional to the point it warranted disciplinary action; (2) respondent had a record of excessive absences during the period in issue; and (3) excessive absenteeism causes a disruption in instruction and has a negative impact upon students, particularly when one couples these concurrences with the Commissioner's statement in Reilly, supra, with respect to absenteeism and a board of education's abrogation of responsibility to insure a thorough and efficient education. This statement in Reilly reads:

> "In view of respondent's record of chronic absence, the Commissioner is constrained to observe that the Board waited for an excessive period of time to resolve this matter. The Board's delay and inaction demonstrated an abrogation of its mandated responsibility to insure a thorough and efficient educational

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program for a segment of its pupil population. Redcay v. State Board of Education, 130 N.J.L. 369 (Sup. Ct. 1943), aff'd 131 N.J.L. 326 (E.&A. 1944)."

(1977 S.L.D. at 415)

Regarding the above, the Board argues that dismissal is necessary if it is to fulfill its responsibility to provide a thorough and efficient education for the students in its charge. It also excepts to the judge's statement that the Board's administrators have given tacit approval to respondent's absences over the years (Initial Decision, at p. 20) and it believes the judge has misconceived and has inappropriately found respondent had never been told her absenteeism was a problem (Initial Decision, at p. 5). With respect to this latter exception it points out that the judge does state in the same paragraph that the June 15, 1983 evaluation report (R-15) refers to adverse effect of absences on student achievement during the 1982-83 school year and it alleges that she apparently ignored two memoranda criticizing her level of performance. Further, it avows that at least three memoranda were entered in evidence (P-20, P-23, P-28) which relate to absences since 1981-82 and state's, "Not only has [respondent] been told, she has been told frequently, something that Judge Tylutki knew or should have known, because it is plainly in evidence." (Board's Exceptions, at p. 4).

In addition to the above, the Board's counsel suggests that in refusing to rule for the dismissal of respondent, the judge may be guilty of compassion, as perhaps were the administrators, because the judge believed the excessive absences to be the result of traumatic events. The Board also asserts that the judge ignored the pronouncements of the Commissioner in Reilly, supra, In the Matter of Mary Marshall, Newark Bd. of Ed., (decided by the Commissioner August 20, 1984) and similar cases and if the Commissioner approves the initial decision he would, in effect, be reversing such decisions.

Respondent rejects the arguments advanced by the Board that her dismissal is warranted. She concurs with the judge's ruling that the Board did not show her record of absences established conduct unbecoming a teacher or incapacity to perform her duties and that she should be reinstated. She does allege, however, that there is no basis for the order denying her back salary for the first 120 days of her suspension in view of the above. Further, she rejects the Board's support of the judge's conclusion that her action surrounding the gall bladder operation is conduct unbecoming a teacher, avowing said conclusion is erroneous as a matter of law. In like manner, she avows that the judge's conclusion that her salary increment be withheld is erroneous as a matter of law.

Respondent strongly excepts to the Board counsel's suggestion that the administrators and judge may be guilty of compassion. Of this she says:

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> "***The manner in which a statement of charges was obtained by the principal, the principal's behavior towards the teachers subpoenaed on behalf of [her], the petitioner's failure to afford adequate discovery to the respondent and the tenor of the prosecution of this case, as may be discerned from the transcript, will never lead anyone to conclude that the administrators had even the slightest inkling of compassion."
> (Respondent's Exceptions, at p. 4)

The Commissioner, upon review of the record in this matter, concurs with the judge's determination that respondent's absence for the period at issue constitutes a pattern of excessive absenteeism. The fact that the judge did not determine that such absenteeism constituted conduct unbecoming a teacher or incapacity does not render the penalties recommended by the judge erroneous. The record is abundantly clear that respondent's pattern of absence is one of long-term, persistent, chronic absenteeism. (See Initial Decision, ante.) This unto itself constitutes "other just cause" pursuant to N.J.S.A. 18A:6-10 such that disciplinary action against her is warranted. As the judge has correctly pointed out in her analysis, it has been clearly established by school case law that excessive absenteeism causes a disruption in instruction and has a negative impact on students and that discipline is appropriate even where legitimate medical reasons exist for the absences. (Initial Decision, ante)

The penalties levied in this matter by the judge (denial of back salary for the first 120 days of suspension, a letter of reprimand in respondent's file, and withholding of her salary increment) are justified on the basis of chronic, persistent, excessive absenteeism alone, even if she had not been found guilty of unbecoming conduct stemming from the sick leave episode in November 1983.

The Commissioner finds the Board's arguments urging reversal of the penalty levied by the judge and calling for dismissal to be without merit. The Commissioner determines that dismissal is not warranted in this matter because as deplorable as respondent's excessive absenteeism may be, it was not proven to constitute incapacity or conduct unbecoming a teacher. Further, the record fails to establish that either the Board or its administrators had taken any corrective action to improve that pattern of excessive absenteeism prior to respondent's suspension and the certification of tenure charges. Exhibits R-15, P-20, P-23, P-28 do not sway the Commissioner from this determination.

The Commissioner will not hesitate to order dismissal of a tenured teaching staff member for chronic, persistent absenteeism, even when no allegation of illegitimate use of sick leave has been alleged, when it can be demonstrated that attempts to correct such absentee pattern have been taken and have failed to elicit change. See In the Matter of Edna Booth, Bd. of Ed. of West Orange, decided by the Commissioner May 31, 1985. In the instant matter, the Board

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and its administrators clearly failed in their responsibility to take measures sooner to counter respondent's deplorable attendance pattern, a pattern which appears to go back far beyond the period of time to which the judge limited the hearing (P-2). In the Commissioner's judgment, the Board herein should have heeded the very words in Reilly, supra, which it now cites in support of respondent's dismissal.

Given the inaction of the Board and its administrators in this matter prior to the tenure charges finally being levied against respondent, the Commissioner cannot but deny the relief represented by the Board. He makes it clear, however, that the Board is free to take future action seeking respondent's dismissal if the chronic absenteeism persists after her reinstatement.

Accordingly, the Commissioner adopts the recommended decision of the Office of Administrative Law in this matter because the Board has borne its burden of proof that respondent has a chronic, persistent pattern of absenteeism which constitutes "other just case" for disciplinary action under N.J.S.A. 18A:6-10 and that she was guilty of unbecoming conduct in regard to the November 1983 sick leave. However, he does modify the order with respect to the salary withholding to be for the 1985-86 school year, not the 1983-84 school year as contained in the initial decision.

The Commissioner further orders that the Board examine respondent's attendance pattern for the 1985-86 school year to determine whether her career long pattern of chronic absenteeism continues to prevail despite the determination herein. If it determines that the attendance pattern continues to be unsatisfactory, the Board may institute tenure charges again pursuant to N.J.S.A. 18A:6-10 et seq.

COMMISSIONER OF EDUCATION

October 10, 1985

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5118-84
AGENCY DKT. NO. 170-5/84

LOWER CAMDEN COUNTY REGIONAL
HIGH SCHOOL DISTRICT NO. 1,
Petitioner,
v.
WILLIAM ROYDS,
Respondent.

Robert E. Birsner, Esq., for petitioner (Maressa, Goldstein, Birsner, Patterson & Drinkwater, attorneys)

Allen S. Zeller, Esq., for respondent (Freeman, Zeller & Bryant, attorneys)

Record Closed: July 19, 1985 Decided: August 30, 1985

BEFORE **JOSEPH LAVERY**, ALJ:

Lower Camden County Regional High School District No. 1 (hereinafter "Board") has certified charges, based on an accompanying statement of evidence, against William Royds (hereinafter "respondent"), a tenured teacher in its employ. It has suspended respondent without pay from his duties. The Board alleges that respondent has engaged in conduct unbecoming a teacher with two minor female students of the district. It now asks the Commissioner of Education to end respondent's tenure, and permanently dismiss him, pursuant to authority reposing in the Tenure Employees' Hearing Law, N.J.S.A. 18A:6-10 et seq.

Respondent denies the charges and seeks reinstatement with back pay.

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PROCEDURAL HISTORY

This matter was initiated by the Board's certification of charges, filed with the Division of Controversy and Disputes, Department of Education, on May 11, 1984. After timely answer submitted July 3, 1984, the Commissioner declared the matter a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and forwarded it to the Office of Administrative Law pursuant to N.J.S.A. 52:14F-1 et seq. The case was received there on July 13, 1984, and scheduled for prehearing conference. The conference convened on August 27, 1984. Plenary hearing was ordered for November 7 and 8, but adjourned because of a discovery motion.

Motion hearing was then convened on December 10, 1984 from which an Order issued on January 7, 1985. On February 8, 1985, hearing was held to resolve a motion by respondent for more specific interrogatory answers. An additional hearing on February 27, 1985 disposed of a motion for summary judgment. That motion was denied by Order of February 28, 1985. Following interlocutory appeal, the Commissioner on March 15, 1985 declined to review the Order pursuant to N.J.A.C. 1:1-9.7(a), (b), (c). Consequently, plenary hearing then convened on April 23 through 26 and on April 29, 1985 in the Oaklyn Municipal Court. The record remained opened for submission of closing statements and a stipulation of facts in lieu of testimony. Because of serious family illness of counsel, efforts to overcome disagreement with respect to that stipulation and certain Board minutes were delayed. Those efforts were not concluded until telephone conference of July 19, 1985. On that date, an Order issued resolving the dispute and closing the record.

ISSUES

The issue, generally stated, is whether respondent has engaged in conduct unbecoming a teacher. More particularly, the issue may be subdivided into the specifics of the Board's charges, as follows:

1. Whether respondent established a personal, sexual relationship with L.A., a 14-year-old student. Further, whether he pressured L.A. to continue the liaison past the time when she sought to end it.

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2. Whether respondent established a personal, social relationship with K.B., a 14-year-old student without her parent's awareness. Further, whether he persisted in efforts to maintain that relationship over her parent's eventual objection, and over his superintendent's order to desist.

BURDEN OF PROOF

The burden to proof falls on the Board, which must carry it by a preponderance of the credible evidence.

Undisputed Facts:

Some of the material facts in this case are not contested. They give structure to the controversy:

Respondent, until his suspension, was a full-time health teacher in the employ of the Board. He was assigned to Edgewood Junior High School, where he also served as a part-time football coach. He enjoyed tenure in his teaching position. During the course of the 1982-83 and the 1983-84 school years, school administrators, including especially Dr. Charles P. Prato, Superintendent of School, focused their attention on respondent. They did so because of information they obtained which raised suspicions of unprofessional conduct. The information concerned contact by respondent in separate instances, with two girls who were pupils at Edgewood Junior High School. At the times under consideration, the pupils were 14 years of age. Each of the episodes was eventually investigated and dealt with by the Superintendent.

The first student connection alleged was with L.A. Respondent for a time maintained a personal closeness with L.A., and was accepted as a beneficial influence by her family during the 1982-83 school year. By the end of summer, 1983, respondent's association with L.A. had soured. As a result, the girl was sent for a short time to a non-public school during the fall semester. In October 1983, she was returned to the district, but as a sophomore was placed in Edgewood Senior High. Respondent taught no classes there. Nevertheless, in December of 1983, the principal of Edgewood Senior High

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School together with three other administrators, submitted an accusatory memo to Superintendent Prato. According to its content, L.A. complained on December 8 that despite a personal relationship that had terminated, respondent continued to send her notes in school. Additionally, a person she did not recognize came to the school on respondent's behalf and threatened her as well as her family. L.A. asked that respondent be made to stop his harassment. The administrators added that L.A.'s mother had been contacted. The mother conceded the discontinued relationship between L.A. and respondent had been longstanding, and less than platonic. The memo went on to describe the mother's account of what had taken place. Although L.A.'s mother feared the embarrassment of a public airing, the administrators nonetheless recommended to Dr. Prato that the problem now be addressed

The second episode involved one K.B. She had been assigned to respondent's health class during the fall semester of the 1983-84 school year. During the winter semester, she was no longer respondent's student. Nevertheless, during the month of March 1984, the parents of K.B. complained that respondent was covertly visiting his attentions on their daughter. They alleged that this was occurring through phone calls placed to their home. The calls were prearranged and designed to secrete the identity of respondent, who initiated the calls. Once this relationship was discovered, both parents, during at least two meetings with Superintendent Prato, demanded that this connection be severed. After the first meeting with the parents, Dr. Prato by letter of March 20, 1984, directed respondent to "cease all contacts with K.B." At the end of March, at the conclusion of a meeting with respondent, K.B., and K.B.'s parents, he repeated that order.

After the Board deliberated over these incidents during executive sessions, Superintendent Prato submitted a written statement under oath, dated April 12, 1984, to the Board's secretary. This statement outlined the foregoing history of events. The allegations prompted the Board's certification of charges dated May 8, 1984, which were immediately filed with the Commissioner.

Subsequently, these proceedings ensued.

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ADVERSARY ARGUMENTS

The Board's Argument:

The Board argues broadly that the specifics of respondent's conduct are per se examples of unprofessional conduct sufficient in themselves to warrant dismissal. The testimony of its witnesses at hearing highlighted the two examples of misconduct which the Board charged:

Respondent's Liaison With L.A.:

R.A., mother of L.A., emphasized that respondent entered the lives of herself and her daughter under the color of professionalism in February of 1983, when L.A. had called home after being suspended for fighting. When R.A. went to Edgewood Junior High, she found her daughter in the company of respondent. During that month or the next, respondent appeared at her home. He showed R.A. a letter of commendation sent by a divorced mother. The letter described his success in helping her daughter. R.A. recalled that respondent offered this as token of his experience, and said he could be "instrumental" in restoring L.A. to the right road. He told R.A. that currently her daughter was preoccupied with a boyfriend on drugs, and publicly engaged in petting. Persuaded by respondent, and concerned for her daughter's welfare, she accepted respondent's offer to help with L.A.

Immediately, respondent came to their home once or twice a week. He discussed such matters as dress, attitudes, and school work. He would accompany both mother and daughter to church on Sundays. L.A. joined him on trips to Philadelphia or to shore resort areas. Respondent agreed to build a deck on R.A.'s house. Troubled by this persistent attention, R.A. cautioned respondent that L.A. might develop a schoolgirl crush. He replied that he would be able to cope with it, should the problem occur. In time, R.A. noticed that L.A. would become embroiled in arguments with her steady boyfriend of the time, A.G., a fellow student. The disputes were over respondent. At some point, R.A. commented to her daughter that the idea of any romantic attachment between a 30 year old man and a 14 year old girl was ridiculous. The mother was taken aback by the vehemence with which her daughter objected to such a characterization. R.A. recalled that with this reaction, her suspicions were aroused.

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Not long thereafter, the personal nature of L.A.'s relationship to her teacher became apparent. In April 1983, both L.A. and respondent sought R.A.'s permission for a four-day holiday in the Bahamas. Some of the trip would be on school time. R.A. was totally opposed. Nevertheless, she believed that unbending resistance to the trip was futile. Her daughter was determined to go. R.A. feared she would lose her daughter should she try to thwart the child's will. Moreover, there was a possibility that if L.A.'s behavior were widely known, L.A.'s father would gain legal custody. The parents were divorced. Eventually, she drove the couple to the airport in the company of her son and his girlfriend, and gave her daughter $100. **Sue Ann Knaell** testified that as the travel agent who arranged the trip, she obtained payment from respondent. The excursion was to Paradise Island, and was arranged in the name of respondent and L.A. (P-1 a, b, and c). Ms. Knaell dealt only with respondent. Yet she knew that airline regulations required prior proof of citizenship. L.A. must have submitted a birth certificate, passport, or vote registration. Moreover, neither respondent nor L.A. had ever sought a refund. The mother remembered that, to deceive the school, she covered L.A.'s absence with a false excuse. She fabricated an emergent family illness during which her daughter had been dispatched to California to act as a babysitter. **David H. Ernst,** a fellow teacher at Edgewood Junior High School and life long friend of respondent, recounted conversations during which he informed Mr. Ernst of the Bahamas trip, and asked to borrow luggage. Beyond these admissions by respondent, Mr. Ernst knew of his intimacy with L.A. because a former student had come to Mr. Ernst's home in tears. She was distraught over being displaced in respondent's affections by L.A. Recalling his concern for his friend, Mr. Ernst stated that he tried unsuccessfully to dissuade respondent from continuing further in this course of conduct.

Once the couple returned from their trip to the Bahamas, friction amoung R.A., L.A. and respondent increased. Within two weeks, L.A. informed her mother that she and respondent were sexually familiar. R.A. remembered that she now perceived respondent's relationship with her daughter to be a serious matter. She treated him coldly. Her anxiety increased. Still, she saw respondent as being in too powerful a position for her to effectively counter his influence over L.A. Instead, R.A. fought repeatedly with her daughter, verbally and physically. In July 1983, an especially violent confrontation triggered a family meeting with grandparents and respondent present. The grandparents were not told that the romantic involvement had turned sexual. Respondent contended that the relationship was special and genuine. R.A. and her parents answered

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that L.A. should not be denied her youth. If the feelings were mutual and genuine, they would be more appropriately pursued when L.A. reached the age of 18. After this meeting, the relationship was thought by R.A. to have been severed. Nevertheless, as a measure of insurance, L.A. was enrolled in a private school for the next semester in an effort to make the break permanent.

The separation held, with some exceptions, during the summer. Yet, when L.A. was returned to Edgewood Senior High in October of 1983, respondent renewed his overtures through notes and phone calls. Eventually, R.A.'s brother, **W.W.**, was called to assist. W.W. recalled that at a family gathering one Sunday in November, without knowing of the sexual connection, he ordered L.A. to end her contact with respondent. The next day, respondent appeared at W.W.'s office. Respondent outlined the extent of his intimacy, and said it sprang from genuine affection. W.W. replied that whatever respondent's intentions, his pursuit of L.A. should not continue. W.W. testified that respondent countered with his opinion that nothing would be done because publicity would disgrace her prominent relatives. In anger, W.W. answered that respondent was making a grievous error to think so. He again ordered respondent to stay away from his niece. When W.W. discovered that respondent had subsequently taken L.A. to a race track within that very week, he threatened L.A. with permanent residence in his own home, where he would assume complete control over her life.

L.A. corroborated her mother's recollection at hearing, and amplified it. She stated that respondent had given her special attention while she was a student. Once he had acquired L.A.'s mother's thrust, sometime in February 1983, the acquaintance became more intimate. When respondent took her places, they hugged and kissed. In March, after returning from the race track, they engaged in sexual intercourse. After this, notes, conversations about their mutual private lives, and regular sexual intercourse followed. No one knew the intensity of their involvement except her closest girlfriends, including J.A. and her mother, after the Bahamas trip. She also had retained her school age boyfriend throughout this time. Finally, L.A. concurred that the sexual, romantic connection with respondent ended after the family confrontation in July. She was tired of hiding everything and wanted to turn to something different. The breach held until her reenrollment in public school in October of 1983. Respondent resumed calling her daily, and tried to see her at school. He ultimately pursuaded her to go to the race track in

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November and then return with him to his home. L.A. concurred that once her uncle and family discovered this, she was finally convinced by them to terminate the affair.

R.A. similarly testified that her daughter's preoccupation with respondent ended at this point. In contrast, respondent's interests continued unabated. He still pursued L.A. by following her, even in the company of her mother, to various public places. He persisted in calling and writing her notes as he had in the past (P-4). L.A. and her mother both stated that a strange girl appeared at school in December and threatened harm to L.A. and her family because of their treatment of respondent. L.A. informed school officials, who questioned her because she was visibly distressed. She gave only a general outline of her problems, which her mother confirmed when the administrators telephoned her. L.A. complained that she wanted to be left alone by respondent. Prompted by longstanding rumors and L.A.'s disclosure, school officials began to investigate (R-1, R-2). Dr. Prato confirmed that process with detailed testimony. Yet, despite the history of this controversy, R.A. stressed that she had no thought of seeing respondent fired or of having the matter brought before the Board.

Respondent's Contacts With K.B.:

The parents of K.B. described their discovery that respondent was associating with their daughter. The father, **D.S.B,** and the mother, **D.B.,** remembered that beginning in late February or early March 1984, they began receiving one-ring phone calls. Anyone answering would be met with a dial tone. K.B. would then go to her room, the phone would again ring, and K.B. would answer. She would then talk to the caller for long periods sometimes exceeding an hour. These calls were nightly, and followed the same seemingly prearranged pattern. The parents remembered teasing their daughter over the shyness of her admirer. They assumed the caller was a boy of comparative age; K.B. did not identify him.

On Sunday, March 18, 1984, K.B.'s mother found cause to believe her daughter was in jeopardy. Returning home a few minutes early from a shopping trip, she saw K.B. talking to a driver of a car with two men in it. Her mother recognized the driver as respondent. The two men left almost immediately. When K.B. entered the house, her mother asked why respondent was there. The child answered that he just happened by. Shortly after, K.B. took a phone call in her room. D.B. stated that she listened outside.

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Her daughter answered questions over the phone concerning D.B.'s reaction to respondent's visit. Her daughter also told the caller that she didn't care what her mother said. At the conclusion of the call, D.B. confronted her daughter. K.B., extremely upset, finally saw that something was wrong. She admitted that respondent's afternoon visit was prearranged. In tears, she divulged the full extent of her relationship, which included telephoning with signals to avoid detection of respondent's identity. K.B. also stated that respondent would discuss his personal life at length during these conversations. She promised her mother she would not accept any calls from him again.

At hearing, **K.B.** confirmed her parents statements with corroborating testimony of her own, differing only over the time during which respondent called. She remembered it lasting approximately one month. She did recall, however, that as early as January respondent had asked her to call him. When she did not, he called her, after asking for her phone number. K.B. stated that she knew the secret arrangement was "wrong." Respondent repeatedly had asked her personal questions, e.g., whether her parents got along, and whether she herself had good relations with them.

Both parents told of their outrage at discovering this state of affairs on that Sunday, March 18, 1984. The following day they went to Edgewood Junior High and complained to the assistant principal who ultimately brought them to the superintendent, Dr. Prato. Acting on their request, confirmed in writing by letter (P-2), Dr. Prato directed respondent to have no further contact with K.B. The superintendent cautioned respondent that he would now have to look into the allegations (P-3). Despite this prohibition, the parents testified, and K.B. confirmed, that respondent renewed his overtures to the child. K.B. recalled that respondent approached her in school and asked if her parents had met again with Dr. Prato. He also asked her to write him notes and leave them in his health class desk. When learning of this, the parents again protested to Dr. Prato, threatening to keep K.B. at home until she could be moved to a private school. However, after being urged to do so by the superintendent, they agreed to a meeting with respondent. At the end of March 1984, the meeting took place with the acting principal, assistant principal, and a union representative present. When respondent denied asking K.B. to send him notes, K.B.'s father angrily accused him of lying. Dr. Prato then concluded the meeting, repeating his prior order to respondent in the presence of all. The superintendent emphatically warned respondent that he should have no further dealings with K.B.

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In written summation, the Board contended that cases on point supported its demands that respondent be dismissed, and that his certification be revoked pursuant to N.J.A.C. 6:11-3.7. The Board observed further that the vast majority of incriminating facts had gone unchallenged by respondent.

Respondent's Arguments:

Respondent did not testify, but called three witnesses on his behalf. One was **William Lavin,** Vice-President of the Teachers' Association; **A.G., L.A.'s** former boyfriend; and **J.A.,** her close friend during the period in issue.

A.G. stated that he knew L.A. since 1982, and as her boyfriend saw her three to four times a week until they stopped seeing each other around Christmas of 1983 or 1984. He often saw L.A.'s friends, such as J.A., at her house. He never saw respondent. On the other hand, he recalled that they argued constantly over her closeness with respondent. Despite his objections, L.A. and her mother continually reassured him that respondent was a family friend. When rumors circulated that L.A. and respondent had gone to the Bahamas together, she denied them. She denied ever dating respondent, much less engaging in sex.

Recalling her close friendship with L.A. from seventh grade through the time in question, J.A. stated she never saw respondent at L.A.'s home. Neither did L.A. or her mother, with whom J.A. was friendly, speak of any relationship between the two. At the time of the Bahamas trip, L.A. told her that she was going to California. J.A. remembered that at one point, respondent had taken L.A. to see her father. L.A.' s mother was infuriated, and tried to keep her family and friends from speaking to respondent afterward. In December of 1983, J.A. recalled, L.A. tried to pursuade J.A. to accompany her and some friends to speak with respondent. J.A. refused. She also refused to testify at L.A.'s request, which ended their friendship. Overall, J.A. was certain that, had there been a romantic relationship between L.A. and respondent, she would have known of it. The two girls were very close, and confided with one another. They routinely discussed boyfriends and other personal topics.

William B. Lavin recalled processing a number of grievances while he was grievance chairman of the Teachers' Association on respondent's behalf. They stemmed

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mainly from his treatment by schools officials. Mr. Lavin recalled one meeting in particular attended by himself, respondent and Dr. Prato. Over Mr. Lavin's objection that Dr. Prato was not following the contract procedure, Dr. Prato questioned him on more sensitive matters. He asked respondent whether he had gone to the Bahamas in the company of, written letters to, or had sexual intercourse with, L.A. Respondent answered no to all three questions. Mr. Lavin added that he had come to know L.A. in his capacity as school guidance counselor. Based on that experience, he did not think her reputation for veracity to be very good.

In post hearing brief, respondent offered a number of legal arguments. First, he contended that the investigation by school officials was constitutionally deficient, as well as in violation of the employment contract, and Board policy. This forced respondent to refrain from testifying at hearing, and the Board should not now benefit from these illegal pressures. Second, the Board has not satisfied its burden of proof by the requisite preponderance of the credible evidence. Third, the Board made use of information illegally obtained, and any evidence derived therefrom should have been suppressed and excluded from the hearing. Finally, the prior "Order on Motion" rejecting respondent's contention that the Open Public Meetings Act was violated, should be reopened and reversed.

FINDINGS OF FACT

Therefore, after considering the testimony previously set forth, and independently assessing the credibility of witnesses and parties, as well as reviewing the record as a whole, I make the following FINDINGS OF FACT:

As to UNDISPUTED facts, I **FIND** those designated on pages 3 through 4 of this opinion.

As to matters which are disputed or CONTESTED, pursuant to N.J.A.C. 1:1-16.3(c)7, I **FIND:**

1. Respondent initiated contact with L.A. and R.A., her mother, outside the school under color of his professional status as a teacher.

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2. Respondent had no authority from the school to represent himself in this fashion.

3. Respondent initiated a personal relationship with L.A. which progressed at his urging to sexual intimacy. This was done without the knowledge or permission of her mother.

4. Respondent paid for a trip to the Bahamas, on which L.A. accompanied him. While there, respondent engaged in sexual intercourse with her.

5. Respondent engaged in sexual intercourse with L.A. in his home and elsewhere, both before and after the Bahamas trip.

6. Respondent continued to pursue L.A. after her family pursuaded her to end their affair in July and again in November of 1983.

7. Respondent in January of 1984 initiated and cultivated a nonprofessional, personal relationship with K.B. inside and outside the school confines.

8. Respondent by late February or early March 1984 had, established a prearranged phone signal for the express purpose of calling K.B. at her home without revealing his identity.

9. Respondent made these calls almost daily, for periods lasting as long as one hour and more, for approximately one month ending March 18, 1984.

10. Respondent during these calls would ask personal questions of K.B. concerning the relationship of herself with her parents and her parents with each other. Respondent would also disclose details of his own private life to K.B.

11. Respondent on March 18, 1984, drove to K.B.'s home with another man knowing her mother would be absent at that time. While there he engaged in social discussion with K.B. having no connection with his professional function as teacher.

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12. Respondent called K.B. secretly on March 18, 1984, after being discovered in front of her house by K.B.'s mother. He questioned K.B. about her mother's reaction.

13. Respondent continued to maintain personal contact with K.B. after being ordered to cease by Dr. Prato, the Superintendent of Schools, following the parents' complaint on March 19, 1984. Respondent urged K.B. to write him letters and deposit them in his classroom desk.

ANALYSIS

There are two facets to this case: one factual, one legal. They will be discussed separately.

The Facts:

Respondent correctly argues that the evidence must not only preponderate for the Board to succeed, it must be credible. A preponderance of evidence generates the belief that the tendered hypothesis is in all human likelihood the fact. Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959), certif. den. 31 N.J. 75 (1959), overruled on other grounds, 36 N.J. 487 (1962). With respect to credibility, the testimony to be believed must not only proceed from the mouth of a credible witness, but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances. In Re Perrone, 5 N.J. 514, 522 (1950).

In describing the two incidents in issue here, the Board's witnesses satisfied both of the above standards. The Board's version of what occurred is by far the more believable.

Respondent's Liaison With L.A.:

The student earliest involved with respondent, L.A., testifying two years later, revealed herself as a willful child, displaying a surface of worldliness beyond her years. Yet, her evolution to that stage of personality development plainly began with

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respondent's urging, at age 14. Her description of the relationship between herself and respondent was totally convincing. There is no doubt that it progressed into full sexuality. The letters of respondent to L.A. (P-4) support her assertions of intimacy, cultivated throughout by respondent. The corroborating testimony of Ms. Knaell, the travel agent, and her exhibits confirm the Bahamas trip (P-1 a, b and c). This was but one instance of their cohabitation.

L.A.'s mother projected herself as a woman caught between the risk of losing her daughter and her own reluctant submission to the continuing liaison of respondent with L.A. R.A.'s frantic response was to lie consistently in order to avoid discovery. Only the ultimate firm intervention by the child's uncle, a totally credible witness, brought the mother's nightmare to an end. Neither the former boyfriend, A.G., nor Mr. Lavin, were able to distort the portrayal of L.A.'s mother. A.G. had been carefully shielded from in-depth knowledge of respondent's attraction to L.A. Yet, even he thought the circumstances unusual enough to incite constant argument between himself and L.A. Her erstwhile friend, J.A. was not a credible witness. The complete record is at variance with J.A.'s protestation of ignorance throughout. L.A. testified that she shared all her confidences with J.A. The latter concurred with this testimony. She conceded that in December 1983, L.A. had even asked her to accompany herself and other friends to see respondent. The invitation could not have been issued in a vacuum. J.A.'s lack of insight does not ring true. Likewise, William Lavin's assessment of L.A.'s reputation for honesty as "not very good" gives little incentive for pause. Mr. Lavin was the grievance representative for respondent in this matter and had no firsthand knowledge of the facts in issue. His opinion cannot be credited. The testimony of respondent's former friend, Mr. Ernst, even as hearsay, deserves far more consideration.

The pervasive impression conveyed by the sum total of facts is devastating. The record discloses that respondent, a 30 year old male teacher, insinuated himself into the good graces of a pupil's mother, during a time when she was under stress and confused. Taking advantage of a volatile single parent situation, he then induced, if not seduced, a 14 year old child under his professional charge into a sexual relationship. After continuous efforts by her family and herself to end this connection and its destructive effects had attained some success, he persisted in efforts to revive it.

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Respondent's Contacts With K.B.:

Respondent offered no testimony in rebuttal to the Board's witnesses who recounted this incident. Both parents of K.B. were entirely credible in their versions of what occurred, both before and after their complaint to the superintendent, Dr. Prato. The child herself, K.B., offered honest and ingenuous corroboration. Her demeanor was marked by the sincerity and innocence to be expected in a 14 year old minor. Dr. Prato's recollection of his repeated warnings to respondent also were completely persuasive. In sum, the record reveals that after respondent had failed to reopen a closed intimacy with L.A., he turned to yet another 14 year old pupil at Edgewood Junior High, K.B. His intention was obviously to create again a personal relationship with a child entrusted to the school where he was a tenured professional teacher. In this instance, however, his efforts were detected and blocked by alert parents who immediately pressed school officials for protection.

The Law:

The findings set forth above on their face amount to conduct unbecoming a teacher. They recite a betrayal of public trust which is inexcusable by any standard. However, should resort to precedent be necessary, the cases of In the Matter of the Tenure Hearing of Frederick J. Nittle, 1974 S.L.D. 269, In the Matter of the Tenure Hearing of Edward J. Quinn, 1975 S.L.D. 397, In the Matter of the Tenure Hearing of Mathilda Grabbert, 1977 S.L.D. 163, adequately support the conclusion that respondent engaged in misconduct with both children, L.A. and K.B. The willingness of L.A. to accommodate respondent's improprieties until November 1983 is by no means a mitigating circumstance. However worldly she may have thought herself, L.A. remained a child of 14. Respondent has engaged in unlawful misconduct which shows he cannot be entrusted with children in a school setting. The legal arguments of respondent's post-hearing brief cannot hold sway. His motion to explore the manner in which respondent's grievances were processed through the contractual procedure was denied in an earlier Order. Such protests must be pursued in a different forum. Alleged violations of the Open Public Meetings Act were similarly ruled on (see appendices A and B). Minutes of the Board's executive session were denied admittance in evidence (R-7, ID). The investigation of events underlying the Board's charges transgressed no sections of the school laws or regulations of the State Board of Education.

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Respondent's allusions to constitutional breaches cannot be resolved in this forum. In any event, they do not square with the circumstances. Neither the Board nor anyone else has filed criminal charges. Consequently, the cases respondent cites are not apposite. Respondent is, of course, free to exercise his fifth amendment right to silence. Nevertheless, he has not been compelled to do so. Therefore, that exercise does not prevent this tribunal or the Commissioner of Education from drawing appropriate inferences. The current proceeding is administrative, not criminal. Amerada Hess v. Quinn, 143 N.J. Super. 237, 248-249 (Law Div. 1976)

CONCLUSION

I **CONCLUDE**, therefore, that based on my review of the entire record, assessment of the credibility of witnesses, and for the reasons set forth in the **ANALYSIS** portion of this opinion that:

1. Respondent did establish a personal, sexual relationship with L.A., a 14 year old student. He pressured L.A. to continue that liaison past the time when she sought to end it.

2. Respondent did establish a personal, social relationship with K.B., a 14 year old student, without her parents' awareness. Further, he persisted in efforts to maintain that relationship over her parents' eventual objection, and over his superintendent's order to desist.

ORDER

I **ORDER**, therefore:

1. That respondent William Royds be dismissed from his employment as a teacher in the Lower Camden County Regional High School District.

2. That the file be forwarded to the State Board of Examiners with a recommendation that the teaching certificate of William Royds, respondent, be revoked, pursuant to N.J.A.C. 6:11-3.7.

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

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

August 30, 1985
DATE

Joseph Lavery
JOSEPH LAVERY, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

September 5, 1985
DATE

Ronald L. Parker x.s.
OFFICE OF ADMINISTRATIVE LAW

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ORDER
Denial of Motion
to Admit Executive
Session Minutes
OAL DKT NO. EDU 5118-84
AGENCY DKT. NO. 170-5/84

LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1,
Petitioner,
v.
WILLIAM ROYDS,
Respondent.

Robert E. Birsner, Esq., for petitioner (Maressa, Goldstein, Birsner, Patterson & Drinkwater, attorneys)

Allen S. Zeller, Esq., for respondent (Freeman, Zeller & Bryant, attorneys)

BEFORE **JOSEPH LAVERY**, ALJ:

This is a motion by respondent to include in the record certain minutes of executive sessions conducted by petitioner during the months of January, March, April and May of 1984.

PROCEDURAL HISTORY

At the close of the final day of plenary hearing in this matter, on April 29, 1985, the record remained open. Counsel were to submit a stipulation of facts fixing the extent to which petitioner's superintendent adhered to the grievance procedure,

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negotiated by contract. This course was followed to avoid recall of the superintendent on a future hearing date to testify as respondent's witness on that topic. After considerable time, counsel determined that a stipulation was not possible. A telephone hearing was then scheduled to allow further efforts to obtain a stipulation. It was understood that, lacking success in these efforts, respondent would have an opportunity to bring a motion. He would then move to include the above-mentioned executive session minutes in their entirety.

During the hearing, convened by phone on July 19, counsel fell short of stipulation. Respondent therefore moved to include the minutes, prompting a verbal order of denial, which this order confirms.

ADVERSARY ARGUMENTS:

Respondent contends that the superintendent's repeated violation of petitioner's rights under the negotiated grievance procedures should be explored. They bear directly on the credibility of the superintendent, and the validity of petitioner's motives in disciplining respondent.

Petitioner replies that the grievance procedure is irrelevant. Parents, in bringing a complaint against a teacher, are not bound by the negotiated contract. Any departures therefrom by the superintendent are attributable to accomodations to the parents involved here. Further, the minutes of any executive session held by petitioner are specifically excluded from consideration (a) by an exemption from the Open Public Meetings Act (N.J.S.A. 10:4-1 et seq.), as well as attorney-client privilege.

ANALYSIS

The executive session minutes are clearly not relevant to the central issues. What must be determined is whether respondent engaged in the conduct charged, and whether that conduct violates the school laws to an extent that discharge and loss of tenure are appropriate. They should not be admitted into evidence, although they must be marked for identification only, and so noted on the exhibit list.

The Board's deliberations in executive session are also the thought processes which underlie their certification of charges. As such, they should not be assessed. The

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certification itself and accompanying statements from the Board must speak for themselves.

Since the rationale for this order rests on the foregoing, whether introduction of the minutes conflicts with the Open Public Meetings Act or attorney-client privilege are arguments which need not be reached.

ORDER

I **ORDER**, therefore, that petitioner's motion be, and hereby is, **DENIED.**

This order may be reviewed by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** either upon interlocutory review pursuant to N.J.A.C. 1:1-9.7 or at the end of the contested case, pursuant to N.J.A.C. 1:1-16.5.

July 19, 1985
DATE

JOSEPH LAVERY, ALJ

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ORDER
DENIAL OF MOTION FOR
SUMMARY JUDGMENT
OAL DKT. NO. EDU 5118-84
AGENCY DKT. NO. 170-5/84

LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1,
Petitioner,
v.
WILLIAM ROYDS,
Respondent.

Robert E. Birsner, Esq., for petitioner (Maressa, Goldstein, Birsner, Patterson & Drinkwater, attorneys)

Allen S. Zeller, Esq., for respondent (Freeman, Zeller & Bryant, attorneys)

BEFORE **JOSEPH LAVERY,** ALJ:

This motion is brought by William Royds (respondent) for summary judgment against Lower Camden County Regional High School District No. 1 (Board).

Respondent Royds argues that the May 7, 1984 Board meeting at which his tenure charges were certified, was in violation of the Open Public Meetings Act, N.J.S.A. 10:4-1 et seq. Respondent cites especially N.J.S.A. 10:4-13 and N.J.S.A. 10:4-14. It is his contention that the Board failed to first adopt a resolution before entering into executive conference closed to the public. That resolution should have stated the general nature of the subject to be discussed, and the time as well as circumstances under which the discussion can be disclosed to the public. Absent such a resolution the action taken by the Board is voidable.

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The Board answers that proceedings surrounding certification of tenure charges is not subject to the provisions of the Open Public Meetings Act. It cites in support Cirangle v. Maywood Board of Education, 164 N.J. Super. 595 (Law Div. 1978).

I **CONCLUDE** that the controlling law is as stated in Cirangle v. Maywood Board of Education. As a consequence, failure to promulgate a resolution and comprehensible minutes, as anticipated by N.J.S.A. 10:4-13 and N.J.S.A. 10:4-14, is not in violation of the Open Public Meetings Act. This being so, the certification of charges against respondent Royds is not voidable.

ORDER

I **ORDER**, therefore, that the motion by William Royds, respondent, asking that summary judgment be rendered in his favor, be **DENIED**.

This order may be reviewed by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** either upon interlocutory review pursuant to N.J.A.C. 1:1-9.7 or at the end of the contested case, pursuant to N.J.A.C. 1:1-16.5.

February 28, 1985
DATE

Joseph Lavery
JOSEPH LAVERY, ALJ

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IN THE MATTER OF THE TENURE	:	
HEARING OF WILLIAM ROYDS, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE LOWER CAMDEN	:	DECISION
COUNTY REGIONAL HIGH SCHOOL	:	
DISTRICT NO. 1.	:	
	:	

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

It is observed that respondent has filed timely exceptions to the initial decision which rely upon his post-hearing brief originally filed with the judge. It is further noted that the Board's exceptions were not timely filed pursuant to N.J.A.C. 1:1-16.4a, b, and c.

The Commissioner will not burden the record of this matter by reiterating the respective arguments of the parties previously advanced before the judge by way of their post-hearing briefs. The Commissioner finds that such arguments have been adequately addressed by the judge in the initial decision. Therefore, the arguments submitted by respondent as exceptions by way of his post hearing brief, as well as the post-hearing briefs of both parties, are fully incorporated herein by reference.

Upon review of the record of this matter, the Commissioner is not persuaded by the arguments advanced by respondent in support of his claim that he did not engage in conduct unbecoming a teacher with two minor female students of the district. Having reviewed the extensive discussion in the transcripts concerning the Public Employees Hearing Act and the Tenure Act, the Commissioner agrees with the ALJ that the tenure laws supersede the Public Employees Hearing Act for the reasons articulated in the initial decision and those expressed by Judge Smith in Cirangle v. Maywood Bd. of Ed., 164 N.J. Super. 595 (Law Div. 1978). That Appellate Court decision held that the legislative intent of the Tenure Act requires that any "action" taken by the Board concerning personnel matters is to be done outside the purview of the public. Thus, because the Tenure Act statutes are beyond the scope of the Open Public Meetings Act, no public resolution to adjourn to private session is required by the board before it considers the review of tenure charges. Neither is the board required to announce publicly its decision on a tenure matter upon emerging from private session. The ALJ properly ordered the elimination of discussion of alleged violations of the Open Public Meetings Act from the plenary hearing.

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Having reviewed all the transcripts in the instant matter, the Commissioner is convinced that the ALJ was also correct in ruling that cross-examination be limited to topics raised on direct examination of the witnesses because the issues related to the grievances filed by respondent were not pertinent to plenary hearing on tenure charges. In no way are procedures that lead to the certifying of tenure charges subject to the grievance process.

The ALJ correctly addressed this point during plenary hearing on April 24, 1985 in saying:

> "***I don't see, as a matter of law, how it would change my duty to simply determine the facts of the charges and then, after I had found the facts, to determine whether those facts come under the heading of conduct unbecoming a teacher and the other charges or the charges, as specified by the board.
>
> "Although it is difficult in doing, it is very simply stated. If I were to allow the extensive questioning and testimony, with respect to this procedure, then I would be violating my duty to manage the case efficiently and get a record that is wide enough to allow everybody's argument and factual testimony in, but fair enough to be acceptable.
>
> "I think that the argument and testimony, with respect, then, to whether the contract was complied with would be legally irrelevant to any conclusions I may draw, for the reasons I just stated.***" (Tr. II - 177-178)

See also State of New Jersey v. State Supervisory Employees Association and State of New Jersey v. Local 195, IFPTE and Local 518, SEIU, 78 N.J. 54 (1978) wherein the Supreme Court of New Jersey held:

> "***Furthermore, we affirm PERC's determination that specific statutes or regulations which expressly set particular terms and conditions of employment, as defined in Dunellen [Bd. of Ed. v. Dunellen Ed. Ass'n, 64 N.J. 17 (1973)], for public employees may not be contravened by negotiated agreement. For that reason, negotiation over matters so set by statutes or regulations is not permissible. ***" (at 80)

The ALJ properly denied exploration into the manner in which respondent's grievances were processed through the contractual procedure in his order dated July 19, 1985. The ALJ therefore

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properly limited the scope of cross-examination to those issues addressed on direct, related to the facts surrounding the filing of the tenure charges, not the procedure employed by the Board in arriving at its determination to certify such charges.

The Commissioner is in accord with the ALJ also that respondent's allusions to constitutional breaches cannot be resolved before the Commissioner. Whether respondent was compelled to remain silent during the tenure proceedings because of the possibility that he might be brought up on criminal charges is irrelevant to the instant matter because no one has filed criminal charges. Respondent's actions are being reviewed administratively for conduct unbecoming a teacher, an entirely separate inquiry that can be established and carried out without invoking criminal proceedings. See Amerada Hess v. Quinn, 143 N.J. Super. 237, 248-249 (Law Div. 1976).

Finally, the Commissioner's review of the record provides no reason to set aside the factual determinations made by the ALJ that:

1. Respondent did establish a personal, sexual relationship with L.A., a 14-year-old student. He pressured L.A. to continue that liaison past the time when she sought to end it.

2. Respondent did establish a personal, social relationship with K.B., a 14-year-old student, without her parents' awareness. Further, he persisted in efforts to maintain that relationship, over her parents' eventual objection and over his superintendent's order to desist.

Accordingly, the Commissioner orders that Respondent William Royds be dismissed from his employment as a teacher in the Lower Camden County Regional High School District as of the date of this decision and that this matter be forwarded to the State Board of Examiners with a recommendation that the teaching certificate of William Royds be revoked, pursuant to N.J.A.C. 6:11-3.7.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

October 18, 1985

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8523-84
AGENCY DKT. NO. 465-11/84

K.C.K. AND K.W.K., BY THEIR GUARDIANS, G.R.E. AND A.C.E.,
Petitioners,

V.

BOARD OF EDUCATION OF SCOTCH PLAINS-FANWOOD, UNION COUNTY,
Respondents.

William Butler, Esq., for petitioners
(Hooley, Butler, DiFrancesco & Kelly, attornevs)

Casper P. Boehm, Jr., Esq., for respondents
(Boehm and Campbell, attorneys)

Record Closed: July 22, 1985 Decided: September 4, 1985

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

K.C.K. and K.W.K., students in the eleventh and twelfth year of the Scotch Plains-Fanwood High School, Union County, by their guardians G.R.E. and A.C.E., who are their grandparents, alleged they were refused admission to public school in the district for the 1984-85 school year even though they are kept in the home of their domiciliary grandparents and are supported by them gratis as if they were their grandparents' own

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children and were thus denied free public education as is their right under N.J.S.A. 18A:38-1. The grandparents have been appointed guardians of the persons of infant petitioners by judgment of the Surrogate of Union County, on April 4, 1984, pursuant to N.J.S.A. 3B:12-12, and have the powers, responsibilities and duties towards infant petitioners as provided under N.J.S.A. 3B:12-51, 52, as well as duties under the Compulsory Education Law, N.J.S.A. 18A:38-25. In a petition filed with the Commissioner of the Department of Education, petitioners demanded judgment directing the Board to provide a free public education to infant petitioners as required by N.J.S.A. 18A:38-1. The Board denied allegations of the petition generally, denied infant petitioners are kept in the home of guardian petitioners or are supported by them gratis as if infant petitioners were their own children, and denied, specifically, infant petitioners are entitled to a free public education in the district. Infant petitioners attended public high school in the district in 1984-85 under a written agreement with the Board calling for escrow of monies on account of estimated tuition costs semester by semester, initiation by petitioners of the present litigation, and release of escrowed funds upon final determination herein to guardian petitioners or pro-rata to the Board on account of tuition then owed, as the case may be. Infant petitioner K.C.K. was graduated from public high school in June 1985. Infant petitioner K.W.K. completed her third high school year then.

The petition of appeal was filed in the Bureau of Controversies and Disputes of the Department of Education on November 19, 1984. The Board's answer was filed there on November 20, 1984. Accordingly, the Commissioner transmitted the matter to the Office of Administrative Law on November 27, 1984 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, a prehearing conference was conducted in the Office of Administrative Law on February 1, 1985 and an order entered establishing, inter alia, hearing dates beginning May 13, 1985. At request and/or with consent of the parties the matter was adjourned to and hearing was concluded on July 2, 1985. Thereafter, time for post-hearing submissions having elapsed, the record closed.

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At issue in the matter, as established generally at prehearing conference, were the following:

A. Whether the Board shall have proven by a preponderance of the credible evidence infant petitioners are ineligible for free public education under criteria of N.J.S.A. 18A:38-1 (subject, nevertheless, to legal effect of a statutory amendment thereof in c. 6, L. 1985, approved January 11, 1985):

B. Whether the Board shall have proven by a preponderance of the credible evidence infant petitioners are not "kept" in the home of their domiciliary guardians within the meaning of N.J.S.A. 18A:38-1(b);

C. Whether the Board had a statutory obligation under N.J.S.A. 18A:38-1(b) to request from petitioners a sworn statement or affidavit as such is referred to in N.J.S.A. 18A:38-1(b); and

D. Legal effect of the statutory amendment of c. 6, L. 1985, approved January
11, 1985.

EVIDENCE AT HEARING

I

G.R.E. testified that he and A.C.E., his wife, who are resident domiciliaries at 472 North Avenue, Borough of Fanwood, Union County, are maternal grandparents of K.C.K. and K.W.K., who since before April 1984 having been living with them in their home. In April 1984, he said, he and his wife were appointed guardians of the persons of their two grandchildren by the Union County Surrogate's Court. The basic reason, he said, was that the children's father, an employee of IBM, had in recent years been under

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transfer by his company first from New Jersey, then to Connecticut, to Louisiana and then back to New Jersey. The grandchildren were growing older, he said, and because and of a probability of future business transfers of the nature father, and in order to keep them stable emotionally and ready for college, he and his wife, the children's grandparents, decided to keep the children with them. The grandparents are close to their grandchildren; there are no other children or grandchildren in the family. Since April 1984, he said, the two grandchildren have lived with him and his wife in Fanwood and have not lived with their natural parents, who reside at 80 Nottingham Drive, Borough of Watchung, Somerset County, a neighboring community.

Since the decision was made, he said, he and his wife having been supporting the two grandchildren and have paid for anything and everything they need, including college visitation trips, food, clothing, doctors' bills, and spending money for school. G.R.E. is retired from banking and stock brokerage interests. He identified (as P-5 in evidence) a series of canceled checks drawn by him on his and his wife's joint account in payment of various necessaries for the grandchildren. The expenses included, variously, attorneys' fees for the guardianship action, tuition for summer school (at Brown University) for both grandchildren, for school cheerleader trips, school pictures, driving lessions, SAT expense, pictures, doctors' bills, clothing, a deposit for tuition at Bucknell for K.C.K. (where she has been admitted for 1985-86), booster club expenses, orthodontia, hair-dressing expenses, summer school applications for both girls, SAT review instruction and the like. The girls received lunch money and spending money from the grandparents.

G.R.E. said he and his wife made the payments and have assumed obligations for the support of the two grandchildren gratis. They denied any pre-arrangement with the natural parents for reimbursement. They have undertaken to send both grandchildren to college at their expense for full tuition and room and board. They have undertaken to continue support of the two grandchildren beyond their high school years and through their college years. They determined to do so for their grandchildren because of their love for them.

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A federal income tax return and a New Jersey income tax return for 1984, filed jointly by the grandparents, declared both grandchildren as dependents. P-6, 7. A voter's registration for K.C.K., the elder grandchild, showed her address as that of the grandparents. P-8.

K.C.K.'s New Jersey driver's license shows her address as that of the grandparents. P-9. She is eighteen years old, born March 31, 1967. K.W.K. is a year younger. Petitioners and the Board stipulated that each grandchild's passport (they were issued in January 1985) showed their addresses as that of the grandparents in Fanwood.

Concerning an agreement reached with the Board (P-4), G.R.E. said he felt compelled to execute it when, in late August 1984 just before school opened, the Board concluded the two grandchildren did not live at the grandparents' home. He signed the agreement in an effort to achieve stability and freedom of mind for the grandchildren without interruption of their lives as they prepared for college. Since the Board threatened to oust the grandchildren from the high school, he felt he had no choice except to agree to terms imposed and, as he has done, to deposit estimated public school tuition costs for the girls semester by semester. His filing the present petiton of appeal before the Commissioner represented a compliance with one of the terms of the agreement.

G.R.E. said the grandchildren's natural father had transferred his job for IBM in Louisiana back to New Jersey in February 1984, when he and the children's mother bought a house in Watchung. The two girls and their mother had earlier come to live with the grandparents in Fanwood in September 1984. Neither grandchild, he said, had ever lived in Watchung with their parents. Three and half years ago, he said, they had lived in Scotch Plains for the previous four years and had attended Park School in the district then. The family had transferred to Connecticut and later lived in Colorado and Illinois. Upon their return to New Jersey, he said, the children and the family preferred the Scotch Plains-Fanwood school district because of their earlier experience and friends there. All

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were aware of a district policy against taking tuition students. G.R.E. felt provisions of the free public education law entitled him and his wife to secure free public education for their grandchildren as their wards.

II

W.F.K., called by the Board under subpoena to bring his personal checkbook records and IRS statements, testified he is the natural father of infant petitioners. He said his daughters wanted to stay in the Scotch Plains-Fanwood high school after he and his wife, the girls' mother, bought a house in Watchung in February 1984. He said the grandparents' guardianship for the girls was a way of insuring family stability because of his susceptibility to business transfer. The girls stayed with the grandparents from September 1983 to date and did not reside with their parents in Watchung. He said he tries to continue fostering a father-daughter relationship with his children but supported the action of the grandparents in assuming guardianship responsibilities and responsibilities for their future college education.

Called by the Board, Joseph M. Powers testified he is a licensed private detective of the state of New Jersey and is retired, after 30 years as a police officer, as police chief of Scotch Plains. His services were retained by the director of special services for the district to surveil activities and living accommodations of the two infant petitioners. His report of investigation on April 24, 26, and 27, 1984 is R-1 in evidence.

On April 24, 1984, Powers observed the grandparents' residence at 472 North Avenue, Fanwood from 6:55 a.m. until 8:15 a.m. and saw no one leave to go to school. He learned from school authorities both grandchildren were in school on time on that date. At 3:30 p.m. the same day, he observed the father's residence at 80 Nottingham Drive, Watchung.

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On April 26, 1984, he observed 80 Nottingham Drive, Watchung from 7:00 a.m. until 8:30 a.m. but saw no activity.

On the same day he observed 472 North Avenue, Fanwood but saw no sign of the grandchildren.

On April 27, 1984 at 80 Nottingham Drive, Watchung, he observed a woman driving a teenage girl to the Scotch Plains-Fanwood high school. The girl was identified to him as K.C.K. From other sources, he said, he learned K.W.K. had arrived early at the school that day for band practice.

Based on information available to him and his observations, he gave an opinion that K.C.K. and K.W.K. were then (April 1984) presently residents of 80 Nottingham Drive, Watchung and not 472 North Avenue, Fanwood. On cross-examination, he conceded he saw only K.C.K. at the Watchung address, on one occasion, April 27, 1984, and could not contradict testimony of G.R.E. or W.F.K. to any other extent.

Called by the Board, Dr. Donald E. Sheldon, an eighteen year employee and presently director of special services for the district, said the question of the infant petitioners' residence in the district first came to his attention in early April 1984, on information from a third party who had reason to believe they lived in Watchung rather than Fanwood. There followed an investigation by Powers as commissioned by the Board, he said, and after receiving his report of investigation in late April (R-1), and after consultation with the superintendent and Board counsel, he issued a letter to the infants' father on August 29, 1984 (P-3):

> In the opinion of the attorney for the Scotch Plains-Fanwood Board of Education, your daughters, K.C.K. and K.W.K., are domiciled at 80 Nottingham Drive, Watchung, New Jersey, rather than at 472 North Avenue, Fanwood, New Jersey, for the purpose of school attendance.

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Please take the necessary steps to transfer K.C.K. and K.W.K. from the Scotch Plains-Fanwood High School to the appropriate high school so that their educational program will not be interrupted.

Sheldon said both infant petitioners were permitted to complete the 1984-85 school year. Ultimately, he said, the decision to deny them admission for the 1984-85 school year was reached on the basis of the surveillance report and other oral third party information.

III

The agreement between the grandparents and the Board (P-4), executed October 9, 1984, recited, generally, that G.R.E. and A.C.E., grandparents of K.C.K. and K.W.K., were issued letters of guardianship of infant petitioners by judgment of the Surrogate of Union County on April 4, 1984; that the grandparents claimed infant petitioners were entitled to free public education in the district pursuant to N.J.S.A. 18A:38-1; that the Board contended infant petitioners were domiciled in the home of their natural parents in Watchung and not within the district and were thus not entitled to free public education; that K.C.K. and K.W.K. were presently attending public school in the district; that the Board would not permit them to continue that education unless the agreement were executed by G.R.E. and A.C.E.; and that the natural parents of the infant petitioners had refused to execute the agreement. The grandparents and the Board agreed, therefore, for G.R.E. and A.C.E. to commence litigation immediately to determine rights of infant petitioners to free public education in the district; and to require deposit in escrow of certain monies by G.R.E. and A.C.E. on account of tuition for the 1984-85 school year for both infant petitioners. Depending upon outcome of such litigation by final judgment, the

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agreement provided generally, the escrowed monies were to be released to guardian petitioners or pro-rata to the Board on account of tuition then owed, as the case may be.

The above was admitted by the Board in its answer to the petition of appeal. The Board also admitted it had never requested a sworn statement from guardian petitioners (until P-10, April 10, 1985) that they were domiciled within the district and were supporting their granddaughters gratis and would assume all personal obligations for them relative to school requirements and would continue such support beyond the school term.

DISCUSSION

Beyond denying validity of domicile of the infant petitioners within the district and validity of their support by their domiciliary grandparents, the Board contended in its answer that any purported guardianship of infant petitioners was "only procured as a subterfuge." Certified records of the Union County Surrogate's Court for both K.C.K. and K.W.K. guardianships (P-1 and P-2) contained sworn complaints by G.R.E. and A.C.E. as grandparents of the infant petitioners; guardianship renunciations by the natural parents and consents to the appointment of G.R.E. and A.C.E. as guardians of the persons of the infant; personal bonds by G.R.E. and A.C.E. in sums of $1,000 each in the case of each infant; acceptances of guardianship; and judgments appointing G.R.E. and A.C.E., grandparents of the infants, as guardians of their persons.

N.J.S.A. 3B:12-51 provides:

> A guardian of the person of a minor has the powers and responsibilities of a parent who has not been deprived of custody of his minor and unemancipated child, except that a guardian is not legally obligated to provide for the ward from his own funds.

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N.J.S.A. 3B:12-52 provides:

> In particular, and without qualifying the provisions of N.J.S.A. 3B:12-51, a guardian of the person of a minor has the following powers and duties, except as modified by order of the court: (a) he must take reasonable care of his ward's personal effects and institute an action for the appointment of a guardian of his ward's estate if necessary to protect it . . . (c) he is empowered to facilitate the ward's education, social, or other activities and to authorize medical or professional care, treatment, or advice . . . He may consent to the marriage or adoption of his ward or to his ward's military service.

K.C.K., according to P-9, is at present eighteen years old. She was born March 31, 1967. K.W.K. is a year younger and not yet eighteen years old. N.J.S.A. 3B:12-55 provides:

> The authority and responsibility of a guardian of the person or estate of a minor terminates upon the death, resignation or removal of the guardian or upon the minor's death, adoption, marriage or attainment of eighteen years of age . . . [See also N.J.S.A. 9:17B-1(a) concerning age of emancipation of minors].

Under the compulsory education law, N.J.S.A. 18A:38-25, it is provided:

> Every parent, guardian or other person having custody and control of a child between the ages of 6 and 16 years shall cause such child regularly to attend the public schools of the district or a day school in which there is given instruction equivalent to that provided in the public schools of children in similar grades and attainments or to receive equivalent instruction elsewhere than at school.

Violation thereof by the guardian is a disorderly persons offense. N.J.S.A. 18A:38-31.

At threshold, issues in this matter depend upon domicile of the student grandchildren in and just before the school year 1984-85. If their domicile was with the grandparents, it may be seen, they are entitled to free public education within the

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district of Scotch Plains-Fanwood. At time of institution of suit, N.J.S.A. 18A:38-1 provided as follows:

> Public schools shall be free to the following persons over 5 and under 20 years of age: (a) any person who is domiciled within the school district; (b) any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term; provided, however, that the board of education may contest the validity of the sworn statement in proceedings before the commissioner, except that no child shall be denied admission during the pendency of any such proceedings before the commissioner and the board shall have the burden of proving by a preponderance of the evidence before the commissioner that the child is ineligible for a free education under the criteria listed in this subsection . . .

Triggering action for the petition, as conceded by the parties in prefatory language in the agreement in P-4 and as specifically put by the district's director of special services on August 29, 1984 in refusing school admission, was that:

> In the opinion of the attorney for the Scotch Plains-Fanwood Board of Education your daughters, K.C.K. and K.W.K. are domiciled at 80 Nottingham Drive, Watchung, New Jersey, rather than at 472 North Avenue, Fanwood, New Jersey, for the purpose of school attendance. . . [P-3].

"Domicile" is the place where one has his true, fixed, permanent home and principal establishment, to which, whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. Every person, in all circumstances and conditions, it is said, is deemed to have a domicile somewhere. A person may have several residences or places of abode but he can have only one domicile

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at a time. Domicile of choice is essentially a question of residence and intention; it involves an exercise of volition. To effect a change of domicile there must be a voluntary change of residence. Residence at the place chosen for domicile must be actual. To the fact of residence there must be added an intention to remain. The burden of proof to establish a change of domicile has occurred rests upon the part asserting it. See, generally, Cromwell v. Neeld, 15 N.J. Super. 296, 300-1 (App. Div. 1951). Normally, it is said, the domicile of unemancipated minors is that of their natural parents who have custody. Lea v. Lea, 18 N.J. 1, 11-12 (1955) (but the fact of domicile is still largely a matter of intent). See also Mercadante v. City of Paterson, 111 N.J. Super. 35, 39-40 (Chan. 1970), aff'd 58 N.J. 112 (1971); and see Martinez v. Bynum, 461 U.S. 321, 75 L. Ed. 2d 879, 888-9, 102 S. Ct. 1838 (1983).

The Board here, therefore, would seem to have raised the direct factual issue of domicile under N.J.S.A. 18A:38-1(a). It did so, without much doubt, on the basis of unspecified oral information given to its director of special services and on the basis of a report of surveillance made by its commissioned private investigator on some four occasions in late April 1984 and in spite of its foreknowledge of the guardianships. The Board did not, as may be seen, require any sworn statement from the infants' grandparents attesting to fulfillment of and compliance with criteria in section (b) of the statute. It did not obey legislative mandate, that is to say, that, during a challenge it could have raised but did not raise before the Commissioner, the children not be denied admission to school in the district in 1984-85 during pendency of such challenge. Instead, it resorted to an "agreement" with the grandparents compelling them, as a condition of school admission, to escrow tuition funds pending their appeal to the Commissioner for resolution of the controversy. Although the practice is discriminatory, in my view, and represents a distortion of rights of children, and for that reason may not be approved, the filed action and issues on this appeal still require, first of all, resolution of the issue of domicile of the grandchildren during the 1984-85 school year.

A 1977 statement by the Senate Education Committee before enactment of the proviso in N.J.S.A. 18A:38-1(b) suggests the 1977 amendatory bill establishing the proviso provides school boards with a procedure to test validity of sworn statements that were the legal basis for so called "affidavit students." It took note that parents sometimes

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attempted to send their children to schools in districts other than their own without actually changing their residences. It is a very simple matter, it was said, for a parent to request a relative or friend who resides within the district to provide the child with an official address within the district for purposes of school attendance. The amendatory legislation offered a procedure to contest validity of the affidavit if asked for by boards without institution of long and costly criminal proceedings through the courts. By permitting boards of education to go before the Commissioner to contest validity of the sworn statements, the committee anticipated, the threat of such a proceeding would deter individuals who falsely and casually signed such statements. Senate Education Committee statement to Senate Bill No. 1464, L. 1977 c. 373.

From all evidence here, however, I am satisfied that the sequence of events preponderantly demonstrated the family situation involving natural parents and grandparents, by which the grandparents assumed guardianship of the grandchildren, was more than merely the "very simple matter" of requesting relatives, the grandparents, to provide the grandchildren with an official address within the district for purposes of school attendance. The undertaking of personal guardianship under N.J.S.A. 3B:12-50, 51 represented a significant assumption of legal responsibilities for welfare of the grandchildren. The action was duly taken before the Union County Surrogate's Court on sufficient proofs and on express renunciations by the natural parents of all rights and claims to guardianship. In the case of the elder grandchild, K.C.K., now eighteen years old, her voting residence was established at the grandparents' domiciliary home, as was her residence for purposes of New Jersey driver's licensing. The grandchildren were declared by the domiciliary grandparents as dependents on their federal and state income taxes for 1984. The record of expenses paid by the grandparents on behalf of both grandchildren for maintenance, medical bills, college tuition, and other necessaries is persuasive to support and corroborate testimony by G.R.E., the grandfather, that he has been supporting and is willing to continue to support the grandchildren gratis, has been assuming and will continue to assume all personal obligations for the children relative to school requirements, and that he intends so to keep and support the grandchildren gratuitously for a longer time than merely through the school term of 1984-85.

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Thus, in my view, the proofs preponderated, firstly, that the grandchildren are domiciled within the Scotch Plains-Fanwood and have been for the school year 1984-85 and, secondly, moreover, that the criteria in N.J.S.A. 18A:38-1(b) have been met. I so FIND.

During pendency of this appeal, however, N.J.S.A. 18A:38-1 was amended again by the Legislature in c. 6, L. 1985, approved and effective January 11, 1985. It reads as follows:

> Public schools shall be free to the following the persons over five and under twenty years of age:
>
> (a) Any person who is domiciled within the school district;
>
> (b) Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parent or guardian with the secretary of the board of education, a sworn statement that he is not supporting the child, accompanied by documentation to support the validity of the sworn statements, information or amount which shall be supplied only to the board and only to the extent it directly pertains the support or non-support of the child; provided, however, that the board of education may contest the validity of the sworn statement in proceedings before the commissioner, except that no child shall be denied admission during the pendency of any such proceedings before the commissioner, and the resident shall have the burden of proving by a preponderance of the evidence before the commissioner that the child is eligible for a free education under the criteria listed in this subsection. If, in the judgment of the commissioner this evidence does not support the claim of the resident, he may assess the resident tuition for the student pro-rated to the time of the board's request for a sworn statement from the resident. Tuition shall be computed

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on the basis of 1/180 of the total annual pupil cost to the local district multiplied by the number of days of ineligible attendance;

(c) Any person who fraudulently allows a child of another person to use his residence and is not a primary financial supporter of that child and any person who fraudulently claims to have given up custody of his child to a person in another district commits a disorderly person offense;

(d) Any person whose parent or guardian, even though not domiciled within the district, is residing temporarily therein, but any person who has had or shall have his all-year-around dwelling place within the district for one year or longer shall be deemed to be domiciled within the district for the purposes of this section;

(e) Any person for whom the Division of Youth and Family Services in the Department of Human Services is acting as guardian and who is placed in the district by said Bureau. This act shall take effect immediately.

During pendency of this appeal, the Board made demand upon petitioners on April 10, 1985 "to submit the necessary proof and documentation including affidavits pursuant to the provisions of N.J.S.A. 18A:38-1, as amended." G.R.E.'s affidavit, dated July 1, 1985 (P-10), attested in response to the request that he and his wife, A.C.E., are guardians of the persons of K.C.K. and K.W.K., that the grandchildren reside with the grandparents at 472 North Avenue, Fanwood, where the latter are domiciled, that they support the grandchildren gratis as if they were their own children, and that they assumed and will assume all personal obligations of the grandchildren, including those relative to school requirements and will continue to keep and support the grandchildren gratuitously for a longer time than merely through the school term, and that the natural parents, J.E.K. and W.F.K. are not supporting the grandchildren. No earlier such demand was made by the Board.

The amendatory legislation accomplished at least one significant change in prior legislation by shifting the burden of proving by a preponderance of the evidence, in a challenge before the Commissioner, to the resident domiciliary to prove the child is eligible for a free education under criteria listed in N.J.S.A. 18A:38-1(b). Another change

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empowered the Commissioner to assess resident tuition if the resident domiciliary's sworn statement is found invalid. The final change declared the fraudulent allowing of a child of another person to use the residence by one who is not the primary financial supporter of the child and any person who fraudulently claims to have given up custody of his custody child to a person in another district to have committed disorderly persons offenses.

On the premise that shifting the burden of proof from the Board under the former statute to the resident domiciliary under the amendatory legislation in a section (b) challenge is a procedural measure and requires retroactive application to proceedings such as this, where the amendment came after institution of suit but before hearing and adjudication, it is my view, nevertheless, that petitioners here have still carried the proof burden on evidence adduced and, further, that the Board's assertion in paragraph 3 of its answer that guardianship procedures were subterfuge has not been substantiated. I **FIND**, under either version of the statute, petitioners' proofs have been sustained by a preponderance of credible evidence that all criteria in the statute necessary and sufficient for admittance in the district for free public education have been met.

Martinez v. Bynum, 461 U.S. 321, 75 L. Ed. 2d. 879, 103 S. Ct. 1838 (1983) involved a facial challenge to the constitutionality of Texas residency requirement governing minors who wished to attend public free schools while living apart from their parents or guardians. The Texas education code required local school authorities to admit minors if their parent, guardian or the person having lawful control of them resided in the school district, but denied tuition-free admission for a minor who lived apart from a parent, guardian or other person having lawful control over them if their presence in the school district was "for the primary purpose of attending the public free schools." A United States citizen whose parents were Mexican residents and citizens left his parents to reside with a sister in Texas, who, though she was his custodian, was not and did not desire to become his guardian. The local Texas district denied his application for admission. A United States District Court found the evidence conclusively showed that Texas school districts would admit children living within them with someone other than

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their parents or legal guardians if any reason existed for such situation other than that of attending school only. Against challenges to the Texas statute under the equal protection, due process and privileges and immunities clauses, injunctive relief was denied by the District court, a denial affirmed by the Court of Appeals for the 5th Circuit and, on certiorari to the Supreme Court, likewise affirmed. The central question decided by the Court was whether the Texas statute interposed a bona fide residence requirement. The Court found the constitution permitted a state to restrict eligibility for tuition free education to its bona fide residents and found the Texas residence requirement had satisfied constitutional standards. 75 L. Ed. 2d 888-90.

It may be suggested that although a "primary purpose" education residency requirement like the Texas version answers constitutional muster, the New Jersey version does not employ that subjective criterion. It employs objective criteria petitioners have met and does not "invalidate" their avowed subjective purpose in meeting the criteria - to obtain free public education.

CONCLUSION

Specifically, I **FIND** and **DETERMINE** K.C.K. and K.W.K. are entitled to free public education in the Scotch Plains-Fanwood district under N.J.S.A. 18A:38-1 for that period of the 1984-85 school year until amendment of the amendatory statute effective January 11, 1985, as well as thereafter to end of the 1984-85 school year as defined in N.J.S.A. 18A:1-1. I **FIND** and **DETERMINE** further the Board's action in conditionally allowing school admission in September 1984 for the 1984-85 school year was violative of statutory injunctions under both versions of the statute requiring, in N.J.S.A. 18A:38-1(b), that "no child shall be denied admission during the pendency of [validity] proceedings before the Commissioner." For that reason alone, I **ORDER** the Board to release any and all claims to funds heretofore escrowed under the agreement between it and G.R.E. and A.C.E. No opinion is expressed herein as to eligibility of K.W.K., age 17 years, for free public education in the Scotch Plains-Fanwood school district for the academic year 1985-86, the parties hereto being left to their respective rights and obligations under N.J.S.A. 18A:38-1, as amended by c. 6, L. 1985, effective January 11, 1985.

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OAL DKT. NO. EDU 8523-84

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

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

DATE September 4, 1985

JAMES A. OSPENSON, ALJ

SEP 6 1985

DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

Sept 9, 1985

DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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K.C.K. AND K.W.K., by their guardians, G.R.E. AND A.C.E.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF SCOTCH PLAINS-FANWOOD, UNION COUNTY,	:	
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties pursuant to N.J.A.C. 1:16.4a, b, and c.

The Commissioner agrees with the findings and determination of the Office of Administrative Law and adopts them as his own for the reasons articulated in the initial decision.

Accordingly, the Commissioner finds that K.C.K. and K.W.K. are entitled to free public education in the Scotch Plains-Fanwood district under N.J.S.A. 18A:38-1 for that period of the 1984-85 school year until amendment of the amendatory statute effective January 11, 1985, as well as thereafter to the end of the 1984-85 school year as defined in N.J.S.A. 18A:1.1. The Commissioner further finds that the Board's action in conditionally allowing school admission in September 1984 for the 1984-85 school year was violative of statutory injunctions under both versions of the statute requiring, in N.J.S.A. 18A:38-1(b), that "***no child shall be denied admission during the pendency of any such proceedings before the commissioner***."

The Commissioner therefore orders the Board to release any and all claims to funds heretofore escrowed under the agreement between it and G.R.E. and A.C.E. No opinion is expressed herein as to eligibility of K.W.K., age 17 years, for free public education in the Scotch Plains-Fanwood school district for the academic year 1985-86, the parties herein being left to their respective rights and obligations under N.J.S.A. 18A:38-1, as amended by c.6, L.1985, effective January 11, 1985.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

October 21, 1985

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INITIAL DECISION
OAL DKT. NO. EDU 8413-84
AGENCY DKT. NO. 455-11/84

HADDONFIELD BOROUGH
BOARD OF EDUCATION,
Petitioner,
v.
TERENCE D. MC GUIRE,
Respondent.

Alan R. Schmoll, Esq., Of Counsel, Joseph F. Betley, Esq.. On the Brief, for petitioner (Capehart & Scatchard, attorneys)

Ezra D. Rosenberg, Esq., for respondent (Katzenbach, Gildea & Rudner, attorneys)

Record Closed: July 25, 1985 Decided: September 5, 1985

BEFORE DANIEL B. MC KEOWN, ALJ:

On November 1, 1984, the Haddonfield Borough Board of Education (Board) certified to the Commissioner of Education for determination under N.J.S.A. 18A:6-10 et seq. charges of unbecoming conduct and other just cause against Terence D. McGuire, a teacher with a tenure status in its employ. Thereafter, the Commissioner transferred the matter to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq. The Board seeks summary decision in its favor that under N.J.S.A. 2C:51-2, Forfeiture of public office, McGuire has forfeited any right he may otherwise have to continued employment by virtue of his conviction for the second degree crime of sexual assault. Respondent opposes the motion and demands a full plenary hearing under the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq. The record closed on the Board's motion July 25, 1985 upon receipt of the Board's reply letter memorandum.

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BACKGROUND FACTS

McGuire was initially suspended with pay on August 30, 1984 by the superintendent, with the approval of the Board president, pursuant to N.J.S.A. 18A:25-6 after a criminal complaint was filed against him for an alleged violation of N.J.S.A. 2C:14-2(b), sexual assault, a crime of the second degree. On September 25, 1984, the Camden County Grand Jury returned a one count indictment against McGuire on the criminal complaint filed. Nonetheless, the Board continued to pay McGuire's salary until November 1, 1984, when it determined to certify administrative tenure charges against him for conduct unbecoming and other just cause based on the superintendent's affidavit which, in part, is reproduced here:

* * *

1. Terence McGuire is employed by the Haddonfield Board of Education as a Teacher of English at the school district's high school. He holds an appropriate certificate as a Teacher of Secondary English.

2. Mr. McGuire has been so employed since September 1, 1971.

3. On August 24, 1984, I came into possession of a copy of a criminal charge brought against Mr. McGuire by the parents of a minor female aged 13 years * * *

4. On August 30, 1984, I met with Mr. McGuire, Dr. Alfred E. Arena, the High School Principal, and Mr. Paul Leahy, a representative of Mr. McGuire's from the New Jersey Education Association. During that meeting, Mr. McGuire admitted that he had put his hands on the breasts of the female minor on June 21, 1984 but that there was a misunderstanding over the incident. It was disclosed that he had also made this admission in a previous meeting with Dr. Arena on July 26, 1984.

5. At the meeting of August 30, 1984, I suspended Mr. McGuire with pay after consultation with the Board President pending completion of an investigation * * *

6. On September 24, 1984, a statement was obtained from the female minor which details the sexual assault upon her by Mr. McGuire on June 21, 1984 * * *

7. On September 25, 1984, the Camden County Grand Jury returned an indictment against Mr. McGuire for sexual assault * * *

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On January 14, 1985, McGuire entered a plea of guilty to the charge of sexual assault in violation of N.J.S.A. 2C:14-2(b). Following his guilty plea, a Judgment of Conviction on the crime was entered against McGuire on or about May 24, 1985 and he was thereafter sentenced by the Honorable Isaiah Steinberg, J.S.C., to five years probation, conditioned upon his continuing psychiatric treatment. McGuire was also ordered to pay $25 to the Violent Crimes Compensation Board. [1]

Because of McGuire's conviction of violation of N.J.S.A. 2C:14-2(b), criminal sexual assult, a crime of the second degree, the Board contends McGuire automatically forfeited his employment as a tenured teacher by virtue of the asserted self-executing forfeiture of public office statute, N.J.S.A. 2C:51-2, and as applied in similar circumstances in the past by the commissioner in In re: James Fridy, 1980 S.L.D. (Dec. 22, 1980), modified St. Bd. of Ed., 1981 S.L.D. - May 6 and June 3, 1981), modified Appellate Division, N.J. Superior Court, Dkt. A-4470-80T3, unreported Jan. 26, 1983 and in In re: Robert Grover, 1983 S.L.D. - (June 1, 1983). The statute provides, in part, as follows:

> a. A person holding any public office, position, or employment, elective or appointive, under the government of this State or any agency or political subdivision thereof, who is convicted of an offense shall forfeit such office or position if:
>
> He is convicted under the laws of this State of an offense involving dishonesty or of a crime of the third degree or above * * *

And,

> b. The forfeiture set forth in subsection a. shall take effect:
>
> (1) Upon finding of guilt by the trier of fact or a plea of guilty, if the court so orders; or
>
> (2) Upon sentencing unless the court for good cause shown, orders a stay of such forfeiture * * *

It is noted that McGuire pleaded guilty to the offense on January 14, 1985 and a Judgment of Conviction was entered and sentencing was imposed May 24, 1985. There is nothing in the record to show that the court ordered automatic forfeiture of McGuire's public employment upon his plea of guilty on January 24, 1985. Consequently, if the

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1 See, N.J.S.A. 2C:43-3.1 and N.J.S.A. 52:4B-1 et seq.

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forfeiture of public office statute applies in this case, the forfeiture would occur under the provisions of N.J.S.A. 2C:51-2(b)(2) and, it is noted, there is no evidence in the record before me that the sentencing court ordered a stay of such forfeiture.

McGuire discounts the automatic application and self-effectuating status of the forfeiture statute. McGuire points out that In re Fridy is not a reported Appellate Division case and, consequently, is not binding legal precedent upon this forum. McGuire notes that because In re Grover relied upon In re Fridy, Grover also is to be discounted in regard to its binding effect in the matter here. McGuire affirmatively argues that N.J.S.A. 2C:51-2 is not applicable because the sole process available to boards of education to dismiss tenured employees is The Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq. That statute requires that once a board certifies administrative tenure charges of conduct unbecoming or other just cause against one of its employees, no discipline may be imposed upon that person until and if the charges are proven true by a preponderance of credible evidence at a plenary hearing to be conducted in the administrative arena. McGuire notes that because the acquisition of a tenure status by public school teachers is remedial, the statutes must be liberally construed while N.J.S.A. 2C:51-2 is penal and must be strictly construed. McGuire suggests that because the New Jersey Supreme Court in Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 74-75 (1982) held that the legislative grant of tenure to satisfactory public school employees who meet the precise condition for such status must be liberally applied, no other legislative expression may interfere or be read in conjunction with that statute. In fact, McGuire contends that in order for this forum to apply the forfeiture statute to him, as a tenured teacher, a finding would first have to be made that the forfeiture statute, originally enacted in 1913, was intended at that time to modify the earlier enacted teacher tenure law in 1909. McGuire reasons that because there is no clear manifestation in the legislative enactment of the forfeiture of public office statute in 1913 in regard to an intent to alter the tenure laws, such an amendment can only be implied and, McGuire notes, implied amendments or repeals are disfavored in the law.

Finally, McGuire contends that the forfeiture of public office statute is a "general" act which must be construed subordinate to what he characterizes as the "specific" terms of the tenure laws and urges that subsequent revisions to the tenure laws, as construed by our courts, vest the Commissioner of Education alone with the power to adjudicate tenure charges where boards seek dismissal of tenured teachers and, even then

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he says the Commissioner is limited to his adjudication only in accordance with N.J.S.A. 18A:6-10.

DISCUSSION

The contention that because Grover, supra, relies upon Fridy, supra, and Fridy is an unpublished Appellate Division decision this forum is not obligated to follow those rulings is not persuasive. Historically, the Commissioner of Education has consistently applied the legal doctrine of stare decisis to his adjudicated rulings. Because of sheer numbers of controversies and disputes filed before the Commissioner of Education invoking his quasi-judicial authority under N.J.S.A. 18A:6-9, such practice is desirable in that it achieves stability and certainty in regard to his interpretation of education law. While unpublished opinions of the Appellate Division are not necessarily binding, such opinions when both parties to a dispute have knowledge of such opinions may certainly be looked to for guidance. That the Commissioner saw fit in Grover to be guided by the Appellate Division affirmance of his prior decision in Fridy, is a valid basis upon which this forum is obligated to follow the Grover opinion.

The contention that N.J.S.A. 2C:51-2, the forfeiture of public office statute, is not self-executing in a tenure matter brought under education law where the teacher involved had a judgment of conviction entered and a sentence imposed upon him for the commission of the second degree crime of sexual assault is without merit. First, the assertion made by McGuire in his brief that the statute in question, N.J.S.A. 2C:51-2, is a "general" act which is subordinate to the "specific" terms of the tenure laws and that the only method by which a tenured teacher may be dismissed is through the Tenure Employees Hearing Law is erroneous. In State v. Musto, 187 N.J. Super. 264 (Law Div. 1982), aff'd o.b. 188 N.J. Super. 106 (App. Div. 1983) William V. Musto was a member of the New Jersey State Senate, a member of the Board of Commissioners of Union City and its Mayor. Following a 46 count indictment returned against him by the United States grand jury, Musto was found guilty on 28 counts. Thereafter, sentence was imposed upon Musto on the charges for which he had been found guilty. Following sentencing, the New Jersey Attorney General instituted suit on behalf of the State seeking a judgment declaring that Musto forfeited his public offices as Senator and as a member of the Board of Commissioners of the City of Union City and Mayor. Musto's argument was rejected that the sole method for removal of a senator is as set forth in the New Jersey Constitution and consequently the forfeiture of public office statute as applied to him is

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unconstitutional. The Hon. Thomas S. O'Brien, following an exhaustive analysis of the argument presented including a consideration of an analogous case in State ex rel. DeConcini v. Sullivan, 66 Ariz. 348, 188 P.2d 592 (Sup. Ct. 1948), held as follows:

> Paraphrasing the Arizona Supreme Court, it is illogical to assume that expulsion or impeachment, provided by our [New Jersey] Constitution, were intended by the framers of that document to be the exclusive methods for the removal of public officers. They serve as an added safeguard to the public against those officers who may be so powerful as to effectively avoid prosecution for wrongdoing. They could never had been intended to provide a shield for the corrupt official to prevent his removal by other means. On the contrary, full power has been vested in our Legislature by the Constitution. N.J.S.A. 2C:51-2 was enacted pursuant to that power.
>
> The wording and history of our Constitution and forfeiture statute in common sense all dictate that the intent of both the framers of that Constitution and our Legislature * * * was to provide complete and adequate safeguards to the public against those who breach its trust - the opposite of trying to make it more difficult to oust such officers. Public interest demands that public affairs be administered by officers upon whom rest no stigma of conviction of an offense involving dishonesty, crimes of the third degree or an offense touching upon his public office, position or employment.
>
> For all of the foregoing reasons, it is the conclusion of this court that N.J.S.A. 2C:51-2 is constitutional and self-executing, to the end that upon his being sentenced by the United States District Court on May 10, 1982, Musto forfeited his seat in the New Jersey State Senate * * *
>
> 187 N.J. Super. at 305-06.

In similar fashion, the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq. could not have been intended by the Legislature to provide a shield for a teacher who has been convicted of the second degree crime of sexual assault. Rather, the Legislature obviously intended that when a teacher who had acquired the legislative status of tenure was thereafter convicted of an offense involving dishonesty or of a crime of the third degree or above, adequate safeguards to the public be available for immediate removal from such employment without the necessity of the board having to establish at an administrative tenure hearing that such conduct is conduct unbecoming. Indeed, by virtue of McGuire's plea of guilty, the subsequent Judgment of Conviction and sentencing for the crime of sexual assault estops him from seeking to relitigate the very same facts upon

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which he pleaded guilty. Matter of Tanelli, 194 N.J. Super. 492 (App. Div. 1984). It should be noted that N.J.S.A. 2C:14-2(b) defines the crime of sexual assault committed by McGuire as follows:

> An actor is guilty of sexual assault if he commits an act of sexual contact with a victim who is less than 13 years old and the actor is at least four years older than the victim.

While McGuire's arguments that the forfeiture of public office statute is a "general" law, as opposed to the tenure laws being a "specific" law, no authority was offered by McGuire to support such a contention. A plain reading of N.J.S.A. 2C:51-2 suggests the contrary; that is, the forfeiture of public office statute applies only to those holding any public office, position, or employment who commit an offense involving dishonesty or a crime of the third degree or above. By the very terms of the statute, it is limited in its scope to such offenders. The legislative status of tenure is extended to all public school employees who meet the precise conditions of the statute upon which tenure is conferred in order to attain such a status. Consequently, the argument advanced by McGuire that a general statute is modifying a specific statute is unfounded.

McGuire's contention that N.J.S.A. 2C:51-2 must be first found to modify the tenure statutes at N.J.S.A. 18A:28-5 is equally unfounded. Rather, the former statute affords adequate safeguards to the public when a person who holds employment as a public school teacher is convicted of a crime of the third degree or above to immediately remove that person from such employment. The Tenure Employees Hearing Law, to the contrary, is a safeguard for those who hold the legislative status of tenure but who have engaged in conduct, not criminal, but deemed by the local board not suitable for the continued employment as a teacher. In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967).

CONCLUSION

N.J.S.A. 2C:51-2(b)(2) is self-executing at the time sentence is imposed upon a public school teacher against whom a judgment of conviction has been entered so that at the precise moment of sentencing automatic forfeiture of that person's legislative status of tenure and employment by a local board of education is forfeited. In this case, McGuire has been sentenced for the crime of sexual assault following the entry of a judgment of conviction on such crime. Accordingly, I **CONCLUDE** McGuire forfeited his

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employment with the Haddonfield Board of Education and that no hearing under N.J.S.A. 18A:6-10 et seq. is necessary in the matter. Summary decision is entered on behalf of the Haddonfield Board of Education and it is **ORDERED** that Terence D. McGuire forfeited his position of employment as a tenure teaching staff member with the Board as of May 24, 1985.

A final matter remains. During the pendency of this case and after the Board suspended McGuire's salary on or about November 1, 1984, McGuire sought by motion made to require the Board to resume his salary payments under N.J.S.A. 18A:6-14. McGuire's motion was denied by written ruling on April 23, 1985 on the strength of the Commissioner's prior holding in In re Donald Martin v. City of Asbury Park, supra. McGuire sought interlocutory review by the Commissioner of Education under the provisions of N.J.A.C. 1:1-9.7 and consistent with In re Uniform Adm'v Procedure Rules, 90 N.J. 85 (1982) which clearly states that the

> * * * agency head must be given broad discretion to decide which ALJ orders are subject to review on an interlocutory basis. As in a court case, interlocutory review may be granted only in the interest of justice or for good cause shown. In the administrative arena, good cause will exist whenever, in the sound discretion of the agency head, there is a likelihood that such an interlocutory order will have an impact upon the status of the parties * * *

Upon McGuire's application for interlocutory review of the denial of his motion to resume salary payments, the director of the Bureau of Controversies and Disputes of the Department of Education advised McGuire "I have determined not to formally review the above-captioned matter, particularly in light of the State Board's affirmance of [In re Donald Martin]." (Letter, May 2, 1985). On July 17, 1985, the Appellate Division of New Jersey Superior Court issued its opinion in In re Martin. McGuire filed a motion in this forum to reopen the record to reconsider the initial order by which his motion was denied. McGuire's motion to reopen the record in this forum was denied with the suggestion he seek a reversal of the adverse ruling before the Commissioner of Education.

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

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

September 5, 1985
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE TENURE	:	
HEARING OF TERENCE D. MC GUIRE,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF HADDONFIELD, CAMDEN COUNTY.	:	
	:	

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

The Commissioner observes that primary exceptions from respondent and the Board were timely filed pursuant to N.J.A.C. 1:1-16.4a, b, and c. However, the Board's reply exceptions were untimely.

In primary exceptions, respondent contends that the ALJ erroneously found that N.J.S.A. 2C:51-2, the Forfeiture of Public Office statute, is self-executing in a teacher tenure matter involving a second degree crime. In so arguing respondent prefaces his contention with the statement that the tenure statute is remedial and must therefore be liberally construed, while N.J.S.A. 2C:51-2 is a penal statute which must be strictly construed. Respondent avers that in order to apply the forfeiture statute to tenured teachers, the Commissioner would have to find that the tenure law, which was enacted earlier than the forfeiture statute, had been altered by the forfeiture statute, eliminating the right to a plenary hearing. Respondent adds that such implied amendments or repeals are disfavored, relying on State v. Dalglish, 86 N.J. 503, 513 (1981). Respondent contends that N.J.S.A. 2C:51-2 was enacted four years after N.J.S.A. 18A:6-10 et seq., and that no clear manifestation was evident in the subsequent legislative action of an intention to alter the tenure law. Respondent adds that the forfeiture statute is a general act which must be construed as subordinate to the specific terms of the tenure laws and quotes, inter alia, W. Kingsley v. Wes Outdoor Advertising Co., 55 N.J. 336-339 (1970).

Also, respondent argues, "***Our courts have rightly and consistently construed the revised tenure laws as vesting in the Commissioner of Education and only in the Commissioner of Education the power to adjudicate the dismissal of tenured teachers for cause and then only in accordance with N.J.S.A. 18A:6-10.***" (Emphasis in text.) (Respondent's Exceptions, at p. 4) Respondent cites In re Fulcomer, 93 N.J. Super. 404, 418 (App. Div. 1967) for that proposition, and adds that he cannot be held to have forfeited his position without recourse to the hearing process set out in N.J.S.A. 18A:6-10 et seq.

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Respondent avers that the ALJ's reliance on State v. Musto, 187 N.J. Super. 264 (Law Div. 1982), aff'd o.b. 188 N.J. Super. 106 (App. Div. 1983), is "confusing at best." (Respondent's Exceptions, at p. 4) Respondent argues that the facts in the two cases differ in that Musto was not a teacher, but rather a public official, and thus the choice in whether or not to afford him a full hearing before automatic forfeiture was not based on the tenure laws, but rather involved the application of N.J.S.A. 2C:51-2 to a constitutional office. Respondent contends that such circumstances are not present in the instant matter since he is a tenured teacher entitled to a plenary hearing under the tenure laws.

Finally, respondent contends that the ALJ erroneously denied his application for reconsideration of his request for salary payments under N.J.S.A. 18A:6-14. Relying on In re Donald Martin v. City of Asbury Park, decided by the Commissioner December 16, 1983, aff'd with modification State Board July 11, 1984, aff'd/rev'd New Jersey Superior Court July 17, 1985, respondent argues that, if a tenured teacher is removed from the classroom through suspension because of indictment, the removal can take place under two sections of the school law. The teacher, respondent contends, can be suspended under either N.J.S.A. 18A:6-8.3 or under the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq. Respondent avows that if, as herein, the Board chooses to rely on the latter statute, then all its provisions apply, most particularly N.J.S.A. 18A:6-14. Thus, respondent argues, the Board should have reinstated his salary, effective the 121st day following his suspension. Respondent argues that an administrative agency is clothed with the power to reopen its own decision pursuant to certain standards including when the need to serve the ends of essential justice dictate. Respondent cites Burlington County Evergreen Pk. Mental Hospital v. Cooper, 56 N.J. 579, 600 (1970) for that proposition. Respondent avers the instant matter warrants reopening the issue despite the fact that the ALJ, on motion, issued a written opinion denying respondent's motion to resume salary payments and also denying the Board's cross-motion for reimbursement of respondent's salary paid from September 26, 1984, the date of respondent's indictment, until November 1, 1984, the date the Board certified tenure charges against him.

The Board concurs with the findings of the ALJ of respondent's conviction for violation of N.J.S.A. 2C:14-2(b), criminal sexual assault, a crime of the second degree. Respondent automatically forfeited his employment as a tenured teacher by virtue of the asserted self-executing forfeiture of public office statute, N.J.S.A. 2C:51-2. The Board avers that precedent for forfeiture was established in similar circumstances in the past by the Commissioner in In the Matter of the Tenure Hearing of James Fridy, decided by the Commissioner December 22, 1980, aff'd with modification State Board May 6, 1981 and June 3, 1981, aff'd with modification N.J. Superior Court January 26, 1983 and rem'd to State Board March 9, 1983, St. Bd. dismissed May 2, 1984. However, the Board does not concur with the findings of the ALJ concerning the denial of the Board's cross-motion for reimbursement of salary. The

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Board relies on its exceptions brief submitted on May 3, 1985 in response to the ALJ's decision on motion dated April 23, 1985. That brief is incorporated herein by reference in its entirety.

The Board argues, inter alia, that in denying the Board's cross-motion for recoupment of salary, the ALJ misconstrued the clear language of In re Martin, supra, and In re Fridy, supra, in ruling that N.J.S.A. 18A:6-8.3 allows the Board in its discretion to suspend without pay an employee who has been indicted. Rather, the Board argues, inter alia "***both cases state unequivocally that an employee's right to continued salary terminates upon his criminal indictment." (Board's Exceptions of May 3, 1985, at p. 3) The Board further argues that requiring the Board to submit affidavits to show it was under a mistaken belief of law in order to recoup salary payments is contrary to the reasoning of Martin and Board of Education of Passaic v. Board of Education of Wayne, 120 N.J. Super. 155 (Law Div. 1972), aff'd o.b. App. Div. 1973 (unreported), cert. den. 64 N.J. 508 (1974), as well as the recent holding in Williams v. Bd. of Ed., Deptford Twp., decided by the Commissioner March 12, 1982, aff'd State Board July 7, 1982, aff'd N.J. Superior Court 192 N.J. Super. 31, (App. Div. 1983), aff'd N.J. Supreme Court, A-73, January 28, 1985. The Board contends that, even assuming it exercised its discretionary authority to continue respondent's salary between September 25, 1984 and November 1, 1984, such exercise was improper by operation of law pursuant to Martin, supra, and Fridy, supra.

The first issue before the Commissioner in the instant matter is whether respondent's conviction for second degree sexual assault gives rise to automatic forfeiture by him of his position under N.J.S.A. 2C:51-2(b), thus precluding a plenary hearing under the tenure laws as a result of his having been charged by the Board with conduct unbecoming a teacher under N.J.S.A. 18A:6-10 et seq. The Commissioner finds unpersuasive respondent's contention that N.J.S.A. 2C:51-2(b)(2) is not self-executing because the sole process available to boards of education in dismissing tenured employees is through N.J.S.A. 18A:6-10 et seq. The Commissioner agrees with the ALJ that the Legislature intended that the tenure laws defer to the forfeiture statute in requiring that any teacher convicted of an offense involving dishonesty or a crime of the third degree or above be immediately and automatically removed from his tenured position. The Superior Court decision in In the Matter of the Tenure Hearing of Orazio Tanelli, School District of the Town of Montclair, 194 N.J. Super. 492 (App. Div. 1984) supports the Board's contention that respondent's dismissal is by operation of law without further recourse to the tenure laws.

