CITY OF PATERSON, PASSAIC COUNTY, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY, RESPONDENT.	:	DECISION

JANUARY 7, 1993

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STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY, RESPONDENT.	:	DECISION

For Petitioner, Ralph L. DeLuccia, Jr., Esq.

For Respondent, Russell J. Schumacher, Esq.

This matter was opened before the Commissioner by way of a Petition of Appeal filed by the City of Paterson (City) on April 2, 1992 seeking a reduction of $8,197,522 in the current expense budget of the State-operated School District of the City of Paterson (District). The District filed its Answer to the Petition on April 20, 1992. Subsequently the parties filed position statements on May 19, 1992 (District) and June 18, 1992 (City). The District filed a Reply on June 29, 1992 and the City submitted a summation on July 8, 1992 whereupon the record in this matter was closed.

Pursuant to N.J.S.A. 18A:7A-52(a) the State District Superintendent of a State-operated School District is required "...[to] fix and determine the amount of money necessary to be appropriated for the ensuing school year and [to] certify the

amounts to be raised by special district tax for school purposes ... to the county board of taxation and the amount or amounts so certified shall be included in the taxes assessed, levied and collected in the municipality or municipalities comprising the district.***" Unlike other budget appeal processes in the State of New Jersey, it is the municipality which must appeal the determination of the amount necessary to be raised for school purposes, setting forth those specific line items which it believes can be reduced without obstructing the district's ability to provide a thorough and efficient system of education.

Based upon the statutory language summarized above, the City proposed the following tax levy reduction:

Budget Adopted by by the District	Amount of Budget Proposed by Governing Body
Current Expense $219,493,816	Current Expense $211,296,294

Amount of Recommended Reduction in the Budget by Governing Body

Current Expense $8,197,522

Amount of Reduction in Dispute Before the Commissioner

Current Expense $8,197,522

By way of specific line item reductions, the City has set forth the following list of such tax levy reductions and comments:

Line Item

110 Administration, Salaries

1992/93 Appropriation	Revised Appropriation	Reduction
$3,352,797	$3,021,297	$331,500

Reduction of 7 new positions.

212 Supervisory Salaries

$2,368,948	$2,091,948	$ 277,000

Reduction of 5 new positions.

213 Teacher Salaries

$59,034,369	$57,692,052	$1,342,317

Reduction of 30 new teachers.

215 Secretarial and Clerical Salaries

$1,921,844	$1,853,844	$ 68,000

Reduction in cost of 4 new positions by $17,000 each.

630 Heat

$1,090,859	$1,000,000	$ 90,859

Overbudgeted in 1991-92 by $90,859.
Actual expenditure in 1990-91 $956,657.

640 Utilities

$2,426,166	$2,220,210	$ 205,956

Recommended appropriation includes 14.93% increase in electric/gas rates.

660 Operation of Plant

$ 347,750	$ 247,750	$ 100,000

Actual expenditures in this category:
1991-92 $159,366 (through 1/10/92)
1990-91 $157,985
1989-90 $222,353

710 Maintenance of Plant, Salaries

$1,711,080	$1,636,080	$ 75,000

District Organizational Chart calls for 1 Director, 4 listed on salary printout at $75,000 per. Deduct 3 at $25,000 each.

720 Contracted Services

$2,501,480	$2,000,000	$ 501,480

Actual expenditures in this category:
1991-92 (through 1/10/92) $463,111
1990-91 $1,345,758
1989-90 $1,343,791

810 Fixed Charges, TPAF/Social Security

$8,544,581	$8,229,581	$ 315,000

Includes reduction in fringe benefits for 42 positions reduced from budget at $7,500 per position.

820 Insurance and Judgments

$23,337,001	$18,565,677	$4,771,324

Recommended appropriation includes a 15% increase over projected spending for health insurance for 1991-92.

830 Rental of Facilities

$ 524,000	$ 404,914	$ 119,086

Total expenditure in 1991-92, $404,914.

TOTAL REDUCTIONS RECOMMENDED: $8,197,522

I. CITY'S REASONS AND POSITION

By way of general argument the City contends that the Board's Brief and its Separate Defense as raised in the Answer to the Petition of Appeal relative to the lack of detailed reasons for the reductions recommended by the City oversimplifies the standard of review in budgetary matters. The City does not contest the necessity for detailed reasons in support of proposed budget cuts, however, it calls upon the Commissioner to consider the fact that the New Jersey Supreme Court in Board of Education of the Township of Deptford v. Mayor and Council of the Township of Deptford, 116 N.J. 305 (1989) recognized that the Commissioner cannot ignore

political concerns of a municipality and cannot override those concerns absent a showing that the municipality has ignored constitutional mandates for providing a thorough and efficient system of education.

Further, while acknowledging that a statement of reasons must accompany the certifying resolution of the Mayor and Council as per Deptford, supra, the City contends that it did provide reasons for its reductions in exhibits attached to its certifying resolution of March 31, 1992. While acknowledging that the reasons provided with said resolution were not as detailed as those being set forth herein, they did suffice to meet the requirements as set forth by the Court particularly in light of what the City claims was only a 15 day period within which to review documents provided by the District.

The City disputes claims by the District that its statement of reasons was inadequate citing the qualifications of its consultant, Dr. Frank Marlow, and a series of workshops conducted by Dr. Marlow prior to the preparation of its certification resolution. (See Affidavit of Dr. Frank Marlow, attached to the City's Position Statement.)

The City likewise contends that it made every effort to seek information from the District prior to making its determination but was rebuffed by the State District Superintendent, Dr. Laval Wilson. The City contends that the District did not make itself available to its consultant as required in Deptford, supra, in order to facilitate its budgetary review.

The City, while acknowledging past deficiencies in the District and its designation as a special needs district, disputes what it considers the District's approach to improvement, namely increased expenditure. It states as follows:

> ***If the answer to the problems of the District of Paterson were merely to put more money in the budget, the local Board of Education and its administrative personnel would have been extremely successful over the past several years as the Board of Education budget increased by a large percentage in all of the years prior to the takeover. Obviously that was not true and the fact remains today that the mere infusion of money and additional staff will not, in and of itself, solve the District's problems.

The City argues that its position paper is based upon analysis of prior year budgets, prior year actual expenditures and the projections of the District's own auditor. Based upon the foregoing review, the City contends the reductions it has recommended can be effectuated without adversely affecting the District's students. Its proposed reductions are not directed at items which impact upon the quality of education but are aimed at "***excessive or overlapping administrative staff and inflated non-educational items, such as insurance costs." (Letter Brief, at p.5)

Finally, the City urges the Commissioner to consider the special needs of all its citizens for police and fire protection as well as garbage pickup and other vital municipal services.

Account	Reduction
110 Administration, Salaries	$331,500

The City argues that the seven new positions projected by the District are unnecessary. It contends that past mismanagement and over-bureaucratization of the District were responsible for past failures and improvement cannot be accomplished by further adding administrative personnel. It argues that efficiency, not increased administrative personnel in the same jobs as existed prior to State takeover, is the key to success.

The City argues that the new administration of the District had already increased its Central Office staff from one superintendent and three assistant superintendents to one superintendent and five assistant superintendents. It contends that the District has always been burdened by large administrative costs and notes that administrative costs rose 30.4% in 1991-92 over 1990-91 and that such costs are now being increased in 1992-93 by a further 8.6% over the 1991-92 figure.

The City claims a review of the positions to be added reflect duplication of services as follows:

> ***For example, the City proposes both a purchasing agent within the Administrative Account 110, presumably to be hired for $47,000, and a Director of Purchasing placed under Account 710 for a salary of $75,000. The proposed position of Ombudsman is intended to facilitate community and parental communication within the District. However, the District already has a press officer who serves the Superintendent to perform this function. In addition, the Advisory Council itself is charged with the duty of acting as a liaison between the community and the District. The positions of Risk Management Specialist and Employee Benefit Specialist would appear to be positions which at best could be performed served by one individual. The District cites as justification for an Employee Benefits Specialist, the fact that the District's health benefits plan was previously mismanaged. However this position has nothing to do with actual

management of the benefit plan but rather is to act as a liaison between employees and benefit providers.

It would seem that the Risk Management Specialist and the staff of the Personnel and Business Administrator's Office should be able to successfully field questions from employees regarding the fringe benefit plans. This is particularly true since the mismanagement of the District's Health plan will be corrected by participation in the State sponsored plan.
(Position Statement 110, at p.4)

212 Supervisory Salaries $277,000

The City questions how many new positions are actually being sought by the District in this account, four or five, as well as the average salary to be paid to the new employees.

Contending that the District had already increased supervisory personnel immediately after the takeover, the City argues that the five or four new positions projected in this account are in addition to those persons in the supervisory category already added upon the takeover. The City contends that Attachment A to its Position Statement in this account reflects 38 supervisory positions as compared to 27 positions reflected in a 1991-92 payroll report (Attachment B), a net increase of 11 positions.

The City contends that the reduction it recommends would still leave an increase of six supervisory positions to minister to a stable student population.

213 Teacher Salaries $1,342,317

Although the District submits that the proposed reductions will, in reality, result in a reduction of 36 new positions, the City contends that is not the case. The manner in which the City calculated the budget needs for the District in Account 213 without the addition of new employees was based on the auditor's projected

need in that line item. The City took the projected expenditure for the 1991-92 school year from the audit report then added an additional 6.7% increase for the 1991-92 school year and a 6.7% increase for the 1992-93 school year. An additional figure was added for career development salary increases which were previously in a separate Account 1113. The 6.7% increase was also added to that figure for both years. The total projected need of the District was $57,692,052. This left a reduction, without the loss of any existing employees, in Account 213 of $1,342,317:

Audit projected need	$49,285,083.
6.7% for 1991-92	3,302,100.
6.7% for 1992-93	3,523,341.
Career Development salary increases 6.7% increase for 1991-92 and 1992-93	1,581,528.
Total 1992-93	$57,692,052.

It is to be noted that the population and enrollment in the City of Paterson schools has actually declined over the past several years. In the 1987-88 school year the actual pupil enrollment was 22,595; the estimated pupil enrollment for 1992-93 is 22,423, thus, there has been an actual reduction in pupil enrollment. However, the account for teachers' salaries, according to the District's proposal, would increase by 54.1% during the same period of time. From 1987-88 through 1991-92 school year this line item increased 31.9%:

1988-1989	$38,308,917.
1989-1990	$42,996,249.
1990-1991	$48,947,473.
1991-1992	$51,828,835.

While the City does not have the necessary documentation from the District to indicate the growth of staff during those periods of time, the increase in the salary account obviously

establishes that additional staff was added. The District proposes a 13.9% increase over the 1991-92 account while the City proposes an 11.3% increase.

The City further argues that the District mischaracterizes the City's proposed elimination of 30 positions as impacting upon Special Education and Bilingual Education programs. The City claims that Special Education and ESL personnel are carried in lines 134 to 200 within the budget which all reflect increases for teacher salaries in those line items.

Thus, the City contends that proposed reductions in the 213 account will not impact upon Special Education and Bilingual/ESL programs.

215 Secretarial and Clerical Salaries $68,000

The City has proposed a reduction of $68,000 in this account by a reduction in the cost of 4 new positions. The position papers submitted by the District appear to indicate that the District budgeted compensation for each of the new positions in the amount of $27,000. The District has obviously made a numerical error in the calculation of this budget line.

As set forth in the listing of personnel by category provided by the District and attached as Exhibit A for Account No. 215, the District is proposing four new staff at a salary total of $148,000. The City argues that a review of the arithmetical calculation will reflect that this is an allocation of $37,000 per position rather than $27,000 and thus, even assuming for the purposes of argument the correctness of the District's position in this matter, a numerical miscalculation in the amount of $40,000.00 has been made in this account.

Further, the City submits that the proposed salary submitted by the District, even ignoring the arithmetical mistake, is unreasonable. The current average salary for secretarial and clerical salaries as set forth on Attachment A is $22,450. Obviously, new employees would be brought in at lower salaries.

Although the District responds that $7,000 of the proposed $27,000 is for fringe benefits, the City contends it is inappropriate to place fringe benefits in the salary account. Proper budget procedures require that the fringe benefits be allocated to line 820 for health benefits and other appropriate lines. The intermingling of fringe benefits and a variety of salary accounts makes it difficult to assess the District's salary proposal.

The City notes on the list of personnel by category that the page for Account No. 215, Attachment A, does not reflect that fringes are included within the salary line item. This is to be contrasted with the budget detail provided for Account No. 710, Attachment B, which specifically reflects within the budget that fringe benefits are considered within the salary line item. The City contends that the original aforesaid line item was not intended to include the fringe benefits and the District is now attempting to change its position.

The City argues that, taking into consideration the arithmetical mistakes incorporated by the District and the fact that the $27,000 figure is far in excess of the average salary for the personnel proposed, its proposed reduction of $68,000 is reasonable and would not adversely affect the educational program provided for the District's students.

630 Heat $90,859

The City contends that the District has historically overbudgeted in Account 630:

Year	Actual Expenditure	Budgeted Allocation
1990-91	$956,657	$ 985,000
1989-90	$870,956	$ 935,600
1988-89	$810,489	$1,135,600

The City has proposed a budget of $1,000,000 in this account with an increase of 4.5% over the actual expenditures in the 1990-91 school year.

The District proposes as its justification for this increase "highly volatile global conditions which govern the price of foreign oil." (District's Position Statement, 630, at p. 21) However, in reality fuel costs have stabilized over the past several years. The City submits that, since the price of fuel has actually come down since 1990 and 1991, the District will be overbudgeted in the 1991-92 year, as it has been in the past.

640 Utilities $205,956

The 1991-92 budget for Account 640 was $2,042,261. Pursuant to the audit report (Attachment A) the projected expenditure in this account is $1,989,550. Thus, the City contends the District's own audit reflects that Account 640 was overbudgeted in the 1991-92 year by $52,711. The level of expenditure proposed by the City for the entire 640 Account represents an 11.6% increase above the current level of expenditure in that account.

The availability of the reduction in question is further substantiated by a review of the 640B and 640C subaccounts for electricity and gas. Not only is Account 640 presently overbudgeted

but so are the electricity and gas subaccounts. The projected 1991-92 expenditure for the electricity and gas subaccounts, as set forth in the audit, is $1,531,550. This projected expenditure is $33,503 under budget for the 1991-92 budget for those subaccounts.

The Pepe affidavit proposes a 14.93% increase in electricity costs and a 10.7% increase in gas costs. For the purposes of argument, the City will accept Pepe's proposed rates of increase. The projected audit expenditure for 1991-92, which is not allocated between electricity and gas, is $1,531,550. When this figure is multiplied by the District's proposal of 14.93%, the figure which should be included in the 1992-93 budget would be $1,760,210. It is to be noted that the City has actually allowed the District more than it has requested with these figures as the District only requested a 10.7% increase in gas and the City has used the 14.93 figure for both subaccounts. However, because the projected expenditure figure in the audit is not broken down between electricity and gas, the larger proposed increase of 14.93% has been applied to the projected expenditure for electricity and gas. Even allocating that benefit to the District, the 1992-93 budget figure should be $1,760,210. That figure when added to the undisputed subaccounts for water and telephone totals the City's proposed expenditure for Account 640 of $2,220,210. The calculations are summarized as follows:

Projected Audit Expenditure for Electricity and Gas--

	$1,531,550
District's proposed rate of increase	X .1493
Total	$1,760,210

City's Proposal

Electricity/Gas	$1,760,210	
Water	$ 100,000	(Undisputed)
Telephone	$ 360,000	(Undisputed)
Total	$2,220,210	

660 Operation of Plant $100,000

The City has proposed a $100,000 reduction in the District's budgeted amount of $347,750 in Account 660. The District's position paper implies that the City has failed to consider expenditures made in Account 660 after January 10, 1992. The City has considered same. It is to be noted that the City in its review of the budget was forced to work with an audit which only provided figures as of January 10, 1992. The audit expenditures as of that date were $159,366. The City submits that the auditor's projected figure of $340,000 for the remainder of the 1991-92 year is completely unrealistic. The auditor's projection would have an additional amount of almost $200,000 spent in the remaining half of the year. There is no justification for such a projection. In fact, the budgeted figure for 1991-92 was $181,000.

The actual expenditures in Account 660 in the school year 1990-91 were only $157,985. As set forth above, the 1991-92 budget amount was $181,000. The City's proposal of $247,750 represents a 36.88% increase over the 1991-92 budget for Account 660 and an even greater increase over actual expenditures. An increase of that magnitude is more than reasonable. The budgeted amount proposed by the District would represent a percentage increase of 92.1% over the 1991-1992 budget. An increase of that size must be substantiated by more than conclusionary affidavits of employees of the District.

The District maintains that additional funds are needed to lease vehicles to be used by maintenance employees. In fact, the projected budget contains no provision for additional maintenance employees. Rather, the City submits that the District intends to utilize such funds for the leasing of vehicles for administrative and supervisory staff.

In summary, the City submits that the 36.88% increase over the 1991-92 budgeted amount is sufficient for operation of the District without affecting the educational programs to be provided to the students.

710 Maintenance of Plant, Salaries $75,000

The City has proposed a reduction of $75,000 in Account No. 710 for Maintenance of Plant, Salaries. The original amount budgeted by the District was $1,711,080. The organizational flow chart provided by the District calls for one director within this account at $75,000. However, the budget detail (Exhibit A) proposed four (4) directors at $75,000 each. The City had proposed reducing this to 1 director at $75,000 and 3 supervisors at $50,000 each, for a savings of $25,000 each.

In its position paper, the District conveniently states that "not all proposed expenditures for new personnel were placed in appropriate accounts." (District's Position Statement, 710, at p.27) Also, in its position paper, the District discloses that salaries for three (3) non-maintenance directors in different divisions were incorrectly provided for in Account 710. The City respectfully submits that the City should not be penalized for the District's errors in budgeting this account. At the time that the City proposed its reduction in this account, the budget detail

provided for four directors within the account. The City had no way of knowing that the District had committed an error by putting three non-maintenance directors within this account.

The City contends that even assuming that the District should be allowed to put three non-maintenance directors in this account, the proposed salary of $75,000 is excessive.

720 Contracted Services $501,480

The actual expenditures for Account 720 in previous school years were as follows:

1990-91----------$1,345,758

1989-90----------$1,343,791

The City's proposed budget of $2,000,000 is 48.6% higher than the 1990-91 actual expenditures by the District in this account. This exceptionally large increase in one account more than adequately covers proposed increases in the costs of those services. The District would propose an increase of 85.9% over the 1990-91 total expenditure.

The District provides no documentation other than unsubstantiated affidavits of employees with regard to the necessity for such an increase. The District has not indicated that any new contracted services are to be included in Account 720. The District attempts to explain this huge increase over the 1990-91 expenditures by an explanation that the position of School Business Administrator was not filled for several months during that year. However, there was an Acting Business Administrator during the period in question and the District continued to operate with an Acting Business Administrator. In addition, the District will now be complying with the appropriate bidding laws and should save substantial monies in conjunction with the award of contracts.

810 Fixed Charges $315,000

The City admits that its recommended reduction in this area was attributed to a reduction in medical benefits which should have more properly been attributed to Account 820. Nonetheless, it points out that a reduction of 42 new positions as recommended in the various salary accounts at approximately $7,500 per position for medical benefits would permit the $315,000 reduction in the 820 Account.

The City contends it should not be penalized for attributing the reduction to the wrong account number since the District itself has admitted to several errors in attribution and has helped to create confusion by including fringe benefits in some areas to salary accounts and to the appropriate accounts in other areas.

820 Insurance and Judgments $4,771,324

In Account 820, Insurance and Judgments, the City has proposed a reduction $4,771,324. This reduction is based on the excessive increase in this account over expenditures made in the account in the school year 1990-91 and the projected expenditures in that account for the school year 1991-92.

The City recognizes that Account 820 is broken down into subaccounts for property insurance and employee health insurance and associated benefits. It is interesting to note, however, that the City's audit is not broken down into such subaccounts regarding health and other benefits; thus a comparison is difficult. However, the City does not propose a reduction in subaccount (1) for property insurance, but rather seeks a reduction in subaccount (2) for employee health and associated benefits.

The actual expenditure in Account 820 for the 1990-91 school year was $11,139,952. The District's audit projection for employee health and associated insurance for the 1991-92 school year, excluding property insurance, liability insurance, and fidelity bonds, is $15,168,894. That audit projected expense is 36% higher than the entire 820 account actually expended by the District in the 1990-91 school year, including all other forms of insurance. The total budget proposed by the District for employee health, prescription, dental and optical, for the 1992-93 school year, is $20,750,800.

This proposed budget is 86% higher than expenditures in the entire account in the 1990-91 school year. It is 36.8% higher than the District's own auditor projections for 1991-92. The City submits that a proposed 86% increase over the 1990-91 expenditures is a flagrant example of runaway spending by the District.

Although there were problems of mismanagement in the past with this program, the District will now be participating in the State health plan. Presumably with the changes in administration, all of the other associated health benefits will be bid and result in additional savings to the District.

The City's proposed reduction of $4.7 million still allows for a 15% increase above the 1991-92 projected expenditures of the District's own auditor. The City submits that such an increase is reasonable and that, in fact, the Commissioner should investigate unreasonable increases in this account in the past year.

830(a) Rental of Facilities $119,086

The District has proposed a budgeted amount of $524,000. This amount is approximately $190,000 in excess of the auditor's projections of the District's expenditures for this account for the school year 1991-92. As set forth in the audit (Exhibit A), the cost of existing leases for the District is $334,914. Although the position statement submitted on behalf of the District indicates that the expenditures in this line item will total $404,914, in reality, the auditor has specifically referenced every existing lease with the District as follows:

St. Bonaventure	$176,000
35 Church Street	$ 58,914
Fair Lawn Bd. of Ed.	$100,000
	$334,914

The City projects an expenditure for this account of $404,914 which is $70,000 in excess of the current commitments of the District as set forth by the District's own auditor. In addition, no documentation has been provided as to the need for the lease of additional facilities or the proposed expenditure for said lease.

The City respectfully submits that since the City has proposed $70,000 in excess of the actual expenditures for the 1991-92 school year, the proposed reduction in the budgeted amount for Account 830(a) Rental Facilities is reasonable and does not adversely affect the educational programs provided by the District.

II. DISTRICT'S POSITION

The District's general position argues that the City has failed to meet its burden of proof to demonstrate that the amounts budgeted by the District are not necessary for a thorough and efficient system of education. The District points out that the City fails to recognize what standard the Commissioner must apply pursuant to N.J.S.A. 18A:7A-52 in circumstances such as this, namely that it is the Commissioner's responsibility to approve an amount necessary "to provide a thorough and efficient educational program including the implementation of the plan to correct deficiencies."

The District asserts that the dispute is not about tax rates, noting that N.J.S.A. 18A:7A-52(b) provides an avenue for the City to appeal to the Division of Local Government Services in the Department of Community Affairs if it believes the school budget places an unreasonable tax burden on the City.

The District likewise rejects the argument of the City that Dr. Laval S. Wilson prevented Dr. Marlow, the City's consultant, from speaking to staff, contending instead that Dr. Wilson only requested to be informed as to what staff members were to be consulted.

The District further argues that the City fails to recognize that the Quality Education Act as amended in accord with the Supreme Court's ruling in Abbott v. Burke, 119 N.J. 287 (1990) requires that special needs districts increase their expenditures in order to narrow the gap between the poorest districts and the wealthier ones. Without such increased expenditures, the children of Paterson would be denied their entitlement to a thorough and efficient system of education.

The District further challenges the City's assertion that additional staffing is the District's answer to meet its constitutional mandate. The District points out that the statute governing State-operated school districts requires a reorganization of central office administrative and supervisory staff within the first six months of its establishment. The District contends that the positions established were all necessary to provide the supervision and oversight lacking under the previous administration and board.

The District also submits that the City's analysis centers almost completely on a review of expenditures in previous years. The District contends such analysis is inappropriate since the 1991-92 budget was prepared by the previous administration which budget did not reflect a relationship to actual expenditures. The District urges the Commissioner to focus on the amount necessary for the 1992-93 school year and reject "simplistic" analyses of percentage increases.

110 Administration, Salaries $331,500

The District maintains that there are compelling reasons, as outlined in its written position statement, to support the addition of the positions of Assistant Business Administrator, Purchasing Agent, Assistant Supervisor of Custodian Services, Risk Management Specialist, Employee Benefits Specialist and Supervisor of Accounting in the Division of Business Services. The numerous deficiencies in the Division of Business Services were caused in part by an administration that was unable to identify its own staffing needs. The City makes conclusionary statements that certain positions are not needed or would overlap in duties. For

example, the Risk Management Specialist and Employee Benefits Specialist positions involve different responsibilities. The functions of the Risk Management Specialist would be to seek ways to reduce the District's exposure to liability and to ensure that proper casualty insurance coverages are in place. The Employee Benefits Specialist would serve as the liaison between employees and health benefits providers. The additional positions in Business Services are all needed and are common in large school districts.

The City has no basis for its assertion that the position of ombudsman is not needed. The role of the ombudsman to facilitate community and parental involvement requires a full-time employee who can devote himself or herself to these responsibilities. This position will assist the State District Superintendent to fulfill his statutory requirement to involve parents and the community in the District. It is ironic that the City would seek to eliminate a position which would foster greater involvement of the community in the District.

212 Supervisory Salaries $277,000

In reply to the City's position statement regarding Account 212, Supervisory Salaries, the District submits that the City has failed to meet its burden of proof to support any reduction in this line item. As indicated in paragraph 6 of the Affidavit of Clarence Hoover submitted by the District with its position statement, this line item reflects the addition of four new director positions in the Division of Curriculum and Instruction. A fifth director position, the Director of Special Services, was added to the initial budget for the 1992-93 school year, but is not a new position for the District. The Director of Special Services

position has been vacant since December 31, 1991 when the former director retired following an extended sick leave. The District's initial budget documents had erroneously listed the Director of Special Services as a new position. Accordingly, only the four director positions set forth in the District's position statement should be at issue.

The 1991-92 payroll report relied upon by the City for its assertion that there were only 27 supervisors prior to the State takeover does not provide an accurate reflection of the particular positions which are included in Account 212 for the 1992-93 school year. As evidenced by the District's budget detail, the payroll report did not include five supervisory positions of which two were added following the takeover, in addition to the four new positions which the District has budgeted for the 1992-93 school year. The District's position statement provides sufficient support for its addition of the new director positions in the areas of Instruction, Literacy, Student Support Services and Bilingual/English as a Second Language. These new supervisory positions will have over-sight in areas of critical need to the District to meet the educational needs of the District and to bring the District into compliance with laws and regulations.

The District submits that the City has provided no rationale to support the elimination of the new director positions which, as indicated in the organization chart, will provide for improved span of control and proper focus in the Division of Curriculum and Instruction.

In conclusion, the District submits that the entire amount budgeted in Account 212 is reasonable and necessary.

213 Teacher Salaries $1,342,317

In reply to the position statement of the City, regarding Account 213, Teacher Salaries, the District submits that the City has failed to meet its burden of proof to support any reduction in this line item. The City's proposed reduction purports to eliminate thirty new teaching positions. The District maintains that the amount of the proposed reduction of $1,342,317 would, in fact, provide for the reduction of thirty-six positions based upon an average salary of $30,000 and $7,000 in benefits which was included in this line item for new teachers.

Notwithstanding the arguments of the parties regarding the number of teachers that would be affected by the proposed reduction, the District submits that the additional teaching staff is necessary and is not unreasonable in light of the high class size and special needs of the District. The District notes that all new teaching staff positions have been included in this account although a number will, in fact, service special education and bilingual/ESL programs/ ESL teachers, the amounts funded for those positions and bilingual/ESL teachers will be transferred to the appropriate accounts. The City's assertion that nineteen (19) new special education/ESL teaching positions are provided for in the 1992-93 budget is incorrect. The documents upon which the City relies indicate increases in the budget, but ignore the fact that the special education/ESL salary accounts were overspent during the 1991-92 year due to the failure of the prior Board of Education to provide adequate appropriations in these accounts.

215 Secretarial and Clerical Salaries $68,000

In reply to the City's position statement regarding Account 215, Secretarial and Clerical Salaries, the District submits that the City has failed to meet its burden of proof to support any requested reduction in this line item. The salary budgeted for each of the four new secretarial positions was $20,000. Also included in this line item was $28,000 for benefits for the new secretaries (at $7,000 each) and projected overtime of $40,000. The District acknowledges that the City's proposed reduction would then leave only $10,000, apart from benefits as salary for the secretaries.

The District submits that the $20,000 salary proposed for the four additional secretarial positions is reasonable. As the secretaries would support new administrators in the Business Services Division, it is essential that the budget adequately provide for the compensation for these new positions.

630 Heat $90,859

In reply to the City's position statement regarding this account, the District submits that the City has failed to meet its burden of proof to support any reduction.

The City appears to base its reduction on actual expenditures from the 1990-91 school year. The current appropriate ledger for the District as of June 25, 1992, indicates that the District will expend no less than $1,073,725 in this line item during the 1991-92 year. The District's budgeted amount of $1,090,859 provides for only a 1.6% increase. The budgeted increase is certainly reasonable in light of potential changes in the price of fuel oil and the potential for a colder winter in the 1992-93 year.

640 Utilities $205,956

In reply to the City's position statement regarding Account 640, Utilities, the District submits that the City has failed to meet its burden of proof to support any reduction in this line item.

As indicated on the appropriation ledger, the expenditures and encumbrances in Account 640, as of June 25, 1992, were $2,001,876. The figures in the appropriation ledger should be utilized, not auditor's estimates made almost six months ago. This amount does not include all utility costs for the 1991-92 year. The District submits that the basis for its budget appropriation for the 1992-93 year is fully supported in its written position statement.

In conclusion, the District submits that the budgeted amount in Account 640 is reasonable and necessary.

660 Operation of Plant $100,000

In reply to the City's position statement regarding Account 660, the District submits that the City has failed to meet its burden of proof to support any requested reduction in this line item. The District submits that its projected expenditures as set forth in its position statement are accurate and that the increases budgeted for are also reasonable. Accordingly, the District submits that the entire amount budgeted in this line item is necessary. A review of expenditures to date in this account indicates that this line item has already been overspent by $72,768.70. The District has had to draw upon this line item for not only vehicle expense for maintenance but also costs the prior Board of Education had not anticipated including permits related to compliance with environmental regulations, including transfer station fees paid to Passaic County Utilities Authority for the disposal of refuse

($85,000 as of June 25, 1992) and refuse collection by a private hauler ($141,460 as of June 25, 1992). The City had formerly provided refuse collection for the District, and the Board of Education was not aware that the City was going to discontinue this service when the District's 1991-92 budget was prepared.

The District rejects as inflammatory and without basis the City's assertion that the District has sought to include funds in this account to be used for the lease of additional vehicles for administrative and supervisory staff. Other than a leased vehicle for the State District Superintendent pursuant to his contract with the State Board of Education and one vehicle utilized to transport administrative and supervisory staff, there are no other leased vehicles for administrators or supervisors in the District.

In conclusion, the District submits that the increases in this line item are clearly reasonable and necessary to meet the District's anticipated expenditures for the 1992-93 year.

710 Maintenance of Plant $75,000

The District avers that its position statement sufficiently sets forth the District's position that the four new director positions which were included in this account are necessary for the District to meet its mandates to bring the District into compliance with laws and regulations affecting its business services.

The City has no basis for its conclusionary statement that the salaries provided for in this account are excessive. The District submits that the compensation of $75,000, which includes $7,000 in benefits is reasonable for the director positions which were included in this account. These positions will have significant responsibilities in the area of business services and the proposed compensation is in line with comparable positions in

other large school districts and city governments. The City errs in concluding that the Director of Purchasing would report to the Purchasing Agent. In fact, the Purchasing Agent will be reporting to the Director of Purchasing.

In conclusion, the District submits that the budgeted amount in Account 710 is reasonable and necessary.

720 Contracted Services $501,480

In reply to the City's position statement regarding Account 720, Contracted Services, the District submits that the City has failed to meet its burden of proof to support any reduction in this line item.

The District accurately pointed out in its position statement and supporting affidavit of Barbara Kaye Mortimer, School Business Administrator, that the District's utilization of funds budgeted in this account was delayed due to the fact that the School Business Administrator position was not filled for several months and that there were no individuals on staff to coordinate the bidding and awarding of contracts. The District anticipates receiving the report of an outside consultant regarding its facilities during the summer of 1992 and anticipates that numerous repairs will be made based upon the report and the District's own assessment of its needs. The amount appropriated in this line item is needed to provide for the anticipated expenditures. The District also noted in its position statement that this line item includes $350,000 earmarked for the provision of maintenance and service to new copy machines and other equipment throughout the District's schools and central offices. Also, $50,000 was budgeted for snowplowing.

Any expenses for contracted building repairs and maintenance during the 1992-93 school year will be handled as current expense and drawn from the 720 Account. To address the District's needs, the District submits that the budgeted amount is reasonable and necessary.

810 Fixed Charges - TPAF/Social Security $315,000

In reply to the City's position statement regarding Account 810, Fixed Charges-TPAF/Social Security, the District submits that the City has failed to meet its burden of proof to support any reduction in this line item. Although the City states that Account 820 should be reduced, instead of Account 810, to reflect the cost of fringe benefits for the 42 new positions it proposes to eliminate, the District has indicated that the 1992-93 budget provided for the cost of fringe benefits in the particular salary accounts. Accordingly, no reduction should be sustained in Account 820 as the fringe benefits for the new positions are not contained in this line item. As noted in the District's position statement, the fringe benefits cost will be transferred to Account 820 upon the hiring of individuals for new positions.

The District submits that the reductions sought by the City are already accounted for in its proposed reductions in the salary accounts. Accordingly, there should no issue pertaining to any reduction in Account 810 or 820 new employees.

820 Insurance and Judgments $4,771,324

The District submits that the figures contained in its position statement accurately reflect the District's anticipated expenditures in this line item for the 1992-93 school year. As the District is not in a position to bring about reductions in the

expenditures in this account, it submits that the entire budgeted amount is necessary.

The City has failed to provide any support for its inflammatory comments regarding the projected expenditures in this account. The District notes that its transition to the State Health Benefits Program will require it to pay $3,800,000 to Massachusetts Mutual pursuant to the termination clause in the agreement between the prior Board of Education and the insurance carrier to cover the payout for claims which arose during the 1991-92 school year, but will be paid for after June 30, 1992. The City's arbitrary assignment of a percentage increase to this line item is without a rational basis.

The District submits that the entire amount budgeted in Account 820 is reasonable and necessary.

830(a) Rental of Facilities $119,086

In reply to the City's position statement regarding Account 830(a), the District submits that the City has failed to meet its burden of proof to support any reduction. In its position statement, the City relies upon erroneous information regarding the cost of existing leases for the District. As set forth below, the District leases two facilities which were not included in the City's calculations and an additional $74,000 in expenditures is anticipated to cover parking expenses for District employees at the Municipal Parking Garage. As the District anticipates the need to lease an additional facility, an increased appropriation for this account is reasonable and necessary.

The District submits that the budgeted amount in Account 830(a) is reasonable and necessary.

	FY 92-93
35 Church Street	$ 60,374.56
133 Ellison	$ 3,600.00
St. Bonaventure School	$175,999.92
Fair Lawn School #1	$106,000.00
28 Marshall	$ 3,000.00
MUA Parking	$ 60,000.00
	$408,974.48
MUA Parking Correcting Adjustment 2/5/92 BKM	$ 14,000.00
TOTAL	$422,974.48
USE	$424,000.00

III COMMISSIONER'S DECISION

In rendering his determination in this matter, the Commissioner takes notes of the legal arguments raised by the parties by way of their general positions. In so doing, the Commissioner finds merit in the District's assertion that the City failed to set forth specific reasons for its recommended reductions in its Resolution appealing this matter to the Commissioner. Upon examination of the comments accompanying the recommended reductions, the Commissioner finds such purported reasons to be thoroughly lacking in detail and specificity and they do not meet the burden of demonstrating that the amount by which the various line items were reduced are unnecessary for the provision of a thorough and efficient system of education. Nonetheless, the Commissioner does recognize that Deptford, supra, does require him to take cognizance of and consider the reasons which may be offered at a later time by the municipality in light of the degree to which these reasons are consistent with the constitutional mandate.

Further, the Commissioner agrees with the position set forth by the District in this matter that his sole responsibility in this matter involving a State-operated school district, pursuant to

N.J.S.A. 18A:7A-52, is to approve an amount necessary for meeting the aforesaid constitutional mandate including such amounts which may be necessary to correct deficiencies. He likewise must affirm the District's position that the City has an avenue, apart from appealing to the Commissioner, provided for in N.J.S.A. 18A:7A-52(b) if it believes the school district budget places an unreasonable tax burden on the City.

The District's legal argument is likewise sound when it points out that the Quality Education Act in accord with the Supreme Court's ruling in Abbott v. Burke, supra, requires a special needs district like Paterson to increase its annual expenditures so that they may reach a point within five years which will be equal to the average expenditures of the most affluent districts in the State. Therefore, it must be concluded that mere comparisons of expenditures in previous years without also meeting the very difficult burden of demonstrating that the budgeted funds of the District are not necessary for a thorough and efficient system of education cannot be accepted as an adequate basis for justifying budget reductions. Of particular moment in this regard is the decision of the State Board of Education in Mayor and Council of the City of Jersey City v. State-Operated School District of Jersey City, decided August 5, 1992 wherein it found:

> ***Moreover, given this district's history of educational inadequacy and fiscal mismanagement which resulted in our decision to order the creation of a State-operated school district, McCarroll v. Board of Education of the City of Jersey City, decided by the State Board, October 4, 1989, we find that the historical spending patterns of this particular district can not be used to conclude that amounts in its 1991-92 budget have been over-budgeted. Rather, in reviewing this district's budget, we must be particularly attentive to whether the District's

> financial resources will be sufficient to enable it to meet the educational needs of its students. Accordingly, we must review the reductions sustained by the Commissioner with great care. (at p.4)

Consequently, while recognizing the heavy burden which the law places upon a municipality in appealing a budgetary allocation of a State-operated special needs district, the Commissioner, also mindful of the responsibilities placed upon him in considering the reasons projected by a municipal governing body pursuant to Deptford, supra, shall proceed to consider the reductions proposed by the City in this matter, line item by line item.

110 Administration, Salaries $331,500

The Commissioner notes that the City offers no cognizable basis for its proposed reduction other than its contention that the increases in administrative personnel create an administrative structure greater than that which existed in an admittedly ineffective and inefficient administration of the district prior to takeover. Consequently, the Commissioner finds and determines that the City has failed to meet its burden of proof and directs that the $331,500 proposed reduction be denied.

212 Supervisory Salaries $277,000

In this account, the Commissioner notes that the City's arguments rest almost exclusively on numbers of new persons to be hired and in a dispute over whether the District's intent is to create four or five new positions. It is noted by the Commissioner that the District has identified the new positions to be created as being in the areas of instruction, literacy, student support services, and bilingual/ESL. Under the circumstances which prevail in this matter, namely a special needs district whose supervisory

structure was so lacking as to require a State takeover, the City has failed to demonstrate that these positions and the revised supervisory structure of the District are not necessary to assist the District in developing a thorough and efficient system of education as constitutionally mandated. Reduction of $277,000 is denied.

213 Teacher Salaries $1,342,317

The City's arguments in reference to their proposed reductions in this account focus entirely upon past expenditures and auditor's projections of costs. This type of analysis fails to take into consideration educational needs in a District whose past performance has been so bad that the extreme step of a State takeover was required. Given past deficiencies and the District's need to reduce class size, despite the City's contention of falling enrollment, the City has failed to demonstrate that the 30 new teachers are not required, particularly in the areas of special education and bilingual/ESL.

While there is merit in the City's argument that the total number of new teachers to be hired, including special education and bilingual teachers, should not be carried in this account, as contended by the District, the fact that the Board has budgeted for its needs in an improper account does not detract from the need itself. The reduction of $1,342,317 is denied.

215 Secretarial Salaries $68,000

The City's argument once again focuses upon inadequacies of the District's budgeting procedures, namely the budgeting of fringe benefits in the salary account. While the City's criticism in this regard is meritorious, it does not address the question of whether

the positions themselves are needed. Consequently, the City has failed to demonstrate the lack of need for the positions in question. The requested reduction of $68,000 is denied.

630 Heat $90,859

Notwithstanding contentions by the City of overbudgeting in this account, the District's latest figures indicate that it has expended the preponderance of the amount appropriated in 1991-92. Given the uncertainties which exist in this area, namely the degree of severity of the winter of 1993, the small increase in heating oil projected by the District is entirely reasonable. The reduction of $90,859 in this account is denied.

640 Utilities $205,956

The City's arguments in this area as they relate to alleged overbudgeting for utilities are all based upon the auditor's projections of 1991-92 expenditures. Actual expenditures for the utilities in question as demonstrated by the District were 98% of the amounts appropriated for 1991-92. Since the budgeting process is an estimate, at best, the total amount projected by the District in this account of $2,426,166 is not an unreasonable estimate. The reduction of $205,956 is denied.

660 Operation of Plant $100,000

Once again the City has utilized previously budgeted amounts to justify its recommended reduction. While its principal argument stresses large percentage increases in this account, it has failed to meet its burden that the amounts necessary for the services required as delineated by the District are unnecessary. The City's claim that the additional funds requested in this account are to provide for leasing of vehicles for use by administrative and

supervisory staff are entirely unsubstantiated. The $100,000 reduction in this account is denied.

710 Maintenance of Plant, Salaries $75,000

The principal argument of the City revolves around how much the District plans to compensate its personnel in this account. It further disputes the District's method of budgeting in placing non-maintenance positions in this account as well as its inappropriate inclusion of fringe benefits in the salary accounts. While there is merit in the City's position relative to the District's cavalier method of budgeting, these arguments fail to address the merits of the need for the positions budgeted by the District.

Even assuming, arguendo, the correctness of the City's position on what the District intends paying the personnel in this account, it has not demonstrated that non-curriculum related directors, such as those in Financial Operations and Management Information, do not have duties which would entitle them to greater compensation than that afforded curriculum supervisors. The $75,000 reduction in this account is denied.

720 Contracted Services $501,480

Once again, the City relies upon past expenditures in justifying its proposed reductions in this account. Reliance upon such data in a district which has been notoriously remiss in meeting its responsibilities is entirely without merit. This is particularly true in a special needs district which is obligated under legislative and judicial mandate to increase its expenditures in order to meet constitutional mandates, one of which is to provide

safe, clean and healthful facilities necessary to ensure a thorough and efficient system of education. The reduction of $501,480 is denied.

810 Fixed Charges $315,000

While the City makes an excellent point in reference to the appropriate place for budgeting fringe benefits such as hospitalization and medical benefits and the District is hereby admonished to correct its deficiencies in the manner in which it budgets such benefits, no reduction in this account is justified in light of the fact that the 42 new positions which the increase in this account is intended to cover have all been sustained by the Commissioner in this decision. The $315,000 proposed reduction is denied.

820 Insurance and Judgments $4,771,324

Again the City argues percentage increases without consideration of the necessity for such increases. The Commissioner notes that the District's explanation that it must pay $3,800,000 to Massachusetts Mutual pursuant to its termination clause with that company to cover payments for claims which arose in the 1991-92 school year, but payable in 1992-93, is not disputed by the City in its summation paper. The reduction of $4,771,324 is denied.

830(a) Rental of Facilities $119,086

The documentation provided in this matter, which includes the payment for parking facilities, indicates the projected expenditure of $424,000 for facilities already leased. The District's contention that another facility is required to be leased during the 1992-93 school year is not refuted by the assertion of the City that if such facility had not been leased as of the time of

this appeal it would not be leased. The Commissioner notes that the City's argument that the District should not pay for parking facilities for its administrative and supervisory staff is entirely without merit. Notwithstanding the alleged $70,000 figure used as salary for administrative and supervisory personnel, the provision of parking facilities for employees does not constitute a luxury or an excessive benefit, particularly in a crowded urban setting. The reduction of $119,086 in this account is denied.

In conclusion, the Commissioner has found that the City of Paterson has failed in its burden to demonstrate that the entire amount budgeted by the State-operated School District of the City of Paterson was not necessary to provide a thorough and efficient system of education to the pupils of Paterson. The Commissioner therefore directs that the entire recommended reduction of $8,197,522 in current expense proposed by the City be denied. The Commissioner therefore further determines that the amount of tax required for the Paterson Public School District in order to provide a thorough and efficient system of education is $38,500,534 which shall partially fund a total current expense expenditure of $219,493,816 as originally projected and certified by the State District Superintendent of the aforesaid district.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JANUARY 7, 1993

DATE OF MAILING - JANUARY 7, 1993

2-93

WALTER MC ALOON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning music teacher was riffed in 1991-92 (N.J.S.A. 18A:28-9). He claimed violation of tenure and seniority rights when Board retained another teacher and not him.

ALJ found that district had corrected errors concerning the other teacher's employment -- she should have been offered positions between 1985 and 1989 and when she was rehired in 1989 she was mistakenly listed as nontenured. Thus, she was a tenured teacher with superior seniority rights to those of petitioner. Therefore, petitioner's rights were not violated. Petition was dismissed.

Commissioner adopted findings and determination in initial decision.

JANUARY 5, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6252-91
AGENCY DKT. NO. 174-6/91

WALTER MC ALOON,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,
Respondent.

Harold N. Springstead, Esq., for petitioner

Harold Smith, Esq., for respondent (Wilentz, Goldman & Spitzer, attorneys)

Record Closed: August 31, 1992 Decided: November 30, 1992

BEFORE **JOSEPH F. FIDLER,** ALJ:

STATEMENT OF THE CASE

Petitioner Walter Mc Aloon, a tenured teaching staff member and a teacher of music, asserts that the respondent Board of Education of the Township of Old Bridge has acted in violation of his tenure rights pursuant to *N.J.S.A.* 18A:28-5, and his seniority rights, pursuant to *N.J.A.C.* 6:3-1.10, by refusing to continue his 1991-92 employment. At issue is whether petitioner's tenure and seniority rights have been violated by the respondent, and if so, what remedies would be appropriate.

PROCEDURAL HISTORY

Petitioner filed a verified petition of appeal with the Commissioner of Education on June 5, 1991. The respondent Board filed its answer on June 19, 1991.

The Department of Education transmitted the matter to the Office of Administrative Law on June 24, 1991, for determination as a contested case, pursuant to *N.J.S.A.* 52:14F-1 to -13.

Prehearing conferences were held on January 9 and February 11, 1992. The matter was originally scheduled to be heard on July 9, 1992, but was adjourned from that date because the petitioner's principal witnesses were unavailable. The matter was then rescheduled to be heard on August 31, 1992. The hearing was held as scheduled in Old Bridge, New Jersey, and the record closed on that date. Subsequently, an order was entered extending the time limit for filing this initial decision.

FINDINGS OF FACT

There is no genuine dispute concerning the material facts in this matter. Jane Lamb is employed by the respondent Board of Education as a music teacher. She has certifications in music, English, and speech and drama. It was the testimony of Ms. Lamb that she was first hired by the respondent in 1974. Ms. Lamb obtained tenure in 1977.

By letter from Assistant Superintendent for Personnel Andrew Korshalla dated April 17, 1985 (Exhibit P-5), Ms. Lamb was informed that certain teaching positions for the 1985-86 school year would be abolished due to declining school enrollments, program modifications and budget uncertainties. Ms. Lamb was informed that she would be directly affected by the action and would not be offered a contract for the coming school year. Ms. Lamb testified that it had become commonplace for the teachers to receive such a notice. Although she had received them each year for a number of years, she had always been rehired for the next Fall. However, the respondent school district did not rehire Ms. Lamb for the 1985-96 school year.

It was the testimony of Ms. Lamb that she applied for a job in the Rumson School District and was hired. She began that job in September 1985. Ms. Lamb worked in the Rumson school district for three years, but she was not thereafter rehired by that district. It was her sincere and credible testimony that during the three year she worked for the Rumson school district, she was not aware of any openings for teachers in the Old Bridge School District. In addition, no one from the Old Bridge School District called her about any such openings. After Ms. Lamb lost her job in the Rumson district in June 1988, she learned of and applied for an

opening in the Old Bridge district, commencing September 1988. Ms. Lamb was interviewed for the job, but she was not hired. However, the individual who was hired subsequently proved to not have the correct certification and she was let go during the school year. Ms. Lamb was then hired by the Old Bridge School District, effective April 27, 1989 (Exhibit P-10).

Ms. Lamb testified that she did not realize when she was rehired at Old Bridge that she was considered to be a non-tenured teacher. It was only after Ms. Lamb was observed for the fourth time that she realized that she was being treated as non-tenured. According to Ms. Lamb, at the beginning of her second year back with the Old Bridge District, she discussed her status with Dr. Peter Delaney, Assistant Superintendent for secondary education. It is undisputed that the respondent school board's error was subsequently corrected and Ms. Lamb was restored to the tenure and seniority rights to which she was entitled.

Dr. Andrew Korshalla testified that he has been superintendent for the respondent school district since 1989. Prior to that, he was assistant superintendent for personnel for about ten years. According to Dr. Korshalla's testimony, the school district used a seniority expert, Robert F. Strauss, to review the school district records and prepare seniority lists (Exhibit J-1). The superintendent's office maintains a preferential hiring list for the rehiring of teachers who had lost their positions due to reductions in force. Ms. Lamb had been informed by the letter of April 17, 1985 (Exhibit P-1), that she would be placed on a preferential hiring list for recall.

Dr. Korshalla testified that the superintendent's office may have been remiss in properly maintaining the preferred eligibility list for recalling tenured teachers. In September 1986, a music teacher with less seniority then Ms. Lamb was called back for rehire by the district (Exhibits P-3 and P-4). In August 1987, petitioner Walter McAloon was hired by the respondent school district as an instrumental music teacher (Exhibit P-7). An elementary music teacher was hired by the respondent district in September 1988 (Exhibit P-8). Dr. Korshalla had no information concerning whether the respondent district at any time contacted Jane Lamb to offer her these positions pursuant to a preferential rehire list.

Dr. Korshalla testified that Jane Lamb was hired by the district effective April 27, 1989 (Exhibit P-10). According to Dr. Korshalla, Ms. Lamb was hired as a non-tenured teacher with prior experience in the district (Exhibit P-11). By a Board resolution of May 8, 1991 (Exhibit P-12), there was to be a reduction in force

affecting all non-tenured teachers. The names of Jane Lamb and petitioner McAloon both appeared as being non-tenured teacher (P-12). According Dr. Korshalla, it was brought to his attention by Dr. Delaney that Ms. Lamb should have been rehired by the respondent district as a tenured teacher. Dr. Korshalla did not know how the mistake concerning Ms. Lamb's tenure had happened, but the mistake was corrected.

Assistant Superintendent Delaney testified that Ms. Lamb asked him to look into her salary and seniority. When he did, he discovered that she had been affected by a reduction in force in 1985 and had not thereafter been called back by the school district. Dr. Delaney stated that he then advised the superintendent that Ms. Lamb was improperly classified as a non-tenured teacher. Dr. Delaney had no knowledge as to whether seniority lists were used to determine whom to rehire following a reductions in force. However, he had been told by consultant Robert F. Strauss that there was a period of about two year when teachers that had been affected by the reductions in force were not carried on the seniority list. In 1986, Ms. Lamb did not appear on the seniority list (Exhibit P-13). Dr. Delaney did not know whether any one from the school district had ever called Ms. Lamb to let her know about openings in the school district. In any event, when it was learned that Ms. Lamb should have been rehired as a tenured teacher, the school district records were corrected to so reflect. When there was a subsequent reduction in force for the 1991-92 school year, petitioner Walter McAloon was not renewed by the respondent school board.

All of the preceding evidence is essentially undisputed and believable, and is is thus **FOUND AS FACT**.

CONCLUSIONS OF LAW

The petitioner asserts that the respondent Board has acted in violation of his tenure rights and his seniority rights by refusing to continue his 1991-92 employment. Under the applicable statutes, *N.J.S.A.* 18A:28-5 and 18A:28-6, petitioner has acquired tenure in respondent's school district. However, the Board has discretion to reduce its work force pursuant to *N.J.S.A.* 18A:28-9, which provides:

> [n]othing in this title or any other law relating to tenure of service shall be held to limit the right to any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for

> reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article.

Pursuant to *N.J.S.A.* 18A:28-12, if any teaching staff member shall be dismissed as a result of such reduction, such personnel shall remain upon a perfered eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified. When such vacancy occurs, the person shall be reemployed by the body causing dismissal, and in determining seniority, and in computing length of service for reemployment, full recognition shall be given to the previous years of service. Pursuant to *N.J.S.A.* 18A:28-9 and *N.J.A.C.* 6:3-1.10, seniority shall be determined according to the number of academic or calendar years of employment, or fraction thereof, as the case may be, in the school district in specific categories.

In this matter, the petitioner contends that he is entitled to a teaching position ahead of Ms. Lamb. He acknowledges that Ms. Lamb had tenure and more seniority then he. However, the petitioner asserts that several music teachers, including the petitioner himself, where hired by the respondent Board before it rehired Ms. Lamb. If it were inferred that the Board had offered any of those positions to Ms. Lamb first, as it should have, then she would have forfeited her seniority if she had declined the position.

The respondent Board admits that it failed to properly keep a perfered eligibility list for those tenured teachers who had been affected by a reduction in force. It was an error that Ms. Lamb had not been offered any of the music teacher offerings in the school district between 1985 and 1989. It was also an error that when Ms. Lamb was rehired by the district in 1989, she was considered a non-tenured teacher. This error was subsequently corrected and Ms. Lamb's tenure and seniority were restored to her. The respondent Board contends that Ms. Lamb therefore has greater seniority then the petitioner, and that the petitioner has failed to establish otherwise.

I agree with the respondent Board. Ms. Lamb is a tenured teacher with superior seniority rights to those of the petitioner. Therefore, I **CONCLUDE** that the respondent Board has not violated the petitioner's tenure and seniority rights. Accordingly, the petition of appeal is **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

November 30, 1992
Date

Joseph F. Fidler
JOSEPH F. FIDLER, ALJ

Receipt Acknowledged:

11/30/92
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 3 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

lam

EXHIBITS

Joint Exhibits:

J-1 Letter dated June 27, 1986

For the Petitioner:

P-1 Letter, dated April 17, 1985
P-2 Resolution, dated April 23, 1985
P-3 Resolution, dated September 16, 1986
P-4 Seniority List, dated June 30, 1985
P-5 Board Resolution, dated November 12, 1987
P-6 Advertisement for Band Teacher/Band Director of June 1987
P-7 Resolution, dated August 18, 1987
P-8 Resolution, dated September 29, 1988
P-9 Memorandum of Available Positions, dated January 4, 1989
P-10 Resolution retroactive to April 27, 1989
P-11 Resolution, dated June 27, 1989
P-12 Resolution concerning non-tenured teachers for the 1990-91 school year
P-13 Seniority list for 1984 and 1986 through 1991

For the Respondent:

None

WITNESSES

For the Petitioner:

Dr. Andrew Korshalla
Dr. Peter Delaney
Jane Lamb

For the Respondent:

None

WALTER MC ALOON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions in accordance with N.J.A.C. 1:1-18.4.

Petitioner's exceptions dispute the finding of the ALJ that Ms. Lamb did not know of any openings for teachers in the Old Bridge district between 1985-88. He avers that since she was on the preferential hiring list and since several teachers were hired during this period, it must be inferred that Ms. Lamb had knowledge of available openings. Petitioner contends that because Ms. Lamb was employed at a district closer to her home, she elected not to accept any of these positions. Petitioner further asserts that, through this failure to act, Ms. Lamb knowingly relinquished her tenure and seniority rights. In support of this hypothesis, petitioner contends that Ms. Lamb's subsequent reemployment in September 1988 as a "new hire" confirms her knowing forfeiture of her rights. Therefore, petitioner urges that the ALJ's decision be reversed and he be rehired with full back pay.

Upon a careful and independent review of the record in this matter, the Commissioner agrees with the findings and conclusions of the Administrative Law Judge and finds petitioner's exceptions without merit. The Commissioner determines that there is no evidence whatsoever to substantiate that the Board ever gave Ms. Lamb formal notice of a teaching vacancy at Old Bridge which she subsequently rejected. Therefore, Ms. Lamb cannot be deemed to have voluntarily relinquished her tenure and seniority rights. The Commissioner further notes that the record clearly establishes that the reemployment of Ms. Lamb as a nontenured teacher in 1989 was a unilateral mistake of the Board which was corrected upon discovery.

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

Marylee Fitzgerald

COMMISSIONER OF EDUCATION

JANUARY 5, 1993

DATE OF MAILING - JANUARY 5, 1993

3-93

JOHN VIETORIS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JANUARY 5, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10360-90
AGENCY DKT. NO. 371-11/90
OAL DKT. NO. EDU 2128-91
AGENCY DKT. NO. 3-1/91
OAL DKT. NO. EDU 2129-91
AGENCY DKT. NO. 6-1/91

JOHN VIETORIS,
Petitioner,
v.
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT,
Respondent.

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

Michael J. Gross, Esq., for respondent (Kenney, Gross & McDonough, attorneys)

Record Closed: November 20, 1992 Decided: November 25, 1992

BEFORE **DANIEL B. McKEOWN,** ALJ, t/a:

This matter was transmitted to the Office of Administrative Law under OAL Docket number EDU 10360-90 on December 13, 1990 and under OAL docket numbers EDU 2128-91 and EDU 2129-91 on March 11, 1991, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

The parties have agreed to a settlement and have prepared a settlement agreement indicating the terms thereof, which is attached and fully incorporated herein.

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

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

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

November 25, 1992
Date

Daniel B. McKeown
DANIEL B. McKEOWN, ALJ, t/a

Receipt Acknowledged:

11/30/92
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 3 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

tmp

RECEIVED
STATE
OFFICE
LAW
Nov 20 3 50 PM '92

SETTLEMENT AGREEMENT

WHEREAS, the Freehold Regional High School District Board of Education and John Vietoris, as a member of the Freehold Regional Education Association, were engaged in litigation before the Commissioner of Education, docket No. EDU-02129-91 S, EDU-02128-91 S & EDU-10360-90 S; and

WHEREAS, John Vietoris past away before the conclusion of the litigation;

It Is Agreed As Follows:

(1) The Freehold Regional Education Association and the Estate of John Vietoris shall waive any right, claim or interest to the 1990 Assistant Football Coach stipend on behalf of John Vietoris.

(2) In consideration for the wavier, the Freehold Regional High School District Board of Education shall pay to a trust fund on behalf of the three children of John Vietoris the lump sum of $5.790.

(3) The Executor or Administrator of Mr. Vietoris' estate shall designate the trustee of these funds, the type of trust instrument, and shall determine the distribution of these funds among the three children of Mr. Vietoris.

(4) The Freehold Regional Education Association and the Estate of John Vietoris shall withdraw, with prejudice, the Petition of Appeal, OAL Docket No. 6-1/91.

FREEHOLD REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION

ESTATE OF JOHN VIETORIS

FREEHOLD REGIONAL H.S.E.A.

OAL DKT. NOS. EDU 10360-90, EDU 2128-91 and EDU 2129-92 (Consolidated)

JOHN VIETORIS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

JANUARY 5, 1993

DATE OF MAILING - JANUARY 5, 1993

4-93

JUANITA FIESELER,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

By award dated May 1, 1992, the arbitrator determined that Board properly withheld petitioner's increment for 1990-91 school year. Issue now is not correctness of withholding for disciplinary reasons or forum, but whether Board paid petitioner the proper salary for 1991-92 school year by not restoring her to a particular step on newly negotiated salary guide.

Citing Probst Supreme Court decision, ALJ found there is no obligation for Board to restore increment withheld. Petitioner's salary appropriately continued to lag behind salary of peers in same amount of increment withheld in 1990-91 school year. Petition was dismissed.

Commissioner adopted findings and determination in initial decision.

JANUARY 7, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL Dkt. No. EDU 2318-92
Agency Dkt. No. 56-3/92

JUANITA FIESELER,

Petitioner,

v.

SOUTH RIVER BOARD OF EDUCATION,

MIDDLESEX COUNTY,

Respondent.

Arnold S. Cohen, Esq., for petitioner (Balk, Oxfeld, Mandell & Cohen, attorneys)

Gordon J. Golum, Esq., for respondent (Wilentz, Goldman & Spitzer, attorneys)

Record Closed: October 29, 1992 Decided: December 3, 1992

BEFORE **JAYNEE LaVECCHIA,** CHIEF ALJ:

STATEMENT OF THE CASE

Petitioner, Juanita Fieseler, commenced this action by way of a petition of appeal filed with the Commissioner of Education on March 4, 1992, contesting the correctness of the salary paid to her for the 1991-92 school year following the

withholding of her increment during the 1990-91 school year. An answer was filed by respondent, South River Board of Education, on March 23, 1992. The Commissioner of Education transmitted the matter on March 30, 1992, to the Office of Administrative Law for a contested-case proceeding pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

A prehearing conference was conducted on July 13, 1992, at which time it was determined that this matter would proceed by way of cross-motions for summary decision. A set of stipulated facts having been submitted and cross-motions and replies thereto filed, the record closed on October 29, 1992.

FACTUAL DISCUSSION

The following facts were submitted by stipulation and are accepted as fact. Ms. Fieseler is a tenured physical education teacher employed by the Board of Education of the Borough of South River (Board) since September 1, 1956. On May 22, 1990, a fifth-grade student claimed that Ms. Fieseler hurt him by twisting his arm behind his back. Based on this claim, the Superintendent of Schools recommended to the Board that Ms. Fieseler's increment be withheld for the 1990-91 school year. On August 16, 1990, the Board voted to withhold Ms. Fieseler's increment of $2,750 for the 1990-91 school year based upon the recommendation of the Superintendent. The correctness of this withholding was tested by arbitration, and by an award dated May 1, 1992, the arbitrator determined that the Board properly withheld Ms. Fieseler's increment for the 1990-91 school year.

During the 1990-91 school year, Ms. Fieseler received a salary of $38,700. Due to the increment withholding during the 1990-91 school year, Ms. Fieseler remained at Step H of the 1989 through 1991 salary guide. Accordingly, she received $36,800 for salary and an additional $1,900 for longevity based on twenty-four plus years of experience, totaling the $38,700 salary received in the 1990-91 school year.

At its May 29, 1991 meeting, the Board acted to set the salary of Ms. Fieseler, as well as other tenured employees, for the period from September 1, 1991 through June 30, 1992, based on a salary list presented to it plus any negotiated increments agreed to following negotiations with the South River Education Association. That list reflected Ms. Fieseler's salary, to which increments would be added for the 1990-91 school year, as $38,700.

The 1991 through 1994 bargaining agreement agreed upon between the Board and the South River Education Association was concluded after the commencement of the 1991-92 school year. The salary increase contained in the salary guide for the 1991-92 school year for a teacher such as Ms. Fieseler, at Step H of the salary guide, amounted to $2,450. That amount represents an increase in the employment increment of $2,300 and an increase in the longevity increment of $150. Thus, the total increase for salary and longevity for an individual at Step H of the salary guide for the 1991-92 school year over that of the 1990-91 school year was $2,450 ($2,300 plus $150). The total salary paid to Ms. Fieseler during the 1990-91 school year amounted to $41,600.

LEGAL ANALYSIS AND FINDINGS

In this appeal, petitioner alleges she should have been returned to her contractual salary schedule step for the 1991-92 school year, which would have resulted in her receiving a total salary of $43,900. She maintains that the provisions of *N.J.S.A.* 18A:29-14 do not apply in the context of setting the appropriate step for her on the contractual salary schedule for the 1991-92 school year. Instead, she maintains that because her increment withholding was determined to be for predominantly disciplinary reasons and therefore was reviewed in the context of binding arbitration provided by the 1990 amendments to the New Jersey Employer-Employee Relations Act, *N.J.S.A.* 34:13A-1 to -39, the provisions of *N.J.S.A.* 18A:29-14 and its related case law do not apply to her. Petitioner claims that she is entitled to be restored to her contractual salary schedule step in effect for the 1991-92 school year. For the reasons which follow, I find petitioner's arguments to be without merit.

The amendments to the New Jersey Employer-Employee Relations Act effected by *L.* 1989, c. 269, expanded the scope of negotiations for public school employees in, among other things, matters relating to minor discipline. As expressed in the Assembly Labor Committee statement to Assembly Bill No. 4706:

> The bill provides public schools with the authority to impose minor discipline on employees, if negotiated. As amended, the bill defines minor discipline as including fines and suspensions, but not letters of reprimand, tenure charges, withholding of increments, or certain suspensions with pay. As amended, the bill permits an employer to use whatever disciplinary sanctions are authorized by law if there is no negotiated agreement regarding minor discipline. The bill includes in the scope of these negotiations the establishment of a schedule for the fines

> and suspensions. As amended, the bill also provides that all discipline, including reprimands, may be appealed through the locally negotiated grievance procedures which must provide for binding arbitration as the final step in the procedure. The withholding of a teaching staff member's increment based on the actual teaching performance would still be appealable to the Commissioner of Education.

The amendments also included a provision which provided that the withholding of an employee's increment, if determined to be for predominantly disciplinary reasons, would be subjected to the binding arbitration grievance procedure described in the statement to the bill. Specifically, *N.J.S.A.* 34:13A-26 provides:

> Disputes involving the withholding of an employee's increment by an employer for predominantly disciplinary reasons shall be subject to the grievance procedures established pursuant to law and shall be subject to the provisions of Section 8 of this act.

Pursuant to *N.J.S.A.* 34:13A-27a, any dispute as to whether an increment withholding is predominantly disciplinary in nature is to be determined by the Public Employment Relations Commission (PERC). If it is determined to be predominantly disciplinary, the dispute is to be resolved through the grievance procedures established pursuant to the amendatory act. *N.J.S.A.* 34:13A-27c.

Nothing in the amendatory language or in the statements attached to the bill suggest that the amendments created new substantive rights for either the employee or the employer with regard to the right to withhold increments or with regard to the restoration of increments in subsequent years. The language quoted above, complemented by the Committee statement to the bill, reflects a procedure to be used to expedite dispute resolution of certain minor disciplinary disputes, including increment withholdings, which are effected for the purpose of imposing discipline on a teaching staff member.

The Board argues, rightfully, that the school board's authority to withhold an increment reposes in the language of *N.J.S.A.* 18A:29-14. That statute provides, in pertinent part:

> Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year

> by recorded roll call of the majority vote of the full membership of the board of education.
>
> * * *
>
> It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment. [Emphasis added.]

The latter emphasized language was not affected by the amendments of *L.* 1989, c. 269, although the Legislature surely could have altered this language when it altered the procedures regarding review of a certain type of increment withholding. It apparently chose not to do so. It is *N.J.S.A.* 18A:29-14 which authorizes increments to be withheld in the first instance when a board, by majority recorded roll call vote, determines to do so. *N.J.S.A.* 34:13A-26 pertains only to the forum in which the dispute as to the validity of the withholding is to be resolved. It does not specifically authorize the withholding of increments for predominantly disciplinary reasons; that authority still lies only with *N.J.S.A.* 18A:29-14.

The two statutes cited above are not inconsistent; they complement one another and should be read harmoniously since they relate to the same subject matter. *State v. Green,* 62 *N.J.* 547 (1973). One confers the authority to withhold an increment and the other offers a new procedure for rapid dispute resolution of one type of withholding. Only *N.J.S.A.* 18A:29-14 discusses the impact of the withholding in subsequent school years and addresses the scope of discretion afforded the Board in the setting of salary in years following an increment withholding.

As the Board correctly contends, *N.J.S.A.* 34:13A-26 is not applicable to this matter. The issue here is not whether an increment was properly withheld for disciplinary reasons during the 1991-92 school year, or the forum in which such a dispute should be resolved. The issue is whether the Board paid petitioner the proper salary for the 1991-92 school year. Petitioner's argument mischaracterizes the Board's action by stating that the Board withheld petitioner's increment for the 1991-92 school year. That is simply not the case. The issue is about restoration, or not, to a particular step on the newly negotiated salary guide applicable during the 1991-92 school year.

Nor is the validity of the increment withholding during the 1990-91 school year at issue here. Petitioner did not raise such an issue in the petition of appeal before the Commissioner, nor could she. PERC had decided that the

increment withholding issue for the 1990-91 school year was predominantly disciplinary, and denied a request for restraint of arbitration on December 20, 1991. Thereafter, on May 1, 1992, an arbitrator determined the increment withholding to have been appropriate. Therefore, the issue of the validity of the increment withholding in the 1990-91 school year may not be contested in this proceeding before the Commissioner.

The issue in this case resolves itself to a simple one: Whether the Board had any obligation to restore petitioner's employment and adjustment increment which had been withheld during the 1990-91 school year when it set her salary for the 1991-92 school year. The Supreme Court's analysis in *Probst v. Board of Education of the Borough of Haddonfield,* 127 *N.J.* 518 (1992), is controlling on this issue.

In *Probst*, a tenured teacher employed by the Board of Education of the Borough of Haddonfield had her employment and adjustment increment withheld for the 1987-88 school year because of unsatisfactory performance. Her salary during the previous year (1986-87) was $25,000, which corresponded to the middle step (J/K) on the Haddonfield salary schedule. Because of the Board's decision, her salary remained at $25,000 for the 1987-88 school year. Her performance was deemed to be satisfactory during the 1987-88 school year, and, accordingly, the Board did not seek to withhold further increments from her salary. However, the Board did not take action to restore the increment which had been withheld from her. Her salary for the 1988-89 school year was established at $27,100. This amount was based upon an increase in her employment increment of $800 and an increase in her adjustment increment of $1,300, for a total increase of $2,100. These increments were consistent with the compensation progression established in the salary schedule; however, the resulting amount, $27,100, did not fit into the guide for the 1988-89 school year.

Probst claimed that she was entitled to receive the middle step (K/L) for the 1988-89 school year, a salary of $28,400. The Supreme Court held that Probst's argument was without merit. Because the local board increased her 1987-88 salary by $2,100, an amount which reflected the combined annual increases set forth in the Haddonfield guide for that school year, the compensation that she received for the 1987-88 school year was proper.

Significantly, the Court stated:

> We conclude that no statute mandates that local boards return teachers to an adopted salary schedule following a withholding. Local boards, however, do have the discretion to do so on finding that restoration to a place on the schedule is warranted for a particular teacher. That discretion should be exercised when a teacher has recovered from the previously-recognized shortcoming and recaptured lost ground by steadily improving performance. The possibility of being returned to the schedule thus serves as an incentive to maintain improvements.
>
> [127 *N.J.* at 528.]

The Supreme Court disagreed that continued off-guide compensation amounts to a continuing punishment. It referred to its earlier decision in *North Plainfield Education Association v. Board of Education,* 96 *N.J.* 587 (1984), where it had recognized that:

> "the fact that [a] teacher[ ] will always lag one step behind is not attributable to a new violation each year, but to the effect of an earlier employment decision."
>
> [127 *N.J.* at 530, citing *North Plainfield,* 96 *N.J.* at 595.]

See also Cordasco v. Board of Education, 205 *N.J. Super.* 407 (App. Div. 1985), which held that *N.J.S.A.* 18A:29-14 expressly prevents teachers from automatically recovering withheld increments. Restoration of denied increments was determined to be a statutorily-delegated function subject to "favorable exercise of discretion by the local board." 205 *N.J. Super.* at 411.

Accordingly, as the above-cited cases make clear, the issue of required restoration of past increments has been decided by our Supreme Court and I find that there is no obligation on this particular board of education, to restore the increment withheld to petitioner Fieseler in the 1991-92 school year. Her salary for the 1991-92 school year continues to lag behind those of her peers in the same amount of the increment withheld in the 1990-91 school year. This is not inappropriate.

The fact that the Board, by vote on May 29, 1991, established Ms. Fieseler's base salary, to which increments would be added in the 1991-92 school year, as the same amount which she had received in the 1990-91 school year was a lawful exercise of its discretion and it will not be disturbed here. No other action was required to affirmatively not restore her previously withheld increment. There being no genuine issue of material fact, and the law being clear, this matter is ripe

for summary decision in favor of the respondent Board of Education. *N.J.A.C.* 1:1-12.5(b). Accordingly, the petition of appeal is **DISMISSED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

12/3/92
Date

Jaynee LaVecchia
JAYNEE LaVECCHIA, CHIEF ALJ

Receipt Acknowledged:

12/4/92
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

Jaynee LaVecchia

DEC 8 1992
Date

OFFICE OF ADMINISTRATIVE LAW

ak/e

JUANITA FIESELER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Pursuant to the provisions of N.J.A.C. 1:1-18.4, petitioner filed timely exceptions reiterating the arguments of her prior brief, which arguments are well summarized by the ALJ and need not be repeated herein. A reply urging acceptance of the initial decision was timely filed by the Board.

Upon careful consideration, the Commissioner concurs with the ALJ for the reasons stated in the initial decision that, notwithstanding that the increment withholding underlying this matter was disciplinary in nature and therefore appealable through the negotiated grievance procedure pursuant to N.J.S.A. 34:13A-26, the question of petitioner's salary following withholding is nonetheless controlled by N.J.S.A. 18A:29-14 and Probst, supra, which clearly hold that a board is under no obligation to return a teacher whose increment has been withheld to the regular salary guide unless it exercises its discretionary authority to do so.

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

Mary Ellen Stgmdd
COMMISSIONER OF EDUCATION

JANUARY 7, 1993

DATE OF MAILING - JANUARY 7, 1993

4-93

EDU #2318-92
C # 4-93
SB # 2-93

JUANITA FIESELER,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, January 7, 1993

For the Petitioner-Appellant, Balk, Oxfeld, Mandell & Cohen
(Arnold S. Cohen, Esq., of Counsel)

For the Respondent-Respondent, Wilentz, Goldman & Spitzer
(Gordon J. Golum, Esq., of Counsel)

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

May 5, 1993

Date of mailing MAY 07 1993

5-93

JANE R. FOX,

PETITIONER,

V.

BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, MORRIS COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner, tenured business teacher, appealed abolishment of her position for 1991-92 due to RIF contending Board retained nontenured teachers in positions for which she was equally qualified.

ALJ concluded Board violated petitioner's tenure rights when it gave more favorable treatment to nontenured teachers (Bednar; Capodilupo) as Board assigned nontenured teachers to perform duties within scope of certificate held by tenured teacher. Further, Board's educational program would not have been seriously disrupted by recognition of petitioner's tenure. Board was ordered to pay petitioner lost salary and benefits (mitigated) resulting from failure to offer her full-time position in 1991-92.

Commissioner adopted findings and determination in initial decision with clarification that job description for the assignment in dispute in this matter requires teaching endorsement of any type and that, therefore, position was instructional. Moreover, law does not permit boards of education to defeat or manipulate statutory tenure or seniority rights by establishing "tailor-made" qualifications for a position.

JANUARY 11, 1993

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7655-91

AGENCY DKT. 263-7/91

JANE R. FOX,

Petitioner,

v.

BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT,

Respondent.

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

Anne M. Siotka, Esq. for respondent
(Wiley, Malehorn & Sirota, attorneys)

Record Closed: July 28, 1992 Decided: November 24, 1992

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

Statement of the Case

This is an appeal by a tenured teacher of business education whose position for the 1991-92 school year was abolished due to a reduction in force. Petitioner Jane R. Fox ("Fox") contends that the school board violated her tenure rights under *N.J.S.A.* 18A:28-5 by terminating her employment while retaining nontenured teachers in positions for which she was certified. Specifically, Fox alleges that she is entitled to preference over nontenured teachers to teach so-called "academic

support" classes as well as business and marketing courses. She also asserts a seniority claim against another tenured teacher for one period of "academic support."

Respondent Board of Education of the Morris School District ("Board"), defends on three separate grounds: that Fox's tenure rights are limited to claims against nontenured teachers holding the identical teaching certificates; that she lacks the proper qualifications to teach these particular courses; and, in any event, that the district is not required to adjust its class schedules to maximize Fox's employment opportunities.

Procedural History

On July 17, 1991, Fox filed a verified petition, seeking reinstatement and back pay, with the Commissioner of Education ("Commissioner"). The Board filed its answer on August 2, 1991. Subsequently, on August 7, 1991, the Commissioner transferred the matter to the Office of Administrative Law ("OAL") for hearing as a contested case.

By certified mail dated March 26, 1991, Fox served notice of the pendency of this matter on two teachers, John Porcelli and George Malanga, whose interests might be adversely affected by the outcome.[1] Neither of them moved to intervene in the proceedings, although the Board called Porcelli as its witness at the hearing. The OAL held a hearing on May 28, 1992. Witnesses and exhibits are listed in the appendix. Both parties submitted post-hearing briefs and replies by July 28, 1992.

---

[1]Fox failed to notify a third teacher, Robert Luisi, because she was unaware of her potential claim against him until the hearing had already commenced. In view of the conclusion that it is not necessary to reach the seniority issue, this lack of notice is inconsequential.

Findings of Fact

All of the relevant facts are uncontested. I **FIND:**

(1) General Background Facts

Jane R. Fox began working for the Board in March 1980 and has more than eleven years of service. Concededly, she has tenure as a teacher in the district. Fox holds an instructional certificate endorsed as teacher of business education and a second certificate endorsed as teacher of data processing.[2] Since coming to the district, she has been assigned to teach business education and computers at the high school level. During the course of her employment, she taught many different subjects, including accounting and bookkeeping, business law, business organization and management, typing and, last but not least, marketing. Board witnesses acknowledge that Fox taught an introductory marketing course in 1987-88, although the school administration now questions whether that assignment was appropriate. Moreover, at one time Fox had served temporarily as coordinator of a

---

[2]State regulations enumerate seven types of subspecialties under the broad heading of business education, namely: (i) comprehensive; (ii) bookkeeping and accounting; (iii) data processing; (iv) general business; (v) secretarial studies; (vi) typewriting; and (vii) marketing and distributive occupations. *N.J.A.C.* 6:11-6.2(a)(4). Fox's initial certificate, issued in September 1980, has the description "teacher of business education." Both parties assume that this description is equivalent to the "comprehensive" or most inclusive type of business education endorsement, but disagree on what subjects the holder of such endorsement may teach.

work-site training program while the regular teacher was out sick, even though Fox does not possess an educational services certificate endorsed for that purpose.[3]

Recently, Fox applied to the State licensing authorities for a marketing endorsement and also for issuance of an educational services certificate as teacher-coordinator of distributive education. In June 1991, the State denied the marketing endorsement because Fox failed to satisfy the current college course-work requirements and had not taken the qualifying test. The teacher-coordinator certificate was denied as well, largely because Fox needed the marketing endorsement as a prerequisite.

Meanwhile, in April 1991, the Board notified Fox that her contract would not be renewed for the 1991-92 school year. Fox does not challenge the fact that a staff reduction was necessitated by declining enrollment and lack of sufficient demand for business courses or the fact that she had the lowest seniority of all tenured teachers in the business department. Instead, she contends that the Board improperly retained nontenured teachers in assignments which should have been offered to her. If she had not been dismissed, her total salary for 1991-92 would have been $42,520.

(2) Tenure Claim to the Academic Support Program

One of these nontenured teachers was John Portelli, who only came to the district in 1989-90 as "teacher on special assignment" and head football coach. The Board's job description for his unusual title sets forth the qualifications as any "valid New Jersey State teaching certificate" and a "[d]emonstrated ability to work with at risk students in providing academic support."[4] Portelli has a certificate as teacher of

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[3]An educational services endorsement as "teacher-coordinator of cooperative vocational-technical education" authorizes the holder not only to teach, but also "to act as liaison between the school and the co-operating employer's training station" in designated subject areas such as distributive education. *N.J.A.C.* 6:11-11.20.

social studies and spent nine years in another school district, where he taught social studies to students in the lowest ability-grouping and was responsible for dealing with disciplinary problems. Dr. Ernest Smith, principal of Morristown High School, recommended him for the job because of Portelli's background and because he projected an image of caring, patience and strength. As noted, Fox also has a valid teaching certificate and has more than a decade of teaching experience in the Morris district.

Portelli's main assignment in 1991-92 was the "academic support program," to which he devoted three out of five teaching periods per day. "Academic support" is an activity designed to provide extra help for students at risk of failing. Answers supplied to interrogatories describe the program as "an intensive study hall for students with low averages" so that "they will complete their homework assignments." While the Board's proofs were somewhat contradictory on whether the period is "an extra duty assignment" like cafeteria duty or "an instructional assignment" like an academic subject, the nature of the program is perfectly clear. Teachers, chosen for "their special rapport with students and expressed interest in the program," give guidance to students on note-taking, study skills and organizational techniques, and monitor students to make sure that they finish their homework. According to Portelli, who helped develop the course proficiency, the academic support program has no formal curriculum. Students enrolled in the program write down their daily homework assignments in a little pad or notebook. Staff members do not provide actual instruction, but are available to "direct, guide [and] give assistance" to students on doing their homework. Grading is pass or fail, depending on whether the student finishes at least one assignment per session.

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[4]Normally, a school board must assign staff members to recognized titles or obtain prior approval from the County Superintendent of Schools before making any appointment to an unrecognized title *N.J.A.C.* 6:11-2.2. Morris School District never obtained approval for the title "teacher on special assignment." Apparently, the County Superintendent's Office advised the district that approval is unnecessary whenever the job title includes the word "teacher."

Additionally, in 1991-92, Portelli taught two periods of history, which admittedly Fox is not qualified to teach and to which she makes no claim.

(3) Tenure Claim to Business Education Courses Including Marketing

Secondly, Fox contends that she, rather than a nontenured teacher, George Malanga, should have been assigned to replace another high school teacher, Mary Jo Wilk, who was on extended maternity leave for all of 1991-92. Wilk holds dual certification: an instructional certificate as a teacher of general business and of marketing and distributive education; and also an educational services certificate as a teacher-coordinator in the field of of distributive occupations. When she left on maternity leave in January 1991, Wilk's teaching schedule had included classes in typing, word processing, introductory and intermediate marketing, and "two release periods to supervise work/study students at the job." Neither Fox nor Malanga possess an educational services certificate needed to serve as coordinator of student activities at the work site. Indeed, Malanga does not even hold the "comprehensive" business education endorsement possessed by Fox. Instead, he has a more restrictive instructional certificate endorsed as "teacher of distributive occupations."[5]

Nevertheless, Malanga was allowed to perform job-site coordinator duties in addition to his teaching assignment. In 1991-92, Malanga taught courses entitled "Business Organization and Management" and "General Business" during periods two and three. Significantly, the Board concedes that Fox could also have taught these two classes, which "fall within the scope of her endorsements." During periods four and six, Malanga taught "Introduction to Marketing" and "Marketing Education I," subjects which Fox says are encompassed within her business education

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[5]Since Malanga acquired his certificate in May 1970, the regulations have been amended to include "marketing" as part of this endorsement. *See,* 16 *N. J. R.* 1647 (July 2, 1984); 16 *N. J. R.* 2788 (Oct 15, 1984) Now the corresponding endorsement is known as "teacher of marketing and distributive occupations."

endorsement and which the Board says can only be taught by someone with a marketing and distributive occupations endorsement. Later in the afternoon, Malanga acted as coordinator for the cooperative education program "whereby students worked for private businesses." Fox makes no argument that she was authorized to serve as coordinator for the off-school program. Malanga will no longer be teaching in the district in 1992-93, because Wilk is returning from her extended maternity leave.

(4) Seniority Claim to One Period of Academic Support

Last, Fox raises a seniority claim against Robert Luisi, a tenured mathematics teacher. Luisi began employment for the district in September 1985, so he has fewer years of service compared to Fox. He holds an endorsement in mathematics and has taught that subject at the high school level. In 1991-92, Luisi taught five sections of mathematics and a single session of academic support during ninth period. Although Fox has never participated in the academic support program, she maintains that she has a greater seniority claim to that assignment.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the Board violated Fox's tenure rights when it gave more favorable treatment to nontenured teachers.

It is well settled that a local school board's acknowledged right to reduce excess teaching staff cannot be used "to justify retaining a non-tenured teacher in a position within the certificate of a dismissed tenured teacher." *Bednar v. Westwood Bd. of Educ.*, 221 *N.J. Super.* 329, 242 (App. Div. 1987), *certif. den.* 110 *N.J.* 512. *Accord, Capodilupo v. West Orange Bd. of Educ.*, 218 *N.J. Super* 510 (App. Div. 1987), *certif. den.* 109 *N.J.* 514 (1987). Tenure "would be little more than a gesture" if persons without coverage had greater job security than those falling within its protection. *Downs v. Hoboken Bd. of Educ.*, 12 *N.J. Misc.* 345, 350, *aff'd sub. nom. Flechtner v. Hoboken Bd. of Educ.*, 113 *N.J.L.* 401 (E. & A. 1934). Similarly, in *Kearny Bd. of Educ. v. Horan*, 11 *N.J. Misc.* 751, 753 (Sup. Ct. 1933), the court declared that a teacher protected by tenure "may not be dismissed for reasons of economy while

other teachers not so protected, whose assignments such [tenured] teacher is competent to fill, are retained under employment." See also, *Seidel v. Ventnor Bd. of Educ.*, 110 *N.J. L.* 31 (Sup. Ct. 1932). If a vacancy occurs while another teacher is on maternity leave for at least one full academic year, a qualified tenured teacher "must be offered that teaching assignment and permitted to accrue seniority credits before an outsider is brought into the system." *Lammers v. Pt. Pleasant Bd. of Educ.*, No. A-5494-90T1 (App. Div. May 1, 1992) (slip op. at 5).

Here Fox has tenure as a teacher in the district and both Portelli and Malanga do not. However, the Board seeks to distinguish the *Bednar-Capodilupo* line of authority on the basis that those cases involved teachers with the same endorsements, whereas the teachers in the instant case have different endorsements. While it is true that the rival teachers in *Bednar* were all art teachers and those in *Capodilupo* were all physical education teachers, the result does not turn on such narrow distinctions. Rather, the deciding factor is whether the Board assigned nontenured teachers to perform duties within the scope of the certificate held by the tenured teacher. Tenure attaches to a "position," such as teacher, principal, or superintendent. *Howley v. Ewing Bd. of Educ.*, 1982 *S.L.D.* 1328 (Comm'r), *aff'd* 1983 *S.L.D.* 1554 (St. Bd.). Hence, the Appellate Division approved the reasoning of the State Board that a teacher acquires tenure "in all positions for which his instructional certificate qualifie[s] him." *Capodilupo*, at 514.

Recently, the State Board clarified that a teacher's "tenure protection extends to all endorsements on his instructional certificate," regardless of whether he had previously served under that endorsement. *Grosso v. New Providence Bd. of Educ.*, 1990 *S.L.D.* __ (St. Bd. May 9, 1990) (slip op. at 6). In *Grosso,* a tenured high school business teacher, with an elementary endorsement but no practical experience at that level, displaced non-tenured individuals serving as elementary teachers. Courts have gone even further, extending tenure rights acquired under one type of certificate to other areas requiring a different type of certificate. *See, Dennery v. Passaic Valley High Sch. Bd. of Educ.*, 251 *N.J. Super.* 144 (App. Div. 1991), *certif. granted*, 127 *N.J.* 561 (1992), holding that a tenured guidance counselor serving exclusively under an educational services certificate has an enforceable tenure right to a supervisory position under a supervisor's certificate. One need not necessarily subscribe to this broader view, however, to conclude that a tenured teacher has

priority, as against all nontenured teachers, to teaching assignments covered by his instructional certificate.

Fox, who has an eleven year teaching career in the district, clearly has a superior right to teach the three periods of academic support assigned to newcomer Portelli in 1991-92. Morris School District can hardly suggest that Fox lacks the appropriate instructional certificate, when its own job description merely requires any valid New Jersey teaching certificate. *See, Data-Samatak v. Scotch Plains-Fanwood Bd. of Educ.*, 1988 *S.L.D.* __ (Comm'r Jan. 27, 1988), *aff'd* 1988 *S.L.D.* __ (St. Bd. June 6, 1988), wherein a tenured teacher was qualified to fill the duties of in-school suspension teacher since she possessed a standard instructional certificate.

More problematic is whether Fox possesses the appropriate certificate to teach the business subjects assigned to Malanga, including the two marketing courses. On their face, the regulations suggest that she does, since Fox's "comprehensive business education" endorsement authorizes her to teach "business education subjects in all public schools" and expressly refers to "general business" which, in turn, encompasses "sales, retailing and advertising." In contrast, Malanga's more limited "distributive occupations" endorsement refers specifically to "sales, advertising [and] retailing" as the only subjects which comprise "distributive occupations."[6] *Compare N.J.A.C.* 6:11-6.2(a)(4)(i) *with N.J.A.C.* 6:11-6.2(a)(4)(vii).

Generally, these regulations seem to contemplate that the "comprehensive" endorsement entitles its holder to teach all of the underlying subspecialties for which a more limited endorsement is also available. Nevertheless, the fact that the licensing authority denied Fox's application for a marketing endorsement creates a strong inference that she is ineligible to teach marketing. Additionally, the

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[6]As previously noted, the distributive occupations endorsement has been expanded so that it presently constitutes an endorsement in "marketing and distributive occupations." *See supra* note 5. There is no evidence, however, that Malanga received any additional training or preparation in the field of marketing beyond that necessary to obtain a "distributive occupations" endorsement.

Commissioner has declared that "marketing is a topic much broader than sales, and it requires more technical preparation in its many and diverse aspects." *Grossman v. Ramsey Bd. of Educ.,* 1988 *S.L.D.* 2202, 2219-20, (Comm'r Nov. 7, 1988), aff'd 1989 *S.L.D.* __ (St. Bd. March 3, 1989), *rev'd on other grounds and remanded,* No. A-3270-88T1 (App. Div. May 17, 1990). Consequently, the Commissioner has ruled that a general business endorsement suffices to teach selling, but that "to teach marketing requires the more specifically tailored endorsement known as marketing and distributive occupations." *Id.* Thus, it must be assumed that Fox is not properly certified to teach the marketing courses.

Even if Fox may not teach marketing, nevertheless she is properly certified to teach Malanga's two other courses in general business and business management. Combined with the three academic support periods which also should have gone to her, the total of five periods per day constitutes a full teaching load in this district. Any contention by the Board that it had sound educationally-based reasons for wanting the same person who teaches marketing to supervise the work-study program is belied by the fact that Malanga lacks the necessary educational services certificate.

Alternatively, the Board relies on *Davis v. Ewing Bd. of Educ.*, OAL DKT. EDU 6539-84 (March 14, 1985), *adopted,* Comm'r (April 29, 1985), for the proposition that petitioner cannot force the school district "to rearrange its schedule to suit her desires and maximize its scheduled course offerings to coincide with her areas of certification." (slip op. at 13). See also, *Fitzpatrick v. Weehawken Bd. of Educ.,* 1982 *S.L.D. 1500 (*App. Div. 1982), holding that a school board is not obligated to protect a teacher's tenure rights "by working out all possible permutations in assignments for which available teaching personnel had credentials and, thus, to restructure, if necessary, its entire teaching staff." 1982 *S.L.D.* at 1501. But Fox is not asking for extensive shuffling of teaching assignments. She makes the more modest claim that she should have been assigned work given to nontenured teachers with equal or lesser credentials. Unlike *Davis*, Fox is not seeking to displace teachers primarily assigned to subjects requiring more than a business endorsement. Contrary to *Fitzpatrick*, Fox is not demanding "a complex pattern of transfers" to save her own job regardless of the consequences. Significantly, the Board has not presented persuasive evidence of valid educationally-based reasons for its staffing pattern or shown that its educational program would have been seriously disrupted by

recognition of Fox's tenure. *Compare, Polo v. Bergen Cty. Vo-Tech Schs.*, 92 *N.J. A.L.R 2d (EDU)* 230,233 (Comm'r Jan 30, 1992), where the board of education had the goal of scheduling afternoon classes for shared students at two different locations.

Given the outcome in favor of Fox on the tenure issue, it is unnecessary to address the seniority issue, which pertains to one period out of a five-period teaching day. Suffice it to note, however, that Fox had no actual service as an academic support teacher and that her seniority accrued by virtue of her service as a business teacher.

Order

It is **ORDERED** that the Board of Education of the Morris School District promptly pay to Fox the lost salary and other lost benefits resulting from its failure to offer her a full-time teaching position in the 1991-92 school year; provided, however, that the amount of lost salary shall be mitigated by any earned income which Fox would not have otherwise received.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

Nov. 24, 1992
Date

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

NOV 25, 1992
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 01 1992
Date

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

List of Witnesses

1. Janet Jones, director of personnel, Morris School District

2. Dr. Ernest H. Smith, Jr., high school principal, Morris School District

3. John Francis Porcelli, teacher on special assignment, Morris School District

4. Arlene Inglis, chair of the business department, Morris School District

List of Exhibits

No.	Description
J-1	Stipulation of facts, dated May 28, 1992
(a)	Copy of instructional certification of Janet Fox endorsed as teacher of business education, issued September 1980
(b)	Copy of instructional certification of Jane R. Fox endorsed as teacher of date processing, issued October 1984
(c)	Copy of a letter to Jane Fox from Janet Jones, dated April 23, 1991
(d)	Copy of teaching schedule of George Malanga for 1991-92
(e)	Copy of employment history of George Malanga

(f) Copy of instructional certificate of George Malanga endorsed as teacher of distributive occupations, issued May 1970

(g) Copy of employment history of John Porcelli

(h) Copy of job description for teacher on special assignment, dated May 18, 1989

(i) Copy of instructional certificate of George F. Porcelli endorsed as teacher of social studies, issued December 1975

(j) Copy of employment history of Mary Jo Wilk

(k) Copy of teaching schedule of Mary Jo Wilk for 1990-91

(l) Copy of a notice to Jane Fox from the Department of Education denying her application for an educational services certificate, dated June 1,1 991

(m) Copy of a notice to Jane Fox from the Department of Education denying her application for a marketing endorsement, dated June 1, 1991

(n) Copy of curriculum guides for courses entitled Marketing and Distributive Education I and II

(o) Copy of a curriculum guide for a course entitled Introduction to Marketing and Distribution, dated October 1984

(p) Copy of a curriculum guide for a course in Business Organization and Management, dated October 1984

(q) Copy of teaching schedule of Jane Fox for 1986-87 to 1990-91

(r) Copy of a letter to Jane Fox from Janet Jones, dated April 17, 1991

(s) Copy of a posting for the position of teacher on special assignment, dated May 9,1989

(t) Copy of a letter to Anne Siotka, Esq. from Arlene J. Inglis, undated

J-2 Copy of a memorandum to Dr. McIvor from Janet Jones, dated May 24, 1989

J-3 Supplemental stipulation of facts, dated June 8, 1992

P-1 Copy of supplemental answers to interrogatories certified by Janet Jones, dated February 14, 1992

P-2 Certification of mailing by Louis P. Bucceri, Esq., dated May 29, 1992

R-1 Copy of teaching schedules for the business department for 1991-92

R-2 Copy of course proficiencies for the Academic Support Program, dated September 1990

JANE R. FOX,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Board filed timely exceptions pursuant to N.J.A.C. 1:1-18.4 to which petitioner filed timely reply exceptions. Petitioner's cross exception, included with her reply exceptions was untimely, however, and thus is not considered in the Commissioner's determination of this matter.

The Board excepts to all the findings and conclusions of the ALJ and seeks reversal of the initial decision. The Board claims Mr. John Porcelli, a nontenured teaching staff member and the head football coach, does not teach (emphasis in exceptions) three periods of "Academic Support" as a "Teacher on Special Assignment (Secondary Level)," but rather only teaches two periods of social studies. (Exceptions, at p. 3) The Board draws a distinction between Porcelli's duties on the academic support program with those of teachers such as Mr. Luisi, who were assigned a duty period of academic support.

Relying on Porcelli's testimony and that of the principal, the Board distinguishes Porcelli's duties with the academic support program by stating his primary role is to function as a "liaison between the Guidance Department and classroom teachers in developing support programs for students who are 'at risk'." (Exceptions, at p. 4) It stresses Porcelli's experience in having worked in another district with at-risk pupils and relies additionally on the job description, Exhibit J-1(h), in claiming the ALJ erred in concluding that petitioner should have received Porcelli's three academic support periods. The Board so claims because Porcelli does not have three periods of academic support, because his job does not include teaching academic support and, finally, because petitioner has not demonstrated she is qualified for the non-social studies portion of Porcelli's schedule, absent a showing of the ability to work with at-risk students.

In so stating, the Board would distinguish the ALJ's reliance on Susan Data-Samtak v. Board of Education of Scotch Plains-Fanwood, Union County, 1988 S.L.D 107, aff'd State Board 1988 S.L.D. 123 by contending that there is no teacher employed in its district as a teacher of academic support, nor is there such a position. It claims instead that the district set reasonable and relevant requirements in addition to mere certification as a teacher to hold the position of teacher on special assignment, namely, that there be a demonstrated ability to work with at-risk students.

The Board raises a second exception regarding the seniority issue between petitioner and Mr. Luisi because of the alleged incorrect conclusion reached by the ALJ regarding Mr. Porcelli's non-social studies assignment for 1991-92 and petitioner's alleged

entitlement thereto. The Board claims there is nothing in the record upon which the ALJ can base his statement that academic support is an "instructional" period. (Exceptions, at p. 9, citing initial decision) It avers that while academic support could broadly be described as instructional, in no way can it be considered an academic assignment subject to tenure or seniority claims. The Board argues that based on the facts and testimony it brought to the record, it is necessary to conclude with regard to Mr. Luisi and any teacher assigned periods of academic support, that analysis of tenure and seniority rights is not appropriate. It finds support for this proposition in Carmine Forte and the Red Bank Regional Education Association v. Board of Education of Red Bank Regional School District, Monmouth County, decided by the Commissioner August 12, 1992 by suggesting that the nature of the academic support position is akin to the in-school suspension room position in the Forte matter, which the Board avers, was determined to be like hall or cafeteria duty because no teaching took place. Thus, the Board would have the Commissioner determine that academic support is an assigned duty period, to which petitioner can claim no tenure and/or seniority entitlement.

Finally, although the Board does not dispute that the "Business Organization and Management" and "General Business" courses taught by Mr. Malanga do fall within the scope of petitioner's endorsements, it excepts to the requirement imposed on the district by the ALJ that it rearrange its teaching assignments according to the standards articulated in the decision. It further excepts to the ALJ's finding that Malanga is not properly certified for the assignment to which he was assigned for the 1991-92 school

year, although such issue is irrelevant in light of the ALJ's determination that petitioner was unqualified for the marketing assignment.

Upon a careful and independent review of the record of this matter, which, it is noted, does not include the transcripts of the hearing below, the Commissioner affirms those findings and conclusions of the Office of Administrative Law. However, the following comment is necessary regarding the Board's exceptions.

As to the Board's claim that the nontenured teacher, John Porcelli, did not "teach" as part of his duties as a teacher on special assignment, one need only look to the job description which specifically notes that said position requires a teaching endorsement of any type to negate the Board's claim. As noted in petitioner's reply exceptions, by definition, therefore, the position in question is a teaching position. Moreover, Exhibit J-1(h), the job description, specifies, inter alia, that the position is one that: "4. Assists students, individually and in groups, who are in need of academic support and behavior modification." It is unchallenged that Porcelli performed all of the duties of said job description and, thus, that he provided instruction to the pupils during those three teaching periods. The Commissioner so finds.

In so concluding, the Commissioner further finds that the ALJ did not err in concluding that Ms. Fox, a tenured teacher, was entitled to the position over nontenured Mr. Porcelli insofar as no particular endorsement was required for the three periods he was assigned as teacher on special assignment. See Data-Samtak, supra. Moreover, the Board's argument that petitioner has not demonstrated

an ability to work with at-risk students, thus, barring her from claiming the teacher on special assignment position is without merit because it is well-settled that the law does not permit boards of education to defeat or manipulate statutory tenure or seniority rights by establishing tailor-made position qualifications. See Bednar, supra. See, also, South River Education Association, et al. v. Bd. of Education of the Borough of South River, 1985 S.L.D. 1384, aff'd State Bd. 1987 S.L.D. 2724, aff'd Super. Ct. (App. Div.) April 16, 1990, Dkt. No. A-1675-87T8. Consequently, the Commissioner dismisses the Board's exceptions regarding the three periods of teacher on special assignment as being without merit.

As to the position teaching business education including marketing, the Commissioner also agrees with the ALJ that without the educational services certificate required by regulation to serve as a teacher-coordinator in cooperative vocational education; petitioner can make no claim to any position as a coordinator of student activities at a work site. See N.J.A.C. 6:11-11.3. Accordingly, because neither petitioner nor Mr. Malanga possessed the requisite educational services certificate, neither was properly certified to teach work-study, notwithstanding the Board's contention that it had sound educationally-based reasons for wanting the same person who teaches marketing to supervise the work-study program. See Grossman, supra. See, also, initial decision, at p. 10. However, like the ALJ, the Commissioner finds that petitioner is properly certified to teach Malanga's two other courses in general business and business management, which the Board does not contest.

Additionally, as found by the ALJ, because this decision favors petitioner on the tenure issue, it is unnecessary to consider petitioner's claim based on seniority to one period out of five held by Mr. Luisi, but it bears emphasizing that because petitioner has no actual service as an academic support teacher, her seniority accrues by virtue of her service as a business teacher.

Finally, the Commissioner's review of the record comports with the ALJ's thorough and cogent discussion of whether the district must accommodate petitioner's schedule as a result of the findings of this case. The Commissioner agrees that no complex or extensive redesigning of schedules is necessary to effectuate the results required by law in this case. See initial decision, at pp. 10-11.

Accordingly, for the reasons expressed by the ALJ, the initial decision is adopted including the directive concerning lost salary and other benefits resulting from the Board's failure to offer petitioner full-time employment as a teaching staff member in the 1991-92 school year, less mitigation.

IT IS SO ORDERED.

Mary Lee Fitzgerald
COMMISSIONER OF EDUCATION

JANUARY 11, 1993

DATE OF MAILING - JANUARY 11, 1993

6-93

IN THE MATTER OF THE TENURE HEARING OF RANDOLPH FREED, SCHOOL DISTRICT OF THE TOWNSHIP OF PENNSVILLE, SALEM COUNTY.	:	
AND	:	COMMISSIONER OF EDUCATION
IN THE MATTER OF THE TENURE HEARING OF CLAIBORNE MASON, SCHOOL DISTRICT OF THE TOWNSHIP OF PENNSVILLE, SALEM COUNTY.	:	DECISION

JANUARY 15, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT

IN THE MATTER OF THE TENURE HEARING OF RANDOLPH FREED, SCHOOL DISTRICT OF THE TOWNSHIP OF PENNSVILLE, SALEM COUNTY	OAL DKT. NO. EDU 9282-91 AGENCY DKT. NO. 281-7/91
IN THE MATTER OF THE TENURE HEARING OF CLAIBORNE MASON, SCHOOL DISTRICT OF THE TOWNSHIP OF PENNSVILLE, SALEM COUNTY	OAL DKT. NO. EDU 9283-91 AGENCY DKT. NO. 280-7/91 **(CONSOLIDATED)**

Gary D. Wodlinger, Esq., for the Board (Lipman, Antonelli, Batt & Dunlap, attorneys)

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

Patricia L. Ratner, Esq., for respondent Mason (Wills, O'Neill & Mellk, attorneys)

Record Closed: December 10, 1992 Decided: December 15, 1992

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

This matter arises out of tenure charges of unbecoming conduct against two teaching staff members on grounds of unauthorized personal use of school supplies and equipment for a private graphics business.

These matters were transmitted to the Office of Administrative Law (OAL) on October 1, 1991, for a hearing pursuant to *N.J.S.A.* 52:14F-1 to -10.

The parties have agreed to settle this matter and have prepared the attached stipulation of dismissal of tenure charges indicating the terms of settlement.

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

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

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

Dec. 15, 1992
Date

Naomi Dower LaBastille
NAOMI DOWER-LABASTILLE, ALJ

Receipt Acknowledged:

Maureen K. Keller

12/17/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

Jaynee LaVecchia

DEC 21 1992
Date

OFFICE OF ADMINISTRATIVE LAW

RECEIVED
OF N.J.
LAW
DEC 10 11 34 AM '92

STIPULATION OF DISMISSAL OF TENURE CHARGES

This stipulation of dismissal is entered into by and between the Pennsville Township Board of Education ("Board") and its tenured employees, Randolph Freed ("Freed") and Claiborne Mason ("Mason").

WHEREAS, Freed has been continuously employed by the Board as a teaching staff member since September, 1971; and

WHEREAS, Mason has been continuously employed by the Board as a teaching staff member since September, 1965; and

WHEREAS, on July 16, 1991, the Board certified tenure charges against Freed and Mason to the Commissioner of Education under the Tenure Employees Hearing Law, which charges were captioned "In the Matter of the Tenure Hearing of Randolph Freed, OAL DKT. NO. EDU 9282-91, AGENCY DKT. NO. 281-7/91" and "In the Matter of the Tenure Hearing of Claiborne Mason, OAL DKT. NO. EDU 9283-91, AGENCY DKT. NO. 280-7/91"; and

WHEREAS, on August 14, 1991, Freed and Mason filed answers contesting the tenure charges; and

WHEREAS, on December 2, 1991, Administrative Law Judge LaBastille issued an order consolidating the Freed and Mason tenure cases, and

WHEREAS, by agreement of the parties and by orders dated January 15, 1992 and July 16, 1992, the tenure charges against Freed and Mason were placed on the inactive list pending an investigation of the identical allegations made against them by the Office of the Salem County Prosecutor; and

WHEREAS, in order to avoid the appearance of a conflict of interest, the Salem County Prosecutor referred the allegations to the Division of Criminal Justice for investigation; and

WHEREAS, by letter dated July 2, 1992, a representative of the Division of Criminal Justice advised the Salem County Prosecutor's Office of its conclusion that criminal prosecution of the allegations against Freed and Mason was not warranted; and

WHEREAS, after the completion of the criminal investigation, the tenure charges against Freed and Mason were reactivated and the parties engaged in comprehensive discovery, which included interviewing all persons having knowledge of relevant facts, and the mutual exchange of all relevant information, witness statements and documentary evidence; and

WHEREAS, on the basis of the determination made by the Division of Criminal Justice and the Office of the Salem County Prosecutor that criminal prosecution of Freed and Mason was not warranted, coupled with all of the information gleaned through the aforementioned discovery process, the Board has concluded that further prosecution of the tenure charges is not in the public interest; and

WHEREAS, in consideration of the conclusion reached in the criminal investigation, the information obtained through comprehensive discovery in the tenure charge process and in light of the unblemished employment records of Freed and Mason over the course of their longstanding tenure, the Board has further concluded that it is in the public interest to reinstate them to their positions as teaching staff members in the Pennsville School District;

NOW THEREFORE, the matter in difference having been amicably adjusted by and between the parties, it is hereby stipulated and agreed as follows:

1. The Board hereby withdraws the tenure charges against Freed, OAL DKT NO. EDU 9282-91, AGENCY DKT. NO. 281-7/91, with prejudice;

2. The Board hereby withdraws the tenure charges against Mason, OAL DKT. NO. EDU 9283-91, AGENCY DKT. NO. 280-7/91, with prejudice;

3. The Board shall reinstate Freed and Mason to their positions as teaching staff members in the Pennsville School District;

4. The Board's actions, based upon the foregoing, are in the best interests of the citizens of the Township of Pennsville and the students of the Pennsville School District.

DATED: November 23, 1992

FOR THE PENNSVILLE BOARD OF EDUCATION

BY: _____
GARY D. WODLINGER, ESQUIRE

FOR THE RESPONDENT, RANDOLPH FREED

BY: _____
STEVEN R. COHEN, ESQUIRE

FOR THE RESPONDENT, CLAIBORNE MASON

BY: _____
PATRICIA L. RATNER, ESQUIRE

IN THE MATTER OF THE TENURE HEARING OF RANDOLPH FREED, SCHOOL DISTRICT OF THE TOWNSHIP OF PENNSVILLE, SALEM COUNTY.	:	
AND	:	COMMISSIONER OF EDUCATION
IN THE MATTER OF THE TENURE HEARING OF CLAIBORNE MASON, SCHOOL DISTRICT OF THE TOWNSHIP OF PENNSVILLE, SALEM COUNTY.	:	DECISION

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

Upon review, the Commissioner cannot be satisfied by the present record that the proposed settlement in this matter meets the Cardonick standard for settlement of tenure matters (In re Cardonick, decided by the Commissioner April 7, 1992, affirmed State Board of Education April 6, 1983).

The charges underlying these consolidated matters, which involve use of public school time and facilities for personal business operations, reach to fundamental questions of public trust and integrity, and cannot be set aside merely because respondents' actions were subsequently not deemed to warrant criminal prosecution or because the Board, having brought charges to the Commissioner, now elects not to pursue them. Indeed, it is well settled that

tenure charges may proceed even where a respondent has actually been tried for, and exonerated of, criminal wrongdoing, as the purposes and standards of criminal and tenure dismissal proceedings are altogether different, e.g., In the Matter of the Tenure Hearing of Jeffrey Wolfe, Randolph Twp., Morris County, App. Div. Opinion A-1610-80T2 (October 5, 1981). It is further well established that, having once taken up the burden of tenure charges, the Board may not lay it down without spreading forth on the record a reasonably specific explanation of why such charges can no longer be pursued or why it is now in the public interest not to pursue them. In the Matter of the Tenure Hearing of Kenneth Smith, School District of the City of Orange, Essex County, decided by the Commissioner March 22, 1982, decision on remand June 16, 1983, affirmed with modification State Board of Education November 2, 1983, affirmed Superior Court January 30, 1986

The present record contains no such explanation, and while the Commissioner does not preclude the possibility of settlement in this matter, she stresses that in order for her to meet her own obligation to the school children of this State, she must be assured that any settlement is consistent with appropriate standards for setting aside of tenure matters as expressed in Cardonick, supra.

Accordingly, the initial decision of the Office of Administrative Law is remanded for revision of the settlement document and expansion of the record consistent with the intent of this decision.

IT IS SO ORDERED.

JANUARY 15, 1993

DATE OF MAILING - JANUARY 15, 1993

Marylee Fitzgerald

COMMISSIONER OF EDUCATION

6-93

184+-93
(6-93)

IN THE MATTER OF THE TENURE	:	
HEARING OF RANDOLPH FREED,	:	
SCHOOL DISTRICT OF THE TOWNSHIP	:	
OF PENNSVILLE, SALEM COUNTY,	:	COMMISSIONER OF EDUCATION
AND	:	DECISION ON REMAND
IN THE MATTER OF THE TENURE	:	
HEARING OF CLAIBORNE MASON,	:	
SCHOOL DISTRICT OF THE TOWNSHIP	:	
OF PENNSVILLE, SALEM COUNTY.	:	
_____	:	

AUGUST 4, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 496-93
AGENCY DKT. NO. 280-7/91 AND 281-7/91

IN THE MATTER OF THE TENURE HEARING OF RANDOLPH FREED, SCHOOL DISTRICT OF THE TOWNSHIP OF PENNSVILLE, SALEM COUNTY
AND
IN THE MATTER OF THE TENURE HEARING OF CLAIBORNE MASON, SCHOOL DISTRICT OF THE TOWNSHIP OF PENNSVILLE, SALEM COUNTY

(REMAND IN EDU 9282-91 AND EDU 9283-91 CONSOLIDATED)

Gary D. Wodlinger, Esq., for the Board (Lipman, Antonelli, Batt & Dunlap, attorneys)

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

Patricia L. Ratner, Esq., for respondent Mason (Wills, O'Neill & Mellk, attorneys)

Record Closed: June 24, 1993 Decided: June 24, 1993

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

The Commissioner of Education remanded these consolidated cases wherein a settlement with stipulation of dismissal of tenure charges was filed on December 15, 1992. In the Commissioner's remand decision of January 15, 1993, she ordered that the settlement document be revised and record expanded, so as to include a reasonably specific explanation of why such charges can no longer be pursued or why it is in the public interest not to pursue them. Additionally, she explains that the settlement must be reviewed to assure that it is consistent with appropriate standards.

Between January and April 1993, I requested that that parties file a settlement document meeting the Commissioner's directive. When this was not done by late May, I issued an order to show cause why the required information should not be placed on the record before me on June 24, 1993. On that date, a brief hearing was held and the record closed.

The parties submitted a stipulated statement of fact explaining the reasons for dismissal of the tenure charges which is fully satisfactory. In addition, I requested that the financial aspects of the settlement be placed on the record.

The parties calculated the amount of the backpay the teachers would have received had they worked from the time they were suspended without pay through February 1, 1993, when they returned to work, which was $42,289 for Freed, and $50,026 for Mason. The teachers were paid these sums from which they must reimburse the unemployment fund for benefits which received during their suspension. In mitigation, the teachers paid the Board back $20,000 (Mason) and $5,000 (Freed).

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

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

2. The settlement fully disposes of all in controversy and is consistent with the law.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 24, 1993
Date

Naomi Dower LaBastille
NAOMI DOWER-LABASTILLE, ALJ

Receipt Acknowledged:

6/28/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 30 1993
Date

OFFICE OF ADMINISTRATIVE LAW

/cae

LIPMAN, ANTONELLI, BATT, DUNLAP
WODLINGER & GILSON
110 North Sixth Street
Vineland, New Jersey 08360 (609) 692-8000
Attorneys for School District of the Township of Pennsville, Salem County

Plaintiff(s),	:	STATE OF NEW JERSEY
	:	OFFICE OF ADMINISTRATIVE LAW
IN THE MATTER OF THE TENURE HEARING OF RANDOLF FREED, SCHOOL DISTRICT OF THE TOWNSHIP OF PENNSVILLE, SALEM COUNTY	:	OAL DOCKET #EDU-9282-91 AND #EDU-9283-91 (Consolidated)
IN THE MATTER OF THE TENURE HEARING OF RANDOLF FREED, SCHOOL DISTRICT OF THE TOWNSHIP OF PENNSVILLE, SALEM COUNTY	:	STATEMENT OF FACTS IN SUPPORT OF DISMISSAL OF TENURE CHARGES AS REQUIRED BY THE COMMISSIONER OF EDUCATION

DECISION dated January 15, 1993
Commissioner decision 6-93

THIS STATEMENT OF FACTS follows the decision of the Commissioner of Education dated January 15, 1993, requiring the Pennsville Board of Education to spread forth on the record a reasonably specific explanation of why the tenure charges in the within matter can no longer be pursued, or why it is now in the public interest not to pursue them.

Made a part hereof and incorporated by reference, is the initial Stipulation of Dismissal that was submitted to the Administrative Law Judge in this matter and of which she found that the parties have voluntarily agreed to the settlement, as evidenced by their signatures, and that the settlement disposes of

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all issues and controversy and is consistent with the law, and that the settlement met with the requirements of N.J.A.C. 1:1-19.1.

The procedural history of this matter is accurately set forth in the attached Stipulation of Dismissal. As that shows, contemporaneously with the Board's certification of tenure charges in this matter, the Board forwarded the matter to the Salem County Prosecutor's Office for investigation. As a result of that criminal referral, the matter was placed on the inactive list until the disposition of the criminal investigation in July of 1992. During that period of time, no discovery took place because of the fifth amendment rights of the respondents. The record in place clearly shows that the respondents were acting on advice of counsel during that period of time and could not effectively participate in discovery in the tenure dismissal matter based on that advice.

Immediately after the determination by the Division of Criminal Justice and the Salem County Prosecutor's Office, as evidenced by their communications dated July 2, 1992 and July 16, 1992, copies of which are annexed hereto, the discovery portion of the tenure dismissal case began under the management of Judge LaBastille, the Administrative Law Judge assigned to this matter. It should be noted that Richard T. Carley, Deputy Director of the Department of Law & Public Safety Division of Criminal Justice, felt that there were issues as to whether or not the respondents had notice about the school policy and whether or not there was

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prior tolerance of similar activities, and further had questions as to the value of what either man may have actually received. In conclusion, Mr. Carley felt that the Division of Criminal Justice felt that the matter should best be addressed as a disciplinary matter, which may have violated internal codes of conduct of the school district. See Carley letter of July 2, 1992, annexed hereto.

Once the discovery process began in the Summer of 1992, the employees had their real opportunity to respond to the Board of Education and explain their position with respect to the occurrences that took place.

As set forth in the Stipulation of Dismissal, the Board of Education was always cognizant of the reality that each teacher had unblemished employment records during their long standing employment with the Board of Education and was fully aware that the case law in such matters indicated that the unblemished employment records of the individual teachers would be considered in the disposition of any matter relating to their continued employment.

Upon reviewing the evidence that was developed during the discovery, the Board of Education learned that Mr. Freed and Mr. Mason had engaged in the activity of utilizing the printing shop equipment after school in the individual enterprise captioned F & M Enterprises. The Board further learned by review of their tax returns that in the relevant years in question that the venture really was not profitable in any true fashion and was small in

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size. The Board further learned that much, but not all of the work in question, was done for charitable causes, such as churches and civic groups.

The Board further learned that there was no evidence that there was any utilization of any school materials in the production of the printed materials in question, only the school building and school printing equipment. On the other hand, the Board learned that Mr. Mason in particular had apparently been able to obtain donations from various sources in the community of miscellaneous equipment that he utilized both in the small business venture that they pursued and in his every day instruction of students in the classroom at not cost to the district.

The Board further learned in discovery that the activity i question had been ongoing periodically for may years, having begun during the term of prior Administrators prior to the employment of the present Superintendent and Principal of the high school. There was some evidence in that regard that there was tolerance of this activity and some level of knowledge that Mr. Mason would utilize the print shop after hours for the printing of materials not related to this instructional activity. The record further showed however, that Mr. Mason never secured any formal written permission from any Administrator, or from the Board of Education at any point in time during the time period in question. The record further revealed that the present Administration, including the present Principal and Superintendent had no idea until the

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discovery was made of the activity in question and have never been asked for permission or had given any permission for the activity in question. The present Administration never had any knowledge of the prior tolerance and/or knowledge of prior Administrators until they learned of that information through the discovery process in this litigation. The discovery also revealed that Mr. Freed relied on representations made by Mr. Mason to him that he had long standing authority to do the activity that was being engaged in after school.

Clearly, as a result of the discovery, the Board concluded that the utilization of the equipment in question, while not a theft in the criminal sense, was a violation of its own conflict of interest policy #4118.13, a copy of which is annexed hereto, and non-school employment policy #4237, a copy of which is annexed hereto. However, through discovery and confirmation with Administrators, the Board could never actually prove that either Mr. Mason or Mr. Freed were ever directly provided with those specific policies at any point in time during the course of their employment, until after this incident occurred. The evidence revealed that while certain policies were directed to employees at the beginning of each year, these policies were never specifically handed out to any of the school employees. Rather, teachers were advised of the existence of an entire policy manual that would cover almost any topic that they could imagine, or directed to its whereabouts in their specific school building for reference should they have any question in their minds regarding the efficacy of

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any conduct that they might wish to engage in. The Board recognized that given the evidence of some prior tolerance of the conduct in question by past Administrators, the teachers could have been lulled into a false sense of security regarding the efficacy of their conduct in this instance and thus, not concern themselves with the formality of the policies in question.

The Board of Education further learned in the course of discovery that, regarding the attendance of Mr. Mason at the graphics show in New York City, that it was true as to their allegation that he represented himself as an employee of another entity rather than as a Board employee. However, discovery revealed that in fact, that employer paid for his attendance at that show, rather than the Board of Education, thus saving the Board that fee, and further, that while at that show, Mr. Mason engaged in activities connected to this teaching job as well as to activities revolving around his other employment.

The Stipulation of Dismissal that was prepared between the parties was done obviously on the advice of counsel, based upon all of the attendant facts and circumstances learned of through the course of discovery and counsel's recognition of prior case law regarding tenure dismissal cases against veteran teaching staff members with no prior disciplinary problems. As part and parcel of the resolution of this matter, the employees waived their privacy rights and allowed the disposition of this matter to be released to the local press, so that the public was fully aware of the resolution of this matter and the reasons for the

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resolution of the matter.

On February 1, 1993, both Mr. Freed and Mr. Mason were reinstated as teaching staff members in the Pennsville School system without incident. Their reinstatement went smoothly without incident with no public protest or outcry with respect to same. Both the Board of Education and respective teaching staff members are satisfied with the resolution of the matter, consider it closed and believe that fulfills the public interest with respect to same.

Dated: June 23, 1993

LIPMAN, ANTONELLI, BATT, DUNLAP
WODLINGER & GILSON
Attorneys for School District of the
Township of Pennsville, Salem County

GARY D. WODLINGER, ESQUIRE

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WODLINGER & GILSON
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VINELAND, NEW JERSEY 08360

STIPULATION OF DISMISSAL OF TENURE CHARGES

This stipulation of dismissal is entered into by and between the Pennsville Township Board of Education ("Board") and its tenured employees, Randolph Freed ("Freed") and Claiborne Mason ("Mason").

WHEREAS, Freed has been continuously employed by the Board as a teaching staff member since September, 1971; and

WHEREAS, Mason has been continuously employed by the Board as a teaching staff member since September, 1965; and

WHEREAS, on July 16, 1991, the Board certified tenure charges against Freed and Mason to the Commissioner of Education under the Tenure Employees Hearing Law, which charges were captioned "In the Matter of the Tenure Hearing of Randolph Freed, OAL DKT. NO. EDU 9282-91, AGENCY DKT. NO. 281-7/91" and "In the Matter of the Tenure Hearing of Claiborne Mason, OAL DKT. NO. EDU 9283-91, AGENCY DKT. NO. 280-7/91"; and

WHEREAS, on August 14, 1991, Freed and Mason filed answers contesting the tenure charges; and

WHEREAS, on December 2, 1991, Administrative Law Judge LaBastille issued an order consolidating the Freed and Mason tenure cases, and

WHEREAS, by agreement of the parties and by orders dated January 15, 1992 and July 16, 1992, the tenure charges against Freed and Mason were placed on the inactive list pending an investigation of the identical allegations made against them by the Office of the Salem County Prosecutor; and

WHEREAS, in order to avoid the appearance of a conflict of interest, the Salem County Prosecutor referred the allegations to the Division of Criminal Justice for investigation; and

WHEREAS, by letter dated July 2, 1992, a representative of the Division of Criminal Justice advised the Salem County Prosecutor's Office of its conclusion that criminal prosecution of the allegations against Freed and Mason was not warranted; and

WHEREAS, after the completion of the criminal investigation, the tenure charges against Freed and Mason were reactivated and the parties engaged in comprehensive discovery, which included interviewing all persons having knowledge of relevant facts, and the mutual exchange of all relevant information, witness statements and documentary evidence; and

WHEREAS, on the basis of the determination made by the Division of Criminal Justice and the Office of the Salem County Prosecutor that criminal prosecution of Freed and Mason was not warranted, coupled with all of the information gleaned through the aforementioned discovery process, the Board has concluded that further prosecution of the tenure charges is not in the public interest; and

WHEREAS, in consideration of the conclusion reached in the criminal investigation, the information obtained through comprehensive discovery in the tenure charge process and in light of the unblemished employment records of Freed and Mason over the course of their longstanding tenure, the Board has further concluded that it is in the public interest to reinstate them to their positions as teaching staff members in the Pennsville School District;

NOW THEREFORE, the matter in difference having been amicably adjusted by and between the parties, it is hereby stipulated and agreed as follows:

1. The Board hereby withdraws the tenure charges against Freed, OAL DKT NO. EDU 9282-91, AGENCY DKT. NO. 281-7/91, with prejudice;

2. The Board hereby withdraws the tenure charges against Mason, OAL DKT. NO. EDU 9283-91, AGENCY DKT. NO. 280-7/91, with prejudice;

3. The Board shall reinstate Freed and Mason to their positions as teaching staff members in the Pennsville School District;

4. The Board's actions, based upon the foregoing, are in the best interests of the citizens of the Township of Pennsville and the students of the Pennsville School District.

DATED: November 23, 1992

FOR THE PENNSVILLE BOARD OF EDUCATION

BY: _____
GARY D. WODLINGER, ESQUIRE

FOR THE RESPONDENT, RANDOLPH FREED

BY: _____
STEVEN R. COHEN, ESQUIRE

FOR THE RESPONDENT, CLAIBORNE MASON

BY: _____
PATRICIA L. RATNER, ESQUIRE

SALEM COUNTY
PROSECUTORS OFFIC

JUL 13 1992

RECEIVED

State of New Jersey
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF CRIMINAL JUSTICE
CN 085
RICHARD J. HUGHES JUSTICE COMPLEX
TRENTON, NEW JERSEY 08625-0085
TELEPHONE: 609-984-6500

ROBERT J. DEL TUFO
ATTORNEY GENERAL

ROBERT T. WINTER
DIRECTOR

July 2, 1992

Francis A. Paladino
First Assistant Prosecutor
Salem County Prosecutor's Office
Salem County Court House
87 Market Street
P.O. Box 462
Salem, New Jersey 08079

Re: Randy Freed and Clay Mason (CJ-92-1967-38J)

Dear Mr. Paladino:

This Division has reviewed the captioned file and discussed the matter with you and Assistant Prosecutor Gregory G. Waterston. The Division has concluded that criminal prosecution is not warranted. While the actions of Mr. Freed and Mr. Mason may have violated school policy, questions exist as to notice about school policy, prior tolerance of similar activities and valuation of any actual theft. While this assessment is not to be construed as an evaluation that the conduct, if criminal, is de minimus, it is this Division's determination that the matter is better addressed as a disciplinary matter that may have violated internal codes of conduct.

Please advise appropriate Pennsville School District officials.

Very truly yours,

Richard T. Carley
Deputy Director

RTC:cs
C IRMS (CJ-92-1967-38J)
Gregory G. Waterston Assistant Prosecutor

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3K

SALEM COUNTY
PROSECUTOR'S OFFICE

RONALD A. EPSTEIN
PROSECUTOR

FRANCIS A. PALADINO
FIRST ASSISTANT PROSECUTOR

DUANE R. BELL
CHIEF OF TRIALS

MARGIE A. VANNEMAN
OFFICE MANAGER

JOHN B. COOKSEY
CHIEF OF COUNTY DETECTIVES

THEODORE D. VENGENOCK
LIEUTENANT OF DETECTIVES

DENNIS A. SAMPLE
LIEUTENANT OF DETECTIVES

July 16, 1992

Gary D. Wodlinger, Esquire
Lipman, Antonelli, Batt & Dunlap, P.C.
110 North Sixth Street, P.O. Box 280
Vineland, New Jersey 08360

Re: Randolph Freed and Claiborne Mason

Dear Mr. Wodlinger:

Please be advised that the above-captioned matter has been reviewed with the Division of Criminal Justice and it has been determined that criminal prosecution is not warranted for the reasons set forth in the enclosed letter of Richard T. Carley, Deputy Director of the Division of Criminal Justice.

I am, by copy of this letter, advising the attorneys for Mr. Freed and Mr. Mason of this decision.

Very truly yours,

Francis A. Paladino

Francis A. Paladino
First Assistant Prosecutor

FAP:dcc

cc: Richard T. Carley, Deputy Director,
Division of Criminal Justice
James M. Weinberg, Esquire
Patricia L. Ratner, Esquire
Gregory G. Waterston, Assistant Prosecutor

COURT HOUSE ANNEX, 87 MARKET STREET, P.O. BOX 462, SALEM, NEW JERSEY 08079
TELEPHONE (609) 935-7510 FAX (609) 935-8737

PENNSVILLE TOWNSHIP BOARD OF EDUCATION
Pennsville, New Jersey 08070
Policy

File Code: 4118.13

EMPLOYEE CONFLICT OF INTEREST

1. No employee of the Board shall have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity, which is in conflict with the proper discharge of his/her duties.

2. No employee of the Board shall use or attempt to use his/her position to secure unwarranted privileges or advantages for himself/herself or others.

3. No employee of the Board shall act in his/her official capacity in any matter wherein he/she has a direct or indirect personal financial interest.

4. No employee of the Board shall accept any gift, favor, service or other thing of value under circumstances from which it might be reasonably inferred that such gift, service or other thing of value was given or offered for the purpose of influencing him/her in the discharge of his/her duties.

Date: January 18, 1983
Date Rev.: MAY 17 1988

Legal References: N.J.S.A. 18A:6-8 Interest of School Officers, etc., in Sale of Textbooks or Supplies
N.J.S.A. 18A:6-8.4 Right to Hold Elective or Appointive Office

Cross Reference: 4237 Non-School Employment

2159Q

3m

PENNSVILLE TOWNSHIP BOARD OF EDUCATION
Pennsville, New Jersey 08070
Policy

File Code: 4237

NON-SCHOOL EMPLOYMENT

Pennsville Board of Education support personnel may not accept outside employment which interfers with proper performance of required duties.

Employees may not use district equipment to perform tasks in outside employment.

Date: January 18, 1983
Date Rev.: MAY 17 1988
Cross Reference: 4218.13 Employee Conflict of Interest

2182Q

NJSBA SCHOOL POLICY SERVICE
New Jersey School Boards Association, P.O. Box 909, Trenton, New Jersey 08605
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OAL DKT. NO. EDU 496-93 (EDU 9282-91 AND EDU 9283-91 ON REMAND)

IN THE MATTER OF THE TENURE HEARING OF RANDOLPH FREED, SCHOOL DISTRICT OF THE TOWNSHIP OF PENNSVILLE, SALEM COUNTY, AND IN THE MATTER OF THE TENURE HEARING OF CLAIBORNE MASON, SCHOOL DISTRICT OF THE TOWNSHIP OF PENNSVILLE, SALEM COUNTY.	:	COMMISSIONER OF EDUCATION DECISION ON REMAND

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

The Commissioner approves the settlement terms as they comport with the Cardonick standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846) The matter is hereby dismissed, subject to compliance with the terms of the settlement.

AUGUST 4, 1993

DATE OF MAILING - AUGUST 4, 1993

COMMISSIONER OF EDUCATION

7-93

IN THE MATTER OF THE TENURE :
HEARING OF JEROME KACPROWICZ, :
STATE-OPERATED SCHOOL DISTRICT : COMMISSIONER OF EDUCATION
OF THE CITY OF JERSEY CITY, : DECISION
HUDSON COUNTY. :
:

SYNOPSIS

State-operated School District certified tenure charges of chronic and excessive absenteeism over a period of nine years from school years 1983-84 to 1991-92 against respondent, high school social studies teacher.

ALJ found respondent was given sufficient warnings by supervisors who were dissatisfied with pattern of absences especially in view of respondent's poor attendance record prior to serious injuries of 1991. ALJ found cause to remove respondent from his employment due to the significant adverse effect of his absenteeism on school children in the District. Thus, the ALJ concluded respondent should be removed as teacher.

Commissioner adopted findings and determination in initial decision dismissing respondent from his tenured employment as of date of her decision and referred matter to State Board of Examiners for further action as appropriate. Commissioner noted District did consider particular circumstances and impact of respondent's absences prior to seeking removal.

JANUARY 21, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1158-92
AGENCY DKT. NO. 7-1/92

IN THE MATTER OF THE TENURE HEARING OF JEROME KACPROWICZ, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY.

Charlotte Kitler, General Counsel, for petitioner

Philip Feintuch, Esq., for respondent
(Feintuch, Porwich & Feintuch, attorneys)

Record Closed: October 23, 1992 Decided: December 7, 1992

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter involves a hearing under the Tenure Employees Hearing Act in which the school district is seeking respondent's removal based upon charges of chronic and excessive absenteeism over a period of nine years from school years 1983-84 to 1991 92, allegedly resulting in a significant adverse effect on the schoolchildren of the school district.

The matter was transmitted to the Office of Administrative Law (OAL) on February 13, 1992, for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The matter was scheduled for a telephone prehearing conference which was held on April 14, 1992. Following this, a prehearing order was entered on May 12, 1992, and the matter was scheduled for a hearing on September 23 and 24, 1992. On September 23, 1992, a hearing was held and concluded. The record remained open in order to allow the attorneys for the respective parties to submit legal arguments. After the submissions, the record closed on October 23, 1992.

FACTUAL DISCUSSION

With certain exceptions, the essential facts in this matter are not disputed. In addition, the parties entered into a stipulation to the following facts:

1. The respondent, Jerome Kacprowicz, is a tenured teacher employed by the Jersey City School District.

2. He was initially hired by the Jersey City Board of Education on October 5, 1973, as a pool substitute teacher.

3. Respondent became employed as a contract teacher with the Jersey City School District effective November 17, 1977.

4. Since the 1981-82 school year, respondent has been a teacher of social studies at Dickinson High School in Jersey City.

5. The parties agreed to stipulate to the joint exhibits set forth in the appendix hereto.

The first witness to testify for petitioner was Anne E. Butler, who was the principal of Dickinson High School from September 1986 to June 1991. Ms. Butler is currently the principal at Public School No. 25. She indicated that respondent was under her supervision during her term as principal of Dickinson, where respondent was a social studies teacher. Ms. Butler indicated that while she did not observe

respondent in the classroom, she was involved in the approval of his annual professional improvement plan (PIP).

Ms. Butler testified that she prepared an annual written performance report for respondent on June 23, 1989, and that page two of this, which is an improvement plan, was prepared by respondent. She indicated that a teacher's attendance is absolutely vital so that students can be taught. Furthermore, continuity in class is very important, especially in the teaching of social studies and history. She also indicated that attendance is important in urban areas such as Jersey City because teachers are role models and should set a good example. She indicated that if high school students are required to attend class, teachers should also attend. High school students are very aware of the actions of teachers; for these reasons, teachers' attendance is extremely important.

Ms. Butler indicated that her comments with respect to attendance and her recommendation to withhold respondent's increment for excessive absenteeism was based upon respondent's 1988-89 attendance record (Exhibit J-4). This revealed thirty-seven days, 1¾ hours used for personal illness and one day used for personal business for 1988-89. Ms. Butler explained that when she first became principal at Dickinson High School, she accepted respondent's absences for the 1986-87 school year as valid since respondent gave legitimate reasons for these absences. However, when in school year 1987-88 respondent's absences again exceeded thirty days, she advised the respondent that his record of absenteeism could not continue.

It was on the basis of respondent's excessive absenteeism during 1988-89 and his prior history of absenteeism that respondent's increment was withheld (Exhibit J-24). Ms. Butler indicated that respondent's absences were interfering too much with instruction and that respondent was always in a situation where his classes had to catch up. She also indicated that she could not bring in a substitute teacher on a continuous basis because of respondent's sporadic absences. She explained that when absences did not occur on a continuous basis, she would have to substitute for respondent with whatever teacher might be available at the time. This might be a teacher with a certificate in social studies, but on other occasions it could be a special education teacher, an art teacher, or a teacher not familiar with the subject matter of social studies.

Ms. Butler testified that she performed another evaluation of respondent on June 16, 1990 (Exhibit J-12). She explained that she prepared the first page and that respondent prepared the second page. She indicated that her comment with respect to respondent's attendance needing to be improved was based upon respondent's attendance record for the 1989-90 school year (Exhibit J-3). This record reveals that he was absent for thirteen days, 4¾ hours for personal illness or personal business and that he was absent for an additional thirty-nine days, ¾ hour as a result of a school accident. Ms. Butler indicated that she did not withhold respondent's increment based on his absenteeism because the thirteen days was an improvement over his absenteeism in prior years.

Ms. Butler testified that she agreed with the evaluation of respondent dated June 7, 1991 (Exhibit J-10). She indicated that the comments regarding the necessity to improve attendance in this report were based on respondent's attendance record for school year 1990-91 (Exhibit J-2) which shows seventeen days, 3¾ hours absences. She noted that this was not an improvement over the prior year and that she felt this to be excessive.

Ms. Butler indicated that the procedure for use of personal illness leave is that after six days, a teacher must produce a doctor's certificate which goes directly to the board of education for approval. However, she indicated that the issue in this case is not whether respondent followed the proper procedure, but the necessity to have the teacher attend in order to teach students. She indicated that a school cannot provide adequate instruction unless the teacher attends, that basic history courses are essential for advanced courses in history, and that teacher absences are detrimental to the student. Ms. Butler also indicated that the school district has adopted a carefully-worded policy (Exhibit P-1) for guidelines on absences and that this was circulated among administrators and supervisors only. She indicated that in the past, the policy of the school district has been that excessive absences may lead to increment withholding and tenure charges.

Ms. Butler also indicated that she reviewed respondent's record of absenteeism approximately one week before the hearing. She indicated that at the time she became principal of Dickinson High School, she did not consider respondent's prior record of absenteeism because she felt that everyone must start with a clean slate.

However, after a review of his entire record, she feels that respondent should be removed as a teacher.

On cross-examination, Ms. Butler indicated that her first involvement with respondent was the evaluation of May 14, 1987 (Exhibit J-16). She noted the respondent's record of absences for 1986-87 (Exhibit J-6) showed absences of thirty-one days. She admitted that the May 14, 1987 evaluation and improvement plan made no mention of attendance. However, Ms. Butler indicated that she believes she would have spoken to respondent concerning the problem of attendance. Ms. Butler also admitted that for school year 1987-88, respondent was absent for over thirty-two days and that other than mentioning this in the evaluation report of January 14, 1988, no action was taken regarding any excessive absences.

Ms. Butler testified that her recommendation to withhold respondent's increment in the evaluation of June 9, 1989 (Exhibit J-13), was made known to respondent at the time the evaluation and plan were approved. She explained that when she reviewed the plan, she automatically put a checkmark next to the "yes." However, she immediately crossed out this checkmark and inserted the checkmark which indicated that she was recommending against an increment, and she added the notation that this recommendation was based on excessive absenteeism. She testified that this change was made prior to giving the evaluation report to respondent. She also testified that she had advised respondent in each of the prior two years that if he did not improve his record of absenteeism, he was faced with the possibility of the withholding of an increment.