Tanelli concerned a tenured teacher, who, having been convicted by the Superior Court as a disorderly person, was then charged by the Board with conduct unbecoming a teacher. While the disorderly person offense required an extensive analysis of whether his conviction "touched on his employment", which is unnecessary in the instant situation because N.J.S.A. 2C:51-2 specifically addresses forfeiture for crimes of the third degree or higher, the

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case is apposite in establishing that N.J.S.A. 2C:51-2 precludes a hearing under the tenure laws. Tanelli, like respondent in the instant matter, contended that the board erroneously gave preclusive effect to his conviction. Although Tanelli's offense occurred before the effective date of N.J.S.A. 2C:51-2a(2), an analysis of the case leads inexorably to the conclusion that had Tanelli's conduct taken place after the adoption of Title 2C, forfeiture would have been required automatically. The Court in Tanelli held:

> "***[T]he Legislature has *** required forfeiture upon conviction alone without regard for mitigating factors." (at 497)

Thus, having pled guilty, the subsequent judgment of conviction and sentencing of respondent for the crime of sexual assault estops him from seeking to relitigate either the same facts or to review any mitigating circumstances upon which he pled guilty.

See also, In the Matter of the Tenure Hearing of Geoffrey Fulcoli, decided by the Commissioner March 18, 1985 (respondent's deliberate, obscene and threatening phone calls not only rise to the level of forfeiture of his position under N.J.S.A. 2C:51-2(a), but those actions also clearly warrant dismissal on the basis of conduct unbecoming a teacher) and State v. Musto, 187 N.J. Super. 264 (Law Div. 1982), aff'd o.b. 188 N.J. Super. 106 (App. Div. 1983).

The Commissioner finds no merit in respondent's argument that the forfeiture law is a "general" law, as opposed to the tenure law being a "specific" law. As the ALJ points out, the scope of the forfeiture law applies only to those holding public office, position or employment who commit an offense involving dishonesty or a crime of the third degree or above. The tenure laws apply to a far broader group, that is, all public school employees who meet the precise conditions of the statute upon which tenure is conferred in order to attain such status not just those who may have been convicted of a 2C:51-2 offense.

Similarly, the Commissioner finds no merit in respondent's argument, that in order for the forfeiture statute to apply to him as a tenured teacher, a finding would first have to be made that the forfeiture statute, originally enacted in 1913, was intended at that time to modify the earlier enacted teacher tenure law of 1909. The Commissioner notes that, while there is no clear manifestation in the legislative enactment of the forfeiture of public office statute of 1913 in regard to an intent to alter the tenure law, neither is there language in the later law expressing the Legislature's intent that the tenure law be complied with when N.J.S.A. 2C:51-2 is at issue. Had the Legislature in its wisdom intended alternative reviews or compliance with the tenure law instead of invoking N.J.S.A. 2C:51-2 when a teacher's actions are in question, it certainly could have expressed itself to that effect.

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The Commissioner will now address the issue of back salary entitlement in light of the recent Appellate Court decision in In re Martin, supra. The Commissioner is in accord with the ALJ's denial of back pay to respondent from the 121st day following the certification of tenure charges against him pursuant to N.J.S.A. 18A:6-14 and also agrees with the ALJ that the Board is not entitled to recoupment of salary paid to respondent from September 25, 1984 to November 1, 1984 for the reasons set forth herein.

For the record, the Commissioner notes the following chronology:

August 30, 1984	Respondent suspended with pay upon Board's receipt of a criminal charge filed in Superior Court against respondent.
September 25, 1984	Respondent indicted by the Camden County Grand Jury.
October 11, 1984	Superintendent filed tenure charges against respondent with the Board for conduct unbecoming a teacher and "other just cause."
November 1, 1984	Board certified charges pursuant to N.J.S.A. 18A:6-10 et seq. against respondent for conduct unbecoming and "other just cause," including the indictment filed against respondent on September 25, 1984. Respondent suspended without pay.
November 7, 1984	Tenure charges filed with Commissioner of Education.
January 14, 1985	Respondent entered a plea of guilty to the charge of sexual assault in violation of N.J.S.A. 2C:14-2(b).
March 4, 1985	Respondent (petitioner for purposes of Motion) filed Motion to compel payment of salary under N.J.S.A. 18A:6-14.
	Board (respondent for purposes of Motion) cross-filed Motion for reimbursement of salary paid to respondent from September 25, 1984 until November 1, 1984.
March 23, 1985	ALJ issued opinion denying respondent's motion to resume salary payments and also denying Board's cross-motion for reimbursement.
May 24, 1985	Respondent convicted of second degree sexual assault in violation of N.J.S.A. 2C:14-2(b) and sentenced to five years probation, conditioned upon his continuing psychiatric treatment.

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September 9, 1985	Initial Decision granting Board's Motion for Summary Decision on the underlying tenure charges for unbecoming conduct due to respondent's criminal conviction on May 24, 1985.

In rendering a determination on the motion and cross-motion in April 1985, the ALJ relied on In re Martin, supra, which had been decided by the Commissioner and the State Board but which was still pending at that time before the New Jersey Superior Court, to deny reinstatement of respondent's salary and to also deny the Board's cross-motion for reimbursement. The judge denied reopening the record on the issue of salary payments stating:

> "***In this case, the Legislature created McGuire's property interest in his salary after 120 days of suspension without pay upon the certification of the administrative tenure charges. It is not disputed that a property interest may be defeated in accordance with law. The Commissioner [In re Martin, supra] has taken the position that N.J.S.A. 18A:6-8.3 defeats McGuire's property interest in his salary resumption by the fact of his indictment, notwithstanding that McGuire did not in any way cause a delay in the administrative tenure proceedings.***"
>
> (Decision On Motion, dated April 23, 1985, at p. 8)

In denying the Board's cross-motion for reimbursement, the ALJ stated:

> "***[T]here is no basis in this record upon which I can find the Board paid such monies to McGuire under a mistaken belief of law. Furthermore, to the extent the Board was not obligated to continue McGuire's suspension with pay under N.J.S.A. 18A:25-6 and N.J.S.A. 18A:6-8.3 upon his indictment, the Board is seen to have exercised its discretion to continue McGuire's salary after his indictment and until the time it certified the tenure charges against him.***"
>
> (Id., at pp. 8-9)

In filing exceptions to the initial decision rendered by OAL on September 9, 1985, respondent reiterates the arguments he advanced on motion in April, that Martin stands for the proposition that if a board of education wishes to invoke N.J.S.A. 18A:6-8.3 in order to suspend an employee without salary by reason of indictment, it must do so specifically and exclusively. Otherwise, if the employee is tenured and is suspended under the provisions of the

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Tenure Employees Hearing Law, suspension without pay cannot be longer than the 120-day period provided in N.J.S.A. 18A:6-14. Respondent contends that the resolution of the Board dated November 1, 1984 only includes reference to N.J.S.A. 18A:6-11 and thus he is entitled to the resumption of his salary as of March 1, 1985.

The Board contended in arguing the motion in April 1985, that in direct contrast to the facts in Martin, the Board suspended McGuire without pay because of his indictment, which was returned on September 25, 1984. The Board argued that the indictment is specifically set forth as the reason for the certified tenure charges filed with the Commissioner. Hence, the Board argued, in accordance with Martin, N.J.S.A. 18A:6-8.3 and 18A:6-14 must be read in pari materia to discern their true intention. Thus, respondent is not entitled to salary after his indictment.

The Board further argued that it is entitled to reimbursement of all monies paid to respondent from September 25, 1984 to November 1, 1984. In making this assertion the Board relied on the following language from Martin:

> "***Although the general rule is that monies paid as a result of a mistake of law cannot be recouped, there is a specific exception for payments which have been made by a municipal corporation or subdivision thereof. In Board of Education of Passaic v. Board of Education of Wayne, 120 N.J. Super. 155 (Law Div. 1972), the court held that the boards of education were entitled to recover payments made under a mistake of law: 'The reasoning behind such a decision is that this court does not feel that a municipality or subdivision thereof, as the instrument of the people, should be bound by a misinterpretation of the law by the authorities in charge.' Id. at 163-164. Accordingly, petitioner may recover monies paid to respondent on or after November 5, 1982.***"

However, on July 17, 1985, the Appellate Court reversed the State Board's affirmance of the Commissioner's December 16, 1983 decision in Martin, holding that N.J.S.A. 18A:6-8.3 did not apply to the Martin facts since respondent in that case was not suspended by reason of indictment. Rather, Martin was suspended by the board without pay after his arrest under the tenure laws.

Since N.J.S.A. 18A:6-8.3 and 6-14 are the two pivotal statues that must be addressed in rendering a determination in this matter, they bear repeating here. N.J.S.A. 18A:6-8.3 reads:

> "Any employee or officer of a board of education in this State who is suspended from his employment, office or position, other than by reason of

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> indictment, pending any investigation, hearing or trial or any appeal therefrom, shall receive his full pay or salary during such period of suspension, except that in the event of charges against such employee or officer brought before the board of education or the Commissioner of Education pursuant to law, such suspension may be with or without pay or salary as provided in chapter 6 of which this section is a supplement."

N.J.S.A. 18A:6-14 reads:

> "Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay, but, if the determination of the charge by the Commissioner of Education is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made. Should the charge be dismissed, the person shall be reinstated immediately with full pay from the first day of such suspension. Should the charge be dismissed and the suspension be continued during an appeal therefrom, then the full pay or salary of such person shall continue until the determination of the appeal. However, the board of education shall deduct from said full pay or salary any sums received by such employee or officers by way of pay or salary from any substituted employment assumed during such period of suspension. Should the charge be sustained on the original hearing or an appeal therefrom, and should such person appeal from the same, then the suspension may be continued unless and until such determination is reversed, in which event he shall be reinstated immediately with full pay as of the time of such suspension."

In discussing N.J.S.A. 18A:6-8.3 in relation to suspension under the Tenure Employees Hearing Law, the Appellate Division stated the following in Martin, supra:

> "***Clearly this statute [N.J.S.A. 18A:6-8.3] is applicable to suspensions under the tenure law so that if a person is suspended from his or her employment 'by reason of indictment' he will not receive the salary benefits contained in the scheme [N.J.S.A. 18A:6-14].***"
>
> (Slip Opinion, at p. 10)

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The court goes on to address the factual circumstances of Martin in relation to the above, stating:

> "***The problem is that Martin was not suspended by reason of indictment, he was suspended by reason of his arrest. His indictment did not occur until over ten months after his arrest and no action by the Local Board to suspend him because of the indictment took place at that time. Thus, the statute does not prohibit [Martin] from receiving his salary when the indictment was handed down." (Id., at p. 10)

In the instant matter, the factual circumstances are clearly distinguishable from Martin, supra. While the respondents in both cases were charged with conduct unbecoming a teaching staff member, Martin "was suspended by reason of his arrest" (see above). In the present case, the record supports that McGuire's suspension without pay was by reason of indictment coupled with conduct unbecoming a teacher. The written statement of evidence sworn by the Superintendent under oath and presented to the Board to support the tenure charge under N.J.S.A. 18A:6-11 specifically cites respondent's indictment, and it is included as part of the sworn statement of evidence. Thus, in the Commissioner's judgment, the "problem" present in Martin is not present in the instant matter, notwithstanding the specific wording of the resolution.

The Commissioner does not believe that a board of education is faced with an "either-or" situation when taking action with respect to a suspension that is by reason of indictment, namely either suspending by virtue of N.J.S.A. 18A:6-8.3 or by virtue of N.J.S.A. 18A:6-14. N.J.S.A. 18A:6-8.3 specifically states that it supplements Chapter 6 and the Appellate Division in Martin, supra, found this statutory provision applicable to suspension under the Tenure Employees Hearing Act so that if a person is suspended by reason of indictment (a reason found in this case as stated above) the person does not receive the salary benefits contained in N.J.S.A. 18A:6-14. As such, he does not believe that the Board herein was required to choose between the two sections of the law. The Commissioner cautions boards, however, that when certifying tenure charges against a tenured employee already suspended pursuant to N.J.S.A. 18A:6-8.3 or under N.J.S.A. 18A:25-6, boards must include all pertinent statutory references as well as the reasons justifying imposition of the relevant statutes in all the documents filed with the Commissioner so as to preclude later litigation as to whether payment of salary is owing.

Furthermore, while the Commissioner agrees with the ALJ in the instant matter that the Board is not entitled to reimbursement for the salary paid to respondent from September 25, 1984 until November 1, 1984, he does so for different reasons. As the ALJ notes, it was entirely appropriate and certainly within its discretion for the Board to suspend respondent with pay from August 30, 1984 until it preferred tenure charges on November 1, 1984. Yet,

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contrary to the ALJ's conclusion, the Board was obligated to continue paying respondent's salary until such time as it acted on his indictment. Since the Board did not act on September 25, but rather waited until November 1 to do so, it was not a matter of discretion, but rather one of legal obligation that respondent receive his salary. The Commissioner is aware of the due process requirements that the Board duly notify respondent of its intention to consider tenure charges, and of respondent's right to respond to that notification within 15 days. Thus, it seems unlikely that the Board could have been more expeditious in acting on the indictment. Nevertheless, unless and until a board indicates that it is preferring tenure charges pursuant to an indictment or the filing of tenure charges, payment of salary is obligatory, not discretionary.

Accordingly, for the reasons set forth in the initial decision as modified herein, the Commissioner finds and determines that N.J.S.A. 2C:51-2(b)(2) is self-executing and that therefore, respondent automatically forfeited his employment with the Haddonfield Board of Education as of the date of his sentencing for the second-degree crime of sexual assault, May 24, 1985. Summary judgment is entered on behalf of the Haddonfield Board of Education and it is further found that no salary is either due to Respondent Terence D. McGuire or owing Petitioner Board of Education of Haddonfield.

In addition, the Commissioner orders that this matter be forwarded to the State Board of Examiners with a recommendation that the teaching certificate of Terence D. McGuire be revoked, pursuant to N.J.A.C. 6:11-3.7.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

October 21, 1985

Pending State Board

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INITIAL DECISION
OAL DKT. NO. EDU 2891-85
AGENCY DKT. NO. 121-5/85

MIDDLETOWN TOWNSHIP
BOARD OF EDUCATION,
Petitioner,
v.
JOHN AHERN,
Respondent.

Peter P. Kalac, Esq., for petitioner (Kalac, Newman & Griffin, attorneys)

Arnold M. Melik, Esq., for respondent (Katzenbach, Gildea & Rudner, attorneys)

Record Closed: August 6, 1985 Decided: September 6, 1985

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

The Middletown Township Board of Education (Board) certified to the Commissioner of Education tenure charges of conduct unbecoming a teacher against John Ahern (respondent). The respondent invoked Evid. R. 25 (Anno. 1985) and refused to enter an answer that might disclose any matter which would incriminate him or expose him to a penalty.

The matter was transmitted to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. After notice, a prehearing conference was held on June 21, 1985. Among other things, it was agreed that the issue to be tried is: Are the charges against John Ahern true in fact and, if true in fact, sufficient to warrant his dismissal or a reduction in his salary.

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The matter was heard on July 16, 17 and 23, 1985, at the Aberdeen Township Municipal Court. The parties timely filed post-hearing submissions.

I.

Nine tenure charges supported by a sworn statement were signed by the principal of Middletown Township High School South on April 15, 1985. N.J.S.A. 18A:6-11. The Board provided the respondent a copy of the charges, a copy of the statement and an opportunity to submit a written statement of position and a written statement of evidence under oath in defense of the charge. Ibid. The respondent declined. After the Board of Education certified the charges to the Commissioner, the respondent, in lieu of formal answer, invoked Evid. R. 25 (Anno. 1985). There is no allegation of procedural deficiency in the preferment of the charges.

The respondent is charged with forging a parent's signature to a note; hosting a party in his home on February 23, 1985, after school hours which was attended by female high school pupils, male and female adults and at which alcoholic beverages were available; on February 23, 1985, following the aforesaid party that the respondent went to sleep and shared a bed, sleeping between two of the female pupils who attended the party; that on March 15, 1985, the respondent, while at a bar in Red Bank purchased alcoholic beverages for two females who were under the legal drinking age; on March 15, 1985, the respondent invited these two females into his home where he served them alcoholic beverages and then invited them to spend the evening at this home; on March 16, 1985, the respondent hosted a party at his home after school hours which was attended by approximately 15 adults, nine of whom were teachers employed by the Middletown Township School District and approximately 16 female high school pupils from the district and at which alcoholic beverages were available; on March 16, 1985, certain of the high school pupils who attended the party became intoxicated; following the party of March 16, 1985, which ended in the early hours of March 17, 1985, the responoent allowed nine female pupils to sleep at his residence; and during the early hours of the morning of March 17, 1985, the respondent went to sleep and shared a bed with one of the female pupils who attended the party of March 16-17, 1985.

The Board alleges that each of these charges, if true in fact, constitutes conduct unbecoming a teaching staff member as set forth in N.J.S.A. 18A:6-10.

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II.

Eight witness testified. C.P., a Middletown High School South pupil who was graduated in June 1985, stated that she knew the respondent and identified him in the hearing room. She attended a party at his home in Brick Town on the evening of March 16, 1985. His home is approximately 20 miles from hers.

The witness was invited by the respondent with approximately 15 other female pupils from the school. Nine or ten adults, mostly teachers, were also present. The witness arrived between 8:00 and 9:00 p.m., driven to the party by girlfriends. All remained at the party. Persons attending the party brought food. Beverages were provided. Among the beverages were beer, fruit juices and carbonated soft drinks.

C.P. stated that no one was "in charge" of the beer. Persons helped themselves. She drank two or three glasses of beer. One of her companions drank beer; the other did not. The beer was in a keg and plastic glasses or cups were provided.

This witness stated that she got sick. The friend who had driven her to the party was not "acting normal." This witness telephoned another person while at the party. She stated that she would not be coming home from the party. She also talked to D.V. who apparently was with the person who received the telephone call.

D.V. arrived later and took this witness home. At the time this witness made the telephone call, she believed that the friend who had driven her to the party was "not okay to drive home." This witness left at 10:30 or 11:00 p.m. with D.V. She became sick to her stomach on the way home and vomited.

C.M. testified that she was graduated from Middletown High School South in June 1985. She knows the respondent as a teacher and basketball coach. On the night March 16, 1985, she attended a party at the respondent's home in Brick Town. A friend, C.L., drove. The respondent had invited them to the party a week or two before March 16. Other Middletown High School South pupils were there. Ten or fifteen adults, all teachers, also were present.

This witness testified that she arrived at about 6:30 p.m. All persons who attended the party brought food. Drinks were already there. The beverages were beer,

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juices and carbonated soft drinks. No one was in charge of dispensing the drinks but rather persons attending the party helped themselves. This witness consumed two or three glasses of beer. She saw other pupils drinking beer.

C.M. testified that she understood the party to be "a sleep over." The respondent had said in advance anyone who did not want to drive could stay that evening. Six or seven pupils did choose to stay as did five or six adults. There were not designated areas for sleeping.

Prior to March 16, the witness had been to the respondent's house two or three times. She knows the layout of the home and identified a diagram (P-5) as approximating the layout. She stated that the marks on the diagram indicating "keg," "food," "juice" and "soda" were accurate.

C.M. placed her initials on Exhibit P-5 to show where she slept on the night of March 16-17. The respondent slept in the same room and bed. There was physical contact in that he had one arm across her shoulders briefly. There was no evidence adduced to indicate that there was any sexual contact.

This witness stated that she was also at the respondent's home on February 23, 1985. The party was to celebrate the victory of the girls' basketball team in its conference. The entire team and many teachers attended the party. Food and drink were both available. This witness drank two or three glasses of beer. Other pupils also consumed beer. As at the later party, "sleep over" was available. This witness did sleep in the respondent's home that night. She indicated on Exhibit P-5 by her initials where she slept on that night.

The witness stated she slept on the pull-out couch. Another female pupil, A.A., and the respondent shared the bed with her. All slept through the entire night. The respondent was between the two pupils.

C.M. also testified that the respondent signed her mother's name to a note that was written as an explanation for tardiness.

On cross-examination, the witness stated that on March 16, she consumed beer and saw other pupils consume beer. The respondent did not serve the beer directly to the

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pupils. The beer and plastic cups were in a part of the home, separate from the soft drinks. Pupils helped themselves.

The witness testified similarly as to the February 23 party. She stated further that many pupils consumed nonalcoholic beverages. She also stated that she had drunk beer while attending these parties and that she did not get drunk or sick at either party.

C.M. did see C.P. and M.G. at the party of March 16. She made no observation of either of them. In her opinion, no one seemed to have overindulged. She made a similar statement as to the February 23 party.

She stated that she did share a bed with the respondent. Six or seven pupils slept in the home that night along with at least three adults in addition to the respondent. Some of the male faculty who attended brought their spouses with them on both February 23 and March 16. So far as this witness knows, all pupils who stayed at the respondent's home overnight had parental permission to do so.

The witness stated she went to sleep at approximately 2:00 a.m. on the morning of March 17. Other persons were in other rooms of the apartment. A total of perhaps 14 persons stayed in the apartment that night. The witness could not estimate the size of the apartment but did state that it was "not that big."

The apartment was quite crowded. The witness stated that she and the respondent were fully clothed while in bed. They went to sleep and nothing more occurred.

At the February party she had slept in the den with A.A. and the respondent. Fourteen or more pupils stayed at the apartment that night. It was quite crowded. Some persons slept on the floor. Sleeping arrangements were "catch as catch can."

D.V., a male pupil, also testified. He was graduated from Middletown High School South in June 1985. He knows the respondent because he served for a time as student aide to the respondent.

On the night of March 16, he drove to Brick Town after receiving a call from C.P. who was at the respondent's home.

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C.P. had stated that she was at the respondent's home not feeling well and would not be able to go out with D.V. that evening. He volunteered to go get her. L.C., I.E., M.G., and M.B., went with him to pick up C.P. They located the apartment but D.V. did not enter it. M.G. and I.E., females, did enter the apartment. While D.V. was there he saw at least three other pupils and two teachers, including the respondent.

He waited there for approximately one-half hour. He saw pupils with cups in their hands wandering in and out of the apartment.

At one point he spoke to a female pupil, C.L. He stated he could not understand her as she was "not making much sense." When he left, L.C., C.P. and M.B. went with him. It was after 11:00 p.m. by this time. C.P. seemingly was intoxicated. Her speech was slurred and she could not walk steadily. M.B. rode in the front seat with D.V.; L.C. and C.P. rode in the back seat. C.P. twice asked D.V. to pull over to the side of the road. The second time he did so, she vomited. M.G. was following D.V.'s vehicle but they got separated. In the second car were M.G. (male), M.G. (female) C.S. and I.E. M.G. (female) nearly fell getting into the car.

On cross-examination, the witness testified that after March 16, he discussed the events of that night with other pupils. They tried to sort out rumors and decide what facts were true. He spoke to an investigator when requested to do so. The investigator did not help him to prepare his recollections. He also stated that while he saw pupils drinking from cups in and near the respondent's home, he did not know the contents of those cups.

The principal of Middletown High School South, who has served in that position for 11 years, testified. He stated that the respondent has been on staff since transferring from a junior high school in 1983. He teaches mathematics and has been the head girls' basketball coach since the early 1980s. This witness filed the charges in this case.

Concerning charge one, the principal stated that a vice-principal had called the matter of the signature on C.M.'s note to the principal's attention. The vice-principal checked into the matter. She was satisfied that the writing was not that of C.M.'s mother. She discovered it was the respondent's and reported to the principal that the respondent admitted to signing C.M.'s mother's name to the note. This occurred in late December 1984.

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The principal reviewed the situation with his vice-principal. They met with the respondent after the Christmas vacation. On February 27, 1985, they gave a letter of reprimand to the respondent (P-2). The respondent acknowledged and signed the letter. The administrators and the respondent discussed the contents of the letter.

On the Monday following March 16, 1985, the principal heard about a party at the respondent's home and that teachers, pupils and alcohol were supposedly all present. He conducted an investigation and notified the superintendent of schools. He interviewed pupils and teachers. Statements were taken by him and also by an investigator. He was present at all times when the investigator questioned any pupil or staff member. A hired stenographic reporter took down the statements. When they were typed they were read and signed by the makers.

The principal also identified the course of study for driver education in use in his high school (P-4). He stated that it is used by all health and physical education teachers pursuant to the mandate found in N.J.S.A. 18A:35-4 concerning the effects of alcohol.

On cross-examination, the witness stated that he met on February 27, with the respondent and vice-principal concerning the C.M. note incident after the vice-principal had investigated the matter. The principal was not present during the vice-principal's inquiries, but believes the inquiries were carefully effected. The witness also believed that a union representative was present with the respondent at the February 27 meeting.

The principal had sent the respondent a memorandum concerning the meeting, advising him of the subject of the meeting and advising him of his right to have a representative present. At the meeting, he did not specifically warn the respondent that anything the respondent said could be used against him. In his February 27 memorandum to the respondent, the principal stated, "a recurrence of this type of incident will result in recommending disciplinary action." So far as the principal knows the respondent did not again sign a pupil note.

Pupils identified by the teaching staff member who first reported the party incident were interviewed about the party. After interviewing two or three pupils, the principal decided to interview all pupils identified. At first, the pupils were called to the office through room intercoms. Later, they were called more discreetly. The vice-

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principal and the principal were present when the pupils came in. The principal read to each pupil a list of questions after telling them what the subject of the questions would be. Neither he nor the vice-principal reviewed pupil records first, advised pupils of the right to have another present or advised that discipline could ensue. Rather, they did state that there would be no discipline as a result of answering the questions.

In the second round of questioning, the Board used a professional investigator and a shorthand reporter. This round of questioning occurred several days later and again was held in the principal's office. Pupils who had stayed overnight at the respondent's apartment were question first, then pupils the administrator had not yet seen were questioned. Parents were advised the night before, by telephone, that the administrators would be asking additional questions, that an investigator and reporter would be present and that the parents were invited to be present.

This round of questioning took place during school hours. Pupils came in, were questioned, and went back to their classes. It took five school days to complete the questioning. A parent was present at all but one interrogation.

Parents were advised that they could raise any problems or questions in their minds concerning the questioning. The administrators did not say at the time of interrogation that parents could object to the process. However, at an earlier evening meeting with the parents involved and the superintendent the parents were advised that they could raise any question or problem even though the administrators did not say specifically that the parents could raise objections. No pupils was interrogated about charges not having to do with the parties.

Charges four and five deal with an incident that allegedly occurred in a bar in Red Bank. Information concerning these charges came from a pupil, J.S. Upon referral to the vice-principal by a teaching staff member, J.S. wrote out a statement. The school administration did not advise J.S.'s parents before the meeting because they did not question her. Rather, she volunteered information. J.S. was 17 at the time.

After J.S. made the admission, the principal spoke to her about being under age and drinking in general. He did nothing more about the incident at that point.

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Concerning charge eight, the principal testified that the mere fact that nine female pupils slept at the respondent's residence was tantamount to unbecoming conduct even though there are no specific regulations regarding such an event. The principal stated he believed this to be unbecoming conduct even though he did check with parents concerning the giving of permission to female pupils to "sleep over." Notwithstanding that several parents replied that they had given permission to their daughters to stay at the respondent's home, the principal brought the charges. He had not heard of the February party before March 16. There is no rule or regulation in effect concerning fraternization with pupils in teachers' homes. There has, in fact, been a cast party since the party of March 16 at the respondent's home. The principal told faculty involved in the cast party that there was to be absolutely no alcohol at the event.

The principal discussed the charges with the superintendent at some point in April, following the investigation. He also reviewed the investigation with the superintendent as it developed. No judgments were made until the investigation was complete.

M.G., who was graduated from Middletown High School South in June 1985, testified that she knows the respondent. He had been her teacher. She was at his home on the night of March 16, 1985, for a basketball team party. She had been invited by the respondent approximately two weeks before. Perhaps 15 pupils and five or six other teachers were present. M.G. arrived at about 8:30 p.m. She drove to the party. C.S. and C.P., female pupils, went with her. All persons attending the party brought food. Beverages were there. No one dispensed the beer. There was no announcement that pupils should not drink the beer.

This witness drank three glasses of beer herself. She saw others drink beer. She left at 9:30 or 10:00 p.m. M.G. (male) drove the witness' car home. C.F. and I.E. went with them. M.G. had been called by C.P. and he came at her request. This witness believed she shouldn't drive home because she had had "a few beers."

M.G. stated she was later contacted by the principal. Other administrators were present when she entered his office. She was told that she was going to be asked a few questions about the party she had attended. She was told she could have a parent or other person present. She was not told that she did not have to answer the questions. She was not advised that she could get into trouble. When asked if she had drunk beer, she answered yes. She was 17 at the time of the party.

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The questioning took place a week or two after the party. It took about 20 minutes. After her statement was reduced to writing, she signed it. She discussed the interrogation with others who would be questioned, particularly C.F. and C.P., who had not yet been questioned.

Concerning the night of the party, the witness stated the beer keg was in a small room to the left. No adult served her beer and no adult asked her if she wanted to drink beer. She did not ask permission to drink beer. She had told her parents in advance that she was going to the party.

III.

Peter Cahill testified on behalf of the respondent. He stated that he lives in Middletown and is the father of a daughter recently graduated from Middletown High School South. The daughter played basketball for the respondent. This witness has met the respondent. He has observed the respondent with team members. He believes the respondent to be coach and a friend to his pupils. He had no problem allowing his daughter to associate with the respondent socially.

On the night of February 23, 1985, the girls' basketball team won the Shore Conference title. A celebration was held that night at the respondent's home. The witness believes the celebration to have been impromptu. The respondent's house is near the game site. This witness was invited as were other parents.

Cahill saw Principal Jackson at the game. He later learned that the principal had been invited to the respondent's home on that evening.

After the pupils were questioned the first time, basketball parents had a meeting. This witness contacted the principal. The principal stated he had to look into the situation because of the magnitude of talk about it in the community. The principal came to the Cahill home. Mr. Cahill later met with the principal and superintendent at other parents' homes. The parents asked the administrators not to involve the pupils. The superintendent said it would be necessary.

The witness also stated that he had not been contacted prior to the first interrogation of his daughter. His discussion with the superintendent and the principal

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came after the fact. He did say, however, that interrogation of the pupils without parental consent was proper.

The party held on March 16 was the "official" basketball party. His daughter told him about it in advance. Parents of the pupils supplied food. The witness knew that the respondent would be there but did not know if other adults would be present. He believes the principal was correct in looking into the matter.

His daughter mentioned the possibility of spending the night at the respondent's home. He stated he told her that it would be all right if she wanted to do so, but that the decision was hers and he knew where she was. About a week after the party, he heard from his wife of a problem concerning the party. The matter then appeared in local newspapers. The papers even mentioned parental consent to stay overnight in the respondent's home. In the witness's opinion, the papers sensationalized the whole thing. He believes the Board did the best it could to keep pupils' names out of the papers.

On cross-examination, the witness testified that he believed the press was "after" the superintendent. The press tried to speak to his daughter. He advised her not to speak to reporters. His suggestion to the superintendent had to do with not using pupils' names "to build a reputation for himself."

A redistricting plan problem had earlier been given attention by local newspapers. The witness attended one meeting on redistricting and read newspaper accounts concerning the question. The superintendent did not develop the issue, but, in the opinion of the witness, may have seen political advantage in it. This witness does not believe that the pupils involved in the parties should not have been interviewed.

The witness stated that he could not recall a telephone call before the first interrogation of his daughter. He believes his first knowledge came from his daughter after the first round of questioning. He spoke to the principal the next day. He was allowed to see the first statement that his daughter had signed after she reviewed it. He did not read the statement at that time.

Concerning her second statement, the witness was later told he could have a copy. He did not ask for one. He was advised he could attend the second round of questioning by the investigator. His wife attended but he did not.

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He believes that the respondent's invitation to the principal to attend a party at the respondent's home was for February 23, not March 16. The principal later said that the respondent had, on February 23, invited him over for a drink. On the basis of that invitation, the witness would have assumed that alcohol would be there and available to pupils. He does not believe the fact that a pupil got sick on beer from the party is "associating on a proper-type basis." He does not believe the fact that pupils shared couch or bed with the respondent on two occasions is "associating on a proper-type basis." Yet, the witness would approve of the respondent continuing to teach and coach his children.

Rosemarie Sneed testified. She is the mother of T.S. She knows of the respondent because her daughter was coached by him. She knows of the charges involved in this matter.

On the night of February 23, 1985, the Middletown High School South girls' basketball team won the Shore Conference championship. An impromptu get-together at the respondent's home then took place. This witness knew that other adults would be there. She believed parents generally would be involved. Her daughter attended with her permission. Her daughter was 16 at the time.

The party on March 16 was the "official celebration." T.S. asked her mother to bake a cake. The witness knew of the party in advance, gave permission to her daughter to attend it and gave permission "to stay over if appropriate." T.S. did not spend the night at the respondent's home.

Mrs. Sneed stated that she has trust in the respondent. He took his team members to Great Adventure amusement park. He took them to a Nets game.

This witness heard the testimony of pupils that they drank beer. She did not hear that the respondent served beer. She knew that from 9 to 15 people were in the apartment on March 16. She heard of the sleeping arrangements and would again give permission to her daughter to attend another party there. She believes the respondent would be a good coach and teacher if not dismissed. She iterated this belief on cross-examination.

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Rosalie Bergman testified. She has children attending the Middletown Public Schools. One child is entering the eleventh grade. She knows of the respondent as a teacher and coach. She believes the pupils worship him. He provides friendship, guidance and support to them.

This witness was at the February 23 game. She became aware of a party at the respondent's home by the time the girls had showered after the game. She gave her daughter permission to go to the party. She talked with her daughter after the party.

Mrs. Bergman cooked for the March 16 party. Her daughter asked permission to stay at the respondent's home on that night. Mrs. Bergman said yes but directed her daughter to be home early in the morning. The daughter did so.

Mrs. Bergman received a telephone call from another parent asking if she had heard talk about the party. On the following Wednesday, at approximately 3:15 p.m., the principal called her. He advised her that he had just met with her daughter in his office and had asked her some questions. The principal asked Mrs. Bergman to verify if she knew about beer being present at the party and about the sleeping arrangements. This witness was concerned that the principal spoke to her child before speaking with her.

Parents of pupils on the girls' basketball team met about a week later. They met with the superintendent and principal on two occasions, both meetings being held in private homes. There was discussion concerning investigation of the respondent. The administrators said the investigation was ongoing and the principal said the parents could be present at the questioning. She has no recall of being told that the pupils had a choice as to whether or not they would answer questions.

At the second meeting, which occurred perhaps ten days after the first, the question of newspaper coverage was discussed and how the administrators would inform parents what was going on before release to the papers. This witness could not recall discussing questioning of the pupils at the second meeting.

Mrs. Bergman stated that she believes she was invited to the February 23 party but that pupils only were invited to the March 16 party. "It was their party." Her daughter slept in the respondent's home on the night of March 16. The witness believes the respondent still is qualified to teach and coach.

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On cross-examination, the witness stated that to her knowledge no school administrator released any pupil name to newspapers.

Caroline Flamenbaum testified. She knows the respondent as a teacher and coach. She respects him as both. She gave permission for her daughter to attend the party at the respondent's home on March 16. Her daughter was ill on February 23 and did not attend that gathering.

This witness made pizza for the March 16 party. The respondent told the witness that she was welcome to stop by on March 16. He made this statement to her prior to March 16.

Mrs. Flamenbaum became aware of the investigation on the Monday following March 16. Her daughter told her that the word among pupils was that some sort of investigation was brewing. Mrs. Flamenbaum learned the investigation actually was underway when the principal spoke to her daughter. She did not question her daughter about the events of March 16 because the daughter seemed upset. The witness did not contact the principal. She did not speak to board members or board agents other than at the meetings held at parents' homes previously referred to. She was not advised that a professional investigator was involved. She did not know she had the right to be present. She heard from her daughter after the fact that she could have been present for the questioning. The witness also stated she could not recall her daughter saying that she had been advised that she had any rights at all concerning the questioning.

The witness stated she would have attended the second round of questioning if advised that she could do so. She was not given a copy of any pupils' statements or answers or of any of the questions asked. Her daughter told the witness that she, the daughter, was required to sign the first statement.

On cross-examination, the witness stated she does not recall that at the second meeting with administrators parents were advised they could be present at the interrogation. She did briefly discuss her daughter's statement with the daughter. The daughter really did not want to discuss it. This witness never asked for a copy of her daughter's statement.

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Mrs. Flamenbaum believes her daughter would tell her the truth. She has no recall of her daughter saying that some pupils stayed at the respondent's home on the night of the party because they were too drunk to drive. The daughter and her father may have spoken about the party out of the witness's presence.

The witness stated that the administration did call her prior to the second round of interrogation but did not contact her before they first questioned the witness's daughter. The daughter told the witness that she had given a preliminary statement. The witness did hear other parents state that the principal had called. She does recall an administrator said at one of the meetings that parents could be present at the second round of questioning. This witness did not attend the second round of questioning. She stated she did not know when it would be.

IV.

The Board recalled the principal. He presented a written statement of J.S., who could not be located for the purposes of this hearing. The statement concerns charges four and five and has to do with an alleged incident at a bar in Red Bank.

The respondent's counsel objected, stating that this is a hearsay document and goes to two charges so far unsupported. Therefore, there is no residuum of competent evidence.

This judge ruled that he would accept the document as having been made in the principal's presence but would not accept the truth or falsity of its contents without other, competent support. After testimony and cross-examination concerning the contents of the document, the Board rested.

The respondent then moved to dismiss charges one, four, five, seven and eight. As to charge one, the respondent argues that the Board has already addressed this charge. In the memorandum of the principal to the respondent, dated February 27, 1985, the principal stated that no further action would be taken. Now, however, the Board resurrects this incident in an attempt to "get Ahern." The principal fraudulently induced the respondent to incriminate himself upon a representation that no further harm would come to him.

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Concerning charges four and five, there is absolutely no competent evidence in the record. Exhibit P-6 is not even a sworn statement. Without a residuum of competent evidence, the principal's testimony is incompetent.

Concerning charge seven, the Board has shown only that one pupil got sick but did not show intoxication. As to charge eight, the Board has made no case on this and it is subsumed in any event by charge six. The mere fact that pupils slept at the respondent's home, without more, does not constitute conduct unbecoming.

In response to the motion, the Board argued that there was no evidence of fraudulent inducement of Ahern to agree to anything in connection with charge one. As to charge seven, C.P. indicated she became ill after consuming beer in the respondent's home. D.V.'s testimony in that regard is sufficient to merit at least consideration of the charge. As to charge eight, argument that this in and of itself is not conduct unbecoming simply does not square with fact. It reflects on the judgment of a teaching staff member.

Having heard the arguments of counsel and making all inferences that fairly may be made in favor of the party not the maker of the motion, I **DETERMINED** that charges four and five should be and are **DISMISSED.** The only evidence in support of these charges is hearsay. Under the general rules of evidence contained in the Uniform Administrative Procedure Rules of Practice, N.J.A.C. 1:1-1 et seq., all relevant evidence is admissible. Evidence may be excluded if its probative value is substantially outweighed by the risk that its admission will either necessitate undue consumption of time or create substantial danger of undue prejudice or confusion. N.J.A.C. 1:1-15.2(a).

Concerning hearsay evidence and the residuum rule, N.J.A.C. 1:1-15.8 provides as follows:

> (a) Subject to the judge's discretion to exclude evidence under N.J.A.C. 1:1-15.2(a) or a valid claim of privilege, hearsay evidence shall be admissible in the trial of contested cases. Hearsay evidence which is admitted shall be accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability.
>
> (b) Notwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide

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assurances of reliability and to avoid the fact or appearance of arbitrariness. [emphasis added.]

V.

CHARGE ONE

The testimony of C.M. together with the incident report memorandum of February 27, 1985 (P-2) and the principal's testimony concerning the incident are credible and are sufficient to support the charge. I **FIND** that on or about December 20, 1984, the respondent did forge the signature of a female student's mother on a tardiness excuse note. I further **FIND** that this constitutes unbecoming conduct as that term is contemplated in N.J.S.A. 18A:6-10. I further **FIND** that such comportment is so foreign to the expectations of the deeds and actions of a professional certificated classroom teacher as to raise doubts as to the continued performance of that person in the profession. Tenure of Blasco, OAL DKT. EDU 3842-79 (July 15, 1980), mod. Comm'r of Ed. (Aug. 28, 1980), mod. St. Bd. (Feb. 4, 1981). Knowing commission of a falsehood cannot be condoned. Here it is compounded. Not only is the act itself wrong, the example it sets for the pupil involved is equally negative. Whether they like it or not, teachers are role models for the pupils they serve.

> [T]eachers . . . are professional employees to whom the people have entrusted the care and custody of . . . school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. As one of the most dominant and influential forces in the lives of the children, who are compelled to attend the pulic schools, the teacher is an enormous force for improving the public weal. Tenure Hearing of Sammons, 1972 S.L.D. 302, 321.

CHARGE TWO

The testimony amply supports a finding that on February 23, 1985, the respondent hosted a party at his home that was attended by female high school pupils and both male and female adults. Alcoholic beverages were available at the party and were, in fact, consumed by certain of the pupils. I **FIND** credible the testimony that, although the respondent did not directly serve beer to pupils, neither did he advise pupils who were

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under the legal drinking age in New Jersey to refrain from drinking beer. C.P. testified that she and M.G. (female) drank beer at the respondent's home on that night. C.M. testified that she, too, consumed beer at the respondent's home on that night. M.G. (female) testified similarly.

On the basis of the credible testimonial evidence, I **FIND** that the respondent made alcoholic beverages available to and permitted alcholic beverages to be consumed by students under the legal drinking age in his home on February 23, 1985. I further **FIND** that this constitutes conduct unbecoming a teaching staff member as contemplated in N.J.S.A. 18A:6-10. The discussion under charge one concerning the teacher's function as a role model applies here a fortiori.

CHARGE FIVE

The credible testimony of C.M. is sufficient to support this allegation. The special nature of the teacher-pupil relationship is sufficient to underlie a finding that this behavior constitutes conduct unbecoming a teaching staff member as contemplated in N.J.S.A. 18A:6-10. Assuming, arguendo, that parental consent was given for female pupils to spend the night at the respondent's home, the respondent would, at best, have made arrangements to get the pupils home safely or, at least, arrange for the female pupils to be segregated at some appropriate place in the home for the period during which they slept.

I **FIND** that on February 23, 1985, the respondent and two female pupils, clothed, shared a bed. I further **FIND** that there is no evidence of any sexual contact between the respondent and either or both pupils. I further **FIND** that such grevious lack of judgment constitutes conduct unbecoming a teaching staff member.

CHARGE SIX

The credible testimony of the pupils establishes that the respondent did host a party at his home on March 16, 1985, which was attended by approximately 15 adults and approximately the same number of female high school pupils. The latter's ages ranged from 15 to 18 years. Alcoholic beverages were available at the party and were consumed by the pupils. There is no showing that the respondent directly served beer to the pupils. There is no showing that the respondent admonished the pupils not to consume alcoholic

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beverages because they were below the minimum age established by law for the consumption of alcoholic beverages in this State.

The discussion and analysis under charge two, above, apply with equal force here. I **FIND** that the respondent's behavior in this regard constitutes conduct unbecoming a teaching staff member as that term is contemplated in N.J.S.A. 18A:6-10.

CHARGE SEVEN

C.P. testified that she drank two or three glasses of beer at the March 16, 1985 party. She testified that she then became sick. She also testified that M.G. (female) was not "acting normal." C.P. called a friend, D.V. She testified at the time she made the telephone call M.G. was not "okay to drive home" because she had been drinking.

Evid. R. 56 states that if a witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to such opinions or inferences as the judge finds may be rationally based on the perception of the witness and are helpful to a clear understanding of his testimony or the determination of the fact in issue. A nonexpert may testify as to his observations about the conduct of an individual and what that conduct indicates to him. State v. Risden, 56 N.J. 27 (1970).

I **FIND** that the opinion of C.P. in this regard is rationally based on her perceptions, that the opinion will aid me in making a determination of this charge and that the conclusion she reached was within her direct ken. See, Brindley v. Firemen's Ins. Co. of Newark, 35 N.J. Super. 1 (App. Div. 1955). In consideration of the foregoing, I **FIND** that the respondent did permit at least one pupil to become intoxicated at the party of March 16, 1985, in his home. I **FIND** that such behavior constitutes conduct unbecoming a teaching staff member as that term is contemplated in N.J.S.A. 18A:6-10.

CHARGES EIGHT AND NINE

These charges are so interrelated as to require that they be considered jointly. The credible testimony supports the allegation that the respondent did, on March 16, 1985, allow nine female pupils to sleep at his residence and that he shared a bed with one of those pupils. There is nothing in the record to indicate that either the respondent or the pupil was unclothed and there is nothing in the record to indicate that there was any sexual contact.

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Nevertheless, for the reasons stated in the consideration of charge three, above, I **FIND** that this constitutes conduct unbecoming a teaching staff member as that term is contemplated in N.J.S.A. 18A:6-10.

VI.

In summary, I **FIND** that charges one, two, three, six, seven, eight and nine have been proven by a preponderance of the credible evidence in the record. Charges four and five were dismissed, on motion, at conclusion of the plenary hearing. In regard to charge one, I **FIND** no fundamental unfairness in the Board's reconsideration of this matter. Certainly, it was considered closed in February 1985. The Board, however, has not only the right but also the responsibility to consider the respondent's entire record when tenure charges are preferred. The Commissioner, similarly, examines the teacher's record. In Tenure Hearing of Ostergren, 1966 S.L.D. 185, 187, the Commissioner stated:

> As has been his practice in other cases . . . brought before him, the Commissioner has taken into account the nature and circumstances of the incident, the teacher's prior record and present attitude, ... [emphasis added.]

The respondent contends that it is the parents, not school authorities, who are most intimately involved and directly concerned with the out-of-school activities and personal lives of their children. While this is in great measure true, it is by no means the whole consideration. As stated in Sammons, above, a heavy duty of self restraint and controlled behavior rarely requisite to other types of employment is placed upon those who chose to be teachers in the puplic schools. Teaching is more than a simple job; it is calling. (Sammons, at 321.)

Having carefully reviewed the entire record, I **CONCLUDE** that the Middletown Board of Education has proven by a preponderance of the credible evidence in the record seven tenure charges against John Ahern. The nature of the charges and the proofs in support of the charges cast grave doubt on the respondent's judgment and, hence, his fitness to remain in the classroom. In Redcay v. State Bd. of Ed., 130 N.J.L. 369 (Sup. Ct. 1943), aff'd 131 N.J.L. 326 (E. & A. 1944) it was held that:

> Unfitness for a task is best shown by numerous incidents. Unfitness for a position under a school system is best evidenced by a series of incidents. Unfitness to hold a post might be shown by

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one incident, if sufficiently flagrant, but it might also be shown by many incidents. (130 N.J.L. at 371).

I further **CONCLUDE** that John Ahern shall be and is hereby **DISMISSED** as a teaching staff member in the employ of the Middletown Township Board of Education retroactive to the date of his suspension, May 2, 1985. It is so **ORDERED.**

It is further **ORDERED** that a copy of the final decision in this matter be forwarded to the State Board of Examiners for its review and, in its discretion, further appropriate action.

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

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

6 SEPTEMBER 1985
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

SEP 0 6 1985
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

DATE

Mailed To Parties:
OFFICE OF ADMINISTRATIVE LAW

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

The Commissioner has reviewed the record of these tenure proceedings including the initial decision rendered by the Office of Administrative Law.

It is observed that respondent's exceptions to the initial decision and the Board's reply to exceptions have been filed with the Commissioner pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b, and c.

Respondent's exceptions to the initial decision are summarized below as follows:

1. The judge erred in not dismissing Charge One inasmuch as the Board had advised him that the circumstances related to his forgery of a parent's signature to a pupil tardiness note was a closed matter.

2. The judge erred in not recommending the dismissal of Charge Eight. Respondent argues that to uphold this charge is tantamount to an ex post facto law inasmuch as the testimony establishes that the pupils who slept at his apartment had obtained parental permission. Moreover, the Principal's testimony further reveals that there was no rule or regulation promulgated by the Board prohibiting pupils from sleeping at a teacher's house.

3. Charges Two and Eight should have been recommended for dismissal by the judge by virtue of his finding that the record is barren of any evidence that respondent directly served beer to those pupils under legal drinking age who attended the parties held in his apartment on February 23 and March 16, 1985.

4. Charge Seven should be dismissed by virtue of the fact that there is no competent testimony in the record of this matter establishing that the pupil, C.P., became sick because of her ingestion of beer.

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5. While it is undisputed that respondent fell asleep in his apartment on February 23 and March 16, 1985 in close proximity to female pupils, such lack of judgment is neither of the nature or circumstance to warrant his dismissal from tenured employment.

Respondent argues that the parents of the pupils were aware of the arrangements made for sleeping at his apartment and the possibility of beer being available. Respondent contends that the consent of these parents for such out-of-school activities must be accorded great weight by the Commissioner in reaching a final determination with regard to the Board's tenure charges against respondent.

The Board urges the Commissioner to affirm those findings and recommended conclusions in the initial decision. The arguments advanced by the Board in its reply to respondent's exceptions are best summarized from those statements set forth in part on pages 4 through 6 of its reply which read as follows:

"***[Respondent's] conduct is so patently egregious as to warrant little further comment. The public interest dictates more professional behavior from teachers than that of the respondent in this case. Teachers are entrusted to care for and mold the character and attitudes of the pupils of this State. In this regard, the Commissioner has enunciated what is expected. In the Matter of the Tenure Hearing of Ernest Tordo, 1974 S.L.D. 97, the Commissioner wrote:

> 'The public interest demands the public trust of those teachers entrusted to care for and mold the character and attitudes of the pupils of this State.' at p. 99

"In that same decision, the Commissioner further elaborated that he must, in making his determination:

> '***consider not only the effect of his decision on the respondent, but on the pupils, their parents, other teaching staff members and the community at large.' at p. 99

"The Commissioner must do the same here. Should the respondent's tenure not be severed, the Commissioner would effectively be announcing to the pupils of Middletown Township, their parents, other teaching staff members, and the community at large, that in New Jersey, it is permissible for public school teachers not only to host

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> parties where alcoholic beverages are made available to pupils under the drinking age, but that that teacher can then share the same bed with the pupil for the evening. Such a conclusion would be incomprehensible.
>
> "The additional argument that the respondent advances with regard to these charges, to wit, parental permission excuses the respondent's conduct, misses the mark. This is an attempt to obfuscate the real issue. A tenure charge deals with the employment relationship between a public employer and its employee. A parent cannot excuse an employee's behavior by granting a child permission to attend a beer-drinking party hosted by a public employee.***" (at pp. 4-6)

"Upon examination of the record of this matter the Commissioner finds and determines that the tortured logic expressed by respondent in his exceptions to the initial decision utterly fails to present any compelling reason to warrant a reversal of those findings and conclusions reached by the judge and further supplemented by the Board in its reply to respondent's exceptions.

Consequently, for all of the foregoing reasons the Commissioner affirms and adopts those recommended findings and conclusions in the initial decision as his own.

Accordingly, the Board's tenure charges one, two, three, six, seven, eight and nine of unbecoming conduct against respondent have been proven true, in fact, by a preponderance of credible and reliable evidence. It is therefore determined that respondent shall forfeit his tenured teaching position in the Middletown Township Public School System as of the date of the Commissioner's decision herein and that this matter be forwarded to the State Board of Examiners with a recommendation that the teaching certificate of John Ahern be revoked, pursuant to N.J.A.C. 6:11-3.7.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

October 24, 1985

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 4026-85
AGENCY DKT. NO. 133-5/85

BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE,
Petitioner,
v.
MAYOR AND COUNCIL OF THE TOWNSHIP OF OLD BRIDGE,
Respondents.

Steven J. Tripp, Esq., for petitioner (Wilentz, Goldman & Spitzer, attorneys)

Michael A. Noto, Esq., Assistant Township Attorney, for respondents

Record Closed: August 15, 1985 Decided: September 9, 1985

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

The Old Bridge Township Board of Education (petitioner) moves for summary judgment seeking an order directing the Township of Old Bridge (respondent) to restore the $416,342 by which the Township reduced the Board's current expense budget pursuant to N.J.S.A. 18A:22-37. The Board grounds its motion on procedural failure of the Township to provide reasons for the reduction in accordance with law. The Township opposes the motion.

This matter was opened and joined before the Commissioner of Education and 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 prehearing

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conference was conducted on July 18, 1985. On July 17, 1985, the Board had filed a motion for summary disposition. At the conference, it was agreed that the governing body would file responsive papers by August 8, 1985. The Township's papers were timely filed. The Board's reply was received on August 15. For the reasons that follow, the Board's motion is granted.

I.

The petitioner Board of Education submitted a school budget to the district's voters at the annual school election held on April 2, 1985. The amount established for current expense was $41,634,211, of which $19,764,730 was to be raised by local taxes. The budget was defeated by the voters.

The petitioner then submitted the budget to the Mayor and Council of the Township of Old Bridge pursuant to N.J.S.A. 18A:22-33. The governing body subsequently adopted a resolution (exhibit A) on April 22, 1985 stating, in pertinent part:

> WHEREAS, the Township Council of the Township of Old Bridge has met with the Board of Education at a public meeting on Monday, April 22, 1985, and heard the presentation and remarks on behalf of said Board of Education regarding the proposed budget; and
>
> WHEREAS, immediately thereafter the Township Council consulted with the Board of Education concerning the amount which is necessary to be appropriated; and
>
> WHEREAS, in spite of said consultation, the Township Council and the Board of Education were not able to agree on the amount which, in the judgement of said bodies would provide a thorough and efficient system of schools in the district; and
>
> WHEREAS, thereafter the Township Council reviewed the proposed budget, examining each item of such budget, and determined that each item of the Current Expense portion of said proposed budget should in total be decreased in the amount of one (1%) percent; and
>
> WHEREAS, the Township Council of the Township of Old Bridge believes that the proposed budget, as reduced, will provide a thorough and efficient system of school in the district; . . .

This action followed. The petitioner alleges that the respondent, in reducing the current expense budget in this manner, has been arbitrary, capricious and

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unreasonable. The reduction in the current expense budget is inconsistent with the petitioner's duty to provide a thorough and efficient system of free public education in the district. Further, the respondent has not provided any supporting reasons for their reduction in the current expense budget as required by law. Bd. of Ed., E. Brunswick Tp. v. Tp. Council E. Brunswick, 48 N.J. 94 (1966). Also see N.J.S.A. 18A:22-37 and N.J.A.C. 6:24-7.5(a)2.

The respondent asserts it could not set forth specific reasons for the economies it recommended because the petitioner refused to cooperate with it in furnishing information upon which the respondent could base judgment for specific line item reductions.

N.J.S.A. 18A:22-37 requires, in pertinent part, that if the voters reject any of the budget items "submitted at the annual school election, the board of education shall deliver the proposed school budget to the governing body of the municipality . . . within 2 days thereafter." The statute further provides:

> The governing body of the municipality . . . shall, after consultation with the Board, and by April 28, determine the amount which, in the judgment of said body . . . is necessary to be appropriated, for each item appearing in such budget, to provide a thorough and efficient system of schools in the district, and certify to the county board of taxation the totals of the amount determined. . . .

N.J.A.C. 6:24-7.2 provides:

> A petition by a school board appealing the decision of its governing body to certify a tax levy less than that deemed necessary by the board to insure a thorough and efficient educational program shall be taken no later than 30 days following the governing body's decision.

N.J.A.C. 6:24-7.4 provides:

> The governing body shall file an answer with the commissioner not later than 15 days after receiving the board's petition.

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and N.J.A.C. 6:24-7.5 requires:

> (a) The governing body shall submit with its answer the following documents:
>
> 1. The amount certified for each of the major accounts;
>
> 2. Line item budget stating recommended specific economies together with supporting reasons.

The authority for these regulations is derived from N.J.S.A. 18A:6-9, Commissioner's jurisdiction over controversies and disputes under school law and E. Brunswick, above. The Court's language in E. Brunswick at 105 is particularly instructive:

> 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 properly related to educational considerations rather than voter reactions. In every step it must act conscientiously, reasonably and with full regard for the State's educational standards and its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community. Where its action entails a significant aggregate reduction in the budget and a resulting appealable dispute with the local board of education, it should be accompanied by a detailed statement setting forth the governing body's underlying determinations and supporting reasons. This is particularly important since, on the board of education's appeal under R.S. 18:3-14, the Commissioner will undoubtedly want to know quickly what individual items in the budget the governing body found could be properly eliminated or curbed and on what basis it so found. [Emphasis added.]

At even this early juncture, several facts are apparent. The proposed budget was rejected by the voters on April 2, 1985. It was transmitted to the governing body. The Board and governing body met on April 22, 1985. The governing body decided to reduce current expenses by one percent across all line items (petitioner's exhibit A, above). The petitioner, by resolution, authorized appeal on May 8, 1985, according to

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N.J.A.C. 6:24-7.2 (petitioner's exhibit C). The petition of appeal was filed on May 21, 1985, and answered on June 5, 1985.

It is further apparent that nothing approaching a "detailed statement setting forth the governing body's underlying determinations and supporting reasons" was provided at the time the respondents determined to reduce the current expense budget by one percent. When the respondents' answer was filed on June 5, it admitted or denied the enumerated paragraphs of the petition of appeal, but set forth no affirmative defenses. Only when the respondents' brief in opposition to the petitioner's motion for summary judgment was received was there raised a counter-allegation that the Board, by being uncooperative and unreasonable, prevented the respondents from conscientiously and reasonably detailing its reasons for each reduction.

The respondent includes a certified copy of the minutes of the April 22, 1985 meeting of the Township Council (respondent's exhibit A). The minutes, apparently verbatim, do not support the counter-allegation.

II.

The facts developed above support the petitioner's contention that the entire reduction must be restored because the respondents failed to provide reasons for the reduction according to law. As in Keansburg Bd. of Ed. v. Borough of Keansburg, OAL DKT. EDU 6000-82 (Sep. 17, 1982), adopted Comm'r of Ed. (Oct. 29, 1982), the narrow issue here is whether or not the respondent's failure to provide supporting reasons for its reductions is so serious as to require restoration of the $416,242.

The petitioner cites E. Brunswick, above, as well as Bd. of Ed., Union Beach v. Borough of Union Beach, 1973 S.L.D. 231. In Union Beach at 232 the hearing examiner summarized the reasons offered by the borough for its reductions:

> Council simply made statements with respect to individual line items indicating that it was of the "opinion" that a reduction could be made; that the Borough of Union Beach could not afford the proposed expenditure; that an account be reduced in the "interest of economy;" that "austerity is upon" the school district; that "items seem to be inflated;" that is of the "opinion" that a position is not needed; that a reduction "works no hardship," . . .

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The hearing examiner concluded that such statements did not constitute "reasons, as demanded by the Court, in East Brunswick, supra, to show the Board how it could economize and continue to operate a thorough and efficient system of the public schools in its district." Id. at 233.

The Commissioner sustained the hearing examiner's determination to restore the full amount. He stated, among other things:

> The statements submitted by Council as reported, ante, do not give adequate reasons, but merely indicate conclusions and judgments made by Council, which are determined to be better than those reasoned determinations made by the Board.
>
> The Commissioner determines, however, that such statements by Council do not meet the Court's guidelines in East Brunswick supra; therefore, they cannot be considered. Id. at 234.

The petitioner also asserts that a governing body's failure to set forth specific line item reductions with adequate supporting reasons at the time of its decision is arbitrary, capricious and unreasonable and warrants full restoration of the amount of the reduction. In Bd. of Ed. of the Tp. of Union v. Tp. Comm. of Tp. of Union, OAL DKT. EDU 2788-81 (June 5, 1981), adopted Comm'r of Ed. (July 9, 1981), the Council adopted a resolution effectuating a lump sum reduction in the current expense budget. The resolution contained no statement of line item reductions or supporting reasons. The governing body, in its answer to the Board's petition of appeal, indicated for the first time the specific items to be reduced and the supporting reasons for the reductions.

The administrative law judge granted the Board's motion for summary judgment prior to hearing, ruling that the governing body's failure to specify the supporting reasons for the reduction at the time of its action was a fatal defect mandating restoration. The Commissioner affirmed the decision. In his affirmance, the Commissioner stated:

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

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In Bd. of Ed. of Paterson v. City Council of Paterson, OAL DKT. EDU 7167-81 (Dec. 1, 1981), adopted Comm'r of Ed. (Jan. 18, 1982), the governing body reduced the school budget by $750,000 without specifying line item reductions or giving supporting reasons. The Commissioner set aside the governing body's action and ordered full restoration. The conclusions adopted by the Commissioner include, in pertinent part, the following:

> This court CONCLUDES that a lump sum reduction of a board's budget without a governing body knowing, identifying and setting forth specific line items of the budget and enunciating supporting reasons therefore at the time of such reduction is per se an arbitrary, capricious and unreasonable act. Such a procedure, which overlooks whether or not the children are being provided with a thorough and efficient education is so tainted as to be void from its inception.

The petitioner here cites other cases which, although they support its position, are not as squarely on point as those already mentioned.

III.

The respondent's main argument is that summary judgment is not appropriate in this case. It contends that there are genuine issues of fact that must be determined. The Council claims that the petitioner refused to cooperate with it in its effort to determine a reduction in the proposed budget. An affidavit of a Council member (respondent's exhibit B) is included. The affidavit sets forth that the councilman was once a member of the board of education. On the basis of that experience he states that there is an abundance of information in readily accessible form kept by the Board and/or its finance committee in devising a budget for each school year. The councilman further states that when the council met with the Board, it was denied reference to this detailed information. He further states that certain questions were asked by himself and other councilman, but the answers were in general terms. The councilman also states:

> During the April 22, 1985 meeting, the Board of Education was completely uncooperative and unreasonable in that they would not move from their position, as stated above, that no cut should be made from the budget (or in the alternative only a minute amount of cuts were to be made in the budget; at one point the Board of Education suggested a decrease in the budget of only $25,000).

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The affidavit also contains references to the 1984 meeting between the Board and Council following defeat of that year's school budget referendum. I **FIND** such references to be irrelevant to the present dispute.

The respondent suggests that without the information that allegedly was denied it by the petitioner, its "task became an impossible one in which a decision was needed in a short period of time." Respondent's brief at 2.

The respondent cites language of the Commissioner in Bd. of Ed., Monmouth Reg'l High School Dist. v. Tp. of Shrewsbury et al., 1967 S.L.D. 155, 157:

> The fact remains, however, that such is the legislative scheme and it behooves all who are in any way involved to lend their best efforts and cooperation to making the procedure operate as effectively as possible in the interests of the children to be served. The governing body's task is a difficult one. It is required to consider an extremely complex matter and to reach a decision which will have important and far-reaching effects, in a very short period of time. If the governing body is to discharge such a duty properly, it must have the advantage of as much information as can be useful to it in arriving at a sound determination. The Board of Education should, therefore, take the initiative to supply detailed data and helpful information for the governing body's use and should be prepared to consult and assist in any helpful way. The governing body, in turn, should take as much time as possible to digest the information supplied and to consult with the Board with respect to the problems and educational needs to be met. It is in such a spirit of mutual understanding and cooperation, with the educational welfare of the children of the community as the paramount consideration, that the legislative plan must proceed, if it is to be successful.

IV.

The record does not show that the respondent demanded any further information than that which was provided at the meeting of April 22 (respondent's exhibit A). The language of the Commissioner in Monmouth Regional, above, is as pertinent and worthy of consideration today as it was when written. But the facts here show that the governing body neither demanded further information nor took "as much time as possible to digest the information supplied."

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On the very night on which the Board and the governing body met, the governing body resolved to cut the current expense portion of the school budget by one percent, across-the-board (petitioner's exhibit A).

The case law discussed above admits no question that the failure of a governing body to specify each line item to be reduced or eliminated and the particular reasons therefore, at the time of its action, is a defect fatal to the reduction.

In this case, the governing body purported to effectuate a lump sum reduction of one percent across-the-board. The resolution making the reduction does not indicate how or why the governing body determined that such a reduction could be made in each line item. The resolution does contain a conclusory statement that the governing body has determined that each item of the current expense budget should be reduced by one percent and further that the governing body believes that the proposed budget, as reduced, will provide a thorough and efficient system of the school and the district. But these are not the underlying determinations for supporting reasons at the time of decision required by E. Brunswick, above, 48 N.J. at 106. Therefore, the action of the governing body is arbitrary, capricious and unreasonable under the standards set in Paterson, above, Union, above and Keansburg, above.

Summary judgments are perhaps not as common in the administrative adjudicative process as they are in the judicial courts. Nevertheless,

> A motion for summary judgment is a means for the efficient disposition of a cause of action where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. R. 4:46-2. Of course, courts should exercise appropriate caution in deciding issues involving policy considerations. Jackson v. Muhlenberg Hospital, 53 N.J. 138, 142 (1969). However, excessive caution would undercut the purposes of a motion for summary judgment, which provides a means for piercing the allegations of the pleadings to determine whether there are issues requiring disposition at trial. Judson v. People's Bank and Trust Co. of Westfield, 17 N.J. 67, 73-75 (1954). If, after drawing all inferences of doubt against the movant, a court finds that there is no genuine issue of material fact, it should enter summary judgment, Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 65 (1980).

Here, the governing body could have requested more information of the Board and, if it received that information, could have had several days to consider it. It then

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would have been in a position to make the reasoned judgments exhorted by the Commissioner's decisions, above. At the very least, the respondent could have documented a spirit of uncooperativeness by the petitioner. It did not do so.

Within one evening, it held a brief meeting with the Board of Education and rushed to judgment. The record is barren of but a few questions put by council members concerning specific programs. The record shows no request by the respondent for more information from the petitioner.

In consideration of the foregoing, I **CONCLUDE** that there are no issues of material fact requiring a hearing in this matter. I further **CONCLUDE** that the action of the governing body in effecting an across-the-board reduction of one percent in the proposed current expense budget without any underlying determinations or supporting reasons at the time was arbitrary and capricious and, therefore, must be set aside. The Commissioner's holdings in Union, Paterson and Keansburg, above, control. The action to reduce the current expense budget is inherently defective.

Summary judgment is **GRANTED** in favor of the Old Bridge Township Board of Education setting aside the reduction and restoring the full amount to the current expense portion of the 1985-86 school budget. It is **ORDERED** that $416,242 be added to the tax levy by the Middlesex County Board of Taxation in addition to those amounts certified by the Township of Old Bridge to the Middlesex County Board of Taxation for school purposes on April 22, 1985.

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

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OAL DKT. NO. EDU 4026-85

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

9 SEPTEMBER 1985
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

SEP 11 1985
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

September 12, 1985
DATE

Ronald J. Parker /rs
OFFICE OF ADMINISTRATIVE LAW

ml/E

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BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
MAYOR AND COUNCIL OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	
	:	

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

Respondent argues, inter alia, that the statement of budget reductions was the only statement that could have been made given the information supplied by the Board. It excepts to the judge's statement that the minutes of the April 22, 1985 meeting with the Board do not support the counter-allegations it raised, avowing that the minutes in conjunction with Mr. Ingram's affidavit clearly support that the Council did not have sufficient information to deal with the important issues associated with the budget and potential reductions. Further, it excepts to the judge's refusal to consider references to the 1984 meeting between the Council and Board.

Respondent asserts that the judge ignored language in Board of Education of East Brunswick, supra, "that [the governing] body is not set adrift without guidance for the statute specifically provides that it shall consult with the local Board of Education***." (48 N.J. at 105). It contends that Council was set "adrift without guidance" through no fault of its own. Further, it argues that "[w]here the Board does not fully cooperate and as in this case refuses to cooperate with the Council, the Council is left with its hands tied and unable to meet the guidelines set up in East Brunswick.***" (Respondent's Exceptions, at p. 3) It also takes exception to the judge's rejection of the argument it advanced and supported by Board of Education of the Monmouth Regional High School District, supra.

Respondent urges that the Commissioner remand the matter to the Office of Administrative Law, arguing that summary judgment was inappropriate because a material issue and factual dispute exists, namely, whether the Board failed to sufficiently cooperate with the Council so as to allow it to fairly evaluate the budget.

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Upon review of the record and the exceptions submitted by respondent, the Commissioner finds that the legal arguments advanced by respondent in its exceptions have been adequately addressed by the judge in the initial decision and that said exceptions fail to provide a substantive argument to warrant reversal of the judge's findings and conclusions and his granting of summary judgment to the Board nor does it provide any substantive proof to support its allegation of noncooperation.

Consequently, the Commissioner adopts the recommendation of the Office of Administrative Law granting summary judgment to the Board and ordering restoration of the reductions which had been recommended by the Council for the reasons expressed in the initial decision. He corrects the amount of restoration to be added to the tax levy to read $416,342. Therefore, the 1985-86 total current expense tax levy certified to the Middlesex County Board of Taxation shall be $19,764,730.

COMMISSIONER OF EDUCATION

October 28, 1985

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3309-85
AGENCY DKT. NO. 118-5/85

THOMAS A. CARLIN,
Petitioner,
v.
BOARD OF EDUCATION OF THE UNION COUNTY REGIONAL SCHOOL DISTRICT, UNION COUNTY

Thomas A. Carlin, petitioner, pro se

Franz J. Skok, Esq., for respondent
(Johnstone, Skok, Loughlin & Lane, attorneys)

Record Closed: August 27, 1985 Decided: September 17, 1985

BEFORE **SYBIL R. MOSES, ALJ:**

This matter comes before the Office of Administrative Law (OAL) as the result of a petition filed by Thomas A. Carlin with the Commissioner of Education on May 6, 1985. Mr. Carlin, then a student in Governor Livingston Regional High School, alleges that the Board improperly and illegally construed its pupil attendance policy when it denied him an excused absence for a religious holiday which, in turn, resulted in a six-day suspension from school. The Board filed its answer on May 29, 1985, denying the allegations of the petition and demanding that it be dismissed. The matter was forwarded to the OAL on May 31, 1985, for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

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A prehearing conference was held on July 16, 1985. It was determined that there was only one legal issue to be determined:

> Was the Board of Education required to excuse petitioner from school for a religious holiday, pursuant to N.J.S.A. 18A:36-15, when petitioner, to the Board's knowledge, was not of the faith of the religious holiday in question.

A hearing date was not scheduled as counsel for the Board indicated he would file a motion for summary decision. A schedule for the filing of said motion was established. Respondent had to file its motion for summary decision by August 17 and petitioner had to respond by August 27. Respondent's motion was timely filed on August 15, 1985. Petitioner has not, as of this date, filed a response to the motion for summary decision, nor has he called or written to ask for an extension of time within which to file a response to the motion.

Notwithstanding the lack of petitioner's response, I have reviewed the Board's motion for summary judgment and case law cited therein, and conducted independent research. A review of case law leads me to the conclusion that, on the merits, the motion for summary decision must be granted.

The pleadings and respondent's motion for summary decision contain enough facts to determine what occurred in March 1985. I find the following to be the facts in this case. In March 1985, Thomas A. Carlin was an 18-year-old senior at Governor Livingston Regional High School. On March 6, 1985, he submitted a note to the school's attendance officer stating that he intended to be absent from school on March 7, 1985 "for a religious holiday." He was absent on the following day from classes, but attended a school-related meeting during this "religious holiday," concerning a prior complaint to the Board of Health. The Superintendent of Schools, who also attended that meeting, asked petitioner why he had not been in school that day. Petitioner stated that he was observing a religious holiday, but refused to state which religion. The only approved religious holiday on March 7, 1985 was Purim, a Jewish holiday.

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During a conference with the school principal, Mr. Festante, petitioner indicated that he was a member of the Little Flower Roman Catholic Church, Berkeley Heights, New Jersey. Mr. Festante thereupon sent Mr. Carlin a letter, by registered mail, refusing to accept his absence and declaring him truant.

On March 8, 1985, the assistant principal, Mr. Jones, imposed the punishment for the truancy. Carlin was given the option of a "in-school suspension" for two consecutive Saturdays beginning March 9, 1985, or an "out-of-school suspension" for three consecutive school days. Although petitioner opted for the "in-school" or Saturday detentions, he failed to report on March 9, the next immediate Saturday. He subsequently filed a grievance concerning his denial of an excused absence for a religious holiday.

The Board argues that there is no genuine issue of fact or law which would require a plenary hearing. The Board asserts that petitioner's interpretation of N.J.S.A. 18A:36-15 as permitting excused absences for all persons on any religious holiday, regardless of one's religious denomination, is in error. It asserts that the constitutional guarantee of the free exercise of religion does not mean that everything which is so called can be tolerated. Counsel argues that while the United States Constitution, Amendment I, grants all persons the freedom of religion, the state also has an interest in maintaining an educational system. Therefore, the First Amendment cannot be used as a device to defeat the necessity for same. State v. Besson, 110 N.J. Super. 528 (Law Div. 1970).

Counsel further asserts that persons who assert free exercise of religion because of their subjective evaluation and rejection of contemporary secular values accepted by the majority do not rest on a religious basis. The Board argues that Mr. Carlin's decision to observe the Jewish holiday of Purim despite his admitted affiliation with a Roman Catholic Church is a unique individual philosophy which does not rise to the level of free exercise of religion mandated by the First Amendment. See, Wisconsin v. Yoder, 406 U.S. 205 (1972). The Board also asserts that it and/or the courts may ask whether the proponent of a particular religion holds his beliefs honestly and in good faith. Petitioner was so asked and refused to respond.

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Furthermore, the Board asserts that religious freedom is subject to reasonable limitations where the public health, safety, morals or convenience are concerned. See, Lieby v. Manchester, 117 F. 2nd 661 (1st Cir. 1941), cert. den. 313 U.S. 562 (1941). A school system cannot be effective or efficient if students are allowed to absent themselves from school and then rationalize their absences by relying on the First Amendment freedom of religion clause. While freedom to believe may be absolute, freedom to excercise one's belief is not. It has to be considered in light of the general public welfare. Counsel points out that the general public welfare in this case embodies compulsary education, the mainstay of the American system of education. He further asserts that petitioner's initial unexcused absence from school on March 7, followed by his refusal to attend make-up sessions, constituted continued and willful disobedience and defiance of authority, and therefore, in accordance with N.J.S.A. 18A:37-2, is good cause for punishment or even expulsion from school.

At the prehearing conference, petitioner asked that the suspension be expunged from his records, because he has already graduated from high school and is starting college in September.

After a review of the statute and cases, it is my decision to grant summary decision to the Board. N.J.S.A. 18A:36-15 states:

> Any absence because of religious holidays shall be recorded as excused absence on the pupil's attendance record or on that of any group or class of which he is a member, and any transcript or application or employment form or any similar form on which information concerning a pupil's attendance record is requested shall show, with respect to absences, only absences other than absences excused because of religious holidays.

In granting the motion for summary judgment and in rejecting Mr. Carlin's argument for the application of the religious holiday statute, I rely upon the cases which clearly hold that a court may grant summary judgment when it is shown that a party's claim (or

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the opposing party's defense) is a sham. See, Barringer v. Miele, 6 N.J. 139, 142 (1951), where the Supreme Court, in affirming the lower court's dismissal of a complaint for failure to state a cause of action, stated:

> It is not the function of a court, on motion to strike a pleading, to determine which of the parties is telling the truth on the facts of the case; nevertheless, the court may, if a pleading is conclusively proved to be false, strike it as sham. Citations omitted. 6 N.J. at 146. [emphasis added]

See also, United Rental Equipment Co. v. Aetna Life & Cas. Ins. Co., 74 N.J. 92 (1977), where the Supreme Court stressed the following consideration in deciding a summary judgment motion: "[P]rotection is to be afforded against groundless claims and frivolous defenses, not only to save the antagonists the expense of protracted litigation, but also to reserve judicial manpower and facilities to cases which meritoriously command attention." 74 N.J. at 99, citing Robbins v. Jersey City, 23 N.J. 229, 241 (1957). The Supreme Court's reasoning in Monmouth Lumber Co. v. Indemnity Ins. Co. of North America, 21 N.J. 439 (1956), (where summary judgment was granted as a result of a frivolous defense), is applicable to a frivolous complaint as well.

> It is fundamental that the purpose of the summary judgment procedure is to grant relief in cases where procedural tactics are interposed to delay the trial and the inevitable result sought by the institution of the suit. It is designed to cut through sham and frivolity . . . and lay the case before the trial court in its true light. If, when so viewed, there appears to be no geniune triable issue of fact, the relief should be granted [emphasis added]. 21 N.J. at 4480.

In this case, there are no genuine triable issues of fact. Petitioner has not even bothered to respond to the motion filed by the Board or to call me to ask for an extension of time. This matter is not only utilizing state judicial manpower and facilities, it is causing the taxpayers of the school district to pay for legal representation. A review of the uncontroverted and unrebutted facts indicates that this petition and complaint is a sham. The day that Mr. Carlin was absent from school was Purim, a Jewish holiday. Petitioner's school record and statement to the principal indicates that he is of the Roman

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Catholic faith. Furthermore, on the very day that he was alleged to be observing this Jewish holiday, he attended a meeting to discuss dirty lavatories in the school. There is no evidence whatsoever that petitioner was ever absent from school to observe other Jewish holidays.

At the prehearing conference, petitioner asserted that the First Amendment prohibited either the Board or this judge from inquiring into the sincerity of his religious beliefs. Petitioner is in error in that assertion. A person's religious sincerity may be inquired into. See, New Jersey Board of Higher Education v. Shelton College, 90 N.J. 470 (1982), where the Supreme Court stated that:

> Although the First Amendment wisely prohibits courts from questioning the validity of religious beliefs, [citation omitted] it does not preclude judicial inquiry into the sincerity of those who claim exemption on religious grounds from a law of general application. 90 N.J. at 481.

See also, Jacques v. Hilton, 569 F. Supp. 730, 732 (D. N.J. 1983), aff'd 738 F. 2nd 422, 732 (3rd Cir. 1984). The district court stated that "[a] party seeking first amendment protection for certain beliefs, allegedly religious in nature, must demonstrate that the beliefs are (1) sincerely held and (2) religious in nature in the claimant's scheme of things (citation omitted)." 569 F. Supp. at 732. While the Jacques case involved the MOVE group in Philadelphia, and that court found that MOVE was not a religion, and the instant case involves Mr. Carlin's alleged following one of the world's major religions, the federal court's reasoning regarding inquiry into the sincerity of belief is applicable here.

The religious observance statute itself permits inquiry as to the sincerity of religious beliefs. The religious holiday sections of N.J.S.A. 18A:36-14 et seq., "Conduct of Schools in General," are all part of L. 1951, C. 322, "An Act concerning the absence of pupils of the public schools from school by reason of religious observance . . ." [emphasis added]. The validity of petitioner's claim that the school may not inquire into whether he actually observed the holiday can be determined just from the title of the act itself, which addresses pupil absences by reason of religious observance. Although some courts

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have held that ". . . the title to an act is not an index, merely a label, and thus the title should not be scrutinized with an overly technical eye," Murnick v. Asbury Park, 187 N.J. Super. 455, 461 (App. Div. 1982), on remand 5 N.J. Tax 406, quoting Howard Savings Institution v. Kielb, 38 N.J. 186, 201 (1962), these decisions do not prohibit examining the title of an act, especially if little other direction of legislative intent may be found. That is the situation in the case at bar, where no legislative history exists regarding this act.

More importantly, however, other courts have recognized that titles ". . . may be considered as an aid to construction" and operate ". . . as a limitation in the enacting clauses, so that a construction which would give the statute a direct effect beyond the object expressed in the title must be rejected." Casey v. Male, 72 N.J. Super. 288, 297 (Law Div. 1962), quoting Samuel D. Wasserman, Inc. v. Klahre, 24 N.J. Super. 143, 147 (App. Div. 1952). The word "observance" is also used in N.J.S.A. 18A:36-14, which states, "No pupil of any public school, who shall be absent, by reason of observance of a religious holiday" shall be deprived of any award or a right to take an alternate test. Similarly, N.J.S.A. 18A:36-16 states that the local boards of education have discretion in excusing absences "by reason of the observance of a religious holiday."

While the petitioner is claiming that he should not be suspended because N.J.S.A. 18A:36-15 cites "absence because of religious holidays," the section's true meaning must be construed from a review of the enactment in its entirety, which consists of six sections. Cf., the reasoning in Paludi v. Ventnor City, 194 N.J. Super. 565 (Law Div. 1984), where the court pointed out that all sections of a particular act must be considered if its true meaning is to be ascertained. Id. at 568, 569.

When I read N.J.S.A. 18A:36-15 in pari materia with N.J.S.A. 18A:36-14 and 16 and the title of the entire Act, I conclude that only pupils who observe a religious holiday may have an excused absence from school. Observance is defined as "the act or an instance of following, obeying or conforming to and a keeping or celebration by appropriate procedure, ceremonies, etc." Random House College Dictionary, Revised Edition 1980, p. 9180. The foregoing analysis mandates a determination that in order to be excused from attendance at school, petitioner must be of the faith which is observing the holiday.

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Otherwise, an absence falls within a student's particular and personal philosophy and is not covered by the Excused Absence Act. The foregoing construction of N.J.S.A. 18A:36-14, 15 and 16 would necessitate inquiry into the sincerity of a student's religious beliefs in order to determine whether the student should have an excused absence from school. This is not even possible in this case since this petitioner student was not even sincere enough to respond to the motion for summary decision.

For all the foregoing reasons, it is hereby **ORDERED** that the motion for summary decision filed by the Board of Education of the Union County Regional School District No. 1 be, and is, hereby **GRANTED**; and

It is further **ORDERED** that the petition asking for an Order that the Board improperly and illegally construed its pupil attendance policy when it denied petitioner an excused absence for a religious holiday and asking for an Order expunging a six-day suspension from Mr. Carlin's record be, and is, hereby **DENIED**.

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

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

Sept. 17, 1985
DATE

SYBIL R. MOSES, ALJ

Receipt Acknowledged:

SEP 19 1985
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

September 20, 1985
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

amn/e

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THOMAS A. CARLIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE UNION COUNTY REGIONAL HIGH SCHOOL DISTRICT, NO. 1,	:	DECISION
RESPONDENT.	:	
	:	

The Commissioner has reviewed the record of the matter controverted herein. It is noted that no exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Having reviewed the initial decision in the instant matter, the Commissioner adopts the findings and conclusions of the Administrative Law Judge as his own and will not burden the record by commenting further on the matter herein. Summary judgment is affirmed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

October 29, 1985

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STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3760-84
OAL DKT. NO. EDU 1871-83 (Partial Remand)
OAL DKT. NO. EDU 4597-82 (On Remand)
AGENCY DKT. NOS. 501-12/81A and
143-4/81A

BOARD OF EDUCATION OF
UNION COUNTY REGIONAL
HIGH SCHOOL DISTRICT NO. 1,
Petitioner,
v.
ANTHONY CASTALDO,
Respondent.

Richard J. Kaplow, Esq., for petitioner
(Weinberg & Kaplow, P.A., attorney)

Anthony Castaldo, respondent, pro se

Record Closed: August 20, 1985 Decided: September 12, 1985

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

This matter is before me on remand from the Commissioner of Education who, in a Final Decision dated May 7, 1984, affirmed my Initial Decision of March 2, 1984, that respondent should forfeit his position as a tenured school psychologist in the employ of the Board of Education of Union County Regional High School, District No. 1, (hereinafter the "Board"). See, In the Matter of the Tenure Hearing of Anthony Castaldo, OAL DKT. EDU 4597-82 (March 17, 1982), remanded by Commissioner (May 6, 1982), and OAL DKT. EDU 1871-83 (March 2, 1984), partial remand by Commissioner (May 7, 1984), aff'd, State Board of Ed. (Dec. 5, 1984). The reason for the instant, limited remand relates to a controversy

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that concerns the respondent's exact salary entitlement. In his decision of May 7, 1984, the Commissioner made the following observation with respect to the reason for the remand:

> The Commissioner finds and determines that he is without sufficient factual information to render a determination with respect to the claims of either party regarding the amount of salary to which respondent was to be accorded, as of November 2, 1983. Additionally, the factual and legal basis upon which the Board is entitled to deduct those sums of money from respondent's salary prior to November 2, 1983, is also unclear. Accordingly, the Commissioner hereby directs that such claims pertaining to the resumption of respondent's salary be separated from the instant proceedings and be remanded to the Office of Administrative Law for a further finding and determination with respect to the merits of the claims of either party. In rendering this determination, the Commissioner, without prejudice to the parties, will not disturb Judge Weiss's Order issued during the pendency of such proceedings.

See, In the Matter of the Tenure Hearing of Anthony Castaldo, supra, at 81-82.

The Order to which the Commissioner referred at the end of the above-quoted language was issued as a result of certain motions made during the course of the tenure hearings which were ongoing at that time. Specifically, I determined that the annual salary to which respondent was entitled as of November 2, 1983, the date set forth by the State Board in its decision, should be $26,000 per year, rather than a higher salary claimed by Castaldo. The difference related to my refusal to credit Castaldo with increments that otherwise would have accrued to his benefit between the date of his original suspension on tenure charges and November 2, 1983.

Two issues therefore are before me in the instant case: (a) the rate of pay to which respondent was entitled as of November 2, 1983; and (b) the amount and propriety of any deductions which the Board claims it is entitled to make from any sums otherwise due and owing to the respondent for the period prior to November 2, 1983. Those two issues were identified in the Prehearing Order entered on October 2, 1984. Although the Board protested inclusion of the first issue, claiming it had already been decided by me, I

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rejected that protest upon the ground that the respondent was entitled to pursue it, given the language of the Commissioner's remand.

The second issue concerning the deductions which the Board claims it must make, relates to the question of whether a certain sum which had been paid over to Castaldo during efforts to settle the case was to be treated as "salary" or not. The Board claims that the payment, $52,000, is to be considered as salary and, therefore, that deductions now have to be taken out of other monies due to Castaldo in order to protect the Board against possible claims by state and/or by Federal authorities for pension contributions, Social Security, withholding tax payments, state unemployment insurance, and the like.

To set the instant proceedings in context, it may be helpful briefly to review some of the pertinent background circumstances which led up to the present case. Originally, in 1981, the Board certified various tenure charges involving unbecoming conduct against the respondent. At the time of the certification, it also suspended respondent. His salary was then $26,000 per year. In August 1981, the Board adopted a resolution determining to withhold respondent's adjustment increment, and his salary for 1981-82 was held at the same $26,000 per year. During that same school year the tenure charges were pending before the Office of Administrative Law, and settlement discussions were taking place between the parties concerning them. Ultimately, as a result of those negotiations, a tentative settlement was reached whereby the Board agreed to drop the tenure charges and to pay to Castaldo the sum of $52,000 in consideration of his submitting a resignation from employment. In an Initial Decision dated March 17, 1982, Administrative Law Judge Elinor R. Reiner approved the tentative settlement and recommended its adoption by the Commissioner. See, In the Matter of the Tenure Hearing of Anthony Castaldo, OAL DKT. NO. EDU 4597-82, Initial Decision, March 17, 1982. However, upon review and consideration of the circumstances, the Commissioner determined to reject the proposed settlement. See, In the Matter of the Tenure Hearing of Anthony Castaldo, supra, May 6, 1982. Accordingly, the matter was remanded to the Office of Administrative Law with a direction that it proceed to a plenary hearing on the

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merits. Unfortunately, between the date of the Initial Decision in March and the Commissioner's remand in May, the Board actually disbursed the $52,000 to respondent. Following the remand, the Board naturally demanded reimbursement, to no avail. As a result, the Board immediately suspended any further salary accrual to Castaldo until such time as the settlement monies were repaid. That decision was subsequently embodied in an Order issued by Judge Reiner in July 1982. Thereafter, following a series of events including an abortive resignation by Castaldo, his dismissal of his attorney, and another direction by the Commissioner that the case promptly proceed to hearing, trial began in April 1983. By then, Judge Reiner had recused herself and the undersigned was assigned to handle the matter.

Prior to commencement of the hearings the Board moved to suppress respondent's defenses because of his continuing failure or refusal to make restitution to the Board. Judge Reiner had originally granted such relief and I simply followed suit. Although my Order suppressing Castaldo's defenses was promptly made the subject of an interlocutory appeal to the Commissioner, in view of his direction that the matter proceed with dispatch, the hearings commenced with respondent's defenses suppressed. Respondent was permitted to cross-examine the Board's witnesses, and I also allowed him to testify on his own behalf. By early June 1983, a great deal of testimony had been received. Then, in a decision dated June 10, 1983, the Commissioner ruled on the interlocutory appeal. In it he determined to reverse the suppression of respondent's defenses, but upheld the continuing denial of Castaldo's request that his salary be resumed. An appeal from the Commissioner's determination was then taken to the State Board of Education, which, on November 4, 1983, reversed the Commissioner and reinstated my Order suppressing Castaldo's defenses. However, the State Board also reversed both the Commissioner and me with respect to the refusal to resume salary payments to Castaldo. To that end, the State Board directed that he be restored to a pay status as of November 2, 1983. See, In the Matter of the Tenure Hearing of Anthony Castaldo, State Board of Education decision, Nov. 4, 1983.

Following the State Board's determination, motions were then made before me with regard to the somewhat clouded salary situation. At the same time, the Board also moved before the State Board for clarification of its November 4, 1983 decision. In

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December 1983, I determined that Castaldo should be credited with normal increments as if he had been employed continuously since 1980-81 and, given his degree level during that period and his years of service, that his salary should be $35,300 per year. However, the Board promptly moved for reconsideration in view of its contention that a previous decision by the Commissioner of Education appeared to dictate that Castaldo should not be credited with those incremental increases. Following my receipt of briefs with respect to the motion, I reconsidered my decision and determined in the Order of February 22, 1984 that the rate of pay to which respondent was entitled should be set at $26,000 per year, and that he be denied incremental increases. My decision was based upon the case of In the Matter of the Tenure Hearing of DeMarco, OAL Docket No. EDU 0265-81, 1981 S.L.D. , aff'd, State Board of Education, 1982 S.L.D. An appeal was then taken from my February 22, 1984 Order and was combined with the appeal which Castaldo was pursuing to the Commissioner from my Initial Decision respecting the termination of his tenure status. As noted, the decision of the Commissioner of May 7, 1984 affirmed the revocation of his tenure, but remanded the case for consideration of the salary questions.

Following the Commissioner's remand and the conduct of a prehearing in October 1984, certain problems arose between Castaldo and his newest attorney (not the one who handled the hearings) respecting the latter's representation. As a result of that disagreement, which included a motion made to me by counsel for imposition of an attorney's lien (which I denied), various delays were occasioned with respect to establishing a firm hearing date to determine the instant issues. During the same period, the Board also was pursuing an alternative administrative route for a decision as to its possible pension and other obligations. Specifically, the Board had made a request to the Division of Pensions for clarification of its obligations and, in a letter dated January 8, 1985, counsel for the Board was advised by a representative of the Division, Peter J. Gorman, Esq., a supervising research analyst, that the question of what deductions should be made, if any, from the $52,000 previously paid to Castaldo involves "many legal ramifications." In that letter Mr. Gorman observed that his "initial reaction to the payment" was that it "was not pensionable wages, but rather appears to have been the payment of a legal settlement without identifying such payment

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as pensionable wages." He noted that if Castaldo was truly an employee and properly reported on the transmittal forms forwarded to this Division, appropriate deductions should have been made from his wages during that period. Thus, given the absence of clarity with respect to the situation, Mr. Gorman advised Board counsel that he was forwarding the matter to the Teachers' Pension and Annuity Fund (hereinafter TPAF) with a request that it review the matter and, if necessary, seek legal advice from the Attorney General's office (Exhibit C-1).*

On February 22, 1985, the acting secretary of the TPAF Board of Trustees wrote to counsel for the Board to inform him that the Board had determined to table any action concerning the appropriateness of deductions from the $52,000 payment made to respondent. According to the acting secretary, his Board of Trustees could not determine whether the settlement was to be treated as "creditable salary," and that until the pending litigation before the Office of Administrative Law was resolved, no action would be taken concerning that question (Exhibit C-2).

Ultimately, after granting respondent additional time to prepare his case, since he had determined to act in a pro se capacity, the matter was listed for hearing on July 3, 1985. On that date, counsel for the Board and the respondent pro se appeared before me, and it was decided that the case could be resolved by way of cross-motions for summary decision. A briefing schedule was established and all briefs were due by August 12, 1985. In addition, respondent requested an opportunity following the filing of briefs to appear to present oral argument. I advised him that I would, in all likelihood, grant that request if it was made following the filing of those briefs. Subsequently, Castaldo informed me that he could not be available for an oral argument and, therefore, waived his previous request. Thus, the matter is now ripe for determination with respect to the issues set forth in the Prehearing Order.

* Mr. Gorman's letter, together with other pertinent documents, will be marked as court exhibits and a list of those exhibits is set forth in the Appendix at the end of this Initial Decision. Since the case is being disposed of by way of summary decision, no hearing was ever held and, therefore, no documents were marked in evidence.

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DISCUSSION

The threshhold issue is whether or not respondent's salary as of November 2, 1983 was $26,000 per year, or, as respondent insists, $35,300 per year. According to Castaldo, the decision of the State Board on November 4, 1983, clearly established his right to the higher salary and that the only possible reduction had to do with mitigation by way of substitute earnings. Since no mention was made by the State Board of any right of petitioner to continue to withhold increments since the date of the suspension, it is Castaldo's position that the higher salary is rightly his.

For its part, the Board maintains, in the first instance, that the question of whether Castaldo's salary should be $26,000 per annum or $35,300 per annum is actually a "non-issue" since it was previously decided by me during the course of the tenure proceedings. Specifically, the Board points out that although I originally determined that Castaldo was entitled to the higher amount, upon reconsideration and in light of the decision in the DeMarco case, supra, the question already has been resolved.

With regard to the propriety of my considering the issue in the first instance, I must reject the Board's assertion. While I did devote a great deal of attention to the same question earlier in these proceedings, the plain language of the Commissioner's instant remand seems to me to require that it be addressed anew. On the other hand, having now reconsidered the question, I continued firmly to be convinced that the rationale expressed by Administrative Law Judge Thomas in his Initial Decision in the DeMarco case, which decision was affirmed both by the Commissioner and the State Board, is eminently correct. In that case, Judge Thomas considered the precise question now before me and held that following the certification of tenure charges and a suspension of the employee, although he is entitled to be restored to salary status following the running of the 120 days under N.J.S.A. 18:6-14, the employee is not automatically entitled to receive increments during that time. Judge Thomas's decision speaks for itself and I again adopt it. Thus, the annual salary to which the respondent was entitled to be paid as of the date of his restoration by the State Board to a pay status (November 2, 1983) was $26,000 per year, the salary he was receiving at the time of his original suspension.

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The second issue has to do with the propriety of deductions, if any, which the Board claims it is entitled to make from any sums due and owing to the respondent for the period prior to November 2, 1983. In other words, although the Board paid $52,000 to Castaldo, that payment was made without any monies being withheld from it for purposes of pension, Social Security, unemployment insurance, etc. Because of that anomalous situation, the Board, during the course of the tenure hearings, made application for permission to establish an escrow fund from salary payments which were to be made to Castaldo by reason of the State Board's decision of November 4, 1983. It was agreed that a reasonable estimate of the total amount to be withheld for those claimed deductions was $6,000 and, to that end, this sum was, in fact, deposited by the Board in an interest-bearing escrow account as of February 23, 1984. I have been advised that the money is co-mingled in a larger Board checking account that maintains a balance of approximately $50,000 at all times (Exhibit C-3). Counsel for the Board has informed me that the account earns simple interest at an annual rate of 5.25%.

I can certainly understand and sympathize with the positions taken both by the Division of Pensions and the TPAF representatives with respect to treatment of the $52,000 payment made to respondent by the Board. However, the time has arrived for a decision to be made concerning it. Having considered all of the circumstances surrounding the payment, together with the arguments of respondent and counsel for the Board, I believe that the sum should be considered as "pensionable wages" or "creditable salary," and that the Board was acting in a most prudent fashion by establishing the escrow account and making a deposit in it of an amount estimated to be approximately equivalent to its possible obligations to state and Federal authorities for the deductions noted above. First, the sum of $52,000 is hardly an arbitrary number. It is precisely twice the annual salary which Castaldo enjoyed at the time of his suspension. Clearly, when a board enters into settlement agreements with employees who have been made the subject of tenure charges, it must follow certain prescribed guidelines. One of those considerations has to do with the linkage, if any, between the amount of any lump sum payment and the potential cost to the Board, if it pursued the tenure hearings to a conclusion. In this case, it seems to me that the Board undertook precisely that consideration. Trying a tenure case before the Office of Administrative Law, and then

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pursuing it before the Commissioner, perhaps the State Board and potentially beyond that, is a time-consuming process. Although efforts have been and are continuing to be made to expedite that process, it is reasonable to consider that a period of about two years potentially could elapse before a final State Board, if not Appellate, decision is made. During that time, except for the first 120 days, the tenured employee would be restored to a pay status, but often would not be required to perform any services in the district. Also, costs and expenses would be incurred with respect to legal representation of the Board in such proceedings. Under those circumstances, linkage of a money settlement to a rate of salary is perfectly understandable, if not normally to be expected. Thus, the $52,000 payment made to Castaldo in this case was, in my opinion, in the nature of a salary settlement designed to cover a two-year period which the Board otherwise would have to pay in any case. The fact that the Board chose to report the payment on a Form 1099, rather than on the standard forms used during the regular payroll process, is of no meaningful consequence. Castaldo was and remained an employee of the Board between the date of the suspension and the date of the Commissioner's final decision approving his forfeiture of tenure. Payments made to him during that time were that of an employer to an employee, and should be treated as salary from which appropriate deductions normally are made. The Board's decision to establish the escrow account in an amount which it approximated to be equivalent to the total deductions, was proper and should be upheld.

In further support of its position, the Board's brief referred to a separate proceeding in the Superior Court, Law Division, in which the Board sued Castaldo to recover the $52,000 settlement payment. As the Board noted, the respondent referred in his pleadings in that case to the payment as being in the nature of salary. See, Answer to Counter-claim, Union County Regional High School District No. 1 v. Castaldo, Sup. Ct. Union County, Dkt. No. LO71859-83 (Exhibit C-4). While the pleadings in the Law Division action are not dispositive of the issue before me, they do tend to support the conclusion that the $52,000 payment can and should be treated as salary.

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As I observed earlier in this decision, at the date originally scheduled for a trial of this matter (July 3, 1985), it was determined that cross-motions for summary decision would be made. However, at that time, the Board proposed that in order to dispose of the case without the necessity of any further proceedings, it would be willing promptly to pay over to respondent the $6,000 escrow, together with interest, provided that he would execute an Indemnification Agreement which would hold the Board harmless from and against any present and future claims for unpaid pension, tax, Social Security, or other payroll deductions which the Board potentially could be found to have failed to deduct from the settlement monies. Although the proposal was rejected by Castaldo, as was his absolute right, the mechanism suggested by the Board is a particularly appropriate one. Accordingly, I recommend that the Board withdraw from escrow the sum of $6,000, together with interest accruing since February 3, 1984, at a rate of 5.25 percent, and pay over that sum to the respondent forthwith. However, as a condition for receipt of payment, the respondent shall, at the same time, execute and deliver to the Board an agreement whereby he will hold harmless the Board from and against all present and future claims for any unpaid pension, tax, Social Security, or other payroll deductions which the Board may be found to owe to state and/or Federal authorities, to the extent of the amount to be paid to respondent in this case. In other words, assuming payment to respondent of approximately $6500, his liability to hold the Board harmless shall be limited to that amount. In the event it is determined by state and/or Federal authorities that the Board owes more than that amount, it shall be the responsibility of the Board and not the respondent to satisfy that excess payment.

Given the foregoing discussion, I now make the following Findings of Fact:

1. The respondent, Anthony Castaldo, was a tenured school psychologist in the employ of the Board of Education between the 1980-81 school year and May 7, 1984, the date of the Commissioner's decision affirming my Initial Decision holding that he had forfeited his position.

2. A lump sum settlement payment made to the respondent by the Board following settlement discussions in March 1982 in the amount of $52,000

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was intended to be, and was, in fact, "salary" and/or "creditable salary" and/or "pensionable wages" from which appropriate deductions should have been made.

3. The placing of $6,000 by the Board in an interest-bearing escrow account in February 1984, was a prudent act designed to protect the Board against possible future claims by state and/or Federal authorities with regard to deductions that the Board should have but did not make from the $52,000 payment.

4. The salary to which respondent was entitled as a school psychologist in the employ of the Board as of November 2, 1983, was $26,000 per year, the rate of pay which he was receiving during the 1980-81 school year when he was suspended from employment and tenure charges were certified against him.

Accordingly, I hereby **ORDER** that the Board shall forthwith determine the precise amount of interest due and owing to the respondent in connection with the deposit of $6,000 into escrow, and the total of that principal sum, together with the accrued interest, shall be paid over to him as promptly as possible following the execution and delivery by respondent to the Board of an appropriate Indemnification Agreement to be prepared by the Board in accordance with this Initial Decision.

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

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OAL DKT. NO. EDU 3760-84

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

September 12, 1985
DATE

Stephen G. Weiss
STEPHEN G. WEISS, ALJ

SEP 16 1985
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:

Sept. 16, 1985
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

le/e

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IN THE MATTER OF THE TENURE	:	
HEARING OF ANTHONY CASTALDO,	:	
SCHOOL DISTRICT OF THE UNION	:	COMMISSIONER OF EDUCATION
COUNTY REGIONAL HIGH SCHOOL	:	DECISION ON REMAND
DISTRICT NO. 1, UNION COUNTY.	:	
	:	

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

It is observed that no timely exceptions to the initial decision have been filed with the Commissioner within the 10-day period pursuant to N.J.A.C. 1:1-16.4a, b and c.

Upon review of the initial decision the Commissioner hereby affirms those findings and recommendations of the judge which deny respondent's claim to annual salary increments during the pendency of these tenure proceedings. In reaching this determination the Commissioner relies on DeMarco, supra.

Also affirmed by the Commissioner is that specific finding by the judge which holds that respondent was entitled to compensation by the Board at an annual salary of $26,000 which was to be resumed as of the 121st day of the tenure proceedings against him and continued at the same rate until May 7, 1984, the date of the Commissioner's decision dismissing respondent from his tenured position in Union County Regional High School District No. 1.

The Commissioner cannot agree, however, with that finding and conclusion in the initial decision, ante, which declares the $52,000 lump sum settlement payment made illegally by the Board to respondent in March 1982 to be "***'salary' and/or 'creditable salary' and/or 'pensionable wages' from which appropriate deductions should have been made***" by the Board. Such finding and determination by the judge is totally without merit and completely disregards the prior decision of the State Board of Education rendered on November 2, 1983, which reads in pertinent part as follows:

> "Tenure charges of unbecoming conduct were certified against Respondent on April 15, 1981. On March 17, 1982, a Stipulation of Settlement and Dismissal was reached by the parties and a $52,000 payment was made to Respondent as part of the terms of the settlement agreement. Subsequently, the Commissioner rejected the settlement agreement and ordered that the matter proceed to hearing on the merits. Respondent, however, did

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not and has not returned the $52,000 to the Board. The Board, in turn, has withheld payment of Respondent's salary.

***

"As to the salary payment issue, the State Board reverses the Commissioner's denial of the resumption of Respondent's salary and directs the resumption of Respondent's salary payments as of the date of this decision (November 2,1983). Pursuant to N.J.S.A. 18A:6-14, the payment of salary is mandatory after the 121st day and may only be offset by sums received for substituted employment. Since this was not the case here, the Board has no authority to withhold Respondent's salary payments.

"We might add that the Board is not without remedy in this instance. It may seek return of the $52,000, or any lesser sum still found owing, by bringing a civil action in a court of competent jurisdiction."

Thus, absent any ruling from a "court of competent jurisdiction" with respect to the disposition of the $52,000 lump sum settlement payment, the Board may not consider such sum of money, in whole or in part, to satisfy its statutorily prescribed duty pursuant to N.J.S.A. 18A:6-14 as amended, regarding the resumption of respondent's salary as of the 121st day and continuing throughout the pendency of the tenure proceedings held in this matter.

Similarly, and equally without merit, is the judge's finding and determination that the $6,000 held in escrow in an interest-bearing account by the Board, represent those deductions which should have been made from the $52,000 in question which is to be paid to respondent in return for a signed indemnification agreement from him.

In this regard, all deductions from respondent's salary compensation should have been made as the result of the resumption of his annual salary payments of $26,000 by the Board pursuant to N.J.S.A. 18A:6-14 as amended. Moreover, any contributory payments which are required by state or federal laws are determined to be the Board's obligation and responsibility to resolve with the appropriate state or federal agencies. The Commissioner so holds.

Accordingly, the initial decision is affirmed in part and reversed in part as determined by the Commissioner herein. The Board is hereby directed forthwith to take all necessary actions consistent with the Commissioner's final determination in the instant matter.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

October 31, 1985 Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2494-85
AGENCY DKT. NO. 54-3/85

HOWARD R. FURBECK, JR.,
Petitioner,
v.
EDISON TOWNSHIP BOARD OF EDUCATION, MIDDLESEX COUNTY,
Respondent.

Susan Enste Holley, Esq., for petitioner (Ruhlman, Butrym and Friedman, attorneys)

R. Joseph Ferenczi, Esq., Board Counsel, for respondent

Record Closed: August 6, 1985 Decided: September 17, 1985

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

Howard R. Furbeck, Jr. (petitioner), alleges the Edison Township Board of Education (Board) has failed to recognize his seniority rights to a middle school vice principalship. The issue in controversy is whether the middle school is properly designated as a secondary school, and, if so, whether there is any claim that Furbeck can lay to seniority therein and, if not, whether Furbeck has greater seniority than any incumbent.

The matter was joined before the Commissioner of Education and transmitted to the Office of Administrative Law for disposition as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on June 4, 1985. The above-stated issue was agreed to and the parties further agreed, there being no operative facts in dispute, that the matter proceed to summary judgment

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on the papers. The petitioner's submission was timely made. For good cause shown, the Board's time for submission was enlarged and the record was closed on August 6, 1985.

I.

The petitioner began his employment with the Edison Township Board of Education on September 1, 1959, as a teacher of seventh and eighth grade mathematics. He held elementary teacher certification. The petitioner served continuously in this capacity, acquiring tenure and seniority as a teacher, until September 1, 1968, when he was appointed vice principal of a district elementary school, under an elementary principal certificate. The school in which he served encompassed grades kindergarten - 6. The petitioner served as vice principal until September 1, 1979, when the elementary vice principal positions in the district were eliminated. As a result of his employment as an elementary vice principal, the petitioner earned tenure and seniority in that position. From September 1979 to June 1984, the petitioner was assigned as a fourth-grade teacher. For the 1984-85 shcool year he was assigned to teach mathematics in a junior high school.

The Board made a determination to reorganize instruction, commencing with the 1984-85 school year, as follows:

> Grades K-5 - elementary school
> Grades 6-8 - middle school having departmentalized instruction
> Greades 9-12 - senior high school

On August 13, 1984, the Board adopted a resolution which determined that the "middle school" containing grades 6-8 and having departmentalized instruction be designated "secondary" as defined in N.J.A.C. 6:3-1.10(l)15 (J-1).

By letter dated December 26, 1984, the petitioner requested recognition of his tenure and seniority status as a vice principal in the school district, specifically, in the newly reorganized middle school:

> In June of 1979, the position of vice-principal in the elementary schools was eliminated due to declining enrollment. This year, September 1984, the sixth grades were placed in the middle school. With the inception of the middle schools, I am requesting an update on my status as a vice-principal in Edison Township. What is my placement on the seniority list? (J-2).

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By letter dated January 9, 1985, the superintendent of schools responded:

> In response to your letter of December 26, 1984, inquiring about your status as a vice-principal in the Edison school system, please be advised that when we reorganized our junior high schools into middle schools (including the sixth grade) the Board of Education, by Resolution, approved the middle schools as secondary schools. Consequently, all tenured incumbent principals and vice-principals in our junior high schools continued their seniority status as secondary principals. Your seniority as a vice-principal in the elementary schools terminated when we eliminated those positions in June of 1979.
>
> If you need further clarification of this letter, please call my office. (J-3).

The foregoing being undisputed, I adopt them as **FINDINGS OF FACT** in this matter.

The petitioner argues that he is entitled to the middle school vice-principalship regardless of its classification by the Board. He further argues that the Board improperly designated the reorganized middle school as secondary. The Board maintains that it properly designated its middle school as secondary and, therefore, seniority as an elementary vice-principal is irrelevant. The Board's intent and action have clearly created the middle schools as secondary schools. Service in such schools requires secondary certification.

II.

It is first noted that the petitioner's seniority as an elementary vice-principal did not terminate when those positions were eliminated by the Board in 1979. Rather, it is held in suspension. Should a future Board recreate those positions, the petitioner would maintain whatever seniority status he has accrued in that category.

I **FIND** and **CONCLUDE** that the Board must develop immediately pursuant to statute and regulations, preferred eligibility lists and seniority determinations for all individuals affected by the Board's June 1979 reorganization. Fallis v. South Plainfield Bd. of Ed., OAL DKT. EDU 5934-84 (Jan. 16, 1985), adopted Comm'r of Ed. (Mar. 4, 1985). It is so **ORDERED.**

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III.

The petitioner cites N.J.A.C. 6:11-3.24(a), which provides:

> When school reorganization results in the inclusion of elementary grades in combination with higher grades, the elementary or secondary principal's certificate issued under previous rules, will be recognized as valid for this reorganized school.

The petitioner urges that the term "higher grades" within this regulation means any grades in the school so organized containing grades seven, eight or nine. In support of this, the petitioner cites Liggett v. Wayne Bd. of Ed., OAL DKT. EDU 7587-82 (Feb. 10, 1983), adopted in part and remanded in part, Comm'r of Ed. (Mar. 31, 1983), decision on remand (OAL DKT. EDU 2537-83) (Aug. 5, 1983), adopted Comm'r of Ed. (Sep. 22, 1983). In the earlier decision, the Commissioner affirmed the finding that individuals possessing secondary principal certificates were eligible to serve as elementary principal, vice-principal or assistant principal and to accrue seniority in these categories. The Commissioner remanded on the limited issue of calculation of the seniority entitlements.

The petitioner reasons that, since the middle school in question was reorganized to include elementary grade six in combination with the higher grades seven and eight, the regulation applies to this case and either an elementary principal certificate or secondary principal certificate would be sufficient for the vice-principal position. The cited regulation makes no reference to the classification of the reorganized school. The regulation does emphasize the actual combination of elementary grades with higher grade levels in the reorganized school. The regulation recognizes that a school containing both elementary and higher grades is well served by principals holding either the corresponding elementary or secondary certificates.

The petitioner asserts that his elementary principal certificate is valid for the vice-principal position in the reoranized middle school. Therefore, he clearly has seniority rights to such a position. In Liggett, above, the Commissioner concluded that secondary principals, since eligibile under N.J.A.C. 6:11-3.24(a) to serve in elementary positions in the reorganized schools, could assert seniority in the reorganized schools, including elementary grades, provided a higher grade was included in the grade level reorganization. By similar reasoning, the petitioner claims eligibility under the regulation

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to the vice-principal position in the Board's reorganized middle school. Because elementary grade six is included in the reorganized school as well as higher grades, petitioner argues he can assert his seniority rights in the new school under any classification the Board makes.

In addition, N.J.A.C.6:3-1.10(m) provides:

> In the event of a restructure of grade levels which results in the elimination of all junior high schools (as defined by N.J.A.C. 6:27-1.2) in the district and the creation of schools with a grade level organization which includes grades seven and eight with or without one or more elementary grades, the seniority rights of the junior high principals, vice-principals and assistant principals displaced by such restructuring shall be transferable to the newly reorganized schools, in the category designed by the district Board of Education, in its classification plan adopted in compliance with N.J.A.C. 6:27-1.2.

N.J.A.C. 6:27-1.2, Classification of schools, provides:

> (a) The following grade groupings shall be used to classify secondary schools which possess the other characteristics of school organization:
>
> Grades 7 to 9 inclusive, junior high school;
> Grades 10 to 12 inclusive, senior high school;
> Grades 7 to 12 inclusive, six-year high school;
> Grades 9 to 12 inclusive, four-year high school;
>
> (b) Grades seven and eight with or without one or more elementary grades may be classified as either elementary or junior high school as determined by the district board of education. The district board of education shall, by formal resolution, designate the classification for these grades in accordance with the plan of school organization of the district.
>
> Subsection (b) became effective July 2, 1984.

Referring to N.J.A.C. 6:3-1.10(m), the petitioner asserts that although this regulation speaks of protecting the seniority rights of junior high school principals and vice-principals whose schools are reorganized, the regulation is more broadly worded and would similarly protect elementary principals and vice-principals also.

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Because the petitioner's original elementary vice-principal position was abolished, his seniority rights transferred to the restructured middle school vice-principal position for which he was properly certified. Thus, the Board violated his seniority rights by failing ro recognize his entitlement to this new position, regardless of its classification.

The Board also failed to comply with N.J.A.C. 6:27-1.2, above, when it classified its middle school, containing grades six, seven and eight, as secondary. The petitioner argues that since the middle school contains grades six-eight, it can only classify as either an elementary or a junior high school according to subsection (b) of the regulation. In addition, since the middle school does not fit one of the four grade groupings set forth in the regulation, it could not properly be designated a secondary school.

The petitioner cites Cohen et al. v. Piscatawy Bd. of Ed., OAL DKT. NO. EDU 2629-81 (Aug. 27, 1981), adopted Comm'r of Ed. (Oct. 2, 1981), aff'd, St. Bd. of Ed. (Feb. 3, 1982). In Cohen, the middle schools contained grades six, seven and eight. Grade six was a self-contained program and grades seven and eight were in departmentalized programs. The Commissioner agreed with the initial determination that the definition of elementary school reached all of the grade arrangements while the secondary definition did not encompass the self-contained sixth grade. It was concluded that the six-seven-eight middle school should be classified as an elementary school.

The petitioner arugues that, in the present case, the middle school also contains grades six, seven and eight. Unlike the middle school in Cohen, each grade is departmentalized, including six. In addition, the definitiion for elementary has changed slightly to include kindergarten, grades one-six and seven-eight without departmentalized instruction. The definition for secondary has not been changed. While grade six still is encompassed only under the definition of elementary grades seven-eight with departmentalized instruction are now only included in the definition of secondary. Thus, a choice must be made as to which category should apply when, as here, neither the definition of elementary nor secondary fully encompasses the grade organization of the middle school. The petitioner points to N.J.A.C. 6:27-1.2, above, and claims that it controls.

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IV.

The Board states that it made a determination to reorganize instruction in the district, commencing with the 1984-85 school year, as set forth above. On August 13, 1984, the Board adopted a resolution which determined that the middle school, containing grades six-eight and having departmentalized instruction shall be designated "secondary" as defined at N.J.A.C. 6:3-1.10(l)15 (J-1).

The Board maintains that the petitioner's seniority as an elementary vice-principal does not entitle him to a vice-principalship in the middle school which is properly designated as secondary. N.J.A.C. 6:3-1.10(m) provides

> In the event of a restructure of grade levels which results in the elimination of all junior high schools (as defined by N.J.A.C. 6:27-1.2) in the district and the creation of schools with the grade level organization which includes grades seven and eight with or without one or more elementary grades, the seniority rights of junior high principals, vice-principals and assistant principals displaced by such restructuring shall be transferrable to the newly reorganized schools, in the category designated by the district board of education, in a classification plan adopted in compliance with N.J.A.C. 6:27-1.2.

The Board's resolution (J-1) is unambiguous

> WHEREAS, this Board has made a determination to reorganize instruction commencing with the 1984-85 school year for the reasons previously stated herein as follows:
>
> A. Grades K-5 (Elementary School)
>
> B. Grades 6-8 (Middle School having departmentalized instruction)
>
> C. Grades 9-12 (Senior High School)
>
> And,
>
> WHEREAS, this Board has made a determination that "Middle School" containing grades 6-8 and having departmentalized instruction shall be designated "Secondary" as defined in N.J.A.C. 6:3-1.10, et seq.
>
> NOW THEREFORE BE IT RESOLVED by the Board of Education of the School District of Edison, as follows:

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A. Instruction, commencing with the 1984-85 school year, shall be reorganized for the reasons stated in the preamble as follows:

1. Grades K-5 (Elementary School)

2. Grades 6-8 (Middle School having departmentalized instruction)

3. Grades 9-12 (Senior High School).

B. That "Middle School" containing Grades 6-8 and having departmentalized instruction shall be and is hereby designated "Secondary".

In the Board's view, N.J.A.C. 6:27-1.2, above, does not support the petitioner's argument that the resolution classifying the middle school as secondary is defective because the proper classification should be junior high school.

A comparison of N.J.A.C. 6:3-1.10(m) and N.J.A.C. 6:27-1.2 indicates some inconsistency by the drafters in choice of words. However, the Board's resolution leaves no doubt as to the intent of the Board in adopting it. This matter should not be decided by an exercise in semantics. In any event, the petitioner's elementary vice-principal certification does not fit into either a secondary or junior high school classification as contemplated in the regulations.

V.

N.J.A.C. 6:11-3.24, Certification in reorganized schools, cited above has been recodified, effective September 1, 1985, at N.J.A.C. 6:11-3.22. However, although the Department of Education reviewed Chapter 11 extensively in 1984 making some amendments and recodifications, it must be noted that the wording of this regulation has not changed since its original adoption in 1972. N.J.A.C. 6:3-1.10(m), by contrast, is an entirely new subsection. 16 N.J.R. 1718(a), adopted June 12, 1984, effective July 2, 1984. Similarly, N.J.A.C. 6:27-1.2, Classification of Schools, was amended extensively on the same dates by the deletion of old subsection (b) and the insertion of the new subsection (b).

The analysis in Cohen, above, must be reexamined in light of the new rule adoptions as must Liggett, above. The State Board must be presumed to have knowledge

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of its prior adoptions when it makes new rules or amends existing rules. To the extent that a new adoption or amendment is inconsistent with an existing rule, the new rule, when its words are given their ordinary meaning, must be considered to take precedence.

Since July 2, 1984, grades 7 and 8 with or without one or more elementary grades may be classified as either elementary or junior high school as determined by the district board of education. It must be noted that N.J.A.C. 6:27-1.2, Classification of Schools, is in the subchapter entitled "Approval of High Schools." N.J.A.C. 6:3-1.10(m), adopted and effective on the same dates, makes reference to N.J.A.C. 6:27-1.2. When the rules are read in pari materia, and it is borne in mind that a junior high school is a secondary school, the intent of the State Board of Education is clear. A local board of education may, by resolution, determine whether a school containing grades 7 and 8 with departmentalized instruction and with or without one or more elementary grades shall be an elementary or a secondary school. I so **FIND.**

I further **FIND** that the Edison Board of Education on August 13, 1984, established the middle school as a secondary school pursuant to rule (J-1). This being so, N.J.A.C. 6:3-1.10(m) comes into play. Any junior high school principals, vice-principals and assistant principals displaced by such restructuring have transferable seniority rights. Where a legislative or rulemaking body has clearly addressed itself to one thing (in this case junior high school administrators), it may fairly be inferred that it has excluded other things. See, Petition of Koegh-Dwyer, 106 N.J. Super. 567 (Law Div. 1969), aff'd 54 N.J. 523 (1969). By abstaining from expressly mentioning elementary school administrators, the State Board has indicated its intent that, when a school is designated as secondary under the rules, it is secondary administrators' seniority rights that are protected, not those of elementary administrators.

In consideration of the foregoing, I **CONCLUDE** that the middle school in the Edison Township School District is properly designated as a secondary school. I further **CONCLUDE** that there is no claim to seniority in that school that the petitioner here may assert.

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

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OAL DKT. NO. EDU 2494-85

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

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

17 SEPTEMBER 1985
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

SEP 18 1985
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

September 23, 1985
DATE

Ronald L. Parker /kS.
OFFICE OF ADMINISTRATIVE LAW

ml/E

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HOWARD R. FURBECK, JR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions submitted by petitioner were not filed within the time prescribed by N.J.A.C. 1:1-16.4a and b.

Upon review of the initial decision, the Commissioner concurs with the judge's determination that petitioner does not have a seniority claim to the controverted "middle school" vice principal position in the instant matter. However, there is a need to clarify the reasons supporting the determination which has been reached.

Petitioner's position as elementary vice principal was abolished September 1, 1979. At that time N.J.A.C. 6:3-1.10(k) established four seniority categories for vice principals; namely, elementary, junior high school, high school and vocational school. (No changes were made in these administrative categories when the seniority regulations were amended effective September 1, 1983.) Each vice principal category is a separate and distinct category and does not fall under the "elementary" category or the "secondary" category contained in N.J.A.C. 6:3-1:10 et seq.

Petitioner's service as a vice principal was at all times in the category of elementary vice principal; therefore, his seniority entitlement is limited strictly to positions which become vacant in that specific category.

N.J.A.C. 6:3-1.10(m) specifically and unambiguously speaks to the protected seniority rights of junior high school principals, vice principals and assistant principals when a restructure of grade levels results in the elimination of junior high schools (grades 7-9). The Commissioner, therefore, concurs with the judge's determination that the regulation does not extend itself to elementary principals, vice principals or assistant principals. The protection afforded by this regulation exclusively rests with junior high school administrative staff when schools are created with a grade level organization including grades seven and eight with one or more elementary grades. Elementary administrative seniority would come into play only if a board of education acts to classify such schools as elementary pursuant to N.J.A.C. 6:27-1.2(b).

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The pivotal issue to be resolved in the instant matter is what vice principal category the controverted "middle school" position falls under given the factual circumstances of the case. The Board's resolution bears repeating here.

> "WHEREAS, this Board has made a determination to reorganize instruction commencing with the 1984-85 school year for the reasons previously stated herein as follows:
>
> A. Grades K-5 (Elementary School)
>
> B. Grades 6-8 (Middle School having departmentalized instruction)
>
> C. Grades 9-12 (Senior High School)
>
> And,
>
> "WHEREAS, this Board has made a determination that 'Middle School' containing grades 6-8 and having departmentalized instruction shall be designated 'Secondary' as defined in N.J.A.C. 6:3-1.10, et seq.
>
> NOW THEREFORE BE IT RESOLVED by the Board of Education of the School District of Edison, as follows:
>
> A. Instruction, commencing with the 1984-85 school year, shall be reorganized for the reasons stated in the preamble as follows:
>
> 1. Grades K-5 (Elementary School)
>
> 2. Grades 6-8 (Middle School having departmentalized instruction)
>
> 3. Grades 9-12 (Senior High School).
>
> B. That 'Middle School' containing Grades 6-8 and having departmentalized instruction shall be and is hereby designated 'Secondary'." (Exhibit J-1)

The Commissioner agrees with the judge's belief that the above resolution leaves no doubt as to the Board's intent in adopting it. (Initial Decision, ante) The resolution clearly demonstrates that when the Board acted to organize its schools with a grade grouping of six, seven and eight, it did not act to classify such schools as elementary. However, there is inconsistency between the wording of the resolution and the regulation which controls for the classification of schools which have grades seven and eight with grade six as fits the facts herein. That regulation, N.J.A.C. 6:27-1.2(b) requires that:

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> "Grades seven and eight with or without one or more elementary grades may be classified as either elementary or junior high school as determined by the district board of education. The district board of education shall, by formal resolution, designate the classification for these grades in accordance with the plan of school organization of the district."

When the Board acted to classify the school containing grades seven and eight with grade six, it should have classified it as a junior high school if it did not desire to classify it as elementary. That the Board chose to call schools with that grade grouping as "middle schools" is not relevant. What is relevant is whether or not its action to classify its schools with grades six through eight comported with N.J.A.C. 6:27-1.2(b).

The answer to this is that the Board's action did not comport with the above-cited regulation. Rather than relying on N.J.A.C. 6:27-1.2(b), the Board cites N.J.A.C. 6:3-1.10 et seq. In the Commissioner's judgment, the Board's erroneous choice of words does not, however, warrant granting the relief sought by petitioner since the Board clearly did not desire to classify the schools as elementary. To do otherwise would elevate form over substance.

Consequently, the Commissioner determines that, pursuant to N.J.A.C. 6:27-1.2(b), the schools in question are classified as junior high schools. Thus, petitioner enjoys no seniority entitlement to a vice principal position in such schools because his seniority has accrued in the category of elementary vice principal. The fact that N.J.A.C. 6:11-3.22 (formerly N.J.A.C. 6:11-3.24a) recognizes both elementary and secondary principal certification in schools reorganized to include elementary grades in combination with higher grades does not alter this determination. What that particular regulation signifies is that the Board could offer petitioner a vice principal position in such a school if it so desired, assuming no individual was on a preferred eligibility list for junior high vice principal positions, given the classification of such schools.

Accordingly, the Commissioner adopts the recommendation of the Office of Administrative law dismissing the Petition of Appeal for the reasons stated herein. Further, he ORDERS that the Board take immediate action to correct its action of August 13, 1984 so as to classify its schools with a grade grouping of six, seven, and eight in conformance with N.J.A.C. 6:27-1.2(b). Any positions assigned as a result of such action must comport with the precise categories established in N.J.A.C. 6:3-1.10 et seq.

COMMISSIONER OF EDUCATION

November 1, 1985

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1717-85
AGENCY DKT. NO. 26-2/85

DONALD TURNER,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF LIVINGSTON, ESSEX COUNTY,
Respondent.

Robert M. Schwartz, Esq., for petitioner

Wayne J. Oppito, Esq., for Intervenor Kenneth Riker

James S. Rothschild, Jr., Esq. (Riker, Danzig, Scherer & Hyland, attorneys), for respondent

Record Closed: September 19, 1985 Decided: October 15, 1985

Before **TIMOTHY N. TUTTLE**, ALJ:

This matter comes before the Office of Administrative Law as the result of a petition filed with the Commissioner of Education on February 14, 1985, by Donald Turner, a tenured Director of Guidance asking the Commissioner of Education to render a declaratory judgment on the question of whether his termination effective June 30, 1985, as Director of Guidance at Livingston Senior High School by respondent was in violation of his seniority and tenure rights pursuant to N.J.S.A. 18A:28-11 and N.J.A.C. 6:3-1.10. The

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petitioner argues that his position as Director of Guidance at Livingston Senior High School is a separate and distinct category for seniority purposes from the Director of Guidance positions at the two junior high schools in the school district. A second petition was filed subsequently by substituted counsel for the petitioner on or about April 9, 1985 seeking substantially the same relief from the Commissioner of Education.

On March 22, 1985 the Livingston Board timely filed an answer to the petition denying that it had violated the petitioner's seniority rights when it reduced the number of Director of Guidance positions within the school district from three to two. The Board of Education contends that the Directors of Guidance at the senior high school and the junior high schools are in the same category for determining seniority rights upon a reduction in force for purposes of economy and that it correctly determined the seniority rights of the petitioner.

The case was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. on March 28, 1985.

A pre-hearing conference was held on May 21, 1985, at which time it was ordered inter alia that notice of the pendency of this proceeding and an opportunity to intervene be given to all persons over whom petitioner claims seniority rights. On or about July 1, 1985, Kenneth Riker intervened through his counsel Wayne J. Oppito, Esq. Evans J. Herman did not intervene in this proceeding despite written notice of the pendency of the instant proceeding.

The sole issue in this proceeding is whether the Director of Guidance position at the senior high school and the Directors of Guidance positions at the two junior high schools within the Livingston School District must be considered as being in the same category in determining seniority rights in a reduction in force by the Livingston Board of Education.

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At the commencement of the hearing in July 23, 1985, the parties agreed to a stipulation of facts. The following facts are uncontested and are hereby adopted as part of my **FINDINGS OF FACT.**

1. The petitioner, Donald Turner, was initially employed in the Livingston School District in the position of Director of Guidance at the senior high school, commencing with the 1978/79 school year. Mr. Turner served as the Director of Guidance at the senior high school continually from the time of his initial employment until June 30, 1985.

2. Evans Herman was initially employed at the Livingston School District in the position of Guidance Counsellor at the senior high school at the outset of the 1966/67 school year. He became Director of Guidance assigned to the Heritage Junior High School at the outset of the 1972-73 school year. He still serves as Director of Guidance assigned to what is now called the Heritage Middle School.

3. Kenneth Riker was initially employed in the Livingston School District as a teacher of social studies at the high school at the outset of the 1956-57 school year. He became a Director of Guidance assigned to the Mount Pleasant Junior High School in the 1961-62 school year and continued at that position through the 1973-74 school year. In 1974-75 school year he became an Administrative Assistant and in 1977-78 school year he became a Vice Principal, a position he still holds. The employment records of all three men are annexed hereto. All three men possess certificates as Directors of Pupil Personnel Services. The three certificates are annexed hereto.

5. A job description dated March 1, 1978, was written for the Director of Guidance at the senior high school. Said job description is attached hereto.

6. A job description was written for the Directors of Guidance who were serving at the junior high schools. Said job description, undated, is attached hereto.

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7. The three documents, the 1978-79 Allocation of Duties for Livingston High School Administrators, the Allocation of Responsibility for Livingston High School Administrators for 1984-85, and the document entitled School Organization are annexed hereto.

8. On or about January 14, 1985, the Livingston Board of Education was ordered to abolish one position of Director of Guidance and annexed hereto are the Board documents.

9. On or about January 29, 1985, petitioner was advised by the Superintendent of Schools that he would not be re-employed for the 1985-86 school term as a result of the abolishment of one position of one Director of Guidance which had taken place on or about January 14, 1985.

10. The employment contract for Kenneth Riker for the years 1965/66, 1966/67, 1967/68, 1968/69, 1969/70, 1970/71, 1972/73 are annexed hereto. The letter notifying Mr. Riker that the Board had received his application to become Director of Guidance in 1985/86 is annexed hereto.

11. The resolution appointing Mr. Turner and his contract for the years 1980/81 and 1981/82 are annexed hereto.

12. The evaluation of all three men as Directors of Guidance are annexed hereto.

13. Two letters dated February 15, 1985 and March 27, 1985, are annexed hereto.

14. Mr. Turner is represented by the Assistant Administrators Association. Mr. Riker is represented by the same association in his capacity as Vice Principal and Mr.

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Herman, until June 30, 1985, was represented by the Livingston Education Association in his capacity as Director of Guidance from July 1, 1985 through the present. In his capacity as Director of Guidance he has been represented by the Assistant Administrators Association.

The limited factual dispute in this matter centers around whether Donald Turner's position as Director of Guidance at the senior high school is functionally distinct in terms of professional duties and responsibilities from the positions of Director of Guidance at the two junior high schools within the school district.

The petitioner, Donald Turner, testified that as Director of Guidance at the senior high school since 1978, his duties were primarily of a supervisory nature with a very attenuated counseling function. The counseling of students was limited to the exceptional and problem cases and consequently the Livingston High School Director of Guidance did not have a student counseling caseload. The Director of Guidance at the junior high schools, on the other hand, had a full student counseling caseload and the supervisory functions as a result of the counseling caseload were much more limited. To illustrate the distinctions between the Director of Guidance positions at the high and junior high schools, the petitioner pointed out the functional divergences between the unofficial written job descriptions for the Director of Guidance at the senior high school (J-7 in evidence) and the Director of Guidance at the junior high school (J-8 in evidence). He further pointed that the Director of Guidance at the high school was a 12-month appointment as opposed to a 10-month appointment at the two junior high schools. The Livingston Senior High School Guidance Director's salary was considerably higher than the Guidance Directors salaries at the two junior high schools in the district.

The Board of Education Secretary and Assistant Superintendent, Bernard M. Roper, and the Deputy Superintendent of Schools, Herbert R. Andlauer, both testified in substance that the "core functions" of the Director of Guidance at both the senior high school and the two junior high schools were essentially identical. Both testified that the

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two written job descriptions for the Directors of Guidance at the senior high school and the junior high schools were never officially accepted by the Board of Education. The job description for Director of Guidance at the senior high school was prepared by the retiring Director of Guidance in 1978 to assist the Board of Education in its professional search for a replacement Director of Guidance. The job description for the Directors of Guidance at the junior high schools was prepared in 1984 by the two Directors of Guidance at the junior high schools for informational purposes. Both educators testified that the greater supervisory/administrative functions became part of the high school position primarily due to the fact that the high school guidance department consisted of six guidance counselors and the Director, whereas the junior high school guidance departments consisted of two guidance counselors and the director.

Based upon the record, I am satisfied and I so **FIND** that there is in fact no significant functional distinction in terms of duties and responsibilities between the position of Director of Guidance at the high school and the positions of Director of Guidance at the two junior high schools. The overwhelming majority of the functions are similar if not identical. Instructively, the qualifications for Director of Guidance, whether at the senior high school or at the two junior high schools are the same. All three Directors of Guidance positions require the Education Services Certificate with a Director of Pupil Personnel Services endorsement, (J-1 in evidence).

To assist the Boards of Education in determining which individuals are to be affected by a reduction in force, as in the instant case, the Commissioner of Education adopted revised seniority regulations in 1983. The pertinent regulation is N.J.A.C. 6:3-1.10(b) which provides in pertinent part as follows:

> Seniority, pursuant to N.J.S.A. 18A:28-9 et seq., shall be determined according to the number of academic or calendar years of employment, or fraction thereof, as the case may be, in the school district in specific categories as hereinafter provided.

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N.J.A.C. 6:3-1.10(l) establishes several specific categories in which seniority be earned.

N.J.A.C. 6:3-1.10(l)17 further provides for a separate seniority category for each specific educational service endorsement issued by the State Board of Examiners and listed in the State Board rules dealing with teacher certification (N.J.A.C. 6:11).

N.J.A.C. 6:11-12.12 establishes a specific educational service endorsement for the position of Director of Student Personnel Services. N.J.A.C. 6:11-12.12 states in pertinent part:

> (a) This endorsement is required for any person who is assigned as a director, administrator or supervisor of guidance and student personnel services of a school system, including the supervision of educational activities in areas related to and within the guidance program.

Finally reference must be made to N.J.A.C. 6:3-1.10(l)15 which distinguishes "secondary" from "elementary" and which provides in pertinent part:

> Secondary. The word "secondary" shall include grades 9-12 in all high schools, grades 7-8 in junior high schools, and grades 7-8 in elementary schools having departmental instruction. . . . Any person employed at the secondary level in a position requiring an educational services certificate or a special subject field endorsement shall acquire seniority only in the secondary category and only for the period of actual service under such educational services certificate or special field endorsement.

In addressing the difference between the elementary and secondary categories, the Commissioner of Education has emphasized the language in the aforecited N.J.A.C. 6:3-1.10(l)15. In Capodilupo v. Board of Education of West Orange, Essex County, 1985 S.L.D. _____ (March 19, 1985), Commissioner's Decision (May 3, 1985), the Commissioner of Education held that a tenured teacher employed in the secondary category only, could not "bump" a tenured teacher in the elementary category with less employment in the district. Significantly, it is in that case that the Commissioner of

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Education held that any person employed at the secondary level in a position requiring an educational services certificate or a special subject field endorsement shall acquire seniority only in the secondary category and only for the period of actual service under such educational services certificate or special field endorsements.

Applying the seniority regulatory framework to the instant matter, it is uncontested that all three affected Directors of Guidance were employed at the secondary level in the Livingston School District. Petitioner, Donald Turner, was assigned as Director of Guidance at the senior high school, grades 10-12. The intervenor, Kenneth Riker, and nonintervenor Evans Herman were assigned as Director of Guidance to the two junior high schools. N.J.A.C. 6:27-1.2(a) specifically classifies junior high schools and senior high schools as secondary schools. Consequently, all three Directors of Guidance must be placed in the secondary category of Director of Pupil Personnel Services for seniority determination purposes.

In the present case, Donald Turner has seven years of service as a secondary Director of Pupil Personnel Services. Evans Herman has 13 years of service in the same category. Intervenor, Kenneth Riker has 24 years of services in the same category having initially been employed in the position in the 1961-1962 school year and aapplying the "tacking provisions" of N.J.S.A. 18A:28-6 and N.J.A.C. 6:3-1.10(h). Therefore, it is clear that the petitioner, Donald Turner, was the least senior individual in that category and that the Board of Education properly determined the seniority question upon its reduction in the number of Directors of Guidance from three to two on January 14, 1985.

Petitioner's counsel's argument that the appropriate seniority category in this matter is that of Supervisor is misplaced. N.J.A.C. 6:11-10.9 specifically requires supervisors to hold administrative and supervisory certificates. It has already been stipulated by all parties that the certificate/endorsement required for Director of Guidance in the Livingston School District is an Educational Services Certificate with the Director of Student Personnel Services endorsement. Consequently, the "Supervisor" category is inappropriate and therefore petitioner's reliance on In the Matter of Richard Walldov, et al. v. Board of Education of East Brunswick, 1985 S.L.D. ____(May 10, 1985), which deals with the seniority rights of supervisors, is not relevant to this matter.

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Accordingly, for all the foregoing reasons, it is hereby **ORDERED** that the petition of Donald Turner seeking reinstatement to the position of Director of Guidance at the Livingston senior high school be and is hereby **DENIED,** and the decision of the Township of Livingston Board of Education in determining the instant seniority question is **AFFIRMED.**

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

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

October 15-1985
DATE

TIMOTHY N. TUTTLE, ALJ

Receipt Acknowledged:

OCT 17 1985
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

OCT 18 1985
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

tw/e

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DONALD TURNER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LIVINGSTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

It is observed that exceptions were timely filed by petitioner pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c. Therein petitioner contends that the duties performed by the Director of Guidance at Livingston High School are administrative and supervisory and, thus, are functionally distinct from the duties and responsibilities carried out by the directors of guidance at the two junior high schools within the district. Petitioner avers that the senior high school position is a twelve-month position, unlike the junior high school positions, which are eleven-month appointments. Petitioner argues that the senior high school position is administrative in that it requires only occasional counseling while, in contrast, the junior high school directors of guidance carry a full counseling load. In addition, the senior high school position entails the director's evaluating all other counselors and staff while at the two junior high schools, personnel evaluations are conducted by the principal, with some input from the guidance directors. Petitioner further points out that the senior high school guidance director's salary is considerably higher than the salaries of the guidance directors at the two junior high schools. Petitioner cites Richard Walldov et al. v. Board of Education of the Township of East Brunswick, decided by the Commissioner May 10, 1985, aff'd State Board November 6, 1985, for the proposition that a department chairperson of guidance at a junior high school could not assert seniority in the position held by his high school counterpart because the two positions were separate for seniority purposes. (Petitioner's Exceptions, at p. 9)

Upon a careful review of the record and contrary to the ALJ's determination, the Commissioner finds that the position of Director of Guidance at Livingston Senior High School entails duties and responsibilities of an exclusively administrative nature and that the position therefore qualifies as a supervisory position under N.J.A.C. 6:3-1.10(1)10.

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When the Livingston Board of Education was ordered to abolish one of three positions of Director of Guidance in the district on January 14, 1985, a reduction in force occurred which served to trigger a determination of seniority of those individuals affected by the reduction. Since the high school and junior high schools encompass grades seven through twelve, the ALJ incorrectly identified the three positions herein as being within the secondary category as defined in N.J.A.C. 6:3-1.10(l)15 and subject to the further application of N.J.A.C. 6:3-1.10(l)17, namely, additional categories of educational service endorsements issued by the State Board of Examiners. However, a careful examination of the duties of the positions in question clearly reveals that the position of Guidance Director at the senior high school is a supervisory position. Specifically, N.J.A.C. 6:3-1.10(l)10 dictates that each approved supervisory title shall be a separate category, which implies that tenure in such a position is separately accrued. In addition, N.J.A.C. 6:3-1.10(l)10 mandates that district boards of education shall adopt job descriptions for each supervisory position which sets forth the qualifications and specific endorsements required for such positions.

In the present case, the Commissioner initially notes that the record does not establish whether the written job descriptions for the guidance directors at the senior high school and at the two junior high schools have been officially adopted by the Board of Education. (Tr. 18, 43) Neither is it clear from the record whether either job description has been submitted to the county superintendent of schools for approval as an unrecognized title as required by N.J.A.C. 6:11-3.6(b). (Tr. 17-18) Further, nowhere in the record is there evidence that the directors of guidance at the two junior high schools were required to possess an Educational Services Certificate with a Director of Pupil Personnel Services endorsement. Even though all three directors of guidance in the district hold such certificates and endorsements, only the unofficial job description for the position of Director of Guidance at the senior high school listed the certification as a requisite qualification for the job.

A review of the record compels the Commissioner to disagree with the ALJ that

> "***there is in fact no significant functional distinction in terms of duties and responsibilities between the position of Director of Guidance at the high school and the position of Director of Guidance at the two junior high schools." (Initial Decision, ante)

The position of Director of Guidance at the senior high school cannot be equated with the junior high school Director of Guidance positions pursuant to N.J.A.C. 6:3-1.10(l)15 and 17 because the job functions differ profoundly. Thus, it is inappropriate to calculate their comparative seniority because the senior high school

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position is supervisory while the duties of Director of Guidance at the junior high schools could be performed without the Director of Pupil Personnel Services endorsement.

Based on the unofficial job descriptions and the testimony of the witnesses, it is the opinion of the Commissioner that the guidance directors at the junior high schools perform duties that do not require a Director of Pupil Personnel Services certificate because their positions entail little supervisory activity. The Commissioner notes Exhibit P-1 marked into evidence, a letter dated December 21, 1981 from a Mr. Riker to a Mr. Alan Berlin, indicating that, as of that date, the Director of Guidance at the high school assumed additional responsibilities. Petitioner stated at the hearing that he

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

The letter indicates that commensurate with these additional administrative duties his salary at that time was raised to that of vice principal. The transcript concurs with the fact that the salary of the Director of Guidance has historically been "equated to the level of Vice Principal" while at the junior high schools, it is not. (Tr. 34) In this regard, Mr. Andlauer, the Deputy Superintendent of Schools, was asked whether

> "the position of Director of Guidance at the high school proved different than the Director of Guidance at the junior high school?"

He replied, "Yes." (Tr. 34)

The Commissioner further notes that, when in circumstances such as those that prevail in the instant matter there exists no officially adopted job description, case law clearly provides that the nature of a position is dictated by the duties performed rather than by the title assigned. See, e.g. Lori Boehm v. Board of Education of the Township of Pennsauken, decided by the Commissioner June 19, 1984. See also Ann A. Quinlan v. Board of Education of the Township of North Bergen, 1959-60 S.L.D. 113, 114 (the duties performed rather than the title of a position must be controlling in determining whether a position is protected by tenure).

The record establishes that the Director of Guidance at the high school does not carry a full counseling load, but rather only occasionally intercedes in particular cases. (Tr. 46) By contrast, the junior high school guidance directors counsel as many as 200 students during any given year. (Tr. 27, 32) Further, it is clear from the record that the Director of Guidance at the high school conducts all evaluations of counselors and other staff in the high

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school guidance department himself, while at the two junior high schools, the principal conducts such evaluations with "input" from the directors. (Tr. 40-41, 44-45) Responsibility for such evaluations is unquestionably a supervisory function and, at Livingston Senior High School, that responsibility rests primarily with petitioner. Notwithstanding the contention of the deputy superintendent that the three positions are comparable, such contention is refuted by the job description, as well as his own testimony that the position of Director of Guidance at the high school "proved different than the Director of Guidance at the junior high school" (Tr. 34) and his admission that he had no evidence that Mr. Herman, one of the junior high school guidance directors conducted evaluations of counselors. (Tr. 40) Consequently, even though the titles of the three positions are identical, the duties clearly indicate that the position at the senior high school is the only one of the three that is supervisory, so petitioner is the only individual among the three concerned herein who may lay claim to seniority entitlement in such position.

Thus, it is determined that the position of Director of Guidance at the senior high school falls under the provisions of the "Supervisory" category, N.J.A.C. 6:3-1.10(1)10. However, the two junior high school Director of Guidance positions do not fall under the supervisory category; rather, it is determined that those positions fall under the "Secondary" category, N.J.A.C. 6:3-1.10(1)(15)iii, which states that:

> "Any person employed at the secondary level in a position requiring an educational services certificate or a special subject field endorsement shall acquire seniority only in the secondary category and only for the period of actual service under such educational services certificate or special subject field endorsement."

Finally, while the Commissioner concurs with petitioner that Walldov, supra, is apposite in the instant matter, petitioner is erroneous in his interpretation of the proposition for which that decision stands. Walldov dealt, inter alia, with a newly created position, Chairperson of Guidance, Grades 7-12, and determined that a junior high school guidance director position was not the same as the newly created position. Walldov is relevant in the instant matter only in the sense that, when a seniority determination is made following a reduction in force, the positions in question must be examined to determine whether they are "substantively different". (at 20)

For the reasons stated herein the Commissioner reverses the initial decision. He orders that petitioner be reinstated to the position of Director of Guidance at the Livingston Senior High School, and that he be provided any differential in salary, benefits and emoluments that may have arisen as a result of improper denial of said position. Further, he directs that written job descriptions for both the senior high school and junior high school Director of

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Guidance positions be submitted to the Board for its approval and adoption as well as to the county superintendent for approval as an unrecognized title as required by N.J.A.C. 6:11-3.6(b).

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

November 26, 1985

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DAVID BRYAN AND THE MAINLAND TEACHERS' ASSOCIATION,

PETITIONERS-RESPONDENTS,

V.

BOARD OF EDUCATION OF THE MAINLAND REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY,

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, November 28, 1983

For the Petitioners-Respondents, Selikoff & Cohen, P.A.
(Steven R. Cohen, Esq., of Counsel)

For the Respondent-Appellant, Donio, Greco & Donio, P.A.
(Louis J. Greco, Esq., of Counsel)

Petitioner-Respondent Bryan is a tenured teaching staff member employed by the Mainland Regional High School Board of Education. For five football seasons, commencing in 1972, Mr. Bryan also served, amidst controversy and criticism, as head football coach for the Mainland Board. At the conclusion of the 1976 football season, he was removed as coach. His request to serve as assistant football coach the following year was rejected and an out-of-district coach was selected instead. Following his removal as football coach, Mr. Bryan coached wrestling and basketball. In December, 1981, the new Mainland head varsity football coach offered Mr. Bryan the position of assistant football coach at Mainland for the 1982-83 school year, but Mr. Bryan declined to accept that position because of earlier difficulties he had encountered coaching football for the Mainland Board. Thereafter, in August, 1982, he was approached by the head varsity football coach for the Pleasantville Board of Education and asked to be assistant football coach for the 1982 football season. Mr. Bryan was assured by the Mainland Superintendent of Schools on two separate occasions that there would be no difficulty securing approval for his release to the Pleasantville Board, and the Pleasantville Board approved Mr. Bryan's appointment at a salary of $1,100 for the part-time coaching position.

On September 1, 1982, Mr. Bryan began coaching at Pleasantville. However, he stopped coaching on September 7, 1982, when he was informed by the Mainland Superintendent that approval of his request to coach at Pleasantville would not be appropriate because football vacancies existed at Mainland and that, accordingly, it would be recommended that permission be denied. When further inquiry by Mr. Bryan disclosed that all football coaching positions at Mainland had been filled, he pressed for a reason why permission to coach at Pleasantville was not forthcoming. In

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response, the Personnel Committee of the Mainland Board articulated two reasons: 1) that the Mainland and Pleasantville football teams are rivals and 2) that because some members of the Mainland football team are also members of the Mainland basketball team, it would be inappropriate for them to see Mr. Bryan coaching for a competing team. Mr. Bryan was advised by letter dated September 20, 1982, P-9 in evidence, that the Mainland Board decided to sustain the Superintendent's decision to deny him permission to coach football at Pleasantville.

In a petition of appeal filed with the Commissioner of Education, Mr. Bryan challenged this decision as arbitrary and capricious and violative of his contract and due process rights under the state and federal constitutions. He sought an order restraining the Mainland Board from withholding consent for him to coach football at Pleasantville or any other school in this state and an award of damages in the amount he would have earned coaching at Pleasantville. Hearings were held in this matter on June 7 and June 8, 1983. An Initial Decision was rendered October 11, 1983, wherein the Administrative Law Judge (A.L.J.) concluded that the Mainland Board's refusal to approve Mr. Bryan's release as an assistant football coach to the Pleasantville Board of Education was arbitrary and capricious both because the decision was not founded upon a need for coaching personnel at Mainland, and because uncontested testimony had revealed that the Mainland Board had developed a consistent pattern and practice, not only of employing out of district personnel to coach Mainland's athletic programs, but also of releasing its own teachers to coach for other school districts. The A.L.J. recommended, and the Commissioner agreed, that the Mainland Board be ordered to refrain from arbitrarily denying Mr. Bryan its consent to coach part-time for Pleasantville or any other surrounding school district. No appeal has been taken from this decision.

However, based upon the Commissioner's decision in Livingston v. Wall Twp., 1980 S.L.D. 1321, the A.L.J. further found that no contractual relationship existed between Mr. Bryan and the Pleasantville Board to support an award of damages and therefore recommended that Mr. Bryan's request for monetary relief be denied. The Commissioner rejected the A.L.J.'s recommendation. He found the positive action taken by the Pleasantville Board to employ Mr. Bryan, together with the Superintendent's preliminary consent and Mr. Bryan's assumption of coaching duties, was sufficient to distinguish the facts in this case from the facts in Livingston, in which no concrete offer of employment was made by the Board and no coaching duties were performed. Accordingly, he directed the Mainland Board to pay Bryan $1,100, the amount he would have earned coaching for the Pleasantville Board.

The Mainland Board has appealed this award of money damages. The State Board concludes that the relief was proper and that the award should be upheld. However, because the State Board did not have the opportunity to review the Livingston decision and because the State Board concludes that the Commissioner's treatment of the damage issue, both in that case and in the instant case, was

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inappropriate, the State Board believes that it is necessary to articulate its reasons for recommending that the damage award in this case be sustained.

The regulation in effect at the time of Mr. Bryan's request to coach an interscholastic athletic program in another New Jersey school district, N.J.A.C. 6:29-3(d), provided in pertinent part:

> School districts shall be permitted to employ certified and qualified, full-time teaching staff members of other New Jersey school districts to work on a part-time basis in the co-curricular interscholastic athletic program provided that:
>
> 1. The employing district can demonstrate annually to the County Superintendent that an emergency situation exists;
>
> 2. Part-time position has been properly advertised regarding such part-time employment;
>
> 3. Both local boards of education are in agreement regarding such part-time employment;
>
> 4. Approval of the County Superintendent shall be obtained prior to such employment by the local board of education.[1]

The Mainland Board argues on appeal that the four steps detailed in the regulation were not completed in this case and that, hence, no valid agreement existed between Mr. Bryan and the Pleasantville Board upon which to predicate the Commissioner's determination that his earlier decision in Livingston did not control. In Livingston, a full-time teacher in the Wall Township School District sought approval of the Wall Township Board of Education to coach for the Asbury Park School District. It had been demonstrated to the satisfaction of the County Superintendent that an emergency situation existed in Asbury Park, but that board did not make an offer of employment to Livingston because officials in Wall Township Board would not be forthcoming. Thus, Livingston never assumed coaching responsibilities in Asbury Park. The Commissioner, while finding that the duty to provide a constitutionally sound educational program, of which interscholastic sports is a part, is grounded in the state constitution, held that the right of a teacher to employment designed to fulfill that goal derives exclusively from his contract with the board for whom he provides

[1] We note that N.J.A.C. 6:29-6.3(d) was deleted effective November 7, 1983. See 15 N.J.R. 1152(b), 1860(c). Under the new regulation, N.J.A.C. 6:29-6.3(b), school districts are permitted to employ any holder of a New Jersey teaching certificate to work in the interscholastic athletic program provided that the position has been advertised. Thus, the requirements contained in N.J.A.C. 6:29-6.3(d) have been eliminated.

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coaching services. The Commissioner found no contract in Livingston, and thus no basis upon which to award money damages because no valid offer of employment could be made by Asbury Park without the Wall Board's consent.

In considering the instant case, the Commissioner noted that there are indicies of contract present here that were absent in Livingston --the repeated indications by the Mainland Superintendent that he would recommend approval to the Mainland Board, a concrete offer of employment by the Pleasantville Board as an assistant football coach at Pleasantville at a salary of $1,100, and the assumption, briefly, of coaching duties. But, here too, the prerequisites set forth in N.J.A.C. 6:29-6.3(d) could not be satisfied so long as approval of the proposed employment was withheld by the releasing board. Since such approval is a prequisite to the creation of a valid contract, this defect defeats a finding of contract, and so, recovery based on contract theory, in this and every instance where the inability to consummate a contract is attributable solely to the arbitrary conduct of the very party seeking to avoid fiscal responsibility for the teacher's monetary loss. While the terms of the contract proposed in this case and Mr. Bryan's assumption of duties thereunder are relevant in assessing his entitlement to damages, we conclude that they should be considered only insofar as they furnish proof that he would have been employed by Pleasantville at an ascertained salary were it not for the arbitrary conduct of the Mainland Board, and that hence his injury is not speculative, but real. We base recovery for that injury, however, not upon the presence of a contractual relationship between Mr. Bryan and another board of education. We find that recovery in damages depends instead upon Bryan's employment relationship with Mainland Board and the Board's duty, implicit in that relationship, as in all matters of discretionary decision making, to respond in a reasonable, responsible and unarbitrary manner to legitimate requests to pursue outside activities, particularly where such activities are not incompatible with an individual's teaching responsibilities and where, as here, the activity proposed is one that is expressly sanctioned, indeed encouraged, by the regulations governing the administration of New Jersey's public schools. N.J.A.C. 6:29-6.3(b); cf. Thomas v. Morris Board of Education., 89 N.J. Super. 327 (App. Div. 1965), aff'd 46 N.J. 581 (1966); Quinlan v. No. Bergen Board of Education, 73 N.J. Super. 40 (App. Div. 1962). We emphasize that where a board acts unreasonably to deprive a teaching staff member of a position within its school district, there has been no reluctance to redress the wrong by awarding the injured party a monetary amount adequate to make him whole. Rockenstein v. Jamesburg Board of Education., 1975 S.L.D. 191, aff'd State Board of Education, 1975 S.L.D. 199, aff'd 1976 S.L.D. 1167 (App. Div); Newmark v. Woodbridge Board of Education, decided by the Commissioner, August 2, 1983. Accountability for the consequences of a board's unreasonable and arbitrary conduct cannot be escaped merely because the position of which the complaining teacher is deprived is outside the district. We conclude that the arbitrary refusal of the Mainland Board to release Mr. Bryan to the

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Pleasantville Board, standing alone, supports the award of money damages in this case.[2] However, because a local board of education is a public entity, in order to balance the interests of both the teacher and the public, care should be taken to ensure that the details of the offered position meet an exacting standard of certainty in order to discourage potential petitioners from asserting claims based upon speculative employment situations. That standard of certainty has been met in this case.

For the reasons stated, the State Board affirms the decision of the Commissioner awarding Petitioner-Respondent damages in the amount of $1,100. The State Board notes that in recommending departure from the Livingston decision on the monetary award issues, we are not reexamining the result reached in that case. Thus, except for modifying that limited portion of the decision in Livingston, the State Board readily accepts the balance of that decision.

We express no view as to whether or not interest is due, or if such interest is due, what amount. Thus, we remand this matter to the Commissioner for the express limited purpose of making such determination.

S. David Brandt opposed in the matter.

Attorney exceptions are noted.

July 3, 1985

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[2] The State Board notes that the Board's refusal here was especially unreasonable since the board had an established practice of releasing its teachers to coach teams in other school districts.

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DAVID BRYAN AND THE MAINLAND TEACHERS' ASSOCIATION,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MAINLAND REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

This matter was reopened before the Commissioner pursuant to the July 3, 1985 State Board of Education decision which remanded the matter to him for the express limited purpose of making a determination on whether or not interest is due and, if so, what amount.

The parties were invited to brief the merits of awarding interest and in what amount. Their respective positions are summarized as follows. Petitioner Bryan (petitioner) argues that he is entitled to pre-judgment interest because there are overriding and compelling equitable reasons to justify such action. Namely, the State Board determined that he would have been employed by the Pleasantville Board at a salary of $1,100 "were it not for the arbitrary conduct of the Mainland Board, and that hence his injury is not speculative, but real." (Slip Opinion, at p. 6) Further, the State Board concluded that the arbitrary refusal of the Mainland Board to release petitioner to the Pleasantville Board, standing alone, supported the award of money damages and noted that "***the Board's refusal here was especially unreasonable since the board had an established practice of releasing its teachers to coach teams in other school districts." (Slip Opinion, at p. 8)

Petitioner cites Board of Education of the City of Newark v. Levitt and Sasloe, 197 N.J. Super. 239 (App. Div. 1984) in support of his entitlement to pre-judgment interest wherein the Court defined such interest as follows:

> "***Pre-judgment interest is in contemplation of law 'damages' for the illegal detention of a legitimate claim or indebtedness. [cite omitted] It therefore serves to 'indemnify the claimant for the loss of what the monies due him would presumably have earned if payment had not been delayed.' [cites omitted]" (at 246)

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Petitioner likewise believes he is entitled to post-judgment interest and cites the same decision as above wherein such interest is defined as:

> "***Post-judgment interest is based on the same rationale, enhanced, however, by the dimension of an adjudication of improper withholding. As a result of the adjudication, the debtor's obligation to pay is derived not only from the parties' transactional relationship but from the legal process itself." (at 246)

In terms of the rate of interest to be awarded, petitioner believes that 12 percent simple interest per annum is appropriate, particularly in light of R.4:42-11(a).

The Board is opposed to any award of interest, arguing that its action was at all times pursued in complete good faith and that the applicable regulation in this matter was changed by the State Board of Education while the case was in progress. The Board believes that the record supports that logical reasons existed for its denial of petitioner's request to coach outside the district and that the regulation in force at the time of the denial was strictly followed by the Board.

Upon a review of the record in this matter, the Commissioner determines that petitioner is entitled to both pre-judgment and post-judgment interest. The Board's arguments to the contrary are deemed to be without merit. The fact that the applicable regulations changed during the pendency of the case has no bearing on the matter. The State Board was fully cognizant of the change and decided the matter on the regulation in effect at the time of petitioner's request to the Board. (at pp. 4 - 5) The State Board's belief that the Mainland Board's refusal to permit petitioner to coach at Pleasantville was "especially unreasonable since the board had an established practice of releasing its teachers to coach teams in other school districts" (supra) is, in the Commissioner's opinion, overriding and compelling equitable reason to justify an award of pre-judgment interest in keeping with the previously-cited definition of such interest provided by the Court in Newark Bd. of Ed. v. Levitt and Sasloe, supra.

The Commissioner grants petitioner's request for 12 percent simple interest per annum. In the absence of any controlling regulations or prior decisions rendered by the Commissioner setting forth the rate of pre-judgment interest, the rate requested by petitioner is deemed reasonable. The Commissioner notes, however, that regulations regarding pre-judgment interest are currently pending before the State Board. During the pendency of these regulations before the State Board, R. 4:42-11(a) shall be applied.

As regards post-judgment interest, the Commissioner determines that such interest shall be paid at 12 percent simple interest per annum. See Levitt and Sasloe v. Bd. of Ed. of Newark, decided by the Commissioner January 31, 1985, aff'd State Board July 3, 1985 and Fischbach v. Bd. of Ed. of North Bergen, decided by the Commissioner January 28, 1985. Interest shall commence on the 61st

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day after the Commissioner's decision rendered on November 28, 1983 until August 30, 1985, the date upon which petitioner was provided by the Board the $1,100 due him. The Board herein was ordered on November 28, 1983 to compensate petitioner $1,100. No basis for controversy existed over the sum to be paid and no stay to the Commissioner's Order was granted in the matter during the pendency of appeal to the State Board.

The Appellate Court instructed in its November 29, 1984 decision in Levitt and Sasloe, Supra, that post-judgment interest cannot start until the precise amount of damages is fixed. The precise amount was stated by the Commissioner on November 28, 1983. Further, the Court expressed that reasonable time should be accorded to render payment. In Fischbach, supra, the Commissioner determined that 60 calendar days is a reasonable time to be accorded from the date of judgment to actual receipt of the award. Finally, given the fact that no stay was granted in this matter, the Commissioner determines that the Board wrongfully withheld the compensation owing to petitioner by not providing him until August 30, 1985 the sum of $1,100 ordered to be paid.

Accordingly, the Mainland Board is ordered to pay to petitioner forthwith, pre-judgment interest on the $1,100 owing to him. Interest is to be calculated at the rate of 12 percent simple interest per annum, commencing September 1, 1982 to November 28, 1983 in light of the fact he was deprived of the use of the coaching salary he would have earned as of September 1, 1982. Post-judgment interest shall be paid at the same rate commencing January 28, 1984, the 61st day following the Commissioner's order, to August 30, 1985, the date upon which petitioner was paid the $1,100 owing him.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 4, 1985

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5938-84
EDU 3504-85
AGENCY DKT. NO. 272-7/84
124-5/85
(CONSOLIDATED)

MARSHA LACHMAN,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL,
Respondent.

Susan Enste Holley, Esq., for petitioner (Ruhlman, Butrym and Friedman, attorneys)

Robert F. Blomquist, Esq., for respondent (Davis, Reberkenny and Abramowitz, attorneys)

Record Closed: September 11, 1985 Decided: October 28, 1985

BEFORE **JOSEPH LAVERY**, ALJ;

Marsha Lachman (hereinafter "petitioner") is a teacher in the employ of Cherry Hill Township Board of Education (hereinafter "Board"). Petitioner brings this appeal in order to have the Board's calculation of her seniority changed. That seniority is currently measured by the Board from 1976 and after. Petitioner asks that her years of employment during 1966-68 and 1971-73 be counted as part of her total seniority.

The Board opposes the change. It contends that it has determined petitioner's seniority in accord with the governing rules of the Commissioner of Education. The calculation was made in anticipation of layoffs during the 1984-85, as well as the 1985-86 school years. Petitioner avoided both layoffs through appointment from a preferred eligibility list.

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PROCEDURAL HISTORY

This matter was initiated by petition of appeal filed with the Commissioner of Education on July 11, 1984. Timely answer followed from the Board. The Commissioner of Education declared the matter a contested case, filing it with the Office of Administrative Law on August 8, 1984 (EDU 5938-84). Prehearing conference was convened on October 12, 1984, from which issued an Order of Inactivity dated October 22, 1984. A second Order of Inactivity issued on March 6, 1985.

Thereafter, petitioner filed her second petition arising from the same set of circumstances (EDU 3504-85). This case also was filed by the Commissioner of Education in the Office of Administrative Law, on June 10, 1985. At motion hearing on July 15, 1985, these two cases were consolidated and an Order issued which, among other things, memorialized that consolidation on July 22, 1985. Plenary hearing on the merits took place in the Trenton hearing rooms of the Office of Administrative Law on August 5, 1985. Briefs followed, the last of which was filed by respondent Board on September 11, 1985. On that date the record closed.

ISSUES

Despite numerous legal arguments pro and con, the general issue to be resolved is straightforward. The question is whether petitioner is entitled to have her seniority credited for those periods which preceded two resignations, the first in 1968, and the second in 1973. More specifically, it must be determined whether petitioner's seniority should include all times of employment prior to 1976 as well after that date.

Burden of Proof:

The burden of proof in this matter falls on petitioner, who must carry it by a preponderance of the credible evidence.

Undisputed Facts:

Most of the material facts are not in contention:

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Petitioner is a certified teacher, with tenure. She is credentialed to teach kindergarten through eighth grade. In 1966, respondent Board hired her as a teacher within that grade span. In September of that year, she began a two year employment which ended in June of 1968. She resigned effective August 26 of that year in order to accommodate her adoption of a child.

Once she was again free to enter the labor market, petitioner sought employment with respondent Board for the 1971 school year. She was told by Principal Byrne of the Clara Barton School that there would be an opening in March of 1971 due to a pending absence of a teacher on maternity leave. She resumed employment on that date and continued teaching there and at the Stockton School until February 19, 1973. Petitioner herself then left work for maternity leave on April 1, 1973 through June 30, 1973. On the latter date, she again resigned.

Subsequently, in the summer of 1976, respondent invited petitioner to apply for the "gifted and talented" teacher position. After selection from some 100 candidates, she was appointed to that title in September of that year. Her employment continued without abeyance in that capacity until 1979 when she was "bumped" from the title. However, her teaching was uninterrupted. She returned to the Stockton School, and resumed elementary grade teaching.

In 1984 petitioner received a "reduction in force" (RIF) notice which prompted her initial appeal in EDU 5938-84. She was appointed to a teaching post nonetheless for the 1984-85 year, from a preferred eligibility list. When a subsequent written notice was issued to her during that year as well as for the 1985-86 year, the second appeal followed in EDU 3504-85. Again, however, petitioner was spared layoff because of her standing on the preferred eligibility list. She continues in employment to the present time.

The sum of years for which petitioner was credited for purposes of seniority prior to 1976 amounts to four years and one month. She continued to earn seniority uninterrupted after that date, which amounted to eight years at the time of her appeal in 1984. In contrast, for purposes of salary, the Board calculated her location on the salary guide by crediting all years worked prior to 1976.

The instant appeals were prompted by RIF notices in 1984 and 1985.

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ARGUMENTS OF THE PARTIES:

Petitioner's Argument:

Petitioner argues that she resigned for maternity reasons in 1968 and 1971 after assurances by a Board official that she would retain her seniority accrued as a result of prior work time. The Board is now estopped from denying that seniority. Additionally, under various legal theories, the Board may not, as a matter of law, exclude the two separate non-continuous periods of her employment between 1966 and 1976, amounting to four years and one month. They have wrongly excluded that amount, and credited her with only 9 years as of June 30, 1985 (R-14).

Petitioner herself testified that when she asked for maternity leave to care for her adopted child, she was advised by William Laub, who handled personnel decisions for the Board. Mr. Laub told petitioner that she could not be granted such leave because the child was adopted. He demanded that she resign, but assured her she would lose no seniority for the time she had worked between 1966 and 1968.

On the next occasion, when she required maternity leave in 1973, Mr. Laub advised her to take such leave from April 1 through June of 1973 and then resign. Again, he guaranteed that she would not lose seniority for the time employed prior to her resignation.

Significantly, after she returned to employment with the Board in 1976, all salary standing and eventually all seniority were reallocated to her as Mr. Laub had promised. He informed her that with the acquisition of tenure, all seniority would be credited. Petitioner stressed that she was aware of no loss of seniority until the RIF notice of 1984. She had no reason to be aware of seniority loss because her salary adjustment and location on the salary guide gave credit to her service prior to 1976. Moreover, she was completely trusting of Mr. Laub, who acted on behalf of the Board.

Turning to the law, petitioner relies on numerous theories to support her position.

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In her petition, she contends there have been violations of N.J.S.A. 18A:11-1, N.J.S.A. 18A:27-4, both the Federal and State constitutions, and public policy of the State of New Jersey. Petitioner also refers to violations of the Federal Civil Rights Act and the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq. as well as N.J.S.A. 18A:6-6.

In addition, petitioner submitted a post-hearing brief offering a number of legal arguments:

First, the Board is prevented by the doctrine of estoppel from disavowing the representations of its agent, William Laub. His advice legally binds the Board since it is an "irregular" exercise of a basic power and not ultra vires or void. The Board was empowered to grant petitioner leaves of absence in 1968 and 1973, and did so. Not until later was resignation found to be inconsistent with that intent.

Second, the Board no doubt would have recorded her breaks in service as "leaves of absence" rather than compelling resignation had they anticipated such change. To retroactively change the rules governing actions of an earlier time would be patently unjust. Because of these equitable considerations, the resignation should be set aside and converted to leaves of absence in order to comply with the presently controlling regulations. Leaves of absence were routinely granted others from 1968 onward for maternity purposes. Moreover, the law permits rescission of resignation by the Board. Thus, equity demands that the original intent of the parties be honored, particularly since the resignations were for purposes of child care and maternity.

Third and finally, petitioner's claim was timely brought and was not moot simply because she has been provided employment for the 1984-85 and the 1985-86 school years. The matter did not ripen for disposition until notice of the 1984 RIF. Petitioner timely appealed thereafter. The question of mootness has already been determined in this case, and any decision now is governed by the "law of the case." What has once been litigated should not be reopened during the course of the same litigation.

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Respondent's Argument:

Respondent answers generally that the Board and its officials have acted in accord with the applicable law of the time. The most recent regulatory changes have caused them to calculate petitioner's seniority as now recorded.

As Administrative Assistant in charge of Personnel, William Laub introduced pertinent records with respect to petitioner's employment. He had been in the Board's employ since 1966, in that capacity. He knew personally that in the Spring of 1968 no leave was permitted for adoption purposes. Such leave was granted only for maternity or medical reasons. In 1973, maternity leave taken by petitioner was subject to the time frame set forth by contract. Such leave was then granted for a minimum of six months and a maximum of one year (P-4). Mr. Laub could not recall whether petitioner had been credited for seniority on her return from the two leaves. However, in 1979 when she attained tenure, she was credited for all those prior years for seniority purposes.

Mr. Laub could not recall any specific conversations with petitioner before her resignations. In the course of his work, he speaks with an inestimable number of teachers. However, it was possible that he may have advised resignation under the policy then governing. Prior to 1983, before receipt of the letter from County Superintendent Beinemen, the Board thought seniority covered all years of employment, as with salary credit.

Turning to the law, respondent Board, in pre-trial and post hearing briefs, argued a number of legal theories:

1. Petitioner's appeals are out of time. The occasion for her petitions was following each of the "forced resignations" of 1968 and/or 1973.

2. Petitioner brings claims which are essentially moot since her seniority rights are inchoate and not vested. With the resumption of employment in the 1984-85 and 1985-86 school years, her inchoate seniority rights fell short of application for a need for resolution.

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3. There is no record or even recollection of the representations ascribed to Mr. Laub. However, if such a representation took place, it would not now estop the operation of laws, or the rules promulgated pursuant to law by the Commissioner of Education and the State Board of of Education. Mr. Laub's statements to the contrary would not be binding. The controlling regulations are unambiguous: resignation cancels all prior seniority accrued.

FINDINGS OF FACT

Therefore, after considering the testimony previously set forth, and independently assessing the credibility of witnesses and parties, as well as reviewing the record as a whole, I make the following FINDINGS OF FACT:

As to UNDISPUTED facts, I FIND those designated on pages 2 through 3 of this opinion.

As to matters which are disputed or CONTESTED, pursuant to N.J.A.C. 1:1-16.3(c)7, I **FIND:**

1. Petitioner was advised by Mr. Laub, on behalf of the Board, before each occasion that she left employment, specifically in 1968 and 1973.

2. On each of these two occasions, Mr. Laub directed her to resign. He further assured her that she would retain the seniority she had accrued from all employment preceding her resignations.

ANALYSIS

The foregoing findings are derived from a positive assessment of petitioner's credibility, which emanated both from her demeanor and the content of her testimony. In re Perrone, 5 N.J. 514, 522 (1950). Ms. Lachman obviously had total recall of transactions which so definitively affected her livelihood. Mr. Laub, who has seen literally thousands of personnel over the years, testified in good faith that he simply had no recollection of the two interviews in 1968 and 1973.

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Further, petitioner is not time-barred in her appeal. She had no inkling at the times of her resignations that her seniority was in jeopardy. As envisioned by N.J.A.C. 6:24-1.2, petitioner first had notice of the order, ruling, or action complained of on the occasions of the 1984 and 1985 RIF's. It is not disputed that in both instances she followed that notice with appeals to the Commissioner of Education well within the requisite 90 days.

Nevertheless, this petition cannot be decided on the facts or on compliance with the 90-day rule. Despite the extensive legal arguments briefed by counsel, the dispute, as a matter of law, is not ripe for review. The controlling administrative interpretation of the school laws is unambiguous. Teachers possess no accrued, vested seniority rights which cannot be disturbed by N.J.A.C. 6:3-1.10, Blinderman, et al. v. Cherry Hill BOE, 1985 S.L.D. ____ (Aug. 19, 1985). More to the point, teachers possess only inchoate seniority rights until such time as a dismissal actually occurs, Hill v. West Orange Boe., 1985 S.L.D. ____ (Jan. 21, 1985, slip op. at p. 11). Thus, the preeminent legal fact is that petitioner has not to date been dismissed. Despite the RIF notices in 1984 and 1985, she has continued to teach in the title for which she has certification. A decision on seniority at this juncture would be advisory at best. There is no case in controversy. Such a decision would also be at variance with the foregoing administrative decisions of the Commissioner of Education, which are binding here.

In so resolving the appeal, it will be unnecessary to comment on the remaining arguments of counsel, except for the relevant "law of the case" argument proferred by petitioner. This doctrine would have more strength if asserted within the context of a criminal, as opposed to administrative proceeding. The latter is meant to be pragmatic, and to deal with all relevant argument and evidence. Nevertheless, assuming arguendo that delay for Judge McKeown's order has the ramifications ascribed to it by petitioner, the "law of the case" still need not control here. As applied in any forum to orders of an interlocutory nature, the doctrine is discretionary. It should be applied flexibly to serve the ends of justice. State v. Roldan, 100 N.J. 187, 205 (1985). That purpose would not be served by litigating a right which the Commissioner of Education has more than once ruled to be "inchoate," and dependent on actual dismissal.

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CONCLUSION

I **CONCLUDE,** therefore, after my review of the entire record, including an assessment of witness credibility, and in consideration of the findings and analysis set forth above, that:

Although petitioner has made timely appeal within the meaning of N.J.A.C. 6:24-1.2, the substance of the dispute is not ripe for review.

ORDER

I **ORDER,** therefore, that petitioner's appeal for a recalculation of seniority be, and hereby is, **DISMISSED.**

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

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

October 28, 1985
DATE

JOSEPH LAVERY, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

October 31, 1985
DATE

OFFICE OF ADMINISTRATIVE LAW

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MARSHA LACHMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon examination of the record, the Commissioner accepts and adopts as his own the judge's determination that the Petition of Appeal in the instant matter is timely pursuant to N.J.A.C. 6:24-1.2. However, given the factual circumstances of this matter, he is unable to accept the determination that the substance of the dispute is not ripe for review for the following reasons.

The judge is correct in stating that teachers possess only inchoate seniority rights but the Commissioner must modify the judge's conclusion that such rights are inchoate until dismissal actually occurs. Rather than being inchoate until dismissal actually occurs, (Blinderman et al., supra, and Hill, supra), the facts in this matter make it clear that seniority rights are inchoate until a reduction in force occurs which affects tenured personnel such as has transpired in this matter.

N.J.S.A. 18A:28-9 grants a local board of education the power to reduce the number of teaching staff members in a district whenever it judges it advisable to abolish any such positions for reasons of economy, reduction in the numbers of pupils, reorganization of the district or other good cause. N.J.S.A. 18A:28-10 mandates that dismissals resulting from any such reduction shall be made on the basis of seniority according to standards to be established by the Commissioner with the approval of the State Board. Further, N.J.S.A. 18A:28-11 requires that:

> "In the case of any such reduction the board of education shall determine the seniority of the persons affected according to such standards and shall notify each such person as to his seniority status***." (Emphasis supplied.)

In the present matter the Cherry Hill Board of Education acted on April 23, 1984 to reduce its teaching staff. Petitioner was one of the teaching staff members affected by this reduction and on April 25, 1984 she was duly provided notice of her seniority status as required by N.J.S.A. 18A:28-11. This notice further in-

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formed her that (1) she would not be reemployed for the 1984-85 school year, (2) she was placed on a preferred eligibility list and (3) her seniority status was eight years in the elementary category. (R-15; Tr. 36-37) See R-16 and Tr. 40-42 as this issue pertains to 1985-86.

It was in April 1984 that petitioner's seniority rights were no longer inchoate but were "vested" because it was at this point the Board was required by N.J.S.A. 18A:28-11 to determine and notify her of her seniority status since she was affected by the reduction in force. Hence, her Petition of Appeal challenging the seniority status accorded to her was timely, having been filed on July 11, 1984, and the matter was then ripe for adjudication, notwithstanding the fact that she was not actually dismissed as explained below.

N.J.A.C. 6:3-1.10(i) requires that:

> "Whenever any person's particular employment shall be abolished in a category, he or she shall be given that employment in the same category to which he or she is entitled by seniority. If he or she shall have insufficient seniority for employment in the same category, he or she shall revert to the category in which he or she held employment prior to his or her employment in the same category, and shall be placed and remain upon the preferred eligible list of the category from which he or she reverted until a vacancy shall occur in such category to which his or her seniority entitles him or her."
>
> (Emphasis supplied.)

The record in this matter clearly demonstrates that subsequent to petitioner being notified of her termination/dismissal and seniority status, she was eligible for "re-employment" for the 1984-85 school year because a vacancy occurred in the category to which her seniority entitled her (albeit she contested the accuracy of the eight years accorded to her by the Board). Regarding this, the Administrative Assistant for Personnel testified as follows:

> "Q. Mr. Laub, did any elementary vacancies develop in the district prior to the start of instructional period for the 1984/85 school [year]?
>
> A. They did.
>
> Q. And was Mrs. Lachman offered one of those vacancies?
>
> A. She was re-employed for the 1984/85 school year." (Tr. 40)

See Tr. 42 as this issue pertains to 1985-86.

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In summary, the record in this matter clearly demonstrates that petitioner's seniority status was not determined based on a speculative reduction in force but said status was, in fact, determined as a result of an actual reduction in force, as required by N.J.S.A. 18A:28-11 at which time she was placed on a preferred eligibility list. (N.J.A.C. 6:3-1.10(i)) A seniority status of eight years in the elementary category was accorded her by the Board, the number of years which she contests. Thus, the matter was ripe for adjudication at the time these events transpired. The fact that she was subsequently recalled when a vacancy occurred has no bearing on the substance of the dispute, namely, the accuracy of the actual amount of seniority accorded her. It is the amount of seniority status accorded her that controlled her reemployment in 1984 and 1985 and it will continue to control her employment in any subsequent year since she has already been subject to a reduction in force. Thus, a decision as to its accuracy is appropriate now, not at some future point when she is not reemployed.

The Commissioner will now examine the claims raised by petitioner regarding seniority credit for service in the district prior to tenure acquisition as the record contains sufficient information to render a determination on them. It has been clearly established that seniority entitlement accrues to tenured personnel and only has meaning when a reduction in force occurs. Howley and Bookholdt v. Bd. of Ed. of Ewing, decided by the Commissioner December 20, 1982, aff'd State Board June 1, 1983 Tenure is acquired only when the precise statutory requirements of N.J.S.A. 18A:28-5 are fulfilled. The statute reads:

> "(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.***"

The record clearly establishes that petitioner did not meet the requisites of the above statute until September 1979. Petitioner herself acknowledges this fact. (Tr. 18-19) It was only at the point of tenure acquisition that seniority became an outgrowth of that statute. Further, seniority credit/entitlement would be restricted to the time of service leading to petitioner's tenure acquisition.

While petitioner acknowledges that she acquired tenure in September 1979, she also states she believed the years of prior service under dispute herein would count for seniority purposes because of information received from the administrative assistant for personnel who had advised her on two occasions that, if she resigned and returned to the district, all prior service would count for salary placement and seniority credit.

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There is no dispute that petitioner was credited with all prior service for salary purposes. A board of education is free to take such action because by statute it is authorized to do so. (N.J.S.A. 18A:16-1) However, seniority credit may only be accorded pursuant to statute and code. Thus, even if a board were willing or "guaranteed" to recognize all prior service in the district for seniority purposes, the granting of credit for any service not leading to tenure would be prohibited by law.

When petitioner followed the advice of the administrative assistant for personnel regarding resignation, she acted at her own peril. The fact that she was misinformed does not compel that the mandates for seniority be set aside. A review of the record does not provide a scintilla of evidence that petitioner was coerced into resignation. See Tr. 21. Nor is there any evidence that the Board or any of its administrators acted in bad faith in this matter. The information provided to her regarding seniority was erroneous, but there is unrefuted testimony that the administrator believed his information to be true upon consultation with the Board's attorney until informed to the contrary by the County Superintendent. (Tr. 38; R-12)

Further, it needs to be stated that in 1968, petitioner had no recourse but to resign if she wished to care for her adopted child. There is no statutory right to such leave since she was not medically disabled. Nor was there a contract provision in the district that provided for leave for this purpose.

In the 1973 instance petitioner's own testimony indicates that the administrative assistant for personnel warned her that a leave could be granted only for one year. Her only statutory entitlement would have been the thirty days' prior and post delivery of her child unless a medically certified disability continued beyond that time. (See Zorfass, N.J. Superior Court, Appellate Division decision, DKT. No. A-322-84T6, October 30, 1985.) Petitioner testified that she was unsure that one year was sufficient for her and if offered an extended leave beyond one year, she would have taken it. (Tr. 11-13) Regarding this, it must be emphasized that, had the Board granted a leave longer than one year as she desired, and by testimony, would have taken, she would not have met the statutory requirements for tenure acquisition because she would not have completed more than three years of employment in four consecutive years. (N.J.S.A. 18A:28-5)

Accordingly, the Commissioner reverses the determination of the Office of Administrative Law that the matter was not ripe for review. He further determines that petitioner's seniority was properly calculated by the Board pursuant to statute and code.

COMMISSIONER OF EDUCATION

December 11, 1985

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
MOTION TO DISMISS, MOTION FOR SUMMARY DECISION, MOTION TO RESUME SALARY, and CROSS-MOTIONS TO STRIKE/COMPEL ANSWERS TO INTERROGATORIES
OAL DKT. NO. EDU 4857-85
AGENCY DKT. NO. 204-7/85
OAL DKT. NO. EDU 4384-85
AGENCY DKT. NO. 171-6/85

WILLINGBORO TOWNSHIP BOARD OF EDUCATION,
Petitioner,
v.
KATHLEEN KUNZ,
Respondent.
and
KATHLEEN KUNZ,
Petitioner,
v.
WILLINGBORO TOWNSHIP BOARD OF EDUCATION,
Respondent.

John T. Barbour, Esq., for petitioner/respondent Board (Barbour & Costa, attorneys)

Barbara E. Riefberg, for respondent/petitioner Kunz (Selikoff & Cohen, attorneys)

Record Closed: October 28, 1985 Decided: November 1, 1985

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PROCEDURAL HISTORY AND BACKGROUND FACTS

The procedural history of the matter together with the background facts as can be discerned from the pleadings, exhibits, and petitioner's affidavit in support of her motion for salary resumption are these. On July 12, 1985, the Commissioner received from the Board a cover letter dated July 11, 1985 and (1) "* * * the charges [against Ms. Kunz] and certification of determination from the Willingboro Board of Education * * *"; (2) proof of service upon counsel for respondent; (3) a Certification of Determination executed in the form of an affidavit on May 6, 1985 by the Board secretary that the Board determined on or about April 29, 1985 to find "* * * probable cause to credit the evidence in support of the charges * * *" and that the Board having found probable cause to credit the evidence determined that the charges against respondent if proven to be true by a preponderance of credible evidence, would warrant respondent's termination of employment or a reduction in her salary, and that it determined to forward the charges to the Commissioner for hearing; (4) an undated document entitled Certification of Charges Pursuant to the Tenured Employees Hearing Law purportedly on behalf of the Board in the form of a statement signed by Board counsel whereby counsel asserts that respondent has been charged with "unbecoming conduct or other just cause," that the charge is predicated upon the "sworn statement of Dr. Peter J. Romanoli, superintendent of Willingboro schools," that respondent elected not to submit a sworn statement to the Board in response to the charges,[1A] and that the Board determined to forward the charges to the Commissioner on April 29, 1985; and (5) the referred to affidavit of the superintendent of schools. That affidavit, executed under oath by the superintendent on March 25, 1985, is reproduced here in full:

> I, Peter J. Romanoli, being of full age and duly sworn upon my oath do depose and say:
>
> 1. I am the Superintendent of Schools of the Willingboro School District and have been for all times material hereto.
>
> 2. Kathleen Kuntz (sic), has been a teacher in the Willingboro School System for a number of years and currently holds a tenure as such.

[1A] According to the Board's brief it granted respondent until April 22, 1985 to file a written response under N.J.S.A. 18A:6-11.

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OAL DKT. NOS. EDU 4857-85 & 4384-85

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

ISSUES

The issues raised here are whether asserted tenure charges certified by the Willingboro Township Board of Education (Board) against Kathleen Kunz (respondent), a teacher with a tenure status in its employ, must be dismissed for procedural and substantive deficiencies; whether respondent's salary was unlawfully terminated; if the charges are not dismissed and her salary was not unlawfully terminated whether respondent's salary must be resumed under N.J.S.A. 18A:6-14; and, whether respondent is required to answer certain interrogatories propounded by the Board after it initiated formal charges against her.

INTRODUCTION

On July 12, 1985, the Commissioner of Education received tenure charges against respondent certified by the Board under N.J.S.A. 18A:6-10, the Tenure Employees Hearing Law. After respondent filed an answer thereto by which she denies the charges and seeks dismissal thereof upon the separate defense the Board failed to act within 45 days as is required at N.J.S.A. 18A:6-13, the Commissioner transferred the matter to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq. In the meantime, respondent instituted a separate action against the Board on June 17, 1984, claiming the Board unlawfully suspended her pay[1] on January 31, 1985 without charges then having been certified as is required at N.J.S.A. 18A:6-14. This case was also transferred to the Office of Administrative Law as a contested case. At a prehearing conference conducted in both cases on August 20, 1985 an Order was entered without objection to consolidate both cases for purposes of hearing and adjudication. A hearing is scheduled to commence November 12, 1985. During the discovery period which followed the prehearing conference, the Board propounded the controverted interrogatories upon Ms. Kunz. Respondent moved to strike the interrogatories while the Board cross-moved to compel respondent to file answers thereto. On October 16, 1985 respondent moved to dismiss the charges and for retroactive salary, plus interest, or, in the alternative, to require the Board to resume her salary. The record closed October 29, 1985 following receipt of the Board's answering brief.

---

[1]It shall be seen later that respondent was suspended from her teaching duties with pay on September 11, 1984. The suspension was continued on January 31, 1985 but without pay.

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3. On or around the beginning of the 1984-85 school year while present at the Willingboro Schools in her capacity as a teacher, the said Kathleen Kuntz was arrested by State Police and Local Police. I was informed that the charges were for possession and distribution of a controlled dangerous substance, which I was told was alleged to be methamphetamine.

4. I reported this incident to the Willingboro Board of Education at the next Board of Education meeting. At that meeting, the Willingboro Board of Education passed a resolution suspending Kathleen Kuntz with pay pending State action on these charges.[2]

5. In late January, 1985 while following up on this matter and while Kathleen Kuntz was still on suspension with pay, I was informed by the Board of Education Solicitor that he had been informed that Kathleen Kuntz had entered the Pretrial Intervention Program on or about November 2, 1984 with respect to these charges. The Board Solicitor further advised me that while she was in this program and if it was successfully completed, the matter would not be submitted to the Grand Jury.[3]

6. Therefore I took action, with the Board of Education President's concurrence to change the suspension of Kathleen Kuntz to be without pay as of February 1, 1985. That action was ratified by the Willingboro Board of Education at its next Public Board meeting.

[The record to date reveals that by letter dated January 31, 1985, the superintendent advised respondent as follows:

> You are hereby suspended without pay immediately for conduct unbecoming a teacher. It is my intention to bring tenure charges against you to remove you from your position as a teacher in the Willingboro school district and to

---

[2]The record reveals that the superintendent advised respondent by letter dated September 11, 1984, "You are suspended with pay pending the outcome of the charges which have been brought against you."

[3]In its brief in opposition to respondent's motion to dismiss, the Board erroneously states that the superintendent's affidavit contains the attestation that "* * * Ms. Kunz failed and refused to inform the Board of her entry into the Pretrial Intervention Program and while therein continued to collect her salary from November 2, 1985 until the Board's independent investigation discovered this fact in late January 1985." Obviously, the superintendent's affidavit does not make such an allegation nor can such an allegation be fairly inferred.

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remove your certification as a teacher.

If you have any questions, please contact me immediately for an appointment.]

7. The Willingboro Board of Education, at that time, further directed that the Board Solicitor and I investigate whether or not proceedings should be commenced pursuant to the Tenured Employees Hearing Act, NJSA 18A:6-10 et seq. Prior to that time, communications had been received from Kathleen Kuntz's legal representatives that they were requesting an opportunity to negotiate Kathleen Kuntz's separation from the Willingboro School District without the necessity of a Tenured Employees Hearing Act Proceeding.

8. Very little negotiations have been forthcoming from Kathleen Kuntz's legal representatives and no resolution has occurred.

9. The aforegoing statements made by me are true. I am aware that if they are knowingly false, I am subject to punishment.

The chronological history and background facts of the matter set forth above may be synthesized as follows. According to the superintendent's affidavit, it is alleged respondent was arrested at the Willingboro schools by State and local police at the beginning of the 1984-85 "school year." Official notice may be taken of N.J.S.A. 18A:36-1 which defines school year as beginning "* * * on July 1 and [ending] on June 30" as distinguished from the definition of academic year at N.J.S.A. 18A:1-1 which is defined to mean "* * * the period between the time school opens in any school district or under any board of education after the general summer vacation until the next succeeding summer vacation." Respondent was suspended from her teaching duties with pay by the superintendent and with the approval of the Board president, with the asserted subsequent ratification by the Board, "* * * pending the outcome of the [criminal?] charges which have been brought against you." Respondent remained suspended with pay until January 31, 1985 when the superintendent, with the approval of the Board president and subsequent ratification by the Board, continued respondent's suspension but terminated her salary. According to the January 31 letter of the superintendent, respondent's suspension was continued without pay "* * * for conduct unbecoming a teacher * * *", notwithstanding that the superintendent further advised respondent it was his " * * * intention to bring tenure charges against you * * *" (emphasis added). The superintendent attests, without specification, to the arrest of respondent by State and

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local police "On or around the beginning of the 1984-85 school year * * *" while she was present at one of the Board's schools. The superintendent further attests that he was informed by some unidentified person that respondent was charged with possession and distribution of a controlled dangerous substance. The superintendent further attests that Board counsel, relying upon some unidentified source, advised him that respondent entered pretrial intervention. The superintendent further attests that the Board charged him and counsel with the duty to investigate "whether or not proceedings should be commenced" against respondent. The superintendent finally attests to negotiations which were to have occurred between respondent's counsel and Board counsel although the superintendent does not identify the source of such knowledge. Nowhere in the affidavit does the superintendent attest that he filed charges of unbecoming conduct or other just cause against respondent. In fact, the terms conduct unbecoming or other just cause are used only in Board counsel's undated Certification of Charges document filed on behalf of the Board. The Board determined on April 29, 1985, ostensibly having found probable cause to credit the evidence, to certify the "charges" against respondent to the Commissioner. Nevertheless, the Commissioner did not come into physical possession of the charges and related documents until July 12, 1985, more than 70 days after the Board acted upon the certification.