Ms. Butler also noted a marked improvement by respondent in his absences for the subsequent year. Respondent was only absent for a total of seventeen days, 3¾ hours for school year 1990-91. Ms. Butler indicated that by contract, a teacher is given fourteen days per year for personal illness and two days per year for personal business. The personal illness or sick leave days are cumulative. Additional leave, which is known as permissive personal illness leave, may be given to a teacher upon recommendation of the Superintendent and approval of the medical director in the amount of one additional day for each year of service as a regularly appointed teacher but for no more than eighty days in any one school year. Upon the granting of this permissive personal illness leave, the teacher is required to forfeit one-half of a substitute's per diem pay. These provisions are found in the negotiated contract

between the Jersey City Board of Education and the Jersey City Education Association, Article 30 (Exhibit R-4).

Ms. Butler indicated that she has no data on the success or lack of success of the students in respondent's classes. She also acknowledged that while there was an improvement in respondent's sick leave for school year 1990-91, she was not satisfied with that improvement but accepted that it was an improvement over prior years. She restated that her concern was the effect of respondent's absences on the students in his class. She acknowledged that the school district gives sabbatical leave to teachers to allow them to remain out of school for a full school year for the purpose of advance studies.

On redirect examination, Ms. Butler indicated that while she did consider the school accident absence of thirty-nine days during school year 1989-90, she did not penalize respondent on this basis.

John Greco, supervisor of social studies and respondent's supervisor, testified for petitioner. He indicated that he evaluated respondent in 1987, 1988, and 1989. An evaluation consists of observing the teacher for one full class, evaluating the teacher's performance, preparing an evaluation report, and conferring with the teacher to discuss the observations and evaluation. A written record is made of the observation and evaluation.

Mr. Greco testified that his first observation/evaluation was done on March 31, 1987 (Exhibit J-17), and that he, as a matter of course, obtains from the administrative office a report as to teacher absences and records this on the report. The March 31, 1987 report indicates that as of that date, respondent's absences totaled twenty-seven and one-half days. Mr. Greco indicated that he discusses absences with the teacher if it needs discussion. He recalls that the twenty-seven and one-half days of absences struck him as excessive. He explained that there are only 180 teaching days per year and that there is a substantial amount of material that must be taught to the students over this limited period of time. He indicated that he is concerned about the impact of the absences in the classroom, and that it is difficult for a teacher to do a good job when too much time is lost with absences.

The witness explained that social studies courses, including history, which are taught by respondent, are survey courses and the attempt is made not to leave anything out. He also indicated that a teacher with a background in the subject matter rather than a substitute teacher would know the background necessary for these kinds of courses.

Mr. Greco indicated that he discusses the evaluation with the teacher and explained to respondent that it was detrimental to the students, to himself, to the school, and to the profession to have excessive absences.

Mr. Greco performed another observation/evaluation of respondent on March 15, 1989 (Exhibit J-14). It is noted that there were thirty-three teacher absences as of that date. Mr. Greco indicated that he usually questions the teacher as to the reason for the absences, and he recalls something about respondent having a problem with his back or his knee. Mr. Greco made it clear that he did not question the legitimacy of respondent's absences but merely that they were excessive. He again explained that the full 180 teaching days are necessary to teach course content in history. If there are excessive absences, there is a detrimental effect on the education process. It involves short-changing the students and they are not afforded the education to which they are entitled. Mr. Greco indicated that he was pretty sure that respondent told him he would try to improve on his absences.

On cross-examination, Mr. Greco indicated that another problem with teacher absences is that if the teacher is absent at the end of a marking period, it is necessary for a substitute teacher or other teaching staff to provide the grade. He has not analyzed the grades obtained by respondent's classes. However, he noted that with regard to his observation/evaluation report of January 14, 1988, excessive absences are reflected in the performance factors and in the areas needing improvement.

The observation of January 14, 1988, was two weeks before the midterm exams, which are scheduled for the last week in January. The subject matter of the lesson on the day of observation was the French and Indian War. However, the midterm examination includes questions concerning the Revolutionary War and the Constitution. Mr. Greco felt that respondent could not cover the Revolutionary War, the Articles of Confederation, and the Constitution in a proper fashion prior to the midterm examination. He felt that the failure of respondent to cover the material

which was to be included on the midterm examination was the direct result of excessive absences.

The report noted that respondent's pacing needed improvement and that respondent should follow the course of study when planning his lessons, indicating that he was too far behind with midterms two weeks away. This observation/evaluation report also recommended improvement regarding teacher attendance and commented that better teaching attendance is beneficial to students, school, and teacher. Mr. Greco indicated that he had no knowledge of how well or how poorly the students performed on the midterm examination.

Mr. Greco indicated on the report of March 15, 1989, the notations of no latenesses and forty-six coverages were included thereon by respondent. He explained that coverages are where a teacher handles another class for an absent teacher. Where a teacher covers a class, he is given a credit of one-fifth of a day as compensatory time or days. These are reflected on the teacher attendance records. For example, in school year 1990-91, respondent earned eleven days in this fashion; in 1989-90, he earned nine days; in 1988-89, he earned twenty-five days; in 1987-88, he earned twenty-six days; in 1986-87, he earned twenty-two days; in 1985-86, he earned twelve days; in 1984-85, he earned eleven days; and in 1983-84, he earned ten days.

When Mr. Greco was questioned about the effects of these absences by respondent, he indicate that while there are failure rates in the school district's records, no study has been made of these. He indicated that respondent was a very fine teacher but that he would have been an even better teacher if he was not excessively absent. He finally indicated that he is aware of a board policy regarding absenteeism.

John Pacifico, who is currently director of Cluster 3, also testified for petitioner. He indicated that he was the vice principal at Dickinson High School from March 1985 until August 1986 and that he was also the interim principal of Dickinson High School in September 1991. He was familiar with respondent while he was the vice principal at Dickinson High School, and he evaluated respondent for the 1984-85 school year.

Mr. Pacifico indicated that he performed the evaluation of June 1, 1985 (Exhibit J-20), which noted that respondent's attendance was an area needing improvement and that respondent's improvement plan included the requirement that respondent devise a plan for improving attendance. Mr. Pacifico recalls that respondent was very positive about attempting to improve his attendance.

Mr. Pacifico also testified that he evaluated respondent in March 1986 (Exhibit J-19). He indicated that he made two classroom observations, the first on March 12, 1986, and the second on March 24, 1986. The report noted that respondent had been absent forty-two times as of March 13, 1986, that attendance was an area needing improvement, and the suggestion was made that some effort at improving attendance must be undertaken. Mr. Pacifico felt that the attendance of respondent had an effect on respondent's conduct of classes with respect to the demonstration of proficiency in the subject matter and the utilization of effective instructional techniques.

Mr. Pacifico indicated that he always discusses his evaluation comments with the teacher so there is no misunderstanding as to his comments. The report of March 1986 was based upon his attendance record for school year 1985-86 (J-7). As a result of this observation, respondent's improvement plan dated June 3, 1986 (J-18), included an improvement action to conduct a self-study as it pertains to respondent's attendance, devise a plan for improving his attendance, and implement a plan and evaluate its effectiveness. However, Mr. Pacifico indicated he does not know if respondent prepared or implemented such a plan, since he left Dickinson High School immediately thereafter.

Mr. Pacifico testified that he returned to Dickinson High School in September 1991 as its interim principal. He reviewed respondent's record and found that his chronic absenteeism had continued. On the first day of school, respondent did not report; Susan Butler, the attendance clerk, advised Mr. Pacifico that respondent had been injured because of an auto accident and would be out of work indefinitely. It was at this point that Mr. Pacifico recommended the filing of tenure charges seeking respondent's removal. He stated that the reasons for his recommendation were: first, the district cannot have an effective instructional program if teachers do not show up to teach; second, teachers are role models for students and respondent's

actions were inappropriate conduct; third, respondent did not make sufficient efforts to improve his attendance problem.

On cross-examination, Mr. Pacifico testified that he recommended the tenure charges strictly because of respondent's absence commencing in September 1991 and based on his prior record of chronic absenteeism. Mr. Pacifico indicated that he did into the reasons for the September 1991 absence and that when he looks at the total number of absences over the past years, he feels the tenure charges are justified. He indicated that respondent has been absent in excess of 300 days over the past nine years if the school accident of thirty-nine days is counted. In addition, he indicated that his focus is on the effect of respondent's absences on students, and the fact that respondent had sick leave available to utilize is of no consequence when considering the effect on the educational program of the school district.

Jerome Kacprowicz testified that with the exception of these tenure charges and a prior increment withholding matter, he has never been subjected to disciplinary action. He identified an observation/evaluation report of April 18, 1991 (Exhibit J-11), conducted by vice-principal John Powers. That report notes that as of that date, he had been absent thirteen times. The report rated respondent as excellent in all performance areas and indicated that there were no areas needing improvement. No mention is made of a problem of absenteeism. Respondent testified that he was never cited for any deficiencies as a teacher other than for attendance.

Respondent testified he did not return to school in September 1991 because of two auto accidents which occurred on July 28, 1991 and on August 17, 1991. He indicated that on the first day of school, he called and spoke to Sue Butler and told her what occurred. He then received leave papers from John Pacifico, which he filled out and returned within the proper time. He never returned for the 1991-92 school year and at the present time he is suspended. He indicated that the school district has never requested a medical examination of him and that no one from the district has ever consulted with him concerning his absence. He has submitted all papers required by the district in connection with his absence.

Respondent testified as to the nature of his injuries. He indicated that he has numerous soft-tissue injuries ranging from his neck to his back and lower back. He

indicated that he has cervical disc bulges, two herniated discs in his back, and nerve damage. At the hearing, he was wearing a pain management unit prescribed by his chiropractor, Dr. Rizzolo.

Respondent testified that as a result of the accident on July 28, 1991, he was brought to the Mountainside Hospital Emergency Room. Subsequently, he was treated by Dr. Rizzolo at Commerce Chiropractic Center, Dr. Garofalo, and Dr. Lock. In addition, he was diagnosed as having a postconcussion syndrome and a posttraumatic syndrome and was under the care of Dr. Irati, a psychologist, and Ms. Weinberg, a social worker who alternately treated and counseled him. He was also seen by Dr. Steven Heller, an orthopedic specialist. He was also sent for a magnetic resonance imaging (MRI) on his lower back, which revealed two herniated discs, L4-L5 and L5-S1. In addition, he was seen by Dr. Sorin, a neurologist, who found nerve damage. Dr. Garofalo prescribed a home nurse, who comes to his home two times per weeks for massage treatment and exercise.

On August 17, 1991, respondent was involved in another auto accident and that Dr. James Maresca came to his home to provide him with emergency medical treatment. He underwent an additional MRI and his condition was found to be getting worse instead of better. As a result of his overall situation, he was referred to a psychiatrist, Dr. Robert Latimer. He was also seen by and treated by Dr. John Infantalino, an internist, and Dr. Laspinosas, a spinal specialist. He was seen by Dr. Pedinoff, a psychiatrist. He has also been referred to a third orthopedic specialist, Dr. Cornelius Necoll, whom he is scheduled to see in the near future.

Respondent is still seeing his various doctors on a regular basis. He sees Dr. Latimer and Dr. Pedinoff two times per week. His home nurse sees him two times per week. He also sees his chiropractor one time per week or as needed.

Respondent testified that he is taking Drudis, an anti-inflammatory drug; Norflex, a muscle relaxant; and synthetic Morphine, Fiorinal, Codeine No. 3, Valium, and Zantac, for his stomach condition caused by stress. He provided printouts from the various pharmacies indicating the various medications he has been prescribed (Exhibit R-1).

Respondent maintained that permissive leave was granted to him by the school district on January 7, 1992.

With respect to the charges, respondent testified that he was trying to improve upon his attendance and that he has always tried to improve this area. With respect to his absences from class, respondent indicated that the success rate of his students was always very good and that it was better than most teachers. He indicated that he had a very good rapport with his students and that he made their success in his classes attainable.

Respondent testified as to his prior educational background and indicated that he has certificates in art, English, and social studies. Respondent denied that Mr. Pacifico evaluated him for two periods in March 1986. He indicated that on the first evaluation date, for various reasons, Mr. Pacifico could not complete the evaluation; he came back for another class observation.

With respect to the denial of his increment in August 1989, respondent testified that he was given the evaluation on June 23, 1989, which was the last day of class. He was asked to sign it and return it immediately, which he did. He was not provided with the signed copy of the evaluation until after he learned that the board of education was going to deny his increment. He first learned that the increment was to be denied on August 18, 1989, and it was eventually denied by the board of education on August 31, 1989. He indicated that he did not speak to Ms. Butler about her recommendation of June 23, 1989, either on that date or after he became aware of it her recommendation in August 1989.

Respondent stated that he felt that the course proficiencies required of his students were always covered. Whenever he was absent, he attempted to work with the substitute teacher by sending in assignments and work and otherwise trying to keep his students prepared. He feels that the school district has handled this entire situation very inhumanely, particularly in view of his automobile accidents and injuries and his inability to work.

LEGAL DISCUSSION AND ANALYSIS

N.J.S.A. 18A:6-10, which governs dismissals of tenured teachers, such as the respondent herein, provides in relevant part that:

> No person shall be dismissed or reduced in compensation,
> (a) if he is . . . under tenure of office, position or employment during good behavior and efficiency in the public school system of the state. . . .
> * * *
> *except for inefficiency, incapacity, unbecoming conduct, or other just cause . . .* [emphasis added].

A review of prior decisions indicates that chronic or excessive absenteeism has been found to constitute both "incapacity" and "unbecoming conduct" within the meaning of *N.J.S.A.* 18A:6-10, such as to warrant dismissal from employment. It has also been held that chronic and excessive absenteeism amounts to "just cause" under *N.J.S.A.* 18A:6-10 such as to warrant dismissal from employment. *Trenton Bd. of Ed. v. Williamson*, OAL DKT. EDU 7335-85 (Apr. 14,1986), *aff'd* by Comm'r (May 28, 1986).

In *In the Matter of the Tenure Hearing of Reilly,* 1977 *S.L.D.* 403, the Commissioner of Education affirmed the dismissal of a teacher, on grounds of incapacity and conduct unbecoming a teacher, whose absences ranged from five to 149 days a year over a ten-year period, notwithstanding the claim that most of the absences were in connection with a physical ailment plaguing the teacher. *See also Malley v. Bd. of Ed. of Pequannock Township,* OAL DKT. EDU 1858-86 (Nov. 19, 1986), *aff'd* by Comm'r (Dec. 29, 1986), *aff'd* State Bd. of Ed. (April 1, 1987); *In the Matter of the Tenure Hearing of DeKrafft,* 1981 *S.L.D.* 1308, *aff'd* State Bd. of Ed., 1982 *S.L.D.* 1470, *aff'd,* No. A-4641-81T2 (App. Div. May 4, 1983).

Excessive absenteeism constitutes valid grounds for dismissing a tenured teacher, even where the absences have been excused or are caused by legitimate reasons of personal illness. *State-Operated School District of Jersey City v. Pellecchio,* 92 *N.J.A.R.* 2d (EDU) 267, 269-270; *Tenure Hearing of Lena White* 92 *N.J.A.R.* 2d (EDU) 157, 161; *Tenure Hearing of Edna Booth,* 1985 *S.L.D.* 722, 744, 760-761; *Tenure Hearing of DeKrafft, supra; Tenure Hearing of Reilly, supra,* 1977 *S.L.D.* at 413-415.

Even if a teacher's performance in the classroom is sufficient and even if the absences were approved leave or sick days to which the teacher was entitled, the absences may nevertheless be considered as material to the issue and can justify removal of the teacher. *Trautwein v. Board of Educ. of Bound Brook,* 1980 *S.L.D.*

1539 (No. A-2773-78, N.J. App. Div. April 8, 1980), *certif. den.*, 84 *N.J.* 469 (1980); *Tenure Hearing of Sheets,* 1979 *S.L.D.* 790, 798, *adopted* State Bd. of Ed., 1980 *S.L.D.* 1536.

The underlying rationale was explained by the Commissioner in *Tenure Hearing of Green*, 1991 *S.L.D.* 1103. In that case, the Commissioner concurred with the Administrative Law Judge in ordering the removal of a high school teacher for chronic and excessive absenteeism ranging from twenty-three days to 105 days annually over a period of five and a half years. Although many of the absences had been approved as sick leave, the Commissioner pointed out that while "a school district has a responsibility to teachers who are plagued with illness and have medical problems . . . the overarching responsibility of the Commissioner and the local Board of Education is to the children" (Commissioner's Decision, July 31, 1991, p. 17).

The Commissioner further explained (pp. 17-18) by quoting from *Meli v. Board of Education of Burlington Cty. Voc.Tech. School,* 1984 *S.L.D.* 906, 913-914, *aff'd,* State of Bd. of Educ., 1984 *S.L.D.* 921:

> Common sense dictates that a teacher's continued absences must, at some point have a negative impact upon [his or] her pupils even if a board of education is unable to prove the relationship between a teacher's attendance and pupil progress. This conclusion is summarized by the Commissioner in *Reilly, supra,* where the Commissioner stated as follows:
>
> > Frequent absences of teachers from regular classroom learning experiences disrupt the continuity of the instruction progress. The benefit of regular classroom instruction is lost and cannot be entirely regained, even by extra effort, when the regular teacher returns to the classroom. Consequently, many pupils who do not have the benefit of their regular classroom teacher frequently experience great difficulty in achieving the maximum benefit of schooling. Indeed, many pupils in these circumstances are able to achieve only mediocre success in their academic program. The entire process of education requires a regular continuity of instruction with a teacher directing the classroom activities and learning experiences in order to reach the goal of maximum educational benefit for each individual pupil. The regular

> contact of the pupils with their assigned teacher is vital to this process.

The point at which the absenteeism is judged to be excessive falls within the reasonable judgment and discretion of the local school district. *Trautwein v. Board of Educ. of Bound Brook, supra*, 1980 *S.L.D.* at 1542; *State Operated School Dist. of Jersey City v. Pellechio, supra,* 92 *N.J.A.R.* 2d at 270. There are certain procedural guidelines which must be followed, as indicated in *Kelsey v. Board of Educ. of Trenton*, 1989 *S.L.D.* 1622, *modified*, Comm. of Educ. (May 11, 1989), which are quoted in *Tenure Hearing of White, supra*, 92 *N.J.A.R.* 2d at 161:

> What a board of education is required to show, however, is that there was consideration of (1) the particular circumstances of the absences and not merely the number of absences, (2) the impact that the absences had on the continuity of instruction during the period of time the absences occurred, not merely after the fact and (3) that there be some warning given to the employee that his or her supervisors were dissatisfied with the pattern of absences.

Respondent's record of attendance shows the following:

School Year	Day Absent
1983-84	23 (J-9)
1984-85	23 (J-8)
1985-86	46 (J-7)
1986-87	32 (J-5)
1988-89	38 (J-4)
1989-90	13 Plus 39 (school accident) (J-3)
1990-91	17 (J-2)
1991-92	All (J-1)

From the above, it can be seen that for the eight school years between September 1983 and June 1991, respondent was absent a total of 262 days, or 223 days if the thirty-nine school accident days are excluded. This amounts to an average number of absences of approximately twenty-eight days per year.

There is no question that respondent's absences over the years were for legitimate reasons. In particular, respondent's most recent absences for the entire 1991-92 school year were based upon respondent's involvement in two motor vehicle accidents in July 1992.

Despite the foregoing, the touchstone upon which a case such as this is to be decided is the effect of the absences on the children of the school district. Common sense dictates that a teacher's continued absences ranging from forty-six days in school year 1985-86 to thirteen days (plus thirty-nine days for a school accident) in school year 1989-90 must have had a negative impact upon respondent's pupils. The pattern of absences shown in respondent's attendance records show frequent absences which necessarily disrupted the required continuity of instruction necessary to provide the opportunity for a pupil's maximum educational progress. Accordingly, in this case, I **FIND** that the petitioner's responsibility to respondent as a teacher who is plagued with illness and medical problems is far outweighed by the excessive number of absences of respondent.

In view of this finding, the issue arises whether respondent was given some warning that his supervisors were dissatisfied with respondent's pattern of absences. In this regard, the evidence reveals that as early as June 1985 and March 1986, John Pacifico, who was a vice principal at Dickinson High School at the time, indicated in respondent's evaluation that respondent's attendance was an area needing improvement.

Anne Butler, principal of Dickinson High School, indicated that while she accepted respondent's absences of thirty-one days for the 1986-87 school year, she advised respondent that his absences for thirty-two days in the 1987-88 school year could not continue. When respondent was absent for thirty-eight days in the 1988-89 school year, respondent's increment was withheld. Despite improving his absences to thirteen days for school year 1989-90 and to seventeen days for school year 1990-91, respondent was advised that his attendance needed to be improved in June 1990 (Exhibit J-12) and in June 1991 (Exhibit J-10). Accordingly, I **FIND** that respondent was given sufficient warnings that his supervisors were dissatisfied with his pattern of absences.

When viewed in light of its impact upon the students, respondent's absence from his teaching duties for the entire school year 1991-92 could be said to have less impact on the continuity of instruction than an absence of approximately one day per week. Nevertheless, the students of a school district are entitled to have available to them a teacher who is able to teach. One who is unable to do so may be properly found to be incapable of teaching and may be removed for "incapacity."

During the hearing, respondent was heard to complain about the inhumane way this matter has been handled by the school district. I would agree with his complaint if respondent's attendance record showed infrequent use of sick leave prior to his involvement in the accident in July 1991 leading to his inability to return to his teaching duties. However, in view of respondent's poor attendance record, and in light of respondent's apparently serious injuries, there is every indication that if respondent is able to return to his teaching duties, his pattern of absences will continue in the future.

Based on the foregoing, I **CONCLUDE** that respondent's conduct amounts to chronic and excessive absenteeism over a period of nine years from school years 1983-84 to 1991-92, resulting in a significant adverse effect on the school children of the school district. Therefore, I further **CONCLUDE** that respondent should be removed as a teacher on the basis of these charges.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

December 7, 1992
Date

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

12/9/92
Date

Maureen R. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 15 1992
Date

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

dgi/e

APPENDIX

LIST OF WITNESSES

For Petitioner:

Anne E. Butler
John Greco
John Pacifico

For Respondent:

Jerome Kacprowicz

LIST OF EXHIBITS

C-1 Stipulation of Facts and Joint Exhibits

J-1 Attendance Record, 1991-92
J-2 Attendance Record, 1990-91
J-3 Attendance Record, 1989-90
J-4 Attendance Record, 1988-89
J-5 Attendance Record, 1987-88
J-6 Attendance Record, 1986-87
J-7 Attendance Record, 1985-86
J-8 Attendance Record, 1984-85
J-9 Attendance Record, 1983-84
J-10 Annual Written Performance Report, dated June 7, 1991 (2 pages)
J-11 Instructional Observation/Evaluation Report, dated 4/18/91
J-12 Annual Written Performance Report, dated June 16, 1990 (2 pages)
J-13 Annual Written Performance Report, dated June 23, 1989 (2 pages)
J-14 Instructional Observation/Evaluation Report, dated March 15, 1989
J-15 Instructional Observation/Evaluation Report, dated January 14, 1988
J-16 Annual Written Performance Report, dated May 14, 1987 (2 pages)
J-17 Instructional Observation/Evaluation Report, dated March 31, 1987

J-18 Annual Written Performance Report, dated June 3, 1986 (2 pages)
J-19 Instructional Observation/Evaluation Report, dated March 12, 1986 and March 24, 1986
J-20 Annual Written Performance Report, dated June 1, 1985 (2 pages)
J-21 Annual Written Performance Report, dated May 14, 1984 (2 pages)
J-22 Annual Written Performance Report, dated May 27, 1983 (2 pages)
J-23 Instructional Observation/Evaluation Report, dated April 14, 1983
J-24 Letter dated August 18, 1989, from Louis Lanzillo to Jerome Kacprowicz
J-25 Letter dated August 23, 1989, from Louis Lanzillo to Jerome Kacprowicz

P-1 Guidelines relative to excessive absenteeism, dated September 25, 1990

R-1 Printout of prescriptions issued to respondent from various pharmacies
R-2 Letter from school district, dated January 7, 1992, approving permissive leave
R-3 Medical reports, records, and billing relating to auto accidents in which respondent was involved

IN THE MATTER OF THE TENURE	:	
HEARING OF JEROME KACPROWICZ,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF JERSEY CITY,	:	DECISION
HUDSON COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by respondent pursuant to the provisions of N.J.A.C. 1:1-18.4. Replies thereto by the Board were filed out of time and are not addressed herein.*

In his exceptions, respondent principally argues that the ALJ erred in recognizing the established criteria for tenure dismissal based on charges of excessive absenteeism and then ruling against respondent notwithstanding the District's failure to meet those criteria. Specifically, respondent argues that the District, as evidenced by the attitude of Interim Principal Pacifico, who filed the charges, failed to consider the particular circumstances of his absences, instead looking solely to their number (Exception

* Respondent's exceptions were dated December 23, 1992 and received by the Commissioner on December 28, 1992. The Board's reply, due no later than five (5) working days after its receipt of exceptions pursuant to N.J A.C. 1:1-18.4, was not filed with the Commissioner until January 7, 1993.

1); that there was no evidence whatsoever of any actual impact on continuity of instruction at the time of his absences' occurrence (Exception 2); and that the District did not give him sufficient warning that his tenure status was in jeopardy as a result of his attendance, particularly upon commencement of his extended absence in 1991-92 (Exception 7) or that it had any concerns about the impact of his pre-1991 attendance pattern on continuity of instruction (Exception 8).

Respondent further argues that the District had no clear, specific or widely disseminated policy on staff absenteeism to which he might have looked for guidance (Exception 4), nor did district administrators themselves have a uniform notion of what constituted excessive absenteeism, as evidenced by the differing views of Principals Pacifico and Butler and by the absence of testimony from any central office administrator (Exception 6). Respondent also contends that his pre-1991 absences should have been considered in a different light from his absence of 1991-92, as the former were sporadic and short-term, while the latter was continuous, long-term and due to a legitimate reason such as is routinely recognized through grant of sabbaticals and leaves to teachers (Exception 5). Finally, respondent argues that it is unfair for him to be penalized through tenure charges for a pre-1991 attendance record for which he has already suffered the loss of an increment and which he improved significantly just prior to the accidents leading to the altogether different absence of 1991-92 (Exception 3).

Upon careful review of the record, the Commissioner is unpersuaded by respondent's exceptions and determines to affirm the decision of the ALJ.

Notwithstanding respondent's contentions, it is clear that the District did consider the particular circumstances of his absences, including those arising from his summer 1991 auto accidents, as well as the actual impact of his past absences and the potential impact of his anticipated absences before deciding to seek his removal. As properly noted by the ALJ, it is not necessary for a district to prove a direct correlation between student achievement and teacher attendance in order to validate concerns, clearly and consistently expressed in evaluations and conferences over a period of time, about the effect of a teacher's absence on the educational program of the district. Neither can respondent rely on the fact that prior warnings and expressions of concern were not couched specifically in terms of "continuity of instruction" or related to possible filing of tenure charges to claim that he had no warning of problems with his attendance or potential consequences for his employment based on those problems.

Similarly disingenuous is the notion that the absence of a highly detailed, widely disseminated written attendance policy somehow exonerates respondent from recognizing that the repeated absence of a teacher from his classroom, however legitimate, will have negative impact on instruction and compromise the basic purpose of the district and the most fundamental obligation of an educator to his students. Therefore, as found by the ALJ, respondent's poor attendance record prior to 1991-92, his protracted absence during that year and the clear indications of continuing medical problems which may reasonably be anticipated to result in further absences in the future, must be found to warrant his removal as a tenured teacher in the District notwithstanding that his teaching

performance, when present, was undisputedly good and that his absences were for a legitimate purpose and properly effectuated in terms of reporting and use of leave.

Accordingly, the initial decision of the Office of Administrative Law dismissing respondent from his tenured employment as of the date of the Commissioner's decision is affirmed for the reasons expressed therein. This matter is further referred to the State Board of Examiners pursuant to N.J.A.C. 6:11-3.6(a) for action as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JANUARY 21, 1993

DATE OF MAILING - JANUARY 21, 1993

7-93

EDU # 1158-92
C # 7-93
SB # 8-93

IN THE MATTER OF THE TENURE HEARING OF JEROME KACPROWICZ, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY.

STATE BOARD OF EDUCATION
DECISION

Decided by the Commissioner of Education, January 21, 1993

For the Petitioner-Respondent, Charlotte Kitler, Esq.

For the Respondent-Appellant, Feintuch, Porwich & Feintuch (Philip Feintuch, Esq. of Counsel)

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

July 7, 1993

Date of mailing 09 JUL 1993

8-93

THELMA JONES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning vice princpal alleged violation of her tenure and employment rights when Board, which had appointed her as scheduling vice principal for July 1, 1991 to August 22, 1991, relieved her of all scheduling responsibilities on July 13, 1991. Petitioner sought compensation for 10 days of work she completed.

ALJ found petitioner was entitled to compensation for period of 10 days from July 1 to July 13 but was not entitled to appointment as scheduling vice principal for 1992-93 as there is no entitlement to summer employment. Further, there is no statutory authorization to award attorney's fees.

Commissioner adopted findings and determination in initial decision.

JANUARY 21, 1993

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10220-91
AGENCY REF. NO. 370-10/91

THELMA JONES,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,
Respondent.

Anthony P. Sciarrillo, Esq., for petitioner

Carolyn Ryan Reed, Associate Counsel, for respondent
(Marvin L. Comick, General Counsel, attorney)

Record Closed: November 2, 1992 Decided: December 11, 1992

BEFORE **MARYLOUISE LUCCHI-McCLOUD,** ALJ:

Petitioner in this matter filed a verified petition with the Department of Education on October 10, 1991, alleging a violation of her tenure and employment rights. An answer to that verified petition was filed by the respondent on October 24, 1991. The matter was then transferred to the Office of Administrative Law (OAL) on November 4, 1991, for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

A hearing was held in the matter on August 7, 1992, at the OAL, 185 Washington Street, Newark, New Jersey. At the conclusion of testimony, the record was left open for written briefs to be submitted by September 7, 1992. Upon consideration of the information in those briefs, this ALJ requested further written submissions. The date for submission of these was extended at the

request of counsel for the petitioner with the consent of his adversary until November 2, 1992, at which time the record closed.

STIPULATION OF FACTS

At the time of the hearing, both sides entered into a number of stipulated facts which were marked J-5 in evidence. Those stipulations are as follows:

1. During the 1990-91 school year, Thelma Jones was assigned as vice principal to University High School.

2. At the board meeting on July 2, 1991, petitioner was appointed scheduling vice principal at University High School for the period July 1, 1991 to August 12, 1991, prorated for a period of ten days (agenda item HR-68B).

3. At the same board meeting on July 2, 1991, agenda item HR-59B transferring petitioner to East Side High School was held by the board and not acted upon.

4. By letter dated July 9, 1991, and received by petitioner on July 13, 1991, Eugene C. Campbell, executive superintendent of the Board of Education of the City of Newark, advised that it was his expectation that administrative reorganizations for the 1991-92 school year would necessitate her administrative appointment to a new school assignment for the September term in her current capacity as vice principal. Mr. Campbell further advised Dr. Jones that she was therefore relieved of all responsibilities for the scheduling of University High School for the 1991-92 school year.

As these facts have been stipulated to by the parties, I **FIND** them to be operational facts in this case.

TESTIMONY

At the time of the hearing, the petitioner, Dr. Thelma Jones, testified. She began by stating her credentials, which are not set out herein at length as there is no claim that she is not qualified for the positions under discussion. She further stated that she has been a scheduling administrator since 1976 and that the assignment includes preparing schedules for students and teachers for the next year. The tasks for this assignment begin in either February or March for the following September. Each summer when she was scheduling vice principal, she would be approved by the board of education. She did indicate that she usually started prior to board action during the school year in order to accomplish the task.

In order to arrange the scheduling, Dr. Jones would meet with the superintendent as well as department supervisors and guidance counselors. She would then review information regarding the individual students and would have a temporary schedule set up by the end of June. During the summer, that schedule is refined and information on homerooms as well as summer-school students is added. She stated that this has been a general practice during the thirty-two years she has worked for the Newark Board of Education. There is an application process for the position of scheduling administrator for the summer, and she did, in fact, apply for that position in 1991.

The petitioner learned on July 2, 1991, that she had been appointed to the position of summer scheduling administrator. As a result, she began doing certain items at home because she only had ten days listed that were authorized. She worked on a master schedule as well as assigning homerooms to individual students. The work was to be completed by mid-August. She indicated that between July 1, 1991 and August 12, 1991, she had worked on the scheduling assignment for at least ten days.

The first notice that she received of her change in status was the letter dated July 9, 1991, indicating that she would be appointed to a new assignment as vice principal in September in a different school.

The witness testified that there was another occasion when she was the scheduling vice principal and she was transferred from Broadway School to

University High School and she was still to finish the scheduling functions that she had in the first school.

Charles Meadows, who is the associate executive superintendent for the school district, also testified during the hearing. He stated that he and the assistant superintendent make a recommendation as to hirings for the summer positions. The amount of days which are allotted to the task depends upon the funds available. The individual who does the scheduling at the initiation of the school year through the conclusion in June is usually the individual who does the summer scheduling. If the scheduling vice principal is ill or a problem results, then the principal would most likely fulfill the task.

Mr. Meadows testified that Dr. Jones was the subject of an administrative reorganization. As such, a new vice principal was assigned to University High School in July. Mr. Meadows stated that Mr. Daniels had indicated that there was nothing in the computer regarding scheduling; it was as though the computer program had been purged. Mr. Daniels began as the new vice principal in July.

Thelma Jones was recalled to testify, and she stated that the scheduling information that she generated was put in the computer on a weekly basis. In addition, she stated there is a backup disk; however, no one indicated to her that there was any problem. She stated that the backup disk was submitted to the school on the last day of the school term.

FINDINGS OF FACT

In addition to those facts which have been stipulated by the parties, I **FIND** the following to be fact:

1. Dr. Jones was appointed scheduling administrator on July 2, 1991, and was aware on that date that this had transpired.

2. It was not until July 9, 1991, that Dr. Jones became aware that she was being transferred from one school to the other.

3. A letter sent to Dr. Jones on July 9, 1991, and received by the respondent on July 13, 1991, specifically stated that she was relieved of all responsibilities for the scheduling of University High School for the 1991-1992 school year. This notice was received eleven days after the initial appointment by the board.

4. Dr. Jones had, at least on one other occasion, been transferred from one high school to another; however, she retained the scheduling duties for the first high school during the summer.

5. The amount of days for which an individual who acts as the scheduling vice principal is paid is determined by funds available rather than by the specific time used to perform the work. Ten days were provided for in 1991.

6. Dr. Jones did a substantial portion of the work both prior to authorization by the board on July 2, 1991, and during the period of time following that appointment, and she stored the information on a computer disk.

7. Although the school indicates that it was unable to find the information stored by Dr. Jones, she testified credibly as to the extent of her work and the fact that it was on a backup disk. It is also noteworthy that no one asked Dr. Jones specifically where the work she had done was.

Having assessed the credibility of the witnesses and having evaluated the evidence in this case, I **FIND,** in addition to those facts stipulated above, these to be operational facts in this case.

DISCUSSION

The petitioner in this case is requesting that she be paid for the ten days that she was authorized to work by the board. Her contention is that due to the fact that she began the work prior to the July 2, 1991 authorization and continued even after the July 9, 1991 letter which she received on July 13, 1991, she is entitled to the full pay for the ten days. It must be pointed out that the ten days authorized for

payment are based upon budgetary considerations rather than any detailed analysis or estimation of the amount of time that it would take to complete the tasks involved in summer scheduling. If, in fact, Dr. Jones is entitled to be paid due to the board action in appointing her to the position of scheduling vice principal, it is clear that the period of time for which the board would be responsible does not predate the board's action in appointing her. As a result, only the period of time subsequent to July 2, 1991, will be addressed.

With respect to when the period of time for which Dr. Jones may be entitled to compensation would terminate, one must look at what, if any, action was taken by the board of education. The letter from the executive superintendent dated July 9, 1991, which was received by the petitioner on July 13, 1991, clearly states in the last paragraph that she was relieved of all responsibilities for the scheduling of University High School for the 1991-1992 school year. As a result, on July 13, 1991, petitioner had clearly been told that her scheduling responsibilities were terminated. Any work which may have been done after this date is also not to be considered since it was no longer authorized.

Having delineated the time frame which is pertinent for this discussion, the question now turns on whether or not Dr. Jones should receive payment for ten days for the position to which she was appointed on July 2, 1991. It must be pointed out, as was indicated in the findings of fact, that Dr. Jones testified most credibly that she did, in fact, do the work involved as scheduling vice principal. There is no indication that the work was somehow deliberately withheld from the board of education. As a result, this discussion is prefaced upon Dr. Jones's good-faith performance of the tasks given to her by appointment through the board of education.

The respondent board of education points out in its posthearing submission that there is no tenure entitlement to summer employment. It further states that because there is no entitlement to summer employment, the petitioner is not entitled to be paid for this additional service since it does not constitute part of her "full pay" under *N.J.S.A.* 18A:29-15. While the respondent is correct that there is no entitlement to summer employment, the petitioner is not claiming that she is entitled to employment which she did not receive. In this case, she was appointed to provide additional services for the board of education and, as a result, is requesting

that she receive the compensation pursuant to that appointment.

N.J.S.A. 18A:29-15 states as follows:

> Nothing contained in this article shall be construed to interfere with or discontinue any salaries schedule now in force; provided, such schedule shall meet the requirements of this article, nor to prevent the adoption of any salary schedule which shall meet its minimum requirements, nor prevent the payment of extra compensation for additional service, nor to prevent the payment of any bonus pursuant to law, but no bonus payment may be made in lieu of an employment or adjustment increment.

In this case, the petitioner is requesting extra compensation as authorized by her appointment for the additional service which she rendered at the request of the board of education. Respondent also contends that since the board of education has the inherent management prerogative to select and assign candidates for summer positions, it should have the ability to change its plans. It is accurate that there is an inherent management prerogative to determine the qualifications, criteria, method of selection, employment, and transfer of personnel by the board of education. *Ridgefield Park Education Association v. Ridgefield Park Board of Ed.,* 78 *N.J.* 144 (1978).

In this case, the petitioner is not questioning the managerial prerogative of the board of education but, instead, is claiming that the board exercised its management prerogative in appointing her to the position of summer scheduling vice principal. It is as a result of this exercise that she is claiming that she should be compensated. Respondent is correct in asserting that once the board determined that Dr. Jones's impending transfer would make it more appropriate to have the newly-assigned administrator complete any scheduling, it had the ability to make that change. The respondent's argument, however, is predicated upon an assertion that Dr. Jones did not render any services for the board of education. As indicated in the findings of fact and based upon Dr. Jones's testimony, it has been determined that she did, in fact, render services in her capacity as scheduling vice principal.

While Dr. Jones cannot be compensated for the work which was done prior to the action of the board in appointing her to the position of scheduling vice principal or after the time when she was advised by the executive superintendent on behalf of the board of education that she was relieved of responsibility for scheduling, a period of ten days exists between the two dates. As a result, Dr. Jones is entitled to

compensation for the additional service rendered during the ten-day period from the July 2, 1991 action of the board to receipt of the letter on July 13, 1991.

Petitioner also requests in the initial petition "reinstatement to the position of summer scheduling administrator pursuant to her assigned duty for the 1992/1993 school year and thereafter." It is clear from the testimony in this case that no mention has been made regarding any appointment by the board of education of Dr. Jones as summer scheduling administrator for the school year 1992-1993. As previously discussed, there is no entitlement to summer employment; as such, this is not an appropriate remedy.

The petitioner also requests attorney's fees in this matter. In support of that, respondent cites *Ross v. Board of Education of the City of Jersey City,* 1981 *S.L.D.* 307, *aff'd,* Commissioner of Education, 1981 *S.L.D.* 319. That case, however, is distinguishable from the case at hand. In that case, the Commissioner awarded counsel fees to a superintendent who was compelled to file a petition in order to carry out mandatory statutory duties which he held. Dr. Jones is not acting in order to carry out any form of mandatory statutory duty.

Absent statutory authority, the Commissioner of Education does not have the authority to award payment of attorney's fees to a petitioner. *Juanita Zielenski v. Board of Education of the Town of Guttenberg,* 1981 *S.L.D.* 768. In this case, there is no statutory authorization to do so; therefore, no award of attorney's fees may be given.

CONCLUSION

Based upon the foregoing, I **CONCLUDE** that the petitioner, Dr. Thelma Jones, is entitled to compensation for the period of time from July 1, 1991, when she was appointed to the position of scheduling vice principal by the board of education, until July 13, 1991, when she received the letter indicating that she was relieved of her scheduling responsibilities.

I further **CONCLUDE** that petitioner is not entitled to appointment as scheduling vice principal in the 1992-1993 subsequent school year.

I further **CONCLUDE** that no award of attorney's fees may be granted in this case.

ORDER

It is hereby **ORDERED** that the petitioner's request for compensation based upon her lawful appointment as scheduling vice principal be and is granted for ten days during the period of time between July 1, 1991 and July 13, 1991.

It is further **ORDERED** that petitioner's request to be appointed as scheduling vice principal for the 1992-1993 school year be and hereby is **DENIED.**

It is further **ORDERED** that the petitioner's request for attorney's fees in this matter be and hereby is **DENIED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

12/1/92
Date

MARYLOUISE LUCCHI-McCLOUD, ALJ

12/15/92
Date

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

DEC 16 1992
Date

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

am/e

APPENDIX

Witnesses

For petitioner:

Thelma Jones

For respondent:

Charles Meadows

Evidence

J-1	Minutes for July 2, 1991 Board meeting (Newark Board of Education)
J-2	Agenda item HR-68 B
J-3	Agenda item HR-59 B
J-4	July 9, 1991 letter from Campbell to Jones
J-5	Stipulation of Facts

THELMA JONES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Respondent's exceptions and petitioner's replies thereto were timely filed in accordance with N.J.A.C. 1:1-18.4. Both rely on the testimony, documentation, and post-hearing submissions which were fully and fairly considered by the ALJ in her initial decision and need not be repeated herein.

Upon careful review, the Commissioner concurs with the decision of the ALJ for the reasons articulated by her in the initial decision. The Commissioner finds that the petitioner's rendering of authorized services to the Board as scheduling vice principal for which she is entitled to compensation is fully supported by the record.

Accordingly, the initial decision of the Office of Administrative Law granting the petitioner compensation for her Board-authorized appointment as scheduling vice principal for ten

days during the period of time between July 1, 1991 and July 13, 1991 and denying petitioner's requests for attorney's fees and appointment as scheduling vice principal for the 1992-1993 school year is affirmed for the reasons stated therein.

COMMISSIONER OF EDUCATION

JANUARY 21, 1993

DATE OF MAILING - JANUARY 21, 1993

9-93

POTTER ET AL.,	:	
PETITIONERS,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,	:	
RESPONDENT.	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
GAFFNEY ET AL.,	:	
PETITIONERS,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning parents in two consolidated cases sought judgment of Commissioner that because distance measurement from their homes to the schoolhouse utilized to compute their children's entitlement to busing required the children to travel roads which were dangerous to their safety, this measurement should be discounted and the children allowed busing. Petitioners alleged Board's termination of bus service for their children was in contravention of Board's own polices concerning remoteness, measurement and safety. Moreover, petitioners charged noncompliance by Board with Open Public Meetings Act (OPMA).

ALJ found no genuine, material triable issues of fact remained in case. Law was clear that petitioners' children lived within two miles of school and were not entitled to busing under N.J.S.A. 18A:39-1 and N.J.A.C. 6:21-1.3 even if roadway danger was assumed as safety conditions of roadways are a municipal and not an educational concern. In addition, ALJ found no substantial or actual noncompliance by Board with OPMA.

Commissioner adopted findings and determination in initial decision. Petitions were dismissed.

JANUARY 21, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION ON MOTION
FOR SUMMARY DECISION

POTTER, ET AL.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,
Respondent.

OAL DKT. NO. EDU 9054-91
AGENCY DKT. NO. 351-9/91

GAFFNEY, ET AL.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,
Respondent.

OAL DKT. NO. EDU 9413-91
AGENCY DKT. NO. 364-10/91

Charles J. Mysak, Esq., for petitioners

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

Record Closed: October 28, 1992 Decided: December 7, 1992

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

Under OAL Dkt No. EDU 9054-91, the Board of Education of the Township of Wayne, Passaic County, terminated busing to Schuyler Colfax Middle School for children of *Potter* petitioners effective September 27, 1991, the Board having

determined a new route measure along Jackson Avenue to Webster path, all of Webster Drive, Wheeler Drive and Huberton Road would place petitioners within two miles of the school, under criteria of *N.J.S.A.* 18A:39-1 and *N.J.A.C.* 6:21-1.3. In a petition of appeal filed with the Department of Education on September 25, 1991, *Potter* petitioners alleged Board action was arbitrary and unreasonable by exposing school children to the risk of serious injury along dangerous roadways and was otherwise in contravention of the Board's own policies concerning remoteness, measurement and safety. Petitioners sought judgment of the Commissioner that they lived more than two miles from the school house and were thus entitled to busing. The Board's answer, filed October 11, 1991, admitted Board action generally but denied petitioners lived more than two miles form Schuyler Colfax Middle School using public walkways and public roadways, the Board for that reason not being obligated to provide busing under statute or regulation. The Commissioner transmitted the matter to the Office of Administrative Law on September 25, 1991 for hearing and determination as a contested case in accordance with *N.J.S.A.* 52:14F-1 *et seq.*

Under OAL Dkt. No. EDU 9413-91, *Gaffney* petitioners alleged Board action in terminating busing for their children was arbitrary, capricious and in contravention of Board policy for exposing children to risk of injury by requiring them to traverse hazardous roadways such as Hamburg Turnpike, Ratzer Road, Jackson Avenue, Newark-Pompton Turnpike, Black Oak Ridge Road, and Route 23, a route nevertheless that if used for route measurement under *N.J.A.C.* 6:21-1.3 would put them within two miles of Schuyler Colfax Middle School. *Gaffney* petitioners sought judgment directing the Board to restore busing for their children, in accordance with their rights under *N.J.S.A.* 18A:33-1 *et seq.* and *N.J.A.C.* 6:21-1.3. *Gaffney* petitioners' petition was filed with the Commissioner on October 7, 1991. The Board's answer was filed on October 15, 1991. The Commissioner transmitted the matter to the Office of Administrative Law on October 7, 1991 for hearing and determination as a contested case in accordance with *N.J.S.A.* 52:14F-1 *et seq.*

The matters were ordered consolidated by an administrative law judge on November 8, 1991. A motion by *Potter* petitioners for emergent relief by way of provision for busing until plenary hearing was denied by an administrative law judge on October 4, 1991 and affirmed by the Commissioner. A motion for similar relief by

Gaffney petitioners was denied by an administrative law judge on October 9, 1991 and affirmed by the Commissioner on December 2, 1991.

On notice to the parties, the matter came on for prehearing conference in the Office of Administrative Law on April 13, 1992, and an order was entered establishing, *inter alia*, hearing dates on September 14 and 15, 1992, at the Office of Administrative Law. At issue in the case of *Potter* petitioners, under OAL Dkt. No. EDU 9054-91, it was determined, is whether the Board's measurement of remoteness under *N.J.A.C.* 6:21-1.3 along Jackson, Webster, Wheeler, crossing Hamburg Turnpike and Huberton is unlawful under *N.J.S.A.* 39:4-34 of the Motor Vehicle and Traffic Act and/or local ordinances and thus violative of petitioner's rights under *N.J.S.A.* 18A:33-1 ("convenience of access") and *N.J.S.A.* 18A:39-1.

In *Gaffney* petitioners, under OAL Dkt. No. EDU 9413-91, at issue is whether Board measurement of remoteness under *N.J.A.C.* 6:21-1.3 along Hamburg Turnpike is violative of petitioner's rights under *N.J.S.A.* 18A:33-1 ("convenience of access") and, if so, whether petitioners are entitled to be bussed under *N.J.S.A.* 18A:39-1.

The prehearing conference order was entered pursuant to *N.J.A.C.* 1:1-13.1, which provides, *inter alia*, that any party may, upon written motion filed no later than five days after receiving prehearing order, request the order be amended to correct errors. *N.J.A.C.* 1:1-13.2(b). No corrective amendment was sought.

Before hearing, the Board then filed a motion for summary decision in its favor pursuant to *N.J.A.C.* 1:1-12.5, to which were annexed certifications of the Board secretary and a Board transportation supervisor, copies of advertised notices of Board meetings and changes of location, together with minutes of the Board's public work session on June 13, 1991. Rm. Theory of the motion, which was focussed on issues as narrowed by pre-hearing order, was that there remained in dispute no genuine, material triable issue of fact and that the Board's decision to abandon courtesy busing in the district for students within two miles of the school house should be tested accordingly and vindicated under long-standing authority of such Commissioner's decisions as *Melick v. Board of Ed. of Lopatcong*, 1985 *S.L.D.* -- (Comm. Ed. December 4, 1985). Petitioners' opposing papers, which consisted of their letter memorandum of law filed on September 1, 1992, contained no

certifications or affidavits ostensibly challenging factual matters presented by the Board, as otherwise required under *N.J.A.C.* 1:1-12.5(b), which provides:

> . . . when a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue that can only be determined in an evidentiary proceeding. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered.

I

In argument on September 14, 1992, the Board conceded for purpose of the motion that it was required to assume the relative danger of the public roadway measurement route. It relied on the proposition that "students have no legal entitlement to district-provided transportation because of roadway danger, and any determination on the part of the Board to offer such service is clearly subject to that body's continuing discretion," as the Commissioner declared when he affirmed denial of emergent relief to *Gaffney* petitioners on December 2, 1991.

The Board argued there was no dispute that all petitioners resided less than two miles from the school house and thus were within the two-mile distance measurement of *N.J.S.A.* 18A:39-1. It argued that *N.J.S.A.* 18A:33-1, which requires each school district to provide "convenience of access" to school buildings, has been construed and interpreted to give petitioners no relief, since the phrase means merely "remoteness" that in turn refers to distance measurement in *N.J.S.A.* 18A:33-1 and *N.J.A.C.* 6:21-1.3. *Beggans v. Board of Ed. of West Orange*, 74 *S.L.D.* 829, 839; *Trossman v. Board of Ed., Highland Park*, 69 *S.L.D.* 61, 63; and *Schrenk v. Board of Ed., Ridgewood*, 61 *S.L.D.* 185. Holdings have been consistent, it was said, that road conditions and traffic hazards do not warrant a conclusion that a school does not have "convenience of access." Responsibility for safe roadways does not lie with the Board; it is well settled that safety conditions of roadways are a municipal and not educational concern. *C.R.C. and G.M.C. v. Bd. of Ed. of Oxford,* 85 *S.L.D.* -- (Comm. Ed. Sept. 9, 1985); *Centofanti v. Bd. of Ed. of Wall*, 75 *S.L.D.* 513. The amendment of *N.J.S.A.* 18A:39-1 by the Quality Education Act of 1990, L. 1990, c. 50, § 50, which omitted the words "remote from any schoolhouse," did not alter methodology of distance measurement of *N.J.A.C.* 6:21-1.3. The Act emphasized

that cost of busing "other pupils" (courtesy or non-remote busing) would not qualify for State aid. *N.J.S.A.* 18A:39-1.1 and *N.J.S.A.* 18A:7D-18.

II

Petitioners argued that Board action by which courtesy busing was abolished in the district on June 13, 1991 was void for non-compliance with the Open Public Meeting Act, *N.J.S.A.* 10:4-6 *et seq*. Specifically, it was urged, place of the meeting was changed without proper notice to the public from a conference room in the administration building to the middle school library at Schuyler Colfax Middle School, contrary to provisions of *N.J.S.A.* 10:4-9(a) and *N.J.S.A.* 10:4-8(d). Petitioners argued that performance of a statutory obligation to give adequate notice to the public cannot be merely "substantially performed." Such mandate must be fully and literally obeyed or public action taken at meetings not in compliance therewith is void, citing *Pollillo v. Deane*, 74 *N.J.* 562, 577 (1977).

Because petitioners had not briefed the question before motion hearing nor furnished supporting certifications of fact, the administrative law judge on September 15, 1992 ordered the record on motion reopened for the limited purpose, only, of requiring the Board to supplement the record with certifications from the Board secretary of notices, advertisements, agenda and minutes of Board meetings. Such supplements were filed on September 30, 1992 in the form of an affidavit from the Board secretary/business administrator, together with minutes of Board meetings of June 13, 1992, June 27, 1991 and August 29, 1991. Petitioners' response consisted of an affidavit by one of the petitioners that did not address regularity of conduct of the meetings in reference to the Open Public Meetings Act. It is not considered here since it exceeded scope of the reopening inquiry as well as that of the pre-hearing order.

FINDINGS OF FACT

The Open Public Meetings Act requires that public bodies establish schedules of regular meetings of the public body to be held during the succeeding year. Notices must be posted and maintained throughout the year in at least one public place. Notices must be mailed to officially designated newspapers and they must be submitted to appropriate municipal offices. *N.J.S.A.* 10.4-18. There is no agenda

requirement for regular meetings. Agendas are only required for special meetings. *N.J.S.A.* 10:4-8(d).

From review of unchallenged documentary evidence concerning scheduled meetings and compliance with the Open Public Meetings Act, I make the following **FINDINGS OF FACT**:

1. At a first organizational meeting in 1990, the Board of Education caused to be printed in the *Record*, a newspaper published and printed in Hackensack, Bergen County, a list of all future scheduled special and regular meetings of the Board for the balance of 1990 and the first six months of 1991. Publication of advertisement was attested by affidavit of an accounting clerk for the publication on May 9, 1990. One of the scheduled meetings was an executive session/executive meeting for 8 p.m. on June 13, 1991 in the administration building conference room.

2. On June 13, 1991 the same publication contained advertisement giving notice of change of location of meeting to Schuyler Colfax Middle School library. Notification to the newspaper was requisitioned 48 hours earlier on June 11, 1991.

3. In addition, notice was posted prominently on the Board of Education bulletin board on June 7, 1991. Copies of the notice were mailed on June 7, 1991 to two newspapers, according to the Board secretary/business administrator, the *Record* and the *Independent News*. In addition, a copy of the notice was filed with the municipal clerk by mail on May 23, 1991.

4. Advertisement of notices was thus in compliance with *N.J.S.A.* 10:4-8(d), 9.

5. The Board acted to eliminate safety or courtesy busing at the meeting of June 13, 1991. Rm-1, exh. E at 5.

6. Notice for a special meeting on June 27, 1991 was legally sufficient under *N.J.S.A.* 10:4-8(d), since notice was posted prominently on the Board bulletin board on September 21, 1990; and since two copies of the notice

were mailed on September 21, 1990 to two newspapers, the *Record* and the *Independent News*. A copy of the notice was mailed with the municipal clerk on September 21, 1990. There was no discussion of courtesy busing by or before the Board at the meeting.

7. Notice for a regular meeting on August 29, 1991 was legally sufficient under *N.J.S.A.* 10:4-8(d), since notice was posted prominently on the Board bulletin board on May 28, 1991 and copies of the notice were mailed on that date to two newspapers, the *Record* and the *Independent News*. A copy of the notice was mailed to the municipal clerk on May 28, 1991. Citizens including a petitioner and petitioners' attorney addressed the Board on "deletion of courtesy busing." Rm-2, exh. C at 25-26.

CONCLUSION

From all of the above, I **CONCLUDE** that there have been demonstrated no genuine, material triable issues of fact that remain in the case. The Board's motion for summary decision, therefore, is ripe for determination under *N.J.A.C.* 1:1-12.5. Because the law is clear that petitioners live within two miles of their children's school, they are not entitled to busing under *N.J.S.A.* 18A:39-1 and *N.J.A.C.* 6:21-1.3 even if roadway danger be assumed. I **FIND** no substantial or actual non-compliance by the Board with notice provisions of the Open Public Meetings Act for the Board meeting of June 13, 1991 when it resolved to rescind its policy of courtesy busing or on subsequent meetings of June 27, 1991 and August 29, 1991.

Summary judgment in favor of the Board dismissing the consolidated petitions is hereby **ENTERED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

December 7, 1992
Date

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

12/9/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 15 1992
Date

OFFICE OF ADMINISTRATIVE LAW

amr

LIST OF EXHIBITS

Rm-1 Respondent's letter memoranda of law, filed July 31, 1992 and September 9, 1992, together with Exhibits A through E

- A Affidavit of Board secretary/business administrator, dated September 26, 1991
- B Affidavit of Board transportation supervisor, dated September 26, 1991
- C Affidavit of Board secretary, dated October 7, 1991, together with affidavits of publication of notice and notice of change of location of work session meeting of June 13, 1991
- D Affidavit of Board transportation supervisor, dated October 7, 1991
- E Minutes of work session meeting of Board on June 13, 1991

Rm-2 Affidavit of Board secretary, dated September 28, 1992, with annexed Exhibits A, B and C

- A Minutes of Board public work session of June 13, 1991, at which Board voted to eliminate courtesy busing (see p. 5)
- B Minutes of Board special meeting of June 27, 1991
- C Minutes of Board regular meeting of August 29, 1991

Pm-1 Petitioners' letter memorandum of law, filed September 1, 1992

Pm-2 Petitioners' letter and affidavit filed October 9, 1992

POTTER ET AL.,	:	
PETITIONERS,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,	:	
RESPONDENT.	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
GAFFNEY ET AL.,	:	
PETITIONERS,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,	:	
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioners' request for an extension of time within which to file exceptions was not received within the period specified by N.J.A.C. 1:1-18.8(b) and, although forthright reasons were given for the delay, they did not rise to the level of emergency or other unforeseeable circumstance within the meaning of the regulation to justify a waiver. Accordingly, the Commissioner has not permitted late filing of exceptions in this instance.

Upon a careful and independent review of this matter, the Commissioner is in complete agreement with the Administrative Law

Judge's findings and conclusions and grant of summary decision to the Board. As recognized by the ALJ, the law is clear that the petitioners, who live within two miles of their children's school, are not entitled to busing under N.J.S.A. 18A:39-1 and N.J.A.C. 6:21-1.3. The law is also clear that this conclusion is not altered by the existence of roadway danger since safety conditions of roadways are the responsibility of the municipality not the Board.

The Commissioner also agrees that the record in this matter does not support petitioners' allegations of the Board's noncompliance with notice provisions of the Open Public Meetings Act for the Board meetings of June 13, 1991, June 27, 1991 or August 29, 1991.

Accordingly, the recommended decision of the Administrative Law Judge granting the Board's Motion for Summary Decision and dismissing the consolidated Petitions of Appeal with prejudice is adopted as the final decision in this matter for the reasons expressed therein.

COMMISSIONER OF EDUCATION

JANUARY 21, 1993

DATE OF MAILING - JANUARY 21, 1993

(SB) 9-93
10-93

SEC #17-93
SEC #18-93
SB #9-93 AND #10-93 (CONSOLIDATED)

SCHOOL ETHICS COMMISSION,	:	
PETITIONER-RESPONDENT,	:	
V.	:	
GARY NARDINO, BOARD MEMBER, BOARD OF EDUCATION OF THE PASSAIC COUNTY REGIONAL HIGH SCHOOL DISTRICT #1, PASSAIC COUNTY,	:	
RESPONDENT-APPELLANT.	:	
AND	:	STATE BOARD OF EDUCATION
SCHOOL ETHICS COMMISSION,	:	DECISION ON MOTION
PETITIONER-RESPONDENT,	:	
V.	:	
GARY NARDINO, BOARD MEMBER, BOARD OF EDUCATION OF THE TOWNSHIP OF LITTLE FALLS, PASSAIC COUNTY,	:	
RESPONDENT-APPELLANT.	:	

Decided by the School Ethics Commission, January 27, 1993

Decided by the Commissioner of Education, February 9, 1993

For the Petitioner-Respondent, William C. Brown, Deputy Attorney General (Robert J. Del Tufo, Attorney General)

For the Respondent-Appellant, Glickman & Bassetti (Robert P. Glickman, Esq., of Counsel)

This is an appeal from two separate decisions rendered by the School Ethics Commission and by the Commissioner of Education. Both Commission decisions find that Appellant failed to comply with

MAR. 3, 1993

N.J.S.A. 18A:12-25c in that he did not file the required disclosure forms, either with respect to the Little Falls Board of Education or the Passaic County Regional High School Board. In both cases, the Commission recommended that Appellant be suspended from Board membership from the date of the Commissioner's decision, and by operation of law, he be automatically removed 20 days thereafter if he failed to file the forms.

In each case, the Commissioner concurred and adopted the "decision of the School Ethics Commission" and concurred with and "adopted as her own the recommendations of the Commission." She therefore ordered that "should the board member so suspended fail to properly file said statutorily required disclosure statements within 20 days...," automatic removal from office shall occur as recommended by the Commission."

Appellant has appealed to the State Board from the decisions in both cases and has filed an application for emergent relief, seeking to stay the Commissioner's determinations of the penalties pending our decision on the merits of the underlying appeal.

Initially, we direct consolidation of these cases so that we may consider and decide them together.

The only aspect to be decided today is Appellant's application for emergent relief. After considering the arguments of counsel, we deny that relief on the grounds that Appellant has failed to meet the standards for emergent relief specified by Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982), in that he has not demonstrated a likelihood that he will succeed on the merits of his appeal.

S. David Brandt, Bonnie Green and John Klagholz opposed. Orlando Edreira abstained.

March 3, 1993

Date of mailing MAR - 3 1993

10-93

BOARD OF EDUCATION OF THE PASCACK VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
YOUNGHEE JOE,	:	DECISION
RESPONDENT.	:	

JANUARY 26, 1993

BOARD OF EDUCATION OF THE PASCACK VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
YOUNGHEE JOE,	:	DECISION
RESPONDENT.	:	

For Petitioner, Rodney T. Hara, Esq. (Fogarty and Hara)

Whereas, this matter was opened before the Commissioner of Education by way of a Petition of Appeal filed by the Board of Education on October 23, 1992, wherein it was alleged that respondent's nephew was not being supported by her gratis so as to entitle him to a free education within the district pursuant to N.J.S.A. 18A:38-1(b); and

Whereas, respondent's receipt of said petition on October 26, 1992 was proven by copy of a signed return receipt card for certified mail; and

Whereas, respondent was duly advised of her obligation to answer said petition by the Bureau of Controversies and Disputes through initial acknowledgement, second notice and third notice pursuant to N.J.A.C. 6:24-1.4(e); and

Whereas, the certified copy of the third and final notice, sent to respondent at the address at which she had signed for

receipt of the petition, was returned to the Bureau unclaimed, said notice advising her that unless an answer were filed within ten (10) days, all allegations against her would be deemed admitted and the Commissioner would decide the matter on a summary judgment basis; and

Whereas, no answer to the Petition of Appeal has been filed as of this date, nor has any other communication been received from respondent; now therefore

IT IS ORDERED this 26TH day of January 1993 that because her nephew Jung Joo Hwan is deemed not entitled to a free education within the Pascack Valley Regional High School District pursuant to N.J.S.A. 18A:38-1(b), respondent is directed to pay tuition for any time he attended school there contrary to the provisions of statute.

COMMISSIONER OF EDUCATION

JANUARY 26, 1993

DATE OF MAILING - JANUARY 26, 1993

11-93

ROBERT PEARY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BARNEGAT, ROBERT L. HORNBELT, SUPERINTENDENT OF SCHOOLS AND WILLIAM DOTY, TRANSPORTATION COORDINATOR, OCEAN COUNTY,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioning parent alleged improper change of designated bus stop. Petitioner contended Board had relocated a long-established bus stop from a "safe" location to an inherently dangerous one.

ALJ found petitioner failed to demonstrate Board acted improperly. Board acted within its legal authority to set up new route. ALJ found Commissioner has consistently held that local boards of education are not authorized by law to ensure safety conditions of roadways. Such authority has been vested in local, county or state governments. Petition was dismissed.

Commissioner adopted findings and determination in initial decision. Commissioner did note the mention of petitioner's son as being perceptually impaired and that transportation for students with educational disabilities may be a matter for consideration as part of Individualized Education Program (IEP) under N.J.A.C. 6:28.

JANUARY 26, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 3466-92
AGENCY DKT. NO. 80-4/92

ROBERT PEARY,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF BARNEGAT; ROBERT L. HORNBELT, SUPERINTENDENT OF SCHOOLS; WILLIAM DOTY, TRANSPORTATION COORDINATOR, OCEAN COUNTY,
Respondent.

Roberta L. Stonehill, Esq., for petitioner (Roeber & Stonehill, attorneys)
Paul J. Carr, Esq., for respondent (Masch, Visotcky, Cerefice & Carr, attorneys)

Record Closed: October 29, 1992 Decision: December 8, 1992

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner is the parent of a twelve year old child who attends school operated by the Board of Education of the Township of Barnegat (Board). Petitioner alleges that in the past, the Board allowed its school bus to pick up and discharge his children in front of petitioner's house. Petitioner alleges further that the Board has changed the designated bus stop to a location on Ocean County Road 554 which is a 50 mile per hour (mph) truck route with narrow shoulders, no sidewalks, at the bottom of a grade, with poor visibility and insufficient stopping distance.

The Board denies petitioners allegations and sets forth thirteen (13) affirmative defenses together with the demand for judgment dismissing the instant matter.

The matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. Subsequent to a prehearing conference, the Board propounded a Motion for Summary Decision and Dismissal with supporting Brief and exhibits. Petitioner opposes the Board's motion.

BACKGROUND FACTS

The following facts are neither contested nor in dispute. Moreover, respondents stipulate to these background facts:

> Commencing with the 1991/1992 school year, petitioner's 12 year old son, who is perceptually impaired and assigned a bus stop located on County Road 554 and Old Brookville Road, Barnegat, New Jersey. County Road 554 is a 50 mile-per-hour truck route with narrow shoulders and no sidewalks. The bus stop assigned to petitioner's son is located at the bottom of a grade with poor visibility and insufficient stopping distance.
>
> For the two years prior to the 1991/1992 school year, petitioner's son resided in California with his mother. For the 16 years prior to the child's move to California, the three Peary children had been picked up by Barnegat Township school busses in front of their home on Old Brookville Road. When petitioner's son returned from California, the stop in front of his home was not re-established. His siblings have finished school.
>
> During the first week of the 1991/1992 school year, petitioner contacted the respondents requesting that the former stop in front of the Peary resident be re-established, as the current stop is unsafe. This request was denied, several reasons being given as to why a stop on Old Brookville Road could not be established. These reasons included: 1) a borough ordinance prohibited busses from using Old Brookville Road; 2) that the condition and width of the road prohibited busses from using it; and 3) that time prohibited the bus from detouring down Old Brookville Road.
>
> Respondent Robert Horbelt instructed petitioner to request from the Barnegat Township Police Department a survey of Old Brookville Road to determine if the current bus stop was safe. After being informed that the Barnegat Township Police Department did not have anyone qualified to do such a survey, Patrolman Michael Duffy was dispatched to inspect the location. By letter dated October 1, 1991, Patrolman Duffy forwarded his findings to Chief Edward J. Smith.
>
> On March 31, 1992, petitioner filed the within petition with the office of the Commissioner of Education seeking to have the

stop in front of the Peary resident on Old Brookville Road re-established. Respondents filed an answer on or about April 15, 1992.

For the 1992/1993 school year, petitioner enrolled his son in the Ocean Township School District. Ocean Township busses, without inconvenience or trouble, picked up petitioner's son in front of his home on Old Brookville Road. Petitioner, whose property is located in both Ocean Township and Barnegat Township, was notified by the Superintendent of the Ocean Township School District, E. Steven Seeley, that his son was no longer eligible to attend Ocean Township Schools as he is a resident of Barnegat Township. The child has subsequently been re-enrolled at the Brackman School and the stop on Route 554 has been re-established. Petitioner accompanies his son to the bus stop each day and picks him up. This is a hardship on petitioner as this interferes with his work.

RESPONDENTS' LEGAL ARGUMENT

The Herein Matter Should be
Dismissed as a Matter of Law
As No Genuine Issue of Material
Fact Exists, Pursuant to N.J.A.C. 1:1-12.5

Respondents stipulates to all factual assertions made by petitioner is his Complaint and attachments for the purpose of the Motion for Summary Decision. The single assertion of merit in petitioner's Complaint is that the intersection in question on County Road 554 and Old Brookville Road is inherently dangerous. Relevant however to petitioner's assertion is Exhibit C2 of petitioner's own Complaint wherein Patrolman Michael J. Duffy of the Barnegat Township Police Department reports to Chief Edward J. Smith on October 1, 1991 that "as far as the stop at Route 554 and Old Brookville is concerned, it does not seem a hardship for a twelve year old boy to walk to the stop unless it was during hours of limited visibility." With respect to the report of George Pierro, of GPI Investigative Services, retained by petitioner which report is marked Exhibit J, respondents stipulates same and asserts that the conclusions reached by Mr. Pierro are not substantiated by the factual basis contained in his report.

Each local board of education is authorized to establish school bus transportation for its pupils when in its judgment it determines to do so. N.J.S.A. 18A:39-1. In instances where pupils live remote from the school house, boards of education are required to provide such pupils with transportation to and from

school. The New Jersey State Board of Education defines the term "remote from the school house" at N.J.A.C. 6:21-1.3(a).

It has been consistently held that while parental concern for the safety of their children to and from the school is understandable, the legal responsibility for the removal of traffic safety hazards does not rest with the local board of education. The Commissioner has on many occasions expressed his concern for conditions affecting the safety of pupils in route to and from school in Schrenk vs. Board of Education of Ridgewood, 1960-61 S.L.D. 185, the Commissioner stated:

> "The provision for safe conditions of travel is a municipal function. A board of education is limited to educational functions. It can provide instruction in safety in order to inculcate habits of safety. It is not within its authority to enforce traffic laws, to provide sidewalks, traffic lights, crossing guards, police patrols, overpasses, etc., to meet the requirements of safe travel to school children." at p. 187.

Other decisions of the Commissioner over the years have produced no elements which would influence him to a contrary judgment. They include Read, et al v. Board of Education of Roxbury Township, 1938 S.L.D. 763 (1927); Iden, et al v. Board of Education of West Orange, 1959-60 S.L.D. 96; Frank v. Board of Education of Englewood Cliffs, 1963 S.L.D. 229; Livingston v. Bernards Township Board of Education, 1965 S.L.D. 29; Trossman, et al. v. Board of Education of Hyland Park, 1969 S.L.D. 61; Locker, et al v. Board of Education of the Township of Monroe, 1969 S.L.D. 178; Tolliver, et al v. Board of Education of the Borough of Metuchen, 1970 S.L.D. 415; Bocco v. Board of Education of the City of Camden, 1971 S.L.D. 71; Concerned Parents of Howell Township School Children v. Howell Township Board of Education, 1972 S.L.D. 600; Beggans, et al v. Board of Education of the Township of West Orange, 1974 S.L.D. 829; affirmed State Board of Education, February 5, 1975. Centofanti, et al v. Board of Education of the Township of Wall, Monmouth County, 1975 S.L.D. 513.

The Commissioner has stated:

> "local boards of education are not designated by statute to provide for the safety of children reaching school, inasmuch as traffic hazards are a local responsibility....the Commissioner must once again point out that local boards of education have the statutory authority to establish rules and regulations for the day to day management and operation. Accordingly, having found no basis to intervene in the actions taken by the board in the instant matter, the Petition of Appeal is hereby dismissed." Id. at page 518.

Further, when boards act within their statutory authority and discretionary authority pursuant to N.J.S.A. 18A:11-1, 39-1 and N.J.A.C. 6:21-1.3, the Commissioner has stated the principle enunciated in Boult and Harris v. Passaic, 1939-49 S.L.D. 7, affirmed State Board of Education 15, 135 N.J.L. 329 (Sup. Ct. 1947), aff'd 136 N.J.L. 521 (E.&A. 1948) as follows:

> "It is not a proper exercise of a judicial function for the Commissioner to interfere with local boards in the management of their schools unless they violate the law, act in bad faith (meaning acting dishonestly), or abuse their discretion in a shocking manner. Furthermore, it is not the function of the Commissioner in a judicial decision to substitute his judgment for that of the boards members on matters which are by statute delegated to the local boards." (at p.13).

Consistent with the case at bar is the matter of Walters, et al v. Board of Education of the Township of Mendham, Morris County, 1977 S.L.D. 854 wherein parents of pupils who attended school alleged the route their children must follow to reach the board's designated bus stop was hazardous. The board denied petitioner's allegations asserting that it met its obligation. The board filed Motion for Summary Judgment which was denied by the hearing examiner and discovery procedures took place. After discovery, the Commissioner held the matter ripe for Summary Judgment in that the facts were not in dispute. Those facts were very similar to the case at bar. Petitioners' children live remote from school and were entitled to bus transportation. The children walked two-tenths of a mile to a designated bus stop. Petitioners' alleged they must traverse Old Brookside Road to reach their bus stop and that it is extremely hazardous in that there were no sidewalks, sharp curves, narrow road, no shoulders, 35 m.p.h. speed limit, and a heavy flow of traffic during the hours in question. Petitioners alleged the board's failure to grant their request or a change in the bus stop by picking up the children at their respective driveways is arbitrary, capricious and unreasonable. The Commissioner cited the same series of cases herein, although boards must provide for the transportation of pupils who live removed from school, the board may in good faith evaluate conditions in various areas in the school district with regard to establishing bus stops. In that decision the Commissioner held:

> "When a local board of education has so acted, the Commissioner may not substitute his judgment for that board in the absence of evidence of discrimination or of evidence that the board's policy is arbitrary, capricious or unreasonable. There is no such evidence herein. Accordingly, the Commissioner will not intervene." (Id. at page 857).

The Walters decision also included letters in evidence submitted by the Chief of Police, letters showing the Superintendent's disposition and discussions reflected in the board's minutes as in the case at bar. (Id. at page 857).

For the foregoing reasons, it is respectfully submitted that no genuine issue of material fact exists and petitioner's claim should be summarily decided as a matter of law in favor of respondents.

Petitioner's Legal Arguments

Respondents' Motion Must be
Denied as a Genuine Issue
of Material Fact Does Exist

Respondents states that the only issue of merit contained in petitioner's petition is that the bus stop established on County Road 554 is inherently dangerous. Respondents refers to the report of Patrolman Michael Duffy of the Barnegat Township Police Department as proof otherwise. This report was drafted in response to a request by petitioner, at the direction of respondent Robert Horbelt, that a survey of Old Brookville Road be conducted to determine if the road was safe for busses to travel. Petitioner was informed that, at the time, there was no one qualified in the Barnegat Township Police Department to make such a survey. Patrolman Duffy, however, was assigned to conduct such a survey.

Patrolman Duffy states in his report that Old Brookville Road "is very narrow (15') and poorly graded. Both berms are heavily wooded." However, walking the 2/10ths of a mile from the Peary home to the bus stop on Route 554, according to Patrolman Duffy, should not be "a hardship for a 12 year old boy . . . unless it was during hours of limited visibility."

The issue here is not whether the distance is a hardship, but that the walk itself and the location of the bus stop are hazardous.

In comparing Patrolman Duffy's analysis concerning the bus stop on Route 554 with his analysis of the bus stop located on Burr Street, which is contained on the same report, it is interesting to note the inconsistencies between the final results. Both stops are characterized as being inherently dangerous due to various factors,

including, but not limited to heavy traffic, tree lines close to the edge of the roadway, no shoulder, no sidewalks, and the roadway is on a grade. Patrolman Duffy, however, considers the Burr Street stop to be unsafe and the Old Brookville Road and Route 554 stop to be safe.

In comparing Patrolman Duffy's report with the investigative report of George Pierro, it is clear that the stop on Route 554 is dangerous. Both reports state the same conditions as to the characteristics of Old Brookville Road. Additionally, Mr. Pierro points out that there is little to no safe room for petitioner's son to walk on Old Brookville Road which would keep him out of the line of traffic. Petitioner's son must, on at least one occasion daily, walk across Route 554. There are no crosswalks, signs or crossing guards to warn oncoming motorist of a school bus stop. There is a blind curve just north the Peary residence which obscures traffic to a pedestrian, and a pedestrian from traffic. These factors were not considered by Patrolman Duffy. His entire analysis of the safety of the stop on Route 554 does not consider all the necessary facts, and, therefore, cannot be considered as conclusive. Mr. Pierro, a qualified expert in accident reconstruction, considers the necessary factual information into his analysis and report. Petitioner, therefore asserts that the report by Patrolman Duffy, and the conclusions contained therein, are not substantiated by all of the relevant facts.

Respondents' argument regarding the removal of traffic safety hazards is moot and without merit. The Board relocated a previously existing, safe bus stop to an inherently dangerous location. Petitioner is not asking the Board to make the location safe, but to simply re-establish the bus stop at the previously used safe location in front of the Peary resident on Old Brookville Road. That stop had previously existed for over 10 years. As petitioner's son is the only child picked up at the current bus stop, it would not cause any inconvenience to others if the stop was relocated to its original position.

Of additional relevance is a past policy established by the Board, whereby, for the safety of the children living on Brookville Road and Old Brookville Road, pupils attending the Barnegat Township Schools would be picked up in front of their homes. This policy was in effect from at least 1976. During the period from 1976 to 1987, the Peary children, along with the children of the Pinto family, who live on Brookville Road, were picked up and dropped off by Barnegat school busses in front of their homes. The children were never required to traverse either Old Brookville

Road or Brookville Road to meet the bus, nor was a stop ever established on County Road 554.

In establishing the current bus stop, the Board did not provide an explanation to the petitioner for the arbitrary decision to relocate the stop from its previous location. When questioned on the issue, respondent William Doty, the current Board Transportation Coordinator, stated that a bus stop never existed on Old Brookville Road. According to Peter De Felica, Jr., the previous Board Transportation Coordinator, the issue of locating school bus stops on Old Brookville Road was specifically addressed and resolved when he began to work for the Board as a bus driver in 1976. During the 1976/1977 school year, Mr. De Felica was the school bus driver who was assigned the route which picked up the Peary children in front of their home on Old Brookville Road. In fact, Mr. De Felica was contacted directly by petitioner on those dates when his children would not be attending school so as to eliminate the need to stop on Old Brookville Road.

Respondents cite numerous cases in which the Commissioner of Education has held, since it is improper for the Commissioner to either interfere in local school board management unless the actions of the Board violate the law, are in bad faith, or are a shocking abuse of discretion, or to substitute his judgment for that of the local board in matters which are, by statute, delegated to local boards of education (see Boult and Harris v. Passaic, supra., that a school bus stop could not be changed. However, the majority of these cases do not specifically deal with the relocation of pre-existing school bus stops, but with whether children who are not considered as living remote from school, as defined in N.J.A.C. 6:21-1.3(a), are entitled to transportation when stops have been eliminated.

Of the two relevant cases cited by respondent, Livingston v. Bernards Township Board of Education, 1965 S.L.D. 29, and Centofani, et al. v. Board of Education of the Township of Wall, Monmouth County, 1975 S.L.D. 513, the relocation of the bus stop in Livingston, supra, was done at the request of the police as the school bus had to make a u-turn in the middle of a well traveled road after picking up and discharging petitioners' children. Such an action created a great risk of injury to an entire bus load of children.

In Centofani, supra, the Commissioner held that the Board had supplied sufficient notice and sufficient reason to petitioners for the relocation of the bus

stop to a site on a local highway, and that the actions of the Board were not arbitrary, capricious, or unreasonable.

Respondents also cite Walters, et al. v. Board of Education of the Township of Mendham, Morris County, 1977 S.L.D. 854, as grounds for dismissal of the within petitioner. In Walters, petitioners sought to have a bus stop relocated on the grounds that the existing stop was inherently dangerous. The facts in Walters were very similar to the facts in the within matter. The Commissioner held that the actions of the Board were not arbitrary, capricious, or unreasonable.

The major, significant difference between Walters and the within matter is that, in Walters, the bus stop that was being sought to be changed was a previously existing bus stop. The stop had not been relocated to an inherently dangerous location by the Board of Education of the Township of Mendham.

In the within matter, the Board relocated a long established bus stop from a safe location to an inherently dangerous location without reason, without informing petitioner of the change, or without permitting petitioner to address the matter before the Board implemented such change. When such a request was made by petitioner, he was informed that there was no possible way that a school bus could pick up his child in front of his home, and respondents began to give lame, and untrue, reasons for such. Included in the excuses were such reasons as a municipal ordinance prohibited such use of Old Brookville Road. Petitioner was supplied with the first page of Barnegat Township Municipal Ordinance § 71-7.2. The paragraph contained on that page addressed the streets on which trucks were prohibited. At no place was it stated that school busses could not use Old Brookville Road. Petitioner later acquired the remaining paragraphs of the ordinance. Under paragraph 2, the issue of busses is addressed. Of importance is the exclusion of school busses from the provisions of Barnegat Township Municipal Ordinance §71-7.2.

Another reason supplied to petitioner for why his son could not be picked up in front of his home was the width and condition of Old Brookville Road. Petitioner was told that the road was not wide enough and the surfacing was in such poor condition that it was unsafe for a school bus to travel down the road. However, Ocean Township Schools send four busses down Old Brookville Road daily. The Board further claimed that, since the road was located in both Barnegat Township and Ocean Township, Barnegat schools would have to obtain special permission

from Ocean Township to use the roadway. If Ocean Township is sending four busses down the road daily, it is apparent that the roadway can handle school bus traffic and obtaining the claimed necessary permission to use the roadway for such would be possible. As such, each reason presented to petitioner is unfounded and without merit.

As per the Commissioner's decision in Boult and Harris v. Passaic, supra, at 13, and Walters, et al. v. Board of Education of the Township of Mendham, Morris County, supra, at 875, the Commissioner can intervene and substitute his judgment for that of a local school board when the Board's actions either violate the law, are in bad faith (meaning acting dishonestly), are an abuse of discretion, or are arbitrary, capricious, or unreasonable.

In Livingston v. Bernards Township Board of Education, supra, the Commissioner, citing Hager v. Weber, 7 N.J. 201, 214 (1951), stated "Abuse of discretion has been defined to mean 'that the * * * ruling went far enough from the mark to become reversible error.'" In the within matter, that actions of the Barnegat Township Board of Education can be characterized as an abuse of discretion. There existed a viable, safe, and pre-established means by which to pick up and discharge petitioner's son, however, without a logical or rational, much less any explanation, the stop was relocated to an inherently dangerous location. Such an action could be considered reckless endangerment, due to the characteristics of the roadway and stop, as there is a foreseeable risk of injury to petitioner's son by causing him to cross and stand along side a heavily traveled truck route which has no sidewalks, shoulders or other safeguards to protect him.

The actions of the respondents cannot be characterized as anything but arbitrary, capricious and unreasonable, in bad faith and an abuse of discretion. Under the Commissioner's decision in Walters, supra, the decision of the Board to relocated the bus stop on County Road 554 must be overturned and the safe stop in front of the Peary residence on Old Brookville Road must be re-established.

To relocate the bus stop in front of the Peary home would cause no hardship or inconvenience to Barnegat Township. Conversely, having petitioner's son picked up and discharged on Route 554 places him in danger and causes a hardship on Mr. Peary who must accompany his son daily to the bus stop resulting in a loss in his working hours.

DISCUSSION AND CONCLUSIONS

The Board's motion to dismiss the herein matter on the grounds of mootness is denied. Although the record demonstrates that petitioner attempted to change his son's school attendance from the Board's school district to Ocean Township School District because petitioner's property lies within both jurisdictions, that attempt failed and petitioner's son has been excluded from the Ocean Township schools. As a consequence of petitioners son's re-enrollment in the Board's schools, the matter may not be dismissed on the grounds of mootness for that reason. Accordingly, the Board's Motion to Dismiss on the basis of mootness is **DENIED**.

For the purpose of its Motion for Summary Decision. The Board and respondents stipulate to all factual assertions made by petitioners in his complaint before Superior Court of New Jersey, Chancery Division, and which the Court transferred jurisdiction to the Commissioner. Respondents incorporate in their stipulation all exhibits and attachments to petitioner's complaint which forms the basis of his herein claim.

Petitioner's son lives remote from the schoolhouse, therefore, is entitled to school bus transportation provided by the Board. N.J.S.A. 18A:39-1, N.J.A.C. 6:21-1.3(a). The Board is required to adopt policies and procedures governing the transportation of its pupils to and from school and school related services. N.J.A.C. 6:21-3.1(b). The Board has wide discretionary authority to promulgate pupil transportation policies so long as it operates within the law, does not act in bad faith or dishonestly, nor abuse its discretion in a shocking manner. Boult and Harris, supra.

Petitioner disagrees that the only issue to be determined is whether the bus stop for petitioner's son is inherently dangerous. Petitioner contends the "issue here is not whether this distance is a hardship, but that the walk itself and the location of the bus stop are hazardous." This, in my considered judgment, is a distinction without a difference. The issue is "whether the school bus stop for petitioner's son is inherently dangerous and, whether the Board is responsible to cure or remedy the danger?"

In the final analysis, this is a case wherein petitioner seeks to have the Board change its existing pupil bus route to overcome an alleged hazardous condition or, in the alternative, to convenience petitioner. As the Board observes, the

Commissioner has consistently held that local boards of education are not authorized by law to provide for the safety of children in reaching the schoolhouse. Such authority lies with the local, county or state governments. See, Walters, supra. citing Read et al. v. Bd. of Education of the Twp. of Roxbury, 1938 S.L.D. 763 (1927). Thus, the Board's pupil transportation policy with regard to petitioner's son must stand unlesss the policy was enacted in bad faith or the Board abused its discretionary authority in a shocking manner.

I **CONCLUDE** that petitoner has failed to affirmatively demonstrate that the Board acted in an arbitrary, capricious or unreasonable matter or that it demonstrated bad faith or an abuse of its discretion.

I **CONCLUDE** that the Board operated within its legal authority in setting the pupil transportation pick-up and discharge locations for petitioner's son.

I **CONCLUDE**, therefore, that the Board's motion of Summary Decision must be **GRANTED.**

ORDER

Accordingly, it is **ORDERED** that the Board's Motion for Summary Decision is **GRANTED** and petitioner's appeal is **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

8 December 1992
Date

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

DEC 17 1992
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 21 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

cad

ROBERT PEARY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BARNEGAT, ROBERT L. HORNBELT, SUPERINTENDENT OF SCHOOLS AND WILLIAM DOTY, TRANSPORTATION COORDINATOR, OCEAN COUNTY,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and respondent Board's replies thereto were timely filed in accordance with N.J.A.C. 1:1-18.4.

Petitioner's exceptions consisted of three certifications, his own and those of two other individuals. The major portion of petitioner's certification contains allegations regarding the performance of individual bus drivers in specific instances which are deemed irrelevant to the matter at hand, and other material which was fully and fairly considered by the ALJ in formulating his decision. The remaining portion of this certification and the other two certifications submitted present evidence which appears for the first time as exceptions. Since this material was submitted beyond the date that the record closed, the Commissioner will not consider it in making her determination.

Upon careful and independent review of this matter, the Commissioner is in agreement with the ALJ's findings and conclusions

and grant of summary decision to the Board. As recognized by the ALJ, the law provides local school boards with wide discretionary authority to promulgate pupil transportation policies. When a board has acted within its lawful authority, the Commissioner will not substitute her judgment for the board's unless there is evidence of discrimination or it is demonstrated that the board's policy is arbitrary, capricious, or unreasonable. The Commissioner finds that the record in the instant matter does not support such a determination.

Additionally, the law is also clear that this conclusion is not altered by the existence of roadway danger. Authority to ensure safety conditions of roadways has been vested in local, county or state governments and is not within the purview of local school boards.

As a final point, it bears noting that the background facts of the initial decision made a one line reference to petitioner's son as "perceptually impaired." It should be observed that transportation for students with educational disabilities is a matter for consideration as part of an Individualized Education Program (IEP) under the related service area of N.J.A.C. 6:28. Therefore, this decision does not preclude this issue from being raised as an IEP issue if warranted.

Accordingly, the recommended decision of the Administrative Law Judge granting the Board's Motion for Summary Decision and dismissing the Petition of Appeal with prejudice is adopted as the final decision in this matter for the reasons expressed therein.

JANUARY 26, 1993

COMMISSIONER OF EDUCATION

DATE OF MAILING - JANUARY 26, 1993

11-93

EDU #3466-92
C # 11-93
SB # 6-93

ROBERT PEARY,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF BARNEGAT, ET AL., OCEAN COUNTY,

RESPONDENTS-RESPONDENTS.

STATE BOARD OF EDUCATION

DECISION ON MOTION

Decided by the Commissioner of Education, January 26, 1993

For the Petitioner-Appellant, Roeber & Stonehill (Roberta L. Stonehill, Esq., of Counsel)

For the Respondent-Respondent, Masch, Visotcky, Cere, Fice & Carr (Paul J. Carr, Esq., of Counsel)

Appellants in this matter are appealing a decision of the Commissioner of Education which, adopting the Administrative Law Judge's (ALJ) determination, found that Appellants had failed to demonstrate that the Board's action in denying their request to change a school bus stop was arbitrary, capricious or unreasonable, or that it showed bad faith or abuse of discretion.

Appellants seek to supplement the record with affidavits relating to the Board's compliance in prior years with requests from others to move the stop. In that this information is material to Appellants' claim that the Board's refusal to do so in their case was arbitrary and capricious, we grant their motion to supplement the record.

Ronald K. Butcher opposed.
May 5, 1993
Date of mailing MAY 07 1993

11-93

EDU #3466-92
C # 11-93
SB # 6-93

ROBERT PEARY,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BARNEGAT, ET AL., OCEAN COUNTY,	:	DECISION
RESPONDENTS-RESPONDENTS.	:	

Decided by the Commissioner of Education, January 26, 1993

Decision on motion by the State Board of Education, May 5, 1993

For the Petitioner-Appellant, Roeber & Stonehill (Roberta L. Stonehill, Esq., of Counsel)

For the Respondents-Respondents, March, Visotcky, Cerefice & Carr (Paul J. Carr, Esq., of Counsel)

The facts herein are not in dispute. Petitioner's 12-year-old son, who attended school in the Barnegat Township school district, was assigned a school bus stop on County Road 554 in September 1991 following his return from living with his mother in California for two years. Prior to his son's move to California, petitioner's children attending the Barnegat public schools had always been picked up by the bus in front of their home on Old Brookville Road since they began attending such schools in 1976.

Petitioner requested that the former stop in front of his home be reestablished, contending that the assigned bus stop on

Oct. 6, 1993

County Road 554, a 50-mile-per-hour truck route with narrow shoulders and no sidewalk, was unsafe. The Board denied the request.

Petitioner challenged the Board's action in a petition filed with the Commissioner of Education on March 31, 1992, requesting that the bus stop be relocated to its former location on Old Brookville Road.

At the beginning of the 1992-93 school year, petitioner, whose property is located in both Ocean and Barnegat Townships, enrolled his son in the Ocean Township school district. During that time, the Ocean Township school buses picked up and discharged his son in front of their home on Old Brookville Road. Petitioner's son was subsequently reenrolled in Barnegat when the Ocean Township Superintendent determined that he was actually domiciled in Barnegat. The bus stop on County Road 554 was then reestablished by the Board.

The Board moved for summary decision, and on December 8, 1992, the Administrative Law Judge ("ALJ") recommended granting the Board's motion. Stating the issue as "whether the school bus stop for petitioner's son is inherently dangerous and, whether the Board is responsible to cure or remedy the danger," initial decision, slip op. at 11, the ALJ, noting that the authority to provide for the safety of children in getting to and from school lies with local, county and state governments and not local boards of education, concluded that petitioner had failed to demonstrate that the Board had acted in an arbitrary, capricious or unreasonable manner or had shown bad faith or abuse of discretion.

On January 26, 1993, the Commissioner adopted the ALJ's findings and conclusions and dismissed the petition. The Commissioner, also stressing that the authority to ensure safety conditions of roads is not within the purview of local school boards, agreed that petitioner had not demonstrated discrimination or shown that the Board's action was arbitrary or capricious. She added, however, that her decision did not preclude consideration of an Individualized Education Program for petitioner's son, who was classified as perceptually impaired.

Petitioner filed the instant appeal to the State Board of Education, along with a motion to supplement the record with affidavits relating to the Board's grant in prior years of other requests to relocate bus stops. On May 5, 1993, the State Board granted petitioner's motion to supplement, finding the information in the affidavits material to petitioner's claim that the Board's action was arbitrary and capricious.

After a thorough review of the record, including the supplemental affidavits filed by petitioner, we reverse the decision of the Commissioner.

Although district boards have wide discretion to promulgate pupil transportation policies, including school bus routes and stops, they may not discriminate or act in a manner that is arbitrary, capricious or unreasonable. Our review of the Board's action herein is not limited to the relative safety of the school bus stop on County Road 554 or the Board's jurisdiction over safety conditions of sidewalks and roadways within the Township. Rather, the broader issue is whether the Board abused its discretion in

denying petitioner's request to reestablish the former bus stop on Old Brookville Road in this particular case.

Under the particular circumstances in the record before us, we conclude that the Board's conduct in this regard was arbitrary and capricious. We find that the basis for the Board's action in refusing to reestablish the former bus stop on Old Brookville Road is not supported by the record.

As found by the ALJ and acknowledged by the Board, see Answer Brief, at 1, the Board predicated its denial of petitioner's request upon its contention that a local ordinance prohibited buses from using Old Brookville Road, that the condition and width of Old Brookville Road precluded buses from operating thereon, and that time constraints prevented the bus from using Old Brookville Road.

Our review, however, indicates that the ordinance cited by the Board, which prohibits trucks and buses over four tons from certain roads, does not bar buses from Old Brookville Road and, in any event, does not apply to buses that are picking up or discharging passengers on the prohibited roads. In addition, the ordinance expressly excludes school buses from its prohibition. Consequently, that ordinance does not in any way provide justification for the Board's action.[1]

The record also indicates that school buses routinely have picked up and discharged students on Old Brookville Road,

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[1] We note that the provision of the ordinance dealing with buses was added on February 2, 1990, during the time in which petitioner's son was living in California and subsequent to the period in which the district's buses regularly stopped in front of petitioner's home on Old Brookville Road.

contradicting the Board's contention that its width and condition preclude such use. In fact, it is undisputed that petitioner's children attending school in Barnegat had been picked up in front of their home on Old Brookville Road on a regular basis since 1976. And there is no indication that the short drive down Old Brookville Road would in any way disrupt the district's bus schedule. Indeed, as established on the record, Barnegat's school buses have used this route regularly in the past.

Nor can we overlook the fact that the Board has granted similar requests from other parents. As indicated in the affidavits of another family living near petitioner in Barnegat, the Board had granted their requests every year to relocate their children's bus stop from County Road 554 to a location in front of their home.

Accordingly, we conclude that, under the circumstances, petitioner has demonstrated that the Board's action in refusing his request in this particular case to reestablish the bus stop on Old Brookville Road was arbitrary and capricious. We therefore reverse the decision of the Commissioner and direct the Board to relocate the bus stop for petitioner's son to its former location on Old Brookville Road.

Orlando Edreira abstained.

Attorney exceptions are noted.[2]

October 6, 1993

Date of mailing 08 OCT 1993

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[2] We note that the petitioner's exceptions were not filed in a timely manner, see N.J.A.C. 6:2-1.17, and were therefore not considered in determining this matter.

12-93

IN THE MATTER OF THE TENURE	:	
HEARING OF LEONARD WATSON,	:	COMMISSIONER OF EDUCATION
BUREAU OF COMMUNITY AND	:	DECISION
RESIDENTIAL SERVICES, NEW JERSEY	:	
STATE DEPARTMENT OF CORRECTIONS.	:	
	:	

JANUARY 26, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8620-91
AGENCY DKT. NO. 313-8/91

IN THE MATTER OF THE TENURE HEARING OF LEONARD WATSON, BUREAU OF COMMUNITY AND RESIDENTIAL SERVICES, NEW JERSEY DEPARTMENT OF CORRECTIONS.

Allen Roth, Deputy Attorney General, for the Department of Corrections (Robert J. DelTufo, Attorney General of New Jersey, attorney)

Steven P. Weissman, Esq., CWA District One, for Leonard Watson

Record Closed: November 20, 1992 Decided: December 18, 1992

BEFORE **JOSEPH F. FIDLER,** ALJ:

The matter was transmitted to the Office of Administrative Law on September 11, 1991, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

December 18, 1992
Date

Joseph F. Fidler
JOSEPH F. FIDLER, ALJ

Receipt Acknowledged:

12/22/92
Date

Maureen L. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 24 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

lam

STEVEN P. WEISSMAN, ESQ.
Communications Workers of
America, AFL-CIO
One Executive Drive, Suite 200
Somerset, New Jersey 08873
(908) 563-4565

In the Matter of the Tenure Hearing of Leonard Watson v. New Jersey State Department of Corrections	BEFORE THE COMMISSION OF EDUCATION OAL Docket No. EDU 08620-91S **SETTLEMENT AGREEMENT**

Petitioner New Jersey Department of Corrections ("DOC") and the Ocean Residential Group ("Ocean"), and Respondent Leonard Watson, desire to enter into the following settlement agreement in the public interest:

1. WHEREAS, Respondent, Leonard Watson, a tenured teacher with a certification for physical education, has been employed by the DOC as a Teacher Level II, twelve months since July 25, 1983; and

2. WHEREAS, Respondent has never previously been subjected to any disciplinary proceedings in the course of that employment; and

3. WHEREAS, on April 22, 1991, DOC advised Respondent that it was referring tenure charges to the Commissioner of Education ("Commissioner"), and in accordance with N.J.S.A. 18A:6-9 et. seq. the following charges were specified: 1) violation of administrative procedures and/or regulations involving safety and security; 2) violation of a rule, regulation, policy, procedure order or administrative decision; 3) breach of security; and 4) unauthorized transportation of an inmate; and

4. WHEREAS, on August 8, 1991, the DOC filed written charges with the Commissioner requesting dismissal, reduction in salary of Respondent; and

5. WHEREAS, on September 5, 1991, Respondent filed his answer with the Department of Education Bureau of Controversies and Disputes; and

6. WHEREAS, Respondent has not been suspended; and

7. WHEREAS, Respondent is currently serving as a Teacher Level II at the Fresh Start Program in Farmingdale; and

8. WHEREAS, Respondent wishes to remain in the position of teaching physical education, and the DOC is eager for him to remain in such position; and

9. WHEREAS, said position will have no supervisory responsibilities of any paraprofessional staff; and

10. WHEREAS, tenure hearings were scheduled before administrative law Judge Joseph F. Fidler for July 13-16, 1992; and

IT IS THEREFORE AGREED that the DOC will withdraw the tenure charges against Respondent, subject to the approval of the Commissioner of Department of Education; and

IT IS FURTHER AGREED that DOC will allow Respondent to be based at the Fresh Start Program in Farmingdale as a tenure teacher Level II in physical education with no corresponding reduction in annual salary subject to approval of this settlement by the Commissioner of DOE; and

IT IS FURTHER AGREED that Respondent agrees to be based at the Fresh Start Program in Farmingdale as a tenured teacher Level II in physical education, after consultation with an attorney, subject to the approval of the settlement by the Commissioner of DOE; and

IT IS FURTHER AGREED that by this settlement, Respondent does not waive his rights, if he is subject to a reduction in force, to employment in any category he is entitled to by seniority; and

IT IS FURTHER AGREED that Respondent's personnel file will reflect the fact that tenure charges were filed and withdrawn in accordance with the terms of this settlement; and

IT IS FURTHER AGREED that the basis of this disciplinary action was due to Respondent's actions concerning the paraprofessionals at the Ocean Residential Group and there is a colorable issue as to whether Respondent received approval for his actions from his supervisors, and that by being based at the Fresh Start Program in Farmingdale, Respondent no longer performs any duties vis-a-vis the paraprofessional program at Ocean Residential Group, and that DOC agrees to move to dismiss the tenure charges against Respondent, subject to approval of this agreement by the Commission of DOE; and

IT IS FURTHER AGREED that this agreement, its contents and its terms do not constitute precedent of any kind to be used against the DOC; and

2C

IT IS FURTHER AGREED that both parties waive the right to file exceptions and cross-exceptions; and

IT IS FURTHER AGREED that nothing in this settlement shall be deemed to be an admission of liability on behalf of either party.

HOWEVER, should the Commissioner of DOE or the State Board of Education refuse to approve any terms of the settlement, including the withdrawal of said tenure charges by DOC or by Respondent, any such refusal shall not interfere with the rights of either party to pursue the matter further.

THE REASONS FOR ENTERING INTO THIS AGREEMENT ARE AS FOLLOWS:

(a) The costs of continuing to prosecute the tenure claims against Respondent are expected to be substantial;

(b) In view of the fact that Respondent is based at the Fresh Start Program in Farmingdale and in this capacity does not perform any duties relative to the paraprofessional program at Ocean Residential Group;

(c) The charges did not involve abuse of students, inappropriate physical contact or any allegations of moral turpitude; and

(d) Both parties after consultation with counsel, fully endorse the agreement and are anxious to implement said terms.

Leonard Watson

LEONARD WATSON
Respondent

Dated: October 28, 1992

Steven P. Weissman

STEVEN P. WEISSMAN, ESQ.
Attorney for Respondent

Dated: October 30, 1992

ROBERT J. DEL TUFO
Attorney General of New Jersey

By: Allan C. Roth

ALLAN C. ROTH
Deputy Attorney General
for Petitioner

Dated: ~~October~~ November 10, 1992

OAL DKT. NO. EDU 8620-91

IN THE MATTER OF THE TENURE HEARING OF LEONARD WATSON, BUREAU OF COMMUNITY AND RESIDENTIAL SERVICES, NEW JERSEY STATE DEPARTMENT OF CORRECTIONS.	:	COMMISSIONER OF EDUCATION DECISION

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

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

COMMISSIONER OF EDUCATION

JANUARY 26, 1993

DATE OF MAILING - JANUARY 26, 1993

13-93

13-93

EUGENE BRADFORD, ON BEHALF OF HIS DAUGHTER, MICHELLE BRADFORD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parent appealed NJSIAA's determination that his daughter, a 17-year-old high school senior, was ineligible to participate in athletic events during 1992-93 school year due to eight-semester rule (NJSIAA Bylaws, Article V, Section 4J), which prohibits participation in athletic events after the expiration of eight consecutive semesters following a student's entry into 9th grade. Petitioner contended his daughter's ineligibility was due to circumstances beyond her control since to retain her dual Belgian-American citizenship she was required to spend a six-month period of residence in Belgium prior to her 18th birthday. Due to family circumstances and other constraints, said stay became a year's stay in Belgium as a freshman and, thus, having spent two years as a freshman, on return to the United States, she was compelled to re-enter the system as a sophomore, thereby extending her high school career by one year.

After careful consideration of evidence and transcripts of Eligiblity Appeals Committee's deliberations, Commissioner upheld NJSIAA's decision. Commissioner found that NJSIAA's determination as to the essentially voluntary nature of petitioner's actions was reasonably based and reached after full and appropriate due process. (Koh and Kim) Thus, Commissioner had no authority to set it aside. Petition was dismissed.

JANUARY 26, 1993

EUGENE BRADFORD, ON BEHALF OF HIS DAUGHTER, MICHELLE BRADFORD,

PETITIONER,

V.

NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

For Petitioner, Eugene Bradford, Pro Se

For Respondent, Michael J. Herbert, Esq. (Picco, Mack, Herbert, Kennedy, Jaffe and Yoskin)

This matter was opened before the Commissioner of Education on December 3, 1992 by the filing of a Petition of Appeal wherein petitioner disputed the decision of respondent (hereinafter "NJSIAA") to declare his daughter ineligible for participation in athletic events during the 1992-93 school year by reason of NJSIAA's so-called "eight-semester rule" (NJSIAA Bylaws, Article V, Section 4J), which prohibits such participation after the expiration of eight consecutive semesters following a student's entry into ninth grade.

An answer having been duly filed by NJSIAA, a briefing schedule was established and the record of proceedings before NJSIAA's Eligibility Committee and Eligibility Appeals Committee were submitted to the Commissioner together with NJSIAA's primary brief. Upon receipt of petitioner's responsive papers on December 18, 1992, the record of this matter was deemed closed.

PETITIONER'S ARGUMENT

Petitioner's daughter Michelle is a seventeen-year old senior at Rumson-Fair Haven High School who began there in 1988-89 as a younger than usual (thirteen-year old) freshman as a result of her early entry into elementary school in England. During 1989-90, she left the United States to attend school in Belgium, and upon her return in 1990-91, re-entered Rumson-Fair Haven as a sophomore, since she had spent her year in Belgium as a freshman and had transferred no credits back to Rumson-Fair Haven. She very successfully participated in interscholastic cross-country and track during 1990-91 and 1991-92, but did not play any sport during either her freshman year at Rumson-Fair Haven (1988-89) or her year of schooling in Belgium (1989-90).

Petitioner contends that his daughter's ineligibility under the eight-semester rule was due to circumstances beyond her control, in that in order for her to maintain the dual Belgian-American citizenship she enjoys by virtue of her parentage (her mother is a Belgian citizen notwithstanding eighteen years of residency in the United States) she was required to spend a six-month period of residency in Belgium prior to her eighteenth birthday. Upon Michelle's moving to Belgium for the 1989-90 school year, Belgian authorities determined that since instruction was entirely in Dutch, a language of which she had no knowledge, Michelle would not be able to adequately function at grade level and would have to enter school as a freshman rather than a sophomore even though she had already completed her freshman year in the United States. Thus, upon Michelle's return to Rumson-Fair Haven in 1990-91, she was compelled to re-enter the system as a sophomore, thereby extending her high school career by a year.

Petitioner further explains that Michelle could not, for practical purposes, limit her stay in Belgian to six months, as family circumstances permitted consideration of only a relatively small range of boarding schools, none of which would accept a student for less than a full year of attendance. Also, petitioner notes that the specific timing of Michelle's stay in Belgium was dictated by consideration of the age at which her parents felt she could reasonably handle such a situation and the availability of relatives to whom her care could be entrusted, and that the obligation imposed on Michelle by Belgium in order to maintain the citizenship that is hers by birthright should not be held against her by NJSIAA (petitioner likens this duty to that of military service, for which the eight-semester rule specifically provides a waiver).

He also contends that, since Michelle was young when she entered high school, she is now at age level for her grade; a circumstance which, together with the fact that she played no sports in either 1988-89 (her freshman year at Rumson-Fair Haven) or 1989-90 (her year in Belgium), places her on equal footing with her classmates and gives her no advantage whatsoever in terms of age or experience. Further, petitioner finds a manifest inconsistency and arbitrariness in NJSIAA's apparent willingness to accept an additional year of growth and development in a student prior to his or her initial enrollment in high school, but not after.

With respect to the conduct of NJSIAA proceedings in this matter, petitioner avers that off-record remarks to the effect that such proceedings were pointless because petitioner's actions were voluntary show that NJSIAA's position was set even before he and his

daughter had a hearing. He further contends that a crucial error in NJSIAA's post-hearing communication with him (statements that Michelle repeated her sophomore year here after completing a sophomore year in Belgium) shows that NJSIAA did not understand a material fact underlying his claim of Michelle's school extension being beyond her control. He also opines that his failure to fully explicate the circumstances of Michelle's trip to Belgium in his initial letter to NJSIAA, which focused on the academic, athletic and career advantages of the family's decision rather than on the necessity for a period of residency to maintain Michelle's Belgian citizenship, was due to his ignorance of the criteria for judging an eligibility appeal and his desire to avoid airing sensitive family issues; and that this error on his part should not now prejudice Michelle's case before the Commissioner. Finally, petitioner posits Michelle's belief that she did not receive due process from a panel on which not a single woman was present.

RESPONDENT'S ARGUMENT

NJSIAA argues that its bylaws, duly approved by the Commissioner of Education and adopted by all participating districts, including Rumson-Fair Haven, are plain on their face and clearly provide that a student will be ineligible for varsity sports after expiration of eight consecutive semesters following entrance into ninth grade, with waivers granted, both according to interpretive guidelines and historically, only for circumstances beyond the control of the affected student(s). (NJSIAA Bylaws, Article V, Section 4J; Interpretive Guidelines, Section 5) NJSIAA further argues that it is now axiomatic that the Commissioner, even where he might decide otherwise in de novo review, will not

substitute his judgment for that of NJSIAA where due process has been provided and there is a reasonable basis for NJSIAA's decision. Dam Jin Koh and Hong Jun Kim v. NJSIAA, 1987 S.L.D. 259

In the instant matter, NJSIAA contends, the case of petitioner's daughter was considered by the Eligibility Committee, which voted unanimously to deny petitioner's request after reviewing all available evidence. Petitioner was then given a full hearing before the Eligibility Appeals Committee, at which petitioner, his daughter and several school officials testified and produced further evidence in support of petitioner's request. Both committees concluded that, notwithstanding petitioner's laudable motives--and even granting arguendo petitioner's new contention at hearing that Michelle's travel was due not to potential personal advantage but to requirements for retaining Belgian citizenship--the decision to have Michelle spend a year abroad was essentially a voluntary one, so that she did not meet the established standard to qualify for a waiver from the eight-semester rule. As NJSIAA's determination was both reasonable and consistent with established rules and guidelines, in the absence of any compelling reason to overturn it, NJSIAA's decision must be sustained by the Commissioner.

COMMISSIONER'S DETERMINATION

Upon careful review and consideration, the Commissioner determines to uphold the decision of NJSIAA in this matter.

Initially, the Commissioner rejects petitioner's allegations regarding failings in the due process afforded him by NJSIAA, as the transcript of hearing before the Appeals Committee 1) evidences the panel's attempt to probe the citizenship question, newly raised at that time, as well as other related matters in a way

that belies any claim that the Committee had pre-judged petitioner's case; 2) indicates that even at hearing, subsequent to the initial letter petitioner now seeks to repudiate and after the standard for judging an eligibility appeal was known to him (see, e.g., transcript at p. 89), petitioner and his daughter both spoke of reasons for their decision, and its timing, relating primarily to advantages in career advancement and social growth; and 3) shows no evidence whatsoever that sexism or gender factors were ever at play in any discussion or decision by the panel. Indeed, the transcript is clear that, after hearing all the testimony and reviewing all the evidence, the panel reasonably concluded that, however laudable petitioner's family choice may have been, it was fundamentally voluntary and therefore outside the scope of any waiver grantable under established rules.

The Commissioner further notes in this context that, while the letter informing Rumson-Fair Haven of NJSIAA's final decision in this matter did include the misstatement claimed by petitioner, it is clear from the transcript of the Committee's deliberations that any possible misunderstanding of Michelle's grade-level pattern played no role in the Committee's basic determination on the central issue in this matter, namely the voluntary nature of the decision to send Michelle abroad after she had entered high school. As that decision was reasonably based and reached after full and appropriate due process, the Commissioner has no authority to set it aside absent compelling reason to the contrary. Koh and Kim, supra

Petitioner does attempt to present such reasons in his somewhat fuller explanation to the Commissioner as to why Michelle's trip was timed as it was, and as to the effect of Belgian

grade-level determinations on extending her high school career. However, even accepting petitioner's view that the duty to reside in Belgium was a requirement beyond his daughter's control, it is clear that the time and manner in which that duty was to be met were within the family's discretion notwithstanding that various personal circumstances and other restraints may have significantly limited the options realistically available to them. That these limitations led to a choice causing Michelle to be ineligible for 1992-93 athletics is unfortunate, but does not change the essentially voluntary nature of the family's actions and therefore cannot override the consequences of those actions in terms of established NJSIAA rules.

Accordingly, the decision of respondent NJSIAA is sustained for the reasons expressed in the record before that body, together with the additional reasons set forth herein. The Petition of Appeal is dismissed.

IT IS SO ORDERED.

Maybel Fitzgerald

COMMISSIONER OF EDUCATION

JANUARY 26, 1993

DATE OF MAILING - JANAURY 26, 1993

14-93

IN THE MATTER OF THE SPECIAL	:	
ELECTION OF THE EDISON TOWNSHIP	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT, MIDDLESEX	:	DECISION
COUNTY.	:	
	:	

SYNOPSIS

Board of Education sought declaratory judgment from Commissioner with respect to application of N.J.S.A. 18A:9-10 and 18A:9-11, which require in pertinent part that upon the voters' adoption of a change from a Type I (appointed) to Type II (elected) school board, the board shall be increased to nine members with the additional seats to be filled through a special election to be held not less than 60 nor more than 70 days from the date of the adopting election.

Petitioning Board had been unaware of this requirement and had scheduled additional seats to be filled at the 1993 annual school election in April notwithstanding that its voters had adopted the change of governance on November 3, 1992. Upon learning of its error, Board determined to hold the necessary special election on February 24, 1993, between 60 and 70 days from discovery of the oversight, and sought validation of this schedule from the Commissioner.

Commissioner determined that the intent of statute and the will of the electorate would be best effectuated by permitting the district to move as promptly and expeditiously as possible toward a fully elected school Board. Commissioner found that special election to be held on February 24, 1993, together with plan to fill three existing seats at April 1993 annual school election, was in compliance with statute under the particular circumstances of this matter.

JANUARY 28, 1993

IN THE MATTER OF THE SPECIAL	:	
ELECTION OF THE EDISON TOWNSHIP	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT, MIDDLESEX	:	DECISION
COUNTY.	:	
	:	

For Petitioner, R. Joseph Ferenczi, Esq.

Whereas, this matter was opened before the Commissioner of Education by way of a petition from the Edison Township Board of Education, filed on December 28, 1992, amended on January 5, 1993 and perfected on January 12, 1993, seeking a declaratory judgment with respect to application of N.J.S.A. 18A:9-10 and 18A:9-11 to a situation recently arisen in the Edison Township School District; and

Whereas, said petition set forth that the citizens of Edison Township, pursuant to N.J.S.A. 18A:9-4 and 18A:9-5, had duly voted at the general election held on November 3, 1992 to change the governance of their school district from a seven-member appointed Board of Education (Type 1) to an elected (Type II); and

Whereas, N.J.S.A. 18A:9-10 provides that whenever the board membership of a district electing to change from Type I to Type II is less than nine, it shall be increased to nine at the next annual school election, unless the election adopting the change shall have been held more than 130 days prior to the annual school election, in

which case the additional seats shall be filled at a special election to be held not less than 60 nor more than 70 days after the adopting election; and

Whereas, the Edison Township Board of Education was unaware of the provisions of N.J.S.A. 18A:9-10, and notwithstanding that the adopting election was held more than 130 days prior to the next annual school election, determined and announced that the two new seats would be filled at the annual school election to be held on April 20, 1993, together with the three seats for three years each that will expire on that date by ordinary operation of law; and

Whereas, on December 16, 1992, the Board discovered that it had not complied with the requirements of N.J.S.A. 18A:9-10, in that it had missed the sixty-to-seventy-day "window" for conduct of a special election for the two new seats following the adopting election on November 3, 1992, and announced its intention to hold such an election by the 70th day from discovery of its error, that is, on February 24, 1993; and

Whereas, the Board now seeks from the Commissioner a declaration that the proposed special election for the two new seats, together with the annual election on April 20, 1993 wherein voters will be asked to fill three seats for terms of three years each consistent with N.J.S.A. 18A:9-11, is valid and in compliance with N.J.S.A. 18A:9-10 and 18A:9-11; and

Whereas, the Commissioner has reviewed the circumstances of this matter and determined that, given that an error has already occurred, the intent of statute and the will of the electorate would best be served at this point by conduct of the special election as planned by the Board and moving on schedule toward effectuation of a fully elected body as dictated by the voters of Edison; now therefore

IT IS ORDERED this 28TH day of January 1993 that the Board of Education of Edison Township School District shall proceed to conduct a special election on February 24, 1993 for the selection of two Board members for terms of two years each; that three seats for terms of three years each shall be filled at the annual school election on April 20, 1993; and that these elections shall be deemed valid and in compliance with statute under the particular circumstances of this matter.

COMMISSIONER OF EDUCATION

JANUARY 28, 1993

DATE OF MAILING - JANUARY 28, 1993

15-93

BOARD OF EDUCATION OF THE BOROUGH OF CLIFFSIDE PARK,

PETITIONER,

V.

ZENUN TAFILAJ a/k/a EZET TAFILHA AND SHPRESA TAFILAJ,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

FEBRUARY 4, 1993

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 3113-92
AGENCY DKT. NO. 51-2/92

BOARD OF EDUCATION OF THE BOROUGH OF CLIFFSIDE PARK,

Petitioner,

v.

ZENUM TAFILAJ a/k/a EZET TAFILHA, AND SHPRESA TAFILAJ,

Respondents.

Susan T. Calabrese, Esq., for petitioner
(Beattie Padovano, attorneys)

Izet Tafilaj, improperly pleaded as Zenum Tafilaj a/k/a Ezet Tafilha, *pro se*

Shpresa Tafilaj, *pro se*

Record Closed: December 3, 1992 Decided: December 22, 1992

BEFORE **RICHARD McGILL,** ALJ:

The Board of Education of the Borough of Cliffside Park filed a petition seeking tuition for respondents' children who were enrolled in school in Cliffside Park but allegedly were not residents of the Borough. The matter was transmitted to the Office of Administrative Law on April 29, 1992 for determination as a contested case.

Prior to hearing, the parties agreed to an amicable resolution of the matter and submitted the attached Stipulation of Settlement and Order of Dismissal. Having reveiwed the record and the settlement terms, I **FIND:**

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

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

I hereby **FILE** my Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

Dec. 22, 1992
Date

Richard McGill
RICHARD McGILL, ALJ

Receipt Acknowledged:

12/24/92
Date

Maureen L. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 30 1992
Date

Joyce LaVecchia
OFFICE OF ADMINISTRATIVE LAW

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STATE OF NEW JERSEY
OFFICE OF [illegible]

BEATTIE PADOVANO, ESQS.
50 Chestnut Ridge Road
P. O. Box 244
Montvale, New Jersey 07645
(201) 573-1810
Attorneys for Petitioner

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY

BOARD OF EDUCATION OF THE BOROUGH OF CLIFFSIDE PARK,

Petitioner,

VS.

ZENUN TAFILAJ a/k/a EZET TAFILHA and SHPRESA TAFILAJ,

Respondents.

Agency Docket No.

OAL Docket No.EDU-03113-92N

STIPULATION OF SETTLEMENT AND ORDER OF DISMISSAL

Petitioner, Board of Education of the Borough of Cliffside Park, being represented by Beattie Padovano, Esqs., 50 Chestnut Ridge Road, Montvale, New Jersey 07645 (Susan T. Calabrese, Esq. appearing); and

WHEREAS, respondents, Izet Tafilaj and Shpresa Tafilaj, improperly pleaded as Zenun Tafilaj a/k/a Ezet Tafilha and Shpresa Tafilaj, being represented pro se; and

WHEREAS, the respondents' children, Bekim Tafilaj and Merkim Tafilaj, attended the Cliffside Park Schools during a time when they did not reside in the Cliffside Park School District; and

WHEREAS, petitioner, Board of Education of the Borough of Cliffside Park subsequently filed a petition against respondents

for tuition reimbursement for collection of tuition for the time during which the respondents' children attended Cliffside Park School District while not residing in the school district; and

WHEREAS, this stipulation is intended by the parties to bind the Board of Education of the Borough of Cliffside Park and Izet Tafilaj and Shpresa Tafilaj, improperly pleaded as Zenun Tafilaj a/k/a Ezet Tafilha and Shpresa Tafilaj, and their successors in interest, including the executors or personal representatives of any persons' estate; and

WHEREAS, the Board of Education of the Borough of Cliffside Park and Izet Tafilaj and Shpresa Tafilaj, improperly pleaded as Zenun Tafilaj a/k/a Ezet Tafilha and Shpresa Tafilaj, wish to amicably resolve the disputes between them without further litigation;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, it is

STIPULATED AND AGREED as follows:

1. The respondents shall pay the sum of $6,967.00 for settlement of the above captioned matter and that this sum shall be paid in the following installments to the petitioner:

$2,000.00 to be paid immediately;
2,000.00 to be paid by October 1, 1992;
1,967.00 to be paid by November 1, 1992; and
1,000.00 to be paid by December 1, 1992

If payments are not made within ten (10) days of the dates set forth in the above schedule, respondent shall have the right to apply ex parte for judgment against petitioners in the

amount of $6,967.00 reduced by any monies already paid by petitioners to respondent on account of this agreement, plus attorneys fees and costs.

2. The petitioner acknowledges receipt of the first payment in the amount of $2,000.00 by a check dated October 11, 1991, check number 1229 written on the account of Izet Tafilaj and Shpresa Tafilaj at Hudson United Bank, 354 Palisade Avenue, Cliffside Park, New Jersey 07010.

3. The respondent, Izet Tafilaj, shall execute a note and mortgage in the forms annexed hereto as Exhibit A for the benefit of the petitioner to secure the settlement sum of $6,967.00 and that such mortgage shall be attached to the property owned solely by Izet Tafilaj located at 339 Palisade Avenue, Cliffside Park, New Jersey 07010, Block 78, Lot 8, also known as:

> Which on a certain map entitled, "Map of Property of John Winterburn, Cliffside, Ridgefield Township, Bergenfield, N.J.", filed in the office of the clerk of Bergen County, April 17th, 1889 as Map No. 405, is known and designated as lot numbered forty-one (41), fronting on the northwesterly line or side of Palisade Avenue, as laid down on said map.
>
> Said premises being also known and designated as Lot 8 in Block 78 on the tax map of the Borough of Cliffside Park.
>
> Commonly known as 339 Palisade Avenue, Cliffside Park, New Jersey.
>
> Being the same premises conveyed to the Grantor hereby by deed of Edward Grena, Dennis DiPoto and Charles Anzalone, as tenants in common, dated June 20, 1988 and recorded in the Bergen County Clerk's Office on June 23, 1988 in Deed Book 7211, at page 82.

4. The Board of Education of the Borough of Cliffside Park shall hold in escrow a Discharge of said mortgage which shall be executed and filed upon respondents' full payment of the settlement figure of $6,967.00. The Board of Education of the Borough of Cliffside Park shall provide the respondent with a filed copy of said Discharge when same is filed.

5. In consideration therefor the Board of Education of the Borough of Cliffside Park shall release the respondents, Izet Tafilaj and Shpresa Tafilaj, improperly pleaded as Zenun Tafilaj a/k/a Ezet Tafilha and Shpresa Tafilaj, from all claims asserted in this action entitled Board of Education of the Borough of Cliffside Park v. Zenun Tafilaj a/k/a Ezet Tafilha and Shpresa Tafilaj, Docket No. EDU-03113-92N.

6. The action entitled Board of Education of the Borough of Cliffside Park v. Zenun Tafilaj a/k/a Ezet Tafilha and Shpresa Tafilaj be and hereby is dismissed.

DATED: , 1992

A.L.J.

DATED: October 8, 1992

Izet Tafilaj, improperly pleaded as Zenun Tafilaj a/k/a Ezet Tafilha, appearing pro se

DATED: October 8, 1992

Shpresa Tafilaj, appearing pro se

DATED: October 14, 1992

Susan T. Calabrese, Esq., Attorney for Board of Education of the Borough of Cliffside Park

BOARD OF EDUCATION OF THE BOROUGH OF CLIFFSIDE PARK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
ZENUN TAFILAJ a/k/a EZET TAFILHA AND SHPRESA TAFILAJ,	:	DECISION
RESPONDENTS.	:	
	:	

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

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

The Commissioner notes, however, that the terms of the settlement appear to have been effectuated prior to the Commissioner's approval. She therefore reminds the parties that they acted at their peril in so doing and cautions them and other litigants whose controverted matters have been duly transmitted to OAL against effectuation of any settlement prior to its submission to, and approval by, the Commissioner pursuant to N.J.A.C. 1:1-19.1.

FEBRUARY 4, 1993

DATE OF MAILING - FEBRUARY 4, 1993

COMMISSIONER OF EDUCATION

17-93

EDWARD HARSHAW,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF WILDWOOD, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, attendance officer/teacher, alleged Board improperly terminated his employment for 1991-92 school year. Petitioner contended tenure statute grants tenure to attendance officers in city district after one year of employment.

ALJ found petitioner filed more than 250 days after Board notified him of its action in not renewing his contract and more than 128 days after last day of employment. Petition was dismissed as untimely based on 90-day rule, N.J.A.C. 6:24-1.2(c). ALJ further found that, due to untimely filing, petitioner lost his tenure and, hence, his right to any future reemployment in the district.

Commissioner adopted findings and determination in initial decision with regard to untimeliness. Commissioner modified decision, however, with regard to future employment entitlement, clarifying that tenure is not lost through filing of an untimely claim and that any future action on the part of the Board to fill the position of attendance officer with a nontenured person would constitute a new cause of action before the Commissioner. (Kaprow)

FEBRUARY 5, 1993

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 1363-92

AGENCY DKT. NO. 21-2/92

EDWARD HARSHAW

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY

OF WILDWOOD, CAPE MAY COUNTY

Respondent.

Richard A. Friedman, Esquire, for petitioner, (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Andrew J. Cafiero, Esquire, for respondent, (Cafiero, Balliette and Balliette, attorneys)

Record Closed: November 12, 1992 Decided: December 16, 1992

BEFORE **EDGAR R. HOLMES,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on February 21, 1992, for determination as a contested case pursuant to the Administrative Procedures Act , N.J.S.A. 52:14B-1 et seq., the act establishing the OAL, N.J.S.A 52:14F-1 et seq. and the act granting jurisdiction to hear controversies and disputes involving teacher tenure to the Commissioner of Education, N.J.S.A. 18A:6-9 and 10.

An Equal Opportunity Employer

The Wildwood Board of Education has moved for summary judgment pursuant to N.J.A.C. 1:1-12.5. These facts are not disputed:

1. Harshaw was employed by the Wildwood Board of Education (Board) on contract commencing September 1, 1989 and ending June 30, 1990.

2. Harshaw was reemployed by the Board on contract commencing September 1, 1990 and ending June 30, 1991.

3. On May 16, 1991, the Board advised Harshaw, by letter, that he would not be renewed for the 1991-92 school year.

4. For the purposes of this motion for Summary Decision petitioner's employment ended on September 15, 1991.

5. On January 21, 1992, Harshaw filed his petition for relief with the Commissioner of Education.

6. Harshaw's contract with the Board appears to be an annual contract for a teacher to which is appended a job description for an attendance director.

7. Harshaw's primary responsibilities were as an attendance officer. He taught some classes.

The Board moves for Summary Decision because the Administrative Code requires that a petition alleging a controversy or dispute be served "no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education ..." N.J.A.C. 6:24-1.2 (c). In this case Harshaw's petition was filed some 250 days after the Board notified him of its action in not renewing his contract and more than 128 days after his last day of employment.

Harshaw alleges that it was not until the week of November 11, 1991, that he discovered N.J.S.A. 18A:38-33. That statute grants tenure to attendance officers in city districts "after employment in such district for one year."

Harshaw further alleges that because the Board treated him as a teacher it misled him into relying upon the teacher tenure statute rather than the attendance officer statute. N.J.S.A. 18A:28-5 provides that teachers achieve tenure after three years of employment, whether measured by the calendar year or successive academic years. This argument has no merit. Harshaw did teach some classes at the school. He was not misled. He was treated as a professional.

The purpose of the 90 day rule is to provide repose in education matters. It is possible that Harshaw might not have discovered N.J.S.A. 18A:38-33 for years.

Would he still be entitled to relief after so long? The rule provides finality. Moreover, it has a long history of enforcement.

> Enforcement of the 90 day limitation has been the subject of many appeals to us as well as to the Supreme Court. See, e.g., Levin v. Hackensack Board of Education, 90 N.J. 145 (1982), and North Plainfield Education Ass'n v. Board of Education, 96 N.J 587 (1984). An agency's construction of a statute over a period of years without legislative interference is to be given great weight as reflecting conformity with legislative intent. Mallone v. Fender, 80 N.J. 120 (1979). The 90 day limitation for initiating a controversy before the Commissioner has been in effect for many years and reviewed many times by us and by the Supreme Court, yet the Legislature has not expressed any disagreement with the State Board and Commissioner's construction of the powers delegated to it by the Legislature in N.J.S.A. 18A:6-26. Kaprow v. Board of Education of Berkeley Township, 225 N.J. Super. 65 (App. Div. 1992)

Harshaw also opines that even if his tenure petition is dismissed because it is out of time he nevertheless has retained reemployment rights because it appears he was released due to a reduction in force. Numerous cases stand for the proposition that tenured teachers and administrators have reemployment rights if they are subject to a reduction in force. (See citations in petitioner's brief). Nevertheless, this argument begs the question of whether Harshaw has tenure. He did obtain tenure, and then lost it because he failed to exercise his right to a hearing within 90 days.

I **CONCLUDE** that the petition should be dismissed for failure to file the same within the time required by N.J.A.C. 6:24-1.2 (c).

I **CONCLUDE** that petitioner does not retain reemployment rights to the position of attendance officer.

I **DISMISS** the petition filed herein, with prejudice.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

16 December 92
Date

Edgar R. Holmes ALJ
EDGAR R. HOLMES, ALJ lmh

Receipt Acknowledged:

12/22/92
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 24 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

lmh

EDWARD HARSHAW,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF WILDWOOD, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	

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

Petitioner rebuts the ALJ's conclusion that the instant petition is untimely by citing such case law as Kaczmarek v. N.J. Turnpike Authority, 77 N.J. 329 (1978) and Kaprow v. Bd. of Ed. of Berkeley Twp., 225 N.J. Super. 65 (App. Div. 1992) (cert. granted N.J.) for the proposition that his petition was timely filed, or that, in the alternative, relaxation of the 90-day rule is warranted under the facts of this case. Petitioner reiterates the position argued below that as soon as he became aware of N.J.S.A. 18A:38-33, which grants attendance officers in cities tenure after one year, he timely filed his Petition of Appeal. He also reasserts his claim that the actions and statements of the Board caused him to be misled, and thus that relaxation of the 90-day rule is appropriate, citing the case law elaborated upon in his post-hearing brief in support of his position. Accordingly, petitioner seeks reversal of the initial decision and a remand of the matter for plenary hearing.

Upon a careful and independent review of the record of this matter, which includes consideration of the parties' post-hearing submissions, the Commissioner agrees with the ALJ that the instant matter is untimely filed and that relaxation of the 90-day rule is not warranted under the facts of this matter.

The Commissioner concurs with the ALJ that petitioner's becoming aware of N.J.S.A. 18A:38-33 some 250 days after the Board notified him of its action to not renew his contract in a position combining duties as a social studies teacher with those of an attendance officer will not toll the time for filing a petition of appeal challenging the Board's action for the reasons expressed in the initial decision. The case law cited by petitioner in his brief does not persuade the Commissioner otherwise. Ignorance of the law will not toll the running of a statute of limitations, and as recently as the appellate decision in Kaprow, supra, the courts have maintained strict application of N.J.A.C. 6:24-1.2. That Kaprow, supra, is currently on appeal before the New Jersey Supreme Court does not alter this conclusion. Unless and until a matter is reversed on appeal, the law as it exists at the time of the Commissioner's determination has full force and effect. See, e.g., Thomas S. Marshall v. Board of Education of the Township of Neptune, 1985 S.L.D. 457, rev'd St. Bd. 1986 S.L.D. 3087.

The Commissioner rejects, however, the initial decision's holding that petitioner has lost his tenure and, hence, any right to future reemployment in the district. Tenure accrues by operation of statute and, once obtained, is not lost through failure to assert a timely claim; rather, what is lost is the right to the position at issue at the time the claim is filed. Thus, while petitioner has

lost his right to claim the position of attendance officer at this time, should the position fall vacant in the future and the Board act to fill it with a nontenured person notwithstanding petitioner's tenure, such action would constitute a new cause of action before the Commissioner. Kaprow, supra

Accordingly, for the reasons expressed by the ALJ, petitioner's appeal is dismissed as untimely filed. The initial decision is modified, however, with regard to its holding on petitioner's future reemployment rights for the reasons set forth herein.

IT IS SO ORDERED.

Mayleen F. Fitzgerald
COMMISSIONER OF EDUCATION

FEBRUARY 5, 1993

DATE OF MAILING - FEBRUARY 5, 1993

17-93

EDU #1363-92
C # 17-93
SB # 12-93

EDWARD HARSHAW,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF WILDWOOD, CAPE MAY COUNTY,	:	DECISION
RESPONDENT-CROSS/APPELLANT.	:	

Decided by the Commissioner of Education, February 5, 1993

For the Petitioner-Appellant, Zazzali, Zazzali, Fagella & Nowak (Richard A. Friedman, Esq., of Counsel)

For the Respondent-Cross/Appellant, Cafiero, Balliette & Balliette (Andrew J. Cafiero, Esq., of Counsel)

The State Board of Education has reviewed the proposed settlement submitted by the parties in this appeal and finds it to be in accord with the principles expressed in Cardonick v. Board of Education of the Borough of Brooklawn, decided by the State Board of Education, April 6, 1983. The State Board therefore approves the settlement in this matter.

June 1, 1994

Date of mailing JUN 03 1994

18-93

ROSE DRABICH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSBOROUGH, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, school bus driver, alleged N.J.S.A. 18A:16-6.1 required Board to pay her legal fees, incurred as result of successfully defending against a summons for running a stop sign while driving students.

ALJ concluded 18A:16-6.1 did not apply, as motor vehicle offenses are not criminal matters under the laws of this state. Petition was dismissed.

Commissioner set aside ALJ's findings and determination. Citing Cilento and reading N.J.S.A. 18A:16-6.1 and 18A:16-6 in pari materia, Commissioner found proceedings arising from motor vehicle offenses to be "criminal actions" for purposes of N.J.S.A. 18A:16-6.1, eligible for indemnification to the extent and under the conditions set forth in that statute. Commissioner further found equity to favor petitioner as motor vehicle action underlying matter undisputedly arose from petitioner's performance of her duties as a school bus driver.

FEBRUARY 8, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6007-92
AGENCY NO. 307-7/92

ROSE DRABICH,
Petitioner,
v.
BOARD OF EDUCATION OF
THE TOWNSHIP OF HILLSBOROUGH,
Respondent.

Stephen E. Klausner Esq., for petitioner (Klausner, Hunter & Cige and Seid, attorneys)

Paul E. Griggs, Esq., for respondent

Record Closed: December 17, 1992 Decided: December 21, 1992

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

Rose Drabich (petitioner) alleges N.J.S.A. 18A:16-6.1 requires the Hillsborough Township Board of Education (Board or respondent) to pay her legal fees incurred as a result of an automobile accident in which the petitioner was involved while driving students.

The Board denies that the statute applies to these circumstances and asks that the petition of appeal be dismissed.

The matter was transmitted to the Office of Administrative Law by the Department of Education pursuant to N.J.S.A. 52:14B-1 through -15 and N.J.S.A. 52:14F-1 through -13. After notice, a prehearing conference was conducted by telephone on November 13, 1992. It was agreed that the sole issue in the case is whether N.J.S.A. 18A:16-6.1 applies to the facts and circumstances of this case. It was also agreed that the matter would proceed on motion and cross-motion for summary judgment. Counsel timely filed their motions and supporting papers and the record closed on December 17, 1992.

FACTUAL BACKGROUND

The petitioner is a bus driver employed by the respondent. The petitioner was involved in an automobile accident while driving students on January 28, 1991. She was cited for violation of N.J.S.A. 39:4-144, in that she allegedly failed to stop or yield right of way before entering an intersection. On May 28, 1992, a municipal court judge dismissed the summons. On May 29, 1992, the petitioner's attorney spoke to the Board secretary, informed him of the disposition and submitted a bill for professional services. On May 29, the Board's counsel wrote to the petitioner's counsel stating that the Board was not responsible for the petitioner's legal fees. The letter also stated that it was the Board's position that a motor vehicle offense is not a criminal action. The present petition was filed with the Commissioner on July 13, 1992.

THE ARGUMENTS

The petitioner urges that the accident occurred in the scope of her employment. On or about February 6, 1991, she retained counsel to represent her in defense of a citation issued as a result of the accident. On or about the same day, her attorney wrote to the Board secretary, advising

> I have been retained by Ms. Drabich to represent her in the defense of the charges. Pursuant to N.J.S.A. 18A:16-6.1, it will be the Board's responsibility to pay my fee if I am successful.

The Board did not reply to the letter.

On May 28, 1992 Drabich was heard in municipal court and the charge was dismissed. On May 29, her attorney wrote to the Board secretary again,

informing him of the disposition and submitting a bill for professional services. Through its attorney, the Board answered under date of June 17, 1992, stating

> I am responding to your letter of May 29, 1992 addressed to the Board Secretary of Hillsborough Township Board of Education. Please be advised that the Board of Education will not be responsible for payment of your bill. It is the position of the Board of Education that a motor vehicle offense is not a criminal action as set forth in N.J.S.A. 18A:16-6.1.

The petitioner asserts that a motor vehicle summons for failing to yield at a stop sign while operating a school vehicle with school children on board is a petty offense, is quasi-criminal in nature and has all of the state and federal constitutional protections of other crimes and offenses. The petitioner also claims that N.J.S.A. 18A:16-6.1 mandates payment of her legal fees in this matter. The statute provides

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

Counsel concedes he could find no case interpreting or applying N.J.S.A. 18A:16-6.1 to a motor vehicle offense. Nevertheless, the petitioner maintains that a motor vehicle violation has many of the same attributes and protections as a criminal offense. Therefore, it must be treated as criminal in nature for this proceeding. Had the petitioner been found guilty of careless driving, she could have been subject to discipline by the Board including a reprimand, increment withholding or tenure charges in addition to any penalty imposed by the municipal court and the Division of Motor Vehicles.