In regard to the purported negotiations between counsel to the parties, the Board in opposition to respondent's motion to dismiss attached Exhibits B and C to its brief which are letters from respondent's counsel proposing to Board counsel alternate methods of resolving the matter other than through a full plenary hearing. The Board implies it did not file the certified charges with the Commissioner until July 12, 1985 as the result of respondent's "* * * requested forebearance * * * to negotiate a settlement of these matters." Consequently, the Board contends any delay between April 29 when it acted to certify the charges through July 12, when it actually forwarded the charges to the Commissioner, is a direct result of respondent's induced delay by the asserted requested forebearance. It must be noted that Exhibit B, respondent's counsel's letter of April 10, 1985 to Board counsel, begins "I [respondent's counsel] have attempted to contact you [Board counsel] by telephone over the past week but have not been able to speak with you. As yet, you have not returned my calls."

After the Commissioner transferred the matters as contested cases, a prehearing conference was held on August 20, 1985 during which it was agreed a plenary

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hearing would commence November 12, 1985. It was also agreed that the parties would complete necessary discovery by October 11, 1985 in anticipation of the November hearing date. The Board, as part of its discovery, propounded the following interrogatories, among others, upon respondent:

1. Please set forth in full and complete detail any and all basis for disputing any factful allegation contained in Superintendent Romanoli's Affidavit of March 25, 1985, including but not limited to, a point by point response as to the accuracy or inaccuracy of each factual allegation made therein.

   [Here follows three subparts to interrogatory 1.]

2. Please set forth in full and complete detail any personal knowledge which Kathleen Kunz had with reference to the allegations contained in the March 25, 1985 Affidavit.

   [Here follows two subparts to interrogatory 2.]

3. Were you arrested on or around the beginning of the 1984-85 school year?

   [Here follows five subparts to interrogatory 3.]

4. For each of the charges in each of the arrests, identified in answer to the prior interrogatory, specify the disposition thereof.

   [Here follows ten subparts to interrogatory 4.]

6. When did you first inform the Board of Education or any of its agents that you entered any Pretrial Intervention Program on any of the charges or arrests?

   [Here follows at least two subparagraphs to interrogatory 6.]

This concludes a recitation of all procedural steps of the matter and background facts upon which additional facts necessary to resolve the various motions made may be found.

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ARGUMENTS OF THE PARTIES

I

MOTION TO DISMISS

Respondent advances four points in support of her motion to dismiss. One, respondent contends the Board violated her statutory due process rights under N.J.S.A. 18A:6-10, -11, and -18 by certifying charges against her while failing to have before it a "charge" of unbecoming conduct or other just cause. Respondent says there is no charge in writing filed against her alleging unbecoming conduct or other just cause and, hence, there is no explanation of how her alleged arrest renders her unfit to teach or how it constitutes conduct unbecoming a teacher. Respondent contends that fundamental notions of due process require a specific notice of charges so that she may adequately defend. Two, respondent contends the charges must be dismissed because under N.J.S.A. 18A:6-11 the Board had no basis upon which to find probable cause to credit the evidence in support of an asserted charge. The superintendent's affidavit, respondent says, is hearsay and that the residuum rule, N.J.A.C. 1:1-15.8, requires a residuum of legally competent evidence for probable cause to credit the evidence to be found by the Board. Respondent notes in support of this argument that the Board did not have before it statements from the arresting officers nor did it have arrest reports. What the Board did have before it, respondent says, was the superintendent's affidavit. Respondent maintains that the statements made in the superintendent's affidavit in regard to an arrest and pretrial intervention, even if true, do not rise to the level of tenure charges under the Tenure Employees Hearing Law for which discipline could be imposed by the Commissioner. Three, respondent seeks dismissal of the charges against her because the Board failed to transmit the charges to the Commissioner within 45 days of the receipt of the superintendent's affidavit which, it is alleged, is in violation of N.J.S.A. 18A:6-13. Respondent explains that the 45-day limit in N.J.S.A. 18A:6-13 is to prevent a delay in the initiation of formal proceedings against an affected employee once the provisions of the Tenure Employees Hearing Law are invoked. Fourth, respondent seeks dismissal of the tenure charges on the grounds the Board violated her federal and state constitutional due process rights by failing to have noticed her of the specific charges and by failing to give her a pretermination hearing as is assertedly required under Cleveland Bd. of Educ. v. Loudermill, 470 U.S. ___, 84 L.Ed. 2d 494, 106 S. Ct. -(1985).

The Board, in opposition to the motion to dismiss, properly points out that N.J.S.A. 18A:6-18 applies only to persons under tenure in schools and institutions of higher

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learning and, consequently, has no application herein. The Board contends N.J.S.A. 18A:6-11 does not require two physically separate documents in the sense of a charge and a statement of evidence executed under oath to be filed with it and subsequently served upon respondent. The Board relies on the proposition that drug charge arrests can form the basis of suspension and ultimate certification of charges against a tenured employee and cites Ott v. Bd. of Ed. of Hamilton Twp., 160 N.J. Super. 333 (App. Div. 1978). The Board insists in this case that "* * * the charges were clear and specific * * *" against respondent.

Despite the Board's assertion to the contrary, respondent does not contend the Board did not find probable cause. Rather, respondent says the Board had an insufficient basis in the superintendent's affidavit to find probable cause because (1) the affidavit is allegedly hearsay and (2) the attestations otherwise made do not rise to the level of tenure charges for which a discipline could be imposed. In response to the hearsay assertion, the Board contends the residuum rule does not apply to a probable cause finding. The Board claims the superintendent's affidavit does provide a basis upon which probable cause to credit the evidence in support of the charge may be found.

The Board maintains it did not violate the 45-day requirement of N.J.S.A. 18A:6-13 because that statute must be read in pari materia with N.J.S.A. 18A:6-11. When done so, the Board says the 45-day requirement applies for the period between the time the affected employee siezes an opportunity to file with it an answer to the charge and a statement of evidence executed under oath in support thereof and the time it would then determine whether to find probable cause to credit the evidence. The Board implies it has no duty to immediately forward charges to the Commissioner for determination.

Finally, the Board, in opposition to respondent's allegation of federal and state due process constitutional requirements, explains that the hearing required by the Cleveland v. Loudermill Supreme Court ruling is to be afforded respondent commencing November 12, 1985 and, moreover, the Board posits the proposition that administrative agencies are without authority to decide constitutional violations.

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II

MOTION FOR SUMMARY DECISION

Respondent seeks summary decision in her favor that the suspension of her pay by the superintendent on January 31, 1985, an action later ratified by the Board, is unlawful under N.J.S.A. 18A:6-14 absent the simultaneous certification of tenure charges against her to the Commissioner by the Board. As pointed out by respondent, the Board did not take an action to certify tenure charges against her until April 29, 1985 and then it did not file such charges with the Commissioner until July 12, 1985. In addition to an alleged violation of N.J.S.A. 18A:6-14, respondent also alleges that the suspension of her pay on January 31 is in violation of N.J.S.A. 18A:6-10 because the suspension of her pay is equivalent to the Board imposing its own penalty upon her and that as such the Board usurped the exclusive authority of the Commissioner. Finally, respondent demands interest upon salary she alleges was improperly withheld from her by the Board and its agents since January 31, 1985.

The Board does not dispute respondent's view of N.J.S.A. 18A:6-10 nor of N.J.S.A. 18A:6-14. Rather, the Board seeks summary decision in its favor that respondent is not entitled to salary from January 31, 1985 because she failed to challenge her salary suspension in a timely manner under N.J.A.C. 6:24-1.2. The Board relies in this regard upon North Plainfield Ed. Ass'n v. Bd. of Ed., 96 N.J. 587 (1984).

III

RESPONDENT'S MOTION TO RESUME SALARY UNDER N.J.S.A. 18A:6-14

If respondent's motions to dismiss the charges and to have all pay returned to her are not granted, as alternate relief, she contends her pay must be resumed as of September 1, 1985 under N.J.S.A. 18A:6-14. Respondent calculates that date in the following manner. The Board acted to certify charges against her on April 29, 1985. N.J.S.A. 18A:6-14 provides that a board may suspend an affected employee without pay upon certification of charges to the Commissioner for determination. The statute further provides that if the charges are not determined by the Commissioner within 120 days of the certification, the affected employee's pay must resume. Respondent contends that April 29, 1985 is the starting date for the 120 day period of suspension without pay. That period would expire on August 27, 1985. Respondent's pay would, under these calculations, resume September 1, 1985 until a determination on the charges issues.

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The Board opposes respondent's motion for the resumption of her pay for three reasons. One, respondent, according to the Board, currently holds substitute full time employment otherwise unidentified as to the nature of the employment, pay earned and hours worked. Two, the Board asserts that because respondent "instigated her entry into the Pretrial Intervention Program to avoid an indictment," N.J.S.A. 18A:5-8.3 provides the 120 day pay loss limitation does not apply (Bb., at p. 10). Three, respondent has allegedly caused delays by not responding to it "to the charges/sworn statement of evidence" and by "inticing the Board not to forward certification of charges to the Commissioner of Education pending negotiations." Consequently, the Board reasons that the 120 day of suspension without pay should commence "the first paid day after the July 12, 1985 filing of the certification of charges with the Commissioner" which would be September 1, 1985. If this reasoning of the Board is correct, respondent would not be entitled to salary resumption under N.J.S.A. 18A:6-14 until December 30, 1985.

IV

MOTION TO STRIKE/COMPEL ANSWERS TO INTERROGATORIES

If the charges are not dismissed, respondent seeks to strike the interrogatories propounded upon her as set forth above upon application of N.J.A.C. 1:1-15.6 which provides that certain rules of privilege contained in New Jersey Rules of Evidence apply in contested cases and among the cited rules are Evid. R. 25, Self-incrimination. Respondent contends that answers to such interrogatories would require her to incriminate herself and to waive her constitutional right against self-incrimination. It is noted that an objection was also raised to Interrogatory 12 which has since been resolved by respondent's answer thereto in her response letter of October 14, 1985, to the Board's brief to compel her to answer the interrogatories.

The Board contends Evid. R. 25 does not automatically apply upon a naked assertion that such a privilege exists and cites In re Ippolito, 75 N.J. 435 (1978). Absent an explanation from respondent why the controverted interrogatories cannot be answered, the Board seeks an order to compel answers thereto. Moreover, the Board explains that no one of the interrogatories address alleged criminal conduct but are limited to the occurrence of arrests, entry into a pretrial intervention program, and factual disputes which, in her view, exist with the superintendent's affidavit.

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DISCUSSION, FINDINGS AND CONCLUSIONS

I

MOTION TO DISMISS

In regard to point one of the motion to dismiss, it is noted that employees of a local board of education who acquire the legislative status of tenure under N.J.S.A. 18A:28-5 may not be dismissed or have their compensation reduced unless charges are brought against them and then only after such charges are heard and determined in the manner provided at N.J.S.A. 18A:6-10 et seq., the Tenure Employees Hearing Law. Specifically, N.J.S.A. 18A:6-10 provides in part that

> No person [under tenure] shall be dismissed or reduced in compensation
>
> * * *
>
> Except for inefficiency, incapacity, unbecoming conduct or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have them preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided * * *

By virtue of this statute "* * * a written charge or charges, of the cause or causes of complaint * * *" must be preferred against the tenured employee and the charge must be signed by the person or persons making such charges prior to the invocation of formal proceedings against the teacher by the board. While it is true, as the Board points out, that N.J.S.A. 18A:6-11 does not require a charge to be set forth in a physically separate document from the document containing the written statement of evidence, a common sense reading of N.J.S.A. 18A:6-10, the threshhold statute for the invocation of the Tenure Employees Hearing Law, demonstrates that a written charge or charges, of the cause or causes of complaint against the affected employee, is to be the initiation of formal proceedings against that person. The charge may be separately stated or stated in the statement of evidence in support thereof. But the charge must be stated and signed.

In this case, the only mention of charge under N.J.S.A. 18A:6-10 against respondent is Board counsel's undated Certification document which represents that the

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Board certified charges of conduct unbecoming and other just cause against respondent. However, there is no Board resolution to show the Board preferred such charges against respondent. The superintendent in his affidavit makes no reference to his preferring charges of conduct unbecoming or other just cause with the Board against respondent. The Certification of Determination executed in the form of an affidavit on May 6, 1985 by the Board secretary does not mention the nature of the charges brought against respondent by anyone.

Board counsel does not explain when such charge or charges was or were preferred against respondent nor does he identify who signed such charge or charges. Furthermore, the document fails to address when such written charge or charges, signed by the person who preferred them against her, were submitted to respondent. Finally, while Board counsel's document is entitled a "Certification" it is a statement by Board counsel which makes the assertion respondent has been charged with unbecoming conduct or other just cause. The document itself contains none of the formalities required of a Certification in Lieu of Oath or in lieu of an affidavit or verification as set forth at N.J. Court Rules, Rule 1:4-4(b). Consequently, little weight is given here to the assertions made by Board counsel therein.

I **FIND** as a matter of fact that a written charge of the cause of complaint against respondent, signed by the person making such charge, was not filed against her with the Board as is required by N.J.S.A. 18A:6-10 and I further **FIND** Board counsel's undated "Certification" unpersuasive that respondent was formally charged by anyone with unbecoming conduct or other just cause. While few persons would disagree that drug charge arrests can form the basis of suspension and ultimate certification of charges against a tenured employee as stated by the Board, the suspension and ultimate certification of such charges must comply with the Tenure Employees Hearing Law. And, while the charge or charges need not be in physically separate documents a charge under N.J.S.A. 18A:6-10 must exist to initiate proceedings under the Tenure Employees Hearing Law.

Even if a charge was properly filed under N.J.S.A. 18A:6-10, point two of respondent's motion to dismiss regarding an insufficient basis to find probable cause has merit. N.J.S.A. 18A:6-11, in its present form as amended by L. 1975, c. 304, para. 1, effective February 7, 1976, provides, in part, as follows:

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> Any charge made against any employee of a board of education * * * shall be filed with the secretary of the board in writing, and a written of statement of evidence under oath to support such charge shall be presented to the board. The board of education shall forthwith provide such employee with a copy of the charge, a copy of the statement of the evidence and an opportunity to submit a written statement of position and a written statement of evidence under oath with respect thereto. After consideration of the charge, statement of position and statements of evidence presented to it, the board shall determine by majority vote of its full membership whether there is probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to warrant a dismissal or reduction of salary * * * In the event the board finds that such probable cause exists and that the charge, if credited, is sufficient to warrant a dismissal or reduction in salary, then it shall forward such written charge to the commissioner for a hearing pursuant to N.J.S. 18A:6-16, together with a certificate of such determination * * *

Black's Law Dictionary, 5th Edition, 1979, at p. 1081, defines probable cause as "Reasonable cause; having more evidence for than against. A reasonable ground for belief in the existence of facts warranting the proceedings complained of * * *". In State v. Bates, 202 N.J. Super. 416, 422-423 (App. Div. 1985) probable cause necessary for a police officer to make an arrest was defined as follows:

> " 'Probable cause' " for an arrest exists where a police officer has a well-founded suspicion or belief of guilt. That suspicion or belief may constitute something less than the proof need to convict and something more than a raw, unsupported suspicion. [citations omitted] As Chief Justice Weintraub so aptly pointed out * * * " 'the rule of probable cause is 'a practical, non-technical conception' designed to afford 'the best compromise that has been found for accomodating * * * often opposing interests' and that '[r]equiring more what unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice.' " [citations omitted]
>
> Moreover, probable cause need not equal the prima facie case required to sustain a conviction, State v. Desimone, 60 N.J. 319, 322 (1972), and need not be based solely on evidence admissible in a courtroom. State v. Fariello, 71 N.J. 552, 569 (1976). No more is demanded than a well-grounded suspicion or belief that (1) an offense is taking place or has taken place and (2) that the suspected individual is or was a party to it * * *

While the foregoing principles of probable cause emerge from criminal law, the principles are sufficiently liberal and nonrestrictive so as to be equally applicable when a board is determining whether probable cause exists to credit the evidence in

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support of an administrative tenure charge against an affected employee. The question to be addressed, then, is whether this Board reasonably suspected or believed respondent may have committed some wrongdoing and, if so, the inquiry then focuses upon the basis of such suspicion or belief. In this case, the only document the Board had before it was the superintendent's affidavit. That affidavit asserts respondent was arrested some time at the beginning of the 1984-85 school year while present at the Willingboro schools in her capacity as a teacher. As noted earlier, the 1984-85 school year, by statutory definition, began July 1, 1984 and, according to the superintendent's affidavit, respondent was then engaged in her duties as a teacher. The superintendent further attests that he "was informed that the charges were for possession and distribution of a controlled dangerous substance" but he does not identify from whom he received such information. The superintendent attests he was then "told" the asserted controlled dangerous substance was methamphetamine but, again, he does not identify his source of information. In paragraph 5 of the affidavit, the superintendent attests he was told by Board counsel, who himself had been informed by some unidentified person, that respondent entered the pretrial intervention program.[4] Finally, the superintendent admits in his affidavit he was directed by the Board to conduct an investigation of the matter with Board counsel to determine whether proceedings should be commenced under the Tenure Employees Hearing Law.

Upon the assumption such investigation was, in fact, conducted the superintendent surely could have learned the nature of the charges against respondent at the time of her arrest from some identifiable source and whether she in fact entered the Pretrial Intervention Program. It would have been a simple matter for the superintendent to identify the source of his information regarding the nature of the charges against respondent at the time of her arrest and it would have been an easy matter for the superintendent to identify the source of Board counsel's information respondent entered the pretrial intervention program. But, given the existing state of the affidavit filed with the Board, there is no possible way, absent reliance upon "* * * a raw, unsupported suspicion * * *", for the Board to have found probable cause to credit wrongdoing on the part of respondent.

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[4]Pretrial intervention programs are authorized at N.J.S.A. 2C:43-12 and are implemented under New Jersey Supreme Court guidelines which are set forth at Rule 3:28. Pretrial intervention is to be distinguished from conditional discharge for certain violations of the Uniform Controlled Substances Act. See N.J.S.A. 24:21-27.

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Contrary to respondent's argument the residuum rule, which requires some competent credible evidence to support ultimate findings of fact, does not apply in a probable cause determination. The rule does apply in the hearing and disposition of contested cases. N.J.A.C. 1:1-15.8. But even without application of that rule, the superintendent's affidavit does not provide a basis upon which probable cause may be found to support any charge against respondent other than she was arrested. The Board could not have evaluated the source of the superintendent's information regarding the nature of a criminal charge against respondent because the superintendent did not provide the Board with his source of information. Consequently, the Board relied only upon a raw, unsupported suspicion that respondent was charged with possession and distribution of methamphetamine. Board evaluation of the source of the superintendent's information is not a rigorous inquiry, nor is such evaluation process a hearing on the merits. Rather, the evaluation process preceding a probable cause finding requires nothing more than a well-grounded suspicion, but not based on rumor, that the affected employee has engaged in wrongdoing. An arrest, standing by itself, is not wrongful conduct by an employee. Accordingly, I **FIND** the Board had an insufficient basis before it upon which to find probable cause to credit the evidence in support of any charge against respondent even if a charge under N.J.S.A. 18A:6-10 had been preferred against her.

Even if a charge was properly filed under N.J.S.A. 18A:6-10 and even if the Board had a sufficient basis to find probable cause to credit the evidence in support of the charge against respondent, point three of the motion to dismiss, the failure of the Board to forward the charge in a timely manner to the Commissioner for determination, has merit. N.J.S.A. 18A:6-13 provides in full as follows:

> If the board does not make such a determination [to find probable cause and to forward such charge to the Commissioner for a hearing as required at N.J.S.A. 18A:6-11] within 45 days after receipt of the written charge[5] * * * the charge shall be deemed to be dismissed and no further proceeding or action shall be taken thereon.

It is clear, as urged by the Board, that N.J.S.A. 18A:6-13 must be read in pari materia with N.J.S.A. 18A:6-11. Thus, the applicable requirements of the latter statute must be examined which provide as follows:

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[5]The source of this statute is L. 1960, c. 136, para. 4 which at the time was codified at N.J.S. 18:3-26. Upon the repeal of N.J.S. 18:1-1, et seq. and adoption of N.J.S.A. 18A:1-1 effective January 11, 1968, the measure was assigned its present codification.

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> * * * In the event the board finds that such probable cause exists and that the charge, if credited, is sufficient to warrant a dismissal or reduction in salary, then it shall forward such written charge to the Commissioner for a hearing pursuant to N.J.S. 18A:6-16, together with a certificate of such determination * * *

N.J.S.A. 18A:6-16 requires the Commissioner "Upon receipt of such a charge and certification, or of a charge lawfully made to him * * *", to cause a hearing on the charge to be conducted within a 60-day period after the receipt of such charges. While the hearing requirement within a 60-day period following receipt of charges by the Commissioner has generally be considered directory as opposed to mandatory, it is clear that the legislative scheme underlying the Tenure Employees Hearing Law is intended to have tenure charges brought against employees finally determined in an expeditious manner. Otherwise, there would have been no need for the legislature to include in N.J.S.A. 18A:6-16, which statute is referenced in N.J.S.A. 18A:6-11, a requirement for a hearing to be conducted within 60 days from the date the Commissioner receives such charges lawfully made to him.

In this case, the affidavit of the superintendent was executed on March 25, 1985 and presumably filed with the Board on or about that date. The Board, having received no response from respondent by April 22, acted on April 29, 1985 to find probable cause and to certify the asserted charges to the Commissioner for determination under its obligation at N.J.S.A. 18A:6-11. However, the charges were not forwarded by the Board to the Commissioner until July 12, 1985.

Respondent contends that the Board's failure to forward the charges to the Commissioner until July 12 is a fatal defect in that the asserted charges should have been forwarded immediately to the Commissioner upon its determination to certify, not more than 70 days later. Respondent says the Board must act to certify charges and forward charges to the Commissioner within 45 days of its receipt of charges. The Board says the 45 day requirement applies only between the time it receives an answer from respondent in regard to the charges made against her to the time it determines to find probable cause and to certify the charges to the Commissioner for determination. The Board contends that once it makes a probable cause finding and acts to certify charges to the Commissioner for determination, the 45 day requirement of N.J.S.A. 18A:6-13 does not apply to the time between the date it so acts and the date the Commissioner receives the charges. Furthermore, the Board justifies its forwarding of the asserted charges to the

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Commissioner on July 12 on the grounds respondent's counsel requested forebearance of the Board not to forward the matter to the Commissioner for determination in order to seek a settlement of the matter.

If the position of the Board is valid that N.J.S.A. 18A:6-11 does not require it, in addition to finding probable cause to credit the evidence in support of a charge, to foward that charge forthwith to the Commissioner for a hearing, then it would be equally valid to hold that N.J.S.A. 18A:6-11 permits a board, having an administrative charge brought against one of their tenure employees, to engage in the formalities of initiating formal proceedings under the Tenure Employees Hearing Law up to and including a finding of probable cause and determining to certify the charges to the Commissioner, but fail to certify such charges to the Commissioner and thereby deprive the affected employee of a hearing on the merits of the charge. Such a proposition is not only prohibited by fundamental notions of fair play, it is also contrary to the entire legislative scheme underlying the Tenure Employees Hearing Law to afford the affected employee their day in court. The Board presents no authority which would allow it not to forward the asserted charges against respondent to the Commissioner until July 12, 1985, a period of 74 days after April 29, the date it acted to certify such charges to him for determination. On the other hand N.J.S.A. 18A:6-11, when read in conjunction with N.J.S.A. 18A:6-13 and 18A:6-16, show a legislative design to afford, as far as is practicable, a speedy resolution to administrative tenure charges brought against an employee. Thus, a board which finds probable cause and determines to certify charges to the Commissioner for determination must forward such charges forthwith to the Commissioner so that the formal hearing process may commence as quickly as possible.

Prior to the enactment of L. 1975, c. 304, a tenure charge filed with a board against an employee did not have to be supported by a statement of evidence executed under oath nor did the employee have a right to receive notice of the charge until the board determined whether the charge, then presumed true, would warrant dismissal or a reduction in compensation. At that time, if the board did not make such a determination within 45 days upon its receipt of the written charge, then the charge was deemed dismissed under N.J.S.A. 18A:6-13. Through the passage of L. 1975, c. 304, N.J.S.A. 18A:6-11 was amended so that a written charge now filed under N.J.S.A. 18A:6-10 against a tenure employee must be supported by a statement of evidence executed under oath, and the charge and statement of evidence must be served upon the affected employee.

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The employee, as a matter of right, has an opportunity, but no obligation,[6] to respond to the charge and to submit a statement of evidence under oath to the board. Only when the affected employee responds or fails to respond to the charge at the local level, may the board begin its deliberation of whether probable cause exists to credit the evidence in support of the charge. Shortly after the passage of c. 304, the question of how the 45 day requirement at N.J.S.A. 18A:6-13 would apply in light of the then new requirement of affording employees notice of the charge against them, a copy of the statement of evidence in support thereof, and an opportunity to respond at the local level was presented to the Commissioner in In re Marilyn Feitel, 1977 S.L.D. 451, 455-56, aff'd St. Bd. of Ed. 1977 S.L.D. 458. The Commissioner held that

> * * * [T]he forty-five day period provided the board in N.J.S.A. 18A:6-13 to determine whether to certify [the charges] to the commissioner begins to toll [run] when the employee files his statement or when the alloted time for the employee to file the statement [in opposition to the charge] expires * * *

While the Feitel decision does not address whether "to certify" means the board, in addition to acting by a recorded roll call majority vote of its full membership to find probable cause to credit the evidence and to determine to certify the charges to the Commissioner for determination, must cause such charges to be forwarded to the Commissioner forthwith for determination, a fair reading of Fietel and the legislative scheme underlying the whole of the Tenure Employees Hearing Law show otherwise.

Accordingly, I **FIND** the Board failed to complete the certification process by not filing the asserted charges against respondent with the Commissioner for determination within 45 days from April 22, the final date the response was due from respondent. Consequently, I **CONCLUDE** that the Board violated the 45 day requirement of N.J.S.A. 18A:6-13 and, as such, it has thwarted the underlying legislative intent of the Tenure Employees Hearing Law to ensure speedy resolution of tenure charges on the merits.

The Board's justification for not forwarding the matter to the Commissioner until July 12 on the basis that respondent's counsel suggested an alternative settlement is no excuse for it not to follow the statutory prescriptions in regard to its probable cause

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[6]See, Ott v. Bd. of Ed. of Hamilton Tp., 160 N.J. Super. 333, 338 (App. Div. 1978).

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finding, its determination to certify charges, and its act of causing such charges to be forthwith filed with the Commissioner. Moreoever, the exhibits submitted by the Board in support of this justification do not show respondent requested forebearance of the Board nor do they show respondent induced the Board to engage in delay.

In regard to point four of respondent's motion to dismiss that the Board violated her federal and state constitutional due process rights, Cleveland Bd. of Educ. v. Loudermill, supra, does not stand for the proposition advanced by respondent that under the Due Process Clause of the Fourteenth Amendment a property right to continued employment created by a state legislature cannot be extinguished by the procedures articulated by that legislative body. Rather, the principle of the case is that a property right " * * * created and * * * defined by existing rules or understandings that stem from an independent source such as state law * * *" 84 L. Ed. 2d - , may be extinguished by procedures set forth by the same state legislature so long as constitutionally required appropriate procedural safeguards of notice and an opportunity for hearing are afforded.

In this case, the New Jersey Legislature created a property interest in respondent's continued employment at N.J.S.A. 18A:28-5. That property interest, in the form of the legislative status of tenure, may be extinguished under the provisions of the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq., so long as the constitutionally adequate procedural safeguards of notice and hearing set forth therein are honored by the complaining board of education. It has already been found that the Board did not afford respondent the statutorily required notice of charges, it did not have a reasonable basis upon which to find probable cause to credit the evidence as is required at N.J.S.A. 18A:6-11, and it violated N.J.S.A. 18A:6-13 by failing to forward the charges to the Commissioner forthwith for a determination. Having found the Board violated various statutory procedural and substantive safeguards afforded respondent, there is no need to further address the constitutional arguments.

II

MOTIONS FOR SUMMARY DECISION

Respondent's motion for summary decision in her favor that the Board unlawfully terminated her pay on January 31, 1985, in violation of her statutory rights has merit. The Board's cross-motion for summary decision that respondent is barred from seeking relief for its violation of her statutory right to salary by application of the

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administrative time-bar at N.J.A.C. 6:24-1.2, which allows 90 days within which to challenge a board action is without merit and is denied.

The contraposition of N.J.S.A. 18A:29-1 that "No teaching staff member shall be entitled to any salary unless he is the holder of an appropriate certificate." is equally true. That is, respondent is a teaching staff member in the employ of the Board and she is in possession of an appropriate certificate. Hence, respondent is entitled by statute to salary. Such salary "* * * shall be payable in equal semi-monthly or monthly installments, as the board shall determine * * *" N.J.S.A. 18A:27-6.

Respondent's initial suspension with salary on September 11, 1984 by the superintendent with the approval of the Board president is authorized at N.J.S.A. 18A:25-6 which provides in part as follows:

> The superintendent of schools may, with the approval of the president * * * of the board * * *, suspend any * * * teacher, and shall report such a suspension to the board * * * forthwith. The board * * * by a recorded roll call majority vote of its membership, shall take such action for the restoration or removal of such person as it shall deem proper, subject to the provisions of chapter 6 and chapter 28 of this title.

Had respondent been indicted, which she was not, her suspension could have been continued without pay as provided at N.J.S.A. 18A:6-8.3 which provides in full as follows:

> Any employee or officer of a board of education in this State who is suspended from his employment, office or position, other than by reason of indictment, pending any investigation, hearing or trial or any appeal therefrom, shall receive his full pay or salary during such period of suspension, except that in the event of charges against such employee or officer brought before the board of education or the Commissioner of Education pursuant to law, such suspension may be with or without pay or salary as provided in chapter 6 of which this section is a supplement.

While it is true that N.J.S.A. 18A:6-14 allows a board to suspend an employee with or without pay upon the certification of charges to the Commissioner, this Board took no action on or near January 31, 1985 to certify charges to the Commissioner against respondent. In fact, there is no basis in this record upon which any finding may be made regarding the underlying reason why respondent's salary was suspended on January 31,

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1985 other than the superintendent's expressed "intention to bring tenure charges" against her. An intention to file charges against a tenure employee affords no basis upon which the employee's statutory right to salary may be deprived. The Board's abrupt suspension of respondent's salary, without lawful authority, on January 31, 1985 does, I **FIND**, constitute a penalty imposed upon her in the form of a present loss of expected income. While the Board's action cannot be deemed a reduction in respondent's salary under N.J.S.A. 18A:28-5, it is a suspension of salary otherwise not authorized by law.

The time bar of N.J.A.C. 6:24-1.2 does not apply to a claim which seeks vindication of a statutory right. North Plainfield Educ. Ass'n v. Bd. of Educ., 96 N.J. 587, 594 (1984); Lavin v. Hackensack Bd. of Educ., 90 N.J. 145 (1982).

Accordingly, I **CONCLUDE** the Board violated respondent's statutory right to salary when it suspended her salary on January 31, 1985 without legal justification. That being so, respondent has been deprived of her salary for at least the period January 31 through April 29, 1985, when the Board found probable cause to credit the evidence and certify asserted charges to the Commissioner, two events discussed in detail above. Respondent asks that in addition to the salary unlawfully withheld from her during that period of time, the Board be ordered to pay her interest. Given the facts of this entire case, together with the abrupt termination of respondent's salary on January 31, 1985 without reason nor legal justification, an award of interest is appropriate. Accordingly, respondent's request for interest on the salary unlawfully withheld from her between January 31, 1985 through April 29, 1985 is hereby **GRANTED**. See Newark Bd. of Ed. v. Levitt, et al., 197 N.J. Super. 239 (App. Div. 1984). Such interest shall be calculated at 12% simple prejudgment interest between January 31 through April 29, 1985 and for the period between the date this decision becomes final and the date respondent's total salary amount unlawfully withheld from her by the Board is paid.

III
MOTION TO RESUME SALARY

If respondent's motion to dismiss the asserted charges against her was not granted for the reasons set forth above, she would have been entitled to immediate salary resumption under N.J.S.A. 18A:6-14 which requires:

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> * * * If the determination of the charge by the Commissioner of Education is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made.

Only one of the Board's three proffered reasons would be sufficient to deny respondent's motion to have her salary resumed under N.J.S.A. 18A:6-14 had the charges not be dismissed. That reason is if respondent does hold substitute full time employment, otherwise not held by respondent while she is simultaneously teaching, and if such substitute employment provides respondent with an equivalent salary she otherwise would be receiving from the Board by way of her salary resumption. The salary resumption benefit of N.J.S.A. 18A:6-14 is not intended to be a windfall to the affected person so that earnings from substitute employment may be considered in mitigation of the amount of salary to be resumed under the law.

The Board's second proffered reason in opposition to this motion, that respondent instigated her entry into the Pretrial Intervention Program to avoid an indictment and thus the provisions of N.J.S.A. 18A:6-8.3 excuses its obligation under N.J.S.A. 18A:6-14, is wholly without merit. N.J.S.A. 18A:6-8.3, quite simply, does not authorize such excuse by the Board. The Board's third proffered reason that it was inticed not to forward the charges to the Commissioner is simply not supported by the evidence of record nor the exhibits the Board itself offered in support of this contention.

Accordingly, had the charges against respondent not been dismissed, she would have been entitled to a resumption of her salary under N.J.S.A. 18A:6-14 commencing on the one hundred twenty-first day of April 29, 1985, or as of September 1, 1985 when respondent's salary otherwise would have resumed.

IV

DISCOVERY CROSS-MOTIONS

Had the charges not been dismissed against respondent herein and discovery was in progress, Evid. R. 25 privilege against self-incrimination must be viewed in light of the definition of incrimination at Evid. R. 24. Incrimination is there defined as follows:

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> Within the meaning of this article, a matter will incriminate (a) if it constitutes an element of a crime against this State, or another State or the United States, or (b) is a circumstance which with other circumstances would be a basis for a reasonable inference of the commission of such a crime, or (c) is a clue to the discovery of a matter which is within clauses (a) or (b) above; provided, a matter will not be held to incriminate if it clearly appears that the witness has no reasonable cause to apprehend a criminal prosecution. In determining whether a matter is incriminating under clauses (a), (b) or (c) and whether a criminal prosecution is to be apprehended, other matters in evidence, or disclosed in argument, the implications of the question, the setting in which it is asked, the applicable statute of limitations and all other factors, shall be taken into consideration.

Evid. R. 25 states that "* * * every natural person has a right to refuse to disclose in an action or to a police officer or other official any matter that will incriminate him or expose him to a penalty or a forfeiture of his estate * * *".

As noted by the Board, a mere naked assertion of Evid. R. 25 privilege against self-incrimination is insufficient. The complained of interrogatories do not, on their face, seek information from respondent which would expose her to a criminal penalty or a forfeiture of her estate by way of a criminal sanction.

Accordingly, had the charges not been dismissed, respondent's motion to strike the interrogatories would have been denied and the Board's motion to compel answers to the interrogatories would have been granted.

In summary, respondent's motion to dismiss the asserted charges against her is **GRANTED** on the basis (1) a signed written charge was not preferred against her as is required under N.J.S.A. 18A:6-10, (2) the Board had an insufficient basis upon which to find probable cause to credit the evidence in support of any charge against respondent, and (3) the Board violated N.J.S.A. 18A:6-13 by failing to certify the asserted charges forthwith to the Commissioner for determination. Respondent's motion for summary decision is **GRANTED** in her favor that the Board unlawfully suspended her salary between January 31 through April 29, 1985. Accordingly, the asserted charges brought by the Willingboro Township Board of Education against Kathleen Kunz is/are hereby **DISMISSED**, with prejudice, and under N.J.S.A. 18A:6-14 when charges are dismissed, the Board is directed to reinstate respondent to her teaching position together with all salary, benefits and emoluments of employment otherwise withheld from her. In addition, the Board is

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ORDERED to pay respondent Kathleen Kunz interest at the rate of 12% simple on the salary it unlawfully held from her between January 31 through April 29, 1985. Such interest shall be applied to the actual amount, and cumulated amounts, of salary withheld from respondent commencing the first pay date after January 31, 1985 up to and including the time the total salary withheld is paid to her. Finally, the Willingboro Board of Education is **ORDERED** to reinstate Kathleen Kunz to her employment as a teacher and it is further **ORDERED** to tender all salary and emoluments withheld from her since January 31, 1985 with interest as hereinbefore **ORDERED.** The hearing scheduled to commence November 12, 1985 is cancelled.

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

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

November 1, 1985
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

NOV 7 1985
DATE

Mailed To Parties:
OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE TENURE HEARING OF KATHLEEN KUNZ, SCHOOL DISTRICT OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY.	:	
KATHLEEN KUNZ,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law. It is observed that the Board's exceptions to the initial decision and Respondent Kunz's reply have been filed with the Commissioner pursuant to N.J.A.C. 1:1-16.4a, b and c.

Essentially, the thrust of the Board's exceptions is that it did in every instance in its certification of tenure charges against respondent comply with the statutory provisions of N.J.S.A. 18A:6-10 et seq., as well as those procedural requirements enunciated by the Commissioner in In re Marilyn Feitel, 1977 S.L.D. 451, aff'd State Board 458; Ott v. Bd. of Ed. of Hamilton Twp., 160 N.J. Super. 333 (App. Div. 1978); Manalapan-Englishtown Ed. Ass'n v. Bd. of Ed. of Manalapan-Englishtown, 187 N.J. Super. 426, (App. Div. 1981); and Arocha and Gonzales v. Hudson Cty Area Voc. Tech. Bd. of Ed., decided by the Commissioner August 16, 1984, rev'd State Board April 3, 1985. The Board contends that this matter should not have been disposed of by the Administrative Law Judge (ALJ) on purely procedural grounds since a "substantial public issue" is involved, i.e. whether a teaching staff member should be returned to the classroom after being arrested and charged with the sale of or possession of or intent to distribute a controlled dangerous substance. The Board cites Ewing Tp. v. Mathesius, 189 N.J. Super. 530 (Law Div. 1983), aff'd 193 N.J. Super. 65 (App. Div. 1984), cert. den. 96 N.J. 320 for the proposition that where there is a substantial public issue involved, courts are reluctant to dispose of an issue on purely procedural grounds.

The Board further avers in excepting to the findings of fact and conclusions of law of the ALJ as follows:

> "***In review of a dismissal on the pleadings, the reviewing Court must accept as true all allegations of the complaint and must draw therefrom those reasonable inferences that are most favorable to the plaintiff's cause.***"
> (Board's Exceptions, at p.2)

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The Board cites Partee v. Jaffee, 84 N.J. 88 (1980) and Polk v. Schwartz, 166 N.J. Super. 292 (App. Div. 1979) for the proposition that the ALJ in the instant matter erred in weighing and analyzing the documents supplied as attachments to the pleadings in deciding the Motion to Dismiss.

Additionally, the Board contends in its exceptions that even if the ALJ could have weighed the evidence, his conclusion that there was no probable cause was in error and should be reversed. Citing a litany of cases related to a definition of probable cause, the Board avers, inter alia, that to support a finding of probable cause, a party may rely on facts which it reasonably believes to be true and concerning which it might reasonably expect subsequent pretrial discovery to be supportive. Paul v. National Education Ass'n., 195 N.J. Super. 426 (App. Div. 1984) The Board also excepts to the ALJ's granting respondent's Motion to Dismiss on the grounds that the Board failed to forward the charge in a timely manner to the Commissioner of Education. The Board's exceptions cite N.J.S.A. 18A:6-13 and N.J.S.A. 18A:6-11. Relying especially on N.J.S.A. 18A:6-11 and citing Ott, supra, and In re Martin, decided by the Commissioner December 16, 1983, St. Bd. aff'd with modification July 11, 1984, Superior Court, Appellate Division aff/rev'd Docket No. A-5503-84T6) July 17, 1985, the Board avows that the time limits set forth in the Tenure Employees Hearing Act are susceptible to waiver or expansion by the request or action of the tenured employee. (Board's Exceptions, at pp. 2-3)

The Board also excepts to the ALJ's granting respondent's Motion for Summary Judgment for a back pay award for the period of January 31, 1985 through April 20, 1985, the period from the initial suspension without pay until the Board's determination to certify charges to the Commissioner of Education. The Board asserts that:

> "***Although the Judge recognizes that there is a ninety (90) day statute of limitations set forth in NJAC 6:24-1.2 for commencing an action before the Commissioner of Education and that the Courts of this State on several occasions have ordered that that limitation be enforced. (North Plainfield Ed. Ass'n v. Bd. of Ed., 96 N.J. 587, 594-595 (1984); Bd. of Ed., Twp. of Bernards v. Bernards Tp. Ed. Ass'n., 79 N.J. 311, 326 footnote #4 (1979); Riely v. Bd. of Ed., Hunterdon Central H.S., 173 N.J. Super. 109 (App. Div. 1980); and, Moreland v. Passaic Bd. of Ed., 3 NJAR 276 (1983), the Administrative Law Judge below chose to ignore the time bar and all the claim. This was error and must be reversed.***"
>
> (Board's Exceptions, at p. 7)

The Board reiterates the argument it advanced before the ALJ that the delay in the filing of the recertification of charges was due to the request of respondent that the matter be negotiated rather than litigated. The Board cites Ott, supra, and In re Martin, supra, for the proposition that when the delay is occasioned by the request of the tenured employee, the 120 days are extended.

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Finally, the Board contends that the calculation of the 120-day period for resumption of pay under N.J.S.A. 18A:6-14 should begin on September 1, 1985 since respondent did not suffer any salary loss after July 12, 1985 until September 1, 1985. The Board avers that the initial decision is in error on this point since

> "***the Respondent did enter the Pretrial Intervention Program to avoid indictment and therefore the provisions of NJSA 18A:6-8.3 supersede the 120 day salary loss restriction.***"
> (Board's Exceptions, at p. 8)

Respondent, in rejecting the Board's arguments, urges the Commissioner to affirm the findings and conclusion in the initial decision essentially for the reasons stated therein. Respondent makes the following comments in reply to the Board's exceptions:

> "***In this matter, the substantial public issue involved at this juncture is not whether a particular teaching staff member should be returned to the classroom, but whether the Willingboro Board of Education complied with the statutory requirements of the Tenured Employees Hearing Law, N.J.S.A. 18A:6-10 et seq. ***It is clear, as the thorough analysis of Judge McKeown established, that the tenure charges brought against Kathleen Kunz were fatally defective.***"
> (Respondent's Exceptions, at p. 1)

Respondent further avers in reply exceptions that the ALJ properly evaluated the charge in light of the procedural requirements of the Tenure Employees Hearing Law. Respondent refers to the ALJ's reasoning in the initial decision, ante, for support of the fact that he was not evaluating the evidence but, rather, was determining whether the submitted documents constituted a "charge" under the Tenure Employees Hearing Law. It is respondent's further contention that there was insufficient basis upon which the Board could have found probable cause because it relied solely upon "***'a raw, unsupported suspicion.'" (Respondent's Reply Exceptions, at p. 2, quoting the Initial Decision, ante)

As to whether respondent's Motion to Dismiss was proper, based on the Board's alleged failure to forward the charge in a timely manner, respondent avers that the Board has changed its argument. Respondent avows as follows:

> "***While the Board originally contended that N.J.S.A. 18A:6-13 and N.J.S.A. 18A:6-11 must be read in pari materia, it now contends that each statute should be examined in a veritable vacuum. Were the Board's argument accepted, the charges would never have to be forwarded to the Commissioner.***"
> (Respondent's Reply Exceptions, at p. 2)

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As to the Motion for Summary Judgment on the issue of back pay for the period between January 31 and April 29, 1985, respondent argues that the Board must be deemed to have waived the issue of timeliness, since it was not raised as a defense in its Answer to the Petition of Appeal. In the alternative, respondent argues the time bar of N.J.A.C. 6:24-1.2 does not apply to a claim which seeks vindication of a statutory right.

Finally, respondent argues that the Board's calculation of the 120-day period was properly rejected by the ALJ. Respondent avers that it has previously been established that the 120-day time period set forth at N.J.S.A. 18A:6-14 begins to run as of the date of certification of charges, rather than the date school begins in the fall. In the Matter of the Tenure Hearing of Gertrude Lennon, School District of the Borough of Spotswood, decided by the Commissioner August 29, 1983, aff'd St. Bd. March 7, 1984 Respondent asserts that the provisions of N.J.S.A. 18A:6-8.3 are not applicable to the instant case since respondent was allegedly never indicted.

The Commissioner, upon review of the respective arguments of the parties, agrees with the determination and findings of the ALJ to dismiss the matter based on the procedural infirmities that are the bases of the Petition of Appeal. However, the Commissioner does not concur with the ALJ's recommendation that such infirmities are of such a nature as to require dismissal of the Petition of Appeal with prejudice. Given the nature and gravity of the charge that is the basis of the matter before him and given his awareness that teachers, as role models for their student charges, are under a heavy duty which "requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment," the Commissioner believes that should a basis exist for certification of charges, this matter should proceed to an ultimate determination. In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional, 1972 S.L.D. 302, 321 The Commissioner therefore does not preclude the Willingboro Board from considering anew the circumstances which were the bases of the original charges and, in full conformity with the requirements of N.J.S.A. 18A:6-11, recertifying them.

The Commissioner further finds the Board's action in suspending respondent without pay upon notification that the Board would consider tenure charges against her is without legal basis. The law clearly provides that any suspension of a tenured teacher must follow one of two events: the filing of an indictment against the tenured individual or the certification of tenure charges to the Commissioner. (See N.J.S.A. 18A:6-8.3.) In the instant matter neither of these events had taken place at the time that the Board suspended her without pay. Respondent is therefore entitled to full restoration of pay from the first day of her suspension without pay, January 31, 1985, less mitigation. During the pendency of any investigation into this matter the Board has discretion to continue respondent's suspension with pay pursuant to N.J.S.A. 18A:6-8.3. However, in the absence of demonstrated bad faith on the part of the Board in so suspending respondent without pay based on the

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information they received that she was in a Pretrial Intervention Program, the Commissioner determines that pre-judgment interest is inappropriate.

Accordingly, for the reasons set forth above, the Commissioner hereby affirms that portion of the findings and conclusion in the initial decision which holds that:

1. the tenure charges against respondent be and are hereby dismissed as being procedurally defective pursuant to N.J.S.A. 18A:6-11; and

2. the Board is directed to pay respondent her full salary as of the date it suspended her without pay, January 31, 1985.

The Commissioner hereby modifies the initial decision as follows: in light of the gravity and nature of the charge, the Board is not precluded from curing the procedural defects of the instant Petition of Appeal and properly recertifying the tenure charges against respondent pursuant to N.J.S.A. 18A:6-11 with due regard to the specific requirements of said statute.

In view of those circumstances involving the alleged arrest and charges against respondent, the Board is not precluded from using its discretionary authority pursuant to N.J.S.A. 18A:6-8.3 to continue respondent's suspension from active employment while pursuing its investigation of the circumstances surrounding that arrest. N.J.S.A. 18A:6-8.3 reads as follows:

> "Any employee or officer of a board of education in this State who is suspended from his employment, office or position, other than by reason of indictment, pending any investigation, hearing or trial or any appeal therefrom, shall receive his full pay or salary during such period of suspension, except that in the event of charges against such employee or officer brought before the board of education or the Commissioner of Education pursuant to law, such suspension may be with or without pay or salary as provided in Chapter 6 of which this section is a supplement.***"
>
> (Emphasis supplied)

Except as modified and supplemented above by the Commissioner, the initial decision is hereby affirmed and the tenure charges against respondent are dismissed without prejudice. In light of the seriousness of the allegations in this matter, the Commissioner further directs that the Willingboro Board of Education make known to the Commissioner its intention relative to these charges within 60 days from receipt of this decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 16, 1985

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INITIAL DECISION
OAL DKT. NO. EDU 2698-85
AGENCY DKT. NO. 92-4/85

UNION BEACH BOARD OF EDUCATION
OF THE TOWNSHIP OF UNION BEACH,
MONMOUTH COUNTY,
Petitioner,
v.
JUDE MARTIN,
Respondent.

Louis E. Granata, Esq. (Yacker & Granata, attorneys), for petitioner

Thomas W. Cavanagh, Esq. (Chamlin, Schottland, Rosen, Cavanagh & Uliano, attorneys), for respondent

Record Closed: October 28, 1985 Decided: November 14, 1985

BEFORE **LEON S. WILSON,** ALJ:

In April 1984, the Union Beach Board of Education certified to the Commissioner of Education charges of unbecoming conduct against Jude Martin, a "tenured" teacher in its employ. The Board found there was probable cause to credit the accusations of misconduct and concluded that, if true, they warranted dismissal or reduction in salary. Mr. Martin disputed both the findings and conclusions of the Board in his answer filed May 10, 1985. On May 13, the Commissioner transmitted the matter to the Office of

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Administrative Law for disposition as a contested case pursuant to the provisions of N.J.S.A. 52:14F-1 et seq. Pretrial conference was conducted on June 11 and respondent's motion to dismiss was denied following oral argument on August 9. Plenary hearings in the matter were conducted September 18, 19 and 23, 1985. On October 2 counsel for the respondent withdrew his request for opportunity to present rebuttal testimony (at that time scheduled for October 9) and counsels' submissions presenting closing argument and legal precedent were completed November 4. The record was deemed closed the last date.

FACTS

In addition to a written stipulation of facts tendered by the parties (J-1 in evidence), the record includes the testimony of three police officers, a complaining witness, and the superintendent of schools, all presented by the Board, and several documents placed in evidence on its behalf. The respondent, Mr. Martin, relied upon the testimony of several fellow teachers. The witnesses who appeared before me and the documents received in evidence are listed in the annexed appendix. From this record, I make the following **FINDINGS OF FACT:**

The Union Beach Board of Education (petitioner) operates a K-8 district employing approximately 60 teachers, of whom 48 are assigned classroom duties. Mr. Martin, the respondent, has been employed as a teacher (fourth through seventh grades) for approximately 18 years, since September 1967. Throughout that time he was, by all accounts, a valued, active and dedicated member of the staff. He served on several committees concerned with personnel selection (principal, head custodian), statewide testing, textbook selection and curriculum. He also contributed to student activities including sports and social events. He has served as an officer and Board member of both the Parent-Teacher Association and the Union Beach Education Association. Specifically with regard to the latter, he served as president of the Education Association for five years and has been a member of its negotiating committee continuously since his first employment.

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He is described by his fellow teachers as a caring and sensitive teacher who is well regarded by his co-workers and by the parents of the community. He is considered "highly professional," "sought after," and "an asset to the district." Until September 1984 he maintained an unblemished record of competent service to his employer. His behavior, whether private or professional, had never attracted the disciplinary attention of the Board, his evaluations were uniformly laudatory and he had never been denied a salary increment. The present proceedings arise out of a single incident that occurred during the early morning hours of Saturday, September 1, 1984.

Sometime before 4:00 a.m. that morning, while driving through a residential area in neighboring Hazlet Township, Mr. Martin came upon Mr. Michael Leach, a pedestrian who was walking his dog. Mr. Leach, then 21 years of age, had shortly before returned from a party. Arriving at his home sometime after 3:30 a.m., he immediately took his small dog for a walk. While some three blocks from his home he noticed a vehicle, later established to be that of Mr. Martin, approaching from behind. The car came to his side of the street and while he continued walking, the driver, Mr. Martin, addressed him. Mr. Martin said: "Isn't there any action in this town?" Mr. Leach answered "No" and continued on his way. The Martin vehicle, however, paced him and after taking a few steps, Mr. Leach heard Mr. Martin say, "Can I play with that thing in your pants" or words to that effect. Mr. Leach replied, "No — leave me alone," and continued walking. Mr. Martin drove off at that point and Mr. Leach walked on toward his home. At the next intersection, Mr. Martin's car again appeared. Moving from Mr. Leach's left, Mr. Martin drove his car from the side street to the street along which Mr. Leach walked. It blocked Mr. Leach's passage. He walked behind the Martin vehicle. As he regained the sidewalk, Mr. Martin again spoke: "Are you sure?" At that point, Mr. Leach paused and told Mr. Martin to return in ten minutes. Mr. Martin again drove off. As he did so, Mr. Leach noted the license number of his vehicle, gathered the dog in his arms and ran home.

Mr. Leach immediately called the local police department. Two officers were dispatched in response. The first to arrive, Officer William Colangelo, met Mr. Leach in front of his home. Confirming Mr. Leach's description of the vehicle and its driver, Officer Colangelo proceeded to patrol the area. Officer Surdi arrived a few moments later. After receiving the details from Mr. Leach regarding the incident, he similarly took up patrol.

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At approximately 4:20 a.m. Officer Colangelo observed the vehicle described by Mr. Leach as it was being parked on a side street. He watched while the driver, Mr. Martin, left the car and walked down the block. Officer Colangelo approached and called Mr. Martin over.

He immediately observed about Mr. Martin signs of intoxication. His eyes appeared bloodshot, his gait was unsteady and his speech was somewhat slurred and thick-tongued. He also noted a strong odor of alcohol on Mr. Martin's breath. After a brief conversation, during which Officer Surdi arrived to support Officer Colangelo, Mr. Martin was arrested and charged with drunken driving (in violation of N.J.S.A. 39:4-50) and with driving while on the revoked list (N.J.S.A. 39:3-40). Shortly thereafter, at the local police headquarters, Mr. Martin refused to submit to a chemical breath test and was charged with that violation (N.J.S.A. 39:4-50.2) as well.

While in custody of the police, Mr. Martin was essentially passive throughout. He refused to answer the questions put to him, or to perform the tests requested of him; however, he was neither aggressive nor belligerent but was in fact "carefree" and "cocky." Mr. Martin was released after a short time.

On September 4, 1984, Detective Thomas J. Sillcocks was assigned to investigate the complaint of Mr. Leach. On September 5, Mr. Leach met the detective at police headquarters and, identifying Mr. Martin from a photo array prepared for the purpose, signed a written statement reviewing the events described here. Additional complaints were thereupon issued charging Mr. Martin with lewdness (N.J.S.A. 2C:14-4) and harassment (N.J.S.A. 2C:33-4).

Sometime during the long weekend, the incident came to the attention of William G. DiMaio, Superintendent of Schools for the Union Beach Board of Education. He reached Mr. Martin by telephone, confirmed the fact of his arrest, and, apparently with some regret,[2] suspended him from his duties.

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2 "You know I have to suspend you for this." Testimony of Mr. DiMaio.

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On September 21, 1984, the Board of Education notified Mr. Martin of its charges of unbecoming conduct against him. On October 19 it adopted a formal resolution suspending him without pay. Further action regarding these charges was postponed pending the outcome of judicial proceedings arising from these events in response to an injunction issued by a judge of the Superior Court at the instance of Mr. Martin.

In mid-December, the several charges against Mr. Martin were heard in the local municipal court.[3] Following a plenary trial extending over three trial days, Mr. Martin was acquitted of drunk driving and convicted of the remaining four offenses. He immediately appealed his convictions for lewdness and harassment. On February 1, 1985, following trial de novo in the Superior Court, the municipal court conviction for harassment was affirmed, but that for lewdness was reversed.

On March 13, 1985, the mentioned injunction having been discharged, the Board of Education filed an amended notice of charges against Mr. Martin. On March 29, 1985, it resolved to certify the charges to the Commissioner of Education.

As indicated, the Commissioner transmitted the matter to the Office of Administrative Law on May 13, 1985.

Preliminary to trial, respondent moved to dismiss the charges, asserting several violations of statutory procedural requirements. In consideration of briefs submitted by counsel and of oral argument heard on August 9, respondent's motion to dismiss was denied by oral decision at the close of oral argument and by confirming written decision issued September 12, 1985.

During the course of the plenary trial before me, the Board attempted to introduce testimony regarding the findings of Officer Colangelo upon a search of Mr. Martin's

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3 It appears that none of these charges were considered to be misdemeanors; instead, they were all, variously, motor vehicle or disorderly person offenses. No evidence of record suggests that any of these charges were reduced or downgraded by the Monmouth County prosecutor or any other authority.

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automobile at the time of his initial arrest. Respondent objected, asserting the proferred evidence had been suppressed upon application to a Superior Court judge from introduction in the municipal court proceedings. Counsel for the Board represented that the matter seized was corroborative of the testimony of Mr. Leach in that it tended to establish a propensity or state of mind consistent with the conduct and statements attributed to Mr. Martin.

Respondent's objection was provisionally sustained. Based upon the representations of counsel, I found that the potential prejudicial effect of the evidence to be offered substantially outweighed its probative value. I afforded the petitioner, however, an opportunity to re-offer the testimony in rebuttal if the underlying testimony of Mr. Leach were contested by the respondent. In the event, Mr. Martin refrained from testifying and did not challenge the assertions of the complaining witness as to the September 1 incident.

Moreover, I was advised that the material seized, about which the arresting officer had been requested to testify, was not available to either counsel and would not in any event have been offered in evidence. No request was made by counsel for the Board to reintroduce the challenged testimony on rebuttal.

My findings as to Mr. Martin's background synthesize the testimony of four of his fellow teachers and of Mr. DiMaio, his superintendent. The latter was significantly less laudatory of Mr. Martin than the former. While Mr. DiMaio agreed that Mr. Martin had been an asset to the district until the fall of 1984, he conceded only that Mr. Martin had been an average teacher, and that in his view, his effectiveness as a teacher would be impaired necessarily by the fact of his arrest and the filing against him of the described charges. The several teachers who appeared, however, and especially Mrs. Helber, the current president of the Union Beach Education Association, uniformly asserted otherwise. Particularly, they testified that in their opinion, given his lengthy history of dedicated and circumspect service to the Board, they "feel confident he should be returned. If he were returned his effectiveness would remain undisturbed." "Each and every teacher that spoke to me [Mrs. Helber] are supportive of him - 60 teachers want him reinstated."

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DISCUSSION

The Commissioner of Education is governed, in his deliberations upon certified charges of unbecoming conduct and upon his determination of the request of the local board of education to impose disciplinary sanction for misconduct, by the provisions of the Tenure Employees Hearing Law, codified at N.J.S.A. 18A:6-10 et seq. The statute, at Section 10, prohibits the dismisssal or reduction in compensation of an employee under tenure except for one of four categories of cause: ineffeciency, incapacity, unbecoming conduct or other just cause. This statute provides little guidance with regard to both the sufficiency of the proofs necessary to establish such a cause, and the choice from among the several degrees of sanction available to a board of education to respond to an established circumstance, more or less serious. Reported decisions of the Commissioner, however, have substantially rationalized his discretionary authority in such matters. Although not binding as judicial authority would be, his interpretation of the statute and his exposition of the legislative policy embodied in it are entitled to substantial deference and are to be followed except if the law clearly requires otherwise.

The petitioner seeks the discharge of Jude Martin, concedely a tenured teacher in its employ, upon the charge of "unbecoming conduct" as specified here. Mr. Martin resists, contending both that the conduct established was not unbecoming a teacher, and that, however characterized, his conduct does not warrant dismissal. Resolution of these issues does not turn upon any single dispositive factor, but rather requires a review of the nature and circumstances of the allegations presented in their entirety. Tenure Hearing of Frederick Ostergren, 1966 S.L.D. 185.

More than a score of such circumstances have been specially identified by the Commissioner as contributing to the ultimate decision. These include the extent to which: (1) the specified behavior was isolated and unrelated to other conduct (Tenure Hearing of David L. Humphreys, School District of Pennsville, July 11, 1977, motion); (2) the behavior involved moral turpitude (Tenure Hearing of Richard Rumage, 1 N.J.A.R. 381 (1980) adopted, Comm'r of Ed. (July 22, 1980)); (3) the incident was a matter of deliberation and forethought (Tenure Hearing of Herman B. Nash, 1971 S.L.D. 284); (4) the

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conduct demonstrated unfitness to teach (Tenure Hearing of Betty Nacht, 1980 S.L.D. 431); and (5) the incident was associated with the performance of teaching duties (Tenure Hearing of Arlene Dusel, 1978 S.L.D. 526).[2]

Examination of the record before me, in terms of these factors, establishes clearly that Jude Martin conducted himself in a manner unbecoming a teacher. It has been repeatedly observed that the obligations and responsibilities of a public school teacher impose a heavy duty of self-restraint and controlled behavior "rarely requisite to other types of employment." Tenure Hearing of Jacque L. Sammons, 1972 S.L.D. 302. While the extent to which the offensive behavior occurred during a teacher's performance of duties, or arose out of his position as a teacher, bears careful scrutiny, the mere fact that misconduct occurred at a time and place entirely apart from school, and involved persons entirely unrelated to it, does not immunize the offender from his employer's disciplinary sanction. In effect, whether the nexus between misconduct and employment be great or small, public identification of one as a teacher is sufficient alone to bring his conduct, no matter how private, within the ambit of the Tenure Employees Hearing Law. Thus, possession of contraband such as marijuana (Ott v. Hamilton Tp. Bd. of Ed., 160 N.J. Super. 333 (App. Div. 1978); Tenure Hearing of Arlene Dusel, 1978 S.L.D. 526), mail fraud (Tenure Hearing of Norris Saunders, Commissioner of Education 156-81), aggravated assault (Tenure Hearing of Stanley Sager, Commissioner of Education, 46-82), violation of a municipal ordinance (Tenure Hearing of Rhen, 1976 S.L.D. 647; Comm'r of Ed., 6-29-76) and acceptance of a bribe (Tenure Hearing of Ernest Tordo, 1974 S.L.D. 97)), though none were directly related to any educational duty, activity or status, have all been held sufficient grounds for professional sanction of one degree or another. Most persuasively, it appears the Commissioner has, in no reported case, refrained from imposing disciplinary sanction, where it was otherwise warranted, merely because no direct connection with tenured employment was shown.

The first of Mr. Martin's assertions is thus patently inapposite. He essentially concedes the allegations of Michael Leach. In effect, it is established for our purposes

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2 A more complete list of such factors is appended as Appendix II.

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that he approached Mr. Leach in the manner and under the circumstances described and addressed him in the words related. Likewise it is established he was, at that time, operating a motor vehicle without a driver's license and that shortly thereafter he refused a lawful police demand that he submit to a chemical breath test. These violations have no connection with his employment other than through his public status as a teacher, and the consequent adverse reflection his behavior has upon his employer and his fellow teachers. It is this latter effect, however, which is sufficient to engage the authority of the Commissioner under the act, and, in the present circumstances, clearly sufficient to establish the specified conduct was unbecoming that of a teacher. It is the character and self-discipline of one who is a teacher that is at issue here, and not the place or time that his deficiencies in those regards were revealed. Tordo. 1974 S.L.D. 97. By virtue of his unique authority over young children, and the weighty responsibility to them and to the community at large with which he is charged, his entire conduct is properly held to that standard which is befitting, or "becoming," that of a teacher.

Whatever else Mr. Martin's conduct might have been, his unwarranted intrusion upon the privacy of a perfect stranger, and his crude sexual suggestion despite plain rejection, clearly violated the standards of circumspection, reticence, modesty, self-control, good taste, mannered behavior, sensitivity and concern for others that the community rightly expects of its teachers. In short, they are unbecoming a teacher and warrant the Commissioner's sanction.

The nature of that sanction, however, remains to be determined. Review of those decisions of the Commissioner cited here and in the annexed appendix suggests several elements in this matter that deserve special attention. These include (1) the extent to which the conduct related was consistent with prior conduct and thus is reasonably predictive of future like misconduct; (2) the extent to which it constituted a clear violation of the criminal law, involved moral turpitude, or exhibited viciousness or cruelty; (3) the extent to which the misconduct was a matter of specific intention and deliberation; (4) the extent to which it was inconsistent with a lengthy unblemished prior record; (5) the extent to which it had a direct harmful or injurious effect; and (6) the extent to which it had an adverse effect upon the proper administration of the school system.

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(1) Nothing of record before me, in any way, suggests that Mr. Martin's confrontation with Mr. Leach was other than an entirely isolated incident totally independent of any other known conduct. In the context of everything that is known about him prior to September 1984, it was unique and out-of-character.

(2) In its review of his conduct, the criminal courts established that his behavior is, at worst, to be characterized as that of a disorderly person; in no respect was his conduct criminal.

(3) The proofs do not establish that the incident arose from thoughtful deliberation or planning. To the contrary, his characterization by the police officers as "carefree and cocky", as well as his behavior as related by Mr. Leach, suggests a casual, bizarre, spur of the moment departure from the routine, borne less of a continuing defect in character than of a momentary impulse, induced, to some extent, by intoxication.

(4) Respondent's laudable, lengthy and unblemished record of service in his profession, as well as the absence of any other suggestion of private misconduct, weigh heavily in the matter of sanction, and they are not challenged by the petitioner.

(5) While the private effect of Mr. Martin's conduct upon Mr. Leach was both unpleasant and lasting ("I am still petrified"; testimony of Mr. Leach) it clearly involved no battery (i.e., unlawful touching), and though assaultive (i.e., in that it put Mr. Leach in fear), it clearly offered no touching other than consensual. The specific injury to public order and discipline is thus fairly to be characterized as de minimis.

(6) The adverse effect, if any, upon the proper administration of Union Beach's school system is less easily appraised. No direct evidence was presented regarding the extent to which the incident was publicized. Indeed, both the superintendent of schools and the president of the Education Association

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> testified that the matter had been kept quiet. All of the teachers who testified, demonstrated, at least implicitly, a sincere concern that Mr. Martin not be popularly prejudged. While undoubtedly there will be some who would remain discomforted by the implications that they choose to draw from the initial charges, there is no rational basis to conclude that through the kind of diligent effort displayed for 18 years he could not regain the confidence and affection of reasonable men.

Perhaps most compelling among the particular circumstances of this offense, is its uniqueness in the history of Jude Martin. While "[I] t has long been held that unfitness to hold a teaching position may be shown by a series of incidents or by one incident, if sufficiently flagrant" (Tenure Hearing of Donald Henley, School District of Camden, 1979 S.L.D. 356, 359), where a single incident is the only instance of improper conduct and where it is not premeditated, cruel or vicious and has no pervasive effect upon the operation of the school either by influencing pupil discipline or impeding the school's administration (see, Tenure Hearing of William H. Kittell, 1972 S.L.D. 535, 541), the Commissioner has repeatedly held that summary dismissal is an unnecessarily harsh penalty and is not warranted. C.F., Tenure Hearing of Betty Nacht, 1980 S.L.D. 431, 438, citing Sammons, 1972 S.L.D. 302, 321.

In consideration of the foregoing factors, and of the Commissioner's injunction that "[T] he kind and degree of penalty will necessarily vary according to the particular problem" (Tenure Hearing of Frederick L. Ostergren, 1966 S.L.D. 185, 188), it is clear that summary dismissal of the respondent for this single offense is an unnecessarily harsh penalty and is not warranted in light of all of the circumstances.

A recent decision of the Commissioner all but compels this conclusion. In the Matter of the Tenure Hearing of Martin Lieb, School District of the Town of West Orange, OAL Dkt. No. EDU 731-85, Commissioner's decision July 1, 1985 (unreported), a teacher was convicted of "lewdness" in violation of N.J.S.A. 2C:14-4 when he approached and touched an undercover agent of the Essex County Police Department. Judge McKeown's finding that "the discipline of termination . . . would be extremely harsh and [is] not

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justified" (Initial Decision, page 11) was accepted by the Commissioner.[4] In the matter before me, the conduct of Mr. Martin was clearly less egregious than that of Mr. Lieb; the respondent here was expressly acquitted of the very offense found to be insufficient warrant for dismissal in that recent case. Particularly in view of the arresting evidence in mitigation presented by Mr. Martin, and the lack of evidence in aggravation, the decision in that matter weighs heavily here.

In consideration, then, of all of the facts and circumstances of this matter, I **FIND** that Jude Martin did, without warrant or justification, harass Michael Leach by making to him an uninvited indecent proposal and that he thereby committed an act unbecoming a teacher; I **FURTHER FIND** that the respondent operated his motor vehicle without a driver's license, and that he refused to submit to a chemical breath test, both in violation of express public law, but that neither of these violations per se arise to the level of conduct unbecoming a teacher warranting administrative discipline; I **FURTHER FIND** that administrative sanction of Jude Martin for that conduct found to be unbecoming a teacher is warranted and justified under the circumstances.

I **CONCLUDE,** however, that respondent's misbehavior as proved has no predictive value and that the likelihood of its repetition, or of the commission of a like or similar offense in the future, is not thereby established. Therefore, I **CONCLUDE** that the summary interruption and permanent loss of the position and livelihood to which respondent has devoted his life for the past 18 years is excessively harsh sanction and is not warranted.

For the foregoing reasons, I **DIRECT** that the respondent, Jude Martin, shall forthwith be restored to his former position without reduction in salary but that he shall, as sanction for the offense proven, forfeit salary and other compensation withheld from him during the period of 150 days following his suspension from duties without pay.

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4 See, The New Jersey Education Law Report, Vol. VI, No. II, October 1985, at p. 7.

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

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

November 14, 1985
DATE

LEON S. WILSON, ALJ

Receipt Acknowledged:

NOV 19 1985
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

NOV 19 1985
DATE

OFFICE OF ADMINISTRATIVE LAW

am/ e

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IN THE MATTER OF THE TENURE	:	
HEARING OF JUDE MARTIN, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP OF	:	DECISION
UNION BEACH, MONMOUTH COUNTY,	:	
	:	

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

The Board's exceptions aver that, while it accepts the findings and conclusion of the Administrative Law Judge, respondent's conduct both on the evening in question and theretofore warrants closer scrutiny. The Board asks the following:

> "***Before directing this teacher be returned to the classroom and reinstated, it is respectfully requested he be subjected to both a medical and psychological evaluation concerning his conduct and the possibility of any further incidents."
> (Board's Exceptions, at p. 2)

The Board expresses particular concern in its exceptions that respondent's behavior on the night he was apprehended

> "***indicates a complete lack of concern for his position and his exposure to punishment. He not only acted in a carefree manner, but he also showed no remorse.***" (Board's Exceptions, at p. 1)

The Board queries whether "this conduct and attitude display a spur of the moment departure from routine, impulsive [behavior][and] suggests the answer to be 'no'.***" (Board's Exceptions, at p. 1)

Respondent excepts to the penalty assigned him by the ALJ, a 150-day suspension without pay. Respondent contends that the extent of the suspension to which he was subject is statutorily defined to be no more than 120 days, and that that period began on February 19, 1985 and ended on June 30, 1985. Respondent requests that the Commissioner clarify the proper number of days of suspension to which he is subject without pay.

Having carefully reviewed the record in this matter, the Commissioner agrees with the ALJ that respondent's

> ***unwarranted intrusion upon the privacy of a perfect stranger, and his crude sexual suggestion despite plain rejection, clearly

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> violated the standards of circumspection, reticence, modesty, self-control, good taste, mannered behavior, sensitivity and concern for others that the community rightly expects of its teachers.***" (Initial Decision, ante)

Like the ALJ, the Commissioner finds the testimony of the complaining witness to be entirely credible. Based on all the testimony offered, the stipulation of record and the arguments presented by counsel at the hearing and in their post-hearing briefs, the Commissioner determines that respondent's behavior toward the complainant during the early morning hours on Saturday, September 1, 1984 was unquestionably conduct unbecoming a teacher.

However, the Commissioner is compelled to disagree with the ALJ's determination to mitigate respondent's penalty to a mere monetary one based on the ALJ's reading of In the Matter of the Tenure Hearing of Martin Lieb, School District of the Town of West Orange, Essex County, decided by the Commissioner July 1, 1985, and the ALJ's conclusion that

> "***[t]he specific injury to public order and discipline is *** de minimis *** a casual, bizarre, spur of the moment departure from the routine, borne less of a continuing defect in character than of a momentary impulse, induced, to some extent, by intoxication.***" (Initial Decision, ante)

The instant matter is readily distinguishable from Lieb. In the latter case, a teacher was convicted of "lewdness" in violation of N.J.S.A. 2C:14-4, when he, on a single occasion while distraught following the death of his mother, approached and touched an undercover agent of the Essex County Police Department. While it is true that in the instant matter the offense with which respondent was charged was a lesser offense than that in Lieb, respondent herein repeatedly propositioned his victim, despite repeated rejection. Furthermore, Lieb's offense was mitigated by the fact that "he was distraught over the death of his mother, the marriage of his stepfather, and the unveiling scheduled to occur sooner than the customary 11 month period.***" (Slip Opinion, at p. 10) Nowhere in the record now before him does the Commissioner find circumstances that would explain away or diminish the seriousness of the offenses with which respondent was charged and convicted. Finally, it is entirely clear from the record that respondent's illicitly propositioning the complainant was not his sole offense, as was the case in Lieb. In the instant matter, respondent was also convicted of driving while on the revoked list and there is question also as to whether respondent was intoxicated while so driving.

In considering the testimony and evidence before him, the Commissioner finds that the ALJ's scope of review was too narrow. Applying the principles set forth in a recent New Jersey Supreme

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Court case, Delguidice v. New Jersey Racing Com'm., 100 N.J. 79 (1985) to the balancing test for excluding evidence established in United States v. Janis, 428 U.S. 433, 96 S. Ct. 3021 (1976), the ALJ herein confined the inquiry to "material [constituting] direct allegation," requiring that any other evidence or contention be reserved until rebuttal. (Tr. II-34) In fact, Delguidice stands for the opposite proposition. As counsel for the Board notes at Tr. II-16, the Court in Delguidice held:

> "***We therefore hold that in the context of a civil licensing or other regulatory proceeding before an agency that is separate and apart from the one that originally obtained the evidence, a defendant cannot complain that relevant, credible information ought to be excluded as a matter of law.***" (100 N.J. at 91)

The Court establishes early in Delguidice that

> "in an administrative hearing, unlike a criminal trial, all relevant evidence is admissible.***" (Emphasis added.)(Id. at 84)

In the instant matter, many questions remain unanswered. Delguidice establishes that it is the ALJ's prerogative to consider proofs and to make inquiry into events beyond those contained in the charges, so long as "high social costs are associated with exclusion of the challenged evidence" as compared with the "likely social benefits of excluding evidence.***" (Id. at 91, 85)

Thus, in conformity with Delguidice, the Commissioner hereby remands the instant matter to the Office of Administrative Law for further consideration of the following questions:

1. Whether the conduct of respondent on the evening in question represents a momentary aberration from the normal behavior of a stable individual or whether respondent's actions on the night in question are an indication of more serious psychological or psychiatric problems reflective of a disturbed personality unfit to return to his duties in the classroom.

2. For what reason was respondent's license revoked?

3. Why was respondent driving while on the revoked list?

4. Whether there were any circumstances surrounding the events of September 1, 1984 which would tend to mitigate the penalty of dismissal from respondent's tenured teaching position.

To facilitate the above inquiries, and for purposes of providing expert testimony as to respondent's fitness to teach, the Commissioner hereby directs respondent to submit to a complete

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psychiatric examination, the results of which are to be made a part of the record herein.

The Commissioner retains jurisdiction following further disposition of this matter before the ALJ.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 20, 1985

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3446-85
AGENCY DKT. NO. 122-5/85

M.P. and G.P.,
Parents of R.P.,
Petitioner,
v.
BOARD OF EDUCATION OF
THE TOWNSHIP OF DELRAN,
BURLINGTON COUNTY,
Respondent.

John A. Sweeney, Esq., for petitioner (Sweeney & Sweeney, attorneys)

Stephen J. Mushinski, Esq., for respondent (Parker, McCay & Criscuolo, attorneys)

Record Closed: October 4, 1985 Decided: November 18, 1985

BEFORE **JOSEPH LAVERY**, ALJ:

This is an appeal by M.P. and G.P., the parents of R.P., on behalf of their daughter, seeking certain relief from the Commissioner of Education. They ask that R.P. be placed in a different school district, specifically that of Cinnaminson. They also ask that the Delran Board of Education asborb the cost of her past and future placement there.

Petitioners base these demands on their allegations that R.P. has been subjected to verbal and physical assaults, threats of violence and harassment by an identifiable group of students in the Delran Township Middle School. Petitioners charge that the Delran Board of Education has been unable and unwilling to prevent these injuries

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to their daughter, or to punish those responsible. As a consequence, they ask that the Commissioner provide the foregoing relief as well as any other remedy which he may deem appropriate, within his statutory and regulatory discretion.

PROCEDURAL HISTORY

This appeal was initiated by timely petition filed with the Commissioner on May 7, 1985. Answer was submitted on June 4, 1985 by respondent Board. Thereafter, the Commissioner of Education declared the dispute a contested case filing it with the Office of Administrative Law on June 6, 1985. Following a prehearing conference on July 1, 1985, the proceedings convened on September 9, 1985 in the Delran Municipal Court. After receipt of briefs on October 4, 1985, the record closed.

ISSUES

The issues in this case may be phrased as follows:

1. Whether respondent Board failed to protect R.P. from verbal and physical assaults, threats of violence, and harassment by an identifiable group of students in Delran Township Middle School, and, if so,

2. Whether this failure deprived R.P. of the thorough and efficient education which the Board is obligated to provide, and, if so,

3. Whether M.P. and G.P., as parents of R.P., are entitled to reimbursement for the costs of unilaterally placing R.P. in another school district.

Burden of Proof:

Petitioner must carry the burden of proof by a preponderance of the credible evidence.

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Undisputed Facts:

A number of facts are disputed here. However, some of the material background is not in contention:

R.P. has, from kindergarten through the first semester of eighth grade, attended schools in the Delran school district. Apart from an initial concern over learning speed which caused her placement in a "pre" first grade, petitioner has proceeded through the system without incident until October of the 1983-84 school year. At that time she was in seventh grade. She then became involved in a verbal dispute with S.R., which ended in a fist-fight. S.R. suffered a swollen lip. Both R.P. and S.R. were given one day in-school detention. The penalty was imposed by the vice-principal, L. Bruce Smith. For the remainder of the year, R.P.'s schooling was uneventful.

When R.P. reached eighth grade, during the 1984-85 school year, her difficulties began again. Antagonism had developed between herself and a collection of former girl friends at Delran Middle School. Friction increased between R.P. and these girls, who were approximately her age. Eventually, these girls were known by school administrators as "the Group". The girls involved in the group were S.R., G.W., J.W., N.P. and V.F. Occasionally, non "Group" members drifted in and out, participating in the adversary relationship with R.P. The hostility between the group and R.P. surfaced both in school and out. Salient examples of in-school confrontations during 8th grade included a "booing" incident at a December dance and a shouting match followed by a physical altercation on January 30, 1985. The latter followed a school-sponsored basketball game held on school property. This incident was the culmination of continuing verbal clashes between R.P. and the Group during the 1984-85 school year. Afterward, petitioners kept their daughter at home, refusing to return her to Delran Middle School.

Board officials had been aware of problems between R.P. and the Group. In December 1984, petitioner and the Group had been counselled by Charlene Nathans (now Burd). Eventually, during that same month, Mr. Gallucci, Principal of the Delran Middle School, was also drawn into the controversy. Following the final January 30 fight, G.P. met with Mr. Gallucci, the superintendent of schools, Mr. Chinnici, and eventually a committee from the Board of Education. Stanley Halpern, school psychologist and

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coordinator of the CST, was also called upon. These meetings were prompted by the decision of R.P.'s parents to keep her at home until what they perceived to be a physical threat to their daughter was removed. The Board and its administrators eventually proposed 4 "plans" to resolve this impasse (R-1, R-2). These "plans" were designed to remove R.P. from her normal scheduling to avoid confrontation, or promote her up and out of Delran Middle School to the High School.

Dissatisfied with the "plans" and their discussions with the foregoing Board officials, M.P. and G.P. removed their daughter from Delran Middle School. Around February of 1985, they unilaterally placed her in the Cinnaminson school district. This placement necessarily involved payment of monies to that district approximating $1,000 for the remainder of the 1984-85 school year and $3,000 for the current 1985-86 academic year.

It is from these circumstances that the present appeal has arisen.

ARGUMENTS OF THE PARTIES:

The parties in their testimony and legal arguments focused on who was responsible for R.P.'s current dilemma, and whether any financial liability may be ascribed to the Board.

Petitioners' Argument:

Petitioners argue that the Board failed to provide a safe environment for R.P. The Board also suggested solutions which were biased and prejudicial to the interest of R.P. Its failure to meet its responsibilities compelled petitioners unilaterally to remove R.P. from Delran Middle School and to absorb costs which should be borne instead by the Delran Board of Education.

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Recalling her experiences with the Group, R.P. testified that her relationship with these girls was friendly prior to the initial October 1983 incident. However, shortly after leaving the Group, she was attacked by S.R., who was more than a foot taller. In self-defense, she punched S.R., inflicting a swollen lip. After this, the Group harassed her constantly despite R.P.'s attempts to stay away from them. They would force her aside in hallways, and verbally abuse her with threats using vile and often anti-semitic epithets, such as "scum" and "Jew". During one out-of-school incident on Halloween 1984, the Group came to R.P.'s house. The girls asked for and received candy. When they left, they nevertheless proceeded to scribble graffiti over her fence and sidewalk. Some names scrawled on those surfaces were "scum", "slut", "Jew", "bitch", "leave town", "fucking Jew whore", "R. fucks", and "Jew bitch". Mrs. P. confirmed the episode, adding that she had much later informed school officials of this conduct during the course of her many meetings with them in 1984-85.

R.P. and her mother stated that the conceded "booing" occurrence followed an announcement during the December 1984 dance that R.P. had won the door prize. The negative reaction was initiated by the Group. Despite the presence of Assistant Principal Smith, and the building principal, Mr. Gallucci, nothing was done. R.P. left the event after being reduced to tears.

Recounting details of the January 30, 1985 fight, R.P. recalled that it took place on school property. After a basketball game sponsored by the school, J.W. and V.F. of the Group began shouting at her in a teachers' room where R.P. had gone. R. was attending as a cheerleader, but had forgotten her shirt. Four janitors who were present told them to "get out of here if you're going to fight". Some girls called her "Jew", "whore", and "scum". When R.P. escaped through a side door she was told by a teacher that her mother had left. In tears, R.P. sought to call her mother from a phone located well away from the scene of her confrontation. However, the girls of the Group followed her down the hall punching her and pushing her from behind. A fight ensued. R.P. eventually found a ride home. Shortly after, her mother arrived and was told her daughter had been seen in a distraught state. Calling home, G.P. was answered by R.P. who was hysterical. R.P. never returned to the Delran Middle School. She remembered that her subsequent mental condition was bleak. G.P. testified that R.P. threatened to kill herself or run away from home if she were forced to return to Delran Middle School.

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Retracing her own participation in her daughter's ordeals, G.P. stated that telephone calls and off-school harassment began as early as September 1984. From October 1984 onward, the girls of the Group followed R.P. to cheerleading practice. They harassed her there and in the locker room. They pushed her and called her names. This forced Ms. Holt, the cheerleading coach, ultimately to threaten disbandment of the cheerleading team if these attacks continued. The steady stream of abusive phone calls forced petitioners to apply a "tracer" through the phone company. By August 16, 1984, it was discovered that S.R. of the group had been making calls. This information is currently the subject of municipal court proceedings.

G.P. stated that she and her husband cautioned R.P. to avoid the Group, and R.P. obeyed, but to no avail. The harassment continued and culminated in the basketball game attack of January 30, 1985. At this point, G.P. called the superintendent of schools, Mr. Chinnici. She outlined R.P.'s entire history of abuse, and told the superintendent they would keep their child at home until her safety was assured. Homebound instruction followed after a two-week hiatus. Eventually, the school, through Dr. Halpern, sought to have R.P. referred for classification through the Child Study Team. Eventually the "plans" suggested in Exhibits R-1 and R-2 were presented as an alternative to homebound tutoring. Mrs. P. recalled that she never agreed to to do more than consider the plans. At no time did she accept them. She resented that her child was being singled out while the remaining members of the Group were left unpunished. Their conduct, in her opinion, was clearly deserving of discipline. Relying on the advice of her own psychologist, Dr. Fox, she continued to keep R.P. at home in order to avoid further victimization. Assessing her contacts with school officials, Mrs. P. believed that in her conversations with Ms. Nathans she was told that R. should not be returned to school. Morever, Mr. Gallucci's response included suggestions as to what other non-public schools were available to R.P.

Mrs. P. also described her active participation in school programs. She was president of the PTA, and often found herself on school premises as a helping mother. Mrs. P. was certain she did not call and complain to any of the mothers of the Group, with the exception of S.R.'s mother. She called her once in an attempt to make peace, without success. She also discussed the Halloween incident with J.W.'s mother, instead of calling the police. Any other contacts with Group mothers were in the course of her role as helping mother. R.P. was not discussed on those occasions.

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Finally, Mrs. P. testified that after meeting with the Board's committee, she knew she could not accept the Board's last offer. Specifically, the Board and its officials suggested that a meeting be called at school with school administrators, R.P. and the Group. Mrs. P. would be excluded. All the girls would be told that further conflict would result in discipline. Mrs. P., lacking confidence that the school would look to her daughter's safety, refused this offer because her presence was not permitted. R.P. did not return to school, and petitioners, on their own, arranged placement in the Cinnaminson Township school district.

Board's Argument:

The Board, through testimony by its district officals and Board president, insists that it made all possible efforts to alleviate R.P.'s distress. Despite every attempt, including numerous alternative proposals, R.P.'s parents unilaterally withdrew their child from the district. Effectively, the parents thus ended the possibility of resolution and terminated any liability on the part of the Board.

Ms. Nathans, the school guidance counsellor, remembered that she viewed R.P.'s problem as arising from typical developing attitudes characteristic among preadolescent girls. From mid-January 1984, she met with the Group and R.P. The five or six girls who were members of the Group said their difficulties with R.P. stemmed from (a) negative verbal action between them and her and (b) their anger over R.P.'s mother's intervention. The Group conceded that they had engaged in name-calling and other epithets against R.P. However, they believed the conflict between the group and R.P. would not end until Mrs. P. removed herself from any intrusion. They also charged that R.P. was "two-faced". She presented one personality to adults and another, less praiseworthy, personality to her schoolmates. The Group agreed that the antagonism had been ongoing for a long time. So informed, Ms. Nathans concluded that these meetings with the girls and R.P. should not be disciplinary. Ms. Nathans viewed the matter as a "peer" problem, stemming from behavior which was not unnatural. She did not believe meeting with other parents was appropriate. It would only exacerbate the conflict. She recalled that the parent of one Group member was angry that her daughter missed class because of discussions relating to R.P.

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Ms. Nathans remembered participating in preparation of the alternative "plans" which would temporarily remove R.P. from the mainstream, and in this way avoid confrontation with the Group. Ms. Nathans "accepted R.'s perception" of the Group's pattern of harassment. As a consequence, she believed that an abbreviated schedule under "Plan C" would probably best serve R.P. It permitted her gradual reentry from homebound study back into the Middle School environment.

L. Bruce Smith, the assistant principal at Delran Middle School, also believed that the pattern of behavior described by R.P. and her mother emerged from typical preadolescent conduct. He recalled that in October 1984 he knew of the Halloween incident at R.P.'s home. He also was present in the building at the time of the December dance "booing". Mr. Smith imposed no discipline at the time because of the confusing crowd circumstances and uncertainty over whether he had authority to impose discipline for booing.

The principal of Delran Middle School, **Michael Gallucci,** knew in December 1984 that R.P.'s mother had complained of neighborhood and school harassment, abusive telephone calls, and scurrilous name-calling which was in part anti-semitic. He investigated, and met with the girls involved in order to find facts. The girls of the Group told him, as they had Ms. Burd, that the problem was not R.P. They insisted that R.P.'s mother was the root cause. She constantly telephoned their mothers with untrue complaints. The Group reaffirmed to Mr. Gallucci their consistent position that the conflict would continue until Mrs. P. removed herself from the situation. The Group also resented Mrs. P.'s frequent presence on the school premises.

Mr. Gallucci recalled that Mrs. P. was almost in daily contact with the school over R.P. She seemed most interested in having her "pound of flesh" through discipline of the Group. He himself believed that R.P. should be left to "suffer the normal vicissitudes" of her age group. Then, perhaps, the friction between R.P. and the group would die a "natural death." The approach taken by school officials centered on attempts to "heal the wounds" between the girls. The "plans" suggested were only temporary expedients and were not meant to be exclusive methods.

Turning to Mrs. P.'s and R.P.'s conduct, Mr. Gallucci recalled that the mother of J.W. was certain that R.P. was making crank calls. J.W.'s mother also told him G.P. had called her five or six times over the ongoing problems of their children. G.P. had

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even stated to him personally that the conflict in part may have arisen because R.P. was better dressed and more affluent. Mr. Gallucci did not recall suggesting placement at other schools. He did agree during conversations with Mrs. P. that the Friends School in Moorestown was "good". His own children were in attendance. Mr. Gallucci never thought that discipline was appropriate under the circumstances. He also felt the problem emanated in good measure from Mrs. P.'s intrusions. He conceded that her deliberate absence from the scene during December 1984 was followed by the alleged January attack after R.P.'s return from the winter break.

Superintendent **Joseph A. Chinnici** remembered his involvement after this latter occurrence. He met with the parents of R.P. the following day, on January 31, 1985. They disclosed to him the entire history of R.P.'s embroilment with the Group. Consequently, he asked for suggestions from Dr. Halpern, the school psychologist. These were embodied in Dr. Halpern's report of February 13, 1985 (R-2). Assessing the psychological state of R.P., Dr. **Stanley Halpern** believed that keeping R.P. out of school would enhance her present depression and cause "school phobia". He felt there was a need for the Child Study Team to evaluate R.P. for possible classification. A special education rule required such referral, he thought. He did not believe that similar evaluation of the girls in the Group was permitted by law. (The Board stipulated through counsel that this was not a special education dispute). Mr. Halpern remembered that Mr. Gallucci said he did not have sufficient evidence to discipline, yet all the officials were certain that "something was happening." He agreed that a child's threats of suicide, such as R.P.'s, should never be taken lightly.

Mr. Chinnicci also did not believe that discipline was appropriate in the absence of clear proof against the other girls. He emphasized the overriding importance of due process for all. At no point did Mr. Chinnici think it necessary to call in the parents of the Group. He noted his April 3, 1985 letter of response to Mrs. P.'s inquiry about what discipline was imposed after the January altercation (P-1). He had replied therein that it would not be possible to discipline one girl involved with R.P. when R.P. herself was not in school to share that penalty. Due process would not be served if a penalty was imposed in that fashion. Moreover, the Board did not specifically direct the superintendent to suspend the other girl involved in the January 30, 1985 incident. **Dorothy Oppman**, Board president, corroborated this, and stated that the Board did not demand discipline in this instance since the January 30 conflict was after normal school hours. Moreover, Mrs. P. had not returned R.P. to school on February 19, violating her verbal agreement to do so, reached after meeting with the Board committee.

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FINDINGS OF FACT

Therefore, after considering the testimony previously set forth, and independently assessing the credibility of witnesses and parties, as well as reviewing the record as a whole, I make the following FINDINGS OF FACT:

As to UNDISPUTED facts, I **FIND** those designated on pages 3 and 4 of this opinion.

As to matters which are disputed or CONTESTED, pursuant to N.J.A.C. 1:1-16.3(c)7, I **FIND:**

1. In addition to the school-centered incidents undisputed by the parties, R.P was verbally harrassed and threatened by the Group sporadically, while attending Delran Middle School from September 1984 through January 1985.

2. The "Halloween incident" took place as described by R.P. and her mother G.P. at pp. 4 and 5 of this Initial Decision.

3. By no later than December 1984, Delran Middle School officials, including the Guidance Counsellor, Ms. Nathans and the Principal, Michael Gallucio, knew of the Halloween incident and ongoing friction between R.P. and the Group.

4. School janitors were present at the outset of the January 30, 1985 altercation between R.P. and the Group. The janitors ejected the pupils from the room in which it started, without intervening. The Group followed R.P. to the telephone, where R.P. attempted to have her mother come and transport her from school grounds. R.P. was involved in a physical fight with at least one member of the Group in the course of this confrontation, and was pushed by others. This incident occurred following a school-sponsored basketball game, attended by R.P. as a cheerleader, on school grounds.

5. R.P.'s mother G.P. continually pressed Delran Middle School officials to resolve the physical and verbal contacts between R.P. and the Group.

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6. G.P. was present often in school in her capacity as president of the PTA and helping mother. G.P.'s only contact with mothers of the Group were in relation to school business with two exceptions: the first was a telephone call during the 1983-84 year during which G.P. attempted unsuccessfully to reach some kind of accord with S.R.'s mother. The second contacts were with S.R.'s mother and J.W.'s mother after the Halloween incident, in lieu of involving the police.

7. R.P. and her parents were subjected to crank telephone calls throughout the time frames at issue here. Eventually, a tracer through the telephone company identified S.R.'s phone number as the source of one such call. That matter is pending in the Municipal Court.

ANALYSIS

An analysis of this matter can be best understood by adhereing to the issues outlined on page 2 of this opinion.

Whether Respondent Board Failed to Protect R.P. on School Premises:

It is important to remember that the administrative burden of proof falls on petitioners. They must show by a preponderance of the evidence that the facts are as they have propounded. Stated another way, the standard is reasonable probability, so that the evidence must be such as to "generate the belief that the tenured hypothesis is in all human likelihood the fact. Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959), certif. den. 31 N.J. 75 (1959), overruled on other grounds, 36 N.J. 487 (1962). The findings in this case have in large measure turned on the question of credibility. Credible testimony must not only proceed from the mouth of a credible witness, but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances, in Re Perrone, 5 N.J. 514, 522 (1950). Hearsay is admissible, but some legally competent evidence must be present to support each ultimate Finding of Fact. N.J.A.C. 1:1-15.8(b).

On this record, the credible testimony of petitioners and R.P. amounts to the preponderating evidence. They have outlined a lengthy history of circumstances in which R.P. has been subjected to physical and verbal abuse, both in school and out. That information has been available to school officials from the beginning of the pattern of

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conflict between R.P. and the Group. The other children have admitted both their antagonism and much of their actions, according to the guidance counsellor and school principal. The Board did not rebut testimony that the final incident on January 30, 1985 was observed by four school maintenance employees. According to Mr. Chinnici the Board itself, without hearing, apparently made a judgment concerning this latter incident that both R.P. and at least one member of the group participated and bore equal responsibility. None of the Group members testified before the Board nor did any of their parents. None appeared at the instant hearing. The evidence adduced on their behalf by administrative officials of the Board was hearsay lacking any residuum of competent evidence. Weston v. State, 60 N.J. 36 (1972).

Whether R.P. was Deprived of a Thorough and Efficient Education:

These proceedings cannot resolve what individual culpability exists among the children involved. That was not the purpose of this hearing. Nevertheless, it would be difficult to defeat the conclusion that R.P.'s thorough and efficient education, which the Board must provide, was halted on January 31, 1985, after petitioners removed their daughter from school. Homebound education made available two weeks later, with no sure end in sight, cannot be thought to satisfy this constitutional right. In rebuttal to petitioners' charges, the Board attests through its officials that it did what it could. These efforts included attempts by the guidance counsellor to assist the Group and R.P. in exploring their feelings. Eventually, school action expanded to discussions with the school principal, Mr. Gallucci, and the superintendent, Mr. Chinnici. Neither the principal nor the superintendent believed that discipline was appropriate. Mr. Gallucci thought that R.P. should be left to "suffer the normal viscissitudes" which are inescapable in a school setting for children her age. Mr. Chinnici saw no possibility of intrusion by the school that went beyond the "plans" of R-1 and R-2. The need for "due process" to the Group stood as a bar. Additionally, the school psychologist had persuaded officials that an answer might lay in referral of R.P. for evaluation under the special education regulations (only partially because of the length of her absence). The Group, on the other hand, was not viewed as sharing the need for discipline or referral.