New Jersey courts have consistently held that alleged violations of the Motor Vehicle Code are quasi-criminal in nature with many of the constitutional rights and protections granted in criminal cases.

In State v. Wenzel, 113 N.J. Super. 215 (App. Div. 1971), interpreting the careless driving statute, N.J.S.A. 39:4-97, the court stated

> Prosecution for a motor vehicle violation is a quasi-criminal proceeding and the State has the burden of establishing all elements of the offense beyond a reasonable doubt. State v. Cestone, 38 N.J. Super. 139, 147-148 (App. Div. 1955); State v.

> Ring, 85 N.J. Super. 341, 343 (App. Div. 1964), certif. den. 44 N.J. 407 (1965). Ibid. at 217

The Appellate Court reversed the County Court's application of res ipsa loquitur, holding that use of the doctrine places a burden on a defendant to explain why he was not negligent. The doctrine has no place in criminal or quasi-criminal proceedings, where the burden is completely on the State to prove beyond a reasonable doubt that the defendant violated a penal or quasi-penal statute.

More recently, in State v. Walten, 241 N.J. Super. 529 (App. Div. 1990), the court stated

> It is true that a motor vehicle charge is quasi-criminal in nature and not an "offense" under the Code of Criminal Justice. State v. Hammond, 118 N.J. 306, 571 A.2d. 942 (1930). Because of its hybrid nature, certain constitutional rights apply to defendants charged with such offenses while others do not. See, e.g., Rodriquez v. Rosenblatt, 58 N.J. 281, 293-94, 277 A.2d 216 (1971). It is not necessary to list which rights do and do not apply here. Suffice it to say that defendants charged with motor vehicle offenses are accorded the basic right of presumed innocence which imposes on the State the corollary obligation to prove a defendant's guilt beyond a reasonable doubt. State v. Feintuch, 150 N.J. Super 414, 422, 375 A.2d 836 (1978). In that important respect a motor vehicle offense is the same as a criminal offense. Therefore, because the improper application of statutory presumptions can impact on such a fundamental right, the analysis undertaken when such presumptions are relevant in criminal cases applies equally well to a motor vehicle offense charging a violation of N.J.S.A. 39:4-129. See State v. Ingram, 98 N.J. 489, 496, 488, A.2d 545 (1985).

In State v. Fogarty, 128 N.J. 59 (1992), the Court held

> We have uniformly recognized that motor vehicle violations, including violations of the DWI statute, are not offenses under New Jersey's Criminal Code. State v. Hammond, 118 N.J. 306, 571, A.2d 942 (1990). Thus Code defenses such as entrapment do not apply to the motor vehicle offense of DWI. See, e.g., Hammond, supra, 118 N.J. at 318, 571 A.2d 942 (involuntary intoxication is not a defense to DWI). Moreover, due to the comparative lack of severity of penalties for DWI, certain constitutional rights do not apply to DWI proceedings. See, e.g., State v. Hamm, 121 N.J. 109, 577 A.2d 1259 (1980) (no right to jury trial in prosecution for third DWI offense; State v. Macuk, 57 N.J. 1, 268 A.2d 1 (1970) (Miranda warnings not required before breathalyzer test).

> Nonetheless, a defendant charged with a motor vehicle offense does not forfeit all constitutional and common law defenses. See, State v. DeLuca, 108 N.J. 98, 527 A.2d 1355, cert. denied, 484 U.S. 944, 108 St. Ct. 331, 98 L.Ed.2d 358 (1987) (prohibition against double jeopardy applies to DWI cases); State v. Tropea, 78 N.J. 309, 316, 394 A.2d 355 (1978) (in motor-vehicle offenses considerations of fundamental fairness bar retrial because of insufficiency of evidence).

The petitioner also cites the Commissioner's decision in Cilento v. Hillside Bd. of Ed., 1985 S.L.D. 1513 in which the administrative law judge discussed N.J.S.A. 18A:16-6.1 with respect to a disorderly person charge that was dismissed in municipal court. The Commissioner adopted the judge's initial decision. 1985 S.L.D. at 1523.

The judge discussed the origin of the statue and its companion, N.J.S.A. 18A:16-6 which provides for board of education payment of costs where a teaching staff member successfully defends against any civil action. The judge determined that disorderly person offenses and crimes are both considered offenses under the Criminal Code. The relationship between a disorderly person offense and a crime has been recognized by our Appellate Division. Conduct that gives rise to a disorderly person offense still may be treated, in appropriate situations, as criminal even though it is not technically a crime under the State Constitution.

N.J.S.A. 18A:6-6.1 was enacted in 1965. It was noted in an introductory statement that the bill was intended to provide legal help under limited circumstances in the event of a criminal action against an employee. The judge reasoned that it was important for teaching staff members to be given financial protection whenever subject of a legal action, civil or criminal, provided the costs are reasonable and the conduct arose out of and in the course of the performance of their duties. The judge also considered N.J.S.A. 18A:16-6 and N.J.S.A. 18A:16-6.1 together and concluded that disorderly person charges, which represent a potentially large group of offenses that can be brought against teaching staff members in municipal courts, were intended to be included in the legislative protections. The judge also gives some legal history. The salient point of the history is that the division of Criminal Offenses into crimes and disorderly person offenses was not necessarily a functional or even qualitative distinction. Instead, it was a distinction based on the recognition that certain types of antisocial conduct are less severe than others and therefore deserving of separate treatment as to sanction or penalty. To a person charged with the conduct, the distinction is not always meaningful. The judge also stated that in a case such as Cilento's, in which a teacher

is charged with assault by a pupil, use of the term disorderly person offense offers little solace. The teacher must engage an attorney and make a court appearance. These carry financial and emotional costs.

The judge also stated

> In summary, then, I believe that in enacting N.J.S.A. 18A:16-6.1, the Legislature did not intend to exclude from its protection circumstances involving disorderly person offense charges leveled against teaching staff members. Thus, unless otherwise barred for reasons independent of the sort of offense involved, the dismissal of the charge of simple assault against Cilento in municipal court does give rise to his entitlement to be reimbursed by the Board for the reasonable costs and expenses incurred in defending the action. Ibid. at 1518.

The petitioner urges that the same reasoning is applicable to her case. For these reasons, she seeks an order of the Commissioner requiring the Board to pay attorney's and legal fees attendant to the municipal court matter.

The Board argues that a motor vehicle violation is not a crime as defined by the New Jersey Code of Criminal Justice. N.J.S.A. 2C:1-4 clearly sets forth the classes of criminal offenses

> a. An offense defined by this code or by any other statute of this State, for which a sentence of imprisonment in excess of 6 months is authorized, constitutes a crime within the meaning of the Constitution of this State. Crimes are designated in this code as being of the first, second, third or fourth degree.
>
> b. An offense is a disorderly persons offense if it is so designated in this code or in a statute other than this code. An offense is a petty disorderly persons offense if it is so designated in this code or in a statute other than this code. Disorderly persons offenses and petty disorderly persons offenses are petty offenses and are not crimes within the meaning of the Constitution of this State. There shall be no right to indictment by a grand jury nor any right to trial by jury on such offenses. Conviction of such offenses shall not give rise to any disability or legal disadvantage based on conviction of a crime.
>
> c. An offense defined by any statute of this State other than this code shall be classified as provided in this section or in section 2C:43-1, the sentence that may be imposed upon conviction thereof shall hereafter be governed by this code. Insofar as any provision outside the code declares an offense to be a misdemeanor when such

> offense specifically provides a maximum penalty of 6 months imprisonment or less, whether or not in combination with a fine, such provision shall constitute a disorderly persons offense.
>
> d. Subject to the provisions of section 2C:43-1, reference in any statute, rule, or regulation outside the code to the term "high misdemeanor" shall mean crimes of the first, second, or third degree and reference to the term "misdemeanor" shall mean all crimes.

Motor vehicle violations are not considered crimes or petty offenses. State v. Dively, 92 N.J. 573 (1983). In State v. Senno, 79 N.J. 216 (1979), the Court stated that motor vehicle violations are petty offenses as compared to misdemeanors and high misdemeanors which are classified as crimes. And more than twenty years ago the Court stated "motor vehicle violations are not 'crimes' in this state, but only petty offenses. There is no right to indictment or to a jury under any circumstances and such matters are tried in the first instance in a summary manner in the Municipal Court. It is not considered a 'criminal prosecution'." State v. Macuk, 57 N.J. 1, 9-10 (1970). This has been affirmed and reaffirmed in a long line of decisions. See, e.g., State v. Tropea, 78 N.J. 309 (1978); State v. VanLanduyt, 157 N.J. Super. 469 (App. Div. 1978); State v. Raupp, 160 N.J. Super.315 (App. Div. 1978); State v. Bodtmann, 239 N.J. Super. 33, 44 (App Div. 1990). In the latter, the court stated "[V]iolations of the motor vehicle laws are not prosecutions for a crime." In 1964, Justice Jacobs listed factors that differentiate motor vehicle infractions from crimes.

> Motor Vehicle Act violations are generally tried quickly and informally . . . The maximum fines and terms of imprisonment are minor in comparison to those fixed for violation of our Crimes Act and indeed they are even much lower than those which may be imposed for violation of our Disorderly Persons Act. The defendant, if found guilty, may for the most part anticipate the imposition of a moderate fine. State v. Currie, 41 N.J. 531, 543 (1964).

Designation of a motor vehicle violation as quasi-criminal finds its origin not in the violation as such, but in the relationship of the violation to specific constitutional connections. Any designation of a motor vehicle prosecution as quasi-criminal is limited to the nature of the proceeding; that is, whether certain constitutional protections should be afforded the defendant. It is clear from the case law that there is a right to counsel and a right against self-incrimination; there is protection against double jeopardy; the burden of proof is on the state; there is a right to counsel in cases where potentially severe penalties exist, for example, six months in jail and substantial loss of driving privileges. State v. Zucconi, 93 N.J.

Super. 380, 384 (App. Div. 1967), aff'd 50 N.J. 361 (1967); State v. Francis, 67 N.J. Super. 377 (App. Div. 1961); State v. Ring, 85 N.J. Super. 341, 342 (App. Div. 1964); State v. Gonzalez, 186 N.J. Super. 609 (Law Div. 1982).

State v. Wenzel, above, as cited by the petitioner did not find careless driving to be a crime. The case merely holds that the state has the burden of establishing all elements of offense beyond a reasonable doubt. Not all constitutional protections apply to motor vehicle violations. In State v. Fogerty, above, the Court held

> [W]e have uniformally recognized that motor vehicle violations, including violations of the DWI Statute, are not offenses under New Jersey's Criminal Code. State v. Hammond, 118 N.J. 306, 571 A. 2d 942 (1990). Thus, Code defenses such as entrapment do not apply to the motor vehicle offfense of DWI. See, e.g., Hammond, above, 118 N.J. at 318, 571 A 2d 942 (involuntary intoxication is not a defense to DWI). Moreover, due to the comparative lack of severity of penalties for DWI, certain constitutional rights do not apply to DWI proceedings. See, e.g., State v. Hamm, 121 N.J. 109, 577 A 2d 1259 (1990) (no right to jury trial in prosecution for third DWI offense); State v. Macuk, 57 N.J. 1, 268 A 2d 1 (1970) (Miranda Warnings not required before breathalyzer test).

Thus, the limited correlation between some motor vehicle offenses and a crime relate only to the proceeding and not the offense per se. A great number of cases hold clearly that a motor vehicle violation is not a crime. Cilento, above, as cited by the petitioner, is not a case involving a motor vehicle violation. Cilento involved an employee charged with a simple assault, a crime under N.J.S.A. 2C:12-1.a and N.J.S.A. 2C:1-4. Much of the Cilento decision concerns a discussion of the criminal attributes of a disorderly persons charge and are undeniable. However, these attributes cannot be extended to a motor vehicle violation. In 1965 when N.J.S.A. 18A:16-6.1 was enacted, it was intended to provide "legal help under limited circumstances in the event of a criminal action against an employee." No mention was made of motor vehicle violations notwithstanding that at the same time there were teachers, custodians and drivers who operated school vehicles. In State v. Pleva, 203 N.J. Super. 178, 188 (1985), the court concluded "If [a court] finds that the statute is clear and unambiguous on its face and admits only one interpretation, the sole function of the court is to enforce the statute according to its literal terms." In this case, the plain meaning of criminal in N.J.S.A. 18A:16-6.1 is that its application is limited to criminal matters and does not extend to this motor vehicle violation.

DETERMINATION AND ORDER

In State v. Macuk, 57 N.J. 1 (1970) the Court clearly said that motor vehicle offenses are not crimes, merely petty offenses and that a prosecution for a motor vehicle violation is not a criminal prosecution. Those pronouncements have been followed for twenty-two years. At least fifty New Jersey cases have cited Macuk and relied on the case.

Generally, defendants charged with motor vehicle offenses such as driving while intoxicated have no Sixth Amendment right to counsel. The law in New Jersey is unusual in that it does provide for the right to counsel for any person charged with a motor vehicle offense that carries with it the possibility of a substantial loss of driving privileges upon conviction. Obviously, there is no bright line between quasi-criminal motor vehicle matters and purely criminal cases. It must be observed, however, that a substantial gap exists between the two. Notwithstanding the additional protections that New Jersey affords defendants charged with motor vehicle offenses, they remain quasi-criminal and have not been classified as criminal matters by any court of competent jurisdiction.

The state ordinarily has the right under its police powers to regulate and control the use and operation of motor vehicles on the public highways of the state and the streets of municipalities. Because the right to operate a motor vehicle is not an unrestricted right, but is a privilege that can be exercised only in accordance with the legislative restrictions placed on it, a state legislature has the right under its police power to regulate and control, by reasonable rules and regulations, the use and operation of motor vehicles subject only to limitations or restrictions imposed by the Constitution of the United States and by the State Constitution. The primary purpose of motor vehicle regulations is to provide for the safety and protection of the general public and travelers on the highways and streets.

It is helpful to bear in mind that the Motor Vehicle Act is a penal statute, but not a criminal statute. Penal, in its ordinary sense, simply means punishable or containing a penalty. Many civil statutes and regulations are penal. This does not make them criminal even though, as noted above, some additional protections may be afforded defendants. Thus, if N.J.S.A. 18A:16-6.1 is construed in accordance with the ordinary meanings of its words, it does not by its language apply to prosecutions

for violation of the motor vehicle laws which, although quasi-criminal, are not prosecutions for a crime. Macuk, above.

Notwithstanding the well-turned opinion in Cilento, above, I **FIND** that motor vehicle offenses are not criminal matters within the contemplation of N.J.S.A. 18A:16-6.1. The distinction between disorderly person offenses and motor vehicle offenses is significant. Disorderly person offenses are not part of a large and comprehensive administrative scheme as well as statutory attention. The fact that certain protections are afforded motor vehicle violation defendants is a function of the cases trenching on certain constitutionally protected areas rather than the inherent nature of the offenses.

I **CONCLUDE** that the laws of this jurisdiction do not recognize motor vehicle offenses as criminal matters. I also **CONCLUDE** that there is nothing in the circumstances of the present case as argued to move it under the contemplation of N.J.S.A. 18A:16-6.1.

The petitioner not having carried the burden of persuasion, I **ORDER** this appeal **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

21 DECEMBER 1992
Date

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

12/23/92
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 29 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

km

ROSE DRABICH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSBOROUGH, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by petitioner pursuant to N.J.A.C. 1:1-18.4. No reply was filed by the Board.

In her exceptions, petitioner urges rejection of the initial decision and references the arguments of her brief before the ALJ, reiterating in particular her belief that Cilento, supra, is dispositive of this matter.

Upon careful review and consideration, although accepting the ALJ's conclusion that motor vehicle offenses are not, generally speaking, criminal matters within the strict technical meaning of that term, the Commissioner cannot concur with the ALJ's further conclusion that petitioner is therefore not entitled to relief under N.J.S.A. 18A:16-6.1.

In construing N.J.S.A. 18A:16-6.1, the ALJ relied on "the ordinary meaning of its words" to conclude that, since motor vehicle offenses are not criminal actions, petitioner's legal fee was not

covered under the provisions of that statute. (Initial Decision, at pp. 9-10) Had N.J.S.A. 18A:16-6.1 existed in a vacuum, the Commissioner would concur with this conclusion. However, N.J.S.A. 18A:16-6.1 cannot be read independently of its companion statute, N.J.S.A. 18A:16-6, which provides for indemnification of school employees in civil matters. These two statutes, taken together, clearly intend to provide a "safety net" for school employees who have legal actions brought against them as a result of performing the duties of their positions. As noted by petitioner, in a matter where the Board refused to indemnify a teacher who had successfully defended against a pupil's charges of simple assault on grounds that simple assault is a "disorderly persons offense" rather than a "crime," the Commissioner adopted the ALJ's reasoning that:

> The threshold issue is whether petitioner is entitled to the benefits of N.J.S.A. 18A:16-6.1 with respect to fees incurred by him in connection with his defense against a disorderly persons charge which was dismissed in municipal court. The Board's position, as noted, is that the Legislature deliberately restricted that statutory entitlement to successful defenses against "criminal actions," and since "simple assault" is statutorily defined as a "disorderly persons offense," and such offenses are not considered to be "crimes," no reimbursement is proper. For the reasons which follow I must disagree with the Board's position.
>
> The statute, N.J.S.A. 18A:16-6.1, provides for reimbursement of costs, including reasonable counsel fees, to a teaching staff member who successfully defends against a "criminal action" brought against the member for any act or omission arising out of and in the course of the performance of his or her duties. It is a companion to N.J.S.A. 18A:16-6, which provides for such costs to be defrayed where a teaching staff member defends against "any civil action." While the Code of Criminal Justice specifically excludes "disorderly persons offenses" from the category of "crimes within the meaning of the Constitution of this State," N.J.S.A. 2C:1-4b, this is not dispositive of the issue at hand.***

The criminal action reimbursement statute was enacted in 1965. See, L. 1965, c. 205, section 2. In an introductory statement, it was noted that the bill was intended to provide "legal help under limited circumstances in the event of a criminal action against an employee." Clearly, that observation articulates the logical conclusion that insofar as the Legislature was concerned, it was important that teaching staff members be given financial protection whenever they were made the subject of any legal action, be it civil or criminal, so long as the costs are reasonable and the conduct arose out of and in the course of the performance of their duties. Sensibly, reimbursement in non-civil cases was limited to dismissals or otherwise successful defenses. It is doubtful in the extreme that the Legislature intended that only those criminal offenses which called for indictment and jury trial were to be covered.

Statutes, of course, are to be read and construed in a sensible fashion. See, e.g., Suter v. San Angelo Foundry and Machine Co., 81 N.J. 150, 160 (1979). When one considers the total protection which N.J.S.A. 18A:16-6 and N.J.S.A. 18A:16-6.1 plainly are intended to provide for teaching staff members, it would not be sensible to conclude that disorderly persons charges, which represent a potentially large category of offenses which can be brought against teaching staff members in the local municipal courts, were intended to be excluded. Indeed, as petitioner accurately notes in his posthearing brief, a charge of simple assault by a student against a teacher is a circumstance which unfortunately may not be foreign to the student-teacher relationship. I cannot assume that in enacting N.J.S.A. 18A:16-6.1, the Legislature deliberately determined to confine the reimbursement benefit in such a narrow way as to knowingly exclude disorderly persons offenses from the ambit of "criminal actions."

***

In summary, then, I believe that in enacting N.J.S.A. 18A:16-6.1, the Legislature did not intend to exclude from its protection circumstances involving disorderly persons offense charges leveled against teaching staff members. Thus, unless otherwise barred for reasons independent of the sort of offense involved, the dismissal of the charge of simple assault against Cilento in municipal court does give rise to his entitlement to be reimbursed by

> the Board for the reasonable costs and expenses incurred in defending the action." (emphasis in text) (Cilento, 1985 S.L.D. at 1516-1518)

Similarly, in the matter herein, the Commissioner cannot contemplate that the Legislature intended to exclude from the scope of school employee indemnification legal actions relative to motor vehicle offenses, when such offenses specifically arise out of performance of employee duties, merely because they "fall between the cracks" of statutory language as being neither "civil" nor "criminal" within the precise technical meaning of those terms. Therefore, for the sole, limited purpose of applying N.J.S.A. 18A:16-6.1, the Commissioner holds proceedings arising from motor vehicle offenses to be "criminal actions" eligible for indemnification to the extent, and under the conditions, set forth within that statute.

The Commissioner further finds this result consistent with considerations of equity, as the motor vehicle action underlying this matter undisputedly arose from petitioner's performance of her duties as a school bus driver, and denying her the relief she seeks would ignore the fact that, but for those duties, she would not have received the summons at issue and would not have been faced with defending herself in a court of law against a charge which ultimately proved unwarranted.

Finally, the Commissioner notes that in finding petitioner eligible for the protections of N.J.S.A. 18A:16-6.1, she expresses no opinion on the reasonableness of petitioner's counsel fees. Pursuant to statute, this matter is properly addressed by the Board, with any dispute arising therefrom constituting a new cause of action before the Commissioner.

Accordingly, the initial decision of the Office of Administrative Law dismissing the Petition of Appeal is reversed for the reasons set forth herein, and the Hillsborough Board of Education is directed to reimburse petitioner's fees and expenses consistent with the provisions of N.J.S.A. 18A:16-6.1.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 8, 1993

DATE OF MAILING - FEBRUARY 9, 1993

18-93

EDU #6007-92
C # 18-93
SB # 13-93

ROSE DRABICH,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSBOROUGH, SOMERSET COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, February 8, 1993

For the Petitioner-Respondent, Klausner, Hunter, Cige & Seid (Stephen E. Klausner, Esq., of Counsel)

For the Respondent-Appellant, Paul E. Griggs, Esq.

This is an appeal from a Commissioner's decision granting indemnification under N.J.S.A. 18A:16-6.1 for legal fees incurred by a school bus driver who successfully challenged a motor vehicle citation for violation of N.J.S.A. 39:4-144 for failing to stop or yield the right of way before entering an intersection.

N.J.S.A. 18A:16-6.1, which provides for "indemnity of officers and employees in certain criminal actions," mandates that:

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

The petitioning school bus driver was involved in an automobile accident while driving students. As stated, she was cited

Aug. 4, 1993

for failing to stop or yield the right of way before entering an intersection. In proceedings contesting the violation, petitioner was represented by counsel. The summons was dismissed and petitioner's counsel sought payment of his fees from the Board. The Board declined payment on the grounds that a motor vehicle offense was not a criminal offense, and petitioner then petitioned the Commissioner of Education for relief under N.J.S.A. 18A:16-6.1.

In his recommended decision, the Administrative Law Judge (ALJ) found that petitioner was not entitled to indemnification under N.J.S.A. 18A:16-6.1 because motor vehicle offenses are not criminal offenses under New Jersey law.

The Commissioner rejected the ALJ's determination. In so doing, he accepted the ALJ's conclusion that motor vehicle offenses are not generally criminal matters. He, however, rejected the determination that petitioner was therefore not entitled to relief under N.J.S.A. 18A:16-6.1, finding that N.J.S.A. 18A:16-6.1 together with N.J.S.A. 18A:16-6, which provides for indemnification of school employees in civil matters, provide a "safety net" for school employees who have legal action brought against them as a result of performing the duties of their positions. The Commissioner determined that the Legislature could not have intended to exclude motor vehicle offenses from the scope of indemnification "merely because they 'fall between the cracks' of statutory language as being neither 'civil' nor 'criminal' within the precise technical meaning of those terms." Commissioner's Decision, at 15. Further finding that indemnification was consistent with equitable considerations, the Commissioner directed the Board to reimburse petitioner's fees as provided by N.J.S.A. 18A:16-6.1. We reverse.

As found by the ALJ, motor vehicle violations are not crimes. Even before enactment of the New Jersey Code of Criminal Justice (hereinafter "Criminal Code"), motor vehicle violations were considered to be merely petty offenses. E.g., State v. Tropea, 78 N.J. 309 (1978). The current statutory framework expressly provides that petty offenses are not crimes within the meaning of New Jersey's Constitution. N.J.S.A. 2C:1-4(b). More directly, the Criminal Code affirmatively specifies what offenses constitute crimes by providing that:

> An offense defined by this code or by any other statute of this State, for which a sentence of imprisonment in excess of 6 months is authorized, constitutes a crime within the meaning of the Constitution of this State...

N.J.S.A. 2C:1-4(a).

In this case, the pertinent statute delineates that in cases of violations of such statutes as N.J.S.A. 39:4-144, which is the statute involved here,

> ...the offender shall be liable to a penalty of not less than $50.00 or more than $200.00 or imprisonment for a term not exceeding 15 days, or both.

N.J.S.A. 39:4-103.

We conclude that, under any approach, violation of the statute involved here quite simply is not a crime. See, e.g., State v. Dively, 92 N.J. 573 (1983). In the absence of any language which would bring a violation of N.J.S.A. 39:4-144 within the rhubric of N.J.S.A. 18A:16-6.1, we can not construe proceedings resulting from a citation for violating N.J.S.A. 39:4-144 as a "criminal action" against an individual so as to entitle him to indemnification for legal fees. Further, given the express language of N.J.S.A.

18A:16-6.1, we reject, as did the ALJ, the view that extending the statutory entitlement to indemnification for expenses related specifically to criminal actions can be justified by the fact that a motor vehicle violation may be considered quasi-criminal for limited purposes relating to constitutional protections.

Nor do the concerns articulated in Cilento v. Board of Education of the Township of Hillside, 1985 S.L.D. 1513, support extending the statutory entitlement to indemnification to this case. Simple assault, which was the offense involved in Cilento, was a disorderly persons offense, and, as such, although not a "crime" in the technical sense, was an offense under the New Jersey Code of Criminal Justice. Moreover, in contrast to motor vehicles violations, simple assaults were treated like the more serious offenses before enactment of the Criminal Code. The change in the way disorderly persons offenses, such as simple assaults, are treated under the Criminal Code was based on a judgment as to the degree of seriousness of the anti-social behavior involved rather than on the character of the conduct. See Cilento, supra. at 1518.

In sum, given the express language of N.J.S.A. 18A:16-6.1, we decline to apply that statute so as to entitle petitioner to indemnification in this case. In this respect, we emphasize that the intent of the statutory framework involved here was to provide legal help under limited circumstances and that there is no indication of any Legislative intent to include the kind of circumstances presented by this case. We further emphasize, however, that although the specific statute involved here does not mandate indemnification under these circumstances, the education laws do not preclude a district board from choosing to reimburse an

employee for costs associated with challenging a summons such as the one at issue here. See Matawan Regional Teachers Association v. Board of Education of the Matawan-Aberdeen Regional School District, decided by the State Board, July 6, 1989.

S. David Brandt opposed.

Bonnie J. Green abstained.

Attorney exceptions are noted.

August 4, 1993

Date of mailing 05 AUG 1993

19-93

DENNIS P. JAFFE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RIVER DELL REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

FEBRUARY 9, 1993

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1697-92
AGENCY DKT. NO. 442-12/91

DENNIS P. JAFFE,
Petitioner,
v.
BOARD OF EDUCATION OF RIVER DELL REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,
Respondent

Dennis P. Jaffe, *pro se*

Marc Joseph, Esq., for respondent
(Joseph & Feldman, attorneys)

Record Closed: December 7, 1992 Decided: December 31, 1992

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

On or about December 26, 1991, petitioner, Dennis Paul Jaffe, filed a petition of appeal with the Commissioner of Education alleging that respondent had violated the Open Public Meetings Act on November 25, 1991. On January 22, 1992, respondent filed an answer. Respondent also counterclaimed, requesting that the Commissioner determine and declare that the board's actions at the November 25, 1991 meeting (*i.e.*, the board's censure of petitioner's conduct) were proper. On

March 6, 1992, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

A telephone prehearing conference was held on April 21, 1992. At this time, the issues were isolated, and a hearing was scheduled for December 7, 8, and 9, 1992, at the OAL. On June 10, 1992, petitioner filed an amended petition. By letter dated June 9, 1992, respondent objected to petitioner's amended petition, indicating that petitioner only had the right to move to amend his petition and had not been granted permission to file an amended petition. A conference call was held on June 22, 1992, during which petitioner's amended petition was accepted as filed, and it was ordered that no additional amendments would be made to the petition filed in this matter.

On July 27, 1992, respondent filed an answer to the amended petition Settlement conferences were held on July 14, 1992 and October 9, 1992; however, no settlement was reached at that time. Prior to the hearing date, respondent filed a motion for summary decision on its counterclaim and for an interim stay prohibiting petitioner from divulging information concerning matters discussed or to be discussed in private session which fall under the categories enumerated in *N.J.S.A.* 10:4-12(b) as exceptions to the Open Public Meetings Act, including but not limited to information concerning personnel issues. Petitioner filed a response to the motion and respondent replied thereto.

On December 7, 1992, the date of the hearing in this matter, the parties agreed to settle this matter and prepared the attached Settlement Agreement indicating the terms of settlement. As a result, the hearing was not held.

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

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

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

December 31, 1992
Date

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

1/5/93
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 7 1993
Date

Jayne LaVoie
OFFICE OF ADMINISTRATIVE LAW

dgi/e

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 1697-92
AGENCY DKT. NO. 442-12/91

DENNIS P. JAFFE,
Petitioner,
v.
BOARD OF EDUCATION OF RIVER DELL REGIONAL HIGH SCHOOL DISTRICT
Respondent.

SETTLEMENT AGREEMENT

The parties hereby agree to settle this matter on the following terms and conditions:

1. Petitioner withdraws his petition of appeal pending before the Commissioner and the Office of Administrative Law (OAL).

2. Respondent withdraws its counterclaim pending before the Commissioner and the OAL.

3. Both parties confirm the Board's commitment and policy of adhering to the provisions of the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq.

4. The parties continue to acknowledge the right of a board member to request that the board and/or its president consider referring a question as to the proper compliance with the OPMA to its legal counsel prior to taking any board action

12/7/92
DATE

DENNIS PAUL JAFFE, Petitioner

12/7/92
DATE

MARC JOSEPH, Esq. for Respondent

dgi

OAL DKT. NO. EDU 1697-92

DENNIS P. JAFFE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RIVER DELL REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

FEBRUARY 9, 1993

DATE OF MAILING - FEBRUARY 9, 1993

20-93

MARIANNO E. FERREIRA,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	COMMISSIONER OF EDUCATION
	:	DECISION
RESPONDENT,	:	
AND	:	
EUGENE KASSAN,	:	
INTERVENOR.	:	
	:	

FEBRUARY 9, 1993

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10440-91
AGENCY DKT. NO. 346-9/91

MARIANNO E. FERREIRA,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD,
Respondent,
and EUGENE KASSAN,
Intervenor.

Alfred F. Maurice, Esq., for petitioner

Suzanne E. Raymond, Esq., for respondent
(Gutfleish & Davis, attorneys)

Louis P. Bucceri, for intervenor
(Bucceri & Pincus, attorneys)

Record Closed: December 24, 1992 Decided: January 4, 1993

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

This matter was transmitted to the Office of Administrative Law on November 13,1 991 for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

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

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

Jan. 4, 1993
Date

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

1/5/93
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 7 1993
Date

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

al

DEC 24 12 09 PM '92

SETTLEMENT AGREEMENT

This Agreement between the Board of Education of the city of Englewood (Board) and Marianno Ferreira (Petitioner) and Eugene Kassan (Intervenor) dated this __/__ day of December, 1992.

1) Petitioner has filed a Petition of Appeal with the Commissioner of Education under Agency Reference Number: 346-9/91 and O.A.L. Docket Number: EDU 10440-91N, claiming his reduction in employment for the 1991-1992 and 1992-1993 school years violated his tenure and seniority rights in the district.

2) The Board has filed an Answer generally denying Petitioner's claims which resulted in the matter being referred to the O.A.L. for disposition as a contested case.

3) Intervenor appeared in the above referenced action as a party in interest and participated in the proceedings.

4) Without an acknowledgement of liability by the Board or the lack thereof by the Petitioner, the Board, Petitioner and Intervenor have agreed to resolve the matter in difference between them as follows:

A) The Board agrees to reemploy Petitioner on a full time basis as a Teacher of Business Education, effective February 1, 1993.

B) The Board shall reimburse Petitioner the out-of-pocket cost expended by Petitioner for health insurance for the period between June 30, 1991 and February 1, 1993, in the amount of $7,513.24, as full and complete settlement in lieu of litigation of the above referenced matter.

Said reimbursement shall be in the payment of a claim and not the subject of withholding taxes or the issuance of a 1099 or other form indicating earned income. Petitioner will provide the Board with copies of paid receipts for health insurance premiums for the period from June 30, 1991 through February 1, 1993 as a condition for payment.

C) The Petitioner shall be paid on step MA-9 of the salary guide. The annual salary is $51,279.00, or such salary as shall be finally determined for teaching staff members for the 1992-1993 school year, which shall be pro-rated.

D) This Settlement Agreement shall not affect Intervenor's employment for the 1992-1993 school year.

E) The Board shall adopt a resolution formally approving this Settlement Agreement. Payment under paragraph two (2) of this Agreement shall be made immediately following the approval of this Settlement Agreement by the Commissioner of Education.

F) Petitioner agrees to execute an Indemnification Agreement with respect to liability to any tax authority for withholdings.

G) Upon the execution of this Agreement by all parties and the adoption of a resolution approving the same by the Board, the Petitioner shall withdraw the above referenced Petition of Appeal with Prejudice.

Englewood Board of Education

by: _____
Respondent

Dated:

_____
Ronald Piliere, Secretary
Board of Education of the City of Englewood

Dated:

_____
Suzanne Raymond, Esq.
Attorney for Respondent

_____
Marianno Ferreira,
Petitioner

_____
Alfred F. Maurice, Esq.
Attorney for Petitioner

_____
Eugene Kassan,
Intervenor

_____
Louis Bucceri, Esq.
Attorney for Intervenor

MARIANNO E. FERREIRA
116 HALGREN CRESCENT
HAVERSTRAW, N.Y. 10927-1032

(914) 429-8342

PAYMENTS MADE TO MEDIX, INC. - COBRA MEDICAL PAYMENTS
P.O.BOX 808, FLORHAM PARK, N.J. 07932-0808

DATE	CHECK NUMBER	AMOUNT	PERIOD COVERED
08-29-91	2958	$413.42	September 1991
10-01-91	3064	413.42	October 1991
10-15-91	3081	413.42	November 1991
11-15-91	3119	413.42	December 1991
12-12-91	3143	413.42	January 1992
01-07-92	3171	413.42	February 1992
02-03-92	3201	413.42	March 1992
03-02-92	2983	413.42	April 1992
03-31-92	3005	413.42	May 1992
04-29-92	3038	413.42	June 1992
05-29-92	3271	482.72	July 1992
06-26-92	3297	482.72	August 1992
08-03-92	3237	482.72	September 1992
09-01-92	3311	482.72	October 1992
09-30-92	3343	482.72	November 1992
10-31-92	3419	482.72	December 1992
11-31-92	3436	482.72	January 1993
		7513.24	

Dated: December 1, 1992

Marianno Ferreira
Marianno Ferreira

INDEMNIFICATION AGREEMENT

MARIANNO FERREIRA hereby agrees to hold harmless and indemnify the Board of Education of the City of Englewood, with respect to any litigation, claims, expenses (legal or otherwise) or investigation by the Internal Revenue Service or any other Board of Education to pay him the sum of $ 7,513.24 in consideration for his release of all monetary and other claims which he may have against the Board of Education.

Marianno Ferreira
MARIANNO FERREIRA

Dated: December 1, 1992

OAL DKT. NO. EDU 10440-91

MARIANNO E. FERREIRA,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	COMMISSIONER OF EDUCATION
	:	DECISION
RESPONDENT,	:	
AND	:	
EUGENE KASSAN,	:	
INTERVENOR.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

FEBRUARY 9, 1993

DATE OF MAILING - FEBRUARY 9, 1993

21-93

ANGELA DAVENPORT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BURLINGTON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

FEBRUARY 9, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 5579-92
AGENCY DKT. NO. 265-6/92

ANGELA DAVENPORT,
Petitioner,
v.
BOARD OF EDUCATION OF CITY OF BURLINGTON,
Respondent.

John C. Gillespie, Esq., on behalf of petitioner (Ferg, Barron & Gillespie, attorneys)

John E. Queenan, Jr., Esq., on behalf of respondent

Record Closed: December 21, 1992 Decided: December 21, 1992

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

Petitioner claimed she was improperly non-renewed to her position as a learning consultant.

This matter was transmitted to the Office of Administrative Law on July 23, 1992, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to dismiss this matter and have prepared the attached stipulation indicating to that effect.

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

1. The parties have voluntarily agreed to the dismissal as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

Dec 21, 1992
Date

Naomi Dower LaBastille
NAOMI DOWER-LABASTILLE, ALJ

Receipt Acknowledged:

Jan 6, 1993
Date

Maureen K. Kelly
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 8 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

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John C. Gillespie, Esquire
Attorney(s): FERG, BARRON & GILLESPIE

Office Address & Tel. No.: 711 East Main Street, Moorestown, New Jersey 08057
(609) 234-4440

Attorney(s) for Petitioner

Angela Davenport

PETITIONER

vs.

Board of Education of the City of Burlington

RESPONDENT

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY

OAL DOCKET NO. EDU 05579-92S
AGENCY REFERENCE NO. 265-6/92

DOCKET NO.

CIVIL ACTION

Stipulation of Dismissal

The matter in difference in the above entitled action having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the same be and it is hereby dismissed without costs against either party.

Dated: November 12, *19* 92 .

By _____
John E. Queenan, Esquire
Attorney(s) for Respondent

By _____
John C. Gillespie, Esquire
Attorney(s) for Petitioner

26—STIPULATION OF DISMISSAL RVST-2 Copyright© 1969 by ALL-STATE LEGAL SUPPLY CO.
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DEC-21-92 MON 10:46 FERG BARRON AND GILLESPI P.02

OAL DKT. NO. EDU 5579-92

ANGELA DAVENPORT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BURLINGTON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed. It is noted for the record that the settlement had no terms other than agreement of the parties to dismiss the matter with no costs to either party.

The Commissioner approves the settlement and adopts it as the final decision in this matter. The matter is hereby dismissed.

COMMISSIONER OF EDUCATION

FEBRUARY 9, 1993

DATE OF MAILING - FEBRUARY 9, 1993

22-93

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

FEBRUARY 9, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 5668-92
AGENCY DKT. NO. 292-6/92

TRENTON BOARD OF EDUCATION,
Petitioner,
v.
ALETHEA STROMAN,
Respondent.

Thomas W. Sumners, Esq., for the petitioner (Sumners, Council & Inniss, attorneys)

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

Record Closed: January 4, 1993 Decided: January 5, 1993

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

This matter concerns the tenure charges filed against the respondent, Alethea Stroman, by the petitioner, the Trenton Board of Education. The respondent requested a hearing and the matter was transmitted to the Office of Administrative Law on July 25, 1992, for a hearing pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

There were telephone conferences regarding this matter on October 15, 1992 and November 12, 1992. On the latter date, the parties agreed to a settlement.

The settlement is set forth in the attached signed stipulation, which is fully incorporated herein.

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

1. The parties have voluntarily reached a settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controvers and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1, and that the settlement should be approved. I further **CONCLUDE** that this matter is no longer a contested case. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

January 5, 1992
Date

BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

Jan 7, 1993
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 11 1993
Date

OFFICE OF ADMINISTRATIVE LAW

cad

STIPULATION OF DISMISSAL OF TENURE CHARGES

This stipulation of dismissal is entered into by and between the City of Trenton Board of Education ("Board") and its tenured employee, Alethea Stroman ("Stroman").

WHEREAS, Stroman has been continuously employed by the Board in the title of principal bookkeeper since September 1, 1977; and

WHEREAS, on June 25, 1992, the Board certified tenure charges against Stroman to the Commissioner of Education under the Tenure Employees' Hearing Law, which charges were captioned "In the Matter of the Tenure Hearing of Alethea Stroman, OAL DKT NO. 05668-92, AGENCY DKT. NO. 292-6/92; and

WHEREAS, by Statement of Position dated May 12, 1992 and by Answer dated July 16, 1992, Stroman contested the tenure charges; and

WHEREAS, upon further investigation with respect to the tenure charges, the Board has determined that it is in the best interest of all parties that the charges be dismissed; and

WHEREAS, the Board has reinstated Stroman to her position of principal bookkeeper;

NOW THEREFORE, the matter in difference having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the Board shall withdraw the tenure charges against Stroman, OAL DKT. NO. 05668-92, AGENCY DKT. NO. 292-6/92, with prejudice.

FOR THE CITY OF TRENTON BOARD OF EDUCATION

BY: Thomas W. Sumners
THOMAS W. SUMNERS, JR, ESQ.

FOR THE RESPONDENT, ALETHEA STROMAN

BY: Steven R. Cohen
STEVEN R. COHEN, ESQ.

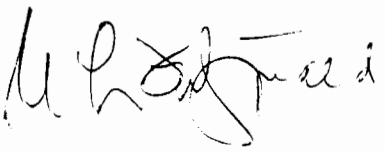
Dated: December 15, 1992

OAL DKT. NO. EDU 5668-92

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

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

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



COMMISSIONER OF EDUCATION

FEBRUARY 9, 1993

DATE OF MAILING - FEBRUARY 9, 1993

23-93

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN SPEAR, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP OF	:	DECISION
BERNARDS, SOMERSET COUNTY.	:	

FEBRUARY 16, 1993

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN SPEAR, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP OF	:	DECISION
BERNARDS, SOMERSET COUNTY.	:	

This matter having been opened before the Commissioner of Education on March 25, 1992 through certification of tenure charges of conduct unbecoming a teaching staff member and other just cause (excessive absenteeism) against respondent, a tenured teaching staff member in the Board's employ; and

The Commissioner having directed respondent by numerous notices and by letter sent via both regular and certified mail on May 7, 1992 to file an Answer to the charges filed against him; and

As of this date neither respondent nor any attorney on his behalf having so filed an Answer to the charges levied against him; and

Each count of the charges against respondent having been deemed to be admitted; now therefore

IT IS ORDERED this 16TH day of February 1993 that summary judgment shall be granted to the Board and that respondent shall be dismissed from his tenured position as a teacher in the district's employ as of the date of this decision.

IT IS FURTHER ORDERED that, pursuant to N.J.A.C. 6:11-3.6, this matter shall be forthwith referred to the State Board of Examiners for review and action as it deems appropriate.

COMMISSIONER OF EDUCATION

FEBRUARY 16, 1993

DATE OF MAILING - FEBRUARY 16, 1993

24-93

ERNESTINE N. DOWLING,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF WOOD-RIDGE, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

FEBRUARY 16, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6472-92
AGENCY DKT. NO. 366-7/92

ERNESTINE N. DOWLING,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF WOOD-RIDGE, BERGEN COUNTY, AND PAUL G. DAVIS REGIONAL SCHOOL BOARD OF EDUCATION, BERGEN COUNTY,
Respondents.

Kenneth I. Nowak, Esq., for petitioner
(Zazzali, Zazzali, Fagella & Nowak, attorneys)

Mark T. Janeczko, Esq., for respondents
(Janeczko & Cedzidlo, attorneys)

Record Closed: January 11, 1993 Decided: January 12, 1993

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

Ernestine N. Dowling, a tenured teaching staff member employed by the Board of Education of the Borough of Wood-Ridge, Bergen County, was employed as a speech therapist from 1982 and assigned at Davis Regional School under a salary funding arrangement until February 1988, when she took an approved maternity leave of absence and continued on a child rearing leave of absence for the next three years. When she signified her readiness to return to employment and requested a part time position for the 1991-92 school year, she was informed no

part-time position was available. After commencement of school in September 1991, however, she was offered and accepted a part-time speech therapist position at the Davis School, a circumstance that the superintendent of the district said constituted a break in service at the beginning of the 1991-92 school year that eliminated tenure and seniority for her. On May 8, 1992, petitioner was informed her part-time position would not be continued for the 1992-93 school year, the break in her service eliminating her tenure and seniority rights. During the 1991-92 school year, petitioner was paid below contract rate on an hourly basis, action she said constituting an unlawful reduction in compensation. In a petition of appeal filed with the Commissioner of Education on June 27, 1992, petitioner alleged failure of the Wood-Ridge district to place her in a part-time position occupied by less senior speech therapist in the 1991-92 year was violative of her seniority rights, that failure of the district to place her into a full- or part-time position for the 1992-93 school year while employing less senior and even non-tenured speech therapists likewise violated her tenure and seniority rights. She sought judgment that respondents, individually or jointly, violated her tenure and seniority rights and directing them to instate her in a full-time position for the 1992-93 school year in accordance with her seniority, and according her differential back pay and whatever other relief was just. Both respondent boards admitted petitioner's tenure and the sequence of events generally but denied violating petitioner's tenure and seniority rights or compensating her unlawfully below scale. Respondents pleaded estoppel and the bar of the limiting period of *N.J.A.C.* 6:24-1.2. The Commissioner transmitted the matter to the Office of Administrative Law on August 24, 1992, for hearing and determination as a contested case in accordance with *N.J.S.A.* 52:14F-1 *et seq.*

Prior to the scheduled hearing date, the parties advised that the matter had been settled amicably. Thereafter, a settlement agreement was submitted.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the agreement;

2. The settlement fully disposes of all issues in controversy, is in the interest of parties and public and should be implemented forthwith.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

January 12, 1993
Date

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

1/14/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 19 1993
Date

OFFICE OF ADMINISTRATIVE LAW

amr

JANECZKO & CEDZIDLO
ATTORNEYS AT LAW
109 HACKENSACK STREET
P.O. BOX 123
WOOD-RIDGE, NEW JERSEY 07075
(201)939-8800
ATTORNEYS FOR RESPONDENT

ERNESTINE N. DOWLING,

Petitioner

vs.

WOOD-RIDGE BOARD OF EDUCATION, ET ALS

Respondent

BEFORE THE COMMISSIONER OF EDUCATION

DOCKET NO. 366-7/92

SETTLEMENT AGREEMENT

WHEREAS, the parties hereto wish to amicably resolve the dispute between them and terminate all litigation, it is hereby stipulated and agreed as follows:

1. The Respondent agrees to pay to the Petitioner the sum of $7,350.00, as and for additional compensation due

the Petitioner for her part time employment for the 1991-1992 school year. Respondent further agrees to notify the State of New Jersey, Department of the Treasury, Division of Pensions, of this additional compensation. Petitioner agrees to be responsible for any employee contributions which may be due to the Division of Pensions based upon her receipt of this additional compensation; and the respondent agrees to be responsible for all employer contributions, if any, which may be due to the Division of Pensions based upon the additional compensation.

2. Petitioner hereby acknowledges that her tenure and seniority rights with the Respondent are terminated. Petitioner waives any claim she may have to further compensation and either a part time or full time position with the Respondent at this time, or in the future.

3. The parties acknowledge that the within settlement must be approved by the assigned Administrative Law Judge and the Commissioner of Education. In the event that this Agreement, or any part of it, shall fail to be so approved, or if a Court or Agency of competent jurisdiction shall at any time declare this Agreement, or any part of it to be illegal, null, void or of no force or effect, then the entire Agreement shall be rendered null and void and the parties shall be returned to the status quo existing prior to the Agreement as to all of their respective rights, claims and defenses.

FOR PETITIONER

ERNESTINE N. DOWLING

Dated: November 27, 1992

KENNETH I. NOWAK, ESQ.

FOR RESPONDENT
WOOD-RIDGE BOARD OF EDUCATION

RONALD O'GRADY, PRESIDENT

Dated: 12/1-/92

MARK T. JANECZKO, ESQ.

FOR RESPONDENT
(PAUL G. DAVIS REGIONAL BOARD OF EDUCATION)
REGION 7 COUNCIL FOR SPECIAL EDUCATION

DR. JOSEPH CARDELLA,
EXECUTIVE DIRECTOR

Dated: 12-14-92

MARK T. JANECZKO, ESQ.

OAL DKT. NO. EDU 6472-92

ERNESTINE N. DOWLING,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WOOD-RIDGE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

COMMISSIONER OF EDUCATION

FEBRUARY 16, 1993

DATE OF MAILING - FEBRUARY 16, 1993

25-93

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEPTUNE TOWNSHIP EDUCATION ASSOCIATION AND NEPTUNE TOWNSHIP PRINCIPALS ASSOCIATION,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioning Board of Education sought ruling that, under N.J.S.A. 18A:29-4.1 and 18A:1-1, it need not pay increments called for by salary schedule embodied in an expired agreement during negotiations toward a successor contract.

ALJ found N.J.S.A. 18A:29-4.1 is clear on its face that boards of education may adopt a one-, two-, or three-year salary policy only; therefore, Board was under no obligation to pay increments beyond the duration of the three-year policy at issue. Summary judgment was granted to Board.

Commissioner reversed, holding that the education statutes do not dispose of the issue raised. Commissioner found that even though Title 18A does not compel payment of increments following expiration of a salary policy, such payment is a matter of collective negotiations and is therefore subject to the provisions of the Employer-Employee Relations Act (N.J.S.A. 34:13A-1 et seq.). Boards are thus to be guided by that act and the prevailing rulings of the Public Employment Relations Commission. Petition was dismissed.

FEBRUARY 16, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2175-92
AGENCY DKT. NO. 256-7/91

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,
Petitioner,
v.
NEPTUNE TOWNSHIP EDUCATION ASSOCIATION AND NEPTUNE PRINCIPALS ASSOCIATION,
Respondents.

James T. Hundley, Esq., for petitioner (Patterson & Hundley, attorneys)

Stephen B. Hunter, Esq., for respondent Neptune Education Association (Klausner, Hunter & Cige, attorneys)

Wayne J. Oppito, Esq., for respondent Neptune Principals Association (New Jersey Principals and Supervisors Association)

Kim Chapman-Berlin, Esq., for amicus curie New Jersey School Boards Association (Sheila Dow Ford, Director, Legal Department, attorney)

Record Closed: November 10, 1992 Decided: December 18, 1992

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

STATEMENT OF THE CASE

Petitioner, the Neptune Township Board of Education (Board), seeks a Declaratory Judgment concerning the application of *N.J.S.A.* 18A:29-4.1 and *N.J.S.A.* 18A:1-1 and whether prior adopted salary schedules are binding upon it subsequent to the expiration of collective bargaining agreement.

BACKGROUND AND PROCEDURAL HISTORY

The Petitioner Board is a body corporate organized under Title 18A of the New Jersey Statutes and empowered by the school laws to conduct and supervise the schools of the Neptune Township School District. Respondent Neptune Township Education Association (Education Association) is the majority representative of all certified educational personnel, secretaries, internal attendance officers, educational aides, van drivers, New Jersey ROTC Naval Science Instructors, and custodians employed by the Board. Respondent Neptune Township Principals Association (Principals Association) is the majority representative of all full-time principals, vice-principals, assistance principals, and the administrator in charge of athletics and co-curricular activities employed by the Board.

On September 14, 1988, the Board adopted a resolution approving the terms of a three(3) year contract with the Education Association for the period July 1, 1988 to June 30, 1991. The July 1, 1988 to June 30, 1991 Agreement between the Board and the Education Association contained various salary guides which were attached to the Petition For Declaratory Judgment as Exhibits A through P.

On June 8, 1988, the Board adopted a resolution approving the terms of a three (3) years contract between the Board and the Neptune Township Custodians' Association, the former majority representative of all custodians employed by the Board. The custodial employees are presently represented by the Respondent Education Association. The Agreement between the Board and the Custodians was in effect for the period July 1, 1988 to June 30, 1991, and contained salary guides which were attached to the Petition For Declaratory Judgment as Exhibits Q and R.

On March 23, 1988, the Board adopted a resolution approving the terms of a three (3) year contract between the Board and the Principals Association for the period July 1, 1988 to June 30, 1991. The July 1, 1988 to June 30, 1991 Agreement

between the Board and the Principals Association contained salary guides which were attached to the Petition for Declaratory Judgment as Exhibit S.

Prior to June 30, 1991 the Board and Respondents were engaged in negotiations directed toward the consummation of collective agreements to replace their respective agreements, both of which expired on June 30, 1991.

On June 28, 1991 the Board received a letter from Stephen B. Hunter, attorney for the Education Association, advising the Board that the Education Association would institute legal proceedings if on July 1, 1991 the Board did not move the employees represented by the Education Association to the next step on the salary guides contained in the July 1, 1988 to June 30, 1991 Agreement.

On July 1, 1991 the Board moved all employees represented by the Education Association and the Principals Association who were not already at the top of a salary guide to the next step of their respective salary guides and adjusted their salaries accordingly.

The Board moved the affected employees up on the salary guides and paid them the increases in their salaries despite the fact that the salary guides were part of negotiated agreements that had expired. On July 11, 1991, the Board filed a Petition For Declaratory Judgment asking the Commissioner to construe the provisions of *N.J.S.A.* 18A:29-4.1 and *N.J.S.A.* 18A:1-1 and determine if, in the absence of a successor contract, the salary schedules contained in the expired Agreement obligated the Board to pay salary increments to its employees beyond the three year term of the expired contract.

On November 30, 1991, the Board approved by resolution the terms of a contract with Respondent Education Association for the period July 1, 1991 to June 30, 1994. On February 12, 1992, the Board approved by resolution the terms of a contract with Respondent Education Association for the period July 1, 1991 to June 30, 1994.

On July 11, 1991 the Board filed a Petitioner for Declaratory Judgment before the Commissioner of Education of New Jersey, (Commissioner), requesting the Commissioner to render a declaratory judgment concerning the application of *N.J.S.A.* 18A:29-4.1 and *N.J.S.A.* 18A:1-1, to a controversy which had arisen between the Board and Respondents.

On August 22, 1991 the Education Association filed an Answer To Petition For Declaratory Judgment. On August 26, 1991 the Principals Association filed an Answer to Petition For Declaratory Judgment.

On September 3, 1991 the Commissioner dismissed the Petition For Declaratory Judgment with prejudice pursuant to *N.J.A.C.* 6:24-1.9. On October 2, 1991, the Board filed a Notice of Appeal of the September 3, 1991 dismissal of the Petition for Declaratory Judgment with the State Board of Education.

On March 4, 1992 the State Board of Education rendered a Decision remanding this matter to the Commissioner for a determination pursuant to *N.J.A.C.* 6:24-2.1 as to whether the Commissioner would entertain the Board's Petition for Declaratory Judgment and for such further proceedings as necessitated by the determination.

On March 18, 1992, the Commissioner sent a letter to the parties advising the parties that upon a review of the matter and the March 4, 1992 Decision by the State Board, he had decided not to consider the instant matter as a declaratory judgment, pursuant to *N.J.A.C.* 6:24-2.1. Rather, the Commissioner referred the matter to the Office of Administrative Law for consideration of the Board's claims as though they had been filed in the form of a Petition of Appeal. The Commissioner further advised that he was advising the Office of Administrative Law that the Judge assigned to hear the matte should first consider the jurisdictional questions raised in the matter as well as the affirmative defense of mootness before proceeding to consideration of the merits of the Board's claim raised pursuant to *N.J.S.A.* 18A:1-1 and 18A:29-4.1.

On June 22, 1992 this tribunal entered a Prehearing Order setting forth that this matter would be submitted on the papers. The June 22, 1992 Prehearing Order set forth the following issues for resolution:

1. Whether the Petition of Appeal of Declaratory Judgment is moot by virtue of a negotiated agreement between the parties?

2. Whether the Commissioner of Education or Public Employment Relations Commission (PERC) has jurisdiction to determine the matter?

3. Notwithstanding the negotiated agreement between the parties, whether the Commissioner may render a Declaratory Judgment in the matter.

Subsequently, on July 27, 1992, the New Jersey School Boards Association (School Boards Association) filed a Notice of Motion for Leave to Participate as *Amicus Curiae* in the instant matter. By way of letter, dated August 11, 1992, the School Boards Association motion was granted.

The matter is ripe for adjudication on the record, including the pleadings, exhibits, affidavits and briefs of the parties in support of their respective positions. The record, therefore, was considered closed on November 10, 1992.

ISSUE NO. 1

Respondents Education Association and Principals Association move for dismissal of the instant matter contending, among other things, that their organizations are parties to a new collective agreement with the Board for the period July 1, 1991 through June 30, 1994 and that the salaries for the 1991-92 school year were paid to their membership in accordance with that agreement. Respondents argue there is no longer a controversy or dispute between the parties and, therefore, the mater is moot.

The Board and School Boards Association argue the contrary contending, among other things, that the issue of statutory construction of *N.J.S.A.* 18A:29-4.1 will likely, in the future, confront the Board as well as other local school boards of education in this State. Boards of education are statutorily authorized to adopt salary schedules which are binding for one, two or three years. *N.J.S.A.* 18A:29-4.1. The statute does not, however, address the effectiveness of the adopted salary schedule at the conclusion of the one, two or three year term. The Board and School Boards Association contend that clarification of and guidance on this issue is essential.

The definition of "moot," as found in *Black's Law Dictionary*, (5th Ed. 1979) at 908, states as follows:

> Moot - A subject for argument: unsettled; undecided. A moot point is one not settled by judicial decision.

Although it is well established that the Commissioner does not decide moot issues, *Carolyn Henry v. Board of Education of the City of Wildwood, Cape May County,* 1975 *S.L.D.* 1 at 3., our Supreme Court has held that an issue is not moot where the potential for a recurrence of the action exists. *Galloway Township Board Bd. of Ed. v. Galloway Township Ed. Assn.,* 78 *N.J.* 25, 46-47 (1978). In *Oxfeld v. New Jersey State Board of Education*, 68 *N.J.* 301 (1975), Justice Clifford dissented from a *per curiam* decision of the Court which held a challenge of the constitutionality of a school regulation governing the distribution of pamphlets and leaflets on school grounds to be moot because the challengers were no longer students at the public high school where the regulation was in force. Justice Clifford said in his dissent, among other things, that:

> Under the circumstance I conclude that there still exists an adversary proceeding, that a broad public interest against prior restraints is involved, that the circumstances which gave rise to this litigation are likely to recur, and that the issue presented is one requiring statewide uniformity of resolution (citation omitted). *Id.* at 305-306.

Having carefully considered the arguments of the parties, I **CONCLUDE** that the instant matter is not moot but, rather, presents an adversary proceeding by virtue of its broad public interest and the strong likelihood that the issue presented will recur, therefore, demanding statewide uniformity of resolution.

Accordingly, respondents' motion to dismiss the instant matter on the grounds of mootness is **DISMISSED**. *Galloway, supra.;* Justice Clifford's dissent in *Oxfeld, surpa.*

ISSUE NO. 2

The regulation at *N.J.A.C.* 6:24-1.9 provides that:

> At any time after the receipt of the answer and prior to transmittal of the pleadings to the OAL, the Commissioner, in his or her discretion, may dismiss the petition on the grounds that no sufficient cause for determination has been advanced, lack of jurisdiction, failure to prosecute or other good reason.

The Commissioner, on September 3, 1991, determined he lacked jurisdiction to render a decision on the Board's petition for Declaratory Judgment to interpret

N.J.S.A. 18A:29-4.1 and *N.J.S.A.* 18A:1-1 and, therefore, dismissed with prejudice the Board's application. In concluding he lacked jurisdiction to grant the requested relief, the Commissioner recognized the two statutes to be embodied within Title 18A, Education, however, that jurisdiction lay exclusively with PERC.

The State Board of Education, by way of decision dated March 4, 1992, held that the Commission did, in fact, have jurisdiction over education statutes where it said:

> Consequently, despite the Commissioner's conclusion to the contrary, there can be no question that a ruling with respect to the applicability of these statues is well within his jurisdiction. In this regard we emphasize that the Commissioner of Education is not deprived of jurisdiction under *N.J.S.A.* 18A:6-9 to decide controversies under the education laws by the fact that, pursuant to *N.J.S.A.* 34:13A-5.4(c), the Public Employment Relations Commission has exclusive jurisdiction over any unfair labor practice listed in *N.J.S.A.* 34:13A-5.4(a) and (b). *City of Hackensack v. Winner,* 82 *N.J.* (1980). (Slip Op. at 2.)

The State Board, therefore, remanded the herein matter to the Commissioner who, in turn, transmitted it to the Office of Administrative Law for determination.

Amicus observes that the Commissioner's authority over educational matters originates from Title 18A, specifically at *N.J.S.A.* 18A:6-9, which provides that:

> The commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the state board of the commissioner.

The Commissioner's authority is broad and expansive with exclusive jurisdiction to determine fitness for teaching, *In the Matter of the Tenure Hearing of Samuel C. Capalbo,* (App. Div., unpublished opinion, Dkt. No. A-4686-83T6, July 17, 1985; *cert. den.* 102 *N.J.* 336 (1985)) and his office maintains concurrent jurisdiction with other administrative agencies, *i.e.*, Division on Civil Rights over complaints alleging discrimination in public school curricula, *Hinfey v. Matawan Regional Bd. of Ed.*, 77 *N.J.* 514 (1978); and over complaints alleging discrimination in employment by a school district, *Jamison v. Bd. of Ed. of Rockaway Twp.*, 171 *N.J. Super.* 549 (App. Div. 1979). The Commissioner may also maintain jurisdiction over matters concerned with Title 18A and PERC. *Thomas J. Kirschling v. Bd. of Ed. of Twp. of Pemberton*, OAL Dkt. No. EDU 355-92, Commissioner's Decision, August 14, 1992.

As *Amicus* observes, when balancing the jurisdictional roles between boards of education and teachers associations, the courts have held in favor of the local boards of education. *Dunnellen Bd. of Ed. v. Dunnellen Ed. Assn.* 64 *N.J.* 17 (1973); *Bd. of Ed. Piscataway Twp. v. Piscataway Maintenance & Custodial Assn.*, 152 *N.J. Super.* 235, 245 (App. Div. 1977); *Bd. of Ed. Twp. of Rockaway v. Rockaway Twp. Ed. Assn.*, 120 *N.J.. Super* 564 (Chan. Div. 1972). The Boards reliance upon education law as the basis for its application implicates the Commissioner rather than PERC and, therefore, must yield to his jurisdiction.

I **CONCLUDE**, therefore, that jurisdiction to determine the Board's application for Declaratory Judgment in the instant matter lies with the Commissioner and not with PERC. *N.J.S.A.* 18A:6-9.

ISSUE NO. 3

Pursuant to *N.J.S.A.* 52:14B-8, and as incorporated into *N.J.A.C.* 6:24-2.1, the Commissioner is authorized to render declaratory rulings. Within the scope of this statutory and regulatory authority, the Commissioner in his sole discretion, may make "a declaratory ruling with respect to the applicability to any person, property or state of facts or any statute or regulation enforced or administered" by him. The Commissioner has exercised this authority *In the Matter of the Request of the Board of Education of the Township of Brick, Ocean County, for a Declaratory Judgment Concerning the Payment of Salaries*, 1977 *S.L.D.*, 704; *In re: The Employees of the Board of Education of the Central Regional Highs School District*, 1 *N.J.A.R.* 80 (1980); *Board of Education of the Township of Neptune, Monmouth County v. Neptune Township Education Association, Neptune Township General Supervisors Association, Neptune Township Department Chairpersons Association and Neptune Township Principals Association*, OAL Dkt. No. EDU 9656-91, Commissioner's decision September 28, 1992, among others.

The facts in this matter demonstrate that the collective bargaining agreement between the Board and respondents contained salary schedules which were binding for a term of three years, pursuant to N.J.S.A. 18A:29-4.1 and, which, provides as follows:

> The board of education of any district may adopt a one, two or three year salary policy, including salary schedules for all full-time teaching staff members which shall not be less than those required by law. Such policy and schedules shall be

> binding upon the adopting board and upon all future boards in the same district for a period of one, two or three years form the effective date of such policy but shall not prohibit the payment of salaries higher than those required by such policy or schedules nor the subsequent adoption of policies or schedules providing for higher salaries, increments or adjustments. Every school budget adopted, certified or approved by the board, the voters of the district, the board of school estimate, the governing body of the municipality or municipalities, or the commissioner, as the case may be, shall contain such amounts as may be necessary to fully implement such policy and schedules for that budget year.

This statute was amended by the *Laws* of 1987, *Chapter* 123, as a consequence of the Commissioner's decision in the matter of *Orlando v. Mercer County Vocational-Technical Schools,* 1984 *S.L.D.* ___ (unpublished, Commissioner's decision September 6, 1984), wherein the Commissioner adopted the language of Administrative Law Judge Bruce Campbell who said, in part, that:

> It is appropriate to note at this point that *N.J.S.A.* 18A:29-4.1 and, by extension, *N.J.S.A.* 18A:29-4.3, authorize boards of education to adopt salary schedules for a period of two years, but not more. A public body may do only what the Legislature authorizes it to do. The statute is clear and unequivocal. . . . . (Slip Opinion at 37).

In amending *N.J.S.A.* 18A:29-4.1, the Legislature merely extended by one year, the permissible period a board of education may adopt a salary policy; including salary schedules for full-time teaching staff members. Such adopted salary policy shall be binding upon the adopting board of education and all future boards for the period of adoption, up to three years. Thus, the statutory limitation has been set.

As *Amicus* observes, by the repeal of *N.J.S.A.* 18A:29-8 (the former automatic annual employment salary increment), the Legislature demonstrated its intent to eliminate automatic annual incremental salary increases under School Law. (N.J.S.A. 18A:29-6 to *N.J.S.A.* 18A:29-8, repealed by *L.* 1985, *c.* 321, §16, effective September 9, 1985, operative September 9, 1985). In its stead, the Legislature promulgated the "Teachers Quality Employment Act," *N.J.S.A.* 18A:29-5.1 *et seq.* which, among other things; established a minimum salary for teaching staff members; provided funding for the salaries prescribed; and, provided the legislated appropriation. The Legislature, in repealing *N.J.S.A.* 18A:29-8 and enacting *N.J.S.A.* 18A:29-5.1 *et seq.* did not provide for automatic salary increments. Rather, at *N.J.S.A.* 18A:29-5.5, it rejected automatic salary increases to those who were in receipt of salaries more

than the mandated minimum even if the increase existed in a collectively negotiated agreement. *N.J.S.A.* 18A:29-5.5 provides as follows:

> Teachers receiving more than the minimum salary set forth in this amendatory and supplementary act shall not receive automatic salary increases pursuant to any existing collective negotiation agreement with a salary guide indexed to compute salaries on the basis of a ratio established between the minimum salary and all other ranges, increments, or increases.

Thus, the Legislature not only abolished the former automatic salary incremental increases, it forbade boards of education from awarding extant collective negotiated salary increases which exceeded the mandatory minimum salary set forth in *N.J.S.A.* 18A:-29-5.a *et seq.*

The question to be resolved here is whether, at the conclusion of a three year agreement between the Board and respondents and in the absence of a successor agreement, the Board is obligated to pay salary increments contained in the expired agreement. In interpreting the statute in question (*N.J.S.A.* 18A:29-4.1), we are guided by the general rules of statutory construction as found at *N.J.S.A.* 1:1-1, which provides in pertinent part, as follows:

> In the construction of the laws and statutes of this state, both civil and criminal, words and phrases shall be read and construed within their context, and shall, unless inconsistent with the manifest intent of the legislature or unless another or different meaning is expressly indicated, be given their general accepted meaning, according to the approved usage of the language. . . .

Our Supreme Court also aids us where it said that, "Generally, a court's duty in construing a statute is to determine the intent of the Legislature." *AMN, Inc. v. South Brunswick Twp. Rent Leveling Bd.*, 93 *N.J.* 518, 525 (1983). It also observed in *Perez v. Patasote, Inc.* 95 *N.J.* 105 (1984) at 114:

> . . . it is the statute's express language that determined in what manner and to what extent the Legislature sought to attain those goals. *In the final analysis it is the statute as written that must govern.* (Emphasis supplied.)

There can be no doubt it was the Legislature's intent to grant local boards of education the statutory authority to adopt a three year salary schedule by its 1987

amendment of *N.J.S.A.* 18A:29-4.1. The Assembly Education Committee Statement clearly expresses the intent of the Legislature where it states, among other things, that: "This bill gives a board the option of adopting or negotiating a three year salary schedule." The Statement also clearly demonstrates that the amendment to *N.J.S.A.* 18A:29-4.1 was a direct consequence of the Commissioner's decision in *Orlando v. Mercer County Vocational-Technical Schools, supra.,* where it was held that a three year salary schedule, even if negotiated in good faith, was not binding because it fell outside the two year provision of the statute.

The statute, *N.J.S.A.* 18A:29-4.1, as amended, is clear and unequivocal. There is no ambiguity in its language that "any district may adopt a one, two or three year salary policy . . ." The Board, therefore, is authorized to adopt a salary schedule not to exceed three years. As Judge Campbell stated in *Orlando*, "A public body may do only what the Legislature authorized it to do." (Slip Op. at 30).

CONCLUSION AND ORDER

I **CONCLUDE**, therefore, pursuant to *N.J.S.A.* 18A:29-4.1, the Board is under no obligation to pay salary increments to its employees subsequent to the expiration of duly adopted one, two or three year salary policy in the absence of a successor salary policy.

Accordingly, it is **ORDERED** that the petitioner Board's application for Summary Decision is hereby **GRANTED**.

It is, therefore, **DECLARED** and **ADJUDGED** that under the provisions of *N.J.S.A.* 18A:29-4.1, the Board is relieved from any obligation to pay its employees salary increments subsequent to the expiration of a one, two or three year salary policy in the absence of a successor policy.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days

and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

18 December 1992
Date

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

12/22/92
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 24 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

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BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEPTUNE TOWNSHIP EDUCATION ASSOCIATION AND NEPTUNE TOWNSHIP PRINCIPALS ASSOCIATION,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by respondent Neptune Township Education Association (NTEA) and respondent Neptune Township Principals Association (NTPA) pursuant to N.J.A.C. 1:1-18.4, and a reply thereto by participant New Jersey School Boards Association (NJSBA). No reply was filed by the Board.

In their respective exceptions, respondents espouse similar positions, averring that the ALJ erred in finding that the instant matter was not moot (NTEA Exception No. 2, NTPA Exception No. III) and that the Commissioner had jurisdiction over it (NTEA Exception No. 1, NTPA Exception No. II), and in ruling that N.J.S.A. 18A:29-4.1 was dispositive of the issues raised herein and subject to an interpretation contrary to the Supreme Court's decision in Galloway Township, supra (NTEA Exception No. 3, NTPA Exception No. I). With respect to mootness, respondents reiterate their previous

argument that, in view of the fact that the Board has paid the increments at issue and negotiated a new collective agreement, there is no longer a controversy between the parties; therefore, the customary practice of both the Commissioner and the Public Employment Relations Commission (PERC) should be followed, and the Commissioner should decline to decide a matter which is clearly moot. With respect to jurisdiction, respondents reiterate their argument that judicial precedent clearly establishes PERC rather than the Commissioner as the primary adjudicator of matters involving unfair practice and terms and conditions of employment, citing Galloway, supra, and Red Bank Board of Education vs. Warrington et al., 138 N.J. Super. 564 (1976).

With respect to N.J.S.A. 18A:29-4.1, respondents contend that the ALJ should have been bound by the Supreme Court's decision in Galloway, supra, which requires that the increments at issue be paid; that the ALJ's reliance on repeal of N.J.S.A. 18A:29-8 (salary schedules) and enactment of N.J.S.A. 18A:29-5.5 (limitations on automatic increases indexed to statutory minimum salaries) is misplaced in that these statutes were not, and are not, relevant to payment of employee increments within the context of the issues raised by this matter; and that, even assuming the relevance of these statutes, the ALJ erred in interpreting them and N.J.S.A. 18A:29-4.1 to conclude that the Legislature by its various enactments and amendments demonstrated an intent to generally eliminate automatic salary increases, so that boards are not required to honor an established salary schedule once the contract within which it is embodied has expired. NTEA adds the further argument (Exception No. 4) that, even if the Commissioner accepts

the ALJ's reasoning in the above areas, the statutes relied on in the initial decision refer only to certificated teaching staff members and therefore cannot be applied to support staff, which must continue to be treated in accordance with Galloway, supra, and prevailing PERC rulings.

NJSBA in turn urges affirmance of the ALJ's decision, which largely adopted arguments presented by NJSBA in its prior brief. In response to respondents' exceptions, NJSBA reiterates these same arguments, with particular emphasis on the notion that reliance on Galloway, supra, and PERC decisions based upon it, is misplaced because the court therein expressly did not consider the question of whether or not the terms and conditions of employment that prevailed under a previous collective agreement constitute the status quo after expiration of the agreement, and because the premise on which the Galloway decision relied was rendered invalid by subsequent repeal of N.J.S.A. 18A:29-8 and amendment of N.J.S.A. 18A:29-4.1, the statute on which the court's decision explicitly turned.

Upon careful review and consideration of this matter, the Commissioner determines to affirm the holding of the initial decision with respect to the Commissioner's jurisdiction over the education statutes relied on by petitioner, and its holding on mootness because petitioner has raised a novel question of education law implicating matters of substantial public interest. The Commissioner rejects, however, the initial decision's analysis and conclusions on payment of salary increments following expiration of a collective agreement for the reasons set forth below.

The initial decision rests on the premise that, because N.J.S.A. 18A:29-4.1 authorizes boards of education to adopt salary

schedules for one, two or three years, boards cannot be bound to a salary schedule beyond three years, even in the absence of a successor schedule. It buttresses this conclusion by invoking certain portions of the "Teachers Quality Employment Act" (TQEA) and judging the intent of the Legislature in enacting those sections to have been rejection of automatic salary increases for teaching staff members. (Initial decision, at pp. 8-11)

The Commissioner, however, does not concur with this interpretation. Both the Commissioner's decision in Orlando, supra, and the 1987 amendment to N.J.S.A. 18A:29-4.1 that resulted from it, were framed in terms of the length of time a Board's salary policy may be drawn by the policy's own terms. The three-year policy in Orlando was rejected because, prior to amendment of 18A:29-4.1, under the provisions of that statute, a board could adopt or negotiate a salary policy effective for two years, with anything more being ultra vires (Orlando) and anything less being binding for two years notwithstanding the terms of the agreement, unless a successor agreement had been reached in the interim (Galloway, supra). Amendment of 18A:29-4.1 was expressly intended to permit a board the flexibility of drawing, and being bound to, its policy or contractual agreements for a one-, two-, or three-year period as it saw fit:

> On September 6, 1984, the Commissioner of Education held (Orlando v. Mercer County Vocational-Technical Schools) that the third year of a salary schedule, even if negotiated in good faith, was not binding and would have to be renegotiated since N.J.S.A. 18A:29-4.1 specifically provides for a two year salary schedule only. This bill gives a board the option of adopting or negotiating a three year salary schedule.

> The committee amendments provide the option of one, two or three year schedules, and also provide that any three year contract negotiated prior to the effective date of this act would be considered valid.
> (Assembly Education Committee Statement, Assembly Bill No. 2045--L.1987, c. 123)

Nothing in this line of development suggests that 18A:29-4.1 ever was, or is now, intended to be applied as a limitation on otherwise prevailing laws governing collective bargaining in school districts. Indeed, as the State Board recognized in its decision in the matter of Peter J. Romanoli v. Board of Education of the Township of Willingboro, Burlington County, 1987 S.L.D. 2678, notwithstanding the term limitations on salary schedules imposed by 18A:29-4.1, the requirement of the Employer-Employee Relations Act (N.J.S.A. 34:13A-1 et seq.) that the status quo be maintained during negotiations is fully applicable where salaries are set by collective bargaining (as opposed to individual agreement, as was the situation in Romanoli's case).

Nor did repeal of N.J.S.A. 18A:29-8 and enactment of TQEA (both effected by P.L. 1985, c. 321) have the import ascribed to them by NJSBA and the initial decision. Rather, c. 321 was a direct response to two practical realities: First and foremost, the starting salary levels for new teachers had fallen significantly behind the starting salaries paid to other recent college graduates and needed to be made more competitive to attract outstanding candidates to the teaching profession (c. 321, Legislative findings and declarations, now N.J.S.A. 18:29-5.2). Second, the existing statutory teacher salary schedule (N.J.S.A. 18A:29-8), which dated from 1963 and provided specific minimum salary amounts for various levels of training and service, had become effectively meaningless,

as its actual dollar amounts (beginning at $4,400 per year for a new full-time teacher) had long since become obsolete, as had its step increment schedule, through such matters having become the province of collective negotiations with enactment of public sector bargaining laws in 1968. Thus, with c. 321, the Legislature sought to establish, through education law and for reasons of educational policy, a minimum dollar amount below which no full-time teacher could be paid regardless of negotiations, and then, having made this "baseline" intrusion into the collective bargaining process, held that teaching staff salaries above the minimum "would be established by local districts under the provisions of the New Jersey Employer-Employee Relations Act (N.J.S.A. 34:13A-1 et seq.)." (Legislative Statement, Assembly Bill 635, later c. 321)

Indeed, c. 321's sole reference to salaries above the new minimum, N.J.S.A. 18A:29-5.5, is not, as implied by the initial decision at pp. 9-10, a blanket disavowal of automatic increments; rather, by both legislative statement and its own terms, it is clearly a one-time "brake" on the "runaway" effect the new minimum would have on then existing collective agreements with salaries above minimum specifically indexed to the minimum itself:

> Teachers receiving more than the minimum salary set forth in this amendatory and supplementary act shall not receive automatic salary increases pursuant to any existing collective negotiations agreement with a salary guide indexed to compute salaries on the basis of a ratio established between the minimum salary and all other ranges, increments, or increases. (emphasis supplied)
> (N.J.S.A 18A:29-5.5)

As the Legislature specifically noted, this provision meant that, upon enactment of c. 321, "any indexed guide based upon a ratio between the minimum salary and all other salaries must be

renegotiated (see [Section] 6). This would only apply to 16 school districts." (Senate Education Committee Statement to Senate Committee Substitute for Assembly Bill Nos. 634 and 635, later c. 321)

Thus, legislative repeal of N.J.S.A. 18A:29-8 and enactment of TQEA meant simply that teacher salaries were, except for their minimum level and the duration of the agreements within which they were embodied, to be matters of collective negotiation rather than education law. Nor did amendment of N.J.S.A. 18A:29-4.1 alter this construct; it merely provided greater flexibility to the parties in determining the duration of the contracts they could negotiate. The initial decision is correct, then, in concluding (as did the State Board in Romanoli, supra) that there is no automatic entitlement to salary increments under education law.

It is a distortion of that law, however, to further conclude that the education statutes are dispositive and that there is therefore no entitlement at all; this is to effectively ignore the concomitant requirements of law governing collective bargaining, the very process expressly contemplated by the Legislature as the vehicle for setting salaries above minimum levels and recognized by the State Board as applicable to collectively, as opposed to individually, negotiated salaries. Indeed, as held by the court in Board of Ed. of Rockaway Township v. Rockaway Township Education Association, 120 N.J. Super. 564 (Ch. Div. 1972), the Employer-Employee Relations Act and the provisions of Title 18A must be read together so that both are harmonized and each given its appropriate role.

In its essence then, the issue raised by petitioner is not susceptible to resolution under education law; rather, it is

controlled by the provisions of the Employer-Employee Relations Act (N.J.S.A. 34:13A-1 et seq.), over which PERC enjoys exclusive jurisdiction and over which the Commissioner of Education has no authority. Therefore, while the Commissioner may interpret Title 18A, she can go no further than to rule, as she has herein, that the provisions of that title are not dispositive of the question of payment of increments following expiration of a collectively negotiated salary schedule, and that, in dealing with this question, boards of education and school employee associations must be guided instead by 34:13A-1 et seq. and prevailing PERC law.

Accordingly, the initial decision granting summary judgment to the Board is reversed and the Petition of Appeal dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 16, 1993

DATE OF MAILING - FEBRUARY 16, 1993

25-93

EDU #2175-92
C # 25-93
SB # 14-93

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,

PETITIONER-APPELLANT,

V.

NEPTUNE TOWNSHIP EDUCATION ASSOCIATION AND NEPTUNE TOWNSHIP PRINCIPALS ASSOCIATION,

RESPONDENTS-RESPONDENTS.

STATE BOARD OF EDUCATION

DECISION ON MOTION

Decided by the Commissioner of Education, February 16, 1993

For the Petitioner-Appellant, Paterson & Hundley (James T. Hundley, Esq., of Counsel)

For the Respondent-Respondent Neptune Township Education Association, Klausner, Hunter, Cige & Seid (Stephen B. Hunter, Esq., of Counsel)

For the Respondent-Respondent Neptune Township Principals Association, Wayne J. Oppito, Esq.

For the amicus curiae New Jersey School Boards Association, Kim Chapman-Belin, Esq.

The State Board of Education grants the motion by the New Jersey Education Association to appear as amicus curiae in this matter. The Association's brief shall be due ten days from the date of this decision.

June 2, 1993

Date of mailing 04 JUN 1993

25-93

EDU #2175-92
C # 25-93
SB # 14-93

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,

PETITIONER-APPELLANT,

V.

NEPTUNE TOWNSHIP EDUCATION ASSOCIATION AND NEPTUNE TOWNSHIP PRINCIPALS ASSOCIATION,

RESPONDENTS-RESPONDENTS.

STATE BOARD OF EDUCATION

DECISION ON MOTION

Decided by the Commissioner of Education, February 16, 1993

Decision on motion by the State Board of Education, June 2, 1993

For the Petitioner-Appellant, Paterson & Hundley (James T. Hundley, Esq., of Counsel)

For the Respondent-Respondent Neptune Township Education Association, Klausner, Hunter, Cige & Seid (Stephen B. Hunter, Esq., of Counsel)

For the Respondent-Respondent Neptune Township Principals Association, Wayne J. Oppito, Esq.

For the amicus curiae New Jersey School Boards Association, Kim Chapman-Belin, Esq.

This is an appeal from a decision of the Commissioner of Education which held that N.J.S.A. 18A:29-4.1 as now in effect neither prohibits nor mandates the payment of salary increments set forth in salary schedules included in a collective negotiations agreement that has expired. After arriving at this conclusion, the Commissioner stressed that while the education laws do not resolve the issue of whether a district board is prohibited from or required

Oct. 6, 1993

to pay such increments to its staff before a successor agreement has been reached, the question is controlled by N.J.S.A. 34-13A-1 et seq. and subject to the exclusive jurisdiction of the Public Employment Relations Commission (PERC).

The Board of Education of the Township of Neptune appealed the Commissioner's decision, contending that because N.J.S.A. 18A:29-4.1 provides authority to district boards to adopt salary schedules for a specified number of years up to three years, a district board is without authority to bind future boards to such schedules for more than the specific period of up to three years. The Board argues that, therefore, N.J.S.A. 18A:29-4.1 prohibits a district board from paying salary increments to staff members pursuant to salary schedules in a collective negotiations agreement once it has expired and that because the terms of N.J.S.A. 18A:29-4.1 are specific, the education statute rather than the New Jersey Employer-Employee Relations Act controls. Amicus curiae New Jersey School Boards Association did not file a separate brief, but joined the district board in its arguments.

In response, the Neptune Township Education Association urges that we affirm the Commissioner's decision. It argues that the Commissioner correctly determined that the New Jersey Supreme Court's decision in Galloway Township Board of Education v. Galloway Education Association, 78 N.J. 25 (1978), controls the issue of whether a district board must pay salary increments following expiration of a collective negotiations agreement and that Galloway mandates such payment. Amicus curiae New Jersey Education Association supports this position.

After reviewing the arguments of counsel, and substantially for the reasons expressed by the Commissioner, we affirm her determination that N.J.S.A. 18A:29-4.1 neither prohibits nor mandates the payment of salary increments once the collective negotiations agreement which includes the salary schedules setting forth those increments has expired. We reject the district board's construction of the statute, and we further agree with the Commissioner that resolution of whether or not such payment is required in any particular instance properly lies within PERC's jurisdiction. That being the case, we modify the Commissioner's decision to the extent necessary to clarify that this agency has not by its decision in this matter interpreted Galloway or passed upon its continued viability.

October 6, 1993

Date of mailing 08 OCT 1993

26-93

SHARON TAXMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning teacher riffed in June 1991 alleged Board violated her tenure and seniority rights when it abolished her full-time position and created three part-time positions teaching typing at three different middle schools at same time every day by three separate teachers. Petitioner refused one of these part-time positions. Petitioner also claimed right to full-time positions held by intervenors. Petitioner was recalled to full-time employment for 1992-93.

ALJ found petitioner failed to establish by preponderance of credible evidence that Board improperly assigned intervenors to teach computers. Three intervenors were properly teaching computer courses, and two other intervenors were properly assigned to teach computer courses falling within mathematics curriculum. ALJ, however, did find that petitioner was entitled to salary and compensation for 1991-92 school year since Board violated her tenure rights by failing to consolidate three part-time typing positions into one full-time position absent evidence that such consolidation would disrupt pupil schedules.

Commissioner adopted findings and determination in initial decision. Petitioner was already restored to a full-time position for 1992-93 school year.

FEBRUARY 18, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8196-91
AGENCY DKT. NO. 292-8/91

SHARON TAXMAN,
Petitioner,
V.
PISCATAWAY TOWNSHIP BOARD OF EDUCATION,
Respondent.

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

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

Richard A. Friedman, Esq., for intervenors (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Randi Doner, Esq., for participants (Balk, Oxfeld, Mandel & Cohen, attorneys)

Record Closed: November 25, 1992 Decided: January 7, 1993

BEFORE **DANIEL B. McKEOWN**, ALJ,t/a:

Sharon Taxman (petitioner) is employed as a teacher by the Piscataway Board of Education (Board). She claims in a Petition of Appeal filed to the Commissioner of Education that the Board violated her tenure and seniority when it determined to eliminate her employment for 1991-92 as the result of an alleged reduction-in-force taken in June 1991. After the Commissioner transferred the matter August 26, 1991 to the Office of Administrative Law as a contested case under N.J.S.A. 52:14F-1 et seq., and after certain settlement efforts failed, intervention status was granted those teachers whose employment status may be affected by petitioner's claim. A

limited hearing was conducted April 21, 1992 at the Edison Township Municipal Building. At the close of the hearing additional teachers whose employment may be adversely affected, though nontenured, were identified as not having been formally noticed of the proceeding. A briefing schedule was delayed until the teachers were noticed and retained counsel. Participation status [1] was granted and counsel was provided the opportunity to become familiar with the record. The record closed November 25, 1992 upon the filing of participants' letter memorandum.

This initial decision concludes petitioner failed to establish by a preponderance of credible evidence the validity of three of her claims. Petitioner did establish the validity of one claim and, hence, is entitled to relief.

BACKGROUND FACTS

The background facts are not in dispute, except as otherwise noted, and they are as follows. Petitioner possesses an instructional certificate with a comprehensive business education endorsement which authorizes her to teach business education subjects in all public schools, including bookkeeping and accounting, secretarial studies, general business, consumer education, business mathematics and business education. N.J.A.C. 6:1-6.2(a)(4). According to her filed Petition petitioner, who has acquired tenure, has ten years seniority in the Board's employ as of June 30, 1991. (Petition of Appeal, paragraph 3).

This case had its genesis on June 30, 1989 when petitioner was subjected to a reduction-in-force by the Board. She unsuccessfully challenged that action before the Commissioner, but a civil action under Title VII of the Civil Rights Act of 1964 is pending in United States District Court. Petitioner was unemployed by the Board for 1989-90. The Board did offer (R-1) petitioner a part-time position for 1990-91 at one of its three middle schools teaching two periods of typing for which she is properly certificated. N.J.A.C 6:11-6.2(a)(4)(2). The Board had created three part-time teaching positions for the 1990-91 year. Since then, typing is taught at each of three middle schools at the same time every day by three separate teachers. Petitioner refused the proffered part-time position. Petitioner claimed the Board deliberately

[1] N.J.A.C. 1:1-16.4 & 5.

scheduled the three classes simultaneously at three different schools to avoid having to offer her full-time employment. Rather, she suggested that the three part-time positions be consolidated into one full-time position which she said she would take. (See R-2 and R-4) The three part-time positions were not consolidated, but were staffed by three nontenured teachers.

Petitioner was eventually employed full-time by the Board for 1990-91 by replacing another teacher who went on a leave of absence. When the "on-leave" teacher returned for 1991-92, petitioner was advised (R-5) she would not be offered continued full-time employment for 1991-92. Petitioner was also advised that one of the three middle schools part-time typing positions, which had been initially offered to but rejected by her for 1990-91, was hers should she choose to accept it. Petitioner replied (R-6) she would accept the proffered part-time position so long as she was also assigned to teach the third typing course which was then assigned to another teacher but over whom petitioner had greater seniority. The Board rejected petitioner's conditional acceptance and counteroffer. Petitioner remained unemployed for 1991-92. She has since been recalled to full-time employment by the Board for 1992-93.

Meanwhile, petitioner filed the instant Petition on August 2, 1991 claiming that the present dispute stems from an action taken by the Board on June 24, 1991 by which it was to have "abolished" her full-time position. According to the evidence and undisputed facts in this record, that assertion is not accurate. The evidence shows that when the Board's Director of Personnel reminded petitioner by letter (R-5) dated June 18, 1991 the 'on-leave' teacher was returning for 1991-92 and her employment would not be continued, he also advised that the Board intended to adopt a resolution on June 24, 1991 to "effectively terminate your employment at the end of this school year." This so-called termination of employment is understood here to refer to that employment held by petitioner during 1990-91 while the other teacher was on leave.

The foregoing facts, together with petitioner's filed memorandum of law, show petitioner more accurately alleges the Board violated her tenure and seniority rights by failing to provide her with full-time employment for 1991-92. Specifically, petitioner alleges her rights were violated (1) when the Board assigned three specific teachers, Nancy Ostrowski, Deborah Williams, and Gerald Matcho, each of whom is an intervenor and each of whom has greater seniority than she, to teach Computers:

Business Applications, Word Processing, Keyboarding/Introduction to Computers, and Adaptive Computers for which, she claims, the individuals are not properly certificated for the subjects they are assigned to teach; (2) by the Board assigning intervenor Edith Fouratt, who has less seniority then she, to teach Introduction to Computer Programing for which she, petitioner, is certificated; (3) by the Board assigning intervenor Neil Campanella, who has greater seniority then petitioner, to teach Money Management for Everyday Life and Money Management in Planning the Future for which he is not properly certificated but for which she is; and (4) by the Board assigning participant nontenure teachers to three part-time typing positions when by consolidating the three positions she could have had full-time employment. Petitioner does not challenge in this Petition the propriety of the initial reduction-in-force effective June 30, 1989 by which her position of employment was abolished. Each of petitioner's allegations shall be considered in the order presented.

I

In regard to petitioner's first allegation intervenor Nancy Ostrowski, who has at least 20 years seniority as of June 30, 1991 (J-1), possesses an instructional certificate with endorsements to teach secretarial studies and Latin. The endorsement of secretarial studies at N.J.A.C. 6:11-6.2(a)(4)(v) authorizes the holder to teach "...secretarial studies in all public schools. Secretarial studies normally include: shorthand, typewriting, office procedures, business machines, business English". The endorsement of Latin under N.J.A.C. 6:11-6.2 authorizes the holder to teach Latin. In 1991-92 Ostrowski was assigned to teach Computers: Business Applications, Word Processing, and Keyboarding/Introduction to Computers. According to the evidence in this record, Computers; Business Application is an introductory course that briefly covers the history of Computing, Word Processing, data base and spread sheets, and the role of computers in modern society. It emphasizes the concepts of computing and problem solving and is given in a computer laboratory. (J-3A). Word Processing has a curriculum guide developed by intervenor Ostrowski. The course provides pupils with a working knowledge of Word Perfect. The subject matter of the course is designed to assist pupils refine language art skills and to acquire basic knowledge of word processing concepts and terminology. (J-3B). Intervenor Ostrowski also developed the Board's curriculum guide for Keyboarding/Introduction to Computers which provides pupils with knowledge of the computer keyboard through the touch method. (J-4).

Intervenor Deborah Williams who has at least 11 years seniority (J-1) as of June 30, 1991 possesses an instructional certificate with an endorsement to teach secretarial studies and a comprehensive business education endorsement. Authorization to teach under these endorsements have already been presented. In 1991-92 Williams was assigned to teach Keyboarding/Introduction to Computers.

Intervenor Gerald Matcho has 30 years seniority as of June 30, 1991. (J-1). He possesses an instructional certificate with endorsements to teach bookkeeping and accounting, social business studies, and typewriting. The endorsement bookkeeping and accounting authorizes the holder to teach bookkeeping, accounting, and business mathematics in all public schools; the endorsement social business studies is not presently listed as an endorsement for business education; and, the endorsement to teach typewriting authorizes the holder to teach typewriting in all public schools. During 1991-92 Matcho was assigned to teach Adaptive Computers: Business Applications and Keyboarding/ Introduction to Computers. Intervenor Matcho developed the curriculum guide for Adaptive Computers: Business Applications, a course which is intended to provide pupils who are classified in need of special education with the opportunity to learn keyboarding, the basics of word processing, and the basics of data base and spread sheet applications. (J-5).

In support of her position that intervenors Ostrowski, Williams, and Matcho are not qualified by endorsements held to teach computer courses, petitioner called Ida Graham as her witness. Ms. Graham is the acting director of the Department of Education Bureau of Teacher Certification. Ms. Graham testified that at the present time there is no specific instructional endorsement required to be possessed by one who is assigned to teach computer courses. Ms. Graham explained that anyone with an instructional certificate and any endorsement may be assigned to teach a computer course. Ms. Graham noted that her predecessor sent a memorandum (I-1) to all chief school administrators during July 1985 advising only that "computer education teachers must possess an instructional certificate."

Petitioner suggests that only the holder of an instructional certificate with a comprehensive business endorsement such as she possesses, or a data processing endorsement, is properly certificated to teach computer courses. The endorsement data processing, N.J.A.C. 6:11-6.2(a)(4)(iii), authorizes the holder to teach data processing in all public schools. The regulations explains that data processing normally includes the areas of keypunching, unit record operation, computer

operation, programming and technology. However, as pointed out by the Board in its memorandum, the data processing endorsement regulation has not been revised since 1984 when computers were not standard classroom fixtures. More importantly, however, the Commissioner held in South River Education Association v. the Board of Ed of the Borough of South River, 1987 S.L.D. - (decided Nov. 4, 1987) that there is no separate endorsement for the teaching of computer literacy. While the State Board of Education observed in Morgan v. Wayne Board of Ed, 1991 S.L.D. - (decided Nov. 8, 1991) that a specific endorsement may be necessary when a computer course involves highly advanced and technologically sophisticated skills, it has not yet determined by rule the specific endorsement it had in mind.

Intervenors properly point out that even if petitioner is correct that a data processing endorsement is required to teach computer courses, she has no claim to teach those courses since she does not possess that endorsement. While a comprehensive business education endorsement would facially suggest that data processing is included as an authorized subject area for the holder to teach, the comprehensive business education endorsement is specific that the subject areas the holder is authorized to teach include bookkeeping and accounting, secretarial studies, general business, consumer education, business math, and business English.

Presently, a teacher of computers must possess an instructional certificate with any endorsement. Intervenors Ostrowski, Williams, and Matcho each possess an instructional certificate with one or more endorsements. Consequently, these three intervenors are authorized to teach the respective courses. Each of these three intervenors has greater seniority than has petitioner. Consequently, petitioner has no claim against the Board with respect to its 1991-92 assignments of intervenors Ostrowski, Williams, or Matcho.

II

With respect to petitioner's second allegation, the facts show intervenor Edith Fouratt has eight years seniority as of June 30, 1991. (J-1). She possesses an instructional certificate with an endorsement to teach mathematics. The endorsement to teach mathematics authorizes the holder "to teach mathematics in all public schools". N.J.A.C. 6:11-6.2(a)(14). During 1991-92 Fouratt was assigned to teach Introduction to Computer Programing. This course is designed to introduce pupils to computers, their uses, and impact upon society. Algorithmic logic is

introduced, as is programing in BASIC language using loops, sort, search routines and graphics. Among other proficiencies expected to be acquired by pupils are the ability to convert between binary, hexadecimal, and the decimal number system. Intervenor Fouratt, who is assigned this course on the strength of her endorsement to teach mathematics, testified without contradiction that this course is in the mathematics department and pupils receive mathematics credit for successfully passing it.

Petitioner maintains that if it is correct all one needs to teach computer courses is an instructional certificate with any endorsement then she should have been assigned to teach Introduction to Computer Programming over intervenor Fouratt on the basis of seniority. Petitioner points out that she has ten years seniority, while Fouratt has eight years seniority. The Board notes that this course, Introduction to Computer Programming, is essentially a mathematics course which provides instruction and skills in mathematics. Computers are merely the vehicle utilized to teach those skills. Consequently, the Board maintains that a mathematics endorsement to an instructional certificate is the appropriate endorsement for this course. Petitioner simply claims that if this course is a mathematics course intervenor Matcho would not have been assigned to teach it because he is not properly certified to teach mathematics.

While a joint exhibit (J-1) shows Matcho taught Introduction to Computer Programming during 1991-92, the Board points out in its filed memorandum at page eight that that is error. The Board asserts, without contradiction, that Matcho taught Keyboarding/Introduction to Computers which is another course in its business department.

According to the evidence in this record, Introduction to Computer Programming is properly considered a mathematics course in that pupils are to become proficient in the ability to convert between binary, hexadecimal and the decimal number system as well as the use of algorithmic logic. Petitioner produced no evidence upon which any finding could be made that the Board assigned this course to its mathematics department in bad faith. Therefore, I **CONCLUDE** intervenor Fouratt is properly certificated to teach Introduction to Computer Programing on the strength of her endorsement to teach mathematics. I also conclude petitioner is not properly certificated to teach this course because she does not possess an endorsement to teach mathematics. Finally, I conclude because petitioner is not properly certificated to teach this course she has no enforceable

claim against the Board regarding its assignment of Intervenor Fouratt to teach Introduction to Computer Programing for 1991-92.

III

With respect to petitioner's third allegations intervenor Neil Campanella has 11 years seniority as of June 30, 1991. (J-1). He possesses an instructional certificate with an endorsement to teach mathematics. During 1991-92 Campanella was assigned to teach Money Management for Everyday Life and Money Management in Planning the Future.

The courses Money Management for Everyday Life and Money Management in Planning the Future are described in course outlines (See J-7). These two course are one semester each and, combined, constitute a one year course. The former course is designed to assist pupils make real-world consumer decisions through basic arithmetic and problem-solving skills. The assigned text is "Consumer Mathematics". General proficiencies pupils are expected to acquire include the application of basic arithmetic skills such as addition, subtraction, multiplication, and division to computing regular and overtime wages, deductions, checking and savings accounts, sales tax, preparing a budget, and the like. The latter course is designed to assist pupils to use money wisely in regard to shelter, paying bills, and making investments. Specific pupil proficiencies include understanding data, the computation of residential bills such as telephone, electric, and gas, the computations of wages and state and federal taxes to be paid, determining the value of house, life and automobile insurance, and understanding stocks and bonds.

Petitioner maintains that intervenor Campanella is not authorized to teach these money management courses on the strength of his endorsement to teach mathematics because the course are business courses for which Campanella holds no endorsement. The Board and intervenor Campanella insist these courses are mathematics courses, not business courses.

The parties agree that the issue to be resolved is the nature of the course itself. That is, is the thrust of the course to teach mathematics or business while incidentally relying upon skills unique to the other discipline. Petitioner points out that the titles of the courses include "Money Management", not mathematics; the text book for both courses, petitioner says is a business education text, although it is noted the title is "Consumer Mathematics"; the outline of the course addresses the purchases

of an automobile, insurance, clothes, food, and earning a salary along with banking, investments, housing and taxation. The subject areas covered according to the outline are business oriented, although petitioner acknowledges that the required proficiencies focus on arithmetic applications within the business context.

Intervenor Campanella points out that regardless of the course title, the thrust of the courses is on mathematics because they focus on the practical application of mathematics skills and concepts in everyday life. Despite the fact that the mathematics skills taught are utilized within a consumer setting the mathematical focus of each course does not change.

While the course titles contain the words "Money Management" and suggest a business orientation, the text "Consumer Mathematics" suggests the focus of the courses is on basic mathematics. When the proficiencies pupils are expected to achieve are considered, the conclusion is reached that both courses are properly considered mathematics courses. The focus of these courses does not appear to be upon how regular and overtime wages may be enhanced, the why or how of paycheck deductions, the theory of checking and/or savings accounts or the like. Rather, the focus of the course does appear to have been designed for those high school pupils who have not mastered basic arithmetic skills.

I have considered petitioner's reasons why she contends these courses are pure business courses but those reasons simply are not persuasive. Pupils who enroll in these two courses receive mathematics credit, the text is "Consumer Mathematics", and, the focus of the course is to strengthen basic arithmetic skills within the context of everyday life. Consequently, I find that Money Management for Everyday Life and Money Management in Planning the Future are mathematics courses and that the teacher assigned must be in possession of a mathematics endorsement. Intervenor Campanella possesses a mathematics endorsement; petitioner does not. Therefore, petitioner failed to show an enforceable claim against the Board for having assigned intervenor Campanella to teach these courses for 1991-92.

Therefore, I find petitioner has failed in her claim that the Board violated her tenure and/or seniority by assigning intervenor Campanella to these courses for 1991-92.

IV

Finally, with respect to petitioner's fourth allegation it is not disputed that three nontenured teachers were assigned three part-time teaching positions at three separate middles schools which the Board describes in its memorandum at page 5 as "three large middles schools serving the [Piscataway Township] sprawling suburban community." Neither petitioner, nor intervenors, nor participants dispute that assertion. However, intervenors join petitioner's claim that the Board violated her tenure by assigning three nontenure teachers to these part-time positions rather than combining the three positions into one full-time position for her. Participants join the Board in its argument that it is not obliged to create a full-time position for petitioner's benefit when to do so pupil schedules would be affected.

There is no evidence in this record to show why typing instruction was scheduled to occur simultaneously at each of the three middle schools when the three part-time positions were first created for 1990-91. It is recognized that the Board presently asserts it is under no obligation to consolidate these three part-time positions into one full-time position for petitioner's benefit because of the impact such a consolidation would have on pupil scheduling at each of the three schools. It cannot be determined on this record what impact, if any, a consolidation of the three part-time positions into one full-time position would have on pupil scheduling other than the obvious impact of pupils in each of the three middle schools receiving typing instruction at different times of the day.

It is recognized that petitioner seeks relief for 1991-92 and, consequently, the Board has available to it for that year the argument that to consolidate three part-time positions into one full-time position would have disrupted three existing class schedules at three separate schools. Of course, the preexisting class schedules "preexisted" for 1990-91. In order to reach whether the Board had an educational policy reason for refusing to consolidate the three positions into one full-time position for 1991-92, one would have to consider the why the three typing classes were scheduled to occur simultaneously at each of the three middle schools as of 1990-91. There is no evidence in this record to establish why the classes were simultaneously schedule for each of the three middle schools for 1990-91 nor 1991-92.

The State Board, in Valenski v. Board of Ed of Garwood, 1985 S.L.D. - (Nov. 13, 1985), held that while a local board has authority to reduce staff for legitimate reasons under N.J.S.A. 18A:28-9, such authority may not be exercised in an arbitrary

manner. The State Board recognized, nevertheless, that the elimination of employment of a tenure teacher must occur after the employing board eliminates positions of nontenured teachers who hold positions for which the tenure teacher is properly certificated. The State Board held that a board of education has the duty to attempt to assign the affected teacher to teach courses assigned to a nontenured teacher before reducing the tenured teacher's position from full-time.

In Laufenberg v. Ramapo Indian Hills Regional Board of Ed, 1991 S.L.D. - (Dec. 12, 1991) the Commissioner, adopting the initial decision of the administrative law judge, relied upon Valenski, supra, noted as follows:

> [T]he State Board reasoned that if the board does not have a sound educational policy, such as one favoring dual instruction for retaining the tenured and nontenured teacher, and full-time assignment of the tenured teacher does not affect pupil schedules (see Klinger, supra, 358), retaining the full-time teacher and reducing or eliminating the positions of nontenured teachers allows the board to achieve its goals without impairing the purposes underlying the tenure positions of the school laws. [Citation omitted].
>
> Therefore, if the respondent Board cannot establish it had educationally based reasons for not retaining petitioner, and thereby acknowledging her tenure rights, it has acted arbitrarily ***

To the extent the Board relies upon Klinger v. Cranbury Twp. Board of Ed, 190 N.J. Super. 354 (App. Div. 1984) in support of its primary defense that it is under no obligation to consolidate three part-time positions into one full-time position because the consolidation would "disrupt preexisting class schedules at three separate schools", such reliance is misplaced. In Klinger the court, in affirming an action to reduce a tenure teacher's employment to part-time, emphasized that its decision rested on the board's longstanding educational policy for dual instruction and the numerous problems inherent in altering that policy.

In this case, the Board has asserted as a defense to petitioner's claim to full-time employment as a teacher of typing for which she is properly certificated, that a consolidation would disrupt preexisting class schedules. However, there is no evidence in this record to reach such a finding. Therefore, I must conclude that the

Board acted arbitrarily in refusing to consolidate the three part-time positions into one full-time position for 1991-92 and offering that full-time position to petitioner. Petitioner, by virtue of her tenure, was entitled to a full-time position as a teacher of typing in 1991-92 absent evidence to support the Board's assertion that such consolidation would disrupt pupil schedules.

Therefore, petitioner Taxman is entitled to the salary and other benefits and emoluments of employment she would have received for 1991-92 had the Board not violated her tenure rights by failing to consolidate three part-time teaching positions into one full-time position in recognition of those tenure rights.

It is so **ORDERED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

January 7, 1993
Date

Daniel B. McKeown
DANIEL B. McKEOWN, ALJ, t/a

Receipt Acknowledged:

1/8/93
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 12 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

tmp

DOCUMENTS IN EVIDENCE

J-1	Seniority list
J-2	Manual-Introduction to Computer Programing
J-3a	Computer Application
J-3b	Introduction-Word Processing
J-4	Keyboarding/Introduction to Computers
J-5	Adaptive Computer-Business Applications
J-6	Lotus 1-2-3
J-7	Consumer Mathematics
J-8	Advanced Placement Computer Science
J-9	Fortran and Cobul
J-10	Understanding Structure Cobul
I-1	Letter, July 25, 1985
R-1	Letter, May 8, 1990
R-2	Letter, May 10, 1990
R-3	Letter, May 14, 1990
R-4	Letter, May 16, 1990
R-5	Letter, June 18, 1991
R-6	Letter, June 21, 1991

SHARON TAXMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The parties' exceptions and the replies thereto were timely filed pursuant to the requirements of N.J.A.C. 1:1-18.4.

Petitioner, relying on her post-hearing brief and exceptions, avers that the ALJ misapplied the facts of the law necessitating reversal of his determinations in the first three parts of the initial decision relative to the business and computer courses at the middle school disputed in the instant matter. The Board and intervenors support the determinations reached by the ALJ relative to the positions discussed in Parts I, II and III of the initial decision.

The Board's exceptions are limited to the ALJ's determination that the Board was obligated to create a full-time teaching position in three separate middle schools for the typing courses disputed herein. Its disagreement with the ALJ rests on two arguments, i.e., he applied to the record a legal standard which

was still evolving at the time of the hearing and thereafter, and that the Board was denied a fair opportunity to offer relevant evidence on the point once it was apparent this legal theory was being invoked in the matter. As to this, the Board argues, inter alia, that it did not become clear that such a claim was being pursued until post-hearing briefs were filed and that the confusion began with the Petition of Appeal itself which, it avers, even petitioner concedes misdescribed her claim. In support thereof, the Board recites from the initial decision the following:

> [P]etitioner filed the instant Petition on August 2, 1991 claiming that the present dispute stems from an action taken by the Board on June 24, 1991 by which it was to have "abolished" her full-time position. According to the evidence and undisputed facts in this record, that assertion is not accurate. The evidence shows that when the Board's Director of Personnel reminded Petitioner by letter (R-5) dated June 18, 1991 the 'on-leave' teacher was returning for 1991-92 and her employment would not be continued, he also advised that the Board intended to adopt a resolution on June 24, 1991 to "effectively terminate your employment at the end of this school year." This so-called termination of employment is understood here to refer to that employment held by petitioner during 1990-91 while the other teacher was on leave.
>
> The foregoing facts, together with Petitioner's filed [post-hearing] memorandum of law, show Petitioner more accurately alleges the Board violated her tenure and seniority rights by failing to provide her with full-time employment for 1991-92. [Initial Decision at 3.] [Emphasis added.] (Board's Exceptions, at p. 2)

The Board also sets forth a lengthy description of the procedural aspects of this case relative to the confusion over what claims petitioner was actually pursuing which is incorporated herein by reference. Among other things, the Board reiterates its argument that the legal theory regarding the three part-time middle school

typing positions was first raised in petitioner's post-hearing brief wherein she cited Laufenberg, 1991 S.L.D. 2447 and McGlynn v. Sea Girt Board of Education, decided July 2, 1992, the former which was decided by the State Board shortly before the hearing was conducted and therefore not generally well known and the latter which was decided by the Commissioner three months after the factual record in the instant matter closed. As to this, the Board recites the following passage from its post-hearing reply brief to demonstrate that it alerted the ALJ well in advance of the initial decision that it wished to expand the hearing record to address the after-the-fact argument regarding the middle school typing positions and that it would be unfair to rest any decision on the legal theory belatedly offered by petitioner without affording it a reasonable opportunity to do so:

> Far from supporting petitioner's argument, Laufenberg and the cases cited in it support the Board in this case. The State Board there reaffirmed its earlier holding in Valinski v. Board of Education of the Borough of Garwood, S.B. #20-85 (decided November 13, 1985), that the Board's duty to a "riffed" instructor does not include creating or maintaining an otherwise unnecessary full-time position if, to do so, would "affect pupil schedules." [Valinski, supra, slip opinion at 5.]; See also Klinger v. Cranbury Tp. Bd. of Ed., 190 N.J. Super. 354 (App. Div. 1982).
>
> In McGlynn v. Sea Girt Board of Education, 1992 S.L.D. _____ (decided July 2, 1992), decided several months after the hearing in this case, the Administrative Law Judge noted the "unsettled" state of the law in this area, but felt that a modest alteration involving a small student body of only 147 students could be required to accommodate the rights of a tenured teacher whose position was abolished. We are confident that Your Honor's close reading of that decision will confirm that it addressed an employment action which, as a factual matter, was far removed from anything involved in our case. Moreover, it represents a development in the law, however modest, arising after the close of the factual record in our case and as to which we, of

> course, had no opportunity to present proofs. There is no basis for inferring that the de minimis scheduling change at a tiny elementary school could be compared to the scheduling complications facing three large middle schools serving this sprawling suburban community.
>
> There is no contention that the duties of Taxman's former position were transferred to non-tenured instructors, or that non-tenured instructors were given preferential treatment in regard to any remaining position. It is clear that the result she urges is not required (or, we say, even permitted) by any existing precedent. At the same time, we recognize that the tenure and seniority decisions emanating from the State Board and our appellate courts in recent years have yielded surprising results, with broad policy implications for local school districts. Should Your Honor be at all inclined to consider extending the law in Taxman's favor, we respectfully suggest that such a policy decision be left to the Commissioner or higher authorities. [Letter brief dated September 18, 1992, from David B. Rubin, Esq., to Honorable Daniel B. McKeown.]

Further, the Board takes vigorous exception to the ALJ's statements on pages 10 and 12 of the initial decision relative to there being no evidence in the record regarding the scheduling of the three part-time typing courses, averring that the reason no such evidence was in the record should be obvious from the following passages found on pages 8 and 9 of the Board's exceptions:

> The reason there was no such evidence "in this record" should have been obvious. With the number of issues, parties and attorneys continuing to grow even after the hearing was concluded, and without a formal pretrial order in place squarely defining the issues in dispute, we were put in the position of responding to this point in Mr. Klausner's post-hearing brief based on a factual record not fully developed.
>
> The result is manifestly unfair to the Board, and points up the necessary role of the prehearing conference procedure in cases where the factual contentions and legal theories are not

immediately apparent from the pleadings.[2] As another administrative law judge observed in the initial decision in McGlynn issued May 1992 issued after the hearing below:

> The tension between the authority of a local board of education not to change its pupil schedules to accommodate a tenured teacher subject to a RIF and the entitlement of a RIFFED tenure teacher to preference a retention within the endorsements on his or her certificate as against a non-tenured teacher remains unsettled. The courts have sustained both views. [Id. at 12.]....

---

[2] This is by no means intended as a criticism of Judge McKeown's handling of the case. His decision to forego a mandatory prehearing conference was no doubt motivated by a long history of counsel's voluntary cooperation as adversaries in many cases before him in the past. The Board's counsel should not be faulted either. The petition of appeal was clear enough -- it clearly alleged a claim which, on its face, the Board was confident it could defeat. As Judge McKeown himself later observed, however, the petition misdescribed Taxman's claim, the complete basis of which only became apparent (we suspect, to Taxman's counsel as well) "with petitioner's filed [post-hearing] memorandum of law." [Initial Decision at 3.]

It is the Board's position that pursuant to N.J.A.C. 1:1-18.5(b) and N.J.A.C. 1:1-18.7(a), the Commissioner has the power to rectify the error that has occurred in the instant matter by remanding it to the Office of Administrative Law.

Petitioner urges that the Board's arguments are inaccurate, averring that one of the issues presented at hearing was her claim that three nontenured business teachers were retained in the middle schools while her tenured position was eliminated. She further avers that the Board introduced a number of exhibits relative to the issue, Exhibit R-1, a letter from its director of personnel to petitioner offering her one of the part-time positions; Exhibit R-2,

her response which questions why she is not being given a full-time position; Exhibit R-3, the director's response thereto; Exhibit R-4, petitioner's response to the director's letter wherein she states, inter alia, "...I find it difficult to understand why you would create three part-time teaching positions with an intentional scheduling of classes at the same hours at all three middle schools...;" Exhibit R-5; and Exhibit R-6.

It is petitioner's position that at no time either in writing or testimony did the Board provide a valid educational reason for not combining the nontenured positions into a full-time position. She further avers that the Board was fully cognizant of the issue given the fact the nontenured typing teachers were participants in the matter and the above-cited exhibits were presented by the Board and testimony taken in regard thereto by the Board's personnel director. As to this, petitioner argues that it is simply insupportable that the Board was surprised by the arguments of her counsel in that she clearly and unambiguously requested that a full-time position be created, rather than three part-time positions, before her petition was filed and ten months before the hearing. (Petitioner's Exceptions, at p. 7)

In response to the Board's request for a remand of the matter to the Office of Administrative Law, petitioner states, inter alia,

> N.J.A.C. 1:1-18.7(a) is inapplicable to this matter. The Board was on pristine clear notice, as previously stated, that Taxman wanted to know why non-tenured schedules were not adjusted so that she could have a full-time position.
>
> This issue was not newly raised or incompletely considered by Judge McKeown. Rather, the Board, for its own tactical or strategic reasons,

[chose] not to introduce testimony on the alleged educational soundness of its decision. Mr. Moore easily could have been questioned on this point. The Board, not Petitioner, while questioning him about the substantial correspondence, could have asked Mr. Moore to explain to the Court, and Mrs. Taxman, "why you (the Board) would create three part-time teaching positions with an intentional scheduling of these classes at the same hours at all three middle schools" (R4) or why "you failed to explain to me why none of the typing classes, in any of the middle schools which are presently scheduled to be taught the last two periods of the day, are not being taught in the morning so that I can have a full time schedule" as she asked, in her letter of June 21, 1991 (R6). It chose not to do so.

Further, a review of Respondent's post-hearing brief discloses no request, by the Board to either reopen the record or supplement the record by affidavit. It is only now that the Board urges that it should have been permitted to "expand the hearing record . . ." and "that it would be unfair to rest any decision on that ground without affording us a reasonable opportunity to do so" (Page 7).

Petitioner asserts that there was a full and fair hearing and that Respondent had notice of this issue before the hearings. The Pretrial discovery also shows notice to all attorneys.
(Petitioner's Exceptions, at pp. 7-8)

As to the Board's arguments that the ALJ misapplied the law to the facts, petitioner avers:

The Board also argues that the A.L.J. misapplied the law to these facts. It first asserts that "Laufenberg v. Ramapo Indian Hills Regional High School District, 1991 SLD 2447 was decided by the State Board on December 12, 1991, shortly before the hearing and well before it had been generally circulated in the school law community." (Page 5 of exceptions). Petitioner finds it hard to believe that Respondent was unaware of this decision for more than four months after its issuance. Counsel had a copy of same by February, 1992.

McGlynn v. Sea Girt Board of Education, 1992 S.L.D. --- (7/2/92) was ignored by the A.L.J. in his decision.

> Valinski v. Garwood Board of Education, 1985 S.L.D. was nearly seven years old at the time of this hearing.
>
> Laufenberg, supra was not newly created law as suggested. Rather, the result reached therein was the necessary consequence of Klinger vs. Cranbury Township Board of Education, 190 N.J. Super. 354 (App. Div. 1982); Lingelback vs. Hopatcong Board of Education; Miller vs. Mendham Twp. Board of Education; Capodilupo v. West Orange Board of Education, 218 N.J. Super. 510 (App. Div. 1987); Bednar v. Westwood Board of Education, 221 N.J. Super. 231 (App. Div. 1987) and Miles vs. Watchung Board of Education, 1984 S.L.D. 1058, aff'd State Board 1984 S.L.D. 1069.
>
> Respondent had a full, fair and complete hearing and received a decision that was based upon all evidence presented. (Id. at pp. 9-10)

The tenured intervenors disagree with petitioner that the ALJ erred in his determination as to their respective positions discussed in parts I through III of the initial decision but they concur with petitioner's reply to the Board's exceptions that the ALJ reached a proper conclusion of law relative to petitioner's right to the typing positions held by the nontenured middle school teachers.

The participant nontenured teachers fully adopt the position set forth by the Board relative to the middle school typing positions. They further point out that although the instant matter was filed in August 1991, they were not granted participant status until June 1992 after the hearing had been conducted. As with the Board, participants urge that the legal standard used by the ALJ was still evolving when the hearing was held and given the position petitioner had advanced, they too aver that there is a need for the matter to be remanded to complete the record.

COMMISSIONER'S DETERMINATION

Upon a thorough review of the record in this matter including the various exceptions submitted by the parties, the Commissioner concurs with and adopts as his own the findings and conclusions of the ALJ as set forth in the initial decision. As to the arguments set forth by the parties relative to the three part-time middle school typing positions, the Commissioner finds and determines, for the reasons set forth below, that the ALJ did not deny the Board an opportunity to expand the record nor is the law so "unsettled" as to a tenured teacher's rights being paramount over those who are nontenured that the Board was in any way disadvantaged in the ALJ's disposition of this matter.

The Commissioner's review of the record does not support the Board's contention that it requested, and the ALJ denied, an opportunity to expand the hearing record to address petitioner's "after-the-fact" arguments about the nontenured teachers. Even granting arguendo that the Board did not have specific notice that petitioner was making a claim for the three middle school typing positions held by nontenured teachers prior to the hearing on April 21, 1992, the record supports that at least on or near the date of the hearing, the Board knew or should have known that the nontenured teachers were being accorded an opportunity to participate in the matter. See letter of April 23, 1992 from Mr. Friedman to the ALJ. Moreover, it is clear from the record that the post-hearing briefing schedule was specifically set to accommodate that participation. Given the nature of the case, i.e., a claim that petitioner's tenure and seniority rights had been violated and the correspondence relative to the participation of the

nontenured teachers, it simply is not reasonable for the Board not to have anticipated that petitioner was seeking a full-time position out of the three part-time positions, particularly in light of the correspondence going back and forth between petitioner and the Board from as early a date as May 1990 (Exhibits R-1 through R-6) in which the issue was directly debated. Likewise, the Board knew or should have known that if it was shown that petitioner was qualified to teach the positions, she would be entitled to them unless the Board could demonstrate a compelling educational reason to defeat her tenure rights. See Capodilupo v. West Orange Board of Education, 218 N.J. Super. 510 (App. Div. 1987), Bednar v. Westwood Board of Education, 221 N.J. Super. 231 (App. Div. 1987). Moreover, while the law may still be "evolving" in the sense that there is no clear-cut formula which exists to define when a tenured teacher's claim may be defeated because of the disruptive impact the accommodation of those rights may cause on the scheduling of courses or assignment of teachers to given classes, the law is not in the least new or unsettled that a tenured teacher has employment rights which must be given the utmost deference except when it can be demonstrated that the board would have to stand on its head to honor those rights. Fitzpatrick et al. v. Weehawkin Board of Education, 1980 S.L.D. 595, 1982 S.L.D. 1500; Dorothy Godwin Davis v. Board of Education of the Township of Ewing, Mercer County, decided April 29, 1985, aff'd State Board September 4, 1985; Valinski, supra; Klinger, supra; Miller, supra

Moreover, if the Board believed it was not being accorded adequate means to establish its proofs, it could and should have specifically made a request of the ALJ to allow expansion of the

record either through further limited hearing or through papers. A reasonable reading of the language cited ante from the Board's reply to petitioner's post-hearing brief does not, in the Commissioner's judgment, constitute such a request.

Therefore, it is determined that a remand to the Office of Administrative Law is not warranted, particularly in view of the fact that the record indicates that petitioner was restored to a full-time position for the 1992-93 school year and, thus, since the issue of combining the three part-time positions is moot, no disruption to the educational process will occur as a result of the relief granted herein.

Accordingly, for the reasons set forth in the initial decision and herein, the decision of the ALJ is adopted as the final decision in this matter.

COMMISSIONER OF EDUCATION

FEBRUARY 18, 1993

DATE OF MAILING - FEBRUARY 18, 1993

26-93

EDU #8196-91
C # 26-93
SB # 11-92

SHARON TAXMAN,	:	
PETITIONER-CROSS/APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, February 18, 1993

For the Petitioner-Cross/Appellant, Klausner, Hunter, Cige & Seid (Stephen E. Klausner, Esq., of Counsel)

For the Respondent-Appellant, Rubin, Rubin, Malgran & Kuhn (David B. Rubin, Esq., of Counsel)

For the Intervenors, Zazzali, Zazzali, Fagella & Nowak (Richard A. Friedman, Esq., of Counsel)

For the Participants, Balk, Oxfeld, Mandell & Cohen (Randi Doner, Esq., of Counsel)

Sharon Taxman (hereinafter "petitioner"), a tenured teaching staff member holding an instructional certificate with a comprehensive business education endorsement, was subject to a reduction in force ("RIF") in June 1989 when her full-time teaching position was abolished by the Board of Education of the Township of Piscataway (hereinafter "Board"). Petitioner unsuccessfully challenged such action before the Commissioner of Education, and also filed a civil action in U.S. District Court under Title VII of the Civil Rights Act of 1964. Petitioner was not employed by the Board in 1989-90.

SEPT. 1, 1993

In 1990-91, the Board created three part-time positions teaching typing in the district's three middle schools at the same time of day. Petitioner possessed the appropriate certification to teach such courses, and was offered one of the three part-time positions for 1990-91. In a letter to the Board's personnel director, petitioner declined the part-time offer, questioning the scheduling of three part-time positions when she was available for a full-time position. Petitioner was eventually employed full-time by the Board for the 1990-91 school year when another teacher took a leave of absence. Petitioner was advised in June 1991 that her employment would be terminated at the end of that academic year in that the teacher on leave was returning. As a result, she was advised, no full-time position would be available for her in 1991-92. She was, however, again offered one of the three part-time typing positions. Petitioner declined to accept such part-time offer, and all three positions were assigned to non-tenured teachers. Petitioner remained unemployed by the Board in 1991-92, but was recalled to full-time employment for 1992-93.

Petitioner filed the instant petition on August 6, 1991, claiming that this dispute arose from the Board's action in June 1991 when it "abolished Petitioner's full-time position." She alleged that the Board had "failed and refused to permit Petitioner to exercise her seniority rights." Petitioner did not specify the positions to which she claimed entitlement.

On March 20, 1992, the Administrative Law Judge ("ALJ") notified the parties that intervenor status had been granted to "teachers who are not yet identified in this matter."

A plenary hearing was held on April 21, 1992. During the course of that hearing, it was apparent that there still was uncertainty concerning the claims being made by petitioner. The non-tenured typing teachers had not been formally notified of the proceedings by petitioner, and were not represented at the hearing. Petitioner called one witness, Ida Graham, acting director of the State Department of Education Office of Teacher Certification, who testified as to the subject fields covered by a comprehensive business endorsement.

Following the close of petitioner's case, counsel for the Board requested that counsel for petitioner delineate his specific positions "so it doesn't surprise us in the [post-hearing] brief." Tr. 4/21/92, at 65. The ALJ thereupon asked counsel for petitioner to specify the claims being pursued in this proceeding. His response concerning the part-time typing positions was as follows:

> Mr. Klausner: Joint Exhibit 1, Paragraph 4, three non-tenured teaching one-third of the time in three separate middle schools.
>
> Judge McKeown: That's your claim?
>
> Mr. Klausner: Two, at least one of them. It's my understanding that they are all teaching by strange coincidence the very same hours of the day.
>
> Judge McKeown: Are you trying to imply something by saying "by strange coincidence."
>
> Mr. Klausner: I'm leaving that for the United States District Court of the District of New Jersey, a separate forum.

Id. at 66.

On May 6, 1992, the three non-tenured teachers who were assigned to the part-time typing positions were formally notified by

petitioner of the instant action. On June 9, 1992, the ALJ granted them participant status.

On September 9, 1992, petitioner filed a post-hearing brief in which she alleged, inter alia, that the Board had violated her tenure rights by failing to consolidate the three part-time typing positions in the Board's three middle schools into one full-time position.

On January 7, 1993 the ALJ rendered his Initial Decision in this matter. He delineated petitioner's claims as alleging that her rights were violated:

> (1) when the Board assigned three specific teachers, Nancy Ostrowski, Deborah Williams, and Gerald Matcho, each of whom is an intervenor and each of whom has greater seniority than she, to teach Computers: Business Applications, Word Processing, Keyboarding/Introduction to Computers, and Adaptive Computers for which, she claims, the individuals are not properly certificated for the subjects they are assigned to teach; (2) by the Board assigning intervenor Edith Fouratt, who has less seniority then [sic] she, to teach Introduction to Computer Programming for which she, petitioner, is certificated; (3) by the Board assigning intervenor Neil Campanella, who has greater seniority then [sic] petitioner, to teach Money Management for Everyday Life and Money Management in Planning the Future for which he is not properly certificated but for which she is; and (4) by the Board assigning participant nontenure teachers to three part-time typing positions when by consolidating the three positions she could have had full-time employment.

Initial decision, slip op. at 4.

The ALJ concluded that petitioner had no entitlement to the positions she was claiming which were held by the tenured teachers, as set forth in the first three claims above. He did, however, conclude that the Board had violated petitioner's tenure rights in failing to consolidate the three part-time typing positions assigned

to non-tenured teachers into one full-time position. Citing Klinger v. Cranbury Tp. Bd. of Ed., 190 N.J. Super. 355 (App. Div. 1982); Valinski v. Board of Education of the Borough of Garwood, decided by the State Board, November 13, 1985; and Laufenberg v. Ramapo Indian Hills Regional Board of Education, decided by the Commissioner, December 12, 1991, the ALJ found that there was no evidence in the record to indicate why the three typing positions were scheduled to occur simultaneously at each of the three schools and what impact, if any, consolidating the three part-time positions into one full-time position would have had on pupil scheduling.

On February 18, 1993, the Commissioner of Education adopted the findings and conclusions of the ALJ. The Commissioner rejected the Board's contention that it had not been given the opportunity to develop a record on petitioner's legal and factual claim regarding the non-tenured typing teachers raised in petitioner's post-hearing brief. The Commissioner concluded that "it simply is not reasonable for the Board not to have anticipated that petitioner was seeking a full-time position out of the three part-time positions..." Commissioner's decision, slip op. at 24. The Commissioner asserted that "[e]ven granting arguendo that the Board did not have specific notice that petitioner was making a claim for the three middle school typing positions held by nontenured teachers prior to the hearing on April 21, 1992, the record supports that at least on or near the date of the hearing, the Board knew or should have known that the nontenured teachers were being accorded an opportunity to participate in the matter." Id. at 23.

The Board has filed the instant appeal, limited to the Commissioner's determination that the Board had violated

petitioner's tenure rights by failing to consolidate the part-time typing positions. The Board contends that the Commissioner applied a legal standard which was still evolving when the hearing was held and that it was denied a fair opportunity to offer relevant evidence on that point once it was apparent that petitioner was asserting such a claim. The petitioner has filed a cross-appeal limited to her claims to the positions assigned to the tenured teachers herein.

After a thorough review of the record, we affirm, for the reasons expressed therein, the Commissioner's decision to reject petitioner's claims to the positions assigned to tenured teachers. We, however, reverse the Commissioner's determination that petitioner's tenure rights were violated by the Board's failure to consolidate the part-time typing positions, and remand for the limited purpose of developing a record regarding the Board's action in scheduling those three part-time positions in different schools at the same time of day, and for a determination on petitioner's claim that her tenure rights had been violated by the Board's failure to consolidate. Although we reject the Board's contention that petitioner expressly waived such a claim at hearing or that the legal issue was not adequately settled at the time of hearing, we find that the petitioner did not assert her "failure to consolidate" allegation in a manner sufficient to fairly apprise the Board at the time of hearing that such a claim was being pursued in this proceeding.

Under the circumstances, we find that the Board could reasonably have concluded at hearing that petitioner was claiming entitlement in this particular proceeding to one of the part-time positions teaching typing, rather than alleging the Board's failure to consolidate those part-time positions into one full-time position.

As indicated above, the petition commencing these proceedings alleges violation of petitioner's seniority rights only,[1] and does not delineate the specific positions to which petitioner was claiming entitlement. The non-tenured typing teachers had not been formally notified of petitioner's case prior to hearing, were not represented at the hearing, and were not granted participant status until some time thereafter. Unfortunately, there was no prehearing order specifying the claims being pursued in these proceedings and it is evident that there was uncertainty even at the hearing as to the precise allegations being made. Indeed, the response of petitioner's counsel to the ALJ's query at hearing requesting clarification of petitioner's claims was so ambiguous as to heighten our confusion regarding the specifics of her claim in these proceedings regarding the typing positions. And, in fact, petitioner did not expressly raise her "failure to consolidate" allegation in this action until her post-hearing brief.[2]

The fact that the Board might or should have anticipated that petitioner would assert entitlement to a full-time typing position in this action is of no moment. It was petitioner's

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[1] We note that petitioner's allegation that the Board failed to consolidate the part-time typing positions assigned to non-tenured teachers implicates her tenure, and not seniority, rights. See Capodilupo v. West Orange Bd. of Ed., 218 N.J. Super. 510 (App. Div. 1987), certif. den., 109 N.J. 514 (1987).

[2] We note that the correspondence in the record between petitioner and the Board regarding the Board's offer of one of the part-time typing positions was introduced into evidence by the Board, over petitioner's objections, for the purpose of demonstrating that "Mrs. Taxman was offered and refused the very position which she is now claiming she is entitled to." Tr. 4/21/92, at 75. Thus, it is evident that the Board believed at hearing that petitioner was only asserting her entitlement to a part-time typing position in this proceeding.

obligation to fairly apprise adverse parties of her claims. Cf. Miltz v. Borroughs-Shelving, a Div. of Lear, 203 N.J. Super. 451, 458 (App. Div. 1985). Under the circumstances, particularly in light of the opportunity given to petitioner at hearing to clarify her position, we find that she failed to put the Board on sufficient notice of her "failure to consolidate" claim so as to permit the Board to defend thereagainst at hearing.

Accordingly, we conclude that the interests of justice require a remand to the Commissioner of Education for transmittal to the Office of Administrative Law for the limited purpose of developing a record with regard to the Board's action in scheduling three part-time typing positions in different schools at the same time of day, and for a determination of petitioner's claim that her tenure rights were violated by the Board's failure to consolidate those positions. We stress that the Board has the burden on remand of establishing that there were educationally based reasons for maintaining three part-time positions, such as that consolidation of these positions would have disrupted class scheduling. See Valinski, supra. We affirm the Commissioner's decision on all other points.[3]

S. David Brandt and John Klagholz opposed.

September 1, 1993

Date of mailing 03 SEP 1993

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[3] We note that although we did not accept the briefs filed in this appeal by the participants and intervenors, such action was based upon their failure to file in a timely manner, N.J.A.C. 6:2-1.12, and we acknowledge their continued status and participation in any further proceedings in this matter, including their entitlement to have filed exceptions to the Report issued by our Legal Committee in this case.

27-93

ELIZABETH TAKAKJIAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FAIRVIEW, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning teacher alleged Board improperly riffed her September 16, 1991 while retaining less senior teacher as teacher of computer/keyboarding. Petitioner was rehired March 2, 1992. Petitioner sought lost salary, lost medical benefits and other emoluments.

ALJ found since petitioner's seniority rights were clearly violated, she was entitled to compensation but not pre-judgment interest. She should have been retained as teacher of computer/keyboarding as no specific certificate or endorsement is required for that position at the elementary level. ALJ awarded back pay, lost medical benefits and other emoluments.

Citing State Board decision in South River Education Association wherein it was determined that an elementary endorsement qualifies an individual to teach computer education at the elementary level, Commissioner adopted findings and determination in initial decision.

FEBRUARY 18, 1993

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10530-91

AGENCY DKT. NO. 378-10/91

ELIZABETH TAKAKJIAN,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF FAIRVIEW,

Respondent.

Harold N. Springstead, Esq., for petitioner
(Springstead and Maurice, attorneys)

Richard A. Brovarone, Esq., for respondent
(Oury, Mizdol & Brovarone, attorneys)

Record Closed: December 10, 1992 Decided: January 12, 1993

BEFORE **DIANA C. SUKOVICH,** ALJ:

PROCEDURAL HISTORY

On October 17, 1991, Elizabeth Takakjian (petitioner or Takakjian) filed a petition with the Department of Education (Department) seeking certain specified relief from the Borough of Fairview Board of Education (Board or respondent). Respondent filed an answer on November 8, 1991 The matter was transmitted by the Department to the Office of Administrative Law on November 18, 1991 for determination as a contested case pursuant to *N.J.S.A.* 52 14F 1 to 13.

A hearing was held on October 19, 1992. Petitioner filed an initial brief on October 28, 1992; and respondent, on November 5, 1992. Petitioner filed a reply brief on November 9, 1992. A reply brief was not filed on behalf of respondent. This judge requested clarification from the parties of their positions and supporting legal citations. Respondent did so by letter submitted on December 9, 1992, and petitioner, on December 10, 1992 The record closed on December 10, 1992.

NATURE OF THE CASE

Takakjian is a full-time tenured teacher employed by the Board. She was subject to a reduction in force (RIF) by respondent effective September 16, 1991 and was subsequently rehired by the Board on March 2, 1992.

Petitioner argues that respondent continued the employment of another teacher, Robert Eagleson (Eagleson), who has less seniority than she, in violation of her tenure and seniority rights. Petitioner seeks back pay in the amount of $7,611.25; interest on that amount for March 2, 1992 to November 2, 1992, at a monthly rate of $47.57, totaling $428.13; lost medical benefits in the amount of $2,040.39; restoration of seniority rights; and contributions to the pension fund and Social Security. Respondent opposes awarding petitioner interest and lost medical benefits. The Board does not dispute that petitioner is entitled to back pay in the amount of $7,611.25.

STIPULATIONS

The parties entered into the following stipulations:

1. Petitioner is a full-time teacher in the employ of respondent and is presently on a child-rearing leave of absence.

2. Petitioner was certified as a teacher of English (August 1980) and as an elementary school teacher (July 1985).

3. Petitioner has been employed by respondent in the Lincoln School, initially as a certified aid during the 1985-86 school year, and she taught compensatory education from February 5, 1987 through the 1989 school

year in grades two to eight. From September 1989 through June 1991, she taught seventh- and eighth-grade English and reading.

4. Because of the temporary closing of No. 2 School, respondent found it necessary to lay off seven teachers, including petitioner, and did so by voting to give a thirty-day notice of termination of employment at a special meeting on August 15, 1991.

5. The RIF applied to petitioner on September 16, 1991, and petitioner was rehired by respondent on March 2, 1992. She was on maternity leave from April 8, 1992 through May 30, 1992, and returned on June 1, 1992 as a second-grade teacher.

6. Respondent retained an employee, Eagleson, as a teacher of computer/keyboarding, who commenced his employment with respondent on September 1, 1987.

7. Eagleson was certified as an elementary-school teacher and teacher of social studies (June 1983). There is no special certification to teach computer/keyboarding.

8. Petitioner attained tenure with respondent on February 5, 1990, and Eagleson obtained tenure on September 4, 1990.

9. At the time of the RIF, petitioner was on Step 5 of the negotiated salary guide, earning a salary of $27,275.00.

10. Petitioner's monthly salary was $2,727.50. She received payment from respondent in September for one-half month, or $1,363.75. That amount for the balance of September and for the following five full months through February 1992 amounts to a total of $15,001.25, which petitioner claims she would have received if she had not been affected by the RIF.

11. Petitioner received unemployment benefits of $6,790.00 during the time she was unemployed and an additional $600.00 from respondent for

substitute teaching, for a total of $7,390.00. The resulting loss of pay to petitioner is $7,611.25.

12. In addition to the loss of salary, Petitioner claims the following lost benefits:

    (a) Contributions to the pension fund and Social Security;

    (b) Loss of seniority rights for the break in service; and

    (c) Medical benefits. In this regard, petitioner was treated as a new employee upon her return on March 2, 1992, and a portion of her medical expenses for the birth of her child on April 9, 1992, were not covered by insurance.

13. No other employees of respondent would be affected if petitioner prevails.

FINDINGS OF FACT

Petitioner testified on her own behalf, and several documents were moved into evidence by her. Joint exhibits in support of the stipulations were also moved into evidence. Respondent did not present any witnesses.

Petitioner testified regarding medical expenses incurred by her in relationship to her pregnancy, as well as medical expenses incurred by her husband, and her reasons for not maintaining medical coverage through respondent at her own expense during the period she was unemployed. Petitioner maintained records on her personal computer, based upon billings sent to her, of the medical expenses in question, and she testified regarding those records. Petitioner also testified that based upon her prior experience, all medical expenses incurred would have been covered, if she had continued her insurance coverage, by a combination of payments by her own insurer as well as that of her husband.

Respondent argues that petitioner has not presented sufficient credible evidence to establish medical expenses incurred, as well as coverage. I am persuaded by respondent's arguments regarding coverage, but not by the Board's analysis pertaining to costs incurred

Petitioner was a credible witness, who impressed me as being very well organized. Although it would have been helpful to have copies of the bills in question in the record, petitioner's records were extremely detailed, including dates of service provision, names of doctors, types of services provided, as well as invoice numbers and charges. I am persuaded that petitioner has established, by a preponderance of the credible evidence, the amount of medical expenses incurred by her and her husband.

However, I am not persuaded that petitioner has met the burden of demonstrating, by the weight of the evidence, what expenses would have been covered if she had maintained insurance coverage. Questions pertaining to coverage are not as straightforward as inputting into personal records information from invoices. By petitioner's own testimony, certain expenses in the past have been excluded from coverage based upon policy exclusions. It is reasonable to assume that petitioner's medical insurance policy defines services covered and specifies exclusions. In the absence of testimony by an individual knowledgeable of the details and application of the insurance policies in question, the absence in the record of copies of the insurance policies for both petitioner and her husband is a fatal defect.

Based upon a review of the entire record, I **FIND** the following to be additional **FACTS.**

A special meeting of the Board was conducted on August 15, 1991. The minutes of this meeting are as stated in Exhibit J-4.

Petitioner's insurance coverage ended on October 31, 1991. Her husband, during the time in question, was covered by the Cigna Insurance Company (Cigna). The cost for petitioner to have maintained coverage via respondent pursuant to the system referred to as COBRA during her period of unemployment would have been $405.31 per month. The cost to continue coverage for the months of November 1991 through May 1992 would have been $2,431.86. Upon receiving notification of her termination under the RIF, petitioner was advised that she could continue her coverage under COBRA at the rate of $405.31 per month. Petitioner was also advised, prior to her termination, that her insurance coverage would end on October 31, 1991. Petitioner was pregnant at the time she was RIFfed. Upon her return to

work, petitioner was not covered by insurance through her employment for an additional sixty days.

Petitioner did not maintain insurance on her own during the period in question because, based upon discussions with her husband, she concluded that it was cost prohibitive. More specifically, petitioner considered the fact that she did not know whether or when she might find another position and also the fact that she did not anticipate anything other than a routine pregnancy and delivery. As it turned out, petitioner unexpectedly had to undergo a caesarean procedure. Petitioner's prior practice regarding insurance claims pertaining to herself was to submit bills to the Board's insurance company and the balance of any unpaid bills to Cigna. Petitioner's practice in the past was also to save a portion of her employment remuneration.

Total unpaid expenses incurred by petitioner in relationship to the delivery of her child not covered by Cigna were $2,076.39. In addition, petitioner's husband incurred medical expenses of $220 in January 1992 Of this amount, $56 was covered by Cigna, leaving a balance of $164.

CONCLUSIONS

The Commissioner of the Department (Commissioner) generally has jurisdiction to hear and determine all controversies and disputes arising under the school laws. *N.J.S.A.* 18A:6-9. Tenure and the implementation of RIFs are addressed in the school laws.

The services of all teaching-staff members and other employees in positions requiring them to hold appropriate certificates shall be under tenure during good behavior and efficiency. Such individuals shall not be dismissed or reduced in compensation except for inefficiency, incapacity, unbecoming conduct, or for other just cause, and then only in a specified manner after employment in a school district or under any board of education for certain specified time periods not at issue in this case. *N.J.S.A.* 18A:28-5.

However, tenure provisions do not limit the right of any board of education to reduce the number of teaching staff members whenever, in the judgment of the board, it is advisable to do so for reasons of economy, because of a reduction in the

number of pupils, because of changes in the administrative or supervisory organization of a district, or for other good cause. *N.J.S.A.* 18A:28-9. Such dismissal shall be made on the basis of seniority according to standards to be established by the Commissioner with the approval of the State Board of Education (State Board). *Id.* at §28-10. The local board of education shall determine seniority of the persons affected according to such standards and shall notify each person of his or her seniority status.

The board may request that the Commissioner issue an advisory opinion regarding the applicability of the standards to particular situations. Such a request shall be referred to a panel composed of the County Superintendent, the Secretary of the State Board of Examiners, and the Assistant Commissioner of Education designated by the Commissioner. An advisory opinion shall be furnished by the panel. Such opinion shall not be binding upon the board of education or any other party in interest or the Commissioner or State Board if any controversy or dispute arises as a result of such determination and an appeal therefrom. *N.J.S.A.* 18A:28-11. Any teaching staff member dismissed as a result of a RIF shall remain on a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified. Such individual shall be reemployed if and when such vacancy occurs. *Id.* at §28-12.

The State Board is authorized to issue appropriate certificates to teach pupils in public schools operated by boards of education. *N.J.S.A.* 18A:6-38. No staff member shall be employed in the public schools by any board of education unless he or she is the holder of a valid certificate. *N.J.S.A.* 18A:26-2. In establishing standards of seniority, the Commissioner shall classify, to the extent practical, the fields or categories of administrative, supervisory, teaching, or other educational services which are being performed in the school district and may, in his discretion, determine seniority upon the basis of years of service and experience within such fields or categories of service, as well as in the school system as a whole, or both. *N.J.S.A.* 18A:28-13. The services of any teaching staff member who is not the holder of an appropriate certificate, in full force and effect, issued by the State Board, may be terminated without charge or hearing. *Id.* at §14.

The Department has promulgated regulations regarding seniority and certification. The State Board of Examiners is granted the authority to grant

appropriate certificates to teach in public schools operated by district boards of education. *N.J.A.C.* 6:11-2.2. The State Board shall issue three educational certificates: an instructional certificate, an administrative certificate, and an educational service certificate. The State Board may issue for each certificate a special endorsement under the appropriate certificate. *Id.* at §2.3

The requirement of certification applies to any person who is employed by a district board of education to perform duties that are regulated by the certification rules. *N.J.A.C.* 6:11-3.1(a). Each newly-employed or reassigned teaching member shall be required to exhibit an appropriate certificate before assuming responsibility for the performance of regulated duties. *Id.* at §3.1(b).

District boards of education shall assign position titles to teaching staff members which are recognized in the pertinent rules. *Id.* at §3.3(a). If a district board of education determines that the use of an unrecognized position title is desirable, or if a previously established unrecognized title exists, the board shall submit a written request for permission to use the proposed title to the county superintendent of schools prior to making an appointment. The county superintendent is authorized to make a determination of the appropriate certification and title for the position. Decisions rendered by county superintendents regarding titles and certificates for unrecognized positions shall be binding on future seniority determinations on a case-by-case basis. *N.J.A.C.* 6:11-3.3(b).

The standard certificate is a permanent one issued to candidates who have met all requirements for State certification. *N.J.A.C.* 6:11-4.1. Each teaching endorsement is required for the corresponding teaching assignment. Each endorsement is valid for all levels, except that the elementary endorsement is valid for grades nursery through eight in all public schools. *Id.* at §6.1(a) & 6.2(a)6. Teachers with elementary endorsements are not permitted to devote more than one-half time to teaching art, music, health, home economics, industrial arts, or physical education in elementary grades. *N.J.A.C.* 6:11-6.1(b).

Teaching endorsements and authorizations are specified in the applicable regulations. The elementary education endorsement authorizes its holder to serve as an elementary-school teacher in grades nursery through eight in all public schools.

Teachers with elementary endorsements are authorized to teach the common branch subjects, such as reading, writing, arithmetic, and spelling, in the secondary school. *N.J.A.C.* 6:11-6.2(a)6. The English endorsement authorizes the holder to teach English in all public schools. *Id.* at §(7). Similarly, the social studies endorsement authorizes the holder to teach social studies in all public schools. *Id.* at §(21). There are no endorsements and authorizations specified for computer and/or keyboarding.

Seniority is required to be determined according to the number of academic or calendar years for employment, or a fraction thereof, in the school district in specific categories as provided for in the pertinent regulations. *N.J.A.C.* 6:3-1.10(b). Whenever a person holds employment simultaneously under two or more subject-area endorsements or in two or more categories, seniority shall be counted in all subject-area endorsements and categories in which he or she has been employed. *Id.* at §(f).

Where the title of any employment is not properly descriptive of the duties performed, the holder thereof shall be placed in a category in accordance with the duties performed, not by title. If the title of any employment is not found in the certification rules or the seniority rules, the holder of the employment shall be classified as nearly as may be according to the duties performed, pursuant to the provisions of *N.J.A.C.* 6:11-3.6. *N.J.A.C.* 6:3-1.10(g). Whenever a person shall move from or revert to a category, all periods of employment shall be credited towards his or her seniority in any and all categories in which he or she previously held employment. *Id.* at §(h). Whenever any person's particular employment shall be abolished in a category, he or she shall be given employment in the same category to which he or she is entitled by seniority. *Id.* at §(i).

The regulations pertaining to seniority set forth twenty-one specific categories. *N.J.A.C.* 6:3-1.10(l). That pertaining to "elementary" includes kindergarten, grades one through six, and grades seven and eight, without departmental instruction. *N.J.A.C.* 6:3-1.10(l)20. Any individual employed at the elementary level in a position requiring an educational service certificate or a special field endorsement shall acquire seniority only in the elementary category and only for the period of actual service under such educational services certificate or special subject field

endorsement. *Id.* at §20(ii). The regulations in this respect recognize additional categories of specific educational service endorsements issued by the State Board and listed in the State Board's rules pertaining to teacher certification (*N.J.A.C.* 6:11). *N.J.A.C.* 6:3-1.10(l)21.

There is no question that petitioner's seniority rights were violated. As stipulated, she had more seniority with respondent than did Eagleson. Both had certifications in elementary education and petitioner, as indicated, had an additional certification in reading; and Eagleson, in social studies. It is clear from the applicable statutory and regulatory provisions that the concepts of certification and tenure based upon seniority are crucial. As discussed, there are no specific certifications or endorsements for computers and/or keyboarding. There is nothing in the record on which to base any findings or conclusions that, based upon their certifications, Eagleson should have been retained and Takakjian RIFfed. To the contrary, in light of petitioner's greater seniority, the conclusion that he should have been RIFfed and she retained is compelling It is clear that petitioner is entitled to an award of back pay. As noted hereinabove, respondent does not, in fact, dispute that she is. In addition, the amount of back pay to which she is entitled is not in dispute.

Respondent argues, however, that petitioner is not entitled to an award of interest or to any relief related to loss of medical coverage. I am persuaded that Takakjian is entitled to relief pertaining to loss of medical coverage, but not to an award of interest.

Baten et al. v. Oakland Board of Education, OAL DKT. EDU 7871-85 (July 15, 1986), modified, Comm'r of Ed. (August 25, 1986) (*Baten)*, involved a case in which a tenured part-time teacher employed by the Oakland Board of Education failed to offer a full-time position to Baten, who was subject to a RIF in violation of her seniority rights. In determining that Baten should receive credit for the difference between seniority for part-time service rendered and the full-time service improperly held from her, the Commissioner stated the following:

> Her entitlements extend to all those which served to make her whole, i.e. all emoluments and benefits she would have received had she been properly assigned by the Board, including any difference in seniority credit between that actually received and what she would have received had she actually filled the position. [Commissioner's Decision at 5]

Similarly, in *Camille v. Board of Education of the Northern Highlands Regional District*, OAL DKT. EDU 5752-84 (Nov. 14, 1984), adopted, Comm'r of Ed. (Jan. 3, 1985) (*Camille)*, the Commissioner determined that the school district had violated petitioner's seniority rights and therefore directed the school board " . . . to assign petitioner immediately to the position to which he is entitled and to provide him any salary, benefits, and emoluments that may have been lost as a result of the Board's improper actions in denying him the full-time physics position." Commissioner's Decision at 6.

There is no question that Takakjian would have been entitled to medical insurance coverage during the period in question but for the improper action of respondent in subjecting her to a RIF in violation of her seniority rights. I am persuaded that she should be placed in a position in which she would have been had the Board not taken the action in question.

The statutory powers of an agency should be liberally interpreted to allow it to achieve the task assigned to it. An administrative agency has implied incidental powers as may reasonably be adapted to that end. Such incidental powers have been extended to the fashioning of remedies, including the award of specific items of compensatory damages not expressly enumerated by statute *Newark Board of Education v. Levitt*, 197 *N.J. Super.* 239 (App. Div. 1984) (*Levitt)* It is reasonable to construe "emoluments" as encompassing all benefits, including medical coverage, to which a tenured individual would have been entitled but for improper action by a local school board. The granting of seniority in *Baten* is analogous to the relief requested by petitioner in this respect. Such a result is especially equitable in light of the fact that it is the responsibility of a local school board to ensure that a tenured employee's seniority rights are not violated when making personnel determinations. *See Camille* at 9.

The more difficult question presented in this case is what specific relief should be granted to petitioner. Respondent's argument that petitioner should have expended funds to continue insurance through COBRA and then sought monetary relief from the Board has some merit on its face. However, adoption of respondent's position would mean that an individual finding himself in petitioner's position might have to forgo coverage because of monetary considerations. It is also noted,

parenthetically, that such a measure of damages has the potential to cost local school boards monies far in excess of the rate for individual employees to continue coverage under COBRA. On balance, I am persuaded that the risk in this respect is more equitably placed on the local school board, which, as discussed, has the responsibility to insure that seniority rights are not violated. Petitioner would not have been placed in a position of having to make a difficult decision if respondent had not taken action in violation of her seniority rights.

An alternative measure of relief might be the cost to provide insurance coverage for petitioner to respondent, if such would have been lower than the COBRA rates. However, respondent offered no evidence in this respect.

In light of my determination that petitioner has not provided sufficient credible evidence regarding the costs not covered by Cigna which would have been covered through her own coverage, the amount of uncompensated costs should not be an explicit measure of damages in this case. Based upon the circumstances of this case, I am persuaded that an equitable measure of relief for petitioner, although not a totally precise one, is a monetary award which is the equivalent of the amount it would have cost petitioner to continue coverage through COBRA for the period in question. However, as a practical matter, the cost to petitioner to have continued medical coverage for the months of November 1991 through May 1992 exceeds the total amount of medical expenses which were not covered. Therefore, based upon the specific facts of this case, I am persuaded that petitioner's relief should be the equivalent of the costs which were not covered ($2,240.30), notwithstanding that I am not persuaded that Takakjian has sufficiently demonstrated what, if any, portion of this amount would have been covered via her insurance coverage from respondent.

Although the Commissioner does not have the express statutory authority to grant prejudgment or postjudgment interest, it is " . . . an ancillary power which he must be deemed to have in order to fully execute his statutory responsibility to hear and determine all controversies and disputes arising out of the school laws." *Levitt,* 197 ***N.J. Super.*** at 245.

The Commissioner's powers are of "great breadth"; he has "fundamental and indispensable jurisdiction over all disputes and controversies arising under the school

laws." *Id.* at 246. The Commissioner's jurisdiction over school litigation includes questions regarding tenure rights and permits the Commissioner to fix dollar amounts due for retroactive benefits when a question of the accrual of tenure rights is resolved in a teacher's favor. *Id.* Interest on a money award is an essential part of the award itself since the purpose of the fixed-sum award is to make a petitioner whole. Prejudgment interest is in contemplation of "damages" for the illegal detention of a legitimate claim or indebtedness. As such, it serves to indemnify a claimant for the loss of what the monies due him or her would presumably have earned if payment had not been delayed. 197 *N.J. Super.* at 246.

Regulations promulgated by the Department grant the Commissioner the authority to award prejudgment and/or postjudgment interest in any circumstances in which a petitioner has sought such relief and has successfully established a claim to a monetary award. *N.J.A.C.* 6:24-1.16(a). Prejudgment interest is that interest awarded from the period of time prior to the adjudication of a monetary claim, and postjudgment interest is interest determined by the Commissioner to be due to a petitioning party for that period of time after a claim has been successfully adjudicated but remains unsatisfied *N.J.A.C.* 6:24-1.16(b). Certain specified criteria apply when awarding interest. Prejudgment interest shall be awarded when the Commissioner has concluded that the denial of the monetary claim was an action taken in bad faith and/or has been determined to have been taken in deliberate violation of a statute or rule. *Id.* at §(c)1. The interest rate shall be based on the average rate of interest earned on investments by the party responsible for such payment during the period of time when the monies awarded were illegally detained. *Id.* at §(d)1.

Respondent argues that prejudgment interest should not be granted because the Board, in reaching its RIF determinations, concluded that the curriculum and implementation of computer programming were of paramount importance to provide the best education of students as mandated by statute. In this respect, respondent argues that petitioner was discharged because her computer credentials were not as strong as those of the retained teacher and that, in light of the fact that this area of law is uncertain, the Board determined that the best course of action had to be based upon the principle of providing a curriculum most beneficial for the students.

As petitioner argues, however, there is nothing in the evidence or in the stipulation of facts to support such assertions. The parties stipulated in pertinent part only that it was necessary for respondent to lay off seven teachers because of the temporary closing of No. 2 School. The minutes of the special meeting of August 15, 1991 shed no light on any additional considerations underlying the determination to RIF Takakjian. The Board's reliance on *N.J.A.C.* 6:3-1.10 is also misplaced. Respondent presented no evidence demonstrating that it complied with the requirements of that provision.

Notwithstanding, I am also not persuaded that petitioner has met the burden of demonstrating that the action in question was taken in bad faith and/or was taken in deliberate violation of applicable statutory or regulatory provisions. In this respect, I am not persuaded that an action contrary to seniority rights is per se a basis for granting prejudgment interest. Parenthetically, I also note that the methodology for computing interest advanced by petitioner is on its face not consistent with the applicable regulation.

I **CONCLUDE** that petitioner is entitled to an award of lost salary in the amount of $7,611.25; that petitioner is entitled to relief representing lost medical benefits and that a reasonable approximation of such benefits is $2,240.39; that petitioner is entitled to restoration of seniority rights; that petitioner is entitled to contributions to the pension fund and Social Security; and that petitioner is not entitled to prejudgment interest for the period between March 2, 1992 to November 2, 1992.

ORDER

It is hereby **ORDERED** that respondent reimburse petitioner, within sixty days of the effective date of this decision, in the amount of $7,611.25, representing lost salary, and the amount of $2,240.39, representing lost medical benefits, and that respondent restore to petitioner seniority rights and contributions to the pension fund and Social Security for the period in question.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

Date January 11, 1993 — **DIANA C. SUKOVICH**, ALJ

Receipt Acknowledged:

Date 1/14/93 — DEPARTMENT OF EDUCATION

Mailed to Parties:

Date JAN 19 1993 — OFFICE OF ADMINISTRATIVE LAW

le/e

APPENDIX

LIST OF WITNESSES

For Petitioner:
Elizabeth Takakjian

LIST OF EXHIBITS IN EVIDENCE

P-1	Note to petitioner from Barbara Tomaras
P-2	Document entitled "Maternity Bills"
J-1	Certification dated August 1980
J-2	Certification dated July 1985
J-3	Teacher's record pertaining to petitioner
J-4	Minutes of special meeting of August 15, 1991
J-5	Teacher's record pertaining to Robert Eagleson
J-6	Document listing teachers, dates of hire, and certifications, dated August 15, 1991
J-7	Certification dated June 1983

OAL DKT. NO. EDU 10530-91

ELIZABETH TAKAKJIAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FAIRVIEW, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon review of the initial decision, the Commissioner concurs with and adopts as his own the recommended decision of the Administrative Law Judge for the reasons set forth in the initial decision. The Commissioner notes for the record that the State Board of Education determined in South River Education Association et al. v. Board of Education of South River, 1987 S.L.D. 2724, that an elementary endorsement qualifies an individual to teach computer education at the elementary level.

FEBRUARY 18, 1993

COMMISSIONER OF EDUCATION

DATE OF MAILING - FEBRUARY 18, 1993

28-93

IN THE MATTER OF THE TENURE HEARING OF WARD CAMPBELL, PRINCETON REGIONAL SCHOOL DISTRICT, MERCER COUNTY.	:	
AND	:	
WARD CAMPBELL,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE PRINCETON REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Board certified nine charges of unbecoming conduct against respondent, tenured science teacher. Charges included racial statements to 7th/8th grade science class, inappropriate behavior during class, and school events, use of physical force, and continuing pattern of unprofessional conduct that triggered parent and student complaints.

In light of testimony, ALJ found that although respondent was capable of being an effective teacher, despite admonitions, he engaged in numerous instances of conduct that were sufficiently flagrant to warrant dismissal from employment. Respondent was ordered dismissed from his position. Petition of appeal concerning increment withholding was dismissed as ALJ found Board acted properly in withholding respondent's 1991-92 increment.

Commissioner adopted findings and determination in initial decision and referred matter to State Board of Examiners for further appropriate action.

FEBRUARY 19, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6883-91
AGENCY DKT. NO. 240-6/91
OAL DKT. NO. EDU 159-92
AGENCY DKT. NO. 411-11/91
CONSOLIDATED

BOARD OF EDUCATION OF THE PRINCETON REGIONAL SCHOOL DISTRICT,
Petitioner,
v.
WARD CAMPBELL,
Respondent.

WARD CAMPBELL,
Petitioner,
v.
BOARD OF EDUCATION OF THE PRINCETON REGIONAL SCHOOL DISTRICT,
Respondent.

Mark J. Blunda, Esq., Of Counsel and on the Brief; **Karen M. Sottell,** Esq., on the Brief for petitioner-respondent Board (Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, P.A.)

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

Record Closed: October 8, 1992 Decided: November 20, 1992

BEFORE **DANIEL B. McKEOWN,** ALJ, t/a:

On April 29, 1991 Ward Campbell (or respondent) who is a teacher with a tenure status in the employ of the Princeton Regional School District Board of Education (Board), was advised that the Board determined to withhold an employment and adjustment salary increment from his salary for 1991-92. Petitioner Campbell appeals that action on the basis that the withholding of salary increments from him by the Board is arbitrary, capricious, without good cause, in bad faith and contrary to N.J.S.A. 18A: 29-14. On November 20, 1991 the Board determined to certify nine charges of unbecoming conduct against respondent Campbell to the Commissioner of Education for determination under the provisions of the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10, et seq., and suspended him without pay under N.J.S.A. 18A:6-14. The Board seeks respondent's removal from its employ. After both matters were transferred July 15, 1991 by the Commissioner to the Office of Administrative Law as contested cases under the provisions of N.J.S.A. 52:14F-1 et seq., an Order consolidating both actions was entered without objection. A hearing was conducted in both matters on ten separate days between April 9 through June 10, 1992 at the Office of Administrative Law, Mercerville. Thereafter, counsel for the parties filed briefs in support of their respective positions. The record closed September 28, 1992 upon receipt of simultaneously filed reply letter memoranda.

Findings are reached in this initial decision that certain charges certified against respondent by the Board are proven true in fact. The conclusion is reached that the termination of employment is warranted due to the gravity of the conduct so proven. Petitioner Campbell's petition of appeal by which he challenges the Board's action to withhold the salary increments from him for 1991-92 is dismissed for failure of Campbell to demonstrate that that action is, under the circumstances, improper in any manner.

OVERVIEW OF CHARGES

The nine charges of unbecoming conduct filed with the Board by the superintendent of schools allege respondent Campbell (1) made inappropriate racial statements to a seventh/eighth grade science class during the 1991-92 school year; (2) made inappropriate racial statements to his middle school advisees during the 1991-92 academic school year; (3) made inappropriate and sexist comments to a female student during the 1991-92 academic year; (4) exhibited crude behavior during class and announced he has been known to use physical force; (5) shoved a student and caused him to fall over a chair; (6) directed and/or manipulated a

student to recant a particular statement and to tell an untruth to the school administration in order to save himself, respondent, from potential disciplinary action; (7) bragged to the school administration that he disciplined a student for use of a "walkman" in class by throwing the student's walkman into the class aquarium; (8) had unjustified and inappropriate physical contact with various students; and, (9) during the course of his career engaged in a pattern of unprofessional conduct triggering complainant from parents, students and administrators which demonstrate he is unsuited to remain as a teaching staff member in the Princeton School District. Each of these written charges is accompanied by detailed specifications which shall be presented, along with the proofs of the parties regarding each charge, and findings thereon.

BACKGROUND

The extensive evidence in this case portrays respondent as either a highly-skilled professional who dedicates himself to being an effective teacher and role-model for all pupils, particularly low-achievers and minority pupils in general, or as an individual who, while possessing the qualities necessary to be a highly skilled professional and effective teacher when he so chose, is also highly skilled in denying, or at the very least, deflecting responsibility for his own conduct which he knew or should have known was offensive and highly unprofessional. The Board explains, which is not disputed by respondent, that an Agreement between the Board and the Association provides, in part, that complaints regarding teachers must be made in writing. (See CA-47, 48, & 49) If complaints were not reduced to writing, Witherspoon Middle School Principal William Johnson, who plays a major role in this case, understood such complaints to be without supporting fact and, thus, he would not consider them in the performance evaluation regarding the complained of teacher.

Following graduation from Rutgers College in 1975, respondent was employed by the Franklin Board of Education for two years until a reduction-in-force occurred. He then came to his present employment with the Princeton Board. Campbell possesses certification in comprehensive sciences, grades kindergarten through 12, and he holds endorsements to teach agriculture and environmental studies.

Generally, the written observations and evaluations of performance in this record portray, facially at least, respondent as a person who has been gifted with innate talents which, when combined with his academic capacity for the teaching of

sciences, make for a remarkable teacher. He was initially employed by the Board for the 1977-78 academic year as a teacher of science, assigned to the John Witherspoon Middle School. Campbell remained at the middle school through 1983-84 but then was assigned to Princeton High School for 1984-85 to teach a variety of sciences courses. He remained at Princeton High School through 1985-86 when he was granted a leave of absence by the Board for 1986-87 and 1987-88. During Campbell's two year leave of absence for 1986-87 and 1987-88 he lived and worked in Nagoya, Japan. (See CA77-82) He also studied Aikido which he describes as a martial discipline. In Campbell's words regarding his interest in Aikido,

> I had been studying ecology for a long, long time *** before college - - and I had become fascinated with what I perceived to be the - - energy - - the forces in nature and how despite their differences every Ecosystem follows the set of dynamics, the same set of principles through stars. But after a period of time I went searching to find someone who is teaching it and *** found that it was being offered by YMCA right in town. I enrolled in Aikido classes at the Y. *** The people were nonaggressive *** [T]he entire premise in Aikido is that it's entirely defensive in posture. That it works in harmony with the forces of life, forces of the earth. And that any aggressive action or activity is simply redirected and turned to the ground or against the aggressor *** I guess that I had some kind of capability *** [M]y instructor -- who is Japanese *** observed my practice and my development and I was kind of a precocious student *** and [he] invited me to come study with him in [Japan]. ***
>
> (6T:69-71)

Along with studying Aikido, Campbell also taught English at a YMCA in Japan, functioned as an instructor at the high school level for the Nagoya Board of Education and taught at the University level. Campbell was also employed by a translation firm in Japan to rewrite certain materials.

Campbell returned to active employment with the Board for 1988-89 and continued in his assignment at the high school. He remained at the high school through 1989-90 and 1990-91, but was reassigned to the Middle School for 1991-92.

Respondent's teaching assignments during the course of his employment with the Board included seventh and eight grade science at the Witherspoon Middle

School, biology, geology, meteorology, oceanography, environmental studies, astronomy, earth science, life science, and physical and biology sciences at Princeton High School. After respondent was awarded a baccalaureate degree from Rutgers College of Agriculture and Environmental Sciences, he acquired a master's degree from the New Jersey School of Conservation and Montclair State College, and he has completed all course work necessary to be issued a school administrator's certificate. In addition, Campbell studied environmental education in England under the auspices University of Pennsylvania, he has attended many workshops sponsored by the New Jersey Science Teacher Association, the New Jersey Earth Science Teachers Association, the Marine Sciences Consortium, the New Jersey School of Conservation, the Agricultural Extension Service, and the Soil Conservation Service. He has taken courses under the auspices of the National Science Foundation at Trenton State College in physics and energy related problems and under the same sponsorship he took a course in geology at Princeton University. Finally, respondent explained he was admitted to a post-masters program at Drexel University where he successfully completed a program in environmental chemistry.

During the course of his employment with the Board, respondent Campbell was awarded a $1,000 grant from the Exxon Research and Engineering Company in recognition

> *** [of] your dedicated and outstanding work as a educator and teacher, your leadership in applying novel teaching methods, for continuously the standards of high school education, the mentorship you provide to your students and the high level motivation you instill in them.
>
> (CA-72)

In addition, Campbell testified that Exxon also awarded him a personal computer and printer for use in his classroom to assist in the preparation of class assignments and to create a data base for his pupils to access.

Finally, Campbell, aside from all other activities listed above, was involved in extracurricular coaching assignments for the Board in soccer and as an assistant coach for the girls' basketball team. He says he spent many hours after school tutoring pupils and creating a pupil publication, Shadow Branches (CA-62), for science.

Respondent's service as a teacher to the Board was at least rated as satisfactory for he acquired a tenure status of employment. In fact, Witherspoon Middle School Principal William Johnson wrote the following recommendation to the then superintendent urging that Campbell be reemployed for 1980-81 which recommendation was followed, and of course, Campbell then acquired tenure. The recommendation is reproduced here in full:

> This recommendation is based on evaluations, conferences, and observations of Mr. Campbell's teaching by me during the past three years.
>
> During his tenure as a teacher at the John Witherspoon Middle School, Mr. Campbell has consistently performed his duties as a teacher of science in a highly satisfactory manner. He is very knowledgeable in his field and possesses the skill to impart the knowledge to his students in a very successful manner.
>
> Mr. Campbell's classroom is organized for a variety of science experiences to take place. Plants, simple machines, various solar gadgets and scientific pictures are on display. He and his students take pride in constantly changing and updating the displays.
>
> He utilizes a variety of teaching techniques that maintains a balance of lecture, class discussions, seat work, homework, and experimentations in an organized and productive manner.
>
> In the three years he has been at the middle school he has served as chairman of our Environmental Education Committee and boys lacrosse coach. For the past two years he has been one of the staff's faculty liaison representatives to the middle school PTO.
>
> His rapport with parents, staff and students has become very satisfactory. He has learned the basics that are effective with Princeton parents, students and staff. Knowing what is expected, Mr. Campbell has been very effective.
>
> I'm pleased to have an enthusiastic and energetic professional of his stature on the middle school staff. I recommend with enthusiasm

and without hesitation that Mr. Campbell be granted tenure as a teacher in the Princeton Regional School District.

Observation reports and evaluations based on those observations (CA-1 through CA-14) preceding Johnson's recommendation that Campbell be allowed to acquire tenure through continued employment tend to support what appears to be Johnson's unqualified, laudatory recommendation on his behalf. The observations and evaluations contain remarks such as respondent is very confident about his ability, he has excellent rapport with students, he is very knowledgeable in the area of environmental education and has contributed significantly to the district's environmental education curriculum guide, he provides leadership, he is unselfish in giving time to his students and he has brought youthful exuberance to the faculty. Such comments are sprinkled liberally throughout respondent's observations and evaluations even during post-tenure years when he engaged in certain conduct which now forms the bases for various tenure charges.

Nevertheless, there are signals contained within several observations and evaluations which reveal respondent's teaching performance had areas in need of improvement not mentioned in Johnson's letter recommendation for tenure. More significantly, each signal for improvement was disclosed by school administrators despite his denials which are spread throughout this record. The areas needing improvement were not improved by respondent after he acquired tenure which, in turn, resulted in these charges of conduct unbecoming.

The very first observation report (CA-1) prepared by Principal Johnson during November 1977 mentions Johnson's concern that Campbell's self-assuredness hinders him from acquiring assistance from his peers and, consequently, Johnson suggested Campbell seek alternative ways to bring about change without offending his colleagues. The next observation (CA-2) prepared during February 1978 show's Johnson advising Campbell to be aware patience and a calm attitude in stressful situations with parents will bring about positive results. Thereafter, Johnson suggested Campbell evaluate his assignments frequently to insure they are not unrealistic for his students (CA-3), that he not, through his own conduct and speech, communicate to pupils in his class they have license to misbehave (CA-8) (CA-9), that shy students generally due poorly in large group setting and alternative ways of allowing such pupils to achieve must be found (CA-10), that he continue to work on his professional posture and maturity and continue to find alternative ways to deal with lower achieving students (CA-11).

Despite the foregoing suggestions for improvement which imply something less than acceptable performance in the identified areas, Campbell's observations and evaluations except two, continued to be laudatory after he acquired tenure, although as before, various observations do recommend areas for improvement. One unsatisfactory evaluation (CA-24) occurred during May 1984 and will be discussed with Charge Nine, while another unwritten, though unsatisfactory, evaluation occurred when respondent was notified April 29, 1991 the Board determined to withhold salary increments for 1991-92 for conduct unbecoming which action is contested here. (See PS-18)

Consequently, the evidence portrays respondent as a teacher with many talents who, simultaneously by his conduct before and after he acquired tenure, offended individuals or groups because of impatience, anger, frustration, arrogance, a lack of maturity, or a lack of professional judgment. Until the Board acted on April 23, 1991 to withhold respondent's salary increments no formal disciplinary action had ever been recommended to be taken against him by school administrators with one exception. During May 1984 when respondent's performance was initially evaluated as unsatisfactory, Principal Johnson recommended to the then superintendent that his salary increments be withheld. The then superintendent, who had recommendations from other principals to withhold increments of other teachers, was persuaded by the teachers' association that to withhold increments from several teachers would send a "bad message" to the Princeton community. Consequently, the then superintendent refused to forward Johnson's recommendation, and others, to the Board. During his employment at Princeton, respondent was issued three written reprimands because of his conduct.

It is noted that during 1979 a study was published and circulated in the Princeton Community entitled The Education of Black Students in Princeton Regional Schools by a Princeton teacher who had been granted a sabbatical leave in order to perform the work. She investigated reasons why the Princeton Regional Schools continue to be desegregated, but not integrated, in spite of the level of asserted sophistication of Princeton citizens and why a disproportionate number of black students seem to make up the rosters of special education and remedial classes despite efforts to improve basic skills levels and thereby raise levels of student achievement. (CA-59) That study was followed by another study entitled Review and Analysis of Special Education Programs and Child Study Team Services in the Princeton Regional Schools. This study was published and circulated as well in June

1984 by PACE Clinical Services, Inc. Part of this study focused on minority group representation in special education and found that while black children make up 12% of the total student population they account for 41% of all students found to be in need of special education. (CA-62) Finally, a study (CA-60) was published, date and author unknown, which had as its objective to identify appropriate intervention strategies to address inequities in minority student program participation and academic performance at Princeton. In addition to these studies, local newspapers reported on September 1, 1991 that the Princeton School District was awarded a $440,000 state desegregation grant to support programs for minority students and broaden its multicultural curriculum. (CA-74) In the meantime, other newspaper articles appeared regarding a community group having been formed whose goal was to improve the education of minority students in Princeton (CA-69), regarding special public meetings the Board held during December 1991 to discuss a report showing black and hispanic students do not perform as well as their white and Asian counterparts (CA-70), a report on December 20, 1991 of members of the administration meeting with community members to discuss ways to improve the academic performance of the district's minority pupils (CA-63 &66), a newspaper report on December 25, 1991 regarding requests made to the Board to take action in order to raise minority student performance (CA-64), and similar kinds of newspaper reports.

Respondent relies on the studies as well as the newspaper reports circulated throughout the community of Princeton along with what he says was his personal well-known concern for the lack of performance by minority students as justification for certain remarks he made to a pupil and remarks he made to other pupils during the afternoon and morning of September 11, 1991 and which form the bases for Charges One and Two. Moreover, Campbell relies on the circulation of the newspaper reports to demonstrate that the subject matter of his remarks is a matter of public concern and, as such, the remarks he made are protected speech under the First Amendment.

PROOFS ON THE CHARGES

Proofs in support of Charges One and Two shall be considered consecutively, after which findings on each charge shall be entered, because the alleged underlying conduct is similar and was to have occurred on the same day.

CHARGE ONE

The specifications to the allegation respondent made inappropriate racial statements to a seventh/eighth grade science class during 1991-92 are as follows:

* * *

2. On Wednesday, September 11, 1991, between 1:55 and 2:40 p.m., Ward Campbell was assigned to teach a 7th/8th grade science class.
3. During the course of the class Ward Campbell directed that A.A., a Black, male student, move to a seat and table closer to the front of the classroom.
4. Upon moving A.A.'s seat, Ward Campbell stated to A.A. words to the effect that, "I'm going to have to give you my Blacks in Princeton speech."
5. Ward Campbell's "Blacks in Princeton" statement was made in a voice loud enough to be heard by the other students in the class.
6. During the course of the same 7th/8th grade science class Ward Campbell disparaged the manner in which Black people spoke and stated that it was necessary to correct their speech.
7. During the course of the same 7th/8th grade science class Ward Campbell indicated that Blacks and Whites should be separated.
8. The racial statements made by Ward Campbell were embarrassing, disturbing and upsetting to the students of the class and were reported to their parents.
9. The racial statements made by Ward Campbell during his 7th/8th grade science class on September 11, 1991 led to a disruption at Back to School Night on the evening of September 11, 1991 and a confrontation between Mr. Campbell and a parent.

* * *

Eight pupils who witnessed and heard comments made by respondent in regard to this charge (K.A., O.B., T.D., J.G., C.B., A.A., S.K., and N.S.) testified at hearing. A.A., who is black and to whom respondent directed the asserted racial remark on September 11, 1991 during an afternoon seventh/eighth grade science

class, had taken a seat at a table in the back of the classroom where several white pupils were already seated. A.A. began singing and talking in response to which respondent directed A.A. to take another seat in the front of the classroom. A.A. says that while simultaneously directing him to the front of the classroom, respondent stated that he, respondent, would have to give him his "Black People's talk about Princeton" and, eventually, that respondent said there has to be a separation between the races. Respondent denies saying anything regarding a "Blacks in Princeton speech" or separation of the races other than, and it is noted at counsel's suggestion on cross-examination of A.A., that black pupils have difficulty in high school because of the separation between black and white students. Respondent explains that what he did say to A.A. as he was directing him to the front of the classroom was "When you and I get the chance I want to talk to you of the special problems blacks have in high school. " Respondent says he made this statement in a low voice while standing next to A.A. as A.A. was seated at the front of the room.

However, K.A., a pupil who was present in the classroom at the time, testified that as respondent directed A.A. to the front of the classroom, she heard him exclaim to A.A. that he, respondent, would have to give A.A. his blacks in Princeton speech and that most of the kids that drop out of the high school are black and that minorities and Europeans should be separated. O.B., another pupil who was also present, is not certain what A.A. did but does recall that respondent said to him that he, respondent, was going to give him the speech about black people in Princeton. T.D., another pupil who was present, recalled A.A. was singing or talking in the back of the room when respondent told A.A. if he did not be quiet he would have to give him the speech about blacks living in Princeton, and that he, respondent, did not understand why minorities and Europeans were not separated, and that he, respondent did not like the way black people talked and he would have to correct A.A. every time he spoke a word.

J.G., another pupil who was present in the classroom, recalls that A.A. was sitting with a group of white pupils during which time he was singing and talking. According to J.G., respondent "yelled" at A.A. for sitting with them and told him to move. T.D. recalls that respondent exclaimed to the pupils that black and white pupils should not be sitting together and that he, respondent, did not like the way black people talked. On cross-examination, T.D. testified that she did hear respondent also tell A.A. that if he continued to misbehave he will have to tell him of the special problems black persons have in Princeton.

C.B., another pupil who was present in the classroom and heard and observed what occurred, testified that respondent did tell A.A. after having directed him to the front of the room that he, respondent, would have to give him the "Black People in Princeton talk". C.B. explained the 'black people in Princeton talk', as explained by respondent during an earlier class that day attended by C.B. and which forms the basis for Charge Two, is about three black girls that respondent had had in his class at the junior high school level. When the girls got to high school they got pulled in by other black pupils and they avoided their studies and did not succeed.

S.K., another pupil who was present in the classroom, recalls that after A.A. was singing in the back of the classroom, respondent told him to take a seat in the front of the room. Then, respondent was to have said to A. that they should have the "black kids in Princeton talk" after which respondent commented that black and whites should be separated in mind and reality and that A.A. "should get out now because you're [A.A.] going to be eaten alive in high school."

N.S., another pupil who was present in this classroom as well as the earlier class when respondent uttered certain remarks forming the basis for Charge Two, recalls that respondent uttered the substance of the asserted 'blacks in Princeton speech' to A.A. as he did in the earlier class. That is, N.S. recalls that respondent essentially stated that black pupils had to watch out when they went to high school because their black friends will try to make them just want to have fun and not study and that before they knew it they would fail high school.

In response to the comments attributed to respondent, A.A. felt sad, angry, and, I infer, humiliated because, in his view, teachers have to work with different kinds of persons from different races and should not make statements singling out black people. A.A. says that if respondent had something to say to him regarding his conduct, he should have talked to him after class but not in class particularly in the manner and content of the remarks made. Other pupils became angry, considered respondent a racist, thought respondent's comments were rude, surprising, and simply not right.

Respondent's recollection of the entire incident in the afternoon as well as during Back-to-School night is that despite school having been started for the year for several days, he was allowing pupils to sit where they wanted. A.A. reported to science class September 11 and took a seat in the back. He began singing. He was

talking with other pupils who were seated at the same table. Respondent asked A.A. to move his seat to the front of the room which he did. In respondent's words "I looked at him and I said when you and I get the chance I want to talk to you about the problems that are special to black students in the high school." In response to why he made such a statement to A.A., respondent replied as follows:

> [Because of the] phrase, students at risk. He [A.A.] absolutely was a person that I wanted to talk to impress upon him that singing in class and lack of any discipline on his own was not going to stand in good stead when it came to being successful.
>
> (6T-150)

Respondent denies ever using the language of giving a "Blacks in Princeton Speech"; he denies uttering any comment regarding the separation between whites and blacks or Europeans and non-Europeans; and, he denies uttering any comment regarding the need to correct the speech of black students. Respondent denies any student, including A.A. , said anything to him after what he admits he said to A.A. Respondent also denies any criticism regarding the speech of black persons.

However, the testimony of J.G. and T.D. regarding respondent's criticism of the way black people talk was independently corroborated by Assistant Principal Owen Schneider on rebuttal. Schneider testified that from time to time respondent, in conversation with him, would refer to black pupils by using a so-called black dialect. Schneider characterized the dialect as slurred speech, distinctly southern, with improper grammar. Schneider points out that respondent normally spoke without a southern dialect, unslurred and proper speech. Schneider also noted that respondent, in using this asserted black dialect, was not describing the manner of words as may have been uttered to him by black pupils; rather, from time to time he would simply recount an episode he had had with a black student by using a so-called black dialect. Nevertheless, Schneider did not raise any concerns he may have had with respondent for speaking in that manner. (10T:92,103)

A Back-to School Program was scheduled for that very same evening, September 11, 1991. When A.A. left school for the day, he went to the hospital to see his mother who had just given birth. A.A. told his mother of what happened in respondent's classroom and as described above. Mother told A.A. to tell his father. His father, Mr. A., accompanied A.A. to Back-to School night that evening and on the way A.A. told father. According to father, he thought the matter was a minor

incident due to A.A.'s misbehavior and told A.A. he would talk with respondent. In the meantime mother, after A.A. had left the hospital, told a mutual friend, Debra Curtis, who also happens to be a Board member. Ms. Curtis was at the school that evening and she told father of what mother had reported to her.

Father did not know respondent at the time, nor did he hear anything about respondent's reputation. He went to respondent's classroom in order to discuss the matter as reported to him by his son and to find out what occurred. When father arrived at the classroom, another group of parents was just breaking up. A.A. was with father. Other parents were filing into the classroom as well. Father, who acknowledges that by now he was upset because of conversations he had with other parents regarding respondent, introduced himself to respondent and asked what happened that afternoon in class. Respondent replied that that was not the time nor the place to discuss the matter and that he would discuss the matter with him later. Father then told respondent he was evading the matter and that if he was not hiding anything and if all that occurred was A.A. misbehaved and had to have his seat moved, then he would understand. But by respondent refusing to discuss the matter then and there, father believed and told respondent that something more was occurring other than what he was told by A.A. Father says that the other parents who were in the classroom also wanted to know what had occurred. Consequently, in light of respondent's refusal to discuss the matter he directed A.A. to report to the assembled group what had happened that day and A.A. began to explain. Father acknowledges he was "pretty close" to respondent and was holding his right finger very close to respondent's face, about one or two inches away. While father acknowledges raising his voice to respondent, he insists he was not shouting at him.

Respondent's recollection of the encounter with father during Back-to School night differs from that of father's. Initially, respondent notes that a policy at Back-to School night is teachers should not have private conversations with parents due to the number of parents that should be seen that evening. Respondent first noticed father, not because he knew him, but because he says father was "antsy", shifting on his feet, seemingly ill at ease. The classroom was filled with about 30 to 35 parents and pupils. Father took one step towards respondent and put his nose one quarter inch from respondent's, raised his left hand and stuck his finger in his face, and proceeded to scream at him with father's finger touching his, respondent's, eyelash demanding to know what occurred. Respondent replied that then was not the time to discuss the matter, while father continued to scream at him. Father was shouting

"This is how we have to treat people like you." All the while, respondent says, the whole room was yelling as if they were egging father on. Respondent recalls looking at father's fingernail and the fingertip, just for a second, and then according to the training he received in Akido began paying attention to father's "energy", not his finger. Then, according to respondent, father began to scream at him with his fingertip touching respondent's eyelash. Father was demanding to know what he had said to his son that afternoon and what he meant by it. Respondent replied that he had no idea who he was nor what he was talking about but that then was not the time nor the place to discuss whatever it was. Father continued to scream but respondent said three times he did not know who he was nor what he was talking about. Finally, respondent says he left the classroom, saw a teacher in the corridor, and asked her to get the principal.

After the principal arrived, respondent returned to the classroom where the principal was present. The principal got father to leave the classroom, and respondent finished his Back-to School duties. However, a meeting between and among father, A.A., the superintendent, Principal Johnson, Assistant Principal Turbeville, Board Member Curtis, and respondent was scheduled to be held that evening after Back-to School night.

Respondent says that at the meeting which was held after Back-to School night, he was "abused" again by father. As soon as respondent walked in to the meeting room, father began yelling at him again. Father complained that A.A. had told him he was misbehaving in class but that respondent said he had to give A.A. his talk about black people in Princeton. According to respondent, father proceeded to lecture him regarding a teacher's duty to always be positive and, having excused his son from the meeting room, told respondent that the reason he was angry in the classroom was that other parents were assuring him he, respondent, was of ill-repute and a child molester. Respondent recalls Board member Curtis making the statement that "children are afraid of you" and the superintendent asking him what he was going to do the following day when the children were afraid to come into his classroom.

The superintendent then directed the school principal, William Johnson, to investigate the entire matter and report back to her. The following morning, principal Johnson excused respondent from science class in which A.A. was enrolled so that he could secure statements from the pupils who were present during the incident. When respondent left the classroom, Johnson instructed the pupils that

they were to write out five questions he was about to ask and to which he wanted answers. After the pupils wrote out the questions as recited to them by Johnson, they were then to answer the questions independently, without talking to anyone and without "foolishness." Johnson also instructed that everything asked must be answered accurately based solely on their own knowledge and not what they heard from others. When the pupils finished answering the questions, Johnson collected the statements. The five questions posed to the pupils were:

1. What happened in class September 11, 1991 that required the teacher to move a student's seat?

2. What did you hear the teacher say re: seat change?

3. How long did the situation take place?

4. After the situation what did the teacher say and do?

5. What did the students do after he spoke to the class?

Principal Johnson collected statements from 23 pupils that day, each of whom was present the day before during the incident with A.A. It is noted that the statements collected by Principal Johnson also addressed respondent's remarks to the four advisees in the earlier LM/SS/AA period which preceded the class when the incident between respondent and A.A. occurred. (See statements, PJ1-28 attached to Johnson's affidavit accompanying the Statement of Evidence along with the tenure charges). Johnson shared the statements with the superintendent and a further investigation of respondent's conduct was ordered. When the investigation was completed, Johnson met with respondent and a representative from the Association. Johnson advised respondent of what the pupils wrote in their statements to which respondent replied "no comment" on the advice of the Association representative.

Within days, parents who were in attendance at Back-to-School night, or whose children reported to them the exchange between respondent and A.A., and one parent who took offense at respondent stating that all black students fool around in high school, wrote letters to school administrators registering their offense taken by respondent's conduct and comments and demanding something be done. (PJ 34-40)

CHARGE TWO

The allegation that respondent engaged in conduct unbecoming by making inappropriate racial statements to Middle School advises assigned him during 1991-92 is accompanied by five relevant specifications which are reproduced here:

1. Ward Campbell was assigned as advisor for a group of Witherspoon Middle School students for the 1991-92 academic year.
2. On Wednesday, September 11, 1991 at approximately midday, Ward Campbell was assigned an advisee class (LM/SS/AA) which included Black, 7th/8th grade, male students C.B., N.S., D.T. and R.W.
3. During the course of this advisee period, Ward Campbell interrupted a discussion among Black, male students to explain to them what Ward Campbell perceived as the "Black Problem" in Princeton.
4. Ward Campbell stated to these advisees words to the effect that when he taught at Princeton High School, only a small percentage of his classes were Black students, but that most of them failed or dropped out. Mr. Campbell explained to these Black advisees that Blacks do not fit in socially at Princeton High School and that there is a great pressure from other Blacks to hang out with Black crowds and have fun, rather than study. Ward Campbell told these advisees a story concerning three Black female students in his high school class who experienced great difficulty because they did not fit in socially.
5. The 7th/8th grade advisees felt humiliated and belittled by Mr. Campbell's statements and understood Mr. Campbell to mean that there was a white barrier at the Princeton High School which would be very difficult, if not impossible, for them to overcome.

***

Respondent had just been reassigned to the Witherspoon Middle School for 1991-92 from the high school. Reference in specification 2 above to LM/SS/AA is

explained by Middle School Principal Johnson as being a home room period from which pupils would be excused to go to music or other special subjects if they chose. Invariably five to ten students would remain with the assigned LM/SS/AA teacher, in this case respondent. During that period of time respondent could do one of three things with the pupils who remained. One, he could enrich the pupils' science curriculum if he so chose; he could engage in an advisee-advisor relationship with the pupils who remained in which he would talk about common problems they were having adjusting to adolescence; or, he could engage in enrichment activities. In regard to the advisee-advisor relationships, Johnson further explained that the teacher, respondent, was to talk with the pupils in terms of organizing themselves for study, getting along with each other, and to establish a rapport with the youngsters so that they know the teachers are there to assist not only in science, social studies, and the like, but in daily school problems which may occur.

On September 11, 1991 at a time prior to the events in Charge One, four black male pupils, C.B., N.S., B.T., and R.W., among others, were assigned respondent's LM/SS/AA period. These four pupils had been talking during the study period when respondent decided to tell them what C.B. called respondent's "Black People in Princeton Speech." Their collective testimony is that respondent told of the experience three black female pupils had at Princeton High School, all of whom had attended Witherspoon Middle School. Respondent told them they have to be careful when they attend Princeton High School because the black pupils who are already there will cause them to fail because all high school black pupils were only interested in a good time. According to the collective testimony of the pupils, Campbell explained that the three female pupils were good students at the Middle School and that despite his having encouraged them to do well at the high school, one female pupil became so frustrated she attacked a white girl and eventually transferred to another school. Another female black pupil failed out of high school, while the third was successful. C.B. testified that respondent was attempting to convey the message for them to study hard in high school and not to let other black pupils in high school "lean on you." N.S. felt that respondent's speech made no sense, was racist, and not intended to encourage him to study, because in his mind respondent was simply stereotyping all black pupils which made him, N.S., feel "bad." D.T. testified that as the result of respondent relating the story of the three black female pupils he felt hopeless and saw no use going to school, despite the fact he knows black pupils at the high school who do not fail R.W. testified he recalls wondering why respondent would say such things to them and that respondent's

words made him feel personally that white high school teachers are just like respondent, advocates of the separation of races.

Respondent Campbell recalls an incident similar to that as described by the four pupils having occurred September 11, 1991 but in a different manner. Campbell says the advisee-advisor portion of this period was intended to allow middle school teachers to interact in an unstructured manner with the students who are present. Respondent says that there was a total number of perhaps five who were present at some part of this 40 minute period. All pupils who were present were also assigned respondent's homeroom. On this particular occasion, respondent says the four male pupils presented him two problems. One, C.B., N.S., D.T., and R.W. simply did not have enough to do in class and, two, they were not involved in supplemental activities offered by the school. Respondent perceived these four, and the two problems presented, as creating a discipline problem for him, although he does not explain why a discipline problem, as opposed to a creative teaching problem, was created. He concluded that the four were extremely bored and were wasting their time. Respondent says that during this particular period, he was going over rules for reading during the class. In respondent's view, the most important basic study skill is the ability to read which, in turn, would leave little time to be wasted. Knowing that Princeton High School functions for students who are self-disciplined, he urged the four to become self-disciplined or "autonomous little study units." Respondent says he then related an experience he had had the preceding year while he was still teaching at Princeton High School. Three black female students were assigned his biology class. Respondent says that because he had students fail his courses because they did not do the work, early on in the school year he pulled these three black females pupils aside and told them there may come a time "if you get really serious about your studies" when they are going to be pressured by their friends not to study hard in order to spend more time with them. Of the three female pupils to whom he spoke, one dropped the course because she simply did not do the work, another transferred to another school, while the third was very successful in his course. Respondent acknowledges having told the four male pupils that there is an inordinate number of black pupils in the high school remedial classes and if they begin high school in the remedial class it is very difficult to get out of that track. Consequently, he urged them, he says, to take advantage of the opportunity at the Witherspoon Middle School to strengthen their skills. Respondent acknowledges he did state that there is pressure on black students at the high school to have fun rather than study based on his personal observations.

Respondent justifies his remarks to the four advisees upon the central thesis that in reality the remarks are not racist, race-based, nor demeaning in any manner. Rather, respondent contends, the remarks simply reflect his professional concern for low achieving pupils and his efforts to motivate such pupils he identifies as having been "at risk." Furthermore, respondent says his professional concern for lower achieving pupils in Princeton is validated by the District's receipt of the $440,000 desegregation grant it received, and the earlier referenced studies which show "declining academic performance of African-American students and other minorities" in the upper elementary grades at Princeton. (Respondent's initial legal memorandum, p.104)

It is to be quickly noted, however, that scant evidence exists in this record to portray respondent as a champion of civil rights on behalf of black or other minority pupils as he suggests. There is no evidence to show respondent had any role in the preparation of any application filed by the Board with the Department of Education– which resulted in the desegregation award, nor is there any evidence that he had a legitimate claim by way of a superior plan to expend any portion of the award to develop and operate an approved project under the terms of the award whatever they may be. Nor is there evidence to show respondent discussed any deep and abiding concern he says he had for the lack of academic progress generally by minority students with the school principal, superintendent, Board, or community leaders.

It is recognized that four black adult witnesses, each of whom is employed by the Board, testified regarding their individual conversations with respondent and his asserted efforts to help minority pupils. Tynetta Howard, a black female who had been an aide to the child study team, had breakfast with respondent every day in school and discussed minority pupils with him. In her view, respondent always tried to get minority pupils on the same level as other pupils and to succeed in life. She discussed with respondent various ways minorities are left behind in school, but never by respondent because he always tried his very best. Joann Parker, a black female instructional aide, testified that respondent's reputation is that he encourages pupils to set goals for life and to work towards achieving those goals. Neither Ms. Parker nor Ms. Howard ever heard respondent utter any racially negative comments and he always treated both women with respect. Ms. Parker acknowledges she was never in respondent's classroom at either the high school or the Witherspoon Middle School. She and Ms. Howard do volunteer work for the same church in the community. Evelyn Counts, a black female now employed by the

Board as a teacher of fifth grade, had known respondent when she was employed as an instructional assistant in prior years. She and respondent discussed educational issues over the years and his concern with whether he was reaching the pupils with whom he was working. Ms. Counts never heard a racist remark uttered by respondent and she finds him to be intelligent, compassionate and she admires what he does and how hard he works with all pupils. Other than for a few days during September 1991, the last time Ms. Counts was in respondent's presence, she thinks, was in 1984. Consequently, all conversations Ms. Counts had with respondent had to occur prior to that time in 1984. Robert Vivens, a black male teacher, testified that when he first began with this Board in 1984, respondent offered him assistance. They often discussed the pupils with whom they worked including race relations. Mr. Vivens acknowledges that but for a few days during September 1991 he had not seen respondent for several years.

Neither the individual nor collective testimony of these four individuals, though honestly given, portray an individual as a positive civil rights activist whose conduct in regard to Charges One and Two should be viewed as beyond reproach.

FINDINGS ON CHARGES ONE AND TWO

It is acknowledged that the testimony of pupils given against a teacher, particularly their teacher, is to be used with great caution because of the authority the teacher exercises over them. Being called as a witness in a tenure proceeding against their teacher could provide the opportunity for pupils to manufacture evidence against the teacher in order to resolve, in their minds, any disputes they may have had with the individual as the result of the teacher-pupil relationship. However, the testimony of a teacher subject to tenure charges should not be accepted at face value in the light of surrounding evidence which may tend to contradict sworn testimony given by the teacher under oath. This entire case is filled with conflicting testimony from pupils who claim they were subjected to misconduct at the hands of respondent, while respondent either denies, straight-out, allegations or attempts to explain them away as simply comments or actions misunderstood by the pupils.

There is no evidence to suggest, much less find, that the pupils who testified before me regarding the underlying conduct of respondent held any bias or ill will towards him relating to Charge One. There is no evidence to suggest that the testimony given by any one of these pupils, including A.A., was anything other than their true, honest, and accurate recollection of what they saw and what they heard.

In light of the overwhelming consistency of the testimony given by these pupils in regard to what they heard and saw regarding this charge, I find respondent's recollection and explanation of what occurred to be less then persuasive. Respondent's effort to discredit their testimony on cross-examination failed. There is no evidence to show why the four pupils in Charge Two were considered a discipline problem or "at risk" by respondent, nor is there any evidence for respondent to believe A.A. was "at risk" of failing high school, other than the fact all five pupils are black!

In regard to Charges One and Two, I have weighed the testimony carefully and considered the evidence presented. I find that by a fair preponderance of credible evidence regarding Charges One and Two, that the following facts are established:

CHARGE ONE

1. A.A. entered respondent's classroom on September 11, 1991 and took a seat at a table in the rear of the classroom where at least one or more white pupils were seated. A.A. began talking and singing. There is no evidence to show respondent had started that particular class.

2. Respondent became annoyed by A.A.'s talking and singing. In a voice loud enough to be heard by all pupils in the classroom who were paying attention, respondent ordered A.A. to take a seat in the front of the classroom while saying to him, words to the effect, "I'm going to have to give you my Blacks in Princeton speech." In addition, I also find that respondent exclaimed, to the effect and in a voice loud enough to be heard by all other pupils in the classroom who were paying attention, that the races should be separated which, I further find, was a direct reference to A.A. sitting with at least one or more white pupils in the back of the classroom. I further find

that respondent exclaimed to A.A. that it was necessary for him to correct the speech of black people.

3. I find that the statements made by respondent were indeed disturbing, upsetting, and source of embarrassment not only to A.A., but to other pupils, black and white, who were present in the classroom.

4. I find that a confrontation did occur between respondent and A.A.'s father that evening at Back-to-School night. Father, according to the evidence in this record, was the aggressor in that confrontation. However, a confrontation, I specifically find, would not have occurred had respondent not uttered the remarks to A.A. in front of the entire class as the evidence in this case shows he did.

5. Respondent's conduct in regard to A.A. disrupted Back-to-School night and the Princeton school community.

6. The remarks made by respondent to A.A. on September 11, 1991 in the context of this charge were, I **CONCLUDE**, intended by respondent to discipline A.A. for having been talking and singing in the classroom. Such remarks were not intended by respondent, I specifically **CONCLUDE**, to advance the academic performance of A.A., or black or minority pupils in general because such remarks were made by respondent solely because he was annoyed. Finally, I **CONCLUDE** that the remarks to A.A. are racist in nature for they would not have been made by respondent to a nonblack pupil and the remarks are based solely on the fact A.A. is black.

CHARGE TWO

1. On September 11, 1991, but prior to respondent having uttered the remarks as found in Charge One, respondent was assigned an LM/SS/AA period.

2. Pupils C.B., N.S., B.T., and R.W., each of whom is black, were in attendance.

3. These four pupils were seen by respondent as creating a discipline problem for him, although there is no evidence in this record to suggest that any one of the four, in fact, presented any discipline problem, then or ever, for respondent in LM/SS/AA.

4. Nevertheless, respondent proceeded to tell these pupils what they label, and more likely than not what he referred to, as his "Black People in Princeton Speech."

5. Among other things, respondent did use words to convey the notion that black pupils at Princeton High School are only interested in having fun and that the four pupils before him should avoid all black pupils at the high school in order to be successful.

6. While respondent justifies the remarks as his effort to strengthen study skills of the four pupils, the fact established in this record is that respondent categorized an entire race of people as being interested only in fun, not academics, based on his purported experience with three black females and the published studies referenced earlier regarding the inordinate number of black pupils in remedial classes. The remarks, despite respondent's assertion, are not at all related to the improvement of study skills.

7. There is no evidence upon which to draw an inference that had these four pupils not presented in respondent's mind a disciplinary problem, respondent would have engaged in similar remarks as part of the LM/SS/AA period. Despite respondent's view that he perceived his remarks as a "pep talk" to these four pupils, three of the four pupils found his remarks racially offensive. Moreover, given the circumstance by which respondent acknowledged these four pupils were presenting a discipline problem, I find his remarks were made

in the context of negative discipline for not having taken advantage of supplemental activities offered by the school instead of simply remaining in study hall and further, because they are black, with the asserted inherent interest of all black high school students only being interested in fun, they more likely than not will not succeed in high school.

8. There is not a scintilla of evidence in this record that any one of the these four pupils are without the skills, abilities, and determination to be successful in high school solely because of their race or color.

9. I conclude such remarks are racist in nature because they would not have been made to white pupils and the remarks are based solely on the fact the four pupils are black.

MOTION TO DISMISS
CHARGES ONE AND TWO

The evidence in this record, taken as a whole, shows more likely than not that had it not been for the incident in which respondent engaged with A.A. on September 11, 199, and the confrontation which occurred with A.A.'s father that evening, these charges would not have been certified against respondent at the present time. On that basis, respondent reasons that all charges must be dismissed because whatever it is he said to A.A. regarding 'black pupils at Princeton High School' matter of public concern evidenced by the published studies, earlier referenced, as well as newspaper reports, also earlier referenced. In this regard, respondent relies upon Pickering v. Board of Education, 391 U.S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968), Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977), Ghiven v. Western Line Consolidated School District, 439 U.S. 410, 58 L. Ed. 2d 619, 99 S. Ct. 693 (1979), and Connick v. Myers, 461 U.S. 138, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983). Respondent also cites what he says is the leading New Jersey case concerning First Amendments Rights, In re Pietrunti , 128 N.J. Super. 149 (App. Div. 1974), certif. denied 65 N.J. 573 (1974), cert. denied 419 U.S. 1057 (1974). Respondent also relies upon other cases which I find to be cumulative and, therefore, unnecessary to recite here.

The motion to dismiss was filed March 27, 1992 prior to the first day of hearing and it sought dismissal upon the 90 day rule N.J.A.C. 6:24-1.2, laches, and the First Amendment. A letter ruling issued April 1, 1992 denying the motion on the application of the 90 day rule, N.J.A.C. 6:24-1.2, and laches. The motion regarding the First Amendment was also denied at the time as being premature.

FIRST AMENDMENT CLAIM

In Pickering, the United States Supreme Court held that a State, or in this case the Board, may not condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression. The Court held that a balance must be struck between the interests of the employee as a citizen in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. 391 U.S. at 568. In Mt. Healthy City Board of Ed. v. Doyle, a public school teacher was not rehired because he had relayed to a radio station the substance of a memorandum relating to teacher dress and appearance that the school principal had circulated to various teachers. The memorandum was apparently prompted by the view of some in the school administration that there was a relationship between teacher appearance and the public support for bond issues. The radio promptly announced the adoption of the dress code as a news item. Doyle, who was untenured, did not have his contract renewed by the Board. Doyle sued and the District Court held that Doyle was entitled to reinstatement with back pay because the Board had violated his First Amendment rights. The Sixth Circuit Court of Appeals affirmed the judgment of the District Court. The United States Supreme Court, however, vacated these judgments and remanded for further hearing on the basis that a public employee's claim of First Amendment violation by the employer involves a three step analysis. First, teachers must demonstrate that their conduct was protected; second, teachers must demonstrate such protected conduct was a substantial or motivating factor in the adverse employment decision; and third, the employer may show that the employment action would have been taken even in the absence of the protected conduct. 429 U.S., at 287.

Givhan v. Western Line Consolidated School District involved a First Amendment claim by a teacher whose employment contract was not renewed for what she claimed was a First Amendment violation based on private encounters with the school principal. The Court held that First Amendment protection applies when a public employee arranges to communicate privately with his employer rather than

to express his views publicly. Finally, in Connick v. Myers, a case decided 15 years after Pickering, an assistant district attorney was dissatisfied with the proposed transfer and circulated a questionnaire to coworkers regarding transfers, office morale, the need for a grievance committee, amount of confidence in supervisors, and pressure to work in political campaigns. Connick was subsequently terminated and challenged that action as violating her First Amendment rights. The Federal District Court and Fifth Circuit Court of Appeals found that the primary reason for the discharge was Connick's survey which, it also found, involved matters of public concern and that the State had not clearly demonstrated that the questionnaire substantially interfered with the operation of the district attorney's office. The Supreme Court reversed the Court of Appeals having found that Connicks' questionnaire touched upon matters of public concern in only a most limited sense and that it was primarily a grievance concerning internal office policy. The Court, relying upon Pickering, held that the identification of protected activity under the First Amendment involves a two step process. One, the speech must have addressed a matter of public concern and, two, the interest of the employee in so speaking must be balanced against the interest of the State, as an employer, in promoting the efficiency of the public services it performs. The Court went on to note that this balancing of interests considers factors such as the need for harmony in the office or work place; whether the government's responsibilities require a close working relationship to exist between a plaintiff and coworkers when the speech in question has caused or could cause the relationship to deteriorate; the time, manner, and place of the speech; the context in which the dispute arose; the degree of public interest in the speech; and whether the speech impeded the employee's ability to perform his duties. 461 U.S. at 149-154.

Recently, the Tenth Circuit Court of Appeals, in Johnsen v. Ind. School Dist. No. 3 of Tulsa County, 891 F.2d 1485 (10th Cir. 1989), a case involving a school nurse who alleged that her First Amendments rights were violated when her contract was not renewed after she spoke out against the district's medication policy, held as follows:

> The balancing of factors under *Pickering* and *Connick v. Myers,* is at times difficult to apply to the many fact patterns which arise, because the court is required to balance apples and oranges: the First Amendment rights of the employee against the nonconstitutional interest of government efficiency. In order to confirm the court's analysis under the *Pickering* balancing test, it may sometimes be helpful for the court to ask alternatively whether

> the public employee's speech was reasonable in light of the surrounding circumstances.
>
> Reasonableness, as an objective standard, involves the same criteria as the *Pickering* balancing test but it provides the court with a more familiar framework to use in balancing the many factors under *Pickering*. To determine whether the speech is reasonable, and therefore protectable, the court can look first at the manner, form, and circumstances of plaintiff's speech. That is consistent with *Connick*, where the Court considered the "manner, time, and place" of the employee's speech. *Connick*, 461 U.S. at 152, 103 S. Ct. at 1692. Therefore, the court can look to when and where the speech took place and to whom the employee spoke.
>
> ***
>
> Another factor that could be considered by the court is the consequences of the public employee's speech. If the disruptions of the operations of the public employer are slight, the public employee's speech is more likely to be reasonable. *Cf. Ware v. United School Dist.*, 881 F.2d 906, 910 (10th Cir. 1989) (speech did not justify termination because "effective functioning of the office was not affected by [plaintiff's] speech"). In contrast, if the normal functioning of the government operation is brought to a halt, plaintiff's speech is more likely to be deemed unreasonable.
>
> ***
>
> (891 F.2d, at 1490, fn.4)

The methodology used in Johnsen to analyze a public employee's First Amendment claim is applicable here. While the issues of a disproportionate number of black pupils being classified as in need of special education and a lack of academic achievement by minority pupils in general are topics of public concern in the Princeton community, that does not end the inquiry because First Amendment rights are not absolute. Rather, a balance must be struck between respondent's right to speak on matters of public concern and the Board's right to operate its schools efficiently for the benefit of its pupils and the community it serves by considering the manner, time, and form of respondent's speech.

Respondent's utterances in both Charge One and Two were made in a racial manner. Respondent, having personally concluded that most if not all black high

school pupils are only interested in fun, not academics, applied that faulty premise to the four black pupils by reciting his "Black People in Princeton" speech to them during LM/SS/AA, on September 11, 1991 solely because they are black. He applied the same faulty premise to A.A. later the same day by publicly threatening to give A.A. the same speech, by publicly declaring he, A.A., should not sit with white pupils, and by negatively criticizing the manner of speech of black people in general. These remarks were made by respondent to A.A. solely because A.A. is black.

While discipline itself is not objectionable, it becomes objectionable as is the manner of the remarks when seen in the context that the discipline was intended to be negative. That is, respondent sought to impose discipline but the discipline selected was motivated only by his faulty conclusion regarding all black high school pupils, and because A.A. and the other four are black. Consequently, the discipline became negative when imposed solely on the basis of the race and color of these combined five pupils. Respondent reached an unreasonable conclusion regarding high school black pupils in general and, finding a need on September 11, 1991 to impose discipline upon the five pupils, forecast to them that more likely than not they will be unsuccessful in high school because they are black.

Respondent's offensive remarks to all five pupils were made in a public school classroom setting, at a time when positive self-attitudes are to be nurtured in pupils regardless of race, creed, color or sex. The testimony of all five pupils, and to some extent respondent's own testimony, is persuasive that they were individually and collectively subjected to stereotypical, race-based remarks by respondent which resulted in feeling of hopelessness, anxiety, frustration, and anger by the pupils. This is hardly the nature of positive self-attitudes to be nurtured in a public school classroom.

When viewed through the prism of the manner, form, and time of the remarks, I conclude respondent's utterances were unreasonable. Race-based remarks to pupils as made here are not within the legitimate scope of a teacher's duty. Remarks to pupils intended to be and which result in negative discipline and negative pupil-self images are outside the reasonably expected conduct of a teacher.

Neither respondent's speech to A.A., nor the other four pupils, may be characterized as a manifestation of his desire to assist black or other minority pupils in the Princeton school. Had that been his intention he certainly would not have denigrated the very essence of the pupils in whom he claims to have had an intense

interest. Consequently, the conclusion is reached that respondent's speech was not reasonable.

Finally, respondent's remarks had a negative impact on the efficient operation of the Princeton schools. A confrontation between A.A.'s father and respondent occurred during Back-to-School night. Citizens in the community, when learning of the reports of respondent's utterances and the incident at Back-to-School night, made demands upon school administrators to correct what was perceived to be an intolerable situation. Pupils with whom respondent worked were justifiably angry, upset, and frustrated by his remarks. Tenure charges resulted from respondent's conduct. These occurrences, I **FIND**, are disruptive influences upon the smooth operation of the Princeton school district.

Consequently, I conclude that respondent's utterances which underlie the bases for Charge One and Charge Two are not, nor were they intended to be by him, comments on the public issue of academic achievement by black pupils in Princeton. Rather, the utterances were the expression of his personal opinion regarding the bleak academic future of these five pupils because they are black. Therefore, the utterances are not within the protection of the First Amendment to the United States Constitution. Respondent's motion to dismiss the charges is **DENIED** in its entirety.

CHARGE THREE

This charge alleges that respondent engaged in conduct unbecoming by making inappropriate and sexist comments to a female pupil during 1991-92. The specifications to the charge are reproduced here in relevant part:

1. During the week of September 9, 1991, Ward Campbell deemed to be deficient the science notebook of S.K., a female student in his 7th/8th grade science class.

2. During the week of September 9, 1991, S.K. approached Ward Campbell at his desk after class and asked if he would recheck her notebook.

3. Ward Campbell responded to the female student words to the effect that, "Sure, you know girls need more help than boys because girls are pretty stupid."

4. The female student, S.K. was embarrassed and belittled by Ward Campbell's unbecoming comments.

***

S.K., who also testified in regard to Charge One, testified that on the same day the incident with A.A. occurred, September 11, 1991, she had asked respondent in a science class to check her science notebook. According to S.K., respondent's reply was "Sure, [be]cause sometimes girls need more help than boys [be]cause girls can be pretty stupid." (5T-94) S.K. says this incident occurred at respondent's desk located in the front of the classroom and that it occurred earlier in the morning before the A.A. incident. S.K. acknowledges that she had to redo her science notebook the night before she requested respondent to review it because her notebook was not "perfect" (5T-100) as demanded by respondent.

S.K. is adamant in her testimony that respondent did not state, as he claims, that he was interested in giving girls extra held because they needed extra help in science and she is adamant that respondent said girls "can be pretty stupid".

Respondent testified that while he does not recall S.K. as a student of his, nor does he recall advising any female student in September of 1991 that "girls are pretty stupid", and denies ever having made that comment, he did check notebooks every day at the beginning of the school year. (6T:135-136) On cross-examination respondent testified that he did state numerous times to many female pupils that if they ever needed extra help in science to let him know. Respondent was then asked the following question and gave the answer that follows:

Q. But you deny that you've ever said to a female words to the effect that girls can be pretty stupid or girls can be pretty dumb?

A. When you use the words to the effect rather than specifically stupid, there is a tremendous difference. There is the point that girls are not encouraged in science. There is the point that

> girls' science achievement tends to suffer, especially the beginning of the high school years and declines thereafter. I could have said anything along those lines that girls do not achieve in science and I am happy to give them extra help. Or extra encouragement. If you then misconstrued the fact that females do not achieve in science and say well, that is to the effect of stupid, then you would twist my words around. Did I use the specific word stupid?. No.
>
> (7T:10-11)

In support of respondent's position that he was interested in helping female pupils to improve their achievement in the sciences, he relies upon the testimony of Dr. F., whose stepdaughter was in respondent's biology class during 1990-91. Dr. F. testified she was impressed with respondent's ability to engage her stepdaughter's mind in biology and his insistence upon her stepdaughter doing assignments over and over again until she correctly completed the assignment. Dr. F. testified respondent corrected her stepdaughter's tendency to rush through whatever assignment she was working upon regardless of the result. Respondent also relies upon the testimony of C.M., presently a senior at Princeton High School who was in respondent 's biology class during her sophomore year, that she enjoyed respondent's teaching style because he was able to get the attention of pupils and keep them interested. Respondent worked with C.M. on projects after school and any problems she may have had. It is noted that respondent wrote C.M. a letter of recommendation for her attendance at an Intensive Math and Science Summer Program during the 1991 Summer. It is also noted that C.M. characterizes herself as a "fairly good" student who is leaving Princeton High School early in order to attend a college program and that her family, particularly her mother, has been very supportive of her. In fact, the math seminar she attended during the 1991 summer was as the result of her mother encouraging her to apply and attend.

Respondent also relies on the testimony of N.A., presently a junior at Princeton High School who was in respondent's biology class during 1989-90. N.A. testified that respondent stressed self organization and made pupils comfortable in class by discussing matters other than biology. As an example, N.A. recalls respondent showing pupils Aikido by using other pupils in class to demonstrate certain moves. N.A. equates Aikido with karate techniques.

FINDINGS

I have considered the testimony offered in support of this charge by the Board, which is limited to the testimony of S.K. as its direct evidence, and I have considered the testimony offered by respondent. No one of the witnesses who testified for respondent, other than respondent, were present at the time this incident was to have occurred when respondent stated that girls can be stupid. I have considered respondent's reply to the question posed on cross-examination as well as all of respondent's testimony and find that that reply, as recited above, is an effort to manipulate what it is that was said. I am persuaded, I am convinced, that S.K. accurately recalls respondent, in reply to her request to check her notebook, stating that he would do so because "girls can be stupid." Respondent's explanation that his concern for the asserted underachievement of females in the sciences was misconstrued by the hearer to ascribe to him the statement that "girls can be stupid" is completely rejected. It stretches credulity to believe a reasonable person, which I find S.K. to be even though she is of tender years, misunderstood a teacher's concern for a particular pupil and translated that concern into the expression "girls can be stupid" without those words having been said. Consequently, I find that a preponderance of credible evidence establishes this charge as true.

CHARGE FOUR

This charge alleges respondent engaged in conduct unbecoming by exhibiting crude behavior during class and by announcing he has been known to use physical force. The specifications to this charges are, in relevant part, as follows:

1. Ward Campbell was assigned to teach an eight grade Science class at the Witherspoon Middle School during 1991-92 school year.

2. On or about the second day of school, Ward Campbell was explaining his class rules to his Science classes.

3. During the course of his explanation of his special class rules, Ward Campbell announced to the class words to the effect that "I've been known to hit kids," who do not comply with his rules.

4. During the second week of September 1991, Ward Campbell approached a table of male students in his eighth grade Science class and proceeded to explain to them how he handled students at the high school. Present at the table were eighth grade male students S.R., J.K., T.S. and A.D. Mr. Campbell explained to the students that when the high school students would wise off to him in the hallway, he would say "fuck you" back to them and Mr. Campbell demonstrated how he would extend his middle finger at them in the vulgar gesture.

5. Other students in the same eighth grade Science class heard Mr. Campbell's statements and were under the impression that he was directing his vulgar comments and gesture at the eighth grade students seated at that particularly table.

6. During the first weeks of September 1991, Ward Campbell told seventh grade students in his LM/SS/AA class that when he was on vacation in Europe, someone with a gun tried to mug him. According to Mr. Campbell, he grabbed the gun from the assailant and shot the mugger.

7. Whether or not there was any truth in these statements made by Ward Campbell to his students, the comments were unbecoming and constitute unprofessional and unbecoming conduct by a teaching staff member.

***

The Board called four pupils to testify in support of this charge; S.M., K.A., O.B., and T.S. The background to the specification where respondent was to have told his class he has been known to hit kids who do not comply with his rules follows. When Principal Johnson was directed by the superintendent to continue investigating the conduct of respondent following the meeting which occurred following the Back-to-School night, and Johnson met with respondent's pupils the following day, one of the questions asked the pupils was to write out what respondent had explained to them about rules and regulations of the Science class. S.M. responded as follows:

> Mr. Campbell [respondent] told us to always be prepared with a pen, paper, notebook, and text book. He also said he hit several kids who had forgotten to bring one of those items. Or he said he had been [known?] to hit people for those reasons.
>
> (PJ-32)

S.M. testified at hearing that when respondent told the class not to forget those rules because he had been known to "hit kids", he believed respondent was telling the truth and was not joking. S.M., on cross-examination, was adamant in his testimony that respondent said he has been known to hit kids who did not bring a pen, paper, notebook, and text book to class. (5T:137) S.M. was frightened by those comments.

T.S. and S.R., both of whom were in respondent's seventh/eight grade sciences class during September 1991 testified regarding the assertion respondent exclaimed of "fuck you" to high school pupils he met in the corridor who would "wise off" to him. T.S. testified that he and S.R. were sitting in the back of the classroom when respondent began telling them of his experiences in high school. Respondent was to have explained that when the students at the high school were loud in the corridors he would tell them to be quiet, in response to which they would extend their middle finger towards him and say "fuck you". T.S. testified he thought respondent's use of that language was crass. 5T:141-143

S.R. testified that he recalls respondent having related that when he was assigned the high school he, respondent, would reply "fuck you" when a student would stick up "the finger" after which S.R. simply stopped listening. S.R. testified that he, along with T.S., J., and E. were present. S.R. testified that he had never heard a teacher use that language before. On cross-examination, S.R. explained that respondent related that experience in regard to disruptive students at the high school.

Respondent, in his testimony, confirms the class rules having been that all pupils were expected to come to class with a pen, pencil, three-ring notebook with five sections. The first section was for class notes, the second section was for vocabulary, the third for laboratory work, the fourth for return tests and quizzes, and the fifth section for other materials. While respondent denies having ever told his class that he was known to hit pupils who do not comply with his rules, he modifies that denial in the following way:

*** I believe - - I mean, really stretching my memory - - on the first or second day of school I believe someone said that. I remember - -

Q. A student?

A. Yes . I remember someone looking up from the first row chairs, looking at me and going, I hear you've been known to hit kids before.

Q. Did you respond?

A. No.

6T:131-132

In regard to the specification that he stated he had shot a mugger in Europe, respondent's testimony in this regard is as follows:

Q. *** Do you recall any conversations during the course of this school year or specifically September of 1991, when there was any discussion of a mugger?

A. Yes, there was.

Q. What were the circumstances concerning this mugger incident?

A. I've been asked this story I think every single year that I've taught. It has - - it has amazing legs. And someone asked me about the fact that they heard that while I was on vacation someone tried to mug me and that I killed them. What my response to that story was, I have no idea. I have been asked that story on repeated occasions through the years.

6T:134-135

In regard to the allegation respondent's use of "fuck you" to high school students as he related to middle school pupils, respondent testified in the following manner:

Q. What do you recall?

A. The particular group of students at this table were the physically largest students in my classroom. Kind of - - the dominant people in the - - in the classroom they had been - -

Q. Did they include the students [T.S. and S.R.] who've testified in the proceeding?

***

A. They were, humph, testing me, you might say, to put it mildly. They were rude and talked amongst themselves loudly during the first two days of school. They would sit lounging backwards with their feet up on the table talking amongst themselves and ignoring me. And so I resorted to splitting them up and putting them in the four different corners of the classroom. The testing went on for about five days. After which they started to settle down and I let them sit together again. They were pretty good in class so at the end of the class I engineered moving the one table that they were sitting at, since they didn't fit at that table - - they were physically too large for their table - - for their legs to fit underneath the table - - to switch that with the one they had been sitting at and moved the two. During that I also told them I was happy with the way they were responding. That I was afraid the testing was going to go on for too long. And that their behavior made me remember a lot of the rude student behaviors that I'd been subjected to in the high school. I did give them the example that - - and it was so complete, the disregard or lack of respect for many teachers in the high school, that there were occasions when I would walk outside of my classroom and asked students who were conversing in the hallway to move their conversation someplace else or to get to their classroom and would be confronted with obscenities and obscene gestures and that I was certainly glad that this did not seem to be the way they were going. The conversation concluded with fixing the room and I asked them if they would be interested in taking care of bird feeder and keeping it supplied if I brought one from school or from home to school. The reason for that simply being that I was talking to two or three of the largest people who could - - who were big enough to hang out the window and put it on the branches of the tree next to the classroom.

6T:132-134

Not until cross-examination did respondent directly deny uttering "fuck you" as is alleged in this Charge, while simultaneously acknowledging he never backs down from a confrontation and that he is a strict disciplinarian.

FINDINGS OF FACT

In regard to the allegation respondent told his class that he has been known to 'hit kids' who do not follow his rules, I am persuaded by the testimony of S.M. that that is exactly what S.M. heard because, I **FIND**, that is exactly what respondent said to his class. Respondent's explanation that it was not he who had said that but a pupil in the first row, to which respondent made no reply, does not have the ring of truth whatsoever. A teacher in New Jersey in public or private school does not elect to be accused by a pupil in class of "hitting kids" without an immediate denial because of the strong public policy in this State against corporal punishment. S.M.'s testimony is indeed more persuasive because it was delivered in an honest, believable, and unpretentious manner. Respondent's testimony rings hollow that while he implicitly acknowledges the words were spoken, attributes those words to a pupil in his class.

So, too, with the assertion he stated that he shot a mugger. The testimony of K.A. and O.B. is found to be more persuasive than that of respondent. Recall that respondent explained this assertion by acknowledging the words were spoken but that someone in class stated to him during 1991 that he/she had heard he had killed someone who tried to mug him. While respondent implicitly states he does not know how, or does not recall how, that story started, and he had no reply to the query, this explanation as well rings hollow. Respondent's tendency regarding this charge and others, is to acknowledge the conduct alleged occurred but to modify or attribute such conduct to someone else, while maintaining he is the innocent bystander. I **FIND** respondent's testimony in this regard not credible.

Finally, the testimony of T.S. and S.R. that respondent related his experiences at the high school where student would raise their middle finger at him signifying a vulgar expression, and recited his response "fuck you" to those students, is persuasive. Respondent's explanation is found to be rambling at best, and an attempt to evade the direct testimony presented against him regarding his use of "fuck you" in front of students.

Therefore, I specifically find respondent announced to the class words to the effect "I've been known to hit kids" who do not comply with his rules; that he uttered the expression "fuck you" in class in front of at least two pupils; and, he related to his pupils he had shot someone who tried to mug him. I do not find the evidence persuasive regarding specification five that students other than those who testified before me had heard respondent's expression "fuck you". Nor is there evidence to show that the two pupils who did testify before me believed he was directing such an expression to them.

CHARGE FIVE

Charge Five alleges respondent engaged in conduct unbecoming by shoving a student and causing him to fall over a chair. The specifications to this charge are as follows:

1. During the 1990-91 school year, Ward Campbell was assigned to teach Science in the Princeton High School.

2. On Thursday, March 21, 1991, at approximately 5:45 PM several students remained after school to work in the biology lab on their science projects. These included students J.J., J.L., and T.R.
3. The students changed the station that Mr. Campbell had playing on the radio in the biology lab. When Mr. Campbell returned to the lab, he ordered the students to change the station back to its previous setting. Student J.J. attempted to do so.

4. When Student J.J. could not find the right station on the radio dial, Ward Campbell pushed or shoved J.J. away from the radio, causing him to fall over a chair and onto the floor.

Note that Charges One, Two, and Three relate to conduct engaged in by respondent during September 1991. Charge Five, under consideration now, occurred during the prior school year, 1990-91, specifically on March 21, 1991. Respondent's assignment was at the Princeton High School. Dr. MaryLu Coviello was the acting high school principal at the time and has since been named the high school principal.

Dr. Coviello testified that on or about March 25, 1991 she was asked by the superintendent to investigate reports regarding an incident which was to have occurred in respondent's biology class on or about the preceding Friday, March 22, 1991 and which was to have involved a pupil, J.J. Coviello called J.J. to her office and asked if an incident had occurred in respondent's biology class the preceding Friday. After having talked with J.J. and learning that an incident indeed occurred not on Friday, but on Thursday, March 21, Coviello then talked with respondent and his representative from the Association. Respondent denied the essence of what Coviello had learned from J.J.

At hearing, J.J. testified that on March 21, 1991 he went to respondent's biology classroom after school with his permission to finish some lab work. Two other pupils, T.R. and J.L., were also present. A radio was by the wall near the classroom windows. Respondent left the classroom and T. or J.J. changed the radio-station. T. and J.J. both tried to reset the station to its original place prior to respondent's return but they were unsuccessful. Respondent returned and directed whoever changed the radio station to reset it to where it was. J.J. got up and tried to change the station and asked respondent to what station he had had it set. Respondent did not reply, but left his desk which was in front of the classroom and came over to the radio to reset the radio and, in J.J.'s words, "I guess accidentally or purposely pushed me and I fell over a chair." (4T:4) J.J. testified that T. and J. were present at the time of this incident and saw him fall over the chair. J.J. was embarrassed, hurt his left arm, and left the room without saying anything to respondent. He did not report the incident to anyone until he was called to the office by Principal Coviello the following week at which time he reported to her, without anyone else present, what had occurred.

On cross-examination J.J. acknowledged that at the time of this incident he was receiving a failing grade in respondent's class and that he was doing his makeup work in respondent's classroom that day, had remained there a few hours and respondent had been assisting him. J.J. testified that two other pupils, G.G. and D.S., had been in the classroom but left before the incident happened. J.J. described the chair over which he was pushed as a small plastic chair, although there were some stools about as well as combination desks and chairs. (4T:20) J.J. also acknowledges that on one prior occasion in respondent's class he leaned back in a chair and accidentally fell (4T:30).

T.R. who was present in the classroom during the incident acknowledges he is friends with J.J. T.R. explained that he and J.J. went to respondent's classroom after school on March 11, in order to finish a science lab. After a while, respondent left the classroom and J.J. changed the radio station. Respondent returned to the classroom and upon realizing that the station had been changed he became angry. J.J. attempted to return the radio to the station it had originally been set by respondent but he could not find the right station. Respondent, already angry, went towards the radio and pushed J.J. out of the way. Contrary to what J.J.'s testimony is, T.R. said that J.J. fell over a stool. Later on, J.J. complained of his arm hurting. According to T.R., J.J. never told him, T.R., that maybe respondent "accidentally" pushed him.

J.L., who in 1990-91 was a transfer student to Princeton from Texas, joined respondents' biology classroom after a portion of the fall semester had passed because he had been in a more advanced biology class which he found too difficult. In J.L.'s view, respondents biology class was very disruptive because he says the pupils were out-of-hand talking, the boys were "messing around", and respondent allowed people to walk in and out of the classroom who otherwise did not belong there. J.L. acknowledges that he and respondent are not friendly and that he did not care for respondent as a teacher. In J.L.'s view, respondent did not respect him as an honorable student because respondent would not take questions he asked seriously. In fact, J.L. testified that respondent had called him a "fool".

In regard to the lab incident with the radio, J.L. testified that when respondent had left the classroom at about 5:00 p.m., J.J. and J.L. began fooling around and J.J. turned the radio station. When respondent returned J.L. says he asked who turned the radio station at which time J.J. and T.L. began to blame each other. Both students, according to J.L.'s recollection, began fooling around trying to find the correct radio station. Respondent got fed up, went to the radio and on his way pushed J.J. out of the way. While J.L. initially testified that J.J. fell over a chair, on cross-examination he acknowledges that J.J. could have fallen over a stool. In any event, respondent then reset the radio. About fifteen minutes later, J.L. left the classroom and saw J.J. in the corridor crying.

J.L. testified that he saw this entire incident out of the corner of his eye and he insists he saw respondent push J.J. out of the way and he saw J.J. fall over a stool. While J.L. was asked about the incident by principal Coviello during May 1991, he was never asked to give a statement. At the time of the incident, J.L. acknowledges

that he was not doing to well in respondent's biology class, achieving mostly C work. J.L. says that he attempted to be transferred from respondent's classroom to another biology classroom but the guidance counselor was to have told J.L. that he could not do anything about his request. J.L. did not like the way respondent conducted his class because he mocked people, called them fools, and did not take some pupils seriously.

Respondent recalls J.J. as an immature pupil who should not have been placed in his biology class during 1990-91 because, in respondent's view, J.J. simply could not do the work. According to respondent, J.J.'s notes were not good, his homework was generally incomplete and he played video games in class for the most part. In fact, and in an effort I infer to show bias against him by J.J., respondent explained that he had taken a Game Boy video game from J.J. and had kept it for three weeks.

According to respondent, the first indication he had that anything untoward happened with J.J. on March 21, 1991 was during the morning of the following day, March 22, when a student identified as G.G. came to respondent and began discussing the "excitement" that occurred in the classroom last night. When he asked G.G. what he was talking about, G.G. told him that J.J. was in the lunch room saying that he had been thrown over three tables, twelve chairs, was kicked and stomped, and thrown to the floor by respondent. Respondent's reaction to what G.G. had told him was to "just let it go by" because he "had already had J.J. in class earlier that day." (6T:114) The next he knew of the incident was when on the following Monday, Principal Coviello took J.J. out of class for about twenty minutes. Later in the day, respondent says he received a written note from Coviello asking to meet with him after school that day. Coviello advised respondent of what J.J. had said and what was to have occurred, as recited above, during the makeup work on March 21.

Respondent does recall that some pupils were doing makeup work in his classroom after school on March 21. Most left by 5:00 p.m. However, respondent claims that G.G. was present as was another pupil D.S. J.L. was there as was J.J., and T.R. Respondent's testimony in regard to J.J. and T.R. both of whom it is noted again were friends, is as follows:

> They were in and out of the classroom. When he [J.J.] was in he was typically running around in the classroom and I would hold - - tell

> him to stop that it was, you know, there's too many ways to trip over things and get hurt in that room with, you know, stuff that's crammed in there***
>
> (6T:117)

Respondent acknowledges that he usually had a radio playing during make-up time in order to relax the students. Respondent does not recall directing students to change a station on the radio or resetting a station to one he wanted. Respondent says the radio was placed along the back wall next to windows because he received better reception from that location. Respondent acknowledges that there were tables, chairs, and desks in the immediate vicinity of the radio. In response to the question on direct examination "Do you recall if there were any stools or chairs right next to the radio?", respondent's reply is as follows:

> There wasn't more than three or four foot between the table and the radio. So again, it was not an area of circulation and there weren't extra chairs or stools in that area.
>
> (6T:119)

Based on the question asked, and the answer given, I infer that there were stools and chairs right next to the radio. Respondent denies pushing or shoving J.J. on March 21, 1991 and he denies pushing or shoving any student "during that time period" after school period.

Respondent testified that during the course of the 1990-91 year, J.J. engaged in certain conduct that he, respondent, found difficult to control. Respondent says J.J. had a knack for falling out of his chair onto the floor, he would walk across the floor and seemingly trip over his own feet, J.J. would walk into him deliberately and pretend to fall down, and he would dance on the top of his desk. None of these asserted conducts by J.J., however, were shared by respondent with the child study team, supervisor or principal. Respondent notes that even after the radio incident was to have occurred on March 21, J.J. continued to report to his classroom after school to make up lab work. When he finally did allow students to make up lab work after the radio incident, teaching colleague James Manzer saw the pupils there and began yelling at him for having allowed pupils after school in his classroom in light of what J.J. accused him. Respondent then claims he asked Principal Coviello to transfer J.J. out of his class but that J.J. continued in his class for the balance of the school year.

On April 15, 1991 Principal Coviello issued a written reprimand to respondent for his conduct on March 21, 1991. Coviello advised respondent that having investigated the matter, and having talked with J.J., and with him in the presence of his Association representative present, and having talked with other pupils who were in the classroom at the time of the incident, she concluded that he, respondent, "inappropriately" pushed J.J. with the result that J.J. fell over a chair. The letter of reprimand (PC-2) continues as follows:

> This writing constitutes a letter of reprimand for your actions to be placed in your file. You have been previously advised by administrative orders on multiple occasions that you are not to keep pupils so late after the end of the school day and that you are to avoid inappropriate physical contact with students.
> In light of this incident, I now reiterate those directives. Specifically, I direct you not to keep pupils so late after school and to avoid any unnecessary physical contact with them.

Ann Johnson, a former teacher of J.J.s' testified on behalf of respondent that she recalls J.J. as a pupil who would fail to do classwork as well as his homework. During a conference with J.J.s' parent and other teachers, which conference had been scheduled for after March 21 when the radio incident was to have occurred, Johnson testified one other teacher mentioned that J.J. always had an excuse why he did not complete his work.

James Manzer, a teaching colleague of respondents but who did not have J.J. as a student, testified he recalls seeing J.J. in respondent's class after school on a date after the radio incident. Manzer says he reacted in horror because, ostensibly, he did not believe respondent should have allowed J.J. in the classroom after school after having made the allegation against him that he, respondent, had pushed him over a chair. Manzer reported his concern immediately to Principal Coviello who proceeded to respondent's classroom and told respondent to release all the pupils who remained after school so that the pupils may go home.

William Bux, who retired from the Board's employ after thirty two plus years teaching and who had J.J. as a pupil in typewriting, categorizes J.J. as a "very bad student" who let the class know that he, J.J., knew everything. Bux claims J.J. is a "very bad citizen" who used to take the typewriter apart while he, Bux, would be in

another part of the room. However, Bux adds that J.J. never acknowledged having taken the typewriter apart and Bux offered no independent evidence to demonstrate that it was J.J. who took the typewriter apart.

Anthony Biancosino, who is the director of the music program at Princeton High School, knew J.J. as a student assigned to his homeroom. Biancosino says J.J. constantly cut homeroom and he claims that J.J. gave him 100 lies in an attempt to excuse his missing homeroom. Biancosino, it appears, attempts to assign blame to J.J., but without any proof whatsoever, that J.J. had bent music stands.

Finally, Glen Nath, a former student of respondents' who graduated from Princeton High School in 1988 and was recently graduated from college and is now preparing to be a teacher, sat in on respondents' classroom during 1990-91 as part of his college requirements. J.J. was a pupil in one of these classes observed by Nath. Nath says that on one occasion he observed J.J. get out of his chair and begin slapping himself across the face for about three seconds. As quickly as J.J. began, he stopped. Nath claims that J.J. was very disruptive in the classroom and attempted to attract attention. Nath says he reported what he observed to vice principal Owen Schneider after class. Nath did not hear anything further from vice principal Schneider.

In his post hearing brief, respondent points out that when Coviello initially talked with him and his representative regarding what J.J. had reported to her, that either at that time or at some other time he asked Coviello to talk with two other students, G.G. and D.S. Respondent takes the position that these students would deny that the incident with the radio as related by J.J. ever occurred. Respondent complains that Coviello did not interview G.G. until sometime in May and she did not interview D.S. at all. Furthermore, respondent relies on Coviello's report (PC-5) of her interview with G.G. in support of his effort to demonstrate that J.J. lied about the entire matter. This report (PC-5), it is noted, shows G.G. was not present when the radio incident was to have occurred. Moreover, respondent elected not to call G.G. as his witness in this proceeding.

FINDINGS OF FACT

Initially, it must be noted that the testimony of respondent's teaching colleagues brought forward for the purpose of discrediting the testimony of J.J. is not at all persuasive that J.J. lied about his recollection of what occurred March 21,

1991. No one of the teachers who testified were present at the time the incident was to have occurred. Neither Johnson's testimony, nor the testimony of Bux, nor Manzer, nor student teacher Nath is individually or collectively persuasive that J.J. lied about the incident. Biancosinos' testimony regarding the suggestion that J.J. bent music stands is without proof. Buxs' testimony regarding J.J. taking a typewriter apart is equally without proof. Therefore, the credibility of J.J. has not been impaired by the individual or collective testimony of these teachers.

Respondents' argument that Principal Coviello failed to interview G.G. in a timely manner regarding the J.J. incident, and completely failed to interview D.S., both of whom he says would exculpate him from wrongdoing, is rejected. There is no proof whatsoever that G.G. and/or D.S. were present in respondent's classroom on March 21, 1991 when the radio incident occurred. While both pupils were present prior to the radio incident, they had both left. Furthermore, the very same document (PC-5) respondent relies on to demonstrate G.G. says J.J. lied, establishes that G.G. himself was to have said he had left the classroom by the time of the incident. Consequently, no merit is found to respondents' complaint that Principal Coviello did not interview G.G. until May nor to his complaint that Principal Coviello failed to interview D.S. The inference is drawn that had G.G. been able to show J.J. 'lied', respondent would have produced him as a witness.

Having considered the testimony and documentary evidence of the various witnesses who testified regarding Charge Five, the principal findings of fact reached are that when, on or about March 21, 1991, respondent left his desk area to retune the radio to its original station, he was angry that one of the three pupils had changed the station and could not properly retune it. It is further found that because J.J. had attempted, unsuccessfully, to retune the radio in respondent's presence, respondent concluded that J.J. had changed the station. As respondent proceeded towards the radio, J.J. was hit or pushed by respondent which resulted in J.J. falling over a chair or a stool onto the floor. I further find that respondent, through his own conduct, caused J.J. to fall over a chair or a stool which resulted in J.J. being embarrassed, humiliated, and suffering from a hurt arm. Finally, I find specifically an absence of evidence to demonstrate that J.J. was in any way the cause of his having fallen over the chair or stool as respondent made his way to the radio.

CHARGE SIX

This Charge alleges respondent engaged in conduct unbecoming by directing and /or manipulating a student to recant his statement and to tell an untruth to the school administration in order to save himself from potential disciplinary action. The specifications to this charge are reproduced here in part:

1. During the week of March 25, 1991, the school administration of the Princeton Regional School District undertook an investigation of allegations that Ward Campbell pushed or shoved Student J.J. in the biology lab.

2. During the week of March 25, 1991, several witnesses, including J.J., independently confirmed that Ward Campbell had, indeed, pushed or shoved J.J. over a chair in the biology lab.

3. Ward Campbell was questioned in the presence of his association's representative concerning the allegations of the biology lab incident. During said interview, Ward Campbell categorically denied ever touching the student.

4. During April of 1991, Student J.J. submitted a handwritten statement indicating that he had spoken with Mr. Campbell and had "apologized for the rumor." According to the student's note, "Mr. Campbell did not push me over tables! I was not pushed over tables! Mr. Campbell and I, as long [sic] as we are concerned this is over!"

5. In response to this note, the School Administration again interviewed separately Student J.J. and the other witnesses to the alleged incident. On April 29, 1991, each of the witnesses, as well as J.J., again confirmed that Ward Campbell had pushed or shoved J.J. over a chair in the biology lab on March 21, 1991.

6. On April 29, 1991, Student J.J. was asked by Acting High School Principal Marylu Coviello if he had written a letter of apology to Mr. Campbell. J.J. explained that Mr. Campbell kept him after class one day and asked J.J. to write a letter because people were trying to get Mr. Campbell fired. J.J. initially wrote a letter stating that Mr. Campbell had pushed him, but had

not meant to harm him. After reviewing the letter, Ward Campbell told J.J. that it was insufficient and that J.J. had to write a letter stating that he had not been pushed. Under the direction and pressure from Ward Campbell, Student J.J. wrote an apology letter stating that he had not been pushed over tables. That letter was false. On April 29, 1991, J.J. reconfirmed in writing to the high school administration that Ward Campbell had, in fact, pushed or shoved J.J. in the biology lab on March 21, 1991, causing him to fall over a chair.

7. The conduct of Ward Campbell in manipulating and/or coercing Student J.J. to submit a false report to the School Administration is unbecoming and unprofessional conduct.

***

Principal Coviello testified that sometime during late April the superintendent advised her that a letter had been received from J.J. in which he revised his account of the incident of March 21 and apologized to respondent. The superintendent asked Coviello to look into the matter. In the meantime, Coviello had not yet seen the letter J.J. was to have written. The letter (PC-3) is in evidence and reads, over J.J.s' signature, as follows:

Dear whom ever it may concern:

A rumor was started about how I was pushed over tables by Ward Campbell which is not true. It is a false rumor. Mr. Campbell and I spoke about this and I apologize for the rumor. My mother and Mr. Campbell spoke also and everything should be cleared up. I am just writing this as you may have no false ideas about what happened. Mr. Campbell did not push me over tables! I was not pushed over tables! Mr. Campbell and I, as long (sic) as we are concerned this is over!

[signature of J.J.]

Principal Coviello, along with assistant principal Owen Schneider, called J.J. to the office in late April and asked why the letter had been sent if what J.J. had earlier

told them was true. J.J. responded that what he had earlier told the administrators was true but that he had since been told by respondent to write the letter of apology. J.J. explained that he had written one letter of apology as requested by respondent, showed it to respondent but respondent made editorial changes so J.J. rewrote it until respondent approved. Principal Coviello then asked J.J. to put his explanation in writing. J.J. was placed in an adjoining office by himself where, on April 29, 1991, he penned the following writing:

> One day after class Mr. Campbell asked me to write a letter stating that he had not pushed me or in fact he might of non-purposely touched me or pushed me or even through me over tables and chairs. I wrote this letter and it said that he might of accidentally shoved me over one chair. When I gave this letter to him he looked at it, paused, and then turned to me and told me to specifically write that he didn't push me or even come close to me. Instead I wrote he didn't push me on purpose! [underlining in original]
>
> [signature J.J.]
> Date April 29, 1991
> (attachment to PC-4)

At hearing, J.J. testified that one day respondent told him to stay after class, which he did. Respondent said he wanted J.J. to write a letter stating that the radio incident was not his, respondent's fault. A rumor had started, and J.J. does not know by whom, regarding what occurred in respondent's classroom on March 21, 1991 as addressed in Charge Five. According to respondent, the pupil G.G. reported to him on March 22 that J.J. was in the lunch room claiming that "he had been thrown over three tables, one two chairs and then kicked and stomped when he landed on the floor. And that he had two witnesses and was going to sue me." (6T:114)

J.J. explained that respondent told him to write a letter which stated that his falling was not his fault. J.J. wrote a letter which said that he, J.J., did not know if respondent had pushed him purposely or not. This letter was rejected by respondent who told J.J. he had to say specifically that he, respondent, did not push him over. (4T-8) J.J. then wrote a second version of the requested letter but left out the last sentence as is recorded on PC-3; that is, "Mr. Campbell and I as long as we are concerned this is over." J.J. explained that respondent specifically told him to add that sentence, which J.J. did, and then gave the letter to respondent. Then, respondent allowed J.J. to leave the classroom.

J.J. was eventually called to the office by Principal Coviello, was asked questions about the letter, and was asked to put in writing what really had occurred. J.J. testified under oath that he did report in writing exactly what occurred. That writing is the attachment to PC-4. In this regard, J.J. testified that one word he would change in the letter is "asked" in the first sentence to "told" because respondent told him what to write and would not allow him to leave the classroom until he did so.

Respondents' version of J.J. having written the letter is that sometime during the week following March 21, as J.J. was leaving class, respondent said to him "I think you owe me an apology" regarding the rumor. According to respondent, J.J. said "I'm sorry" and left. About three weeks later, respondent says, he became ill at ease because Principal Coviello had not interviewed "his" student witnesses, G.G. and D.S. Consequently, respondent asked J.J. if "he would mind putting his apology in writing." (6T:122) Respondent gave him a blank piece of paper, had J.J. sit at one side of the classroom while he stayed on the other side. Respondent acknowledges he asked J.J. to be specific about what he was apologizing for. Respondent says that this incident occurred during the school day, but after one of his classes. Respondent denies telling J.J. to rewrite anything in the letter.

Respondent testified that when J.J. finally handed him the letter, he was to have asked J.J. what was behind the whole incident. It is noted that the question respondent says he posed to J.J. implies that no incident occurred. Nevertheless, respondent testified that J.J. responded in the following manner:

> He [J.J.] said that he was sitting on the edge of the table and that when I moved to go to the radio to change the station that he hopped off as I was going by and tripped getting out of my way. He said J. had come to him after class and said hey, you have a chance to get Mr. Campbell in trouble and that this was the story that was suggested to him by J.L.
>
> (6T:124)

Respondent did not report the asserted conversation he had had with J.J. regarding J.L. suggesting that J.J. "get" him or sue him because with the asserted written letter of apology he received from J.J. that day, the matter was finished.

Respondent claims J.L. wanted J.J. to get him because, respondent says, the relationship between him and J.L. was abysmal, not a positive or constructive relationship. However, respondent never referred J.L. to guidance or the administration.

Respondent testified T.R. has a bias against him and would testify against him regarding Charge Five and Six because T.R. was doing "extremely poorly" in class and he, respondent, would not let T.R. wear his baseball hat.

When respondent received the letter of apology from J.J., he gave either the original or a copy to Ann Johnson, the president of the Association. Eventually, respondent testified that he supplied the president with the letter in order for her to use it at her discretion but, in his view, the original allegation leveled against him by J.J. had been made less serious by this letter of apology. Respondent does acknowledge that he wanted this letter from J.J. for his "protection". (7T:115)

In regard to J.J. and other pupils using his classroom after school on days after the radio incident was to have occurred, respondent acknowledges that for the first week and a half after the incident was to have occurred he locked the lab after school. After that period of time, respondent elected not to lock the biology lab after school; he left it open in order for students to use. After school, respondent left the lab room unattended while students were present.

FINDINGS OF FACT

According to the evidence in this record a rumor began that respondent had pushed J.J. over tables in the classroom. Neither letter (PC-3; attachment to PC-4) contain, I **FIND**, misstatements of what did in fact occur regarding the radio incident. That is, J.J. was not pushed over tables; rather, through respondents' conduct J.J. was pushed or shoved over a chair. The evidence in support of this charge does establish that respondent directed J.J. to write a letter of apology and that it was he who initiated the notion of an "apology" from J.J. If there had been a prior conversation between the two, and if J.J. offered the words "I'm sorry" as respondent says, J.J.'s direct reference, I **CONCLUDE**, was to respondent's directive that J.J. owed him an apology and/or because a rumor had started which involved J.J. but with which he had nothing to do. Respondent wanted a written letter of apology for his own protection and to lessen the seriousness of what it is J.J. had

reported to principal Coviello regarding what did, in fact, occur March 21, 1991 at the hands of respondent.

The focus of this charge is not necessarily on what it is that J.J. wrote in the letter, but the circumstances under which the letter was written in the first place. That is, respondent, in his role of teacher, directed or used words that one of his students understood to be a directive to write a letter of apology for a rumor with which he, J.J., had nothing to do.

I **FIND** that the evidence in support of Charge Six establishes respondent, through his status as a teacher of J.J., manipulated and/or coerced J.J. into submitting a report, eventually filed with the superintendent by the President of the Association at the behest of respondent, which report was intended by respondent to misrepresent what occurred March 21, 1991 as more fully described in the Findings to Charge Five. Respondent's conduct in this regard, specifically in regard to the manipulation and/coercion of a pupil under his control, is established as fact. I so **FIND**.

CHARGE SEVEN

Charge Seven alleges respondent engaged in conduct which, inferentially, constitutes conduct unbecoming. The specifications to that charge are as follows:

1. On or about September 10, 1991, the Assistant Principal of the John Witherspoon Middle School, Les Turbeville held an in service period for four (4) team teachers on the topic of assertive discipline.

2. During the course of the session, Ward Campbell expressed the view that it was about time the administration began to back its teachers. Mr. Campbell complained to the administrator and other teachers assembled that he had warned a student several times about the use of a "Walkman" during class. Mr. Campbell announced to the group that after several days of warnings, he removed the student's radio and dropped it into the class aquarium. Mr. Campbell believes his actions were appropriate.

3. The admitted conduct by Ward Campbell demonstrates his unprofessional and unbecoming conduct and his lack of the necessary judgment to serve as a teaching staff member.***

The proofs offered by the Board in support of this charge show that the circumstances surrounding the complaint of conduct by respondent occurred at an in-service training meeting held September 10, 1991 by assistant principal Leslie Turbeville. Turbeville testified that he was conducting the training session on assertive discipline strategies. At this particular session, respondent and three or four other teachers were present. During the meeting respondent encouraged other teachers to give Turbeville their support because there had been "a conspicuous lack of administrative support in discipline in the district in the past." (2T:184) In order to support respondent's thesis that there was a prior lack of administrative support of teachers, respondent related an example where he removed a Sony Walkman from a student after prior warnings and dropped the walkman into a class aquarium. Respondent, according to Turbeville, then complained that the administration at that time did not support him in such conduct. Turbeville then told respondent that if anything is confiscated in school by teachers, the proper procedure is to bring the confiscated item to him for disposition because it was he, Turbeville, who was in charge of discipline.

In Turbevilles' view, he believes respondent was attempting to support his training program on discipline. While respondent related the Walkman episode somewhat in humor in his attempt to be supportive, Turbeville did not find it humorous. He reported the matter that day to the principal, although he did not file a written report until nine days later and then on the advice of counsel. Contrary to the Board's brief, assistant principal Turbeville did not immediately report the incident to the principal because of his concern about the judgment of respondent in regard to discipline. (Board's Brief, p.50)

Respondent testified, in essence, that so many pupils brought radio walkmans to class that he found it very distracting. Respondent claims that other pupils who did not bring walkmans to school were distracted as well. Respondent claims that he got the idea to put a walkman in the class aquarium as an example where they belong. Respondent explains that he related that event to assistant principal Turbeville after the training session on September 10 and Turbeville's response was to look at him and say, incredulously, "You put a Walkman in the aquarium?"

After respondent testified to that point, he then modified his claim that that was his idea. Respondent then claimed that he was not sure it was his idea as opposed to it being "kind of a group idea two or three students and he" created. Then, in a manner I find to be respondents' attempt to exculpate himself from the fact that it was his idea to put the Walkman in the aquarium, his testimony becomes more specific with respect to the idea being a group idea. Respondent claims as follows:

> Well, the students that I was talking with were kind of ticked that they would constantly lose class time, lab time was short enough as it was. And I would threaten to put Walkman in the aquarium, but it's kind of a toothless threat if there is no Walkman there or if I don't actually do it. Since I can't actually do something like that, there was only one other choice. And he had a broken Walkman that [here he names a specific student A.L. who was not called as a witness by respondent]***
>
> (6T:109)

Respondent then goes on to explain that the Walkman that he had earlier told Turbeville he placed in the aquarium because he thought it was a great idea is now characterized as a group idea and that the walkman was broken.

FINDINGS OF FACT

Credibility which should attach to respondent's testimony is very difficult to measure because respondent has difficulty providing straightforward answers to questions asked. In this instance, respondent first testified that it was his idea to place a Walkman into the aquarium. Within seconds, respondent then modified that testimony to say maybe it was a group idea with students. Immediately thereafter, respondent testifies as if he specifically, and in a miraculous manner, recalls precisely the scene where it was agreed by students to place a broken Walkman in the aquarium. I find such testimony to be vague, unclear, uncertain, self-serving, and an effort by respondent to evade the truth of what he said..

I am convinced, taking assistant principal Turbeville's testimony and respondent's testimony as a whole, that respondent made the statement during the training session that he placed a pupil's Walkman into the class aquarium. I reject

respondent's effort to mitigate that statement by proffering that it was a joint idea with students, no one of whom was called to testify.

In sum, I **FIND** the Board has proven respondent uttered the comment as alleged in Charge Seven and that that utterance constitutes an admission by him of such past conduct.

CHARGE EIGHT

Charge Eight alleges respondent engaged in conduct unbecoming by having unjustified and inappropriate physical contact with various pupils specifically though not limited to the 1989-90 school year. The specifications to Charge Eight are, in part, as follows:

1. Ward Campbell was assigned to teach in Princeton High School during the 1989-90 school year.
2. During the 1989-90 school year, Ward Campbell engaged in unjustified and inappropriate physical contact with students, including, but not limited to:
   (a) In the fall of 1989, kicking Female Student N.N. in the buttocks on more than one occasion when she bent over to pick up a pencil.
   (b) In the fall of 1989, grabbing Female Student N.N. from behind and tickling her or grabbing her at the waist, causing her to be startled.
   (c) During the fall of 1989, twisting the arm of Female Student N.N.
   (d) During the 1989-90 school year, grabbing the wrist of Female Student E.C. and turning her arm around which forced her to the ground.
   (e) During the 1989-90 school year, kicking the buttocks and twisting the arms of several students in his classes.
3. Ward Campbell utilized poor judgment and violated school policy by engaging in ongoing, unjustified and inappropriate physical contact with various students.
4. The conduct of Ward Campbell caused parental complaint, an investigation by the Division of Youth and Family Services and a

disruption of the continuity of instruction for the students in Mr. Campbell's classes.

N.N., one of the two principal student witnesses against respondent regarding this charge, was first enrolled in the Princeton School District as a freshman at the High School for the 1989-90 year. Prior to that time, she attended the Cranbury Elementary Schools. During her freshman year, N.N. had respondent as a teacher of biology. During evening hours at home Mrs. C., the mother of N.N., explained that N.N. would complain that respondent's class was very loud, noisy, and that he would allow a particular student to come into the classroom, not otherwise assigned there, and jump on the tables. Moreover, N.N. complained that respondent would yell at students in the classroom. Mrs. C. advised N.N. that she was in a new school, with new teachers and new students, and that perhaps she was going through a breaking-in period. Mrs. C. did not report the complaints of her daughter to school officials because she was hoping that it was merely a breaking in period.

However, during the middle of October Mrs. C. observed on a particular evening that N.N. could not eat dinner and that she was very upset. After making inquiry, N.N. finally acknowledged to her mother that she was having a lot of trouble in respondent's classroom. She explained to Mrs. C. that respondent would take her arm and twist it behind her; that he had come up behind her to scare and tickle her; that he grabbed her by the shoulders and pushed her down into the seat; that when she was bending over to pick up a pencil respondent put his foot on her rear and pushed her to the floor; that on one occasion respondent while standing in front of her yelled at her, grabbed her pencil and jammed it down into her notebook on her desk and broke the point off in front of her which, N.N. added, he had done to other pupils in the classroom; that he said he was the teacher and they were students and they cannot complain to anyone because no one would believe them over him. N.N. explained to Mrs. C. that she had made no prior complaints because she was convinced that no one would believe her over respondent.

The following day, Mrs. C. contacted Gregory Youngman, a guidance counselor at the high school and advised him of what N.N. had told her the prior evening. Youngman assured Mrs. C. that he would talk to N.N., find out what was going on, and get back to her. Youngman did contact Mrs. C. and told her that he reassigned N.N. out of respondent's classroom to another teacher, and that John Sakala, who was then the principal of Princeton High School, would contact her about respondent's conduct as explained to her by her daughter. Principal Sakala

requested Mrs. C. to put in writing N.N.'s complaints about respondent as explained to her, which she did on or about October 26, 1989 (See PS-10).

N.N., who is presently 16 years of age and a junior at Princeton High School, testified that respondent's class was not a regular, run-of-the-mill classroom because "Everybody was a little bit loud and kind of out of order because there wasn't to much order in the class." (3T:31). As examples, N.N. explained that a pupil, M.W., who was a sophomore at the high school and not otherwise assigned to that class, was allowed by respondent to come in and run around and cause commotion and from desktop to desktop. (3T:29) She described a typical day in respondent's biology class in the following manner:

> Usually every day in the beginning, just as the bell is beginning ringing to start the class, M.W. would come in and do his running around and craziness and Mr. Campbell would come in and - - and you know, yell or bang on his desk or something to get some kind of attention and you know, tell everybody to shut-up and calm down and sit. And you didn't usually - - actually, we never worked out of a text book or anything like that. It was just he would write a lesson on the board sometimes or give us the vocabulary words or things like that. It was just not - - there was no like structure to the class or to the lesson or anything.
>
> If anybody got out of their chair or - - or whatever, Mr. Campbell would yell. He would get like physically violent. Mr. Campbell, he twisted my arm, several times, behind my back to where it hurt. I bent down to pick up a pencil or something else other than that and he kicked me in the rear. A few times. I remember once I got up to sharpen my pencil at the sharp - - pencil sharpener and he got mad at me and said that I shouldn't have been out of my chair without permission and took the pencil and drove it into the book on my desk and broke it in half.
>
> He got - - he got very violent at things like that and you could just tell that he wasn't joking about it and he actually meant it.

> He was - - he was also mentally abusive in the fact where he would say things like I don't know why I even bother teaching this class because, you know, you're all so stupid.
>
> Umm, it wasn't just me that he did this to. He did it to - - to T. and to B. and to E. and all - - all in a similar fashion. I know I didn't like it and I asked him to stop. But I don't really think he cared.
>
> (3T:31-32)

N.N. testified that the twisting of arms occurred just about every day and she explained the twisting of arms by being taken by her wrist and having it twisted behind her to the point where she could not move her arm. Respondent, in N.N.s view, could be provoked into arm twisting because perhaps she had been out of her chair or he simply wanted to show some karate move although, in her view, respondent usually did not need a reason to engage in arm twisting. N.N. observed respondent twist the arms of other pupils, specifically E. C., who as the result of the arm twisting landed on the floor. In describing how respondent put his foot on her rear when she bent down to pick up a pencil, N.N. said respondent did not swing his legs and kick her but he did put his foot on her and pushed her down to the floor. N.N. felt very uncomfortable in respondents' class as the result of his conduct and she felt totally violated. N.N. acknowledges cutting respondent's class many times because she concluded that the class was totally worthless.

N.N. testified she had asked her guidance counselor on at least three occasions to be transferred to another biology class, but the counselor would advise her to stay where she was and that maybe things would change. After her efforts to be transferred were unsuccessful, N.N. testified she finally complained to her mother. Guidance counselor Richard Saldon specifically testified that N.N. never complained to him that respondent had twisted her arm or had "kicked" her in the buttocks, but he does not recall whether N.N. ever discussed respondent with him during 1989-90. (9T:61) N.N. does acknowledge having failed algebra during the 1989-90 school year and she acknowledges that she has cut classes during her sophomore and present junior year.

Principal Sakala recalls the incident with N.N. He testified he referred the matter to the Department of Human Services, Division of Youth and Family Services because he felt that what N.N. alleged, if true, was improper conduct. Sakala and his

then assistant principal Coviello, met with respondent who denied N.N.'s allegations except to acknowledge he did approach N.N. and tickle her. On October 26, 1989 respondent was advised by the superintendent that after consultation with the Board President he was suspending him with pay immediately because of the then pending DYFS investigation. It is noted that a written report of the investigation was not received from DYFS until the following school year, 1990-91, and that in the meantime respondent was reinstated to his teaching position November 27, 1989. Upon reinstatement, Sakala told respondent in writing (PS-13) while DYFS would probably not recommend criminal charges of child abuse that his investigation of the matter revealed he used poor judgment and that he should seek counseling, which respondent did not do.

Nevertheless, the Board did an investigation of the N.N. incident which resulted in the superintendent issuing respondent a letter of reprimand (PS-17) for his conduct and the Board withheld respondent's 1991-92 salary increments because of the N.N. incident and the March 22, 1991 incident when he pushed J.J. off a chair (PS-18). In light of the increment withholding action, it is inferred respondent's performance for 1990-91 was unsatisfactory.

Sakala testified that he was concerned over N.N.'s allegations against respondent because at the close of the preceding school year another pupil complained that respondent struck him in the back of the head. That pupil's mother came in but elected not to press the matter. On another occasion, sometime in 1989, Sakala was told that respondent was running an informal karate class in the school gymnasium. According to Sakala, he was concerned over the safety of pupils in that kind of physical contact. Sakala personally met with respondent and his representative and made it clear that respondent must not have physical contact with students whatsoever. Sakala also took the opportunity to tell respondent that he must treat all pupils equitably and fairly in the classroom, to stop shouting and the verbal insults of which pupils, Sakala says, had complained. Sakala recalls respondent's comments being merely that he understood what was being said to him.

E.C., who is the subject matter of specification 2(d) above, and a witness to some of the other alleged conduct in this charge, is presently 16 years of age and in her junior year at Princeton High School. E.C. testified that she was in respondent's biology class during the 1989-90 year while she was a freshman. She remained in

respondent's class less than one half year because she felt very uncomfortable in his class.

E.C. explained that respondent was uncomfortable with the strictness of the classroom of having to sit up straight and his incessant stare at her straight in the eye. She described this stare as intense eye contact which made her feel very uncomfortable. E.C. described respondent as very formal and unrelaxed in a very strict, self-disciplined way while she was very relaxed and "humorous". (3T:65) E.C. described the strictness she discerned about respondent in the following manner:

> He also made us do homework over again if we didn't do it exactly the way he asked it do be done. What I mean by this is by underlining things in different colors and getting all of the equipment - - all the school supplies that he asked like a see-thru ruler and - - and colored pencils and you know kind of nursery school type things. And instead of concentrating on learning the material we concentrated on the formalities of the material.
>
> (3T:66)

E.C. described respondent as demanding if the asserted formalities regarding the colored pens were not met because he would hand the submitted work back to the pupil and direct that the work be done over again until it was done exactly the way he wanted it. E.C. described herself as being frightened in the classroom because the classroom was kind of dictatorial and she felt worthless and without "power".

E.C. described the intrusion into the classroom by M.W., the sophomore pupil referenced already by N.N. Along with M.W., E.C. also identified other pupils, not assigned the classroom, who would simply walk into the class and engage in conversation with respondent and talk about matters unrelated to class such as having been to respondent's house, and seeing his house being built. E.C. described these kinds of intrusions as occurring more often then actual class time.

E.C. recalls that respondent spent classroom time discussing martial arts, particularly judo. Respondent would talk about how skilled he was in the martial arts and on many occasion he demonstrated his skills in class. On one occasion during class, E.C. acknowledges that she went to respondent and said something to the effect "I bet you couldn't get me" with a particular karate move. (3T:72)

Respondent said he could and E.C. said to try. E.C. put her arm out and said, in effect, to respondent "let us pretend I punched you" at which respondent grabbed or took her arm and twisted it around somehow and she fell to the ground. E.C. insists that while respondent did not mean to hurt her, that he did hurt her and she had a bracelet on her wrist at that time which pinched her skin. E.C. said that it did not hurt when she fell to the ground but the only thing that did hurt was respondent's grip on her wrist which was over the bracelet because the bracelet pinched her skin.

E.C. does recall respondent on another occasion in class proclaiming how he knocked a corner of a desk off with his bare hands and she recalls another occasion when N.N. was putting lipstick on at her assigned seat in the classroom. She recalls respondent coming up from behind her and in a playful way squeezed her waist and shouted something such as "Don't do that". (3T:79) E.C. quickly points out that the touching was not sexual nor did respondent say anything obscene. While E.C. describes respondent's demeanor in the classroom as strict, highly disciplined, and akin to a military style, E.C. herself points out the apparent contradiction with the way respondent allowed M.W. and others simply to walk into the classroom anytime at all.

Respondents' testimony regarding the conduct of this particular biology class, as well as the pupils who were assigned and what occurred, is quite to the contrary of what has already been presented. Initially, respondent acknowledges that M.W. and others would appear in and disrupt his biology class. Respondent explains that M.W. engaged in particularly outrageous behavior. He was apparently a student in need of special education. Respondent befriended him and told him essentially that before he lost his temper and did something he would regret to come in to his classroom, which he did. However, if respondent was lecturing at the time then M.W. knew he could not stay and would proceed to the school nurse. Consequently, respondent, I infer, justifies the intrusions by unassigned pupils into his biology class by claiming he was really working with them.

With respect to N.N., respondent claims that her behavior for the first month of 1989-90 made no impression upon him. Generally, respondent says he was dissatisfied with the lack of achievement of the whole class, and in particular, the lack of homework. Consequently, respondent began checking homework on a daily basis after which he began getting complaints and negative comments from N.N. Respondent claims that one day in October he was sitting in the corridor outside of

the science department when N.N. walked by. He invited her to sit down, which she did, and he advised her that she was not doing really well in biology and asked what he could do to help her. Respondent claims that her response was he could let her sing when she wished to, he could stop grading homework, and he should allow her to walk in and out of class whenever she wanted. (6T:97)

Respondent says that the day N.N. told her mother what he was to have been doing to her, which respondent says are lies, N.N.'s behavior in class that day was bizarre. Respondent says that N.N.'s behavior was so "weird" that he asked her to move her seat from in front of his desk to the side of the room by the aquarium. Then, respondent claims N.N. simply started to sing a whole series of sounds including rhyming sounds and letters strung out one after the other. Respondent said N.N interrupted his lesson every couple of minutes and asked to move back to her seat in front of him and that he finally relented. After resuming her seat in front of his desk, N.N. was quiet for about two minutes and then looked at him and asked if she could draw his nose. Respondent said no and that she should do her work. A couple of minutes later, respondent says N.N. wanted to know if she could touch his mustache. Again, respondent said no and she should do her work. Five minutes later, respondent says N.N. got out of her chair, sat on the floor, and started to sing. After having told N.N. to get back in her chair, which she did, N.N. rolled her head around and continued singing louder and louder. At the end of whatever she was singing, respondent says she got out of the chair, onto the floor side ways with her knees up around her chest and began singing and "incredible series of rhyming sounds and - - and letters." (6T:99) Class ended and N.N. and other students left the classroom. Respondent did not discuss what he says was N.N's behavior that day with any member of the child study team, or any school official, or anyone else despite the fact N.N.'s behavior, he says, was unlike any behavior he saw as a teacher. (7T:86) Rather, respondent says he was going to discuss that behavior with a member of the child study team the following day until after he learned of the allegations N.N. had made about him to her mother.

Respondent denies that during the 1989 fall, he ever kicked or pushed N.N. or any student in the buttocks and he denies having ever twisted N.N.'s arm, or any other pupil's arm, behind their back, and he denies twisting any pupil's wrist or having used any form of martial arts in class. He does acknowledge that on one occasion during class he addressed a question to N.N. to which he received no response so he called her name twice and "went over and shook her by the shoulders and went N.?" (6T:101) On another occasion, respondent acknowledged that N.N.

was putting on lipstick after he had told her many times not to put makeup on during class. He walked up behind N.N. and told her to put the lipstick away and "tickled her" on her shoulders.

Respondent testified in regard to E.C. that he recalls sitting at his desk when E.C. got in line with other pupils for him to check their homework. E.C. became impatient so she walked right up to him and began shaking her homework papers in his face. According to respondent, the corners of the papers were hitting him on the cheek, near his eye so he grabbed her wrist and moved her and the papers away from his face. It appears that respondent denies twisting E.C.'s arm although in response to the question "Did you twist her arm?", his response was "You don't have to. You just grab the wrist and you move her away. It's very simple." (6T:103) Respondent recalls another occasion with E.C. when she wanted to talk with him while he was taking with someone while seated at his desk. According to respondent, E.C. began to poke him in the shoulder and shook her fist in his face. He grabbed her wrist and moved her away from him.

In regard to respondent's denial of pupil arm or wrist twisting, his testimony on cross-examination is illuminating:

> Q Now, your testimony is that other than the four physical contact incidents with you [two with N.N. and two with E.C.] which you have described which you think are entirely appropriate, you've had not other physical contact with students, putting aside playing basketball, lacrosse, football, anything like that; is that true?
>
> A No.
>
> Q Okay. What's the true testimony?
>
> A You can also add to basketball or the arm wrestling. You can also add showing them wrist stretching exercises and centering and meditation exercises.
>
> Q Anything else?
>
> A No.
>
> Q Now, didn't you previously tell us you did not show students any of these martial arts?
>
> A That's correct.
>
> Q Or is this some kind of explanation?
>
> A No. Neither. This - - the centering exercises and wrist stretches and mediation are not wazu (phonetic) or martial technique.

Q Do you come into physical contact with the other person?
A During.
Q Wrist stretching, centering or meditation.
A You could.
Q Did you?
A Most likely, yes.
Q You can't recall?
A The idea of centering - -
Q You can't recall?
A I cannot recall.
Q Okay, Now, wrist stretching implies from the words that there's some stretching of the wrist; is that correct?
Q By another person or by the subject himself or herself?
A By the subject him or herself.
Q Okay, Centering. What is that?
A In other words, instead of sitting like a snail vark (sic-phonetic), watching your posture and having a sense of where your own center of consciousness is. Some call it the hara (phonetic). Other (sic) call it the one point. Fred Astaire called it his center of gravity. ***

7T:87-89

Respondent's own witness, N.A., testified he demonstrated karate, or aikido, moves in class on pupils. (10T:61-63)

Respondent points out that his performance rating for 1989-90, despite the allegations against him by N.N., was satisfactory, the highest rating to be received by a teacher at Princeton. Furthermore, respondent insists that he was not disciplined in any manner as the result of whatever conduct was alleged against him during 1989-90. Respondent claims that N.N. lies when she makes the allegations here against him and that she now has a vendetta against him (7T:80); that E.C. is truthful when she describes what occurred between him and her except, respondent insists, E.C. did not testify that he twisted her arm behind her back, made her fall to the ground, pinched the bracelet on her hand and caused her to cry. (7T:87) I **FIND,** contrary to respondent's insistence, that E.C. did so testify.

I have considered the testimony of C.M., C.B., and K.A., each of whom was a pupil in respondent's class and each of whom hold respondent in high regard, and I reviewed the testimony of N.A. who, as reported above, acknowledged that

respondent demonstrated martial arts in class. The collective testimony of the pupils, except as specifically noted otherwise, is that respondent was a good teacher who kept their interest in class. However, no one of these pupils was present when the incidents described above by N.N. or E.C. were to have occurred. I have also reviewed the testimony of Guidance Counselor Saldon who cannot recall N.N. complaining of respondent; I reviewed the testimony of Ann Johnson who considers respondent a very effective teacher; I reviewed the testimony of James Manzer, William Bux, and Claudia Eberly who presented themselves to testify regarding the positive influence respondent had on pupils. I have reviewed the testimony of Sherry Sprague, Anthony Biancosino, Gil Mortensen, parent Cleo McCray, and Beth Frykberg. Each of these individuals testified regarding personal opinions they formed concerning N.N. which are negative and respondent which are positive and his effectiveness as a teacher, along with his honesty and integrity. Finally, I have reviewed and considered the testimony of Tynetta Howard who says she overheard N.N. said to another that her "plan" worked to get out of respondent's class. There is no evidence, however, that Ms. Howard reported what she was to have heard, in light of the seriousness of the matter, to Principal Sakala.

Nevertheless, respondent's performance was rated satisfactory for 1989-90.

FINDINGS OF FACT

I have considered the testimony and documentary evidence offered by the parties in support of their respective positions on this charge and while the individuals called by respondent to testify in his defense were honest and forthright in their personal opinions regarding him, I am persuaded that respondent did in fact engage in the conduct alleged in this charge. That is, I am absolutely persuaded that respondent kicked or pushed N.N. in the buttocks on more than one occasion during 1989-90; that he did grab N.N. from behind and tickle her; that he did twist the arm of N.N.; that he did grab E.C. by the wrist and turn her arm around her back which forced her to the ground; and, I am convinced that respondent did, in fact, demonstrate martial arts techniques in class on pupils and, more likely than not, caused wrist burns to be inflicted upon those pupils. Respondent's own testimony regarding this charge is equivocal at best and in my view offered as an attempt to mislead. If N.N.'s behavior on October 24 was as bizarre as respondent claims no valid reason exists why he did not take immediate steps to assist her. Therefore, the conduct underlying charge eight is found to be true in fact and that such conduct manifests poor judgment by him and caused DYFS to launch an investigation which,

in turn, resulted in his suspension. Respondent's suspension from his teaching duties necessarily caused a disruption in the continuity of instruction for the pupils in his assigned classes. Contrary to respondent's Brief at page 44, his suspension is mandated by law, N.J.S.A. 9:6-3.1, not by local policy.

CHARGE NINE

Charge Nine is reproduced here without the 23 paragraphs of specifications:

> During the course of his career, Ward Campbell has engaged in a pattern of unprofessional conduct which has triggered complaints from parents, students and administrators and which demonstrates that he is unsuited to remain as a teaching staff member in the Princeton School District.

The Board offers this charge not to prove the truth of the complaints made against respondent, but to show that throughout his entire career he received notice that the complained of conduct in the specifications, which the Board asserts was repeated in charges one through eight, would not be tolerated and that such complained of conduct, if continued, would result in serious disciplinary action.

The extensive specifications to this charge repeat the conduct complained of in charges one through eight, and conduct allegedly engaged in by respondent from 1978 through 1986 which formed the bases for telephone complaints made to principal Johnson. The complained of conduct not already addressed in charges one through eight includes respondent's exclamation to a parent in February 1978 who had telephoned him to discuss her child that she was "so full of shit" for which he received a written reprimand (PJ-52); conduct in 1982 by which parents complained that respondent, in explanation to another parent why there was no grade on that parent's child's report-card, stated that it was not his fault, he was working with "assholes"; that he was denied permission for a weekend field trip with eight female students but conducted the field trip anyway and that on that field trip he used profanity in front of the female pupils. In 1983 complaints were lodged against respondent for having given "pink bellies" to pupil, for having used "four letter words," leaving his class unattended, issuing illegible ditto's and unreasonable ground rules, and for having used "bad language" in class.

During 1983-84 a number of complaints of respondent's conduct were telephoned to principal Johnson by three parents who claimed respondent gave pupils wrist burns, pink bellies, and "head locks", that he engaged in "strange" and/or "threatening" behavior, tore up pupils' papers in class, looked "intoxicated", and referred to a parent's child during a parent conference as a "twitch shit." A complaint was made also over an incident which was to have occurred in 1984 with a pupil C.S., who has since graduated from Princeton High School and is presently in attendance at the University of Pennsylvania, who appeared and testified at this hearing. The incident with C.S. which occurred in April 1984 and for which he received a written reprimand from Johnson, along with an earlier written reprimand from the superintendent (PJ-42) for "horseplay" with pupils, resulted in an unsatisfactory evaluation of respondent's performance for 1983-84, and a recommendation to withhold a salary increment. The "horseplay" in which respondent was to have engaged in March 1984 was the pink bellies, wrist burns, and swinging a pupil around a desk. The withholding recommendation was not forwarded to the Board by the then superintendent because of the "bad message" all such recommendations would send the community as already reported above in Background. Nevertheless, a letter of concern was issued by Principal Johnson (PJ-43) in regard to the C.S. incident.

When respondent was assigned to the high school for 1985-86 he received a memorandum from his supervisor (PS-5) regarding his conduct of shouting at the supervisor in front of students and teachers, along with the memorandum having memorialized an earlier incident when respondent exclaimed in front of students that room assignments given him were "stupid."