The Board's response to petitioners' charges is puzzling. Whatever the good intentions of these experienced school administrators, it is obvious they failed in their efforts to assure that a thorough and efficient education was available to R.P. Board

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officials, in all the incidents reported, put too fine a point on how far they might involve themselves. The child was plainly traumatized to a degree requiring psychological care by her experience. Moreover, there was, throughout, a danger that she would be physically harmed by the Group (or even, to a lesser extent, the reverse). According to the Board's own witnesses, no one involved, including the Group itself, disavowed the continuing hostilities involving R.P. The school had an obligation to intervene and end this state of affairs. Instead of assisting the Group to get in touch with its feelings, thorough and efficient education would have been better served if the school had gotten in touch with all the girls' parents. Due process does not mean that selected participants in harmful and improper behavior be freed from inconvenience. The school had an obligation to alert the parents of all the children involved, as opposed to fending off the persistent, and undoubtedly irritating complaints of R.P.'s mother. At that point, both any contributory behavior of R.P. and that of the Group could be gauged. Firm and forthright action by the school thereafter could have been subject to challenge by any or all of the parents through an informal hearing before Administrators, and upward. Thus would the needs of due process have been satisfied, Goss v. Lopez, 419 U.S. 565 (1975). These needs would not have been met by isolating R.P., in full or in part, as the school's "plans" would have done.

There is a real danger to second-guessing school administrators with decades of experience. The circumstances of this intense dispute are removed in time and memory. However, the evidence of record is wholly persuasive that the school, and eventually the Board, gave way to a group of children who disliked R.P. and her mother. They resented the official presence of R.P.'s mother on school grounds for school-related activities which she had a right to pursue. School administrators adopted a conciliatory approach apparently on the theory that these unfortunate circumstances were a predictable by-product of normal pre-adolescent female development. R.P. was obliged to endure and to profit from these "viscissitudes". It is at least arguable whether such a defense can withstand the application of common sense, much less legal doctrine. In any event, it is virtually certain that the law is inconsistent with such a theory.

The Board had an obligation to provide for the safety of R.P. and, for that matter, the Group. All the children involved were exposed to physical as well as emotional hazard in the course of their recurring, often violent clashes. R.P. herself was under the care of a doctor who counselled her to avoid the Middle School altogether. There is no doubt that in New Jersey, school personnel have a duty to exercise reasonable

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supervisory care for the safety of students entrusted to them. Their accountability for injuries resulting from failure to discharge that duty is firmly established. Caltavuturo v. Passaic, 124 N.J. Super., 361, 366 (App. Div. 1973), Jackson v. Hankinson and Bd. of Ed., New Shrewsbury, 51 N.J. 230, 235, 236 (1968); Titus v. Lindberg, 489 N.J. 66, 73 (1967). The "plans" proffered by the Board and its administrators do not amount to supervision. They are palliatives which place the onus on R.P. and her mother to adapt quiescently in the face of physical and mental abuse emerging from her relationship with a group of schoolmates. The Board had a duty to impose a firm control over the environment of their school. Instead, the school administrators adopted what was, at least in part, a "hands-off" policy with respect to the Group and their parents. The nearest step toward firm control was the last offer following petitioners' meeting with the Board. R.P. was to be dropped at the school without her mother. School officials, at that late date, would then have cautioned all involved that discipline would follow if friction continued. This exclusionary approach was hardly an enticing gesture, to a mother and child already frantic from anxiety over lack of protection.

Whether Petitioner Should be Reimbursed for Unilateral Placement of R.P. outside the Delran district:

The Commissioner of Education has authority to direct the Board to reimburse petitioners. His constitutional duty is to assure the maintenance and support of a "thorough and efficient system of public schools," N.J. Const., Art. VIII, Sec. 4, par. 1. Following Robinson, et al., v. Cahill, 62 N.J. 473 (1973) and its sequellae, the Public School Education Act of 1975 particularized the Commissioner's affirmative obligation to see to it that the statutory objectives are met L., 1975, c. 212 (N.J.S.A. 18A:7A-1 et seq.), Robinson, et al., v. Cahill, 62 N.J. at 509n. The Act at N.J.S.A. 18A:7A-5 demands that a thorough and efficient system of free public schools include a number of elements. One among them is:

> F. Adequately equipped, sanitary and secure physical facilities and adequate materials and supplies; [emphasis added]

The broad-ranging power of the Commissioner and the State Board of Education (as head of the Department of Education) to inquire into the thoroughness and efficiency of the operation of local public schools, has been made clear by the Supreme

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Court in In re Upper Freehold Reg'l School Dist., 86 N.J. 265, 272-273 (1981). Neither party has cited any case in this State supporting compensation for unilateral placement of a child in a different school district for safety reasons. The nearest analogy may be found in the special education regulations, at N.J.A.C. 6:28-1.1 et seq. These regulations control placement of educationally handicapped pupils. There, at N.J.A.C. 6:28-4.2(a)7, the rule permits placement of a handicapped pupil in a privately operated special class, only with written approval of the Department of Education through a county office. However, the Commissioner in exceptional circumstances of unilateral placement, has awarded reimbursement. He has done so after discerning shortcomings in the conduct of a local Board. Harbor Hall School v. Township of Weehawken Boe., 77 S.L.D. 342; "J.G.", by his parents v. Boe. of Pompton Lakes, 79 S.L.D. 105. The rationale for these exceptions was the Board's failure to provide a free, appropriate education, N.J.A.C. 6:28-2.1(a).

Here, special education regulations obviously do not govern. However, in like fashion, the Commissioner should exercise his constitutionally and statutorily based powers, cited supra to carve out an exceptional remedy. He should require reimbursement for past expenses in the Cinnaminson School district, because of the Board's failure to provide R.P. with a thorough and efficient education.

Petitioners did all that they could to obtain assurances of their daughter's safety. In response, the Board offered alternatives which would remove R.P., in whole or in part, from the schedule accorded all other students at Middle School. The girls in the Group suffered no such removal from the Middle School mainstream. Once the Board took its final position, G.P. sought timely intervention by the Commissioner for any relief available. In the interim, petitioners moved to insure the safety of their child in a different school district. They should not now be penalized for doing so by absorbing the costs of this last desperate attempt to have their child educated in a public school system without peril.

The Board argues correctly that its decision should not be overturned unless it is arbitrary, capricious and abusive of its discretionary power. However, in focusing on the isolation of R.P., failing to resolve whether discipline was appropriate, and, finally, seeking to bar R.P.'s mother from a meeting which included her alleged tormentors en masse, the Board's actions warranted reversal.

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Nevertheless, although compensation for past schooling is appropriate, this subsistence should not be indefinite. All the girls are older, and apparently in High School. New efforts should be made by the Board to resolve this impasse between R.P. and the Group. These steps should include a meeting of school administrators with the parents of all involved. The administrators should outline what has occurred and express those cautions which seem appropriate concerning future discipline for verbal or physical assaults. Clearly specified guidelines concerning conduct and penalties should be provided all the parents and all the children. Once done, R.P. should then return to the next level of schooling in the Delran school district.

CONCLUSION

I **CONCLUDE**, based on my review of the record, including the credibility of witnesses, and for the reasons expressed in the ANALYSIS portion of this decision that:

1. Petitioners should be reimbursed for the cost of placement of R.P. in the Cinnaminson school district from February 1985 through her return to the Delran High School.

2. The parents of all the children involved in this long history of antagonism, including petitioners, should be asked to meet with the appropriate board and school officials. These officials should outline the history of what has occurred. They should also set guidelines and provide safeguards to assure proper deportment in the future. Clear penalties for violations should be made known to the Group, R.P., and all the parents..

3. Compensation for attendance at Cinnaminson High School should terminate upon completion of these steps, and R.P. should then return to Delran High School.

ORDER

I **ORDER**, therefore, that petitioners be compensated for past and current expenses incurred by placement in the Cinnaminson school district, and

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I **ORDER** further that the Board now take those steps which are consistent with the foregoing initial decision.

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

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

November 18, 1985
DATE

Joseph Lavery
JOSEPH LAVERY, ALJ

Receipt Acknowledged:

NOV 19 1985
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

NOV 2 1 1985
DATE

Ronald J. Pankey, J.S.
OFFICE OF ADMINISTRATIVE LAW

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M.P. AND G.P., parents of R.P.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DELRAN, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

It is observed that no timely exceptions to the initial decision were filed with the Commissioner pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

The Commissioner has previously held that parents are generally not entitled to tuition reimbursement if they unilaterally withdraw their children from the school district of residence and send them to another school district. See Magdalene Lichtenberger v. Board of Education of the Borough of Maywood, 1966 S.L.D. 163, aff'd State Board 1970 S.L.D. 458; William Potter v. Board of Education of the Township of Holmdel, 1971 S.L.D. 384, aff'd State Board 1972 S.L.D. 689.

The factual circumstances of the instant matter warrant a different conclusion. It is clear that the Board herein failed to take the appropriate action deemed necessary to guarantee R.P.'s safe access to attend the public school in Delran without fear of intimidation and possible physical harm from a certain group of pupils whose behavior was not subject to the imposition of disciplinary action.

Instead the Board offered R.P. home instruction or, in the alternative, a modified shortened school day. Consequently, the alternatives left open to R.P. accorded her disparate treatment from all other pupils with regard to her right to access and attendance at school during regular school hours. It can only be concluded therefore that it was R.P. who was being unjustly disciplined for the unacceptable behavior engaged in by a group of her peers.

The Commissioner cannot condone the Board's decision in this regard which in effect excluded R.P. from regular daily attendance in the Delran School District.

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Although the remedy granted herein by the Commissioner which accords petitioner tuition reimbursement is exceptional, it is nevertheless appropriate given the specific circumstances which prevail in this matter wherein the Delran Board of Education and its officials by their inaction and avoidance of responsibility gave petitioners no option but to either accept an inferior educational status or withdraw the child from school and seek alternate relief through the Commissioner. The record clearly establishes that petitioners exhausted all available avenues of redress short of formal appeal with no success. When all such avenues for redress had been exhausted, petitioners were left with no choice other than to remove their daughter from an intolerable situation and to seek the due process relief granted herein by the ALJ and affirmed by the Commissioner. Such remedy clearly is, as indicated by the ALJ, consistent with the Commissioner's broad authority pursuant to Robinson v. Cahill, supra.

The Commissioner upon review of the record hereby affirms those findings in the initial decision as his own.

Accordingly, as concluded by the ALJ the Board is directed to compensate petitioners for the past and current expenses incurred by the placement of R.P. in the Cinnaminson School District. However, the Board in effecting R.P.'s immediate return to Delran High School is directed to adopt its own remedial plan in order to take those appropriate measures deemed reasonable and equitable in providing an atmosphere within the Delran School District which promotes the safety and well-being of R.P.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 30, 1985

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LOUIS BORRELLI,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RUTHERFORD, BERGEN COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, September 26, 1983.

For the Petitioner-Respondent, Bucceri & Pincus
(Sheldon H. Pincus, Esq., of Counsel)

For the Respondent-Appellant, H. Ronald Levine, Esq.

Petitioner-Respondent Borrelli is a tenured guidance counselor employed by the Rutherford Board of Education. On June 14, 1982, the Board resolved to "permanently" withhold Petitioner-Respondent's employment and adjustment increments for the 1982-1983 school year, predicating this action on two incidents that had occurred during the 1980-81 school year: an unauthorized absence, for which his salary had been administratively "docked", and an unauthorized acquisition and use of the Minimum Basic Skills (MBS) Test administered in the Spring of 1981. The Board had approved Petitioner-Respondent's salary increments for the 1981-1982 school year. Petitioner-Respondent appealed to the Commissioner of Education, contending that the Board's act in withholding his 1982-83 salary increments for conduct not occurring during the year in which such action was taken was arbitrary and capricious, retaliatory and time barred, and seeking restoration of his increments and back pay. The Board argued that its action, delayed on the advice of counsel during the pendency of Mr. Borrelli's civil rights action against the Board, was a proper exercise of the discretion afforded it by N.J.S.A. 18A:29-14.

Hearings in this matter were held on June 2 and June 21, 1983. On August 9, 1983, the Administrative Law Judge (ALJ) rendered his initial decision wherein he found that the withholding of increment for the unauthorized absence was discriminatory inasmuch as no such action was taken against three other teaching staff members who were less honest than Petitioner-Respondent in disclosing the reasons for their absences. As to this infraction, the A.L.J. concluded that "docking" Borrelli's pay was an appropriate and sufficient disciplinary measure.

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As to Petitioner-Respondent's conduct relating to the MBS test, however, the A.L.J. concluded that the withholding of increment was proper. While no misuse of the test was established, the A.L.J. found that Mr. Borrelli secured possession of the test by misrepresenting that he had permission to take it when in fact he did not, and, further, that he was insubordinate in that he took the test home after he was told not to by the Superintendent of Schools. The A.L.J. rejected Petitioner-Respondent's claim that the withholding action was barred by laches, reasoning that even though such action was taken a full year after the underlying incidents occurred, such delay is permissible under Trautwein v. Bound Brook Bd. of Ed., decided by the State Board, 1979 S.L.D. 876, 877, aff'd by the Appellate Division, 1980 S.L.D. 1539, cert. denied, 84 N.J. 469 (1980). The A.L.J. also declined to characterize such action as retaliatory against Mr. Borrelli for instituting a federal civil rights action, finding instead that the withholding action had been contemplated prior to settlement of the litigation but had been deferred on the advice of the Board's attorney.

Noting that the Board's action to "permanently" withhold Mr. Borrelli's increments could not be construed to bind future boards in the exercise of their discretionary authority under N.J.S.A. 18A:29-14 to restore said increments, the A.L.J. recommended that the Board's action be sustained, subject only to compensating Petitioner-Respondent in such amount of salary withheld for the 1982-83 school year as exceeded the amount that would have been withheld had such action been taken earlier and been effective for the 1981-1982 school year.

The Commissioner of Education rejected the A.L.J.'s recommendation, finding instead that the Board's action was delayed for reasons that were self-serving, and that reliance upon conduct during the 1980-81 school year was improper and an abuse of the Board's discretion under N.J.S.A. 18A:29-14. The Commissioner directed the Board to restore Petitioner-Respondent's employment and adjustment increments and to take such adjustment into account in computing his salary for subsequent years. The Board has appealed.

While the State Board affirms the Commissioner, it feels the cursory reasoning of that decision should be enlarged upon to afford guidance to this and other Boards in applying the Trautwein doctrine. We reiterate that the decision to withhold salary increments is a matter of managerial prerogative which has been delegated by the legislature to local boards of education. Bernards Twp. Bd. of Ed. v. Bernards Twp. Education Assoc., 79 N.J. 311, 321 (1979). N.J.S.A. 18A:29-14 provides in relevant part that:

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> 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....

Once the discretion thus legislatively vested has been exercised, substantive review of a board's decision is limited. Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288, 295-296 (App. Div. 1960). However, deference to a board's reasons for withholding an increment does not preclude examination of the board's action for procedural compliance with the statute.

The authority to withhold salary increments "in any year" has been construed to mean that the Board may, based upon its assessment of a teacher's performance in a given year, take action in that year or at any time prior to the commencement of the succeeding school year to withhold the teacher's salary increments. Law v. Parsippany-Troy Hills Bd. of Ed., decided by the State Board, August 4, 1982, rev'g the decision of the Commissioner rendered October 26, 1981, aff'd Docket No. A-280-82T2 (App. Div., October 25, 1983). See also Northern Highlands Regional Bd. of Ed. v. Martin, 1979 S.L.D. 852, 853 (App. Div.). The discretionary power of a board to withhold increments must be exercised before the right to said increments accrues to or vests in the teaching staff member on the first day of the next succeeding school year. Once vested, the increment cannot be rescinded by board action. Belli v. Clifton Bd. of Ed., 1963 S.L.D. 95, 98.

Petitioner-Respondent's increment for 1981-82 school year, based upon the Board's assessment of his performance during the 1980-1981 school year was, for better or worse, approved in the Spring of 1981 and vested as of the first day of the 1981-1982 school year. Having determined that Mr. Borrelli was entitled to receive his salary increments, the Board was estopped from reassessing in the following year Petitioner-Respondent's performance in 1980-1981. See Law v. Parsippany-Troy Hills Bd. of Ed., supra. See also Willingboro Administrators Assoc. v. Willingboro Bd. of Ed., 1980 S.L.D. 1427, 1437-1438.

Although the court seemed to relax this rule in Trautwein, supra, by permitting a local board of education to consider absenteeism occurring in past and current school years when deciding to withhold salary increments, that case held only that past conduct over a reasonably relevant period of time may be considered where it establishes a pattern of conduct that has continued into the school year in which the action to withhold the increment is taken. The operative factor distinguishing Trautwein from the case before us is the continuity of conduct, with incidents of absenteeism occurring not solely in remote years but in the year in which the increment was withheld.

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Thus, where conduct not warranting board action to withhold salary increments in a single year continues to be exhibited in subsequent years, such that the cumulative effect of the pattern of conduct has a deleterious impact on the delivery of educational services, the board may at that point decide that withholding future increments is appropriate. In such cases, the board should not be confined to examining the current school year in a vacuum but should be permitted to consider the developing pattern. However, where no such continuing pattern is identified, no justification exists to review behavior in prior years. The single isolated acts involved here occurred only during the 1980-1981 school year. They did not recur in the 1981-1982 school year.

Permitting the Board to consider conduct confined to the 1980-1981 school year when it made its salary increment decision for the 1982-1983 school year, even though that conduct did not persist into the school year in which the decision was made, in effect authorizes a local board of education to re-examine a prior decision to award increments if it finds that its earlier judgment approving them was unsound. Indeed, that portion of the Administrative Law Judge's decision that ordered an adjustment in the amount withheld to reflect the increments that would have been withheld for 1981-1982 discloses that the effective revocation of vested increments, albeit prospective, is precisely the outcome. Had the Board wished to rely upon the reasons it proffered, it would have had to act to withhold Mr. Borrelli's increments prior to the inception of the 1981-82 school year. Having failed to do so, the Board waived its right to withhold the increments for that year and could not effectively accomplish this result by re-examining the same isolated incidents in a subsequent year. As there was no recurrence of the objectionable conduct in 1981-1982, the Board could not identify a continuing pattern of behavior that would justify renewed scrutiny of Petitioner-Respondent's 1980-81 performance. We conclude that under these circumstances, the Board's original assessment may not be revisited.

The State Board of Education therefore affirms the decision of the Commissioner of Education on the ground that, consistent with the discretion legislatively entrusted in local boards of education pursuant to N.J.S.A. 18A:29-14, conduct occurring in remote school years may not be re-examined to support an adverse increment determination in subsequent years unless such earlier unsatisfactory conduct is cumulative, so as to be added to other conduct occurring during the year in which the decision to withhold the increment is made.

Finally, although we find that the withholding of increment was not proper in this case, we emphasize, as we did In the Matter of the Tenure Hearing of Theodore Augustine Burns, decided by the State Board, October 24, 1984, that when an employment increment is withheld properly, such withholding is permanent unless a future board acts affirmatively to reinstate it.

July 3, 1985

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JAMES BREE,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BOONTON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, August 6, 1984

For the Petitioner-Respondent, Katzenbach, Gildea and Rudner
(Douglas B. Lang, Esq., of Counsel)

For the Respondent-Appellant, Wiley, Malehorn and Sirota
(Frederic J. Sirota, Esq., of Counsel)

Petitioner-Respondent in the instant case is a tenured teaching staff member who has been employed by the Board of Education of the Township of Boonton since 1970. In his application for employment by the Board, he included as part of his teaching experience that he had taught physical education and coached football during the last two years that he was an undergraduate in college. His application also included the fact that he had fulfilled his student teaching requirement by teaching freshman English at his college. P-9, P-10. He, however, did not specify that his physical education/coaching experience was voluntary. Id. Although the Board's policy was to not give credit for volunteer teaching, the application did not ask for this information and Petitioner-Respondent was not questioned at his interview concerning the nature of his physical education/coaching experience. Initial Decision, at 3. Nor did the Board pursue this specific issue through inquiries to the school at which Petitioner-Respondent served as a volunteer. Id. Petitioner-Respondent was therefore credited with his two years of volunteer service, as well as his three years of paid teaching experience when he was hired and given placement on the salary guide.

In February, 1983, the fact that Petitioner-Respondent's salary reflected two years' unpaid experience came to the Board's attention through an administrative survey of experience data. Id., at 2. On September 8, 1983, the Board acted to recoup salary overpayments resulting from this mistake by denying him a negotiated 6.5% increase for 1983-84. P-3. However, his base salary for 1983-84 increased $176. P-1, P-2, P-3. On April 9, 1984, the Board approved Petitioner-Respondent's salary for 1984-85, which was set at the 1983-84 level, thus denying him the negotiated increase for 1984-85. C-1. Petitioner-Respondent challenged the validity of the

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Board's initial action by filing a petition with the Commissioner on December 13, 1983, and later, by letter dated May 31, 1984, amended that petition to include the Board's action for 1984-85.

In his initial decision, the Administrative Law Judge (ALJ) found that Petitioner-Respondent did not misrepresent, fraudulently or otherwise, his pre-1970 teaching experience. Initial Decision, at 8. While the application for employment was not entirely complete, it was reviewed and accepted by the Superintendent, who could have required completion at the interview. Id., at 6. The ALJ further noted that the information sheet clearly established Petitioner-Respondent's date of graduation from college and that corrective action could have been taken at that time. Id. He concluded that any error in salary placement was unilateral on the part of the Board and its agent. Id. Therefore, in the absence of fraud or misrepresentation, the Board acted unlawfully in denying Petitioner-Respondent the negotiated increases for both 1983-84 and 1984-85. Thus, the Board was ordered to compensate him for the difference between the salary he received and his entitlement for 1983-84 and to establish his 1984-85 salary in a manner consistent with the decision. Id., at 8-9.

The Commissioner, emphasizing that there is no statutory prohibition against offering salary above the statutory minimum for initial employment and therefore no prohibition against crediting a teacher with volunteer experience, affirmed the initial decision. The Commissioner further emphasized that it was the Board's obligation to resolve any concerns about Petitioner-Respondent's application prior to his initial employment. Commissioner's decision, at 12. The Commissioner concluded that since the Board failed in this obligation, it was estopped in the absence of fraud or misrepresentation from recouping monies from Petitioner-Respondent's salary thirteen years later. Id., at 13.

The State Board agrees that it was the Board's obligation to resolve any concerns it had about Petitioner-Respondent's application at the time of initial employment and that, in the absence of fraud or misrepresentation, a board may not later withhold increases in salary to which a teaching staff member is otherwise entitled. However, in the instant case, Petitioner-Respondent filed his petition challenging the Board's action for 1983-84 on December 13, 1983, more than 90 days after the Board took action on September 8, 1983. Although amendment to his original petition, in which he alleged improper denial of the negotiated increase for 1984-85, was timely, we conclude that his challenge to the Board's action of September 8 must be dismissed as untimely.

N.J.A.C. 6:24-1.2 provides that petitions to the Commissioner to determine controversies arising under the school laws shall be filed within 90 days after receipt of notice of the school board's actual ruling. This time limit has been strictly construed to mean that the 90 day period runs from the time the initial cause

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of action accrued. See Watchung Hills Regional Education Association v. Watchung Hills Regional High School District, 1980 S.L.D. 356. Thus, even a teacher who proceeds to advisory arbitration is not relieved from compliance with the 90 day filing requirement. Bd. of Ed. of Bernards Twp. v. Bernards Twp. Ed. Ass'n., 79 N.J. 311 (1979). Although N.J.A.C. 6:24-1.19 confers on the Commissioner the authority to relax the 90 day requirement, such authority is invoked only where there are compelling reasons justifying relaxation or where circumstances are such that strict adherence would be inappropriate, unnecessary or where injustice would result. See Pfeifer v. Board of Education of Willingboro, decided by the Commissioner September 15, 1980, aff'd, State Board June 3, 1981, dismissed, App. Div., 1981. The record reveals no circumstance that would warrant relaxation in this case.

We emphasize that the right to a negotiated increase, like the right to an increment, is not a statutory entitlement. See North Plainfield Education Association v. Board of Education of the Borough of North Plainfield, 96 N.J. 587 (1984). Therefore, the 90 day requirement applied to Petitioner-Respondent's challenge of the Board's refusal to grant him the increases in this case. Id. As previously stated, he did not comply with this requirement in challenging the Board's action of September 8, 1983, and, in the absence of circumstances warranting relaxation of the rule, his claim for 1983-84 is time barred. Moreover, his failure to comply with the timeliness requirement precludes any dependent action for relief in future years. Id. The fact that he is permanently deprived of the 1983-84 increase does not constitute a new violation each year, but is the effect of an earlier employment decision. Id.

For the reasons stated above, we dismiss Petitioner-Respondent's claim for 1983-84 as untimely and reverse the Commissioner's order that Petitioner-Respondent be compensated for the difference between the salary he received and that to which he would have been entitled for 1983-84. However, since his challenge to the Board's action for 1984-85 was not untimely, we order that his salary for 1984-85 be set to include the negotiated increase for that year.

Attorney exceptions are noted.
February 6, 1985

Pending N.J. Superior Court

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C.D., A MINOR CHILD, BY HER PARENTS, M.D. AND S.D., ET AL.,	:	
PETITIONERS-RESPONDENTS,	:	STATE BOARD OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, August 24, 1984

For the Petitioners-Respondents, David H. Dugan III, Esq.

For the Respondent-Appellant, Archer & Greiner
(Arthur Risden, Esq., of Counsel)

This appeal presents the issue of whether a board may effectuate a staggered session plan that will affect students in one grade and be in effect for four years. The case was initiated when parents of minor children appealed to the Commissioner of Education a decision made by the Board of Education of the Lenape Regional High School District on December 20, 1983, to implement a Modified Planned Schedule (hereinafter referred to as Staggered Overlap Plan) at Shawnee High School, which was scheduled to go into effect at the commencement of the 1984-85 school year.

Under the plan, which was to continue for four consecutive years, 10th, 11th and 12th grade students would follow their normal schedule, with class sessions extending from 7:25 a.m. to 1:50 p.m. Ninth graders, however, would arrive at 12:23 p.m. and end their day at 4:53 p.m. This schedule permits the ninth graders to attend their normal classes, but will eliminate lunch and study hall. Because an activities bus will be provided in the morning, ninth graders could participate in extra-curricular clubs. Similarly, they would be able to participate on all the school's sports teams except the girls' tennis team. However, a ninth grader who achieved varsity status would be unable to practice with varsity teams that practice in the afternoon. The Plan would not directly affect travel time since under the District's busing plan, children who are closer to any one of its three high schools may have to travel longer than those who live farther away.

The Board of Education of the Lenape Regional High School District operates three high schools: Cherokee, Shawnee and Lenape. The Staggered Overlap Plan outlined above was the Board's response to overcrowded conditions at Shawnee High School. As established by the State of New Jersey, the three high schools in the District have the following capacity:

Cherokee - 1,525 capacity

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Lenape - 2,036 capacity

Shawnee - 1,575 capacity

As of September 30, 1983, enrollment at each of the high schools was:

Cherokee - 1,538 enrollment

Lenape - 1,744 enrollment

Shawnee - 2,053 enrollment

Initial Decision, at 5.

Thus, Cherokee was 13 students over capacity and Shawnee was 478 students over capacity with enrollment projected to increase to 2,383 by 1987-88. R-2. At the same time, Lenape was 292 students under capacity. Under the current scheme, Cherokee students are drawn from Evesham Township, Lenape students from Mount Laurel and Southampton and Shawnee students from Medford, Medford Lakes, Tabernacle and Shamong. Initial Decision, at 4.

Although the Board considered redistricting as a solution to the overcrowding problem at Shawnee, it chose to adopt the Staggered Overlap Plan because it concluded that the problem was temporary and would abate by the conclusion of the 1987-88 school year, Staggered Overlap would avoid the upheaval inherent in redistricting, Staggered Overlap would permit the maintenance of current community boundaries and would be more politically sensitive to the desires of the population of Medford, which had supported programs, budgets and building referenda. The Board also selected the Staggered Overlap Plan because it had been used in the past, it would only affect ninth graders, and it was less costly than redistricting. The Board concluded that concern about students remaining at home alone in the morning was not overriding since students on regular schedules are home alone in the afternoon and, by starting school later, students tend to sleep later and have less time to plan parties. R-1.

In his initial decision, the Administrative Law Judge (ALJ) found that the Board's decision to adopt the Staggered Overlap Plan was reasonable and had been made in good faith. He therefore denied the parents' application for either a temporary or permanent injunction of implementation of the decision. The Commissioner, however, set aside the findings and determination in the initial decision. In doing so, he noted that the Manual for the Evaluation of Local School Districts Pursuant to the Public School Education Act of 1975 (hereinafter referred to as Manual) requires that a district's long-range facilities plan must have been reviewed/revised within the last five years in order that the district may be certified and that the Guidebook for the Manual for the Evaluation of Local School Districts Pursuant to the Public School Education Act of 1975 (hereinafter referred to as Guidebook) states that schools on split session will be considered to have not implemented the long-range

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plan and "cannot be recommended for certification." The Commissioner concluded that he could not in good conscience affirm the action by the Board "which would knowingly result in the district's non-certification" if it underwent monitoring. He therefore directed the District to develop a plan to redistrict. However, because he recognized that redistricting prior to the 1984-85 school year would cause scheduling and busing upheaval, he ordered that the Staggered Overlap Plan be eliminated no later than the commencement of the 1985-86 school year.

In its appeal to the State Board of Education, the Board argues that the Commissioner's reliance on the Guidebook was improper because the Guidebook has never been promulgated as a rule or regulation and that its application was in any event improper since the certification program did not become effective until June, 1984, the District's updated facilities plan was not scheduled to be submitted until December, 1984, and it is not scheduled to be visited by the monitoring team until December, 1985. The Board also contends that the Staggered Overlap Plan is not a split session and therefore is not an impermissible use of the District's facilities.

Initially, we emphasize that the standard set forth in the Guidebook and incorporated into the certification program reflects the well established policy that split sessions are not an acceptable method of dealing with overcrowding. See Central Regional Education Association et al. v. Board of Education of the Central Regional High School District, 1977 S.L.D. 543; Board of Education of the Borough of Bradley Beach v. Board of Education of the City of Asbury Park, 1959-60 S.L.D. 159. Even before enactment of the Public School Education Act of 1975, L.1975, C.212, which was designed to fulfill the constitutional mandate for a thorough and efficient system of free public schools, it was recognized that double sessions are not educationally sound because they deprive students of full educational opportunities. As stated by the Commissioner,

> ...the Commissioner is convinced that double sessions cannot be considered an adequate substitute under any circumstances for the complete educational program possible in a normal school day and can only be defended under emergency conditions. Because of the deprivation of full educational opportunities for pupils, of inadequate expedients which must be employed, of the unnatural stresses and strains through inconvenience which are placed on pupils, homes and staff, the Commissioner deplores the necessity to resort to a double session organization...

Board of Education of the Borough of Bradley Beach v. Board of Education of the City of Asbury Park, supra, at 162-63.

Accordingly, split sessions were considered permissible only for temporary periods under unusual conditions. See Wassmer v.

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Board of Education of Wharton, 1967 S.L.D. 125, 127-28.[1] Although the policy expressed in Bradley Beach was articulated in the context of the termination of a sending-receiving relationship, we conclude that the same principles apply in any situation in which a board resorts to split sessions in order to solve its overcrowding problems. See Wassmer v. Board of Education of Wharton, supra.

We further conclude that split sessions preclude the provision of a thorough and efficient education, which is constitutionally and statutorily mandated. See N.J.S.A. 18A:7A-1 et seq. Pursuant to N.J.S.A. 18A:7A-5(f), one of the major elements of a thorough and efficient system of free public schools is adequate facilities. Accordingly, each district is required to provide adequate facilities for its student body in order to be certified under the revised process for certification of local school districts. As previously stated, under the certification process currently in effect, schools on split session cannot be recommended for certification. This procedure embodies the principle that when a board is forced to resort to split sessions because of overcrowding, its facilities are not adequate and, therefore, it is not able to provide a thorough and efficient education. See Central Regional Education Association et al. v. Board of Education of the Central Regional High School District, supra. We would be remiss in our duty to assure the provision of a thorough and efficient system of education, see Robinson et al. v. Cahill et. al., 62 N.J. 473, 508-09 (1973); 18A:7A-6, if we failed to effectuate the policy embodied in our own certification program, see Minutes, New Jersey State Board of Education, August 3, 1983, that split sessions preclude the provision of a thorough and efficient education and that, accordingly, split sessions constitute an impermissible use of a district's facilities.

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[1] Respondent-Appellant argues that the current certification process contradicts the case law because under the certification process schools on split session cannot be recommended for certification. Reply Brief, at 2-3. This, according to Respondent-Appellant, constitutes "new law" that would force all districts now on split session to build new schools. We note that although under the certification process there is no discretion concerning the recommendation for certification, the process does not force districts to build new schools. Rather, under the Level II Review Process, the district superintendent organizes a self study team within one month of notification that the district has not been certified. Manual, at 26. Within three months, the team produces an improvement plan that will bring the district to Level I standards within one year. Id., at 27-28. Thus, the certification process incorporates recognition of the fact that unusual circumstances may necessitate use of split sessions for a temporary period, a period now given definite limitation by the monitoring process. However, we note that the validity of the certification process is not at issue in this case.

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The fact that this policy has not been cast into regulation makes it no less binding on boards of education. As stated by the New Jersey Supreme Court,

> Administrative adjudications in contested cases determine the legal rights of specific individuals or a limited group of individuals. N.J.A.C. 1:1-6(a)(iii). See Texter, 88 N.J. at 384. See generally Shapiro, supra, 78 Harv. L. Rev. at 924-30. Nevertheless, administrative agencies may and do fulfill their regulatory responsibilities through the adjudication of individual disputes. (Citations Omitted)
>
> In the context of public administration, adjudication is regulation. In effect, an agency engages in ad hoc rulemaking every time it decides a contested case. The agency can use the adjudicative process to set certain policies, to define the contours of its regulatory jurisdiction, to give specific content to general regulations, and to handle specialized problems that arise. Thus, the agency's decisional authority over contested cases is directly and integrally related to its regulatory function.

In re Uniform Adm'v Procedure Rules, 90 N.J. 85, 93-94 (1982).

Moreover, although

> [t]he function of filling in the interstices of [an enabling act] should be performed, as much as possible, through th[e] quasi-legislative promulgation of rules to be applied in the future...any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise. *** Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order.

Securities and Exchange Comm'n v. Chenery Corp., 332 U.S. 194, 201-02 (1947).

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As set forth above, it has long been established by our adjudicative process that split sessions are not an adequate substitute for the complete educational program possible in a full school day. The Board here was not free therefore to adopt a split session plan as a solution to its overcrowding problems when it acted in December, 1982, and when it determined to implement its plan in December, 1983. Moreover, by implementing a split session plan, the Board acted contrary to the statutory mandate requiring the provision of adequate facilities, a major element in a system of thorough and efficient education.

Additionally, we emphasize that the plan in this case was not implemented until the 1984-85 school year, subsequent to the adoption of the revised certification process, see Minutes, New Jersey State Board of Education, August 3, 1983, and to the issuance of both the Manual and the revised Guidebook which set forth certification procedures under which split sessions will result in non-certification. Although the District is not scheduled for monitoring until December, 1985, it would, under the monitoring process, be forced to eliminate its split session plan within sixteen months of notification of non-certification. See Manual, at 26-27.[2] Under these circumstances, implementation of a split session plan was unreasonable. We conclude that regardless of the fact that we are called upon to judge this plan in our adjudicative capacity rather than as part of the certification process, we cannot permit the District to continue to implement a plan that precludes the provision of a thorough and efficient education, that violates the policy that underlies the certification process, and that will result in non-certification when the District is monitored.

After examining the Staggered Overlap Plan, we find that regardless of how the Board has labeled it, the plan is in fact a split session plan. As stated, the plan involves only one grade - the ninth grade. All students from all grades are in the building at one time from 12:23 p.m. to 1:50 p.m. and the plan allows for a six period school day. However, as set forth above, ninth graders have no lunch or study halls, they have less opportunity to participate in athletics since they are unable to participate in girls' tennis and, if they achieve varsity status, cannot practice with teams that practice in the afternoon. Although the plan fulfills minimum curriculum requirements, we conclude that a complete educational program for this district includes more. Study halls, lunch periods, extra-curricular and athletic activities provide the opportunity for students to develop their individual talents and abilities and, hence, are part of the educational program. See N.J.S.A. 18A:7A-5(d). Essentially, a complete educational program is more than the opportunity to attend a minimum of classes and we agree with the Commissioner that such program is possible only when students attend school for the full school day. Moreover, we emphasize that the Staggered Overlap Plan deprives ninth graders of the opportunity to participate fully in varsity sports and that such

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[2] See supra note 1.

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opportunity is a part of the requirements for a thorough and efficient education. See Livingston v. Board of Education of the Township of Wall, 1980 S.L.D. 1321, at 1326-28. Further, study hall, lunches and all extra-curricular and athletic activities are offered to all students at Shawnee except ninth graders and all such activities offered by their schools are available to all other ninth graders in the District. Thus, the Staggered Overlap Plan deprives ninth graders at Shawnee of the full educational program in place in that district. Additionally, because the ninth graders must attend school from 12:23 p.m. until 4:53 p.m., both students and parents are inconvenienced by the Plan.

We therefore find that the Staggered Overlap Plan constitutes a split session notwithstanding the fact that all students are in the building at the same time during the approximately 1 1/2 hour overlap period. In fact, it is during the overlap period that the number of students physically present exceeds capacity. The fact that only the ninth grade is deprived of the full school day does not make the Staggered Overlap Plan any more acceptable than one under which all students were so deprived. Likewise, that ninth graders are deprived of the complete educational program for only one year cannot change the fact that they are attending school on split session for that year. Finally, we conclude that the opportunity for individual students to transfer to Lenape High School, see P-7, does not affect the nature of the Plan since all ninth grade students who remain at Shawnee High School are on split session.

We emphasize that during the entire time period relevant here this board has the capability to operate its schools so that no student in the District would be deprived of the educational opportunity afforded by a full school day and that, therefore, when it implemented its Plan, it was capable of effectuating a plan that would have provided a thorough and efficient education and that would have conformed to the sound educational principles articulated in our case law and to the requirements of the certification process in effect at that time, thus avoiding any risk that it would be denied certification because its facilities were inadequate. Therefore, for the reasons set forth above, we affirm the Commissioner's determination. Accordingly, the District is ordered to redistrict and to eliminate the Staggered Overlap Plan no later than the commencement of the 1985-86 school year.

Attorney Exceptions are noted.
May 1, 1985

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C.D., a minor, by her parents, M.D. and S.D., et al.,	:	
PETITIONERS-APPELLEES,	:	
V.	:	
BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	SUPERIOR COURT
RESPONDENT-APPELLANT,	:	APPELLATE DIVISION
AND	:	
ONE MEDFORD, et al.,	:	
INTERVENORS.	:	
	:	

Argued July 30, 1985 - Decided August 19, 1985

Before Judges Cohen and Baime

On appeal from the final decision of the State Board of Education.

David H. Dugan, III, argued the cause for petitioners/appellees.

Arthur F. Risden, argued cause for respondent, Lenape Regional High School District (Archer & Greiner, attorneys; Mr. Risden on the brief).

Ellis I. Medoway, Deputy Attorney General, argued the cause for the State Board of Education (Irwin I. Kimmelman, Attorney General, attorney; James J. Ciancia, Assistant Attorney General, of counsel, and Mr. Medoway on the brief).

The State Board of Education affirmed the decision of the Commissioner of Education requiring the Lenape Regional High School District Board of Education to redistrict and eliminate the Modified Schedule Plan by the start of the 1985-86 school year. An appeal was made to this court, and we now affirm, essentially for the reasons set forth by the State Board of Education in its comprehensive August 24, 1984, opinion. R. 2:11-3(e)(D) and (E).

We add only the following: the State Board is the final administrative tribunal for the hearing of school law controversies. In re Masiello, 25 N.J. 590, 605 (1958). We are

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obliged to defer to its determination, unless it is arbitrary or capricious, or lacks support in the record or violates relevant legislative policies. Campbell v. Dept. of Civil Service, 39 N.J. 556, 562 (1963); Thomas v. Bd. of Ed. of Morris Tp., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd 46 N.J. 581 (1966). If there is substantial evidence in the record to support more than one result, it is the State Board's choice which governs. Dore v. Bedminster Tp. Bd. of Ed., 185 N.J. Super. 447, 453 (App. Div. 1982).

Local school boards have broad discretion in certain areas. Parsippany-Troy Hills Ed. Ass'n v. Bd. of Ed., 188 N.J. Super. 161 (App. Div. 1983). Their decisions that lie within the scope of their discretionary powers may not be upset unless arbitrary, irrational or improperly motivated. Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288, 294 (App. Div. 1960). Nevertheless, the State Board has the right to impose educational standards generated by its statewide statutory responsibilities for a thorough and efficient system of public schools. It may overturn local decisions whose effect is to intrude upon the State Board's functions in that regard or to contravene significant state-wide educational policies.

The State Board thoroughly considered the local decision and the local concerns and reasonably concluded that they were overriden by the need to prevent the educational disadvantages inherent in split-session scheduling. The State Board's conclusions that redistricting was a practical alternative to split-session scheduling, that the local plan was in fact split-session scheduling, and that such scheduling was impermissible where practically avoidable were all reasonable conclusions supported by the evidence and by the State Board's expertise.[1] The decision was not improper rulemaking. In re Uniform Adm'v. Procedure Rules, 90 N.J. 85, 93-94 (1982); Metromedia, Inc. v. Director, Div. of Taxation, 97 N.J. 313, 334-335 (1984). It did not improperly apply a new rule retroactively.

Affirmed.

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[1] We grant the motions to supplement the record. Comparison of the present case with that of Black Horse Pike Regional High School District confirms our conclusion that the State Board reasonably approaches matters of split-session scheduling and bars it only where, as here, it is practically avoidable.

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IN THE MATTER OF THE TENURE :
HEARING OF SAMUEL C. CAPALBO, : SUPERIOR COURT
SCHOOL DISTRICT OF THE BOROUGH : APPELLATE DIVISION
OF KEANSBURG, MONMOUTH COUNTY. :
_____:

Decided by the Commissioner of Education, October 31, 1983

Decided by the State Board of Education, May 2, 1984

Argued: March 20, 1985 - Decided: July 17, 1985

Before Judges Matthews, Furman and Havey

On appeal from the New Jersey State Board of Education

Michael D. Schottland argued the cause for appellant, Samuel C. Capalbo (Chamlin, Schottland, Rosen, Cavanagh & Uliano, attorneys (Margaret L. Algarotti on the brief).

John O. Bennett, III argued the cause for respondent, Keansburg Board of Education (Bennett, Davison & Munoz, attorneys (Mr. Bennett, of counsel; Robert E. Munoz and Laurie Angiollio-Bent, on the brief).

Irwin I. Kimmelman, Attorney General of New Jersey, submitted a Statement in Lieu of Brief for New Jersey State Board of Education (Regina A. Murray, Deputy Attorney General, on the Statement).

PER CURIAM.

This appeal arises from the removal of appellant, Samuel Capalbo, from his position as the tenured principal of the Keansburg Junior/Senior High School. At its January 17, 1982 meeting, the Board of Education of the School District of the Borough of Keansburg (hereinafter Keansburg Board), considered the request of four female teachers to certify tenure charges against Capalbo for unbecoming conduct, incapacity, discrimination and religious and sexual harassment. In a five to four vote, the Keansburg Board determined there was no probable cause to warrant a certification of the charges.

The teachers appealed the Keansburg Board's determination to the Commissioner of Education and filed additional affidavits to support their position. Pursuant to N.J.S.A. 52:14F-1 et seq., the Commissioner transmitted the matter to the Office of Administrative

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Law. At that time, the Keansburg Board and the complaining teachers moved to have the matter remanded to the Board for reconsideration based on the existence of additional corroborating affidavits. On September 28, 1982, an Administrative Law Judge (ALJ) ordered the matter remanded to the Keansburg Board, indicating the Board's decision should contain a statement of reasons for its determination.

Capalbo appealed that decision to the Commissioner of Education. The Commissioner affirmed the ALJ's decision. Appellant moved before the Commissioner for a stay of his order pending appeal before the State Board of Education. On December 30, 1982, appellant's motion was denied. On that same day, Capalbo sought emergent relief from this court for a stay of the Commissioner's remand order. We denied the stay.

On January 11, 1983, the Keansburg Board certified the tenure charges against appellant by a vote of seven to one. One Board member was absent from this meeting. Appellant filed an answer to the charges on February 7, 1983, denying all allegations therein.

Appellant began teaching in the Business Department of the Keansburg High School in 1968. On July 1, 1979, he was appointed principal of the Keansburg Junior/Senior High School. He remained in the High School as principal until July 1, 1981, when he was reassigned as principal of one of the elementary schools in the district.

His employment with the Keansburg school district was terminated on November 1, 1983, the date of the Commissioner's ruling in this matter. The charges resulting in his dismissal were, as noted, initiated by five female teachers of Keansburg High School, and filed with the Keansburg Board on December 3, 1981. The complaint charged Capalbo with unbecoming conduct, incapacity, discrimination and sexual harassment. These charges arose solely from his conduct as principal during the 1979-1980 and 1980-1981 school years.

The hearings in this matter commenced before an administrative law judge on July 6, 1983, and continued until July 21, 1983. The judge considered four charges certified by the Keansburg Board: (1) touching the person of female students; (2) touching the person of female teaching staff members; (3) public expression of anti-Semitic remarks, and (4) use of his administrative position to sexually harass employees. The judge dismissed the charge of improper touching of students. The remainder of the charges, however, were sustained.

The administrative law judge filed her initial decision with the Commissioner of Education on September 8, 1983. She found Capalbo guilty of conduct unbecoming a principal and directed his dismissal. The Commissioner affirmed that decision and ordered the

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Keansburg Board to terminate appellant's employment as tenured principal and from all capacities in the school system. On May 2, 1984, the State Board affirmed the Commissioner's decision.

Appellant first contends that his procedural due process rights were violated by the Commissioner's remand. He argues that this procedure placed him in "double jeopardy." Further, that a remand to the local board is appropriate solely for the board to articulate its reasons in granting or refusing certification. Finally, that the second vote by the Keansburg Board was invalid because one member was not present at the meeting.

N.J.S.A. 18A:6-11 governs the procedure implemented in filing charges against a tenured employee. It provides, in pertinent part:

> Any charge made against any employee of a board of education under tenure during good behavior and efficiency shall be filed with the secretary of the board in writing, and a written statement of evidence under oath to support such charge shall be presented to the board. The board of education shall forthwith provide such employee with a copy of the charge, a copy of the statement of the evidence and an opportunity to submit a written statement of position and a written statement of evidence under oath with respect thereto. After consideration of the charge, statement of position and statements of evidence presented to it, the board shall determine by majority vote of its full membership whether there is probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to warrant a dismissal or reduction of salary...

Appellant was never placed in "jeopardy." In limine we note that "double jeopardy" protections are not afforded in civil matters. In re Garay, 89 N.J. 104, 111 (1982). Nevertheless, appellant was never "in jeopardy" at the Keansburg Board hearing. A person is placed in jeopardy when he is put to trial before the trier of fact. United States v. Jorn, 400 U.S. 470, 480 (1971). The issue before the Keansburg Board was whether there was probable cause to certify the charges against appellant. Since the Board was only empowered to determine probable cause, appellant's Constitutional rights did not attach, and the Board's second consideration could not constitute double jeopardy.

Capalbo relies on Manalapan-Englishtown Ed. Assn. v. Board of Ed., 187 N.J. Super. 426 (App. Div. 1981) for the proposition that a remand to the Keansburg Board if proper only for an articulation of reasons for its original determination and not for recon-

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sideration. In Manalapan the local school board refused to certify charges against a tenured principal. The Commissioner of Education affirmed the local board's decision. 187 N.J. Super. at 428. The Commissioner's determination was subsequently upheld by the State Board of Education. 187 N.J. Super. at 428.

On appeal, this court discussed the duties of the local board. It held that the board's responsibilities are to determine: (1) whether there is probable cause to credit the evidence in support of the charges and (2) whether the charge, if credited, is sufficient to warrant the dismissal of the tenured principal or a reduction in his salary. 187 N.J. Super. at 429. The board's responsibilities do not reach the level of fact finding. 187 N.J. Super. at 430. Manalapan remanded the matter to the local board to "expressly determine whether 'there is probable cause to credit the evidence in support of the charge[s]...' and then to articulate plainly the reasons for the determination respecting those questions." 187 N.J. Super. at 432.

Appellant construes Manalapan far too narrowly. In Manalapan, we were concerned with a local board which had overreached its jurisdiction. In remanding the matter, we delineated the board's responsibilities so as to avoid a repetition of this problem. Here, the Keansburg Board merely reconsidered whether there was probable cause to certify the charges against appellant, and in so doing acted within its jurisdiction.

The Commissioner remanded the matter on the basis of new affidavits against appellant. New charges could have been brought before the Keansburg Board on the basis of additional affidavits. The remand permitted the evaluation of these closely related charges in one proceeding, rather than two. We conclude that it was in the interest of justice that the Commissioner remanded to the Keansburg Board the initial charges for redetermination.

Appellant also contends the second vote was invalid because one Board member was absent. N.J.S.A. 18A:6-11 quoted in part above, states, "[T]he board shall determine by majority vote of its full membership ..." whether or not there is probable cause to certify charges. Appellant argues that N.J.S.A. 18A:6-11 mandates full membership in determinations by the board. A correct reading of the statute is that a majority of the whole number of the members of the board is necessary to find probable cause. There is no direction in the statute that all members must be present to effectuate the board's decision.

Appellant next argues that the Commissioner of Education was without authority to remove him from his position as tenured teacher. He contends that the Keansburg Board never charged him with misconduct as a teacher or informed him that it would seek his removal from the school district in all capacities. Thus, he argues, the Commissioner extended his jurisdiction by ruling beyond the Board's charge.

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The Commissioner found appellant guilty of conduct unbecoming a teaching staff member, and specifically directed the Board to "terminate respondent's employment as a tenured principal in the Keansburg School District ..." At the time of the Commissioner's decision, appellant was employed as a principal for the Keansburg Board of Education, and the only contract of employment between the School Board and him was that of principal.

N.J.S.A. 18A:6-9 grants jurisdiction to the Commissioner to "hear and determine ... all controversies and disputes arising under the school laws ..." (emphasis provided). Further, N.J.S.A. 18A:6-10 provides that "No person shall be dismissed or reduced in compensation, (a) if he is or shall be under tenure of office ..." (emphasis provided). Finally, N.J.S.A. 18A:6-11 provides that if a written charge is made "against any employee of a board of education under tenure ...." the board shall determine whether the charge warrants dismissal. The foregoing statutes which govern the Commissioner's jurisdiction and duties in tenure charges do not distinguish procedure with respect to tenured teachers and principals. Appellant's contention that the Commissioner had no jurisdiction to remove him from his position as tenured principal we find to be without statutory basis.

In Redcay v. State Board of Education, 128 N.J.L. 281 (Sup. Ct. 1942), aff'd on rehearing 130 N.J.L. 369 (Sup. Ct. 1943), aff'd 131 N.J.L. 326 (E. & A. 1944) the former Supreme Court upheld the dismissal of a principal from all capacities in the school system. Redcay, a tenured employee, served as principal of the Middletown Township High School from 1923 to 1939. 128 N.J.L. at 281. In August 1939, he was charged with conduct unbecoming a principal. After a remand for purposes not pertinent here, the State Board again affirmed the decision of the Commissioner of Education. 130 N.J.L. 369. On appeal, the removal proceedings were found proper and in accordance with the statutory guidelines. 130 N.J.L. at 371. The Court found the proofs supported the action taken by the State Board, and affirmed Redcay's dismissal. 130 N.J.L. at 371.

Appellant cites Viemeister v. Bd. of Education of Prospect Park, 5 N.J. Super. 215 (App. Div. 1949), for the proposition that a removal as principal does not necessarily include removal as teacher. His reliance on that case is misplaced. Viemeister dealt with attempts by a school board to abolish by resolution the position of principal and create the new position of "teaching principal." 5 N.J. Super. at 217. The court in Viemeister was addressing the problem of reducing the number of school employees. There was never any indication that the principal was guilty of conduct unbecoming to his position.

Moreover, implicit in the Commissioner's removal of appellant here as a tenured principal was his removal in any tenured capacity, including that of teacher. The State Board so found in February 1984 on a motion brought by appellant to clarify the Com-

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missioner's order. The administrative law judge, after hearing all the evidence with respect to appellant's conduct, concluded that he was "unfit for the position of principal or for any position in the public schools ...." We find the contention that the Commissioner had no authority to remove appellant as teacher is without merit.

Appellant next contends that the evidence did not support his dismissal as a teacher. His argument is twofold. First, he contends his punishment is disproportionate to the offense charged, and second, that there was insufficient evidence to support his dismissal as teacher.

In administrative hearings charges need only be proven by a preponderance of the evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). This principle was first cited with respect to charges of unbecoming conduct in Beggans v. Civil Service Commission, 10 N.J. Misc. 1142 (Sup. Ct. 1932):

> The evidence might have been insufficient to convince a jury beyond a reasonable doubt of the guilt of the accused [of a crime] but still have clearly indicated the [employee's] guilt of unbecoming conduct justifying dismissal.
> (10 N.J. Misc. at 1144)

We find it apparent from the evidence presented that appellant's behavior constituted conduct unbecoming a principal. The administrative law judge found: "[T]he stream of salacious comments publicly addressed to Karen Brown in and of themselves constitute unprofessional conduct sufficient to support a tenure charge and dismissal." In addition, she found that appellant's touching of the female teachers, making obscene gestures to the female teachers, and making anti-Semitic remarks constituted conduct unbecoming a teaching staff member.

Although appellant admits many of the allegations raised by the witnesses, he contends they were made in a joking manner. He claims the statements made to the teachers must be examined in the context of the situation in which they occurred. He further contends he was friendly with the teachers prior to his becoming principal. Joking and bantering had been commonplace in the Keansburg school system and he merely continued this conduct when he became principal.

Appellant's explanation is unconvincing. Appellant offensively touched and spoke with the new teachers as well as those he had previously known.[1] Secondly, Capalbo's administrative power

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[1] Diane Roberts, for example, testified that Capalbo made several insulting comments to her and constantly touched her in an offensive manner. Roberts was 24 years old and began teaching at Keansburg High in September 1980 when Capalbo first became principal.

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as principal, president of the Teachers' Association, and department chairman, prevented individual teachers from responding to his remarks. Capalbo, for example, had a "hit list" of teachers to be removed, and arranged difficult schedules for and withheld supplies from teachers he did not like. Appellant also commented that, "the Board will give me a bonus for every tenured teacher I get rid of." Such statements and activities disrupted the teachers and made it uncomfortable for them in their work place. The Commissioner's removal of appellant from his position as principal is supported by the evidence.

Appellant argues that the Commissioner erred in dismissing him from his position as teacher since all of the evidence presented at the hearing related to his conduct as a principal, and none of the allegations referred to his conduct as a teacher. He also contends that the Commissioner never considered the consequences of his action on Capalbo's career.

In In re Fulcomer, 93 N.J. Super. 404, 421 (App. Div. 1967), this court stated:

> Although such conduct certainly warrants disciplinary action, the forfeiture of the teacher's rights after serving for a great many years in the New Jersey school system is, in our view, an unduly harsh penalty to be imposed under the circumstances ... consideration should be given to the impact of the penalty on appellant's teaching career, including the difficulty which would confront him, as a teacher dismissed for unbecoming conduct, in obtaining a teaching position in this State, with the resultant jeopardy to his equity rights in the Teacher's Pension Fund accruing from his 19 years credit.

In Fulcomer, the teacher physically grabbed a pupil in efforts to maintain discipline. 93 N.J. Super. at 421. Fulcomer had served the school district for 23 years and had an unblemished record until that incident. 93 N.J. Super. at 421. This Court held the punishment imposed was disproportionate to the teacher's conduct. 93 N.J. Super. at 422.

Appellant urges this court to apply Fulcomer to the case at hand. We cannot agree. His conduct was intimidating, rude and degrading. In addition, his rudeness was not an isolated incident; it spanned the two years he was employed as principal of Keansburg High School. Appellant was never discreet in making his comments. Not only did he humiliate the female teachers in front of their male co-workers, but he also made offensive remarks in front of the students.[2]

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[2] On several occasions Capalbo publicly stated to Karen Brown that she was too old to have a baby and that she should have an abortion.

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The position of teacher is a sensitive one. The Commissioner is entrusted with the authority to ensure that our public school teachers do not violate the public trust placed in them. In light of the foregoing evidence, the Commissioner's decision to remove appellant from any position in the public school system of the Keansburg School District was not an abuse of discretion. Campbell v. Dept. of Civil Service, 39 N.J. 556, 562 (1963).

Sexual harassment and discrimination charges had been filed with the Division on Civil Rights by the complainants here against the Keansburg Board and appellant, and were litigated before the Division on Civil Rights prior to the institution of this tenure matter.

Appellant argues that the consideration of these charges by the Division on Civil Rights precluded their inclusion in the tenure matter by the Commissioner of Education.

The principles of administrative comity and the relationship between the Division on Civil Rights and the Commissioner were first addressed in Hinfey v. Matawan Regional Board of Education, 77 N.J. 514 (1978). There complainants filed with the Division on Civil Rights and the Commissioner of Education complaints charging sexual discrimination. 77 N.J. at 519. The Director of the Division on Civil Rights severed and retained jurisdiction over that part of the complaint which alleged unlawful employment practices, and transferred the counts alleging discrimination in curricula to the Department of Education. 77 N.J. at 519.

Complainants appealed the dismissal and transfer of the files to this court. We reversed the order of the Director of Civil Rights, holding that although the Division on Civil Rights and the Commissioner of Education have concurrent jurisdiction over complaints alleging sex discrimination with respect to the complaints already filed, the Division's jurisdiction was mandatory. 147 N.J. Super. 201 (App. Div. 1977).

The Supreme Court reversed and held that although the Division on Civil Rights and the Department of Education have concurrent jurisdiction, charges of sex discrimination in public school curricula were better handled by the Commissioner. 77 N.J. at 520. The court further stated that principles of comity and "deference to sibling agencies are part of the fundamental responsibility of administrative tribunals ...." 77 N.J. at 532.

In the present case both the Commissioner and the Director of the Division on Civil Rights found evidence that supported action in their areas of expertise. During the hearings before the administrative law judge, complainants offered the determination of the Division on Civil Rights in evidence. In discussing this evidence, the administrative law judge noted that the testimony

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regarding tenure charges was broader than that presented before the Division on Civil Rights. She further stated:

> This is not a case where both hearings were addressed to the same issue .... There is no "primary" jurisdiction in [the Division on] Civil Rights ... as to the questions before me. Sex discrimination is not the gravamen of the Board's case before the Commissioner. The Commissioner has a duty to determine fitness for employment in the public schools. No other agency has concurrent jurisdiction over that question. The issues are unlike those calling for deference of one agency to another under the holding of Hinfey v. Matawan Regional Bd. of Ed., 77 N.J. 514 531 (1978).

We agree with the observations of the administrative law judge. The present case does not concern allegations of discrimination, rather it concerns the sanctioning of a tenured employee for unbecoming conduct. While the basis of the charges are sexual harassments held to be discriminatory by the Division on Civil Rights, the present action is a disciplinary matter, not a discrimination hearing. The jurisdiction of the Commissioner of Education is exclusive in the area of tenure charges. N.J.S.A. 18A:6-16. The consideration by the Commissioner of evidence concerning sexual harassment was necessary and proper in his determination of conduct unbecoming a tenured principal.

Affirmed.

(Cert. denied 102 N.J. 336)

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CINNAMINSON TEACHERS' ASSOCIATION, on behalf of all guidance counselors employed by Respondent, and FRANK KILLINO, an individual,	:	
PETITIONERS-APPELLANTS,	:	SUPERIOR COURT
V.	:	APPELLATE DIVISION
BOARD OF EDUCATION OF THE TOWNSHIP OF CINNAMINSON, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

Decided by the Commissioner of Education, August 26, 1983

Decided by the State Board of Education, February 1, 1984.

Argued: January 28, 1985 Decided: March 1, 1985

Before Judges McElroy and Dreier

On appeal from New Jersey State Board of Education

Carol Laskin argued the cause for appellants (Selikoff & Cohen, attorneys; Joel S. Selikoff, of counsel; Barbara E. Riefberg, on the brief).

Bruce E. Barrett argued the cause for respondent Board of Education, Township of Cinnaminson (Slimm, Dash & Goldberg, attorneys; John L. Slimm, of counsel; Mr. Barrett, on the brief).

Irwin I. Kimmelman, Attorney General of New Jersey, attorney for respondent State Board of Education (Regina A. Murray, Deputy Attorney General, on the statement).

PER CURIAM.

Petitioners, Cinnaminson Teachers' Association on behalf of the guidance counselors employed by the Board of Education of the Township of Cinnaminson, as well as Frank Killino, a guidance counselor and former Director of Guidance, have appealed from a decision of the New Jersey State Board of Education. The State Board had affirmed the decision of the Commissioner of Education but for the reasons stated in the initial decision of an Administrative Law Judge. Petitioners had challenged the reorganization of the guidance department at the local high school commencing with the 1982-1983 school year.

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Due to declining enrollment the local Board of Education had determined to abolish the position of Director of Guidance at the high school as part of a general program "to abolish all positions such as Department Chairpersons, Lead Teachers, Middle School Subject Coordinators, and Grade Level Chairpersons when any such department contains fewer than six members". The administrative responsibility of the director's position was to be assumed by the principal of the high school. By separate action the Board also reduced the contract years for all guidance counselors to 10 month positions. In the past, two of the counselors had had 12 month contracts and a third a 10½ month contract. Lastly, the summer duties which had previously been performed by petitioner Killino and the other 12 month counselor were shifted to the high school's two vice principals who had also served during previous summer months. The change extended their service over the summer by 15 days for one and 11 days for the other. The Board also expected that approximately three weeks' work would be available for a single guidance counselor and advertised for a guidance counselor or teacher certified in guidance to do summer work for that period. The Board estimated that this reorganization would save the school system approximately $6,000 per year. Also since an improved computer system was to be instituted continued use of the counselors during the summer has become economically unsound.

Since no member of the petitioner association applied for the per diem summer work, in late July or early August 1982 the Board authorized 20 days' work for the guidance counselors. When one of the vice principals attempted to have guidance counselors return, he was informed that "none of them were going to work unless all of them were offered something." One counselor could not work at all, and the other three counselors divided the 20 days' work by drawing straws, one working seven days and the two others 6½ days each.

Petitioners first object to the principal's assumption of the supervisory duties in the guidance department, noting that he does not possess a certification as a director of pupil personnel services, a certification held by Mr. Killino. The Administrative Law Judge found that only the supervisory function (approximately 20% of Mr. Killino's workload) was transferred to the principal, and such supervision was within his competence to perform. N.J.A.C. 6:11-12.12(a) requires that any person supervising a guidance counselor must have a director's certificate. A literal reading of this section would require a school system which employed a single guidance counselor also to hire a certified director. We accede to the Administrative Law Judge's acquiescence in the transfer of these duties, noting specifically that the State Board has affirmed and that the Board's interpretation of its own administrative regulation is entitled to deference by this court.

Petitioners next contend that they were reduced in compensation in violation of their tenure rights under N.J.S.A. 18A:28-5. The Board properly notes that N.J.S.A. 18A:28-9 permits a reduction

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in force for reasons of economy, a reduction in the number of pupils or change in the administrative or supervisory organization of the district. Reduction in hours of employment is considered a reduction in force within this statute if done for reasons of economy. Klinger v. Board of Ed. Cranbury Tp., 190 N.J. Super. 354, 357 (App. Div. 1982). Considering the 30% decrease in student enrollment, the Board's actions in this instance were reasonable.

Petitioners next contend that the seniority issue as to the additional days' work was not appropriately addressed by the State Board. This matter was not raised until the post-hearing brief before the Administrative Law Judge. Although the "callback" on the basis of seniority for the 20 days' work might have been a proper issue, the individual counselors, by their refusal to apply (in order of seniority or otherwise) and their agreement to divide the work among themselves, properly estopped Mr. Killino who had the seniority rights from raising this issue. We understand that as to the summer of 1983-1984 and 1984-1985 there are separate actions pending concerning the method of filling the additional work days and, therefore, we express no opinion on this subject.

Petitioners lastly allege that Mr. Killino was entitled to personal notice of the abolition of his position as Guidance Director. Such notice is not required by N.J.S.A. 18A:28-9. The only statutory notice that applies to the nonrenewal of a contract appears in N.J.S.A. 18A:27-10 which mandates written notice prior to April 30 to a non-tenured teaching staff member whose contract is not being renewed. Mr. Killino received notice in the faculty newsletter of April 2, 1982 and has not directed our attention to any statute, regulation or decision mandating such notice. An early State School Board decision, Page v. Trenton Bd. of Ed., 1973 S.L.D. 704, 709 had reasoned by implication that tenured teachers were entitled to the same notice as non-tenured teachers. This reasoning, however, was rejected in the later decisions of Wexler v. Bd. of Ed. Borough of Hawthorne, 1976 S.L.D 309, aff'd State Board of Education 1976 S.L.D. 314 and Metzger v. Bd. of Ed. Willingboro Tp., 1979 S.L.D. 598. Other than the dictates of courtesy, we can find no legal requirements for formal notice to Mr. Killino as a prerequisite for the abolition of the Director's position.

Since substantial credible evidence supports each of the decisions of the State Board of Education, we affirm. Dore v. Bd. of Ed. Bedminster Tp., 185 N.J. Super. 447, 449 (App. Div. 1982).

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BOARD OF EDUCATION OF THE BOROUGH OF CLIFFSIDE PARK,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
VINCENT T. MC KENNA, TAX COLLECTOR AND TREASURER OF THE BOROUGH OF CLIFFSIDE PARK AND TREASURER OF SCHOOL MONEYS OF THE CLIFFSIDE PARK BOARD OF EDUCATION, BERGEN COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, October 30, 1984

For the Petitioner-Respondent, Winne, Banta, Rizzi, Hetherington, and Basralian (Robert M. Jacobs, Esq., of Counsel)

For the Respondent-Appellant, Stanley L. Wyrzylowski, Esq.

The State Board of Education finds that Respondent Appellant's receipt of compensation for his services as treasurer of school monies does not constitute a "continuing claim" against the Board. However, we reiterate that N.J.S.A. 18A:12-1 and -2 together "indicat[e] the several qualifications required" for membership on a board of education, Visotcky v. City Council of Garfield, 113 N.J. Super. 263 (App. Div. 1971). As we have held previously, lack of a conflicting interest is one such qualification for board membership. Woodstown-Pilesgrove Regional Board of Education v. John J. Ketas, 1980 S.L.D. 1563. Moreover,

> [t]he interest which disqualifies is not necessarily a direct pecuniary one, nor is the amount of such an interest of paramount importance. It may be indirect; it is such an interest as is covered by the moral rule: no man can serve two masters whose interests conflict. Basically the question is whether the officer, by reason of a personal interest in the matter, is placed in a situation of temptation to serve his own purposes to the prejudice of those for whom the law authorizes him to act as a public official. And in the determination of the issue, too much refinement should not be engaged in by the courts in an effort to uphold the municipal action on the ground that his interest is so little or so indirect.

Aldom v. Borough of Roseland, 42 N.J. Super. 495, 502 (App. Div. 1956).

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We therefore conclude that where, as here, an individual is serving as treasurer for school monies, pursuant to which the board determines the amount of his salary and pays him for his services, his potential claim for compensation and his interest in that compensation are a conflicting interest sufficient to disqualify him from board membership under N.J.S.A. 18A:12-2.

With the modification set forth above, the decision of the Commissioner is affirmed. Respondent-Appellant's Motion For Stay is denied.

March 6, 1985

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JACQUELYN A. COCHRAN, ANGELA P. PIEGARI AND BARTON LILENFIELD,	:	
PETITIONERS-RESPONDENTS,	:	
V.	:	STATE BOARD OF EDUCATION
WATCHUNG HILLS REGIONAL HIGH SCHOOL BOARD OF EDUCATION, SOMERSET COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, September 26, 1983

For the Petitioners-Respondents Cochran and Piegari, Klausner & Hunter, Esqs. (Stephen E. Klausner, Esq., of Counsel)

For the Petitioner-Respondent Lilenfield, Katzenbach, Gildea and Rudner, Esqs. (Ezra D. Rosenberg, Esq., of Counsel)

For the Respondent-Appellant Buttermore, Jeremiah & Phillips, Esqs. (William S. Jeremiah, Esq., of Counsel)

Jacqueline A. Cochran, Angela P. Piegari and Barton Lilenfield, Petitioners-Respondents in this matter [hereafter, "Petitioners"], all tenured teaching staff members, were employed by Respondent-Appellant, the Watchung Hills Regional High School Board of Education, in the full-time Child Study Team [CST] positions of Learning Disability Teacher/Consultant, Social Worker and School Psychologist, respectively. On April 12, 1982, the Board voted to abolish these full-time positions for economy reasons, replacing them, on May 10, 1982, with half-time positions. Petitioner Cochran rejected the half-time position when it was offered to her in July 1982. Piegari and Lilenfield both accepted.

In September 1982, Petitioners learned that the Board had contracted with the Somerset County Educational Services Commission [hereafter, the outside contractor] for the provision of CST services, including some of the services previously performed by them. Thereafter, they filed a Petition of Appeal with the Commissioner of Education, challenging the Board's actions as violative of their tenure and seniority rights.

In his initial decision dated August 9, 1983, the Administrative Law Judge found that the three full-time positions had been improperly abolished and that part of the duties previously performed by Petitioners, which had not been included in the half

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time positions, had been impermissibly transferred to the outside contractor in violation of Petitioners' tenure rights. The ALJ directed that Petitioners be returned to their full-time positions.

The Commissioner adopted the ALJ's determination, relying upon agency experience which indicated that a regional high school district of this size could not possibly provide necessary CST services with a half-time team. Commissioner's Decision, at 21. He found further that a monitoring report furnished by the Division of Special Needs - Handicapped of the State Department of Education had also questioned both the adequacy and the legality of the delivery of CST services in the Watchung Regional High School District. This monitoring report bolstered the Commissioner's conclusion that a half-time CST was not capable of meeting the District's needs and that the decision to reduce Petitioners' positions had been a mere subterfuge to transfer part of their duties to outside contractors at lower costs.[1]

This appeal followed. In response to the monitoring report utilized by the Commissioner, the Board offered affidavits here, in which it admitted that the decision to reduce Petitioners' positions had been accompanied by an expectation that a contractor would be hired to perform some of the duties of the CST team.[2] This

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[1]The Board argues that the Commissioner should not have relied upon the monitoring report in reaching his decision. However, the report was prepared by a Division not involved in this litigation, and was relied upon only to supplement other evidence in the record. The Board has taken the opportunity to refute the findings in the report through contravening affidavits. Agencies are permitted to draw upon their experience and specialized knowledge in the resolution of disputes, N.J.S.A. 52:14B-10(b); Public Advocate Department v. Public Utilities Bd., 189 N.J. Super. 491, 519 (App. Div. 1983), and reviewing courts routinely defer to agencies within their area of special competence. Hiering v. Bd. of Trustees of Public Employees, 197 N.J. Super. 14, 19 (App. Div. 1984); Dore v. Bedminster Tp. Bd. of Ed., 185 N.J.Super.447, 453 (App. Div. 1982). The Commissioner's consideration of the monitoring report was proper.

[2]Affidavit of Joseph Sabo, Superintendent of Schools, accompanying the Board's brief states at paragraph 3:

> I also recognized, however, that there probably would be a need to supplement the services of the half-time child study team at the beginning of the 1982-83 school year to bring the work of the child study team into compliance with the sixty-day time requirements of the regulations. It was also possible that we would need to supplement services at other times during the year, although this was not done in school year 1982-83.

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serious admission confirms the Commissioner's "sense and experience" that the Board had actually intended not to abolish Petitioners' positions but merely to divide up their duties and to distribute part of those duties to the outside contractor in violation of their tenure rights. Upon its review of the record in this case, the State Board has determined that the decision of the Commissioner should be affirmed.

The statute under which the Board acted here to abolish Petitioners' full-time positions, N.J.S.A. 18A:28-9, authorizes local boards of education:

> to reduce the number of teaching staff members employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause.

Reduction in force decisions made pursuant to N.J.S.A. 18A:28-9 are entirely within the authority of the local board. In re Maywood Bd. of Ed., 168 N.J. Super. 45, 55 (App. Div.), certif. denied, 81 N.J. 292 (1979); Boult & Harris v. Passaic Bd. of Ed., 1939 S.L.D. 7, 13, aff'd St. B., 1939 S.L.D. 15, aff'd, 135 N.J.L. 329 (Sup. Ct. 1947), aff'd, 136 N.J.L. 521 (E&A 1948). Such decisions have, however, been reviewed to determine whether the position ostensibly abolished has not in fact been abolished but merely transferred to another in violation of the incumbent's tenure and seniority rights, Viemeister v. Prospect Park Bd. of Ed., 5 N.J. Super 215 (App. Div. 1947); Catano v. Woodbridge Bd. of Ed., 1971 S.L.D. 448, 458, or whether the reduction in force decision has been made arbitrarily when legitimate economic and educational objectives could have been served with less erosion of the rights of tenured employees. Lingelbach v. Hopatcong Bd. of Ed., decided by State Board May 17, 1984, aff'd, Superior Court, Appellate Division, Docket No. A-4783-83T7, decided May 5, 1985. In either case, one must examine the entire course of events.

The CST was intended by regulation to represent a multi-disciplinary approach to identifying, evaluating, and planning suitable educational programs for children with learning difficulties. N.J.A.C. 6:28-1.3(d)[1982].[3] The basic CST consisted of school psychologist, a learning disabilities teacher - consultant and a social worker, all of whom were expected to be employees of the local board of education, N.J.A.C. 6:28-1.3(a). Outside contractors were authorized in limited circumstances by N.J.A.C. 6:28-1.3(f), only

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

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with prior approval of the County Superintendent, and only for the purpose of supplementing existing team members. General CST work was still intended to be performed by employees of the local board. Nevertheless, in the instant case, the board set out to abolish full-time CST positions and replace them with half-time positions fully recognizing that more general CST contracting would be necessary because of anticipated case load. See Affidavit of Joseph Sabo, at para. 3.

Hence, the Board's intention was not an actual abolishment of positions, but a mere reorganization and transfer of duties to a less expensive provider. Under these circumstances the Board action taken here falls squarely within the prohibition of Viemeister v. Prospect Park Bd. of Ed., supra. The Commissioner and the ALJ correctly concluded that the integrity of the reduction in force decision was vitiated by the virtually contemporaneous decision to contract for additional CST services that the team, as originally constituted, would otherwise have performed. That being the case, the reduction in force decisions were properly voided, the full-time positions reinstated, and Petitioners ordered restored to those positions. For the foregoing reasons, the decision of the Commissioner is affirmed. The Watchung Hills Regional High School Board of Education is directed to reinstate Petitioners to their positions, with back pay, less mitigation for other employment, for the school years 1982-83 forward.

December 4, 1985

Pending N.J. Superior Court

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MICHAEL S. COLAVITA,	:	
APPELLANT,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE HILLSBOROUGH TOWNSHIP SCHOOL DISTRICT, SOMERSET COUNTY,	:	APPELLATE DIVISION
RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, November 3, 1983

Decided by the State Board of Education, May 2, 1984

Argued: March 11, 1985 - Decided: March 28, 1985

Before Judge Dreier and Shebell

On appeal from Final Administrative Decision of New Jersey State Board of Education

Stephen E. Klausner argued the cause for appellant (Klausner & Hunter, attorneys; Howard M. Barman, on the brief).

George F. Frana, Jr. argued the cause for respondent (Chase and Frana, attorneys; Mr. Frana, on the brief).

Irwin I. Kimmelman, Attorney General, attorney for State Board of Education (June Kanter, Deputy Attorney General, on the Statement in Lieu of Brief).

PER CURIAM.

Michael S. Colavita, a teacher, appeals from a decision of the State Board of Education dismissing his petition wherein he appealed from the decision of the Commissioner of Education which affirmed the Administrative Law Judge's decision. The Hillsborough Township Board of Education denied Colavita's salary increment for the school year 1982-83 after an investigation of a complaint of the parents of one of his pupils that he had used inappropriate language in the classroom. The Superintendent of Schools received the complaint and directed the School Principal to conduct the investigation. The Principal spoke with other teachers and with students from Colavita's class. Colavita, later informed of the complaint, denied the allegations verbally to the Principal and thereafter in writing to the Superintendent. The Board of Education voted to deny the increment under N.J.S.A. 18A:29-14 without a plenary hearing.

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A full hearing was made available for the first time before the Administrative Law Judge. He acknowledged the ability of the local Board to exercise its discretion in withholding salary increments of teaching staff members and found it had a reasonable basis for determining that there was good cause to find Colavita had not earned an increment. See Kopera v. West Orange Board of Education, 60 N.J. Super. 288 (App. Div. 1960). The Administrative Law Judge recognized that the decision to withhold Colavita's increment was based only upon hearsay evidence, a fact acknowledged by all parties on appeal. Thus, if the residuum rule as set forth in N.J.A.C. 1:1-15.8 is applied the decision cannot be sustained. Weston v. State of New Jersey, 60 N.J. 36, 51 (1972).

N.J.A.C. 1:1-15.8b provides that:

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

The Administrative Law Judge however stated:

> The rule, it seems to me, must be applied in this circumstance in a reasonable fashion. Public schools exist to serve the pupils of our state. A school principal is charged with the responsibility for administering the school in his charge. When the principal receives a complaint from a parent that a teacher is using inappropriate language in a classroom, the principal must, in large measure, seek to talk with pupils in the particular class.....To the extent that the principal acts in good faith, without bias, or improper influence the principal's findings as the result of his investigation may be afforded deference....
>
> ...The superintendent, deferring to the judgment of the principal, concluded that petitioner more probably than not used such words in his classroom....
>
> Though the allegations of inappropriate language by petitioner [are] supported solely by hearsay, the reason for an increment withholding action need only be supported by a showing that the Board had a reasonable basis to take the controverted action.... The Board accorded weight to the judgment of the superintendent and to its principal and it concluded reason existed to

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> believe petitioner did, in fact, use such language.... I ... find that the Board had, in all the circumstances, a reasonable basis to take this controverted action.

The Commissioner in affirming the Administrative Law Judge's decision dismissing Colavita's petition held that inasmuch as Colavita had the burden of sustaining his appeal petition that his "hearsay" objection was inappropriate as he could have subpoenaed the witnesses but did not. The State Board of Education affirmed the Commissioner's decision for the reasons stated by the Commissioner. We reverse.

While the burden of proof is upon the petitioner to demonstrate that the School Board's decision to withhold his annual increment is unreasonable, we are unable to agree with the Commissioner and the State Board of Education that his burden includes a duty to subpoena the witnesses whose hearsay statements were offered. The petitioner here demonstrated that the entire case against him was hearsay and that with regard to at least two of the hearsay statements, the alleged declarants denied that the statements were an accurate reflection of what they told the investigator. The petitioner's failure to call other witnesses to refute the statements attributed to them may add to the weight to be given to the hearsay evidence but it does not make those statements "legally competent evidence."

We determined in Kopera v. West Orange Board of Education, 60 N.J. Super. at 296-97, that when the first hearing on the withholding of a salary increment is before the Commissioner of Education, the Commissioner should determine

> (1) whether the underlying facts were as those who made the evaluation claimed, and (2) whether it was unreasonable for them to conclude as they did upon those facts, bearing in mind that they were experts, admittedly without bias or prejudice, and closely familiar with the mise en scene; and that the burden of proving unreasonableness is upon the appellant.

The Commissioner, being charged with the responsibility for determining whether the underlying facts were as those who made the evaluation claimed, is bound to follow the provisions of N.J.A.C. 1:1-15.8. All parties have conceded throughout this case that there has only been hearsay evidence offered to sustain the underlying facts supporting the withholding of the salary increment and that there has been no "legally competent evidence" presented to support the "ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness." Id. The proofs fail under the test of the residuum rule.

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We are aware that the residuum rule has been under heavy attack from the academic community as being both logically unsound and administratively impractical. See, e.g., 3 K.C. Davis, Administrative Law Treatise, sec. 16:6 at 239-46 (2d ed. 1980); 1 J.H. Wigmore, Evidence (Tillers rev. 1983) sec. 4b at 119-25; E.W. Cleary, McCormick, On Evidence, sec. 354 at 1017; K.C. Davis, "Hearsay in Nonjury Cases," 83 Harv. L. Rev. 1362 (1970). However, so long as the residuum rule remains part of the New Jersey Administrative Code we are loathe to uphold so obvious a circumvention of the rule in a particular case. See Goodman v. London Metals Exchange, Inc., 86 N.J. 19, 29 (1981); Weston, 60 N.J. at 50-52.

We reverse and remand to the State Board of Education for entry of an order directing the Hillsborough Township Board of Education to grant Michael S. Colavita the annual increment for the school year 1982-83 with all consequential benefits flowing therefrom.

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MICHAEL S. COLAVITA,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE HILLSBOROUGH TOWNSHIP SCHOOL DISTRICT, SOMERSET COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, November 3, 1983

Decided by the State Board of Education, May 2, 1984

Remanded by the Appellate Division, March 28, 1985

For the Petitioner-Appellant, Klausner and Hunter
(Stephen E. Klausner, Esq., of Counsel)

For the Respondent-Respondent, Chase and Frana
(George F. Frana, Jr., Esq., of Counsel)

The Appellate Division has remanded this case to the State Board of Education for the limited purpose of "directing the Hillsborough Township Board of Education to grant Michael S. Colavita the annual increment for the school year 1982-83 with all consequential benefits flowing therefrom". Michael S. Colavita v. Board of Education of the Hillsborough Township School District, Docket No. A-4342-83T6, decided by the Appellate Division on March 28, 1985.

Both parties have submitted proofs concerning the exact amount owed Mr. Colavita. Based on our review of those proofs, we find that Mr. Colavita is entitled to $2,125.00 which represents the amount due him for 1982-83. Accordingly, we direct the Board to pay that amount to Mr. Colavita.

Mr. Colavita also seeks interest from June 1983 until payment is received. We conclude that, under the standard established by Board of Education of the City of Newark v. Ruth Levitt and Esther E. Sasloe, Docket No. A-5614-82T2, decided by the Appellate Division on November 29, 1984, Mr. Colavita is not entitled to such interest. Finally, because the remand was for the limited purpose of directing payment to Mr. Colavita, we will not consider his request for expungement of the file.

October 2, 1985

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ANGELA CORDASCO,

PETITIONER-APPELLANT,

V. : SUPERIOR COURT

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY, : APPELLATE DIVISION

RESPONDENT-RESPONDENT.

Decided by the Commissioner of Education, June 28, 1984

Decided by the State Board of Education, December 5, 1984

Argued: October 29, 1985 -- Decided: November 22, 1985

Before Judges Antell and Shebell

On appeal from the final decision of the State Board of Education

Sanford R. Oxfeld argued the cause for appellant (Oxfeld, Cohen & Blunda, attorneys; Mr. Oxfeld of counsel).

Melvin Randall argued the cause for respondent East Orange Board of Education (Love & Randall, attorneys; Mr. Randall of counsel and on the brief).

David Powers, Deputy Attorney General, argued the cause for New Jersey State Board of Education (Irwin I. Kimmelman, Attorney General of New Jersey, attorney; James J. Ciancia, Assistant Attorney General, of counsel and Ellis T. Medoway, Deputy Attorney General, on the brief).

Russell Weiss, Jr. argued the cause for the New Jersey School Boards Association (Paula A. Mullaly, attorney; Mr. Weiss on the brief).

The opinion of the court was delivered by

ANTELL, P.J.A.D.

Pursuant to N.J.S.A. 18A:29-8, any teaching staff member holding an office, position or employment in any school district of this State shall be entitled to a salary employment increment each year until reaching a specified maximum level. N.J.S.A. 18A:29-14, however, authorizes a local board of education to "withhold, for inefficiency or other good cause, the employment increment, or the

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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." That statute concludes by saying, "It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment." An adjustment increment is defined by N.J.S.A. 18A:29-6 as

> "in addition to an 'employment increment,' an increase of $150.00 granted annually as long as shall be necessary to bring a member, lawfully below his place on the salary schedule according to years of employment, to his place on the salary schedule according to years of employment...."

Petitioner is a tenured elementary school teacher in the East Orange school system since 1968. During the 1981-82 school year she was in the 14th step of the then applicable teacher's salary guide. Because defendant Board of Education voted to withhold her increment for the 1982-1983 school year due to excessive absenteeism, petitioner did not progress to the 15th step during the 1982-1983 school year. Defendant's action went unchallenged by petitioner.

Her evaluations for the 1982-1983 school year being satisfactory, petitioner requested that she be placed at the 16th level of the salary guide for the 1983-1984 school year, where she would have been had her employment increment not been withheld for the 1982-1983 year. This request was denied by letter dated June 23, 1983 and petitioner appealed to the Commissioner of Education. An Administrative Law Judge, by decision dated May 10, 1984, recommended that petitioner's requested relief be granted, but the Commissioner rejected this recommendation and dismissed the appeal. The State Board of Education affirmed the Commissioner and from this determination petitioner now appeals.

The agency decision is based on the view that the final statement of N.J.S.A. 18A:29-14 that it "shall not be mandatory upon the Board of Education to pay any such denied increment in any future year as an adjustment increment" leaves petitioner's claim for relief to the exercise of sound discretion by the local board of education. Petitioner's attack thereon argues that the foregoing statutory language addresses, not the teaching staff member's right to advancement on the salary guide, but only the right to reimbursement of the amount of the employment increment withheld, in this case $250. Noting that N.J.S.A. 18A:29-10 directs the payment of an annual adjustment increment to all teaching staff members to bring them to a level on the salary guide appropriate to their training level and years of employment, petitioner argues that the last sentence of N.J.S.A. 18A:29-14 was deemed necessary by the legislature to guard against the possibility that local school boards would eventually repay the full amount of the withheld employment increment in the belief that this was required by N.J.S.A. 18A:29-10.

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We do not discern the legislative intent urged upon us by petitioner. We reject its implications that, (1) local boards are free to restore the amount of withheld increments and that, (2) absent the last sentence of N.J.S.A. 18A:29-14, the legislature could be understood to have authorized the withholding of an increment in one statute and then directing that it be repaid in another. In our view, which coincides with that of the State Board of Education, the questioned language was crafted to ensure that, unlike other cases which might come within the scope of N.J.S.A. 18A:29-10, where an employment increment had been withheld "for inefficiency or other good cause" under N.J.S.A. 18A:29-14, the local board was not obliged to restore the teaching staff member to that station on the salary guide to which her training level and years of employment would otherwise entitle her. We agree with the State Board that petitioner's remedy may only be found in the favorable exercise of discretion by the local board.

Our approach accords with the opinion of the Supreme Court in North Plainfield Educ. Ass'n v. Bd. of Educ., 96 N.J. 587 (1984). This decision involved two school teachers whose employment increment had been withheld for a year in which they had taken a sabbatical leave. Although the case dealt with the applicability of a 90 day period of limitations upon the taking of appeals within the Department of Education, the Court nevertheless noted that because the increment had been withheld "the teachers will always lag one step behind," and that this was "not attributable to a new violation each year, but to the effect of an earlier employment decision...." Id. at 595.

Affirmed.

[205 N.J. Super. 407]

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ANDREW T. CORRADO,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NEWFIELD, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, May 24, 1984

For the Petitioner-Appellant, Katzenbach, Gildea and Rudner
(Arnold M. Mellk, Esq., of Counsel)

For the Respondent-Respondent, Reuss and Cavagnaro
(Carl W. Cavagnaro, Esq., of Counsel)

For the Participant, Hoffman, DiMuzio and Hoffman
(Joseph J. Hoffman, Esq., of Counsel)

In deciding this appeal, the State Board must determine whether N.J.S.A. 18A:28-12 requires that credit for military service rendered prior to employment within a school district be included in calculating seniority when there is a reduction in force pursuant to N.J.S.A. 18A:28-9. The case arose when the Board of Education of the Borough of Newfield failed to credit Andrew T. Corrado, a tenured special education teacher, with such service when it reduced its teaching staff and terminated his employment on April 14, 1983.

Mr. Corrado is a retired United States Air Force Sergeant. In September, 1979, following more than 20 years' active military service, he was employed by the Newfield Board of Education as a teacher of the handicapped, a position for which he was properly certified. Petition, #1 & 2; Exhibit A. He acquired tenure in September, 1982, and continued his employment through the conclusion of the 1982-83 school year. Petition, #1. At that time, the Newfield Board affected a reduction of its teaching staff. In calculating Mr. Corrado's seniority rights, the Board did not credit him with his years of military service and, accordingly, determined that he had accrued only four years' seniority based upon the amount of time he had taught within the district. Exhibit C. Consequently, the Board retained another teacher, who had ten years' seniority in that district, for the single special education position existing for 1983-84. Exhibit B. By letter dated April 28, 1983, the Board informed Mr. Corrado that he was terminated. Petition, #3. He then filed a petition with the Commissioner,

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seeking reinstatement to his position on the basis of seniority. Joan Kargman, the teacher who was retained by the Newfield Board, sought to intervene or, in the alternative, participation in the matter and was granted status as a participant.

In the Initial Decision, the Administrative Law Judge (ALJ), rejecting the argument that N.J.S.A. 18A:28-12 applied only to placement on a preferred eligibility list subsequent to a reduction in force, concluded that the statute applied to tenured teaching staff members affected by a reduction in force and the crediting of seniority rights to those teachers. Initial Decision, at 21. He then determined that the intent of N.J.S.A. 18A:28-12 was to grant full recognition of a teaching staff member's military service, such service to be credited as though the teaching staff member had been regularly employed within the school district during the time he served in the military. Id. The ALJ therefore found that when his seniority was computed, Mr. Corrado should have been credited with his 20 years' service in the military as well as his four years' service as a teacher within the district -- giving him a total of 24 years' seniority. Id., at 22. Accordingly, the ALJ found that Mr. Corrado was improperly dismissed and ordered him reinstated. Id.

The Commissioner reversed the ALJ's determination. Based on review of the legislative history of the statute, he found that N.J.S.A. 18A:28-12 was intended to protect the positions of tenured employees upon resumption of employment in a school district after having served in the armed services. He therefore held that N.J.S.A. 18A:28-12 grants credit for military service to tenured teaching staff members who were in the Board's employ after September 1, 1940, and who were subsequently called into the armed services. Commissioner's Decision, at 38. Thus, because his military service was voluntarily rendered prior to the time he was employed by the Board and before he acquired tenure, the Commissioner concluded that Mr. Corrado's only claim for seniority purposes was to his four years' of service as a teacher. Id., at 39.

After reviewing the relevant statutes and the legislative history of N.J.S.A. 18A:28-12, the State Board concludes, as did the Commissioner, that calculation of seniority when there is a reduction in force includes credit for military service only where the teaching staff member had been employed by the board prior to rendering such service. However, we find, as did the Commissioner in his subsequent decision in Judith Elsie Meyer v. Bd. of Ed. of the Township of Wayne, decided by the Commissioner, December 20, 1984, that the acquisition of tenure prior to entry into military service is not a prerequisite to entitlement to such credit and further conclude that the statute's application is not limited to service that was not voluntary.

N.J.S.A. 18A:28-12 provides that:

> If any teaching staff member shall be dismissed as a result of such reduction, such person shall be and remain upon a preferred eligible list in

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> the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal, if and when such vacancy occurs and in determining seniority, and in computing length of service for reemployment, full recognition shall be given to previous years of service, and the time of service by any such person in or with the military or naval forces of the United States or of this state, subsequent to September 1, 1940 shall be credited to him as though he had been regularly employed in such a position within the district during the time of such military or naval service. (Emphasis supplied.)

If read literally, the statute is unambiguous: the full length of military service rendered by any teaching staff member is to be credited in determining seniority. However, we emphasize that our function in interpreting the language of the statute is to effectuate the intent of the legislature. Marsh v. Finley, 160 N.J. Super. 193 (App. Div. 1978). We, therefore, may not give literal meaning to the language when it is apparent that such meaning was not intended by the legislature. Bd. of Ed. of Manchester Township v. Raubinger, 78 N.J. Super. 90 (App. Div. 1963). Moreover, because the sense of a statute controls over its literal terms, we must avoid interpretations that lead to absurd or unreasonable results. Schwartz v. Dover Public Schools in Morris County, 180 N.J. Super. 222 (App. Div. 1981); Citizens for Charter Change in Essex County v. Caputo, 151 N.J. Super. 164 (App. Div. 1981). As stated, a literal reading of N.J.S.A. 18A:28-12 would mandate including credit for all military service when calculating the seniority of any current teaching staff member. This interpretation would result in the retention of teachers with only a few years actual teaching experience over those with many years experience in cases where a military career had preceded employment as a teacher. We do not believe that the legislature could have intended such an unreasonable result and therefore find it necessary to examine the legislative history in order to determine the intent of the legislature.

Prior to the World War II, tenured teachers who were subject to a reduction in force were entitled to be placed on a preferred eligibility list and reemployed based on seniority that gave full recognition to previous years of service. R.S. 18:13-16 et seq. Military service, however, was not included in the calculation of seniority. See id. On March 2, 1942, the legislature, prompted by World War II, amended R.S. 13-19 to require that the time of service by supervising principals, principals and teachers rendered after September 1, 1940, "...shall be credited in determining seniority under this act as if such [persons] had been regularly employed within the district during the time of such military service...." R.S. 18:13-19, L. 1942, c. 269. In the

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statement that accompanied the amendment, which was adopted without modification, the sponsors declared:

> When there is an excess of tenure teachers in relation to pupils enrolled in a school district, the board is authorized to dismiss teachers beginning with those having the least number of years of service to their credit in that district. The purpose of this bill is to provide that teachers who are serving in the military services shall not lose their relative seniority rank upon resuming service in the school district. (Emphasis supplied.)

As noted by the Commissioner, the provision governing the accrual of military service credit for seniority purposes under N.J.S.A. 18A:28-12 is the same as that set forth in R.S. 18:13-19. Based on the clear statement of legislative purpose made when credit for military service was initially mandated, we conclude that the statute was intended to protect those teaching staff members who had been employed by a school district before entering the military and that, consequently, credit for military service under N.J.S.A. 18A:28-12 does not accrue to those individuals who served in the military before embarking on teaching careers.

We further conclude that because the statute does not require that teaching staff members acquire tenure before entering military service in order to receive credit and because the legislative history reveals no intent to impose such limitation, the length of service in the military of all teaching staff members who were employed within a school district prior to entering the military is to be included in determining their seniority regardless of whether they had acquired tenure before they entered the military. Likewise, we find no indication in either the statute or the legislative history that military service is to be credited only when the service was not rendered voluntarily. Although we recognize that the basis of military service has changed since World War II, we find that any distinction between teaching staff members who are drafted and those volunteering for military service for purposes of seniority calculations made pursuant to N.J.S.A. 18A:28-12 must be drawn by the legislature.

As set forth above, we hold that time spent in the military is to be credited to any teaching staff member who had been employed within a school district prior to entering military service as if he had been regularly employed within the district during the time of such service. We further hold that such credit is not limited to reemployment but is to be applied in making all seniority determinations pursuant to N.J.S.A. 18A:29-9 et seq. To hold otherwise would contradict the clear intent of N.J.S.A. 18A:28-12 that military service be credited "in determining seniority."

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N.J.S.A. 18A:28-12 was originally drafted as part of one long paragraph, that included the procedure for both reductions in force and for establishment of preferred eligibility lists. The original statute, R.S. 18:13-19, L. 1942, c. 269, established a seniority system applicable to reductions in force (RIF) and directed that military service be credited "in determining seniority under this act." Id. In the same paragraph, the preferred eligibility list for reemployment was established "based on full recognition to previous years of service." Id. Thus, the "seniority" to which the credit extended was that to be used as the basis for determining the order of reductions in force, as well as for reemployment purposes.

In 1951, R.S. 18:13-19 was amended to include, among other things, the procedure now found in N.J.S.A. 18A:28-10 and 28-11, whereby the Commissioner sets the standards for determining seniority. The preferred eligibility list provision was amended to include an express reference to "seniority" as its basis. The military service credit provision remained intact, and by stating that "...service...with the military...shall be credited in determining seniority under this act...(emphasis added), L. 1951, c. 292, the provision clearly applied to both the RIF and reemployment situations. The same language was carried forward when the act was amended with minor editorial modifications in L. 1957, c. 181, 63. With the recodification of Title 18A, the long paragraph was split into subsections. However, we conclude that the applicability of the military service credit provision to the whole act was not changed, as demonstrated by the current wording of N.J.S.A. 18A:28-12 that recognition of teaching and military service be given"...in determining seniority, and in computing length of service for reemployment,..."

Further, we find that limiting credit for military service to reemployment situations would create a two tier seniority system not contemplated by the statutory scheme set forth in N.J.S.A. 18A:28-9 et seq. Under that scheme, reductions in force must be made on the basis of seniority, see N.J.S.A. 18A:28-10, and the seniority of the individuals affected must be determined by the local board, N.J.S.A. 18A:28-11, which then must prepare a preferred eligibility list for reemployment in order of seniority. N.J.S.A. 18A:28-12. Thus, N.J.S.A. 18A:28-9 et seq. applies to tenured teaching staff members who are affected by a reduction in force and governs the seniority rights of those teachers, both for purposes of the reduction in force and placement on a preferred eligibility list. We can find no basis for concluding that the legislature intended to establish a dual system for calculating seniority and, in light of N.J.S.A. 18A:28-12's directive that military service be included in determining seniority, conclude that such service must be included in calculating seniority when a reduction in force occurs, as well as for reemployment purposes. See Howley and Bookholdt v. Board of Education of the Township of Ewing, decided by the Commissioner, December 20, 1982.

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Finally, although not at issue in this appeal, the State Board notes that N.J.A.C. 6:3-1.10(c) appears to contradict N.J.S.A. 18A:28-12 by providing, without qualification, that.

> In computing length of service for seniority purposes full recognition shall be given to previous years of service within the district and the time of service in or with the military or naval forces of the United States or this State, pursuant to the provisions of N.J.S.A. 18A:28-12.

In order to avoid conflict between the regulation and the statute, the State Board directs the Commissioner to revise th regulation.

The decision of the Commissioner is affirmed with the modifications set forth above. In so far as this determination is contrary to the previous decision rendered by the Commissioner in Lang v. Board of Education of the Princeton Regional School District, 1979 S.L.D. 245, that decision is overruled.

Attorney Exceptions are noted.

April 3, 1985

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ANDREW T. CORRADO,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NEWFIELD, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, May 24, 1984

Decided by the State Board of Education, April 3, 1985

Remanded by the Appellate Division, October 18, 1985

For the Petitioner-Appellant, Katzenbach, Gildea and Rudner
(Arnold M. Mellk, Esq., of Counsel)

For the Respondent-Respondent, Reuss and Cavagnaro
(Carl W. Cavagnaro, Esq., of Counsel)

For the Participant, Hoffman, DiMuzio and Hoffman
(Joseph J. Hoffman, Esq., of Counsel)

At our request, the Appellate Division has remanded this matter to the State Board in order that we may reconsider our decision of April 3, 1985, in light of the June 29, 1985, amendment to N.J.S.A. 18A:28-12 by L. 1985, c. 217. Prior to its amendment by the Legislature, N.J.S.A. 18A:28-12 provided that if a teaching staff member was dismissed as a result of a reduction in force,

> ...in determining seniority, and in computing length of service for reemployment, full recognition shall be given to previous years of service, and the time of service by any such person in or with the military or naval forces of the United States or of this state, subsequent to September 1, 1940 shall be credited to him as though he had been regularly employed in such a position within the district during the time of such military or naval service.

L. 1985, c. 217 amended the statute to provide that, effective immediately, in computing the length of service for seniority purposes, full recognition of military service shall be given "except that the period of that service shall not be credited toward more than four years of employment or seniority credit." The sponsors' statement that accompanied the amendment stated that

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> ...the purpose of this bill is to clarify the law to ensure that seniority entitlement is afforded to all veterans by recognizing all military service after September 1, 1940 even if it occurred prior to the time that the veteran was employed by the board. This bill would provide the same four years of credit for military service for seniority purposes as provided in the military service credit for salary purposes pursuant to N.J.S.A. 18A:29-11.

Thus, under the statute as amended, teachers who have served in the military are entitled to equivalent credit for that service for up to four years regardless of whether or not they had embarked on their teaching careers before entering the service.

After carefully reviewing the amendment and the sponsors' statement that accompanied it, we conclude that the amendment did more than merely clarify existing law. Rather, we find that it both places a specific limit on the number of years of military service that may be credited for seniority purposes and extends the benefit of such credit to veterans who served prior to employment as a teacher. As stated by the sponsors,

> [a]ll teachers who are veterans and honored their military commitments had their lives disrupted and their career delayed, if not interrupted, because of the time that they spent serving in the military.

This stands in marked contrast to the sponsors' statement that accompanied the previous amendment to N.J.S.A. 18A:28-12, which originally added the requirement that credit for military service be given for seniority purposes. That statement declared that

> [t]he purpose of this bill is to provide that teachers who are serving in the military services shall not lose their relative seniority rank upon resuming service in the school district.

In our previous decision in this case, we found that granting full credit for miltary service without limit would result in the retention of teachers with only a few years of actual teaching experience over those with many years experience, in this case the retention of a teacher with four years' teaching experience over an individual with ten years' experience. Corrado v. Board of Education of the Borough of Newfield, decided by the State Board, April 3, 1985. We concluded that this result was unreasonable and, therefore, it was necessary to examine the legislative history in order to construe the statute properly. Id. at 5. As set forth above, the legislative history revealed that the purpose of the provision in question was to insure that individuals serving in the military did not lose their relative seniority upon resuming service in the school district. Accordingly, we held that an individual was

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entitled to full credit for military service for seniority purposes, but only if he had been employed as a teacher before entering the service. Id. at 6-7.

Reconsideration of our decision in light of the recent legislation does not alter our conclusion that prior to its amendment, N.J.S.A. 18A:28-12 required that full credit for military service be given without any limitation on the number of years, but that only those employed as teachers before entering the service were entitled to such credit. Since the recent amendment to N.J.S.A. 18A:28-12 was not specifically accorded retroactive application by the Legislature, we conclude that it is prospective. That is, it only applies to reductions in force occurring after the effective date of the amendment, June 29, 1985. However, even if the statute as now amended were to be applied in this case, the result would be the same as the result we reached in our decision of April 3, 1985.

December 4, 1985

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BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD,

PETITIONER-APPELLANT,

V.

BARRY F. DEETZ,

RESPONDENT-RESPONDENT.

SUPERIOR COURT

APPELLATE DIVISION

Decided by the Commissioner of Education, August 4, 1983

Decided by the State Board of Education, November 7, 1984

Argued: April 23, 1985 -- Decided: May 10, 1985

Before Judges Michels, Petrella and Baime

On appeal from the State Board of Education

Louis C. Rosen argued the cause for appellant Board of Education of the Village of Ridgewood (Aron & Salsberg, attorneys; Mr. Rosen, of counsel and on the brief).

Emil Oxfeld argued the cause for respondent Barry F. Deetz (Oxfeld, Cohen & Blunda, attorneys; Mr. Oxfeld, of counsel and on the brief).

Irwin I. Kimmelman, Attorney General of New Jersey; submitted a statement in lieu of brief on behalf of respondent State Board of Education (Regina A. Murray, Deputy Attorney General, on the statement).

PER CURIAM.

The final administrative action of respondent State Board of Education (State Board) reversing the decision of the appointing authority, appellant Board of Education of the Village of Ridgewood (Ridgewood), to remove respondent Barry F. Deetz as a teacher in Ridgewood High School is affirmed substantially for the reasons expressed by the State Board in its decision of November 7, 1984.

We have studied the entire record in the light of the arguments presented and are satisfied that the determination of the State Board is not arbitrary, capricious or unreasonable and does not lack full support in the evidence. See Henry v. Rahway State Prison, 81 N.J. 571, 579-580 (1980); Campbell v. Dept. of Civil Service, 39 N.J. 556, 562 (1963); Dore v. Bedminster Tp. Bd. of Ed., 185 N.J. Super. 447, 453 (App. Div. 1982). Furthermore, we find

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that all of the issues of law raised are clearly without merit. R. 2:11-3(e)(1)(D) and (E). We emphasize that our role in reviewing the State Board's findings is to determine "'whether the findings made could reasonably have been reached on sufficient credible evidence present in the record, considering the proofs as a whole, with due regard to the opportunity of the one who heard the witnesses to judge of their credibility ... and ... with due regard also to the agency's expertise where such expertise is a pertinent factor.'" Mayflower Securities v. Bureau of Securities, 64 N.J. 85, 92-93 (1973) (quoting Close v. Kordulak Bros., 44 N.J. 589, 599 (1965)). See also In re Suspension of Heller, 73 N.J. 292, 309 (1977); Jackson v. Concord Company, 54 N.J. 113, 117-118 (1969); Dore v. Bedminster Tp. Bd. of Ed., supra, 185 N.J. Super. at 453. We are satisfied that such evidence appears in the record.

It is not our function to substitute our independent judgment for that of an administrative body, such as the State Board, where there may exist a mere difference of opinion concerning the evidential persuasiveness of the relevant proofs. First Sav. & L. Assn. of E. Paterson v. Howell, 87 N.J. Super. 318, 321-322 (App. Div. 1965), certif. den., 49 N.J. 368 (1967). See also Dore v. Bedminster Tp. Bd. of Ed., supra, 185 N.J. Super. at 453. New Jersey Bell Telephone Company v. State, 162 N.J. Super. 60, 77 (App. Div. 1978). As a reviewing court, we will not weigh the evidence, determine the credibility of witnesses, draw inferences and conclusions from the evidence or resolve conflicts therein. See In re Tenure Hearing of Grossman, 127 N.J. Super. 13, 23 (App. Div. 1974), certif. den., 65 N.J. 292 (1974).

Moreover, contrary to the argument advanced by Ridgewood, the ultimate administrative decision maker in school matters is the State Board. Dore v. Bedminster Tp. Bd. of Ed., supra, 185 N.J. Super. at 452. See N.J.S.A. 18A:6-27; Quinlan v. Bd. of Ed. of North Bergen Tp., 73 N.J. Super. 40, 51 (App. Div. 1962). Indeed, any party aggrieved by any determination of the Commissioner of Education (Commissioner) may appeal as of right to the State Board. N.J.S.A. 18A:6-27. As the final administrative arbiter of school law matters the State Board is not limited to reviewing issues of law. Dore v. Bedminster Tp. Bd. of Ed., supra, 185 N.J. Super. at 452; Winston v. Bd. of Ed. of So. Plainfield, 125 N.J. Super. 131, 139 (App. Div. 1973), aff'd, 64 N.J. 582 (1974); Quinlan v. Bd. of Ed. of North Bergen Tp., supra, 73 N.J. Super. at 50-51. Rather, the State Board may review the factual determinations of the Commissioner to determine whether his decision was based on a preponderance of the credible evidence. Cf. In re Polk License Revocation, 90 N.J. 550, 560 (1982); Atkinson v. Parsekian, 37 N.J. 143, 149 (1962); Dore v. Bedminster Tp. Bd. of Ed., supra, 185 N.J. Super. at 452. In so doing, it is now well-established that the State Board may make its own independent findings of fact, nevertheless giving due consideration to the opportunity of the fact finder to observe the parties and their witnesses. Quinlan v. Bd. of Ed. of North Bergen Tp., supra, 73 N.J. Super. at 50-51.

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Ridgewood argues that the State Board gave insufficient deference to the Administrative Law Judge's assessment of the credibility of the witnesses and that in deciding to reinstate Deetz the State Board reconsidered the case de novo, focusing heavily on issues of credibility rather than on issues of fact and law. However, the State Board recognized that it should give "'due regard to the opportunity of the one who heard the witnesses to judge their credibility,'" and "fully endorse[d] the decision of the Commissioner in which he has upheld dismissal of teachers whose involvement with drugs was proven."

The State Board's primary responsibility here, in its role as final arbiter in school law controversies, was to assure that its decision was supported by a preponderance of the credible evidence and was consistent with public policy and the pertinent principles of law. In a meticulously worded decision the State Board concluded that the lack of corroboration of the testimony offered by Ridgewood's witnesses and the animosity between the parties precluded the Board from affirming the Commissioner's decision. We agree.

Affirmed.

[Cert. denied 101 N.J. 321 (1985)]

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GARY E. DEUTSCH,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE HUDSON COUNTY AREA VOCATIONAL-TECHNICAL SCHOOLS, HUDSON COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, December 20, 1983

For the Petitioner-Appellant, Rothbard, Harris and Oxfeld (Sanford R. Oxfeld, Esq., of Counsel)

For the Respondent-Respondent, Schumann, Hession, Kennelly and Dorment (Frank DeStefano, Esq., of Counsel)

Petitioner-Appellant Gary E. Deutsch was first employed by Respondent Board of Education on November 28, 1978, as Supervisor of Special Projects. As such, he was responsible for implementing and supervising a pilot program to provide to the various school districts in Hudson County coordinated transportation services for special needs pupils. This was accomplished through the Hudson County Consortium, a separate transportation entity operated under the jurisdiction of the Board, but funded entirely by revenues paid to the consortium by participating districts for services furnished.

In August, 1981, the Board adopted a job description for the position of Hudson County AVTS Project Director, formally detailing the duties being performed by Mr. Deutsch, and he assumed that title. Mr. Deutsch continued to serve in this position until November 29, 1982, when it was abolished by the Board for reasons of economy and efficiency. He unsuccessfully sought appointment to the positions of Job Placement Coordinator, Board Secretary/Business Administrator and Supervisor of Special Education.[1] On January 19, 1983, Mr. Deutsch filed a petition of appeal with the Commissioner of Education, challenging the Board's decision to abolish his position as arbitrary and violative of his tenure rights and, if the Board's action was sustained, seeking to assert seniority claims to other positions within the district.

[1]Apparently, this position was subsequently abolished and Petitioner-Appellant's claim thereto is moot. See Initial Decision, at 4.

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Pursuant to N.J.S.A. 52:14F-1 et seq., the matter was referred to the Office of Administrative Law as a contested case on March 31, 1983. Following a plenary hearing, the Administrative Law Judge (ALJ) rendered his initial decision November 4, 1983, wherein he concluded that the Board's action abolishing Mr. Deutsch's position was taken in good faith and that Mr. Deutsch had not achieved seniority in either a subject area or general supervisory position. He recommended that the petition of appeal be dismissed and the Commissioner agreed, entering his decision to that effect on December 20, 1983. It is from this decision that Mr. Deutsch now appeals. He continues to contend that the Board acted improperly in abolishing his position, that his termination thus violated his tenure rights, and that, even if the Board's decision is upheld, his seniority rights have not been observed.

For reasons articulated herein, the State Board finds that the Board's decision to abolish Petitioner-Appellant's position was reasonable and made in good faith, that while Mr. Deutsch did attain tenure, his actual experience as a transportation coordinator does not, considered in light of prevailing legal standards, entitle him to assert a seniority claim to other positions within the district. Accordingly, the State Board affirms the decision of the Commissioner of Education.

The authority to effect a reduction in force, predicated upon economic considerations or upon change in the administrative or supervisory organization of the district, is conferred by statute upon local boards of education. N.J.S.A. 18A:28-9. When a board resolves pursuant to that authority, as it did here, to abolish a position and terminate the person holding it, tenured or not, such decision is presumed correct and will not be disturbed unless it is demonstrated by a preponderance of the credible evidence that the board acted arbitrarily, capriciously or unreasonably. Thomas v. Morris Twp. Bd. of Ed., 89 N.J. Super. 327 (App. Div. 1965), aff'd 46 N.J. 581 (1966); Quinlan v. No. Bergen Twp. Bd. of Ed., 73 N.J. Super. 40, 46 (App. Div. 1962). Unless such proofs are offered, it is not the prerogative of a reviewing agency to substitute its judgment for that of the local board. See Boult & Harris v. Passaic Bd. of Ed., 1939-1940 S.L.D. 7, aff'd 135 N.J.L. 329 (Sup. Ct. 1947), aff'd 136 N.J.L. 521 (E & A 1948). Hence, if a reasonable basis exists for the board's conclusion, it must be sustained. Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288, 295 (App. Div. 1960).

In this case the evidence cumulatively established that the need identified in 1978 for a full time Director of Coordinated Transportation Services had ceased to exist by 1982 when the Board abolished Mr. Deutsch's position. Even though the number of routes operated by the district had increased, the number of bus runs operated by the consortium had declined sharply. Indeed, Petitioner-Appellant concedes that at the time his position was abolished his responsibilities in that position required only 50% of his time. And, although his salary was paid not by the Board, but by the consortium out of revenues received from the several districts it served, eliminating Mr. Deutsch's position resulted in

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a net savings of $35,000 to the district since the Board transferred Mr. Deutsch's part time duties to the district Director of Transportation, consolidating those positions so that a portion of the Director's salary was assumed by the consortium. In addition, the district saved the annual salary of one secretary and certain administrative expenses that had been borne by the Board in connection with Mr. Deutsch's position. The decision to retain the position of District Director of Transportation while abolishing Mr. Deutsch's position was predicated upon the district's ongoing and ultimate responsibility to transport all of its students, including those served by the consortium, whether or not transportation for some of its students is provided by another entity. Hence, the decision to eliminate Petitioner-Appellant's position was cost effective, as indicated by the declining demand for transportation services provided to the district by the consortium, and was consistent with the Board's statutory responsibility to provide transportation.

The soundness of this decision is further confirmed by an audit report prepared by the Division of Finance and Regulatory Services within the State Department of Education. This report, which was admitted into evidence as R-1 following the hearing, questioned the level of transportation supervision maintained by the Board and suggested the creation of a district-wide transportation service to reduce taxpayer expense. While Petitioner-Appellant argues that the late submission of this document was improper, it is the considered judgment of the State Board that, although the procedure was irregular, so long as this evidence serves merely to corroborate other facts independently establishing the reasonableness of the board's action, consideration of the report did not exceed the bounds of latitude ordinarily accorded evidentiary rules in administrative proceedings and did not operate to Petitioner-Appellant's prejudice. N.J.S.A. 52:14B-10; In the Matter of the Tenure Hearing of Sally Williams, School District of Union Twp., 1973 S.L.D. 464, aff'd 1974 S.L.D. 1437 (St. Bd. of Ed.), aff'd N.J. 1975 S.L.D. 1162 (App. Div.).

Having determined that the Board acted properly in abolishing Mr. Deutsch's position, it remains to be considered whether he was tenured and, if so, whether he is entitled on the basis of seniority to assert a claim to any other positions in the district. It is now well settled that a member of the professional staff of a local board of education is entitled to the benefits conferred by tenure if he served in a position for which a valid certificate was required, he held the appropriate certificate and has served the requisite period of time. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 74 (1982); N.J.S.A. 18A:28-5, 1.1. Clearly, Mr. Deutsch has satisfied all three prerequisites. The job description for the position of Hudson County AVTS Project Director required that the candidate for that position hold both standard teacher and supervisor certification. P-3. It is undisputed that petitioner holds such certificates, and that he has served the

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requisite period of time as established by N.J.S.A. 18A:28-5(a) or (c). It is of no moment that his salary was not paid by the Respondent Board, Spiewak v. Rutherford Bd. of Ed., supra, at 81-82, nor that his title was changed from Supervisor, at the time of his appointment in 1978, to Director in 1981, when the job description for his position was formally adopted, because the qualifications and duties of his position remained the same and were merely confirmed by the board's action. Cf., N.J.S.A. 18A:28-6.

Even though it is clear that Mr. Deutsch attained tenure in the supervisory position of Project Director, Transportation, it must now be determined whether he is entitled to seek appointment on the basis of seniority, to several other positions in the district. The standard to be used in evaluating seniority claims was set forth by the New Jersey Supreme Court in Lichtman v. Ridgewood Bd. of Ed., 93 N.J. 362 (1983). The court there held that a tenured part time librarian whose position had been abolished could assert a seniority claim to a full time librarian position if the same certification was required for each job and the nature and duties attending each position were the same. Noting with approval the emphasis in the revised regulations governing seniority that "actual experience in particular positions should be the critical determinant in awarding seniority," 93 N.J. 362, at 369, the court embraced the element of "actual experience" in its holding that:

> appellant's seniority accrues from her actual service in the particular position for which she was certified...the nature and duties of the... position that she sought were identical to those of her...position which had been eliminated. The service and experience she compiled in her position --- her seniority --- properly entitled her to preference over a non-tenured applicant...

Id. (emphasis supplied).

Thus, in order to prevail in his seniority claims, Petitioner-Appellant must establish first that the same certification needed for the abolished position is required for the position sought and second, that the duties encompassed by the two positions are substantially the same, such that the service in the vacated position furnishes actual experience for the position to which a seniority claim is asserted. See Flanagan v. Bd. of Ed. of the City of Camden, decided by the State Board of Education, September 5, 1984.

In accordance with the job description established for Project Director, Transportation, P-2 and P-3, Mr. Deutsch was required to hold a regular teacher's certificate and a supervisor's certificate. He was responsible for collecting data on special needs students requiring transportation and preparing bus routes for them, advertising for bids from transportation companies and recommending the award of transportation contracts by the Board. He prepared applications for grants and funding, maintained a record keeping

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system and generated joint transportation agreements between participating school districts to insure receipt of state aid for transportation. He participated in training sessions with transportation contractors and represented the Board at conferences. In addition, it was contemplated that his duties would include exploring the possibility of providing other coordinated services to districts in Hudson County.

The only other supervisory position to which claim is made and for which a job description has been provided[2] is Supervisor of Vocational Education. While the certification requirements for this position correspond to those of the abolished position, the duties established for the Supervisor of Vocational Education are markedly different, most notably in the area of supervising curriculum and instructional personnel. P-11. Whereas no supervision of classroom instruction or involvement in curriculum development was associated with the position that was abolished, the Supervisor of Vocational Education must evaluate vocational education teachers and improve their instructional techniques, assign student teachers, develop and revise vocational curriculum, plan and implement new programs, and provide inservice training to teachers and teacher's aides. The only duty required of the Supervisor of Vocational Education and for which Mr. Deutsch's position remotely prepared him was the preparation of applications for funding. Thus, the actual experience requirement of Lichtman has not been met.

Further, even if Mr. Deutsch would be entitled, on the basis of seniority, to preferred eligibility for the position of Director of Transportation[3], that position is presently held by someone with greater seniority. While Mr. Deutsch may have been qualified for the position of Job Placement Coordinator, according to the job description, P-9, this position requires no certification and entails assisting students in securing employment. Hence, this is not a supervisory position to which seniority considerations apply. See Lichtman, supra. Similarly, appointment to the position of Board Secretary/ Business Manager, to whom Mr. Deutsch was responsible as Project Director, would constitute a promotion rather

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[2]It is noted that the position of Supervisor of Special Education, previously sought, has apparently been abolished. Initial decision, at 4.

[3]We note that no job description has been provided that would permit consideration of this question.

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than a lateral appointment vis-a-vis the position abolished, and while Mr. Deutsch may have been a qualified applicant, the Board's decision to appoint someone else is not subject to challenge on seniority grounds.

As set forth above, the relevant inquiry is whether the certification required for and the duties and responsibilities attending the position eliminated are substantially identical to the certification and duties of the position to which petitioner asserts a seniority claim. Lichtman, supra. With the possible exception of Director of Transportation, to which Mr. Deutsch may enjoy a preferred eligibility status should the position become vacant, in none of the positions sought do the certification requirements and duties correspond to those of the position vacated.

For all of the foregoing reasons, the State Board concludes that the Board acted reasonably and responsibly in deciding to abolish petitioner's position and, further, that while Petitioner-Appellant had attained tenure, he was not eligible on the basis of seniority for appointment to any of the other positions in the district to which he asserts a claim. Accordingly, the State Board affirms the decision of the Commissioner of Education.

Attorney exceptions are noted.
April 3, 1985

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IN THE MATTER OF THE TENURE	:	
HEARING OF ROBERT E. DOYLE,	:	SUPERIOR COURT
SCHOOL DISTRICT OF THE TOWNSHIP	:	APPELLATE DIVISION
OF PEMBERTON, COUNTY OF	:	
BURLINGTON.	:	
	:	

Decided by the Commissioner of Education, March 15, 1984

Decided by the State Board of Education, November 7, 1984

Argued: April 24, 1985 -- Decided: May 14, 1985

Before Judges Fritz, Gaulkin and Long

On appeal from the State Board of Education

Joel S. Selikoff argued the cause for appellant Robert E. Doyle (Selikoff & Cohen, P.A., attorneys).

Ernest N. Sever argued the cause for respondent Board of Education of the Township of Pemberton (Sever & Hardt, attorneys).

Irwin I. Kimmelman, Attorney General, submitted a statement in lieu of brief on behalf of the State Board of Education (June Kanter, Deputy Attorney General, on the statement).

The opinion of the court was delivered by

GAULKIN, J.A.D.

Robert E. Doyle, a tenured teacher with the Pemberton Board of Education (Board), appeals from a decision of the State Board of Education which found him guilty of conduct unbecoming a teacher and ordered his dismissal.

The Board certified seven charges to the Commissioner of Education, each involving Doyle's alleged use of unnecessary force against a student in violation of N.J.S.A. 18A:6-1. Upon Doyle's request, the matter was heard by an Administrative Law Judge (ALJ) as a contested case. N.J.S.A. 52:14F-1 et seq. In her Initial Decision, the ALJ concluded that the allegations of Counts 1, 2, 3, 4, 5 and 6 had been proved and that "the pattern of unacceptable conduct warrants the removal of Dr. Doyle from his position." Upon his review of the record, the Commissioner found "sufficient evidence" in support of the Counts 1, 2, 3 and 5, but rejected the

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recommendations of the ALJ as to Counts 4 and 6. The Commissioner also concluded that dismissal would be "unduly harsh" within the meaning of In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967); he instead ordered that Doyle be "deprived of salary for the 120-day suspension period plus an additional 30 days' salary and that any salary increment for 1983-84 be withheld."

The Board appealed and Doyle cross-appealed to the State Board of Education. The Legal Committee of the State Board (N.J.A.C. 6:2-1.14) proposed affirmance of the Commissioner's decision that Doyle's actions constituted conduct unbecoming a teacher but recommended "increasing the penalty...to suspension without pay for one full academic year, as well as withholding of increment for 1983-84." The State Board ordered, with four dissenting votes, that "[t]he initial decision of the [ALJ] is reinstated and adopted by the State Board of Education for the reasons expressed therein." Doyle appeals from that decision.

Doyle first urges that the findings of the ALJ, expressly adopted by the State Board, were "unsupported by sufficient substantive credible evidence in this record" and were "incomplete and erroneously applied, contrary to the express provisions of the pertinent statute, N.J.S.A. 18A:6-1." With respect to Counts 1, 2, 3 and 5, we find this contention entirely unpersuasive. Our review of the record satisfies us, to the contrary, that the facts found by the ALJ and thereafter adopted by both the Commissioner and the State Board are amply supported by substantial credible evidence in the record (Mayflower Securities v. Bureau of Securities, 64 N.J. 85, 92-93 (1973)), that those findings are sufficiently articulated to permit their intelligent review (State Health Dep't v. Tegnazian, 194 N.J. Super. 435, 442-43 (App. Div. 1984)) and that they fully justify the conclusion that Doyle violated N.J.S.A. 18A:6-1 on each of those four occasions. We similarly find without merit Doyle's contention that the evidence of prior warnings was of "questionable relevancy" and was given "improper weight"; the evidence was properly received and, we are satisfied, had no undue impact on the administrative decisions.

We find, however, that the decision of the State Board as to both Counts 4 and 6 and as to penalty is flawed because, as Doyle urges, the State Board "failed to articulate the reasons for its rejection" of the contrary findings of the Commissioner as to those matters. As already noted, the State Board simply adopted and reinstated the findings and conclusions of the ALJ. An administrative agency can properly adopt the findings and conclusions of an ALJ, of course, where the ALJ has addressed the entire record. See N.J.S.A. 52:14B-10(c). But here the record which had been considered by the ALJ was thereafter supplemented by the decision of the Commissioner; it was the record as thus supplemented which the State Board had an obligation to consider. Cf. N.J.S.A. 52:14B-10(c); Greater Boston Television Corp. v. F.C.C., 444 F.2d 841 (D.C. Cir.), cert. den. 403 U.S. 923, reh. den. 404 U.S. 877

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(1971); Public Advocate Dep't v. Public Utilities, 189 N.J. Super. 491 (App. Div. 1983). The Commissioner gave a reasoned and articulate explanation for his rejection of the ALJ findings with respect to Counts 4 and 6 and to the penalty to be imposed. The State Board did not address the Commissioner's findings or conclusions, nor did it explain why it rejected them. In performing our task of determining whether the decision of the State Board is supported by sufficient credible evidence (Dore v. Bedminster Tp. Bd. of Ed., 185 N.J. Super. 447, 453 (App. Div. 1982)), we must take into account whatever in the record fairly detracts from its weight. St. Vincent's Hospital v. Finley, 154 N.J. Super. 24, 31 (App. Div. 1977). Since the State Board decision does not undertake to evaluate the Commissioner's contrary assessments, we cannot fairly say whether the findings and conclusions of the State Board as to Counts 4 and 6 and penalty are in fact supported by substantial credible evidence. Id., at 31-33; cf. Tegnazian, 194 N.J. Super. at 450.

Our concern is not for mere procedural nicety. Here a tenured teacher of long service has been dismissed from his professional employment because of six unrelated events occurring over a period of more than three years; it is conceded that no one of the incidents alone would have warranted disciplinary action. The Commissioner, who brings expertise to the administrative process (Manalapan-Englishtown Ed. Ass'n v. Bd. of Ed., 187 N.J. Super. 426, 432 (App. Div. 1981)), regarded the sanction of dismissal as being "unduly harsh." The Legal Committee of the State Board agreed that dismissal would be too harsh. Four members of the State Board dissented from the decision to dismiss. In that setting, we do not regard our insistence that the State Board specifically evaluate the findings and conclusions of the Commissioner to be a cosmetic exercise.

We therefore vacate the State Boad decision insofar as it sustains the Count 4 and 6 charges and orders Doyle's dismissal; we affirm the State Board decision as to Counts 1, 2, 3 and 5. The matter is remanded to the State Board for reconsideration of its findings and conclusions as to Counts 4 and 6 and the penalty to be imposed in light of the Fulcomer standards. Since Doyle's dismissal has been stayed pending this appeal, the State Board shall permit the parties to present any additional proofs arising out of Doyle's continued employment as might fairly bear on its application of the Fulcomer standards.[1]

Affirmed in part, vacated in part and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

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[1]We were advised at oral argument that there have been no further incidents during the pendency of the appeal.

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MICHAEL DREHER,	:	
PETITIONER-APPELLANT,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF JERSEY CITY, HUDSON COUNTY,	:	APPELLATE DIVISION
RESPONDENT.	:	

Decided by the Commissioner of Education, December 22, 1981

Decided by the State Board of Education, July 6, 1983

Argued: January 21, 1985 Decided: February 28, 1985

Before Judges McElroy and Dreier.

On appeal from Final Administrative Agency Decision of the State Board of Education.

Michael P. Dreher argued the cause Pro se. (Mr. Dreher, on the brief).

Seymour Margulies argued the cause for respondent Board of Education of Jersey City (Margulies, Margulies and Wind, attorneys; Seymour Margulies, on the brief).

Irwin I. Kimmelman, Attorney General of New Jersey, attorney for respondent State Board of Education (Jaynee LaVecchia, Deputy Attorney General, on the statement).

PER CURIAM.

Petitioner has appealed from a final decision of the State Board of Education affirming, for other reasons, the decision of the Commissioner of Education dated December 22, 1981. The Commissioner had modified the findings of the hearing examiner insofar as the hearing examiner had found petitioner entitled to the higher pay but not the tenure benefits of a principal for the 1978-79 school year. The Commissioner found that although the Jersey City Board of Education had not strictly complied with N.J.S.A. 18A:27-10 this noncompliance was insufficient to warrant relief in favor of petitioner. The State Board of Education found that the noncompliance with N.J.S.A. 18A:27-10 mandated a finding under N.J.S.A. 18A:27-11 that petitioner was offered a contract for the 1978-1979 school year. The State Board determined, however, that N.J.S.A. 18A:27-12 required written acceptance by petitioner of the new employment on or before June 1 of the preceding year. There being no evidence of

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such written acceptance, the State Board of Education affirmed the dismissal of the petitioner.

The petitioner here raises two points, noting specifically that the balance of his claims against the Jersey City Board of Education were not pressed during the administrative proceeding, since they are pending in an ongoing action in the Federal District Court. We have, therefore, not considered these additional points. Petitioner claims first that he should have been permitted to avoid the effects of a stipulation entered into by his former attorney and the attorney for the Board of Education that his two years' service as principal was pursuant to 10 month rather than 12 month contracts. Second, petitioner asserts that his compliance with N.J.S.A. 18A:27-12 had not been raised before the hearing examiner, Commissioner or State Board of Education. Therefore, the State Board's factual finding that he had not accepted the new employment in writing is based only on the absence of evidence in the record, not by any positive proof. Petitioner asserts that he was and is fully prepared to prove that he did accept the position by a letter written prior to June 1, 1978, had this defense been raised before the hearing examiner or at either of the administrative appellate stages.

With regard to the stipulation concerning petitioner's employment on a 10 month basis, he claims that he had no knowledge that his attorney had entered into such a stipulation until after the hearings had been closed. There was some confusion as to whether he was apprised of this stipulation before, during or after the Commissioner's decision. This point is relevant since N.J.S.A. 18A:28-6 provides different tenure requirements depending upon whether the employment had been for successive calendar year periods, shorter academic years or sporadic employment during three academic years.

N.J.S.A. 18A:28-6(a) provides for tenure in the new position after "the expiration of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing board for such purpose." The words "calendar years" does not mean (as petitioner apparently supposed from his statements made at oral argument) January 1 through December 31 only. In Manchester Board of Education v. Raubinger, 76 N.J. Super. 90, 100-101 (App. Div. 1963), Judge Goldmann construed a predecessor statute and held that these words mean a successive twelve month period, which in that case ran from July 1 through June 30. Under subsection (a) of the statute, therefore, petitioner was entitled to tenure at the expiration of the two consecutive calendar years that he served as principal, if his contract were for a twelve month period.

If petitioner's contract were for ten months, under subsection (b) he would have had to be employed in the third academic year or for some additional time in excess of two academic years during a three year period under subsection (c). We see, therefore, that the

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stipulation concerning the length of petitioner's contract was of pivotal importance in this case.

Petitioner has submitted to us copies of the employment agreements covering his initial employment as a teacher and the contracts over the years of several other teachers (with their names deleted). All of these contracts were for a calendar year. The letter dated June 10, 1976 from the Superintendent of Schools appointing petitioner as a principal does not state whether it is for a calendar or academic year, however, it does refer to "an annual salary" which was "payable in 24 semi-monthly equal installments." The appointment was to take effect September 1, 1976, the same commencement date as in the numerous annual teacher contract letters that appear in the record. Petitioner noted that, although after the close of school he was not required to go to his office on a daily basis any more than the teachers were required to go to their classrooms, he was "on call" for the entire summer and regularly received memoranda concerning preparation for the ensuing school year. He candidly admitted that he was infrequently required to go to his office. Petitioner further claims that since it was the uniform practice that all principals and teachers were hired under annual contracts, the Board attorney who successfully obtained the stipulation to the contrary either was unfamiliar with this policy or acted in bad faith. Since we have found that the hearing must be reopened concerning the acceptance letter, and the evidence concerning the length of the contract is relatively simple to produce or refute, petitioner should be permitted to avoid the stipulation of his attorney. The respondent board easily can show the basis upon which it hired its principals for the period in question. Resolutions from Board minutes, copies of the contracts or testimony of the principals themselves should establish the policy of the Board. If petitioner is correct, and there is no question that he was hired under the letter noted above as a principal and so served for two years, N.J.S.A. 18A:28-6(a) would have given him tenure irrespective of the alleged acceptance of the new contract or his service for an additional four days beyond the termination of the old agreement.

We are not here assuming the bad faith of the Board's counsel. We note only that since the hearing will be reopened in any event, the case that should be heard should not be hypothetical, assuming the ten month contract; rather the actual facts should be laid before the fact finder. Since there appears to us to be a bona fide dispute as to whether the parties' attorneys operated under a mutual mistake in fact, petitioner should be permitted to challenge the effect of the stipulation at such new hearing.

With respect to the acceptance of the third year of employment, the record is clear that petitioner had not been faced with any claim of his failure to accept such contract in writing prior to June 1. He, therefore, would not have been expected to have volunteered the proof concerning such acceptance. The respondent Board has argued that petitioner had the burden of proof to show

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such acceptance, and we agree. Such burden of proof, however, was not placed upon petitioner until the issue was raised. From reading the hearing examiner's report (unfortunately not contained in petitioner's appendix, but supplied by the respondent Board) the issue was neither raised nor discussed at the hearing. It would be highly unfair for petitioner to have lost his tenure rights, if such rights in fact existed, because of his failure to perceive that an appellate authority would make a factual finding concerning an issue not raised below.

Petitioner has informed us that although an acceptance letter was submitted in satisfaction of N.J.S.A. 18A:27-12, he cannot find any copy in his records. The Board likewise has indicated that they cannot find the original, but appellate counsel informed us that the records concerning this case and its federal counterpart has produced such voluminous records through successive attorneys' efforts, that it is difficult to state with precision that such a letter is not in the Board's files. Petitioner has indicated that he intends to rely upon the testimony of two other principals with whom he discussed the contents of the letter at the time that it was mailed. Evid. R. 70, although not strictly binding in administrative hearings, provides that the secondary evidence including oral testimony is admissible "if there is no conveniently available written secondary evidence." Subsection 3 requires this issue to be resolved by the fact finder.

As we have noted, if petitioner is found to have been hired under twelve month contracts, this issue will be moot as tenure would have been conferred at the expiration of the second year pursuant to N.J.S.A. 18A:28-6(a). If that issue remains unresolved or is determined in favor of the Board, evidence concerning the acceptance of the mandated third year's contract should be received and analyzed in an amended opinion.

The decision of the State Board of Education is reversed and this matter is remanded to the State Board of Education for further proceedings in accordance with this opinion. We do not retain jurisdiction.

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MICHAEL DREHER,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION ON REMAND
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, December 22, 1981

Decided by the State Board of Education, July 6, 1983

Remanded by the Appellate Division, February 28, 1985

For the Petitioner-Appellant, Michael P. Dreher, Pro Se

For the Respondent-Respondent, Margulies, Margulies and Wind (Seymour Margulies, Esq., of Counsel)

On February 28, 1985, the Appellate Division remanded this matter to the State Board of Education, for the purpose of obtaining further evidence on whether Petitioner accepted employment for a third year and whether the length of his contract was ten months. This matter is remanded to the Commissioner of Education for further proceedings in accordance with the Appellate Division's decision in the above titled matter, rendered February 28, 1985, Docket #A6120-82T3.

July 3, 1985

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PETER FISCHBACH,	:	
PETITIONER-APPELLANT,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN,	:	APPELLATE DIVISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, December 29, 1983

Decided by the State Board of Education, July 11, 1984

Argued: October 8, 1985 - Decided: November 15, 1985

Before Judges Pressler, Dreier and Gruccio

On appeal from a Decision of the Commissioner of the Department of Education of the State of New Jersey

Louis P. Bucceri argued the cause for appellant (Bucceri & Pincus, attorneys; Gregory T. Syrek, on the brief).

John C. McGlade argued the cause for respondent (Greenberg & Covitz, attorneys; Mr. McGlade on the brief).

David E. Power, Deputy Attorney General argued the cause for the State Board of Education (Irwin I. Kimmelman, Attorney General of New Jersey, attorney; Regina Murray, Deputy Attorney General, on the brief).

PER CURIAM.

This appeal arises from the decision of the respondent Board of Education of the Township of North Bergen in September 1980 to demote appellant Peter Fischbach from vice principal to classroom teacher. In separate proceedings before an administrative law judge, Mr. Fischbach argued successfully that by virtue of his experience in respondent's district he had obtained tenure as an assistant superintendent and he won reinstatement as an assistant superintendent plus back pay. That decision is not the subject of this appeal.

In this appeal he contests two unfavorable subsidiary rulings by an ALJ and the Commissioner of Education, which he challenges on these grounds:

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1. The State Board of Education exceeded its authority by declaring appellant's school administrator's certificate retroactively void.

2. Appellant was improperly denied service credit as a vice principal from April 1, 1973 to February 18, 1974.

During an initial hearing before an ALJ in June 1980, the North Bergen Teachers' Association sought the revocation of Fischbach's certificates as principal/supervisor and school administrator alleging various improprieties in Fischbach's applications for those certificates. The ALJ found no impropriety in the issuance of the principal/supervisor certificate. However, with regard to the school administrator's certificate, which was needed for the superintendent position, the ALJ found that Fischbach had misrepresented his administrative experience, and this misrepresentation was "conduct unbecoming a teacher" within the meaning of N.J.A.C. 6:11-3.7. Consequently, the ALJ recommended that Fischbach's school administrator's certificate be revoked.

The Board of Examiners concurred and ordered that certificate revoked, although it disagreed that Fischbach had been guilty of unbecoming conduct, choosing instead to call it "reckless disregard for the integrity of the certificate process," which the board fit within the "other just cause" category of N.J.A.C. 6:11-3.7. No appeal was taken from that decision.

In a subsequent hearing before an ALJ, Fischbach challenged his September 1980 demotion to teacher and claimed entitlement to tenure as a superintendent. There the ALJ discussed the ALJ's decision in the initial hearing and determined that although that decision was silent as to retroactivity, the decision implicitly made the certificate void ab initio:

> The fallacy in Fischbach's argument is his assumption that his administrator's certificate remained valid until the date of the decision by the State Board of Examiners. Although it is true that order of revocation in [the initial hearing] was not entered until September 17, 1981, the reasoning of the case makes clear that the administrator's certificate had been issued in reliance on false representations made on behalf of Fischbach. It follows that the administrator's certificate was void ab initio because it had been obtained under false pretenses. Otherwise Fischbach would be able to benefit from his own wrongdoing by taking advantage of an improperly-issued certificate.
>
> [1983 S.L.D. at 1428]

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In adopting the decision of the latter ALJ, the commissioner of education dismissed without discussion Fischbach's argument that the initial revocation decision was prospective only.

Fischbach challenges the commissioner's and ALJ's assumption that the initial decision to recommend the revocation of his certificate was implicitly retroactive. However, neither the ALJ during that initial hearing nor the Board of Examiners qualified the revocation. One simply recommended and the other ordered the certificate "revoked." The basis for this order was not Fischbach's conduct after validly procuring the certificate but rather his misrepresentation in applying for the certificate. Therefore, the decision of the State Board of Education to revoke Fischbach's certificate ab initio was only a clarification of the Board of Examiners' determination.

To construe the revocation as being prospective only would permit Fischbach to obtain tenure as superintendent and thereby benefit from his own irresponsible conduct. As a matter of public policy and absent any statute, a revocation based on a material misrepresentation of qualifications in procuring a certificate must go back to the time of its issuance so that the offending party may not benefit from his wrongdoing.

As to the second issue presented concerning service credit as a vice principal, we find that the question is premature. Fischbach would gain nothing in this proceeding by a favorable ruling by this court on this issue. At state here is nothing more than an advisory opinion that Fischbach might or might not benefit from should he choose to assert his seniority as vice principal at a future date. Since Fischbach has not demonstrated a "sufficient stake" or "real adverseness" in this issue, we decline to engage in what would be merely an academic exercise. In re Boardwalk Regency Corp. Casino License, 90 N.J. 361, 367-368 (1982), app. dis. 459 U.S. 1081 (1982). See also In re Conroy, 190 N.J. Super. 453 (App. Div. 1983), rev'd on other grounds 90 N.J. 321 (1985).

Affirmed.

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DANIEL W. GIBSON, JR.,	:	
PETITIONER-RESPONDENT,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,	:	APPELLATE DIVISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, March 30, 1984 and June 28, 1984

Decided by the State Board of Education, June 6, 1984

Argued: September 10, 1985 - Decided: October 18, 1985

Before Judges Pressler, Dreier and Bilder

On appeal from the State Board of Education and the Commissioner of Education

H. Richard Chattman argued the cause for appellant (Podvey, Sachs & Catenacci, attorneys; Robert L. Podvey, of counsel; Steven Firkser, on the brief).

Nathanya G. Simon argued the cause for respondent (Schwartz, Pisano & Simon, attorney; Nathanya G. Simon, on the brief).

Irwin I. Kimmelman, Attorney General of New Jersey, filed a statement in lieu of brief on behalf of the State Board of Education (Alfred E. Ramey, Jr., Deputy Attorney General, on the statement).

The opinion of the court was delivered by

PRESSLER, P.J.A.D.

In 1975, as a result of the concerted effort of the Legislature, the Governor and the Commissioner of Education, the State, by the enactment of N.J.S.A. 18A:17A-1, et seq., responded to the increasingly intolerable chaos infecting the Newark public school system. The legislative scheme created for Newark was the so-called unit control system, achieved by the creation of the unique office of executive superintendent exclusively responsible for the day-to-day educational, fiscal and operational activities of the district and the concomitant allocation to the Newark Board of Education (Newark Board) of a role limited to policy-making. See N.J.S.A.

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18A:17A-3 and -7. These consolidated cases raise significant and novel questions respecting the relationship and respective powers of the Newark Board and its executive superintendent pursuant to that statute.

Our review of the record, considered in light of counsel's argument, now persaudes us that the issues raised by this appeal so intimately affect educational policy, practice and organizational structure as to require their prior consideration by the State Board of Education, which has not yet addressed the substantive questions on their merits. We therefore remand to the State Board for that purpose.

Explanation of the present posture of this litigation requires reference to its procedural history. On August 8, 1983, petitioner Daniel W. Gibson, Jr., then a member of the Newark Board, filed with the Commissioner of Education a verified petition whose gravamen was the claim that the Newark Board, by various of its official actions, was attempting to subvert the fundamental legislative scheme of N.J.S.A. 18A:17A-1, et seq. The specific areas of controversy include the Newark Board's attempt to hire a lobbyist/consultant to perform duties allegedly assigned by statute to the executive superintendent; its attempt to remove the Office of Board Affairs, the executive director of Board Affairs and the Office of General Counsel from the general supervisory authority of the executive superintendent; and its retention of outside counsel to provide it and its individual members with legal services beyond those available from general counsel for the district. The petition also alleged that the Newark Board had conducted several meetings in violation of the Open Public Meetings Act, N.J.S.A. 10:4-6, et seq., thereby requiring the nullification of actions taken at those meetings respecting the approved contract for the lobbyist/consultant.

The matter was referred by the Commissioner of Education to the Office of Administrative Law for hearing, and the administrative law judge issued an initial decision on February 2, 1984, which sustained Gibson's position with respect to the Open Public Meetings Act but which otherwise approved the challenged actions of the Newark Board as within its policy-making function. In short, it was the view of the administrative law judge that the Office of Board Affairs and the Office of General Counsel were, as a matter of statutory interpretation, subject neither to supervision by the executive superintendent nor to any obligation to report to him. The administrative law judge further concluded that outside legal counsel was appropriately available to respond to requests for legal opinions by individual board members as well as the board collectively and indeed that the retention of outside counsel without recommendation by the executive superintendent was within its inherent power. Finally, the administrative law judge was satisfied that as a matter of concept the Newark Board was also within its power in contracting with the lobbyist/consultant, the only legal

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defect in the contracting process having been the Open Public Meetings Act violation.

Following his receipt of exceptions from the parties and after considering the record in the matter, the Commissioner of Education issued his determination on March 30, 1984, concurring with the administrative law judge only in respect of the Open Public Meetings Act issue and disagreeing with all of his substantive conclusions. In addition to setting aside the findings of the administrative law judge which had approved of the specific Newark Board actions challenged by Gibson, the Commissioner issued the following directives to the Newark Board in an evident attempt to resolve for the future potential areas of jurisdictional conflict between it and its executive superintendent.

* * * * * *

2. The Board shall promulgate the necessary Board rules with sufficient specificity pertaining to the employment of outside consultants which shall be in compliance with N.J.S.A. 18A:17A-3 et seq. and N.J.A.C. 6:20-8.1 et seq.

3. The Board shall promulgate the necessary rules specifying the manner and circumstances under which outside counsel is to be retained by the Board without compromising or diminishing the effectiveness of those powers and duties of the Executive Superintendent or the Office of General Counsel.

4. The Board shall further clarify through its rule-making authority the manner and conditions under which legal advice of Board counsel is to be obtained not inconsistent with this decision.

5. The Board shall take the necessary action to revise its chart of organization to comply with the Commissioner's decision herein, establishing the proper placement for the Offices of Board Affairs and General Counsel, under the authority and supervision of the Executive Superintendent.

6. The Board shall immediately take the necessary action to terminate the lobbyist/consultant contract in effect with Mr. Kittrels and shall reassign any or all of the duties described therein that the Board wishes to continue to the Office of Executive Superintendent and/or his designee pursuant to N.J.S.A. 18A:17A-3 and 6.

The Commissioner also directed the Newark Board to compensate Gibson for his legal fees in prosecuting the action.

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On April 27 the attorney who had represented the Newark Board in these proceedings filed a notice of appeal with the State Board of Education in which he explained that the Newark Board had not formally authorized the appeal of that action since it had been unable to reorganize and commence proper functioning following controversies which had attended the early April change of its membership. On May 14, 1984, however, the Newark Board was finally properly constituted and met. It then considered the question of an appeal from the Commissioner's decision and voted to ratify counsel's previous filing of the notice of appeal. Despite the documentation of the ratifying vote provided to the State Board, it nevertheless dismissed the appeal on June 6, 1984, on the ground that a properly authorized appeal had not been taken within the statutory 30-day period prescribed by N.J.S.A. 18A:6-28. The Newark Board's appeal from the State Board's dismissal is the first of the matters now before us (Gibson I).

The second matter before us, Gibson II, arises out of two resolutions adopted by the Newark Board on May 29, 1984, the first of which relieved both general counsel and outside counsel from any obligation to report to the Newark Board through the executive superintendent, and the second of which appointed general counsel without a prior recommendation of the executive superintendent. Gibson filed a second verified petition with the Commissioner contending that both of these resolutions violated N.J.S.A. 18A:17A-3 and 5, and the Commissioner, by a determination issued on January 21, 1985, agreed with Gibson's contention, rejecting the contrary conclusion of the administrative law judge.

On February 7, 1985, the Newark Board filed a motion with this court seeking to consolidate Gibson I and Gibson II and further seeking leave to appeal the Commissioner's decision to this court directly. That motion was granted.

The foregoing recitation of the history of this litigation makes clear that the threshold issue before us in Gibson I is whether the State Board properly dismissed the Newark Board's appeal on procedural grounds. We are firmly convinced that it erred in so doing.

N.J.S.A. 18A:6-28 requires an appeal to the State Board to be taken within 30 days after the decision appealed from. The notice of appeal here was filed within that time period. The fatal defect found by the State Board was the fact, frankly conceded by counsel upon filing, that the appellant, the Newark Board, had not formally approved that action. The record demonstrates, however, that the Newark Board did not meet at any time in April 1984 because of its inability to reorganize as scheduled on April 10, 1984, as a result of the confusion over who its new members actually were. Indeed, on April 24, 1984, the Commissioner of Education ordered the Newark Board not to conduct any of the reorganizing activities scheduled for its meeting of that date. See Board of Education v. Brown and Brown, 1984 S.L.D. 7 (May 2, 1984), aff'd by the State

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Board (1984). On April 24 no quorum was present, and consequently no meeting was ever convened and no executive session ever took place. It was only after this fiasco, on April 27, 1984, three days short of the expiration of the appeal, that counsel filed the notice in order to protect the right of appeal which he had ascertained was at that point desired by a majority of individual members.

Under these circumstances, we are satisfied that it was virtually impossible for a formally approved notice of appeal to have been timely filed and hence that the filing of the notice on condition, as it were, of subsequent formal ratification constituted substantial compliance with the time limitations. See, e.g., Bernstein v. Board of Trustees, 151 N.J. Super. 71, 76-77 (App. Div. 1977). To hold otherwise would be fundamentally unfair and would needlessly and unjustifiably deprive the Newark Board of a right to appeal in difficult and sensitive litigation involving novel issues of significant public interest. We therefore reverse the State Board's dismissal of the notice of appeal in Gibson I.

Having determined that the appeal in Gibson I is procedurally viable, we must next consider the forum which should first decide it. We have reached the conclusion that our grant of leave to appeal to us directly from the Commissioner's decision in Gibson II was improvident. We then believed that the appeal primarily involved a question of the attorney-client relationship, and it was our view that a court was as well, if not better, equipped to determine that issue as the State Board of Education. Having had, however, the opportunity fully to review the record on the consolidated matter and to consider the oral argument of counsel, we are now persuaded that the contours of this controversy transcend that issue and indeed involve very basic questions significantly affecting the entire operation of the Newark school system. We are persuaded that the status of the Office of Board Affairs and its executive director and the asserted right of the Newark Board to engage in the practice of retaining outside consultants independent of the executive superintendent's role are issues of equal importance and that all of these issues intertwine. It is our further view that these issues implicate matters of educational policy as to which this court should defer in the first instance to the expertise and experience of all levels of the agency charged with the administration of the school laws. See Abbott v. Burke, 100 N.J. 269 (1985). And see also Dougherty v. Human Services Dep't, 91 N.J. 1 (1982).

We have therefore determined to remand both Gibson I and Gibson II as a consolidated controversy to the State Board for its action. We do, however, retain jurisdiction and direct that the State Board shall conclude its consideration of the appeal from the Commissioner's determinations within 90 days from the date hereof and shall file its determination with the clerk of this court within that time. Any party wishing to pursue an appeal from that determination or any of its components shall advise the court of that intention within 10 days thereafter and an appropriate expedited scheduling order will then be entered. In the interim, we have

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determined that no stay shall be granted from the Commissioner's determinations.

We add, however, a single caveat. We are satisfied that even if it should be ultimately held that general counsel holds an office subject to the executive superintendent's recommending power pursuant to N.J.S.A. 18A:17A-5(c), we would nevertheless conclude that in matters such as this in which there is a controversy between the Newark Board and the executive superintendent respecting the scope of the respective statutory authority of each and which by its nature implicates the Newark Board's policy-making and legislative province, the board is entitled to retain counsel of its own choosing to advise it and to conduct any ensuing litigation. We therefore hold that the Newark Board's retention of its present counsel to represent it in this litigation is a valid action irrespective of the ultimate outcome of the underlying disputes.

The decision of the State Board of Education in Gibson I dismissing the appeal on procedural grounds is reversed, and we remand both Gibson I and Gibson II to the State Board for consideration on the merits in accordance with this opinion. Jurisdiction is retained.

[205 N.J. Super. 48]

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GLEN ROCK EDUCATION ASSOCIATION, SARAH BROWN AND N. MILES LEONARD,

PETITIONERS-RESPONDENTS,

V. : STATE BOARD OF EDUCATION

GLEN ROCK BOARD OF EDUCATION, : DECISION

RESPONDENT-APPELLANT.

Decided by the Commissioner of Education, August 15, 1983

For the Petitioners-Respondents, Bucceri & Pincus
(Sheldon H. Pincus, Esq., of Counsel)

For the Respondent-Appellant, Martin R. Pachman, P.A.

In this case, the Glen Rock Education Association and two individual taxpayers of the Borough of Glen Rock challenged the decision of the Glen Rock Board of Education to eliminate one of two library positions requiring certification and to create in its stead the noncertified position of Assistant to the Librarian. In September, 1980, prompted by declining enrollments, the Glen Rock Board reorganized the library services provided in its junior-senior high school facility. That process included the staffing change in dispute here. At that time, the Board decided that instead of employing a separate librarian for each library, as it had in the past, a single Library Media Manager (Manager) would assume responsibility for the operation of both libraries. The Library Media Manager was to be assisted by two noncertified employees, an assistant to the librarian and a media technician. Each of these employees were to be directly supervised by the Manager.

At its meeting September 15, 1980, the Board approved both the job description for the Assistant to the Librarian and the employment of Eileen Colyer for that position. P-6 in evidence. Pursuant to N.J.A.C. 6:11-3.6(h), this job description was submitted to and approved by the County Superintendent on September 25, 1980. On November 11, 1980, Petitioners-Respondents filed a petition of appeal before the Commissioner of Education, claiming both that the creation of the position and its approval by the County Superintendent contravened the rules and regulations governing the certification of teaching staff members in New Jersey's public schools and arguing that the services performed by the Assistant to the Librarian could only be rendered by an individual certified as an Educational Media Specialist or as an Associate Educational Media Specialist pursuant to N.J.A.C. 6:11-12.21 and N.J.A.C. 6:11-12.22.

The initial decision, rendered April 26, 1982, concluded that the Assistant to the Librarian has no teaching responsibilities and performs services different from the Library Media Manager, thus

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> [t]he associate educational media specialist is concerned with the improvement of the learning process and instruction through the evaluation, selection, organization, distribution, production, and utilization of appropriate print and nonprint resources and the equipment needed for their use. The associate educational media specialist provides technical consultative services to teaching staff to assure more effective use of available resources.

Id.

Thus, although we conclude that positions requiring the Associate Media Specialist Certificate need not include among their duties direct teaching responsibilities, such positions must require that the individual holding the position possess and utilize the capacity to teach. Where a position does not require that an individual possess and utilize the capacity to teach in order to fulfill the duties of the job, the certificate is not required. As set forth above, the duties of the Assistant to the Librarian in the instant case did not concern "the improvement of the instructional process and instruction", but rather involve assisting the Library Media Manager in insuring the smooth functioning of the library and directing teachers and students to resources. Accordingly, the position did not require that the individual holding the position either possess or utilize the capacity to teach.

This conclusion is supported further by examination of the provision authorizing a holder of the now abandoned Teacher-Librarian Certificate to seek extension of that certificate to cover the expanded functions embraced by the Associate Media Specialist Certificate, N.J.A.C. 6:11-12.23(c)(2) (b)(i). Prior to September, 1979, certification as a Teacher-Librarian was required of anyone providing instruction in the use of school libraries. N.J.A.C. 6:11-12.6(a) (deleted 9/7/79). In order to qualify for Teacher-Librarian certification, the applicant was required to complete a number of credit hours in library science and hold a standard teacher's certificate. N.J.A.C. 6:11-12.6(b). When this provision was deleted, a process was developed whereby the holders of such certificates could apply for conversion of the now invalid certificate. N.J.A.C. 6:11-23(c)(2)(b)(i). We emphasize that the Teacher-Librarian certificate was required for positions involving instruction in the use of the school library in the elementary and/or secondary schools. N.J.A.C. 6:11-12.6(a) (deleted September 7, 1979). Although the instruction involved in positions requiring the Teacher-Librarian Certificate was not the same as that provided by classroom teachers, [1] See Mary R. Walton v. Board of of the Borough of Shrewsbury, decided by the Commissioner August 6, 1984, aff'd by the State Board, January 2, 1985, such instruction

[1]We note that the Teacher-Librarian Certificate, like those for Educational Media Specialists and Associate Educational Media Specialists, was an educational services certificate rather than an instructional certificate.

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required that individuals holding those positions have and utilize the capacity to teach. We find that no less is required before a position necessitates possession of the broader certificate for Associate Media Specialists.

In sum, we conclude that because the duties of the Assistant to the Librarian in this case consist of functions pertaining to maintaining library materials and scheduling and directing teachers and students to library resources and do not require self-generating initiative, and because the position involves neither direct instructional responsibility nor any responsibility requiring the capacity to teach, the position does not require certificate as a Educational Media Specialist or as an Associate Educational Media Specialist. Accordingly, the State Board finds that the Board here properly developed and approved the position of Assistant to the Librarian as a non-certified position. However, we caution the Board that, although the individual presently employed in that position appears capable of undertaking her assignments without constant supervision, adequate direction and monitoring of this position by the Library Media Manager is essential.

For the reasons set forth above, the State Board reverses the decision of the Commissioner.

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[1]We note that the Teacher-Librarian Certificate, like those for Educational Media Specialists and Associate Educational Media Specialists, was an educational services certificate rather than an instructional certificate.

May 1, 1985

Pending N.J. Superior Court

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GUSSIE GOEBEL,	:	
PETITIONER-CROSS-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MAYWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, September 27, 1984

For the Petitioner-Cross-Appellant, Aronson and Springstead
(Anthony N. Gallina, Esq., of Counsel)

For the Respondent-Appellant, Gladstone and Hart
(Marvin H. Gladstone, Esq., of Counsel)

The State Board of Education affirms the decision of the Commissioner of Education with the modification that Petitioner/Cross-Appellant's back pay is to be based on the salary she would have earned for 1983-84, together with a 7 1/2 percent increase, which is the same increase granted her replacement.

March 6, 1985

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PAUL GORDON,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PASSAIC, MORRIS COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner, October 31, 1983

For the Petitioner-Respondent, Greenberg, Kelley and Prior
(James F. Schwerin, Esq., of Counsel)

For the Respondent-Appellant, Wiley, Malehorn and Sirota
(Robert Goldsmith, Esq., of Counsel)

Petitioner-Respondent was a tenured teacher of instrumental music employed by the Board of Education of the Township of Passaic from 1968 through 1980. On April 28, 1980, the Board abolished the district's instrumental music program and, as a result, Petitioner-Respondent's position because of declining enrollment and a decrease in pupil participation in instrumental music. The program was abolished again for the 1981-82 school year, but the Board reinstated a limited instrumental music program for 1982-83 and created a new position of Vocal/Instrumental Music teacher. Although Petitioner-Respondent held a Teacher of Instrumental Music Certificate and was eligible for certification as a teacher of music, the Board hired a non-tenured teacher, who held a Comprehensive Music Certificate, to fill the position.

In December, 1982, Petitioner-Respondent became aware that the Board had created the new vocal/instrumental position. He retained an attorney, who wrote to the Board on December 16, 1982, requesting Petitioner-Respondent's reinstatement. Exhibit R-5. On January 10, 1983, the Board denied any violation of Petitioner-Respondent's tenure or seniority rights and declined to reinstate him. Exhibit R-6. On May 17, 1983, more than four months after Petitioner-Respondent knew that the Board had created the new position and denied his request for reinstatement, he filed a Petition of Appeal with the Commissioner asserting violation of his tenure and seniority rights.

In his Initial Decision, the Administrative Law Judge (ALJ) found that Petitioner-Respondent's delay in filing his petition violated the timeliness requirement of N.J.A.C. 6:24-1.2 and that, in the absence of circumstances warranting relaxation of the rule under N.J.A.C. 6:24-1.19, he was barred from any retroactive

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relief. However, relying on North Plainfield Ed. Assoc. v. Bd. of Ed. of the Borough of North Plainfield, Docket No. A-4583-81T3, App. Div., June 20, 1983, he concluded that Petitioner-Respondent was entitled to prospective relief based on his tenure status. He therefore ordered Petitioner-Respondent's reemployment for the 1983-84 school year. The Commissioner affirmed the findings and determination of the ALJ and adopted them as his own.

After reviewing the entire record and the relevant law, the State Board of Education concludes that N.J.A.C. 6:24-1.2 governs any and all relief that may be granted to Petitioner-Respondent and that bifurcation into retroactive and prospective relief was improper. As set forth above, in granting prospective relief, the ALJ relied on the Appellate Division decision in North Plainfield Ed. Assoc. v. Bd. of Ed. of the Borough of North Plainfield, supra. That decision held that teachers had a statutory right to credit on the salary guide and that, therefore, the 90 day requirement of N.J.A.C. 6:24-1.2 was not applicable to claims asserting that right. However, on appeal to the New Jersey Supreme Court, the decision of the Appellate Division was reversed. North Plainfield Ed. Assoc. v. Bd. of Ed. of the Borough of North Plainfield, 96 N.J. 587 (1984).

The New Jersey Supreme Court held that salary increments are not statutory entitlements because they do not accrue without regard to performance as a teacher and therefore the award of an annual increment is subject to the time bar provided by N.J.A.C. 6:24-1.2. Id., at 594. In so holding, the court contrasted increments, which are in the nature of rewards for meritorious service to the school district and subject to denial by a school board for inefficiency or other good cause, with military service credit, which accrues without regard to performance as a teacher. Id., at 593-94. The court emphasized this distinction by stating that:

> The legislative purpose of N.J.S.A. 18A:29-11 is to reward veterans for service to their country in time of war. The reward takes the form of crediting the military service as teaching experience even though there is no functional relationship between the two. The credit has the effect of increasing the number of dollars to which the teacher who is a veteran is entitled. The emolument is not for service rendered or to be rendered for school teaching as such. It was established by the Legislature as a reward or bonus for service in the military, and not for performance as a teacher. Accordingly, the payment should be considered as a statutory entitlement, rather than as an element of the employment contract. That being so, the statute of limitations is inapplicable. [Id. at 151.]

Id., quoting Lavin v. Hackensack Bd. of Ed., 90 N.J. 145 (1982).

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The State Board finds that the tenure and seniority rights of teachers, unlike the right to military service credit, are predicated on the rendering of services as a school teacher. Under N.J.S.A. 18A:28-5, teaching staff members acquire tenure only after employment in a school district or by a board for a specified period of time. Likewise, seniority rights accrue only after a teaching staff member has rendered services for a period of time sufficient for him to have achieved tenure. N.J.S.A. 18A:28-9 et seq. In both cases, the rights acquired are functionally related to teaching experience. As set forth above, the kind of statutory right that renders the statute of limitations inapplicable is one that, like the right to military service credit, does not bear a functional relationship to service as a teacher. North Plainfield, supra., Lavin, supra. We therefore conclude that the statute of limitations specified in N.J.A.C. 6:24-1.2 applies to claims, such as that in the instant case, which allege the violation of tenure or seniority rights.[1]

N.J.A.C. 6:24-1.2 requires that petitions of appeal in matters arising under the school laws be filed within 90 days of notice of a ruling affecting the petitioner. The relevant case law holds that the 90 day rule is to be strictly applied and that the time in which the petition must be filed be measured from the time when the cause of action accrued. See, e.g., Watchung Hills Regional Education Association v. Watchung Hills Regional High School District, 1980 S.L.D. 356. Although N.J.A.C. 6:24-1.19 confers on the Commissioner the authority to relax the 90 day rule, such authority is invoked only where there are compelling reasons justifying relaxation or where circumstances are such that strict adherence would be inappropriate, unnecessary or where injustice

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[1]In its exceptions to the Legal Committee Report in this matter, Petitioner-Respondent argued that, for purposes of the application of N.J.A.C. 6:24-1.2, the distinction between increments and the right to military service credit lies in the fact that the right to military service credit is not contractual in nature and that, because tenure and seniority rights also are derived from statute, the ninety-day rule does not apply to assertions of violations of those rights. We reiterate that the distinction drawn by the court in North Plainfield was based on the relationship of the rights in question to performance as a teacher and not on a holding that the right to an increment is a contractual right. Further, we note that increments are not contractual rights. Rather, it is the amount of an increment that is negotiable within statutory limits. See N.J.S.A. 18A:29-12 and 29-14. Thus, the fact that a particular right is statutorily derived alone does not determine whether assertions of violations of that right are subject to N.J.A.C. 6:24-1.2's ninety-day requirement. As set forth above, we conclude that North Plainfield requires that the right accrue without regard to performance as a teacher in order to escape application of N.J.A.C. 6:24-1.2.

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would occur. See, Pfeiffer v. Board of Education of Willingboro, decided by the Commissioner, September 15, 1980, aff'd by the State Board of Education, June 3, 1981, dismissed by the Appellate Division, 1981.

In the case before us, Petitioner-Respondent's cause of action accrued in December, 1982, when he became aware that the Board had created the vocal/instrumental position. His petition not filed until May 17, 1983, well beyond the 90 day limit established by N.J.A.C. 6:24-1.2. No evidence was presented to justify the delay and we agree with the Initial Decision that relaxation of the rule was not warranted. As previously stated, we find that any and all relief to which Petitioner-Respondent may have been entitled was subject to the 90 day requirement of N.J.A.C. 6:24.1.2. The State Board therefore holds that Petitioner-Respondent's failure to comply with that requirement bars his claims to both retroactive and prospective relief.

Attorney Exceptions are noted.

March 6, 1985

Pending N.J. Superior Court

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IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : STATE BOARD OF EDUCATION
DISTRICT OF GREEN BROOK, : DECISION
SOMERSET COUNTY. :
:

Decided by the Commissioner of Education May 22, 1984 and July 30, 1984

For the Petitioner-Appellant, Gaetano M. DeSapio, Esq.

For the Petitioner-Respondent, Janet M. Ressa, Pro Se

For the Respondent-Respondent, Nichols, Thomson, Peek & Meyers (Kenneth S. Meyers, Esq., of counsel)

On April 3, 1984, balloting was conducted in the annual school election for the school district of the Township of Green Brook, Somerset County. The results of that election were initially announced to be as follows:

	AT POLLS	ABSENTEE	TOTAL
Theodore D. O'Keefe	209	0	209
Laurie A. Fitchett	198	0	198
Janet M. Ressa	178	0	178
WRITE-IN CANDIDATES			
John D. Kline, III	184	0	184
Fred H. Marigliano	183	0	183
Richard B. Kwiatkowski	178	0	178

On April 5, 1984, write-in candidates Fred Marigliano and Richard Kwiatkowski requested a recount. In a letter received on April 10, 1984, ballot candidate Janet M. Ressa also requested a recount. Both requests asserted that there had been irregularities in the election. Pursuant to the candidates' requests, an authorized representative of the Commissioner conducted a recount of the ballots.

The Commissioner reviewed his representative's report and, on May 22, 1984, rendered his decision regarding the final tally of votes for both declared and write-in candidates. In the Matter of the Annual School Election Held in the District of Green Brook, decided by the Commissioner, May 22, 1984. He adopted his representative's findings and affirmed the exclusion of a number of votes where names were written in next to names that were crossed out,

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where names written in were illegible, and where names were written in columns 20 and 21. Id., at 2-4.[1] The Commissioner further concluded that a number of write-in votes should have been excluded from the tally because either: (1) more than one write-in vote had been entered in the "personal choice" slot provided in Column 1 of the voting machine, or (2) the write-in vote had been entered in Column 4 on the voting machine, which had not been locked as required. The Commissioner reasoned that, in either situation, inclusion of the write-ins would create the possibility that votes were cast for more than three candidates, the designated limit in this election. Accordingly, he deducted the write-in votes at issue from the tally of the recount and determined that the results of the election were as follows:

	AT POLLS	ABSENTEE	TOTAL
Theodore D. O'Keefe	209	0	209
Laurie A. Fitchett	198	0	198
Janet M. Ressa	178	0	178
John D. Kline, III	174	0	174
Richard B. Kwiatkowski	164	0	164
Fred H. Marigliano	151	0	151

Under the Commissioner's decision, a total of 56 individual votes cast for specific write-ins were excluded. After subtraction of those votes, the successful candidates were determined to be Theodore O'Keefe, Laurie A. Fitchett and Janet M. Ressa. Thus, Janet M. Ressa, who had placed last in the initial count, was designated as a duly elected member of the board.

At the same time that the three candidates requested a recount, they also petitioned for an investigation of the alleged irregularities in the election. In the Matter of the Annual School Election Held in the School District of Green Brook, decided by the Commissioner, July 30, 1984. The matter was transmitted to the Office of Administrative Law and hearings were conducted on May 14 and May 23, 1984. On June 12, 1984, the Administrative Law Judge (ALJ) determined that the totality of the irregularities in this case was of such significance that the will of the people had been thwarted and a new election was necessary. In reaching this conclusion, the ALJ took judicial notice of the Commissioner's decision of May 22. Relying on that decision, the ALJ found that 12 write-in votes were disqualified because the slot in Column 1 was left open, that there was at least one instance when a write-in had been disqualified because it was illegible where the election judge had refused to sharpen the pencil, and that votes cast in columns 4, 20

[1]We note that the Commissioner did not specifically consider his representative's report that one person voted who was not registered. See Initial Decision, at 4. However, as stated above, the Commissioner did adopt the findings in the Report.

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and 21 were disqualified. Moreover, he determined that five individuals did not cast their write-in votes at all because they did not understand how to cast them while, at the same time, one person was allowed to vote although she was not a registered voter. The ALJ emphasized the facts that (1) Slot 1 should have been locked so as to preclude the possibility of multiple votes and, further, no instructions were given to voters to insure that they would cast their votes properly; (2) one machine had the names of three write-in candidates written in a slot; (3) written instructions as to how to cast a write-in vote were incorrect and such instructions were not contained in the sample voting machine; (4) decisions governing the election as to whether voters could use their own writing instruments and whether nonregistered voters could vote were changed during the day and; finally, (5) at least 50% of the voters asked how to cast a write-in vote. Initial Decision, at 14-15. The ALJ determined that these multiple irregularities resulted in the disqualification of more than twenty votes and if they had been counted for whom they were cast, different candidates may have won the election.

The Commissioner, also relying on his decision concerning the recount, held that the irregularities were insufficient to require a new election. He found that the written instructions given voters on entering the booth, as well as instruction on how to cast a write-in, although technically deficient, were in substantial compliance with the law and were not a departure from instructions given in previous elections. He therefore concluded that such deficiency was not fatal to the election. He further found that although the failure to lock the write-in slots contradicted N.J.S.A. 19:48-1, this failure was not the fault of the Board or attributable to election workers employed by the Board. He also emphasized, as he had held in his prior determination on the recount, that this failure did not contribute to the outcome of the election as it related to the petitioning candidates. Finally, although he found that the other charges advanced were factually true to some extent, he determined that they were insufficient to show that the outcome of the election was influenced. The Commissioner therefore reversed the decision of the Administrative Law Judge.

The State Board of Education, on its own motion, ordered consolidation of these two matters because the parties and issues in both cases were identical. In the Matter of the Annual School Election held in the District of Green Brook, State Board Docket Nos. 54-84 and 83-84, November 7, 1984. After reviewing the record in both matters, we conclude that numerous irregularities occurred in the Green Brook election which, taken together, affected the outcome of the election. We further conclude that because of the impossibility of determining how the electorate would have voted in the absence of these irregularities, a new election is required.

When improper election procedures result in a failure to elect a board member, N.J.S.A. 18A:12-15(d) provides that such

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vacancy shall be filled by special election. However, it is well established that, in the absence of fraud, the mere presence of irregularities does not warrant setting aside an election. Petition of Clee, 119 N.J.L. 310 (Sup. Ct. 1938); In re Livingston, 83 N.J. Super. 98 (App. Div. 1964). It is only when deviations from statutory procedures are so gross as to produce illegal votes that would not have been cast or to defeat legal votes that would have been counted that an election will be set aside. In re Wene, 26 N.J. Super. 363, 383 (Law Div. 1953). As stated in Wene:

> The rule in our State is firmly established that if any irregularity or any other deviation from the election law by the election officials is to be adjudged to have the effect of invalidating a vote or an election, where the statute does not so expressly provide, there must be a connection between such irregularity and the result of the election; that is, the irregularity must be the producing cause of illegal votes which would not have been cast or of defeating legal votes which would have been counted, had the irregularity not taken place, and to an extent to challenge or change the result of the election; or it must be shown that the irregularity in some other way influenced the election so as to have repressed a full and free expression of the popular will.

In re Wene, supra, at 383.

The Commissioner has consistently emphasized, that because school elections are no less important than other elections, they are to be conducted with careful regard for and in strict compliance with every requirement of law. See, e.g., In the Matter of the Election Inquiry in the School District of the Borough of South River, 1974 S.L.D. 1040; In re Annual Election in Palisades Park, 1963 S.L.D. 99. Those requirements include proper preparation of voting machines, In the Matter of the Annual School Election Held in the School District of the Borough of Pompton Lakes, 1977 S.L.D. 586, and the requirement that, where instruction to the electorate is provided with respect to write-in votes, such instruction must be proper. In the Matter of the Annual Election Held in the School District of the Borough of Helmetta, 1977 S.L.D. 695. In the instant case, neither of those requirements were met. Moreover, because those failures were combined with the other irregularities in this case, there is no doubt in our minds that the outcome of the election was affected.

The importance of the proper preparation of voting machines is well illustrated by the Commissioner's decision in Pompton Lakes, supra. In that case, it was discovered during the election that when the lever next to the personal choice slot was depressed, the personal choice slot locked so that it was impossible to write in a name. Id., at 587. The Board Secretary attempted to compensate for this deficiency by taping shut the personal choice slot and

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utilizing the fourth slot. Id. However, he abandoned the procedure when he realized it permitted voters to vote for four choices instead of three and the election was carried out with the machines improperly aligned. Id. The Commissioner found that improper preparation of the machines had resulted in an election so marked by confusion that it could not be held to be a valid expression of the will of the electorate. Id., at 589. In so holding, the Commissioner emphasized that:

> Write-in voting is difficult, at best, when voting machines are properly prepared. If such machines are not correctly prepared, or if they are mechanically imperfect, a whole election can be rendered a nullity. Accordingly, the Commissioner is again constrained to caution this Board and all local boards of education and election officials to employ all possible precautions to insure, prior to election, that voting machines are in good working condition.

Id., at 590.

In the Green Brook election, slot 4 was not locked as required, resulting in the exclusion of 30 individual votes cast for the three write-in candidates. Commissioner's decision of May 22, 1984, at 10. Additionally, slot 1 was not locked, resulting in approximately 12 instances of disqualification on the grounds that, because it was larger than the other slots, votes were cast for more than a total of three candidates. Although it is not absolutely required that slot 1 be locked, the Commissioner has repeatedly recommended that slot 1 not be used because of the possibility that more than one name may be entered in that slot. As stated In the Matter of the Annual School Election Held in the Township of Hillsborough, 1965 S.L.D. 74:

> There appears to be no clear practice with respect to the use of irregular ballot slot #1 among the various election boards of the State. This larger write-in space is provided primarily for use in presidential elections in which the voter may want to write the names of a series of electors. ... The Commissioner has observed, in his experience ... that where large slot #1 is not locked out it is often necessary to void a ballot because more than one name has been written in this space. From his experience the Commissioner would recommend that slot #1 not be used in school elections....

Id., at 76.

The State Board emphasizes that the Commissioner's recommendation was designed to avoid exactly the situation that occurred in the Green Brook election. Moreover, the failure to lock

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out slot #1 in this instance was exacerbated by the fact that the written instructions provided to the electorate were incorrect. While the instructions indicated that if a voter lifted a slot to register a write-in vote, he would be unable to vote for the ballot candidate immediately below that slot, in reality lifting the slot did not prevent a voter from also voting for the ballot candidate. Initial Decision, Commissioner's decision of July 30, 1984, at 5. As set forth above, it has long been held that where instruction to the electorate is provided, it must be proper. In the Matter of the Annual School Election Held in the School District of the Borough of Helmetta, supra. In this case, the incorrect instructions provided combined with incorrect preparation of the machines resulted in the confusion that characterized this election. When the votes that were disqualified as a result of these violations are added to those disqualified because of illegibility where election officials had refused to sharpen the pencils for four hours and the fact that one person was permitted to vote who was not registered is considered, there can be no doubt that the outcome of this election was affected by the irregularities. The State Board emphasizes that, in fact, the Commissioner's decision on the recount itself changed the initial outcome of the election by the disqualification of votes.

We find that, because of the number of votes affected by the irregularities, we cannot with reasonable certainty determine which candidates would have been successful in his or her efforts to win the third position on the Green Brook Board.[2] Although we affirm the need for extreme caution in setting aside an election, we conclude that the irregularities occurring in this election were so pervasive and of such significance as to thwart the will of the electorate of Green Brook. Further, we are forced to reiterate that:

> Members of boards of education play a dominant role in the governance of local school districts and in determining the quality of the education of our young people. They expend more public funds per capita than any other state or local body. It is of vital importance that board members be properly elected and that they enjoy the support of the majority of the electorate. We are deeply concerned over the numerous cases of election irregularities which have come before the Commissioner in recent years. We urge the Commissioner to take suitable measures to reduce election law violations and irregularities...

In the Matter of the Annual School Election Held in the School District of the Borough of Tinton Falls, 1979 S.L.D. 872, 875.

Where, as here, irregularities are of such proportion as to change the outcome of the election, the suitable measure is provided

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[2] As set forth above, the irregularities did not affect the outcome of the election as to those candidates placing first and second in the contest.

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by N.J.S.A. 18A:12-15. The statute provides that vacancies on a school board are to be filled:

> ...(d) By special election if there is a failure to elect a member at the annual school election due to improper election procedures. Such special election shall be restricted to those persons who were candidates at such annual school election, shall be held within 60 days of such annual school election, and shall be conducted in accordance with the procedures for annual and special school elections set forth in chapter 14 of Title 18A of the New Jersey Statutes....

The annual school election for 1985 will be held on April 2, 1985. We believe that the basic intent of the law will be best carried out by allowing the electorate to vote in that election for candidates to fill the unexpired term of the third position on the Green Brook Board for which there was a failure to elect in 1984. Until such time as the results of that election are certified, Janet M. Ressa shall continue to serve in that position in order to avoid undue disruption to Board operations.

Attorney Exceptions are noted.
Maud Dahme abstained.
January 2, 1985

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FRANCES W. HYMAN ET AL.,	:	
PETITIONERS-RESPONDENTS,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,	:	STATE BOARD OF EDUCATION
	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, August 15, 1983

For the Petitioners-Respondents, Bucceri and Pincus
(Louis P. Bucceri, Esq., of Counsel)

For the Respondent-Appellant, Greenwood and Sayovitz
(Sidney A. Sayovitz, Esq., of Counsel)

In Spiewak v. Rutherford Bd. of Ed., the New Jersey Supreme Court held that public school teachers who provide part-time remedial or supplemental instruction may acquire tenure if they meet the specific criteria in N.J.S.A. 18A:28-5. 90 N.J. 63 (1982). The decision in Spiewak, however, did not address the question of whether those teachers are entitled to placement on the salary guide for "regular" full-time teaching staff members where supplemental teachers are covered by a separate salary guide or where they are not covered by any guide. Whether supplemental teachers who are covered by a separate negotiated salary guide are entitled to placement on the guide for "regular" teaching staff members is the issue presented in this appeal.

I.

In April, 1982, the Teaneck Board of Education terminated three part-time supplemental teachers. In June, those teachers, relying on Spiewak, petitioned the Commissioner, asserting violation of their tenure rights. The Board, in light of Spiewak, reinstated the supplemental teachers. Accordingly, they amended their petition, withdrawing the allegation of improper termination and asserting that they, and all auxiliary teachers employed by the Board, were entitled to parity of salary and benefits with "regular" teachers as a matter of law.

The Administrative Law Judge (ALJ) concluded that the three individual petitioners had acquired tenure as supplemental teachers, but that they were not entitled by law to salary parity with regular classroom teachers. He found that N.J.S.A. 18A:16-11, which authorizes de facto school employees to recover compensation in a court of competent jurisdiction, did not apply to the case before

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him because petitioners knew the duties, the terms of the contract and the terms of compensation after the first year of their employment. Initial Decision, at 18-19. He further found that Spiewak did not hold that supplemental teachers were entitled to salary parity, but rather that salaries and benefits of different categories of teachers were primarily controlled by contract in the absence of a statutory mandate. Id., at 19. Thus, he determined that salaries were a matter for negotiation within statutory guidelines. Id. Finally, he concluded that because such statutory guidelines were not violated in the case before him, the Board had acted lawfully in agreeing to the salaries of the auxiliary teachers as specified in the negotiated contract. Id., at 19-21.

The Commissioner modified the initial decision, holding that Spiewak required placement on the appropriate step of the salary schedule that established the rates of compensation for regular teaching staff members. Commissioner's decision, at 27. However, he further held that a board may negotiate differences in salary compensation between supplemental teachers and full-time classroom teachers when there is a clear recognition on both sides in the negotiating process that auxiliary teachers are by law teaching staff members eligible to obtain tenure. Id. He determined that this standard had not been met in the case before him at the time that the negotiated agreement applying to auxiliary teachers became effective and that, therefore, those teachers were entitled to placement on the guide for full-time classroom teachers. Id., at 28. The Commissioner reasoned that to permit the auxiliary teachers to be paid on a separate scale would force them to accept an inferior status by virtue of the Board's failure to recognize them as tenure eligible in the first instance and concluded that he could not interpret Spiewak to require boards to recognize such teachers as tenure eligible without the same status and rights attaching to them. Id.

The Board appealed from that portion of the Commissioner's decision that required placement of the supplemental teachers on the appropriate step of the existing salary schedule for full-time classroom teachers. In response, the Petitioners-Respondents asserted that they were entitled to guide placement as a matter of law under Spiewak and that only if the Board could demonstrate that they knowingly waived that right could a separate negotiated salary scale be upheld.

II.

The threshold issue in this appeal is whether supplemental teachers are entitled by law to placement on the full-time classroom teachers' salary guide. Only if the right to guide placement is conferred by the school laws must we determine the circumstances under which that right may be waived. Initially, we note that the Commissioner's holding that such right exists is based on the New Jersey Supreme Court's decision in Spiewak v. Rutherford Bd. of Ed., supra. We therefore will first consider that decision and its impact on the issue of whether supplemental teachers are entitled by law to guide placement.

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In Spiewak, the court, reversing Point Pleasant Beach Teachers' Ass'n. v. Callam, 173 N.J. Super. 11, cert. denied 84 N.J. 469 (1980), held that part-time remedial or supplemental teachers are teaching staff members under N.J.S.A. 18A:1-1 and may acquire tenure if they meet the specific criteria set forth in N.J.S.A. 18A:28-5. In a decision rooted in analysis of the tenure statutes, the court reasoned that, in the absence of a statutory exception or contrary legislative intent, supplemental teachers fell within the express terms of N.J.S.A. 18A:1-1, which defines teaching staff members. 90 N.J. 63, at 73-74. Because N.J.S.A. 18A:28-5 provides that all teaching staff members may achieve tenure if they fulfill the requirements set forth in the provision and because no valid exception excludes supplemental teachers from the statute, the court found that such teachers were tenure eligible. In so holding, the court emphasized the statutory basis of tenure, see id., at 72, and concluded that "[w]hether certain teachers are entitled to tenure never depends on the contractual agreement between the teachers and the board of education [and]...[tenure] may not be forfeited or waived." Id., at 77.

After establishing the statutorily based tenure rights of supplemental teachers and addressing the question of whether the rule established in the case applied retroactively, the court remanded two of the individual cases involved in the consolidated appeal to the Commissioner for a determination of what benefits were owed to those teachers who had acquired tenure.[1] Id., at 84. In remanding the cases, the court stated:

> We do not decide what, if any, additional benefits the teachers in these cases are entitled to, either retroactively or prospectively. That is primarily a matter of contract and the relevant collective bargaining agreements are not part of the record. Further, the parties for the most part did not brief this question and the Appellate Division did not address it. We therefore remand to the Commissioner of Education to make that determination in accord with the principles laid down in this opinion.

Id., at 84 n. 3.

As set forth above, the decision in Spiewak is based on analysis of the tenure statutes. Although the court acknowledged that supplemental teachers may be entitled to additional benefits, it

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[1] In the third case, Anderson v. Summit Bd. of Ed., the court reversed the decision of the State Board and reinstated the decision of the Commissioner, 90 N.J. 63, at 84.

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clearly stated that such benefits, unlike tenure rights, are primarily a matter of contract. Thus, we conclude that the decision in Spiewak does not grant to supplemental teachers any statutory entitlement to benefits beyond that which may be conferred on them by existing statutes.

Subsequent to the decision in Spiewak, the Appellate Division concluded, in Rutherford Ed. Ass'n et al. v. Board of Education of the Borough of Rutherford, that supplemental teachers not covered by a negotiated agreement were entitled to appropriate salary guide placement and benefits as statutes and contracts may provide. Docket #A-2014-82T3 through #A-2023-82T3 (consolidated) (App. Div., January 11, 1984). The court based this conclusion on the history of the Spiewak case itself. From that history, it reasoned that since the Appellate Division had affirmed the Commissioner's determination that equal benefits and emoluments were due the supplemental teachers in Spiewak and since the Supreme Court had affirmed the judgment of the Appellate Division, the Supreme Court had affirmed the decision to grant equal benefits without limitation. Slip Op., at 17.

The court further found that the Supreme Court's reference to the collective agreements in Spiewak "...simply recognized the fact that a calculation of the benefits due required a comparison of what remedial teachers received and what other teachers received under the existing contract. The footnote should not be read as to deny a prospective award of proper salary guide placement and benefits provided by statute and/or contract." Id., at 17-18. The State Board agrees that the footnote in Spiewak does not deny the award of benefits provided by contract or statute. However, we emphasize that the decision in Rutherford did not address the issue of whether supplemental teachers are entitled to guide placement as a matter of law. We must therefore turn our consideration to the relevant statutes in order to determine whether such right exists.

III.

As set forth in Spiewak, the Tenure Act, N.J.S.A. 18A:28-1 through -18, specifically defines the conditions under which teachers are entitled to tenure. Spiewak, supra., at 72. Those statutes make tenure a mandatory condition of employment and supersede contractual terms. Id. Thus, if the tenure statutes confer on teachers a particular entitlement, such as seniority rights, that entitlement could not be waived through negotiation. See, e.g. Spiewak, supra. However, review of the tenure statutes indicates that those statutes do not grant to any teaching staff members the right to placement on a salary guide.

The tenure statutes protect teachers from dismissal for unfounded, flimsy or political reasons and prevent school boards from abusing their superior bargaining power over teachers in contract negotiations. Spiewak, supra., at 73. Accordingly, those statutes confer on teaching staff members who acquire tenure such rights as seniority rights on reductions in force, 18A:28-10 et seq., and the right to remain on a preferred eligibility list in

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order of seniority for reemployment purposes, 18A:28-12. Additionally, 18A:6-10 et seq. protects tenured teachers from arbitrary dismissals by specifying disciplinary procedures that must be followed by a board seeking the dismissal of a tenured employee. Although affording teachers significant rights and protections, nothing in the tenure laws confers the right to placement on any salary guide. Any statutory entitlement to such placement must therefore be found in N.J.S.A. 18A:16-1 and N.J.S.A. 18A:29-1 et seq., which apply to compensation of teaching staff members.

N.J.S.A. 18A:16-1 authorizes boards of education to employ teachers and to "determine, fix and alter their compensation...", subject to the provisions of Title 18 and other law. The other provisions of Title 18 that affect compensation are found in N.J.S.A. 18A:29-1 et seq. N.J.S.A. 18A:29-4.1 provides in pertinent part that:

> A board of education of any district may adopt a salary policy, including salary schedules for all full-time teaching staff members which shall not be less than those required by law. Such policy and schedules shall be binding upon the adopting board and upon all future boards in the same district for a period of two years from the effective date of such policy but shall not prohibit the payment of salaries higher than those required by such policy or schedules nor the subsequent adoption of policies or schedules providing for higher salaries, increments or adjustments....

Thus, the statute authorizes, but does not require boards of education to adopt a salary policy for all full-time teaching staff members, its application is limited to full-time members[2] and application of the statute is not predicated on the acquisition of tenure. See N.J.S.A. 18A:1-1. Further, when a board elects to adopt a salary policy pursuant to N.J.S.A. 18A:29-4.1, it may, but is not required to include salary schedules for all full-time teaching staff members. If a board does include salary schedules in its policy, it is not required to promulgate a single salary schedule

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[2]Although the application of N.J.S.A. 18A:29-4.1 is limited to full-time teaching staff members, we note that under N.J.S.A. 18A:16-1, boards of education have the general power to establish compensation and that such authority may be exercised through collective negotiation pursuant to the New Jersey Employer-Employee Relations Act. See Maywood Ed. Assoc. Inc. v. Maywood Bd. of Ed., 13 N.J. Super. 551 (Ch. Div. 1975); Camden v. Juanita Dicks, 135 N.J. Super. 559 (Law Div. 1975). Accordingly, boards do have the authority to negotiate salary schedules for part-time teachers.

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for full-time members because the clear wording of the statute permits the adoption of salary schedules so long as such schedules are not less than those required by law. However, because the statute specifically authorizes the inclusion of salary schedules for all full-time teaching staff members, if a board adopts a salary policy that includes a schedule covering one group of full-time members, it must provide schedules for all such members. Finally, any member who does not fall within the categories covered by the salary schedule set forth in 18A:29-7, must be paid a minimum of $2,500. N.J.S.A. 18A:29-5.

As stated, N.J.S.A. 18A:29-4.1 provides that salary schedules must not be below those required by law. Those standards are set forth in N.J.S.A. 18A:29-7 and -12. However, those provisions, like N.J.S.A. 18A:29-4.1, apply only to full-time teaching staff members pursuant to N.J.S.A. 18A:29-6, which defines "member" as a full-time teaching staff member. "Full-time" is defined as the number of days of employment in each week and the period of time in each day required by the State Board of Education to qualify any person as a full-time member. N.J.S.A. 18A:29-6. Local boards, in turn, have been given the authority by the State Board pursuant to N.J.A.C. 6:3-1.13 to define full-time so long as the the number of hours required each day is more than four hours. Thus, the minimum requirements for salary schedules that are included in a board's salary policy apply only to full-time teaching staff members as defined by the local board. Likewise, pursuant to N.J.S.A. 18A:29-6, the provisions governing yearly increments, N.J.S.A. 18A:29-8, agreement as to initial salaries, N.J.S.A. 18A:29-9, salary adjustment, N.J.S.A. 18A:29-10 and credit for military service, N.J.S.A. 18A:29-11, apply only to full-time members. Moreover, none of these provisions require placement on any particular salary schedule.