Principal Johnson testified that he personally discussed each of the complaints, with the exception of one, set forth in the specifications to this charge with respondent. Johnson did not discuss the field trip complaint because the trip occurred after the school year ended. Johnson was able to recall having discussed each telephone complaint with respondent because he maintained, and continues to do so, a log of telephone calls received during his principalship. Johnson testified that his practice regarding the log and telephone complaints received is that whenever the complaint deals with a matter sufficiently serious to require him to speak to the teacher involved he places a star alongside of that complaint in his log. Thus, Johnson was able to credibly testify that he discussed each complaint he received with respondent. Johnson also testified that throughout the years respondent was assigned his school, he had conferences with him "all the time" in

order to give him suggestions for improvement of his complained of behavior as a teacher. Johnson explained that he wanted respondent to straighten out his conduct in order to eliminate parental and student complaints he had been receiving. Throughout the observations and evaluations of respondent's performance which are contained within this record, reference is made to the need for improvement in respondent's "professional posture." That reference according to Johnson, was an effort to get respondent to "fine tune" his professional demeanor as a teacher in the district based on parental complainants he received, but could not consider in his evaluations of respondent's performance under the Agreement.

Johnson worked out a procedure he calls "fact or fiction" with respondent regarding the numerous telephone complaints he had been receiving. Johnson explains under this "fact or fiction" procedure he would go to respondent and say, in essence, "Ward, I got a phone call. Is it true such and such happened? If it's true,– clean it up. If it's not true, forget it. " (1T:34) Johnson testified that the "fact or fiction" procedure with respondent went on for years because of the numerous telephone complaints he received from parents regarding the conduct of respondent. Johnson testified that he cannot recall respondent ever admitting that inappropriate conduct when Johnson discussed the complaints with him. In fact, Johnson testified that in most cases, after respondent denied having engaged in conduct which would be the subject of a complaint, respondent would then provide a litany of what was wrong with the pupil whose parent telephoned the complaint. (2T:25)

Respondent admits the vulgar exclamation to the parent in 1978 that she "was full of shit" and he admits "horseplay" but only in the form of having organized an arm wrestling contest in class, a picture of which he notes was published in the school yearbook. Respondent specifically denies the incident with C.S. and he denies having been put on notice or counseled regarding any other complaint which school administrators may have received regarding his conduct from 1978 forward.

Respondent testified that between the period 1977 through 1984 he and Johnson did discuss his vulgar exclamation to the parent who called on the telephone regarding her child; his arm wrestling for which the superintendent subsequently issued a letter of reprimand for the "horse play"; and, his conduct in regard to C.S. which incident, respondent insists, did not occur. Respondent specifically denies Johnson ever spoke to him concerning pink bellies, foul language,

using head locks on students, wrists burns, referring to any student as a "twitch shit", exclaiming that he works with "assholes", or that he tore up pupil papers. However, respondent does not deny the "fact of fiction" mode of inquiry Johnson used with him on a number of occasions.

In regard to the superintendent's letter of reprimand (PJ-42) Johnson testified that he received a parental complaint on March 29, 1984 that respondent gave a pupil a wrist burn, swung another pupil around a desk, and that pink bellies were being administered in respondent's classroom. Johnson eventually reported the complaint to the superintendent. Johnson testified that he investigated the complaint because the parent had given him permission to do so. Johnson discovered that "there was some type of fooling around in Mr. Campbell's class," although respondent denied the fooling around, pink bellies, and wrist burns. There followed a conference with the superintendent, Johnson, respondent, and a representative from the Association. Following that meeting, the superintendent issued the letter of reprimand [PJ-42] which letter identifies respondent's complained of conduct, that is wrist burns, pink bellies, and swinging a pupil around a desk, as "horse play." In the reprimand letter, the superintendent notes that principal Johnson had had repeated discussions with respondent regarding his professional responsibilities and that he has engaged in unprofessional conduct; that his professional improvement plan for the preceding year required him to abide by professional expectations; and that "horse play" in class should be discouraged. Finally, the superintendent notes that respondent is expected to use professional conduct and judgment, not tolerate inappropriate student behavior, to cease engaging in brash, bravado, machismo activity because it may frighten timid children, and to eliminate all forms of "horse play." On cross-examination respondent's testimony regarding the letter of reprimand and his denial of prior warnings regarding his complained of conduct is as follows:

> Q. Now, let me refer you to the second paragraph [PJ-42: Letter of Reprimand], which reads: 'Over the course of your time in the district, you and Mr. Johnson have had repeated discussions about your professional responsibilities and his sense that you have not conducted yourself in a professional manner.'
>
> Do you see that sentence?
>
> A. Yes, I do.
>
> Q. Now, is that a false statement?
>
> A. That is a false statement.

Q. And did you write to Mr. Houston [the then superintendent] and Mr. Johnson saying that that was a false statement?

A. No, I did not.

***

Q. Then it says: 'This latest incident was in direct disregard of this year's PIP [Professional Improvement Plan]'

Is that true?

A. No.

Q. Now, if you'd move down on that same page, it says: 'Mr. Johnson pointed out that he expected the following.' And then paragraph number 2 says: 'You should apply professional judgment, involving yourself in juvenile activities or failing to maintain your composure would be opposed to this.'

Do you see that language?

A. Yes, I do.

Q. Now, do you know that he was talking about?

A. No, I do not.

Q. Did you ask him about it?

A. No, I did not.

Q. Did you write in response and either object to that or question it?

A. No, I did not.

***

Q. Now, paragraph three says: 'You should intervene and stop student behavior that might be construed as inappropriate.'

Did you know what he was talking about?

A. No, I did not.

Q. Did you write to him?

A. No, I did not.

Q. And did you ask for a conference about this?

A. No, I did not.

Q. Paragraph four says: 'Brash, bravado, machismo activity, while appealing to some children, frighten and alienate other children.'

Do you see that language?

A. Yes, I do.

Q. Did you know what he was talking about?

A. I believe it had something to do with the lacrosse team and my coaching of the lacrosse team. And there were some children that

were intimidated by the lacrosse players coming into my classroom to drop off their equipment

Q. That was the machismo activity you were engaged in?

A. That is the machismo activity as best I can figure out what he was talking about.

Q. Were you curious about what he was talking about?

A. No, actually I wasn't.

. . .

Q. Now, the second page at the top says: 'We spent considerable time discussing your image in the community and how far you need to go to restore confidence in your professional demeanor.'

Do you see that language?

A. Yes, I do.

Q. Did you know what he was talking about?

A. Not in the slightest.

Q. Did you think that the restoration of confidence was due to one arm wrestling incident?

A. I had no idea what he was talking about?

Q. And you didn't think it was worthwhile to check with the Superintendent as to what this letter meant?

A. That's correct.

Q. Didn't you think it might have an impact on your employment?

A. In all honesty, if you want to know what was in my mind when I got it?

Q. I do.

A. I thought it was a joke. I couldn't - - I - - I just could not believe this. So I just wrote it off and went on with my life.

(7T:34-39)

Mr. Campbell was also questioned regarding the May 8, 1984 letter of concern from Principal William Johnson (PJ-43) regarding the C.S. incident;

Q. The third paragraph says: 'Throughout your tenure as a teacher at John Witherspoon School we [Johnson and respondent] have discussed and I [Johnson] have reinforced the importance of you maintaining a professional posture at all times.

Is that a true statement?

A. Yes, it is.

Q. So in the preceding, I guess it was seven years you'd had many discussions with Mr. Johnson about your professional posture?

A. No

Q. What's not true about the statement?

A. Throughout my tenure as a teacher from the very first year that I was there he informed me, he reminded me that I was the youngest person on the faculty and that I had to be careful with how the older people, both on the faculty and around, perceived me. Even the idea of going out and adopting and hugging a tree [as part of environmental science] raised eyebrows and created a ruckus. And then I got in trouble again when we were outside with the kids looking at the trees when we got caught in a rainstorm. So in addition to being chastised for naming trees and encouraging people to adopt them and hug them, then there was a problem when the kids got rained on. The nice thing was that the home ec teacher loved the fact that it happened because it finally got her a dryer for her classroom and she thanked me for getting the kids wet.

. . .

Q. In your mind, those two situations, the hugging the tree, and playing basketball at lunchtime, were the problems concerning your professional posture?

A. Yes.

Q. It then says: 'This latest incident leads me to believe that you -- that the area of professionalism is an area in which you cannot function up to our standards.

Again, you think he was only talking about the tree hugging and basketball?

A. I could not elaborate. I don't know.

(7T:40-42)

FINDINGS OF FACT

Findings on this charge are limited to whether principal Johnson and/or the superintendent discussed respondent's complained of conduct with him between 1978 through 1984. Findings do not reach the issue of whether respondent did, in fact, engage in the specific complained of conduct except where he acknowledges

its truth as in telling the parent she is "so full of shit" which conduct is found true in fact.

I find principal Johnson's testimony credible that he personally discussed with respondent each complaint received regarding his conduct, except the field trip, between 1978 through 1984. This credibility assessment is based on Johnson's undisputed written compilation of his starred telephone log upon which he relied during his testimony regarding events which occurred years ago. It is also based on reasonably expected conduct of a high school principal that when complaints of this nature and quantity are received regarding a teacher's conduct, he/she will discuss the complaint with the teacher. Respondent's contrary testimony is found to be contrived, not worthy of belief, and not credible. It simply is not reasonable, as an example, for a teacher to have received a written reprimand from the superintendent as respondent did, discuss the reprimand with the superintendent, the principal, and his association representative, then claim he has little if any idea to which conduct the reprimand refers, make no inquiries at the meeting or thereafter, and conclude that the reprimand was a "joke"!

Another example of respondent's lack of credibility is the C.S. incident. C.S., who by all accounts in this record is and was an honest individual, an excellent student without ill will towards respondent, gave compelling testimony that respondent publicly referred to her as a slut in a classroom. C.S.'s testimony is so strong that had respondent's complained of conduct been a separate charge he would have needed more than simply to deny such conduct or to rely on E.K.'s writing, which was prepared a month later and appears to have been requested of her by him.

Finally, respondent offers no reasonable explanation for "fact or fiction" which he acknowledges having occurred. Principal Johnson's testimony is unrefuted that the complaints he had to discuss with respondent regarding his conduct were so numerous that he resorted to the use of "fact or fiction".

I am persuaded that the Board established the truth of Charge Nine that between 1978 through 1984 respondent knew that complaints of his conduct were being made against him and that he acquired such knowledge because Principal Johnson told him of such complaints and repeatedly cautioned him to cease conduct causing such complaints.

SUMMARY OF FINDINGS

While the observed teaching performance of respondent has been rated highly, except in 1983-84 and 1989-90, his conduct from 1978 forward not observed by supervisors but proven true in fact includes:

* Telling a parent she is 'full of shit';
* Being repeatedly told of parental complaints against his use, or allowing the use, of wrist burns, pink bellies, and inappropriate physical contact with pupils, his use of inappropriate language, and his use of intimidating conduct in class;
* A recommendation had been made by principal Johnson to the then superintendent to withhold salary increments for 1984-85 because of the C.S. incident and the 'horseplay' in which he was to have engaged. The recommendation was not forwarded to Board because of the "bad image" it, and other similar recommendations, would present; not because of a view that the recommendation was not justified by respondent's conduct.
* Respondent's teaching performance was rated as unsatisfactory for 1983-84 and, again, for 1990-91. The 1991 unsatisfactory evaluation was as the direct result of respondent's conduct regarding N.N. and J.J.
* Despite having been repeatedly told of alleged improper conduct, one year after having returned from his two year leave of absence, respondent engaged in inappropriate physical contact with N.N. by placing his foot on her buttocks as she bent down to pick up a pencil, by twisting her arm, and other objectionable conduct, and by engaging in similar conduct with E.C., and other unidentified pupils in the classroom.
* Respondent, through his conduct motivated by anger he would not, or could not, control pushed a pupil, J.J., from a chair onto the floor thereby causing J.J. pain and embarrassment.
* Respondent applied psychological pressure to J.J. in order to secure from him a letter of apology in order to deflect personal responsibility for his own conduct.
* Despite having been repeatedly cautioned of his improper conduct and inappropriate language, respondent announced to his

class during September 1991 that he has been known to hit kids, uttered the epithet 'fuck you' in class in the presence of at least two pupils, and he bragged of having shot a mugger.

* On September 11, 1991 respondent uttered racial remarks to A.A. and four other black pupils including having to give A.A., who is black, his 'blacks in Princeton speech', that the races should be separated, that it is necessary for respondent to correct the speech of black people and that black pupils at Princeton High School are only interested in having fun, and that four specific black pupils more likely than not would fail high school because they are black.

In his filed brief at page 107 respondent asks the question, perhaps rhetorically but nevertheless asks, whether principal Johnson, teacher Vivens who testified on behalf of respondent, or Joann Parker, who also testified on behalf of respondent, and all three of whom are African-American, would have faced tenure charges if they had made the statements to A.A. and the advisees respondent had made and for which he was charged with conduct unbecoming. Respondent then argues that because he is a "white male" should not in anyway stigmatize his efforts to encourage minority students.

The answer to the question posed may only be answered by the Board for it is that body which determines whether to certify tenure charges against one of its employees. However, if what respondent suggests is that the comments he made to A.A. and the other four black pupils would not be considered racist if said by a black person, respondent misses the point of the need for this society to eliminate stereotypical race-based comments which are demeaning. Being an African-American, or a member of any other minority group, does not carry with it license to subject black students to stereotypical, racist comments which are offensive and demeaning particularly in a public school setting and particularly when the speaker of the remarks is a public school teacher.

CONCLUSIONS

Tenure of employment as a teaching staff member such as that possessed by respondent protects teachers from arbitrary dismissal for "unfounded, flimsy or political reasons." Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 73 (1982). Tenure is designed to aid in the establishment of "a competent and efficient school system" by affording protective teachers a measure of security in the ranks they hold after

years of service. Viemeister v. Prospect Park Bd. of Ed., 5 N.J. 215, 218 (App. Div. 1949). Unfitness to remain a teacher may be shown by a single incident, if sufficiently flagrant, but is "best shown by numerous incidents." Redcay v. State Bd. of Ed., 130 N.J.L. 369, 371 (Sup. Ct.) aff'd 131 N.J.L. 326 (E&A 1944); In re Fulcomer, 93 N.J. Super. 404, (App. Div. 1967).

N.J.S.A. 18A:6-10 provides that a tenured teacher shall not be dismissed or reduced in compensation "except for inefficiency, incapacity, unbecoming conduct or other just cause." In this case, the Board established that respondent, who has the capacity to put on an excellent lesson while being observed, is also vituperative with pupils and parents, he has demonstrated an inability to control his temper, and he has a propensity to place his hands on pupils in order to correct what he perceives to be deficiencies or excesses in their performance. It must be quickly noted that there is no evidence whatsoever that respondent ever touched any pupil in a sexual manner and no one of these charges make such an allegation.

Respondent's argument that the Board failed to show he was counseled or warned regarding allegations of unprofessional conduct under Matter of the Tenure Hearing of Cowan, 224 N.J. Super. 737 (App. Div. 1988) is rejected. The proofs in this case amply demonstrate that respondent was warned by principal Johnson as early as 1978 regarding complaints of his offensive conduct. Those warnings continued thereafter whenever Johnson received a telephone complaint. Moreover, principal Sakala brought to respondent's attention complaints he received from pupils and parents regarding his conduct. While such warnings are not in the context of "WARNING-DO NOT ENGAGE IN SUCH CONDUCT", any reasonable person must see the conversations and written reprimand he received from Johnson and Sakala as warnings to respondent that his conduct as complained of by parents would not be tolerated. Regrettably, respondent failed to heed such warnings.

Respondent's reliance upon the absence of criticism regarding his conduct in his observations and evaluations to show he has always performed at a satisfactory level is misplaced. Principal Johnson's testimony is clear that he would not comment in respondent's observations/evaluations on complaints regarding his conduct which were not placed in writing. Consequently, Johnson used the evaluation device to direct respondent to improve his professional posture, which he knew referred to complaints received of which he was advised. The need to have had closer supervision of respondent by Principal Johnson and more direct comment on complaints received regarding his conduct is, nevertheless, indicated. Assistant

Principal Schneider's silence to respondent mimicking the speech of black persons is puzzling.

Respondent argues that whatever occurred with N.N. or E.C. or any other pupil who may have testified against him in this proceeding does not constitute corporal punishment under N.J.S.A. 18A:6-1. While this defense is mounted, no one of the charges allege corporal punishment under law. Rather, what is in dispute is respondent's conduct of inappropriate physical contact with pupils characterized as unprofessional conduct. Respondent's conduct proven true does indeed constitute unprofessional conduct.

The facts in this case demonstrate that since initial employment in 1977-78 respondent's conduct has been the subject of complaints by parents, pupils, and supervisors. When a pupil school teacher admits having exclaimed to a parent seeking information on the progress of her child that she 'is so full of shit', when as the evidence in this case convincingly establishes the teacher refuses to cease inappropriate physical contact with pupils and sarcastic, demeaning, vulgar, intimidating, intemperate, and race-based remarks to pupils, when as the evidence convincingly establishes the teacher uses his superior position to apply psychological pressure for his benefit to a pupil to do something the pupil would not otherwise do, and when as the evidence in this case convincingly establishes the teacher receives a letter of reprimand from the superintendent and treats it as a 'joke' and ignores the admonitions contained therein, that teacher has manifested his intention not to conform his conduct to that expected by his employer, the Board of Education. Despite the fact the teacher may otherwise be rated as a highly satisfactory teacher through observable conduct in the classroom during a prepared lesson, the psychological and emotional detriments which befall certain pupils through that teacher's conduct, not observed by supervisors, create too much risk to pupils to have that teacher continue in his tenured employment.

Respondent has demonstrated over the years profoundly irresponsible conduct with pupils, he has refused to heed admonitions to conform his conduct to that expected of any teacher, and he has refused to cease and refrain from the use of objectionable conduct. While respondent may otherwise be an effective teacher during the presentation of a lesson observed by his supervisors, conduct in which he has engaged and in which he continues to engage is sufficiently flagrant for respondent to be separated from his employment with the Board and to forfeit his

tenure. Accordingly, the employment of Ward Campbell as a teacher in the employ of the Princeton Regional Board of Education shall be and is terminated.

INCREMENT WITHHOLDING CHALLENGE

N.J.S.A. 18A:29-14 provides, in part, that "Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded role call majority vote of the full membership ***."

On April 29, 1991 respondent was advised that the Board had acted on April 23, 1991 to withhold employment and adjustment salary increments from him for 1991-9 because of his "inappropriate physical contact with pupils in September and October of 1989 [the N.N. incident] and on March 22, 1991 [the J.J. incident]" (PS-18).

Respondent seeks to have the Board's action withholding his salary increments set aside on the basis that it failed to present credible evidence that it had a reasonable basis for its conclusion that he engaged in any of the conduct identified by N.N. or by J.J.

In Kopera v. West Orange Bd. of Education, 60 N.J. Super. 288, 296-297 (App. Div. 1960), held that on an appeal of an increment withholding action by the affected employee, the Commissioner is to determine (1) whether the underlying facts were as those who made the evaluation claimed, and (2) whether it was unreasonable for them to conclude as they did upon those facts, bearing in mind that they were experts, admittedly without bias or prejudice, and closely familiar with the mise en scene. The burden of proving unreasonableness is upon the appellant. Respondent's complained of conduct regarding N.N. and J.J. has been proven true in fact. That conduct formed the underlying facts by the Board for the withholding action. Therefore, the facts are as stated by N.N. and J.J. It is imminently reasonable for a board of education, and specifically this Board, to withhold salary increments from a teacher who has engaged in such proven conduct. Therefore, respondent is not entitled to relief because he failed to show the Board was unreasonable in its judgment. The Petition of Appeal regarding the Board's action to withhold respondent's salary increments for 1991-92 is **DISMISSED.**

A final matter remains. N.J.S.A. 18A:6-14 provides that a board of education which certifies a tenure charge to the Commissioner may suspend the affected

employee with or without pay. If the employee is suspended without pay, as in this case, and if the determination of the charge is not made within 120 calendar days after the certification, excluding all delays granted at the employee's request, then that employee's full salary shall resume on the 121rst until such determination is made.

Respondent was suspended without pay on November 20, 1991 when the Board certified charges against him. His full salary resumed on the 121rst day thereafter while his suspension continued. The plenary hearing was conducted on 11 days between April 9 and June 18, 1992 at the Office of Administrative Law, Mercerville. There, the hearing rooms are equipped with an audio-recording device. Written transcripts of testimony heard are prepared on request of the parties from the audiotapes by Audio Transcription Service in West Orange. The extensive record in this case, the correct spelling of certain terms used by respondent, and the occasionally lack of clarity of the audiotapes caused some delay in transcript preparation. Consequently, respondent could not comply with an originally selected date of filing post-hearing memorandum by about mid-August 1992. The last writing was submitted by respondent on October 8, 1992, the date this record closed.

The Board seeks to have the delay from mid-August to October 8, 1992 charged to respondent as a "delay" for purposes of salary payments already issued him under N.J.S.A. 18A:6-14. It prays for an Order authorizing it to recoup the approximate seven weeks salary payments made.

Respondent opposes the Board's motion and, and in an affidavit filed by respondent's counsel, points out that mid-August was a tentative date for the filing of memorandum and was never agreed as a firm date. Furthermore, respondent's counsel attests that Audio Transcription Service required correct spellings of certain names and phrases before it would prepare transcripts. In short, respondent's counsel asserts that he did all in his power to assure transcripts were promptly prepared.

I have considered the argument of the Board in support of its motion, as well as respondent's opposition thereto. I am not persuaded by the argument of the Board that whatever delay existed in the preparation of the transcripts from each day of hearing in this matter was caused by respondent. Whatever delay occurred in

transcript preparation is due solely to the process of audio-recording as it presently exists. The Board's motion is **DENIED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

November 20, 1992
Date

Daniel B. McKeown
DANIEL B. McKEOWN, ALJ, t/a

Receipt Acknowledged:

11/23/92
Date

Maureen L. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 24 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

tmp

DOCUMENTS IN EVIDENCE

INDEX TO ATTACHMENTS TO AFFIDAVIT OF WILLIAM JOHNSON

PJ-1 Statement, A., 9/11/91
PJ-2 Statement, K.A., 9/11/91
PJ-3 Statement, M.B., 9/11/91
PJ-4 Statement, O.B., 9/11/91
PJ-5 Statement, M.B., 9/11/91
PJ-6 Statement, C.B., 9/11/91
PJ-7 Statement, C.B., 9/11/91
PJ-8 Statement, C.B., 9/11/91
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PJ-10 Statement, J.G., 9/11/91
PJ-11 Statement, K.K., 9/11/91
PJ-12 Statement, K.L., 9/11/91
PJ-13 Statement, M.M., 9/11/91
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PJ-21 Statement, R.T., 9/11/91
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PJ-25 Statement, N.S., 9/12/91
PJ-26 Statement, D.T., 9/12/91
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PJ-28 Statement, S.K., 9/11/91
PJ-29 Statement, S.R., 9/16/91
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PJ-31 Statement, A.D., 9/16/91
PJ-32 Statement, S.M., 9/12/91
PJ-33 Statement, A.S., 9/13/91
PJ-34 September 18, 1991 letter

PJ-35 September 12, 1991 letter
PJ-36 September 16, 1991 letter
PJ-37 September 16, 1991 letter
PJ-38 September 17, 1991 letter
PJ-39 September 17, 1991 letter
PJ-40 September 18 handwritten letter
PJ-41 ID only
PJ-42 April 3, 1984 letter of reprimand
PJ-43 May 8, 1984 letter from William Johnson to Ward Campbell
PJ-52 February 14, 1978 letter reprimand from William Johnson to Ward Campbell

INDEX TO ATTACHMENTS TO AFFIDAVIT OF MARYLU COVIELLO

PC-1 March 26, 1991 memo
PC-2 April 15, 1991 memo
PC-3 Undated, handwritten letter
PC-4 April 29, 1991 memo
PC-5 May 14, 1991 memo

INDEX TO ATTACHMENTS TO AFFIDAVIT OF LESLIE TURBEVILLE

PT-1 September 19, 1991 memo

INDEX TO ATTACHMENTS TO AFFIDAVIT OF JOHN SAKALA

PS-1 October 1, 1984 memo
PS-2 ID only
PS-3 ID only
PS-4 September 25, 1985 memo
PS-5 October 11, 1985 memo
PS-6 September 15, 1988 handwritten complaint letter
PS-7 March 27, 1989 handwritten memo
PS-8 May 15, 1989 memo
PS-9 October 25, 1989 memo
PS-10 October 26, 1989 letter
PS-11 October 26, 1989 letter
PS-12 Employee change of status' form

PS-13 November 27, 1989 memo from John Sakala to Ward Campbell
PS-14 June 1, 1991 Summary Evaluation Report
PS-15 June, 1990 Summary Evaluation
PS-16 October 17, 1990 memo
PS -17 April 15, 1991 letter of reprimand
PS-18 April 29, 1991 letter re: Increment withholding

RESPONDENT WARD CAMPBELL'S EXHIBITS

CA-1 Observation, November 16, 1977
CA-2 Observation, February 14, 1978
CA-3 Evaluation, March 28, 1978
CA-4 Observation, October 3, 1978
CA-5 Observation document, October 3, 1978
CA-6 Observation, October 3, 1978
CA-7 Response, October 17, 1978
CA-8 Observation, January 12, 1979
CA-9 Response, February 15, 1978
CA-10 Observation, March 20, 1979
CA-11 Annual Evaluation, April 9, 1979
CA-12 Observation, December 18, 1979
CA-13 Observation, January 8, 1980
CA-14 Observation, February 5, 1980
CA-15 Letter Memorandum, March 3, 1980
CA-16 Annual Evaluation, March 31, 1980
CA-17 Annual Evaluation, April 7, 1981
CA-18 Observation, March 24, 1982
CA-19 Annual Evaluation, May 10, 1982
CA-20 Observation, January 25, 1983
CA-21 Evaluation, May 12, 1983
CA-22 Observation, February 13, 1984
CA-23 Observation Form, March 1, 1984
CA-24 Staff Evaluation, May 17, 1984
CA-25 Letter, May 22, 1984
CA-26 Letter, May 21, 1984
CA-27 Letter, May 29, 1984
CA-28 Letter, May 29, 1984
CA-29 Observation

CA-30 Observation, April 15, 1985
CA-31 Observation, April 15, 1985
CA-32 Evaluation, April 15, 1985
CA-33 Observation, February 13, 1986
CA-34 Evaluation, May 16, 1986
CA-35 Observation, November 21, 1988
CA-36 Evaluation, May 15, 1989
CA-37 Observation, December 4, 1989
CA-38 Note, May 7, 1990
CA-39 Observation Form, May 8, 1990
CA-40 Observation Form, May 10, 1990
CA-41 Summary Evaluation, June 1, 1990
CA-42 Annual Evaluation, June 6, 1990
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CA-44 Observation, November 28, 1990
CA-45 Note regarding Ward Campbell
CA-46 ID only
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CA-48 A portion of Board policy
CA-49 A portion of Board policy
CA-50 Memorandum, September 12, 1991
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CA-54 ID Only
CA-55 ID only
CA-56 ID only
CA-57 ID only
CA-58 ID only
CA-59 Document dated February 12, 1979
CA-60 Document, October 19, 1991
CA-61 Document, June 19, 1984
CA-62 "Shadow Branches", 1981-82
CA-63 Newspaper Princeton Packet, December 20, 1991
CA-64 Article published December 25, 1991
CA-65 Article, the Trenton Times, March 3, 1992
CA-66 Article, Trenton Times, December 20, 1991
CA-67 Princeton Packet Newspaper, December 27, 1991

CA-68 Article, Town Topics, November 1991
CA-69 Newspaper article, Trenton Times, October 6, 1991
CA-70 Newspaper article, Trenton Times, November 8, 1991
CA-71 Article, Princeton Packet, December 29, 1991
CA-72 December 20, 1990 letter
CA-73 ID only
CA-74 Article, Trenton Times, September 1, 1991
CA-75 Document
CA-76 Document
CA-77 Letter, March 10, 1987
CA-78 Letter, October 20, 1987
CA-79 Letter, February 16, 1988
CA-81 Letter, undated
CA-82 Letter, undated

Office of Administrative Law
Inter-Communication

To: **File - Board of Education of the Princeton Regional School Board v. Ward Campbell**
OAL DKT. NO. EDU 6883-91, AGENCY DKT. NO. 240-6/91 and EDU 159-92, Agency DKT. NO. 411-11/91

From: **Daniel B. McKeown, ALJ, t/a**

Re: **Initial Decision**

Date: **November 25, 1992**

The initial decision rendered on November 20, 1992 contains errors as follows:

1. Page 2, first paragraph, last line:

   the record closed date should be October 8, 1992.

2. Page 25, last paragraph, 7th line:

   after the word School and before the word matter please add the words **is a.**

3. Page 77, second paragraph, third line:

   the word pupil should be **public.**

It is hereby **ORDERED** that the initial decision be corrected as set forth above and that this memorandum be forwarded to the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, DR. JOHN ELLIS.**

November 25, 1992 Daniel B. McKeown

IN THE MATTER OF THE TENURE HEARING OF WARD CAMPBELL, PRINCETON REGIONAL SCHOOL DISTRICT, MERCER COUNTY.	:	
AND	:	
WARD CAMPBELL,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE PRINCETON REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by Respondent-Petitioner Campbell pursuant to N.J.A.C. 1:1-18.4, as were replies thereto by the Board of Education.

In his exceptions, Campbell initially reiterates the proposed findings of fact set forth in his post-hearing brief, which generally credit and emphasize the evidence and testimony of Campbell and his witnesses while impeaching, re-characterizing or downplaying the importance of the Board's proofs. Turning specifically to the initial decision, Campbell first avers that the ALJ erred in concluding (Initial Decision, at p. 73, Charge IX) that there was, between 1978 and 1984, a pattern of counseling and/or warnings concerning unbecoming conduct on Campbell's part as

required by Cowan, supra. Instead Campbell contends, his evaluations are filled with praise by evaluators who were not precluded, contrary to the ALJ's implication, from mentioning any concerns they had with respect to any aspect of Campbell's department, including concerns not relating to the particular classes they were observing. Thus, were there any concerns or had there been any warnings about Campbell's conduct, they would have been expressed in more than "the few amorphous criticisms***included in several observations over a period of almost fifteen (15) years***." Further, the ALJ should not have relied on testimony from William Johnson relating to anonymous complaints in view of the district's practice of considering such complaints untruthful. (Petitioner's Exceptions (Exception I), at p. 82)

Campbell next contends that the ALJ erred in crediting the testimony of N.N. and construing the testimony of E.C. to conclude that Campbell engaged in inappropriate physical contact with them and other students in his 1989-90 biology class (Charge VIII). E.C.'s testimony clearly established that Campbell only demonstrated martial arts techniques at her insistence and never meant to injure her, while N.N.'s testimony was totally uncorroborated and contradicted by other, more credible, witnesses; as well as belied by the fact that N.N., who disliked the rigor of Campbell's class and was a "problem" student, never reported any of the supposed incidents to her guidance counselors. (Exception II)

Campbell then argues that the ALJ erred in concluding that Campbell had hit or pushed J.J., causing him to fall over a chair, and then coerced the student into writing a letter denying that this had occurred (Charges V and VI). In so concluding, the ALJ ignored

J.J.'s well-known propensity toward lying, drawing attention to himself and self-abusive behavior, as well as his own earlier finding that the letter in question contained no misstatements of fact. Also ignored was the fact that no intention to harm had been demonstrated and the lack of credibility of the Board's "corroborating" witnesses. (Exception III)

In his next exception, Campbell avers that the ALJ erred in sustaining the Board's charge (Charge II) of inappropriate racial statements to middle school advisees during the 1991-92 school year, as it is abundantly clear from the testimony of the affected students that they recognized Campbell's intent as exactly what it was: encouragement and good counsel regarding pitfalls to avoid in high school and recognition that all students, regardless of background, could achieve the very best in academics if they were willing to overcome peer pressure and apply themselves to their work. In this context, any reference to race was merely an acknowledgement of the undisputed cycle of failure experienced by most black students within the Princeton system, and of the undisputedly disproportionate number of blacks in remedial classes, from which it was extremely difficult to emerge once "tracked" there through poor performance in middle school. (Exception IV)

Campbell then argues that the ALJ erred in finding that Campbell made inappropriate racial statements to his middle school science class regarding student A.A. and that he engaged in inappropriate behavior on "back to school" night when confronted there by A.A.'s father (Charge I). Accounts of Campbell's classroom comments, which were of the type discussed at Exception IV above, clearly became exaggerated and misrepresented as they passed from

student to student; while Campbell's conduct on "back to school" night was entirely consistent with the purpose of that event and completely reasonable given the irrational and agitated state of A.A's father, whose provocative manner precipitated the entire incident. Also, there was no support in testimony or evidence for the ALJ's conclusion that Campbell referred to separation of races regarding A.A's choice of seating, and it is likewise clear that black staff members in the district--who actually appreciated Campbell's spontaneity and commitment to black students--saw no racism in, and took no offense at, Campbell's use of black dialect, one of the bases on which the ALJ concluded that Campbell evinced racist tendencies. (Exception V) With respect to Charges I and II, Campbell also reiterates the First Amendment arguments raised in his earlier Motion to Dismiss as set forth at length in the initial decision at pp. 25-30, averring that the ALJ's analysis fails because it is based on the erroneous assumption that Campbell's message in the comments at issue was negative rather than positive. (Exception VI)

Also without merit, according to Campbell, are the ALJ's findings regarding inappropriate sexist remarks to female student S.K. (Charge III), intimidating classroom behavior (Charge IV) and the "Walkman in the aquarium" incident (Charge VII). In the first instance, the ALJ took at face value the testimony of a witness who could in no way be found credible, as well as ignoring the general climate out of which the allegations against Campbell arose; in the second, he ignored both witnesses who corroborated Campbell's account and Campbell's own credible testimony. (Exceptions VII and VIII) In the third, he absurdly sustained charges when it was clear

that Campbell had never taken an operational Walkman, but had only used a broken one volunteered by a student as a "message" to the disruptive students about whom both Campbell and other students were concerned. (Exception IX)

Campbell then reiterates his recitation of relevant tenure law as contained in his post-hearing brief, concluding that its application in his case compels dismissal of all charges. He further opines that it would be a tragedy for the Princeton system, as well as a travesty of First Amendment protections, to permit hysterical overreaction to constructive statements arising from known public issues and the testimony of a few disturbed students to terminate the employment of a gifted, dedicated teacher who routinely went out of his way for students and consistently received positive evaluations. (Exception X) Finally, Campbell reiterates his argument, summarized at p. 78 of the initial decision, regarding the absence of any basis for the Board's witholding of his 1991-92 increment. (Exception XI)

In reply, the Board references its various submissions before the ALJ and urges affirmance of the initial decision. In general reply to the three main thrusts of Campbell's exceptions, the Board also: 1) responds to Campbell's arguments on lack of evidence by noting that the charges against him were established by numerous witnesses and written statements, and, in virtually all cases, were directly disputed only by Campbell himself, notwithstanding his claims that other witnesses corroborated his testimony; 2) replies to Campbell's attacks on the ALJ's credibility determinations by citing the well-established principle of deference to the trier of fact who actually saw and heard the witnesses, and

by noting the thoroughness and care with which the ALJ summarized Campbell's contradictory testimony; and 3) urges rejection of Campbell's arguments on protected speech, noting the critical distinction between this matter and the cases cited by Campbell in the manner, form and time of the speech at issue.

Upon careful review of the record, including ten volumes of hearing transcripts, the Commissioner determines to affirm the decision of the ALJ for the reasons well and fully expressed therein.

The Commissioner is unpersuaded by Campbell's exceptions, which largely raise arguments already addressed at length in the initial decision. Specifically, the Commissioner is fully satisfied that the ALJ's recitation of testimony is both accurate and thorough, and that he carefully measured conflicts, inconsistencies and potential biases in deciding which testimony to credit in reaching his findings of fact. The Commissioner is likewise unpresuaded by Campbell's attempts to discredit certain student witnesses by impugning their general character and deportment and to support his own case by general attestations to his character and teaching effectiveness which bear little or no relation to the actual incidents underlying the Board's charges. Finally, the Commissioner concurs with the Board that the credibility determinations of the finder of fact, who observed the witnesses first-hand, are to be accorded great weight in the absence of any meaningful basis on which to challenge them upon review of the hearing transcripts.

Moreover, the Commissioner finds disingenuous in the extreme Campbell's arguments to the effect that, because his evaluations were silent on incidents of the type complained of

herein, he received no indication that such conduct was not acceptable to the district. To the contrary, as found by the ALJ, Campbell received numerous warnings over the years and simply continued to deny that his attitude and professional posture might be a problem. Similarly disingenuous are claims that, because a Walkman was not operational, because a forced letter of apology contained no factual inaccuracies, or because a demonstration of martial arts techniques was given in response to a student's dare, the conduct associated with these incidents as set forth herein is any less objectionable. Most egregious of all, however, is the notion that, from the mouth of a public school teacher addressing individual pupils in the classroom setting, comments of an overtly racist and sexist nature are nothing more than constructive attempts to guide students into better behavior and academic performance, and are furthermore protected expressions of concern and experience on a matter of established public interest within the school district.

In sum, then, the Commissioner concurs with the ALJ that, while it is regrettable that the decision herein will mean the loss of a teacher who has in some respects accomplished a great deal and shown much potential, Campbell's continuing--and evidently unrepentant--pattern of irresponsible and insensitive utterances, inappropriate physical gestures and intimidation tactics in dealing with students is sufficiently flagrant to warrant his dismissal from tenured employment in the Princeton school district, whatever his intentions may have been in engaging in such conduct.

Accordingly, for the reasons well expressed therein, the Commissioner affirms the initial decision of the Office of Administrative Law sustaining the Board's withholding of Campbell's

1991-92 increment, finding that certain procedural delays were not caused by Campbell so as to warrant recoupment of salary paid during suspension, and dismissing Campbell from his tenured employment as of the date of this decision, which is hereby referred to the State Board of Examiners for action as it deems appropriate pursuant to N.J.A.C. 6:11-3.6(a).*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 19, 1993

DATE OF MAILING - FEBRUARY 19, 1993

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* The Commissioner notes for the record that one non-material finding of fact in the decision above (Charge VIII, Initial Decision, at p. 66) appears to be in error. N.J.S.A. 9:6-3.1 does in fact mandate suspension for employees alleged to have committed an act of child abuse, but the statute specifically applies to "institution[s]" as defined in N.J.S.A. 9:6-8.21, and by this limitation does not include public schools, which are defined instead under the separate rubric of "day school."

28-93

EDU # 6883-91 and #159-92 (consolidated)
C # 28-93
SB # 15-93

IN THE MATTER OF THE TENURE HEARING OF WARD CAMPBELL

AND

WARD CAMPBELL,

PETITIONER-RESPONDENT/RESPONDENT,

V.

BOARD OF EDUCATION OF THE PRINCETON REGIONAL SCHOOL DISTRICT, MERCER COUNTY,

RESPONDENT-PETITIONER/APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, February 19, 1993

For the Petitioner-Respondent/Respondent, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross (Mark J. Blunda, Esq., of Counsel)

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

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

July 7, 1993

Date of mailing 09 JUL 1993

29-93

JOHN L. SCHETTINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD ET AL., BERGEN COUNTY,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioner, resident and taxpayer of Borough of Ridgefield and unsuccessful candidate for local school Board, challenged alleged use of public funds to promote political views and candidacy of incumbent Board members.

ALJ concluded that the Board did exceed its lawful authority in disseminating the flyers in question and that the proper remedy was injunctive relief to ensure equal representation of other viewpoints. Board was ordered to print and distribute four flyers, once a week for four weeks preceding the next school election, giving equal coverage and prominence to views of all candidates appearing on official ballot. Flyers were to be of comparable size, length and frequency as those mailed in connection with April 1991 school election.

Commissioner concurred with ALJ that the literature complained of by petitioner crossed the line into partisanship. The Commissioner, however, modified the ALJ's remedy. Commissioner has long held that partisan literature of any type has no role in Board-supported election activities. Commissioner directed that in order to ensure compliance with the letter and spirit of law requiring public-supported election literature to be nonpartisan in nature, the Board shall establish a procedure whereby Board publications concerning budget or election shall be reviewed for compliance by full Board in consultation with Board attorney and approved by Board prior to distribution to public. This procedure shall apply to all 1993 school election materials and shall remain in place for one year from date of decision.

FEBRUARY 25, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6396-91
AGENCY DKT. NO. 162-5/91

JOHN L. SCHETTINO,
Petitioner,
v
RIDGEFIELD BOARD OF EDUCATION and ALFRED L. KOTKIN, MARIANNE MERWEDE, ROSS ARRABITO, ROBERT DORSETT, EDMUND A. EYERMAN, THOMAS FENELLE and NICHOLAS PETRILLO, individually,
Respondents.

Louis M. Flora, Esq., for petitioner
(Giblin & Giblin, attorneys)

Dennis G. Harraka, Esq., for respondents
(Ferrara, Turitz, Harraka & Goldberg, attorneys)

Record Closed: August 3, 1992 Decided: January 8, 1993

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

Statement of the Case

This is a suit by an unsuccessful candidate for the local school board challenging the alleged use of public funds to promote the political views and candidacy of incumbent board members. Basically, the pleadings raise three important issues: (1) whether expenditures by the board for the printing and distribution of certain flyers constitute a misuse of public funds; (2) whether the approval of the flyers was done in a manner which contravenes the Open Public Meetings Act, N.J.S.A. 10:4-6 to -21; and, (3) whether school officials were derelict in failing to exercise greater control over the content of editorials published in a student newspaper.

Procedural History

On May 28, 1991, petitioner John Schettino ("Schettino") filed a petition with the Commissioner of Education ("Commissioner") against the Ridgefield Board of Education ("Board") as well as the named individual board members. Respondents filed an answer on June 18, 1991. Subsequently, on June 27, 1991, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case.

Both parties have stipulated all material facts, consented to a common set of exhibits, and brought cross-motions for summary decision. Both parties filed legal briefs in support of summary decision on June 15, 1992. Schettino filed a reply brief on June 29, 1992. The Board filed a reply on August 3, 1992.

Findings of Fact

All of the underlying facts and the contents of the relevant documents are undisputed, although their legal significance is strongly contested. I **FIND**:

John L. Schettino is a resident and taxpayer of the Borough of Ridgefield in Bergen County. In April 1991, he was one of four candidates for two vacant seats on the Ridgefield Board of Education. Other candidates included the two incumbents Alfred L. Kotkin and Marianne Merwede. The election was held on April 30, 1991. During the preceding four weeks, the Board arranged for the mailing of four separate flyers to residents of the Borough. It is acknowledged that the Board paid

for the flyers through the use of funds contained in the Board's regular operating budget. Costs for printing the four flyers amounted to $2,740 and for mailing them amounted to $1,615, or a total of $4,355. These costs were previously included as part of the district's annual printing expenses, which had been authorized for bidding at a public meeting held on July 12, 1990 and awarded at a public meeting held on July 31, 1990.

The Board as a whole did not draft the flyers. Instead, it delegated responsibility to prepare the flyers to three Board members, Marianne Merwede, Edmund Eyerman, and Nicholas Petrillo, who were assisted by various school administrators. Generally, the Board does not approve the content of each mailing made on its behalf by the school administration. In this particular case, the Board did not call for a public reading of the flyers or approve their content by formal vote.

Each of the flyers emphasized that the current Board had "lower[ed] school taxes," while promoting "good schools" which equate to "higher home values." Each contained a similarly-worded paragraph, usually highlighted in italics:

> This is to inform you that the Ridgefield Board of Education will continue to respond to the false "information" being spread throughout Ridgefield concerning the public schools. We believe it is necessary to respond to these critics. We want the citizens of Ridgefield to have all the information in order for your to understand what your tax dollar is proving the children and community of Ridgefield.

Each flyer, or "fact sheet" as the flyers described themselves, dealt with a specific topic of interest to parents and taxpayers. Each had the names of current Board members and a special telephone number at which a Board member could be contacted "anytime after 6:00 p.m."

The first flyer, dated April 5, 1991, made a comparison of the situation in 1985-90 with that in 1980-84, listing the accomplishments of the incumbent Board in such areas as public support for the school budget, expanded educational programs, reduction of the rate of salary increases, reduced administrative expenses, and improved communication with the Borough's governing body. Using emotionally-charged language, the first flyer referred to "an attempt to bring politics into the

schools by organized political groups" and accused certain unidentified persons of "spreading misinformation and mistrust . . . to further their own political interest."

The second flyer, dated April 12, 1991, appeared one week later. It contained a relatively straightforward report of achievements by Ridgefield high school students in terms of acceptances by competitive colleges, average scores on college-entry examinations and other standardized tests, percentage going on to higher education, and various awards and commendations. The third flyer, dated April 19, 1991, included an excerpt from a newspaper article stating that the Board had adopted a budget for 1991-92 in "the same amount as last year's total" which resulted in a tax savings of "about $25 for the average homeowner." Additionally, the third flyer featured statistics contrasting Ridgefield school district's "zero increase" with school tax increases in several neighboring communities. Finally, the fourth flyer, dated April 26, 1992, compared student achievement in Ridgefield with similar or wealthier Bergen County districts and cost per pupil in Ridgefield with state and county averages.

Schettino does not deny the accuracy of the figures provided in these "fact sheets," which were derived largely from official data set forth in the "recent report card sent by the State of New Jersey." However, Schettino argues that the choice of data was "selective" and "biased" so as to use "only those districts to which Ridgefield compares most favorably." Further, Schettino criticizes the Board for failing to include the total dollar amount of the 1991-92 budget and for allegedly taking unfair credit for a spending reduction caused by the defeat of last year's budget.

Of course, it is not the proper role of the Commissioner to declare which candidate for the local school board has a better grasp of the issues, analyzes statistics more artfully, or advocates more appealing public policies. That is a question for the voters to decide for themselves at the school election. Rather, the limited function of the Commissioner is to determine whether or not the Board crossed the delicate boundary between the legitimate purpose of informing the public of its activities and the improper purpose of campaigning for reelection of one of its members.

Apart from the flyers mailed under Board auspices, Schettino also objects to the contents of two editorials which appeared in a special edition of the high school newspaper, known as The Crown, distributed one day before the school board election. The Crown is "prepared and published by students of Ridgefield High School" and the cost of its printing is "funded by the Board of Education as part of its educational program." Students control the factual and editorial content of their own school newspaper, subject to monitoring by a faculty advisor. Two of the six student editors for 1990-91 happen to have been children of incumbent Board members. Only one was the child of a candidate running for office. No proof exists that any parent exercised undue influence over the editorial slant of the student newspaper. Indeed, the parties stipulated that the Board "exercises no editorial or prior restraint control over political expression contained in student editorials[.]" Importantly, the offending edition itself had a clearly-worded disclaimer that, "These editorials represent the opinions of the student editors of *The Crown*, not the Board of Education or Administration."

Again, the nature of Schettino's complaint is that the student editorials took definite positions and supported platforms of individual candidates for the Board, not that they contained libelous or obscene materials or were poorly written or inadequately researched. One student editorial entitled *Regionalization Rears Its Ugly Head Once Again* opposed a proposal to explore economies available through regionalization and urged students to "[t]ell your parents how you feel about regionalization" and to "[t]alk to neighbors and other relatives." Another entitled *Imagine There's No RMHS* asked readers to "[p]lease urge parents and neighbors to vote for the budget."

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the Board exceeded its lawful authority in disseminating the flyers in question and that the proper remedy is injunctive relief to insure that other viewpoints are equally represented.

Guidance on the limits of a school board's authority to expend public funds for campaign literature was provided by the landmark ruling of the New Jersey Supreme in *Citizens To Protect Public Funds v. Parsippany-Troy Hills Bd. of Educ.*, 13 *N.J.* 172

(1953). *Citizens* was a declaratory judgment action, seeking to invalidate a school bond referendum because of the board's failure to submit building plans in advance to the local planning board and also seeking a determination that the expenditure of public funds for the distribution of booklets advocating a favorable vote at the election was illegal. Although the narrow holding of the case is that submission to the planning board need not precede the election, the majority of the Court regarded the remaining question regarding the booklets to be of sufficient importance to justify "our comments upon the actions taken." (*Citizens*, at 178). Those actions included distribution of a pamphlet, found by the Court to present fairly the facts and advantages and disadvantages of the program in seventeen of its eighteen pages, but to endorse a "Vote Yes" in three separate places and to overdramatize "the dire consequences of the failure to do so." (*Citizens*, at 180).

Absent any express statute permitting a school board to pay for publication of such booklets, the Court recognized a power arising by necessary implication for school boards to incur "reasonable expenditures for the purpose of giving voters relevant facts to aid them in reaching an informed judgment when voting upon the proposal." (*Citizens*, at 179). In a thoughtful opinion written by Justice William J. Brennan Jr., the majority imposed reasonable restrictions on such implied authority. They drew the line at the point where,

> . . . the board made use of public funds to advocate one side only of the controversial question without affording the dissenters the opportunity by means of that financed medium to present their side, and thus imperiled the propriety of the entire expenditure. The public funds entrusted to the board belong equally to the proponents and opponents of the proposition, and the use of the funds to finance not the presentation of facts merely but also arguments to persuade the voters that only one side has merit, gives the dissenters just cause for complaint. (*Citizens*, at 181).

Realizing that its analysis was inconsistent with earlier pronouncements in *City Affairs Committee of Jersey City v. Jersey City*, 134 *N.J.L.* 180 (E. & A. 1945), which had upheld a seemingly broader municipal power to publicize one-sided views on subjects of public controversy, the majority in *Citizens* believed that "simple fairness and justice" require that use of public funds for advocacy be restrained within the suggested limits. (*Citizens*, at 182).

More recently, the Commissioner enjoined a school board from circulating a newsletter which "went beyond a straightforward presentation of factual information to advocate passage of the budget" and which "clearly conveyed" the impression that the current board of education "is doing a terrific job in contrast to its predecessors." *Fenton v. Sullivan,* 1991 *S.L.D.* 677, 682 (Comm'r April 23, 1991). Thus, *Fenton* stands squarely for the proposition that school boards are still governed by the standards enunciated in the *Citizens* decision. Despite the lack of any specific admonition to vote "yes" on the budget, the Commissioner found that "value judgments" expressed in the newsletter and its non-neutral tone constitute forbidden advocacy. *(Fenton*, at 683).

Here too, the flyers sent out by the Ridgefield Board transcend mere recitation of factual information and espouse a partisan point of view, extolling the virtues of the current board, deriding the stewardship of the former board, and accusing opponents of spreading lies and distortions. The general tenor of these documents is adversarial and argumentative, as distinct from nonjudgmental and dispassionate. Any impartial observer would conclude that the flyers amount to campaign literature designed to persuade voters on how they should vote in the upcoming election. Use of public funds for such purpose, however well-intentioned and high-minded, is an abuse of trust which cannot be condoned.

When fashioning an appropriate remedy, it is well to keep in mind that denial of access for outsiders to offer their side of the story is what brings this expenditure of public money "outside the pale." (*Citizens*, at 182). No legal precedent has been cited for holding board members personally liable for errors of collective judgment. Moreover, in *Fenton*, the Commissioner rejected the notion of individual liability for actions taken by board members in their official capacity. Even if such relief were theoretically permissible, it should not be invoked against a board member who may have been overzealous, but who is not charged with converting public funds for private financial gain. Rather, a more fitting remedy is to require the Board to give equal coverage to the views of all candidates in the next school board election. Such remedy would avoid the dangers inherent in prior restraint and censorship. It would have the advantage of expanding the opportunity for public debate and for greater understanding of the issues. And it would go a long way toward making amends for the wrong done to residents, like Schettino, who do not share the prevailing sentiment on the Board.

Given this outcome, it is unnecessary to reach the alternative ground for invalidating the Board's action, namely the claimed failure to comply with the Open Public Meetings Act. In passing, however, it should be noted that funds for the printing and mailing of the flyers were properly approved at a public board meeting and that no provision of the Act requires board members to review the precise wording of every publicity release issued in course of the year. Nobody contends that the contents of the flyers do not accurately reflect the consensus view of the Board membership.

Lastly, Schettino attacks the two editorials in the school newspaper as another example of "improper use of publicly funded media to support political candidates or positions." But this argument misconceives the educational purpose behind the school newspaper and misconstrues the function of educators in supervising learning activities.

Recently, in a 5-to-3 opinion, the United States Supreme Court recognized the right of a high school principal to make a pre-publication review of a school newspaper and excise two pages containing articles on student pregnancy and divorce. *Hazelwood Sch. Dist. v. Kuhlmeier,* 484 *U.S.* 260, 108 *S. Ct.* 562, 98 *L. Ed.* 2d 592 (1988). Rejecting the idea that school authorities had created a "forum for public expression," the court found that the school newspaper serves that role only if school authorities have followed a policy of opening such facilities "for indiscriminate use by the general public." *Hazelwood*, 484 *U.S.* at 267. Otherwise, the activity is reserved as "a supervised learning experience for journalism students." *Hazelwood*, at 270. Certainly the Ridgefield High School student paper is intended to be a teaching tool for students to develop critical thinking skills, hone their writing abilities, and practice their persuasive talents. No one, however, could reasonably be misled into thinking that this student paper was designed to represent all views in the community at large or as a mouthpiece for the Board. Any such misconceptions are quickly dispelled by the disclaimer at the bottom of the editorial page that the views expressed are those of the student editors alone.

With respect to adult supervision, the court held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are

reasonably related to legitimate pedalogical concerns." *Hazelwood*, at 273. Examples of adequate reasons to intercede include speech which is "ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences." *Hazelwood,* at 271. Mere existence of such editorial control does not mean that the faculty advisor is bound to exercise it whenever a piece might conceivably offend someone in the community. Whether or not one happens to agree with the particular stand taken, it can hardly be denied that the student editorials are cogent, intelligently written and suitable for high school readers. In times when so many young people are disaffected, it is hard to fault Ridgefield students for caring passionately about their education or for wanting to preserve what is good about their school. Far from being an appropriate instance for the imposition of editorial control, it would have been a gross violation of educational and journalistic standards to suppress these editorials simply because of disagreement with their content.

Order

It is **ORDERED** that the Board print and distribute four flyers, once a week for the four weeks preceding the next school election, giving equal coverage and prominence to the views of all candidates whose names appear on the official ballot for school board member. These flyers shall appear with the same frequency, be of comparable size and length, and be given an equivalent numerical distribution as the flyers mailed by the Board in connection with the April 1991 school election.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

Jan. 8, 1993
Date

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

Jan. 12, 1993
Date

Maureen R. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 14 1993
Date

Joyce LaVecchia
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Exhibits

No.	Description
J-1	Flyer re: Status of Ridgefield Schools
J-2	Flyer re: Student Achievement
J-3	Flyer re: School Budget
J-4	Flyer re: New Jersey School Report Card
J-5	Printing Invoice for J-1
J-6	Printing Invoice for J-2
J-7	Printing Invoice for J-3
J-8	Printing Invoice for J-4
J-9	Mailing Statement for J-1
J-10	Mailing Statement for J-2
J-11	Mailing Statement for J-3
J-12	Mailing Statement for J-4
J-13	Bid Form and Specifications Supplement
J-14	Board Minutes of July 12, 1990 Meeting
J-15	Board Minutes of July 31, 1990 Meeting

J-16 Finance Sheets dated April 25, 1991 and May 16, 1991

J-17 The Crown Special Edition, dated April 29, 1990

J-18 Letter from Joseph J. Costello, Business Administrator/Board Secretary, Ridgefield Board of Education regarding the School Tax Levy for Three Budget Years

J-19 Certificate and Report of School Taxes 1989/90 School Year

J-20 Certificate and Report of School Taxes 1990/91 School Year

J-21 Mayor and Council Resolution 234-90

J-22 Certificate and Report of School Taxes 1991/92 School Year

J-23 Letter dated April 2, 1992 from Leonard J. Grazeola, Chief Financial Officer, Borough of Ridgefield

JOHN L. SCHETTINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD ET AL., BERGEN COUNTY,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-18.4.

In its exceptions, the Board, together with the individually named respondents, references the arguments of its brief before the ALJ and reiterates its position that Citizens to Protect Public Funds, supra, does not prohibit dissemination of the type of literature at issue herein, which it characterizes as informational in nature and appropriate under the circumstances. The Board also contends that the initial decision improperly limits the Board's ability to respond to misconceptions and misinformation about its budget and negates the Board's right and duty to provide residents with comparative information about surrounding school systems, arguing that inference of comparative judgments about

current as opposed to prior Board members is inconsequential and in no way violative of proper use of public funds.

In his exceptions, petitioner (who advises that he is now representing himself pro se) concurs with the ALJ's overall findings, but objects to the decision not to address petitioner's Open Public Meetings Act (OPMA) allegations and to the ALJ's choice of remedy. Petitioner contends that the ALJ's disposition of this matter has left unchecked, and indeed, through the remedial requirement of equal time for all candidates, actually expanded the very abuse he (petitioner) sought to end, namely the printing and distribution of partisan literature and of publications purporting to represent the views of the Board without specific prior approval at a public meeting.

Upon careful review of this matter, the Commissioner concurs with the ALJ that the literature complained of by petitioner, while in some respects consisting of legitimate factual presentations, crossed the line into partisanship through its pejorative language and clear aim at opposition candidates for school board membership. She further concurs with the ALJ's observation that OPMA does not require each and every publication of the Board to be discussed and approved by formal action of the Board prior to its preparation and/or distribution.

However, the Commissioner does not concur with the ALJ's choice of remedy in this matter. While clearly based in the cited language of Citizens to Protect Public Funds, supra (Initial decision, at p. 6) referring to absence of like opportunity for dissenters, the proposed remedy would, in the Commissioner's view,

stand for the proposition that partisan literature paid for with public funds is acceptable so long as all sides are accorded equal representation. The Commissioner does not believe that Citizens, when taken in its entirety, either requires or supports this result; indeed, the Commissioner has long held that partisan literature of any type has no role in Board-supported election activities. Moreover, while the ALJ did not rule on petitioner's specific OPMA allegations and the Commissioner declines to remand this matter on that basis as it is unnecessary for a fair resolution of the controversy at hand, the Commissioner does note that the only indication in the record of full Board action with regard to the disputed literature is the "blanket" approval implied in its bid award for the upcoming year's printing expenses. Although no determination is made herein that this procedure constituted a Sunshine law violation, there is no question that it contributed to the underlying controversy and helped lead to the election literature violation proven in these proceedings.

Therefore, in fashioning a remedy for that violation, rather than requiring further partisan literature, the Commissioner instead directs that, in order to ensure compliance with the letter and spirit of law requiring public-supported election literature to be nonpartisan in nature, the Ridgefield Board of Education shall establish a procedure whereby Board publications pertaining either directly or by reasonable inference to the school budget or election of Board members shall be reviewed for such compliance by the full Board in consultation with the Board attorney and approved by the Board prior to their distribution to the public. This procedure shall apply to all materials related to the 1993 school election and

shall review in place for one year from the date of this decision, after which time it may be continued at the Board's discretion.

Accordingly, the initial decision of the Office of Administrative Law is affirmed in its analysis and conclusion regarding the Board's violation of relevant election literature law but modified in its discussion and order of remedial action as set forth herein. The Board is enjoined from publication of partisan literature and is further directed to establish appropriate review procedures consistent with the Commissioner's intent above.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 25, 1993

DATE OF MAILING - FEBRUARY 26, 1993

30-93

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND
COMMISSIONER OF EDUCATION

In the Matter of	:	
	:	OAL DOCKET NO. EDU 6112-92
BARBARA BRENNER,	:	EDU DOCKET NO. 314-7/92
	:	PERC DOCKET NO. TI-93-1
Petitioner,	:	
	:	JOINT ORDER
-v-	:	
	:	CONSOLIDATION AND
MIDDLESEX TOWNSHIP	:	PREDOMINANT INTEREST
BOARD OF EDUCATION,	:	DETERMINATION
	:	
Respondent.	:	
	:	

Appearances:

For the Petitioner before the Commissioner of Education, Kenney, Gross & McDonough, attorneys (Carol Scott Stevens, of counsel)

For the Petitioner before the Public Employment Relations Commission, Wayne J. Oppito, attorney

For the Respondent, Rand, Algeier, Tosti & Woodruff, attorneys (Ellen S. Bass, of counsel)

Barbara Brenner petitioned to the Commissioner of Education seeking an order declaring her tenured in the position of principal in the Township of Middlesex school district, assigning her to the position of principal at Hazelwood School for 1992-93, and retroactively compensating her for the Middlesex Board of Education's failure to assign her to that position pursuant to N.J.S.A. 18A:6-10. The matter was transmitted to the Office of Administrative Law for determination as a contested case. In addition, Brenner filed a petition for contested transfer determination with the Public Employment Relations Commission. Brenner alleges that she was

transferred from principal at Hazelwood to director of Project Climb in violation of N.J.S.A 34:13A-25.

The parties jointly moved to consolidate the petitions and for designation of the Commissioner as having the predominant interest pursuant to N.J.A.C. 1:1-17.5. The parties agreed that the Commissioner's determination could serve to either moot the questions raised by the petition before the Commission or substantially affect the resolution of those questions.

The Administrative Law Judge concluded that the two matters should be consolidated pursuant to the terms of an executed consent order.

Having considered the record and the Administrative Law Judge's order, and having made an independent evaluation of the record, the Commissioner of Education on MARCH 1, 1993, 1993 and the Chairman of the Public Employment Relations Commission, acting pursuant to authority granted to him by the full Commission, on February 19, 1993 made the following determination in the matter.

ORDER

The Commissioner of Education and the Chairman of the Public Employment Relations Commission ORDER that EDU Docket No. 314-7/92 OAL Docket No. EDU 6112-92 and PERC Docket No. TI-93-1 be consolidated for hearing; and it is

FURTHER ORDERED that the predominant interest in the conduct and outcome of the consolidated matter rests with the Commissioner of Education; and it is

FURTHER ORDERED that the Administrative Law Judge shall conduct a hearing on this matter and issue a recommended decision; and it is

FURTHER ORDERED that the Commissioner of Education has the authority to issue a final decision on all issues raised by the prehearing order dated December 2, 1992; and it is

FURTHER ORDERED that if resolution of the issues over which the Commissioner of Education has the predominant interest does not moot the issues raised by the petition for contested transfer determination, the Public Employment Relations Commission shall thereafter be granted 45 days to render a final decision on that matter.

DECISION RENDERED BY THE COMMISSIONER OF EDUCATION ON MARCH 1, 1993

Mary Lee Fitzgerald, Commissioner

DATED: Trenton, New Jersey
MARCH 1, 1993

DECISION RENDERED BY THE PUBLIC EMPLOYMENT RELATIONS COMMISSION ON FEBRUARY 19, 1993

James W. Mastriani, Chairman

DATED: Trenton, New Jersey
February 19, 1993

MARCH 1, 1993

DATE OF MAILING - MARCH 1, 1993

31-93

CONSEC SECURITY GROUP, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY, AND MC ROBERTS PROTECTIVE AGENCY, INC.,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioner, unsuccessful bidder, appealed decision of Board to accept bid from respondent for security services. Petitioner contended it was the lowest responsible bidder.

ALJ found petitioner had met all requirements of bid and was therefore the lowest responsible bidder. (N.J.S.A. 18A:18A-37) Board was ordered to contract with petitioner immediately replacing respondent as provider of security services for Board.

Commissioner adopted findings and determination in initial decision.

MARCH 1, 1993

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6530-92

AGENCY DKT. NO. 406-8/92

CONSEC SECURITY GROUP, INC.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY, AND MC ROBERTS PROTECTIVE AGENCY, INC.,

Respondents.

Ronald J. Cappuccio, Esq., for petitioner

Richard Sacks, Esq., for respondent Lakewood Board of Education

Paul T. Jamison, Esq., for respondent McRoberts Protective Agency, Inc. (Karasic, Stone & Marvel, attorneys)

Record Closed: November 25, 1992 Decided: January 14, 1993

BEFORE **JOSEPH LAVERY,** ALJ:

STATEMENT OF THE CASE

Petitioner, Consec Security Group, Inc., (Consec), appeals for relief from the decision by the respondent **Lakewood Board of Education (the Board).** That body accepted a bid from respondent

McRoberts Protective Agency, Inc., (McRoberts) to undertake security services for the Lakewood School District.

Consec argues that, as the lowest responsible bidder it is entitled to the contract for those services. The Board and McRoberts dispute this. They reply that, though not lowest in cost, McRoberts is still the lowest responsible bidder as intended by controlling law.

PROCEDURAL HISTORY

This matter was filed in the Office of Administrative Law (OAL) as a contested case on August 27, 1992. The case was assigned to the **Hon. Steven C. Reback**, who issued an Order of Motion for Emergent Relief on September 2, 1992. On October 1, 1992, the Commissioner decided the motion, and the matter was forwarded for plenary hearing. The hearing convened on October 26, 1992, in the Trenton hearing rooms of the OAL. Letter briefs followed, the last of which was date-stamped as filed on November 25, 1992. On that date, the record closed.

ANALYSIS

Background:

The material facts are not greatly in dispute. Essentially at issue are the legal implications of the evidence provided by the Board, McRoberts, and Consec. With that in mind, the critical background may be described:

Pursuant to applicable law, the Lakewood Township Board of Education advertised for bids preliminary to contracting for security services, to be undertaken by fourteen guards at three sites in the school district. The bids were to be submitted no later than May 4, 1992. In answer, four companies submitted bid proposals. Included among the four were Consec, with a bid of $164,304, and McRoberts, whose bid was $188,966.20.

After hearing the presentations during interview with all the bidders on May 26, 1992, the Board selected McRoberts. Consec, which had given an hour's presentation, complete with charts, reacted by bringing suit in Superior Court, arguing that it was the lowest responsible bidder under the Act. The court ultimately directed that a "responsibility hearing" be convened by the Board. In compliance with the court's order the Board held the hearing on August 13, 1992. The testimony on behalf of Consec was provided by Ronald Gilgallon, who has seventeen years' experience in the security business, and is the licensed qualifier under the Private Detective Act of 1939.[1] At the end of the hearing, the Board members individually and collectively declared that Consec should be rejected. They did so for the reasons expressed in the transcript of the hearing (Exh. J-1, at pp. 51-58).

In the course of both the "responsibility hearing" directed by the Superior Court, and the administrative hearing in the Office of Administrative Law, the comparative history of McRoberts and Consec unfolded. Consec, formed seven years ago, provides security in both New York and New Jersey. Its headquarters are in Harrison, and two other primary offices are in Kearny and Woodbridge. It has some 550 employees, and 120 accounts. Sixty-five to seventy percent of its customers are public sector entities, in federal, state, county and local political subdivisions. Nearby, Consec also services private sector retirement communities. The company is bonded.

Though it has no broad experience with schools, Consec did obtain a contract with the Orange School District. Once that expired, however, the contract was re-bid, and a different firm now is used by the District. (At the responsibility hearing, Mr. Gilgallon testified that Consec had the contract for 1992-93.) While there, however, Consec gave coverage to a high school and a middle school. Officers were present during the day and evening classes, and during the summer. As in all other settings, and as it

[1] Mr. Gilgallon, who testified under oath before this tribunal in the instant appeal, incorporated this testimony before the Board by adoption.

would here, Consec provided the uniforms and associated security equipment.

In support of his bid, Ronald Gilgallon testified that the company has a strong credit line, and has never lost a contract. He was certain that the company could meet every requirement which was made known by the Board to prospective bidders. Describing the command table of organization, he described himself as the first level, followed by vice presidents, office managers, regional managers, on-site managers, and shift supervisors. Consec also employs roving inspectors for unannounced visits. Mr. Gilgallon agreed that no stationary supervisor is afforded, because of his company's elaborate system of centralized supervision by highly-paid managers. This includes a quality control system with on-site inspection. However, he stressed that, even though the bid hadn't asked for it, as is usually done, Consec could offer a roving on-site supervisor, by deducting lunch, at no additional cost.

Moreover, he stated, emergency response from nearby Consec sites would be ten minutes away. Local operating manuals (Exh. P-1) guide the on-site guards in every respect. As a matter of policy and practice, Consec sought to assure that all emergency measures and equipment were in place before needed. Further, as in Orange (though never used, despite student mini-riots), local law enforcement and emergency assistance would be summoned for such incidents. Mr. Gilgallon did not think his post, an hour-and-a-half distant, or inspectors stationed forty-five minutes away, amounted to detriments. He named other security companies whose centers were located out-of-state. Consec central office managers, he stated, were in constant contact with on-site personnel by phone twenty four hours a day. Significantly, sixty to seventy Consec guards were on duty in the immediately surrounding area.

When hiring, Mr. Gilgallon emphasized, two interviews precede a background and reference check. A third interview is accompanied by a "sensitivity test" and a psychological test (Exh. J-1, p. 23) Consec, Mr. Gilgallon emphasized, is always attuned to local conditions when employing guards. He added that, notwithstanding it

was not made a bid condition, Consec would also be willing to drug-test. The estimated cost the Board would absorb for this (possibly $25 per guard) would not approach the more than $24,000 difference between Consec's bid and McRoberts's.

Beyond this, Consec was willing to allay another Board concern over the age of the guards. The company was agreeable to age-specific hiring, though, it contended, this too was not a condition of the bid. Finally, Mr. Gilgallon highlighted the company's three-tier redundancy in guard assignment. Absences are anticipated by pre-shift check, and replacements sent beforehand. Consec, Mr. Gilgallon asserted, took all relevant steps to offset lax guard attendance, a long-term industry-wide problem, no matter what the salary.

Mr. Gilgallon conceded there had been no formal "bid walk" by Consec. The Board of Education secretary had told the company by phone it would be unnecessary. He also had only a few days after he had discovered the bid solicitation to submit his papers. Nevertheless, a Consec official did visit the buildings without entering, after being directed there by the superintendent's secretary. Consec knew it had time to thoroughly inspect the buildings when it prepared their security for the next school year, Mr. Gilgallon stated.

In testimony answering Consec, **Board Superintendent Ernest Cannava** observed that other companies did drug and psychological testing, without cost. He conceded however that these requirements were not part of the bid. It was his recollection that the Board selected McRoberts instead of Consec because of: superior experience, on-site supervision, drug testing, location of main office, and age-adjustment in guard hiring.

Barbara W. Foster, vice president of McRoberts, recalled that she herself prepared the bids on behalf of her company. She was in charge of the McRoberts S. Jersey Office, in Brick Township, ten minutes from Lakewood. She acknowledged however that the Brick office deals with managers on site who are more distant. The

farthest is in Blackwood, on the other side of the state. The company itself has been in business for some 115 years, with a presence in New York, New Jersey, Connecticut, Spain, England, and Brussels.

In April, Ms. Foster recalled, she personally went to the Lakewood District, talked to administrators, and "bid-walked" the area, with two other security companies and the High School principal. From her tour, she concluded that the guard age had to be raised as a deterrent, the number of supervisors should be increased, radios were needed, and training would have to be increased from twenty to forty hours. In the bid, she included an on-site supervisor, as required, to oversee and be a liaison. She thought the Board's bid specifications were unclear, and wrote to the Board. Nothing oral was permitted.

Addressing the company's experience with schools, she noted that it was currently responsible for St. Rose of Belmar, and Central Regional in Bayville, and had put in a bid to succeed Consec in the Orange School District. Ms. Foster added that McRoberts was insured, and performed drug and psychological testing at no extra charge.

Arguments of the Parties:

Consec's Argument:

Consec insists in its post-hearing brief dated October 27, 1992, that it has met the standard for responsibility, and as the lowest responsible bidder, it has a vested right in the contract award. The company argued that its experience and location satisfied Lakewood's needs, and that both the supervision and age criticisms of the Board were adequately countered by the facts. McRoberts's "supervisor" was simply a low-paid guard on site, designated as such. The call for drug-testing could be met, if compensated. It was not a requirement of the bid.

As a matter of law, the Board's preference for McRoberts does not render Consec irresponsible, and the Board has no authority otherwise to reject all bids. For those reasons, Consec must be selected.

The Board's Argument:

The Board argued in its brief that Consec did not make sufficient effort to acquaint itself with the schools. Consec also misread the bid specifications with respect to supervision requirements, and did not adequately explain proposed training to the Board. Further, Consec misrepresented its contract status with the Orange School District, placing its credibility and integrity in issue. Finally, the Board is free to impose post-bid conditions as a matter of law. In any event, neither the ALJ nor the Commissioner may overturn the Board's decision, unless it is arbitrary, capricious, and unreasonable.

McRoberts's Argument:

McRoberts contends that the Board's itemized expressions of dissatisfaction when it rejected Consec at the responsibility hearing of August 13, 1992, proved that Consec was an irresponsible bidder. Consec did not provide the supervisor on-site which the bid required. The record itself, in McRoberts's view, reveals Mr. Gilgallon's shifting testimony and lack of effort, particularly with respect to a bid walk, to determine what the Board required.

In contrast, Ms. Foster, on behalf of McRoberts, thoroughly explored the district, and her company's obligations during the bidding process. McRoberts demonstrated that it would offer all that the Board expected, both pre- and post-hearing. It would do so at no extra cost.

As a matter of law, McRoberts asserts, the Board made a reasonable decision. Unless shown to be arbitrary, capricious, and unreasonable, or unless found to have been made in bad faith, it

may not be disturbed. Neither the ALJ nor the Commissioner may simply substitute their judgments.

CONCLUSIONS OF LAW

The Applicable Law:

The law which must be applied here is the Public Schools Contract Law, N.J.S.A. 18A:18A-1 through N.J.S.A. 18A:18A-59. The controlling statutory sections are clear. The first, N.J.S.A. 18A:18A-4, states:

> Every contract or agreement for the performance of any work or the furnishing or hiring of any materials or supplies, the cost or the contract price whereof is to be paid with or out of school funds, not included within the terms of N.J.S. 18A:18A-3, shall be made and awarded only by the board of education after public advertising for bids and bidding therefor, except as is provided otherwise in this chapter or specifically by any other law.
>
> No work, materials or supplies shall be undertaken, acquired or furnished for a sum exceeding in the aggregate the amount set forth in, or calculated by the Governor pursuant to, N.J.S. 18A:18A-3, except by contract or agreement.

Additionally, N.J.S.A. 18A:18A-37 provides, in pertinent part:

> All purchases, contracts or agreements which require public advertisement for bids shall be awarded to the lowest responsible bidder.

In determining whether the Board has satisfied these sections in its disposition of the bids at issue, this tribunal and the Commissioner of Education are bound by overarching legal concepts, some cited by Consec, the Board and McRoberts:

Actions by local Boards of Education which lie within their discretion may not be upset, unless patently arbitrary, without

rational basis, or induced by improper motives, Kopera v. West Orange Bd. of Education, 60 N.J. Super. 288, 294 (App. Div. 1960). In an analogous context, because of mirrored wording in the Local Public Contracts Law, N.J.S.A. 40A:11-1 through N.J.S.A. 40A:11-40, at N.J.S.A. 40A:11-6.1, a board of adjustment has discretion to reject the lowest bid, but only after hearing, and a finding that the bidder is not "responsible." That discretion to so find is not unlimited, and cannot be exercised arbitrarily. The decision must be based on bona fide judgment, grounded in facts tending to support the termination. The evidence of "irresponsibility" must be such as to cause fair-minded and reasonable persons to believe awarding the contract is not in the best interests of the Board, Stamato & Co., Inc., of Tp. of Vernon, 131 N.J. Super. 151, 156 (App. Div. 1974). The Court in Stamato declared that "responsibility" involves experience, financial ability, moral integrity, and availability of facilities to perform the contract, Id. at 157.

On the other hand, a public contract cannot be awarded on terms which are different from those contained in the bid. This rule assures against favoritism, improvidence, extravagance and corruption in the bidding process, and assures that all bidders are equal in their competition, Palamar Const., Inc., v. Tp. of Pennsauken, 196 N.J. Super. 241, 250-251 (App. Div. 1983). The reported exceptions upheld have been when more onerous terms have been placed on the successful bidder, rather than on those challenging, Ibid. However, a successful bidder is legally entitled to the contract as bid. Post-bid concessions must be voluntary and consensual. The bidder need not "knuckle under," Id. at 253.

Applying the Law to the Facts:

The facts of Consec's participation in the bidding show that the company conformed to the statutory and decisional law. It has met all the requirements of the bid:

It is a company of considerable size, seven years in existence. Its president has seventeen years' experience in

security. Consec has undertaken security in a school, and was not replaced for cause, but through a comparable bidding process. **I FIND** that Mr. Gilgallon did not know of the Orange decision not to renew until after the responsibility hearing, and his testimony does not reflect tainted moral integrity, as argued.

As to supervision, a roving on-site supervisor satisfies the bid, with specification that it would provide a roving supervisor on-site. McRoberts's designation of a guard-level supervisor is not a superior offer.

The location of Consec headquarters is comparable with the rest of the industry. McRoberts, with an office in Brick, has guards in Blackwell, across the state. More importantly, Consec has sixty to seventy guards in the area, and constant, round-the-clock telephone contact, supplemented by local municipal enforcement.

Consec provides not only psychological testing, but "sensitivity" testing as well. It has promised to adapt to local conditions with its guards, and would satisfy the post-bid requirements of age imposed by the Board.

As to drug tests, these plainly were not a requirement of the bid, and, by law, Consec is not required to acquiesce. It is significant that the Board is willing to assume an increased cost of over $24,000, on the theory, in part, that it should not have to pay Consec some $25 a person for drug testing fourteen guards.

Finally, the dispute over a "bid walk," which **I FIND** that Consec missed because of a short time frame left for it to submit a bid, does not disclose a material defect. The company's absence was offset by an official's pre-bid visit to the grounds. That was sufficient for an informed decision on what was needed.

The reasonable man test outlined by the cumulative case law, supra, has been met. There is no dispute that Consec's bid is over $24,000 lower than McRoberts's. The reasons expressed by the Board members at the responsibility hearing of August 13, 1992 (Exh. J-1,

at pp. 51-58) have not shown that Consec is irresponsible. What the rationales of individual board members show is mere preference, or irrelevant dissatisfaction with Consec's post-bid presentations. Consequently, the decision to reject Consec was arbitrary, capricious, and unreasonable.

ORDER

I ORDER therefore:

1. That Consec be declared the lowest responsible bidder, and

2. That the Lakewood Board of Education now contract with Consec for the security services sought under the bidding process of the Public Schools Contracts Law, and

3. That Consec immediately replace McRoberts Protective Agency as provider of security services for the Lakewood Board of Education.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

January 14, 1993
DATE

Joseph Lavery ALJ
JOSEPH LAVERY, ALJ

Receipt Acknowledged:
Maureen K. Kelley
DEPARTMENT OF EDUCATION

Jan. 15, 1993
DATE

Mailed to Parties:
Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

JAN 21 1993
DATE

ml/E

DOCUMENTS IN EVIDENCE

Joint Exhibits:

J-1 Unsworn testimony of R. Gilgallon

J-2 Official Proposal Form

For petitioner:

P-1 Security Manual

P-2 Resume of Louis C. Papa

For respondents:

None

WITNESSES

For petitioner:

Ronald T. Gilgallon

For respondent Lakewood Board of Education:

Edward W. Luick
Dr. Ernest Cannava

For respondent McRoberts Protective Agency:

Barbara W. Foster

CONSEC SECURITY GROUP, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY, AND MC ROBERTS PROTECTIVE AGENCY, INC.,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Timely exceptions were filed by the respondent Board of Education pursuant to N.J.A.C. 1:1-18.4, to which no reply was made by petitioner.

In its exceptions, the Board argues that the ALJ improperly substituted his own judgment for that of the Board, which reached a reasonable determination as to petitioner's responsibility after a duly conducted hearing at which it concluded that petitioner did meet bid specifications in several key areas. As the Board's decision was neither arbitrary nor unreasonable, and was amply supported by testimony and evidence presented at both the responsibility hearing and proceedings at OAL, the Commissioner may not overturn the Board's determination merely because the ALJ reached a conclusion different from that of the Board. The Board further argues that, assuming arguendo that the bid award at issue should be set aside, there is no legal authority for the ALJ to have outright awarded the bid to petitioner rather than permitting the Board to reject all bids and begin anew as is its right by law.

Upon careful review of this matter, the Commissioner concurs with the ALJ that the central issue in this matter is whether petitioner is a responsible bidder, not whether the Board's preference for the second highest bidder was reasonably based. The Commissioner further concurs, for the reasons expressed in the initial decision, that the evidence and testimony herein clearly establish petitioner's responsibility. Therefore, as a matter of law, the Board's preference for another bidder cannot defeat petitioner's status as lowest responsible bidder and its consequent entitlement to the contract at issue. N.J.S.A. 18A:18A-37

Nor is the Commissioner persuaded by the Board's contention that, pursuant to N.J.S.A. 18A:18A-22, it should not be allowed to waive all bids and rebid the instant contract. While boards do have a general right to reject all bids on some reasonable basis, to permit a rebid at this late point in the present matter, after conduct of an impartial hearing which squarely established the responsibility of the low bidder, as well as its willingness to comply with the additional requirements imposed by the Board after bids were opened, would effectively permit the Board to circumvent the Public School Contracts Law and compromise a process designed to provide the public with specified services at the lowest cost and prevent bidders from having to compete on anything less than a level playing field.

Accordingly, the initial decision of the Office of Administrative Law awarding the disputed security contract to petitioner is affirmed for the reasons expressed therein.

IT IS SO ORDERED.

MARCH 1, 1993

DATE OF MAILING - MARCH 1, 1993

COMMISSIONER OF EDUCATION

31-93

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(31-93)

CONSEC SECURITY GROUP, INC.,	:	
PETITIONER-RESPONDENT,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY, AND MC ROBERTS PROTECTIVE AGENCY,	:	DECISION ON MOTION
RESPONDENTS-MOVANTS.	:	
	:	

APRIL 19, 1993

OAL DKT. NO. EDU 6530-92

CONSEC SECURITY GROUP, INC.,	:	
PETITIONER-RESPONDENT,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY, AND MC ROBERTS PROTECTIVE AGENCY,	:	DECISION ON MOTION
RESPONDENTS-MOVANTS.	:	
	:	

For Movant Board of Education, Richard K. Sacks, Esq.

For Movant McRoberts Agency, Richard B. Stone, Esq., (KaRasic, Stone and Marvel)

For Respondent Consec Group, Ronald J. Cappuccio, Esq.

This matter was opened before the Commissioner of Education by way of the Board's March 16, 1993 Motion for Stay of the Commissioner's decision of March 1, 1993, wherein the Commissioner directed that the Board, having been found to have improperly awarded a bid contract to McRoberts Agency for reasons outside of the published specifications, must terminate its present arrangement with McRoberts and replace that agency with Petitioner Consec as the lowest responsible bidder. On March 23, 1993, McRoberts filed papers indicating that it wished to join in the Board's motion pending appeal to the State Board of Education.

In its moving papers, the Board argued that the district and its students would suffer if the Board must be compelled to alter its security arrangements at this late point in the school

year, as McRoberts is now established in the district, is performing admirably and relates well to students, staff and administration. While the Board acknowledges the harm to Consec if a stay is granted, it contends that the harm to it would be greater, as the former consists of mere loss of income while the latter consists of disruption to the school environment and harm to student and staff morale.

In reply, Consec argues that the Board, having during the course of prior proceedings delayed in all ways possible so as to continue with its preferred bidder, now seeks yet another delay even in the face of the Commissioner's twice ruling against it, once on Consec's request for emergent relief and again on the merits of the case. Consec further argues that it was specifically found to be, and is, able to meet all of the Board's specifications so that there is no reason why its services cannot now be substituted for those of McRoberts.

Upon careful consideration, although recognizing the dislocation inherent in changing security services mid-year, the Commissioner does not find the Board entitled to a stay of the determination against it.

In so holding, the Commissioner notes that Consec has prevailed in both its claim for emergent relief and its case on the merits, and that in a decision on emergent relief dated October 1, 1992, it was specifically noted that arrangements with McRoberts during the pendency of proceedings on the merits would be on a per diem basis. Now that proceedings have come to conclusion and the Board has been found to have acted improperly in selecting McRoberts over the fullY qualified Consec, the Board cannot argue that the

time taken by proceedings to establish this impropriety should now serve as the basis to deny Consec the relief for which it has fought, particularly in view of the fact that no damages are available to prevailing challengers of public bids for work which they should have been given but were not. M.A. Stephen Construction Co. v. Borough of Rumson, 125 N.J. Super. 67 (App. Div. 1973)

Accordingly, the Board's motion for stay is DENIED and the Commissioner's decision of March 1, 1993 stands unless and until reversed on appeal to the State Board of Education pursuant to N.J.S.A. 18A:6-25.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 19, 1993

DATE OF MAILING - APRIL 19, 1993

31-93

EDU # 6530-92
C # 31-93
SB # 16-93

CONSEC SECURITY GROUP, INC.,

PETITIONER-RESPONDENT,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY AND MC ROBERTS PROTECTIVE AGENCY,

RESPONDENTS-APPELLANTS.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, March 1, 1993

For the Petitioner-Respondent, Ronald J. Cappuccio, Esq.

For the Respondent-Appellant, Board of Education of the Township of Lakewood, Richard Sacks, Esq.

For the Respondent-Appellant McRoberts Protective Agency, Inc, Karasic, Stone & Marvel (Paul T. Jamison, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. By virtue of our decision herein, the motion by respondent Board of Education of the Township of Lakewood for a stay of the Commissioner's decision dated March 1, 1993 in this matter is rendered moot, and it is therefore denied.

July 7, 1993

Date of mailing 09 JUL 1993

32-93

IN THE MATTER OF THE TENURE HEARING OF DR. RICHARD C. HOROWITZ, BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY.	:	
AND	:	COMMISSIONER OF EDUCATION
DR. RICHARD C. HOROWITZ,	:	DECISION
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE BRIDGE-WATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY,	:	
RESPONDENT.	:	
	:	SYNOPSIS

Board certified a series of tenure charges of unbecoming conduct against district's superintendent of schools. The 22 charges were of two basic types and categories. The bulk of the charges revolved around the superintendent's behavior in connection with various issues relating to a proposed $23.4 million Board-sponsored voter referendum which involved several construction projects including Bradley Gardens Elementary School. Charges alleged that Dr. Horowitz' conduct in connection with activities required to effectuate the referendum was inappropriate and improper. Other charges alleging improprieties unrelated to referendum and Bradley Gardens were also filed.

ALJ dismissed some charges prior to hearing and some during hearing. Based upon discussions, findings and conclusions, the ALJ concluded that Board successfully established by preponderance of credible evidence that Dr. Horowitz engaged in conduct unbecoming his position as a public servant in regard to several of the tenure charges (Charges I, V, VI, VIII, X, XI, XIII, and XIX). ALJ found Dr. Horowitz engaged in a series of actions or inactions which manifested a lack of appropriate professional judgment, a total disregard for State laws and regulations and Board policies, a lack of communication with Board and a lack of candor with Board and the public, and conduct, if not criminal, sufficiently questionable so as to raise concern as to capacity to perform his job within confines of legality. Moreover, ALJ found no taint in the certification of the tenure charges. ALJ found loss of tenure was warranted. (In re Fulcomer) ALJ ordered Dr. Horowitz' tenure revoked as superintendent of schools.

Commissioner affirmed with modification findings and conclusions of ALJ with respect to charge of unbecoming conduct and also concurred with ALJ that there was no tainted Board member vote in certification of tenure charges. Commissioner found Dr. Horowitz' continued presence as an educational leader in the District, in light of the seriousness of the charges and the divisive effect they have had on the District, was not tenable or in the best interest of students or the community. Thus, dismissal from tenured employment was warranted. Board was directed to terminate Dr. Horowitz' tenured employment and matter was forwarded to State Board of Examiners for further appropriate action.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NOS. EDU 2031-92 & 972-92
(Consolidated)
AGENCY DKT. NOs. 26-1/92 & 23-1/92

IN THE MATTER OF THE TENURE HEARING OF DR. RICHARD C. HOROWITZ, BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY,

and

DR. RICHARD C. HOROWITZ,

Petitioner,

v.

BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY,

Respondent.

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State of New Jersey
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v.

BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY,

Respondent.

Michael J. Herbert, Esq. & **Stacy S. Weinstein**, Esq., for The Board of Education (Picco Mack Herbert Kennedy Jaffe & Yoskin, attorneys)

Phillip E. Stern, Esq., for Dr. Richard C. Horowitz (Melissa Vance Kirsch, Esq., attorney)

Record Closed: October 23, 1992 Decided: December 18, 1992

BEFORE **JEFF S. MASIN**, ALJ:

This proceeding before the Office of Administrative Law ("OAL") began as a result of a decision by the Board of Education of the Bridgewater-Raritan Regional School District ("Board" or "district") transmitted to the Commissioner of Education ("Commissioner") to certify a series of tenure charges against the district's Superintendent of Schools ("Superintendent"), Dr. Richard C. Horowitz (sometimes hereinafter referred to as "respondent"). The Board, acting pursuant to *N.J.S.A.* 18A:6-11, had voted to certify the charges on January 27, 1992. On January 31, 1992 Dr. Horowitz filed an application for emergent relief with the Commissioner seeking to prevent the Board from certifying the charges. This application for injunctive relief was transferred to the OAL and was heard by Administrative Law Judge Jeff S. Masin on February 7, 1992 (OAL DKT.NO. EDU 927-92). Judge Masin denied the application for injunctive relief for reasons set forth in an Order issued on February 10, 1992. Thereafter, the Commissioner affirmed the denial of injunctive relief and separately determined that the charges certified by the Board should be transmitted to the OAL for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -21 and *N.J.S.A.* 52:14F-1 to -13 (OAL DKT. EDU 2031-92).

A prehearing conference was held on the consolidated cases on March 16, 1992. Hearings were then held on July 21, 22, 23, 24, 27, 28, 29, August 10, 11, 13, 14, 17 and 18. During the hearing on July 27, the judge issued a 62 page oral decision on issues which related to the claim made by Dr. Horowitz that several of the Board members who voted on January 27, 1992 to certify tenure charges should not have voted, as their participation had been tainted, thus requiring that the vote be voided and the certification of the charges be nullified. A copy of the oral opinion is appended to this initial decision and is made a part hereof for purposes of review by the Commissioner.

On August 13 the ALJ dismissed charges II, III, IV, XIV, XV and XVIII. In respect to these charges, the Board determined that it would not present any evidence to support them beyond the statements in support of these charges filed with the Commissioner when the charges were certified.

After the close of testimony on August 18, the parties prepared briefs and closing statements, which were filed with the ALJ on October 9 (Board brief), October 19 (Dr. Horowitz' brief) and October 23 (Board reply). The record closed upon receipt of the October 23 submission. Due to the complexity of the issues and the lengthy review of evidence necessary in the preparation of this opinion, the ALJ requested an extension of time in which to file the initial decision.

THE TENURE CHARGES

The charges which were the subject of the certification to the Commissioner were prepared and filed by Board member Dr. Michael Ryan, who filed them with the Board on January 8, 1992. These charges were of two basic types and categories. The first, constituting the bulk of the charges, revolved around the circumstances of a Board sponsored referendum held on October 2, 1990. This public vote was upon the basic question of whether the district should spend $23.4 million on several specified construction projects within the district. Among these was a project to renovate and enlarge the Bradley Gardens Elementary School ("Bradley Gardens"). The circumstances of the referendum, and most especially the proposed work at Bradley Gardens, became an issue of great concern within the district. The tenure charges brought by Dr. Ryan alleged in general that Dr. Horowitz' conduct in connection with this entire Bradley Gardens episode was so inappropriate and improper as to warrant action against his tenure, pursuant to the Tenure Act, *N.J.S.A.* 18A:6-11.

In addition to the Bradley Gardens related tenure charges ("Bradley Gardens charges"), Dr. Ryan also filed several charges alleging improprieties on the part of Dr. Horowitz which were unrelated to the referendum and the Bradley Gardens matter. These have also been examined in the course of the hearing.

The issues for exploration in the hearing included not only the question of whether the substantive charges against the superintendent could be proven by a preponderance of the credible evidence, but also included a number of other matters. Among these are the question of whether the votes of certain board members were tainted, whether a reprimand and pay freeze issued to Dr. Horowitz in April, 1991 as a result of the Board's initial response to the Bradley Gardens matter should act as a bar to any tenure charges arising out of the referendum/Bradley

Gardens issues under the doctrine of equitable estoppel, whether certain of the non-Bradley Gardens charges should be barred by the equitable doctrine of laches, and, if any of the tenure charges were established, what would be the appropriate action to be taken in regard to the Superintendent's tenure.

The specific tenure charges will be reviewed below in the course of the discussion of the evidence and the analysis thereof. A list of the charges is attached to this decision as an appendix and is also an exhibit in evidence.

CHRONOLOGICAL HISTORY

Before beginning a review of the extremely detailed evidence presented during the course of the 13 days of hearing it will be helpful to set forth a basic chronology of the major events involved in the case. This listing does not delve into the actions and statements of the participants to a great degree, but only where essential to the chronology. Additionally, the chronology is not a recitation of all of the significant events, but is instead a relatively spare review of the highlights. Much additional material related to the activities of the various participants will be considered later on in this opinion.

The starting point of the entire Bradley Gardens incident, which forms the basic scenario in which the bulk of the events related to the tenure charges occurred, was a Board sponsored referendum held in February, 1989, in which the Board sought authority from the voters to issue bonds for the purpose of financing several proposed projects in the District. As indicated in the record, the bond referendum was rejected by the voters and, subsequent to the vote, certain groups expressed strong concern over the nature of the information which the Board had provided to the voters concerning the referendum, concerns which resulted in a petition filed with the Commissioner. In February, 1990, the Board, still interested in the need for certain projects, especially in regard to problems arising from the continued existence within the district of two high schools and the possibility of a new arrangement which might involve a consolidation of these, formed four committees whose purpose was to explore issues related to facilities. The intent was to prepare the groundwork for a new bond referendum to be submitted to the voters. One of these committees was a High School Design committee, another was an Elementary

Facilities Committee (EFC). The EFC met several times through the late winter and spring of 1990 and rendered a preliminary report to the Steering Committee, which was overseeing the new referendum project, on June 6, 1990. Thereafter, the Steering Committee received a final report from the EFC on June 11, 1990.

The EFC's report referred in part to proposed work at the Bradley Gardens Elementary School. The idea was to bring this school up to parity with other elementary schools. The necessary improvements were listed as having a cost of $905,000. The exact formulation and significance of this figure is of primary importance to some of the issues regarding the tenure charges and will be discussed below. Suffice it to say, this number was a part of the data presented by the EFC to the Steering Committee and it subsequently was passed on by the Steering Committee to the full Board. (Executive Summary Report, RBG-14)

On June 26, 1990, the full Board adopted a resolution which approved the Steering Committee report. This report called for the voters to be asked to approve a referendum which was to be held in the early fall, which referendum would seek to authorize the expenditure of $23.4 million dollars for a number of projects detailed in the Steering Committee report, including the consolidation of the two high schools into one high school; the renovation of the Bradley Gardens school, including an expansion of the facility; the conversion of the Eisenhower School to an elementary school; the expansion of existing Instructional Media centers; the relocation of the office at the Adamsville School; and work involving the addition of Learning Center space.

Following the Board's adoption of the resolution on June 26, the Board set out to prepare for the referendum, which was authorized by a vote of the Board at it's meeting of August 21, 1990. The resolution adopted at that time mirrored the Board's adoption of the Steering Committee report on June 26.[1] In the summer months the Board also formed the Ad Hoc Committee, which was charged with the preparation of a special *Board Bulletin*.[2] This was to be a document submitted to the voters of the district in order to inform them as to the purposes and the proposals of the referendum. This committee met 3 or 4 times during the summer. A *Board Bulletin* was prepared and was in fact sent to the residents of the district in early September. The Board also sent out an errata sheet which was included with the *Bulletin*.

In addition to the mailed *Bulletin*, the Board also scheduled two public information sessions, which were held on September 12 at the Wade Administration Building and on September 17 at the High School West. Further, Board representatives participated in an informational cable TV program which was recorded on September 18. The program was broadcast on September 28, 29, 30 and October 1, 1990.

Another public information session was held at the Adamsville School PTO on September 26. A local newspaper, the *Messenger Gazette*, ran an article on the referendum which was published on September 27. This featured an interview which had been held with Dr. Horowitz and the then Board President William Tronolone.

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1 The proposal read:

> The Board of Education of the Bridgewater-Raritan Regional School District in the County of Somerset, New Jersey is authorized (a) to renovate and to construct additions to the Bridgewater-Raritan High School West, to renovate and to construct an addition to the Bradley Gardens Elementary School, to renovate facilities at the Adamsville Elementary School, the Crim Elementary School, the Hamilton Elementary School, the John F. Kennedy Elementary School and the Van Holten Elementary School and to purchase furniture and equipment necessary therefor and (b) to issue bonds of the School District for the purpose in the principal amount of $23,400,000.

2 *Board Bulletin*, Volume 17, No. 1 "Bridgewater-Raritan Schools - The Next Phase" (hereinafter "*Board Bulletin*," or "*Bulletin*").

As the referendum date approached, the requirements of State regulation mandated that certain submissions be presented to the State Department of Education ("DOE"). These included schematic drawings and educational specifications and a Project Cost Estimate Form. *N.J.S.A.* 6:22-1.1 to -1.4. These were submitted to the DOE's Bureau of Facilities Planning ("Bureau"). The submission was made on September 20 or 21, and Pablo Jordan, of the architectural firm of Jordan and Pease, met with Dr. Macaluso of the Bureau in Trenton on September 21. The necessary approval of the submitted documents was issued by the Bureau on September 26.

On October 2, 1990, the voters of the district approved the referendum. This authorized the Board to proceed with the projects contemplated by the Steering Committee report and adopted by the full Board.

Following the vote of October 2, the architectural firm of Jordan and Pease submitted a bill for services to the district on October 17, 1990. (RBG-40). As will be detailed below, this bill was based on a cost of the portion of the referendum proposal which Jordan and Pease had worked on, that is, the proposed work at Bradley Gardens. The bill came to the district's Business Administrator, Dr. Peter Mazurak. Because the bill was calculated at 8% of the cost for the Bradley Gardens project, which was listed at $1,955,000.00, rather than the $905,000 which had been shown in the Elementary Facilities Report, Dr. Mazurak requested that Jordan and Pease send him a copy of the Project Cost Estimate Form. This form was sent to Dr. Mazurak on December 3, 1990. His actions upon receipt of the form will be examined below.

After the successful passage of the referendum, the Board enlarged the Building and Grounds Committee, chaired by Board Member Raymond Kovonuk. This committee met on December 17, 1990 and at that time Mr. Jordan presented it with detailed plans for the Bradley Gardens project. On December 18, the Board received a report on the December 17 meeting from Mr. Tronolone and also from Board Vice-President Clara Navarrete.

On March 12, 1991 a Board meeting was held at which a "Current Expense Surplus" computerized schedule was presented to the Board. This showed that

there was a $1.925 million surplus for "special projects." In addition, a request was presented to transfer $1.383 million of the $1.925 million from "Current Expense Surplus" to "Current Expense-Budget 1990-91." This document listed the amounts of the transfer, broken down as to certain projects, including district-wide asbestos removal at $100,000.00; renovations for barrier-free facilities-district-wide at $150,000.00; relocation of boiler at Bradley Gardens $495,000.00; reroofing at Kennedy School $333,000.00 and reroofing of portions of Hillside School for $305,000.00. Clara Navarrete questioned this request. In response to her questions as to the reasons for and the necessity of such transfers, Dr. Horowitz sent Mrs. Navarrete a note, stating "don't you remember that we discussed that the $320,000 for the roof at High School West was going to be used for the overrun at Bradley Gardens?" Mrs. Navarrete asked the Superintendent to prepare a memo, putting down all of the expenses at Bradley Gardens and discussing the finances thereof. Dr. Horowitz prepared a memorandum dated March 18, for Mrs. Navarrete. The Project Cost Estimate Form of September 20, 1990 was attached to this memorandum. (RBG-43). When Mrs. Navarrete saw this she noted that the cost estimate was listed at $2.459 million dollars.

The reaction of Mrs. Navarrete to the information provided to her in the March 18 memo was to speak to Mr. Tronolone about the $2.459 million figure.[3] This led to a meeting with Pablo Jordan, held at his office on April 6, 1990. At that meeting, Jordan showed Navarrete and Tronolone the letter that had accompanied the submission of the Project Cost Estimate Form and the other documents which Jordan had submitted to the Bureau on September 21, 1989. Mrs. Navarrete's name was signed on this letter, as Board Vice-President. The letter purported to be a certification that the Board had authorized the proposal as submitted to the Bureau, a proposal showing the cost estimate at $2.435 million, rather than the $905,000 which had been the figure in the various documents produced, reviewed and adopted by the Board in June, 1989. Since Mrs. Navarrete had in fact not signed, or even seen, the letter, and since Mr. Jordan represented to Mrs. Navarrete and Mr. Tronolone that he had actually signed the names on the letter,[4] the Board members

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3 There is controversy as to the question of what, if any, knowledge Mrs. Navarrete had of the overrun prior to March, 1991. This will be considered herein.

4 The circumstances of the signing of Mrs. Navarrete's name and of Mr. Jordan's comments thereon are in dispute. See below.

were concerned, to say the least. They proceeded to advise the full Board of the situation.

On April 9, 1991, the full Board held a meeting. Mr. Tronolone provided them with the March 18, 1991 memorandum. Messrs. Horowitz and Jordan were asked to be present at the end of the meeting. Discussions ensued, which will be reviewed in detail below. However, for the purpose of this chronology, the outcome of the meeting was that the Board, meeting on April 12, decided that action should be taken immediately to deal with the information with which it had presented. As part of the response, the Board provided a so-called *Rice* letter to Dr. Horowitz, which advised him that he could have a personnel discussion regarding him in public, as opposed to private, session of the Board.[5]

On April 14 Dr. Horowitz submitted a written review of the Bradley Gardens matter to the Board. On April 17, the Board met in closed session to consider what, if any, personnel action should be taken against Dr. Horowitz. A decision was made to issue a formal reprimand to the Superintendent. In addition, the Board decided to appoint a Task Force for the purpose of undertaking a review of the Bradley Gardens matter. The exact parameters of the charge of the Task Force are in dispute and will be considered below.[6] The formal reprimand was presented to Dr. Horowitz by Mr. Tronolone on April 19.

The Task Force review was never actually concluded. Initial findings were presented to the Board on June 25, 1991. The Board then decided to hire the law firm of Stark & Stark to undertake an independent investigation of the Bradley Gardens matter. Once again, the record herein reflects some differing views as to the exact nature of this investigation and of the charge and/or direction given to the

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5 *Rice v. Union County Regional High School Board of Education*, 155 *N.J. Super.* 64 (App. Div. 1977), *certif. den.* 76 *N.J.* 238 (1978).

6 See April 25, 1991 document "Referendum Task Force" which sets forth the "charge."

law firm. Nevertheless, Stark & Stark presented the Board with a report on September 13, 1991. (PBG-50). The Board commented thereon, and Stark & Stark then issued a report on September 18. (PBG-51). On October 4, Dr. Horowitz issued a response to the reports. (PBG-26, PBG-27). This was submitted to the Board. A additional response followed on October 28. (RBG-54). The Board issued a *Board Report* on October 31, 1991.

On October 11, 1991, Board Vice-President Clara Navarrete filed tenure charges against Dr. Horowitz. (RBG-52). These were related to the actions or inactions attributed to Dr. Horowitz in regard to the Bradley Gardens matter. His response to these was set forth in the October 28 document, RBG-54, which he submitted to the Board.

On October 30, the Board voted 4-4 not to certify the tenure charges. Mrs. Navarrete recused herself from the vote. Following this vote, the Board voted unanimously to request that the Attorney General of New Jersey undertake an investigation of aspects of the Bradley Gardens affair. (PBG-30).[7]

In the period following the Board's tie vote, attempts were made to arrange a settlement between the Board and the Superintendent, a settlement which would presumably have resulted in Dr. Horowitz leaving the district. Certain information as to allegedly inappropriate conduct by Dr. Horowitz unrelated to the Bradley Gardens/referendum affair was then purportedly brought to the attention of Board member Dr. Michael Ryan. On January 8, Dr. Ryan filed his series of tenure charges, (Appendix, RBG-89), which the Board certified by vote of January 27.

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7 No information as to the status of the investigation has been received.

During the period of time that the Board was considering the tenure charges, it sought an opinion from it's bond counsel as to whether the events surrounding the referendum might jeopardize the validity of the vote approving the expenditures. In a letter dated November 13, 1991, bond counsel advised that the Board could undertake certain actions, such as scaling down the size and the expense of the Bradley Gardens work, actions which in all likelihood would serve to protect the referendum's approval from any questions as to its validity, regardless of whether the process was tainted by any bad faith actions on the part of either the Superintendent and/or the architect. (RBG-57).

THE ALLEGEDLY TAINTED VOTE

As noted, when the Board voted to certify the Ryan tenure charges to the Commissioner, Dr. Horowitz took to the offensive, arguing in his motion for emergent relief that the vote was tainted due to the alleged conduct and actions of certain Board members, which actions he claimed disqualified those members from participating in the vote. This issue was preserved for consideration in this hearing by the Commissioner's decision of March 6, 1992 affirming the decision of the ALJ denying emergent relief. The matter was the subject of four days of testimony at the hearings held in July. For the reasons expressed in the oral decision rendered by this judge on July 27, 1992, the transcript of which is attached hereto as a part of this initial decision, I **CONCLUDE** that the vote was not tainted, and the participation of the several members in the January 27, 1992 vote was not improper.

EXAMINATION OF THE EVIDENCE AS RELATED TO THE SPECIFIC CHARGES

The basic thrust of the Bradley Gardens related tenure charges is that Dr. Horowitz, from very early in the planning of the project, knew that the estimated cost of the Bradley Gardens portion of the proposed projects which were to be authorized in the October 2, 1989 referendum was far above that which had been estimated in the reports filed by the Elementary Facilities and Steering Committees (the latter adopted the EFC report) and that he failed to provide the Board with this information, failed to provide the information to the public, actively worked to avoid telling the Board of the news, and generally neglected his duty to the Board and the public. To this, Dr. Horowitz demurs, accepting a degree of responsibility for poorly handling certain aspects of the matter, but denying vigorously that he actively or passively deceived the Board or the public. As for the Board, he argues that at least some of its members had at least a general sense of the growing size and cost of the project prior to the referendum and as for the public, he seems to argue that information made available to it, as well as to the Board, was not only not misleading or deceptive, but, in fact, specifically showed that the project as architecturally envisioned by Jordan and Pease was not the same project as that proposed by the EFC.

THE PRE-REFERENDUM PLANNING PERIOD: PLANNING THE BRADLEY GARDENS PROJECT

The planning for the renovations and additions to the Bradley Gardens Elementary School was first considered by the EFC. This group consisted of lay individuals, that is, no architect, planner or other person on the committee was an expert with respect to the details of the specific process which would take the proposed changes in the building from concept to blueprints. The original proposal of the EFC, which was part of the report adopted by the Steering Committee, called for a 4,000 square foot addition to the building. The cost for such an addition was admittedly determined without any specific input from any architect who might be engaged to draw the plans for the work.[8] The Committee received input as to an

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8 Committee members testified that they requested an architectural consult, but that Dr. Horowitz and Mr. Tronolone refused to provide one.

estimated cost factor from Dr. Horowitz, who took the factors from the cost estimates arrived at by The Vitetta Group, the architectural firm which was involved in the planning of the proposed high school consolidation project. This formula was $110.00 per square foot for new construction and $60.00 per square foot for renovation, each subject to a multiplier of 1.25, plus 25% for overhead, which calculated out to a cost of $905,000.00 for the proposed 4,000 square foot addition at Bradley Gardens. When the EFC presented it's recommendations to the Steering Committee, the 4,000 square foot and the $905,000 figures were specifically referenced in the recommendation. (RBG-10, pg.9). The report did not state that the recommendation had been made without review or comment by an architect. The Steering Committee apparently did not question the figures as to the size of the project necessary to fulfill the goals of the EFC as to Bradley Gardens or the methodology or the sources used for the cost figures presented by the EFC.

At the same time as the EFC was wrapping up its work and the Steering Committee was reviewing and adopting the EFC's work, the Jordan & Pease firm was beginning its involvement in the process of bringing the proposals of the EFC for Bradley Gardens to fruition. On June 14, 1990, Pablo Jordan and his partner, David M. Pease, met with the Superintendent, the Principal of the Bradley Gardens School, John Petronella and Kenneth Grenci, the Plant Engineer for the district. It is not clear who arranged for or who authorized the meeting. Subsequent to this meeting, the evidence shows that Mr. Jordan assumed the primary responsibility for the firm with regards to the project, with Dr. Horowitz acting as the contact person for the district. However, Jordan also consulted with Mr. Petronella and others as he gathered the necessary information which he needed in order to draw the blueprints and other plans for the facility. No evidence has been presented that an executed contract for this work was entered into at this time.

Mr. Jordan testified that during this period he began to learn that as a result of certain Code requirements the space required to fulfill the goals of the project would have to be greater than the EFC's proposed 4,000 square feet. (Eventually the Jordan & Pease plan called for 12,460 square feet.) According to Mr. Jordan, the extra space included such things as an office in the gym, certain renovations within the existing space, an art room and a learning center, a second corridor and a relocated boiler room. Of course, the cost of this project grew as well. Mr. Jordan said that he discussed the initial assessment concerning additional costs

with Dr. Horowitz on August 17, 1990. Dr. Horowitz told him that the additional monies needed for these additional costs could be obtained from other sources. All of these events were occurring in an "extremely tight time frame" in regards to the upcoming referendum. Mr. Jordan was hired "very late" and the job was proceeding "under pressure" with "little time to produce."

According to Dr. Horowitz, he was aware by the end of July or early August of an estimated cost for the project of $1.4 million. Mr. Jordan was recommending that a second corridor be included. This caused an access problem for the interior boiler room, and necessitated that a new boiler room be added to the building. After a meeting with Mr. Jordan on August 17, the estimated cost for the construction alone was nearly $2 million. Thus, at the time that the Ad Hoc Committee was in the process of preparing the groundwork for providing the public with information prior to the October 2, referendum, the Superintendent, and the architect, knew that whatever the basis of the $905,000 figure which had been contained in the reports at the time of the adoption of the resolution for the bond referendum, that figure was nowhere close to enough money to actually complete the Bradley Gardens project.

Dr. Horowitz described his reaction to the news which he was receiving concerning the increased cost necessary for the work intended at Bradley Gardens. According to him, as he saw the estimates growing, he began to view the concept for the project put forth by Pablo Jordan as only one possible plan for the job. The Superintendent testified that this perception, this doubt as to the actual utility of the Jordan plan, colored his thoughts and actions in the pre-referendum period, especially as to his contacts with the Board on the issue of the increase in costs over the $905,000 estimate.

As the planning for the various projects which were to be a part of the referendum went on, particularly the High School project which was admittedly the driving engine of the whole bond issue, the architects proceeded to prepare the required paperwork for the DOE, with the help of necessary Board and district employees. Pursuant to regulations, the referendum could not be held without the DOE first approving the preliminary submissions. *N.J.A.C.* 6:22-1.2. In early July, the Vitetta Group had been ready to transmit certain documents to the DOE in

connection with the High School project and Learning Center projects. (RBG-17;PBG-4). The necessary enabling resolution for these had been adopted on June 26. The July 5, 1990 submission to the Bureau from Vitetta included a cover letter which certified that the Board had approved the submission. This letter bore the signatures of Dr. Horowitz, as the chief executive officer for the Board, and of Mrs. Navarrete, signing as the Vice President in the absence of the then vacationing President Tronolone. In September, as the date of the referendum vote rapidly approached, Pablo Jordan was preparing to file similar documents for the Bradley Gardens project. On September 13, Mr. Jordan faxed a copy of the Project Cost Estimate Form that was to be submitted to the Bureau to Dr. Horowitz. The figure shown on that form as the cost estimate for the project was $2.459 million. According to Dr. Horowitz, this figure made him "angry" and "upset."

On September 20, Mr. Jordan prepared a cover letter for the package of materials about to be delivered to the Bureau, with whose representative, Dr. Macaluso, Mr. Jordan was scheduled to meet the next day. The circumstances surrounding the preparation of this letter are of great significance, as the tenure charges include serious allegations of misconduct in connection with the letter, on the part of Dr. Horowitz, conduct purportedly rising even to the level of criminality. All agree that this letter was copied by Mr. Jordan from the July 5 letter filed by the Vitetta Group. The letter certified that the Board had, on June 26, 1990 "agreed that the attached educational specifications be submitted to the State Department of Education." The letter bore signatures purporting to be those of Dr. Horowitz and Mrs. Navarrete, although in contrast to the July 5 letter, Mrs. Navarrete's name was misspelled as "Navarrette." In fact, as freely acknowledged by Mr. Jordan, the September 20 letter did not bear Mrs. Navarrete's actual signature, since Mr. Jordan had signed both the Superintendent's and Mrs. Navarrete's names. The submitted documentation included the Project Cost Estimate Form, with it's $2.459 million estimate.

Mr. Jordan testified, in part basing his statements on the recollections he had previously recorded in a chronology of events which he prepared in April, 1991, that on September 20, he had a telephone conversation with Dr. Horowitz, in which conversation he discussed with the superintendent that all of the information necessary for the submission to the DOE had been gathered, except for the letter which had to accompany the documentation and which had to bear the signatures

of the Superintendent and the Board President or Vice-President. Mr. Jordan told Dr. Horowitz that he had a meeting scheduled for the next day with Dr. Macaluso at the Bureau. In the course of his testimony, Mr. Jordan repeated the statement he had written in his chronology, saying that he and Dr. Horowitz

> discussed and he approved that I would use a letterhead from one of the letters he received from him, copy the text used in a letter given to the architect hired for the other projects and copy the signatures attached.

Mr. Jordan claimed in the chronology that he undertook this course of action

> openly and innocently in the best interest of expediting a process which is absolutely necessary before a referendum can be conducted.

In answer to the interrogatories from Stark & Stark, Mr. Jordan stated that Dr. Horowitz authorized him to sign his, that is, Dr. Horowitz' name on the letter. However, in response to the question of whether Dr. Horowitz had authorized the signature of Mrs. Navarrete's name, the witness stated at the hearing that

> ...we did not discuss because at the time I didn't even know who was on the bottom line or the second line or the third line, a specific name to be authorized--to put the signatures on...All--I was authorized to sign the paper and send it out and I signed whatever was on that.

Mr. Jordan denied that he would have signed any name on the letter if he had not received the authorization of Dr. Horowitz to do so.

The letterhead paper which Mr. Jordan used had been supplied to him by Dr. Horowitz and had either been brought by messenger or delivered, but the architect could not recall from whom or exactly how he had received it.

When pressed on the issue, Mr. Jordan insisted that he "had no doubt" that he was authorized by Dr. Horowitz to put the signatures on the letter. Mr. Jordan recalled that after doing so and delivering the package to the Bureau, he personally went to the office of the Superintendent on September 21 and delivered a copy of the package.

Dr. Horowitz' recollection as to the subject of the cover letter was that he "absolutely" did not tell Mr. Jordan to either sign the names or to copy the Vitetta letter. He could not recall giving Mr. Jordan the Superintendent's Office letterhead "directly." He also questioned whether Mr. Jordan had called him regarding any need to sign a letter for the September submission to the Bureau, only recalling that the architect did discuss with him the need to get documents to Trenton, with no discussion as to the specifics of these. The filed documents were then brought to his office on the 20th, or perhaps on the 21st.[9] These were in booklet form with a cover. He does not recall that Mr. Jordan came to his office and handed him the package, although this possibly could have happened. As for the bound documents, he "thumbed through them" and they simply ended up on a shelf in his office. He did not look at them until he learned of the April 9, 1991 meeting and he then pulled out the bound material to look at them. When he did he saw the letter bearing Clara Navarrete's signature (as he then believed) and he wondered to himself and then expressed a question to Assistant Superintendent Dr. McGarry how the Board could have "a problem," since Mrs. Navarrete's signature was on the letter to the Bureau. According to Dr. Horowitz, at the time of this examination of the materials he did not realize that either Mrs. Navarrete's signature or his own were not genuine.

While the preparation of these documents and the work of Pablo Jordan proceeded, the Board's Ad Hoc Committee worked to prepare the Bulletin for submission to the voters. This committee included representatives from the public, Mr. Irving Putter and Dr. Michael Ryan, who later on became a Board member, Dr. Horowitz, Mr. Tronolone, Mrs. Navarrete and David Sandler, the district's communications specialist. The mission of the committee was substantially directed at assuring that the public received full and accurate information regarding the bond issue, in order to avoid the questions and accusations which had followed upon the previously rejected referendum.

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9 September 20 was Rosh Hashanah, and Dr. Horowitz recalled that the school district was closed on that day.

The *Board Bulletin* (RBG-22) produced by this committee was a seemingly comprehensive look at the upcoming bond referendum, chock full of charts, figures and text explaining the costs, benefits, and goals of the proposal and contrasting the situation in the district's schools if the referendum was approved or if it were disapproved. Among the various charts was one contained on page 3. This one had two headings, the left hand side, headed "Financial and Educational Costs of the Status Quo" and the right hand portion, entitled "Financial Costs and Educational Benefits of a Passed Referendum." Under each of these headings the third of the elementary school issues listed dealt with "Bradley Gardens," the left side noting that if the referendum failed the result for this school would be that it would not have "parity" with the other elementary schools and that in contrast, an approval of the referendum would provide for "(N)ew all purpose room, learning center renovations and building repairs" which would "bring(s) school in parity with others in district." The "financial" factor for this achievement is listed as "905,000." There is no mention anywhere in the *Bulletin* that the estimated cost of the work to be performed at the school would be either $1.4, $1.8 or $2.459 million. The Bulletin also lists the proposed work to be done at the Adamsville School, which would provide for greater security and a more appropriate layout to conform to a new parking lot.

According to David Sandler, who now is a communications consultant for several boards of education and holds a B.A. in Journalism and English and a Masters in Secondary Education, the committee members all felt that it was very important that they show the public how open they were being about the October referendum. The understanding was that the voters were voting on the referendum as a whole, although the biggest issue by far was the proposed consolidation of the high schools. As Sandler understood, the learning center projects were a very small part of the committee's discussions.

The witness recalled that Dr. Horowitz, who was his boss, saw all the proofs for the *Bulletin* and approved them. Mr. Sandler edited the draft. Dr. Horowitz was not involved in putting the draft together. He "may have stuck his head in" to a committee meeting, but Mr. Sandler did not specifically recall the Superintendent as a member of the committee. As for Mr. Tronolone, he was a *ex officio* member, but was not at meetings "a lot."

During the period of time that the Ad Hoc Committee was working on the draft of the *Bulletin*, Mr. Sandler recalls that Dr. Horowitz mentioned to him that it looked like there would be a cost overrun on the Bradley Gardens project. The Superintendent stated that this was "something the Board would have to deal with." Dr. Horowitz was not specific on the figure for this overrun. The $905,000 figure came from the EFC and Sandler said that Dr. Horowitz called this a "best ballpark" figure and said that the $23.4 million figure was not going to change, thus he said that the $905,000 should be kept in the *Bulletin*. The witness characterized the "elementary as something of an afterthought" and said that this conversation occurred "in passing." While Mr. Sandler at first indicated that the conversation about Bradley Gardens might have come either a little before or after the referendum, he then agreed that it "certainly could have been a little before."

Mr. Sandler believed that he had attended each of the meetings of the Ad Hoc Committee and he could not recall that Mr. Putter had ever reviewed the numbers with Dr. Horowitz at any of these meetings. Indeed, he did not recall that the Superintendent was ever actually "at" any of the meetings.

The witness was shown a transcript of the statement he gave to the Task Force on May 21, 1991 at which time he told them that he did not know "exactly when" this conversation regarding the cost of the Bradley Gardens project occurred, but he said that he "think(s) it was after the referendum...Yes, and I'm really guessing, February, March 1991." Sandler testified at the present hearing that he didn't recall Horowitz mentioning it before the referendum. He also started that at the time he spoke to the Task Force he felt "fairly vulnerable due to his job being discussed at that evening's board meeting."

Sandler opined that had Dr. Horowitz told him that the $23.4 million was not the actual figure for the cost of the proposed work under the referendum he would have "had concern." However, it was not a major issue if the $2.45 million cost for Bradley Gardens did not change the total amount of the bond issue.

Sandler conceded that people reading the *Board Bulletin* would have thought that the $905,000 was the amount required for the Bradley Gardens portion of the proposed work. He recalls that Board members had said that they wanted the

information presented to the public to be "absolutely accurate," due to the claims made as to the allegedly false nature of the information communicated in regard to the defeated February, 1989 referendum.

On redirect examination, the witness stated that he believed that the comment from Dr. Horowitz had been made prior to October 2. He also noted that the *Bulletin* had emphasized the High School project.

Irving Putter testified that he was a member of the Ad Hoc Committee and attended 2-3 meetings of the group. He recalled that Dr. Horowitz was present at the last two of these meetings, and that the specific figures were reviewed while the Superintendent was present at a meeting in the middle of August. Putter read the figures aloud to make sure that there were no errors and the Superintendent responded "yes," "yep," or words to that effect. He also remembered that he had met with Mr. Sandler in July and that Sandler has mentioned the time constraints and had said that the Committee should list all of the questions and answers that they could think of and go over the answers so as to make sure that they were not misleading.

Mr. Putter expressed his view that the *Board Bulletin* represented the "culmination" of a divided community coming together. It was to be an accurate fact sheet for the community.

Dr. Michael Ryan, also a member of the Ad Hoc Committee who later became both a Board member and ultimately the author of the tenure charges certified on January 27,1992, testified that the intent of the *Bulletin* and of the chart previously reviewed above was to show the voters that as result of their approval of the referendum the Bradley Gardens School would be brought up to parity for a cost of $905,000. He recommended at the time that the chart be placed in the *Bulletin*. According to the witness, no one then intimated that the work could not be accomplished for $905,000. The members of the committee "fully expected" that this would be done. However, he agreed that at the time that figure and the 4,000 square foot size of the project were established the Board's architect had not yet been involved in the project. The "driving force" behind the proposal was the idea of bringing the school to parity with the Crim School, which was the school which Dr.

Horowitz referred to as representative of the goal to be accomplished. Parity, not square footage, was to be the key factor in the Bradley Gardens project.

Clara Navarrete recalled that the goal of the *Board Bulletin* was to advise the public "as accurately as possible what they were voting on." Mr. Sandler and Dr. Horowitz had put together drafts which were then presented for review by the Committee, which then modified them. The "errata" sheet was put together by Mr. Sandler after an error was discovered on page 2 of the Bulletin.[10] The Notice regarding the public information sessions was also included with the errata sheet.

In regard to the $905,000, Mrs. Navarrete acknowledged that this figure was an estimate. As she put it, "everything is an estimate until you have the actual numbers." However, what the Board and the Ad Hoc Committee were looking for was a "ball park" figure. She understood that the $905,000 was just that, a "ball park" figure.

Dr. Horowitz testified that the responsibility for putting together the draft of the *Bulletin* was Mr. Sandler's. They spoke about it in a "conceptual fashion" and Dr. Horowitz later proofread the final copy before it was sent to the printer. Dr. Horowitz normally would have been on a committee such as the Ad Hoc Committee, but here he did not spend much time at it's meetings.

According to the witness, the *Board Bulletin* contained the $905,000 figure because this was the "hard information" then available which the Board and the architects had come up with, a figure that could be presented to the public with as "little ambiguity as possible." It was taken directly from the EFC report. Although in late July Pablo Jordan had explained to Dr. Horowitz that the impact of Code requirements on the number of square feet allotted to each child and the need for certain other changes in the original concept was such that the cost of the project might be as much as $500,000 more than the original $905,000 estimate, at the time that the Committee was busy putting together the *Bulletin*, Horowitz had received

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10 This error was not related to any information concerning the proposed Bradley Gardens project.

nothing in writing from Jordan as to this increased cost. Mr. Sandler explained to Dr. Horowitz that it was important to show in the *Bulletin* that passage of the bond issue would "save money by spending money." They were looking for a clear way to express all of this to the voters.

Dr. Horowitz contended that the purpose of the use of the $905,000 figure was to show the comparison between the cost of building the Bradley Gardens project versus not building it. The Ad Hoc Committee insisted on a comparison between the status quo and the "passed referendum" situations. The reference to the $6.9 million listed on page 2 of the *Bulletin* was drawn from the EFC report. This figure was intended to show the cost of addressing the elementary school needs if the bond issue was not passed. Dr. Horowitz was the one responsible for suggesting that the figures from the EFC report be used. If the *Bulletin* had used the estimates which were emanating from Pablo Jordan, it would have been necessary to redo these figures. This would have been very complicated and difficult to explain and the approach used, that is, the use of the $905,000 was the "clearest, the most straightforward" one available.

The Superintendent stated that at the time the *Bulletin* was prepared he had no doubt in his mind that the figures in the document were only meant for comparative purposes. However, since that time, he has come to appreciate that the *Bulletin* as published did not do what he, and apparently in his belief the Committee as well, thought it would do. It was necessary that any comparison be of "apples to apples."

The witness had no recollection, and therefore could not deny, Mr. Putter's assertion in regard to the Committee meeting of August 20, when, according to Mr. Putter, the Superintendent acknowledged the accuracy of each and every one of the figures in response to Mr. Putter's question as to whether each was correct. Had he been asked this at the time, he would have said they were accurate "for the way they were going to be used." Until September 13, there was nothing which changed the cost estimate from $905,000. On the 13th, he received the facsimile copy of the Project Cost Estimate Form which Mr. Jordan was then preparing for submission to the Bureau.

As noted in the chronology, in September the Board held the two public information sessions and the cable television program was taped. Several days before the first public session the architect and Board representatives appeared before the Planning Board. At these various events, presentations were made by Mr. Jordan and others to explain the projects which were to result from passage of the referendum and as part of these presentations, displays were shown, in the form of drawings which showed the contemplated size and general layout of, among other projects, the anticipated work at Bradley Gardens. Substantial testimony as to these meetings and the interesting and significant things which occurred during them was presented by both parties.

Pablo Jordan, of the firm of Jordan & Pease, a licensed architect for 30 years with substantial experience in the planning and design of school related projects, testified. Mr. Jordan was in attendance at the September 12 public presentation. Prior to this date, he had had no contact with anyone from the Board of Education regarding the Bradley Gardens project, other than with Dr. Horowitz, Mr. Petronella and staff. At the public meeting, Jordan was seated at the head table with Dr. Horowitz and members of the Board. During this meeting, Reverend Dr. John Stephenson, a member of the Board, passed a note to Mr. Jordan, a note which asked him whether the Bradley Gardens project could actually be constructed for $905,000. (RBG-27). This inquiry "surprised" Mr. Jordan, for he had previously discussed his estimates of increased costs with Dr. Horowitz and assumed that the information had been shared with the members of the Board. When he received Dr. Stephenson's note, he conferred with Dr. Horowitz, who told him that he, Jordan, should let Horowitz answer the query and any others from any Board members. As it was, there was no direct discussion of the anticipated cost of the Bradley Gardens project at either the September 11, Planning Board meeting or at the September 12 or 17 public meetings, or at the PTO meeting on the 26th at Bradley Gardens.

Mr. Jordan also used a display at the September 12 meeting. This was a floor plan, on which the square footage was listed at 12,640 square feet. This display was probably presented to the Planning Board at the presentation made to that body on September 11, when, as far as he can recall, the projected square footage was the same, or very close, to that which was shown on the reduction of the floor plan that was part of the documentation submitted to the DOE on September 20. (PBG-53) At the public meeting on September 12, Mr. Jordan placed the floor plan

on display, containing the reference to the square footage at 12,640 square feet. In all probability, the reduction used that night and the one which was ultimately used in the submission to the DOE were the same, although Mr. Jordan said that he could not swear to this. As the parties stipulated, several Board members were present at the public hearings on the 12th and the 17th. In addition, Mr. Jordan believes that Mrs. Navarette was present at Bradley Gardens on the 26th.

Mr. Jordan explained that the purpose of the public hearing was to inform the public of the problems which the referendum was intended to address. The presenters also explained how the proposals would resolve those problems.

Reverend Dr. John F. Stephenson, Jr., an ordained Presbyterian minister and a member of the Board of Education from 1985 until his defeat in a reelection bid in April, 1991, was the co-chair of the EFC, along with Ray Kovenuk. While that committee was functioning, Dr. Stephenson and others on the committee had requested that the committee be provided with the consulting services of an architect. According to Dr. Stephenson, this request was turned down by Dr. Horowitz and then Board President Tronolone, who told the committee to use the same multipliers in their cost calculations as the Vitetta Group was using for the high school project. Stephenson believes that Dr. Horowitz actually supplied this data to the committee.

As Dr. Stephenson recalled at the hearing, sometime thereafter, probably on August 21, or perhaps on the 28th of August or September 4, either before or after a Board meeting, Dr. Horowitz approached Dr. Stephenson in the hallway and told Stephenson that he, Horowitz, owed Stephenson an "apology" because "You were right, you needed an architect." This conversation lasted 2-3 minutes at most and the witness said that he considered it to be an apology. At the same time as he apologized, Dr. Horowitz told Dr. Stephenson that some of the cost overrun could be covered by monies which had been previously earmarked for some of the other recommendations which the EFC had made, such as the additions to the media centers and the office relocation at the Adamsville School.

Dr. Stephenson explained that his reaction to the news from Dr. Horowitz was concern, in that Dr. Stephenson had lived through the previous referendum and the reaction to it and the allegations concerning the Board and he knew that

"people delight to discredit the Board and administration." He was also concerned lest the cost overruns jeopardize the referendum and delay the high school consolidation, an outcome which would be "pennywise and pound foolish." The defeat of the first referendum was itself costing the taxpayers a great deal of money, some $3.5 million a year.

Dr. Stephenson testified that he believed that the cost overrun problem would be "taken care of" in due course. He recalled passing the note to Pablo Jordan on the 17th or 18th of September. He did not raise his query as to whether the project could be brought in within budget publicly (that is, out loud) so as not to provide an opportunity for others to discredit the Board.

On cross-examination, Dr. Stephenson said that he could not be "absolutely certain" that Dr. Horowitz had mentioned the media centers or the Adamsville School in the discussion following the apology, but he did believe that the mention of their being "architecturally not cost effective" did occur. He believes that the Superintendent said that the project would cost "considerably" more. In his deposition with Stark & Stark, he said "considerably" or a term "similar," suggesting "running quite a bit beyond." He made no connection at the time of this conversation with the *Board Bulletin* and did not recall the Ad Hoc Committee. He knew that the *Bulletin* was sent out to the public, but he did not recall that he took any action about it. As for the information which the Superintendent had given him in this conversation, Dr. Stephenson stated that he "assumed" that it would be "passed on to the Board." There was nothing "hard to work on."

Dr. Stephenson stated in his deposition that had he known that the cost estimate had grown to nearly $2.5 million that information "would have pulled the fire alarm." The Board would have had to reevaluate the matter. However, if the cost was in the neighborhood of $1.25-$1.5 million, this would not have surprised him." He was not certain as to whether he mentioned his concerns about the possible jeopardy to the referendum to Dr. Horowitz or whether he might have told the Superintendent that there was no "need" to put out this information about the increased costs at that time.

The witness opined that he never perceived that there was any deception being practiced in regard these cost estimates. The referendum for approval of a

$23.4 million bond issue was, in his view, "absolutely" a "broad, amorphous plan." The funds did not have to be spent in the particular ways outlined in the Bulletin. If the cost of the Bradley Gardens component exceeded the $905,000 then the extra monies would have to be obtained from other sources of income.

Clara Navarrete, Vice President of the Board at the time of the pre-referendum meetings, testified that she was late in arriving at the September 12, meeting. However, she remembered that at that meeting, Board member Arthur Weigand reviewed the statements in the *Bulletin* and described its purpose. She remembers that Mr. Weigand used the list on page 3 as he did this. There was a blueprint displayed on an easel which was facing out toward the public. However, she claimed that she did not pay particular attention to this, never went up to it and commented that she never saw a square footage figure for Bradley Gardens (other than the original proposal of 4,000 square feet) until March, 1991. She never knew that the size of the Bradley Gardens project had grown beyond 4,000 square feet until March. At the September 17, meeting, Mr. Weigand followed the same format, but at this second meeting the presentation was shortened a bit. Dr. Horowitz, Mr. Jordan and Dr. Stephenson were all present at both of the meetings.

Mrs. Navarrete attended the PTO meeting at Bradley Gardens on the 26th. The Board had asked that some members of the Board and the administration visit the PTO and give it's members as much information as they could. There was no mention of the cost of the project at this meeting.

Mrs. Navarrete testified that during the summer of 1990, as the preliminary preparations for the referendum were ongoing, Dr. Horowitz had told her in passing that there might be a necessity to spend $3-400,000 hundred thousand dollars to move the boiler room at Bradley Gardens. She responded to this news, saying that it sounded like a reasonable cost, one which she believed the Board had already placed in it's surplus budget, at least to the amount of $120,000. As Mrs. Navarrete first recalled, this expense, and the need for it, were never discussed at the meetings held with the public in September. However, later in her testimony, Mrs. Navarrete stated that she did not recall whether or not the added expense for the boiler room move was mentioned at the public meeting of September 17. Skeletal minutes of the public meeting, (RBG-29), are not helpful as

to the answer.[11] She also could not recall if she or the Board were told whether the $3-400,000 included the already set aside surplus of $120,000 for replacing the boiler. She personally saw the $3-400,000 as an added cost due to problems in the design phase of the project, but the Board had some money (the $120,000) set aside to offset this expense. The witness also acknowledged that she knew that there would have to be some additional square footage provided for the moved boiler room.

Arthur Weigand, who was elected to the Board of Education in April, 1989 and is a manager of business planning for Ingersoll-Rand, testified that he was present at the September 12 and 17 meetings. He gave a presentation at each meeting. When he spoke, he waved the *Board Bulletin* which had been sent out to the voters and which was available at the meetings and he specifically referred to page 3 and ran down the numbers, referring to the lower halves of pages 2 and 3 and mentioning the results of a positive or of a negative vote. To Weigand, the *Bulletin* was "the bible" regarding the referendum. In the 1989 referendum there had been confusion over the figures. Here, there was "one set of figures and that was it." There was no information conveyed to Mr. Weigand as to any increase in the projection of a cost for achieving parity at Bradley Gardens for $905,000. He had no idea as to the derivation of that figure and he had no real sense of the square footage involved in the project. His focus was always on the dollars involved. However, it is possible that he or someone at the meetings may have mentioned the square footage, although he has no specific recollection as to this. The only thing that registered with him as "firm" was the figure of $905,000. In fact, at the meeting on the 12th, he did not use the term "estimate" in his reference to the Bradley Gardens work or the $905,000 figure, because he did not know that the architects had not finished their work. He "only knew that they had not spent the money yet."

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11 These only reflected that Dr. Horowitz spoke at each meeting as to the Bradley Gardens project, but the minutes give no details as to what he said.

William Tronolone, the Board President at the time of the referendum, confirmed the testimony of Arthur Weigand that Mr. Weigand had asked the public present at the September 12 meeting to follow along in the *Bulletin*. Mr. Jordan referred to a drawing, 1 foot by 2 feet, placed on a large placard with about 5 inches of the bare placard on each side of the drawing. He recalls no other reference to cost of the project, except what Mr. Weigand said in regard to the figures in the *Bulletin*. While the presentation made by the various speakers at the meeting on the 17th was shortened slightly at the suggestion of Mr. Sandler, Mr. Weigand again went through the charts.

When the cable television presentation was taped there was a script which was used (J-1), but it was edited for presentation. Although Dr. Horowitz spoke of the "extraordinary" communications between the committees who had worked on the various components of the plan and referred to the way in which the pieces "fit together," he never mentioned that the costs of the Bradley Gardens portion were anticipated to be higher than $905,000.

Mr. Tronolone and Dr. Horowitz were interviewed for an article which was published in the local weekly newspaper, *The Messenger Gazette*, in late September. In the course of that interview by reporter Steve Strunsky, the phrase used in reference to the cost of the Bradley Gardens work was reported as "at least $900,000." No reference was made to any specific higher cost or estimate of such. Indeed, Mr. Tronolone insisted that no mention was ever made to him by anyone, including Dr. Horowitz, of any increase over the figure of $905,000 at any time before the referendum, this even though after his return from vacation on July 29 until the date of the referendum he saw Dr. Horowitz frequently in person or spoke with him by telephone. The first that Mr. Tronolone heard of this was from Mrs. Navarrete in March, 1991.

On cross-examination, the witness explained that after the resolution was adopted on June 26, 1990, he believed that both architects, Jordan and Pease and Vitetta, were working with the district's School Administrator/Board Secretary, Dr. Peter Mazurak, within the confines of the authorized budget. He believed that if changes in that budget were required, those involved would come back to the Board. When he saw the footprint of the building displayed at the meetings in

September, he sat there and "said to himself" that the $905,000 was buying the district a "nice product" and that he felt "very proud of it." He did not recall seeing any square footage reference.

Dr. Peter Mazurak, who retired from the employ of the Board of Education effective June 30,1991, after 25 years of service, was the Board's School Business Administrator since 1969 and the Board Secretary beginning in the early 1970's. Dr. Mazurak had played significant roles in regard to prior bond referendums and building projects, working with the architects and bonding counsel. In regard the referendum of October 2, 1990, Dr. Mazurak worked with Jordan & Pease on a contract between them and the Board, of which more will be said later. However, in regards to the pre-referendum period, Dr. Mazurak said that while he had heard of a possible escalation in the costs for the Bradley Gardens project, he did not have any knowledge as to any figures. He never heard any other amount than $905,000 prior to the referendum. As for whether any Board members knew anything about the escalation prior to October 2, the witness stated that although from some things said to him over time by Dr. Horowitz, he had assumed that Mrs. Navarrete had some such knowledge, he personally had no evidence that she, or any member, had such knowledge before the vote.

Dr. Mazurak acknowledged that he had a vague recollection of having seen a Jordan & Pease letter of July 18, 1990 from Linda Andreychik, that firm's business manager, which was accompanied by a document entitled, "Appendix No. 3" to the firm's "Standard Form of Agreement." This Appendix contained information as to the calculation of the fee for professional services which the firm would eventually charge. The standard language included the following:

> FEE SHALL BE BASED ON A PERCENTAGE OF CONSTRUCTION PER THE FOLLOWING FEE CHART:FIGURES WOULD BE PRORATED TO ACCOMMODATE THE ACTUAL CONSTRUCTION BUDGET.

Dr.Mazurak's recollection was that at the public meetings there was a discussion of the floor plan layout and elevations, but he could not "so much recall" any discussion of the physical size of the project.

The witness was questioned about the plans drawn for projects. He agreed that it is often necessary to change the plans as a result of State requirements.

Dr. Horowitz' management style was very "hands on" with regard to the business end of the operation. This was in contrast to other superintendents with whom Dr. Mazurak had worked. In addition, since Dr. Mazurak had already announced that he was retiring, the Superintendent was perhaps more involved. While everyone expects that the Superintendent of Schools know everything, this is "just not possible."

Dr. Horowitz testified that he was present at both of the public meetings and that there was some narrative by himself and possibly others as to the goals at Bradley Gardens and how they were to be met. Pablo Jordan had charts which he displayed and he spoke for about 5-10 minutes as to what the plans represented. There were two "mentions" of the 12,645 square feet, one being of the square footage for particular spaces. There was no reference that he recalled to the $905,000. He said nothing at these meetings, or on the cable TV presentation, concerning any change in the expected cost of the project.

The Superintendent spoke concerning the Planning Board meeting held on September 11, which he attended with Messrs. Jordan, Tronolone and Mrs. Navarrete, as well as Board Attorney Daniel Soriano. Mr. Soriano and the architects spoke, as did an environmental consultant. Mr. Jordan used a "footprint," display which Dr. Horowitz believed was the same as the one which was used at the public meetings. He believes that the size of the project was discussed, but there was no discussion as to the cost. Mr. Jordan mentioned to him that he had read in the newspaper that the Bradley Gardens project might come in at $905,000. He wanted to know "where do we stand with the public?" Dr. Horowitz told him not to lie and to tell the truth if the matter came up. It did not.

The Superintendent discussed his contacts with certain members of the Board in the pre-referendum period, contacts in which he contends that he in one fashion or another conveyed, or at least attempted to convey to them, and apparently to his thinking to the full Board, the fact that the original $905,000 estimate had been superseded by some new and greater estimate of the cost, or at

least was most likely to be. These comments, conversations and suggestions occurred in August and early September.

As Dr. Horowitz recalled, in the period between August 1-31, he spoke to Clara Navarrete, a frequent visitor to his office, and showed her preliminary sketches of the project which he had received from Pablo Jordan. These showed the second corridor, a larger size all-purpose room, and the movement of the boiler room. Mrs. Navarrete looked at these plans and "liked what she saw." They discussed the boiler room "issue" as a "reasonable way of devoting another $.5 million as ...rationale for financing additional costs." He was "using her as a sounding board." She nodded and "seemed to feel this was a fair way." There was neither a suggestion from her or an offer or suggestion from her regarding sharing this information as to the changes in the plans and the increased costs with the other members of the Board. The Superintendent testified that in the course of these conversations with Mrs. Navarrete, he is "absolutely certain" that he told her of the cost estimate of $1.4 million, but less certain if he told her of the figure of $1.8 million, being only "reasonably certain" of this. He could not be sure whether at the time that he went over the plans with her the then current estimate of which he was aware was $1.4 or $1.8 million, but in reviewing the plans he told her of the $495,000 expense for the new boiler room, and she was "in agreement with the concept." He also asserted that prior to the referendum he told her that some of the referendum monies could be "reassigned to Bradley Gardens."

Dr. Horowitz did recall that he had spoken to Dr. Stephenson and had "apologized" to him regarding the need for the EFC to have an architect available to them during their deliberations, and he also recalled that he mentioned cost increases in the course of this conversation.

The witness stated that in early September he told Mrs. Navarrete that the increase was "even larger than the last time," that is, the last time he had revealed to her that the estimate had gone up from $905,000. He also believes that Mr. Tronolone asked him how he was "doing" with Mr. Jordan, and he then told Mr. Tronolone, the Board President, that the project might have to be bigger. This occurred just about at the time that the *Board Bulletin* had gone out to the voters.

As of the 13th or 14th of September, Dr. Horowitz was still "working" with the figure of $1.8 million for the estimate. He expressed his concern about this figure to Mr. Jordan. He was also concerned that the public might think that the cost of the project would actually be $905,000. He mentioned his concerns to both Dr. Mazurak and Dr. McGarry, and although he could not say exactly when these mentions occurred, they were before the referendum.

When Dr. Horowitz saw the faxed copy of the Project Cost Estimate Form on September 13th, and saw that the estimate had now grown to $2.459 million, he was quite concerned. The referendum was only 2 weeks hence. The plans had not yet gone to Trenton for approval. While Mr. Jordan gave him a lot of assurances that all of the calculations were on the high side and said that it was necessary to estimate "very high," the Superintendent was "concerned about the referendum." All of this "cemented his conclusion" that the Board should "just get approval to build." Then the Board could take another look at the project and determine how to proceed to completion.

Dr. Horowitz testified that he checked with bond counsel to determine if it would be legal to change the plans after the public approved the referendum. He learned that it would be, so long as the site and the educational goals were the same and would be met by any new plan. However, before the vote, he perceived that any changes that might be made at that late date might jeopardize the referendum. Here he said that he was speaking of its chances for success, not its legality.

As previously mentioned, Dr. Horowitz testified that at this time in the pre-referendum period, he had come to view the Jordan plan as only an option that the Board could follow. As the chief executive officer of the district, he was charged with the responsibility of implementing the Board's resolution. As part of this responsibility, Dr. Horowitz had concerns regarding the media centers for the elementary schools, which were intended to be a part of the referendum funded projects. The principals of the elementary schools had expressed a big concern with regard to the need for these, reflecting a general educational concern in the district. The plan had been to expand the libraries in each of the schools and to do so by adding perhaps 200-300 square feet to the libraries. The Vitetta Group was asked to look into this matter and Lisa Soulos of that firm was sent to examine the schools. Dr. Horowitz testified that he was informed by Ms. Soulos that the idea of adding

this extra area to the libraries was not economically or architecturally reasonable. The firm recommended instead that additional shelving be purchased and arranged to improve the usable space in the libraries/media centers. Thus, Dr. Horowitz contended that he had become aware that the actual expense required for these centers would not be anywhere near to the $490,000 that the EFC had listed in its report. The Superintendent claimed that he sought documentation of this assessment from Ms. Soulos, but that it took many calls and a great deal of time to receive this. (In fact, a letter from Ms. Soulos, bearing a date of July 30,1991, was received in the Superintendent's office.) Dr. Horowitz was uncertain as to whether he had shared this information with Reverend Dr. Stephenson at the time he apologized to Dr. Stephenson in August, 1990. While he might have done so, he could not be sure that he had. At the same time, Dr. Horowitz testified that he did tell Dr. Stephenson "maybe in September" that the cost would be "far more than" $905,000.

As the date of the referendum approached, Dr. Horowitz was advised by Lisa Soulos that Dr. Macaluso would not approve the high school consolidation plans. This threw the Superintendent into a "panic." However, a meeting occurred soon thereafter and the plans were approved.

Dr. Horowitz related that prior to the referendum he had no definite knowledge of who on the Board of Education knew of the increased cost estimates. However, he felt that by his telling Mrs. Navarrete she would tell Mr. Tronolone. He had no "direct feeling" as to Reverend Dr. Stephenson. As for Mrs. Navarrete, the witness recalled that he showed her the plans for Bradley Gardens after he first saw them when they were brought to his office by Pablo Jordan about September 11, or shortly before that. As he recollected them, these were blueprints, on large rolls of paper, showing schematics of where the rooms were located. He met with Mrs. Navarrete in the conference room outside of his main office. He shared with her the information that the project would include not only the boiler room, but also the second corridor. This meeting was the culmination of at least six "communications" with Mrs. Navarrete which Dr. Horowitz claimed occurred during the summer of 1990, during which he discussed the size and/or cost of the project with her at least two or three times.

As for Mr. Tronolone, the Superintendent's best recollection was that he had mentioned to Tronolone that he was hearing from Mr. Jordan that the desires of the EFC could not all be designed as they had anticipated and that the plans called for a bigger addition than the committee had projected. He pinpointed this discussion as having occurred sometime in August, 1990. There was no mention of "dollars" during this talk. However, as Dr. Horowitz recalled, the talk was that the project would have to be "bigger and more expensive." The witness acknowledged that his recollection of the details of this contact with Mr. Tronolone was "not clear." When the Superintendent referred to his discussions of the size and/or cost increases with Dr. Stephenson and Mrs. Navarrete in his written statement rendered after the April 9, 1991 meeting with the Board, he did not mention anything as to this contact with Mr. Tronolone. He also told the Task Force that he "didn't inform the President of the Board." In explanation of these failures to mention this contact in the course of these attempts by him to reconstruct his communications to Board members in the pre-referendum period, the Doctor stated that at the time of these two incidents he had no "firm" memory of the matter, and that the "discussion" with Mr. Tronolone sounded "familiar" to him, although he had "no idea if he had informally told him (Mr. Tronolone). However, Dr. Horowitz asserted that as he now testified in the tenure hearing, he had a firm memory that while he did not communicate any of the information to the Board President "formally," that is, by way of memorandum or as part of the Board's agenda at its meetings or in the course of discussions as to the agenda with the President, he nevertheless did tell him "informally." As he has thought about the matter for fifteen months, the Doctor has been able to clarify this question as to his pre-referendum communication with Mr. Tronolone by reflecting on the way in which the Board "operated at that time." In fact, during the Stark & Stark deposition he stated that while he could not swear to the fact or the nature of such pre-referendum comments to Mr. Tronolone, he "assumes" that he did tell him "something based on the nature of the relationship." He never made any sort of "decision" either to notify or not to notify Mr. Tronolone. As for any discussions with any of the other Board members as to the cost ineffectiveness of the Adamsville office or library/media centers projects, he had no such contacts.

Reflecting on the pre-referendum situation, Dr. Horowitz conceded that his failure to formally advise the entire Board of the cost increases "may have been dumb." He was relying on the two Board members who "with 100% certainty"

knew of the issue. Now, the Superintendent realizes that he should have "been covering (his) ass given the political blowup." In fact, as he put it, had he given the Board enough information, "we wouldn't be sitting here now," adding that at the time he thought that he was providing "enough."

On cross-examination, the witness clarified his statements as to what he might or might not have said to any Board members, especially Mrs. Navarrete, concerning the cost effectiveness question on which he was receiving advice from the Vitetta Group. He is not sure as to whether he imparted the news that the projects were not considered to be cost effective to any of the members, although he did mention to Mrs. Navarrete that additional funds would be available. He "might" have told Mrs. Navarrete or Dr. Stephenson and "in a general sense" Mr. Tronolone. While he is "absolutely certain" that this information was given to him before the referendum, he did say that it was after the referendum in his April 12, 1991 written statement to the Board. When confronted with this fact at the hearing, the witness agreed that "that's a contradiction" for which he admitted he had no explanation, adding only that that was his recollection at that time. He now recalls that "they" went out to the learning centers and the libraries and he believes that there was some feedback and some mention before the referendum. His testimony in the August 1, 1991 deposition was that there was already feedback from Vitetta in July, 1990 and that as to one of the elementary schools the proposal made "no sense at all." He also testified in the present hearing that he believes that he did mention the cost effectiveness issue to Dr. Stephenson in August, 1990.

Dr. Horowitz agreed that the *Board Bulletin* in no way conveyed to the voters any hint of the possibility that the library center project might be cost ineffective. As for the $905,000 figure, which was retained in the *Bulletin* despite his knowledge that the Bradley Gardens project could not be built for that cost as per the advice of Pablo Jordan, the witness recalled that when he saw the Project Cost Estimate Form drafted by Mr. Jordan and faxed to him on the 13th of September, he was "upset and angry." The estimate of $2.459 million was "fairly startling." However, despite this reaction, Dr. Horowitz did not share this information with the Board. At that time he felt that the Jordan designed project was "not necessarily" going to be the project that the Board would ultimately build. He believed that after the referendum "the matter could be taken care of." By this time, the Jordan plan was "theoretical" to him. He did not share the cost estimate of $2.459 million

with the Board until March 18, 1991, at which time he provided a copy of the Project Cost Estimate Form to Mrs. Navarrete.

The witness spoke of the circumstance surrounding the query made by Reverend Dr. Stephenson to Mr. Jordan in September as to whether the Bradley Gardens project could be produced for $905,000. He could not remember whether this happened on the 12th or the 17th, but when Mr. Jordan expressed concern regarding the inquiry, Dr. Horowitz told him that he would give the Board information as to the cost. However, he did not provide them with the Project Cost Estimate Form until April, 1991.

Dr. Horowitz remembered that Dr. Mazurak had spoken to him regarding the boiler room expense at about the time that Mr. Jordan showed him plans which called for the second corridor. The money for the boiler was already in the surplus account.

POST-REFERENDUM EVENTS
OCTOBER, 1990-APRIL, 1991

Following passage of the bond referendum on October 2, the pace of events slowed. On October 17, 1990, Dr. Peter Mazurak received a typed version of RBG-40. According to his testimony, as of the date of the referendum Dr. Mazurak believed the cost of the Bradley Gardens project to be $905,000. He had not been involved in the drawings or the submission of documents to the DOE. When he reviewed the formula for the fee for the schematic drawings he saw that it was calculated at 8% of a contracted figure of $1,955,000. He saw the figure of $2,055,000 and understood this to represent the construction cost, which he had understood up to that point to be $905,000. He had no breakdown available to him to explain this new figure. He needed to see how the amount of the referendum, the $23.4 million, was broken down into its different components so that he could set up accounts for the purpose of making sure that no component was overspent, leaving too little money available for any of the other components. He went to Dr. Horowitz to find out this information. The Superintendent took a number out of his file. After this occurred, Dr. Mazurak discussed with Dr. Horowitz the need to discuss the escalating cost with the Board, telling his boss that he should probably do something to inform the Board. He asked Dr. Horowitz where there might be

funds available to cover the additional costs. According to the witness, they spoke several times about this. However, the topic of the escalating costs was not brought up at the cabinet meetings, which were generally held on a weekly basis.

In his deposition of July 31, 1991, Dr. Mazurak spoke of his "unhappiness" regarding the Board not being told about the cost escalation and said that he told the Superintendent that if he had to pay the architect, it would "blow the whole thing out in the open." Dr. Mazurak saw it as his duty to tell Dr. Horowitz to tell the Board. He kept hoping the the matter would "momentarily be all straightened out." While he felt that he would be justified in making a partial payment to the architect, if he had to pay the whole amount, the Board would question him as to why the fee was so much. He explained the the normal procedure was to reserve the cost of the architect's fee by drawing a purchase order for that whole amount so as to protect that sum within the referendum funds. He felt that a purchase order drawn for the full amount of the Jordan & Pease fee, a fee calculation based upon the escalated cost estimate, would cause the Board to ask questions.

Dr. Mazurak said in his deposition that he never tried to "convince" the Superintendent to bring the subject of the increased costs to the Board, but only "suggested" it to him. He felt that this was the appropriate way to proceed, as Dr. Horowitz was his supervisor.

Dr. Mazurak never took it upon himself to personally advise the Board concerning the increased estimates. Each time that he raised the issue with Dr. Horowitz, the Superintendent gave him "plausible" answers, indicating to him that money to cover the difference could be had from other sources. He mentioned the use of surplus monies, but did not speak of specific amounts. He kept assuming that Dr. Horowitz would present the matter to the Board "shortly." Dr. Mazurak was scheduled to retire. He mentioned in his deposition that he was concerned that the Board would not be advised regarding the cost issue by the date of his retirement.

On December 17, 1990 a meeting was held at which some of the Board members had their first contact with the architect. The Board had expanded the Building and Grounds Committee to include those members of the High School Design and the EFC Committees. According to Board member Ray Kovonuk, this was the "first time there was any real certainty" as to the size of Bradley Gardens,

although he did not recall any discussion at that meeting as to the square footage or the cost. The drawings shown were not entirely complete and there were some dimensions missing. Mr. Kovonuk was not able to tell the exact delineations of the plan. He gleaned nothing from the presentation to suggest the idea that there was any difference from the $905,000 figure.

Clara Navarrete attended the December 17 meeting and then gave a report to the Board at its December 18 meeting as to the results of the prior days meeting.[12] According to Mrs. Navarrete, the only discussion about cost which occurred at this December 17 meeting had to do with Mr. Jordan's review of options with respect to the roof and using a wood truss concept. Nothing was said regarding the overall cost of the Bradley Gardens work. Jordan presented unfinished sketches and elevations. The committee complimented him on the way the building would look after the work was completed.

Mrs. Navarrete, who holds a Bachelor's Degree in Electrical Engineering, recalled that she had leafed through the initial drawings and the elevations at the time of the December 17 meeting. The minutes of the meeting, PBG-55, reflect a discussion as to the need to move the boiler.

The witness reviewed a transcript of the December 18, 1990 Board meeting, a review which helped to refresh her recollection as to the events of that evening at least to "some extent." She "basically" reported what had gone on in the meeting of the night before, including the discussion about the wood trusses and the fact that the drawings made the project look "very pretty."

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12 According to testimony, it was standard operating procedure for the Board to receive reports from it's committees. On December 18, Mrs. Navarrete presented a report to the Board on the Buildings and Grounds Committee meeting of the previous night.

Dr. Horowitz' recollection of the December 17 meeting was that the size of the project was discussed, as each page of the plan was reviewed. Mr. Kovonuk, Mrs. Navarrete and Dr. Stephenson were all present. Costs were discussed. A laymen on the EFC who was there said that the project was a lot bigger and asked if it would cost more. Dr. Horowitz responded that it was quite a bit bigger and that the cost was considerably more. He also noted that the Board had the option to decide how to fund the increased costs and that it had some alternate sources available.

The Superintendent also addressed himself to Dr. Mazurak's testimony about his suggestions to the Superintendent that he, Dr. Horowitz, tell the Board about the cost overrun. He denied that "suggestions" were made "in that form." He did acknowledge that Dr. Mazurak did speak to him about the Jordan & Pease fee request predicated on a cost of more than $905,000, raising a concern about how to pay this fee. There was no discussion of making a small, up-front payment so as to avoid having to present the entire bill to the Board. Dr. Horowitz did not go to the Board at that time, but instead went to the Board committee on December 17th. He could not recall the date of Dr. Mazurak's comments, which he thought were probably made in late 1990. Once again referring to the Jordan plans, the Superintendent testified that he never "had any faith in that number."

MARCH, 1991-JANUARY, 1992

The issue of the actual cost of the Bradley Gardens project and the questions about the activities of the Superintendent in regard to this matter came to a head beginning in mid-March, 1991. It was then that a request for Board approval of transfers from surplus caused questions to be asked of the Superintendent.

In March, the Board of Education was faced with the task of crafting a school budget in the face of amendments made by the Legislature to the Quality Education Act ("QEA"), *N.J.S.A.* 18A:7D-1 to -36. Among the significant aspects of those amendments were requirements concerning the way in which Boards of Education could deal with surplus funds. The Act "capped" the amount of general free balance (surplus) that a district could carry. The effect of this limitation was to allow Boards to either transfer the amount which they held in surplus which

constituted between 5%-10% of the 1990-91 net budget to the 1991-92 budget, or to transfer that amount to the current expense budget for 1990-91.

On March 12, 1991, the Board met to discuss its 1991-92 budget. A document, RBG-92, presented at the meeting, detailed the surplus purportedly existing as of that date. A second document, entitled, "Transfers," was also presented. This called for the Board to transfer a number of specified sums previously allocated to certain specified projects in the Current Expense Surplus to the Current Expense account for the 1990-91 budget. These proposed transfers were:

1. Asbestos removal-district-wide	$100,000.00
2. Renovations for barrier-free facilities-district-wide	$150,000.00
3. Relocation of boiler-Bradley Gardens School	$495,000.00
4. Reroofing John F. Kennedy School	$333,000.00
5. Reroofing portions of Hillside School	$305,000.00
TOTAL:	$1,383,000.00

These reports, presented to the Board at the meeting of the 12th, brought an inquiry from Clara Navarrete as to the necessity of utilizing these surplus funds. When Mrs. Navarrete objected to the approval of these transfers at the Board's meeting of March 18, Dr. Horowitz testified that he found her action "odd," considering his prior conversation with her as to the use of funds for the Bradley Gardens overrun. He stated that he whispered to Dr. McGarry, asking him rhetorically whether she did not remember the need for funds for Bradley Gardens. Dr. McGarry shrugged, and when the Superintendent made the same inquiry to Mr. Tronolone, he responded in the same fashion. A note was passed to Mrs. Navarrete, who nodded in a noncommittal way. After the meeting, Mrs. Navarrete asked Dr. Horowitz to refresh her recollection on the matter and to give her a memorandum. Dr. Horowitz explained at the hearing that he was not at that time intending to recommend any immediate transfers to the Board. He was simply sharing his thoughts with the Board about what might happen if the bids ever went out for the Bradley Gardens project.

As part of the memorandum which he prepared for Mrs. Navarrete, Dr. Horowitz appended the Project Cost Estimate Form, which had been filed with the

Bureau on September 20, 1990. This was the first time that he had presented anyone on the Board with any document or other reference to the estimate of $2.459 million.

Clara Navarrete confirmed that the presentation of the information regarding transfers had surprised and perplexed her. She recalled at the time that she had seen previous surplus reports, which she remembered as having lower amounts listed for at least some of the projects, such as the JFK School roof. In addition, the then current budget already had a reserve of $600,000 for contingency projects if the referendum had failed. When Dr. Horowitz passed the note to her, asking if she remembered the concept of the West High School roof money being used for the overage at Bradley Gardens, she did not have any such recollection. She was only aware of the matter of the boiler work. The entire matter made no sense to her and she was "quite puzzled." After the meeting Dr. Horowitz seemed quite confused about why she raised the questions regarding the roof, etc., and she told him that she did not recall any conversation regarding the West roof funds and the idea of using them for something else. She asked him for a memorandum on the subject. In response, he supplied RBG-43, which she received on the 19th. The Project Cost Estimate Form was attached. This was a document which she had never seen before. She insisted at the hearing that she had no knowledge up to that date that the cost estimate was $2.459 million. Dr. Horowitz had never mentioned this to the Board before, nor had he said anything about taking specified bond monies and transferring them to the Bradley Gardens project.

After Mrs. Navarrete received the memorandum from Dr. Horowitz, she called Mr. Tronolone and asked him if he had ever heard anything about the cost increase. (It should be noted that Mrs. Navarrete acknowledged that the idea of an additional cost of $495,000 in regards to the boiler move did not surprise her.) Her request to Mr. Tronolone was based in part on the fact that as the Board President he would, in the normal course of events, have seen and signed the form. Mr. Tronolone told her that he did not know what she was talking about. She showed him a copy of the memo and they resolved that they had better find out what had happened.

On March 22, a dinner was held in honor of the retiring Dr. Peter Mazurak. Mrs. Navarrete approached Pablo Jordan at the dinner and told him that she wanted

to ask him some questions. A meeting with the architect was arranged, which took place on April 6, after her return from vacation.

Prior to the April 6 meeting William Tronolone met with Dr. Horowitz on or about April 2, at which time he asked the Superintendent if he could shed any light on what was happening. Dr. Horowitz gave him a "whole rundown," telling Mr. Tronolone that the project had grown because of Code requirements and that the Board could "try to pay (the extra costs) from different pieces of the referendum." At this meeting, Mr. Tronolone did not ask Dr. Horowitz why he had not previously disclosed this information to the Board.

On April 6, a Saturday, Mrs. Navarrete and Mr. Tronolone met with Mr. Jordan at his office for a period of about five hours. This meeting was held without any notice to the full Board. As the participants in this meeting each noted in their testimony, as the meeting progressed, Pablo Jordan was perplexed by the apparent lack of information as to the situation at Bradley Gardens. He testified that he said to her "don't tell me that you haven't seen the packet sent to the State Department of Education...I signed for you." According to Mrs. Navarrete, he told her that she knew that he was signing her name to the documents, RBG-34, and showed her the letter of September 20, 1990 which had accompanied the various documents submitted to the Bureau. She noticed that her name was misspelled.

William Tronolone confirmed Mrs. Navarrete's testimony as to the April 6 meeting. The then president of the Board described himself as in "total shock," as he found out "all this had happened before the referendum."

On April 9, the Board met in closed session following its regular meeting. Dr. Horowitz and Mr. Jordan were present at the Board's request, as was Daniel Soriano, the Board attorney. Mr. Tronolone recalled that during this session Mr. Jordan was asked whether he had been directed to sign the September 20 letter to the Bureau by Dr. Horowitz. As the witness recalled, at that point Mr. Jordan hesitated and then finally said, "No." When Dr. Horowitz was asked why he had made no report to the Board regarding the escalating cost estimates, he responded, "No one asked." This testimony was corroborated by Pablo Jordan and by Clara Navarrete. She recalled that the question posed to Mr. Jordan as to the signatures was whether Dr. Horowitz had "authorized" him to sign, but she was not certain

whether the question was posed as to one or both of the signatures. She said that in response to this query, Mr. Jordan looked at Dr. Horowitz, hesitated and then said, "No." As she understood Mr. Jordan's response, he signed the letter for the sake of expediency and thought that she knew of the signature. She believed that Mr. Jordan acted thinking that he had permission to do so. In further testimony, Mrs. Navarrete said that in her July 31, 1991 deposition, she had stated that the "indications" given at this meeting by Mr. Jordan were that he had been "directed" by Dr. Horowitz.

Arthur Weigand, a Board member in April, 1990, recalled that he first heard about the overrun on the late afternoon of the 6th of April, when he received a phone call from Mrs. Navarrete's husband asking if he could come over to the Navarrete's home. When he arrived, he found Mrs. Navarrete and Mr. Tronolone. He described these two as appearing like "death warmed over." He was told of the revelations of the meeting with Pablo Jordan, and Mr. Tronolone remarked that "I don't believe it, I'm in touch with that man just about every day." Mrs. Navarrete could not believe that anyone would sign her name. The two "appeared to need to talk to someone."

In a memorandum which he filed with the Board of Education on April 12, RBG-46, Dr. Horowitz stated that he had never given Mr. Jordan any authorization to sign the names on the September 20 letter. He also said that he had told Mrs. Navarrete of the fact that the $905,000 was insufficient in the summer of 1990.

After the meeting held on April 9, the Board met on the 17th of April to decide what it wanted to do in the face of the revelations made at that meeting. A determination was made to issue a letter of reprimand to the Superintendent and to freeze his salary. According to Mr. Tronolone's testimony, the Board directed him to present the letter to Dr. Horowitz and to advise him that this was the action of a unanimous Board. He was to remind the Superintendent that he had previously told the Board that if they as a body lost confidence in him that he would look for another job. In addition, the Board decided to form a Task Force to look into the Bradley Gardens matter. Mr. Tronolone was told to tell Dr. Horowitz that the Task Force was not engaged in a "witch hunt." As Mr. Tronolone related his understanding of the Task Force's mission in his hearing testimony, the purpose of the group was to look at the project and see what about the project could be scaled

down. Any personnel matters that seemed to be involved would be presented to Mr. Soriano for whatever action was appropriate. Mr. Tronolone testified that he related all of this to Dr. Horowitz. He also told the Superintendent that it was the position of the Board that he, Dr. Horowitz, should leave. He also told the Doctor that the letter of reprimand was for the failure to let the Board know what was happening, but that he would ask the Board to remove the letter from the Superintendent's file if Dr. Horowitz had a problem in finding a job. Since the Task Force was to be composed of three district employees, Mr. Tronolone asked Dr. Horowitz to write letters to these three asking that they work on the Task Force.

The letter of reprimand, which is the subject of much testimony and legal analysis as to it's effect upon any additional actions against Dr. Horowitz, read in part:

> Dear Dr. Horowitz:
>
> ...
>
> The Board found that although you knew since last September that the estimated cost of the Bradley Gardens addition had increased to over two and one-half times the initial estimate, you withheld this information from the Board and permitted the project architect to proceed to finalize construction plans. You also modified initial building program proposals and made decisions regarding the allocation of referendum and reserve funds without the knowledge or authorization of the Board.
>
> Your actions have usurped the authority of the Board, and you are hereby formally reprimanded by the Board and denied any salary increase for 1991.
>
> In the future, the Board shall expect you to exercise better judgment regarding the parameters of your authority as Superintendent and to respect the prerogatives of the Board. Improved communications between you and the Board shall be carried out through the Board President.
>
> ...

As the issue of the purpose and the meaning of the letter of reprimand and it's possible affect upon the ability of the Board to take any further action against Dr. Horowitz is a central feature of his defense against those tenure charges that relate to the referendum and the Bradley Gardens affair, the testimony of those

who spoke to their understandings as to these matters will be explored. As for Mr. Tronolone, he testified that it was never the intention of the Board that the letter of reprimand serve as the "final disposition" of the Board regarding Dr. Horowitz. Thus, as new information was developed, the Board was eventually to take a further look at Dr. Horowitz' conduct and was ultimately to certify tenure charges against him.

Mrs. Navarrete testified that the Board's action in reprimanding the Superintendent and in withholding his increment was taken in the absence of any sworn statements from Pablo Jordan. The letter made no reference to the signing of her name (or that of Dr. Horowitz) on the September 20 letter without her permission or authorization (an action which the Board was ultimately to charge had been a forgery in which Dr. Horowitz was in some fashion involved), but instead was only addressed to the withholding of information from the Board. She echoed the thought that the Board had decided that it was time that there be a parting of the ways between the Board and the Superintendent.

Mr. Weigand noted that after the meeting which he had with Mr. Tronolone and Mrs. Navarrete on the afternoon of April 6, they were concerned and uncertain as to how to proceed. As he put it, they were "neophytes and needed help." At the April 17, meeting, the Board members discussed the letter of reprimand, which had been drafted by Mr. Soriano. The attorney had advised the Board of the spectrum of possible actions at the Board's closed session of April 9, after Dr. Horowitz and Mr. Tronolone were excused.

Mr. Weigand explained that the Board did not decide that the letter of reprimand was to be the final action to be taken. The Board wanted more facts. The purpose of the Task Force was to find out how the Bradley Gardens project had gotten "off track" and how to get it "on track." At the time, the Board was not yet concerned with the issue of whether the bond issue might be void, an issue which was later brought up by private individuals at Board meetings.

Albert Tornatore, Esq., a member of the Board until April, 1992, was called as a witness by Dr. Horowitz. According to Mr. Tornatore, the reasons for the reprimand and the freeze were "multiple." The Superintendent should have told the Board of the "significantly higher" estimates. The message was that it was

essential to "bring us on board." However, the reprimand had "nothing" to do with the $905,000. The project looked as if it was going to come in at a figure that was "much, much higher than expected." While it was "obvious(ly) not" going to be $905,000, this recognition of a likely increase over the $905,000 did not go so far as to encompass a figure of $2 million. The idea was that Dr. Horowitz had made a blunder, and now it was time to straighten it out and move on with the Bradley Gardens project. His understanding at the time of the issuance of the letter of reprimand was that it was a step in this direction and that it was meant to be the end of any discipline of Dr. Horowitz. It is Mr. Tornatore's belief that at that time the Board was going to put the matter to rest, but that the then Board majority wanted to go on a "start the hunt." "Witch hunts" were discussed many times in closed sessions.

Mr. Tornatore explained that he never viewed the $905,000 as an actual figure for the cost of the Bradley Gardens School portion of the bond issue. He said that the numbers in the various reports were estimates put together in the early to mid 1980's, and "all knew these not to be the numbers." The district could not "be that exact 1 1/2 years before putting the project out to bid." He felt that Dr. Horowitz had simply tried to deal with the issue without getting the Board involved. Had the Board been aware of the estimate of over $2 million, the Board could have then decided "what to do with these numbers."

Christine Henderson Rose, the current president of the Board and a member of the body in April, 1991, testified that she was in favor of the reprimand because Dr. Horowitz had failed to keep the Board apprised of the costs of Bradley Gardens. This failure had to result in a consequence, so as to convey the message to the Superintendent that he needed to keep the Board "much better informed." Mrs. Rose felt "betrayed" by the action of Dr. Horowitz. She had previously believed that she and Dr. Horowitz had talked about important matters, and she felt that they had a "trusting" and a "good relationship." However, on what she characterized as a "rather large issue," her "trust had been betrayed."

Mrs. Rose felt personally that the main issue as to the Superintendent's failure of communication with the Board was in regard to the pre-referendum period. The *Board Bulletin* "was not an issue." Mrs. Rose herself had seen the 12,000 plus square foot figure on the schematic presented back at the September public

meetings, but she said that there was no actual discussion of the size until April 9. (There is no indication that she raised any question in September as to the increase and its possible effect on the cost estimate).

As Reverend Dr. Stephenson recalled the circumstances, at the April 9 meeting (to which he arrived late) the Board told Messrs. Horowitz and Jordan that the purpose of the Task Force was simply to ascertain the facts. The decision to issue the letter to Dr. Horowitz was undertaken in respect to what had happened, to chastise in order to settle the matter. The discussion was geared to what action the Board should take in light of what Dr. Horowitz had failed to do. There was no discussion about any future action one way or another.

The Reverend pointed out that the Board members were incensed because the failure of Dr. Horowitz to advise them of the increased estimates, either before or after the referendum, prevented them from giving consideration to questions and alternatives which the increase in the cost of the renovation Bradley Gardens would have raised, such as whether the Board wanted to spend that much money on that building. The Board was also concerned about any delay in the completion of the project that might result from the failure to keep the Board aware. As for himself, the witness did feel that Dr. Horowitz had responsibly shown the Board how it could go about the task of covering the increase in expense. Overall, he did not view what had occurred as an attempt to deceive anyone.

In the period following the issuance of the letter of reprimand to Dr. Horowitz, as the Task Force and then Stark & Stark undertook their respective reviews of the Bradley Gardens situation, the Board of Education entered into talks with Jordan & Pease. These eventually led to a settlement of the bill which that firm had rendered for its architectural services in the preparation of the plans for the school. The original amount sought by Jordan & Pease was $156,400, plus expenses. (RBG-40). An initial payment had been made in early March, 1991 in the amount of $28,488.82. As a result of the negotiations in late spring, an additional payment of $61,049.83 was agreed upon, for a total of $89,538.65. In Mr. Tronolone's words, the plans drawn up by the firm were "never used." According to Mrs. Navarrete, the reason for this was because of the need to scale down the project.

Questions as to the actual extent and timing of the contractual arrangements between the Board and Jordan & Pease were addressed by Dr. Peter Mazurak. During his testimony, he identified RBG-84, a February 7, 1991 document which he asserted was the first contract between the two. As Dr. Mazurak recalled, and as the evidence shows, prior to that date Jordan & Pease performed work for the Board on this project. Dr. Mazurak explained that the Board was trying to standardize all of its contracts with architects. Dr. Mazurak had retired by the time the Board negotiated the settlement with Jordan & Pease in June, 1991 and he played no part therein.

Clara Navarrete testified that she was unaware of the existence of any document which authorized Jordan & Pease to proceed with any work on Bradley Gardens, prior to the February 7, 1991 contract. She did find out that there was an unsigned contract which was different than the one which the Board had. She was not sure if she had ever seen PBG-3, the "Addendum," transmitted by Jordan and Pease in July, 1990.

With the end of June and the decision of the Board to appoint Stark & Stark to further examine the whole Bradley Gardens affair, the most active period of the incident ended, with the matter then progressing to the stage of reports, counter statements, charges, votes and ultimately a certification of tenure charges to the Commissioner. Some additional matters related to the Bradley Gardens portion of those charges will be considered in the course of the analysis and discussion below. However, one particular legal issue raised by Dr. Horowitz does necessitate a review of some further testimony. Specifically, Dr. Horowitz contends that the Boards' issuance of the April 19, 1991 letter of reprimand and the lose of increment prevents the Board from taking any further disciplinary action against him. While the legal implications of this argument will be considered below, counsel did explore with several of the Board's witnesses questions as to the nature of the information that was available to the Board at the time of this April action and what information it thereafter came into possession of.

Clara Navarrete, who authored the first set of tenure charges which the Board failed to certify after she recused herself from voting on them and the Board split 4-4, listed the information which she perceived to be newly available to the Board after the issuance of the Stark & Stark report on September 13, 1991.

According to her, the Board had no sworn statements available to it prior to that date, and certainly not in April when the reprimand was issued. The Board was also unaware of the fact that Dr. Horowitz had supplied the architect with Superintendent's office stationary before the date of the preparation of the draft of the letter ultimately issued to the Bureau on September 20, 1990, bearing the apparent signatures of Dr. Horowitz and Mrs. Navarrete. Of course, the Board did not have the benefit of the conversations held with various individuals by the Task Force, and she also claimed that in April the Board did not yet know of the early information transmitted to Dr. Horowitz as to the cost estimate of nearly $2.5 million. Finally, she argued that the Board did not know in April about Dr. Mazurak's attempt to get Dr. Horowitz to advise the Board that he, Dr. Horowitz, knew that the cost for the project had significantly escalated.

Mrs. Navarrete also pointed out that subsequent to the issuance of the letter of reprimand the Board became concerned about the validity of the whole bond issue. Additionally, according to Mrs. Navarrete the absence of a contract with Jordan & Pease until February, 1991 was not known to the Board at the time that the reprimand was issued. The eventual inability to use the Jordan & Pease plans, and the consequent loss of approximately $100,000, was also a factor in regard to the damage done by Dr. Horowitz, which was not appreciated in April, 1991.

Arthur Weigand and William Tronolone confirmed Mrs. Navarrete's view that at the time of the reprimand the Board was not yet focused upon the question of the possibility that the referendum results might be invalidated. They also echoed her statements as to the lack of sworn testimony and the absence of Dr. Mazurak's information regarding his concerns as expressed to the Superintendent.

Albert Tornatore expressed his view that while the Board did discuss the validity of the bond issue, this type of problem, that is, the need to find extra funds for projects, was one which the Board dealt with "all the time." While he acknowledged that the Board did not know of the blank letterhead supplied to the architect at the time of the reprimand, he asserted that Dr. Mazurak's concerns were known in January.

THE NON-BRADLEY GARDENS CHARGES
DR. HOROWITZ' CONDUCT ON MARCH 19, 1991

The first of the tenure charges which are not related to the referendum and the Bradley Gardens project relates to allegations that he engaged in conduct unbecoming his position as a public employee when he supposedly engaged in a noisy confrontation with Irving Putter, a citizen who has been significantly involved in school matters, including the referendum. Mr. Putter is a retired resident of Martinsville, and was formerly employed as a senior research director for Merck and Company. He possesses a B.S. in Chemistry. He previously served as Chairman of the the Zoning Board. He described himself as "having a long history of promoting better schools."

Mr. Putter was not involved in the pre-referendum activities regarding the February, 1989 referendum. However, concerned as he was over the "demise" of public education, he began to attend Board meetings thereafter. He became an alternate member of the High School Design Committee.

On March 19, 1991, Mr. Putter attended the public Board meeting. The purpose of the meeting was to explain the proposed budget to the public. Mr. Putter had "strong feelings about it." He had written a statement and during the public comment section of the meeting he was reading it aloud. In the statement, the witness made references to Dr. Horowitz as "misleading the Board...violating the trust" and questioned how the district could instill values in the students in the face of such conduct by it's superintendent. Dr. Horowitz stood up and began to say that Mr. Putter was "out of order, " that any discussion of personnel at the open meeting was against Board policy. Mr. Putter regarded this comment as wrong, as he believed that he had a First Amendment right to speak. He continued with his statement, the Board President having allowed him to do so. When the meeting was over, he was located on the right side of the auditorium. Dr. Horowitz approached him, "very, very agitated." The Superintendent called Mr. Putter a "demagogue" and asked him "are you crazy, insane, why are you doing these things." Mr. Putter did not believe that his statement deserved such a response. Dr. Horowitz' comments included a couple of "invectives."

Mr. Putter went to the men's room. After he emerged, he saw that Dr. Horowitz was speaking with Mr. Strunsky, a local newspaper reporter. As Mr. Putter walked by them, he heard his name. He knew that Dr. Horowitz "liked to speak to the press." Mr. Putter had the impression that Dr. Horowitz was trying to negate the statement that Mr. Putter had made to the Board and the public during the meeting. He interjected himself into the conversation, saying "Richard, stop trying to change the story...You're trying to put a spin on." An argument ensued over savings, the Superintendent saying that Mr. Putter did not know "what you're saying." Mr. Strunsky left, but the confrontation continued. Dr. Horowitz told Mr. Putter, "You know you're a no good shit." Dr. Horowitz continued comments included such language as "bastard" and "f--k." Mr. Putter responded that if Dr. Horowitz "could not stand the heat he should get out of the kitchen." He insisted that he had a right to criticize. Dr. Horowitz got "angrier and angrier." Mr. Putter told the Superintendent that "the best thing he could do for the district is to leave it." As this exchange continued, Dr. Horowitz was approximately 20 feet from Mr. Putter. He then "dashed" toward Mr. Putter, with his fist raised, and came to within a foot of Mr. Putter. He then turned away and walked out. The incident was described by the witness as a "yelling, shouting match."

On cross-examination, Mr. Putter recalled that when Dr. Horowitz interrupted him during the meeting and objected to the nature of the remarks, Board President Tronolone asked him to refrain from personal attacks. After the evening of the 19th, Mr. Putter and Dr. Horowitz chatted at Board meetings and in hallways on a number of occasions. The incident was never brought up again between them. As for others, the witness believed that he may have discussed the matter with individual board members prior to the issuance of the tenure charges by Dr. Ryan in January, 1992.

On or about December 8, 1991, Mr. Putter met with Dr. Horowitz and a Mr. Vaucher. These two men were described by Mr. Putter as "very concerned" about what was happening in the district. Some years before Dr. Horowitz had told Mr. Putter that if he became a divisive element in the district he would leave it. Messrs. Vaucher and Putter felt that Dr. Horowitz had done a "large disservice" to the district. Mr. Putter had read all of the depositions taken by Stark & Stark. He showed Dr. Horowitz a "tenure charge," which he had prepared after the Board failed to certify the tenure charges filed by Mrs. Navarrete in October. He told Dr.

Horowitz that he would not file the charge if the Board and Dr. Horowitz cooperated in an attempt to get an agreement which would remove the Superintendent from the district. Mr. Putter informed each of the Board members individually that he had drawn up tenure charges and that he had meet with Dr. Horowitz. The witness described his goal as to "get what was right for the kids." The "assault" by Dr. Horowitz, that is, the March 19th incident, was included in these charges.

Dr. Horowitz recalled the remarks made by Mr. Putter at the meeting on March 19 as being beyond the bonds of normal criticism and more in the nature of a personal attack. He said this to Mr. Tronolone. When he saw Mr. Putter in the hallway he "challenged" Mr.Putter, calling him a "demagogue." He told him that he respected Putter's right to disagree, but that he did not appreciate his remarks that he, Dr. Horowitz, was not "fit to be around children." This was a criticism of his integrity.

The witness denied that he swore during his confrontation with Mr. Putter, something that he would have remembered had he done it. He "absolutely" did not approach him with his fists raised, but he does talk with his hands. He did storm out of the door. He does not believe that he called the man any names, but he "probably" raised his voice to Putter. There were numerous interactions with Mr. Putter after that night and the incident was never brought up. In summary, Dr. Horowitz remarked that he "blew it" with regard to this incident.

Albert Tornatore testified that he witnessed the "argument" between Mr. Putter and Dr. Horowitz on March 19th. He was "right there," with Mr. Putter 3-4 feet to his left and Dr. Horowitz 15 feet to his right. He also recalled the probable presence of others, including a reporter. He remembers that Mr. Putter was badgering the Superintendent and Dr. Horowitz "lost his cool." He does not recall that Dr. Horowitz cursed, but he did hear the "demagogue" remark and recalls that Dr. Horowitz got very loud and then stormed out of the building. Dr. Horowitz was waving his arms as he spoke, but he did not raise his fists toward Mr. Putter. When Dr. Horowitz left, Mr. Putter seemed "quite pleased," as if he was trying to get Dr. Horowitz' goat and had succeeded.

On cross-examination, the witness acknowledged that in his view Mr. Putter was the aggressor in this incident, which arose perhaps a couple of hours after the statement by Mr. Putter during the Board meeting, a statement which the witness recalled as including references which he understood to be aimed at the Superintendent and which referred to him as "dishonest" and "deceitful." Mr. Tornatore also agreed that there might have been an earlier portion to this confrontation, a portion which he did not witness.

After the confrontation ended with Dr. Horowitz storming out of the building, Mr. Tornatore caught up with him in the parking lot. He told the Doctor that he should not let people "get to him."

This incident may have been brought up by Mr. Tronolone at a subsequent meeting at which the Board was evaluating Dr. Horowitz. Mr. Tornatore does not recall saying at that meeting that the incident was "worse than I said."

DR. HOROWITZ' CONDUCT ON OCTOBER 31, 1991

A second of the non-Bradley Gardens related tenure charges deals with a purported incident of October 31, 1991. On that night the Board met at the Wade Building and dealt with the report which was being issued in regards to the Bradley Gardens affair. During a break in the session, Dr. Michael Ryan, a member of the Board, went to the men's room. He observed Dr. Horowitz, standing in the hallway and gesturing while speaking "loudly." Dr. Horowitz was making negative references to the Board. This apparently continued, for as the Board resumed its meeting, Board President Tronolone asked what was going on out in the hall. Dr. Ryan responded "Richard," referring to Dr. Horowitz as the cause of the noise which was continuing out in the hallway and could be heard in the meeting room. Dr. Ryan described the hallway as adjacent to the meeting room.

William Tronolone recalled the incident and testified that as the meeting was progressing he heard a lot of noise and recognized Dr. Horowitz' voice. He was not able to make out what the Superintendent was saying. This noise continued, disrupting Mr. Tronolone in his role as the chair and the Board's meeting, "for a good ten minutes." Mr. Tronolone had to ask Dr. McGarry to close the door to the meeting room. According to the witness, this was the only time that it was necessary

to close the door during a meeting, unless the session was a closed one. After the request was made to have the door closed, Dr. Horowitz returned to the meeting.

Dr. Horowitz addressed himself to this charge during his testimony. He recalled that during a break in the meeting he was going to the copy room to make some copies of the rebuttal which he had prepared in response to the Board's report. There was a great deal of activity that evening, a large audience was present, and the hallway at the Wade Building was fairly narrow. Dr. Horowitz could only say that it was quite common for it to be necessary to close the doors in the course of Board meetings due to outside noise. He heard nothing about any problem that night regarding noise that was purportedly related to him, until he saw the matter included in the January tenure charges.

DR. HOROWITZ' TESTIMONY AT AN OAL HEARING ON OCTOBER 7, 1990

The last of the non-Bradley Gardens charges deals with some testimony that Dr. Horowitz gave in a hearing held in the Office of Administrative Law before Honorable Daniel B. McKeown on October 7, 1990.[13] The hearing before Judge McKeown was in regard to a challenge to the validity of an election held in the district on April 4, 1989. More specifically, two witnesses called by the Board in the present hearing had charged that Dr. Horowitz had given false testimony under oath in the October 7, 1990 hearing with regard to when and whether he had seen write-in votes at a particular time on the evening of April 4.

Albert C. Bareis, a retired employee of Allied Signal Corporation, testified that in the election held on April 4, 1989, there were three seats on the Board which were being contested. Three incumbents, Dr. Block, Jean Crabtree and Mr. Tornatore, were running, as were write-in candidates Arthur Weigand, Ray Kovonuk and a person named Tilak. The first two of these three were elected. Of the incumbents only Mr. Tornatore was reelected. Mr. Bareis held the position of treasurer for the write-in candidates. Stickers were being used as the means for "writing-in" the names of these individuals on the pre-printed ballot.

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13 A transcript of the relevant portion of the testimony is Exhibit RBG-99.

On the night of the election, Mr. Bareis was at the Crim School, which was a polling place. He had been present that day when the polls first opened and then was sometimes on duty and sometimes off duty, apparently as an observer. He was also there at the close of the polls at 9 P.M. He wished to observe the counting of the votes, especially the write-ins, those actually written or those were a sticker had been used. Shortly after 9 P.M. the witness saw poll workers taking the votes from the paper rolls, which were 8 feet or more long. Dr. Horowitz was present at this time.

As Mr. Bareis recalled the scene, one group of poll workers were tallying the votes from the machine for the registered candidates. Another group was counting the rolls, apparently the write-in votes. As this was occurring, the witness remembered that Dr. Horowitz came up and had a brief conversation with he and Mr. Tilak. Dr. Horowitz asked Tilak if he was a write-in candidate. After this conversation, Mr. Bareis remained at the polling location until all of the rolls had been counted and the rolls had been loaded in boxes and placed in the trunk of Election Judge Beverly Eaton's car for transport to the Administration Building. This took a couple of hours. During this post-closing period, Dr. Horowitz had been present from shortly after 9 P.M., but Mr. Bareis could not say exactly when the Superintendent had left, except that he was there until at least the preliminary count at Crim had indicated that the incumbents had won. This preliminary count had been made by about 1/2 to 3/4's of a hour after the close of the polls. According to the witness, the "numbers were there for anyone who wanted to see" them tabulated on the election sheet. However, no statement was made at Crim School as to who won the election.

According to Mr. Bareis, his complaint against Dr. Horowitz arises from the fact that when the Superintendent testified before Judge McKeown he stated that he had not seen a write-in paper roll on the night of the election until he saw one in the Administration Building later during the evening of the election or the next morning. (RBG-99). Mr. Bareis recollection of Dr. Horowitz' presence at the Crim School during the immediate post-poll closing caused Mr. Bareis and another campaign worker, Jean Moll, to conclude that Dr. Horowitz had perjured himself before Judge McKeown. However, Mr. Bareis admitted that neither he nor Jean Moll had brought the matter to the attention of the School Board or it's counsel, either at the time of the Superintendent's testimony or thereafter. As for the

circumstances of his finally advising anyone connected with the Board of the matter, Mr. Bareis explained that Somerset County had proposed that it place a garage near the Vocational-Technical School and the County Library and that this had incensed residents of Bridgewater. Mr. Bareis attended a meeting of the Freeholders and sat next to Dr. Ryan. Mr. Bareis had been reading in the newspapers about the turmoil regarding Bradley Gardens and he expressed concern to Dr. Ryan, who he apparently knew to be a Board member, as to whether the truth regarding Bradley Gardens would ever be found out. He added that there was another incident that had him concerned. He related the story regarding the testimony to Mr. Ryan. This ultimately led to the preparation of R-2, a notarized statement signed by both Mr. Bareis and Mrs. Moll in which they asserted that Dr. Horowitz "may have committed perjury" in his testimony before Judge McKeown.

Mrs. Jean E. Moll of Martinsville, who described herself as a certified Somerset County election worker, testified that on the night of the April 4, 1989 election she was not working as an election worker, but was present at the polls at Crim School. She had been involved in the election as a worker on behalf of candidates running therein. She confirmed that she had seen Dr. Horowitz' at the time that she and her daughter entered the polling area as the polls closed. She first saw the Superintendent near a phone in the hall. When she entered the polling location, she observed that workers had locked the machines and were in the process of cranking out the paper rolls and taking out the write-in rolls. She saw the write-in stickers on the rolls. The election judge, Beverly Eaton, tore the rolls in order to place them in manila envelopes, but they would not fit in the envelopes. According to the witness, there had to be a couple of hundred stickers.

Mrs. Moll confirmed the accuracy of R-2, in which she became involved when Mr. Bareis called her a few days before January 7, 1992. She was not present at the hearing before Judge McKeown. She does recall that she had seen Dr. Horowitz in Crim School for about 20 minutes on the night of the election after the polls closed. According to Mrs. Moll, the stickers used for writing in the names of the slate of write-in candidates on whose behalf she had worked were white, with black printing, and these were "readily noticeable."

Dr. Horowitz testified that on April 4, after the polls had closed, he recalled being in Mrs. Long's area in the administration office located in the Wade

Building. He had stopped at Crim School earlier that day in order to say hello to the head custodian. While at the school, he was "in and out" of the polling area. The polls were still open when he arrived. They closed perhaps 15 minutes later. He thinks that he recalls seeing the machines opened. Although he had been at elections before, he could not recall if he had ever before seen a machine open. He had no "specific recollection" of whether he had seen the rolls out of the machines that night and had no recall one way or the other as to whether he saw the write-in stickers while at Crim.

Dr. Horowitz opined that he now had a better recollection of the events on the night of this election than he may have had at the time that he testified before Judge McKeown "because of the tenure charge." He recalls a discussion about paper ripping and an inability to get a count. Overall, the witness stated that he may have seen the rolls and the stickers at Crim, probably saw something at Crim, but he could not be certain.

In his testimony before Judge McKeown, Dr. Horowitz had stated that he had seen a write-in sheet in Mrs. Long's office at the Board headquarters and when asked if this was the first time that he had seen a write-in sheet he responded, "yes, I believe so." RBG-99, pg. 81. On cross-examination by Mr. Soriano, he was asked again if it was his testimony that he had never seen "such a sheet" until "at or about the election in April of 89." He responded, "In my entire life experience, I can't say for certain, but one that I can know right away that that's an election sheet."

DISCUSSION AND ANALYSIS
DISCIPLINE OF A TENURED EMPLOYEE

N.J.S.A. 18A:6-10 provides the standards applicable to a school board's attempt to take disciplinary action against a tenured employee.

> No person shall be dismissed or reduced in compensation,
>
> (a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state,or
>
> (b)..;

except for inefficiency, incapacity, unbecoming conduct, or other just cause, ...

These standards are applicable to proceedings brought under the Tenure Act to remove or otherwise discipline a Superintendent of Schools. Tenure is no longer available to incoming superintendents, but those in office at the time of the recent legislative changes in the Tenure Act, such as Dr. Horowitz, have a grandfathered status and are thus protected by the provisions of the above quoted statute.

ARE THE BRADLEY GARDENS RELATED TENURE CHARGES BARRED BY THE DOCTRINE OF EQUITABLE ESTOPPEL DUE TO THE BOARD'S PRIOR ISSUANCE OF A LETTER OF REPRIMAND?

Dr. Horowitz contends that the issuance of the letter of reprimand in April, 1991 prevents the Board from taking any further action against him in regards to any matter related to the referendum and the Bradley Gardens matter. In support of this argument counsel for Dr. Horowitz invokes the doctrine of equitable estoppel, arguing that once the Board chose to discipline Dr. Horowitz for matters arising from the referendum, the imposition of additional discipline for the same events would be inequitable.[14] As counsel argues this position, he contends that the Board did not have any new information after April 19 which could justify it's decision to pursue tenure charges. Counsel suggests that the Board knew in April that it felt that Dr. Horowitz had failed to communicate to it information as to the increased cost estimate and that whatever the precise wording of the later tenure charges, the Board is seeking in those charges simply to repunish the Superintendent for the same thing, that is, the lack of communication which was the very subject matter of the prior reprimand.

In addition to the contention that the charges dealt with in the reprimand are in fact the same as those addressed in the present tenure charges, Dr. Horowitz argues that the Board assured him at the time that it delivered the reprimand to him, through the person of Mr. Tronolone, that it had completed any action of a

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14 Originally, counsel contended that the bar arose from the principles of res judicata, but traditionally that doctrine has been held to apply to instances of prior judicial action, of which there was none here.

disciplinary nature in regards to his conduct vis a vis Bradley Gardens. Therefore any further action against him should be barred, since he relied upon this representation and he should not now be called upon to answer to a further set of allegations arising from the same incident.

In response to this argument, the Board asserts that the letter of reprimand, issued as it was at the very beginning of the Board's examination of the lengthy and complex series of events related to the referendum and Bradley Gardens, was a limited response, dealing with limited facts and a limited scope of wrongdoing on the Superintendent's part. It was never meant by the Board to necessarily be its last word on the propriety of Dr. Horowitz' actions, and was not reasonably relied upon as such by him. In addition, on a more broad-based level, the Board argues that in matters of significant public interest and concern, such as the conduct of the chief executive officer of a school district, a matter which involves the exercise of essential governmental functions, the doctrine of equitable estoppel should be and is in fact rarely invoked as a bar to governmental action.

Traditionally, the use of equitable estoppel, if it is to be invoked to shield a party from what might otherwise be imposed upon that party, must be based upon a demonstration that the party against whom the doctrine is invoked made a knowing and intentional misrepresentation of material significance to the party seeking to invoke the estoppel and that that party reasonably relied upon that misrepresentation to it's detriment. *O'Malley v. Department of Energy,* 109 *N.J.* 309 (1987). While this doctrine is generally applicable in civil proceedings and is also applicable in the administrative context, the Courts have long held that as towards governmental bodies the doctrine has a far more limited applicability. Thus, "[e]quitable estoppel is rarely invoked against a governmental entity." *Vogt v. Borough of Belmar*, 14 *N.J.* 195, 205 (1954). The nature of the conduct in which the governmental body is engaged in a particular instance where a party seeks to invoke the doctrine against that body is of especial significance, for while even as a general concept the government is rarely estopped, where the function involved is an "essential governmental function(s)" the *Vogt* Court held that estoppel is even less favored. An estoppel will lie against a governmental body only "to prevent manifest wrong and injustice and where it would not hinder or prejudice essential

government functions." *In re Allstate Insurance*, 179 *N.J. Super.* 581, 583 (App. Div. 1981).

That the Board of Education's examination of the circumstances surrounding conduct of a public referendum on a major bonding proposal and the conduct of it's chief executive officer in regards to that referendum and it's associated subsequent events is a matter in which the Board is engaged in an essential government function, can hardly be disputed. Whatever the "political" views of the individual members on the subject or on the matter of the Superintendent, the review of what happened, how and why the lines of communication faltered, of any possible criminal wrongdoing, and of how to straighten out the resulting problems, as well as questions as to how these might relate to the ongoing relationship with the Superintendent, are all matters of vital interest and concern to a school district. That the Board had a public responsibility to look into the matter, even if only to see how to best deal with the escalated costs and size of the Bradley Gardens project, can also not really be debated. Thus, it is fair to say that the Board, in its investigation of the entire affair, was engaged in the conduct of the sort of essential function in the context of which the successful invocation of the doctrine of equitable estoppel would be an almost extraordinary legal event.

The standards which the courts have established for the determination of whether an equitable estoppel will lie against a governmental body require that there be apparent a manifest injustice which will be prevented by imposition of the estoppel. In the present case, the respondent apparently contends that the injustice which any further disciplinary action arising from the circumstances of the Bradley Gardens matter will work against him is the addition of further punishment on top of that already imposed by the Board, punishment which he argues would be imposed in violation of the Board's word as conveyed to him that his culpability, such as it was, for the mistakes, misjudgments and errors involved in the incident had been addressed once and for all. The questions which arise therefore are whether such representations were actually made and whether, even if they were, allowing the Board to take further action(more accurately allowing the Commissioner to do so) would be of such a degree of wrong as to constitute manifest injustice.

The letter of reprimand advised Dr. Horowitz that he was being sanctioned for his failure to advise the Board of information which he knew about "since last September" concerning the increase in the estimated cost of Bradley Gardens and his permitting the architect "to finalize construction plans." It also referred to his having "modified initial building program proposals and having made decisions" in respect to allocation of monies from the referendum and surplus without Board authorization or it having knowledge of the matters. The letter makes no reference to such matters as the circumstances that surrounded the signing of the September 20 letter by Pablo Jordan, a matter of which the Board clearly had at least preliminary details at the time of the April 18 vote to issue the reprimand, or to such matters as the question of whether the Superintendent ignored the advice of Dr. Mazurak, whether he misled the voters in regard to the *Board Bulletin* and at the open meetings and on the cable TV program, at which times he addressed the public directly on the Bradley Gardens project, and whether his knowledge as to the increase pre-dated September, so as to raise even greater concern as to the degree and extent to which the Superintendent misled the Board and the public in the very early stages of the pre-referendum period. These were all matters of which the Board was at the time of the letter either ignorant or possessed of only sketchy knowledge. The letter itself does not in any way suggest that it is necessarily the final word of the Board as to the actions of it's Superintendent. While it does tell Dr. Horowitz what will be expected of him in the future, it cannot be read as a manifestly conclusive verdict on every aspect of Dr. Horowitz' conduct in the past in connection with the Bradley Gardens incident. Indeed, while there is some real dispute amongst the individual Board members as to the charge given to the Task Force, it would seem that the Superintendent, and all those otherwise involved with the whole affair, could not reasonably have assumed that no further disciplinary action of any sort could occur no matter what the information revealed by the Task Force might be. Assurances that the Task Force was not engaged in a "witch hunt," while quite reasonably understood as indicating that that group was not out to target the Superintendent, cannot reasonably be understood to have suggested that he was to be insulated from any further action whatsoever. The very fact that the Task Force was put into place by the Board at the very same time as it reprimanded the Superintendent suggests most strongly that the members of the Board were still sufficiently uninformed on the details of the whole Bradley Gardens affair as to preclude any sense of absolute finality in it's action against the Superintendent.

Statements made at hearing by some of the members that they believed at the time that the letter of reprimand was invested with such a degree of finality must be taken with some caution, for at the time the Board was just beginning to learn of the full parameters and meanings of the matter. It seems highly doubtful that any of the members had cause then and there to pause and consider whether the letter was an absolutely final, and legally preclusive, act. Had the members at the time been asked whether their letter was meant to address each and every act of wrongdoing by the Superintendent, they might well have paused at such an assurance and waited to act until at least the Task Force reported, when as testified to, any personnel matters would have been turned over to Mr. Soriano.

The Board's action, and it's intention, must also be considered in the light of the testimony of several of the members, including such as Mrs. Rose, who appears to generally be a supporter of Dr. Horowitz, that the information that they received had shocked them and had caused a feeling of hurt, a loss of trust and a generally depressive reaction. This Board, on learning of the first revelations of withheld information, acted quickly, perhaps even precipitously so, to set the Superintendent in his place and put him on warning as to his future conduct. It simply makes little sense to conclude that the Board actually meant to foreclose any other possible actions against him for whatever else he might be found to have done wrong in this context.

Any suggestion that Dr. Horowitz relied upon supposed promises of finality by Mr. Tronolone and as a result withheld any attempt to petition the Commissioner to review the propriety of the reprimand must likewise be considered with considerable doubt. Dr. Horowitz has readily accepted upon himself a significant degree of blame for the lack of communication and advice to the Board as a body in respect to the bond referendum. While he certainly has never agreed with the Board's assertions that his conduct had any criminal overtones or that he was anywhere as culpable as the tenure charges suggest, that he saw the fault of his conduct at least to the extent of the gap in communication is really hard to now dispute. It is rather difficult to believe that he would have seriously considered an appeal to the Commissioner from the reprimand and the increment withholding, given his own realization that his conduct was not without blemish, and the fact that the letter did not purport to suggest the sort of "criminal" conduct later alleged in

the tenure charges. To now argue that he was dissuaded from such an appeal by the "assurances" of Mr. Tronolone that he was free from concern about any additional action against him is simply not a persuasive position.

As noted above, the test for invoking an estoppel is a conjunctive one. Even where it may be argued that a manifest injustice may occur, the law has recognized that precluding a governmental unit from engaging in otherwise appropriate action is a very serious matter. Government must be permitted to act so as to carry out it's assigned functions, and anything that would stand in the way of such action must be both a matter of extreme importance in itself and a matter which does not threaten the essential operation of government. Here, where the issue is the propriety of the conduct of the chief school administrator in matters of significant financial concern and where questions of honesty and integrity are raised, such preclusion, and it's possible impact were it to require that this Board continue to employ a seriously flawed superintendent, is inappropriate.

A related concept that also speaks in favor of permitting the Board to pursue the tenure charges is that which allows administrative agencies to reconsider and reopen matters previously considered. In the absence of statutory prohibitions, an administrative agency may "reopen or...modify and...rehear orders previously entered by it." *In re Trantino Parole Application*, 89 *N.J.* 347, 364 (1982). While there are obviously equitable limitations to this power, and "...sound discretion reflecting due diligence, and ... good and sufficient cause" must be demonstrated, *Trap Rock Industries, Inc. v Sagner*, 133 *N.J. Super.* 99, 110 (App. Div. 1975), *aff'd*, 69 *N.J.* 599 (1976), under the facts of this case, where the Board acted quickly in the face of a revelation which shocked a broad range of the membership and where it then first undertook to investigate and where the matter is of significant public concern, and in the absence of any reasonable understanding of finality, further review and action by the Board is not offensive to principles of administrative repose. Indeed, one of the important, although certainly not exclusive, factors to be considered in regards to the issue of whether the agency can revisit the matter is the thoroughness and the exhaustiveness of the agency's initial review. *In re Trantino, supra.* at 364-65; *Ruvoldt v. Nolan*, 63 *N.J.* 171 (1973). Certainly, the Board's consideration of the whole Bradley Gardens affair was not even remotely exhaustive at the time it voted to issue the reprimand and withhold the increment.

Respondent's reliance on *Backer v. Board of Education of the Township of Roxbury*, 92 *N.J.A.R. 2d* (EDU) 441, in support of the use of equitable estoppel in the present case is unpersuasive. There, the Commissioner found that the superintendent had placed in writing a determination that there would be no further disciplinary action taken in respect to the incident in question, so long as there was no reoccurrence of the problems specified in a prior letter of reprimand. No such event occurred. The Board's decision to seek to take further action was apparently prompted by a separate incident of apparent insubordination. Here, there was no such representation of finality. In addition, the entire scope of the rather complex affair had not even begun to be examined when the Board issued the letter of reprimand. The full range of misdeeds which the Board ultimately perceived to have been committed by it's superintendent were not necessarily evident at the time that the Board issued the reprimand and withholding.

While the above discussion of the applicability of equitable estoppel as a bar to the tenure charges leads to the conclusion that the Board should not be estopped, the conclusion does not in any sense suggest either that the Board has proven any of the charges or, that if it has, that the appropriate sanction for the violations proven is necessarily any more severe than the punishment already meted out in April, 1991. Those determinations must now be addressed.

THE BRADLEY GARDENS RELATED TENURE CHARGES

Charge I and Charges V-XV relate to the referendum and the Bradley Gardens matter. Of these, the bulk, represented by #'s V- XIII, deal with the information withholding and forgery allegations. As a prelude to the consideration of the specific charges, several general comments and conclusions can be stated. The determination of the specifics will largely flow from these findings.

The preliminary conception of the EFC regarding the need for changes at the Bradley Gardens School was formulated by a committee which operated in the absence of any expert guidance as to the actual architectural consequences of it's perceived plan. The intent of the committee was to bring the school to a state of parity with the district's other elementary schools, and in this regard Dr. Horowitz looked to the Crim School as a guide for what was needed at Bradley Gardens.

While members of the committee did express some concern to the Superintendent and the Board President about the need for architectural guidance during the course of the committee deliberations, for reasons which are unclear, this assistance was not provided. The failure to provide this assistance appears to have been an error in judgment and Dr. Horowitz acknowledged this fact when he apologized to Reverend Dr. Stephenson. This error may well have led to some serious misconceptions about what the physical ramifications of the committee's plans were.

The result of the committee's unaided decisions was to pass on to the Steering Committee a plan which was assigned a dollar amount for completion which was derived from a formula which was borrowed by Dr. Horowitz from the Vitetta Group's work on the High School, a formula which produced the infamous $905,000 figure, which was then incorporated into the Steering Committee's report. I **FIND** that the $905,000 figure, derived as it was without professional input by an architect who had reviewed the committee's work and the implications thereof, was never a realistic assessment of the likely cost of the Bradley Gardens project. It was instead a rough estimate, one which unfortunately became incorporated in reports and in Board communications, most significantly the *Board Bulletin*, without any indication as to its actual uncertainty. This figure, which some witnesses have testified always seemed to them as no more than an estimate, and a rough one at that, and which other witnesses have testified was to them a very real, meaningful figure upon which they placed real reliance, was never qualified in either of the committee's reports or the subsequent Board sponsored *Bulletin* as being the kind of initial assessment, prepared and arrived at without architectural review, which it in fact was. In the sense that the entire preliminary consideration of the project was done without the kind of professional, expert review which might well have better informed those working on the reports and might have led to a more realistic assessment of real costs, the early process was flawed, and this flaw clearly, although I would suggest, not inevitably, resulted in false understandings, assumptions and positions even before Pablo Jordan and Richard Horowitz first met to discuss the project in mid-June, 1990.

At the first meeting between Superintendent Horowitz and architect Jordan on June 14, the architect was presented with at least the general concept of the Bradley Gardens project, as it was conceived by the EFC and Dr. Horowitz. There

is no evidence that at that point Mr. Jordan gave Dr. Horowitz any reason to be concerned that the cost of the project would be much in excess of the $905,000. No evidence suggests that Mr. Jordan expressed or felt any concern about the cost estimate at the time, but it must also be conceded that at that point he himself may not yet have begun to focus upon the cost factors or the full ramifications of the proposal. *See*, Jordan answers to Interrogatories, RBG-77, Question #6, Answer at pg. 3a.

The reason why anyone would appreciate the likely prospect that the actual cost would exceed the figure of $905,000 is in itself an obvious one. It seems very difficult to imagine that any person with any degree of common knowledge in regard to construction of large structures would assume that there would not be some inflation of the original estimate. Thus, Dr. Horowitz and Mr. Jordan probably both appreciated at the time of their first meeting that the cost when the project was completed was not likely to be exactly $905,000. However, I **FIND** that nothing which occurred at the June meeting alerted the Superintendent to the idea that their would be a significant, much less an exponential, growth in the cost estimate.

As Dr. Horowitz testified, I **FIND** that his first real indication of a large growth in the cost estimate occurred when Pablo Jordan reported to him in July that the boiler room had to be moved and that a second corridor was necessary. Mr. Jordan's determination that Code requirements necessitated changes in the original conception of what needed to be done to accomplish the committee's goal of bringing the school to parity was made in and around the early part of July. Thereafter, as the summer continued, I **FIND** in accordance with Dr. Horowitz' testimony that he learned from Mr. Jordan that the cost estimate, which had grown to $1.4 million with the needed second corridor and the boiler room move, had again grown to $1.8 million. I **FIND** that it was this figure which Dr. Horowitz was aware of during the period when the *Board Bulletin* was being drafted by Mr. Sandler and the Ad Hoc Committee, with Dr. Horowitz having seen and approved the draft that was to proceed to the printer and be prepared for public distribution. This $1.8 million figure was to last as the estimate until the fax transmittal of the Project Cost Estimate Form to Dr. Horowitz on September 12. I **FIND** that at that time, for the first time, the Superintendent learned of the growth of the estimate to $2.459 million.

As noted, the Doctor knew at the time of the preparation of the *Bulletin* that the architect working on the plans for the Board was estimating the cost of the project at a figure nearly double that of the original estimate presented to the Board. I **FIND** that despite this knowledge Dr. Horowitz did not tell the Committee about his knowledge. Instead, he kept to himself the knowledge that the estimate of $905,000 was no longer even remotely a "ball park figure," telling Mr. Sandler only that there would be an increase, an "overrun," without specifying the extent thereof. I **FIND** that the Superintendent decided on his own not to share any information as to the newer estimates with the Committee, which included both Board and lay members. His reasoning for this decision, the "lack of hard information," hardly appears to justify his decision. The determination of how and if to present information to the public as to the estimated costs of the Bradley Gardens project and how to portray to the public the relationship of that cost to and as a part of the entire $23.4 million bond issue was not the Superintendent's to make alone. The very purpose of the Ad Hoc Committee was to work on the best way to publicize the bond referendum to the public so as to provide it with the best and most accurate information from which the public could decide on how to vote. As was clearly noted in the testimony of several witnesses, this task, and in fact the whole bond issue, was undertaken by the Committee, and by the Board, in an atmosphere colored by the well publicized concerns as to the credibility of information emanating from the Board in respect to the 1989 referendum. Given this very evident and important concern to assure the public that it could rely upon the data put forth by the Board to the greatest degree possible, the choice as to how to explain the cost estimates, and how to deal with the "softness" of the data, was clearly and rightfully that of the Ad Hoc Committee, and ultimately of the Board, not that of the Superintendent acting alone.

While Dr. Horowitz was learning of the increase in the cost estimate during the summer of 1990, I **FIND** that he began to share limited information as to the likelihood of increases with several persons. He told Clara Navarrete that the boiler would have to be moved, mentioning the figure of $3-400,000 for that work. As Dr. Horowitz himself stated, at the time that he told her of the need for this additional expense, the cost estimate which he had received word of may have already grown to $1.8 million, exceeding the amount of the increase to which he made Mrs. Navarrete privy by some $400,000. Yet, the Doctor did not suggest that he had told Mrs. Navarrete of this even higher estimate in August when he told her

of the boiler room move. According to him, this information, concerning an even higher expense, was mentioned to her in early September. However, I FIND that his recollection as to the mention of an "even greater estimate" is at best hazy and not to be relied upon.

In addition to his comments to Mrs. Navarrete, such as they were, Dr. Horowitz says that he made mention to Mr. Tronolone of an increased cost at about the time the *Board Bulletin* went out to the public, that is, about September 12. This was the time just before the first of the public meetings. Mr. Tronolone denied that he had any knowledge of any increase before the referendum. While Mrs. Navarrete's level of interest and her apparent curiosity may have led Dr. Horowitz to show her sketches and to mention the boiler room issue to her in August, Dr. Horowitz' recollection that he passed on information to Mr. Tronolone as to an increase in response to a casual remark by Mr. Tronolone as to how he was "doing" seems far less reliable. I **FIND** that he did not tell Board President Tronolone of the possibility of increases prior to the referendum.

As for Reverend Dr. Stephenson, as the Board itself recognized at the time of its report, Dr. Stephenson did have some degree of information that the costs were rising after Dr. Horowitz offered his "apology" for not providing the EFC with architectural consultation. This occurred in August. Dr. Stephenson agrees with this fact, while both he and Dr. Horowitz are uncertain about the full contents of their discussion, particularly in regard to the possibility that the topic of the inefficiency of portions of the referendum projects was discussed.

It must be emphasized in regard to these findings as to the Superintendent's communication of cost estimate increases to two Board members in the pre-public meeting, pre-referendum stage, that they cannot, and should not, be considered as in any way serving as a form of notice to the Board as a whole that the $905,000 was a dead issue. Casual mentions to a minority of members is not formal notice to the Board. While the exact form which any "official" communication to the Board that the figure for the project was at the minimum reasonably likely to grow to a considerable degree may not be a matter of any importance, the fact of such an "official" notice is a matter of real, and significant, importance. A senior public official such as a school superintendent cannot share significant information with some "select" members of the body to whom he reports

and then try to claim that the full body has knowledge of the information by some form of osmosis, or that he assumed that the "privileged" members had passed on the information, even in the absence of any request by him that they do so. No such request was made here.

Dr. Horowitz told the Task Force that he wasn't "worried" about the information regarding the increases in estimated cost, because Stephenson and Navarrete knew. "That's the way superintendents think." RBG 111, pg. 37. He continued

> But I have two key people on the Board with different sides of the aisle so to speak, who both know about this, that's fine, I didn't keep it all to myself. No one raised the red flag. I know what I got to do administratively, I got to get that damn referendum passed, that's number one for the community, we got to get Bradley Gardens built... we got to find money that's where my interest was.

The difficulty with the sentiments expressed in this revealing statement is that the simple reference to these two "key" people was not any assurance that the other "key" people, that is, the rest of the members of the Board, would learn of what was going on. Admittedly, Boards and superintendents work out relationships with regard to their communications and procedures. However, a superintendent must take into account the specific circumstances of a situation in determining exactly how to deal with the Board on any given matter. Here, given the nature of the public concerns regarding accuracy, the Board's obvious stated interest and concern in addressing this public concern, the rapid and significant increase in estimated cost and the superintendent's own acknowledgement as to his uncertainty regarding what numbers he had mentioned to these two "key" people, as well as his admission that these references came in discussions that were "more just conversations" (RBG-111, pg. 7), I see nothing about the fact that Stephenson and Navarrete knew "something" which lessens Dr. Horowitz' culpability to any significant degree.

Dr. Horowitz entered the period of the public presentations regarding the bond issue with full knowledge that the cost estimate had risen to $2.459 million. Even though he had not actually seen the faxed copy of the Project Cost Estimate Form prior to the meeting on September 12, nevertheless, he clearly had knowledge that that figure, a figure which "shocked" him, was on the Form by the time that he

appeared at the second public meeting on September 17, and then later on when he appeared on the cable TV program.[15] What is of course even more significant than his mere knowledge of the increase is the fact that his attention to the entire cost matter was focused on the issue by Pablo Jordan's query to him in regard to the note from Dr. Stephenson. Here was a Board member directly questioning the architect, who had been in constant contact with Dr. Horowitz, as to the significance, and the viability, of the $905,000. If anything should have alerted Dr. Horowitz to the necessity of addressing himself to the Board as a collective body as to the new cost information that he possessed, this inquiry, which he became aware of when Mr. Jordan pointedly asked him how to handle it, should have been the warning alarm. Yet, despite this specific inquiry directly questioning the issue of the reality of the original cost estimate before the referendum and at a time when the Board could still have considered how to deal with the matter, Dr. Horowitz chose to do nothing, telling Mr. Jordan that he would deal with the matter. The testimony of both men that Dr. Horowitz counseled Mr. Jordan not to lie if asked about the estimate, while believable in itself, nevertheless does nothing at all to relieve the sense that here, most pointedly and clearly, the Superintendent took it upon himself to deny to the Board information concerning a vital matter of financial concern, a matter directly related to a public referendum soon to be held, a matter that the Board surely had every right to know about. Additionally, Dr. Horowitz appears never to have advised the whole Board of the questions which he said had arisen regarding the viability of the proposed media centers and other aspects of the proposed projects. Once again, this failure of communication, which is really a withholding of material information, had the definite potential of depriving the Board of the possibility of dealing with the information pre-referendum. What is more, the voters, particularly those who had an interest in the affected schools, may have been mislead as to the benefits that the bond issue could offer them, and this could easily have resulted in persons voting without having a realistic sense of what they were voting for.

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15 In fact, he told the Task Force that when he received the fax of the Project Cost Estimate Form on September 13 he called Jordan and said, "Pablo, last time you told me $1.7-$1.8, what the hell is this $2.459? This is out of sight." RBG 111, pg. 3.

In his testimony, Dr. Horowitz seemingly sought to excuse, or at least to explain, his conduct at this time as flowing in part from his "perception" that the Jordan & Pease plan was no longer necessarily the plan that the Board would ultimately use and that therefore the cost estimate regarding that plan was no longer of much significance. Apparently, the theory is that if the Superintendent no longer viewed the plan as viable, he could, on his own, decide that it was not important for the Board to know information directly related to that "irrelevant" plan. Of course, at the time that Dr. Horowitz was purportedly deciding that the Jordan & Pease plan was of such unlikely significance, the Board had not been clued in to the Superintendent's doubts. If in fact this was a reason for Dr. Horowitz' decision of how to deal with the Stephenson inquiry, such a decision was an arrogant usurpation of the Board's role. While the Superintendent may have been the primary point person in regards to the day to day dealings with the Bradley Gardens matter and the architect, he was not the final authority, and in the case of such essential matters as the projected cost of the project and the news of a very significant increase therein, he was surely wrong in thinking that his doubts as to the likelihood of using the Jordan plan were a reason for not sharing his knowledge with the Board, especially after the query by Dr. Stephenson.[16]

While Dr. Horowitz professed his uncertainties regarding the matter of whether the Board would actually be using the Jordan plan and tied this to his conduct in the pre-referendum period, more specifically in September, I am not at all convinced that he was really considering this as a factor in his decisions as to what to tell anyone at that time. From the record, there is considerable reason to believe that he did not really see the question of funding the additional costs for Bradley Gardens as that much of a problem. In light of this, while he certainly may have quite legitimately felt that some alterations in the details of the Jordan plan might be appropriate, it seems less likely that he was really motivated at his time in respect to his decisions on the question of what to tell the Board by this matter of the unlikelihood of using the basic Jordan plan. Most especially, I doubt strongly that

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16 In regard to this, it is important to also note Dr. Horowitz' expressed views on the theoretical nature of the project during this period of time, *See*, RBG 111, pg. 15 and his view on his role as the person with the responsibility to "get that done" in regard to resolving facility problems at Bradley Gardens, RBG 111, pg. 6 (lengthy answer).

this played a real role in the decision as to how to respond to Dr. Stephenson's inquiry. This is not to say that Dr. Horowitz' testimony in this hearing as to his thoughts at the time was false. He may now believe that he was less committed to, or more uncertain about, the ultimate usefulness of the Jordan plan than he really was at the time. It is clear that he now understands that he made some very significant errors of judgment at the time. It may well be that his thoughts and recollections as to the exact matters he was thinking about at the time has been colored to a degree by his attempt to justify the course he took, while not necessarily attempting to argue that he did nothing wrong. Regardless, I **FIND** that he was not as motivated by these uncertainties as he now claims.

Another basis for Dr. Horowitz' "defense" rests upon the concept that the vote on October 2, 1990 was actually only a vote to approve or to disapprove a $24.5 million bond issue, and that the details of the breakdown of that total authorized amount into the constituent projects which together made up the total package was neither offered to the voters as a part of the referendum question adopted by the Board in August, nor was it a vital feature of the pre-referendum information offered to the voters as an informational base from which they could, with assurance, draw so that they could cast an informed ballot. In this conception, it mattered little how the approved total was ultimately carved up, and if the information offered to the public by such means as the *Board Bulletin* and the open public forums was inaccurate, it did not matter very much. Since the Board was not bound to actually spend each and every dollar in the exact fashion which was stated in the report of the Steering Committee as adopted by the full Board on June 26, and since even the submissions to the Bureau were not so binding that the Board could not revise it's plans for the money, any "harm" which could possibly have occurred as a result of the withholding or consequent misrepresenting of information from Board and/or public is of little or no consequence.

The difficulty with the idea that it was the total amount of the package that mattered and not how the sums contained therein were apportioned is that it overlooks such fundamental concepts as truthfulness and integrity, trust and fairness. While the Board might well have ultimately deemed it appropriate and necessary to change the exact spending estimates and actual expenditures, as it prepared for the referendum, the Board, which is an agency and a servant of the public, was duty bound to play fair with it's constituency. It had an obligation to

give the potential voters of the district as true a picture as it possessed of both the positives and the negatives of the proposed plan. This important, even fundamental, role and obligation was heightened to an even greater degree by the events of the previous referendum and the subsequent furor over the questions as to the Board's fulfillment of this commitment to honesty and accuracy in that instance. The Board, possessed of knowledge that some of the proposals in the adopted report could not likely be completed, or were in fact not needed as proposed, would have certainly been obligated to share this information with the public in a manner that would preserve to the Board sufficient flexibility so as to permit it to carry out as many of the objectives of the bond proposal as possible. Deprived of existing information on this front, the Board was in no position to fulfill its obligation. The theory that all that mattered was the sanctity of the $24.5 million and not the accuracy or reliability or truthfulness of the constituents simply does not wash.

The last and perhaps most troubling issue concerning the pre- referendum period relates to the signing of Mrs. Navarrete's name to the September 20 letter to the Bureau and the uncertainties of whether Mr. Jordan signed the name at the "direction" or by "authorization" of Dr. Horowitz, or instead acted totally on his own. First, I **FIND** no significant evidence that the actions of Dr. Horowitz and Mr. Jordan, under any of the various suggested scenarios, were motivated by any concern other than that of the need to file the required papers in Trenton prior to the referendum in order to gain the necessary approval.[17] Any decisions made were made without any idea of seeking to circumvent a review of the papers by Mrs. Navarrete or any of the members of the Board, particularly without any attempt to prevent their review of the Project Cost Estimate Form with it's estimated cost of $2.459 million.

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17 Interestingly, the August 14 letter from Mr. Jordan which listed the documents required to be submitted to the Bureau does not list the certification. PBG 5.

Initially, I **FIND** that Pablo Jordan faxed the Project Cost Estimate Form to Dr. Horowitz along with the other paperwork on September 12. Dr. Horowitz first saw it on September 13. Dr. Horowitz was extremely upset at the estimate of $2.459 million for Bradley Gardens. However, he did not suggest to Mr. Jordan that the forms not be filed. Mr. Jordan, who was quite concerned at the rapid approach of the referendum and who had worked on the project through the summer under a rushed schedule, then prepared to actually file the forms in advance of a meeting with Dr. Macaluso at the Bureau. He was aware of the letter prepared by the Vitetta Group in July. It was in form the exact letter which needed to be filed with the documents in September. It would have made much sense to simply copy the body of the letter had the information in that letter been a fully accurate statement of the actions of the school board, which in regard to the implication that the Board had in fact approved a cost estimate of $2.459 million it was clearly not. However, once the decision was made to simply copy the Vitetta letter's language, the only question was whether it would then be presented to Mrs. Navarrete to sign, or whether it would be given to the now available Board President Tronolone to sign (which would have been the proper procedure), or alternatively, whether the signatures on the letter would themselves be copied.

The uncertain factual issue here is whether Pablo Jordan simply copied the letter and signed both the Superintendent's and Mrs. Navarrete's name without consulting on the issue with Dr. Horowitz or whether he did speak to Dr. Horowitz and either tell him what he proposed to do, or was instead told what to do by the Dr. Horowitz. As the undisputed evidence shows, and as I **FIND**, Mr.Jordan did have access to Superintendent's office stationary at the time he prepared the final copy of the letter. This was definitely supplied to him at some time previous to the 20th by Dr. Horowitz. Neither of the men could specifically explain when or under what exact circumstances this stationary was supplied to Mr. Jordan, and it is impossible to determine the answer to this question from the meager evidence on the subject. However, from the evidence and the inferences which arise therefrom, I **FIND** that the letter was prepared and signed by Pablo Jordan based upon his understanding that he should proceed to file the documents with the Bureau forthwith, prior to the scheduled meeting which was to be held the next day with Dr. Macaluso. I **FIND** that although he never actually said to Dr. Horowitz that he was going to sign the name of either Board President Tronolone or Board Vice President Navarrete to the letter, Mr. Jordan simply went ahead and did so, using the format and even the signatures

from the Vitetta letter, with the assumption of tacit approval for such action from the superintendent, to whom he had previously spoken in order to tell him that the papers had to be filed. I **FIND** no evidence to suggest that the two men conferred and schemed for the purpose of a coverup of what they were filing. As for the actual placement of the signatures upon the letter, I accept Mr. Jordan's testimony that this occurred after he spoke to Dr. Horowitz about the need to file the papers. However, I accept Dr. Horowitz' statement that Mr. Jordan did not specifically ask him about whether he, Jordan, should sign the letter. Instead, I **FIND** that in the general course of a conversation concerning the need to file papers with the DOE the idea was conveyed from Dr. Horowitz to Mr. Jordan that it was a good idea to make use of the pre-existing language of the Vitetta letter for the required certification. No specific mention of the practical issue of obtaining signatures on the letter occurred. Mr. Jordan, pressed for time as he found himself, then took it upon himself to copy the letter, and he also deemed it appropriate and within his authorization to copy the signatures. As for the date of this conversation, I **FIND** that it occurred prior to September 20, since Dr. Horowitz was not at work on Rosh Hashanah and the district offices were closed that day.

Certainly, Mr. Jordan's decision to sign Mrs. Navarrete's name was a incorrect one. It is quite probably true that the architect was far more familiar with the process and procedure surrounding this filing requirement. As such it is not clear from the record exactly what Dr. Horowitz understood as to the exact nature of the specific filings. Any laxity on his part in regard to questioning Mr. Jordan about the issue of signatures on the letter was wrong. However, I do not find sufficient credible evidence that any such laxity was guided by nefarious reasons. Suffice it to say, the architect took an easy shortcut at a time of some pressure and the Superintendent did not question him or direct him as to the proper procedure. He surely did know of the general concern of the architect in respect to the filings and he certainly conveyed a general idea that the matter should be quickly and efficiently dealt with. However, from the available evidence I cannot conclude that his general authorization should be read as a tacit approval of forgery, in any way, shape or form.

It must also be remembered that at the time that Mr. Jordan acted he was under the belief that Dr. Horowitz had already, or was in the process of, advising the Board that the cost estimate had grown. This logical belief might well have

flowed from the assurance that Dr. Horowitz gave to Mr. Jordan at the time of the passage of Dr. Stephenson's note. Given his understanding, Mr. Jordan might well have found nothing surprising about the idea of simply filing a letter of certification with the signatures thereon, copied from a previous such letter. Since Dr. Horowitz did not advise Mr. Jordan of any new problem or opposition from the Board, Mr. Jordan could well have assumed, albeit incorrectly, that the Board was aware of, and willing to go along with, a cost estimate of $2.459 million. That the Superintendent's actions, or his inactions, may have fostered such an understanding, contrary as it was to the facts, is simply another fault to be laid at the doorstep of Dr. Horowitz.

One of the persistent themes raised by Dr. Horowitz throughout his counsel's presentation of evidence and examination of witnesses dealt with the presence at the public meetings, as well as at the Planning Board meeting and at the cable TV presentation, of the sketch of the Bradley Gardens School which showed the square footage of the renovations and additions to be in excess of 12,000 square feet. Apparently, the respondent feels that since this document was open for all to see at those times that the Board members, individually at least, must have known, or at least should have known, that the plan no longer contemplated a 4,000 square foot project, but instead one of triple the size and quite logically one of a greater expense than the $905,000 contemplated for the 4,000 square foot job mentioned in the EFC and Steering Committee reports. In some way, the respondent seems to suggest that although he may have been lax in his responsibilities towards the Board and the public in this period of time, nevertheless, the information was there for all to see, and to pursue, and this in a way mitigates or negates some or all of his fault.

Once again, it is not enough for one holding the exalted position of trust and responsibility that Dr. Horowitz held to rely on happenstance, luck and the good fortune of others to fulfill his responsibilities. Armed as he was at the time of these meetings and presentations with the information that he had as to the increase in costs and square footage, Dr. Horowitz had an affirmative obligation to bring to the attention of the Board this type of important information. That others might chance to see the square footage figure on the drawings and might follow up this visual notice by asking questions as to what had happened to the 4,000 square foot project and what impact had occurred in regard to costs is not a proper and effective means of informing the collective Board. While someone may have paid enough attention

to the sketch and been alerted, there was every chance that others would not. It was up to Dr. Horowitz to take it upon himself to go to the Board in a formal and direct manner and keep them abreast of developments. This he most assuredly did not do[18].

Subsequent to the referendum, the appearance of the Jordan & Pease bill caused Dr. Mazurak to raise concerns with Dr. Horowitz. While he acknowledged having heard some vague mention of a cost escalation during the summer, Dr. Mazurak denied that he had any definite information on the subject and he also did not indicate having discussed this subject with Dr. Horowitz until the arrival of the aforementioned bill in October. As to these recollections, I **FIND** that Dr. Mazurak recall was accurate, this despite Dr. Horowitz' belief that he had spoken with Dr. Mazurak about the additional boiler room expense at about the time that Mr. Jordan brought up the need for the second corridor. Given the role that Dr. Horowitz had assumed with regard to this project and the limited involvement of Dr. Mazurak, as contrasted to his description of his role in the past, the lack of such a discussion is not surprising.

The whole issue of the interchanges between Drs. Mazurak and Horowitz in regard to the implications of the bill received in October is an interesting one. Here was Dr. Mazurak, according to his version of the matter, asking his boss what the bill was all about, as it was clearly calculated on the basis of a cost that was far beyond that which Dr. Mazurak knew of. He describes himself as suggesting to Dr. Horowitz that the Board should be told that a cost escalation had occurred, or embarrassing questions might later be raised as to the reasons and the basis for the bill. As Dr. Mazurak recalls, the Superintendent, while apparently acknowledging Dr. Mazurak's concern in the course of several references to the issue over a period of time, nevertheless never brought up the subject at cabinet or Board meetings. As for Dr. Horowitz, he did not deny that his subordinate had expressed concern. While denying that this was raised in the form of "suggestions" that he bring the issue to the attention of the Board, nevertheless, Dr. Horowitz does not appear to deny that

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18 Review of the videotape of the cable TV presentation demonstrates that the writing on the plan which listed the square footage is unreadable for the viewer. While those at the meetings, and Mr. Tronolone at the cable presentation, might have come close enough to see the numbers is of course possible, but there is no evidence to support any finding that this occurred.

he was very aware that another senior member of the executive office of the district felt that the information that he, the Superintendent, had should not remain solely within his own realm, but should be shared with the district's governing body, which was after all the instrument responsible to the voters and taxpayers of the district. However, despite the knowledge of this very reasonable concern, the Superintendent once again did not see fit to go to the Board and advise them directly of what had occurred. According to the respondent, he instead appeared at the meeting of the expanded Buildings and Grounds Committee on December 17, a date which was about two months after the arrival of the Jordan & Pease bill at the Superintendent' office, the event which had sparked the concern of Dr. Mazurak.

Here again, the respondent's reasoning for his course of action is tied to his continuing claim that at the time he "had no faith in that number." Apparently this statement is meant to once again convey at least a degree of uncertainty as to whether the Jordan plan was ever to serve as the actual basis for the Board's attempt to bring to fruition it's promise to raise Bradley Gardens to parity with the district's other elementary schools. As before, the contention about this factor of "uncertainty" and a "lack of faith" raises the obvious question of why Dr. Horowitz did not simply go before the Board and lay the whole matter on the table so that the Board, the properly constituted legislative body, could deal with the issue as it saw fit. Perhaps the answer lies in the fact that the Doctor was not so unsure of the ultimate usefulness of the plans, but instead was rather sure that a way existed to fund the larger plan by using surpluses and funds released from other portions of the referendum package, a release he foresaw due to the information which he had as to the architect's position on the lack of feasibility of some of those portions.

Dr. Horowitz once again points to the December 17 meeting as a time and place where information as to the growth of the project was readily available to those in attendance, and then, through the medium of the report given the next day at the Board meeting by Mrs. Navarrete, to the whole Board. This seems to represent another example of the Superintendent saying that he passed the significant information to the Board by indirect means, but he might claim that as far as he was concerned, the Board already knew the score by means of the earlier public meetings and displays thereat, and the informal words to Reverend Dr. Stephenson and Mrs. Navarrete and Mr. Tronolone. Since I have already commented

on these and the efficacy of such communications, suffice it to say that here, once again, the Superintendent made errors of judgment, compounding those of before, and he failed in his duty to come right out and discuss the expansion of size, and more importantly of cost, as he should have. While Dr. Horowitz recalled a discussion of the size and he also remembered a question from a lay member of the Committee that prompted a word concerning the "considerably" greater cost, others who were present remembered this cost discussion only in regard to the roof truss question, and while Mr. Kovonuk did remember that he was aware at this meeting for the first time of the size of the project, he could recall no reference being made to the effect of that upon the cost.[19] Based upon the various statements, I **FIND** that there was never a statement made or a reference conveyed at that meeting to the effect that the cost of the project was "considerably" greater than the originally estimated $905,000. While perhaps this is an example of a situation where the persons present at the meeting should have raised some questions about what they were seeing and hearing and how it might affect what the cost would be, in the end, the meeting failed to serve as a medium for transmission of such critical data to the Board. I **FIND** nothing to suggest that Mrs. Navarrete left that meeting and then went to the Board meeting the next night with any real reason to suspect, much less to report, that the cost was to be $2.459 million, or any such figure beyond at most the extra $3-400,000 for the move of the boiler room. There is nothing in the transcribed remarks of her December 18 report, RBG-97, which conveys any sense of such knowledge. While it reflects that certain plans were shown and certain costs discussed, there is no sense of any overall cost having been mentioned.

Thus, based upon the above discussion and findings, I **FIND** that in March when the Superintendent presented his request to the Board for the transfer of funds from surplus in order to cover the extra expenses for the Bradley Gardens project, no member of the Board of Education had any information that the most recent estimate of the cost of the project was $2.459 million, no member of the Board had any knowledge that some of the intended projects which were to have been funded by the bond referendum were not financially or architecturally

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19 While Dr. McGarry testified in his disposition that the lay questioner was Bob Hughes, the Stark and Stark report stated that Hughes denied any recollection of such a discussion of cost. Neither of these gentlemen testified in the OAL hearing.

feasible, and no member was aware that the documents submitted to the Bureau of Facilities Planning in September, 1990 had represented that the Board had approved the proposal as submitted, a proposal represented therein to have an estimated cost of $2.459 million. Further, as is obvious from these conclusions, the Board had never been asked nor had it ever authorized its Superintendent, or any architect, to proceed with a plan for the school that would be likely to cost so much more than the cost which had been represented in the Board Bulletin and at the public meetings (by inference if not by actual statement.) I **FIND** that when the request for the transfers was made and Mrs. Navarrete expressed objection and asked Dr. Horowitz for an explanation, she did so because she genuinely did not at that moment understand what the purpose and the intent of the requested action was. Although I **FIND** that she did have some knowledge that the Superintendent had in the past mentioned to her the need to spend money to move the boiler, the exact understanding which she had as to that matter is not clear. Her genuine surprise, while not entirely and absolutely based on a complete *tabula rasa* as to the entire subject of cost overruns for the Bradley Gardens work, was nevertheless not feigned. As for the other Board members, they were at least as in the dark as she, and as for the cost estimate of $2.459, they were all equally as uninformed.

The reason for this "state of innocence" as to this estimate can rightfully be laid primarily at the feet of the Superintendent of Schools. His lack of openness, candor and judgment caused the responsible body to be unaware of the facts as they existed in March and for sometime prior. That some members might have had a chance to learn more about the situation, had they focused upon the sketches at some point and begun to ask searching questions, or through some other happenstance, is not a defense to, or even a mitigation of, the Superintendent's failures. Having the information, Dr. Horowitz should have shared it with the Board of Education, long before it came out. Indeed, the manner in which it emerged itself reveals much. It does not appear that the request for the transfer was explained in a forthright and open manner as being related to the increase in costs, with a clear statement of what the increase was anticipated to be. Not until the questions raised by Mrs. Navarrete were addressed through the submission of materials and information by Dr. Horowitz and Pablo Jordan did the Board truly see for the first time the picture of what had happened.

CONCLUSIONS AS TO SPECIFIC CHARGES

Charge I of the certified tenure charges relates to contract matters. The Board alleges that Dr. Horowitz has permitted the district business administrator to present bills and receive authorization for payment of such bills in instances where "there was no valid signed contract."

In support of its contentions the Board cites sections of its own Operations Manual, which requires that all contracts which encumber district funds be written and approved by the district business office before "finalization" (Section 3301) and that the policy of the Board is to strictly observe "the letter and the spirit of all laws and regulations relating to . . . expenditures," a policy which the Board "holds the Superintendent and Board Secretary/Assistant Superintendent for Business directly responsible for carrying out . . . ." (Section 3300)

In addition to these policies of its own, the charge notes that the New Jersey Statutes require that no public body may make payments without a "signed, valid contract." No specific statutory provision is cited within the body of the charge. In the Board's post-hearing brief counsel cites *N.J.S.A.* 18A:18A-40 and *N.J.S.A.* 2C:30-4, the latter a criminal statute.[20]

Evidence as to the exact circumstances of the arrangements and the working relationships between the Board, Dr. Horowitz and Jordan and Pease is not extensive. For instance, although Mr. Jordan and Dr. Horowitz met on June 14 and discussed the Bradley Gardens project on a preliminary basis there is no evidence as

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20 *N.J.S.A.* 18:-18A-40 provides:

"All contracts for the performance of work or furnishing materials, supplies or services shall be in writing . . . ."

N.J.S.A. 2C:30-4 makes it a crime for a

"person . . . charged with or having the control of a State office . . . or a member of a county or municipal governing body or a member of a board of education" to "purposely and knowingly . . .

a. . . .;

b. Incurs obligations in excess of the appropriation and the limit of expenditure provided by law for that office, division . . . board or body."

to a contractual relationship existing between the Board and the firm at that time for this particular project or for the bond issue in general. Subsequent events indicate that on July 18, 1990, the Appendix No. 3 was forwarded from Jordan and Pease to Dr. Mazurak, specifically in reference to the "Bradley Gardens Project J & P 9026-100." This is described simply as an appendix to "our Standard Form of Agreement between Owner and Architect on the above referenced project." No evidence has ever been produced that the Board, as "Owner," and Jordan and Pease, as "Architect," had up to that date ever entered into a signed contract. The Appendix appears to be a supplement to a then nonexistent contract, at least there is no evidence that at the time it was forwarded to the Board in July there existed any written agreement, much less any fully agreed upon oral terms. Dr. Mazurak testified as to discussions concerning a contract, but the evidence supports the conclusion that there was no written contract upon which to append anything even at the time that Jordan and Pease submitted their bill in October for investigation and field measurements, in the amount of $28,488.82. It was at this time that the issue of Dr. Mazurak's concern over the amount of the bill and the circumstances surrounding it was raised to Dr. Horowitz. Despite the fact that he admittedly knew from these discussions that there was no underlying written contract in existence at the time and that Dr. Mazurak saw real problems in paying the invoice in the absence of a contractual basis, there is no evidence that Dr. Horowitz prevented the payment from being made, as was eventually done on March 10, 1991, only a short time before Dr. Horowitz came before the Board with his request to transfer funds, the spark which led to disclosure of the whole Bradley Gardens affair. Not for the first time, it must be said that he did not choose to go to the Board to discuss any of this, but simply let the payment be made.[21]

Counsel for Dr. Horowitz argues in his brief that his client was not involved in the settlement of the contract with Jordan and Pease. This is true, as he had been excluded from any involvement after the April 9 meeting. However, to argue his lack of involvement and knowledge of the monetary issues surrounding the October, 1990 invoice ignores the clear evidence, including the testimony of the respondent himself. I **FIND** that he did know of the lack of a written contract.

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21 By this time, a contract had been concluded, but the payment was for services rendered at a time when none existed.

The policies of the Board, as cited in the body of Charge I, require a written contract if funds are to be encumbered. No such written instrument existed. Despite counsel's protestations that everything done in this regard with respect to the early invoice occurred without Dr. Horowitz' knowledge, the evidence does not support that claim.

I **CONCLUDE** that the Board has sustained charge I. Dr. Horowitz did knowingly permit the payment of the Jordan and Pease invoice for services which were rendered by that firm at a time when no written contract existed for such services. In doing so, he violated the spirit and the letter of the Board policies 3301 and 3300. Further, his conduct was in derogation of the mandate of *N.J.S.A.* 18A:18A-40.

As regards the criminal statute, *N.J.S.A.* 2C:30-4, as a member of the Board, albeit without a vote, *N.J.S.A.* 18A:17-20, the Superintendent falls within the coverage of the 1989 enactment. I **FIND** that Dr. Horowitz' conduct in regard to this matter arguably involved at least an acquiescence in the disbursement of monies for which there had been no appropriation by the Board.

Charge V alleges that Dr. Horowitz permitted the submission of documents to the Bureau of Facilities Planning, which conduct was, in light of the content of the documents submitted, in violation of the intent of *N.J.A.C.* 6:22-1.2, the regulation which requires the submission of educational specifications and a project cost estimate form to the Bureau. More specifically, the allegation centers on the claim that Dr. Horowitz knew that the Board's resolution of adoption of the Steering Committee report had authorized a project for $905,000 and the papers which he allowed to be filed showed that the Board had authorized work which was estimated to cost $2.459 million. Since the Board was never presented with, much less never agreed to authorize or even to consider a project of such financial magnitude, the Board contends that the Superintendent's allowance of the submission of the documents, as he knew them to have been drafted by Pablo Jordan, was a act unbecoming Dr. Horowitz' "position of public trust."

N.J.A.C. 6:22-1.2 requires that educational specifications detailing all facilities considered for a construction program be submitted to the Bureau of

Facility Planning Services for its approval. This submission must include estimates of dimensions and square footage and explanations of planned usage, and this submittal must be signed by the president of the board of education and by the chief school administrator "as evidence of certification of approval by the local district board of education." *N.J.A.C.* 6:22-1.4 provides for the submission of schematic plans for approval before any funds are authorized locally via a bond referendum. As a part of this submission, the project cost estimate must be presented.

The evidence clearly reveals that the estimated cost of the Bradley Gardens project, as represented to the Board at the time it voted to adopt the idea, was $905,000. At no time after June 26, 1990, did anyone come before the Board and explain to it that the estimate was off base, much less that it was widely off the mark, and that it should consider whether it wished to take another look at the proposal, limit more clearly the extent of it's concept, expand it's idea of what should be done, or whatever other action, or inaction, that it might deem appropriate. On September 13, when he received the draft of the submissions from Pablo Jordan, Richard Horowitz well knew that the Board of Education had never seen any proposal, any documentation, any suggestion that the cost estimated for the project was nearly three times that which was referenced in the Steering Committee report. While it is all well and good to remember that all of these figures as to estimated costs were just that, estimated costs, and while all involved knew and acknowledged, or in candor should have known, that the actual finished cost of the project was not likely to really be $905,000, nevertheless, the Superintendent had to be aware that his Board, to which he owed substantial obligations of trust and candor, had no knowledge whatsoever of this figure that Mr. Jordan was telling him that he, Jordan, was about to send off to the Bureau, bearing the imprimatur of Board acceptance and approval. While the ultimate fate of any estimate, and indeed of the educational specifications and plan sketches submitted pursuant to *N.J.A.C.* 6:22-1.2, is of course an uncertain one, and while as the Superintendent argues, the submission in no way absolutely binds the Board and freezes it as to the nature of what is ultimately done, the clear purpose and intent of this regulation is to have the Board place before the Department of Education its then current, best and agreed to understanding of what it proposes to accomplish. To even suggest that the truth of the submissions (as well as the truth can be understood at the time that the submission is made), is an irrelevant or a loose concept, ignores the fact that it is inconceivable that a Board can act so cavalierly in its relations with the

Department, or with the truth. The regulation has to mean something, it has to have a purpose, and in order to serve that purpose it must demand that the information provided pursuant to the regulation's command be as truthful and accurate as possible. Thus, any submission of data which was false, or any submission of material data which is unknown to the very Board who by its purported certification proposes to stand behind the submission as representing an authorized plan of the Board, is an improper submission.

There is no evidence that Dr. Horowitz took any action whatsoever to prevent Mr. Jordan from filing the Project Cost Estimate Form as it was presented to Dr. Horowitz in draft, with the $2.459 million figure. He neither asked or directed Mr. Jordan to change it, nor did he come to the Board to get specific authorization from it to make the representation to the Bureau that the Board was contemplating undertaking, and/or knew of the possibility that it might be undertaking, such an expense for the project. While "shocked," Dr. Horowitz was nevertheless unmoved to do anything to prevent what was in fact a false representation as to the nature of the cost estimate which the Board had authorized. Given that the Board was responsible for this submission, that as the superintendent Dr. Horowitz was the Board's representative in contact with the architect, and given that he knew of the intention of Mr. Jordan to file the form, Dr. Horowitz' failure to act constituted conduct unbecoming a School Superintendent.

Charge VI alleges the failure of Dr. Horowitz to sign the plans for construction submitted to the Bureau and contends that his failure to do so and to advise the authorities of such failure was an omission constituting misconduct in office and thus conduct unbecoming his position of trust. This charges relates to the uncontested fact that Dr. Horowitz did not personally sign the letter of certification submitted to the Bureau. The letter was actually signed with Dr. Horowitz' name by Pablo Jordan. As previously discussed, the decision to sign Dr. Horowitz' name was directly that of Mr. Jordan. Had Mr. Jordan chosen he could have sent the unsigned letter to Dr. Horowitz for his signature, and he no doubt could have arranged for Mr. Tronolone, as Board President, to personally sign his name as well. In fact, Mr. Jordan signed the Superintendent's name and copied Mrs. Navarrete's name. That he did not have the specific authorization of Mrs. Navarrete is certain. As for the Superintendent's, as I have previously noted, Mr. Jordan proceeded to prepare and submit the letter with the implied agreement of Dr. Horowitz. He may well have

believed that the Doctor would have no problem with him signing, that is, in this context copying, the signature of the Superintendent. As this was happening, Dr. Horowitz quite clearly made no attempt to assure that he, personally, complied with the requirements of *N.J.A.C.* 6:22-1.2 that he, as the chief school administrator, sign the plans. After the plans were filed, Dr. Horowitz never contacted the Bureau to advise that the filed plans lacked his own, personal signature. This conduct, which reflected at least a lax approach to the responsibilities inherent to the Superintendent in this particular matter, was conduct which the Superintendent should not have condoned or participated in.

In charges VIB and VII the charging body asserts that Dr. Horowitz directed Mr. Jordan to sign Mrs. Navarrete's name to the certification letter of September 20, 1990 and that since this was done without obtaining her authorization, the act constituted forgery in violation of *N.J.S.A.* 2C:21-1. Charge VIB alleges that such conduct constitutes unbecoming conduct. Charge VII contends that Dr. Horowitz received a copy of the letter bearing the forged signature and that he then failed to inform the Board or the State authorities of the forgery, conduct again identified as unbecoming one in Dr. Horowitz' position.

Forgery is defined in *N.J.S.A.* 2C:21-1 as

> a. Forgery. A person is guilty of forgery if, with purpose to defraud or injure anyone, or with knowledge that he is facilitating a fraud or injury to be perpetrated by anyone, the actor:
>
> (1) Alters or changes any writing of another without his authorization;
>
> (2) Makes, completes, executes, authenticates, issues or transfers any writing so that it purports to be the act of another who did not authorize that act or of a fictitious person, or to have been executed at a time or place ...other than was in fact the case,...
>
> (3) Utters any writing which he knows to be forged in a manner specified in paragraphs (1) or (2).

In this case, the evidence does not sustain the suggestion that the Jordan signing of the Navarrete name occurred at the express direction of Dr. Horowitz. Instead, as I have said, Dr. Horowitz knew that the forms and documents were to be filed and that Mr. Jordan was very concerned about getting the filing accomplished. Despite the fact that he had this knowledge, I do not find any substantial evidence

that Dr. Horowitz was ever directly asked for specific permission or authorization to sign Mrs. Navarrete's name. Mr. Jordan himself testified credibly that at the time he spoke to Dr. Horowitz about the need to file the submissions with the DOE he himself did not know whose specific name was signed on the Vitetta letter that he was proposing to use as the form for his own letter of certification. As previously discussed, I have concluded that the conversation which occurred between these two gentlemen, while including a general reference to the idea of copying the Vitetta letter, did not focus upon the question of obtaining new signatures for the new letter or simply copying the signatures which already appeared on the old letter. I **FIND** that the ultimate decision to merely copy the signatures was Pablo Jordan's, who, as noted before, acted in haste and clearly in error. I **FIND** no evidence that Dr. Horowitz was knowingly involved in a decision to copy Mrs. Navarrete's name and make unauthorized use of it. While the practical affect of the discussion regarding the copying of the Vitetta letter may well have been to induce Mr. Jordan to take the "shortcut" of copying the names as a matter of expediency, I **FIND** nothing here to suggest that Dr. Horowitz knowingly facilitated a fraud upon anyone in regard to the unauthorized signature which Mr. Jordan undertook to place upon the September 20 letter. Thus Charge VIB has not been sustained.

As for Charge VII, the focus here is upon the after-the-fact conduct of the Superintendent. Certainly, as the charge states, Dr. Horowitz must have been aware, or at least he should have been had he taken the time to think about it, that he had not signed any papers at all in regard to the required submission to the Bureau in late September. Whether he thought about the requirement for his signature subsequent to the conversation in regard to the copying of the letter is doubtful.

The next question that arises under the terms of this charge is whether Dr. Horowitz was in fact aware after the submission of the documents and the delivery of a copy of them on September 21 that there was a forged document in the package. If he did know, and chose to ignore the fact, either out of a lack of concern for the seriousness of the matter, or of the implications of the submission of documents purporting to certify matters never even presented to the Board over the purported, but in fact unauthentic signature of the Board Vice President, or simply out of an uncalculating neglect, his conduct would no doubt be properly characterized as unbecoming. If he let the matter be because he had no concern about Mr. Jordan signing his name to the letter since he felt that he had, in essence,

authorized Mr. Jordan to do so, if not specifically than by implication, then he might well have conceived that nothing wrong had occurred and that there was nothing of consequence to report to the Board. If on the other hand, he never saw the letter at all, or glanced at it in so casual a fashion as he leafed through the bound documents which Mr. Jordan had dropped off, then it is very difficult to fault Dr. Horowitz for not advising the Board or any other authorities.

I **FIND** that the credible evidence, such as it is, does not demonstrate by a preponderance that Dr. Horowitz actually reviewed the September 20 letter when he received the package after it had been filed. I **FIND** that he testified truthfully that he looked over the contents of the package in a "thumbing through" fashion, which I **FIND** implies a rather quick skim of the contents, and that while he may have actually "seen" the letter in the package, he did not focus on it's contents, much less on the signatures. Thus, as for the allegation that he knew of the fact that he had not signed the document and failed to report that the forgery of his name appeared on the filed papers, I **CONCLUDE** that the proofs do not support a finding to that effect. Thus charge VII must be dismissed.

Charges VIII, IX and X allege that the Superintendent "allowed" the submission of documents to the DOE which were known to him to contain false information. The forms were of course actually filed by Mr. Jordan. In Charge VIII, the reference is to the forms "stating that the Bradley Gardens project at $2.45 million was to be funded through a referendum and capital outlays, and that the project had been approved by the Board on June 26, 1990." Obviously, there was no approval on June 26 of a project of that cost magnitude at that school. While the general concept of a project was approved, the Board at that stage was looking at a proposal of a much smaller financial scale. It would have been wholly wrong to suggest that the June 26 approval was in any way an approval of the far larger cost. Any assumptions as to how the funding of a nearly three times more expensive project would take place, and any assumption as to the use of other funds from the referendum, funds which were already assigned to other projects within the bond issue, was unwarranted. Thus, when Dr. Horowitz saw the draft of the submissions, especially the Project Cost Estimate Form that was sent to him by Mr. Jordan some 7 or 8 days before the filing of the documents, Dr. Horowitz could very easily have told Mr. Jordan that he could not agree to the filing of any documents that would suggest any approval, or even any contemplation, by the Board of a project

estimated to cost nearly $2.5 million dollars. He could have told Mr. Jordan that he would quickly take the matter up with the Board so as to alert them to the apparent realities of the situation and obtain their approval for a submission which made such a representation (or perhaps their disapproval, which might have prompted an early pre-referendum review of exactly what was going on in regards to the Bradley Gardens project). In the event, Dr. Horowitz did no such thing. He agreed with Mr. Jordan that the paperwork should be filed as per the requirements of the Code, without any apparent concern that the documents were speaking of a project grossly out of line with the original estimate, and even well beyond the sums that Dr. Horowitz claimed to have mentioned in passing to several Board members.

Dr. Horowitz' failure to raise his hand and his voice and to call to the Board's attention in any real and meaningful fashion the entire issue of the escalating cost estimates for the Bradley Gardens project, an ongoing failure which has been discussed extensively in this opinion, manifested itself once again in respect to these submissions. I **FIND** that he did "allow" the submissions referenced in Charge VIII and that at the time he knew that the project as proposed in the submission was not what had been contemplated, much less approved, by the Board. Again, even Dr. Horowitz acknowledged his substantial doubts about the efficacy and viability of the project as contemplated by Jordan & Pease at the time of the submissions in September. While I have tended to diminish the importance of this "lack of confidence" excuse in the course of this decision, it is possible that this reasoning may have played a role in Dr. Horowitz' action regarding the "allowing" of the submissions. Perhaps he simply felt it did not matter what the submission said, because in his view the whole project had taken on an air of unreality. If this was in fact a motivating factor, even to a subtle degree, it simply points out once more the essential failure of Dr. Horowitz to communicate with his Board and take them into his confidence on matters with which they had a vital, and indeed an ultimate, interest.

Charge IX argues that Dr. Horowitz' had knowledge that Pablo Jordan was "submitting a letter with false statements and forged signatures". It contends that he "acted in a manner that would constitute official misconduct," in violation of *N.J.S.A.* 2C:30-2. This provision of the New Jersey criminal statutes makes it a crime for

A public servant ... with purpose to obtain a benefit for himself or another or to injure or to deprive another of a benefit:

a. He commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized or he is committing such act in an unauthorized manner; or

b. He knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office.

Apparently, the thrust of this awkwardly worded charge is that Dr. Horowitz knew of the false and forged quality of the submissions which Mr. Jordan was about to make to the Bureau and did nothing to prevent the submission from being made in this inappropriate manner. As for the forgery, I have previously found that Dr. Horowitz did not have actual and specific knowledge of the fact that Mr. Jordan had in fact forged names on the letter. He had implicitly given permission to Jordan to sign his name, and he never specifically discussed the idea of Jordan signing Navarrete's name. See discussion, ante. at pages 73-76. As for the falsity of statements in the submission, the Superintendent knew that the Board had not authorized a project with the cost estimate shown on the Project Cost Estimate Form. He saw the Form in draft. He made no effort to prevent Mr. Jordan from filing the Form as drafted, despite his now expressed misgivings and concerns regarding what he was seeing. Dr. Horowitz thus knew that false representations were being made to the Bureau, albeit, as I have noted before, he probably did not view the matter with much concern.

The failure of Dr. Horowitz to take any steps to prevent the filing in the form and manner that he saw it at the time the draft documents were submitted to him was a failure to exercise a responsibility inherent in his position as the chief school administrator of the district. He certainly had the authority to tell the architect that the representations in the documents were at best misleading with regard to the proposal as envisioned and approved by the Board. He did not choose to exercise his authority. This failure can certainly be characterized as conduct which was unbecoming a public official in a high position of trust and authority.

The issue that must of course be considered with regard to the allegation in this charge is whether it can be said that the conduct reached a level of criminality, as the statute defines the act by the purpose with which the actor proceeds. Failures

to perform actions which a public official is, can and should, indeed even must, undertake, are not necessarily criminal acts. The statute requires that the public servant have a purpose "to obtain a benefit for himself or another or to injure or to deprive another of a benefit." In the instant case, I **FIND** no evidence that Dr. Horowitz acted, or failed to act, out of any intent to injure or deprive anyone of a benefit. As for any intent to benefit himself personally, only in a most strained way can it be said that allowing the submissions to take place without Board review would have moved the referendum and, if it passed, the project to proceed speedily, in a manner that might engender Board, and public, approval for the Superintendent. This possibility is too remote and uncertain a reward to even be considered as the kind of benefit meant by the statute. As for any benefit to another, presumably here Pablo Jordan and his firm, while approval of the plans by the Bureau would set the stage for the referendum to take place as scheduled, that fact, and the possibility of ultimate approval of the bond question and construction of the project, to suggest that Dr. Horowitz acted, or failed to act, as he did in an attempt to give some benefit to Mr. Jordan is simply not a supportable conclusion.

I **CONCLUDE** that although Dr. Horowitz acted in a manner that was unbecoming, he did not violate *N.J.S.A.* 2C:30-2. Charge IX must therefore be dismissed.

Charge X alleges that Dr. Horowitz knew the Project Cost Estimate Form contained false information concerning both the Board's approval of the project as submitted and the source of the funds for the project as it appeared in the submitted documentation. The Board contends that Dr. Horowitz concealed this knowledge from the Board and that this conduct violated *N.J.S.A.* 2C:21-4, which provides

> a. Except as provided in subsection b. of this section, a person commits a crime of the fourth degree if he falsifies, destroys, removes, conceals any writing or record, or utters any writing or record knowing that it contains a false statement or information, with purpose to deceive or injure anyone or to conceal any wrongdoing.
>
> b. A person is guilty of issuing a false financial statement, a crime of the third degree, when, with purpose to deceive or injure anyone or to conceal any wrongdoing; he by oath or affirmation:
>
> (1) Knowingly makes or utters a written instrument which purports to describe the financial condition or ability to pay of some person and which is inaccurate in some substantial respect; or

> (2) Represents in writing that a written instrument purporting to describe a person's financial condition or ability to pay as of a prior date is accurate with respect to such person's current financial condition or ability to pay, whereas, he knows it is substantially inaccurate in that respect.

Once again, the evidence shows that Dr. Horowitz was aware of the contents of the draft Project Cost Estimate Form before Mr. Jordan filed that document. He never told the Board about the fact that the architect's latest estimate, the one that was being filed with the Bureau, was for $2.459 million. He knew that the Board had never approved a project of such financial magnitude. He also knew that the estimates as to the portion of the bond monies which would be allocated to the Bradley Gardens project were only $905,000. He therefore had every reason to know that it could not be properly represented to the Bureau that the Board had approved the use of nearly $2.5 million of the monies to be raised from the proposed bonds for this particular project. Thus, when Dr. Horowitz, by both his active agreement with Mr. Jordan concerning the filing of the documents, including the Project Cost Estimate Form, and his inaction, that is, his failure to prevent the filing of a document which contained false and highly misleading information, may be said to have participated, or at least to have acquiesced in, the uttering of a "false statement."

Merely uttering a false document in and of itself does not automatically violate *N.J.S.A.* 2C:21-4. The required intent must be demonstrated to have existed at the time of the uttering. Here, the purpose of the filing of these documents was to convince the Bureau to approve them so that the bond referendum could be held as scheduled. Clearly, had the documents indicated that the Board had not considered, much less agreed to, an estimate for the work of nearly $2.5 million, or to the plan as modified from its original concept, the Bureau might have refused to approve them. Thus, the submission of these documents, in which Dr. Horowitz played a role, albeit not the primary one, but nevertheless an important one, was done for the purpose of inducing a government agency to act based upon inaccurate and in fact clearly false information.

Based upon the above, I **CONCLUDE** that, although I do not believe that at the time he spoke with Mr. Jordan and then reviewed the faxed copies of the documents to be submitted (which included the Project Cost Estimate Form), Dr.

Horowitz had an active and formed desire to practice deceit upon anyone, his conduct aided in a submission that had the significant potential for doing that. The purpose here was to induce action by fostering a belief in a state of affairs regarding the Board of Education's view on the referendum which was in fact not the actual state of affairs. This is deception. Whether a prosecutor would charge someone (particularly Dr. Horowitz), or a grand jury would indict, under the circumstances of this case is impossible to know. However, reviewing the evidence, I **CONCLUDE** that the preponderance of the credible evidence demonstrates that Dr. Horowitz' conduct as at least an aider and abettor of the uttering meets the definition of the crime as set forth in the statute. Such conduct, even if not clearly criminal, is nevertheless conduct which is unbecoming for a public servant. While Charge X affirmatively states that Dr. Horowitz violated the criminal statute, a finding which a jury in a criminal case could only make if it found that all of the required elements of the statute had been proven beyond a reasonable doubt, it can at least be affirmatively concluded here that the conduct contains all of the elements of the violation as defined in the statute. Within the limitations of the caveat, I **CONCLUDE** that Charge X has been sustained.

Charge XI asserts a violation of *N.J.S.A.* 2C:21-16. This statute makes it a crime for a person to

> . . . by deception as to the contents of the instrument he causes or induces another to execute any instrument affecting, purporting to affect, or likely to affect the pecuniary interest of any person.

Here, as in the case of Charge X, the thrust of the allegation is that Dr. Horowitz "caused the execution of State approval which was likely to affect the pecuniary interest of the district public." This is again a focus on the "deceiving" of the Bureau concerning supposed Board approval of the estimated cost and the sources of funding for Bradley Gardens.

That the submission of the documents to the Bureau was meant to induce it to issue an approval so that the referendum could be conducted is not to be doubted. That there were false and misleading representations made is also true. The referendum was a vote to authorize the sale of bonds which would create a public debt. Thus, the issuance of the approval would allow the referendum to go forward and, if the result of the vote was to approve the Resolution, the public's

pecuniary interests, as well as the district's itself, would have been affected (assuming of course a successful sale of the bonds). As before, the question of the actual intent to work a deception is the key as to whether a crime was committed. The certain intent of Messrs. Horowitz and Jordan at the time was to induce an approval by the Bureau. In the sense that either of them acted to send the Bureau documents which either of them knew made representations about what the Board had actually approved, representations which could hardly have been understood as being true, the actor or actors engaged in wrongful conduct since Dr. Horowitz, at the time that he saw the documents knew that the representation was false, I **CONCLUDE** that Dr. Horowitz did at least acquiesce in the presentation to the Bureau of information which he knew was untrue as stated, information which could easily have misled the Bureau. I **CONCLUDE** that the conduct fits the definition of the crime. The conduct, even if unlikely to lead to a criminal charge, was nevertheless conduct unbecoming Dr. Horowitz' position.

The twelfth charge brought by the Board refers to the Superintendent's direction to David Sandler to use the $905,000 figure in the *Board Bulletin*, this despite Dr. Horowitz' knowledge at the time that he told this to Mr. Sandler that the cost estimate received from the architect was far in excess of that figure. It is alleged that this conduct "interfered with the right of the voters to make an informed vote." As Dr. Horowitz has acknowledged, he was consulted "regularly" on the drafting of the *Bulletin*. *See*, RBG 111, pg. 1.

It is not at all certain exactly how the Board of Education would have dealt with the matter of the Bradley Gardens project had it been advised in July or August, 1990 of Mr. Jordan's revision of the cost estimate. In theory, the Board could have told the architect to downscale, could have sought to revise upward the cost of the bond referendum by a subsequent resolution, could have simply told the voters in writing and later at the September meeting of the uncertainties raised by the information received from Mr Jordan, or could perhaps have taken some other course. It cannot be presumed that they would have chosen to do absolutely nothing, to simply sit on the information and deal with it after the referendum. However, as discussed above, the Board was not advised of the increases. When Mr. Sandler raised the question of how to deal with the cost issue in the *Bulletin*, Dr. Horowitz, relying, according to his testimony, upon the "lack of hard information," directed the use of the $905,000 figure, which he saw as the only "hard" figure

available. Why this was any "harder" a figure, any more of a reliable estimate, than the architect's own more current numbers, is unclear. Suffice it to say that by using the $905,000 amount, without reference of any kind to the already identified likelihood of substantial additional expenses, the *Bulletin* risked creating the impression with the voters that that figure, or at least one very close thereto, was the cost for Bradley Gardens. At the time of distribution of this very *Bulletin*, after he already had been told by the architect that the estimates had grown to at least double the original $905,000, Dr. Horowitz was being told that the estimate was not nearly $2.5 million. While it is not clear that the *Bulletin* could have been easily stopped from distribution by the time he saw the draft Project Cost Estimate Form, allowing Mr. Sandler to place the unexplained, unqualified $905,000 in the *Bulletin* was an action which had the potential for misleading voters in their understanding of the financial package and of its constituent parts. While this is not to say that any voters were in fact "interfered" with, the proof of such definite interference is not crucial. The issue is the likelihood that the conduct created a situation which had the reasonable potential for such interference. Here, although it is perhaps true that all dollar figures mentioned in the *Bulletin*, except for the total of $24.5 million, should have been qualified as tentative, where the Superintendent had information from the architect, a seemingly well-versed and reliable source, that the figure was now grossly off, the direction to Mr. Sandler to simply use the original and now highly questionable estimate fits the category of an action that was likely to interfere with the proper and informed consideration of the voters on the issue of significant public concern.

I **CONCLUDE** that the Board has established by the preponderance of the credible evidence that Dr. Horowitz' direction to Mr. Sandler was, in the circumstances, an act of misconduct.

Charge XIII is related to the information which Dr. Horowitz was receiving that not all of the projects which were to be funded by the bond issue were economically or architecturally feasible as originally proposed by the EFC. The Board contends that with this knowledge available to him the Superintendent nevertheless advised Mr. Sandler that the *Board Bulletin* should reflect the idea that all of the originally proposed projects would be funded with monies from the referendum. However, as the Charge states, "the Superintendent knew that the plans sent to the State did not correspond to what the voters were told."

The evidence clearly shows that by the time that the *Board Bulletin* was in the final drafting stage, Dr. Horowitz was aware of questions having been raised as to the feasibility of some of the media center and other projects. Nothing about the doubts with regard to these projects was reflected in the *Board Bulletin*, nor was there any actual communication to the Board of these matters in this time period. Mr. Sandler was not instructed to place any caveats, any qualifications or any words of caution in the *Bulletin*. In this situation, once more the conduct of Superintendent Horowitz was lacking in candor. As the public meetings proceeded, the Board presented the voters, and perhaps more directly those voters who were in some way more directly interested in the particular elementary schools, with the continued picture of improvements and solutions to be performed in accord with the recommendations of the EFC, as later adopted by the full Board. Since he at this point had serious doubts as to whether this was a true picture of the likely realities, and since that information was coming from the professionals working on the projects for the involved architects, Dr. Horowitz had good reason and a strong basis for revealing the concerns to the full Board and, either through it or at its direction, to those who were so soon to vote on the referendum. His failure to do so was certainly conduct which had a serious potential for deceiving both the Board and the voters. Whether it in fact did so is secondary. The conduct was unbecoming one in whose person and position great public trust was placed.

I **CONCLUDE** that the Board has proven Count XIII by a preponderance of the credible evidence.

THE ADDITIONAL CHARGES

The several charges which are unrelated to the referendum and the Bradley Gardens project can be readily disposed of. Unlike the previously considered matters, I see little that needs extended comment.

Charge XVI relates to the testimony of witnesses regarding Dr. Horowitz' testimony during the election contest before Judge McKeown. The Board's charge assumes that Dr. Horowitz testified "contrary to fact" and the allegedly incorrect testimony was in regard to the question of when he saw the rolls containing the write-in votes. Interestingly, the body of this charge, while claiming that the

testimony was "contrary to fact" and that the presentation of such was conduct unbecoming, does not state that the incorrect evidence resulted from knowingly false statements. Certainly, if Dr. Horowitz misstated the facts as to any significant matters, but did so due to a failure of memory, confusion, honest mistake or for other legitimate reasons, it could not rationally be argued that his conduct was worthy of any finding that he had done something sanctionable. The charge itself suggests such an unreasonable argument. In the event, I **FIND** no evidence, much less any persuasive evidence, that Dr. Horowitz engaged in perjurious testimony before Judge McKeown. The testimony of Jean Moll and Mr. Bareis does not support a conclusion that the Superintendent lied. While they did see him at the school and it appears that he was there at a time when the rolls were being worked on, to jump from these findings to one that he purposely and knowingly committed a criminal offense, to wit, perjury, is not a jump which this very limited evidence will support. I **FIND** that Dr. Horowitz' testimony as to the recollections he had as to when he saw the rolls, while perhaps mistaken, was nevertheless his best, honest recall, not a willful misstatement of fact. In fact, his responses to the questions concerning his prior experience of seeing these sheets or similar ones, prior to his seeing them in Mrs. Long's office, were statements couched in terms of his "belief" and his being unable to say for "certain" that he had not previously seen a sheet "in my entire life experience." While certainly these responses could have been knowingly false recitations, the evidence here is simply too limited and speculative to allow for a finding that perjurious evidence was offered. Therefore, if Charge XVI was meant to relate to such knowing misrepresentations, as I suspect it surely was, the charge must be **DISMISSED**.[22]

The nineteenth charge arises from Mr. Irving Putter's revelations of the incident at the meeting on March 18 and the subsequent confrontation in the hallway. Dr. Horowitz admits that during this very heated post-meeting incident he "lost it." He admits that he called Mr. Putter a demagogue, but denies the stronger epithets and vulgarities related by Mr. Putter. This gentleman, who sought at the Board meeting to exercise his right to comment on the Board and the Superintendent's performance, paints a somewhat darker picture, complete with physical and verbal threats.

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22 As such, Dr. Horowitz' defense of laches need not be considered.

I **FIND** that Mr. Putter saw Dr. Horowitz in the hallway in conversation with a reporter. He decided to intervene in this conversation because of his belief that Dr. Horowitz was attempting to negate Mr. Putter's comments regarding the Superintendent. At this point, Dr. Horowitz was quite incensed at Mr. Putter for what Dr. Horowitz viewed as an uncalled for and inappropriate personal attack during the Board meeting. Reacting to this anger and the appearance to him that Mr. Putter, by intervening in his conversation with Mr. Strunsky, was carrying on his assault upon his character, Dr. Horowitz, who is a rather large figure, speaking in a voice which I **FIND** is characteristically loud, and with gesticulations of hand and arm, vented a good measure of verbal "reaction" to Mr. Putter. Although Mr. Putter attempted to characterize a portion of this as an assault and perhaps even as a battery about to happen, I do not find that the Superintendent made any actual threats of a verbal or a physical nature upon Mr. Putter. The arm motions were not meant to be assaultive, but Mr. Putter may have viewed them as such in the heat of the moment, faced as he was by a man who was large, upset, verbally aggressive and loud.

The Board contends that Dr. Horowitz' conduct, his use of abusive language and his threat toward Mr. Putter were unprofessional and therefore conduct unbecoming his position. Without at this point considering just how serious the consequences for his actions should be, I **CONCLUDE** that on the evening in question Dr. Horowitz, as he himself candidly admitted, "lost it." His loud, aggressive and at least to some degree abusive response to an admittedly disturbing attack cannot be condoned. As Superintendent, Dr. Horowitz is a prominent public figure, one whose actions in office are generally fair game for comment, critical and otherwise, by citizens. No doubt some of this criticism is unfair, even highly so. Mr. Putter's particular remarks at the Board meeting were strong and personal. They attacked the Superintendent in a way that suggested flaws in his character and doubts as to his fitness. These were the type of remarks that could well rile their object. Regardless, one in such a position must temper his or her reaction, must put aside the temptation to respond in kind. While Dr. Horowitz is, like all of us, only human, and can be expected to take strong exception to unfair, even vicious attacks upon him, he must, due to the role he plays and the position he holds, refrain from either verbal or physical manifestations of uncontrolled reactions. Dr. Horowitz failed to do so on the night of March 18. This conduct was unbecoming. The charge is sustained.

The last of the charges, XX, alleges conduct unbecoming in connection with the October 31, 1991 incident described by Mr. Tronolone where he contends that Dr. Horowitz' loud yelling in the outer hallway interfered with the Board's ongoing session and forced him, as the Board President, to ask that the doors to the meeting room be closed. Mr. Tronolone asserted that this was the only time such an action was necessary during his time on the Board, a claim disputed by others.

Having heard the witnesses on this issue, I **FIND** that Dr. Horowitz was upset that night at the Board's actions in respect to the ongoing, and then quite active, tenure dispute. He did speak in loud tones in the hall and could be heard in the meeting room. Although Mr. Tronolone did find the noise disturbing, I **FIND** that this was not the only time noise outside the meeting room required that the doors be closed. As for the contention that Dr. Horowitz' loudness that evening was unprofessional, reflected "adversely on the district" and was therefore unbecoming conduct, I **CONCLUDE** that this makes far too much of the event, and that the circumstances, even as described by Mr. Tronolone, do not rise to a level sufficient to permit a finding of misconduct. For this reason, Charge XX is **DISMISSED**.

SUMMARY OF CONCLUSIONS AS TO THE TENURE CHARGES

Based upon the discussions, findings and conclusions related above, I **CONCLUDE** that the Board has successfully established by a preponderance of the credible evidence that Dr. Horowitz engaged in conduct unbecoming his position as a public servant in regard to several of the tenure charges. These are Charges I, V, VI, VIII, IX, X, XI, XII, XIII, and XIX. The Board has failed to prove Charges VIB, VII, XVI, and XX. Charges II, III, IV, XIV, XV, XVII and XVIII were previously dismissed.

WHAT IS THE APPROPRIATE SANCTION FOR THE PROVEN VIOLATIONS?

Tenure is granted to certain public employees at least partly as a protection for them against the possibility of job loss resulting from the whims and fancies of appointing authorities, whose makeup often changes. The strong protection which tenured employees are shielded with makes it very difficult for a public employer to discipline and even harder for one to remove, a tenured employee. The evidence needed to justify the imposition of a sanction against a tenured individual must therefore reflect the serious nature of that person's

wrongdoing. Minor infractions are not the stuff which should lend itself to the major step of imposing a serious penalty on a tenured employee. Removal of tenure is the ultimate sanction for such an individual, and therefore, where the employer seeks removal, major defalcations of the employee's responsibilities and duties need be proven.

A superintendent of schools serves as the chief executive officer of a school district. The superintendent is responsible by statute for the "general supervision over the schools of the district . . . under rules and regulations prescribed by the state board . . . and he shall have such other powers and perform such other duties as may be prescribed by the board . . . employing him." *N.J.S.A.* 18A:17-20.

The tenured superintendent may continue to serve "during good behavior and efficiency." *N.J.S.A.* 18A:6-10. This statute establishes that a tenured employee who engages in conduct manifesting "inefficiency, incapacity, unbecoming conduct, or other just cause . . ." may be "dismissed or reduced in compensation."