In sum, the statutes governing compensation apply only to full-time teaching staff members and, therefore, do not confer the right to placement on any salary guide to part-time teachers. Further, there is no requirement that a board adopt a salary policy for its full-time teaching staff members, although it is authorized to do so under N.J.S.A. 18A:29-4.1. Moreover, if a board elects to adopt a salary policy that includes salary schedules, such policy may include more than one salary schedule so long as the schedules meet the requirements set forth in N.J.S.A. 18A:29-7 and -12 and all full-time teaching staff members are included in some schedule. Placement on such schedules, in turn, must be in accordance with N.J.S.A. 18A:29-7, -8, -9, -10 and-11. Finally, members not covered by the categories contained in the schedule set forth in N.J.S.A. 18A:29-7 must be paid at least $2,500 per year. N.J.S.A. 18A:29-5. The statutes governing compensation therefore do not grant to teaching staff members, whether full or part-time, an entitlement to placement on any particular salary guide.

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IV

As set forth above, neither the tenure statutes nor those governing compensation confer on teaching staff members the right to placement on any particular salary guide. Nor does the decision in Spiewak create such right. We therefore conclude that supplemental teachers are not entitled by law to placement on the salary guide for full-time classroom teachers.

Further, we emphasize that compensation is a term and condition of employment within the contemplation of the New Jersey Employer-Employee Relations Act. N.J.S.A. 34:13A-5.3. As stated by the New Jersey Supreme Court in Bd. of Education of Englewood v. Englewood Teachers, 64 N.J. 1 (1973):

> [Hours and compensation] along with physical arrangements and facilities and customary fringe benefits would appear to be the items most evidently in the legislative mind. It is undisputed that the Board could not agree on hours or compensation in violation of specific terms of the education laws or in violation of specific departmental rules or regulations; .... Where the Legislature sets forth minimum schedules of compensation (N.J.S.A 18A:29-7; N.J.S.A. 18A:29-12) and minimum increments (N.J.S.A. 18A:29-8; N.J.S.A. 18A:29-12), the board may not go below but may go above. Similarly it may not depart from any statutes or regulations which fix hours though it may go above prescribed minimums. Cf. N.J.A.C. 6:3-1.13.

Id., at 7.

Thus, boards and teachers are free to negotiate terms of compensation within the parameters set by the education laws and specific department rules or regulations.

In the instant case, the Teaneck Board and the Teaneck Teachers' Association entered a collective bargaining agreement on October 5, 1982, which set forth a separate salary schedule for auxiliary teachers. Agreements between the Teaneck Board of Education and the Teaneck Teachers' Association, Auxiliary Instructors' Agreement (1982-1985) (hereinafter cited as Agreement). The agreement provides that:

> As to the auxiliary staff, the parties shall be free to litigate, in the forum of their choice, the question of whether said auxiliary staff shall receive the same salary, benefits and other emoluments as "regular teachers" of the Teaneck school systems. In the interim said auxiliary staff shall receive salary and benefit increases in accordance with the terms of this memorandum

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> on the existing salary guide for auxiliary staff. Acceptance of any salary increases or benefits under this agreement shall be without prejudice to the rights of the parties.

Agreement, Article XXIV.

In so agreeing, the Board acknowledged that auxiliary teachers could be entitled to the same salary and benefits as "regular" teachers. We find that this acknowledgment, made subsequent to the decision in Spiewak, reflected the Board's recognition of the tenure eligibility of such teachers. Moreover, although the Board, on April 26, 1982, had terminated the individual supplemental teachers who originally petitioned the Commissioner, Petition, at #5, it reinstated those petitioners after the decision in Spiewak was rendered, see Initial Decision, at 2, and admitted the tenure eligibility of its auxiliary teachers in its answer to the Amended Petition in this matter. Answer to Amended Petition, at #8. We therefore conclude that nothing in the record demonstrates that the Board denied the tenure eligibility of its auxiliary teachers when, subsequent to the Spiewak decision, it entered the agreement that set forth the salary schedule at issue here.

Moreover, as previously stated, the adoption of a salary policy that includes more than one salary schedule is permissible so long as those schedules conform to the requirements established by the school laws. See Bd. of Ed. of Englewood v. Englewood Teachers, supra. Since the tenure statutes do not mandate placement of any group of teaching staff members on a particular salary guide, we find that the Board did not violate the tenure laws in negotiating a separate salary schedule for auxiliary teachers. However, although the adoption of a separate guide is not in itself a violation of the school laws, we emphasize that each guide must conform to requirements imposed by those laws and that supplemental teachers, like other teaching staff members, are entitled to appropriate salary guide placement as provided by statute and contract.

In the case before us, the salary guide for auxiliary teachers covers full-time as well as part-time auxiliary teachers. See Agreement, Article XVII. The work day of a full-time auxiliary teacher is shorter than the work day of a "regular" full-time classroom teacher. Compare Auxiliary Instructors' Agreement, Article XVII with Teachers Agreement, Article XXII. However, although the Board is permitted to define "full-time", see N.J.S.A 18A:29-6 and N.J.A.C. 6:3-1.13, the clear wording of the compensation statutes provides that the entitlements contained in those statutes accrue to full-time teaching staff members and those statutes do not differentiate between subcategories of full-time members. See N.J.S.A. 18A:29-4.1, -5 and N.J.S.A. 18A:29-6 et seq. We therefore find that full-time auxiliary teachers are full-time teaching staff members within the meaning of the compensation statutes. Thus, we conclude that salary schedules applying to them must conform to the requirements of the compensation statutes and that the placement of such teachers must be in accordance with those statutes.

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Here, the schedule for auxiliary teachers sets forth salaries that are less than the comparable salaries for nonauxiliary teaching staff members with similar qualifications and teaching experience, contains fewer steps and does not provide for teaching experience in other public schools. Nor does it provide for military service credit or business experience and extra salary for advanced educational degrees is provided by a set sum added to the basic guide step, rather than being included in the step. See Agreement.

As set forth above, the compensation statutes do not require that full-time teaching staff members be paid any specific salary, but merely set minimum salaries. N.J.S.A. 18A:29-5, -7, -12. The schedule in this case satisfies those minimums. Likewise, the statutes do not set forth a required form for incorporating compensation for advanced degrees, but establish salary minimums that are below those agreed to here. See N.J.S.A. 18A:29-7. Nor do the statutes require that salary credit be given for teaching experience outside the district or for experience in business. However, N.J.S.A 18A:29-11 mandates that up to four years' credit for military service be given to all full-time teaching staff members. In so far as the salary schedule covering full-time auxiliary teachers in this case fails to credit those teachers for military service, it is deficient and we hold that placement of full-time auxiliary teachers on the guide must include credit for military service as provided by N.J.S.A. 18A:29-11.

Finally, we reiterate that where a Board, as here, has elected to adopt a salary policy that includes salary schedules for one group of full-time teaching staff members, it must provide schedules for all groups of full-time teaching staff members. N.J.S.A. 18A:29-4.1. By adopting a guide for all auxiliary teachers, including full-time auxiliary teachers, the Board here has fulfilled that requirement. That the guide covering such teachers is not the same as that for another group of full-time teaching staff members does not constitute a violation of the school laws.

We hold today that the fact that there is a separate negotiated salary guide applying to supplemental teachers does not in itself violate the school laws. Because we find no right to placement on the "regular" full-time teacher's salary guide under the school laws, it is unnecessary to consider under what circumstances such right, if it existed, could be properly waived. Although we recognize that this result allows different categories of teaching staff members to be treated differently in terms of salaries, we emphasize that such differences are permissible under the existing statutory framework. Moreover, the State Board believes that boards of education must be able to exercise flexibility, within the statutory guidelines, in establishing salaries so that they may maximally utilize available resources and attract needed categories of teachers. We conclude that the proper exercise of such flexibility is consistent with the principles articulated in Spiewak since, if a board adopts a salary policy that includes a

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salary schedule covering auxiliary teachers, all auxiliary teachers within the same category would be treated the same in terms of their salary entitlements. See 90 N.J. 63, at 80. We also emphasize that, although a salary guide for supplemental teachers may fully comply with the requirements of the school laws, negotiated agreements that include salary guides, as well as the negotiation process that results in such agreements, are within the scope of the New Jersey Employer-Employee Relations Act. N.J.S.A. 34:13A-1 et seq. Allegations of violations of that Act, however, are not within our jurisdiction, but rather within the jurisdiction of the Public Employees Relations Commission (PERC), which is charged with enforcing that Act.

V.

In sum, we conclude that the decision in Spiewak does not mandate the placement of supplemental teachers on the salary guide for regular teaching staff members and that such right is contained in neither the tenure statutes nor those governing compensation. Because supplemental teachers are not entitled to guide placement as a matter of law, we hold that separate guides covering supplemental teachers are permissible so long as such guides conform to the requirements established by the school laws. However, we emphasize that where a board has adopted a salary schedule for any group of full-time teaching staff members, all full-time members must be covered by a schedule. Finally, we reiterate that under the New Jersey Employer-Employee Relations Act, boards and teachers are free to negotiate terms of compensation within the statutory framework of the school laws.

Attorney Exceptions are noted.

March 6, 1985

Pending N.J. Superior Court

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LAWRENCE IVAN AND THOMAS MURRAY,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE PRINCETON REGIONAL SCHOOL DISTRICT ET AL., MERCER COUNTY,	:	DECISION
RESPONDENTS-RESPONDENTS.	:	
	:	

Decided by the Commissioner of Education, September 28, 1984

For the Petitioner-Appellants, Jamieson, Moore, Peskin and Spicer (Melvin S. Narol, Esq., of Counsel)

For the Respondents-Respondents, Clapp and Eisenberg (William J. O'Shaughnessy, Esq., of Counsel)

Petitioners-Appellant's Request for Oral Argument in this matter is denied because the State Board has concluded that this procedure is not necessary to making a fair determination of the case. See N.J.A.C. 6:2-1.15(a).

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

April 3, 1985

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LAWRENCE IVAN AND THOMAS MURRAY,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	
BOARD OF EDUCATION OF THE PRINCETON REGIONAL SCHOOL DISTRICT AND DR. PAUL HOUSTON, SUPERINTENDENT OF SCHOOLS; JOHN SAKALA, PRINCIPAL OF PRINCETON HIGH SCHOOL; BOTH INDIVIDUALLY AND AS EMPLOYEES OF THE PRINCETON REGIONAL BOARD OF EDUCATION, MERCER COUNTY,	:	SUPERIOR COURT APPELLATE DIVISION
RESPONDENTS-RESPONDENTS.	:	

Decided by the Commissioner of Education, September 28, 1984

Decided by the State Board of Education, April 3, 1985

Argued: November 6, 1985 -- Decided: November 19, 1985

Before Judges Antell, Matthews and Shebell

On appeal from the New Jersey State Board of Education

Melvin S. Narol argued the cause for petitioners-appellants (Jamieson, Moore, Peskin and Spicer, attorneys; Mr. Narol of counsel and on the brief).

William J. O'Shaughnessy argued the cause for respondent Princeton Regional School (Clapp & Eisenberg, attorneys; Mr. O'Shaughnessy of counsel and Arnold K. Mytelka and Francine A. Schott on the brief).

David Earle Powers, Deputy Attorney General, argued the cause for respondent State Board of Education (Irwin I. Kimmelman, Attorney General of New Jersey, attorney; James J. Ciancia, Assistant Attorney General, of counsel and Mr. Powers on the brief).

PER CURIAM.

The determination presented for review is affirmed substantially for the reasons stated by the Commissioner of Education in his written decision of September 28, 1984. We find that determination to be supported by substantial credible evidence in the record as a whole and take into account the Commissioner's expertise. R. 2:11-3(e)(1)(D); Close v. Kordulak Bros., 44 N.J. 589, 599 (1965).

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J.S. as guardian of K.S.,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG, WARREN COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, July 5, 1984

For the Petitioner-Respondent, Schachter, Wohl, Cohn and Trombadore (Richard J. Schachter, Esq., of Counsel)

For the Respondent-Appellant, Harbourt and Duh (Boyd Harbourt, Esq., of Counsel)

The decision of the Commissioner is affirmed for the reasons expressed therein. Pursuant to that decision, K.S. was eligible for admission to the National Honor Society at Phillipsburg High School as of July 5, 1984, the date of the Commissioner's decision in this matter. The State Board declines to determine whether K.S.'s appointment to the Honor Society should be retroactive since that issue is not properly before us.

January 2, 1985

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KAREN LINGELBACH,	:	
RESPONDENT AND CROSS-APPELLANT,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE BOROUGH OF HOPATCONG,	:	APPELLATE DIVISION
APPELLANT.	:	

Decided by the Commissioner of Education, June 9, 1983

Decided by the State Board of Education, May 2, 1984

Argued: May 7, 1985 - Decided May 17, 1985

Before Judges Antell and Simpson

On appeal from a final decision of the New Jersey State Board of Education

David J. Weaver argued the cause for appellant Board of Education of the Borough of Hopatcong (Trapasso, Dolan & Hollander, attorneys; Mr. Weaver, on the brief).

Regina A. Murray, Deputy Attorney General, argued the cause for the State Board of Education (Irwin I. Kimmelman, Attorney General of New Jersey; Ms. Murray, on the letter brief).

Robert A. Fagella argued the cause for respondent cross-appellant (Zazzali, Zazzali & Kroll, attorneys; Mr. Fagella, of counsel and on the brief).

The opinion of the court was delivered by

SIMPSON, J.A.D.

The issue in this appeal is whether a purported reduction in force (RIF) violated the tenure rights of a full-time school social worker where her 30 hour per week position was abolished and she was replaced by two part-time social workers paid at a lower rate for a projected total of 50 hours per week. Karen Lingelbach was continuously employed in the full-time position for 11 years when the Hopatcong Board of Education abolished her position on April 26, 1982 "as part of an economy and reorganizational plan ... pursuant to ... N.J.S.A. 18A:28-9." The Board established the part-time positions on July 19, 1982 at $12 per hour, which was a much lower rate than the equivalent hourly rate of Ms. Lingelbach's

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$24,311 annual salary. There were additional "projected savings" of between $2600 and $2800 since the hourly workers received no sick, holiday, vacation or pension benefits. Ms. Lingelbach rejected the part-time employment, which was proffered pursuant to N.J.S.A. 18A:28-12, at the hourly rate without benefits and appealed the Hopatcong Board's action to the Commissioner of Education. The matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

Following stipulations and a hearing on oral testimony, an Administrative Law Judge (ALJ) concluded that the Hopatcong Board's action was a "reasonable and lawful administrative reorganization" under N.J.S.A. 18A:28-9. The Commissioner of Education affirmed the Initial Decision of the ALJ. The State Board of Education reversed and remanded to the Commissioner for determination of damages and this appeal by the Hopatcong Board followed. The scope of our appellate review is limited as recently summarized in Hiering v. Board of Trustees of Public Employees, 197 N.J. Super. 14, 19 (App. Div. 1984):

> The scope of our appellate review of the Board's decision that is contrary to the recommendations of the ALJ is set forth in Public Advocate Dep't v. Public Utilities Bd., 189 N.J. Super. 491 (App. Div. 1983). We must determine whether the findings could reasonably have been reached on sufficient credible evidence in the record, considering the proofs as a whole, with due regard to the opportunity of the ALJ to judge the witnesses' credibility and with due regard also to the agency's expertise where such expertise is a pertinent factor. 189 N.J. Super. at 499. We consider the ALJ report only as a part of the record to determine whether the Board's findings are supported by substantial credible evidence. See State, Dept. of Health v. Tegnazian, 194 N.J. Super. 435, 449 (App. Div. 1984).

Our careful review of the record satisfies us that the State Board's findings are supported by the requisite substantial credible evidence except as to an undisputed erroneous conclusion that Lingelbach was only entitled to a 5/6 position rather than a full-time position. We also conclude that the State Board was correct in determining, in effect, that the action by the Hopatcong Board was arbitrary and capricious in abridging Lingelbach's N.J.S.A. 18A:28-5 tenure rights under the circumstances of this case. The principal reliance by the Hopatcong Board, the ALJ and the Commissioner upon Klinger v. Cranbury Tp. Bd. of Ed., 190 N.J. Super. 354 (App. Div. 1982), is misplaced. In that case the reduction of two full-time physical education positions to two 7/10 positions was upheld where there was a long-standing, legitimate interest in having dual instruction and there was an actual reduc-

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tion in the need for physical education services. In the present case the need for school social workers' services increased, and there was insufficient cause to destroy Lingelbach's tenure rights for N.J.S.A. 18A:28-9 reasons. It was undisputed that Lingelbach's performance was exemplary and commendable, and it is obvious that all objectives of the Hopatcong Board (with the exception of, in effect, saving money by replacing tenure-price hours with part-time price hours) could have been obtained without violating Lingelbach's tenure rights by simply adding one part-time school social worker to the staff.

In the final analysis, there is a conflict between the legislative policies implicit in N.J.S.A. 18A:28-5 and N.J.S.A. 18A:28-9 and substantial evidence in this record to support more than one result. The tenure statute seeks to give some measure of security after years of service, while the RIF statute has a goal of governmental economy. Viemeister v. Prospect Park Bd. of Ed., 5 N.J. Super. 215, 218 (App. Div. 1949). Under such circumstances it is the choice of the State Board of Education that governs and deserves judicial deference. Dore v. Bedminster Tp. Bd. of Ed., 185 N.J. Super. 447, 453 (App. Div. 1982).

The decision of the State Board is affirmed on the Hopatcong Board's appeal, and on the cross-appeal it is modified to entitle Lingelbach to a full-time social worker position. The matter is remanded for further proceedings consistent with these holdings. We do not retain jurisdiction.

[Withdrawn, January 16, 1986]

(Cert. denied 101 N.J. 333 (1985))

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IN THE MATTER OF THE TENURE	:	
HEARING OF LARRY F. LISKOVEC,	:	STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF WOODBRIDGE, MIDDLESEX COUNTY.	:	

Decided by the Commissioner of Education, September 24, 1984

For the Petitioner-Respondent, Palmisano and Goodman
(Carl J. Palmisano, Esq., of Counsel)

For the Respondent-Appellant, Klausner and Hunter
(Stephen E. Klausner, Esq., of Counsel)

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

February 6, 1985

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IN THE MATTER OF THE TENURE	:	
HEARING OF LARRY F. LISKOVEC,	:	SUPERIOR COURT
SCHOOL DISTRICT OF THE TOWNSHIP	:	APPELLATE DIVISION
OF WOODBRIDGE, MIDDLESEX COUNTY	:	
(LARRY F. LISKOVEC, Appellant).	:	
	:	

Submitted December 9, 1985 - Decided December 13, 1985

Before Judges Morton I. Greenberg and Havey.

On appeal from the State Board of Education.

Klausner & Hunter, attorneys for appellant (Stephen E. Klausner, on the brief).

Carl J. Palmisano, attorney for respondent Board of Education of the Township of Woodbridge.

Irwin I. Kimmelman, Attorney General, attorney for respondent State Board of Education (David Earle Powers, on the statement in lieu of brief).

PER CURIAM

After a careful review of the matter we have concluded that the decision of the respondent State Board of Education of February 6, 1985 is supported by sufficient credible evidence on the record as a whole and the issues of law raised are clearly without merit. R. 2:11-3(e)(1) (D) and (E).

Affirmed.

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BOARD OF EDUCATION OF THE CITY OF ASBURY PARK,

PETITIONER-APPELLANT AND RESPONDENT-CROSS-RESPONDENT,

V.

DONALD MARTIN,

RESPONDENT-RESPONDENT AND PETITIONER-CROSS-APPELLANT.

SUPERIOR COURT

APPELLATE DIVISION

Decided by the Commissioner of Education, December 16, 1983

Decided by the State Board of Education, July 11, 1984

Argued: May 8, 1985 - Decided: July 17, 1985

Before Judges Fritz, Gaulkin and Long

On appeal from New Jersey State Board of Education

J. Peter Sokol argued the cause for Board of Education of the City of Asbury Park (McOmber & McOmber, attorneys).

Mark J. Blunda argued the cause for Donald Martin (Oxfeld, Cohen & Blunda, attorneys).

Regina A. Murray, Deputy Attorney General, argued the cause for State Board of Education (Irwin I. Kimmelman, Attorney General of New Jersey, attorney).

PER CURIAM.

On this appeal, the Board of Education of Asbury Park (Local Board) challenges a decision by the State Board of Education (State Board) which held that N.J.S.A. 18A:6-14 required the Local Board to resume paying Donald Martin, a suspended teacher, when the Commissioner of Education (Commissioner) failed to resolve the tenure charges pending against Martin within 120 days from the date the charges were certified, notwithstanding the fact that the Local Board was blameless as to the delay. On cross appeal Martin challenges the determination of the State Board that, when tenure charges against him based on conduct unbecoming a teacher were not resolved within 120 days and his salary was resumed, his salary could legally be re-suspended based on the same charges when he was subsequently indicted. Martin also claims as error a ruling by the State Board that a Local Board may recoup money improperly paid to an employee as a result of a mistake of law. In each of the challenged rulings, the State Board affirmed a decision of the Com-

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missioner which had, in turn, affirmed a determination of an Administrative Law Judge (ALJ). Because we believe that the State Board correctly interpreted N.J.S.A. 18A:6-14 as requiring the resumption of Martin's salary after 120 days, we affirm the decision on appeal. As to the cross appeal, we reverse the State Board's determination that on the facts presented the Local Board could re-suspend Martin's salary upon his indictment. This ruling renders the recoupment issue moot and we do not here address it.

The case arose out of the following facts, most of which are procedural. After confirming with the Monmouth County Prosecutor's Office that Martin had been arrested and charged with weapons violations and was the objective of an ongoing investigation by the United States Postal Authorities regarding his involvement with materials sexually exploiting minors, the Superintendent of Schools for Asbury Park suspended Martin with pay, effective November 30, 1981. Thereafter tenure charges seeking Martin's dismissal were brought against him charging him with conduct unbecoming a teacher for his distribution of material involving so-called "kiddie porn." On December 28, 1981, the Board certified the charges against Martin to the Commissioner and suspended him without pay effective January 1, 1982. On January 29, 1982, Martin filed an answer to the charges with the Commissioner generally denying the Local Board's allegations. The matter was transferred to the Office of Administrative Law pursuant to N.J.S.A. 18A:6-16 and N.J.S.A. 52:14B-10(c). On April 19, 1982 a prehearing conference was conducted before the ALJ, who scheduled the charges for hearing on June 28, 29 and 30, 1982. On April 14, 1982 Martin made a motion to compel discovery. Thereafter the Local Board made a similar motion. On May 18, 1982 the ALJ ordered the Local Board to produce the documents sought by Martin by May 21, 1982. This discovery deadline was later extended to June 11, 1982, and the hearing was adjourned until August 9, 10 and 11, 1982. In the meantime, because 120 days had elapsed since his initial suspension without pay, Martin was restored to the payroll as of May 1, 1982 pursuant to N.J.S.A. 18A:6-14.

The evidence which was necessary to prove the tenure charges against Martin was in the possession of a U.S. Postal Inspector and the Monmouth County Prosecutor's Office from which the Local Board requested it. According to the Superintendent of Schools these authorities denied the Local Board permission to use this evidence while criminal proceedings were pending. Sometime in late July, 1982, Martin moved to prohibit the Local Board's use of all material that had not been timely provided in response to discovery requests. Because of the Board's problem in producing crucial evidence against Martin which the legal authorities would not make available for inspection until after it was presented to a grand jury, the ALJ denied Martin's motion and placed the matter on the inactive list until the grand jury acted. On August 18, 1982, the Board moved to amend its tenure charges to add new charges after the discovery of additional evidence. On November 4, the ALJ denied

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the Board's motion to amend the charges against Martin and directed it to instead certify additional charges and bring a motion for consolidation.

On November 5, 1982, Martin was indicted by the Monmouth County grand jury, which charged him with one count of second degree conspiracy to endanger the welfare of children (N.J.S.A. 2C:5-2; N.J.S.A. 2C:24-4b(5)); five counts of second degree endangering the welfare of children (N.J.S.A. 2C:24-4b(2) and (5)); two counts of third degree endangering the welfare of a child (N.J.S.A. 2C:24-4a)); one count of third degree theft of movable property (N.J.S.A. 2C:20-3a)); one count of third degree receipt of stolen property (N.J.S.A. 2C:20-7(a)); one count of fourth degree hindering the apprehension and prosecution of his wife (N.J.S.A. 2C:29-3); two counts of fourth degree unlawful possession of a weapon (N.J.S.A. 2C:39-5d); and two counts of fourth degree transportation of a weapon (N.J.S.A. 2C:39-9d).

After the indictment was returned, the case was removed from the inactive list and hearings were scheduled for February 15, 16, 17 and 18, 1983. A second set of tenure charges seeking dismissal was brought against Martin charging him with conduct unbecoming a teacher for placing pornographic material on school property and for using school property without authorization in conducting a business selling pornographic material. The Local Board certified these charges against Martin and suspended him without pay on December 17, 1982. On January 20, 1983, Martin pleaded guilty to the fifth count of the indictment, which charged him with second degree endangering the welfare of children. On January 28, 1983, the Board made a motion for summary judgment on the grounds that Martin's employment was forfeited under N.J.S.A. 2C:51-2 and, in addition, seeking reimbursement of salary payments made to Martin from May 1, 1982 until December 16, 1982. The February hearing dates were adjourned.

Martin was sentenced on April 15, 1983, an occurrence which essentially rendered the substantive tenure issue moot but left open the payment issues. Hearings were held on these issues on May 17, 1983, June 23, 1983 and July 26, 1983. The ALJ issued her decision on October 18, 1983, determining that under the tenure laws Martin could not be suspended without pay for more than 120 days. She also determined that once Martin was indicted, the tenure laws were no long applicable and the Local Board would no longer be obliged to pay him. She concluded that because monies paid as a result of a mistake of law by a municipality or municipal corporation can be recouped, the Local Board could recover monies paid to Martin after he had been indicted on November 5, 1982 but that Martin could keep the money he had received from May 1, 1982 until November 4, 1982. In effect, the ALJ's decision permitted Martin to retain $11,712.12 paid to him from May 1, 1982 until November 4, 1982, but required him to reimburse the school district for $3,764.61 paid to him on or after November 5, 1982.

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Thereafter both the Board and Martin filed exceptions to the ALJ's decision with the Commissioner of Education. On December 16, 1983, the Commissioner affirmed the ALJ's findings and determinations. Both parties then appealed to the State Board from the Commissioner's determination. On July 13, 1984, the State Board affirmed. This appeal and cross appeal ensued.

N.J.S.A. 18A:6-14 provides that:

> Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay, but, if the determination of the charge by the Commissioner of Education is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made. Should the charge be dismissed, the person shall be reinstated immediately with full pay from the first day of such suspension. Should the charge be dismissed and the suspension be continued during an appeal therefrom, then the full pay or salary of such person shall continue until the determination of the appeal. However, the board of education shall deduct from said full pay or salary any sums received by such employee or officers by way of pay or salary from any substituted employment assumed during such period of suspension. Should the charge be sustained on the original hearing or an appeal therefrom, and should such person appeal from the same, then the suspension may be continued unless and until such determination is reversed, in which event he shall be reinstated immediately with full pay as of the time of such suspension.

As we read this statute, its meaning is plain: that the salary of a suspended employee must be resumed if the case is not resolved within 120 days of the certification of tenure charges to the Commissioner. Nothing in Ott v. Bd. of Ed. of Hamilton Tp., 160 N.J. Super. 333 (App. Div. 1978), certif. den. 78 N.J. 336 (1978), relied on by the Local Board, supports a different view. In Ott the court looked to the express language of N.J.S.A. 18A:6-14, to establish the maximum period for suspension without pay pending adjudication by the Commissioner of Education as 120 days. The only exception approved in Ott is that provided in the statute itself: where a delay is granted at the request of the suspended person. The respondent in Ott requested a delay (Id. at 336), Martin did not. That is the crucial distinction between these cases. The Local

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Board claims that Ott can be considered to apply to this situation because Martin caused the delay insofar as he committed acts which made him the object of the criminal investigation that resulted in the delay. N.J.S.A. 18A:6-14 and Ott are quite clearly to the contrary. Both require a request for a delay on the part of the suspended employee before he can be denied his salary beyond the 120 day period. Ott, supra, 160 N.J. Super. at 342. The issue here is the other side of the coin. In essence, the Board urges that because it was blameless as to the delay, it is entitled to some equitable consideration. That is not the principle for which Ott or the statute may be invoked. The reason behind the requirement of a "request" for delay by the suspended teacher is clear - to incorporate an objective standard into the act and to avoid the addition of another issue for litigation.

Nor is there any basis for us to validate the Board's suggestion that because Martin pleaded guilty to a crime and has, in a sense, benefitted from the education law, an exception to the law should be carved out allowing reimbursement for the salary paid while he was suspended. There is simply no authority for the proposition that teachers who are ultimately convicted of criminal charges must return salary paid to them while they were suspended pending criminal adjudication. On the contrary, the plain language of the statute leads to an opposite conclusion.

In this connection we reiterate the often stated principle that in construing a statute, if the language chosen by the Legislature is plain and the result is not contrary to obvious legislative intent, "the sole function of the court is to enforce it according to its terms." Sheeran v. Nationwide Mutual Ins. Co., Inc., 80 N.J. 548, 556 (1979) quoting Caminetti v. United States, 242 U.S. 470 (1917). If the statute is clear and unambiguous on its face and admits of only one interpretation, there is no need to delve any deeper than the act's literal terms to divine the Legislature's intent. State v. Butler, 89 N.J. 220, 226 (1982). Courts should refrain from usurping the legislative function and must enforce the legislative intent as written and not according to some unexpressed intention. International Broth. of Elec. Workers v. Gillen, 174 N.J. Super. 326, 329 (App. Div. 1980).

In our view the point of N.J.S.A. 18A:6-14 is quite clear - on the one hand, to encourage the speedy resolution of tenure charges by providing an incentive toward prompt action on the part of the certifying authority and, on the other, to protect the suspended teacher from absolute financial ruin in a case in which the process, through no fault of his, drags on beyond 120 days. This goal was met in this case and we are satisfied that the State Board properly ruled that the blamelessness of the Local Board as to the delay is irrelevant to the operation of N.J.S.A. 18A:16-4. If exceptions other than the one relating to delay at the request of the person charged are thought to be necessary, they must be engrafted on the statute by the Legislature and not by the courts.

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Martin challenges the further decision of the State Board that he was not entitled to receive the salary paid to him after he was indicted. He claims that the State Board incorrectly determined under N.J.S.A. 18A:6-8.3 that his right to salary terminated on November 5, 1982, the day of his indictment. N.J.S.A. 18A:6-8.3 provides:

> Any employee or officer of a board of education in this State who is suspended from his employment, office or position, other than by reason of indictment, pending any investigation, hearing or trial or any appeal therefrom, shall receive his full pay or salary during such period of suspension, except that in the event of charges against such employee or officer brought before the board of education or the Commissioner of Education pursuant to law, such suspension may be with or without pay or salary as provided in chapter 6 of which this section is a supplement.

Clearly this statute is applicable to suspensions under the tenure law so that if a person is suspended from his or her employment "by reason of indictment" he will not receive the salary benefits contained in the scheme. The problem is that Martin was not suspended by reason of indictment, he was suspended by reason of his arrest. His indictment did not occur until over ten months after his arrest and no action by the Local Board to suspend him because of the indictment took place at that time. Thus, the statute does not prohibit him from receiving his salary when the indictment was handed down.

Nothing in Romanowski v. Bd. of Ed. of Jersey City, 89 N.J. Super. 38 (App. Div. 1965) supports a contrary view. In Romanowski, the employee was suspended following his indictment, for malfeasance in office without charges having been certified by the Local Board as required by the tenure law. Id. at 39-40. That case stands for the proposition that an employee can be suspended for malfeasance independent of the tenure law, and that the charges, if proven, would result in forfeiture and would obviate the need for tenure proceedings. Id. at 40-41. It does not support the contention that an indictment per se suspends application of the tenure laws. Instead, the tenure laws are indeed applicable to the instant case. Unlike the respondent in Romanowski Martin was not suspended by reason of indictment and his suspension was not for malfeasance, it was for conduct unbecoming a teacher. Pursuant to the tenure law the Local Board was required to pay him while he was suspended. When he was finally indicted, the Local Board did not act to suspend him by reason of that indictment. His indictment alone could not convert the suspension by reason of arrest into a suspension by reason of indictment when no specific action to that effect was taken by the Board.

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Because we hold here that Martin was entitled to the salary payments he received, we need not address the issue of the power of the Local Board to recover monies erroneously paid as a result of a mistake of law.

Affirmed in part; reversed in part.

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MATAWAN REGIONAL TEACHERS ASSOCIATION AND ESTATE OF RUSSELL L. THOMAS, CHARLENE CANZANO, JUDITH ANN HOLMES, RICHARD POST AND HELEN L. KOSTYK,	:	
APPELLANTS,	:	SUPERIOR COURT
V.	:	APPELLATE DIVISION
BOARD OF EDUCATION OF THE MATAWAN-ABERDEEN REGIONAL SCHOOL DISTRICT,	:	
RESPONDENT.	:	

Decided by the Commissioner of Education, December 1, 1983

Decided by the State Board of Education, May 2, 1984

Argued: May 22, 1985 - Decided: June 12, 1985

Before Judges Matthews, Furman and Havey

Sanford R. Oxfeld argued the cause for appellants (Oxfeld, Cohen & Blunda, attorneys; Mark J. Blunda of counsel and on the brief).

Andrew J. DeMaio argued the cause for respondent (DeMaio & DeMaio, attorneys).

Irwin I. Kimmelman, Attorney General, attorney for State Board of Education (June Kanter, Deputy Attorney General, on the statement in lieu of brief).

The opinion of the court was delivered by

FURMAN, J.A.D.

Matawan Regional Teachers Association, the Estate of Russell Thomas, Charlene Canzano, Judith Ann Holmes, Richard Post and Helen Kostyk appeal from a decision of the State Board of Education, which upheld the Board of Education of the Matawan-Aberdeen Regional School District (Board) in denying applications by the four individual plaintiffs for additional paid sick leave days under N.J.S.A. 18A:30-6 and remanding to the Board the application on behalf of Thomas's estate.

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N.J.S.A. 18A:30-6 provides:

> When absence, under the circumstances described in section 18A:30-1 of this article, exceeds the annual sick leave and the accumulated sick leave, the board of education may pay any such person each day's salary less the pay of a substitute, if a substitute is employed or the estimated cost of the employment of a substitute if none is employed, for such length of time as may be determined by the board of education in each individual case. A day's salary is defined as 1/200 of the annual salary.

N.J.S.A. 18A:30-6 prescribes no specific legislative standards to govern the exercise of discretion by boards of education in resolving whether to pay teachers for sick leave days beyond their annual and accumulated sick leave. The issue of unconstitutionality is not raised. Plaintiffs do not challenge the statute on the ground of lack of adequate legislative standards, see Sheeran v. Nationwide Mutual Insurance Company, Inc., 80 N.J. 548, 558 (1979).

In Bd. of Ed. Piscataway Tp. v. Piscataway Main., 152 N.J. Super. 235 (App. Div. 1977), we held that, because the grant of extra sick leave days under N.J.S.A. 18A:30-6 is discretionary, a board of education could not negotiate away that discretion in its collective agreement with an employee association; a clause in the agreement granting extended paid sick leave as of right was beyond the scope of negotiability and invalid because of its conflict with the board's statutory obligation to deal with "each individual case."

In Molina v. Bd. of Ed., [decided May 3, 1983], the Commissioner of Education approved the promulgation of policy guidelines by boards of education for the exercise of their discretion under N.J.S.A. 18A:30-6. According to Molina, such policy guidelines should be "clear and consistent . . . applicable to all persons in substantially similar circumstances;" any specific limitation, such as one limiting paid sick leave to once only during the course of any individual teacher's service, should be communicated to employees in advance "so they will know what to expect." But the policy guidelines before the Commissioner in Molina made an exception for applications in "special cases," e.g., such as, if granted, would impose an intolerable financial burden on the school district or, if denied, would induce a premature return to employment, risking aggravation or new disability, by a teacher in need of income; or the loss of that teacher to other employment.

Molina approved but did not require policy guidelines for the award of extended paid sick leave by boards of education under N.J.S.A. 18A:30-6. No policy guidelines, written or otherwise, had been established by defendant Board on the appeal before us. A Board member testified that, in weighing application under N.J.S.A.

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18A:30-6, he had given consideration to the applicant's length of service and imminence of his retirement. He had favored granting extended paid sick leave as "a bridge to retirement." The Deputy Superintendent of the school district agreed in his testimony that those two factors had been treated as significant by the Board on past applications, together with the details of the individual application, the nature of the sickness or injury and the number of extra days requested.

Thomas was a 19-year employee who suffered from a heart and a thyroid condition. He sought one additional week's paid sick leave at the end of the school year. He had also applied for a disability retirement. As a result of administrative oversight or confusion, no decision was rendered on his application for one week's extended sick leave. His disability retirement was accepted. He subsequently died.

The four individual plaintiffs had served with the school district from between two years in the case of Post to 12 years in the case of Canzano. Canzano and Holmes suffered complications from pregnancy; Kostyk was about to undergo a hysterectomy; and Post was recovering from a back injury sustained in a motor vehicle accident. Kostyk applied for extended sick leave of approximately six weeks, the others of approximately one week each.

On appeal the principal argument on behalf of Thomas's estate is that he was entitled to one week's extended sick leave based on the precedent of Albert Levine, a 30-year employee with a serious heart affliction, who, the year before, had been granted four extra days' paid sick leave prior to his retirement at the end of the school year. According to this argument, the State Board of Education, which affirmed the Commissioner of Education, should not have remanded the Thomas application but should have ordered that the Board pay the additional sick day benefits in accordance with the Administrative Law Judge's recommendation. We disagree. The Board should have the opportunity to review the Thomas application as an "individual case," in the light of the Levine precedent, insofar as parallel and not distinguishable, and to exercise the discretion vested in it by N.J.S.A. 18A:30-6.

The argument on behalf of the four individual plaintiffs hinges in part upon the conclusion by the Administrative Law Judge that their applications were denied "with little or no information as to the nature of the injury or illness . . . and without a thorough review of the individual requests." But the Commissioner concluded that the Board had sufficient relevant facts before it, a conclusion in our view consistent with the medical data and other information in the record.

Additionally, the four individual plaintiffs contend that their applications were not evaluated on the merits, in accordance with a so-called blanket policy not to grant extended paid sick leave because of the Board's apprehension of a flood of such applications if any were successful. Nothing in the record supports

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that contention, except a reference in the Board minutes upon the denial of Kostyk's request for six additional weeks' paid sick leave: "[The Deputy Superintendent] and the Board explained that their position was to grant sick leave of absence without pay when an employee's sick days had been exhausted."

According to the Deputy Superintendent's testimony that excerpt from the official minutes was incorrect. The Board President testified that he knew of no such Board policy.

We agree with the State Board decision on appeal that defendant Board's denial of the applications by Canzano, Holmes, Post and Kostyk was reasonably based upon the record before it. Defendant Board's decision was neither arbitrary nor in violation of the Molina standard of uniformity under substantially similar circumstances. The four individual teachers were relatively junior in service, not on the verge of retirement because of disability or age; three of them applied within the same month. We cannot construe the denial of extended paid sick leave to all four as establishing per se a blanket Board policy of granting paid sick leave only without pay. The record fails to support the individual plaintiffs' contention that the Board was derelict in its denial of their applications in violation of its statutory mandate to exercise its discretion in each individual case.

We affirm.

[202 N.J. Super. 142]

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JANET D. MILES,

PETITIONER-RESPONDENT,

V. : SUPERIOR COURT

BOARD OF EDUCATION OF THE BOROUGH OF WATCHUNG, SOMERSET COUNTY, : APPELLATE DIVISION

RESPONDENT-APPELLANT.

Decided by the Commissioner of Education, June 14, 1984

Decided by the State Board of Education, December 5, 1984

Argued: November 19, 1985 - Decided: December 5, 1985

Before Judges Shebell and Muir

On appeal from Decision of the State Board of Education

Victor E.D. King argued the cause on behalf of appellant (King, King and Goldsack, attorneys; Mr. King on the brief).

Richard A. Friedman argued the cause on behalf of respondent (Ruhlman, Butrym & Friedman, attorneys; Mr. Friedman and Mary Jane Cullen on the brief).

Irwin I. Kimmelman, Attorney General, filed a Statement in Lieu of Brief on behalf of the State Board of Education (Regina A. Murray, Deputy Attorney General, on the Statement).

PER CURIAM.

This appeal by the Watchung Borough Board of Education requires us to determine the validity of a State Board of Education decision to favor a tenured teacher's rights protected under N.J.S.A. 18A:28-5 over the authority of the Watchung Board to reduce the teaching force as permitted by N.J.S.A. 18A:28-9.

In February 1983, the Watchung Board, faced with declining enrollments and high costs in its music department, voted to eliminate two full-time vocal arts positions and to create two 4/5 time positions. Petitioner, Janet Miles, a tenured teacher, held one of the full-time positions, while a non-tenured teacher held the other. Miles accepted one of the 4/5 positions and the non-tenured teacher accepted the other.

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Miles then appealed the reduction to the Commissioner who assigned the contested case to the Office of Administrative Law. N.J.S.A. 52:14B-1 et seq. An Administrative Law Judge, after submission of certain stipulated facts and testimony by both sides, rendered a decision directing the Watchung Board to reinstate petitioner to a full-time teaching position and to compensate her for salary and benefits she would have received if retained on full-time employment. The Commissioner affirmed the findings and decision of the Administrative Law Judge and the State Board of Education accepted the Commissioner's determination.

The Watchung Board, relying on Klinger v. Cranbury Tp. Bd. of Ed., 190 N.J. Super. 354 (App. Div. 1982), contends that given the good faith reduction in force with no inferiority of treatment of the petitioner, the best interests of the educational program and, therefore, the interests of the children must prevail over one tenured teacher's right to a full-time position.

When the Watchung Board recognized the declining enrollment and high cost of the music program, it directed the Superintendent to make a study and recommendations. At that time, the Borough had two schools, the Bayberry, K-5 school, where the non-tenured teacher taught, and the Valley View, 6-8 school, where petitioner taught. The former had 273 students while the latter had 200. The Superintendent projected further enrollment decline to a total of 350 students in the near future.

After consulting with the principals of the two schools, the Superintendent recommended the reduction plan subsequently approved. He did so based on the conclusion that it was in the best interests of the students to have only one teacher at each school. In his testimony before the Administrative Law Judge, the Superintendent noted the alternative of having petitioner full time and the non-tenured teacher 3/5 time would require some students at Bayberry having two teachers for the same class, something he considered educationally inappropriate for the children. He did acknowledge that employing petitioner full time and the non-tenured teacher 3/5 time was possible. Additionally, the principal of the Bayberry school, in her testimony, indicated the return of petitioner as a tenured teacher would mean students at the Bayberry School would have to have 60 instead of 30 minute classes the one day petitioner taught there each week.

The Watchung Board in making its decision to follow the recommendation of the Superintendent did not consider the alternative of retaining petitioner full time.

The applicable standard of review for an appellate court when reviewing the final decision of an administrative agency is for the court to examine the record to determine whether sufficient credible evidence exists therein to support the agency decision. Dore v. Bedminster Tp. Bd. of Ed., 185 N.J. Super. 447, 453 (App. Div. 1982). In doing so, due regard must be given to the agency's

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expertise where that expertise is a pertinent factor. Close v. Kordulak Bros., 44 N.J. 589, 599 (1965). Further, should there be substantial evidence in the record to support more than one result, it is the agency's choice which governs. Dore v. Bedminster Tp. Bd. of Ed., supra, 185 N.J. Super. at 453.

Here we are dealing with the expertise of the State Board of Education which is the ultimate administrative decision maker for controversies arising under the school law. N.J.S.A. 18A:6-27. Dore v. Bedminster Bd. of Ed., supra, 185 N.J. Super. at 452. The State Board in balancing the conflict between the tenure laws, N.J.S.A. 18A:28-5, and the reduction in force authority of local boards under N.J.S.A. 18A:28-9, accepted the Administrative Law Judge's conclusion that

> the related arts program at the Valley View School would not be affected by the assignment of the petitioner one day per week to the Bayberry School in addition to the four days per week she now teaches in the Valley View School.

and

> that there [was] no substantial showing of the likely disruption of the music program at the Bayberry School if the petitioner were so assigned.

These accepted findings came in the face of the Borough Superintendent's conclusion that the assignment of the petitioner one day a week to the Bayberry School would be educationally inappropriate for the children.

In these highly controversial and often debatable cases involving the policy conflicts between the two statutes, courts must recognize that the State Board's expertise makes it better equipped to resolve the difficulties. The courts may not interfere unless the decision lacks support in the record. Dore v. Bedminster Tp. Bd. of Ed., supra, 185 N.J. Super. at 453. We conclude there is sufficient substantial credible evidence in the record to support an alternative result.

The Watchung Board also asserts there is a confusion engendered by prior decisions of the State Board and the holdings in Klinger v. Cranbury Tp. Bd. of Ed., 190 N.J. Super. 354 (App. Div. 1982) and Lingelbach v. Hopatcong Bd. of Ed., ___ N.J. Super. ___ (App. Div. 1985). It asserts the confusion requires a return to Klinger, favoring a local board's authority to reduce force over the interests of a tenured teacher. While our decision avoids the necessity to review each of the cases referred to, our reading of those cases suggests there are viable distinctions among them sufficient to belie the existence of any confusion.

We affirm.

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MONTVILLE TOWNSHIP EDUCATION ASSOCIATION AND MONTVILLE TOWNSHIP EDUCATIONAL SECRETARIES ASSOCIATION,

PETITIONERS-APPELLANTS,

V. : SUPERIOR COURT

MONTVILLE TOWNSHIP BOARD OF EDUCATION, : APPELLATE DIVISION

RESPONDENT-RESPONDENT.

Decided by the Commissioner of Education, April 16, 1984

Decided by the State Board of Education, November 7, 1984

Argued: November 6, 1985 - Decided: December 6, 1985

Before Judges Pressler, Dreier and Bilder.

On appeal from the State Board of Education.

Douglas B. Lang argued the cause for appellants (Katzenbach, Gildea & Rudner, attorneys; Arnold M. Mellk, of counsel; Ezra D. Rosenberg and Mr. Lang, on the brief).

David B. Rand argued the cause for respondent Montville Township Board of Education (Rand & Algeier, attorneys; Mr. Rand, of counsel; John F. McDonnell, on the brief).

Cynthia J. Jahn argued the cause for amicus curiae New Jersey School Boards Association (Paula A. Mullaly, attorney; Ms. Jahn, on the brief).

Irwin I. Kimmelman, Attorney General of New Jersey, attorney for State Board of Education (Alfred E. Ramey, Jr., Deputy Attorney General, on the statement in lieu of brief).

PER CURIAM.

Petitioners, Montville Township Education Association and Montville Township Educational Secretaries Association, appeal from a decision of the State Board of Education determining that the attendance evaluation rating system promulgated by respondent Montville Township Board of Education (Montville board) was neither arbitrary nor unreasonable but constituted an appropriate exercise of the local board's policy-making authority. We reserve.

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The guideline in question was adopted by the Montville board in August 1982 on the recommendation of the superintendent of schools as a potentially effective way of reducing teacher absence. The concept of the guideline is simplistic. An attendance component was added to the annual teacher evaluation and a rating of "satisfactory," "needs improvement" or "unsatisfactory" assigned for this component based on the number of days missed.[1] All absences are included for purposes of the rating except those for "death in family days" and professional days. Thus, absence on account of illness is included and would result in a less than satisfactory rating if in excess of the guideline allowance. Although the staff member's record would include an explanation of the absence, the explanation, no matter how justifiable or compelling, could not affect the mechanically assigned rating.

Considering the guidelines to be in violation of the sick leave provisions of N.J.S.A. 18A:30-1, 2, 3 or 7, as well as violative of their collective negotiation agreements, petitioners first sought relief by filing a grievance with the local board and asserting the right to arbitrate it. The board responded by filing a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission, which ultimately concluded that the subject matter of the controversy was a managerial prerogative and entered an order permanently restraining arbitration.

Petitioners then instituted these proceedings by seeking declaratory judgment under the school laws invalidating the guidelines and restraining their implementation. The administrative law judge entered an initial decision concluding that the guidelines were reasonable. The Commissioner of Education disagreed and ordered the board to revise the rating system in order to take into account "legitimate extended illness or confinement to home or hospital by a physician." The State Board reversed the Commissioner's decision, holding that the guidelines did "reasonably consider teacher absences" but added this cautionary note:

> Although the Guidelines may have a "chilling effect" on excessive absence without medical excuse, such effect is essential to achieving the legitimate goal of improving overall teacher attendance. As stated above, we find no indication that the Guidelines have curtailed the statutory right to sick leave, See N.J.S.A. 18A:30-2, and there is no evidence in the record of any disciplinary action against any staff member. However, even though this is not a case

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[1]According to the guideline, a rating of "satisfactory" is assigned to absences in one year of 0-6 days and in two years of 0-12 days. A rating of "needs improvement" is assigned to absences in one year of 7-11 days and in two years of 13-20 days. A rating of "unsatisfactory" in assigned for absences in one year of 12 or more days and in two years of 21 or more days.

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> in which action of the Board is alleged to have interfered with the exercise of the right to take sick leave, we caution the Board that before taking disciplinary action based on its Guidelines, it is required to consider the circumstances of the absences in each case, as well as the number.

Although we are keenly aware of the deference to which a decision of the State Board of Education is entitled, we are nevertheless constrained to reverse it and, in effect, to reinstate the determination of the Commissioner. We are satisfied that the record does not support the State Board's finding that the evaluation system as presently constructed does take legitimate illnesses into proper account. We so conclude because irrespective of the narrative information which may be included in the evaluation report, the simple fact remains that the assigned rating is a merely mathematical consequence and unaffected by the reason for the absence. A rating so assigned is, in our view, arbitrary. We are therefore persuaded that the local board's action is indeed unreasonable. See, e.g., Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288, 294 (App. Div. 1960).

At the outset, we note that petitioners do not contest either the significance of good staff attendance in achieving quality education or the right of a local board to include attendance as a component in the evaluation of overall performance. Their contention is, simply, that a board may not "mark down" a staff member's performance based on his recourse, when he is ill or disabled, to a statutorily provided sick leave. We agree with this contention and the Commissioner's response to it.

The Commissioner was of the view that there inhered in the rating system itself sufficient harm to require his remedial action irrespective of proof or lack thereof of any specific instances of application. The Commissioner thus recognized that an unsatisfactory rating under the system had a potentially adverse impact on staff members' employment possibilities, assignment or income. See Piscataway Tp. Ed. Ass'n v. Piscataway Tp. Bd. of Ed., 1980 S.L.D. 483 at 493. The Commissioner, moreover, relied on the State Board's decision in Kuehn v. Board of Ed. of the Tp. of Teaneck, 1983 S.L.D. (decided February 1) in which it concluded that an employment increment could not be withheld from a teacher on the basis of her absence, because of serious illness, of more than 90 school days during a single year. The State Board in Kuehn held that a teacher who was ill was statutorily entitled to use annual and accumulated sick leave provided for by N.J.S.A. 18A:30-1 and 18A:30-3, and, consequently, that the exercise of that statutory right could not justify the local board's adverse action against her.

We are satisfied that the principles relied on by the State Board in Kuehn are fully applicable here. See also Hackensack Bd. of Ed. v. Hackensack Ed. Ass'n, 184 N.J. Super. 311, 318 (App. Div.

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1982). An unsatifactory rating adversely prejudices a staff member's legitimate interest in a satisfactory evaluation report. That prejudicial consequence contravenes the statutory allowance for sick leave in the event of illness or disability. In this respect, the Commissioner concluded that

> While there is no one more concerned than the Commissioner that a local district's staff attendance be at the highest level possible and while he commends the Board's objective to improve continuity of instruction through a reduction in staff absenteeism, he nonetheless takes exception to the judge's determination that the attendance evaluation guidelines in the instant matter are reasonable. Attendance is without question an appropriate criterion in the evaluation of professional staff. The fact that professional staff attendance is one of the indicators reviewed by the State Department of Education in the evaluation of local school districts certainly illustrates the importance of said attendance. Notwithstanding its importance, the Commissioner cannot accept as reasonable an attendance evaluation system which would determine a teacher's attendance evaluation rating solely upon the basis of the accumulative number of days of absence, regardless of the circumstances of the absences or a teacher's previous attendance history. A board may certainly take steps to implement a policy to improve the attendance of its professional staff; to do so would constitute a reasonable exercise of its discretionary powers. However, if such a policy goes so far as to ignore legitimate extended illness or confinement at home or hospital by a physician in determining an unsatisfactory evaluation rating for attendance, such a policy must be deemed arbitrary, even if said policy allows for teacher reaction to the rating through narrative statements.

We are persuaded that the Commissioner's view of the matter is in accord with established principle and that his reasoning is unassailable.

We reverse and remand to the State Board for the entry of an order consistent with the decision of the Commissioner of Education.

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NEW JERSEY EDUCATION ASSOCIATION, :

PETITIONER-APPELLANT, :

V. :

ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION, :

RESPONDENT-RESPONDENT, : STATE BOARD OF EDUCATION

V. : DECISION

BOARD OF TRUSTEES, TEACHERS' PENSION AND ANNUITY FUND, :

THIRD PARTY RESPONDENT-RESPONDENT. :

_____ :

Decided by the Commissioner of Education, October 9, 1984

For the Petitioner-Appellant, Greenberg, Kelley and Prior (William S. Greenberg, Esq., of Counsel)

For the Respondent-Respondent, Petit-Clair and Graves (Edward F. Petit-Clair, Esq., of Counsel)

For the Respondent-Respondent, Irwin I. Kimmelman, Attorney General of New Jersey (Charlotte A. Kitler, Deputy Attorney General)

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

February 6, 1985

Pending N.J. Superior Court

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I/M/O TENURE HEARING OF MARY	:	
ALICE O'HARA, SCHOOL DISTRICT OF	:	SUPERIOR COURT
THE CAMDEN COUNTY VOCATIONAL	:	APPELLATE DIVISION
SCHOOL, CAMDEN COUNTY.	:	
_____	:	

Decided by the Commissioner of Education, June 22, 1983

Decided by the State Board of Education, February 1, 1984

Argued: February 19, 1985 - Decided: August 30, 1985

Before Judges McElroy, Dreier and Shebell

On appeal from final decision of the State Board of Education

Mary Alice O'Hara, appellant, argued the cause pro se.

Robert F. Blomquist argued the cause on behalf of respondent school district (Davis, Reberkenny & Abramowitz, attorneys; Mr. Blomquist on the brief).

Irwin I. Kimmelman, Attorney General of New Jersey, attorney for State Board of Education filed a statement (Alfred E. Ramey, Jr., Deputy Attorney General, on the statement).

PER CURIAM

This is an appeal by a discharged tenured teaching staff member from a final determination of the State Board of Education affirming the decision of the Commissioner of Education who, in turn, had affirmed the findings and determination of Administrative Law Judge August E. Thomas made in his initial decision dated April 26, 1983. The initial decision held that the charges were brought in timely fashion and reviewed tenure charges brought by respondent (Board) that appellant (O'Hara) had engaged in actions constituting conduct unbecoming a teacher and in direct insubordination. The judge specifically found that appellant's actions "in some instances were bizarre, ludicrous and contributed to a substantial disruption in the administration of the school district." He also held that O'Hara had been given full opportunity to defend against these charges but instead engaged in delay, confusion and frustration of proper legal process, that her conduct in that respect amounted to an abandonment of her defenses to the charges, and that her absence from the scheduled tenure hearing was the result of her "manipulation."

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Our review of this voluminous record and of the arguments raised by the parties convinces us that the initial decision and the determinations by the Commissioner of Education and the State Board of Education find sufficient support in the credible evidence on the record as a whole, that all issues of law raised are clearly without merit and that an opinion by this court would have no precedential value. R.2:11-3(e)(1)(D) and (E). Accordingly, the final determination of the State Board of Education is affirmed.

Respondent urges that we exercise our original jurisdiction and enjoin appellant from bringing "any new actions in state tribunals against persons who have encountered O'Hara in any capacity in previous litigation," unless she first obtains leave of the Superior Court to do so.

There is no question that O'Hara has mounted one legal assault upon another against the respondent and others who have incurred her displeasure or those she regarded as treading upon her personal and property rights and has done so for over five years. She has been to this court with five separate assertions of legal rights, none of which, including the present enterprise, has been successful. In reply, we regrettably are obliged to refer respondent to the holding of Judge Brotman rendered in a federal suit brought by this appellant against this respondent in which she claimed her termination from employment was a matter of sex discrimination violative of 42 U.S.C. Sec. 2000e-1 et seq. O'Hara v. Bd. of Educ., 590 F. Supp. 696 (D.C.N.J. 1984), aff'd 760 F.2d 259 (3rd Cir. 1985) (unpublished opinion). As did Judge Brotman, we regard the relief sought as too broad although, considering the litigious bent of appellant, it is a quite understandable desire. The applicable principles are those stated in D'Amore v. D'Amore, 186 N.J. Super. 525 (App. Div. 1982).

> There is, of course, no question of the power of the court to enjoin prospective harassing litigation. But that power must be exercised consistently with the fundamental right of the public to access to the courts in order to secure adjudication of claims on their merits.
>
> Accordingly, and in order not to impinge upon this right, the injuctive power is required to be exercised sparingly and only in those situations in which the exclusive harassment purpose is not merely a matter of the suitor's subjective intent but is, rather, objectively determinable. Thus, the general reluctance of the court to enjoin litigation, expressed a century and a half ago in Jackson v. Darcy, 1 N.J. Eq. 194, 197 (Ch. 1831), yielded, as this State's jurisprudence developed, to two circumstantial categories of enjoinable litigation. The first includes

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attempts to litigate claims despite their preclusion by such legal doctrines as res judicata. The second includes claims which are already pending or are about to be instituted in another forum whose jurisdiction thereover is superior or prior. See, e.g., Leigh Valley R.R. Co. v. McFarlan, 31 N.J. Eq. 730 (E. & A. 1879); Lane v. Rushmore, 125 N.J. Eq. 310 (E. & A. 1938), cert. den. 307 U.S. 636, 59 S.Ct. 1033, 83 L.Ed. 1518 (1939); Newark Ledger Co. v. Russell, 136 N.J. Eq. 406 (E. & A. 1945); John Hancock Mut. Life Ins. Co. v. Fiorilla, 83 N.J. Super. 151 (Ch. Div. 1964).

Obviously then, it is only prospective litigation of specifically identified claims which is susceptible to restraint, and then only after those claims have been determined to fall within one of the recognized categories of objective harassment. A nonspecific and nondiscrete injunction against prospective litigation generally is patently insustainable. Thus, in Newark Ledger Co. v. Russell, supra, 136 N.J. Eq. at 419, the court made clear that while the defendant there would be restrained from attempting to relitigate precluded matters, he could not be restrained 'from instituting other proceedings against complainants or any of them in the absence of a showing as to what such proceedings might be.' [Id. at 530].

Affirmed.

(Cert. denied 104 N.J. 386 (1986))

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IN THE MATTER OF THE SENIORITY :
RIGHTS OF CERTAIN TEACHING STAFF :
MEMBERS EMPLOYED BY THE OLD :
BRIDGE TOWNSHIP BOARD OF EDUCA- : STATE BOARD OF EDUCATION
TION AND THE EDISON TOWNSHIP : DECISION
BOARD OF EDUCATION, MIDDLESEX :
COUNTY. :
_____:

Decided by the Commissioner of Education, August 6, 1984

For the Petitioners-Appellants, Ruhlman, Butrym and Friedman
(Richard A. Friedman, Esq., of Counsel)

For the Petitioners-Appellants, Klausner and Hunter
(Stephen E. Klausner, Esq., of Counsel)

For the Petitioner-Respondent, Wilentz, Goldman and Spitzer
(Steven J. Tripp, Esq., of Counsel)

For the Petitioner-Respondent, R. Joseph Ferenczi, Esq.,

For the Amicus Curiae, New Jersey Education Association and the New Jersey School Boards Association, Paula A. Mullaly, Esq.

The decision of the Commissioner is affirmed for the reasons expressed therein. Because it is crucial that the rules governing seniority be both accessible to and clearly understood by the education community, the State Board directs that the Commissioner review the process by which this Declaratory Judgment is to be disseminated to local districts. Such review should include assessment of the need for additional procedures for dissemination and explanation. Further, the State Board finds that it is imperative that the rules governing certification and endorsement be consistent with those governing seniority. We, therefore, direct the Commissioner to review the rules governing certification and to advise the State Board of any amendment that would be required in order to insure that those rules are consistent with the purpose of the seniority regulations as expressed in the Declaratory Judgment in this matter.

January 2, 1985 Pending N.J. Superior Court

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PENNS GROVE-CARNEYS POINT EDUCATION ASSOCIATION,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION ON PENNS GROVE-CARNEYS POINT REGIONAL SCHOOL DISTRICT, SALEM COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, September 29, 1983

For the Petitioner-Appellant, Selikoff and Cohen, (Steven R. Cohen, Esq., of Counsel)

For the Respondent-Respondent, Jordan and Jordan, (John D. Jordan, Esq., of Counsel)

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

May 1, 1985

Pending N.J. Superior Court

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JOHN POLAHA,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BUENA REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, December 17, 1984

Decision on Motion by the Commissioner of Education
April 10, 1985

Decision on Motion by the State Board of Education,
September 2, 1985

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

For the Respondent-Appellant, Capizola, Fineman and Kutner
(Robert J. Pryor, Esq., of Counsel)

On March 8, 1983, the Board of Education of the Buena Regional High School District, Appellant in this case, abolished the position of Community Education Director held by John Polaha, who had been employed in the position since September, 1979, and who had acquired tenure in it. On April 18, 1983, the Board resolved not to rehire Mr. Polaha for the 1983-84 school year because the position he held had been abolished. By letter from the Superintendent dated April 19, 1983, Mr. Polaha was notified that he would not be rehired.

On July 12, 1983, the Board redistributed the duties formerly performed by the Community Education Director, dividing them between a part-time position and an existing administrator. On July 14, the part-time position of Community Education Enrichment Course Coordinator was advertised and, on July 23, 1983, Mr. Polaha wrote to the Superintendent requesting appointment to the position.

With his request, negotiations between Mr. Polaha and the Superintendent began, which ended when Mr. Polaha refused the Board's offer of the position at $10 per hour and requested reinstatement as Principal of the Adult High School and Director of the Community Education Program based on his seniority. Subsequent to the negotiations, on November 9, 1983, Mr. Polaha filed a Petition of Appeal to the Commissioner of Education, alleging that the Board had continued the programs for which the Community Education Director was responsible and asserting that he was entitled by seniority to reinstatement to positions responsible for the Adult High School and the Community Education Program.

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During the hearing in this matter, the Board moved to dismiss on the grounds that the petition was not filed within 90 days of when Mr. Polaha saw the July 14 advertisement for the part-time position of Community Education Enrichment Course Coordinator as required by N.J.A.C. 6:24-1.2. The Administrative Law Judge (ALJ) denied the motion because, although Mr. Polaha knew of position around July 14, 1983, he entered negotiations with the Board aimed at securing an acceptable position. In his Initial Decision, the ALJ concluded that Mr. Polaha "should not be penalized for his attempt to settle the matter through negotiations [and] that the 90-day period did not start until the later part of October..." Initial Decision, at 8.

In addressing the merits of the case, the ALJ reasoned that because Mr. Polaha had not shown that he was entitled by seniority to any position existing at the time of his termination and, because the only new position created was that of Community Education Enrichment Courses Coordinator, Mr. Polaha was not entitled by seniority to any other position. Id., at 9. Although he concluded that the Board had acted properly in abolishing the full-time position held by Mr. Polaha and reassigning the duties so as to create one or more part-time positions, he found that Mr. Polaha was entitled by seniority to the part-time position of Community Education Enrichment Courses Coordinator at the hours and salary set by the Board. Id. at 10.

The Commissioner set aside the ALJ's determination, reasoning that because the community education portion of the position had been reduced to the part-time position advertised by the Board and the education portion transferred to the Superintendent, Mr. Polaha's position still existed. Since the position had not been abolished in fact, the Board had violated Mr. Polaha's tenure rights, Commissioner's Decision, at 16-17, and he was therefore entitled to reinstatement to "both the community education and adult high school positions." Id., at 20.

The Commissioner agreed with the ALJ that Mr. Polaha's claim to the community education portion of his position was not time-barred, and, accordingly, awarded him pro-rated salary from September, 1983, for that portion. Id. He concluded that although Mr. Polaha's claim to the adult portion was not time-barred because "...a statutory right with respect to tenure is involved...", id., he concluded that Mr. Polaha was entitled only to prospective relief for that portion of his position based on laches. Id. For the reasons that follow, the State Board disagrees and, based on our review of the relevant law, we conclude that Mr. Polaha's claim is time-barred.

N.J.A.C. 6:24-1.2 provides that petitions to the Commissioner to determine controversies arising under the school laws shall be filed within 90 days after receipt of notice of the school board's ruling. That a right derived from statute is involved does not excuse compliance with the 90 day requirement where the right is functionally related to service as a teacher. North Plainfield Education Ass'n v. Bd. of Ed. of the Borough of

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North Plainfield, 96 N.J. 587 (1984). Thus, contrary to the Commissioner's determination, where, as here, abridgment of tenure or seniority rights is asserted, the petition must be filed in accordance with the requirements of N.J.A.C. 6:24-1.2. Gordon v. Bd. of Ed. of the Township of Passaic, decided by the State Board, March 6, 1985. We therefore conclude that any and all relief that may be granted to Petitioner-Respondent in this case is governed by N.J.A.C. 6:24-1.2.

The relevant case law holds that the 90 day rule is to be strictly applied and that the time in which the petition must be filed is measured from the time when the cause of action accrued. See, e.g., Watchung Hills Regional Ed. Association v. Watchung Hills Regional School District, 1980 S.L.D. 356. Thus, even a teacher who proceeds to advisory arbitration is not relieved from compliance with the 90 day filing requirement. Bd. of Ed. of Bernards Twp. v. Bernards Twp. Ed. Ass'n., 79 N.J. 311 (1979). Although N.J.A.C. 6:24-1.19 confers on the Commissioner the authority to relax the 90 day rule, such authority is invoked only where there are compelling reasons justifying relaxation or where circumstances are such that strict adherence would be inappropriate, unnecessary or where injustice would occur. See, Pfeiffer v. Board of Education of Willingboro, decided by the Commissioner, September 15, 1980, aff'd by the State Board of Education, June 31, 1981, dismissed by the Appellate Division, 1981.

Pursuant to N.J.A.C. 6:24-1.2, the cause of action accrues and the 90 day period begins "after receipt of notice by petitioner" of the action concerning which the hearing is requested." In the instant case, the Superintendent had advised Mr. Polaha as early as February, 1983, that a new approach to community education was being taken, which was adopted by resolution of the Board at its meeting on July 12, 1983. See J-2 and J-3, in evidence; Tr. 8/2/84, at 106. As set forth above, on July 23, 1983, Mr. Polaha wrote to the superintendent requesting appointment to the position of Community Education Enrichment Coordinator. Initial Decision, at 4, Stipulation of Facts #14. We therefore conclude that Mr. Polaha was aware of the Board's action by that date and that his cause of action accrued by July 23, 1983.

Mr. Polaha, however, did not file his petition until November 9, 1983, after the 90 day period of limitations had expired. Contrary to the ALJ's determination, which was adopted by the Commissioner, Mr. Polaha's negotiations with the Superintendent do not excuse his failure to comply with the requirements of N.J.A.C. 6:24-1.2. See Bd. of Ed. of Bernards Twp. v. Bernards Twp. Ed. Ass'n., 179 N.J. 311 (1979). Finally, we emphasize that no indication is present in this case of circumstances warranting relaxation under N.J.A.C. 6:24-1.19. Therefore, we conclude that Mr. Polaha's claim is time-barred.

S. David Brandt opposed.

Attorney exceptions are noted.

October 16, 1985 Pending N.J. Superior Court

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ELLIOT POLLACK,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF RIDGEFIELD PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, June 8, 1984

For the Petitioner-Respondent, Zazzali, Zazzali and Kroll
(Paul L. Kleinbaum, Esq., of Counsel)

For the Respondent-Appellant, Aron and Salsberg
(Stephen R. Fogarty, Esq., of Counsel)

This case involves the issue of whether the Board of Education of the Township of Ridgefield Park's action in withholding salary increment for 1983-84 from Elliot Pollack, a tenured teaching staff member, was arbitrary or capricious. Pollack began his employment with the board as an English teacher in 1977. No disciplinary action has ever been taken against him and he has received commendations from his principal and from parents. See J-29, J-34, J-35. During 1983, he received, pursuant to negotiated agreement, one formative evaluation, two summative evaluations and one Annual Performance Review. These, along with an Annual Performance Review and a summative evaluation performed in 1982, J-6, J-7, were reviewed by the Board before it took action to withhold his increment.

The first evaluation performed in 1983 was a summative evaluation dated March 10, 1983. J-3. In that evaluation, Pollack's supervisor, based upon conferences with the school principal and observation of a portion of a seventh grade class, stated that Mr. Pollack's instruction was often superficial, peripheral and fragmented, and that a midterm examination covered materials not covered in class. Id. In an effort to ensure sequential development, he scheduled a formative evaluation and directed Mr. Pollack to submit copies of his lesson plans each week. Id. In his comments, Mr. Pollack stated that his classroom methodology was an attempt to reinforce slow learners and he asserted that his supervisor's evaluation failed to provide concrete instances where his teaching was fragmented and superficial.

A formative evaluation, dated March 21, 1983, was then conducted, J-4[1]. That evaluation concluded that while the importance

[1]We note that such evaluations may not be used to adversely affect the status of a teacher. J-36.

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of various components of the lesson were distorted and students intimidated because of lack of preparatory time, the lesson observed was well structured mechanically and recommended that the same careful planning be given to all lessons. J-4. Mr. Pollack took issue with the criticism, stating that all aspects of the lesson were clearly stated and that all aspects of the class were of equal importance. Id.

On May 2, 1983, another summative evaluation was issued, again based on observation of portions of classes and conferences with the principal. J-2. Mr. Pollack's supervisor stated that before entering Mr. Pollack's class on April 15, 1983, he had reviewed the lesson plan, which indicated that students would be receiving instruction and activities on subject-verb agreement. Id. He noted that the class activity was listing things each loved to do, but that the students were then asked to turn to an exercise on outlining. Id. Discrepancies between the plan and the lesson observed were also noted as to an observation on April 16. This led the supervisor to conclude that there was little consistency between the plans and what was actually taught. Id. The supervisor stated that he needed assurances that the stated instructional program was being accurately represented, and therefore asked Mr. Pollack to submit to him, in addition to lesson plans, an assessment of objectives taught during the previous week. Id. While noting positive aspects of Mr. Pollack's performance, such as planning trips and hall monitoring, he stated that Mr. Pollack was not meeting his instructional responsibilities to the program. Id. Mr. Pollack took issue with the evaluation, emphasizing that observation followed days on which he had been absent and that none encompassed a whole class period. He defended his extemporaneous instruction style on the basis of the composition of the class. Id.

By letter from the Superintendent dated May 5, 1983, Mr. Pollack was informed that his performance was less than satisfactory and that such deficiencies "may call for a withholding of [his] employment and adjustment increment for the 1983-84 school year unless the deficiencies are corrected forthwith." J-33. The letter identified seven areas in which Mr. Pollack's performance was deficient, including planning and objectives. Id. On June 7, 1983, the Superintendent informed Mr. Pollack by letter that he intended to discuss with the Board his 1982-83 evaluations and the determination of whether his increment should be withheld. J-30.

On June 10, 1983, an Annual Performance Review was issued. J-1. In this Review, Mr. Pollack's failure to expose students to the program designed for them was reiterated and, based on observation subsequent to May 5, his failure to remedy his deficiencies was recorded. Id. Mr. Pollack disagreed with the Review, emphasizing that the test results of his students had improved and that improvement in his instruction had been noted by teacher observation. Id. He also asserted that lack of mutuality existed on the part of his supervisor and that areas in which he was deficient had not been corrected because they were not specific. Id.

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At its public session on June 16, 1983, following a pre-determination hearing that had been provided at Mr. Pollack's request, see J-32, the Board determined to withhold Mr. Pollack's increment. J-31. In September, 1983, Mr. Pollack filed a petition with the Commissioner, alleging that the Board's action was arbitrary, capricious and therefore illegal.

The Administrative Law Judge (ALJ) found that there had been no observation subsequent to May 2 to support a conclusion in the June 10 Annual Performance Review that Mr. Pollack had not corrected his deficiencies. He further gave credence to Mr. Pollack's testimony, which focused on his inability to get clarification of the evaluation that his instruction was superficial, peripheral and fragmented, asserted that he was unable to get suggestions for improving from his supervisor and stated that observation subsequent to May 2 was for 15 minutes. See Initial Decision, at 2-3. He found the credibility of the supervisor suspect because he parrotted the principal's words in the evaluation, did not submit a written recommendation regarding the withholding, was equivocal concerning the withholding and bypassed the principal in recommending withholding to the Board. Id., at 4. The ALJ therefore concluded that Mr. Pollack had met his burden of proof and that the withholding of increment was arbitrary and capricious. Id., at 5.

The Commissioner found that the Board had predicated its decision concerning the withholding of increment upon correction of the delineated deficiencies. Commissioner's decision, at 16. He determined that sufficient observation was not conducted to support a conclusion that the deficiencies had not been corrected. Id. The Commissioner further found merit to the ALJ's conclusion that the credibility of the supervisor was suspect, id. at 17, and that the principal's belief that Mr. Pollack's instruction was fragmentary could not be based on observation within the meaning of N.J.A.C. 6:3-1.21(h)6 because he did not observe Mr. Pollack for evaluation purposes, but merely "popped in and out." Id., at 17-18. Moreover, the Commissioner concluded that the evaluation process itself was fragmentary since Mr. Pollack had not been observed for a full class period despite a departmentalized setting and the fact that lesson plans are written for a full class period. Id., at 19. Thus, he found that Mr. Pollack had borne his burden of proving that the Board did not have a reasonable basis upon which to act, both as to the time prior to May 5 and the period subsequent to that date. Id., at 21. This conclusion was based on the Commissioner's determination that there was a lack of clear evidence in the record to demonstrate sufficient observation to provide a rational basis for the Board's action. Id. He therefore ordered reinstatement of Mr. Pollack's salary at the appropriate step of the salary guide. Id., at 22. The State Board reverses the Commissioner's decision.

Under N.J.S.A. 18A:29-14, "[a]ny board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year...." Accordingly, a board of education has the inherent right to exercise its preeminent function to pass upon the quality

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of teacher performance. Clifton Teachers Ass'n v. Clifton Bd. of Ed., 136 N.J. Super. 336, 339 (App. Div. 1978). Moreover, it is well established that the only question open for review when a board withholds an increment is whether the board had a reasonable basis for its factual conclusion. Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288, 295-96 (App. Div. 1960). The State Board therefore may not substitute its judgment for either the board or those who made the evaluation, but may only determine: (1) whether the underlying facts were as those who made the evaluation claimed and, (2) whether it was reasonable for them to conclude as they did based upon those facts, bearing in mind that they were experts, admittedly without bias or prejudice, and closely familiar with the mise en scene. Id., 296-97. The burden of proving unreasonableness is on the party challenging the board's action. Id., at 297. After careful review of the record, we conclude that Petitioner-Respondent in this case has failed to carry the burden of proving that the Ridgefield Park Board's action in withholding his increment for 1983-84 was unreasonable.

As set forth above, the Board reviewed a total of six evaluations and considered four evaluations made during 1983 before taking action to withhold Mr. Pollack's increment.[2] The evaluations specify that Mr. Pollack's instruction was superficial, peripheral and fragmented, J-3, and consistently emphasize his failure to follow lesson plans, J-3, J-2, J-1. Moreover, each of the evaluations was based on observation, see J-4, J-3, J-2, J-1, and the Annual Performance Review was based on Mr. Pollack's overall performance for the entire year, as well as observation, T. 92. Although the Commissioner determined that the Board's action was unreasonable because it was based on evaluations themselves based on inadequate observation, especially after Mr. Pollack's receipt of the Superintendent's letter of May 5, we conclude that the record demonstrates observation sufficient to reasonably support both the conclusion reached in the evaluations and, accordingly, the Board's conclusion that withholding of increment was warranted.

N.J.A.C. 6:3-1.21, on which the Commissioner relied in determining that the observation in this case was inadequate, requires that every district adopt policies and procedures requiring annual evaluation of all tenured teaching staff members. For purposes of the regulation, observation means "a visitation to an assigned work station by a certified supervisor for the purpose of formally collecting data on the performance of a teaching staff member's assigned duties and responsibilities and of a duration appropriate to same." N.J.A.C. 6:3-1.21(h)(6). There is no requirement that observation be of a specified duration, such as a class of even a lesson period. Likewise, the procedures followed by the Ridgefield Board, adopted pursuant to negotiation, require only that summative evaluations shall consist of classroom observations and evaluations of total performance of an employee without

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[2]Previous evaluation performed in 1982 was considered null and void because of expiration of a time limit under the negotiated agreement, Initial Decision, at 3.

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specifying a required duration for such observation. J-36.[3] Here, the evaluations were based on at least five classroom observations, J-1, J-2, J-3, J-4, which, although for less than a class period, may not be deemed inadequate in the absence of an affirmative showing that they could not have reasonably revealed the conclusions reached in the evaluations. Kopera, supra. No such showing was made in this case. Rather the record demonstrates that numerous informal and formal observations occurred and the only challenge as to their adequacy was cast in terms of duration. See, e.g., T. 42-3, T. 97-9, T. 112-13. While observations lasting a full class period may be desirable, we may not substitute our judgment for that of the Board or that of the evaluators. We find that in this case the numerous formal and informal observations were sufficient to reasonably support the conclusions reached in the evaluations and therefore the conclusion reached by the Board.

We emphasize that the Board's action to withhold Mr. Pollack's increment was based on review of evaluations for 1982-83 and its assessment of his performance over the school year. See J-30. While the Superintendent's letter of May 5 indicated that correction of the deficiencies forthwith might avoid such withholding, J-33, the Board by that letter did not destroy its inherent right to pass upon the quality of teacher performance. Clifton Teacher's Ass'n., supra. Moreover, that letter did no more than reflect the underlying purpose behind the evaluation procedure, which is to insure that a teacher receives adequate notice of any unsatisfactory performance and of ways of improving future performance. Robert Gollob v. Englewood Board of Education, 1980 S.L.D. 1354. Here this fundamental purpose was fully satisfied. Mr. Pollack stated that during the school year his supervisor brought many concerns about his teaching performance to his attention. T. 51-58. The most significant was Mr. Pollack's failure to follow his lesson plans, which resulted in fragmented lessons. T. 51-52. Although Mr. Pollack disagreed with this criticism, stating that there was a difference in perception, T. 66-67, this cannot change the fact that the burden was on Mr. Pollack to conform his instructional methods to meet those criticisms. We have no doubt that he had ample opportunity to do so over the course of the 1982-83 school year. Finally, the record clearly reflects that Mr. Pollack's supervisor observed him after his receipt of the Superintendent's letter of May 5. e.g. J-1, T. 92. As set forth above, that this observation lasted fifteen minutes alone does not demonstrate that it was insufficient to reasonably support the conclusion that Mr. Pollack's deficiencies had persisted. Rather, that observation revealed to the Supervisor that the students did not seem to know what Mr. Pollack was talking about even after explana-

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[3]While formative evaluations must include observation for one full class period at the secondary level, observation is only required for one lesson at the elementary level. J-36. The Supervisor complied with this requirement when he observed Mr. Pollack for one full lesson on March 16, 1983. J-4.

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tion and that he then went on to another topic. T. 92-93.[4] Thus, the observation could reasonably have led to a conclusion that the deficiencies had not been corrected.

For the reasons stated, the decision of the Commissioner is reversed.

All exceptions are noted.
February 6, 1985

Pending N.J. Superior Court

[4]We note that it was never asserted that any observation was conducted in bad faith. Nor was the Supervisor's credibility as to what he actually observed found to be suspect. See Initial Decision, at 4.

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PETER J. ROMANOLI,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, November 13, 1984

For the Petitioner-Appellant, Carl John Kerbowski, Esq.

For the Respondent-Respondent, Richards and Martinez
(Robert P. Martinez, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. The State Board notes that the determination in this matter is consistent with previous decisions rendered by the Commissioner, which have held N.J.S.A. 18A:29-14 applicable to superintendents of schools. See, e.g., Robert Longo v. Board of Education of the City of Absecon, 1975 S.L.D. 336.

March 6, 1985

Pending N.J. Superior Court

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DONALD ROWLEY,	:	
PETITIONER-APPELLANT,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE MANALAPAN-ENGLISHTOWN REGIONAL SCHOOL DISTRICT,	:	APPELLATE DIVISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, May 23, 1983

Decided by the State Board of Education, May 2, 1984

Argued: October 1, 1985 - Decided: October 23, 1985

Before Judges Pressler, Dreier and Bilder

On appeal from the State Department of Education

Thomas W. Cavanagh, Jr. argued the cause for appellant (Chamlin, Schottland, Rosen, Cavanagh & Uliano, attorneys; Mr. Cavanagh and Jay R. Schmerler, on the brief).

Gerald L. Dorf argued the cause for respondent Board of Education of the Manalapan-Englishtown Regional School District (Dawes & Brown, attorneys; Sanford D. Brown, on the brief).

Irwin I. Kimmelman, Attorney General for New Jersey, attorney for respondent State Board of Education (Alfred E. Ramey, Jr., Deputy Attorney General, on the statement in lieu of brief).

The opinion of the court was delivered by

PRESSLER, P.J.A.D.

Donald Rowley, a tenured teacher employed by the Board of Education of the Manalapan-Englishtown Regional School District, appeals from a decision of the State Board of Education directing his dismissal on the grounds of inefficiency. In so doing, the State Board rejected the determination of the Commissioner of Education dismissing the charges against Rowley on procedural grounds and itself addressed de novo the substance of the charge, concluding that the allegations of inefficiency had been proved. The State Board reached this conclusion without, however, making any findings of fact, without having reviewed the transcript of the lengthy

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hearing conducted by the administrative law judge, and without the benefit of any findings of fact by either the administrative law judge or the Commissioner, neither of whom had reached the merits of the substantive issue. We reverse and remand.

Rowley, a fourth-grade teacher, was regularly employed by the local board since 1962. Although the record is not clear as to when his teaching difficulties began, it is at least beyond dispute that routine evaluation of his performance during the 1980-1981 school year led to the administrative decision that his teaching was inadequate to qualify him for the usual salary increment for the following year. Rowley's performance was closely monitored during the first half of the 1981-1982 academic year. Eight evaluations were made of his classroom teaching between October 1981 and February 1982, three by then acting superintendent of schools, Joseph Scozzari, who was appointed to the superintendent's post in July 1982; two by Thomas W. McNearney, Rowley's vice-principal; one by Glen Allen Palmer, a mathematics and science supervisor employed by the district; one by Esther Harris, a language arts and instructional supervisor employed by the district; and one by Jeffrey Klein, an assistant superintendent.

The evaluation technique began with the evaluator's observation of the teacher in the classroom for about an hour. The evaluator then filled in a questionnaire requiring a rating of 30 specified characteristics of proper teaching, divided into six major categories. The available ratings were "observed in lesson," "observed in lesson but needs improvement," "should have been in lesson, but not demonstrated," and "not applicable to lesson observed." The description of the individual characteristics is, by and large, expressed in general terms. A composite of the eight evaluations shows that as to fourteen of the separate characteristics, Rowley's performance was rated acceptable by at least half the evaluators. As to three others, at least half of the evaluators either rated the performance as acceptable or the characteristic as not applicable to the lesson observed. Of the remaining thirteen characteristics, all evaluations concurred in rating Rowley as needing improvement in only one area, namely, meeting "the individual needs of students within the class." As to the rest, there was a divergence of opinion among the evaluators, the majority of them having rated the performance as needing improvement. In no case did a majority rate any required characteristic as altogether absent from the lesson. Each of the evaluation forms was, moreover, supplemented by a narrative critique, giving further specification respecting the observed deficiency as well as specific recommendations for improving performance. These critiques were not altogether consistent with each other, although patterns of some specific deficiencies did emerge, including a perceived overreliance by the teacher on textbook materials, uninteresting presentation of the lesson, the failure to group the pupils homogeneously in subject areas where the class as a whole showed wide divergence in individual ability, the failure to assure that homework had been done,

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and the failure to grade homework. Finally, it appears that there were a number of discussions between Rowley and his supervisors during this period, including weekly conferences with the acting superintendent, respecting the deficiencies in his performance and techniques for improving it.

Following this intensive evaluation period, the acting superintendent, on March 11, 1982, filed with the local board written inefficiency charges against Rowley, alleging that he had "failed" properly to perform in 14 of the designated areas and "needs improvement" in another five. The filing of these charges invoked the 90-day period provided for by N.J.S.A. 18A:6-11 during which the teacher is afforded the opportunity to overcome his deficiencies.

During the ensuing 90-day period, Rowley was evaluated five times, once each by McNearney, Klein and Harris, each of whom had evaluated him earlier in the school year; once by Robert Hagler, Rowley's new principal; and once by Robert Weiner, the district's curriculum supervisor. Each evaluation report included a written critique and series of recommendations and was followed by a post-evaluation conference between Rowley and the evaluator.

Based on those evaluations, the acting superintendent concluded that Rowley had failed to overcome his inefficiency and in June, 1982, served him with notice of the continued prosecution of the charges. On June 24, 1982, the local board voted to certify the charges to the Commissioner of Education who, in turn, referred the matter to the Office of Administrative Law for further proceedings as a contested case.

After seven days of hearings, the administrative law judge issued an initial decision recommending dismissal of the charges because of the local board's failure to comply with the statutory mandate of N.J.S.A. 18A:6-11. He did not address the substance of the board's charges and made no findings of fact with respect thereto. The Commissioner concurred. On appeal to the State Board, the board accepted the contrary view of its legal committee, which had concluded that the documentary evidence, which included the 13 evaluation reports, not only demonstrated the local board's compliance with the statute but also justified Rowley's dismissal.

The threshold issue before us is the proper interpretation and application of N.J.S.A. 18A:6-11, amended by L. 1975, c. 304, which governs local board procedures in initiating good cause charges against tenured teachers. That statute provides, in pertinent part,

> * * * that if the charge is inefficiency, prior to making its determination as to certification, the board shall provide the employee with written notice of the alleged inefficiency, specifying

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> the nature thereto, and allow at least 90 days in which to correct and overcome the inefficiency.

The administrative law judge and the Commissioner were both of the view that compliance by the local board with its obligation to afford the teacher the 90-day correction period constitutes an absolute prerequisite to its right to certify charges against the teacher and, consequently, that a failure of compliance compels dismissal of the charges. The State Board apparently concurred in this reading. Nor was there any conceptual disagreement between the State Board and the Commissioner respecting the manner in which the local board is required to comply with the 90-day mandate. Their dispute was only as to whether there had in fact been the requisite compliance.

The courts of this state have not yet been called upon to interpret the 90-day provision of N.J.S.A. 18A:6-11 in a reported opinion. The Department of Education has, however, developed a clear standard for local board compliance beginning with its 1977 promulgation of written guidelines which it issued to all local boards, superintendents and administrative principals. See Guidelines for Implementation of the Tenure Employees Hearing Law, Department of Education, Division of Controversies and Disputes (May 3, 1977). Section IIB4 of the Guidelines provides that

> During the aforementioned 90 day period, members of the administrative/supervisory staff should make reasonable efforts to provide assistance to the teaching staff member to overcome the specific inefficiencies.

As he explained in his decision in this action, the Commissioner of Education has consistently construed the statutory mandate in the light of this guideline, concluding that "if a board chooses to file tenure charges of inefficiency against any teacher, the administration bears the heavy responsibility to render positive assistance to the teacher in an effort to overcome his inefficiencies." (See also In the Matter of the Tenure Hearing of Ethel P. Hogue v. Teaneck School Dist., Bergen Cty., 12-83 S.L.D. (January 13, 1983); In the Matter of the Tenure Hearing of Franklin Johnson, Sch. Dist. of the Tp. of Cherry Hill, Camden Cty., 239-81 S.L.D. (July 2, 1981). The State Board, concurring with this view of the Commissioner, noted that

> It is now settled that, under N.J.S.A. 18A:6-11, a local board of education is duty bound to assist a tenured teaching staff member, against whom it has filed charges of inefficiency, in improving his teaching performance before removing him from his teaching position. *** The rationale underlying this rule is that a teacher whose teaching effectiveness is called into

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> question after years of meritorious service in a school district should, in recognition of that contribution, be afforded an opportunity to demonstrate that he is still capable of effective teaching. He can only avail himself of that opportunity if he understands clearly the basis for the criticism supporting the allegations of inefficiency and is offered constructive advice as to how he might restore his teaching skills.

As the State Board concluded, what is required is "a cohesiveness of effort before and after the filing of charges that enables the Board ultimately to measure a teacher's improvement by synthesis of observations." The disagreement between the Commissioner and the State Board in this case was only as to whether or not the local board had provided the required assistance.

We are persuaded that the Department of Education's construction of the statutory 90-day provision is consistent with the statutory language, consonant with legislative purpose, provides necessary safeguards for the teacher and imposes no undue burden on the local board or the public interest. While we are not bound by an agency's interpretation of a statute within its administrative and enforcement jurisdiction, nevertheless, that interpretation is entitled to great weight. See, e.g., In re Bridgewater Tp., 95 N.J. 235, 244-245 (1984); Appleby v. Civil Service Com'n, 190 N.J. Super. 249, 255 (App. Div. 1983); Infocomp Corporation v. Somerset Trust Company, 165 N.J. Super. 382, 391 (App. Div. 1979). For the reasons we have already stated, we are content to defer to the Department's interpretation here. We are therefore guided by that interpretation in considering the divergent views of the Commissioner and the State Board as to whether or not the local board here complied with its statutory obligation.

As we have noted, the administrative law judge had before him not only the documentary evidence of all the pertinent evaluations but the testimony of most of the evaluators and of the teacher as well. Having heard all of this testimony and juxtaposing it against the evaluation forms, it was his observation that "after the hearing I had a much greater sense of the problem respondent faced in meeting the charges filed with the board against him." That juxtaposition led him to conclude that the local board had failed to give the teacher the benefit of meaningful assistance as required by the statute. He pointed out that when an inefficiency charge is initiated

> ***the teacher must have some yardstick against which he/she is measured during the [90-day] improvement period. In effect, the teacher must be told precisely about the alleged inefficiencies, so that he/she has a reasonable opportunity to correct them by the end of the improvement period.

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He thus concluded that

> If, as alleged, respondent began floundering in the performance of his teaching after years of good service, causing the filing of charges of inefficiency by the Superintendent, then the Board's supervisors were duty-bound to assist him during his improvement period. As stated before, they did not.
>
> Their observations concluded with five independent evaluations by five different supervisors which were unrelated to the charges filed against respondent. Further, there was no effort by the supervisors to synthesize or incorporate their evaluations with respondent's alleged inefficiencies. In short, the evaluations had little or no relationship to the task which is required by regulation and decision law, i.e., to assist respondent in improving his classroom instruction.

The Commissioner expressly concurred, noting also that "although respondent was observed by five different evaluators, their testimony reveals that not one of them used the charges filed by the Board as a cross-reference or as evaluative criteria during their observations of respondent." Accordingly the Commissioner accepted the administrative law judge's recommendation that the charges be dismissed because of noncompliance with N.J.S.A. 18A:6-11.

The State Board, on appeal to it by the local board, did not have before it the transcripts of the hearings conducted by the administrative law judge. It relied, as we have noted, on the documentary evidence which included the written evaluations. Its conclusion was that the five evaluators' written critiques and individual post-evaluation conferences with the teacher satisfied the local board's obligation to accord meaningful assistance during the 90-day period.

If the record in this action had consisted only of the documentary evidence, we might well have been required to defer to the State Board's view of it since that view does not constitute a facially unreasonable reading of that evidence. The problem, however, is that the documentary evidence, read in the context of the testimony of the evaluators and the teacher, also supports the contrary reading by the administrative law judge and the Commissioner. It is axiomatic that fundamental concepts of administrative due process require that the basis of agency action be spelled out by specific findings of fact supported by the record as a whole. A necessary corollary of this principle is that the ultimate finder of fact must read and consider all of the evidence presented. See In re Shelton College, 109 N.J. Super. 488, 492 (App. Div. 1970). The failure of the State Board to have considered

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the hearing transcript renders its determination a nullity. Thus, had the State Board reached its conclusion based on the full record and had it tested the findings of the administrative law judge and the Commissioner against the full record, we would have been required to defer to its contrary findings if reasonably supported thereby. Findings made, however, on the basis of a partial record and without regard to any of the testimony are obviously not entitled to any deference at all.

We are nevertheless persuaded that since consideration of the full record could support a finding that the Board's assistance during the 90-day period was adequate and since agency expertise is necessarily involved in making that determination, we must remand to the State Board for its reconsideration of the threshold question of whether the local board properly complied with the statutory provision respecting the 90-day correction period. See, e.g., Dougherty v. Human Services Dep't, 91 N.J. 1 (1982). If the State Board, on the basis of the full record, should agree with the findings of the administrative law judge as concurred in by the Commissioner, then obviously that will be the end of the matter, the charges against Rowley will have to be dismissed, and the local board will remain free to initiate any new proceeding against the teacher it deems appropriate.

If on the other hand the State Board concludes, on the basis of the full record and by findings of fact supported thereby, that the local board did comply with N.J.S.A. 18A:6-11, we are satisfied that it must remand to the administrative law judge for an initial decision which addresses the substance of the charge. The State Board's conclusion that the local board had sustained its burden of proving Rowley's inefficiency is defective not only by reason of its failure to have considered the hearing transcript but also because it made no findings of fact in support thereof. The attorney general indeed concedes that "in the absence of additional factfinding on the record or an initial decision on the merits by the [administrative law judge], the question of whether the charges of inefficiency had been sustained should not have been reached." We concur. We are further satisfied that the orderly function of the administrative process requires the meritorious question to be first addressed by the administrative law judge and then reviewed by the Commissioner. Any party dissatisfied with the Commissioner's decision may then appeal to the State Board.

Reversed and remanded to the State Department of Education for further proceedings consistent herewith.

[205 N.J. Super. 65]

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RUTHERFORD EDUCATION ASSOCIATION, CAROL A. FROEHLICH, DAVID SKIDMORE AND JOANNE ROSS, APPELLANTS V. BOARD OF EDUCATION OF THE BOROUGH OF RUTHERFORD, BERGEN COUNTY, RESPONDENT.

LINDA MC GOVERN, APPELLANT V. BOARD OF EDUCATION OF THE BOROUGH OF RIVERDALE, MORRIS COUNTY, RESPONDENT.

THEA LEVINSKY, APPELLANT V. BOARD OF EDUCATION OF THE PASCACK VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY, RESPONDENT.

LAURIE CURRIER, APPELLANT V. BOARD OF EDUCATION OF THE TOWNSHIP OF WEEHAWKEN, HUDSON COUNTY, RESPONDENT.