In deciding on the appropriate penalty, this judge, and ultimately the Commissioner, must perform a "delicate balancing act" (as the test is described in *In The Matter of the Tenure Hearing of David Fulcomer*, 93 *N.J. Super.* 404 (App. Div. 1967)) and must also be aware of the obviously strained relationships between the majority of the Board which voted to certify the tenure charges in January and the Superintendent. As the State Board of Education noted in *In The Matter of the Tenure Hearing of Dr. Frank J. Napoli,* 1988 *S.L.D.* 284 it is necessary to "separate out what may be the actual shortcomings in respondent's performance and what may be the result of deplorable relations between him and the Board. *Napoli, supra.,* at 291. The balancing test, as described in *Fulcomer*, (which was a case involving a teacher) requires consideration of the

> . . . findings as to the nature and gravity of the offenses under all the circumstances involved, any evidence as to provocation, extenuation or aggravation, and should take into consideration any harm or injurious effect which the teacher's conduct may have had on the maintenance of discipline and the proper administration of the school system.
> *In Re Fulcomer, supra.,* at 422.

The *Fulcomer* test is fully applicable to this case, for the fact that Dr. Horowitz holds a different position from that of a teacher is one which does not change the

fundamental factors at work in the test. However, the different position which he holds does add a factor, for as the State Board made quite clear in *Napoli*,

> the standard of behavior required of teachers is stringent, the standard for high administrative personnel must be even more stringent. *Napoli, supra.*, at 288.

In the present case, the findings and conclusions reached by this judge establish that Dr. Richard Horowitz engaged in a series of actions, or in some instances inactions, which manifested a lack of appropriate professional judgment, a lack of communication with the Board of Education, a lack of candor with the Board and with the public, a failure to respond to the demands of his office, a failure to honor the meaning and the spirit of administrative regulations governing aspects of his job and the activities in which he became involved in that position, and conduct which, if not in fact criminal, was in some instances sufficiently questionable so as to raise concern as to his capacity to perform his job within the confines of legality. In sum, these actions and this conduct demonstrate that Dr. Horowitz engaged in misconduct, in activities which were unbecoming a public official holding a high position of trust and responsibility in a major school system of this State. For these actions, Dr. Horowitz most definitely should be disciplined.

Of course, in this case, the school board has already imposed discipline on the Superintendent. As I previously noted, the fact that equitable estoppel does not bar further discipline does not automatically imply that the outcome of this case must result in some greater penalty. Yet, after a full review of the total picture in the context of the *Fulcomer* test, including an analysis of Dr. Horowitz' conduct and a consideration of the function within the district which he fulfills, I am convinced that the previous sanction of a reprimand and a withholding of increment is insufficient. Instead, I **CONCLUDE** that loss of tenure is the necessary and appropriate result.

At bottom, the primary cause of Dr. Horowitz' difficulties no doubt lies in an exercise of poor judgment. In fulfilling the important responsibilities of his position, the Superintendent, faced with the growing knowledge that the Bradley Gardens project was a more complex and expensive affair than the Board and its committees had thought, apparently did not understand that the escalation of estimated cost was so much greater than the mere inflationary rise that might

otherwise have been normally expected, that it was absolutely imperative that he take clear and affirmative steps to advise his full board and to seek their input and advice, their direction and counsel as to the manner in which they and he should or might proceed in regard to this aspect of the referendum. It was even more imperative that he do so because, even beyond the normal need to keep the Board abreast of significant happenings, particularly those of a financial nature, in the circumstances of this Board and this referendum there existed a heightened need to assure that the Board possessed the most complete, most up to date and most accurate information available, so as to allow it to both understand on its own and to be able to convey to the public, as its collective judgment deemed appropriate and necessary, truthful and accurate information regarding the referendum. Given the experience of the 1989 referendum and the criticism to which the Board was subjected thereafter, anything which prevented the Board from acting in this manner was a serious interference with its responsibilities. The very concerns and problems which had surfaced in 1989 were implicated again in the determinations of the Superintendent not to openly and fully discuss the information that he had with the Board in a timely fashion. That some of this information was "soft" was irrelevant. This Board, particularly under the circumstances, needed and deserved the opportunity to judge for itself what this information meant. Thus, Dr. Horowitz, who served in a fiduciary capacity and therefore had a very substantial responsibility to both the Board and the public, breached that duty under circumstances and against a backdrop of prior events which only served to exacerbate the nature of his deficiencies.

In exercising his authority as Superintendent in respect to how to proceed, Dr. Horowitz demonstrated a serious lack of professional judgment. His failings went well beyond the important, but perhaps less pejorative, "lack of communication" which was the concern addressed by the Board in its reprimand of April, 1991. Beyond this lack of judgment, Dr. Horowitz demonstrated that he was not sufficiently attuned to the vital need to keep faith with the Board of Education and the public. Trust is a key element in any employment relationship, trust is vital in the relationship between public officials and the public, trust is paramount in the relationship of a school superintendent who is the chief operating officer and professional employee of a school district, and the Board of Education, which generally consists of lay persons serving in a part-time public service capacity,

persons who thus must place extreme reliance upon the ability, the efficiency, the judgment and the faithfulness of the superintendent.

While certainly there are circumstances where the public's need to know of each and every significant development regarding the schools may be outweighed by competing considerations for at least a period of time, in the context of this proceeding, the public was ill served by the practices and the decisions made by this Superintendent[23]. By his actions, he broke faith with those to whom he stood in a fiduciary relationship.

The reasons for imposing a penalty which goes beyond that of the reprimand and withholding of increment are also related to other conclusions reached herein concerning the problems with Dr. Horowitz' performance. His refusal to seriously and directly address the concerns of Dr. Mazurak, his refusal to show due concern about the nature of the documents which were to be filed by Mr. Jordan, his failure to advise the Board after he suggested to Pablo Jordan that he would do so after Dr. Stephenson passed his vote, his long term failure to deal openly and forthrightly with the information available to him from July, 1990 onward into September and even beyond into March, 1991 about the very likely significant to even gross increases in the cost estimate, raise serious questions as to his capacity to properly fill the role of Superintendent of Schools. While of course Dr. Horowitz has done well in this role in some of its aspects, the findings and conclusions here demonstrate that his ability to rise to the "stringent" level of behavior demanded of a Superintendent must be doubted.

As a result of Dr. Horowitz' actions, the Board of Education reasonably determined that it had to appoint a Task Force, and then an independent law firm, to conduct inquiries into what had happened in regards to the Bradley Gardens proposal.[24] The Superintendent's conduct has created a difficult and admittedly

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23 That some present or former members of the Board may have also erred is a matter of concern. The voters of the district have had, or will in the future have, the opportunity to address the continued fitness of members to sit on the Board.

24 Despite the continuing protestations of the minority members of the Board, I **FIND** no evidence to suggest that these determinations arose out of a "witch hunt," or that they were conducted in any sense to "get" Dr. Horowitz.

divisive issue for the Board, and this controversy has spilled over to the public. The conduct opened up the Board to the substantial risk that the previous concern as to the honesty of its approach to the public in regard to referenda would once again arise. The conduct has lead the Board to expend substantial sums of money in order to see if its administrative operation was in order, and if not, why not. The conduct has, in short, led to a serious disruption of the orderly and smooth operation of this school district.

Despite the fact that I am cognizant that a new majority now prevails on the Board which may have some different leanings with respect to Dr. Horowitz than the Board which voted to certify the tenure charges, I am convinced that his conduct as proven here demands additional, and very serious, treatment. While the findings here do not suggest to me in the slightest that Dr. Horowitz is a "bad" individual or that his character is in any way "tainted," nevertheless, the evidence demonstrates ample just cause for removal of his tenure as Superintendent of Schools.

ORDER

It is **HEREBY ORDERED** that the tenure held by Dr. Richard C. Horowitz as Superintendent of Schools be **REVOKED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

December 18, 1992
Date

JEFF S. MASIN, ALJ

Receipt Acknowledged:

Dec. 18, 1992
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 18 1992
Date

OFFICE OF ADMINISTRATIVE LAW

INDEX OF EXHIBITS ADMITTED INTO EVIDENCE

Exhibit	Date	Description
J-1	09/18/90	Video Tape of "Referendum '190" Presentation
PBG-1	02/16/89	Editorial "Plan is Fiscally 'Irresponsible'", *Messenger Gazette*
PBG-2	06/26/90	Introduction Statement by Presiding Officer, Bridgewater-Raritan Board of Education ("Board")
PBG-3	07/18/90	Letter to the Board from Linda Andreychik, Jordan & Pease Architects, with enclosed Appendix No. 3 to the standard form of agreement
PBG-4	08/02/90	Letter from Lisa C. Soulos of Vitetta Architects to Kenneth C. Stevenson, Director Bureau of Facility Planning Services, N.J. Department of Education ("DOE") with attached certification letter under signatures of Richard C. Horowitz and Clara L. Navarrete-
PBG-5	08/14/90	Letter to Dr. Horowitz from Pablo L. Jordan
PBG-6	11/30/90	Letter to High School Design Committee from Ray Kovonuk
PBG-7	12/11/90	Construction Timeline/Critical Events Garretson Road - Bradley Gardens
PBG-8	04/19/91	Letter to Dr. Horowitz from William Tronolone
PBG-9	04/08/91	Report on April 8, 1991 Building and Grounds/Transportation Meeting
PBG-10	04/25/91	Referendum Task Force announcement signed by William Tronolone
PBG-12	05/02/91	Editorial "Back to Business", *Somerset Messenger-Gazette*
PBG-13	05/02/91	Editorial "School Vote Fallout", *The Courier-News*
PBG-14	05/07/91	Letter to Daniel C. Soriano, Jr., from Raymond R. Trombadore
PBG-15	06/04/91	Letter to William Tronolone from Raymond R. Trombadore
PBG-16	06/11/91	Letter to Daniel C. Soriano, Jr., Esq. from Philip E. Stern, Esq.
PBG-17	07/02/91	Release by Jordan & Pease

INDEX OF EXHIBITS ADMITTED INTO EVIDENCE

Exhibit	Date	Description
PBG-18	07/03/91	Memorandum to Daniel Soriano from James P. Cardaneo
PBG-19	07/09/91	Letter to Philip E. Stern, from Daniel C. Soriano, Jr.
PBG-20	07/23/91	Letter to Daniel C. Soriano, Jr. from Philip E. Stern
PBG-21	07/30/91	Letter to Richard C. Horowitz from Lisa C. Soulos
PBG-22	08/20/91	Letter to Daniel C. Soriano, Jr. from Philip E. Stern
PBG-23	09/05/91	Letter to William Tronolone from Howard D. Cohen and attached Statements dated July 27, 1991 and August 27, 1991
PBG-24	09/12/91	Letter to Thomas B. Lewis from Philip E. Stern
PBG-25	Undated	Television Presentation - "Referendum 90" outline
PBG-26	10/04/91	Response to the Stark & Stark reports from Dr. Horowitz
PBG-27	10/04/91	Letter and enclosed response to the Stark & Stark September 13 and 18, 1991 reports, sent to Respondent from Petitioner
PBG-28	10/10/91	Article *The Courier-News* entitled "School Additions Sought"
PBG-30	10/31/91	Resolution of the Bridgewater-Raritan Board of Education
PBG-31	11/01/91	Letter from Dr. Horowitz to the Board
PBG-32	11/01/91	Press Release from the Office of the Superintendent
PBG-34	11/11/91	Editorial in *The Courier-News* entitled "Halt the Vendetta"
PBG-35	12/02/91	Letter to Dr. Richard C. Horowitz from William Tronolone, with attached documents
PBG-36	12/02/91	Memorandum to the Board from Richard C. Horowitz and attached paper entitled "Community Opposition - A Personal Analysis" dated November 26, 1991
PBG-37	12/05/91	Letter to William Tronolone from Dr. Richard C. Horowitz
PBG-39	01/27/92	Certification of Probable Cause

INDEX OF EXHIBITS ADMITTED INTO EVIDENCE

Exhibit	Date	Description
PBG-40	02/09/92	Article in *The Sunday Star-Ledger* entitled "Teenagers Appeal for a Place to Meet"
PBG-41	02/13/92	Article in *The Courier-News* entitled "Committee's Extras Could Send B-R Building Costs $1.2M Higher"
PBG-42	02/17/92	Editorial in *The Sunday-Courier News* entitled "Smoldering Issue"
PBG-44	05/23/91	Letter to William Tronolone from Dr. Horowitz
PBG-45	05/28/91	Letter to Dr. Horowitz from William Tronolone
PBG-47	Undated	Bradley Gardens Elementary School Facilities Evaluation prepared by Vitetta Group
PBG-50	04/22/91	Memorandum to Barbara Fisher from Dr. Horowitz
PBG-51	9/18/91	Stark & Stark Investigation Report
PBG-52	2/11/92	Board Minority Report to Commissioner of Education
PBG-55	12/17/90	Report on Board Committee Meeting
PBG-56	12/18/90	Minutes reporting on December 17, 1990 meeting
PBG-57	4/04/90	Minutes of Steering Committee
PBG-59	8/02/91	Memorandum to the Board for Dr. Horowitz
PBG-63	7/30/91	Letter to the Board from Lisa C. Soulos of Vitetta Group
PBG-64	2/11/92	Vitetta data regarding High School bids
PBG-65	2/14/91	Minutes of Special Meeting of the Board
PBG-66	8/07/91	Transcript of the Deposition of Dr. Joseph B. McGarry
P-1	12/14/89	Board Bylaws
P-2	01/16/92	Investigative Memorandum from Dr. Horowitz to the Board

INDEX OF EXHIBITS ADMITTED INTO EVIDENCE

Exhibit	Date	Description
P-3	01/23/92	Memorandum from Clara L. Navarrete to the Board
RBG-4	04/20/89	Budget Highlights"
RBG-5	06/02/89	Decision of Commissioner IMO *The 1989-90 School Budget for the Bridgewater-Raritan School District, Somerset County*
RBG-7	06/16/89	Letter to Mrs. Joanne Failing from Bernard F. Steinfelt
RBG-8	09/25/89	Letter to William Tronolone from the Board Facilities Committee
RBG-10	06/05/90	Final Report of Board Elementary Facilities Committee (EFC)
RBG-10A	08/04/90	Updated EFC Report
RBG-11	06/14/90	Additions & Alterations to the Bradley Gardens Elementary School, submitted to the Board by Jordan & Pease
RBG-12	06/18/90	Letter to the Board from Pablo L. Jordan
RBG-13	06/19/90	Minutes of a Work Session of the Board
RBG-14	6/19/90	Executive Summary Report of Board Steering Committee
RBG-15	06/25/90	Minutes of a Special Work Session of the Board
RBG-16	06/26/90	Minutes of a Regular Meeting of the Board
RBG-17	07/05/90	Letter to Dr. Michael Macaluso under signature of Richard C. Horowitz and Clara L. Navarrete
RBG-18	08/07/90	Extract of the Minutes of a Work Session of the Board
RBG-19	08/21/90	Extract of Minutes of a Regular Meeting of the Board
RBG-20	08/21/90	Minutes of a Regular Meeting of the Board
RBG-21	Undated	Invitation by the Board to the Public to Attend the September 12 and 17 Public Information Sessions
RBG-22	Fall '90	*Board Bulletin* of the Board

INDEX OF EXHIBITS ADMITTED INTO EVIDENCE

Exhibit	Date	Description
RBG-23	09/12/90	Letter to Dr. Horowitz from Pablo L. Jordan, with attached draft Project Cost Estimate Form
RBG-24	09/12/90	Minutes of a Special Meeting of the Board
RBG-26	09/12/90	Letter to the Bureau of Facilities Planning from Michael Sarkissian, Bridgewater Township Planner
RBG-27	Undated	Handwritten Memo to Mr. Jordan from John Stephenson
RBG-28	09/13/90	Letter to the Office of Equal Education Opportunity from Dr. Horowitz, with Questionnaire attached
RBG-29	09/17/90	Minutes of a Special Meeting of the Board
RBG-31	09/20/90	Letter to the DOE, c/o Dr. Michael D. Macaluso under signatures for Dr. Horowitz and Mrs. Navarrete, with Bradley Gardens School Project Education Specifications
RBG-32	09/20/90	Letter to the Office of the County Superintendent of Schools from Pablo L. Jordan
RBG-33	09/20/90	Completed Project Cost Estimate Form
RBG-34	09/20/90	Letter to Dr. Richard C. Horowitz from Pablo L. Jordan, with attached Schematic Plan Submission documents
RBG-35	09/20/90	Letter to the Bureau of Facilities Planning from Pablo L. Jordan
RBG-36	09/20/90	Letter to the Bureau of Facilities Planning under signature of Dr. Horowitz and Mrs. Navarrete
RBG-37	09/25/90	Schematic Plan approval to Jordan & Pease from Carl A. Letterie, Director of the Bureau of Facilities Planning
RBG-38A	09/27/90	Article by Steve Stronsky, *Messenger Gazette*
RBG-40	10/17/90	Letter to Dr. Mazurak from Linda Andreychik, with billing voucher attached
RBG-41	12/03/90	Facsimile sheet and letter to Dr. Mazurak from Jordan & Pease

INDEX OF EXHIBITS ADMITTED INTO EVIDENCE

Exhibit	Date	Description
RBG-42	12/14/90	Memo to the Board from Dr. McGarry
RBG-43	03/18/91	Memo to Mrs. Navarrete from Dr. Horowitz, with attached Project Cost Estimate Form
RBG-46	04/12/91	Memorandum to the Board from Dr. Horowitz
RBG-47	04/29/91	Chronology of relevant events in the development of the Bradley Gardens School additions and alterations project by Pablo Jordan
RBG-48	07/02/91	Release by Jordan & Pease to the Board
RBG-49	08/06/91	Facsimile Cover Sheet to Tom Lewis from Raymond Trombadore, with Pablo Jordan's chronology of events
RBG-50	09/13/91	Report from Stark & Stark
RBG-51	10/10/91	Statement of Evidence Supporting Tenure Charges by Clara Navarrete
RBG-52	10/11/91	Tenure charges by Mrs. Navarrete against Dr. Horowitz
RBG-53	10/28/91	Letter to Board Members from Dr. Horowitz
RBG-54	10/28/91	Response of Dr. Horowitz to the October 4, 1991 tenure charges
RBG-55	10/30/91	Letter to William Tronolone from Clara L. Navarrete
RBG-56	10/31/91	Board Report on irregularities surrounding 1990 Bond Referendum
RBG-57	11/13/91	Letter to the Board from Andrea L. Kahn
RBG-59	01/08/92	Stmt. of Evidence Supporting Tenure Charges by Dr. Ryan
RBG-60	01/07/92	Memo to James Cardaneo from Dr. Ryan
RBG-61	01/24/92	Letter to James Cardaneo from Philip E. Stern, Esq. (Response to tenure charges)
RBG-62	01/31/92	Memorandum to the Members of the Board of Education from D. Soriano, Esq. regarding Jordan & Pease

RBG-63	04/12/91	RICE Notice to Dr. Horowitz from William Tronolone
RBG-64	04/22/91	Memo to J. DeCicco from Dr. Horowitz regarding Task Force
RBG-65	05/28/91	Minutes of the meeting of the Board
RBG-66	06/25/91	Minutes of the meeting of the Board
RBG-67	06/18/91	Minutes of the closed session of the Board
RBG-68	06/25/92	Task Force presentation regarding Bradley Gardens
RBG-69	09/03/91	Memo to P. Dante, Maintenance Supervisor, from James Cardaneo regarding September 3, 1991 meeting
RBG-70	10/31/91	Rebuttal Memo from P. Dante
RBG-71	11/06/91	Memo to P. Dante from James Cardaneo regarding P. Dante's Rebuttal Memo dated October 31, 1991
RBG-72	12/16/91	Letter to James Cardaneo from Glenn Walker
RBG-73	Undated	Handwritten "investigation" notes of Dr. Horowitz
RBG-74	Undated	Attendance records for Cardaneo, Cochran, Dante, Grenci, Guide, Horowitz and Walker for the period December 16, 1991 through January 19, 1992
RBG-75	Undated	Employee attendance chart for the period July, 1991 through June, 1992
RBG-76	07/31/92	Memorandum to Pablo Jordan from Dr. Horowitz regarding Bradley Gardens Ed. Specs Data
RBG-77	08/21/91	Pablo Jordan answers to Stark & Stark Interrogatories
RBG-78	12/06/90	Facsimile cover sheet and letter to the Board from Pablo Jordan
RBG-79	01/02/91	Letter to the State of New Jersey from Roy V. Heitmann of Jordan & Pease regarding Bradley Gardens School
RBG-80	01/07/91	Letter to Jordan & Pease from Carl A. Letterie, Director, Bureau of Facilities Planning, DOE
RBG-81	03/26/91	Letter to the Board from Pablo Jordan regarding Bradley Gardens

RBG-82	04/22/91	Letter to Jordan & Pease from William Tronolone regarding the Bradley Gardens School Task Force
RBG-83	05/01/91	Letter to J. DeCicco from Pablo Jordan regard Bradley Gardens School Task Force
RBG-84	02/07/91	Letter to Jordan & Pease from Peter Mazurak with Bradley Gardens contract for additions/alterations
RBG-85	03/20/92	Report on Board Committee Meeting
RBG-86	08/17/90	Memo to Board Finance Committee from Dr. Horowitz
RBG-87	07/31/91	Deposition transcript of Dr. Peter Mazurak
RBG-88	Undated	District Organizational Chart and Board Policies
RBG-89	01/07/92	Tenure charge packet
RBG-90	01/27/92	Board Certification of the January 8, 1992 tenure charges
RBG-91	02/14/90 to 05/29/90	Minutes of the Elementary Facilities Committee
RBG-92	03/05/91	District Report on Surplus
RBG-93	03/12/91	Transfers from surplus to current expense budget
RBG-94	02/29/89	Current expense surplus as of June 30, 1989
RBG-95	01/14/89	Current expense surplus as of 11/14/89
RBG-96	01/10/89	Current expense surplus as of 01/10/89
RBG-97	02/18/90	Transcript from tape recording of Board meeting
RBG-98	03/12/91	Minutes of the Board Work Session
RBG-99	10/11/90	Transcript of Administrative Law hearing concerning April 4, 1989 election charge
RBG-100	07/21/89	Letter to William Tronolone from Robert A. Strauss for P.R.O.U.D.
RBG-101	07/28/89	Letter to William Tronolone from Robert A. Strauss

RBG-102	Undated	Board and Administration Statement concerning P.R.O.U.D. settlement
RBG-103	02/18/89	P.R.O.U.D. Petition
RBG-104	09/90	Public Information Session Format
RBG-105	Undated	Vitetta square footage from Bradley Gardens
RBG-106	04/25/90	Excerpts of 1990-91 Board Final Budget
RBG-107	07/31/90	Memorandum from Dr. Horowitz to Pablo Jordan
RBG-108	08/29/90	Memorandum to Dr. Horowitz from John Petronella
RBG-109	11/09/90	Excerpts of proposal from Wagner Hohns to the Board
RBG-110	05/01/91	Tapes of Task Force Interview of Dr. Horowitz
RBG-111	05/01/91	Transcript of Task Force Interview of Dr. Horowitz (admitted for reference purposes only)
RBG-112	Undated	Excerpts of Audit for 1989-90 school year.
R-2	01/07/92	Statement from Albert Bareis and Mrs. Jane Moll
J-2		Exhibit under seal by Order of December 18, 1992

APPENDIX A

TRANSCRIPT OF ORAL DECISION

It had to do with the individual conduct of the teaching staff member vis-a-vis two Board members. Personal interest.

This case -- we have some charges. This case has to do with a $23.4 million bond issue, of which one major component had been I think tripled or almost tripled with all the attendant facts.

It didn't deal with interaction between Dr. Horowitz and Mr. Tronolone and Mrs. Navarrete. It had to do with Mr. or Dr. Horowitz's conduct vis-a-vis that public issue. That's what's involved here. And you can't disqualify the messenger. That's what Mr. Stern is attempting to do. It's not a personal interest.

THE COURT: All right. This case arose when the Board of Education certified tenure charges to the Commissioner of Education in early February of 1982. (Sic) And at that time Counsel, on behalf of Dr. Horowitz raised an issue as to whether certain Board members need be disqualified from voting or should have been disqualified from voting because of alleged taints upon their ability to fairly and impartially perform their duties.

And, of course, we had a proceeding with regard to an application for emergent relief and at that time I indicated certain views with respect to these issues.

But, of course, the standard that applied at that

time was a different standard than applies at this time. And, therefore, it is essential that I re-visit the issue completely with respect to whether or not the allegations made here do raise a sufficient specter of a taint upon the ability of any one or more Board members to vote and to consider the charge fairly and impartially, such that that Board member or Board members should be disqualified from voting.

And we approach the task of determining whether or not there is a tainted vote with some guidance from the courts and from the Commissioner, but perhaps because of the nature of what we're dealing with, the disqualification and the issue of when one is so affected by some interest as to be disqualified because that's such a difficult issue to pin down, the guidance that we have is general in nature and then it's specific to particular case facts.

And that means that, as has been suggested, it's necessary to apply these rather general concepts to the specific facts of each case. And in most instances there is no, as it's been referred to, no bright line test as to when one is disqualified or when one is not.

Now, there are situations where there is something close to a bright line test. And those arise when there are clear indications of financial conflicts of interest

or when there are specific -- what we can perhaps call familial or relation conflicts where it's clear that certain individuals cannot expect to fairly and impartially deal with matters involving, for instance, members of their family or something of -- or certain other individuals with whom they have a close personal relationship.

And in those situations we sort of have a bright line test that says in those cases the public official should not be involved and should step aside.

But in this case we deal with a more difficult and hard to define set of interests where the matter is not financial and the matter is not familial and the matter is not of the almost quasi familial relationship.

We deal here with the relationships between members of a public body and an individual who they have an infinite relationship with in the context of the professional positions that they hold as members of the Board and as Superintendent of Schools, the chief executive officer.

And in these situations when -- in these situations the judgment as to when a tainting or disqualifying factor exists is much more elusive.

If we look at the case law we indicate -- we find that generally the question that must be looked at is

whether -- and this is quoting from the Van Italie case at 28 New Jersey, in this case at 268, -- the question will always be whether the circumstances could reasonably be interpreted to show that they have the likely capacity to tempt the official to depart from his sworn public duty.

The Court in Van Italie recognized the fact that local governments would be seriously handicapped if every possible interest, no matter how remote and speculative, would serve as a disqualification of an official, pointing out that if that were the case, it would discourage capable men and women from holding public office.

And the Court went on to note that while the Courts have to be very careful in scrutinizing certain circumstances with great care and condemning anything which "indicates the likelihood of corruption or favoritism" when the Courts review these situations they have to be mindful that abrogating a municipal action at the suggestion that some remote and nebulous interest is present would be to unjustifiably deprive a municipality in many important instances of the services of its duly elected or appointed officials, the determinations of municipal officials should not be approached with a general feeling of suspicion, for as Justice Holmes has said "Universal distrust creates universal incompetency".

So we note that -- well, the Courts have to be

careful and, of course, all of these things apply equally to the Commissioner and to Administrative Law Judges sitting for the Commissioner in these matters and deal with -- and to all public bodies as well as municipalities.

We have to be careful in balancing the interests, that we are careful to assure that those situations which rise to a level in which there is a reasonable likelihood of corruption or favoritism or the appearance of such are condemned, but that those in which the suspicion is raised or the allegation is raised or the accusation is made of either favoritism or the appearance of such or personal interest or the appearance of such, are not automatically used as basis for eliminating the right of duly appointed or elected public officials from performing the duties for which they have been elected or appointed.

And with that as background, we proceed to look at the situation in this case and also to look at the guidance that we have from certain other cases to see whether this situation raises the kinds of concerns that would suggest removal of one or more of the Board members from their right to have voted on these charges.

Now, there has been a lot said in this case about the Colella matter. And one has to look, of course, at the Colella matter with care to see what it was that was

condemned in Colella and then to weigh that against what we have here.

And in Colella we see that the charges in that case concern two incidents occurring in February and March of 1983 respectively in which it was alleged that Mrs. Colella -- I don't know if it's Miss or Mrs., it was Miss when she was my Algebra teacher, I don't know what it was here -- Ms. Colella had allegedly --

(End of Tape H-6076)

(Beginning of Tape H-6077)

THE COURT: (Continuing) -- sent what were described as scurrilous, anonymous notes to two Board members which alleged gross improprieties by a certain teacher and accusatory statements including some concerning family members.

The decision refers to the reactions of the two Board members involved. Board member Broncaccio (Phonetic) described as "extremely upset, disgusted and saddened" concerning the fact that the letter would be written and Board member Nestrian (Phonetic) describing himself as "very upset" and viewed the note as an attempt to "intimidate myself and my family".

Nestere went so far as to retain -- I'm sorry, Broncaccio went so far as to retain a handwriting expert to investigate or to look into this matter to see who had

written the note.

Criminal charges were filed by both of these Board members. In this context the Administrative Law Judge in reviewing the matter concluded that neither of these individuals could properly vote.

And in doing so, she pointed out that the -- she pointed to these factors: The fact that they filed criminal charges up "upon the clear belief that she" Colella, "had sent the letters", that the note to Nestere included grossly insulting references to his family and that the letter to Broncaccio made disparaging remarks concerning the conduct of her niece and sister-in-law.

These two Board members believe that Colella attached them and their families. Broncaccio advanced personal funds to hire a handwriting expert. And then Judge LaBastille goes on to state that "most assuredly their votes to charge and remove Colella had the capacity to be effected by a personal interest in the result."

And she cites the South Plainfield case at 1975 SLD 47, in which the Board member involved who voted had been specifically the individual who gave certain records to teaching staff members who were then alleged to have disseminated this confidential information; a situation where Cerille, the Board member had clearly had a clear self interest in the disciplinary actions taken because in

fact he had been engaged in the conduct which may have led to the dissemination or aided it.

So we have in the Colella case a situation where we had very specific personal familial attacks made on Board members who when faced with these went out and went to the Prosecutor, filed charges.

In the case of one, paid for part of the investigation. We have individuals who were clearly incensed by the fact that they had been and their families had been personally attacked. And that was the basis of the charges, that the letters which were sent constituted insubordination and conduct unbecoming a teaching staff member.

It was a specific response, the Board's charges, to this same specific set of facts that was causing these individuals to have these reactions and to go out and pay for investigations and file criminal charges and so forth.

And in that situation Judge LaBastille and ultimately the Commissioner agreed that these individuals had such a personal interest that they could not properly vote.

Now, with that as background, so that we are clear on what Colella actually involved, let's look at what we have in this case.

First of all, and I think we can start perhaps near the beginning. There is an allegation made that Mr.

Tronolone was tainted because he -- and of course this goes for Mrs. Navarrete too -- attended a meeting in early April with Pablo Jordan, a meeting which I think the evidence would fairly suggest was not specifically authorized by the Board in any sense. There was no Board resolution. There had not been any discussion of the full Board about the idea of going to talk to Pablo Jordan. They acted essentially on their own, although -- excuse me -- clearly they seem to have acted in a capacity as Board members.

And at that point, of course, the matter was rather new to the Board. They had only begun to learn of what had occurred, at least according to the evidence that's before me at this point. And they had a meeting. It has been suggested that the mere fact that they met with Mr. Jordan tainted their ability to fairly and impartially make judgments with respect to the question of whether to certify charges.

And we always have to remember here, although I don't think this is by any means dispositive, what we're dealing with here is not making a final determination on the charges and a determination on the punishment for the violation of those alleged tenure charges because that's not in the hands of the Board. That's in the hands of the Commissioner.

The Board acts in this matter somewhat akin to a Grand Jury. They look at the evidence and they then make some determination on whether or not there appears to be a probable cause that tenure charges have or tenure violations have occurred and they then certify the charges to the Commissioner who makes the ultimate determinations on this.

And at any rate, the allegation has been made and repeated that that meeting tainted these individuals. I've pressed Mr. Stern on a number of occasions to tell me why and, frankly, I don't think I received a satisfactory answer to why the attendance at that meeting in and of itself constituted a disqualifying act on the part of these individuals.

There is no evidence before me that would suggest that something occurred at that meeting that would have dealt a blow to the ability of these members to take a look at what occurred much later on, which was following the Stark and Stark report, task force work, the responses filed by Dr. Horowitz, the lengthy deposition he gave and so forth, there's nothing to suggest that that meeting with Pablo Jordan in early April eliminated or even affected in the slightest the individual's ability to fairly look at these potential charges later on.

Not only is there no evidence, but frankly I have no

heard really a legal theory on this to suggest why that meeting tainted them. And I find nothing about that meeting that would constitute a taint on the ability of either Mr. Tronolone or Mrs. Navarrete to have ultimately voted on these charges.

Now, as we move forward we go into what we call the investigative phase. The allegations are made with regard to the investigation that Mr. Tronolone should be disqualified because of some conduct on his part or the appearance of some conduct on his part -- and I am well aware as Counsel has pointed out, that we're dealing here with two things. We're dealing with the appearance and we're dealing with the actuality. And the appearance is really more important than the actuality because the actuality of conflict is usually a more stark situation which one can more easily identify.

But the public interest is also to be protected against the appearance of possible impropriety; the appearance of taint.

Was there something about the way Mr. Tronolone conducted himself in connection with these investigations? First the task force and then the Stark and Stark investigation, which would suggest that his ability to fairly and impartially deal with the charges was tainted.

There have been suggestions made that Mr. Tronolone

ran the investigation. He directed the investigation. He directed who should be deposed, who should be spoken to. He controlled what access and in fact the suggestion has been strongly made that he denied access to Dr. Horowitz to the Board and it's not so clear that it's suggested he denied access Dr. Horowitz to the investigators, but at any rate, the allegation is made that the investigation was really Mr. Tronolone. He was in charge. He was running it. He was directing it. In fact, he's -- it was suggested in argument that he was the one who picked Stark and Stark and the implication from all of this was that Mr. Tronolone, who according to the suggestion had it in for Dr. Horowitz and wanted to get him, used this investigation and directed this investigation as a vehicle to get Dr. Horowitz.

Well, when one looks at the evidence that's actually been presented here, we find that it's woefully short of establishing what has been suggested by Counsel in his arguments and perhaps by Dr. Horowitz in his testimony.

There is no doubt that the Board set up a task force. And there is no dispute about the fact that the individual who was elected to be the head of that task force happened to be the Principal in the school where Mrs. Tronolone was employed as a special education teacher.

That's about the extent of the suggestion that Mr.

Tronolone -- I'm sorry -- that Mr. DeCicco's role as Principal in that school created a -- even an appearance of conflict.

It would be very hard I suspect to conclude based solely on the fact that she was a teacher in the school to find that there was some conflict in Mr. Tronolone's ability to make a fair judgment ultimately on what came out of this task force investigation and the Stark and Stark investigation, which of course subsequently came into place and seems to have been a far more extensive -- whether one agrees with its outcome or not -- a far more extensive look into this than the task force investigation was. It's awfully hard to find that there was something about this relationship between Mrs. Tronolone and Mr. DeCicco that would have even remotely suggested an impact on Mr. Tronolone's ability to make fair and impartial judgments on the charges when they were finally brought up.

There was a suggestion made in Dr. Horowitz's testimony that perhaps Mr. -- perhaps there was too much time -- Mr. Tronolone spent too much time at the school and some kind of intimation here that, well, maybe something was going on. And in fact, there was some suggestion at one point that Mr. DeCicco had had some discussions about salary in connection with the position

that he was being suggested for which happened to be one involving this referendum, separate from any of the doings in this matter, and the idea that some hours later Mr. Tronolone made the same suggestion, indicating perhaps some kind of contact.

Well, that's awfully nebulous, all of that. It's so nebulous that it doesn't even arise, as I see it, to even suggesting the possibility of some favoritism or some bias or some personal interest here.

And that I think characterizes that nebulous term, perhaps characterizes the whole idea regarding the relationship of Mr. Tronolone to Mr. DeCicco. If there were evidence in this case of a more direct and clear nature that would suggest that there was something here, perhaps that could have risen to the level of establishing a concern on the part of the public as to whether fairness was occurring and, therefore, a potential for self-interest that would have been disqualifying.

But I cannot find that this evidence and the suggestions made here with respect to this relationship constitute anything even close to something that even created an appearance. And therefore, I find that the -- what we'll call the Tronolone/DeCicco relationship in and of itself was insufficient to create a taint.

Now, with respect to the allegation that Mr.

Tronolone directed this investigation, I heard that statement made several times, but if you look at the evidence to see whether there's any real indication of that, it's awfully hard to find.

Yes, Mr. Tronolone was Board President and, yes, the Board looked to him because he apparently had some contacts with the School Board Association for some suggestions with regard to the name of a law firm to become the outside investigator.

And, yes, apparently he made some suggestions, although there was some indication that he consulted with some other people as well.

And even if he had been the one who had suggested Stark and Stark and perhaps maybe he had made that suggestion and there were no other suggestions made.

The mere fact that he suggested that Stark and Stark be brought in as the independent investigator, in and of itself certainly doesn't suggest that he was going to run Stark and Stark's investigation or that he had any control over who they would talk to or how they would go about the business they were hired for.

Interestingly enough, there's been no testimony presented by either side here from anyone from Stark and Stark.

But in the absence of some real evidence that Mr.

Tronolone was able or even suggested to them or even tried to control who the attorneys for Stark and Stark decided that they should speak to and who they should depose and who they should question and what documents they should look at, it would be awfully presumptuous for me to conclude that Stark and Stark allowed itself and the attorneys who were involved in this allowed themselves to be directed by the Board President as to how they should conduct this investigation.

And while nothing is beyond the realm of possibility, on the evidence before me I certainly couldn't make the conclusion that those attorneys when brought in and given the task of looking into this allowed themselves to be co-opted in that fashion.

Now it may well be that Dr. Horowitz thinks they were because we can assume that he doesn't agree with the results of the Stark and Stark investigation -- in fact, he's made that very plain in the context of his response -- but no one here is suggesting, at least in this context in the taint situation, that anybody had to agree with what Stark and Stark did.

The question is how did they conduct the investigation and was it reasonably fair. And I say reasonably because in the context of almost any investigation someone will probably point to something and

say well, they should have done this, they should have done that, they should have spoken to this person, they didn't speak to that person, they shouldn't have done this. That's almost endemic in the fact that when there's an investigation there are often two sides and when the results come out, there are people on both side who look at that investigation and they can pick it apart and they can see faults with it and they can see things they don't even think were fair.

That doesn't mean the investigation was controlled by anybody; that it was purposely aimed at anybody or that it was engineered.

And while the allegation was made here that Mr. Tronolone conducted -- controlled it, I just don't see any evidence to that effect. The same thing really with the DeCicco situation and the task force situation. Although the suggestion is made that -- and I have to say that I think perhaps in the context of this whole thing and one has to look at the whole context, that the task force situation in and of itself can't be isolated from the fact that there was an ongoing investigation that brought in Stark and Stark and that involved a lot more in the investigation than simply the task force.

When we look at the evidence regarding the task force, once again there seems to be an absence of any real

evidence to suggest, much less to lead to a conclusion, that Mr. Tronolone actually engineered that investigation or directed it or that anybody reasonably could think that he did.

Now, merely the fact that he's the Board President and merely the fact that he has some general connection with DeCicco or that he had some general connection perhaps with Stark and Stark in the sense of having had suggested that is not sufficient to even create the appearance -- and again, we have to focus on the appearance here -- the appearance that Mr. Tronolone had some control over the investigation. If that were the case, then this would be a very easy situation. It would be almost bright-line to suggest that merely because somebody happens to suggest who the investigator should be, that automatically they control the investigation or that the public should think that they controlled it.

That would be absurd.

I see no evidence here from which I could conclude that the public had any concern or had any reason to be concerned that Mr. Tronolone was running this investigation.

Now, I have to say this in the context of something else, which I have to touch on here. And that is, although there is not a lot of evidence in this case yet

concerning -- and there may not be -- concerning the overall relationship between Dr. Horowitz and this Board, I don't have to be blind to the fact here -- and I think there's some evidence of this and in fact there has been some testimony about this -- that this relationship with the Board and its individual members has not always been a smooth one. And there's no question that some Board members and Dr. Horowitz probably, have some very strong feelings about each other.

And that's probably normal in the context of public business between a Board and a Superintendent because this is a relationship which is unlike many that are dealt with in the context of even taint proceedings where you have a Board or a Judge or a body which has a short and limited contact with an individual and there is really little if any personal knowledge of each other and they don't work together and, therefore, it's a very discreet situation.

In this situation we've got people who work with each other every day and who had a very close professional contact. And no doubt in that situation there were some strong feelings and there were perhaps some likes and dislikes; and there were perhaps some strong views on how well or how poorly Dr. Horowitz performed his duties and he may have had some strong views about how the Board members performed their duties. And that context can't be

totally overlooked here.

But when we look at the investigative process here and we look to see whether in the context of that there's any indication that the Board President or that the public would think that the Board President controlled that, -- there may be some members of the public who were so certain at the time that this was all going on that Mr. Tronolone was not a fan of Dr. Horowitz's that they might perhaps have conceived that oh, you know, this investigation, Mr. Tronolone, he doesn't like Dr. Horowitz and he's involved in some way in making suggestions here. Oh, automatically Mr. Tronolone is running this and it's going to come out the way he wants it.

Well, there might be some people in the public who would think that and people are entitled to their opinions, but in this context I have to deal with this in the context of evidence and reasonable implications that arise therefrom and from what has been presented, I do not see any basis for concluding that Mr. Tronolone's conduct in the context of this investigation process constituted action which would either taint him directly because of some actual conflict or would taint him because of an appearance or a reasonable appearance of such conflict.

Now, the next -- I guess the next category that we have to deal with in the context of these suggestions here

deals with the question of Mrs. Navarrete.

Now there is no doubt that in October Mrs. Navarrete had expressed a position in the sense that she had come forward and filed tenure charges against Dr. Horowitz. And while she did not vote on those charges, the mere fact that she filed the charges undoubtedly suggested to the public -- and again, because we're dealing with perception, we can look at the fact that she filed the charges almost separate from the fact of whether she voted -- undoubtedly that might suggest to the public that a person who files charges against someone has an opinion in favor of those charges or believes that those charges are probably true.

No doubt there are situations where someone will file charges without any notion of whether they're true or not or any feeling about it. But because something has occurred, they may think it's appropriate to put this into the public forum in the sense of saying, well, you know, we hear about this, here's some charges, let's vote on them.

But I think more realistically people will look at a situation where someone files charges and feel that that person has some belief that those charges are warranted. And in fact, it might be -- it might well be of questionable propriety for someone who didn't think the

charges had some reasonable likelihood of being true to even throw them out into the arena to have them voted on.

Well, we have Mrs. Navarrete filing charges in October. And the public could have looked at that and drawn whatever conclusions it wanted to draw. But as the Mackler case holds, there is nothing improper about a member of a public body who files the charges to vote on those charges.

It's simply not the case that the mere filing of charges constitutes a conflict. And although I think Mr. Stern has backed off on that in the context of the argument here, originally there was the suggestion made -- and I think it's worth addressing because it's even come up I think here -- that the mere filing of the charge was sufficient to disqualify her.

The case law and common sense suggested that's not the case. So there was nothing about the fact that Mrs. Tronolone filed the charges in October that would have disqualified her from voting at that time.

She chose not to vote. There's been some testimony and there's some document in here about why she chose not to vote. I don't see anything about the circumstances at that time that would have required her not to vote.

Now, she suggested that she wanted to keep her options open. The letter that she filed with the Board is

not quite as explicit and it's open to some -- I think it's fairly open to some interpretation as to what was going on in her mind. One could even look at that letter and without her explanation or separate from her explanation, one could think that perhaps she really did think that because she filed the charges it was better that she not vote.

Even if that was what was in her mind, and she has testified that that was not the actual reason, but even if we were to assume for purposes of this proceeding that the reason why she did not vote was because she believed that it was better that she didn't because she had filed the charge, the law would not have required her to do that.

And there is nothing about the fact that she decided not to vote that in and of itself suggests that she didn't think that she could fairly vote. She might have questioned whether there might be some perception on the part of the public, but the case law seems to preclude that as a concern because if the case law was concerned about the fact that the Board -- and the Mackler case was decided by the Supreme Court in 1954 -- if the Supreme Court had been concerned that the public would have a perception that the charging party had an predilection and couldn't fairly and impartially consider the -- maybe

predilection isn't the right word -- if the Supreme Court was concerned that the public would look at the situation of a charging party and say, oh, the charging party can't fairly judge these charges because here she is the charging party.

So, therefore, on the basis of public perception as opposed to actual conflict, we're going to bar the charging party from voting, well, the Court didn't go that way. The Court apparently was convinced that the public perception would not be that the charging party wasn't fairly and impartially looking at the charges. Even if the charging party had some strong belief that the charges were sustainable because after all, when one files a charge, one is supposed to look at the evidence in support of that and make some judgments and then decide whether or not it appears to that individual the charges are warranted.

And there's nothing improper about that. That's what a public official is supposed to. And the mere fact that she filed the charges, as the Court has said, would not have disqualified her. Therefore, the fact that she chose not to vote did not set a precedent because it was not something that she was required to do and it did not set a precedent that would have barred her from voting on the later set of charges, which were much identical to the

first set, although they included some other things as well.

Now, with regard to her reaction to the first vote, the 4/4 vote, that reaction, as described by Mrs. Rose, was rather strong and it could be interpreted in a personal sense I suppose because as described by the witness, there was a statement about where's my retribution. And then there was some testimony about other statements involving retribution, some of which might have been more of the Board's retribution.

Well, retribution is a strong word and Mrs. Navarrete suggested in her testimony that it's not a word that's in her common parlance.

This was a situation in which, from the testimony, even from that of Mrs. Rose I think, there's an indication that the Board, upon learning of the circumstances surrounding the Bradley Gardens matter and the letter and the apparent -- and here I have to say and be clear about the apparent lack of authorization because I've made no judgments with regard to that at this point -- but the Board looking at this at that point could have looked at it and seen what appeared to them to be a lack of authorization for the signing of the letters, what might look like a forgery, what might look like misrepresentation, what might look like deception, what

might look like putting the Board in the appearance of having misrepresented to the public what was going on with regard to this bond issue because, after all, the Board is the public body here which was standing behind this bond issue, and a lot of things that might have made this Board very upset and very angry and might have caused the Board as a body and the individual members of the Board to have some real question about the conduct of its Superintendent in the performance of his public duties.

And while the evidence might ultimately not support their view, it's certainly fair to say that this Board, including the individual members, including even Mrs. Rose, were quite upset and disturbed, shocked by all of this.

Mrs. Tronolone -- I'm sorry -- Mrs. Navarrete files a charge, a series of charges based on the Bradley Gardens matter which undoubtedly she thought were warranted and which there was some evidence to look at and if one judged the evidence in a certain way would appear to support the charges.

And I say that because obviously not every member of the Board may view the charges exactly the same; not everyone may have accepted everything exactly the same as any other member, but some members of the Board certainly at the time these charges were voted on, had some strong

belief as to what that evidence and what that investigation had disclosed and undoubtedly had some strong belief that Dr. Horowitz had conducted himself in an improper fashion.

And what happens from this vote is a tie vote, which does not certify the charges.

Mrs. Tronolone comes back in the room and learns -- Mrs. Navarrete, I'm sorry, comes back into the room and learns that the charges have not been sustained. In fact, they haven't been voted down -- they've been voted down by the mere fact that there is a tie vote.

And at that point it's alleged that she made a strong statement which could be interpreted as suggesting that she, as an individual Board member, and her other statements, one of her other statements, that the Board as a Board is not going to get its response -- it's reaction -- it's not going to get something back in regard -- it's not going to get action against Dr. Horowitz for what they perceive, Mrs. Navarrete and some, if not all of the Board members, perceived as being serious misconduct on his part.

It isn't surprising at that point that a Board member might have a strong reaction, a strong negative reaction to what occurred.

Does the fact that Mrs. Navarrete -- and we'll take

it for the purposes of this application at this point -- if you were to take the worst case scenario that she did in fact say "Where's my retribution", does that indicate that she has such a personal interest here that she could not fairly and impartially have voted on the charges when they came up the second time?

Well, here we start to go back into the Colella situation because here we have to look at the nature of the personal interest that's alleged.

The Board learned that a letter had been drafted and signed with two names on it, Dr. Horowitz's and Mrs. Navarrete's. At no time, at least during the time that the Board was considering the charges, either the first time of the second time, does it appear that there was any suggestion that Mrs. Navarrete had in fact signed the letter and was now backing off from that and was now not telling the truth about having signed it, nor, at least on the evidence before me at this point, is there any indication that there was any serious or perhaps any suggestion that Mrs. Navarrete had in fact authorized that her name be placed on the document, even if she didn't sign it.

What the Board was faced with was a letter which had been signed with her name. Who signed it might be in dispute, but she was not one of the people who was being

looked at as having signed it. Who authorized that her name be signed was being looked at, but she was not one of the persons who was being looked at as having authorized the signature.

Does that kind of situation involve the kind of personal interest on her part that Nestere and Broncaccio had, the Board members in Colella? There's no question that Mrs. Navarrete was upset by the fact that her name had been used. There's no question that undoubtedly she had some personal reaction to that.

It would be, I suppose, not consonant with human nature not to have some reaction to the fact that you saw your name there. But is that what we dealt with -- is that what was dealt with in Colella? Is that the kind of situation, as Counsel suggests, that's on all fours or within the very close to being on all fours with Colella?

In Colella we had letters written that have specific and apparently very nasty, I take it, personal allegations against members of the families of Board members. In fact they're described I think as being disparaging comments concerning family members and grossly insulting. I quote: "Grossly insulting" references to one of the Board member's families.

Is that the same thing as seeing your name put on a document where you're not suggested as being the person

who did anything wrong in connection with that name getting there? I don't think so.

We're dealing with degrees. We're dealing with perhaps fine lines. We're dealing with the question of public perception. We're dealing with things that are not easy to pin down and not easy to create tests for.

And it's, I suppose, possible that someone -- some other Judge can conceivably have a different viewpoint on this, but I look at the situation and I look at Colella and I look at what happened there and I look what happened here in connection with whether the appearance of the name of Navarrete on the letter engendered the kind of personal interest that you had in this case, in Colella, and I jus' don't see it.

It's very clear that where the writer of the letter in Colella was going after the members of a family and making -- and we don't have the description of what these are except in terms like "gross remarks" and "scurrilous remarks" and "disparaging comments about the family members" and so forth.

Those are such personal kinds of things. And those are the kinds of things that strike home with an individual and strike at the heart of an individual so much that it would clearly create a personal interest in getting this person.

Does this do that? I don't think that one can quite go to that point of saying that merely by seeing one's name there when there was no suggestion that she had been involved, there was no accusation against her, there was no disparagement of her here, I don't think it rises to the level of the Colella situation.

Now that would be a different case. This would be an entirely different case, as Mr. Herbert acknowledged. This would be an entirely different case if at the time or subsequently there were some suggestions anywhere -- and if there are, they're not before me -- there were some suggestions anywhere that Mrs. Navarrete had a role in connection with that letter, that she was trying to hide something about that letter; that she knew what was going on at the time of the letter; that she had been part and parcel of what was happening when that letter was written and when that letter was signed.

If that was the case at all, if there was any suggestion about that, if that had been raised, then I absolutely would agree that Mrs. Navarrete's personal interest in that situation would be one that would be much more akin to the Colella situation because one could then look at it and say here's somebody who in the context of the very thing being investigated, the very thing that is being suggested as creating the taint, that is the name on

the letter and the fact that she found the name -- saw the name on the letter and that that caused her to have this personal reaction, if she were alleged to have had something to do with that, arguably, then I would say that there would probably be a personal interest such as to raise the taint.

But that's not alleged here. I have heard no evidence or even any suggestion in argument that that's the situation that was faced by Mrs. Navarrete at the time or that the Board had any reason to think that that was the situation, whether the public had any reason to think that that was the situation at that point in the course of events.

And in that situation I don't think that that rises to the level of the kinds of things that we have in Colella or in some of the other cases where it has been determined that there was a personal interest, such as to disqualify one.

Now, did Mrs. Navarrete have some personal interest in a remote sense? Did she want to see perhaps the individual who had used her name brought to justice, so to speak? I suppose so. It wouldn't be part of human nature if she didn't.

But did that rise to such a level -- that personal interest -- and I think it's fair to say that every Board

member had, to a degree, a personal interest in protecting their integrity, the integrity of a body on which they sat against what might have appeared to be, to the public, an action on the part of the Board that misled the public because the public looks at this whole thing and it's not clear whether the public distinguishes between the actions of the Superintendent and the actions of the Board. The Board is the one that comes to the public and says we want you to vote in favor of this bond issue and here's what we represent to be the dollar figures and so forth. And in fact, that's not what may have been the case. The public may have some real concern about what the Board is doing and every Board member may have some personal feeling and some personal interest in defending the Board as a body and their own integrity in the sense that they don't want the public to think that they went out and misled the public.

So everybody has a certain degree of personal interest, but do those personal interests rise to the level of disqualifying them? I don't think so and I don't think the facts concerning the letter and Mrs. Navarrete's name being on there would rise to that level.

So that Mrs. Navarrete's reaction, even if we take the worst case scenario, as described by Mrs. Rose, I don't believe is indicative of the kind of personal

interest. It's not the kind of reaction that I find to b so obviously a personal and direct and specific and so over-involving and all-consuming kind of personal interest that it should have suggested to the public, which of course may not have even known about that reaction and there's no evidence that the public would have known about that reaction so as to create to the public outside the Board itself the perception of a taint.

I don't think that that rises to that level.

Now, we then move on to the January situation and the investigation.

The January situation has to be taken both in isolation by itself and in the context, I think, of the entire scenario here because the January situation, that is the filing of the tenure charges in January, the vote on the tenure charges, Mrs. Navarrete's role there, none of that is completely separate from what was going on before.

We are once again faced with a Board that had before it information that had been brought together through a rather lengthy investigative process, and which on its face may well have suggested to every member of the Board and in fact the Board's actions prior to January strongly support the fact that every member of the Board to some degree or another was dissatisfied with the conduct of the

Superintendent and was concerned with whether the Bradley Gardens affair had been handled properly.

So that this was a Board that did not come to the January vote completely -- it was not a -- I think it's fair to say voting on this on a totally clean slate and completely without reference to what had gone on before. Obviously they weren't because this was a matter in which there had been an extensive investigation, responses to that and so forth.

Now, when the investigation began concerning Mr. Donte's accusations, when that began and was eventually passed on by Mr. Cardaneo to the Superintendent, the Board was unaware of that as far as we know.

The Superintendent received the letter -- received information about a letter December 16th. Mr. Herbert suggests that at that point he did nothing and only began investigating this with any seriousness after he learned about the tenure charges being filed by Dr. Ryan.

One could, I suppose, draw that conclusion if one wanted to. On the other hand, Dr. Horowitz has proffered an explanation involving the Christmas vacation period and the circumstances of the timing and such that individuals were not available or it was deemed not appropriate during the Christmas recess period to investigate.

Evidence has been presented about the work schedules

of certain individuals, one I suppose could decide either way in this based on what's before me. It's not a situation I think that's clear-cut one way or the other as to exactly what was going on at the time.

And I prefer, I think, rather than to try to, at this point in the case at least, make a conclusion -- draw a conclusion as to whether Dr. Horowitz suddenly raised this thing when he got the charges to look at it more in the context of what does it mean that he did advise the Board that he was looking into something and he was passing it on to them to look into about Mrs. Navarrete.

Now, when he advised the Board on January 23rd, 1992 -- I'm sorry, not January 23rd -- on January 16th, 1992 the Board became aware of the fact that there was some suggestion that Mrs. Navarrete might have done something that wasn't proper.

That was the extent really of the investigative statement -- the investigative report. One might look at this and decide that Dr. Horowitz had drawn conclusions, but, of course, he had passed it on to the Board. He had not taken action against Mrs. Navarrete. He couldn't take action against her.

What he did was he passed on to the Board what he had found, according to his report, and drew some conclusions by it, which he labeled as preliminary and said here it is

and I'm uncomfortable and you look at it.

At that point the Board was on notice, so to speak, that Mrs. Navarrete might have done something, something that was totally unrelated to anything that had to do with the series of charges that were pending against Dr. Horowitz.

They were not charges that Mrs. Navarrete had done anything improper in connection with Bradley Gardens or for that matter with any of the other things that were listed in Dr. Ryan's charges, the non-Bradley Gardens matters.

They were a separate, totally separate, set of circumstances in which he suggested that perhaps Mrs. Navarrete had done something wrong.

Now, as I understand Mr. Stern's theory here, and I've asked him about this several times, there are at least two aspects to the alleged taint regarding the investigation: The first of these is in respect to the fact that a charge is filed in and of itself. And the suggestion that merely because Dr. Horowitz filed a charge and it involved Mrs. Navarrete -- I won't call it a charge -- the investigation and it involved Mrs. Navarrete, that she was disqualified.

Well, as has been suggested here, and I think it was suggested even at the arguments back in February, there is

a great danger in any policy determination that would hold that merely because a member of a public body is the -- either the target of or their name has been raised in the context of a "investigation" by someone who they are charged with supervising or reviewing, that that would automatically preclude them from being involved in any review of the conduct of that individual, that that would be a dangerous precedent.

It would set up a situation in which someone who knows that they are -- that charge are pending against them or contemplated against them or that an investigation is occurring about them, could simply create an investigation on paper and let the public body know about it and say ah ha, this person is now precluded from making any judgments about me.

So in the theoretical sense any policy that would be -- would allow for that kind of automatic disqualification would be very dangerous.

If we take it down for the situation here or if we take it down to a more -- perhaps a more concrete level, if there is some "substance" to the investigation in the sense that it's not something created one morning on a piece of paper with nothing at all behind it, but instead it's something in which there is some factual material that is actually being looked into, that's more akin to

what we've got here.

And the question there is would the existence of that kind of investigation create a taint on the person being "investigated".

It's probably not terribly hard I suppose for someone who wants to to look at something, find something that actually is in writing or that exists or something rather than coming out of whole cloth, and suggesting that there might be something wrong here about the conduct of a particular individual and here's some documents and I want you to look into this.

Unfortunately, accusations can be made sometimes without a lot of support, but with something that one can point at and say something happened here, something happened there and therefore, I think you better look into it.

And while I'm not suggesting that's what happened here, once again one would have to be very careful before one would create a policy that would say that anybody whose name has come up in an investigation that has some background is disqualified.

So what we have here then is a situation where there is some background to this investigation. I say that in the sense that there are letters that came in. There was some allegation that had been made by Mr. Donte. There

was some allegation apparently made by another individual who was identified.

It's not something that's totally out of whole cloth. It may not mean anything. It may not have involved any impropriety at all. The facts asserted by the these individuals may be totally false. And in fact in the case of Mr. Donte, it may well be that it was shown to have been false.

But the point is that there was something back there. It wasn't something that Dr. Horowitz sat down on the morning of the 9th or 10th of January over breakfast and said I'm going to create an investigation and what could it be, what could the scenario be and he started writing down something that was entirely fictitious and had no backing at all. There was something here, even if it didn't amount to anything.

So he takes this and he sends it off to the Board. Does that disqualify Mrs. Navarrete?

I don't think that the state of the law, as best as one can glean it from what we've got here, suggests that that automatically disqualified Mrs. Navarrete.

Had Dr. Horowitz made allegations that struck at the Bradley Gardens matter and Mrs. Navarrete's role or purported role or conduct in connection with the Bradley Gardens matter in terms of the alleged misrepresentations,

the letter and all of these things, and had that been the subject of this so-called investigation, one might have a more difficult task in deciding whether that would disqualify her because one might then say well, you know, they're both accused or they're both being investigated in the context of the Bradley Gardens matter, so maybe it wouldn't be appropriate to allow her to vote because she has an interest in protecting her position here because she may be guilty of the things he's alleged to be guilty of or maybe they're, you know, maybe they worked together on this and now they're trying to pawn it off on each other or something.

In that context maybe that would require that she not vote. And I'm not making a judgment -- I'm certainly not making a decision on that because that's not the facts here.

The facts of this investigation, the January 16th investigation, have nothing at all to do with Bradley Gardens or as far as I'm aware, with any of the other matters that were pending before the Board -- and Mrs. Navarrete is a member of the Board -- at the time of the vote in late January. They're totally separate.

And even if Mrs. Navarrete had done something wrong in the context of this Buildings and Grounds matter, even if she had done something for which she could be

reasonably found to have done something wrong, that would not, as long as she was a member of the Board, seem to preclude her from voting on whether or not Dr. Horowitz had done something wrong in a totally separate matter that was before the Board. Until such time as she might be suspended by the Board, if they had the right to do that or removed, she is a member of the Board.

And in the absence of the kind of particularized charges involving the same set of circumstances of the charges against Dr. Horowitz, if that would be -- I'm not deciding -- if that would be a disqualifying factor. In this context where they're totally separate tracks, they're totally separate matters, I see nothing about this investigation being brought to the attention of the Board that would suggest that they should have turned to Mrs. Navarrete or she should have on her own concluded that I can no longer vote on the charges against Dr. Horowitz because he has raised to the Board the possibility that I have done something wrong in a totally separate matter.

I don't think that there's any law, and nothing has been cited to me here, that would suggest that this kind of situation works what we might call a bright-line disqualification, an automatic disqualification.

Now, having said that, we now go on to what happened when Mrs. Navarrete, having learned of this, responded.

Does the response of the January 23rd, 1992 memo, does that suggest that Mrs. Navarrete should be disqualified?

Mrs. Navarrete received this document as did the Board under some interesting circumstances. And I don't at this point intend to make any conclusions of what they all meant, but she was brought in and questioned by Dr. Horowitz about the Donte allegations, gave her version and left and apparently Mr. Donte ultimately seemed to have agreed with what she said, more or less.

Another set of allegations involving another Buildings and Grounds worker then were looked into by Dr. Horowitz the next day. For reasons which he has explained in his explanation he did not choose either before speaking with that individual or after speaking with that individual to bring Mrs. Navarrete in and to question her again and then perhaps to find out whether that individual was also going to recant as Mr. Donte apparently had done when faced with whatever Mrs. Navarrete's version might be.

So when Mrs. Navarrete got this, given the way this investigation had been conducted, she might well have wondered what was going on and why she wasn't given the same opportunity with regard to the second assertions as she was with regard to the first ones.

And in her letter she expresses a view that her

rights were violated, that she wasn't informed or given the opportunity to respond and I think that's clear with respect to the second set of allegations; and then she makes some demands to protect her name, as she says, demanding that Dr. Horowitz rewrite his report to correct -- as to her statements, that he not refer to rumor and innuendo and that he apologize and that the Board reprimand him.

There is no doubt at this point that Mrs. Navarrete was upset about the way in which Dr. Horowitz may have conducted this investigation, and undoubtedly she was upset about his suggestion because he worded it in a way that is not simply a here's some statements, you look into it. He worded it in a more direct way. He drew some preliminary conclusions. And there's some language in here that could be construed as indicated he was making some judgments rather than simply being a -- solely a fact gatherer who was passing it on to the Board.

So she had some reason I think at this point to view what he had said as being if not an out-and-out accusation, certainly something close to that and she reacted with this letter.

Now, does this reaction suggest the inability to fairly vote on the pending charges on Bradley Gardens and the other charges?

Well, I have to look at this in the whole context of this entire matter. I have to look at this not solely as to this particular piece of paper and what it stands for, but I have to look at the fact that Bradley Gardens was not a new issue; that Bradley Gardens had been voted on before, that Mrs. Navarrete had filed charges before, that she had undoubtedly made some judgments before, that she did not come to the January vote as did nobody on this Board, they couldn't have come to this with a completely blank view of the Bradley Gardens matter.

The matter was too prominent and had been going on for too long and had been the subject of too much activity for this Board to have addressed this matter in January with a totally clean slate as to these charges.

And whether that creates any other problems in this case is not the issue at this moment. The issue at this moment is whether or not Mrs. Navarrete's response to this investigation would disqualify her from fairly and impartially voting on those charges.

And while I could conceive that she might at this point have had some strong feeling about Dr. Horowitz, I think one has to realistically look at this in the whole context and say that there is nothing about this with -- I'm sorry -- there is nothing about this which would suggest that her ability to have a fair and impartial view

on Bradley Gardens, which is the primary subject of the tenure charges filed by Dr. Ryan, was impacted by this.

Now perhaps what I'm saying here and I think I'm trying to look at this realistically -- perhaps what I'm saying here is that it's probably unrealistic to suspect that by the time this letter arrived or by the time this reaction manifested itself that Mrs. Navarrete did not already have before her a lot of things regarding Bradley Gardens which she had undoubtedly already made some judgments about.

I think, in all honesty, and in what might be seen as a -- what is I think a realistic assessment of the situation, rather than perhaps trying to be too idealisti about this, Mrs. Navarrete, who brought the charges in October and who had seen this investigative material and undoubtedly made some judgments about it, came to this January vote as I suspect that most Board members did -- certainly the ones that were on the Board in October, which I think was the -- it was the same Board because the election was later -- most Board members had to have some strong feelings about this matter one way or the other.

It would be, I think, the height of absurdity to suggest that this Board took a completely fresh look at this matter in January with no residuum from their previous review of what was before them.

Now, perhaps one might argue that somehow or another that tainted the whole Board. Perhaps one might argue that having acted back in April with the reprimand, and this is a part of this case that having acted back in April that they couldn't properly have acted in October, and having looked at the matter in October and not having been able to do anything but get a four/four vote, that in January they shouldn't have been allowed to look at it again and they shouldn't have been allowed to vote again because the whole thing was tainted at that point.

Maybe someone might argue that and that has not been argued here except in a different sense, in the context of the -- what you've called the res judicata argument, Counsel. But that's not really the subject of this particular taint claim.

The particular taint claim here is Mrs. Navarrete and I am unwilling to conclude here that what happened in regard to this so-called investigation and the response is a sufficient basis to deny Mrs. Navarrete the right to vote, given the whole context of this case because what we're dealing with here is not a discreet and limited issue, as we sometimes have in cases where something happens that's quickly addressed by a Board, there is no long history, there is no lengthy investigation, there is no prior vote, there is no prior action of the Board. You

don't have a record, so to speak which everybody sort of brings to them to the ultimate -- to the subsequent vote that we had here. In most cases that's not the case. In this case it is.

So when this Board voted in January it's hard to imagine that whatever happened here in connection with this could have been something that would have ousted Mrs. Navarrete's ability to make a judgment on these charges if it had not already been tainted before. And since I find no taint to have existed prior to January and given what I view as -- I believe is the only realistic way to look at this entire matter, that is as a sort of a continual, I don't think that this situation and this response in January is such as to raise the kinds of personal interests and conflicts that are suggested in the cases.

Now finally, what we're dealing with here is an allegation that a School Superintendent in the context of his conduct of Board business on behalf of the public engaged in misconduct, what has been alleged to as misconduct, deception, some implication in a forgery, things of a very serious nature.

It's fair to say that the public, both the citizens of Bridgewater-Raritan District as well as the broader public as the interests are represented by the Commissioner, generally have a right to have those

allegations thrashed out in the context of a proceeding of this nature, so that it can be determined whether the Superintendent is wholly blameless and his name should be restored or whether he is to be blamed and is to suffer the consequences for his misconduct.

It would be -- and it is only in the rarest of circumstances that that ability of the public to have the charges resolved on their merits is limited by a determination that because of some flaw in the procedural process, that the merits should not be reached. And while we know, and for very good reasons, that there are times when the procedures have to stand in the way of getting at the merits, at the same time one has to be very careful, as has been suggested in the case law, in the Mackler case, -- I'm sorry, in the Van Italie case -- we have to be very careful in making that balance between what we might call the procedures, as important as they are, and the ultimate determination on the merits.

We must be very careful not to, unless absolutely necessary, allow the procedures to get in the way of the substance.

I have given careful consideration to the suggestion here that this Board's actions were tainted. I have viewed that in the context of a continuum of activity surrounding this investigation and I have tried to assess

that in the most reasonable fashion that I can.

I don't think -- although in the context of going through this we've had to look at the segments of this investigation and of this vote and the subsequent vote and so forth, we've had to look at the segments -- I don't think one can solely do it that way. One has to look at the whole picture as well.

And looking at the whole picture I find a Board which started out in this proceeding back in April of 1991 already having before it something that apparently to the entire Board, because of the action they took, seemed to involve some improprieties of whatever level and degree and seriousness the individual Board members and the Board as a whole may have viewed it. They did not start out in April nor did they face this in October nor did they face this in January without already having before them something that implied that something went on that didn't seem right, and that in fact something had gone on that they could put their fingers on, whatever fault there was, whatever blame there was, they had a letter that had been signed by people -- signed by -- at least in the case of Mrs. Navarrete which apparently had not been authorized by the Board or by her individually. They knew about that. They knew that there was some indication that something had happened to this $905,000 figure and that it had

exploded in size.

They knew that there was something that didn't look right. In fact they acted on it in April.

So that when they approached this as individual Board members later on, despite the distractions that might have occurred in connection with some of the suggestions, some of the allegations, the ultimate Navarrete investigation and so forth, one sort of has to take those and look at those as being almost -- I don't want to call them side shows, that's not what I'm really trying to imply here -- but they are things that came along and sort of tagged on to the back, rode along on the context of the main problem which was what happened with Bradley Gardens and did somebody do something wrong here.

And while there is no question in my mind that a fair assessment of the relationship between Dr. Horowitz and this Board -- and I say -- and individual members of the Board -- which suggested there was a rocky road, that there were personality clashes, that there were problems in terms of the professional relationships and so forth and so on, I don't see any of those having risen to a level that they overcome even on a matter of perception that they can reasonable be seen as overcoming what was at the bottom of this which was this Board's ultimate concern with whether there was some wrongdoing in connection with

Bradley Gardens and the fact that at some point this Board came to a conclusion and -- the Board members came to a conclusion that they better go forward with this, that they better bring these charges because they weren't satisfied with what had occurred. They saw the potential for some serious wrongdoing. They could not resolve the matter with Dr. Horowitz. And there's been testimony -- the record is replete with testimony that there were attempts to resolve this in a way that would have removed them from the district on an amicable basis prior to any charges being filed. They could not resolve that for whatever reason.

And that, therefore, as Mrs. Navarrete determined in October and as Dr. Ryan determined in January, something had to happen to bring this matter to the attention of the Commissioner and let the Commissioner, who is the one who decides this matter, not the Board as to whether or not there have indeed been improprieties, let the Commissioner look at this.

Having said all that, I find that the allegations of taint in this matter as to Mr. Tronolone and Mrs. Navarrete have not been and ultimately -- although I've referred to this previously, I'll say it again -- with regard to Dr. Ryan as a charging party -- have not been established.

I find no basis for concluding that there was either an actual conflict of interest or that there was a reasonable public perception of a conflict of interest that would have suggested that any of these Board members who have been alleged to have been tainted could not, in the context of this proceeding, in the context of the entire situation, fairly and impartially made a determination on these tenure charges.

Ultimately the Board has determined that the matter was serious enough to require that the Commissioner of Education look at the entire matter through this hearing process before me and determine whether these charges are sustainable or not.

If they're not, then Dr. Horowitz's name will be cleared, and if they are, then he will suffer whatever consequences are appropriate.

I do not see this proceeding as having been tainted by these matters which have been raised.

I think that Counsel, in good faith, has attempted to establish what he saw and what undoubtedly Dr. Horowitz saw as problems with the process. But I am not convinced that he has sustained the burden of showing that this proceeding on the part of this Board or its individual members was tainted.

And, therefore, I conclude that these charges must go

forward on their merits. We have been here for quite s time. I suspect strongly that everybody is dying to stand up, walk around, so we will recess until 1:15 at which point we will continue with the merits.

MR. HERBERT: Your Honor, may I suggest one thing?

Could Counsel and I confer with you for about fifteen minutes?

THE COURT: Okay. Do you want to do that first and then we'll break until 1:30?

MR. HERBERT: Yes, your Honor.

THE COURT: I think everybody has been very patient this morning and I think I shouldn't rush everybody back in. All right, 1:30.

(Luncheon recess held)

THE COURT: All right. Good afternoon. The record will reflect that after we recessed, before lunch, Counsel and I had some discussion in chambers regarding future scheduling in this matter.

Counsel have indicated to me that it is clear to them that we will not be able to complete this case before the conclusion of Wednesday, which was the last scheduled hearing date.

We will continue the matter, assuming that to be so, I have no reason to doubt it, we will continue this matter on August 10th is the Monday, Mr. Herbert?

APPENDIX B

TENURE CHARGES

CHARGES

CHARGE I

During his time in office the Superintendent has allowed the business administrator to present bills to the Board of Education and has received authorization to pay bills for which there was no valid signed contract.

Section 3301 of the Bridgewater-Raritan School District Operations Manual provides:

> All contracts incumbering district funds shall be in writing and approved by the Business Office prior to finalization.

Section 3300 provides, in part:

> It is the policy of the Board that the Administration strictly observe the letter and the spirit of all laws and regulations relating to expenditures by the school system... The Board holds the Superintendent and Board Secretary/Assistant Superintendent for Business directly responsible for carrying out this policy...

The N.J.S.A. requires that no public body may make payments without a signed, valid contract.

The Superintendent's failure to follow N.J.S.A. and Board Policy with respect to contracts and payments constitutes conduct unbecoming his position of public trust as a District Superintendent.

CHARGE II

The Superintendent participated in the writing of the 1991-1992 District Budget. In that Budget there was the presentation of line items that were intended to mislead the reader as to the true intent of the Administration. This budget was presented to the voters for the District voters to vote on.

Section 2210 of the Bridgewater-Raritan School District Operations Manual provides a Code of Ethics that in part reads:

> 2. Professional school administrators obey local, state, and national laws; hold themselves to high ethical and moral standards...

The Superintendent's presentation to the voting public of budget line item expenses that were intended to deceive the reader constitutes conduct unbecoming his position of public trust as a District Superintendent.

CHARGE III

Section 2210 of the Bridgewater-Raritan School District Operations Manual provides a Code of Ethics that in part reads:

> 2. Professional school administrators obey local, state, and national laws; hold themselves to high ethical and moral standards...

In his efforts to have Bridgewater Township and Raritan Borough Councils approve the 1989-1990 District Budget, which Budget had been defeated in the annual election, the Superintendent presented to the Township and Borough Councils that the student enrollments would be far greater than the official projections that

the Administration provided to the County Superintendent. Such action constitutes conduct unbecoming his position of public trust as a District Superintendent.

CHARGE IV

The Superintendent in 1990 ordered architectural services without a purchase order and without the required Board approval. The Superintendent's obligating the Board for payments not authorized by the Board constitutes conduct unbecoming his position as a District Superintendent.

CHARGE V

In the Summer of 1991 the Board of Education authorized the Superintendent to work with architect Pablo Jordan to design plans for improvements to the Bradley Gardens School, totalling $905,000. By September 1991 the Superintendent had caused by his instructions to the architect new and unauthorized plans with an estimated cost of $2,459,000. The Superintendent knew that these plans were forwarded to the Department of Education, Bureau of Facility Planning Services pursuant to N.J.A.C. 6:22-1.2. The accompanying transmittal letter falsely stated that the Board of Education had approved the plans. The plans were then approved by the Bureau of Facility Planning Services.

By allowing, with his knowledge, the submissions of false statements to State authorities and acceptance of approval for plans based on those false statements and conducting a referendum based on the approval, the Superintendent violated the intent of N.J.A.C. 6:22-1.2, and his action thus constituted conduct unbecoming his position of public trust as District Superintendent.

CHARGE VI

Plans for construction of school facilities are to be signed by the chief school administrator and submitted to the Department of Education, Bureau of Facilities Planning for approval (N.J.A.C. 6:22-1.2). The Superintendent did not sign the required documents that were forwarded to the State Department of Education prior to the October 1990 referendum. He knew that the documents upon which the approval for the referendum were based contained false information and did not have his signature.

The Superintendent did not sign the required documents and did not inform the authorities of his failure. This omission appears to constitute misconduct in office and therefore was conduct unbecoming his position of public trust as District Superintendent.

CHARGE VIB

Wherein N.J.S.A. 2C21-1 outlines the minimum standard of conduct to be followed by the general population, a standard clearly lower than that to which a District Superintendent, as a public official would be held; by providing Pablo Jordan with blank official Superintendent stationery and directing him to copy the text of the July 5, 1990 letter from another architectural firm to the State Board, sign the names contained thereon and submit the new letter to the State Board in the schematic plan submission packet as evidence of Board certification of approval, without the permission of Clara Navarrete, an intended signator, the Superintendent acted in a manner which would constitute forgery, as defined by N.J.S.a. 2C:21-1, and, as such, thereby conducted himself in a manner unbecoming his position of public trust as District Superintendent.

CHARGE VII

The Superintendent testified that he knew that the Board had authorized $905,000 for the Bradley Gardens School construction and that he had directed the architect to change the plans, an action that increased the cost estimate to $2,459,000. Documents to secure approval for the referendum by the State Department of Education required the signature of the Superintendent. He did not sign the documents. He knew the State Approval was given. He received a copy of the documents along with the cover letter carrying his forged signature. He did not inform the Board, nor did he inform the State that "his" signature was a forgery.

The Superintendent's failure to inform the Board and State authorities in a timely manner of a forgery of his name on official documents constitutes conduct unbecoming his position of public trust as District Superintendent.

CHARGE VIII

In 1990 the Superintendent allowed the submission of Schematic Plans to the Bureau of Facilities Planning, and a Project Cost Estimate Form stating that the Bradley Gardens project at $2.45 million was to be funded through a referendum and capital outlays, and that the project had been approved by the Board on June 26, 1990. These statements were false. Thus, the Superintendent acted in a manner which would constitute offering a false instrument, as defined by N.J.S.A. 2C:21-3. He therefore conducted himself in a manner unbecoming his position of public trust as District Superintendent.

CHARGE IX

Pablo Jordan, the architect, with the knowledge of the Superintendent, submitted to the State Department of Education a letter with false statements and forged signatures. Thus, the Superintendent acted in a manner that would constitute official misconduct (N.J.S.A. 2C:30-2) that being the knowing commission of an act related to his office, under the color of his office, which was unlawful and unauthorized exercise of his power. He thus conducted himself in a manner unbecoming his position of public trust as District Superintendent.

CHARGE X

The Superintendent concealed from the Board of Eduction the data in the Project Cost Estimate Form of the Bradley gardens Project that was in his possession and had been submitted to State authorities. He knew the document contained false information concerning the Board's approval and the source of funds. The Superintendent thereby acted in a manner that would constitute falsifying or tampering with documents and thus violated N.J.S.A. 2C:21-4, and therefore acted in a manner unbecoming his position of public trust as District Superintendent.

CHARGE XI

By deceiving the Bureau of Facilities Planning Services as to the Board Approval and source of funds for the Bradley Gardens Project, the Superintendent caused the execution of State approval which was likely to affect the pecuniary interest of the district public. In doing so he conducted himself in a manner which would constitute securing execution of documents by deception as defined in N.J.S.A. 2C:21-16. He thus conducted himself in a manner unbecoming his position of public trust as District Superintendent.

CHARGE XII

The Superintendent knew that the cost of the Bradley Gardens Plan that he and the architect had developed would cost far in excess of $905,000. In fact, under the Superintendent's direction cost estimates increased to approximately $1,300,000, then $1,800,000 and eventually to $2,459,000. Yet, the Superintendent directed the communications specialist, Mr. Sandler, who was employed by the District, to include a statement in a Board Bulletin that represented to the readers that the cost of the project would be $905,000.

By his deceiving the Board and the voters as to the true cost estimates for the Bradley Gardens project, the Superintendent interfered with the right of the voters to make an informed vote. Such conduct is unbecoming his position of public trust as District Superintendent.

CHARGE XIII

The Superintendent gave information to the communication specialist, Mr. Sandler, who was employed by the District, to write a Board Bulletin as an information source for voters prior to the October 1990 referendum, in which Board Bulletin the voters were told that the monies from the referendum would be used for improvements at every school in the District and delineated the planned spending. At the time the Board Bulletin was sent to the voters the Superintendent knew that the plans being sent to the State did not correspond to what the voters were told.

The Superintendent thereby deceived the Board and the voters on the substance of a public election and thus conducted himself in a manner unbecoming his position of public trust as District Superintendent.

CHARGE XIV

Section 2210 of the Bridgewater-Raritan School District Operations Manual provides a Code of Ethics that in part reads:

> 2. Professional school administrators obey local, state, and national laws; hold themselves to high ethical and moral standards...

In 1989 the Superintendent opposed a Board-appointed committee's recommendation to reconfigure the grades, e.g. the high school would in that plan be grades 10-12. In an article that he wrote and had published in the Courier News (1/29/89) the Superintendent claimed that state regulations would cause the plan to cost the District $17,000,000. When a citizen pointed out that the regulations did <u>not</u> require that expenditure, the Superintendent and the Assistant Superintendent caused a letter to be published in the newspaper, in which letter a misrepresentation of the pertinent state regulations concerning school facilities was given. Thus, the Superintendent misinformed the public on the state regulations concerning possible expenditures, which act constitutes conduct unbecoming his position of public trust as District Superintendent.

CHARGE XV

Prior to a bond referendum in 1989 the Superintendent allowed election materials urging a "Yes" vote to be sent home with children, and allowed public funds to be used for promotion attempting to influence the outcome of the election. These were improper actions, possibly violations of Election Law, and constitute conduct unbecoming his position of public trust as District Superintendent.

CHARGE XVI

Testifying under oath at hearings of the State of New Jersey, Office of Administrative Law, the Superintendent made statements that were contrary to fact, thus conducting himself in a manner unbecoming his position of public trust as District Superintendent.

CHARGE XVII

In a Board investigation of the irregularities surrounding the 1990 Bond Referendum in Bridgewater-Raritan, the Superintendent was questioned under oath and made statements in a deposition, which statements were contrary to fact; which act constitutes conduct unbecoming his position of public trust as District Superintendent.

CHARGE XVIII

The Superintendent supplied data on enrollment and school capacities and verified his statements to members of a Board-appointed committee. The Superintendent disagreed with the committee's recommendations and just before the release of the committee's report, the Superintendent claimed that the data and information which he had supplied were incorrect. The Superintendent's failure to provide full, correct information to a Board-appointed Committee and his last-minute attempt to discredit their work constitutes conduct unbecoming his position of public trust as District Superintendent.

CHARGE XIX

On March 19, 1991 the Superintendent behaved very unprofessionally and in anger in speaking to a resident of Bridgewater. The Superintendent's use of abusive language and his threatening a senior citizen with physical violence is conduct unbecoming his position as District Superintendent.

CHARGE XX

On October 31, 1991 the Superintendent left a Board Meeting and yelled in anger in the hallway, behaved in an unprofessional manner, and disturbed the Board Meeting, which action reflected adversely on the District, and thus constitutes conduct unbecoming his position as District Superintendent.

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JEFF S. MASIN
DEPUTY DIRECTOR AND
ADMINISTRATIVE LAW JUDGE

December 21, 1992

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Re: In the Matter of the Tenure Hearing of Dr. Richard C. Horowitz, Bridgewater-Raritan Regional School District, Somerset Co., and Dr. Richard C. Horowitz v. Bd. of Ed. of Bridgewater-Raritan Regional School District, Somerset Co.
OAL DKT. NOS. EDU 2031-92 & 972-92

Dear Counsel:

It has been called to my attention that on page 99 of the Initial Decision in the above matter, in the Summary Of Conclusions as to the Tenure Charges, charge IX was mistakenly included in the charges that were sustained. As noted on page 91 of the decision, Charge IX was in fact dismissed.

Yours very truly,

Jeff S. Masin

mjm
c John Ellis, Ed.D., Commissioner
Joanne Restivo, Deputy Clerk

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IN THE MATTER OF THE TENURE HEARING OF DR. RICHARD C. HOROWITZ, BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY.	:	
AND	:	COMMISSIONER OF EDUCATION
DR. RICHARD C. HOROWITZ,	:	DECISION
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE BRIDGE-WATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY,	:	
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Commissioner notes that the initial decision is composed of two major parts - an oral decision rendered by Administrative Law Judge Jeff S. Masin on July 27, 1992 and the written initial decision issued by him on December 18, 1992. Petitioner Horowitz was granted an extension until January 11, 1993 to file exceptions to the initial decision. His exceptions were timely filed on that date. The Board's exceptions and reply exceptions were timely filed. It is observed that petitioner's voluminous submission and the Board's lengthy reply submission contain extensive reference to the transcripts of the testimony taken at 13 days of hearing in this matter. Said

submissions, as well as the post-hearing briefs of the parties, are incorporated herein by reference.

The Commissioner requested and received an Order of Extension from the Office of Administrative Law to file her final decision in this case. The Commissioner has conducted her own detailed and exhaustive examination of the record in this matter, including a careful review of the transcripts of the proceedings.

The Commissioner determines that prior to consideration of the tenure charges in this matter, a threshold determination must be made as to whether the vote of one or more members of the Board certifying these charges was tainted. The exceptions and reply exceptions on this issue are summarized below.

I. THE ALLEGEDLY TAINTED VOTE

1. As to William Tronolone

Petitioner takes exception, inter alia, to the ALJ's determination that Mr. Tronolone did not manipulate the investigation of Dr. Horowitz for personal, vindictive reasons. As support for his argument he offers the following: Mr. Tronolone proposed the idea of a task force; he suggested the specific outside firm to conduct the investigation; this investigating firm only interacted with specific individuals, and some members of the Board did not necessarily agree with all the conclusions of the outside investigators.

Petitioner also takes issue with the ALJ's finding regarding Mr. Tronolone's relationship with Mr. DeCicco. Petitioner further avers that the ALJ unfairly limited testimony on both of these issues which would have been relevant to establishing bias and, therefore, remand on these points is required.

The Board responds that the ALJ limited testimony in these areas only when proffers of relevancy were requested from petitioner's counsel in response to objections and none were forthcoming.

2. As to Mrs. Clara Navarrete

Petitioner excepts, inter alia, to the ALJ seeking to impose an additional requirement to the Colella "disqualifying interest" definition as applied to the investigation being conducted on Mrs. Navarrete i.e., that the subject matter of the personal interest capable of producing bias - the investigation, be the same as the subject of the tenure charges. (In re Colella, 1985 S.L.D. 118) Petitioner maintains that there is no legal support for this additional requirement which he alleges was a key factor in the ALJ's findings.

Petitioner also contends that the ALJ improperly limited testimony on certain issues relative to the taint of Mrs. Navarrete such as details regarding the grounds, seriousness, and scope of the investigation which was being conducted on her and the "acrimony" which existed between her and Dr. Horowitz.

Petitioner further excepts to what he avers were probably the real reasons for the ALJ's ruling on the taint issue.

> ***The ALJ opines that the charges against Dr. Horowitz are serious that the public has a right to have them heard at a hearing, and that "some flaw in the procedural process" should not deny them this.***(Petitioner's Exceptions, at p. 25)

The Board, in response to the limitation of testimony assertion, avers that the ALJ continuously granted petitioner's counsel great leeway to develop his theories and only limited

testimony when it went so far astray of resolution of the taint issue or when he perceived evidentiary problems. Accordingly, the Board contends that petitioner was not limited from presentation of any relevant taint testimony and the matter need not be remanded. (Board's Reply Exceptions, at p. 10)

As to the procedural process allegation, the Board argues that petitioner has distorted a portion of the ALJ's ruling in an attempt to establish that the ALJ may have found taint. The Board maintains that the actual finding was clearly opposite and states that the accurate statement made by the ALJ was:

> I do not see this proceeding as having been tainted by these matters which have been raised.
>
> I think that Counsel, in good faith, has attempted to establish what he saw and what undoubtedly Dr. Horowitz saw as problems with the process. But I am not convinced that he has sustained the burden of showing that this proceeding on the part of the Board or its individual members was tainted. (Board's Reply Exceptions, at p. 17, citing ALJ Decision, Transcript of Oral Decision, at p. 106)

The Commissioner, upon a full review of the record and transcripts, finds all of petitioner's exceptions in this regard to be without merit and adopts the findings and conclusions of the ALJ, with the modifications noted below.

As the ALJ articulately notes, under Mackler v. Board of Education of the City of Camden, 16 N.J. 362 (1954), it is clear that

> ***[T]here is nothing improper about a member of a public body who files the charges to vote on those charges.
>
> It's simply not the case that the mere filing of charges constitutes a conflict. (Initial Decision, Transcript of Oral Decision, at p. 75)

The Commissioner finds, therefore, that neither Mrs. Navarrete nor Dr. Ryan were precluded from voting on the tenure charges brought by them in October and January, respectively, by virtue of being the initiators of these charges.

The Commissioner additionally finds that the record supports the ALJ's conclusion that had Mrs. Navarrete chosen to vote on the October tenure charges, any personal interest she possessed at that time did not rise to the level required under Colella, supra, to taint her vote.

The Commissioner notes that the individual, factually dependent determinations as to whether the particular interests of Board members Tronolone and Navarrete were sufficient to disqualify their January tenure votes must be undertaken with great care. As articulated by the ALJ:

> We have to be careful in balancing the interests, that we are careful to assure that those situations which rise to a level in which there is a reasonable likelihood of corruption or favoritism or the appearance of such are condemned, but that those in which the suspicion is raised or the allegation is raised or the accusation is made of either favoritism or the appearance of such or personal interest or the appearance of such, are not automatically used as a basis for eliminating the right of duly appointed or elected public officials from performing the duties for which they have been elected or appointed. (Initial Decision, Transcript of Oral Decision, at p. 58)

As to William Tronolone, after a through review of the record, including petitioner's exceptions, the Commissioner finds, as did the ALJ, that the evidence does not support petitioner's allegation that Mr. Tronolone had any personal interest which would taint his vote. The Commissioner further finds that relevant proffered testimony was fully and fairly received by the ALJ.

As to Mrs. Clara Navarrete, the Commissioner determines that petitioner's reliance on the investigation being conducted on Mrs. Navarrete and her reaction to it as compelling evidence of her strong personal interest requiring a finding of taint under Colella, supra, totally unpersuasive. As aptly noted by the ALJ

> ***[T]here is a great danger in any policy determination that would hold that merely because a member of a public body is the -- either the target of or their name has been raised in the context of an "investigation" by someone who they are charged with supervising or reviewing, that that would automatically preclude them from being involved in any review of the conduct of that individual, that that would be a dangerous precedent. (Initial Decision, Transcript of Oral Decision, at pp. 90-91)

After a full review of the record, the Commissioner finds that this investigation conducted in earnest by Dr. Horowitz after Mrs. Navarrete filed a set of tenure charges against him and first brought to the Board's attention after he learned that a second set of charges had been filed, falls woefully short of establishing his taint allegation. Neither does the Commissioner find that Mrs. Navarrete's reaction to this particular investigation was any more than that which could be reasonably expected by any individual under the particular circumstances, nor does the Commissioner agree that this reaction evidences the level of personal interest required to establish taint under Colella, supra.

The Commissioner does, however, specifically reject any attempt by the ALJ to establish or to rely on in rendering his determination any "bright-line" test which concludes that an investigation of a board member which concerns allegations related to the tenure charges may constitute a personal interest rising to the level of a Colella, supra, disqualification but an investigation involving unrelated charges would not. Clearly, this type of test is unnecessary in the instant case. The Commissioner notes that the sensitivity and importance of situations of this type demand a case-by-case analysis irrespective of the investigation's subject matter. Additionally, the Commissioner observes that the routine application of such a broad test could lead to a grossly unjust result.

The Commissioner hereby adopts the suggested findings and conclusions of the ALJ, as modified above, for the reasons clearly articulated by him, concluding that there was no tainted Board member vote in the certification of tenure charges against Dr. Richard Horowitz.

* * * *

Dr. Horowitz makes a number of general exceptions to the ALJ's recitation of testimony, examination of evidence, and findings of fact which include extensive reference to preferred testimony. After a full review of these and the Board's reply exceptions, the Commissioner determines that these exceptions of Dr. Horowitz are without merit and discussion of this material is unnecessary.

Each of the tenure charges will now be examined and further exceptions addressed.

II. TENURE CHARGES

> CHARGE I - Engaging in conduct unbecoming a District Superintendent by allowing payment of invoices without contracts in violation of N.J.S.A. 18A:18A-1 et seq., N.J.S.A. 2C:30-4, and Sections 3300 and 3301 of the Bridgewater-Raritan School District Operations Manual.

Dr. Horowitz' exceptions argue, inter alia, that there is no evidence establishing that he knew of the lack of a signed contract. Further, he urges that this charge, if anything, would constitute inefficiency, rather than unbecoming conduct, for not properly supervising his subordinate, Dr. Mazurak, who was responsible for these business details. Dr. Horowitz avers that since the conduct constitutes "inefficiency," this charge must be dismissed because he did not receive 90-day notice pursuant to N.J.S.A. 18A:6-11.

Dr. Horowitz' exceptions further object to the use of a criminal statute in this charge maintaining that there was no evidence that he acted with any criminal intent in the Board not having a formally executed contract.

The Board responds that the record does not support Dr. Horowitz' supposed lack of knowledge regarding the absence of a signed contract. It argues:

> Bridgewater-Raritan is a "unit control system", in which the Business Administrator (until April, 1991, Dr. Mazurak, reports to and is supervised by the Superintendent of Schools (Mazurak T7/27 at 113, 114). In response to an October 17, 1990 Jordan & Pease billing (RBG-40; App. 13) Dr. Mazurak issued a March 10, 1991 payment in the amount of $28,488.82; yet at that time there was no signed contract off of which the payment was to be drawn (RBG-87 at pages 36-39). He did so with the knowledge of the Petitioner.

> Dr. Mazurak testified that the October bill for Investigation and Field Measurements "was arranged through Dr. Horowitz and there was nothing -- there wasn't any purchase order for him" (RBG-87 at page 42)
>
> (Board's Reply Exceptions, at pp. 29-30)

The Board further avers that at the time Dr. Horowitz allowed payment of the Jordan & Pease invoice without a signed contract, the following provisions of the Operation Manual for the Bridgewater-Raritan Regional School District were in effect:

> BUSINESS AND NON-INSTRUCTIONAL OPERATIONS 3300
>
> Expenditures
>
> It is the policy of the Board that the administration strictly observe the letter and the spirit of all laws and regulations relating to expenditures by the school system and to the control of its finances and property.
>
> Within the framework of applicable laws and regulations, purchases and use of materials and manpower shall be accomplished in accordance with good business practices with the primary purpose of serving the program of instruction.
>
> The Board holds the Superintendent and Board Secretary/Assistant Superintendent for Business directly responsible for carrying out this policy, and toward that end, the Superintendent shall detail the procedures for executing this policy in written administrative directives.
>
> * * * *
>
> BUSINESS AND NON-INSTRUCTIONAL OPERATIONS 3310
>
> EXPENDITURES
>
> Requesting Goods and Services (Requisitions)
>
> Requisitions for budgeted items shall originate from the key personnel directly responsible for their use. All requisitions will be examined and approved, or disapproved, for purchasing by the appropriate administrator.
>
> See Purchasing Handbook for detailed procedures.

No employee of the school system may obligate the Board without its having gone through the regular, approved procedures.

* * * *

BUSINESS AND NON-INSTRUCTIONAL OPERATIONS 3351

EXPENDITURES

The Board will authorize payment for goods and services when the following criteria have been met:

1. Orders have been contracted within budgeting limits. [emphasis added] (Board's Reply Exceptions, at pp. 30-31)

The Board states that this policy makes it completely clear that the superintendent would be held absolutely accountable to assure that district funds were neither obligated, or expended, in the absence of a signed contract.

Upon review of the record and the arguments advanced in the exceptions and reply exceptions, the Commissioner agrees with the findings and recommendations of the ALJ with respect to this charge. The Commissioner finds that Dr. Horowitz allowed the submission and payment of an invoice from Jordan & Pease when he knew there was no valid contract in place with this firm with respect to this subject matter. The Commissioner rejects Dr. Horowitz' contention that he had no knowledge regarding the lack of a contract, finding that the totality of the evidence indicates that any such lack of knowledge would have to be attributable to a purposeful attempt to remain ignorant of the situation. This also would be totally unacceptable behavior for an individual in his position.

With respect to the inclusion of a criminal statute in the charge, the Commissioner specifically notes that in her

consideration of this charge, she, like the ALJ, did not attempt to ascertain Dr. Horowitz' guilt or innocence on the criminal charge but rather confined her examination to determining whether the underlying behavior established constituted unbecoming conduct. This will be discussed in greater detail in relation to subsequent charges.

The Commissioner finds that the failure of the district's chief school administrator to comply with statutory requirements and the clear mandates of his own Board is inexcusable and constitutes nothing less than unbecoming conduct. The Commissioner hereby adopts the findings and conclusions of the ALJ in his initial decision as her own.

> CHARGE V - Engaging in conduct unbecoming a District Superintendent by knowingly permitting the submission of false statements to the State; accepting approval for those plans based on those false statements and, therefore, conducting the 1990 Bond Referendum based on the same in violation of the intent of N.J.A.C. 6:22-1.2.

Dr. Horowitz takes exception to the determination that the submission to the Department of Education was false or in violation of the statute. He argues, inter alia, that the architect, Pablo Jordan, testified that

> ***[T]he transmittal letter referred to educational needs, and not construction cost estimates. (T24-47) [and] that it was usage, not Code, that required a transmittal letter. (T24-47).
>
> (Dr. Horowitz' Exceptions, at p. 50)

Dr. Horowitz continues that Mr. Jordan further testified that

> [T]he [transmittal] letter had nothing to do with the cost estimate sheet. There was no requirement that the Board or the Superintendent sign or approve this sheet. (Id., at p. 52)

The Board in its reply avers that Pablo Jordan specifically testified that a letter signed by the Board President and Superintendent was required to accompany the educational specifications for the Department of Education presentation required to obtain project approval prior to the referendum (Jordan T7/24 at 86).

The Board further points out the Department of Education's pre-referendum oversight procedures embodied in part in N.J.A.C. 6:22-1.2 and 1.4, which at the time of the District's submission in September 1990, provided in relevant part as follows:

> Education specifications for building construction or modifications.
>
> (a) Education specifications shall be prepared in writing detailing all the facilities considered for the construction program and shall be submitted to the Department of Education, Bureau of Facility Planning Services for approval.
>
> N.J.A.C. 6:22-1.2
>
> (b) Estimates of dimensions and square feet for each area of new or modified construction shall be provided, together with an explanation of the proposed area utilization and relationships, and shall be signed by the president of the district board of education and chief school administrator as evidence of approval by the district board of education.
>
> (c) Educational specifications and subsequent revisions must be approved prior to the submission of plans and specifications. Incomplete specifications will not be accepted and shall be returned to the district board of education.
>
> N.J.A.C. 6:22-1.4 Submission of schematic plans prior to local funding....
>
> (d) This set of plans shall be submitted to the Bureau of Facility Planning Services with a site plan whenever site work is being affected, a

> project cost estimate (including a construction cost estimate escalated to the mid-point of construction), a project schedule, a transmittal letter indicating plan submission to the county superintendent, and local planning board, when applicable, and a five-year long-range facility plan in accordance with N.J.A.C. 6:22-7.1, including a current five-year enrollment projection. [emphasis added]
>
> (Board's Reply Exceptions, at pp. 35-36)

Upon review of the record, the Commissioner fully supports the ALJ's findings and conclusions with respect to this charge and adopts them as her own.

> CHARGE VI - Engaging in conduct unbecoming a District Superintendent by permitting the submission of plans to the State without his signature as required by N.J.A.C. 6:22-1.2, accepting approval for those unsigned plans and, thereafter, conducting the 1990 Bond Referendum, knowing that the approval of the referendum was based upon those plans which did not have his signature.

Dr. Horowitz' exceptions urge that because Charges V and VI deal with the same alleged action, i.e., the transmission of "false" information to the State, the charges should be treated as one. In the alternative, Dr. Horowitz argues that Charge VI should be treated as a de minimis violation of the Code for failure to actually place a signature on a document.

Dr. Horowitz also argues that prior to August 6, 1990 the cited provision of the New Jersey Administrative Code did not require the signature of the superintendent for the submission of educational plans. He avers that given that the rule adoption was just a little over a month before his required submission, it is understandable that he would not be in possession of this new requirement until his Code volumes were updated.

The Board's reply avers that the Administrative Code signature requirement has been in effect since April 4, 1988. The Board states that

> ***[T]he August 1990 amendments revised the review and approval process and moved the signature requirements contained in 6:22-1.1 to 6:22-1.2. However, the signature requirements under 6:22-1.2, formerly at 6:22-1.1, were not altered. (Board's Reply Exceptions, at p. 39)

After a full review, the Commissioner agrees with the findings and conclusions of the ALJ, the Board has established that Dr. Horowitz exhibited conduct unbecoming a superintendent by his failure to sign the State submission.

The Commissioner specifically rejects Dr. Horowitz' contention that this violation of the New Jersey Code is a de minimis infraction. As a requisite regulatory mandate attendant to the approval of the Board's planned voter referendum on October 2, the absence of Dr. Horowitz' signature had the potential to delay the required approvals necessary to permit the timely conducting of the referendum. The superintendent was fully aware of the importance of this particular referendum to his Board. As such, Dr. Horowitz, by virtue of his position, had an obligation to assure that all necessary details, no matter how trivial such details may have appeared to him, were attended to in order to ensure that the wishes and expectations of his Board were met. The Commissioner finds that Dr. Horowitz' failure to exercise this requisite degree of care is nothing less than unbecoming conduct.

The Commissioner, likewise, rejects Dr. Horowitz' contention that since Charges V and VI spring from the same activity

they should be treated as one charge. The Commissioner finds the fact that there were two regulatory infractions by Dr. Horowitz, irrespective of their being connected to the same activity, evidences a serious failure to honor the meaning and spirit of State rules and regulations governing his administrative responsibilities as a superintendent and further demonstrates a disregard for the expressed concerns of his Board that the referendum be conducted in a timely, honest, and open manner.

> CHARGE VIB - Engaging in conduct unbecoming a District Superintendent by acting in a manner which would constitute forgery, as defined in N.J.S.A. 2C:21-1.

No exceptions were filed by either party with regard to this charge. Upon review of the record, the Commissioner agrees with the ALJ's finding that the evidence does not substantiate that Dr. Horowitz was knowingly involved in a decision to copy Mrs. Navarrete's name and make unauthorized use of it. Therefore, the Commissioner finds that unbecoming conduct has not been established and agrees with the conclusion of the ALJ that this charge must be dismissed.

> CHARGE VIII - Engaging in conduct unbecoming a District Superintendent by allowing the submission to the State of official documents, knowing the same to contain false statements and forged signatures; thus, acting in a manner which would constitute offering a false instrument, as defined in N.J.S.A. 2C:21-3.

> CHARGE IX - Engaging in conduct unbecoming a District Superintendent by permitting the submission to the State of documents containing false statements and forged signatures; thus acting in a manner which would constitute official misconduct, as defined in N.J.S.A. 2C:30-2.

CHARGE X - Engaging in conduct unbecoming a District Superintendent by acting in a manner which would constitute falsifying or tampering with documents, as defined in N.J.S.A. 2C:21-4.

CHARGE XI - Engaging in conduct unbecoming a District Superintendent by acting in a manner which would constitute securing execution of documents by deception, as defined in N.J.S.A. 2C:21-16.

Dr. Horowitz' exceptions object to the framing of these charges in terms of criminal statute violations. He avers that this permits multiple findings of unbecoming conduct for one behavior, i.e., the submission of educational specifications to the DOE. He urges the Commissioner, if she finds he acted in a manner unbecoming a superintendent under these charges, to recognize that finding as one act of unbecoming conduct.

The Board in its reply fully agrees with the reasoning and findings of the ALJ on these charges.

The Commissioner finds that the framing of these four charges in terms of the violation of criminal statutes was unfortunate. Determining the guilt or innocence of Dr. Horowitz on the underlying criminal charge is, as recognized by the ALJ, totally outside the purview of this forum. The review of the ALJ and the Commissioner in this connection must be solely confined to the examination and weighing of the factual circumstances attendant to the charge to determine whether unbecoming conduct has been established. The Commissioner determines that when the distinguishing criminal statute citations are removed from Charges VIII, IX, X, and XI, what remains is a number of serious behavior infractions which stem from one foundational act. Consequently, the

Commissioner concludes that the above-referenced charges shall be combined and she finds that the factual evidence fully supports the establishment of unbecoming conduct on this combined charge.

In reaching this determination, the Commissioner specifically rejects the ALJ's conclusion with respect to Charge IX wherein he found that unbecoming conduct was established but all of the necessary elements to the criminal charge were not substantiated, requiring him to dismiss the charge. As previously discussed, for purposes of this tribunal the examination of this charge must cease when the conduct determination is achieved.

> CHARGE XII - Engaging in conduct unbecoming a District Superintendent by deceiving the Board and the voters as to the true cost estimates for the Bradley Gardens Project and interfering with the right of voters to make an informed vote in the 1990 Bond Referendum.

Upon review of the record including Dr. Horowitz' exceptions, the Commissioner finds such exceptions to be without merit and hereby adopts as her own the findings and conclusions of the ALJ with respect to this charge for the reasons clearly articulated by him in the initial decision.

The Commissioner particularly notes that as a result of the prior disastrous Board-sponsored referendum in February 1989, Dr. Horowitz was fully aware of the Board's particular concern that all information provided to the public on the upcoming referendum be as full and accurate as possible. By directing the use of the $905,000 cost figure for the Bradley Gardens project in materials disseminated to the public when he was clearly aware that this figure did not come any where near to an approximation of the true

cost of the proposal, Dr. Horowitz exhibited a flagrant disregard of the Board's wishes and the best interests of the district and public.

> CHARGE XIII - Engaging in conduct unbecoming a District Superintendent by misrepresenting to the voters in the Board Bulletin that the monies from the 1990 Referendum would be used for improvements at every school in the district in contrast to spending as delineated in State submissions.

Dr. Horowitz avers in his exceptions that the referendum breakdown chart on page 3 of the Bulletin did not state that the project relating to the Library/Media Centers would involve actual physical expansion but rather:

> ***The bulletin stated that a solution would be to "Improve Library/Media Centers so students can enjoy greater participation in technological advances of the information age." As to the allotted monies (in the chart, on page 3 of the bulletin), the money was to "allow[s] schools to keep up with advances in information retrival [sic] techniques."
>
> (Dr. Horowitz' Exceptions, at p. 64)

Further, Dr. Horowitz states that there were no plans or drawings regarding the Library/Media Centers presented to the public which could have served to mislead them. He maintains that

> The language of the Board Bulletin was broad -- it did not promise exact projects but spoke of what the goals and solutions were to be. (Id.)

Dr. Horowitz next argues that this matter, unlike the Bradley Gardens project, did not involve any large increase in costs that the voters would allegedly be misled about and, therefore, should have been informed of prior to voting.

In its reply, the Board argues that the chart on page 3 of the Bulletin:

> unequivocably advised voters that $905,000 of the $23.4 million dollar proposed referendum would be used for a "new all purpose room, learning center renovations and building repairs" for Bradley Gardens to bring that school in parity with others in district." That chart further advised the voters in the other districts that their schools would receive $490,000 for Library/Media Centers (enlarging the existing media centers into 1,600 square foot facilities, based upon the elementary facilities committee report (RBG-10 at 13; App. 2)). As well, the voters in the Adamsville elementary school district were advised that $90,000 would be allocated from the $23.4 million dollars to build a new main office.
> (Board's Reply Exceptions, at p. 52)

The Board avers that the plain language of the Bulletin and common sense support the ALJ's conclusion on this charge.

Upon review of the record, the Commissioner finds Dr. Horowitz' arguments unpersuasive and concurs with the ALJ's findings and determination with respect to this charge. Contrary to Dr. Horowitz' apparent argument that a large increase in costs was the only factor of which voters might need to be informed to preclude the possibility of misleading them, the Commissioner finds that undisclosed known variations in the "scope" of the envisioned project could be equally misleading. Along with the total cost of the package placed before them, voters were entitled to review and consider an accurate breakdown of what those monies were proposed to achieve for them.

The Commissioner notes that once again, knowing the Board's concern for the accurate presentation of material connected to the referendum to the public, Dr. Horowitz' failure to disclose his

serious doubts as to whether the presented material reflected a true picture of the likely realities demonstrated a complete lack of regard for the best interests of the Board.

> CHARGE XIX - Engaging in conduct unbecoming a District Superintendent on March 19, 1991, by using abusive language and threatening a senior citizen of the District with physical abuse.

Dr. Horowitz avers, inter alia, that this charge should be dismissed because the behavior established by the evidence does not support the allegation that he "threatened" a senior citizen.

> ***[T]he ALJ found only that Dr. Horowitz "vented a good measure of verbal 'reaction'" to Putter, and that while he did not find that Dr. J. Horowitz made any threats of a verbal or physical nature upon Mr. Putter, Mr. Putter "may have viewed" Dr. Horowitz's arm motions as a threat.
> (Dr. Horowitz' Exceptions, at p. 73)

Additionally, Dr. Horowitz avers that the ALJ did not fully consider or give appropriate weight to eyewitness testimony (Tornatore T13-135, 136, 137, 230, 234) and even Mr. Putter's own testimony (Putter T11-126, 127, 128, 129, 137) regarding the extent to which Mr. Putter deliberately provoked the "verbal reaction" he received from Dr. Horowitz. He alleges that this testimony corroborates that:

> ***Mr. Putter*** clearly picked a fight with Dr. Horowitz and was ready for -- in fact, eagerly anticipated -- the consequences.
> (Dr. Horowitz' Exceptions, at p. 70)

Dr. Horowitz next argues that even if the factual findings of the ALJ are accepted, the legal standard which he applied was incorrect. He avers that the ALJ found that:

> ***Dr. Horowitz is a prominent public figure, one whose actions in office are generally fair game

> for comment, critical and otherwise, by citizens. No doubt some of this criticism is unfair, even highly so.
> (Initial Decision, at p. 98)

Dr. Horowitz then argues

> ***The ALJ acknowledges that Putter's remarks were strong, personal, and attacked Dr. Horowitz in a way suggesting flaws in his character and doubts as to his fitness, remarks that could well rile their object. However, the ALJ states that one in "such a position" as Dr. Horowitz must "temper his reaction" and must put aside the temptation to respond in kind. Even though Dr. Horowitz is only human and can be expected to take strong exception to unfair, even vicious attacks upon him, due to the "role he plays" and the "position he holds" he must refrain from either "verbal or physical manifestations of uncontrolled reactions."
> (Dr. Horowitz' Exceptions, at pp. 73-74)

Dr. Horowitz avers that this standard is contrary to prior decisions of the Commissioner in similar tenure charge cases involving "altercations." Specifically, Dr. Horowitz cites In the Matter of the Tenure Hearing of Romanoli, 1975 S.L.D. 352 involving a tenure charge against a superintendent for an altercation with a board member, where the Commissioner stated:

> Indeed, the Commissioner finds the private nature of the incident herein is a bar to the exercise of any authority by him, and he opines that a decision to the contrary would mandate the formulation of a graduated set of moral, ethical and legal standards applicable to the use of language by public school employees in private situations for which he finds no jurisdiction.... [T]eachers do not "shed their constitutional rights to freedom, of speech or expression at the schoolhouse gate. Neither, the Commissioner holds, are they, nor superintendents of schools, divested of such rights when they engage in essentially private, personal conversations - albeit other than that used in polite exchange -- at midnight in a school parking lot.
> (Dr. Horowitz' Exceptions, at p. 75, quoting Romanoli, supra, at 357)

Dr. Horowitz further cites In the Matter of the Tenure Hearing of Belford, 1978 S.L.D. 660; In the Matter of the Tenure Hearing of Villani, 89 S.L.D. 2297; In the Matter of the Tenure Hearing of Buch, 77 S.L.D. 95, as support for his contention that rather than imposing the stringent standard utilized by the ALJ, the Commissioner considers existing factual circumstances such as the privateness of the confrontation, whether a single encounter was involved, whether the event was unpremeditated and of short duration, and whether evidence in the case establishes any deleterious effect on the educational program of the Board, in reaching a tenure charge determination. Dr. Horowitz argues that when evaluated under the correct legal standard, this charge cannot be sustained.

The Board in its reply notes that while not denying that he lost control in his confrontation with Mr. Putter, Dr. Horowitz nonetheless urges that his conduct was somehow provoked and, therefore, excusable. In this regard the Board relies on what it sees as the well-substantiated conclusion of the ALJ.

After a full and careful review of the record, the Commissioner finds Dr. Horowitz' exceptions unpersuasive. She specifically rejects his reliance on Romanoli, supra, and the other cited cases for the proposition that existing school law supports the evaluation of a school superintendent under some lesser standard than the one articulated by the ALJ. First of all, the Commissioner is compelled to point out that the holding in Romanoli, supra, was unequivocally qualified:

> ***This determination is limited to the specific factual circumstances in this case. It does not

> negate the numerous prior decisions of the Commissioner and the courts that private conduct may, in other circumstances, properly be the subject of a charge before the Commissioner.***
> (1975 S.L.D. at 357)

The remaining cases cited by Dr. Horowitz are ones which involved an "altercation" as the sole tenure charge where the issue before the Commissioner was whether the one charge involved was sufficient to warrant a penalty of discharge. The Commissioner further notes that the factual circumstances existing in the above-cited cases are in no way similar to those in the instant case. The "altercation" which is being reviewed here involves a school superintendent and a senior citizen member of the general public, which took place inside a public building shortly after a public school board meeting, and was anything but "private" having taken place before witnesses, one of whom was a reporter. The Commissioner determines that these particular factual circumstances could most assuredly have had a deleterious effect on the Board and its programs.

The Commissioner further finds that prior decisions regarding the level of conduct expected from teaching staff are uniformly consistent in holding that teachers hold positions of public trust, are responsible for the care of children for whom they serve as role models, and are thus held to higher standards of behavior than most other employees and individuals. See e.g., In the Matter of the Tenure Hearing of Jacque L. Sammons, 1972 S.L.D. 302. It is equally clear in prior decisions that the professional conduct demanded of a superintendent is significantly higher yet.

As enunciated by the State Board of Education in In the Matter of the Tenure Hearing of Frank J. Napoli, 1988 S.L.D. 284:

> If the standard of behavior required of teachers is stringent, the standard for high administrative personnel must be even more stringent. As was noted in In the Matter of the Tenure Hearing of Louis Cirangle, 1980 S.L.D. 95, 96, aff'd by the State Board, 1980 S.L.D. 97, aff'd, Docket #A-3967-79A (App. Div. Jan. 30, 1981), certif. denied, 87 N.J. 347 (1981):
>
> > The position of Chief School Administrator, difficult at best, cannot be exemplified by one who displays less than the self-restraint and controlled behavior requisite as an example to the Board, teachers and pupils alike.
>
> The Respondent, as superintendent of schools, occupies a crucial position within the school district and community. He is entrusted with the responsibility for providing educational leadership and for administering the school district so as [to] ensure proper implementation of board policy with respect to personnel matters as well as educational programming.***
>
> (1988 S.L.D. at 288)

The Commissioner is not unmindful that it may well be true that Mr. Putter was not without fault in this situation. However, she cannot agree that a superintendent may be categorized as a professional person if he substitutes inflamed, irate reaction for the application of that kind of reasoned action which should be characteristic of the District's highest administrative officer. Dr. Horowitz, by "losing it" in an altercation with this senior citizen member of the general public of his District, exhibited a lack of restraint and self-control required by one who is responsible for educational leadership. His actions also did a serious disservice to his Board which relies upon him to conduct himself properly and appropriately in fulfilling his

responsibilities. Clearly, the behavior of Dr. Horowitz with respect to this incident was entirely unprofessional and nothing less than unbecoming conduct.

Finally, the Commissioner agrees that the use of the words "threatening a senior citizen with physical abuse" in the phrasing of this charge was unfortunate in its legal connotations but she also believes that judgment on this charge should not be frustrated by the imprecise use of this term when its intended meaning is so clearly spelled out in the language of the remainder of the charge, which in itself established unbecoming conduct on the part of a school superintendent.

The Commissioner, therefore, agrees with the findings and conclusions of the ALJ in his initial decision with respect to this charge and adopts them as her own.

III. PENALTY

Dr. Horowitz excepts to the ALJ's determination that the evidence does not support the assertion that certain Board members were "out to get him." Dr. Horowitz avers that evidence, such as that pertaining to the Stark & Stark investigation, substantiates a "vendetta" against him and this must be considered in the imposition of a penalty.

Dr. Horowitz further avers that his misconduct does not rise to a level warranting dismissal arguing that the heart of the charges against him relate to Bradley Gardens and his failure to inform the Board and the public of increased costs. Dr. Horowitz relies on a number of cited cases wherein the Commissioner imposed a penalty of dismissal only after finding a continual pattern of wrong

doing or a personal pecuniary interest of the superintendent, which Dr. Horowitz alleges is not present in this case.

Dr. Horowitz next excepts to the ALJ's refusal to permit evidence as to his past record as a superintendent (T13-301) alleging that such a determination was prejudicial as this information is highly relevant to a decision on the appropriate penalty to be imposed, especially when unbecoming conduct is charged. Dr. Horowitz presents a number of unbecoming conduct cases where the Commissioner determined dismissal was too harsh a penalty after considering such factors.

Dr. Horowitz urges that if he is dismissed as a superintendent, he be permitted to return to an elementary school principal position, since the instant charges relate to conduct as a superintendent not as a principal and both the ALJ and the Board recognized that he performed adequately as a principal. Dr. Horowitz points to the Commissioner's decision in In the Matter of the Tenure Hearing of Paul J. McCormick, Hunterdon Central Regional High School District, 1980 S.L.D. 145 as support for his partial dismissal from tenure argument.

The Board in its reply exceptions avers that Dr. Horowitz is attempting to categorize his deception of the public, Board, and the Department of Education as inefficiency or bad judgment. The Board argues that Dr. Horowitz' actions went well beyond mere inefficiency in performance or bad judgment and could more appropriately be defined as fraud or deception.

The Board further notes that the cases cited by Dr. Horowitz to support his argument that dismissal is too severe a penalty all involve teachers and not superintendents, who, because of their high position, the Commissioner has found are to be held to a significantly more stringent level of behavior.

The Board urges that the ALJ's imposed penalty of tenure revocation be upheld.

From her review of this matter, the Commissioner agrees that the relationship between Dr. Horowitz and the Board became increasingly strained in the months before the institution of the within charges but she is not persuaded by the evidence that Dr. Horowitz' allegation that the charges are the culmination of a vendetta against him for purposes of ousting him from his position can in any way be supported. Neither does she find a factual situation approximating that in In re Onorevole, 1987 S.L.D. 96, 172 to exist in this case.

Upon a careful and thorough consideration of the record, the Commissioner finds that the totality of factual evidence in this case reveals a superintendent who completely failed to understand or appreciate the very substantial fiduciary duty he owed, by virtue of his position, to his Board, the District and the taxpayers. A superintendent of schools serves as the chief executive officer of a school district and, as such, the Board must place considerable reliance on his ability, honesty, integrity, efficiency, judgment and faithfulness in the performance of his duties. It is likewise critical that in his dealings with the District and the taxpayers he continually maintain their trust and confidence.

The Commissioner determines that through a series of behaviors which are the subject of the instant case, Dr. Horowitz breached the fiduciary duties owed to all of these parties. As articulated by the ALJ in his initial decision:

> Dr. Horowitz engaged in a series of actions, or in some instances, inactions which manifested a lack of appropriate professional judgment, a lack of communication with the Board of Education, a lack of candor with the Board and with the public, a failure to respond to the demands of his office, a failure to honor the meaning and the spirit of administrative regulations governing aspects of his job and the activities in which he became involved in that position, and conduct which, if not in fact criminal, was in some instances sufficiently questionable so as to raise concern as to his capacity to perform his job within the confines of legality.***
>
> (Initial Decision, at p. 101)

The Commissioner further determines that the charges in this case are not mitigated because the majority of them relate to the Bradley Gardens affair. What the Commissioner finds here are a series of derelictions of responsibilities by Dr. Horowitz as a superintendent. Any one of these incidents considered alone and unrelated to the others could possibly be ascribed to misunderstanding, unintentional oversight, or an error of judgment. Unfortunately, however, they are not unrelated and taken as a whole they add up to a pattern of behavior that conclusively demonstrates unfitness for an educational leadership position in the Bridgewater-Raritan school system.

The Commissioner particularly notes that she is fully cognizant of her discretion to fashion whatever penalty she deems suitable in this situation. However, for all of the previously discussed reasons, she concludes that anything less than forfeiture

of Dr. Horowitz' tenure in the district would be inappropriate. His failure to deal openly and forthrightly with information available to him over an approximately eight-month period, including the almost tripling of the cost for the Bradley Gardens Project from $908,000 to $2.459 million, his total disregard for State requirements and Board policies, and his failure to honor what he clearly knew to be a heightened need for open and honest disclosure to the public call into question his fundamental personal character - his truthfulness, integrity, sense of fairness, openness, candor, and, obviously, judgment.

In reaching this determination, it must be emphasized that the Commissioner was also particularly mindful of and sensitive to the divisiveness and strong emotions this controversy has evoked in the community. Dr. Horowitz, through his actions in this regard, created a climate of disharmony, loss of confidence, and mistrust in which the Bridgewater-Raritan school district should not be required to operate.

As stated in In the Matter of the Tenure Hearing of Joseph A. Maratea, 1966 S.L.D. 77, aff'd State Board 106, aff'd N.J. Superior Ct. (App. Div.) 1967 S.L.D. 351:

> ***The Commissioner is assiduous to protect school personnel in their employment when they are subjected to unfair or improper attacks or when they are unable to perform effectively because of conditions not of their own making or beyond their control. An employee is not entitled to protection of tenure, however, when, by his own acts or failures, he creates conditions under which the proper operation of the schools is adversely affected.***
>
> (at 106)

The Commissioner finds that such is the case here. She is forced to the conclusion that the Bridgewater-Raritan school district has been so adversely affected by Richard Horowitz' actions that his continued presence as an educational leader in the District is simply not tenable nor is it in the best interest of the students or the community. The imposition of a penalty other than dismissal from tenured employment in the District would not cure these conditions and would only serve to exacerbate the distressful conditions under which this school district now finds itself.

The Commissioner has fully reviewed the cited circumstance where Dr. Horowitz alleges he was precluded from presenting testimony regarding his past record which might serve to mitigate the penalty in this decision and she agrees with the ALJ's determination that such testimony was inappropriate at the time offered. The Commissioner further notes that Dr. Horowitz makes no claim to have ever attempted the introduction of this type of evidence at a later time during the hearing proceedings and she, therefore, finds his allegation of prejudice unpersuasive.

The Commissioner additionally notes that Dr. Horowitz' reliance on McCormick, supra, in arguing for a partial dismissal from tenure is totally without merit. The Commissioner finds no analogous factual pattern which could in any way justify permitting a superintendent whose actions caused such a devastating effect in his District to remain there in any capacity as an educational leader, albeit as a superintendent or principal.

IV. CONCLUSION

Upon careful and thorough consideration of the record, the Commissioner concludes that the Board has proven unbecoming conduct on the part of Dr. Horowitz on Charges I, V, VI, the combined Charge (VIII, IX, X, XI), XII, XIII, and XIX. She concludes that the totality of these incidents and their character, along with the consequences they have caused in the District, clearly show Dr. Horowitz to be unfit to fulfill the duties of a teaching staff member in the Bridgewater-Raritan school district.

The foregoing determination rendered by the Commissioner is based upon those findings and recommendations set forth in the initial decision of the ALJ as modified herein.

The Board is hereby directed to terminate Dr. Horowitz' employment as a tenured teaching staff member in the Bridgewater-Raritan school district as of the date of the Commissioner's decision.

It is further ordered that pursuant to N.J.A.C. 6:11-3.6(a)(1), a copy of the final decision in this matter be forwarded to the State Board of Examiners for its review and, in its discretion, further appropriate action.

IT IS SO ORDERED.

MaryLee Fitzgerald

COMMISSIONER OF EDUCATION

MARCH 1, 1993

DATE OF MAILING - MARCH 1, 1993

32-93

SB #32-93

EDWARD FARLEY AIZEN,

PETITIONER-APPELLANT,

V.

JEFFREY OSOWSKI, DIRECTOR, DIVISION OF SPECIAL EDUCATION, NEW JERSEY STATE DEPARTMENT OF EDUCATION,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, May 17, 1993

For the Petitioner-Appellant, Edward Farley Aizen, pro se

For the Respondent-Respondent, William C. Brown, Deputy Attorney General (Robert J. Del Tufo, Attorney General

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

August 4, 1993

Date of mailing 05 AUG 1993

33-93

BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK,

PETITIONER,

V.

BOROUGH COUNCIL OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

MARCH 4, 1993

BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOROUGH COUNCIL OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

This matter was opened before the Commissioner of Education by way of a petition filed by the Board of Education of Lincoln Park (Board) appealing the defeat of a cap waiver placed before the voters of the Borough of Lincoln Park in the amount of $629,159. The Board's appeal argues that the above-cited amount is necessary in order to provide a thorough and efficient system of education to the children of the district.

On March 4, 1992, the County Superintendent of Morris County by letter authorized the Board to place a cap waiver proposal before the voters of the district in the amount of $629,159 pursuant to the provisions of N.J.S.A. 18A:7D-28(f).[1]

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[1] The Commissioner had previously on February 28, 1992 granted a cap waiver of $240,496 due to unanticipated special education costs as authorized under N.J.S.A. 18A:7D-28(e) which was included within the basic budget advertised and placed before the voters. Since the basic budget was approved by the voters that amount is not part of this appeal.

The County Superintendent's letter, however, notified the district that while the entire $629,159 could be included in the cap waiver proposal being presented to the voters, only $299,035 for specific line items was approved as being necessary to provide a thorough and efficient education. She further notified the Board that it must appeal that amount to the Commissioner should the cap waiver proposal be defeated. The amount of $330,124, not deemed essential for T&E, was not eligible for appeal to the Commissioner.

When the voters approved the current expense budget presented by the Board, but defeated the cap waiver proposal submitted under N.J.S.A. 18A:7D-28(f), the Board appealed to the Commissioner seeking approval to increase its current expense budget by the entire amount of $629,159 and challenged the action of the County Superintendent in not determining that the entire amount was necessary in order to provide a thorough and efficient system of education. The Borough of Lincoln Park (Borough) in its Answer urged the Commissioner to dismiss the petition contending that the Commissioner was barred by the express language of N.J.S.A. 18A:7D-28(f)[2] from considering any appeal of a defeated cap waiver proposal.

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2 N.J.S.A. 18A:7D-28(f) provides:

> Any school district may submit a proposal to raise the amount of tax levy necessary to exceed the maximum permissible net budget permitted by this section to the legal voters of the district for type II school districts without a Board of School Estimate and to the Board of School Estimate for those school districts with a Board of School Estimate as required during the school budget approval process pursuant to chapters 22 and 54 of Title 18A of the New Jersey Statutes and section 13 of P.L. 1971, c.271 (C. 18A:46-41). The proposal to raise additional tax levy to exceed the maximum permissible net budget shall be in

Acting on the Borough's motion to dismiss, the Commissioner determined that authority to consider such appeals did exist, citing an Attorney General Opinion which held as follows:

> It is our opinion that the constitutional mandate for a thorough and efficient school system of education, which incorporates an obligation that districts have adequate fiscal resources, would empower the Commissioner to order a budget increase where necessary to meet the constitutional mandate. This interpretation is consistent with the longstanding and continuing legislative delegation of this constitutional responsibility to the Commissioner and the State Board, Robinson (V), id. at 461, which has been recognized by the courts.***
>
> The QEA and subsequent amendments have not relieved the Commissioner of this constitutional responsibility. Thus, based on this delegation and the court's expansive interpretation of the Commissioner's authority and obligation to meet the constitutional mandate, it is reasonable to conclude that the Legislature did not intend to restrict the Commissioner's ability to fulfill his constitutional responsibilities. The recently enacted provision, therefore, does not preclude the Commissioner from entertaining a petition from a local school district whose budget -- without the cap waiver -- is determined to be inadequate to provide a thorough and efficient education to the children in that district. Those districts should be readily identifiable since the county superintendent should approve their budgets conditioned on the district receiving approval of a cap waiver.
> (Attorney General Opinion, July 8, 1991, at p. 4)

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addition to the amounts required to be approved for each school district in accordance with chapters 22 and 54 of Title 18A of the New Jersey Statutes and section 13 of P.L. 1971, c.271 (C. 18A:46-41). In the event that a school district's proposal to raise the tax levy to exceed the maximum permissible net budget is not approved in accordance with the budget approval process set forth in chapter 22 of Title 18A of the New Jersey Statutes for type II districts and for type I districts, chapter 54 of Title 18A of the New Jersey Statutes for county vocational school districts and section 13 of P.L. 1971, c.271 (C. 18A:46-41) for county special services school districts, that disapproval shall be deemed final and shall not be subject to further review or appeal.

Additionally, the Commissioner dismissed that portion of the Board's cap waiver appeal which was not deemed essential for a T&E education by the Morris County Superintendent, also concluding that any appeal of the County Superintendent's determination should have been made prior to presenting the cap waiver proposal to the voters.

The Board appealed to the State Board arguing that the Commissioner had the obligation to consider the full amount of the cap waiver request. The Borough cross-appealed arguing once again that the Commissioner lacked authority to hear an appeal of a defeated cap waiver and that hearing the matter under procedures not codified denied it due process.

The State Board affirmed the Commissioner's authority to direct an increase in a district's budget when such an increase is necessary to meet the constitutional mandate of providing a thorough and efficient system of education relying, inter alia, on the Attorney General Opinion referred to above. However, citing the sparseness of the record and the absence of regulatory criteria by which the County Superintendent determined what additional amounts were necessary to provide a T&E education, the State Board remanded the entire cap waiver appeal to the Commissioner finding no basis in the record to treat differently those items deemed "approved T&E amounts" and those deemed "not approved T&E amounts." See Board of Education of the Borough of Lincoln Park v. Borough Council of the Borough of Lincoln Park, State Board Decision December 2, 1992.

Further, in the absence of regulations specifically codifying a cap waiver appeal process, the State Board held that it found nothing in the current regulatory scheme which would preclude

the Board from having the opportunity to demonstrate to the Commissioner that the entire amount of the cap waiver proposal was necessary to provide a T&E education.

Moreover, the State Board concluded, that unlike the circumstances which prevail when a budget is defeated and when a Board of School Estimate establishes a budget amount necessary for a thorough and efficient system of education, the municipal governing body has no statutorily prescribed role in a cap waiver appeal before the Commissioner. Indeed, the State Board concluded that it found no basis upon which the Commissioner or the State Board would be precluded from affording complete relief to the Board even if the Borough were not joined as a respondent. Nevertheless, the State Board found that there was no basis upon which it could conclude that permitting the municipality to participate on a voluntary basis could deprive it of its right to due process as contended in the Borough's cross-appeal. Thus, by virtue of the State Board's decision in this matter, the Commissioner presently has before her the entire amount of the cap waiver proposal as submitted to the voters.

Upon remand from the State Board, a review of the record indicated that while the Board in its original submission of its Position Paper on August 19, 1992 had presented its rationale for the entire amount of $629,159, the Borough's Position Paper addressed only those line items included within the $299,035 found to be necessary for a thorough and efficient system of education by the Morris County Superintendent of Schools. Further, the Commissioner noted in light of the remand from the State Board that nothing in the record existed to explicate the County Superintendent's

rationale for her rejection of the $330,124 from the cap waiver proposed as not being essential to the provision of a T&E education. Consequently, on December 28, 1992, Dr. Maureen Keller, Director of the Bureau of Controversies and Disputes, addressed a letter to the parties informing them that Dr. Sharon Clover, Morris County Superintendent, was to submit a sworn affidavit setting forth her rationale as to why she had determined the $330,124 was not essential to a T&E education. The letter from Dr. Keller also afforded the Borough an opportunity to supplement its original Position Paper to include its position relative to the $330,124 which it had not addressed.

The County Superintendent's affidavit was filed on January 22, 1993. The Borough did not submit a position on the $330,124, relying instead on the County Superintendent's submission. The record in the matter closed on February 8, 1993 upon receipt of the Board's reply to the County Superintendent's submissions.

The accounts and amounts in dispute in this matter are as follows:

Account		Cap Amount Requested
120D	Purchase Other Professional Services	$ 15,983
130	Other Administrative Expenses	8,892
211	Administrative Salaries	15,000
213	Teachers' Salaries	127,032
214	Salaries Other Instructional Staff	77,450
215	Secretarial Salaries	4,000
216	Other Salaries for Instruction	100
220	Textbooks	20,000
230	Library and AVA Materials	23,124
240	Teaching Supplies	25,200
250	Other Expenses for Instruction	16,400
260A	Purchase Professional Educational Services	3,000
260B	Purchase Technical Educational Services	15,000
320	Other Expenses Attendance	325

Account		Cap Amount Requested
410	Salaries Health Services	51,700
430	Purchase Professional/Technical Services	300
510	Pupil Transportation	27,050
520	Contracted Transportation Services	25,000
550	Other Expenses Pupil Transportation	810
610	Plant Operation Salaries	19,255
630	Heat	5,000
710	Salaries Maintenance	46,089
730	Purchase Equipment	31,954
730C	Purchase New Instructional Equipment	26,515
820	Insurance	13,800
930	Expenditures to Cover Deficit in Cafeteria	6,000
Program #27	Adult Education	7,500
22-210	Speech Teacher	16,680
	Total	$629,159

Account	Request for Cap Waiver
120D	$15,983

BOARD'S POSITION

The Board's position in this account stems from its alleged need to undertake a building program to more adequately meet the needs of its middle school pupils at the Chapel Hill School whose newest wing is 35 years old. The funds requested in this account are for architectural services and filing fees which the Board contends cannot be reallocated from other areas budgeted in the Professional and Technical Services Account.

BOROUGH'S POSITION

The Borough contends that the Board showed a budget surplus of $361,157 after appropriating $167,424 into the 1992-93 budget and could therefore allocate a portion of that surplus to cover all approved T&E cap waiver programs.

The Borough likewise argues that all work requiring architectural services has been completed and submitted to the State.

COUNTY SUPERINTENDENT'S POSITION

The County Superintendent disapproved the inclusion of this amount in that portion of the cap waiver proposal because she deemed it not necessary for a T&E education given the status of the project for which the architectural fees are allocated, i.e., the plans were already submitted to Trenton and the project was on hold. The Board avers this position is in error.

Account	Request for Cap Waiver
130	$8,892

BOARD'S POSITION

The Board's request is based upon increases in New Jersey School Boards Association membership fees, increased cost of seminars and workshops for Board members and administrators and the need to replenish supplies.

Failure to increase the amount available will result in inability to receive adequate training for Board members and administration.

COUNTY SUPERINTENDENT'S POSITION

The County Superintendent indicates in her affidavit that the costs for this cap waiver request could be deterred for one year since the training and seminars are not required by code or statute and the account still has $85,507 for "other Board expenses." The Board rebuts the County Superintendent's position by pointing out that board membership training is now statutorily required.

Account	Request for Cap Waiver
211	$15,000

BOARD'S POSITION

The amount requested here is for salary increases totaling $4,074 for three building principals. In requesting this amount, the Board waived the additional $11,000 which it had originally requested.

BOROUGH'S POSITION

The Borough argues that the increases enjoyed by principals over the last five years have exceeded the inflation rate by two to three times. With the increase requested here, the Borough contends that the average increase in salary for principals will amount to over 8% per year over the last five years. It contends sufficient funds are available in surplus.

COUNTY SUPERINTENDENT'S POSITION

Having approved $4,074 for the purpose in her original review, the County Superintendent did not address this item in her sworn statement since the Board has waived the remaining $10,926.

Account	Request for Cap Waiver
213	$127,032

BOARD'S POSITION

The Board's request arises from a professional need for $90,000 for two additional elementary teachers to meet increasing enrollment anticipated for kindergarten and first grade to maintain lower class sizes at these two levels. Additionally, the Board argues that it employed three second grade teachers and only two third grade teachers in 1991-92 and, therefore, will require an

additional third grade teacher in 1992-93 when the second graders move to the third grade.

Without the funds requested, the Board argues that it will also have to riff a Basic Skills Teacher and increase the number of students handled by four remaining teachers in an area requiring individualization.

BOROUGH'S POSITION

The Borough argues that the district is currently overstaffed at the middle school and recommends transfers to the elementary schools. It also argues for the elimination of a part-time position shown in the 1991-92 budget.

COUNTY SUPERINTENDENT'S POSITION

The County Superintendent points out that her original approval of $90,000 was based upon the $31,690 salary of the Basic Skills teacher and a starting salary of $30,000 for the two additional teachers requested.

Account	Request for Cap Waiver
214	$77,450

BOARD'S POSITION

The Board contends that the amount budgeted for 1992-93 in this area of Salaries Other Instructional Staff is a decrease from what was expended in 1991-92. Unless the entire cap waiver request is granted, the district will be required to eliminate a librarian and discontinue its part-time guidance person.

The Board contends the additional guidance services are necessary to address a need identified by the administration, Board and community for individualized elementary school counseling,

crisis intervention and to expand the suicide prevention program and drug counseling program.

Presently one full-time and one part-time person are providing guidance to 969 pupils.

In its February 8, 1993 submission, the Board indicated it was unable to staff the library position and believes it essential that the funds be made available to bring the librarian back.

BOROUGH'S POSITION

The Borough argues that this account has shown extraordinary increases in five of the previous six years averaging 7 to 8% per year. The increases in expenditures will result in increases greater than the increases in pupil population growth. The Borough contends that current staffing levels have been the same for five of the last six years without detriment to a T&E education and therefore the requested increases are not warranted.

COUNTY SUPERINTENDENT'S POSITION

The County Superintendent originally approved as necessary for T&E an amount of $38,725 for the salary of the librarian. Her statement declares that a guidance counselor is not required for elementary school under current legislation defining T&E.