FAIR LAWN EDUCATION ASSOCIATION, KAY BERGQUIST, ELEANOR JASNOW, FLORA FRANK, ANNE JOYCE SCHLEIER, REET HAYDEN, PHYLLIS STOLAR, RUTH E. ROGLER, EILEEN ZELCH, NESSIA GORMANNS, VIVIAN C. FELICE, PATRICIA S. SMOTZER, ELAINE PAVON, NANCY DIXON, KATHERINE SOLOMON, MYRA SPIRA, CLARE SALESKY, MURIEL HIRSCH, VIRGINIA E. WHITMAN, ARLENE ALBALAH, EILEEN SPIELMAN, FYRNE ZAGORIA, ELLEN LEVY, MARCIA SALKOWITZ, JANET FORER, NATALIE WEISSMAN, SYBIL B. PINE AND BARBARA RUDNICK, APPELLANTS V. BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY, RESPONDENT.

NEW MILFORD EDUCATION ASSOCIATION, ANITA SCULT, LINDA MACCHIO, JANET FLIEGER, ELAINE GLINE AND DEBORAH BOGYO, RESPONDENTS V. BOARD OF EDUCATION OF THE BOROUGH OF NEW MILFORD, APPELLANT.

SUPREME COURT

Decided by the Commissioner of Education, May 6, 1982

Decided by the State Board of Education, December 1, 1982

Argued: November 26, 1984 -- Decided: April 11, 1985

On certification to the Superior Court, Appellate Division.

H. Ronald Levine argued the cause for respondent Board of Education of the Borough of Rutherford, etc.

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Sidney A. Sayovitz argued the cause for respondent Board of Education of the Borough of Riverdale, etc. (Greenwood and Sayovitz, attorneys).

Brian N. Flynn argued the cause for respondent Board of Education of the Township of Weehawken, etc. (Krieger, Ferrara, Flynn and Catalina, attorneys).

Sheldon H. Pincus argued the cause for respondents New Milford Education Association, et al. (Bucceri & Pincus, attorneys; Gregory T. Syrek, of counsel and on the brief).

Regina A. Murray, Deputy Attorney General, argued the cause for respondent State Board of Education (Irwin I. Kimmelman, Attorney General of New Jersey, attorney).

Susan Galante, Associate Counsel, submitted a brief on behalf of amicus curiae New Jersey School Boards Association in A-45 Rutherford Education Association v. Board of Education of the Borough of Rutherford (Paula A. Mullaly, General Counsel, attorney).

Gregory T. Syrek argued the cause for appellants Rutherford Education Association, et al. (Bucceri & Pincus, attorneys).

Gerald L. Dorf argued the cause for appellant Board of Education of the Borough of New Milford (Mr. Dorf, attorney; Russell Weiss, Jr., on the briefs).

Reginald F. Hopkinson argued the cause for respondent Board of Education of the Borough of Fair Lawn, etc. (Jeffer, Hartman, Hopkinson, Vogel, Coomber & Peiffer, attorneys).

Louis C. Rosen argued the cause for respondent Board of Education of the Pascack Valley Regional High School District, etc. (Aron & Salsberg, attorneys; Rodney T. O'Hara, on the brief).

The opinion of the Court was delivered by
GARIBALDI, J.

The issue here is whether Spiewak v. Rutherford Board of Educ., 90 N.J. 63 (1982), is to be applied retroactively to Title 1, supplemental and compensatory education teachers (Title 1 teachers), who filed petitions with the Commissioner of Education prior to June 23, 1982, the date of our decision in Spiewak. In Spiewak, we held that a Title 1 teacher is eligible for tenure unless he or she comes within the explicit exceptions of N.J.S.A. 18A:28-5 or related statutes such as N.J.S.A. 18A:16-1.1. Id. at 74. We also held that "the legal rule established by these cases shall be applied prospectively to all persons not before the Court***." Id. at 83. Further, we decided that teachers not before the Court would not be

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entitled to any back pay award, and would not be entitled to be rehired if they had been terminated before the date of the decision. Id. at 83 n.2.

Each of the teachers in this appeal was employed by a board of education as a Title 1 teacher and each filed a petition with the Commissioner of Education, prior to the date of our Spiewak decision, seeking a declaration of tenure eligibility, reinstatement, additional salary, and/or additional benefits. Accordingly, this appeal requires us to determine whether the right to tenure and the emoluments of tenure afforded to the plaintiffs in Spiewak should be similarly afforded to these teachers. Today, we hold that a Title 1 teacher still employed by a school district at the time of this Court's decision in Spiewak, who had instituted an action based on his or her right to tenure and the benefits attached thereto prior to our Spiewak decision, is entitled to the same retroactive application of tenure and the emoluments of tenure, as the plaintiffs in Spiewak, subject to the limitations later set forth in this opinion.

In this connection, it is essential to emphasize what we decided in Spiewak. In that case, we held that Title 1 teachers were "teaching staff members" within the meaning of N.J.S.A. 18A:1-1, and therefore "[a]s to the teachers involved in this litigation, they are entitled not only to tenure but also to retroactive payment of any benefits they would have received if they had been accorded tenure properly." 90 N.J. at 83. There, as here, we were concerned with the class of teachers eligible for tenure status.

We did not decide in Spiewak, nor do we decide today, what are the emoluments of tenure. As stated in Spiewak:

> We do not decide what, if any, additional benefits the teachers in these cases are entitled to, either retroactively or prospectively. This is primarily a matter of contract and the relevant collective bargaining agreements are not part of the record. Further, the parties for the most part did not brief this question and the Appellate Division did not address it. We therefore remand to the Commissioner of Education to make that determination in accord with the principles laid down in this opinion. [Id., at 84 n. 3.]

Accordingly, as in Spiewak, we remand to the Commissioner of Education to determine when tenure accrued for each teacher in this case, what retroactive benefits each teacher is entitled to

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receive, and the calculations of such benefits, in accordance with the principles set forth in this opinion.[1]

On appeal to the Appellate Division, Rutherford Education Association et als. v. Rutherford Board of Education, Bergen County, Linda McGovern v. Riverdale Board of Education, Thea Levinsky v. Pascack Valley Regional High School District Board of Education, Laurie Currier v. Weehawken Township Board of Education, Hudson County, and Fair Lawn Education Association et als. v. Fair Lawn Board of Education, Bergen County, were argued and decided together.

A. Rutherford Education Association, Carol A. Froehlich, David Skidmore and Joanne Ross v. Board of Education of the Borough of Rutherford, Bergen County

This case, (Rutherford), was instituted on April 14, 1980 by the filing of a verified complaint by plaintiffs, Rutherford Education Association, Carol A. Froehlich, David Skidmore, and Joanne Ross, against the Rutherford Board of Education (Board). The three individuals were employed by the respondent, Rutherford Board of Education, as tenure-eligible Title 1 and State Compensatory Education (S.C.E.) teachers. The complaint alleged that Froehlich, Skidmore, and Ross, serving as S.C.E. and Title 1 teachers, were qualified for tenure within the meaning of N.J.S.A. 18A:28-5, and thus entitled to the corresponding salary and benefits of other teaching staff members. Carol Froehlich has been employed by the Board since 1977, David Skidmore since 1975. Joanne Ross' employment was terminated after the 1979-80 school year due to a lack of funding.

The State Board of Education concluded that Ross' position was abolished in good faith for economic reasons and therefore held that Ross was not entitled to tenure or reinstatement. The State Board also held that Froehlich and Skidmore were tenure eligible, but calculated sick leave benefits for them from June 23, 1982 (the date of this Court's decision in Spiewak). The Board denied all other compensatory claims, retroactive and prospective.

The Appellate Division affirmed the State Board's holding that Ross was not entitled to reinstatement but reversed the State Board's conclusion that Froehlich and Skidmore were not entitled to receive the same salary and benefits as other teachers in the school

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[1] We have been advised by the Attorney General that the Legal Committee of the State Board of Education is drafting its recommendation to the State Board on a number of appeals that concern the issue of what, if any, benefits Title 1 teachers are entitled to by virtue of their tenure-eligibility status pursuant to the Spiewak decision.

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district. It held that they were entitled to receive proper salary guide placement and benefits on a par with other teaching staff members. However, the Appellate Division denied the teachers' request for retroactive relief, holding that all relief commenced on June 23, 1982, and remanded the case to the Commissioner of Education for a determination of the amount of back salary due Froehlich and Skidmore.

B. Linda McGovern v. Board of Education of the Borough of Riverdale

This case (McGovern) was initiated on March 16, 1978 by the filing of a verified petition. Linda McGovern claimed tenured status as a teaching staff member on the basis of her service as a Title 1 supplementary teacher from September 1974 through December 1977, and as a regular classroom teacher from January 1, 1978 through June 30, 1978. Following the 1977-78 school year, McGovern's employment was terminated due to a reduction in force caused by declining enrollment. The State Board of Education held that in accordance with the Spiewak decision, McGovern's prior termination by the Board barred her claims of tenure and compensation. On appeal to the Appellate Division, McGovern sought reinstatement, and retroactive and prospective salary and benefits. The Appellate Division affirmed the decision of the State Board, finding it in accord with Spiewak.

C. Thea Levinsky v. Board of Education of the Pascack Valley Regional High School District

This case (Levinsky) was initiated by the filing of a verified petition on August 20, 1980. Levinsky was employed as an S.C.E. math teacher from November 8, 1976 through May 9, 1977. When this position was discontinued, she was employed as a Title 1 compensatory education math and reading teacher from September 6, 1978 through June, 1981. Her employment was terminated at the end of the 1980-81 school year due to a lack of funding. Consequently, Levinsky lacked sufficient time for the acquisition of tenure under N.J.S.A. 18A:28-5. Her petition sought recovery for back pay and benefits afforded other tenure-eligible staff members.

The State Board of Education held that since Levinsky's employment terminated before she acquired tenure and she was not employed by the Pascack Valley Board of Education at the time of our Spiewak decision, she was foreclosed from any relief. Since Levinsky conceded that she was discharged prior to acquiring tenure, the only issue was whether she was entitled to retroactive back wages. The Appellate Division affirmed the decision of the State Board of Education.

D. Laurie Currier v. Board of Education of the Township of Weehawken

This case (Currier) was initiated on July 24, 1981, by a verified petition. The petition alleged that the school board's

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action to employ her on only a part-time basis from September 9, 1981 through September 30, 1981, after she had acquired tenure under the terms of N.J.S.A. 18A:28-5, violated her tenure and seniority rights. Currier seeks recovery of the salary and benefits belonging to a full-time teacher only for September 1981.

Currier is a certified elementary school teacher and was employed by the Board as a S.C.E. teacher on a per-diem basis from December 7, 1976 to June 17, 1977. She was again employed from February 24, 1978 to June 21, 1978. She was then employed as an elementary school teacher during the 1978-79, 1979-80, and 1980-81 school years and was compensated according to the teachers' salary guide. On April 28, 1981 the Board voted not to renew Currier's employment contract for the 1981-82 school year. She was, however, reemployed as a part-time S.C.E. teacher from September 9, 1981 through September 30, 1981, and employed full-time in that position beginning October 1, 1981. She currently holds that position.

The State Board of Education held that Currier had attained tenure, but denied compensatory relief for the month of September, 1981. The State Board relied on the language of Spiewak to the effect that teachers not before the Court would not be entitled to any back pay award. The sole issue Currier appealed to the Appellate Division was whether the State Board properly denied her retroactive monetary relief for September 1981. The Appellate Division affirmed the State Board's decision, holding that it was in accord with Spiewak.

E. Fair Lawn Education Association, et als. v. Board of Education of the Borough of Fair Lawn

This action (Fair Lawn) was initiated by verified complaint on September 9, 1980 on behalf of the Fair Lawn Education Association and twenty-seven teachers, only seven of whom are involved in this appeal. The petition alleged that as Title 1, S.C.E., and supplemental teachers the plaintiffs were entitled to tenure pursuant to N.J.S.A. 18A:28-5 and the same salary and benefits granted to other teaching staff members in their district. Some of the teachers have been employed since 1969.

The State Board of Education held that the positions held by Levy, Pavon, Stolar, Albalah, Solomon, Smotzer, and Jasnow were tenurable, but that any emoluments accruing with tenure should be awarded only prospectively. The Board further held that Levy never achieved tenure, that Jasnow's tenure ended with her voluntary termination prior to our Spiewak decision, and that Smotzer's tenure ended when she died prior to our Spiewak decision. None of these three women was granted further relief. Solomon, Albalah, Pavon, and Stolar were found to have achieved part-time tenure status, and salary level and other benefits were ordered to be adjusted prospectively. The Appellate Division affirmed the decision of the

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State Board, holding that it was in accord with Spiewak, and directed that the prospective relief awarded to the teachers be calculated from June 23, 1982.

F. All of these matters were heard with the appeal known as Rutherford. The Appellate Division affirmed the State Board in Levinsky, Currier, and McGovern. With the exception of Joanne Ross' case in the matter of Rutherford Education Association, et als. v. Board of Education of the Borough of Rutherford, Bergen County, and with the exception of the cases of Levy, Jasnow, and Smotzer in the matter of Fair Lawn Education Association, et als. v. Board of Education of the Borough of Fair Lawn, the Appellate Division remanded the cases of the remaining teachers in Rutherford and Fair Lawn to the Commissioner of Education to determine what prospective benefits are owed to the teachers, consistent with that court's opinion. We granted the teachers' petition of certification. 97 N.J. 595 (1984).

We now affirm the judgment of the Appellate Division in Levinsky, McGovern, and Fair Lawn to the extent it denied retroactive tenure or emoluments to teachers terminated prior to our decision in Spiewak. We reverse the judgment of the Appellate Division in Currier, Rutherford, and Fair Lawn to the extent that it denied retroactive tenure to teachers still employed at the time of the Spiewak decision. We remand Currier, Rutherford, and Fair Lawn to the Commissioner of Education for a determination of when each teacher achieved tenure, the emoluments each teacher is entitled to receive due to his or her tenured status, and the calculation of such benefits in accordance with this opinion.

G. New Milford Education Association, et als. v. Board of Education of the Borough of New Milford

This case was instituted by the filing of a verified petition on July 9, 1981, naming the New Milford Education Association, Anita Scult, Linda Macchio, Janet Flieger, Elaine Gline, and Deborah Bogyo as plaintiffs. The petition alleged that the employment history of the individually named Title 1 and S.C.E. teachers entitled them to tenure, retroactive and prospective salary guide placement, and other benefits that would have accrued had their jobs been properly classified. Some of these teachers have been employed since 1969 and the early 1970's.

The Administrative Law Judge held that all the plaintiffs were tenured, and as such were entitled to prospective and retroactive salary guide placement from the date of filing their petition.

The State Board of Education held that back pay should not be awarded prior to June 23, 1982, the date that Spiewak was decided by this Court, and therefore held that back pay could not be awarded for the 1981-82 school year. The State Board also held that two of

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the teachers, Scult and Flieger, were entitled to count all years of prior teaching experience towards their prospective salary guide placement.

The Appellate Division reversed that part of the State Board's decision denying back pay pursuant to retroactive salary guide placement.

We granted the New Milford Board of Education's petition of certification. 97 N.J. 595 (1984). We now affirm the judgment of the Appellate Division to the extent that it granted tenure eligibility, and the emoluments thereof, to teachers who were not before the Court in Spiewak but who had filed a petition with the Commissioner of Education prior to the decision in that case. We remand the case to the Commissioner of Education to calculate when each teacher achieved tenure, the emoluments each teacher is entitled to receive due to his or her tenured status, and the calculation of such benefits, in accordance with this opinion.

II

As long ago as 1940 Chief Justice Charles Evans Hughes lamented that questions of retroactivity had for years been considered "among the most difficult" problems that engage the attention of the courts, both state and federal. See Chicot County Drawage Dist. v. Baxter State Bank, 308 U.S. 371, 374, 60 S.Ct. 317, 319, 84 L.Ed. 329, 333 (1940); Coons v. American Honda Motor Co., Inc., (Coons II), 96 N.J. 419, 425 (1984). That the issue of retroactivity still remains troublesome is evident in our reconsideration of it in Coons II, eighteen months after our decision in Coons v. American Honda Motor Co., 94 N.J. 307 (1983), (Coons I), and here, twenty months after our decision in Spiewak. The Supreme Court faces similar difficulties in dealing with retroactivity. See Shea v. Louisiana, ___ U.S. ___, 105 S. Ct. 1065, 84 L.Ed. 2d 38 (1985), in which the Court struggled with the limited retroactive application of its decision in Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed. 2d 378 (1981).

This Court has "generally followed the traditional rule that the overruling of a judicial decision is retrospective in nature." Darrow v. Hanover Tp., 58 N.J. 410, 413 (1971); see also Coons II, supra, 96 N.J. at 439; Busik v. Levine, 63 N.J. 351, 360-61 (1973), app. dism. 414 U.S. 1106, 94 S.Ct. 831, 38 L.Ed. 2d 733 (1973); Wangler v. Harvey, 41 N.J. 277, 287 (1963); Fox v. Snow, 6 N.J. 12, 14 (1950); Ross v. Board of Chosen Freeholders of Hudson Cty., 90 N.J.L. 522 (E. & A. 1917); Goncalvez v. Patuto, 188 N.J. Super., 620, 626 (App. Div. 1983); Cogliati v. Ecco High Frequency Corp., 181 N.J. Super. 579, 582 (App. Div. 1981), aff'd, 92 N.J. 402 (1983). Darrow further stated that the basis for the doctrine of retrospective application is pragmatic rather than theoretical, resting upon the judicial perception that ordinarily "a weighing of the various policies involved called for retrospectivity." 58 N.J. at 413-414. Thus, there is a presumption in favor of

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retrospectivity, and "that presumption can be overcome only by a clear demonstration in a particular case that there are sound policy reasons for according a judicial decision prospective application only." Cogliati, supra, 181 N.J. Super. at 583.

The threshold inquiry in any retroactivity decision is whether a new rule of law has actually been announced. State v. Burstein, 85 N.J. 394 (1981). In Spiewak, we held that our decision explicitly overruled Point Pleasant Beach Teachers' Ass'n v. Callam, 173 N.J. Super. 11, certif. den., 84 N.J. 469 (1980). As we wrote in Spiewak, "[o]ne can hardly imagine a clearer case of a clean break in the law than disapproval of a court decision that has been followed by state agencies." Spiewak, supra, 90 N.J. at 83. Today, we affirm our decision that Spiewak amounted to a new rule of law.

We have held that in determining whether to apply a new rule retroactively a court has four options: (1) make the new rule of law purely prospective, apply it only to cases whose operative facts arise after the new rule is announced; (2) apply the new rule to future cases and to the parties in the case announcing the new rule, while applying the old rule to all other pending and past litigations; (3) grant the new rule limited retroactivity, applying it to cases in (1) and (2) as well as to pending cases where the parties have not yet exhausted all avenues of direct review; and (4) give the new rule complete retroactive effect, applying it to all cases, even those where final judgments have been entered and all avenues of direct review exhausted. State v. Burstein, supra, 85 N.J. at 402-03 (citing State v. Nash, 64 N.J. 464, 468-70 (1974)).

Which option a court chooses depends primarily on the court's decision as to what is just and consonant with the public policy considerations in the situation presented. State v. Nash, supra, 64 N.J. at 469. In making the choice, however, we have held that a court should consider the following three factors: (1) the purpose of the new rule and whether it would be advanced by retroactive application; (2) the reliance placed on the old rule by the parties and the community; and (3) the effect that retroactive application would have on the administration of justice. State v. Burstein, supra, 85 N.J. at 406; see Mirza v. Filmore Corp., 92 N.J. 390, 397 (1983); State v. Catania, 85 N.J. 418, 446 (1981); State v. Carpentieri, 82 N.J. 546, 549 (1980); State v. Howery, 80 N.J. 563, 569, cert. den., 444 U.S. 994, 100 S.Ct. 527, 62 L.Ed. 2d 424 (1979); State v. Lueder, 74 N.J. 62, 77-78 (1977); State v. Nash, supra, 64 N.J. at 471. In determining whether a court should apply a decision retroactively, the Supreme Court has held that virtually the same factors should be considered.

> (1) whether the decision establishes a "new principle of law;" (2) whether retroactive operation of the decision would further or retard the purpose of the new rule; and (3) whether retroactive application would work an injustice upon those who had reasonably relied upon the old

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rule. Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07, 92 S.Ct. 349, 355, 30 L.Ed. 2d 296, 306 (1971). [Coons II, supra, 96 N.J. at 440 (Garibaldi, J., dissenting)].

Depending upon the facts of a case, one of the factors may be pivotal. For example, we look to factor one, the purpose, when the new rule is an exclusionary rule meant solely to deter illegal police conduct. In that instance the new rule is virtually never given retroactive effect, for "the deterrent purposes of such a rule would not be advanced by applying it to past misconduct." State v. Burstein, supra, 85 N.J. at 406.

Similarly, in Chevron Oil Company, supra, 404 U.S. 97, 108, 92 S.Ct. 349, 356, 30 L.Ed. 2d 296, 306, the Supreme Court held that although Louisiana's statute of limitations, rather than federal law of laches, was applicable to the federal court action, the Court would not apply it retroactively, for to do so would deprive the injured employee of any remedy. To terminate the lawsuit abruptly was deemed to be "inimical to the beneficient purpose of the Congress."

In other cases the factor determinative of whether to apply a new rule of law retroactively is the second factor, the reliance placed on the old rule by the parties and the communities. State v. Burstein, supra, 85 N.J. at 406; Coons II, supra, 96 N.J. at 440; Salorio v. Glaser, 93 N.J. 447 (1983). For example in Salorio, although we declared the Emergency Transportation Tax Act, N.J.S.A. 54:8A-1 to -57 unconstitutional, we applied our decision prospectively, in recognition of the State's fiscal problem and its reliance on the taxing statute as a significant revenue-raising measure. Id., at 467. Likewise in Passaic v. Local Fin. Bd., 88 N.J. 293, 303 (1982), despite the municipality's adoption of an ordinance in violation of the law, this Court would not remand for a review of the appropriation and financing inasmuch as expenditures in reliance thereon could not be undone.

In contrast, "in tort law the element of reliance is substantially less important and retrospectivity generally applicable." Mirza v. Filmore Corp., supra, 92 N.J. at 398, in which we upheld retroactive application of law holding that commercial landowners are responsible for maintaining public sidewalks abutting their property in reasonably safe condition. As Justice Proctor stated in Darrow v. Hanover Township, supra, 58 N.J. at 415, "reliance has very little place in the field of torts so far as it affects the negligence itself; persons do not generally regulate their conduct because they will or will not be liable in negligence." See also Dalton v. St. Luke's Catholic Church, 27 N.J. 22 (1958), in which immunity of charitable organizations for tort liability was overturned retrospectively, in view of the fact that validity of the immunity had been questioned for a considerable period of time, making reliance unjustified. But see New Jersey Bd. of Higher Educ. v. Shelton College, 90 N.J. 470, 490 (1982)

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(enjoining unlicensed college from granting degrees but allowing award of credits and degrees to junior and senior students in recognition of students' pursuit of educational goals in "good faith" reliance on credibility of institution); Jersey Shore v. Estate of Baum, 84 N.J. 137, 152 (1980) (common-law principle of protecting wife from liability for husband's necessary expenses, without according similar protection to husband, invalidated on equal protection grounds; holding applied prospectively only to debts incurred after date of decision because of "primary factor" of "[r]eliance on the prior law"); Barone v. Harra, 77 N.J. 276, 281 (1978) (in view of reliance on prior law, Court's holding of compensability under workers' compensation law for injuries sustained during lunch period applied prospectively); Merenoff v. Merenoff, 76 N.J. 535, 560 (1978) (abolition of interspousal tort immunity in personal injury actions applied prospectively); Tomarchio v. Township of Greenwich, 75 N.J. 62, 78 (1977) (invalidation of proof of dependency requirement in workers' compensation statute applied prospectively); Mercer Coun. #4 v. Alloway, 119 N.J. Super. 94, 101 (App. Div.) (despite invalidation of Civil Service Commission rule, Commission's "substantial *** reliance to date" on rule justified declaration that all prior actions as well as actions to be taken within 45 days of court's opinion would be valid), aff'd, 61 N.J. 516 (1972); Darrow v. Hanover Twp., supra, 58 N.J. at 420 (abrogation of interspousal tort immunity in automobile negligence actions applied prospectively in light of the reliance by insurance carriers on the state of the law, which caused them not to investigate accidents in which spousal immunity would have precluded a claim). Coons II, supra 96 N.J. at 429-30.

In State v. Burstein, supra, 85 N.J. 394, we examined the effect that the new rule of law would have on the administration of justice, the third factor considered in deciding whether a new rule of law should be applied retroactively. In that case, we held that even limited retroactive application of State v. Cerbo, 78 N.J. 595 (1979), would inflict "virtually incalculable" costs on our administration of justice.

> The State has represented that, in Essex County alone, retroactivity would require the retrial of or dismissal of counts against at least 60 defendants. On a statewide basis, even limited retroactivity would presumably require additional retrials and dismissals that might burden our courts and other branches of our criminal justice system. As for complete retroactivity, the costs such application would inflict on our administration of justice are virtually incalculable. [Burstein, supra, 85 N.J. at 410].

In contrast, in Mirza v. Filmore, in which we retroactively applied tort liability for injuries sustained as a result of the negligence of commercial landowners who failed to maintain public

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sidewalks abutting their property in reasonably good condition, we held that "[t]his is not a situation where retrospectivity would unduly hamper our courts or have a drastic impact on the administration of justice." Mirza v. Filmore, supra, 92 N.J. at 400. Writing for the majority, Justice Schreiber noted that the effect of retrospectivity would be limited by the applicable statute of limitations. Id.

An additional administrative consideration regarding a court's decision on retroactivity was stated in Darrow, supra.

> Prospectivity permits the Court to introduce an important change in the law with minimal disruption; it will not affect past conduct or relationships. The fear of disrupting what had been regarded as settled has sometimes restrained our courts from adopting a new and more just rule. [citation omitted]. Prospectivity can avoid unsettling the past and serve as an encouragement for judicial creativity.
>
> [58 N.J. at 419-20].

The decision whether the need to do justice outweighs the disruption of unsettling the past is one that is dependent upon the facts of each case.

Balanced against these factors is our belief that those responsible for effecting a change in the law should benefit from their efforts. Accordingly, we have recognized that purely prospective rulings fail to reward litigants for their efforts and fail to further the broader goal of providing an inducement to challenge existing interpretations of the law. It has been our position that fundamental fairness generally requires that champions of the cause should be rewarded for their effort and expense in challenging existing law.

In an effort to balance these considerations, this Court has developed the concept of limited prospectivity. There are various types of limited prospectivity, one of which is to apply the decision retroactively to the parties in the lawsuit but prospectively to all others. See, e.g., Spiewak, supra, 90 N.J. at 82-83 (overruling the prior decision in Point Pleasant Beach, supra, 173 N.J. Super. 11, applied prospectively except as to parties before court); Cogliati v. Ecco High Frequency Corp., 92 N.J. 402, 417 (1983) (decisions extending responsibility of predecessor in title for maintenance of public sidewalks, applied prospectively except as to parties); Pascucci v. Vagott, 71 N.J. 40, 50-51 (1976) (setting aside of classification standards under welfare statute applied prospectively except as to litigants); Darrow v. Hanover Township, supra, 58 N.J. at 420 (abrogation of doctrine of interspousal immunity in automobile negligence cases applied prospectively except as to litigants).

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Another form of limited prospectivity is to apply the new rule of law retroactively to the parties before the court and also to those litigants whose claims were pending at the time of the decision announcing the new rule, but prospectively to all others. In Ramirez v. Amsted Industries, 86 N.J. 332 (1981), we held that as a matter of fundamental fairness a new rule of strict liability in a products liability case should be extended to all plaintiffs similarly situated:

> Therefore, we apply the new rule to the present case and its companion, Nieves v. Bruno-Sherman Corp. and Harris Corp., 86 N.J. 361. Moreover, we conclude that on balance and as a matter of fundamental fairness, the benefit of today's rule should be extended to other similarly situated plaintiffs with products liability suits against successor manufacturers affected by this rule, which suits were in progress as of November 15, 1979, the date of the Appellate Division decision. There is a basic justice in recognizing that persons who have exercised the initiative to challenge the existing law should be accorded relief if their claims -- not yet resolved when the new rule of law is announced -- are ultimately vindicated. [Id. at 357].

Teachers in the cases before us argue that the principles of fundamental fairness contemplated by this Court in Ramirez are particularly appropriate here.

III

We turn now to an application of these considerations to this case. In Spiewak, supra, 96 N.J. 63, we applied the new rule regarding tenure status retroactively only to the litigants in that case, and prospectively to all others. In reaching that conclusion, we relied on the fact that the new rule constituted a major change in the law and that it would be unfair to apply the rule retroactively "to parties that have acted in reliance on the rules established in prior case law." Id. at 82. We also found that prospective application of the new rule would "avoid any possible confusion in the administration of statutes and the execution of the law." Id. However, we balanced these considerations favoring the Board against the rights of the teachers in that litigation not to be denied the reward for their efforts and expenses in challenging both the practice of their boards of education and the prior law. Id. at 83.

The factors we considered in Spiewak are still relevant in considering the retroactive application of that decision. We remain primarily concerned with the financial impact on the boards of education of a retroactive decision. In Cogliati, supra, 92 N.J. at 417, we emphasized that financial impact upon persons who relied on

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past law is a sufficient reason to apply the law prospectively. In that case we applied the holding prospectively to all but the litigants in the case, fearing that the new rule might leave property owners or occupiers exposed to liability that they had not contemplated or insured against upon the sale of their property. Id. But cf. Mirza, supra, 92 N.J. 390, in which we held that the retroactive application of the decision was justifiable because existing insurance would cover the losses of property owners who had relied upon prior law.

There is no question that in this case the school boards acted properly and in good faith in relying on prior law. Further, it is unquestioned that applying Spiewak retroactively would have a substantial impact on the finances of many communities. "Municipal financing is predicated on a pay-as-you-go principle." Lavin v. Hackensack Bd. of Educ., 90 N.J. 145, 154 (1982). Boards of education prepare budgets on a cash basis. Presumably, they did not budget for expenses that would arise from a retroactive application of Spiewak. Therefore, providing tenure and its emoluments retroactively would not only have a serious adverse financial effect on the boards of education, but also may have serious consequences on the tax structure of many communities and other community services. In addition, we maintain, as we did in Spiewak, that the retroactive application of that decision would result in administrative confusion. Accordingly, we affirm Spiewak to the extent that the decision will not be applied retroactively to all teachers.

Despite the adverse financial impact and administrative confusion that may be imposed on the respective boards of education, the teachers in this case present strong arguments of fundamental fairness as to why they should be afforded the same relief as the teachers in Spiewak. We are not dealing here with a situation in which noncombatant bystanders seek to crash the victory party. The teachers in these actions were diligent in pursuing their claims of tenure status. They were fighting the same fight as the litigants in Spiewak, but merely on another flank. Had these cases been heard by this Court before Spiewak, the teachers here would presumably have been given the benefit of our holding in that case. The principle upon which a decision is made retrospective as to the litigants in that case, i.e., to give litigants the benefit of the rule for which they fought, applies equally to teachers who were litigating the Spiewak issues simultaneously with the litigants in that case. Having examined the records in these cases, we now believe it unfair to deprive litigants of the benefit of the Spiewak holding simply because their cause was not the first one to reach this Court. All the teachers before this Court in this action were diligent in pursuing their claim of tenure status, and all of their actions were commenced prior to our decision in Spiewak. Accordingly, we afford them the benefits of the Spiewak teachers.

There are, however, two limitations that we place on the retroactive application of the Spiewak decision to the teachers who filed a petition prior to our Spiewak decision. The first

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limitation is based upon our recognition that its retroactive application will result in significant administrative confusion if it is applied retroactively to a teacher terminated by a board prior to our Spiewak decision, regardless of whether that teacher petitioned the Commissioner of Education prior to Spiewak. Permitting the reinstatement of such a teacher would create administrative chaos involving not only that teacher but also other teachers in the system. Such a teacher's right of reinstatement would have to be evaluated in terms of whether he or she had acquired tenure at the time of termination, or whether a Board had terminated a teacher while retaining less senior employees. Any decision reinstating such a teacher could engender a challenge by a displaced teacher. Thus, our Spiewak decision will not be applied retroactively to any teacher who was not employed by a board at the date of our Spiewak decision.

The second limitation on retroactivity reflects our concern with the financial impact on the boards of education if Spiewak is given unlimited retroactivity as to all teachers employed by a board at the date of our Spiewak decision who had petitioned the Commissioner of Education prior to that decision. Even with respect to those teachers, retroactivity is limited. Although tenure is to be calculated for those teachers from the date of their employment, we hold that the Commissioner of Education shall determine and calculate the emoluments of tenure each teacher is entitled to receive from a date six years prior to our decision in this case.

In arriving at this date, we have considered all the factors relied on by this Court and the United States Supreme Court in determining whether a decision should be applied retroactively. Here, we seek to balance the interests of all of the parties before the Court. We recognize that the various school boards relied in good faith on the law as it existed prior to Spiewak's overruling of Point Pleasant Beach Teachers' Ass'n v. Callam, supra, 173 N.J. Super. 11, and on this Court's assertion in Spiewak that the holding of that case was limited to the parties before this Court at that time. The Board never misled the teachers. Nevertheless, we recognize the right of a teacher who has diligently pursued his or her remedies to receive an award for those efforts. The six-year figure is a compromise between the parties' interests, based on our judgment that to calculate retroactive benefits based on the date on which employment commenced (in some cases as early as the late 1960's) would place an unfair burden on the school boards. This six-year limitation has the additional advantage of administrative ease.

IV

In conclusion, we hold that Title 1 teachers who were still employed by a school board at the time of this Court's decision in Spiewak, and who had instituted an action with the Commissioner of Education based on his or her right to tenure and the benefits attached thereto prior to our Spiewak decision, are entitled to the

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same retroactive application of tenure and, subject to a six-year limitation, the emoluments of tenure, as the plaintiffs in Spiewak. We therefore remand the cases of Carol Froehlich, David Skidmore, Laurie Currier, Katherine Solomon, Arlene Albalah, Elaine Pavon, Phyllis Stolar, and all of the New Milford teachers to the Commissioner of Education for a determination of what retroactive benefits are owed to those teachers.

For affirmance in part; reversal and remandment in part -

Chief Justice WILENTZ and Justices CLIFFORD, HANDLER, POLLACK, O'HERN and GARIBALDI - 6.

Opposed - None.

[99 N.J. 8 (1985)]

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JEROME SORENSEN,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, August 8, 1983

For the Petitioner-Respondent, Zazzali, Zazzali & Kroll, PA (James R. Zazzali, Esq., and Paul L. Kleinbaum, Esq., of Counsel)

For the Respondent-Appellant, Aron & Salsberg (Stephen R. Fogarty, Esq., of Counsel)

From July 1, 1975 through June 30, 1978, Petitioner-Respondent served and was tenured as Director of Guidance at the Wayne Hills High School operated by the Wayne Township Board of Education, Respondent-Appellant herein. He was paid on the Supervisors' salary schedule. Following the retirement in June, 1978, of the Director of the other high school in the district, Petitioner-Respondent performed the duties of Director at both high schools. In November, 1978, the Board reorganized its guidance department and merged the two Director positions and the responsibilities attending them into a single district-wide Director of Guidance position. At that time, Petitioner-Respondent assumed the new position, for which he continued to be compensated on the supervisors' salary scale.

In connection with the reorganization, the Board also created two new positions of Department Chairperson in the guidance departments of each high school. These Chairpersons performed only support and liaison functions under the direction of the district-wide Director, and, so, were compensated on the teachers' salary scale. Serving within this system, Petitioner-Respondent attained tenure as District Director of Guidance, a position he held through the 1981-1982 school year. However, this position was abolished for economy reasons prior to the start of the 1982-1983 school year. Since that time, Petitioner-Respondent has been employed in one of the two guidance department Chairperson's positions. Although Petitioner-Respondent continued to have responsibility for all the duties he had performed initially as Director of Guidance at Wayne Hills High School and later as District Director of Guidance, together with many of the additional duties he had assumed in the

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district-wide position, he has not continued to receive the supervisor's salary he had been earning. Instead, he has, since the 1982-1983 school year, been salaried in accordance with the teachers' salary guide. In these proceedings, Petitioner-Respondent has challenged his payment on the teacher's salary guide.

On May 25, 1983, the controversy was submitted to the Administrative Law Judge (ALJ) for disposition based on a Joint Stipulation of Facts. On June 22, 1983, the ALJ rendered his initial decision. Relying upon Williams v. Plainfield Board of Education, 176 N.J. Super. 154 (App. Div.), cert. denied, 87 N.J. 306 (1981), he found that Petitioner-Respondent's assignment to the position of guidance department Chairperson constituted a transfer which, even following a reduction in force, cannot, consistent with the tenure laws, be attended by a reduction in salary. The ALJ directed that Petitioner-Respondent's salary be restored to its prior level on the supervisors' salary scale and that the Board proceed forthwith to adopt a proper job description, one that would reflect the supervisory nature of the duties attending the Chairperson position, in accordance with N.J.A.C. 6:3-1.10(f) (now (g)) and N.J.A.C. 6:11-3.6.

The Commissioner of Education agreed. However, in addition to finding a wrongful reduction in salary under the tenure laws, the Commissioner, relying on his earlier unreported decision in Dandorph v. North Bergen Board of Education, decided by the Commissioner, October 27, 1980, concluded that the Board action contravened the requirement of N.J.S.A. 18A:16-11, that, in the event a discrepancy exists between the title of a position and the duties performed, school board employees are to be compensated in accordance with the duties they actually perform.

The Board has appealed, arguing that both the ALJ and the Commissioner ignored the fact that the reassignment prompting Petitioner-Respondent's complaint was occasioned by a reorganization of the guidance department and a reduction in force resulting in the abolition of Petitioner-Respondent's former position. The Board contends that, because of this circumstance, reliance upon the principles discussed in Williams, supra, was inapposite since that case did not concern a reduction in force made pursuant to N.J.S.A. 18A:28-9, but rather a straight transfer pursuant to N.J.S.A. 18A:28-6. The Board further argues that the Commissioner's reading of N.J.S.A. 18A:16-11 was in error in Dandorph, supra, and that application of his conclusions there to the facts in this case attributes to that provision a meaning not contemplated by the legislature and inconsistent with judicial precedent construing it.

Petitioner-Respondent continues to maintain, as he did below, that he in fact holds the same position he held prior to 1978, and, so, should not now receive less compensation than he did then merely because the title assigned to the position has been changed. The State Board agrees, and upholds the result reached by the Commissioner. However, because the decision below fails to

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address the pivotal issue of whether or not the Board's actions in fact abolished the Director of Guidance position, the State Board believes that it is necessary to review the controversy in this context.

Pursuant to N.J.S.A. 18A:28-9, local boards of education are entrusted with considerable discretion to abolish positions and reduce the number of teachers they employ whenever such action is deemed necessary to effect a change in the administrative or supervisory organization of the district or for economy reasons. Moreover, the statute provides that:

> [n]othing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members...

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

However, as recognized by the Appellate Division in its recent decision in Lingelbach v. Board of Education of the Borough of Hopatcong,

> [in] the final analysis, there is a conflict between the legislative policies implicit in N.J.S.A. 18A:28-5 and N.J.S.A. 18A:28-9.... The tenure statute seeks to give some measure of security after years of service, while the RIF statute has a goal of governmental economy. Under such circumstances [where substantial evidence in the record supports more than one result] it is the choice of the State Board of Education that governs and deserves judicial deference.

Docket No. A-4783-83T7, decided May 17, 1985, Slip. Op., at 4 (citations omitted.).

We emphasize that because reduction in force decisions often necessarily implicate tenure rights, which have historically been vigorously guarded by the legislature, close scrutiny of the decision making process underlying reductions in force and the consequences thereof must be undertaken whenever an allegation is made that tenure rights have been impermissibly compromised. Viemeister v. Prospect Park Board of Education, 5 N.J. Super. 215, 219 (App. Div. 1949); Catano v. Woodbridge Board of Education, 1971 S.L.D. 448, 458-9. Therefore, in balancing the competing interests involved when a position is abolished pursuant to N.J.S.A. 18A:28-9, the State Board must be satisfied that the board of education has exercised its discretionary powers in good faith. Lauten v. Jersey City Board of Education, 1963 S.L.D. 119; Shaner v. Gloucester City Board of Education, 1938 S.L.D. 542, 543, aff'd State Board, 1938 S.L.D. 543. Further, we reiterate that a board's decision to abolish a position is not sacrosanct, and will be disturbed if it is

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found upon examination that the essential duties of the abolished position have been transferred to another position, the need for the abolished position continues to exist and that the Board's action has been taken to defeat the employment or salary rights of a tenured employee. Viemeister, supra; Catano, 1971 S.L.D., at 458.

Although Petitioner-Respondent was not left unemployed by the Board's action, upon assuming the position of department Chairperson he was no longer salaried as a supervisor. Instead, he was paid according to the teachers' salary schedule, under which he received approximately $10,000 less annually. If in fact the positions previously held were not abolished, the Board is not relieved of its responsibilities under the tenure laws and this salary reduction would be held to constitute an abridgment of Petitioner-Respondent's right to be secure against such reductions in compensation. N.J.S.A. 18A:28-5.

Whether or not the positions of Director of Guidance and District Director of Guidance were abolished in fact depends upon a comparison of the duties of the abolished positions and those of the position replacing them. As is set forth in the Petition of Appeal and the Joint Stipulation of Facts, all the responsibilities set forth in the job description for Director of Guidance, see Stipulation of Facts #15, Exhibit A of the Petition of Appeal, were retained when the job description for Guidance Director was revised to include district-wide responsibilities. See Stipulation of Facts, #16, Exhibit B of Petition. These duties included scheduling and coordinating the administration of standardized testing in the high schools, developing reports on test results, assigning compensatory education classrooms and teachers, developing room utilization charts and teaching schedules, coordinating the integration into the high school of students from private schools and the district's junior high school, confirming the availability of scholarships and acting as advisor for scholarship programs, overseeing the distribution and data processing of student grade reports, developing the budget for the guidance department and supervising and evaluating guidance counselors.

In addition, as District Director of Guidance, Petitioner-Respondent was required to develop a uniform guidance procedure, develop a schedule of testing dates and parent school programs, report on and interpret high school results on N.J. College Basic Skills Placement Test, develop long range plans concerning student population surveys, and countersign checks for the distribution of scholarship money. In connection with the compensatory education program, Petitioner-Respondent also assumed responsibility for observing and evaluating compensatory education teachers, ordering and distributing supplies and confirming that the schools met state compensatory education requirements. In connection with the scholarship program, he met with civic groups regarding donations and he reported on the expenditure of PTO scholarship money in the high schools. He also ascertained report card distribution dates, reviewed student transcripts in connection with state standards for

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graduation and developed a weighted class rank. See Petition of Appeal, #8. Except for the expanded duties associated with the compensatory education and scholarship programs and student records, all of the foregoing duties continue to be performed by Petitioner-Respondent in his present position as Guidance Department Chairperson. See Joint Stipulation of Facts, #17.

Although the scope of the Guidance Director's position for the district is theoretically broader than that of a Director of Department Chairperson for a single school within the district, examination of the duties performed by Petitioner-Respondent in each of the Director positions and as Department Chairperson, especially when compared to the limited support function performed by the Department Chairperson before the district-wide position was abolished, discloses not only that the duties performed by Petitioner-Respondent in all three capacities are substantially similar, but also that the liaison function supplied by the Department Chairperson during Petitioner-Respondent's tenure as District Guidance Director had not been needed when a Guidance Director was assigned to each high school and was no longer performed by Petitioner-Respondent once he returned to the high school position. This shows that it was the Department Chairperson position and not the Director of Guidance positions, temporarily merged into a single district-wide position, that was no longer needed.

We find that precisely the same deception that was denounced in Viemeister has occurred here. Nor can the Board elude the consequences of this deception by contending that the result was achieved in two steps rather than one. True, the economy effected initially by creating a single Director of Guidance position when one of two positions within the high school became vacant represented a prudent allocation of resources. However, because both phases of the reorganization plan are interdependent, we conclude that they cannot be evaluated separately. Moreover, after abandoning the centralized approach, instituted in 1978, the Board's failure to restructure the guidance department to reflect the actual allocation of responsibilities, albeit in the name of economy, is suspect. In a transparent cost saving maneuver, the Board has attempted to utilize the less expensive support structure it had four years earlier, put in place to implement a centralized guidance department, to now furnish all the services that had previously been provided by the more highly paid Guidance Director, including some additional services that had been delivered by the District Director.

Although we find that the Board here, as in Catano, supra, had legitimate economic concerns, those interests must yield where pursuit of them occasions an impermissible result. Lingelbach v. Board of Education of the Borough of Hopatcong, supra. Where, as here, the need for the position of Guidance Director as originally constituted continued to exist at all times relevant to the instant inquiry and the duties attending that position continued to be performed by Petitioner-Respondent both as District Director of

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Guidance and as Department Chairperson, we conclude that the Board did not in fact abolish the position of Guidance Director on the high school level or later on the district level, but instead transferred those duties, substantially intact, to the now extinct Department Chairperson position. We find that the Board cannot claim to have acted in good faith when precisely the same services previously valued at $30,000 are demanded of the person serving in the new position but are now valued at only $20,000 simply because the position's title has been changed. The Department Chairperson position assumed by Petitioner-Respondent was at once substantially similar to both Guidance Director positions that the Board had purported on separate occasions to abolish and fundamentally different from the Department Chairperson position that had existed during the intervening period. We further find that the Board's action is all the more insidious inasmuch as its announced interest in effecting economy would in this instance have been served, albeit to a lesser degree, by abolishing the Department Chairperson positions and reinstating the high school Director of Guidance positions, representing a savings to the district of approximately $10,000 instead of $30,000.

In sum, we conclude that the position held by Petitioner-Respondent as Director of Guidance in Wayne High School from 1975-78, and augmented during his tenure as district-wide Director of Guidance from 1978-82, survived the Board's purported effort to abolish both positions and remains viable, its duties being performed now, as before, by Petitioner-Respondent. Hence, we would hold that the reduction in compensation he has sustained as a result of the Board's action violates his rights under the tenure laws, and that such violation is not justified by cost savings to the district. Lingelbach, supra; Viemeister, supra; Catano, supra. Accordingly, the State Board affirms the decision of the Commissioner of Education on the grounds set forth above and directs the Wayne Township Board of Education to compensate Petitioner-Respondent in accordance with the appropriate step on the supervisors' salary guide, restoring him to the financial position he would have occupied had his salary not been reduced.[1]

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[1] Disposition of the controversy on the grounds set forth above obviates the need to consider the propriety of the Commissioner's construction of N.J.S.A. 18A:16-11 in Dandorph v. No. Bergen Board of Education, or the application of the principle therein announced to these facts. However, it is noted that concern that teaching staff members be compensated for duties actually performed inheres in the regulatory requirement that job descriptions correspond to actual responsibilities. N.J.A.C. 6:3-1.10(g); N.J.A.C. 6:11-3.6. In the context of ascertaining whether or not a position is protected by tenure, this proposition can hardly be regarded as novel. Boeshore v. No. Bergen Board of Education, 1974 S.L.D. 805; Quinlan v. No. Bergen Board of Education, 1959-60 S.L.D. 113-114.

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We express no view as to whether or not interest is due, or if such interest is due, what amount. Thus, we remand this matter to the Commissioner for the express limited purpose of making such determination.

Attorney exceptions are noted.

August 7, 1985

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DONALD SPEER,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, June 19, 1984

For the Petitioner-Appellant, Rothbard, Harris and Oxfeld (Nancy Iris Oxfeld, Esq., of Counsel)

For the Respondent-Respondent, William Wallen, Esq.

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

January 2, 1985

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CHARLES R. STOCKTON,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, November 19, 1984

For the Petitioner-Respondent, Ruhlman, Butrym and Friedman
(Mary Jane Cullen, Esq., of Counsel)

For the Respondent-Appellant, Merlino, Rottkamp and Flacks
(Robert B. Rottkamp, Jr., Esq., of Counsel)

On April 23, 1984, Charles V. Stockton, a Learning Disability Teacher Consultant (LDTC) employed by the Trenton Board of Education, filed a petition of appeal with the Commissioner of Education, alleging that the Board had improperly changed his position on the salary guide after the 1983-84 school year had begun. Mr. Stockton received his first paycheck at the adjusted salary on November 9, 1983, but did not file his petition until after the Assistant Superintendent-Business Administrator denied his request for reinstatement of his salary. Thus, when Mr. Stockton filed his petition, more than 90 days had elapsed from his receipt of his first paycheck at the adjusted salary.

The Administrative Law Judge dismissed the petition because Mr. Stockton failed to file his petition within 90 days of his first payment at the adjusted salary, thereby failing to comply with the requirements of N.J.A.C. 6:24-1.2. The Commissioner set aside this determination, concluding that the ninety day filing period began running on February 8, 1984, when Mr. Stockton was notified that his request for reinstatement of his salary was denied. The Commissioner, therefore, remanded the matter to the Office of Administrative Law for proceedings on the merits.

For the reasons that follow, the State Board reverses the Commissioner's decision. N.J.A.C. 6:24-1.2 provides that petitions to the Commissioner to determine controversies arising under the school laws shall be filed within 90 days after receipt of notice of the school board's actual ruling. This time limit has been strictly construed to mean that the 90 day period runs from the time the initial cause of action accrued. See Watchung Hills Regional Education Association v. Watchung Hills Regional High School District, 1980 S.L.D. 356. Thus, even a teacher who proceeds to advisory arbitration is not relieved from compliance with the 90 day filing

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requirement. Bd. of Ed. of Bernards Twp. v. Bernards Twp. Ed. Ass'n., 79 N.J. 311 (1979). Although N.J.A.C. 6:24-1.19 confers on the Commissioner the authority to relax the 90 day rule, such authority is invoked only where there are compelling reasons justifying relaxation or where circumstances are such that strict adherence would be inappropriate, unnecessary or where injustice would occur. See, Pfeiffer v. Board of Education of Willingboro, decided by the Commissioner, September 15, 1980, aff'd by the State Board of Education, June 31, 1981, dismissed by the Appellate Division, 1981. We emphasize that no such circumstances are present in this case. Thus, Mr. Stockton was required to file his petition within 90 days from the time the initial cause of action accrued.

Pursuant to N.J.A.C. 6:24-1.2, the cause of action accrues and the 90 day period begins "after receipt of notice by petitioner" of the action concerning which the hearing is requested. In the instant case, Mr. Stockton was aware of the challenged action when he received his first paycheck at the adjusted salary on November 9, 1983. See North Plainfield Educ. Ass'n. v. Bd. of Ed. of the Borough of North Plainfield, 96 N.J. 587 (1984). His petition was not filed until April 23, 1984, more than five months after the expiration of the ninety day period of limitations. His request to the Assistant Superintendent to reinstate his salary does not excuse his failure to comply with the requirements of N.J.A.C. 6:24-1.2. See Bd. of Ed. of Bernards Twp. v. Bernards Twp. Ed. Ass'n., 79 N.J. 311 (1979). Consequently, Mr. Stockton's claim is time-barred. We emphasize that this is not a case involving a violation of a statutory entitlement unrelated to service as a teacher, See North Plainfield, supra; Gordon v. Bd. of Ed. of the Township of Passaic, decided by the State Board March 6, 1985. Nor, unlike the Petitioner in Parisi v. Bd. of Ed. of the City of Asbury Park, decided by the State Board October 24, 1984, was Mr. Stockton unsure that he was the individual affected by the salary adjustment. We, therefore, conclude that Mr. Stockton's petition was untimely and we reverse the decision of the Commissioner.

April 3, 1985

BRANDT, S.D., JONES, J., MARIK, R.H., SEABROOK, J.M., and WOLFENBARGER, R.J., dissenting.

Although we recognize that the weight of authority favors the position taken by the majority, we believe that the rule set forth in the majority opinion is inequitable. Under that rule, where an appeal to the Commissioner is predicated on action taken by a board, receipt of a paycheck may serve as notice of that action for purposes of establishing when the cause of action accrued under N.J.A.C. 6:24-1.2. We cannot agree.

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A paycheck in an amount different than that expected, rather than resulting from any action by the board, may reflect merely miscomputation caused by administrative or clerical error. Receipt of such paycheck, therefore, cannot provide definite and specific notice of a board's action. See Louis Parisi v. Bd. of Ed. of the City of Asbury Park, decided by the State Board, October 24, 1984. To require an individual to file a petition on the basis of such ambiguous "notice" requires him to second guess what "action", if any, has been taken. This places an unfair burden on petitioners and forces individuals to appeal to the Commissioner when the discrepancy in a paycheck is the result of administrative or clerical error. In addition, the requirement tends to cast a litigious pall over administrative and informal efforts to resolve disputes. Accordingly, we would hold that, in the absence of a showing of actual knowledge, receipt of a paycheck does not constitute sufficient notice to trigger the 90-day period for the filing of a petition.

In the instant case, petitioner, upon receipt of his paycheck, sought to resolve the discrepancy and to obtain a specific and definite statement from the Board concerning its position. However, he was not informed by the Board that his salary had been correctly calculated and that his paycheck reflected the Board's belief that he had been overpaid for three years until his request for salary reinstatement was denied on February 8, 1984. That his attorney informed the New Jersey Education Association of his circumstances on December 16, 1983, cannot change the fact that prior to February 8, he had not received definite and specific notice of why his salary was not as he expected. We, therefore, would find that his cause of action accrued on February 8 and agree with the Commissioner that the appeal, filed on April 23, 1984, was timely.

May 1, 1985

Pending N.J. Superior Court

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IN THE MATTER OF THE TENURE	:	
HEARING OF CORNELIUS TAYLOR,	:	STATE BOARD OF EDUCATION
CAMDEN COUNTY VOCATIONAL-	:	DECISION
TECHNICAL SCHOOL DISTRICT	:	
CAMDEN COUNTY,	:	
	:	

Decided by the Commissioner of Education, August 6, 1984

For the Petitioner-Respondent, Davis, Reberkenny and Abramowitz (William C. Davis, Esq. of Counsel)

For the Respondent-Appellant, Selikoff and Cohen (Steven R. Cohen, Esq., of Counsel)

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

January 2, 1985

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MARY R. WALTON,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SHREWSBURY, MONMOUTH COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, August 6, 1984

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

For the Respondent-Respondent, Atkinson and DeBartolo
(Bunce C. Atkinson, Esq., of Counsel)

The decision of the Commissioner is affirmed. We note that the decision in this matter is consistent with the recent decisions of the State Board of Education in Flanagan v. Board of Education of the City of Camden, decided by the State Board, September 5, 1984 and Nachtman and Herbert v. Board of Education of Middletown Township, decided by the State Board, December 6, 1984.

January 2, 1985

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BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, MERCER COUNTY,

PETITIONER-APPELLANT,

V.

BOARDS OF EDUCATION OF THE UPPER FREEHOLD REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY, PLUMSTED TOWNSHIP, OCEAN COUNTY AND MILLSTONE TOWNSHIP, MONMOUTH COUNTY,

RESPONDENTS-RESPONDENTS.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, March 4, 1981

Remanded by the State Board of Education, September 2, 1981

Decision on Remand by the Commissioner of Education, September 20, 1982

Remanded by the State Board of Education, December 7, 1983

Decision on Remand by the Commissioner of Education, November 29, 1984

For the Petitioner-Appellant, Baggitt, Mancino and Carroll (David W. Carroll, Esq., of Counsel)

For the Respondent-Respondent, Upper Freehold Regional Board of Education, Kalac, Newman & Griffin (Peter P. Kalac, Esq., of Counsel)

For the Respondent-Respondent, Plumsted Township Board of Education, Kessler, Tutek, Futey & Gladfelter (Henry G. Tutek, Esq., of Counsel)

For the Respondent-Respondent, Millstone Township Board of Education, Cerrato, O'Connor, Mehr & Saker (William J. Mehr, Esq., of Counsel)

The instant appeal represents the culmination of almost five years of litigation over whether the Washington Township Board of Education should be permitted to end its sending-receiving relationship with the Upper Freehold Regional Board of Education. The proceedings were originally initiated in 1980, when the Washington Township Board filed a petition with the Commissioner, seeking to withdraw its students from the relationship, which

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encompassed grades 9 to 12, because of overcrowding at Allentown High School. At the conclusion of the hearing before the Administrative Law Judge (A.L.J.), the motion to dismiss made by Upper Freehold was granted. The Commissioner declined to review this determination and, upon appeal, the State Board reversed and remanded the matter for further hearing to bring out all the relevant factors. Decision of the State Board, September 2, 1981.

Following the additional hearing in 1982, the Commissioner affirmed the A.L.J.'s determination that Allentown High School provided a thorough and efficient educational program that was comfortably housed in approved facilities and that the loss to Upper Freehold outweighed any benefits that would be derived from approving withdrawal. Following appeal by Washington Township, Upper Freehold asked for and was granted oral argument before the Legal Committee of the State Board. At that time, it moved for permission to supplement the record to show that functional capacity had increased and that enrollment had declined. The State Board concluded that further fact finding was necessary and remanded the matter "for the express purpose of supplementing the record and resolving the overcrowding issue." Decision of the State Board, December 7, 1983, at 3.

In its decision remanding the matter, the State Board eliminated the requirement that before approval would be granted for withdrawal from a sending-receiving relationship, a petitioning district must prove that the receiving district was unable to provide a thorough and efficient education. Id. Instead, the State Board held that the Commissioner must determine only whether good and sufficient reason has been presented by the petitioning Board and must weigh all the relevant factors in reaching this conclusion. Id. After enumerating those factors, the State Board reaffirmed that a petitioning district must still demonstrate "by a definite presentation of facts, that it has satisfied the 'good and sufficient reason' test." Id. Thus, in remanding the matter for limited further proceedings on the issue of overcrowding and by directing the Commissioner to proceed in a manner consistent with its opinion, id., at 4, the State Board directed the Commissioner to determine whether Allentown High School was overcrowded and whether, based on the record in this case, good and sufficient reason had been established for terminating the sending-receiving relationship between Washington Township and Upper Freehold.

In accordance with the remand, three days of hearings were held during 1984. On October 9, 1984, the A.L.J. rendered his initial decision in which he concluded that, based on testimony by State Department of Education and County specialists and on-site inspection, there was no evidence of overcrowding at Allentown High School. He found that functional capacity was 838 students and, as of January 1, 1984, enrollment was 815 with maximum daily attendance of 727 in the morning and 698 in the afternoon. Accordingly, the A.L.J. dismissed the petition. The Commissioner, denying motions to supplement the record by Washington Township, affirmed the A.L.J.'s

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findings and determination and held that Washington Township had failed to establish good and sufficient reason for withdrawing from the sending-receiving relationship.

In considering the instant appeal, the State Board, on April 3, 1985, denied Washington Township's motion to supplement the record to include evidence to show that student enrollment was going to increase in the future because of projected growth in the municipality. The State Board reiterates that, although we recognize the possibility, present in every case involving issues of overcrowding, that student enrollment may change over time, we strongly believe that the time has arrived to reach a final disposition in the case before us and that the extensive record in this case provides a sound basis for making such a determination.

In reviewing the Commissioner's decision that Allentown High School is not overcrowded and that Washington Township has failed to establish good and sufficient reason for withdrawing from its sending-receiving relationship, we find that the Commissioner failed to provide analysis of his conclusion on the issue of overcrowding under the standard set forth in that decision. Therefore, although we concur with the Commissioner in concluding that Washington Township has failed to establish good and sufficient reason for withdrawal, we are compelled to elaborate on his decision.

Under the standard established in our decision remanding this case, when a district seeks to withdraw from a sending-receiving relationship, N.J.S.A. 18A:38-13 requires that the Commissioner of Education determine whether good and sufficient reason has been presented by the petitioning board and that he "weigh all the relevant factors in reaching his conclusion." Branchburg Township Board of Education v. Somerville Board of Education, 173 N.J. Super 268, 276 (App. Div. 1980). Those factors include the educational impact, financial impact, facility considerations and racial impact upon all pupils and districts involved. Board of Education of the Township of Washington v. Boards of Education of the Upper Freehold Regional School District, Plumsted Township, and Millstone Township, decided by the State Board, December 9, 1983. Although the petitioning district need not prove that the receiving district is unable to provide a thorough and efficient education, it must demonstrate by a definite presentation of facts that there is good and sufficient reason to approve withdrawal. Id., at 3. Good and sufficient reason may exist, for example, where a district desires to educate its children in its own district and cost effectiveness is the only advantage to continuation of the relationship. Board of Education of the Borough of Kinnelon v. Board of Education of the Borough of Riverdale, decided by the State Board, April 6, 1984, aff'd Docket No. A-3857-83T2 (App. Div., February 8, 1985).

In the instant case, Washington Township argues, as it has during the entire course of this litigation, that withdrawal should be permitted because Allentown High School is overcrowded and that,

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consequently, substandard facilities are in use.[1] On appeal, it also argues that the public school attrition rate shows community dissatisfaction with the present arrangement and that such dissatisfaction justifies granting the withdrawal request if the change can be accomplished without substantial detriment to the remaining districts. We do not agree. N.J.S.A. 18A:38-13 prohibits withdrawal "except for good and sufficient reason." As stated in our decision remanding this case, we continue to require that good and sufficient reason be shown by a definite presentation of facts. Board of Education of the Township of Washington v. Boards of Education of the Upper Freehold Regional School District, Plumsted Township, and Millstone Township, supra, at 3. We conclude that although community dissatisfaction or preference may be considered in cases such as this, the reasons for such dissatisfaction or preference must be clearly established by a definite presentation of facts and those reasons must provide good and sufficient reason for granting a withdrawal request.

In the instant case, the statistics show an attrition rate of 44% over the past 5 years. P-8, Exhibit J. Although Washington Township submits that community dissatisfaction with the current sending-receiving relationship is responsible for the attrition rate, the only support in the record for this assertion, aside fron the attrition rate itself, is a 1980 survey indicating that, at that time, twice as many high school students from Washington Township would attend public school if Lawrence was the receiving district. Tr. 7/15/80, at 13-15. We emphasize that, even assuming that the attrition rate does reflect community dissatisfaction, Washington Township has not established the reason for such dissatisfaction aside from the implication that it is the result of inadequate facilities. See Brief on Behalf of Petitioner, at 25-26. Thus, whether community dissatisfaction provides a sufficient basis for granting the withdrawal request in this case depends on whether Allentown High School is overcrowded. In so concluding, we reiterate that community dissatisfaction or preference may provide a basis for granting a withdrawal request, but only where the existence of such dissatisfaction or preference is clearly established, as well as the underlying reasons, and where those underlying reasons provide good and sufficient reason for terminating the sending-receiving relationship.

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[1] We note that during oral argument before the Legal Committee of the State Board, held on September 22, 1983, counsel for Washington Township stated "...our initial thrust was overcrowding. I have stated that for the record and I can't deviate from that...." Tr. 9/22/83, at 38.

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Finally, Washington Township contends that the equities favor withdrawal because racial balance would not be adversely affected, the financial impact on the three remaining districts would not be substantial and the educational program at Allentown High School would not be disadvantaged. Although we find support in the record for Washington Township's contentions that withdrawal would result in no substantial negative impact to the other districts involved,[2] we emphasize that lack of negative impact does not excuse it from the requirement that it must establish good and sufficient reason for the withdrawal, Washington Township, supra. As stated, the "good and sufficient reason" posited Washington Township, and upon which even its contention of community dissatisfaction is predicated, is the existence of overcrowding at Allentown High School. Thus, whether Washington Township has presented good and sufficient reason for withdrawal turns on whether Allentown High School is overcrowded.

For the reasons expressed by the Commissioner in his decision on remand, we conclude that Allentown High School is not overcrowded. Because Washington Township has failed to establish such overcrowding, and because it has not demonstrated by definite presentation of facts any other good and sufficient reason for withdrawal, we affirm the Commissioner's determination. We however emphasize that our decision today does not prejudice Washington Township's right to bring an action in the future on the basis of other good and sufficient reason.

Attorney Exceptions are noted.
June 5, 1984

Pending N.J. Superior Court

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[2] See e.g., Commissioner's Decision, September 20, 1982 (racial balance would not be significantly affected if withdrawal were approved); R-39 (Washington Township pupils constituted 10.9% of enrollment at Allentown High during 1983-84); R-10 (net loss in revenue to Upper Freehold, Millstone and Plumsted would be $200,000 after completion of three year phased withdrawal).

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EDWARD WEIGAND,	:	
PETITIONER-RESPONDENT,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE TOWNSHIP OF MARLBORO, MONMOUTH COUNTY,	:	APPELLATE DIVISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, April 9, 1984

Decided by the State Board of Education, September 5, 1984

Argued: October 28, 1985 - Decided: November 19, 1985

Before Judges J.H. Coleman and Havey

On appeal from the Final Decision of the State Board of Education

Vincent C. DeMaio argued the cause for appellant (DeMaio & DeMaio, attorneys; Mr. DeMaio on the brief).

Jay R. Schmerler argued the cause for respondent (Chamlin, Schottland, Rosen, Cavanagh & Uliano, attorneys; Thomas W. Cavanagh, Jr. on the letter brief).

Irwin I. Kimmelman, Attorney General of the State of New Jersey, attorney (June Kanter, Deputy Attorney General, on the statement in lieu of brief).

Sylvia Jahn argued the cause on behalf of amicus curiae New Jersey School Boards Association (Paula A. Mullaly, General Counsel, James A. Harkness, Assistant Counsel, on the letter brief).

PER CURIAM.

Appellant Board of Education of the Township of Marlboro appeals from the determination of the State Board of Education that appellant had violated respondent Edward C. Weigand's tenure rights when appellant failed to continue Weigand's employment for the 1983-84 school year.

Weigand was hired by appellant on April 28, 1980 to fill the position of a teacher who had resigned. He served in that capacity until the end of the 1979-80 school year. He was thereafter employed as a regular classroom teacher for the 1980-81, 1981-82 and 1982-83 school years. As part of a reduction in force,

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appellant notified Weigand in March 1983 that it would not be renewing his employment for the 1983-84 school year. Weigand appealed to the Commissioner contending that he had acquired tenure. The Administrative Law Judge, who heard the matter as a contested case, concluded that Weigand's services during the 1979-80 school year were as a regular teaching staff member, and not as a substitute. She accordingly concluded that Weigand had acquired tenure status and therefore recommended reinstatement to his position and reimbursement for lost salary and benefits. The Commissioner adopted the findings in their entirety. The State Board affirmed, relying on Sayreville Educ. Ass'n v. Board of Educ., Etc., 193 N.J. Super. 424 (App. Div. 1984).

We affirm. We are entirely satisfied that the State Board's determination was supported by sufficient credible evidence. See Dore v. Bedminster Tp. Bd. of Ed., 185 N.J. Super. 447, 453 (1982). Clearly, Weigand was not filling a vacancy caused by the temporary absence of a regular teacher whose return to duty was contemplated. He therefore could not be deemed a substitute teacher as defined by N.J.S.A. 18A:16-1.1: see Sayreville Educ. Ass'n v. Board of Educ., Etc., supra, 193 N.J. Super. at 427-428. He thus was entitled to teaching staff membership during the 1979-80 term and consequently to all the rights and benefits of that status. Moreover, the facts amply support the State Board's conclusion that the "special situations" envisioned by Sayreville which would permit appointment of short-term substitutes "for a relatively brief time" were not present here. Id. at 433-434. The vacancy did not suddenly occur; Weigand was interviewed almost two weeks before the resigning teacher left the position. Moreover, nearly 60 days remained in the school year when Weigand's services began, a period we view as substantial in the circumstances then present.

We affirm.

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JANE M. WILLIAMS, an individual,

APPELLANT,

V. SUPREME COURT

BOARD OF EDUCATION OF THE TOWNSHIP OF DEPTFORD, GLOUCESTER COUNTY, a body corporate and politic of the State of New Jersey,

RESPONDENT.

Argued: January 7, 1985 - Decided: January 28, 1985

On appeal from the Superior Court, Appellate Division, whose opinions are reported at 192 N.J. Super. 31 (1983).

Steven R. Cohen argued the cause for appellant (Selikoff & Cohen, attorneys; John E. Collins, of counsel; Barbara E. Riefberg, on the brief).

Betsy G. Shain argued the cause for respondent (Capehart & Scatchard, attorneys; Alan R. Schmoll, of counsel).

Regina A. Murray, Deputy Attorney General, argued the cause for State Board of Education (Irwin I. Kimmelman, Attorney General of New Jersey, attorney; James J. Ciancia, Assistant Attorney General, of counsel).

PER CURIAM.

The judgment is affirmed, substantially for the reasons expressed in the majority opinion of the Appellate Division, reported at 192 N.J. Super. 31 (1983).

Chief Justice Wilentz and Justices Clifford, Handler, Pollock, O'Hern and Garibaldi join in this opinion.

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CLAUDE WRIGHT, JR., AND EAST ORANGE PERSONNEL ASSOCIATION,

RESPONDENTS,

V. SUPREME COURT

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

APPELLANT.

Decided by the Commissioner of Education, August 30, 1982

Decided by the State Board of Education, March 2, 1983

Argued: November 26, 1984 - Decided: May 7, 1985

On certification to the Superior Court, Appellate Division, whose opinion is reported at 194 N.J. Super. at 181 (1983).

Melvin C. Randall argued the cause for appellant (Love & Randall, attorneys).

Barry A. Aisenstock argued the cause for respondents (Oxfeld, Cohen & Blunda, attorneys).

Robert E. Anderson, Jr., General Counsel, submitted a brief on behalf of amicus curiae Public Employment Relations Commission.

Russell Weiss, Jr., Associate Counsel, submitted a brief on behalf of amicus curiae New Jersey School Boards Association (Paula A. Mullaly, General Counsel, attorney).

The opinion of the Court was delivered by

CLIFFORD, J.

We granted certification, 97 N.J. 579 (1984), to review the Appellate Division's determination that N.J.S.A. 18A:17-3 does not foreclose collective negotiations between a school board and the public employee representative on the subject of tenure for public school custodians. We hold that the provision in the specific agreement at issue that grants tenure to custodians after three years of employment is not barred by the statute and is within the scope of collective negotiations. Hence, we affirm.

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I

On October 5, 1977 the East Orange Board of Education (Board) hired petitioner, Claude Wright, Jr., as a public school custodian. Petitioner's employment was governed by a series of successive contracts for fixed periods not in excess of twelve months. On or about May 20, 1981, the Board gave Wright notice that his employment would not be renewed for the 1981-82 school year.

During the period of his employment Wright was a member of the East Orange Personnel Association (Association), which had entered into a negotiated agreement[1] with the Board. Article XIII of the agreement provided:

> Tenure: All members of the bargaining unit shall receive tenure after three years of employment.

It is undisputed that petitioner had been employed for more than three years when the Board terminated his employment. Wright therefore claimed a right to tenure by virtue of the unambiguous provision in the agreement. In denying tenure the Board relied on N.J.S.A. 18A:17-3, which reads as follows:

> Every public school janitor of a school district shall, unless he is appointed for a fixed term, hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except as the result of the reduction of the number of janitors in the district made in accordance with the provisions of this title or except for neglect, misbehavior or other offense and only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title.

Wright petitioned the Commissioner of Education, seeking reinstatement. In its answer to the petition the Board pointed to Wright's appointment for a fixed term as the basis for denying him tenure. The parties agreed on a joint stipulation of facts, and the controversy was submitted to an Administrative Law Judge (ALJ). As there were no essential facts in dispute, petitioner moved for summary judgment. The ALJ concluded that pursuant to Article XIII of the labor agreement Wright was automatically entitled to tenure after three years of employment. Accordingly, the ALJ ruled that the Board's termination of petitioner was improper.

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[1] Although the majority representative changed during the period of petitioner's employment so that there was more than one collective negotiation agreement, the contract language pertaining to tenure remained the same in each agreement.

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On the Board's appeal the Commissioner of Education reversed the ALJ, holding that because the Board had employed Wright under fixed contracts that expired annually on their own terms, N.J.S.A. 18A:17-3 precluded tenure status for the petitioner regardless of the terms of the negotiated contract. The State Board of Education affirmed the Commissioner's decision, but the Appellate Division reversed, 194 N.J. Super. 181 (1984), holding that the statute did not stand in the way of the valid negotiation of tenure as set forth in Article XIII of the agreement.

II

It is now well settled that although public employees have a legitimate interest in engaging in collective negotiations, the scope of negotiations in the public sector is limited. In re IFPTE Local 195 v. State, 88 N.J. 393, 401 (1982); accord Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ., 78 N.J. 144, 162 (1978); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 79-80 (1978). In order to determine whether a subject is negotiable, a court must balance the competing interests of the government employer and the public employees by considering "the extent to which collective negotiations will impair the determination of government policy." In re IFPTE Local 195, supra, 88 N.J. at 402.

In an effort to "consolidate" its earlier opinions on this subject,[2] this Court adopted a three-part test for scope-of-negotiations determinations. In re IFPTE Local 195, supra, 88 N.J. at 404. First, a subject is negotiable only if it intimately and directly affects the work and welfare of public employees. Id. at 403. Second, an item is not negotiable if it has been preempted by statute or regulation. Id. Third, a topic that affects the work and welfare of public employees "is negotiable only if it is a matter 'on which negotiated agreement would not significantly interfere with the exercise of inherent management prerogatives pertaining to the determination of government policy.'" Id. at 404, quoting In the Matter of Paterson Police PBA Local No. 1 v. Paterson, 87 N.J. 78, 86 (1981).

Applying the foregoing test to these proceedings, we have little difficulty with the question of whether tenure is an item that intimately and directly affects the work and welfare of public employees. As we have recognized in the context of the public school teacher tenure statute, N.J.S.A. 18A:28-5, tenure "prevents school boards from abusing their superior bargaining power *** in contract

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2 For a listing of prior authority concerning public-employees-scope-of-negotiations law, see In re IFPTE Local 195, supra, 88 N.J. at 403 n. 10.

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negotiations." Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 74 (1982). It protects employees from dismissal for "unfounded, flimsy or political reasons." Zimmerman v. Newark Bd. of Educ., 38 N.J. 65, 71 (1962), cert. denied, 371 U.S. 956, 83 S. Ct. 508, 9 L.Ed. 2d 502 (1963). Once the status of tenure is earned, it provides a measure of job security to those who continue to perform their jobs properly; and "[n]othing more directly and intimately affects a worker than the fact of whether or not he had a job." State Supervisory Employees, supra, 78 N.J. at 84.

We next must determine whether Article XIII of the labor agreement has been preempted by N.J.S.A. 18A:17-3. The Board constructs a conflict between Article XIII's directive that "[a]ll members of the bargaining unit shall receive tenure after three years of employment" and what the Board perceives as the statute's mandate that tenure must be denied to those custodians who are appointed for a fixed term.

At the outset, we note that the mere existence of a statute or regulation relating to a given term or condition of employment does not automatically preclude negotiations. In re IFPTE Local 195, supra, 88 N.J. at 403; State Supervisory Employees, supra; 78 N.J. at 81. A public employer and majority representative are free to negotiate terms and conditions of public employment that have not been set by specific statute or regulation. Thus, "[n]egotiation is preempted only if the 'statutory or regulatory provisions *** speak in the imperative and leave nothing to the discretion of the public employer.'" In re IFPTE Local 195, 88 N.J. at 403-04, quoting State Supervisory Employees, 78 N.J. at 80.

N.J.S.A. 18A:17-3 does not speak in the imperative. Rather, the statute grants the Board discretion to determine which custodians, if any, are to receive the benefits of tenure.

> Every public school janitor of a school district shall [receive tenure] unless he is appointed for a fixed term.

It is clear from the statute that a janitor employed without a fixed term contract will gain tenure immediately upon beginning employment. On the other hand, the statute allows an employing board to deny tenure to all custodians, as an appointment for a fixed term is an appointment without statutory-mandated tenure.

Yet even though the statute provides mechanisms for immediate tenure and complete denial of tenure, these are not the only alternatives contemplated by the statute. By using the word unless to modify the word shall, the legislature has signaled its intention to leave employing boards with some flexibility. Accordingly, boards may, without contravening the terms of the statute, permissibly pick and choose between the statutory minimum of no tenure for any custodial employee and the statutory maximum of

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instant tenure for all custodians. Article XIII of the negotiated agreement, which grants tenure after three years of employment, is but one example of a clause that falls between N.J.S.A. 18A:17-3's outer limits without derogating the statute's intent.

Inasmuch as N.J.S.A. 18A:17-3 leaves a school district with considerable discretion in making custodian-tenure decisions, there is no preemption hurdle blocking the negotiability of custodians' tenure rights. As we stated in State Supervisory Employees, supra, 78 N.J. 54:

> [S]tatutes or regulations concerning terms and conditions of public employment which do not speak in the imperative, but rather permit a public employer to exercise a certain measure of discretion, have only a limited preemptive effect on collective negotiation and agreement. Thus, where a statute or regulation mandates a minimum level of rights or benefits for public employees but does not bar the public employer from choosing to afford them greater protection, proposals by the employees to obtain that greater protection in a negotiated agreement are mandatorily negotiable. A contractual provision affording the employees rights or benefits in excess of that required by statute or regulation is valid and enforceable.
>
> * * * * * *
>
> Where a statute sets both a maximum and a minimum level of employee rights or benefits, mandatory negotiation is required concerning any proposal for a level of protection fitting between and including such maximum and minimum.
>
> [Id. 78 N.J. at 81-82.]

As we have sought to demonstrate, under N.J.S.A. 18A:17-3 the maximum benefit to be gained by custodians would be immediate tenure, and the minimum benefit would be employment without tenure based upon appointment for a fixed term. Here, the majority representative has negotiated with the employer on behalf of the negotiating unit. Even though Article XIII's safeguards are better than the minimum protections provided by the statute, they do not grant a right in excess of the statutory maximum. Therefore, under the doctrine of State Supervisory Employees and In re IFPTE Local 195, we conclude that N.J.S.A. 18A:17-3 does not preempt Article XIII of the negotiated agreement.

The third and final prong of our test to determine the scope of public sector negotiations looks to whether negotiation of Article XIII significantly interfered with the managerial

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prerogatives of the Board. This test segment recognizes that negotiation will always impinge to some extent on the determination of policy. In re IFPTE Local 195, supra, 88 N.J. at 404. Thus, in order to strike a balance between the interests of public employees and the requirements of democratic decision-making, a topic will be found nonnegotiable only if the interference with managerial prerogatives is "significant." Id.

In determining what is significant, our focus has been primarily upon the extent to which "students and teachers are congruently involved." Woodstown-Pilesgrove Bd. of Educ. v. Woodstown-Pilesgrove Educ. Ass'n, 81 N.J. 582, 592 (1980). Thus, where the issue involves hiring, Teaneck Bd. of Educ. v. Teaneck Teachers Ass'n, 94 N.J. 9 (1983); teacher evaluations, Bethlehem Township Bd. of Educ. v. Bethlehem Township Educ. Ass'n, 91 N.J. 144; or school calendar, Burlington County College Faculty Ass'n v. Burlington County College Bd. of Trustees, 64 N.J. 10 (1973), we have held the matters non-negotiable as involving a significant educational purpose. Cf. Woodstown-Pilesgrove, supra, 81 N.J. at 594 (payment for hours worked due to extension of work period on day preceding holiday from that which had previously existed involved budgetary considerations as dominant element; negotiation and binding arbitration of that matter did not "significantly or substantially trench *** upon the managerial prerogative of the board ***."). In each instance the congruent involvement of teacher and student implicated the local district's responsibility to ensure that "all children receive a thorough and efficient education." Ridgefield Park, supra, 78 N.J. at 165. It therefore seems clear to us that allowing the negotiation of a provision such as Article XIII does not amount to the "significant interference" of which our cases speak.

The Board insists that this matter is controlled by our conclusion in Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 76 (1982), that the teacher-tenure provisions of N.J.S.A. 18A:28-5 constitute a mandatory contractual term that may not be waived or bargained away. Thus, respondent contends by analogy that tenure for janitors may not be negotiated. What that argument overlooks, however, is that the teachers' tenure statute is fundamentally different from the janitors' statutory tenure provision, N.J.S.A. 18A:17-3. The teachers' tenure statute speaks in the imperative, providing that all teachers shall have tenure after three years of employment. A teacher's statutory right to tenure cannot be altered by contract and boards have no discretion to deny a teacher tenure if he is reemployed after three years of service. Conversely, as we have taken pains to explain, supra at 119-120, N.J.S.A. 18A:17-3 grants an employing board discretion in determining whether to grant tenure to custodians.[3] Therefore, negotiation of custodians'

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[3] Even the acquisition of tenure under a negotiated labor agreement is not a promise of continued employment. N.J.S.A. 18A:17-3 still safeguards the boards' right to dismiss custodians because of a reduction in force or due to misconduct, inefficiency, and other good cause.

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tenure rights must be permitted within the limits delineated in State Supervisory Employees, 78 N.J. at 81-82.

III

Not only does the instant collective-negotiations clause satisfy this Court's three part test for determining public sector negotiability, but allowing custodians to bargain for tenure rights also comports with the legislative intent behind N.J.S.A. 18A:17-3. Janitors were first granted statutory tenure in 1911. L. 1911, c. 44. As the statute granted immediate tenure to all janitors, its purpose was to fulfill the janitors' need for help in acquiring job security. There is no reason to believe that the intent of N.J.S.A. 18A:17-3, which presumptively grants tenure in the absence of a fixed contact, is different from that of its predecessor.

Moreover, if the representative unit of the custodians were prohibited from negotiating job security, the result would frustrate, rather than promote, the intent of the janitors' tenure statute. In our view it is more consistent with the statutory purpose of N.J.S.A. 18A:17-3 to uphold the negotiated provision, which affords custodians a right to tenure after having worked for three years.

We therefore hold that inasmuch as N.J.S.A. 18A:17-3 does not preempt a school board's power to grant tenure to custodial employees after three years of satisfactory performance, and inasmuch as a negotiated provision to that effect advances the primary purpose of the statute without significantly interfering with educational policy, the subject is a proper topic for collective negotiations. Therefore, Article XIII of the employment contract between the East Orange Board of Education and the East Orange Personnel Association is within the scope of public-sector negotiations. Accordingly, the Board cannot now disavow that which it legally negotiated.

The judgment of the Appellate Division is affirmed.

For affirmance CHIEF JUSTICE WILENTZ AND JUSTICES CLIFFORD, HANDLER, POLLOCK, O'HERN, and GARIBALDI - 6.

For reversal - None.

[99 N.J. 112 (1985)]

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SHERI ZORFASS,	:	
PETITIONER-RESPONDENT	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,	:	SUPERIOR COURT
RESPONDENT-RESPONDENT	:	APPELLATE DIVISION
V.	:	
JANET MIKLOS,	:	
THIRD PARTY RESPONDENT-APPELLANT	:	

Decided by the Commissioner of Education, December 2, 1983

Decided by the State Board of Education, August 8, 1984

Argued: September 19, 1985 - Decided: October 30, 1985

Before Judges Furman, Petrella and Ashbey

On appeal from the State Board of Education

Steven R. Cohen argued the cause for appellant Janet Miklos (Selikoff and Cohen, attorneys; Mr. Cohen, of counsel and on the brief).

Stephen B. Hunter argued the cause for respondent Sheri Zorfass (Klausner & Hunter, attorneys; Mr. Hunter, of counsel and on the brief).

Irwin I. Kimmelman, Attorney General of New Jersey, attorney for respondent State Board of Education (Regina A. Murray, Deputy Attorney General, of counsel and on the letter brief).

PER CURIAM.

Petitioner Zorfass and respondent Miklos both claim title to a position of full-time guidance counselor with the Cherry Hill Board of Education by virtue of seniority. The Board of Education of the Township of Cherry Hill, the appointing authority, initially found in favor of respondent Miklos. The Commissioner of Education found in favor of petitioner Zorfass. The final administrative action of the State Board of Education affirmed the decision for Zorfass on August 8, 1984. We affirm the decision of the State Board.

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Due to the complicated nature of this case, we will review the procedure which brought about this appeal before discussing the merits. On March 24, 1983, following a reduction in force (RIF) pursuant to N.J.S.A. 18A:28-9, Zorfass petitioned the Commissioner of Education for a declaratory judgment concerning her seniority and that of Miklos. Miklos was not a named respondent in the petition. The matter was then transferred to the Office of Administrative Law (OAL) with the Cherry Hill Township Board of Education (Cherry Hill) as respondent and Miklos as third party respondent.

Both Cherry Hill and petitioner Zorfass joined in a request for a declaratory judgment. Cherry Hill did not appear or file a brief in this appeal but a letter was filed endorsing the legal position of Janet Miklos.

Zorfass's petition stated that, in connection with a RIF, Cherry Hill had evaluated the parties' relative seniority as guidance counselor and found in favor of Miklos. Miklos held the job in question and by reason of stays of ultimate orders has continued to hold that position for as long as our record reveals.

The matter was heard upon a stipulation of facts and legal memoranda before Administrative Law Judge Tylutki (ALJ). ALJ Tylutki found the following employment by each of the parties:

JANET MIKLOS

SCHOOL YEAR	ASSIGNED SCHOOL	POSITION	TYPE OF EMPLOYMENT
1972-73	Heritage	Math	Full-Time
1973-74	Heritage	Math	Full-Time
1974-75	Heritage	Math	Full-Time
1975-76	Heritage	Math	Full-Time
1976-77	Beck	Guidance	Full-Time
1977-78	East	Guidance	Full-Time
1978-79	East	Guidance	Full-Time
1979-80	East	Math	Full-Time
1980-81	East	Guidance	Full-Time
1981-82	East	Guidance	Full-Time
1982-83	Brainard	Guidance	Full-Time

SHERI ZORFASS

SCHOOL YEAR	ASSIGNED SCHOOL	POSITION	TYPE OF EMPLOYMENT
1974-75	Ad. Bldg.	Guid. Coun. for Handic.	Full-Time
1975-76	Ad. Bldg.	Guid. Coun. for Handic.	Full-Time
1976-77	Ad. Bldg.	Guid. Coun. for Handic.	Full-Time

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SCHOOL YEAR	ASSIGNED SCHOOL	POSITION	TYPE OF EMPLOYMENT
1977-78	Ad. Bldg.	Guid. Coun. for Handic.	Full-Time except 1/3/78 to 1/19/78 -- medical leave w/pay; 1/20/78 to 3/31/78 -- medical leave without pay; 4/1/78 to 6/30/78 child rearing leave without pay.
1978-79	Coles	Guid. Coun. for Handic.	*Part-Time
1979-80	Coles	Guid. Coun. for Handic.	*Part-Time
1980-81	Coles	Guid. Coun. for Handic.	*Part-Time except 12/1/80 to 1/12/81 -- medical leave with pay; 1/13/81 to 2/8/81 child rearing leave without pay.
1981-82	Paine/Hinchman	Elementary Guidance Counselor	Full-Time
1982-83	Heritage	4/10 Guidance Counselor 6/10 English	Full-Time

*Part-Time means worked a half day for five days per week.

As the controversy pertained to Zorfass's credits the ALJ presented an analysis of the parents' contentions about the time to be credited to Zorfass.

ZORFASS'S TIME

[Zorfass's Attorney] Mr. Hunter Months of Seniority	School Year	[Miklos's Attorney] Mr. Cohen Months of Seniority
10	1974-75	10
10	1975-76	10
10	1976-77	10
7	1977-78	4.5
5	1978-79	5
5	1979-80	5
4.5	1980-81	4.625
10	1981-82	10
61.5		59.25

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The ALJ found that Miklos's attorney's computation for 1980-81 was accurate and Zorfass should receive 4.625 months seniority for that year.[1] The ALJ concluded that Zorfass was entitled to 61.625 months of seniority credit, as opposed to Miklos's entitlement of 60 months.

In arriving at the appropriate credits for Miklos the ALJ made the determination that Miklos was entitled to 10 months of seniority credit for the year she served as a math teacher in between her employments as guidance counselor. Such a circumstance is provided for in N.J.A.C. 6:3-1.10(g) and the contrary has not been seriously argued on appeal. The ALJ also disposed of Cherry Hill's argument that Zorfass had suffered no loss from the RIF because she was still employed during the 1982-83 school year, albeit her employment was 40 percent guidance counselor and 60 percent English teacher. The ALJ held that N.J.A.C. 6:3-1.10(h) entitled Zorfass to employment as a full-time guidance counselor according to N.J.A.C. 6:3-1.10(k) and N.J.A.C. 6:11-12.13.

We now come to the essence of the controversy. Zorfass's attorney's chart for Zorfass gives her seven months credit for the school year 1977-1978. Miklos's attorney's chart gives Zorfass 4.5 months for the same period. The 2.5 months difference represents the time period between January 20, 1978 and March 31, 1978 when Zorfass was absent from school on unpaid disability leave for childbirth. From January 3, 1978 to January 19, 1978 she was absent from school on paid disability leave for childbirth and from April 1, 1978 to June 30, 1978 she was absent from school on unpaid leave for child care. (Emphasis supplied).[2]

Sometime in the school year 1977-1978, anticipating the birth of her child, Zorfass applied for and received medical disability leave commencing on what appears to be the first day of the winter term in 1978 and running three months thereafter. The record is barren of the reasoning behind selection of this time period as her baby was born February 22, 1978 almost two months later. Pursuant to an agreement with Cherry Hill she was absent six months, three related to childbirth and three allowed as child care leave.

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[1]This finding is not material to the result.

[2]There is no claim that Cherry Hill discriminated against petitioner by denying her seniority credit for maternity leave while according credit to others with similar short-term absences for non-childbirth disability. Cf. Flaum v. East Ramapo Cent. Sch. Dist. Bd. of Ed., 450 F. Supp. 191 (S.D.N.Y. 1978).

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It has never been contended that the child care leave counted towards seniority. Nor is there challenge to the inclusion of paid disability leave for childbirth. At issue is the 2.5 months unpaid disability leave.

The ALJ found this 2.5 months counted towards seniority. The Commissioner of Education rendered his decision December 2, 1983 affirming the ALJ's findings and accepting her interpretation of the law applicable to the stipulated facts. On August 8, 1984 the State Board of Education affirmed the Commissioner's decision for the reasons expressed by the Commissioner.

The seniority regulations governing this controversy are as follows:

> Seniority, pursuant to N.J.S.A. 18A:28-9 et. seq. shall be determined according to the number of academic or calendar years of employment, or fractions thereof, as the case may be, in the school district in specific categories as herein provided. Seniority status shall not be affected by occasional absences and leaves of absence. N.J.A.C. 6:3-1.10(b) (Emphasis supplied).[3]

Miklos relies upon prior determinations of the State Board of Education on similar but distinguishable facts. In the case at hand the State Board accepted "for the reasons expressed therein" the following Commissioner's findings.

> Based on a thorough reading of the manifold arguments advanced by the parties and in view of the thorough analysis made by the judge, the Commissioner is convinced that she properly determined the seniority of petitioner herein. In particular, the Commissioner notes with approval the differentiation made by the judge between Berkowicz and Micciche as applied to the instant matter.

Berkowicz v. Scotch Plains - Fanwood Regional School Dist. Bd. of Ed., 1980 S.L.D. 866 and Comaskey v. Fort Lee Bd. of Ed., 1981 S.L.D. 25, aff'd. 1981 S.L.D. 34 are cited by Miklos for the proposition that no unpaid maternity leave is to be counted towards seniority. In Comaskey the ALJ relied on Lascari v. Lodi Bd. of

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[3]This regulation was "clarified" to provide that periods of unpaid absences not exceeding 30 calendar days in any one year, leaves of absence at pay, and unpaid absences for study would be credited. "All other unpaid absences or leaves of absence shall not receive seniority credit." N.J.A.C. 6:3-1.10(b) as amended R. 983 d. 255 effective June 20, 1983, operative September 1, 1983.

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Ed., 36 N.J. Super. 426 (App. Div. 1955) which disqualified a two year disability for seniority purposes. Comaskey also had a long term absence from September 1, 1972 to September 1, 1974 (a mandated maternity leave), and from either September 1, 1978 or January 3, 1978 to September 1, 1979.

In Comaskey these time periods were not credited towards seniority and reliance was placed upon In re: Fidek, 76 N.J. 340, (1978) for the proposition that it would be unfair to credit the time of every approved leave while others "remained at work developing their skills." 76 N.J. at 344.

This is the background for Micciche v. Mount Holly Tp. Bd. of Ed., 1981 S.L.D. 1301, rev'd. on other grounds, 1982 S.L.D. 1542. On December 1, 1981, the Commissioner of Education decided that Micciche having sustained a three month childbirth disability in 1978 should have this disability period included in her seniority determination under N.J.A.C. 6:3-1.10(b).

The State Board of Education rejected this determination saying

> ...In January of 1978 Petitioner had requested unpaid maternity leave for the balance of the school year 1977-78, which would remain after the anticipated birth (which actually occurred on March 27) and the Board granted this request in February of 1978. Approximately two years later Petitioner sought a determination by the Board as to her seniority credit for the final three months of the 1977-78 school year.... By the time she filed her grievance in January 1980, her purported disability in the spring of 1978 had long since come to an end. At a hearing before the Administrative Law Judge Petitioner offered in evidence a doctor's note stating that she was disabled for three months following the birth.... [H]e declined to accept the note "without more".... Accordingly; the claims of disability was [sic] never substantiated by medical proof....

Respondent Miklos contends these cases mean maternity leave is not to be counted, whether accompanied by disability or not, no matter of how short a duration. It is the position of petitioner Zorfass that these cases turn on the failure of petitioners to seek leave for disability, to provide proof of disability and to limit the length of absence.

Petitioner Zorfass distinguishes cases in which childbirth related leaves became absences for child care and therefore not "occasional" nor due to disability. She claims that Micciche made it clear that an unpaid childbirth leave would be acceptable for seniority credit if applied for in advance, required by disability and not of long duration. Zorfass established her disability to the

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satisfaction of Cherry Hill prior to being given leave. There was no distinction between the paid and unpaid leave in her situation thus the time period from January 20, 1978 to March 31, 1978 was an "occasional" absence.

The following is the analysis made by the ALJ on October 14, 1983:

> After reviewing the arguments, I agree with Mr. Hunter's interpretation of the decisions of the Commissioner and the State Board of Education in the Miccichi [sic] case. The State Board of Education in Miccichi clearly rejected the Commissioner's decision that the three-month period should be treated as a medical leave and held that as part of the child rearing leave of absence, the three-month period should not be counted toward seniority, citing the Commissioner's decision in Berkowicz, supra.
>
> By the decision in the Miccichi case, a distinction has been drawn between medical leaves of absences and voluntary leaves of absences for any purpose. If a Board employee elects to be out for a substantial period of time on an authorized leave of absence, that employee is not entitled to seniority credit for that period of time, Berkowicz, supra; Comaskay [sic], supra; In re: Fidek, 76 N.J. 340,344 (1975).
>
> Based on the decisions cited as well as the arguments presented by the parties, I CONCLUDE that Ms. Zorfass is entitled to seniority credit for the period from January 20, 1978 to March 31, 1978 (2.5 months).

Short-term disability leaves related to childbirth have been discussed in our decisional law. Hynes v. Bloomfield Tp. Bd. of Ed., 190 N.J. Super. 36 (App. Div. 1983). (Four weeks before delivery and four weeks after delivery without requiring a disability certificate). We are satisfied that the State Board's interpretation of the applicable law to the facts of this case is not arbitrary, capricious or unreasonable, nor does it lack support in the evidence. See N.J.S.A. 18A:6-27; Quinlan v. North Bergen Tp. Bd. of Ed., 73 N.J. Super. 40, 46-47 (App. Div. 1962).

Affirmed.

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