Account	Request for Cap Waiver
215	$4,000

BOARD'S POSITION

The amount requested in this account is to bolster the account for substitute secretaries which without the amount requested would be $7,500. For 1991-92 the district expended $11,101.51 for this purpose thus leaving it without sufficient resources for meeting this important service.

COUNTY SUPERINTENDENT'S POSITION

The County Superintendent points out that the actual audited expenditure in this account for 1991-92 was $85,542 out of $90,378 appropriated. Thus, the County Superintendent concluded that the requested cap waiver was not necessary based upon the previous year's budget expenditures. The Borough joins in this position.

Account	Request for Cap Waiver
216	$100

BOARD'S POSITION

The Board waived this request in its February 8, 1993 submission (p. 4).

Account	Request for Cap Waiver
220	$20,000

BOARD'S POSITION

The advertised budget in this area for textbook purchases is approximately $15,000 less than the 1991-92 unaudited expenditures. The Board contends that the total sum requested (including cap waiver amount) represents approximately $32 per pupil for replacement of existing texts, as well as the purchase of new science books for its elementary schools. These texts are replaced on a five-year review plan. Failure to replace the science texts will disrupt the cycle and require increased expenditures in future years.

BOROUGH'S POSITION

The Borough contends that this account has gone through extraordinary fluctuations in previous years (1990-91 - 1991-92) presumably based upon the need for science textbooks. It is the

Borough's contention that substantial purchases of science textbooks have already occurred under grievants' budgets; therefore, no new science textbooks are necessary for T&E.

COUNTY SUPERINTENDENT'S POSITION

The County Superintendent approved the cap waiver request in this account as necessary for T&E.

Account	Request for Cap Waiver
230	$23,124

BOARD'S POSITION

The Board contends that it cannot maintain its library and audio visual materials on the $7,330 in its advertised budget when last year it expended $26,304.49 in this account. It contends that the amount requested is necessary to provide its students with up-to-date materials, periodicals, newspapers, records, maps and globes and such expenses cannot continue to be deferred.

COUNTY SUPERINTENDENT'S POSITION

The County Superintendent believed that the amounts requested could be deferred until next year and that the amount budgeted of $7,339 was sufficient to meet those expenditures which were necessary. The Borough joins in this position.

Account	Request for Cap Waiver
240	$25,200

BOARD'S POSITION

The Board contends that the amount budgeted in the advertised budget was less than that budgeted for 1991-92 which was itself less than expended in 1990-91.

Such reductions, it contends, increase needs in succeeding years. The Board contends that it will not be able to provide K-8 workbooks for drill and reinforcement without the additional funds.

Its instructional music program, argues the Board, will have to be reduced due to lack of sheet music.

BOROUGH'S POSITION

The Borough contends that this account has also had extraordinary increases in the last five years. The Borough contends that the amount budgeted for 1991-92 was sufficient to provide for a T&E education and no further increase is necessary. It urges the use of surplus if the Board seeks to expand its expenditures.

COUNTY SUPERINTENDENT'S POSITION

The County Superintendent states an increase of 9.23% of the $25,000 ($6,193) was warranted, an amount equal to the district's cap allowance. This would permit expenditures of $93,387, an amount approximately $1,000 over the previous year's budgeted amount. The Board denies any relationship between the cap allowance for the need for supplies and the supplies requested.

Account	Request for Cap Waiver
250	$16,400

BOARD'S POSITION

The Board contends that the consumable supplies in this account are necessary to update computer software and to upgrade computer facilities for sixth graders who have been moved to the district's middle school.

The monies will also be used to purchase building office supplies, the eighth grade Washington trip, graduation costs and administrative travel expenses.

COUNTY SUPERINTENDENT'S POSITION

The County Superintendent in her statement contended that the software expenditures could be deferred. Further, she pointed out that the $33,749 in the basic budget was greater than the audited 1991-92 actual expenditures by over $3,000. The Borough joins in this position.

Account	Request for Cap Waiver
260A	$3,000

BOARD'S POSITION

This line item is for the hiring of a consultant to assist in developing educational specifications for a new middle school or additions to the elementary school. In addition, it avers it is being required for bonding purposes to have its enrollment projections recalculated and extended, which cost is in the neighborhood of $3,000.

COUNTY SUPERINTENDENT'S POSITION

The County Superintendent denied this originally when reviewed but offers no specific reason for so doing other than to refer to the original denial of funds for architectural fees. The Borough joins in this position.

Account	Request for Cap Waiver
260B	$15,000

BOARD'S POSITION

The Board originally contended this amount was necessary to secure the services of an engineer to complete surveying and site

work for its contemplated building program. However, in its February 8, 1993 submission it waived its request.

Account	Request for Cap Waiver
320	$325

BOARD'S POSITION

This request for travel service for attendance personnel has been waived by the Board.

Account	Request for Cap Waiver
410	$51,700

BOARD'S POSITION

This request is to provide a nurse at each building. The Board contends that the geographics of the district make it ineffective and inefficient for one nurse to be assigned to two buildings.

BOROUGH'S POSITION

The Borough insists that the amount necessary to maintain a nurse for each building is available in surplus. It also argues that there is no justification for nursing staff levels found adequate for T&E purposes in previous budget years.

COUNTY SUPERINTENDENT'S POSITION

The County Superintendent approved this expenditure in her cap waiver review.

Account	Request for Cap Waiver
430	$300

BOARD'S POSITION

This request is to provide X-rays and physicals to newly hired employees.

BOROUGH'S POSITION

The Borough's position wrongfully identifies the services provided in this account.

COUNTY SUPERINTENDENT'S POSITION

The County Superintendent approved this amount in the cap waiver.

Account	Request for Cap Waiver
510	$27,050

BOARD'S POSITION

The Board's rationale is to provide available funds should Special Education pupils require bus aides. The amount budgeted is sufficient to provide only one aide while the district contends that six children have been identified for school year 1992-93 who require such aide assistance.

COUNTY SUPERINTENDENT'S POSITION

The County Superintendent rejected this amount due to what she perceived as its speculative nature. The Borough joins in this position. The Board denies the amount is speculative, avering that it constitutes prudent budgeting.

Account	Request for Cap Waiver
520	$25,000

BOARD'S POSITION

This amount, the Board contends, is necessary to cover the cost of maintaining the same level of mandated busing as the previous year.

COUNTY SUPERINTENDENT'S POSITION

The amount for after-school trips and field trips was not considered essential for T&E. Additionally, Account 520C contained

$13,820 budgeted for transportation for trips other than to or from school. The Borough joins in this position.

Account	Request for Cap Waiver
550	$810

BOARD'S POSITION

This amount is requested for clerical assistance and supplies for bus transportation. Without these funds the Board contends it will be unable to provide the necessary bus passes and mailing of transportation information to parents.

COUNTY SUPERINTENDENT'S POSITION

The County Superintendent found no monies provided for these services in the 1991-92 audited budget. The Borough joins in this position.

Account	Request for Cap Waiver
610	$19,255

BOARD'S POSITION

The monies requested here are to retain the services of a district messenger and to provide funds for overtime for custodians. The messenger service is deemed important to the Board for delivery of mail and messages to district building and county and state offices.

Overtime pay is deemed less expensive than hiring additional custodial help.

COUNTY SUPERINTENDENT'S POSITION

These monies were deemed not necessary by the County Superintendent since audited expenses in this account for 1991-92 were $208,871 and 1992-93 appropriations are $228,387. The Borough joins in this position.

Account	Request for Cap Waiver
630	$5,000

BOARD'S POSITION

The Board is on a heat budget plan and originally contended that it needs the $5,000 to make an adjustment on its anniversary date. However, it now waives that request as it has received its final billing.

Account	Request for Cap Waiver
710	$46,089

BOARD'S POSITION

The Board contends that without the funds requested it would be required to eliminate a maintenance mechanic. Since some of the funds requested in this account were already utilized for summer maintenance work, failure to provide the monies requested in this account would require depleting the Board's surplus.

BOROUGH'S POSITION

The Borough argues that maintenance staffing has increased dramatically over the last five years with three part-time positions being added in 1991-92. The Borough argues that the Board offers no specific justification for the waiver amounts requested and urges that the Board use surplus to meet any needs in this area.

COUNTY SUPERINTENDENT'S POSITION

Having originally approved this amount as necessary for T&E as part of the cap waiver review process, the County Superintendent offers no further justification.

Accounts	Request for Cap Waiver
730 and 730C	$58,469

BOARD'S POSITION

The Board points out that the basic budget approved by the voters contained no appropriation in this account for new and replacement instructional and non-instructional equipment. While acknowledging its willingness to accept the $31,954 approved as part of the T&E cap waiver amount by the County Superintendent, the Board argues that it cannot operate the district with no money allocated in this account.

BOROUGH'S POSITION

The Borough argues that the Board has expended large amounts in this area in previous years and since the equipment involved is of a durable nature, the Board should be able to function for a year without further expenditure in this account.

COUNTY SUPERINTENDENT'S POSITION

The $31,954 was already approved as essential by the County Superintendent in her cap waiver review process. In her affidavit submitted at the Commissioner's request, the County Superintendent rejected the Board's original request for an additional $26,515 under 730C as not having been justified by the Board since no specific equipment was delineated.

Account	Request for Cap Waiver
820	$13,800

BOARD'S POSITION

This account involves premiums for the Board's various insurance policies including health insurance. The Board contends that the amount appropriated for 1992-93 is based upon the actual

premiums due. The additional $13,800 requested by way of cap waiver was to cover health benefits for the two new elementary teachers and the BSI teacher.

BOROUGH'S POSITION

The Borough maintains that the $10,000 approved for T&E purposes by the County Superintendent in this account can be taken from the Board's surplus.

COUNTY SUPERINTENDENT'S POSITION

The County Superintendent argues that the $10,000 cap waiver amount approved by her is sufficient to meet the actual costs of the insurance premiums including the two new elementary teachers and the BSI teacher based upon the actual State Health Benefits Plan rate increase.

Account	Request for Cap Waiver
930	$6,000

BOARD'S POSITION

The Board points out that it annually has a deficit in its cafeteria account. Based upon auditor's advice, the Board has budgeted an amount each year necessary to eliminate any deficit. It further avers it cannot offset any additional deficits in the cafeteria account by increasing revenues. The amount it charges for lunches is very close to the maximum allowed and it already has a high participation rate.

COUNTY SUPERINTENDENT'S POSITION

This amount was not approved since the Board could handle the amount requested with increased revenue if a deficit was projected prior to the start of the school year. The Borough joins in this position.

Account	Request for Cap Waiver
Program #27	$7,500

BOARD'S POSITION

The Board has waived its $7,500 request for this adult education program account.

Account	Request for Cap Waiver
22-210	$16,680

BOARD'S POSITION

The amount requested here is to increase the speech program an additional two days per week to supplement the one full-time and one part-time speech teacher. The Board contends that at present 85 pupils in three buildings are serviced under existing staff. The additional time is required to serve more students likely to be identified by virtue of increasing enrollment.

COUNTY SUPERINTENDENT'S POSITION

Based upon prior year expenditures and no increase in speech class enrollment, the County Superintendent deemed this amount as not being required. The Borough joins in this position.

COMMISSIONER'S DETERMINATION

The Commissioner has carefully considered the arguments presented by the parties, as well as those provided by the Morris County Superintendent of Schools. Based upon the above, the Commissioner finds and determines as follows:

Account 120D $15,983

The Commissioner finds that the Board has not met its burden to demonstrate the need for the architectural services requested. Cap waiver request is denied.

Account 130 $8,892

The Board has not met its burden of demonstrating that it cannot meet its obligations in this account with the approximately $1,000 more appropriated in 1992-93 than was appropriated in 1991-92. Cap waiver request is denied.

Account 211 $15,000

The Board having waived its request for $10,926, the cap waiver in the amount of $4,074 is approved. The Borough's argument that this amount can be met by appropriation from the Board's surplus is without merit. A $361,157 surplus in a $12,216,762 budget as maintained exists by the Borough is barely sufficient to meet possible emergencies and well within state guidelines. The $4,074 in cap waiver funds is granted.

Account 213 $127,032

Based upon the County Superintendent's assessment of the cost of hiring two new teachers and maintaining the services of a BSI teacher, the Commissioner grants the approval of $90,000 in cap waiver funds.

Account 214 $77,450

The Commissioner determines that the Board has met its burden of demonstrating its need for the entire $77,450 requested here. The Commissioner finds the Board's argument for maintaining guidance services compelling given the uses to which those services are put as described by the Board in its Position Statement. The waiver request of $77,450 is granted.

Account 215 $4,000

The Commissioner finds that the Board has not met its burden of demonstrating that it cannot meet its requirements for substitute secretaries without the amount requested here. The 1992-93 appropriated amount is over $2,000 more than appropriated in 1991-92. The waiver request is denied.

Account 220 $20,000

The cap waiver amount requested in this account of $20,000 is approved. The Board's argument of the need for replacement and new textbooks is compelling as its rationale for not disrupting an orderly process for textbook replacement.

Account 230 $23,124

The Commissioner finds the Board's argument for additional funds to maintain its library and audio visual materials current persuasive. The $7,339 approved for this purpose by the County Superintendent is insufficient for that purpose. The Commissioner directs a cap waiver amount of $16,607 be granted to equal the amount appropriated in 1991-92.

Account 240 $25,200

The Commissioner finds that the $6,193 approved by the County Superintendent as a cap waiver amount is sufficient to meet the district's needs since it would provide an amount more than equal to the $92,251 appropriated in this account in 1991-92. A cap waiver amount of $6,193 is approved.

Account 250 $16,400

The cap waiver amount requested in this account is denied. The County Superintendent points out that the audited expenditures in this account for 1991-92 are approximately $3,000 less than what is appropriated for 1992-93.

Account 260A $3,000

The Board has not demonstrated the need for a consultant to write educational specifications for its proposed building program.

Account 410 $51,700

The amount requested in this account for retention of a school nurse is approved. The Commissioner finds that, while a nurse in each building is not a statutory or regulatory requirement, the actual reduction of nursing services in a district which has seen it necessary due to its geographics to provide a nurse in every building could be detrimental to the well-being of the pupils. A cap waiver amount of $51,700 is approved.

Account 430 $300

The requested waiver amount of $300 in this account is denied. The Board has failed to demonstrate that there is an inability to reallocate such a small amount from its budget.

Account 510 $27,050

The amount requested in this account is denied based upon the reasoning of the County Superintendent that the need for additional bus aides is too speculative.

Account 520 $25,000

The cap waiver request in this account is denied based upon the County Superintendent's reasoning that the after-school activities recounted by the Board as part of its need are not essential to a T&E education. The Commissioner is also persuaded by the County Superintendent's argument that 520C contains funds for trips other than to or from school.

Account 550 $810

The cap waiver amount in this account is denied. The Board has failed to meet its burden of demonstrating need in that no funds for this account were expended in the 1991-92 school year as audited.

Account 610 $19,255

The Commissioner determines that the Board has failed to meet its burden. The County Superintendent's statement indicates that audited year expenditures in this account were $208,871 and 1992-93 appropriations allowed are $228,387 and should be sufficient to meet the needs described by the Board. The cap waiver amount is denied.

Account 710 $46,089

The Commissioner determines that the Board has met its burden of demonstrating the need for maintaining its current level of maintenance services. Given the level of past year expenditures, $87,644 in 1991-92, it would appear obvious that an appropriated

amount of $47,891 would be insufficient to meet the need to maintain clear and safe facilities. The cap waiver request of $46,089 is granted.

Accounts 730 and 730C $58,469

The Commissioner notes that the amount budgeted by the Board in these accounts for 1992-93 is zero. In light of the need for assuring the Board ability to meet its needs for at least maintaining its current level of business and instructional equipment, the Commissioner affirms the County Superintendent's recommendation of a cap waiver amount of $31,954 as being necessary to ensure a T&E system of education.

Account 820 $13,800

The Commissioner affirms the recommendation of the County Superintendent that a cap waiver of $10,000 be granted in this account to cover the cost of health benefits for the two new elementary teachers. The Commissioner finds the Board's argument for additional funding to be unpersuasive.

Account 930 $6,000

The Commissioner, upon review of the 1991-92 June 30 status report, affirms the Board's request for a $6,000 cap waiver in this account. The Board's argument that the above amount is necessary to offset an anticipated deficit in the cafeteria account is persuasive based upon past experience. A zero amount budgeted in this account for 1992-93 would not be prudent.

Account 22-210 $16,680

The Commissioner denies the Board's request in this account. Given the estimate of the County Superintendent that the

district has not demonstrated firm figures that would indicate an actual increase in the number of students requiring speech services, the amount budgeted for 1992-93 $40,260 would appear sufficient to meet their needs.

SUMMARY

The following represents a summary of the accounts and cap waiver amounts approved by the Commissioner:

Account	Amount of Waiver Approved
211	$ 4,074
213	90,000
214	77,450
220	20,000
230	16,607
240	6,193
410	51,700
710	46,089
730	31,954
820	10,000
930	6,000
Total Cap Waiver	$360,067

As a consequence of the cap waiver amount approved above, the Commissioner directs the Morris County Board of Taxation to increase the amount of taxes raised for Current Expense in the Lincoln Park School District for the 1992-93 school year by $360,067 bringing the total Current Expense tax levy for the 1992-93 school year to $9,592,302.

Maryanne FitzGerald

COMMISSIONER OF EDUCATION

MARCH 4, 1993

DATE OF MAILING - MARCH 5, 1993

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

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

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

March 17, 1993
Date

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

3/23/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 26 1993
Date

OFFICE OF ADMINISTRATIVE LAW

tmp

DOCUMENTS IN EVIDENCE

None

SUMNERS, COUNCIL & INNISS, P.C.
1302 West State Street
Trenton, New Jersey 08618
(609) 393-6604
Attorneys for Respondent

DOROTHY LOFFREDO and PAT WILLIAMS-TURNER	:	*BEFORE THE COMMISSIONER OF EDUCATION*
Petitioners,	:	*OAL DOCKET NO. EDU 6212-92*
v.	:	*STIPULATION OF DISMISSAL*
BOARD OF EDUCATION OF CITY OF TRENTON, MERCER COUNTY,	:	
Respondent.	:	

This Stipulation of Dismissal is entered into by and between the Board of Education of the City of Trenton, Mercer County ("Board") and Dorothy Loffredo and Patricia William Turner as follows:

1. At the end of the 1991-1992 school year, the Board deducted $545.80 from the salary of its Secretary Dorothy Loffredo and $390.40 from the salary of its Secretary Patricia Williams-Turner.

2. The Board will reimburse Dorothy Loffredo the sum of $545.80 minus appropriate employment deductions and will reimburse Patricia Williams-Turner the sum of $390.40 minus appropriate employment deductions.

3. In consideration for the salary reimbursement set forth above, Dorothy Loffredo and Patricia Williams-Turner dismiss with prejudice the within Petition and waive any and all claims arising out of the Board's decision to deduct their salaries.

SUMNERS, COUNCIL & INNISS, P.C.

Thomas W. Sumners, Jr.
Attorney for Respondent

ZAZZALI, ZAZZALI, FAGELLA & NOWAK

Richard A. Friedman
Attorney for Petitioners

73-93

IN THE MATTER OF THE TENURE	:	
HEARING OF EDDIE LEE HARRELL,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF PATERSON,	:	
PASSAIC COUNTY.	:	
	:	

APRIL 22, 1993

STATE OF NEW JERSEY

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6474-92

AGENCY DKT. NO. 374-7/92

IN THE MATTER OF THE TENURE HEARING OF EDDIE LEE HARRELL, STATE OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON.

Gregory G. Johnson, Esq., for petitioner (Carroll & Weiss, attorneys)

Louis P. Bucceri, Esq., for respondent (Bucceri and Pincus, attorneys)

Record Closed: January 12, 1993 Decided: March 12, 1993

BEFORE **MARY ANN BURGESS,** ALJ/t.a.:

STATEMENT OF THE CASE

Eddie Lee Harrell is a tenured teacher in the employ of the City of Paterson School District, now the State Operated School District of the City of Paterson (hereafter the School District). Mr. Harrell has been employed by the School District as a physical education teacher since 1962.

On May 28, 1992, the School district received a written Statement of Charges and Statement of Evidence field by Emmajean Stepherson, Ph.D., Assistant Superintendent of Schools, charging Mr. Harrell with (1) acts of corporal punishment, as prohibited by N.J.S.A.

18A:6-1; (2) unjustified physical contact with pupils; (3) use of profane language directed to pupils; (4) insubordination and (5) sleeping during the course of the performance of his professional duties. These charges were served upon Mr. Harrell who formally opposed their certification.

By resolution dated July 29, 1992, the School District authorized the filing of the above-described tenure charges with the New Jersey State Commissioner of Education. The School District also suspended Mr. Harrell without pay pending the resolution of the tenure proceeding in accordance with N.J.S.A. 18A:6-14.

These tenure charges are the subject of the present administrative proceeding.

PROCEDURAL HISTORY

Tenure charges against Eddie Lee Harrell were formally filed with the State Commissioner of Education John Ellis on July 30, 1992. Thereafter, the School District, through its counsel, requested that this proceeding be accelerated in accordance with N.J.A.C. 1:1-9.4(b). The School District also requested that the matter be transmitted to the Office of Administrative Law (OAL) immediately and that Mr. Harrell file his Answer directly with the OAL. Commissioner Ellis, in a letter dated August 6, 1992, denied both requests.

An Answer, denying the allegations contained in the charges, was filed on behalf of Eddie Lee Harrell on August 19, 1992. The matter was thereupon transmitted to the Office of Administrative Law.

A prehearing conference was conducted in the matter on September 22, 1992 which resulted in the entry of an Order on the same day. Thereafter, two telephone conferences were held to resolve discovery issues. Further, at the request of both parties, OAL arranged to conduct the hearing at the Totowa Municipal Building. The numerous local witnesses were, therefore, accommodated at a field location adjacent to the Paterson school district.

Prior to the commencement of the hearing, counsel for Mr. Harrell requested that the witnesses be sequestered. The School District did not object. Therefore, with the exception of Mr. Harrell and one adult witness for the School District, all witnesses were sequestered prior to their testifying in this proceeding.

Counsel for respondent also submitted a motion seeking resumption of Mr. Harrell's salary payments. Since Mr. Harrell had been suspended without pay on July 29, 1992, it was argued that the statutory 120 day period of "suspension without pay" expired on November 26, 1992. The School District resisted this application arguing that the respondent had not cooperated in providing information concerning earnings from substituted employment. If Mr. Harrell were receiving income from substituted employment, the District would be entitled to offset its salary payments to him by any income he received from that employment. After considering the arguments advanced by counsel, an Order was entered on December 9, 1992 directing the School District to resume full salary payments to respondent, Eddie Lee Harrell, effective November 27, 1992. The Order further stated that the salary payments would be reduced by all moneys Mr. Harrell received from substituted employment. During the hearing, the School District would be permitted to question Mr. Harrell to determine whether he had received any such compensation during the course of his suspension.

The plenary hearing in this matter was conducted on December 1, 2, 3, 4 and 9, 1992 and on January 11 and 12, 1993. At the close of the School District's case, counsel for Mr. Harrell moved for dismissal of the charges. Based on the record before it, the court concluded that the School District had met its burden of establishing a prima facie case as to all the charges certified against Mr. Harrell. The respondent's motion to dismiss was, therefore, denied.

At the conclusion of the hearing, counsel for the School District advised the court that he would not question Mr. Harrell concerning the issue of compensation for substituted employment. Both counsel also waived the opportunity to present written or oral summations to the court.

OVERVIEW OF THE CHARGES

The School District certified five charges against its physical education teacher, Eddie Lee Harrell.

Charge One asserts that Mr. Harrell:

> . . . committed several acts of corporal punishment by causing trauma or inflicting physical injuries upon pupils and otherwise using undue physical force upon pupils assigned to his care and supervision:
>
> 1. On February 25, 1988, respondent while supervising a physical education class inflicted corporal punishment upon a pupil, J.R., by grabbing, striking, kicking and otherwise injuring said pupil absent justification for use of physical contact.
>
> 2. On January 29, 1991, respondent while supervising a physical education class inflicted corporal punishment, absent justification upon a pupil, G.C., by grabbing the pupil by the neck and pushing the pupil in his chest.
>
> 3. On March 25, 1991, respondent while supervising a physical education class inflicted corporal punishment upon a pupil, D.F., by grabbing him by the shirt and striking the pupil in the back and pushing him down the stairwell.
>
> 4. On March 6, 1992, respondent while supervising a physical education class inflicted corporal punishment upon a pupil, G.B., by pushing the pupil in the back of the head into a brick wall in the gym equipment storage room.
>
> 5. On March 6, 1992, respondent while supervising a physical education class inflicted corporal punishment upon a pupil, A.R., by grabbing the arm and pushing the pupil into a brick wall in the gym equipment storage room.
>
> 6. On March 6, 1992, respondent while supervising a physical education class inflicted corporal punishment upon a pupil,R.R., by grabbing the arm and throwing the pupil to the floor.
>
> 7. On March 6, 1992, respondent while supervising a physical education class inflicted corporal punishment upon a pupil, J.M., by pushing the pupil in the back on to the floor mat injuring his nose.

The second charge, that Eddie Lee Harrell engaged in "unjustified physical contact" is based on the same seven incidents set forth in Charge One.

The third charge asserts that Eddie Lee Harrell, engaged in conduct unbecoming a teaching staff member, when

> On, March 26, 1991, . . . [he] used profane and inappropriate language directed toward pupils, D.F. and N.I., in disrespect.

Charge Four asserts that Eddie Lee Harrell engaged in acts of insubordination. This charge specifies:

> On March 1, 1991, Principal Glenn Lagatol expressly instructed respondent not to put his hands on any more pupils assigned to his physical education class. Respondent was instructed to notify the administration of any problems. On March 25, 1991 and March 6, 1992, the respondent failed to obey this directive to cease and desist from using physical force on pupils.

The fifth and last charge asserts that Eddie Lee Harrell, on June 10, 1991, and on other dates, ". . . fell asleep during the course of performing his duties in the classroom or attending faculty meetings." Mr. Harrell, therefore

> . . . risked the safety of pupils under his care and supervision and exhibits disrespect to fellow teaching staff members. . . [his] conduct constitutes conduct unbecoming a teaching staff member.

Charges One, Two and to a lesser extent Four are based upon the same specifications or incidents. The testimony of the witnesses will, therefore, be discussed in the order of those seven incidents and appropriate findings of fact made with regard to each incident. There will be a further grouping of the four incidents which occurred on March 6, 1992 since these involve many common witnesses. Furthermore, Charge Three: Use of Profane Language involves the March 26, 1991 incident listed in Charges One and Two and will be addressed at that point. The remainder of this decision will then address Charge Four: Falling Asleep During Duty.

In his opening statement, counsel for the school district contended that it would be established by a preponderance of the evidence, that Mr. Harrell had committed acts of corporal punishment against seven students in the Paterson school district. The district would also establish that Mr. Harrell was guilty of insubordination in failing to follow the Policy on Corporal Punishment and his principal's directions with regard to this policy. Finally, the district would establish that Mr. Harrell had fallen asleep while on duty. Having proven these charges, counsel argued that Mr. Harrell would be unfit to continue as a teacher in the school district and should, therefore, be dismissed from that position. Citing language of the Commissioner of Education, In the Tenure Hearing of Sammons, 1972 S.L.D. 302, 321 (June 15, 1972) counsel stressed that teachers have a heavy duty to their students which ". . . requires a degree of self-restraint and controlled behavior, rarely requisite to other professions." Counsel pointed out that Mr. Harrell had already breached this responsibility in 1979, when he was found guilty of slapping a student while breaking up a fight. At that time the Commissioner ordered that he forfeit two weeks salary.

Counsel for Mr. Harrell argued that his client has been teaching physical education in one of the toughest urban school districts in the State New Jersey for over 30 years. Throughout this time, he has continued to be a strict disciplinarian. Counsel argued that the students decided to "get back" at Mr. Harrell for being too tough by making up these charges of corporal punishment (1 T:17). He concluded that Mr. Harrell did not mistreat his students and that he is not guilty of the tenure charges filed against him.

CHARGE ONE: CORPORAL PUNISHMENT
CHARGE TWO: UNJUSTIFIED PHYSICAL CONTACT
(1) February 25, 1988 Incident Involving J.R.

The District called Kathleen Ruffer as its first witness in connection with the February 25, 1988 incident. Ms. Ruffer has been an elementary school teacher with the School District since 1975. During the 1987-88 school year, this witness was employed as a seventh grade teacher in P.S. No. 11 in the City of Paterson. Ms. Ruffer described her students as ranging in age from 11 through 15 primarily of Spanish origin or black from extremely low-income families. She described the neighborhood as depressed.

During the 1987-88 school year, Ms. Ruffer had approximately 23 youngsters in her seventh grade class. One of her students was J.R. She described J.R. as approximately 5'4" tall, of medium build, thin, and wearing glasses. Ms. Ruffer taught all subjects to her class and never had a problem with J.R. He was a solid C/B student who had a good attendance record. He was popular with his classmates although somewhat quiet.

Ms. Ruffer testified that during that school year, her class had gym class with Mr. Harrell after the lunch period between 1:00 and 1:30 on either Thursdays or Fridays. Ms. Ruffer knew Mr. Harrell for at least two years when he taught physical education at P.S. No. 11. Ms. Ruffer testified that since P.S. No. 11 had no gymnasium, the children had their physical education classes in the outdoor play ground, weather permitting. It was the required procedure for the teacher to bring the class to the playground for the physical education class and to pick the class up at the end of the gym period. On this particular day in February, 1988, Ms. Ruffer went to pick up her class at the outside play ground. It was a cold, windy day and the witness noticed a great deal of newspaper flying around on the play ground. Her class was also excited and rather noisy. She tried to quiet them down as she brought them to the first stairway (P-21). Ms. Ruffer then observed Mr. Harrell and J.R. come though the outer door behind her class. When she realized what was happening, she sent her class to the next level to get them out of the way.

Ms. Ruffer testified that Mr. Harrell was behind J.R. and had his arms across J.R.'s chest. The boy's back was against Mr. Harrell's chest. J.R. was raised off the ground and being thrust forward by Mr. Harrell. Mr. Ruffer was about to pass to the next level with her class, when she heard a thud in the hallway. She turned and saw J.R. sprawled prone, face down, on the ground with Mr. Harrell standing over him. Mr. Harrell was swinging both his arms over J.R. as he said "Get up and fight. You're a tough guy" (2T-14-17 to 18).

Ms. Ruffer testified that as she approached Mr. Harrell and reached for his arm, he started to kick J.R. She described a minimum of three kicks directed to J.R.'s leg, thigh and buttocks. The boy squirmed away trying to avoid the blows. Sometime, during the altercation, J.R.'s glasses were knocked off and came to rest near a closet door. As one point Ms. Ruffer caught J.R.'s eye and he said to her: "Please get him off me. Please help me" (2T:16-6 to 8).

Ms. Ruffer tried to get Mr. Harrell's attention by placing her hand on his arm. He did not respond. It was her opinion that during this incident Mr. Harrell was out of control.

The incident ended when Mr. Rosenblum, the principal, came out of his office and got between J.R. and Mr. Harrell, separating them. Mr. Rosenblum then assisted J.R. to his feet. He indicated to Ms. Ruffer that he would take care of the matter and that she should return to her class. About ten minutes later, the basic skills instructor came to Ms. Ruffer's room and she went to the main office to find J.R. She found him in the office and noticed that he had cuts to the side of his eye and that he was crying. Since J.R. had not yet seen the nurse, Ms. Ruffer brought him to her office. Ms. Ruffer returned to her class when the nurse, Ms. Hopko, said she would take care of J.R.

Ms. Ruffer was later contacted by DYFS and questioned as part of their investigation of this incident. As a result of the investigation, Mr. Harrell was arrested at school on a Friday. The next morning, between 6:30 and 7:00 a.m., Mr. Harrell called Ms. Ruffer's home to complain that she had helped get him arrested. Ms. Ruffer felt intimidated and harassed by the telephone call. Up until that time, she believed she had a pleasant relationship with Mr. Harrell.

On cross examination, Ms. Ruffer explained that while Mr. Harrell had J.R. in a bear-hug, J.R. tried to move his arm from side to side and that when Mr. Harrell lifted J.R. his legs were dangling. This witness also conceded that she did not see what caused the thud that caught her attention and, therefore, did not know how J.R. got to the floor. Ms. Ruffer testified that until this incident none of her children had complained about Mr. Harrell; in fact, they loved gym. She also explained that none of the physical education teachers assigned to P.S. No. 11 were pleased by the assignment since the school had no gym.

On re-direct, Ms. Ruffer testified that J.R. returned to school the day after the incident. Further, J.R. completed the school year and was promoted to the eight grade in June, 1988. He was fourteen years of age at the time.

The next witness to be called by the District in connection with the February 25, 1988 incident was Norman Rosenblum. Mr. Rosenblum has been employed as a building principal

in the Paterson School District since 1969. His first appointment was as principal of P.S. No. 20. He was thereafter transferred to P.S. No. 11 in 1976. Mr. Rosenblum testified that he was on sick leave in 1989 and officially retired from the system in December, 1990.

During the 1987-88 school year, Mr. Rosenblum was principal of P.S. No. 11 where Ms. Ruffer was the seventh grade teacher and Mr. Harrell taught physical education on a part-time basis. Mr. Rosenblum testified that on February 25, 1988, he was working in his office when he heard a commotion by the first floor stair case. Mr. Rosenblum left his office and saw J.R. on the floor with Mr. Harrell standing over him. This witness recalled that Mr. Harrell had J.R. by the neck or jacket collar and that he told him to let the boy go. Mr. Rosenblum then picked J.R. up from the ground.

Mr. Rosenblum testified that, after the incident, he called J.R.'s home and that his father came in for a conference. When J.R.'s father saw his son with a bruise under his eye, he became quite upset. J.R.'s father was given permission to take his son home for the remainder of the school day. Mr. Rosenblum also sent home to J.R.'s parents a "Conduct Report" prepared by Mr. Harrell. On the report, he noted: "Parent must come in to see the teacher" (P-19). Mr. Rosenblum testified that J.R.'s father did return to the school on the next day and that the matter appeared to be satisfactorily resolved (P-20). This witness further stated that J.R. was never disciplined despite Mr. Harrell's initial report.

On cross-examination, it became apparent that Mr. Rosenblum did not have a clear recollection of some of the details of the February 25, 1988 incident. Indeed, this witness admitted that his memory of the event was refreshed by reading a transcript of the testimony which he had given the Paterson Police Department. The Police Department, together with the Division of Youth and Family Services, had conducted a joint investigation into the February 25, 1988 incident. After considering the arguments of counsel, this court concluded that the transcript of Mr. Rosenblum's testimony was not shielded by the confidentiality provision of N.J.S.A. 9:6-8.10 since it was part of the police investigation. It was also noted that the transcript of Ms. Ruffer's testimony, part of the same investigation, had been included in the Statement of Evidence in this matter. Mr. Rosenblum's testimony was, therefore, provided to Mr. Harrell's counsel and introduced into evidence as R-3.

Referring to this document, Mr. Rosenblum stated that Mr. Harrell had told him that J.R. brought a rolled up newspaper to the play ground and was using it to hit other students. Further, a section of the newspaper was blown about the schoolyard and J.R. refused to clean it up as directed by Mr. Harrell. Mr. Rosenblum also restated his opinion, originally given to the Paterson Police that Mr. Harrell was "not in a rage" (2T:83-16 to 17).

The School District next called Dorothy Hopko to testify concerning the February 25, 1988 incident. Mrs. Hopko testified that she has been employed by the Paterson school district for nine years and that she has been the school nurse of P.S. No. 11 during that entire period.

The witness stated that she treated J.R. on February 25, 1988 at about 1:45 p.m. She prepared a "Student Incident/Accident Investigation Report" of that treatment in which she noted his injuries.:

> . . . . right side of his face was red and bruised; his right eye was red and weeping; his right ankle and knee were bruised and abrased; and the area over his right shoulder and lumbar region of his back were red in color. (2T:91-17 to 22) (P-18)

It was this witness's opinion that these injuries were consistent with someone falling to the ground and being kicked in some manner. Mrs. Hopko further described J.R. as very emotional when he arrived at her office and as being "overwhelmed," "unable to cope". (2T:92-3, 9 to 10).

Mrs. Hopko also included in her report J.R.'s account of what transpired between himself and Mr. Harrell:

> Student states 'I was leaving the playground after gym. I was going up the stairs to the first floor when Mr. Harrell grabbed me by the back of my coat collar and dragged me back to the playground. Mr. Harrell then dragged me back into the building and we started to fight. He kicked me on my right shoulder.' (P-18) (2T:92-18 to 94-12).

Mrs. Hopko testified that she spent some time with J.R. applying cold compresses to his injuries. She also recommended that the boy see his own physician. Although she believed her

recommendation was followed, she did not receive any report back or medical slip from the family.

Ms. Hopko, on cross examination, rethought her opinion that J.R.'s bruises and injuries were consistent with a fall and kicking. She conceded that she could not give a definitive opinion as to the cause of J.R.'s injuries.

The respondent, Eddie Lee Harrell, testified in his own behalf. He testified that he has been employed by the Paterson school system as a physical education teacher since 1962. Mr. Harrell further stated that he has a B.S. in physical education and social studies. He also has a masters in education administration specializing in principalship. The respondent has numerous certifications including physical education teacher, principal supervisor, science, social studies and driver education.

With regard to the February 25, 1988 incident, Mr. Harrell testified that it occurred at the end of his physical education class with the seventh grade. J.R. and several other students had newspapers and were hitting one another with them. The other students were not in Mr. Harrell's gym class and left the playground when recess ended. J.R. was left on the playground with the remainder of the 7th grade physical education class. When the bell sounded, Mr. Harrell had the class line up. He then told J.R. to come with him and pick the paper up; J.R. went outside but just stood there. Mr. Harrell stated that if he did not pick up the paper, he would take him to the office. The respondent then put his hand on J.R.'s back and they walked through the doors into the school building. Mr. Harrell testified that when they reached the second level area shown in P-22 that J.R. dropped to the floor "right on his buttocks" (5T:27-3 to 8). J.R. then

> . . . started cursing and kicking me in the front part of my leg, and what I was doing at this particular time was trying to keep him from kicking me on the shins and the legs. I kept snatching my leg back and saying '. . . you got to go to the office. You got to go to the office,' and the next thing I knew, Mr. Rosenblum was there, and he told me to let him take . . [J.R.], and he took . . . [J.R.] and he told me to go to the office and write it up and I went to the office and wrote it up. . . (5T:26-12 to 22).

Mr. Harrell denied kicking J.R. or challenging him to fight. He also denied seeing any visible injuries when J.R. got up from the floor.

Mr. Harrell testified that on the following day, February 26, 1988, he met with J.R.'s father and explained what happened. It was his view that the matter was resolved and that if J.R. gave him a hard time, the office was to call J.R.'s father who would remove him from the school immediately.

Mr. Harrell testified that he continued teaching his physical education classes for the next three weeks. According to his schedule, he would teach at P.S. No. 14 on Mondays and Tuesdays and at P.S. No. 11 for the next three days. On Friday afternoon of the third week, he was arrested by the Paterson police for assaulting a student. Mr. Harrell testified that when the parties appeared in municipal court on this complaint, J.R. agreed to dismiss it. It was Mr. Harrell's recollection that J.R. told the judge that ". . . it was a minor thing" (5T:38-16 to 20).

In addition to the dismissal of the complaint, Mr. Harrell was notified on April 18, 1988 that "no indictment had been found against" him based on the February 25, 1988 incident (R-4). At a later date, J.R. filed a civil suit against the School District and Mr. Harrell based on the events of February 25, 1988.

On cross examination, Mr. Harrell denied the testimony of both Ms. Ruffer and Mr. Rosenblum. Nor was Mr. Harrell able to offer a reasonable explanation for the injuries sustained by J.R. during the February 25, 1988 incident.

On rebuttal, the school district called J.R. and his father, I.R. The respondent did not object to these witnesses testifying on rebuttal. Since J.R. is no longer a student within the Paterson system, the district had difficulty locating him and informing him of the hearing dates.

J.R. testified that he attended the seventh grade at P.S. No. 11 during the 1987-1988 school year and that Kathleen Ruffer was his homeroom teacher and Eddie Lee Harrell, his gym teacher. With regard to the February 25, 1988 incident, J.R. testified that Mr. Harrell asked him to pick up some papers in the playground and he said "No" since he had not put them there.

Mr. Harrell then grabbed him by the collar and dragged him outside. Mr. Harrell next dragged J.R. back into the school and up the stairs.

J.R. testified that:

> . . . in my defense, I hit him or tried to hit him, and then after that he just threw me on the floor. He was still holding me. He threw me on the floor, and then he started hitting me, swinging at me (7T:9-12 to 16).

J.R. who was wearing his glasses at the time of the incident, testified that when Mr. Harrell swung at him, his glasses flew off causing cuts to the face. Once on the ground, Mr. Harrell started kicking J.R. in his ribs. This witness further testified that Mr. Harrell only stopped kicking him when Mr. Rosenblum came between them.

J.R. confirmed that he was taken to Nurse Hopko for treatment and then to Mr. Rosenblum's office. After being called by the principal, J.R.'s father came to P.S. No. 11.

J.R. testified that he is presently eighteen years of age and that at the time of the incident he was fourteen. He conceded, that after four years, he did not remember all the details of the incident but that he clearly recalled that Mr. Harrell did kick him.

With regard to the municipal court complaint, J. R. testified that he and his family were not represented by counsel. He explained that his father agreed to dismiss the complaint because he did not know that much English and was confused. J.R. testified that he was upset by the dismissal. He did not feel he had done anything wrong to be treated the way Mr. Harrell had treated him.

On cross examination, J.R. testified that after the dismissal of the criminal complaint, his family retained an attorney to bring a civil action against the Paterson school district and Mr. Harrell. This matter was settled before it went to trial and J.R. received $10,000 from the settlement.

As to the incident itself, J.R. testified that he struggled to get away from Mr. Harrell as the teacher dragged him back out to the playground. Mr. Harrell, however, held on to him dragging him back into the school and up the stairs to the next level. J.R. recalled that Mr. Harrell held him low as he dragged him along and that his legs first bumped along the ground and then up the stairs. As the next level, Mr. Harrell held J.R. against a wall and J.R. tried to hit him in self-defense. It was then that Mr. Harrell threw him to the floor and reached over him trying to hit him with his hands. At this time J.R. tried to push Mr. Harrell away with his feet.

J.R. admitted that he was "blinded" with rage during this incident so he could not see clearly what was going on. He did recall that Mr. Harrell, after trying to hit him with his hands, started kicking him.

The final witness to testify concerning the February 25, 1988 incident was J.R.'s father, I.R. Mr. R. confirmed that he was called by the principal to come to the school to pick up his son. When Mr. R. arrived at P.S. No. 11, he spoke with Mr. Rosenblum and Mr. Harrell. Mr. R. testified that he was not told the truth about what happened. He was told that his son had disobeyed Mr. Harrell. J.R. came into the office while his father was meeting with Mr. Rosenblum and Mr. Harrell. Mr. R. became angry when he saw his son because J.R.'s face was red, with a scratch on his right eye and his glasses were broken. Mr. R. was angry because "the teacher not supposed to do that." Mr. R. later called the Spanish Handicapped Association because J.R. was a classified student.

Mr. R. denied that he had told Mr. Rosenblum or Mr. Harrell that he was satisfied. He said J.R. is a "special kid" and should have more consideration than the others (7T:70-14 to 17). Mr. R. testified that after this incident, his son lost interest in school and dropped out before graduation.

As to the appearance before the municipal court, Mr. R. testified that no one from DYFS or from the Paterson Police Department appeared. After talking to Mr. Harrell's attorney, Mr. R. agreed to dismiss the complaint because he understood that Mr. Harrell "was out of the school, not with the Board of Education" any more (7T:75-3 to 6).

On cross examination, Mr. R. testified that during his conference at the school, Mr. Harrell said J.R. was disrespectful and that when Mr. Harrell grabbed J.R., the boy threw himself to the floor. When he saw the marks on J.R.'s face, he asked his son what happened.

> He told me he put some paper on the floor, and Mr. Harrell wanted him to pick it up. He didn't pick it up, and Mr. Harrell said come here,' threw him to the floor, and hit him with the foot. (7T:81-1 to 5).

Mr. R. further denied that his son got into a lot of fights when he was 14 years of age.

This witness also testified that he never contacted the police. The police had been notified by DYFS. Thereafter, representatives of both DYFS and the police came to Mr. R.'s home and took statements from J.R. and from his father. Mr. R. denied that he ever told the municipal court judge that the matter should be dismissed because it was not serious. He also confirmed that after the dismissal of the complaint, no one from DYFS or the Paterson Police Department contacted the family.

FINDINGS OF FACT

Having carefully considered the testimony of the witnesses presented by the School District in support of the first specification of Charges One and Two and the testimony of the respondent presented in his own defense, and having had the opportunity to view the demeanor of those witnesses as they gave their testimony, and having fully reviewed the exhibits entered into evidence relevant to this incident, I **FIND** the following:

During the 1987-88 school year, J.R. was a fourteen-year-old student in the seventh grade at P.S. No. 11 in the Paterson School District. This school, located in an economically depressed area of Paterson, has a large number of Spanish speaking students. During that year, Ms. Kathleen Ruffer, was J.R.'s homeroom teacher. She taught all subjects to the students in her class. J.R. was a solid C/B student with a good attendance record. Although he was a quiet boy, he got along well with his classmates who respected him. At 14 years of age, he was approximately five feet four inches tall, of medium build, but slender, and wore glasses.

In that school year, Eddie Lee Harrell had a split assignment. He taught physical education classes at P.S. No. 14 on Mondays and Tuesdays. For the remainder of the week, Mr. Harrell taught physical education at P.S. No. 11. J.R. was in Mr. Harrell's Thursday afternoon physical education class at P.S. No. 11. Since there was no gymnasium at P.S. No. 11, Mr. Harrell taught his class on the school playground in good weather and in the class home room on bad days.

The seventh grade students looked forward to, and enjoyed, their physical education classes with Mr. Harrell. Ms. Ruffer had a pleasant relationship with Mr. Harrell while Norman Rosenblum, the principal of P.S. 11, was happy that Mr. Harrell was assigned to teach physical education at his school.

On Thursday, February 25, 1988, Mr. Harrell was conducting his physical education class for Ms. Ruffer's seventh grade on the playground of P.S. No. 11. J.R. was present on the playground for the class. It was a windy day and newspapers had blown about the playground. Mr. Harrell asked J.R., who was already in the school building, to go back to the playground and pick up the newspapers. J.R. refused. Mr. Harrell grabbed J.R. and dragged him back out to the playground. He again told J.R. to pick up the paper or he would take him to Mr. Rosenblum's office. J.R. again refused. Mr. Harrell, putting his arms across J.R.'s chest in a bear hug, lifted J.R. off the ground and propelled him back into the school and up the stairs. Ms. Ruffer escorting her class back to its homeroom, witnessed this part of the incident. When the pair reached the hallway at the second level, Mr. Harrell pushed J.R. up against the wall; when J.R. struck out at Mr. Harrell, the latter threw him to the floor. J.R.'s glasses were knocked off. Hearing the thud, Ms. Ruffer turned and saw Mr. Harrell standing over J.R., swinging his arms over J.R. in a threatening fashion and challenging him to get up and fight. Ms. Ruffer tried to get Mr. Harrell to stop but he did not. As J.R. lay on the floor, Mr. Harrell kicked him at least three times on his leg, thigh and buttocks. J.R. squirmed on the floor in an effort to avoid the blows.

Hearing the commotion, Mr. Rosenblum left his office and found J.R. lying on the floor with Mr. Harrell standing over him. He told Mr. Harrell to stop and then Mr. Rosenblum helped J.R. stand up. The principal then sent J.R. to the nurse.

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As a result of this incident, J.R. sustained a bruise to the right side of his face, with a red and weepy right eye. J.R.'s right ankle and knee were bruised and abrased and his right shoulder and lumbar area were red in color.

J.R.'s father came to the school on February 25, 1988, for a conference with Mr. Rosenblum and Mr. Harrell. He became angry when he saw his son's condition. He believed a teacher should not have done this to his son. I.R. later dismissed criminal charges against Mr. Harrell. He did so because he believed that Mr. Harrell was permanently removed from the school and would not harm another student. I.R. did not agree to dismiss the charges because he thought the incident was "minor" or "not serious." After this incident, J.R. lost interest in school and eventually dropped out before graduation.

Mr. Harrell's account of the incident, that J.R. was disrespectful, cursed and kicked at him, sat down on his backside, and refused to go to the principal's office, does not provide a reasonable explanation for the injuries sustained by J.R.

Although four years had passed since the incident, J.R. was able to testify to the main aspects of the occurrence. This testimony was consistent with his statements at the time of the incident and consistent, to a large extent, with the testimony of Ms. Ruffer and Mr. Rosenblum.

Ms. Ruffer, a very convincing witness, gave a straight forward account of the events she witnessed. There was no testimony which would establish any reason for Ms. Ruffer either coloring or exaggerating her recital of the events she witnessed.

Mr. Rosenblum, the building principal, had very little recollection of the events of the February 25, 1988 incident apart from the written record. Further, Mr. Rosenblum was interested in retaining Mr. Harrell as a physical education teacher and thus was anxious to satisfactorily resolve the matter with J.R.'s family.

Although J.R. was disrespectful to Mr. Harrell, Mr. Harrell's conduct to J.R. was not permitted under N.J.S.A. 18A:6-1. Mr. Harrell laid hands on J.R. and kicked him and these actions were not required to prevent injury either to himself or another student. The School

District has therefore established by a preponderance of the credible evidence that Eddie Lee Harrell inflicted corporal punishment on J.R. and had improper physical contact with him as charged herein.

CHARGE ONE: CORPORAL PUNISHMENT
CHARGE TWO: UNJUSTIFIED PHYSICAL CONTACT
(2) January 29, 1991 Incident Involving G.C.

The School District's next witness, Glenn J. Lagatol, testified with regard to the remainder of the charges filed against Mr. Harrell. Mr. Lagatol has been employed by the Paterson school district for approximately twenty-two years. He has been principal of P.S. No. 15 since July, 1989. Previously, Mr. Lagatol was principal of P.S. No. 2 and was vice principal of six different schools throughout the system.

This witness attended Montclair State College for his undergraduate degree and William Paterson College for his masters. He holds a principal certificate, a Spanish teacher's certificate - K through 12 and an elementary certificate.

Mr. Lagatol described P.S. No. 15 as a sprawling edifice built in 1928. It is the second largest elementary school in Paterson having 1100 students and 150 faculty and staff members. P.S. No. 15 is a full service institution offering a K through 8 curriculum.

This witness described his responsibilities as building principal, as supervising instruction, effectuating curriculum, expediting problems. He is ultimately responsible for everything which goes on in P.S. No. 15. He monitors discipline with the assistance of the vice principals and contacts parents, if necessary.

Mr. Lagatol testified that he is very familiar with the faculty of P.S. No. 15 seeing everyone at least once a day and most twice a day. This witness first met Eddie Lee Harrell in 1986 when Mr. Lagatol was vice principal of Eastside High School and Mr. Harrell was assigned to the physical education department in the high school. He described his relationship at that time as cordial but more recently colored by his concerns that Mr. Harrell needed to

improve in certain areas. He described Mr. Harrell as lacking in an ability to curb his temper and see things clearly. Although he thought Mr. Harrell a competent educator, he was of the opinion that he reacts in a hard-headed, vociferous, hot tempered manner most of the time.

As an example of this behavior, Mr. Lagatol identified a note which he received from Mr. Harrell on March 23, 1990 in which Mr. Harrell complained that he was ". . . put on the spot by some-ones spoiled brat," and was being "set up" by these kids for actions which are "taken or interpreted as corporal punishment." Mr. Harrell further asked that his classes be covered for the remainder of the day since he was going home. (P-1).

Mr. Lagatol explained that he has had group discussions with all his staff about corporal punishment. He has also met with individuals, including Mr. Harrell, to discuss the prohibition against corporal punishment in solving problems.

Mr. Lagatol testified that Mr. Harrell was one of two gym teachers assigned to P.S. No. 15. The other teacher is Miss Cynthia Jones. On an ordinary school day, Mr. Harrell was required to sign in at 8:40 and then report to his duty station which was the gymnasium. Mr. Harrell's first period would start at 8:48. The homeroom teacher would drop off the class to the gym teachers; the girls would go into the girls' locker room supervised by Ms. Jones and the boys would be supervised by Mr. Harrell in their locker room. After the children were suited up, they would return to the gym and each teacher would take attendance for his/her class. Those students who did not change would sit on the bench and would not participate in gym class. The students who were prepared for gym would have their warm up exercises and then their gym activities which often were planned by the two teachers. On any given day, Mr. Harrell would have 5 to 6 classes, each consisting of between 25 to 35 students.

This witness next testified concerning the January 29, 1991 incident. On that day, G.C., a fifth-grade student who was eleven years old at the time, was brought to Mr. Lagatol's office. The child told this witness that he was playing with another student when Mr. Harrell told him to stop. He did not and Mr. Harrell grabbed him by the neck, pushed him into the lockers and then lifted him up. Mr. Lagatol testified that G.C. was crying when he came into his office and that he saw bruises on his neck. There were three or four bruises on his neck separated by

spaces.

After speaking with G.C., Mr. Lagatol interviewed three students, A.T., D.S. and O.S., who witnessed the incident in the boys locker room. These students essentially corroborated the statement of G.C. One student, O.S., stated that he tried to get Mr. Harrell to take his hands off G.C. Mr. Lagatol then called Mr. Harrell into his office and questioned him about the incident. Mr. Harrell denied putting his hands on G.C.'s neck but stated he used the physical restraint necessary to break up a fight in his locker room.

This witness also testified that he sent G.C. to the school nurse who noted the two to two and one-half reddened areas on the side of the boy's neck. There was no discoloration on the trunk of the body. The nurse reported:

> Student states that he was playing/wrestling in Gym locker room with A.T. Mr. Harrell came in and pushed him. He cursed at Mr. Harrell and Mr. Harrell grabbed him by the neck. (P-4).

After investigating the matter, Mr. Lagatol notified the Division of Youth and Family Services and reported the incident to William M. Kline, the Assistant Superintendent of Schools. Mr. Lagatol identified two documents which are annually contained in the staff handbook and distributed to all staff members at the commencement of the school year. The first document is the 1991-92 Statement on Corporal Punishment which points out the prohibition contained in N.J.S.A. 18A:6-1 and the second which contains the requirements to report suspected incidents of child abuse to DYFS (P-5). Mr. Lagatol testified that Mr. Harrell was present for the orientation session for the three years he was assigned to P.S. No. 15 and, therefore, had received copies of these documents.

This witness also testified that he had discussed with Mr. Harrell the procedures for quelling disturbances among students. Initially, a teacher should verbally instruct the students to stop. If they do not, the teacher should ask other students to separate those who are fighting. In this way, the teacher is not placed in a compromising situation in which he may have improperly restrained a child. Of course, the teacher must intervene directly if there is a danger to students.

After reporting the January 29, 1991 incident, Mr. Lagatol removed Mr. Harrell from his teaching duties and assigned him to do clerical work for the vice principal, Hilda Ruiz. Mr. Harrell remained on administrative assignment until March 1, 1991 when he was returned to the classroom.

On cross examination, Mr. Lagatol conceded that he too has a hot temper. Further, when he and Mr. Harrell had worked at Eastside High School, they did not always see "eye-to-eye." Mr. Lagatol also admitted that he did not personally observe any of the incidents of corporal punishment charged against Mr. Harrell, but simply reported statements given by the involved students and other witnesses.

With regard to the January 29, 1991 incident, Mr. Lagatol testified that G.C. had told him that he was playing, "fooling around" with his friend in the locker room (1T:88-12 to 89-25). Although G.C. told the nurse that he was "wrestling" with his friend, G.C. did not use that word when he reported the incident to Mr. Lagatol. This witness conceded that G.C. might have sustained the bruises on his neck as a result of wrestling. Mr. Harrell was returned to his teaching duties without formal action to suspend him as a result of the January 29, 1991 incident.

The School District next presented G.C., the child involved in this incident. This student, as well as all others called to testify, was initially questioned by the court. In each case, the court was satisfied that the student understood the obligation to tell the truth and that punishment would follow should he not tell the truth and was, therefore, competent to testify.

G.C. testified that he is currently 13 years of age. At the time of the 1991 incident, G.C. attended fifth grade at P.S. No. 15. Miss Palumbo as his homeroom teacher and Eddie Lee Harrell as his gym teacher. On January 29, 1991, Miss Palumbo brought her class to the gym. Mr. Harrell told the boys to go into the locker room and change into their gym clothes. Following the end of the class, Mr. Harrell sent the boys to the locker room to change. G.C. testified that he was in the locker room, in his street clothes, and he was playing with D. S. and his cousin, O.S. This witness testified that Mr. Harrell was at his desk and told them ". . . to shut up and to get in line. And we went to that line and we went to the back of the line, and

we kept playing. . ." (1T:148-20 to 23). Mr. Harrell pushed him and G.C. told him not to push him but he kept pushing him so G.C. " . . said the F word" to Mr. Harrell (1T:149-14 to 18). Mr. Harrell then threw G.C. into the corner of the locker room, causing his head to hit the lockers, and grabbed him by the neck. G.C.'s cousin, O.S., tried to stop Mr. Harrell but was pushed away. Mr. Harrell then threw him into a chair and told him to stay there. An older student then brought G.C. to Mr. Lagatol's office. G.C. did state that before the incident with Mr. Harrell, he and his friends were fooling around and ". . . grabbing by the neck and pushing, not hard, but a little bit hard." G.C. denied that the bruise on his neck was made by his friends since they did not grab him in the spot where Mr. Harrell grabbed him.

On cross examination, G.C. stated that there were approximately 20 boys in the locker room with Mr. Harrell. He conceded that while playing around, his friend A.T. scratched him on his neck. He also admitted that when Mr. Harrell pushed him he did not hit the locker, but bumped into a friend who was standing behind him. At the end of the incident, Mr. Harrell pushed G.C. into a chair.

G.C. admitted that it was usually fun having gym with Mr. Harrell. However, the kids were sometimes upset with him when he yelled at them.

The next witness called by the School District was D.S. who testified he was 13 years of age. D.S. was in Ms. Palumbo's homeroom and in Mr. Harrell's gym class with G.C. and was a witness to the January 29, 1991 incident. D.S. testified that he saw Mr. Harrell push G.C. three or four times toward the locker. According to this witness, G.C. did not hit the lockers at this time. After G.C. said the "F" word to Mr. Harrell, the teacher grabbed G.C. by the neck, threw him into the lockers and then into a chair. This witness also confirmed that G.C. was crying when Mr. Harrell threw him down into the chair. D.S. also denied that any of the students in his class were out to get Mr. Harrell.

On cross examination, this witness admitted that he did not know whether G.C. was "fooling around" with his friends. D.S. did not pay attention to G.C. until everybody started screaming. This witness also admitted that the boys liked having gym with Mr. Harrell since he let the boys play basketball and kickball if they were ready before the girls were suited up

for gym. D.S. also testified that only O.S. had trouble with Mr. Harrell because he "used to be bad" and he wanted to get even with the teacher (1T:197-11 to 2.4).

The School District also presented the testimony of Hilda Ruiz. This witness is the vice principal of P.S. No. 15 and was directly involved in several of the charges filed against Mr. Harrell. However, her sole testimony with regard to the January 29, 1991 incident related to the involved students' reputation for honesty. When asked, on cross examination whether ". . . G.C. is in the group that you find to be more trustworthy or the one that you find to be otherwise." Mrs. Ruiz responded, "I would say otherwise" (2T:202-15 to 24).

In his own defense, Mr. Harrell testified that on January 29, 1991, he observed G.C. and another student wrestling. Mr. Harrell observed that one student had an armlock on G.C.'s neck. This witness told the two to cut it out. Since they continued to wrestle, Mr. Harrell got up from his desk and pushed the two boys apart. As the students were lining up, G.C. cut the line. Mr. Harrell told him to go to the end of the line. G.C. did not obey so Mr. Harrell then backed him up with his hand until he was at the end. When Mr. Harrell turned around, G.C. moved. Mr. Harrell told him "You're out of line" (5T:53-1 to 5). G.C. then said "F" you to Mr. Harrell. At this point, Mr. Harrell walked over to G.C., who had started to cry, placed both hands in the front of his shirt and moved him over to his desk and sat him down. When G.C. popped up, Mr. Harrell sat him down again. Mr. Harrell then took the class to meet its homeroom teacher; when he returned to the locker room, G.C. was gone.

On cross examination, Mr. Harrell simply denied that the January 29, 1991 incident had occurred as described by G.C. and D.S.

Ms. Cynthia Jones, the other gym teacher, testified on behalf of Mr. Harrell. However, the January 29, 1991 incident occurred in the boys' locker room. Ms. Jones did not witness this incident since, at the time, she was within the girls' locker room supervising her students.

The School District called as its final rebuttal witness, J.C. This witness testified that he is 13 years of age and was a student in Ms. Palumbo's fifth grade class during the 1990-91 school year. J.C. witnessed the January 29, 1991 incident involving G.C. This witness testified

that the incident occurred while the students were getting ready to take gym. J.C. related that G.C. ". . . jumped out of the line. Mr. Harrell, he grabbed him and tried to talk to him and threw him against the locker." 7T:94-20 to 23. This witness described Mr. Harrell as grabbing G.C. by the neck and estimated that the incident lasted about 30 minutes.

On cross examination, J.C. admitted that he did not observe the beginning of the incident. He was facing forward when he heard noise from behind. He turned and saw Mr. Harrell grab G.C.'s shirt front. The teacher held on to him, walked him backward to the lockers and held him against the lockers. This witness stated that he then saw Mr. Harrell grab G.C. by the neck. According to J.C., Mr. Harrell raised G.C. off his feet and held him against the lockers by the neck. This witness also testified that after the incident he heard some kids say "something like" we will "really get Mr. Harrell this time" (7T:117-22 to 25).

FINDINGS OF FACT

Having carefully considered the testimony of the witnesses presented by the School District in support of the second specification of Charges One and Two and the testimony of the respondent presented in his own defense, and having had the opportunity to view the demeanor of those witnesses as they gave their testimony, and having fully reviewed the exhibits entered into evidence relevant to this incident, I **FIND** the following:

During the 1990-91 school year, G.C. was eleven years of age and attending the fifth grade in P.S. No. 15. G.C.'s home room teacher was Mrs. Palumbo and his gym teacher was Eddie Lee Harrell.

On January 29, 1991, G.C. completed his gym class with Mr. Harrell. He returned with the other boys to the boys locker room and changed into his street clothes. G.C. then began playing and wrestling with his friend, D.S., and his cousin, O.S. The boys were grabbing each other around the neck "a little bit hard."

Mr. Harrell told the boys to stop and to get in line. They stopped briefly but started up again. Mr. Harrell rose from his desk and pushed the boys apart. I **FIND** that Mr. Harrell

acted appropriately in separating the boys. Mr. Harrell then directed A.C. and his friend to the end of the line. G.C. did not follow this directive but cut in the line. Mr. Harrell put his two hands on G.C.'s chest and pushed him backward toward the lockers. While being pushed, G.C. said "Fuck you!" to Mr. Harrell. At this point the teacher grabbed G.C. and pushed him first to the lockers and then pushed him into a chair.

The conduct of G.C., in failing to follow Mr. Harrell's directives and in cursing him before his class, was clearly disrespectful and provocative. However, Mr. Harrell overreacted to this conduct and improperly placed his hands on G.C. and pushed him first into the lockers and then into a chair.

The credibility of the student witnesses was undercut by the admission that one of the participants, O.S., wanted to get even with Mr. Harrell. Further, after the incident, there was talk among the students that they would really get Mr. Harrell this time. Finally I did not find G.C. a particularly convincing witness.

Accordingly, although there was a bruise on G.C.'s neck after the January 29, 1991 incident, I **FIND** that it was not established by a preponderance of the credible evidence that this bruise was caused by Mr. Harrell. The evidence before this court equally supports the conclusion that G.C. sustained this injury when his friend grabbed him around the neck "a little bit hard."

The School District has, therefore, failed to establish by a preponderance of the credible evidence that Eddie Lee Harrell has inflicted corporal punishment upon G.C. However, the School District has established by a preponderance of the credible evidence that Mr. Harrell overreacted to G.C.'s disrespectful conduct and improperly physically restrained G.C. as included in the second specification of Charge Two.

CHARGE ONE: CORPORAL PUNISHMENT
CHARGE TWO: UNJUSTIFIED PHYSICAL CONTACT
(3) March 25, 1991 Incident Involving D.F.
CHARGE THREE: USE OF PROFANE LANGUAGE
March 25, 1991 Incident Involving D.F. and N.I.

Mr. Lagatol, the principal of P.S. No. 15, next testified concerning an incident which occurred on March 25, 1991. This witness stated that he was attending a Board of Education Workshop on that date and left Vice Principal Hilda Ruiz in charge of the school. When Mr. Lagatol returned from the conference, Mrs. Ruiz reported that a fourth-grade student had stated that Mr. Harrell had pushed him, with a half clenched fist on his back, down a flight of stairs (P-7).

On March 26, 1991, after reviewing Mrs. Ruiz' report, Mr. Lagatol interviewed the student, D.F. The student told the principal that Mr. Harrell punched him in the back and knocked him down the stairs. Mr. Lagatol described D.F. as a ten year old youngster who was approximately 4'2" or 4'3" tall. The student indicated that when Mr. Harrell punched him, he almost fell down the stairs but his friend, N.I., caught him and saved him from falling down the stairs. D.F. further reported that the only thing he was doing was talking softly to his friend while lined up on the stairs.

Mr. Lagatol also testified that Mrs. Valdes, D.F.'s homeroom teacher, had initially brought D.F.'s complaint to the attention of Mrs. Ruiz. When D.F. returned from gym, he reported that Mr. Harrell punched him in the back. Mrs. Valdes saw the mark on D.F.'s back and showed the mark to two other staff members. Mrs. Valdes sent a report on D.F.'s complaint to Mrs. Ruiz. (P-8).

On the next day, D.F. was brought to the nurse, Kathleen Moffitt. She prepared a report which described a "bruise. . . midway down the boy's back" (P-10). When Mr. Lagatol confronted Mr. Harrell with the report, he denied it. However, Mr. Lagatol told him that the incident would be reported to DYFS and to Mr. Kline. Mr. Lagatol also relieved Mr. Harrell of his classes and reassigned him to clerical duties. Mr. Harrell continued to work for Vice

Principal Ruiz until May 1, 1991. At that point, Mr. Harrell was reinstated to his teaching position since Mr. Lagatol was given no direction to the contrary by his supervisor.

Before Mr. Harrell was returned to his position, Mr. Lagatol met with him. Mr. Harrell complained about Ms. Ruiz, the Vice Principal responsible for his supervision. Mr. Harrell felt the "kids were getting over her and they were trying to frame him" (1T:54-10 to 11). In order to make Mr. Harrell feel more comfortable, Mr. Lagatol informed him that he should report any difficulties directly to him and that he need not go through Mrs. Ruiz. Mr. Lagatol testified that he emphasized at this meeting at the beginning of May, 1991, as he had done many times previously with Mr. Harrell, "do not put you hands on the children," (1T:56:3 to 7). Mr. Lagatol testified that between September, 1990 and October, 1991, he met approximately twelve times with Mr. Harrell to discuss the proper way to utilize physical restraint. Mr. Lagatol testified that in his opinion this was an "insubordinate" number of times to have to meet to discuss this problem with an experienced teacher (1T:58-25 to 59-8).

On cross examination, Mr. Lagatol testified that from his interview with D.F., he was not certain whether the incident occurred when the students were lined up to go to gym or when then were lined up at the end of class. Mr. Lagatol also conceded that when D.F. returned to his homeroom, his teacher, Ms. Valdes, showed the mark on his back to two Hispanic staff members. However, when Mr. Hargrove, the security guard who is Afro-American, appeared at her room, Mrs. Valdes would not explain the problem to him. Mr. Lagatol was unable to offer a definitive explanation for Mrs. Valdes' actions.

The School District next called Mrs. Loida Valdes to testify as to the March 25, 1991 incident. Mrs. Valdes stated that she is employed by the School District as a bilingual teacher in P.S. No. 15. During the 1990-91 school year, this witness taught the fourth grade bilingual class and D.F. was a student in that class.

Mrs. Valdes testified that on March 25, 1991:

> . . . I went to pick up my class in the gym room and when we got back to my room. . . D. was crying. And I asked him what happened to him and D. and another student told me that he was hit by the gym teacher. (1T:225-3 to 8).

D.F. then lifted his T-shirt and Mrs. Valdes observed red mark on his back somewhat beneath the shoulder blade. Mrs. Valdes described the mark as large, red and circular.

Mrs. Valdes tried to report the incident immediately to her Vice Principal, Mrs. Ruiz. However, Mrs. Ruiz was not available and sent the security guard, Mr. Hargrove, to find out what happened. Mrs. Valdes declined to tell Mr. Hargrove what had happened or to show him the mark in D.F.'s back. This witness explained:

> . . . I was a new teacher and I don't want nobody else involved in the problem I want to see Ms. Ruiz. (1T:228-8 to 10).

Mrs. Valdes explained in cross examination that Mr. Montanez, her teacher's aide, was in the room when D.F. showed the mark on his back. Further, Ms. Deulofeu, a teacher's aide in the next room, came to her class at the moment that D.F. was showing the mark on his back.

The Vice Principal, Mrs. Hilda Ruiz, also testified concerning her involvement with the March 25, 1991 incident. Mrs. Ruiz testified that she has been employed by the School District for approximately eighteen years. This witness started as an instructional aide, later became a teacher and is currently one of two Vice Principals at P.S. No. 15. She holds certifications as principal, supervisor, elementary grades K-8, bilingual, bicultural and ESL. Mrs. Ruiz supervises instruction, chairs various committees, is in charge of discipline for the grades assigned her and handles misconduct reports.

Mrs. Ruiz testified that she prepared the incident report which was dated March 26, 1991 and sent to Mr. Lagatol (P-7). This report was prepared after she interviewed D.F. sometime between 8:45 and 9:00 a.m. on the morning of March 26, 1991. Mrs. Ruiz explained that she was in a meeting with the eighth grade on Monday afternoon when Mrs. Valdes had tried to contact her. Mrs. Ruiz, therefore, sent the security guard, Mr. Hargrove, to Mrs. Valdes' class. Mr. Hargrove was to find out the nature of the problem and let her know if it was an emergency.

Mrs. Ruiz admitted that she initially told the nurse, Ms. Moffitt, that Mr. Harrell had pushed D.F. because that is what the child most likely told her. In her report to Mr. Lagatol

she stated that Mr. Harrell punched D.F. Again, Mrs. Ruiz believed that D.F. had also used that term. This witness explained that D.F. is a bilingual student and his use of English words was imprecise.

With regard to her relationship with Mr. Harrell, Mrs. Ruiz testified that she was aware that Mr. Harrell had objected to her being his supervisor. Mrs. Ruiz thought that Mr. Harrell was not happy with her style of supervision. This witness stated that it was fine with her if Mr. Harrell felt more comfortable with Mr. Lagatol as his immediate supervisor.

On cross examination, Mrs. Ruiz was unable to fully explain why Mrs. Valdes would not tell Mr. Hargrove, the security guard, the nature of the problem in her classroom. Mrs. Ruiz speculated, that Mrs. Valdes, an untenured teacher, may have been concerned about being involved in a controversy. The next morning, when Mrs. Ruiz spoke to Mrs. Valdes and Mr. Montanez, she was told about the red mark on D.F.'s back. She also spoke with D.F.'s father who was very upset about the mark on his son. Mrs. Ruiz was, therefore, confident that the day-old bruise she saw on D.F.'s back when the nurse examined him was the same injury observed by Mrs. Valdes on the prior day.

The student, D.F., testified as to the events of March 25, 1991. This witness will be thirteen in April, 1993. During the 1990-91 school year, D.F. stated that he was in Mrs. Valdes' bilingual fourth grade class in P.S. No. 15. D.F. also testified that Mr. Harrell was his gym teacher; his gym class took place in the afternoon and there were approximately forty-one students in the class.

On March 25,1991, D.F. testified that he had changed into his gym clothes in the locker room. He engaged in various activities and testified that he had fun in gym that day. After gym, the boys lined up to go back to the locker room to change back into their street clothes. When he had lined up, D.F. was standing toward the top of the steps and was talking to his friends N.I. and V.R. Mr. Harrell told him to be quiet so he spoke "lowly." Mr. Harrell said "Come here." Mr. Harrell grabbed him by the back of his gym shirt and then hit him in the back. D.F.'s friends grabbed him to prevent him from falling backward down the stairs. When in the locker, D.F. told Mr. Harrell that he would bring his father to school. Mr. Harrell said

"I don't know Spanish;" then he said the "bad word;" Mr. Harrell said "Fuck You." (1T:205-12 to 24).

D.F. testified that Mrs. Valdes came for her class. D.F. was crying and told her what happened. D.F. confirmed that he showed his back to Mrs. Valdes, Mr. Montanez and Miss Deulofeu when he returned to class. D.F. testified that Mr. Harrell hit him hard, hard enough to make him cry. Mrs. Valdes called Mrs. Ruiz and tried to take D.F. to the nurse but could not do so. It was then the end of the school day and D.F. went home.

On cross examination, D.F. admitted that when he was lining up to go to the locker, he cut around the divider. Mr. Harrell saw him and sent him to the back of the line, but he went toward the top standing between his friends N.I. and V.R. D.F. also stated that when he was in the locker room, he was speaking to his friend in Spanish. Mr. Harrell said to him, "I don't know Spanish, talk English." (1T:221-1 to 2). When D.F. went home, he showed his father the mark on his back.

Another witness to this incident who testified on behalf of the School District was N.I. This student testified that he is presently thirteen years of age and during the 1990-91 school year was a student in Mrs. Valdes' fourth-grade bilingual class at P.S. No. 15. On March 25, 1991, N.I. was taking gym with Mr. Harrell.

N.I. confirmed D.F.'s testimony that D.F. had cut in the line and had been sent to the back by Mr. Harrell. Instead of going to the back, D.F. stood between this witness and V.R. Mr. Harrell called DF.. to him and D.F. moved closer to him. Mr. Harrell hit D.F. and this witness grabbed D.F. so he would not fall down the stairs. N.I. stated that he saw Mr. Harrell hit D.F. with a closed fist with a graduation ring on it. N.I. also testified that once in the locker room Mr. Harrell said "Fuck you" to D.F. when he heard him speaking in Spanish.

On cross examination, N.I. described Mr. Harrell as angry when he said the bad word to D.F.

The final witness to testify on behalf of the School District was V.R. This witness was ten and one-half years old at the time of the incident. During the 1990-91 school year, he was a student in Mrs. Valdes' bilingual fourth grade class in P.S. No. 15. V.R. was in Mr. Harrell's gym class with D.F. at the time of the March 25, 1991 incident.

V.R. testified that on that date, Mr. Harrell hit D.F. This witness stated that as the boys were lined up on the stairs waiting to go to the locker room, D.F. was talking softly. Mr. Harrell then took D.F. out of line "and that's when he hit him and he sort of fell." (3T:213-18 to 19). The boy's friend, N.I., kept him from falling. When the boys were in the locker room, D.F. started speaking Spanish and that's when Mr. Harrell said "Fuck you" to D.F. (3T:221-10 to 12).

This witness confirmed that D.F. was crying after Mr. Harrell hit him and that he was still crying when he returned to Mrs. Valdes' class. He also looked at the mark of D.'s back both in gym and in the classroom. This witness told Mrs. Valdes what happened to D.F. and corroborated that Mrs. Valdes also saw the mark on D.'s back.

On cross examination, V.R. conceded that he and D.F. went around the curtain "for nothing" and Mr. Harrell sent him to the front of the line and D.F. to the end.

In his own defense, Eddie Lee Harrell testified that he recalled having D.F. in his class. Mr. Harrell testified that he had approximately 42 students in that particular class and that he does not recall the circumstances surrounding the March 25, 1991 incident. Mr. Harrell did deny that he ever hit D.F. or used profane language to him. He also denied that he told D.F. to speak English.

Mr. Harrell explained that at the end of the gym activities, he has the boys line up single file on the steps going up to the locker room. On this particular day, the boys went wild as they were lining up so he had them go back. They lined up a second time and he unlocked the locker room for the boys. Mr. Harrell again testified that he did not recall any incident with D.F.

On cross examination, Mr. Harrell admitted that he had a conference with Mr. Lagatol following the incident with D.F. Mr. Lagatol informed him that he would be suspended from his teaching duties until the investigation into this incident was resolved. Mr. Harrell conceded that he refused to put anything in writing since Mr. Lagatol had already decided to refer the matter to DYFS.

Mrs. Cynthia Jones also testified on behalf of Mr. Harrell. Mrs. Jones testified that she has been employed as a physical education teacher in the School District for thirteen years. The present school year is her twelfth at P.S. No. 15. Mrs. Jones testified that she knew Mr. Harrell since he was transferred to P.S. No. 15.

Mrs. Jones explained that during many physical education periods both teachers were in the gym with their classes. At those times, they would either team teach or take their classes and work with them separately. There were times, however, when one of the teachers had a health class. At those times, the other gym teacher would be in the gym alone with his/her class. Mrs. Jones also testified that even when she and Mr. Harrell team taught, each teacher was responsible for, and had to supervise, his/her own class. With the two classes together, there would be from 45 to 60 students in the gym.

This witness testified that both teachers followed the same procedures. The classroom teacher would bring the students to the front of the gym. When they were quiet, the children would come into the foyer area of the gym. When they were again quiet, the boys would enter their locker room, the girls theirs. When finished changing their clothes, the students would come out and line up on the stairs. When quiet, they would pass into the gym and form their squads. After the gym class, they again line up on the stairs. When quiet, they return to the locker room. After they change, they again line up on the stairs. When the bell rings for the end of the class, the homeroom teacher comes and receives the class. Mrs. Jones supervises the girls while they are in the locker room; Mr. Harrell would supervise the boys. If both classes did not arrive together, they would either wait or let the first class pass to the locker room and start changing. With regard to the locker rooms, the teacher unlocks the door and then allows the students to pass in first.

With regard to the March 25, 1991 incident, Mrs. Jones did not recall any problem on the staircase nor was she questioned about it by anyone in authority. Mrs. Jones also denied that D.F. had come to her to complain about Mr. Harrell. However, she stressed that her attention was focussed on the girls during that period of time. Furthermore, she had difficulty recalling who D.F. was.

FINDINGS OF FACT

Having carefully considered the testimony of the witnesses presented by the School District in support of the third specification of Charges One and Two and in support of Charge Three and the testimony of the respondent and the witness presented in his support, and having had the opportunity to view the demeanor of those witnesses as they gave their testimony, and having fully reviewed the exhibits entered into evidence relevant to this incident, I **FIND** the following:

During the 1990-91 school year, D.F., a ten-year-old, was a student at P.S. No. 15 in the Paterson School District. He was in the fourth-grade bilingual class of Mrs. Loida Valdes. D.F. was also in Mr. Harrell's afternoon physical education class. During that same year, N.I., an eleven-year-old, and V.R., a ten-year-old, were also students in Mrs. Valdes' fourth-grade class and had an afternoon gym class with Mr. Harrell.

D.F. who will be thirteen in April is a short boy of slight build. When in the fourth grade, he stood approximately four feet, two and one-half inches tall. He spoke in a very quiet voice and, although able to testify without the aid of interpreter, he occasionally had difficulty using the correct English word.

On March 25, 1991, the three students: D.F., N.I. and V.R., were present for Mr. Harrell's gym class. After D.F. suited up, he fully participated in the gym activities and enjoyed this particular class.

The gym at P.S. No. 15 has a curtain-like divider which can be moved by hand. At the end of the gym activities, the boys were to line up in single file on the stairs leading up to the locker rooms. D.F. and V.R. ran around the gym divider; D.F .wanted to cut to the front of

the line waiting to go to the locker rooms. Mr. Harrell, having seen D.F. and V.R. run around the divider, separated the boys sending D.F. to the back of the line. Instead of going to the end, D.F. stood toward the front of the line. V.R. was in front of D.F. while N.I. was behind him.

D.F. was talking loudly to his friends when Mr. Harrell told him to be quiet. D.F. continued to talk in a very soft voice. Mr. Harrell called him. As D.F. started to go up the stairs, Mr. Harrell grabbed him by his gym shirt and then hit D.F. hard in the back. The blow, struck with a semi-closed fist, caused D.F. to lose his balance and begin to fall backwards down the stairs. N.I., standing behind D.F., caught him and prevented him from falling down the stairs. D.F. , who may have not strictly followed Mr. Harrell's directives was not openly disrespectful to him nor did he provoke him in any way.

D.F. began to cry after Mr. Harrell hit him. When D.F. was in the locker room, he spoke Spanish to his friends telling them that he was going to tell his father and bring him to the school. Mr. Harrell told D.F. "to speak English and not Spanish" and then said "Fuck you" to D.F. and N.I.

Mrs. Valdes observed D.F. crying when she picked up her class. D.F. told her what happened and lifted his shirt to show the mark on his back. Mrs. Valdes saw a large, red, circular mark on D.F.'s back, below the shoulder blade. Two aides, Mr. Montanez and Mrs. Deulofeu, were in the room at the time and also saw the red mark.

Mrs. Valdes tried to report the incident to Vice Principal Ruiz. Mrs. Ruiz, involved in a meeting, sent the security guard, Mr. Hargrove, to Mrs. Valdes' class to find out the nature of the problem. Mrs. Valdes wanted to report directly to Mrs. Ruiz and did not provide any information to Mr. Hargrove. Mrs. Valdes also tried to have the nurse look at D.F. but the nurse was involved in an emergency. As it was the end of the school day, D.F. went home.

On the following day, March 26, 1991, D.F. returned to P.S. No. 15 with his father. Mrs. Ruiz had a conference with the father who was quite upset by the incident. Mrs. Ruiz then interviewed D.F., N.I. and V.R. She then brought D.F. to the nurse, Miss Moffitt who noted a bruise midway down the boy's back. Mrs. Ruiz prepared a report to the Principal, Mr.

Lagatol. The principal interviewed Mr. Harrell who denied the incident, but refused to give any specifics about the events of March 25, 1991.

After considering the reports before him, Mr. Lagatol referred the matter to DYFS and reported the incident to his immediate supervisor. Mr. Lagatol also relieved Mr. Harrell of his teaching duties and assigned him to clerical duties in Ms. Ruiz' office.

The above findings, as they pertain to the occurrences within Mr. Harrell's gym class on March 25, 1991, basically reflect the testimony of D.F., N.I. and V.R. I **FIND** all three boys to be entirely credible witnesses. Their testimony was direct and, although consistent, gave no hint of its being rehearsed or fabricated. D.F. was a particularly convincing witness demonstrating a quiet sense of shock at Mr. Harrell's acts toward him. There was absolutely no evidence in the record which would support Mr. Harrell's general theory that these particular boys were out to get him.

Mr. Harrell's flat denial of this incident, despite the mark on D.F.'s back observed by at least three adults immediately following the gym period, is totally unpersuasive. Similarly, Ms. Jones, who simply testified that she did not recall an incident involving D.F., was similarly unconvincing since it was not clear that this witness remembered who D.F. was.

Based upon the above, I **FIND** (a) that the School District has established, by a preponderance of the credible evidence, that Eddie Lee Harrell did improperly inflict corporal punishment on D.F., causing him injury, and that such action was not permitted by the language of N.J.S.A. 18A:6-1(a) through (4) as charged herein, (b) that Eddie Lee Harrell did have unjustified physical contact with D.F. as charged herein; and (c) that Eddie Lee Harrell did use profane language to D.F. and N.I. as charged herein.

CHARGE ONE: CORPORAL PUNISHMENT
CHARGE TWO: UNJUSTIFIED PHYSICAL CONTACT
CHARGE FOUR: INSUBORDINATION

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(4) March 6, 1992 Incident Involving G.B.
(5) March 6, 1992 Incident Involving A.R.
(6) March 6, 1992 Incident Involving R.R.
(7) March 6, 1992 Incident Involving J.M.

The principal of P.S. No. 15, Mr. Lagatol also testified concerning four separate incidents which occurred on March 6, 1992. This witness identified the Incident Report which he wrote on March 9, 1992 to his immediate supervisor, Dr. C. Jean Stepherson (P-14). Mr. Lagatol informed Dr. Stepherson that on that date, four fourth-grade students: G.B., A.R., R.I., and J.M., reported to him that Eddie Lee Harrell had mistreated them during gym class on March 6, 1992.

Mr. Lagatol testified that before he prepared this report, he interviewed the students involved. G.B. stated that Mr. Harrell "pushed him in the back of the head into the wall." A.R. indicated that the gym teacher "dragged him by the arm and pushed him in the closet." The third student, R.I., reported that Mr. Harrell "dragged him by the arm and threw him on the ground" while J.M. stated that Mr. Harrell "pushed him by the shoulder and then pushed his head down with his nose going into the mat on the gym floor" (1T:62-2 to 10). Mr. Lagatol also interviewed five additional students who witnessed the incidents. The statements of these students corroborated the reports given by the four involved in the incident. All the students appeared very anxious, concerned and upset when reporting these events to the Principal.

Mr. Lagatol further testified that he was not in school on Friday, March 6, 1992 when the incidents occurred. The matter was brought to his attention by Vice Principal Hilda Ruiz who called him at home on March 6, 1992. Mr. Lagatol investigated the reports when he returned to school on Monday, March 9, 1992.

This witness identified Ms. Karen Drozdale as the fourth-grade teacher of the four students involved in the March 6, 1992 incident. Mr. Lagatol described Ms. Drozdale as a first-year teacher who had come to Paterson with seven years teaching experience. This teacher provided Mr. Lagatol with a hand written report of the March 6, 1992 incident (P-16).

After investigating the incident and receiving reports from Ms. Ruiz and Ms. Drozdale, Mr. Lagatol interviewed Mr. Harrell who flatly denied the charges. Shortly after the March 6, 1992 incident, Dr. Stepherson supported Mr. Lagatol's decision to suspend Mr. Harrell from his teaching duties.

Mr. Lagatol also identified Mr. Harrell's annual performance evaluation which was dated March 9, 1992 (P-13). Mr. Lagatol testified that he indicated on the evaluation that Mr. Harrell "needs improvement" in the area of "relating to students." As Mr. Lagatol testified:

> It was my impression that he had a severe lack in effective skills as far as developing a rapport . . . with the students (1T:60-6 to 15).

This evaluation of Mr. Harrell by Mr. Lagatol was specifically related to the growing incidents of alleged physical abuse of children. The evaluation was given to Mr. Harrell during the period of his suspension.

On cross examination, Mr. Lagatol conceded that because of the term of Mr. Harrell's suspension, the formal procedures for the annual evaluation were not followed. With regard to the March 6, 1992 incident, Mr. Lagatol reiterated that he did not observe the occurrences but simply reported the statements of the students. Mr. Lagatol also admitted that following the incident, the nurse saw only two of the four students involved. According to the report of the nurse, Joan Hochman, there were no visible marks on the students, J.M. and R.R. (R-1 and R-2).

Mr. Lagatol further testified that he was aware of some animosity existing between Mrs. Drozdale and Mr. Harrell. He recalled a negative incident transpiring between the two prior to March 6, 1992. He believed it concerned a health class which Mr. Harrell was to teach in Ms. Drozdale's fourth-grade class.

Mr. Lagatol also testified that he had interviewed Ms. Jones, the other gym teacher, concerning the March 6, 1992 incident. Ms. Jones told the principal that "She has never seen anything" (1T:126-5 to 6).

The Vice Principal, Mrs. Hilda Ruiz, also testified concerning the March 6, 1992 incident. Mrs. Ruiz stated that she was in the office of the other Vice Principal, Mr. Garibell, when Mrs. Drozdale came in. The teacher brought two students and told the Vice Principals that Mr. Harrell had hurt them during the gym period. Mrs. Drozdale also reported that Mr. Harrell had not been at his duty station when she had brought her class to the gym that morning. Mrs. Ruiz explained that Mrs. Drozdale's class had gym the first two periods of the school day with the first period starting at 8:50 a.m.

Mrs. Ruiz initially interviewed the two students who were brought to the office on March 6, 1992, R.R. and J.M. One reported he was grabbed by the arm and the other that he was thrown to the mat. These two students were taken to the nurse who found no visible marks on them. That afternoon, Mrs. Ruiz interviewed Mr. Harrell who denied hitting the students. Mrs. Jones, the female gym teacher, joined the conference and told Mrs. Ruiz that

> . . . Mrs. Drozdale said that she will get even or something like that with Mr. Harrell because of something that had happened previously, a bad evaluation to her when the students returned from gym to the classroom. . . (2T:150-1 to 5).

Following this interview, Mrs. Ruiz reported to Mr. Lagatol, who was not in school that Friday. The principal indicated that he would take charge of the matter on Monday, March 9, 1992.

However, on March 9, 1992, Mrs. Ruiz did send notices home to the parents of G.B., A.R. and J.M. (P-23, P-24 and P-25) and asked them to come in for a conference. Mrs. Ruiz believed that two of the boys had their parents come in and that she discussed the March 6, 1992 incident with them.

Mrs. Ruiz testified that from her contacts with Mrs. Drozdale, she had no impression that Mrs. Drozdale was trying to get even with Mr. Harrell. This witness also stated that there have been no problems at P.S. No. 15 between blacks and Hispanics.

On cross examination, Mrs. Ruiz admitted that on Friday March 6, 1992, Mrs. Drozdale brought two students to her who were hurt during Mr. Harrell's gym class. However, by Monday, March 9, 1992, Mrs. Drozdale was convinced that four students had actually been harmed during the gym class (P-16). Mrs. Ruiz conceded that she had no idea whether Mrs. Drozdale's students gave the reports they did in an effort to please her.

The School District next called Mrs. Karen Drozdale to testify in support of the charges against Mr. Harrell. This witness testified that she is employed by the Paterson School District as a fourth-grade teacher in P.S. No. 15. Mrs. Drozdale began teaching in Paterson in September, 1991.

This witness has a B.S. in Education from Long Island University. She has taught for eight years in the elementary area. Mrs. Drozdale's first teaching assignment was in a prep school in Manhattan. She then taught for a year in the inner city in New Haven, Connecticut. Thereafter, she taught for three years in a prep school in Manhattan. After taking a year off, she began in P.S. No. 15 in September, 1991.

During the 1991-92 school year, Mr. Harrell was the physical education teacher for her fourth-grade class. The gym class was scheduled for the first two periods on Fridays. Mr. Harrell also taught her class health one period a week, sometime after lunch. Mrs. Drozdale explained that she was new to the school and really did not know Mr. Harrell; he was just another teacher in the building. This witness also stated that her children liked gym, observing that "gym is something that's positive for children" (4T:38-4 to 5).

Mrs. Drozdale testified that her classroom was not in the building but in an outside mobile unit. After morning announcements, Mrs. Drozdale would line up her class and walk them from the outside unit, which is by the faculty parking lot, to the school building. She would take them into the building and down the stairs to the gym.

On March 6, 1992, when Mrs. Drozdale brought her class to the gym, at about 9:00 a.m., Mr. Harrell was not there to receive them. She waited five to ten minutes and tried to call the office. Mrs. Jones, the other gym teacher, did not say where Mr. Harrell was but

offered to watch her class until Mr. Harrell returned.

Mrs. Drozdale thought it was unsafe and unfair for Mrs. Jones to watch both classes so she went to the main office to report Mr. Harrell's absence. As she was doing so, one of the secretaries saw Mr. Harrell returning in his van. Mrs. Drozdale testified that it was close to 9:20 a.m. when Mr. Harrell returned to the school.

Since the gym period ended at 10:05 a.m., Mrs. Drozdale went down to the gym about 10:00 a.m. to pick up her class. This witness testified that she waited for her class in the cafeteria which is outside the doors to the gym. As she waited for her class, Mr. Harrell came out of the gym and approached her. Mr. Drozdale described Mr. Harrell as:

> . . . very angry. . . he basically put his face in mine and his finger in my face and started to yell at me and curse at me
>
> * * *
>
> He said, 'You f'ing bitch, keep your Goddam nose out of my business. It's not your business where the hell I am.' (4T:48-20 to 49-5)

Mrs. Drozdale asked Mr. Harrell to stop yelling. She was very surprised and upset by his unprofessionalism and the extent of his anger.

Mr. Harrell then returned to the locker room. Shortly thereafter, her class came out and was dismissed to her in accordance with normal procedure. The children were very excited on the way back to the classroom. Mrs. Drozdale explained that she had to stop the line at least five times to quiet the children. She asked them to stop talking until they reached their classroom.

When they did so, the students began to shout out and tell Mrs. Drozdale what Mr. Harrell had done during the gym period. This witness testified that she made all the students sit down and told them to raise their hands if they had something to say. She would listen to the students, one at a time. Mrs. Drozdale testified that initially two boys came to her, J.M. and R.R., who seemed incredibly disturbed. After listening to the boys, she noted down their

statements (P-28). At lunch time, she took the boys, J.M. and R.R., to the Vice Principal, Mrs. Ruiz. Together they brought the boys to the nurse, Mrs. Hochman, who examined them. On Monday, March 9, 1992, both Mrs. Drozdale and Mr. Harrell were asked to provide written reports on the events of March 6, 1992 to Mr. Lagatol. Mrs. Drozdale provided a handwritten report to her principal on that day (P-27; P-16).

Mrs. Drozdale described the four students as "good kids" (4T:70-2). Although J.M. is not a very bright student, he has a "heart of gold" and will help the little kids (4T:70-3 to 7). R.R. is a good kid, quiet and an excellent student. G.B. is a very good kid and a fairly good student while A.R. is an average student. Mrs. Drozdale testified that she had had no disciplinary problems with these students.

On Friday, March 6, 1992, Mrs. Drozdale only reported that two students were involved in the incident. However, on Monday she saw G.B. and his mother and spoke to A.R. She then drafted the report to Mr. Lagatol in which she listed the four students who were hurt, in some way, by Mr. Harrell.

Mrs. Drozdale admitted that, as a first-year teacher, she was concerned about her January 15, 1992 evaluation. Mr. Lagatol had rated her as "acceptable" rather than "good" in the areas of "discipline" and "students growth in self control." (4T:79-7 to 20). This evaluation took place in the period after Mr. Harrell had taught health to her class. Mrs. Drozdale complained that there was no closure to Mr. Harrell's lesson. He had given the students a test but had not collected the papers; there was writing on the blackboard; the students were in four corners of the room and it took her ten minutes to calm them down. After explaining the situation to Mr. Lagatol, he indicated that he understood why it took her so long to get the class under control.

On cross-examination, Mrs. Drozdale conceded that as a result of her initial analysis, she believed two students, J.M. and R.R., had been hurt by Mr. Harrell. However, after further interviews on Monday, March 9, 1992, she came to believe that two additional students, G.B. and A.R., had also been involved in the incident with Mr. Harrell. However, she noted no physical injuries on G.B. or A.R. on Friday and neither student asked to see the nurse on that day.

Mrs. Drozdale admitted her concern over her "acceptable" rating on two categories of her January 15, 1992 evaluation. However, she denied discussing that evaluation with Mrs. Jones, the other gym teacher and could not recall discussing it with anyone else. With regard to her discussion with Mrs. Jones on the morning of March 6, 1992, Mrs. Drozdale denied ever saying that she would take Mr. Harrell to the cleaners.

Although there was much discussion of the events which took place in gym on March 6, 1992, Mrs. Drozdale testified that she tried to contain and preclude such discussions after that day.

The School District next presented the students who had been involved in the March 6, 1992 incident.

G.B. testified that he was a student in Mrs. Drozdale's fourth-grade class at P.S. No. 15 during the 1991-92 school year. He also had Mr. Harrell for gym and was present for class on March 6, 1992.

This witness testified that when gym finished that day, the students were helping put away the basketballs. G.B. was inside the equipment room near to the doorway. Mr. Harrell grabbed him by the back of the neck and threw him against the wall. G.B. testified that his forehead hit the brick wall and he "was in a lot of pain." (3T:16-22). When the students were lined up, G.B. heard Mr. Harrell call Mrs. Drozdale a "bitch" (3T:23-14 to 25).

After the students returned to their homeroom ,G.B. told Mrs. Drozdale what had happened to him during Mr. Harrell's gym class. G.B. also told his mother when he went home. Because his head still hurt, his mother took him to the doctor.

On cross-examination, G.B. testified that when Mr. Harrell grabbed him by the neck, he told him "get over there" (3T:32-9), because there were too many kids in the equipment room. When G.B. got home, he saw a red bump on his forehead where he hit the wall.

This witness also testified on cross examination that he saw Mr. Harrell grab A.R. by the arm and throw him to the floor. G.B. stated that Mr. Harrell hurt him first and later threw A.R. to the ground. During these occurrences, Mrs. Jones, the other gym teacher, was at a distance and was talking to a girl who asked for a hall pass.

The next student to testify was A.R. who was eleven years old when he was in Mrs. Drozdale's fourth-grade class during the 1991-92 school year. On March 6, 1992, A.R. participated in Mr. Harrell's gym class.

This witness testified that the boys were in the gym before the girls and were playing with the basketballs. Mr. Harrell said:

> 'Put the ball back' I went to put the ball back, and he caught me and threw me. (3T:63-1 to 3).

A.R. testified that when Mr. Harrell threw him, his left shoulder hit the wall. When the students returned to their homeroom, A.R. did not tell Mrs. Drozdale what had happened to him. He waited until Monday, March 9, 1992, to tell Mrs. Drozdale.

On cross-examination, A.R. stated that when the boys lined up, J.M. had told him that Mr. Harrell had "clipped" him ". . . or pushed him, something like that." (3T:85-1 to 3).

The student, R.R., next testified on behalf of the School District. This witness, who was nine at the time of the incident, was also in Mrs. Drozdale's fourth-grade class in P.S. No. 15. R.R. testified that he was in Mr. Harrell's gym class and that he enjoyed it.

On March 6, 1992, R.R. stated that he:

> . . . had a basketball, and Mr. Harrell said, 'Put the basketball away,' and then I went to put the basketball away, and then my other friend gave me the basketball so I could put it away, and then when Mr. Harrell saw me with the other basketball, he threw me. He grabbed me and pushed me (3T:103-2 to 8).

This witness stated that Mr. Harrell grabbed him by the arm. When Mr. Harrell threw him, his shoulder hit the wall. R.R. testified that when he returned to his homeroom, he told Mrs. Drozdale what had happened to him in the gym class. This witness also confirmed that Mr. Harrell had called Mrs. Drozdale a "bitch" (3T:111-11).

On cross-examination, R.R. confirmed that the incident with Mr. Harrell occurred at the end of the gym period when the students were returning the basketballs to the equipment room. As he was going into the room with his second basketball, Mr. Harrell grabbed R.R.'s right arm and threw him. R.R. landed between the wall and the door to the equipment room and struck his right shoulder. This witness further confirmed that after he told Mrs. Drozdale about the incident, he was taken to the nurse. This witness also testified that he witnessed Mr. Harrell throw G.B. causing him to hit his head.

R.R. conceded that Mr. Harrell was a strict teacher and that the class wanted to get even with him after the events of March 6, 1992. On re-direct, the witness explained:

> I said, 'I'm going to tell the principal because he can't touch me, because he's not my parent. (3T:137-18 to 20).

R.R., therefore, stated that the boys who were hurt by Mr. Harrell wanted to get even by reporting him to the principal who could do something about the situation.

Another student who testified concerning the events of March 6, 1992 was J.M. This student testified that he has been attending P.S. NO. 15 since approximately the second grade. During the 1991-92 school year, he was 11 years old and in Mrs. Drozdale's fourth-grade class and Mr. Harrell's gym class. J.M. testified that he liked to participate in Mr. Harrell's class. On March 6, 1992, J.M. had forgotten his gym shorts and was sitting on the side. Mr. Harrell who was passing out the balls, rolled one to V.C. Instead, the ball went to J.M. who

> . . . just took it and tried to throw it in the court, and then he took it, and Mr. Harrell just came and pushed me, and I tripped on the mat and almost hit my head on the cement wall (4T:7-10 to 13).

J.M. explained that Mr. Harrell took him by surprise "just pushed him" and that he tripped and fell on his side. This witness gave him a "medium" push from his left shoulder. When he fell on the mat, he hit his shoulder which hurt a little. After gym was over, another student, A.P., said he should tell their teacher what happened. J.M. did tell Mrs. Drozdale. The teacher brought him to Vice Principal Ruiz, who then brought him to the nurse.

On cross-examination, J.M. explained that when the class returned to the homeroom, A.P., V.C. and B.D. called him and together they went to the teacher to tell her what happened in Mr. Harrell's class. Mrs. Drozdale then asked the rest of her students whether they saw "things" during the gym period.

Another student who testified concerning the March 6, 1992 gym class was V.C. During the 1991-92 school year, 9-year-old V.C. was in Mrs. Drozdale's fourth-grade class and in Mr. Harrell's gym class. This student testified that he liked taking gym with Mr. Harrell.

V.C. was present on March 6, 1992 when Mr. Harrell was throwing the basketballs from the equipment room. According to this witness, Mr. Harrell threw a ball which hit J.M. in the stomach. He then grabbed J.M. by the arm and threw him to the wall.

On cross-examination, V.C. admitted that he was "real far" when Mr. Harrell grabbed J.M. and he could not hear anything (3T:255-3). After they returned to Mrs. Drozdale's classroom, the students started shouting out what had happened during Mr. Harrell's class.

The School District next called D.S. to testify in support of the charges against Mr. Harrell. This witness was also in Mrs. Drozdale's fourth-grade class in P.S. No. 15 and had Mr. Harrell for gym during the 1991-92 school year. D.S. testified that on March 6, 1992, she saw Mr. Harrell grab J.M. and push him to the wall. She also saw the gym teacher grab A.R. and throw him to the floor. This witness further testified that she heard Mr. Harrell call Mrs. Drozdale, a "bitch" (3T:167-1).

On cross-examination, this witness testified that Mr. Harrell grabbed J.M. by the arm and pushed him by the wall. Mr. Harrell then called A.R. and grabbed him by the arm,

between the elbow and the wrist. The gym teacher pulled A.R. and he fell.

Another student called to testify concerning this incident was A.P. This witness was also in Mrs. Drozdale's fourth-grade class during the 1991-92 school year. A.R. participated in Mr. Harrell's gym class on March 6, 1992. She testified that Mr. Harrell pushed J.M. and that he fell on the mat and almost hit his head.

On cross-examination, A.P. testified that when the students returned to their classroom, Mrs. Drozdale started "getting more mad and more mad because she said that Mr. Harrell said a bad word to her" (3T:287-20 to 22).

The final student to testify concerning the March 6, 1992 incident was B.D. This student was in Mrs. Drozdale's fourth-grade class, during the 1991-92 school year. This witness testified that she saw Mr. Harrell push D.S. when she did not follow his directions. B.D. also testified that after gym, the students told Mrs. Drozdale what happened during that class. B.D. confirmed that J.M. told Mrs. Drozdale that Mr. Harrell had pushed him. On cross-examination, this witness explained Mrs. Drozdale questioned the class to determine exactly what had happened during Mr. Harrell's class.

Mr. Harrell testified in his own defense. He did not recall any incidents occurring during the first two gym periods on March 6, 1992. He first learned of the allegations, when Vice Principal Ruiz sent for him after lunch on March 6, 1992. Mrs. Ruiz indicated that two students had reported that they had been punched by Mr. Harrell. When this witness learned that the students were in Mrs. Drozdale's class, he explained to Mrs. Ruiz that Mrs. Drozdale was out to get him. Mr. Harrell told Mrs. Ruiz that:

> . . . 'Mrs. Drozdale came to the gym and informed Mrs. Jones, who was the other phys. ed. teacher, that she was going to take me to the cleaners and that I didn't know who I was messing with. I had caused her to get a bad rating before, and this time she was going to capitalize on it and that she was going to report me to the authorities because her kids observed me leaving the building.' (5T:72-4 to 11).

Mr. Harrell then testified concerning the events which occurred on March 6, 1992. Mr. Harrell and Mrs. Jones were standing in the corridor by the gym door. It was approaching 9:00 a.m.; Mrs. Jones' class had arrived but Mrs. Drozdale's had not. Mr. Harrell told Mrs. Jones that he was going out to the parking lot to move his van which was blocking another car. Mrs. Jones agreed to cover Mrs. Drozdale's class if she arrived before Mr. Harrell's return.

Mr. Harrell left the building, moved his van and used the bathroom in the teachers' room. He estimated that he was gone from five to ten minutes. When he returned, the boys and girls were in the locker rooms changing into their gym outfits. Mrs. Jones told him that Mrs. Drozdale had gone to the administration to report that he had left the building and was not there to receive her class for gym. Mrs. Drozdale said it was not fair to leave both classes with Mrs. Jones.

Mr. Harrell testified that the gym class proceeded and that G.B., A.R., R.R. and J.M. were in attendance. However, J.M. was not dressed in his gym clothes and, therefore could not participate in the class. Mr. Harrell would sometimes permit a student who had not suited up to engage in free play before the start of the formal gym class.

Mr. Harrell did not recall G.B. helping put away the basketballs on March 6, 1992 nor did he recall pushing him. This witness also did not recall grabbing A.R. or R.R. Finally, Mr. Harrell did not recall J.M. tripping and falling backwards. Indeed, Mr. Harrell could recall no incidents during the course of the gym class in which the two classes played "number" basketball and were using four basketballs.

This witness confirmed that several minutes before the end of the period, he left the gym to talk to Mrs. Drozdale. Mr. Harrell testified that he:

> . . . told Mrs. Drozdale that, when did she get off going to report me to the administration when she was late coming to class, and when I had someone there to receive the class? I said, 'Mrs. Jones has told me everything that you have said, and you have stated the fact that I caused you to get a bad rating, etc., and the fact that you are going to take me to the cleaners.' I said, 'Lady, do me a favor. Mind your own damn business,' and left. (5T:91-12 to 21).

As Mr. Harrell gave this testimony, he stood, his voice rose and he gestured with his arms. He also gave the impression that he moved very close to Mrs. Drozdale when he spoke to her. This witness denied calling the teacher a "bitch" or a "f'ing bitch." (5T:91-22 to 25). However, he did describe Mrs. Drozdale as looking "dumbfounded" after he had confronted her.

Prior to this incident, Mr. Harrell had been made aware that Mrs. Drozdale was annoyed with him. This witness testified that Principal Lagatol and Sandra Mickens, Chairperson of the Fourth Grade, had both mentioned that Mrs. Drozdale blamed him for a low rating she received on her January 15, 1992 evaluation.

Mr. Harrell confirmed that he was suspended as a result of the March 6, 1992 incident. This witness also denied that he had had any discussions with Mr. Lagatol regarding the use of physical contact with students prior to his final suspension.

On cross examination, Mr. Harrell denied that he had often been in Principal Lagatol's office concerning allegations of corporal punishment. This witness could not, however, explain the note which he sent to Mr. Lagatol on March 23, 1990 in which he stated:

> . . . Every time I turn around I am in your office for something I didn't do but taken or interpreted as corporal punishment!! (P-1)

Despite the language of P-1, Mr. Harrell denied that had any conferences, discussions or meetings with Mr. Lagatol regarding allegations of corporal punishment. He did concede, however, that each time a referral was made to DYFS that Mr. Lagatol met with him. Mr. Harrell recalled three such meetings. He admitted that since the decision to refer these matters to DYFS had been made, he had refused to provide Mr. Lagatol with written reports on the various incidents.

The respondent, Eddie Lee Harrell, called Joan Hochman to give testimony in support of his case. Mrs. Hochman testified that she has been employed by the Paterson School District for twenty-three years. This witness has been the school nurse at P.S. No. 15 since September 1991.

Mrs. Hochman testified that on March 6, 1992, she conducted an examination of J.M. and R.R. in the presence of their teacher, Karen Drozdale, and Vice Principal Ruiz. At the time of the examination, Mr. Harrell had been told by Mrs. Ruiz that the two boys had been "manhandled" by Mr. Harrell (6T:5-21).

Further, one of the boys reported to her that he had been pushed against a locker while the other informed her that he had been hit in the shoulder. Mrs. Hochman could not recall the name of the student making each complaint.

This witness testified that, as part of her examination, she lifted the boys' shirts, examined their skin, palpated, moved their shoulders and checked their range of motion. As a result of these procedures, Mrs. Hochman found nothing physical. Neither boy had any complaints of pain and both had a complete range of motion. This witness told Mrs. Ruiz and Mrs. Drozdale of her findings and prepared two reports, one dated March 6, 1992 and another dated March 10, 1992 (R-1 and R-2). Mrs. Hochman could not explain why there were two reports; she theorized that the first might have been temporarily misplaced resulting in a request that she prepare the second. The substance of both reports were virtually identical.

One cross examination, Mrs. Hochman conceded that the boys may have been shoved or pushed by Mr. Harrell without having marks on their skin.

Mrs. Cynthia Jones, the other physical education teacher, also testified in Mr. Harrell's behalf with regard to the events of March 6, 1992.

On that morning, Mrs. Jones testified that Mr. Harrell had asked her to watch his class for a moment and said that he'd be "right back" (6T:24-8). This witness indicated that those words were generally used when a teacher had to go to the men's or ladies' room. After Mr. Harrell left, Ms. Jones' class arrived and then Mrs. Drozdale brought her class for Mr. Harrell at about 8:55 a.m. This witness told Mrs. Drozdale to leave the class and she would watch the students until Mr. Harrell returned. While her students were still nearby, Mrs. Drozdale objected:

> 'This is not fair to you.' She told me, 'My kids saw him get in his car and go someplace. He was the cause of my getting a poor rating. I'm going to take him to the cleaners,' and I said 'You should calm down.' 6T:24-20 to 24.

Mrs. Drozdale then left her class with Mrs. Jones. Mrs. Jones stated that until that day she was not aware of any animosity between Mr. Harrell and Mrs. Drozdale.

On that particular day, the two classes had gym together. The curtain which partitions the gym was, therefore, not drawn. Mrs. Jones did not see Mr. Harrell touch, shove or push any of the students that day. She also did not see him go into the equipment room or hear any noise from that room.

Mrs. Jones also testified that she had never been told by Mr. Lagatol or anyone in administration that she should ask other students to separate students who are fighting. It was her opinion that you do not involve other students in the fight.

On cross examination, Mrs. Jones conceded that when she had been interviewed by the District's attorney earlier, she had never mentioned Mrs. Drozdale's comment. The witness' explanation was that she was never asked about it. Mrs. Jones, however, did inform Mr. Harrell of Mrs. Drozdale's statement as soon as he returned to the gym on March 6, 1992. She did not recall Mr. Harrell speaking to Mrs. Drozdale at the end of the gym period.

Mrs. Jones further stated that she had only assumed that Mr. Harrell had gone to the men's room because of the language he used. He could very well have gone to move his van which was illegally parked.

Mrs. Jones conceded that although she has no clear recollection of the meeting, she may have been interviewed by Mrs. Ruiz concerning the events of March 6, 1992. This witness also admitted that, while she did not observe Mr. Harrell hitting, shoving or pushing any students, her attention was not directed to Mr. Harrell.

> I'm not watching Mr. Harrell. I don't watch what he does.
>
> * * *
>
> . . . my job is to teach the children, so I'm watching the children. If they're making any mistakes, I have to correct the mistakes. . . (6T:46-16 to 47-2).

Mrs. Jones further clarified that if Mr. Harrell had used any profanity in the boys' locker room, she would not have been able to hear it.

> In the boys' locker room, I can't hear anything. His door is closed, my door is closed, so I wouldn't hear anything. I don't hear anything that's going on. It's far apart. My door is closed.
>
> * * *
>
> I don't know anything that going on in the locker rooms (6T:49-9 to 19).

On redirect, Mrs. Jones explained that if the boys are on the gym floor before the girls, they generally have a brief period of free play. That activity stops as soon as the girls line up on the stairs. The boys then put the basketballs away in the mesh holder. However, on re-cross, Mrs. Jones did not recall whether the boys had been playing with the basketballs on March 6, 1992, when the girls came out.

FINDINGS OF FACT

Having carefully considered the testimony of the witnesses presented by the School District in support of the specifications of Charges One and Two and Charge Four and the testimony of the respondent and the witnesses presented in his behalf, and having had the opportunity to view the demeanor of those witnesses as they gave their testimony, and having fully reviewed the exhibits entered into evidence relevant to these charges, I **FIND** the following.

During the 1991-92 school year, G.B., A.R., R.R., J.M., V.C., D.S., A.P. and B.D. were all students in Mrs. Drozdale's fourth grade in P.S. No. 15. These students were also in Mr. Harrell's physical education class during the same year. These students described Mr.

Harrell as being a strict teacher who demanded compliance with his many rules. However, the students generally liked Mr. Harrell and enjoyed participating in his class.

On the morning of March 6, 1992, Mrs. Drozdale brought her fourth-grade class from their mobile classroom which was in the faculty parking lot to the gym in the school building. Although the first period began at 8:45 a.m., Mrs. Drozdale arrived with her class at approximately 9:00 a.m. Mr. Harrell was not at the gym to receive Mrs. Drozdale's class. Mrs. Jones, the other gym teacher, offered to watch the class until Mr. Harrell's return. Mrs. Drozdale became concerned since some of her students said they had seen Mr. Harrell leave the school parking lot in his van. In front of her students, Mrs. Drozdale told Mrs. Jones that she was going to report Mr. Harrell to the administration. She said he had already been the cause of her receiving a poor rating and she was not going to let him get away with this. Mrs. Drozdale left her class with Mrs. Jones and reported Mr. Harrell's absence to the main office. As she was doing so, Mr. Harrell was seen returning to the school after moving his van in the faculty parking area.

When Mr. Harrell returned to his gym class at approximately 9:15 a.m., he was told by Mrs. Jones that Mrs. Drozdale had reported him to the administration.

Before gym class formally began on March 6, 1992, the boys had free time to play with the basketballs. Mr. Harrell told A.R. to put the basketball back. As he began to do so, Mr. Harrell caught him and pushed him causing his left shoulder to hit the wall. A.R. did not tell Mrs. Drozdale of this incident until the following Monday, March 9, 1992.

On the same day, J.M. did not bring his gym outfit and, therefore, could not participate in the gym class. Before the class began, J.M. was sitting by the mats, when a basketball rolled toward him. J.M. took the basketball and shot a basket. Mr. Harrell saw J.M. with the basketball and pushed him toward the mats. J.M. tripped over the mat, fell and hit his left shoulder on the mat. When he returned to his homeroom, J.M. told Mrs. Drozdale what Mr. Harrell had done to him during the gym class.

At the end of the gym activities on March 6, 1992, G.B. helped return the basketballs to the equipment room where the balls are kept. Because there were too many boys in the room, Mr. Harrell grabbed G.B. by the back of the neck and pushed him toward the wall, telling him to "Get over there!" G.B.'s forehead hit the brick wall leaving a red bump and causing his head to hurt. G.B. told his teacher, Mrs. Drozdale, what Mr. Harrell had done to him. When he went home, G.B. told his mother who took him to a doctor since his head still hurt.

R.R. was also returning a basketball to the equipment room at the end of gym glass on March 6, 1992. When R.R. returned with a second basketball, Mr. Harrell grabbed him by the arm and pushed him causing his shoulder to hit the wall. R.R. told Mrs. Drozdale what Mr. Harrell had done to him when the class returned to its homeroom.

Several minutes before the end of the gym period, Mr. Harrell left the class and confronted Mrs. Drozdale who was waiting in the cafeteria. Mr. Harrell, who was visibly angry, told Mrs. Drozdale, in a loud voice, that she should mind her own damn business.

Following the gym period, which ended at 10:05 a.m., Mrs. Drozdale's students were agitated and were shouting out that Mr. Harrell had hurt several students during that period. Some also told Mrs. Drozdale that Mr. Harrell had cursed her out, referring to her as a bitch. After trying to calm her students and ascertain the facts, Mrs. Drozdale determined that J.M. and R.R. had been hurt by Mr. Harrell. Although Mrs. Drozdale tried to report immediately to Mrs. Ruiz, she was unable to do so.

Mrs. Drozdale, therefore, brought J.M. and R.R. to Mrs. Ruiz during the lunch period which started at 12:05 p.m. Mrs. Drozdale had reported that both boys were punched by Mr. Harrell. Mrs. Ruiz interviewed the boys and concluded that they had been grabbed and pushed by Mr. Harrell and both had struck their left shoulder area. Mrs. Ruiz brought the boys to the nurse, Mrs. Hochman, who found no physical evidence of Mr. Harrell's contact with the boys.

On the following Monday, March 9, 1992, upon further reflection, Mrs. Drozdale reported to the principal, Mr. Lagatol, that four students: G.B., A.R., as well as R.R. and

J.M., had been hurt by Mr. Harrell during the gym period on March 6, 1992. Mr. Lagatol interviewed the students as well as five additional student witnesses. Mr. Lagatol also interviewed Mr. Harrell who flatly denied the charges. Mr. Lagatol reported the incident to his superior as well as to DYFS. Mr. Harrell was thereupon suspended from his teaching position.

In making the above findings, I have determined that the students who were involved in the March 6, 1992 incident were believable. I have accepted the assessment of Mrs. Ruiz that these students are trustworthy, the evaluation of their teacher, Mrs. Drozdale that they are good kids and the reluctant acknowledgment of Mr. Harrell that they are not disciplinary problems. The testimony of G.B., A.R., R.R. and J.M. was straightforward and their individual testimony was generally corroborated by at least one other student witness. Although the testimony of the children was consistent in many areas; it differed depending upon which segment of the March 6, 1992 incident was witnessed. I found nothing in the testimony of the children nor in their demeanor as they gave this testimony which would persuade me that these events were either imagined or fabricated in an elaborate scheme to get Mr. Harrell. Indeed, I find that the students essentially liked Mr. Harrell and enjoyed participating in his classes.

Further I find that Mr. Harrell's testimony was at times evasive, that some of his explanations of events were simply not believable and that his demeanor on the stand occasionally showed signs of his excitable nature and physically aggressive mannerisms.

Although Mrs. Jones, the other physical education teacher, was a credible witness, I find that the incidents of March 6, 1992, happened either before Mrs. Jones arrived in the gym with the girls or in the area of the equipment room which was out of Mrs. Jones' range of vision.

I find that Mrs. Drozdale's action in reporting Mr. Harrell's absence to the administration and Mrs. Jones' report of her conversation with Mrs. Drozdale concerning that action, angered Mr. Harrell. That anger continued through the gym period and culminated in Mr. Harrell's loud and unpleasant confrontation with Mrs. Drozdale in the cafeteria.

That anger may also partially explain Mr. Harrell's harsh dealings with J.M., A.R., R.R. and G.B. Mr. Harrell grabbed and pushed these students causing them to either trip or fall.

His actions were reckless and could have resulted in injury to the boys. However, with the exception of the bump on G.B.'s forehead, Mr. Harrell's actions did not result in physical marks or bruises to the boys.

I do not find that Mr. Harrell acted intentionally to inflict corporal punishment upon the boys. Rather, I find that his actions constitute rough handling or improper physical contact with the four students which might have, but did not, result in harm to the boys. I do find that Mr. Lagatol met with Mr. Harrell on numerous occasions, during the 1990-91 and 1991-92 school years, to discuss with him the prohibitions against corporal punishment and having unjustified physical contact with students.

It is therefore concluded that the School District established by a preponderance of the credible evidence that on March 6, 1992, Eddie Lee Harrell did have unjustified physical contact with G.B., A.R., R.R. and J.M. Further, since the record herein demonstrates that Mr. Harrell was directed not to have improper physical contact with his students, the School District has established that Eddie Lee Harrell was guilty of insubordination as listed in Charge Four.

CHARGE FIVE: FALLING ASLEEP DURING DUTY

The School District also presented testimony in support of its charge that Eddie Lee Harrell had fallen asleep on duty during the 1989-90, 1990-91 and 1991-92 school years.

Mr. Lagatol, the principal of P.S. No. 15 testified, that on several occasions Mr. Harrell had fallen asleep during faculty meetings. The principal, during his rounds of the school building, also "observed Mr. Harrell asleep behind his desk when students were inside the locker room" (1T:71-1 to 6). Mr. Lagatol described Mr. Harrell as sitting upright, with his eyes closed and breathing evenly. When students were close by, Mr. Lagatol would speak in a loud voice so that Mr. Harrell would wake up and save face. On one occasion, when Mr. Lagatol spoke to the gym teacher, he denied he was sleeping but simply "resting his eyes" (1T:71-15 to 18).

Mr. Lagatol also testified that Vice Principal Hilda Ruiz had observed Mr. Harrell asleep

in his class on June 10, 1991. The principal authorized Mrs. Ruiz to issue a letter of reprimand which was prepared and sent to Mr. Harrell on June 11, 1991 (P-17). Mr. Lagatol testified that if a teacher is asleep and not attending to his duties:

> . . . students are at their own will to do whatever they wish to do. Kids can get into mischief and they can cause physical harm to one another (1T:76-13 to 17).

On cross examination, Mr. Lagatol testified that he had observed Mr. Harrell sleeping in the locker room during the "5 to 7 minutes" when the boys change into or out of their gym clothes. He made these observations during the 1990-91 and 1991-92 school years.

Mrs. Ruiz, one of two vice principals at P.S. No. 15, testified concerning her observations which resulted in the letter of reprimand which was sent to Mr. Harrell on June 11, 1991 (P-17). Mrs. Ruiz recalled that on the day before she wrote the letter, she observed Mr. Harrell falling asleep in Room 305 while she was checking classrooms on the third floor. This witness testified that the students were talking and out of their seats while Mr. Harrell was asleep. Mrs. Ruiz described Mr. Harrell's head as falling forward. She did not recall Mr. Harrell's schedule, but thought he should have been teaching a health class at that time. Mrs. Ruiz walked into the room and touched Mr. Harrell's arm to wake him. The witness stated that Mr. Harrell opened his eyes and smiled at her. He explained that he was taking medication which made him drowsy. Mrs. Ruiz stated that she also observed Mr. Harrell falling asleep at staff meetings.

A.R., one of Mrs. Drozdale's fourth-grade students, testified that he observed Mr. Harrell fall asleep in health class. He described Mr. Harrell as falling asleep and then waking up to again read questions to the class. A.P. and R.R., also students in Mrs. Drozdale's fourth-grade class during the 1991-92 school year, confirmed that Mr. Harrell would fall asleep during health class.

Other students testified that they observed Mr. Harrell sleeping in the locker room. J.C., a student in Mrs. Palumbo's fifth-grade class, testified that he had observed Mr. Harrell sleeping in the locker room approximately five times. J.M., who was in Mrs. Drozdale's fourth-grade class during the 1991-92 school year, described Mr. Harrell as sitting down in the

locker room with his eyes closed and head back. He would sleep for about five to eight seconds until the boys got loud and woke him up.

Mr. Harrell testified in his own behalf concerning the charge of falling asleep. This witness denied falling asleep but did recall feeling drowsy on the date Vice Principal Ruiz observed him. Mr. Harrell stated that he was covering the class for a teacher who had to attend a chairperson's meeting. That teacher had given the students enough work to keep them busy until she returned. Mr. Harrell's only responsibility was to monitor the students' conduct. This winess also denied that he had fallen asleep during health class although he did admit that he has a habit of closing his eyes while thinking. Mr. Harrell also denied sleeping in the locker room which he described as too noisy for that to happen.

On cross examination, Mr. Harrell conceded that Mrs. Ruiz, who had observed him sleeping on June 11, 1991, was "somewhat fair" and only wrote him up because of Mr. Lagatol's recommendation that she do so. Mr. Harrell further acknowledged that he had heard various students testify that they had observed him sleeping. Mr. Harrell admitted that these children were not hard core disciplinary problems but only had to be admonished on occasions.

FINDINGS OF FACT

Having carefully considered the testimony of the witnesses presented by the School District in support of Charge Five and the testimony of the respondent presented in his own defense, and having had the opportunity to view the demeanor of those witnesses as they gave their testimony, and having fully reviewed the exhibits entered into evidence relevant to this charge, I **FIND** that following:

On at least two occasions, Eddie Lee Harrell fell asleep at faculty meetings which are held on a monthly basis after regular school hours. Lack of attention during these meetings might result in Mr. Harrell missing information important to the proper discharge of his teaching responsibilities.

On June 11, 1991, a particularly hot day, Mr. Harrell fell asleep while monitoring a class for another teacher. Medication taken by Mr. Harrell contributed to his drowsiness.

While teaching health classes, Mr. Harrell would occasionally sit at his desk, close his eyes and doze. He would generally be awakened by noise in the classroom.

While monitoring the boys in the locker room, Mr. Harrell would sit at his desk and close his eyes. At times, he would fall asleep for very brief periods. The noise in the locker room would quickly awaken him.

Mr. Harrell's sleeping, even for very brief periods of time, when he was scheduled to either teach health classes or monitor the conduct of students, diminishes the educational process and exposes to harm the children in his care.

Based upon these findings, it is **CONCLUDED** that the School District has established by a preponderance of the credible evidence that Eddie Lee Harrell fell asleep while on duty as listed in Charge Five.

LEGAL DISCUSSION AND CONCLUSIONS

State statutes grant teachers in New Jersey the right to tenure. Zimmerman v. Newark Board of Education, 38 N.J. 65, 70-72 (1962) certif. den. 371 U.S. 956, 83 S. Ct. 508, 9 L.Ed.2d (1963). The tenure statute prevents school boards from abusing their superior bargaining power over teachers in contract negotiations. Spiewak v. Rutherford Bd. of Ed. 90 N.J. 63, 73 (1982). It protects teachers from dismissal for "unfounded, flimsy or political reasons." Zimmerman v. Newark Board of Education, 38 N.J. at 71.

It has long been held that unfitness to remain a teacher may be shown by a single incident, if sufficiently flagrant, but it is best evidenced by a series of incidents. In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967); Redcay v. State Bd. of Ed., 130 N.J.L. 369, 371 (Sup. Ct.) aff'd. 131 N.J.L. 326 (E & A 1944). In determining the appropriateness of a

teacher's conduct, the Commissioner of Education has often stressed ". . . that those persons who enter the teaching profession exercise a significant influence upon those they teacher and. . . must exercise a high degree of exemplary behavior." In re Tyler, 13 N.J.A.R. 297

> While teachers are sensitive to the same emotional stresses as all other persons, their particular relationship to children imposes upon them a special responsibility for exemplary restraint and mature self-control. In the Matter of the Tenure Hearing of Thomas Appleby, 1969 S.L.D. 159, 173, aff'd. State Board, 1970 S.L.D. 448.

The respondent in the present case, Eddie Lee Harrell, had been charged in 1977 with inflicting corporal punishment on a student, M.F. Following a hearing on that charge, the Commissioner of Education concluded that Mr. Harrell did slap M.F. in an effort to restrain that student in an altercation he was having with another boy. In the Matter of the Tenure Hearing of Eddie Lee Harrell, 1979 S.L.D. 479. The Commissioner specifically found no justification for the use of undue physical force by respondent against M.F. to maintain discipline in his classroom. However, in determining what penalty would be appropriate, the Commissioner considered the following factors:

> . . . The circumstances under which the episode occurred, its provocation, the nature of the incident itself, the age of the pupil, the teacher's record, his attitude and the prognosis for his continued effective performance and usefulness in the school system. . . . In the Commissioner's opinion each such matter must be judged in light of all of the circumstances. The kind and degree of penalty will necessarily vary also according to the particular problem. In the Matter of the Tenure Hearing of Frederick L. Ostergren, 1966 S.L.D. 185, 188

The Commissioner concluded that under all the circumstances, dismissal of Mr. Harrell was not warranted. However, his conduct could not be "ignored or condoned". 1979 S.L.D. at 486. The Commissioner, therefore, directed that Mr. Harrell forfeit a sum of money equal to two weeks salary.

In the present tenure proceeding, there is not a single incident but rather seven separate instances of either corporal punishment or unjustified physical contact. The first occurred in 1988. As specifically found, Mr. Harrell laid hands on J.R., lifted him off the ground, threw him to the floor and kicked him at least three times. J.R. was bruised as a result of these

actions which were not done in self defense or to protect other students. This incident is a serious one and if it were the sole incident involving Mr. Harrell, might be "sufficiently flagrant" to warrant his removal.

This incident, however, does not stand alone. It is followed by one in January, 1991 when, as found, the respondent overreacted to G.C.'s disrespectful conduct and physically restrained him in an improper manner. Within two months of this incident, and following a period of suspension from his teaching duties, respondent was again found to have committed an act of corporal punishment when he grabbed D.F. and punched him in the back. This act was totally unprovoked and resulted in a large, round bruise midway down D.F.'s back.

In the following school year, Mr. Harrell, angry with a fourth-grade teacher, was found to have taken his anger out on her students. Mr. Harrell improperly pushed, G.B., causing him to hit his forehead on a wall; improperly grabbed and pushed A.R. causing him to strike his shoulder; improperly grabbed and pushed R.R. and improperly pushed J.M. causing him to trip and fall on his shoulder. The conduct of the students involved was not provocative nor were Mr. Harrell's actions taken to protect either himself or other students. Indeed, Mr. Harrell's rough handling of the four students was done without considering the potential harm to the students.

A review of the factual findings herein amply demonstrates that Mr. Harrell is sadly lacking in the self restraint and self control so necessary to an effective and successful teacher. Indeed, the evidence herein discloses a pattern of conduct by Mr. Harrell where he deals with incidents of misconduct, either real or perceived, in a physically aggressive manner, at times causing injury to his students.

In a society which is becoming ever more violent, it is essential that teachers be exemplars of problem solving that does not resort to physical aggression. Mr. Harrell has failed to discharge that important responsibility to his students. Indeed, his actions may unfortunately give a clear signal to his students that physical aggression is an appropriate and acceptable response.

The Commissioner concluded in his earlier decision that while Mr. Harrell's single act of slapping a student could not be condoned, it did not warrant dismissal. Unfortunately, the record developed herein, involving seven incidents, does warrant such action. The incidents involving J.R. and D.F. resulted in physical harm to those students. The other incidents demonstrate a pattern of repetitive conduct which puts students at risk.

In addition to these charges, Mr. Harrell was also found to have used profane language to D.F. and N.I. and to have fallen asleep in the course of his duties. This conduct, in and of itself, would not warrant dismissal. However, when viewed as part of the total record, it further demonstrates that Mr. Harrell's action show little respect for his students and diminish the teaching profession.

Accordingly, the employment of Eddie Lee Harrell as a physical education teacher in the employ of the State Operated School District of the City of Paterson is hereby terminated.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

3-12-93
DATE

MARY ANN BURGESS, ALJ/t.a.

Receipt Acknowledged:

3/12/29
DATE

DEPARTMENT OF PERSONNEL

Mailed to Parties:

MAR 19 1993
DATE

OFFICE OF ADMINISTRATIVE LAW

gjb

WITNESS LIST

For petitioner:

Glenn J. Lagatol
G.C., student at P.S. No. 15
D.S., student at P.S. No. 15
D.F., student at P.S. No. 15
Loida Valdes
N.I., student at P.S. No. 15
Kathleen Ruffer
Norman Rosenblum
Dorothy Hopko
Hilda Ruiz
G.B., student at P.S. No. 15
A.R., student at P.S. No. 15
R.R., student at P.S. No. 15
D.S., student at P.S. No. 15
V.R., student at P.S. No. 15
V.C., student at P.S. No. 15
A.P., student at P.S. No. 15
B.D., student at P.S. No. 15
J.M., student at P.S. No. 15
Karen Drozdale
J.R., student at P.S. No. 11
I.R., father of J.R.
J.C., student at P.S. No. 15

For Respondent:

Eddie Lee Harrell

Joan Hochman

Cynthia Jones

EXHIBITS

J-1 Picture No. 3 of Equipment Room, P.S. 15

J-2 School Schedule, 1991-92, Teacher: Eddie Lee Harrell; Public School no. 15, Paterson

P-1 Letter from Mr. Harrell to Mr. Lagatol, dated March 23, 1990

P-3 Memo from Mr. Lagatol to Mr. Kline, dated January 29, 1991

P-4 Student Incident/Accident Investigation Report, dated january 29, 1991

P-5 Excerpt from Staff Handbook, 1991-92, Corporal Punishment

P-6 Memo from Mr. Lagatol to Mr. Kline, dated March 26, 1991

P-7 Memo from Mrs. Ruiz to Mr. Lagatol, dated March 26, 1991

P-8 Report from Loida Valdes, dated March 25, 1991

P-9 Memo from Ms. Moffitt to Mr. Lagatol, dated March 27, 1991

P-10 Student Incident/Accident Report, dated march 28, 1991

P-11 Memo from Mrs. Ruiz to Mr. Lagatol, dated April 1, 1991

P-12 Letter from Mr. Lagatol to Mr. Harrell, dated October 18, 1991

P-13 Performance Evaluation, Eddie Lee Harrell, dated March 19, 1992

P-14 Memo from Mr. Lagatol to Dr. Stepherson, dated March 9, 1992

P-15 Photographs, No. 1 and No. 2, P.S. No. 15

P-16 Letter from Mrs. Drozdale to Mr. Lagatol, dated March 9, 1992

P-17 Letter from Mrs. Ruiz to Mr. Harrell, dated June 11, 1991

P-18 Student Incident/Accident Investigation Report, dated March 2, 1988

P-19 Conduct Report, J.R., dated February 25, 1988

P-20 Letter from Mr. Rosenblum to Mr. Kline, dated February 26, 1988

P-21 Photographs, No. 1 and No. 2, P.S. No. 11

P-22 Photographs, No. 1 and Nos. 2, P.S. No. 11

P-23 Note to parents of A.R., dated March 9, 1992

P-24 Note to parents of J.M., dated March 9, 1992

P-25 Note to parents of G.B., dated March 9, 1992

P-26 Photograph, Doorway to Gym, P.S. No. 15

P-27 Memo from Mr. Lagatol to Mrs. Drozdale and Mr. Harrell, dated March 9, 1992

P-28 Note from Mrs. Drozdale, dated March 6, 1992

R-1 Memo from Joan Hochman, School Nurse, dated March 10, 1992

R-2 Memo from Joan Hochman, School Nurse, dated March 6, 1992

R-3 Transcribed Statement of Norman Rosenblum to Paterson Police, dated March 9, 1988

R-4 Three page document concerning criminal complaint involving J.R., 1988

IN THE MATTER OF THE TENURE :
HEARING OF EDDIE LEE HARRELL, : COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT : DECISION
OF THE CITY OF PATERSON, :
PASSAIC COUNTY. :
:

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Respondent's exceptions were timely filed in accordance with N.J.A.C. 1:1-18.4.

Respondent's exceptions urge, inter alia, that the initial decision should be rejected because the ALJ found many of the district's charges to be proven based solely on the testimony of young children who she found to be credible despite inconsistencies in their testimony and conflict in their stories of the same events. Respondent provides numerous transcript citations which he avers support his position and maintains that such conflicts and inconsistencies prove the relied upon testimony was not credible and, therefore, the district has not met its burden of proof with respect to these charges.

Respondent also asserts that testimony regarding his hitting J.R. in the face is inherently incredible. He states:

> The respondent testified that at the time of the incident, J.R. was about as tall as the respondent (TV27/15-20). J.R. claims that while he was lying on his back on the floor, kicking out at the respondent who was standing by his

> feet, the respondent leaned over kicking the boy and punched him in the face. Such an action would be physically impossible and respondent would have fallen over on top of J.R. if he had leaned over far enough to touch his face.
> (Respondent's Exceptions, at pp. 7-8)

He additionally excepts to the ALJ's finding that his account of the incident did not provide a reasonable explanation for J.R.'s injuries averring that:

> ***J.R. himself claimed that he hit the respondent (TVII 9/12-13), that he was kicking out at the respondent (TVII 13/17-19) and that he banged his legs against the steps while struggling with the respondent (TVII 40/13-24).
> (Id., at p. 8)

He submits that the ALJ could not conclude with any certainty that these actions were not the cause of J.R.'s injuries rather than the respondent.

The Commissioner has conducted her own detailed and exhaustive examination of the entire record in this matter including the transcripts of the seven days of hearings and each of the exceptions advanced in respondent's 23 page submission, and determined that she is in full agreement with the ALJ's findings and conclusions that the district has proven the following charges against respondent:

CHARGE 1 - CORPORAL PUNISHMENT

(a) February 25, 1988 on J.R.

(b) March 25, 1991 on D.F.

CHARGE 2 - UNJUSTIFIED PHYSICAL CONTACT

(a) February 25, 1988 on J.R.

(b) January 29, 1991 on G.C.

(c) March 25, 1991 on D.F.

(d) March 6, 1992 on G.B., A.R., R.R., and J.M

CHARGE 3 - UNBECOMING CONDUCT (PROFANE AND INAPPROPRIATE LANGUAGE)

- March 26, 1991 toward D.F. and N.I.

CHARGE 4 - INSUBORDINATION

- With regard to the March 6, 1992 incident involving G.B., A.R., R.R. and J.M.

CHARGE 5 - FALLING ASLEEP DURING DUTY

In reaching this determination, the Commissioner was particularly mindful of her responsibility to assure that the decision is supported by a preponderance of credible evidence, particularly when, to a great extent, these charges depend upon the testimony of young students. As articulated by the State Board in In the Matter of the Tenure Hearing of Barry Deetz, School District of the Village of Ridgewood, 1984 S.L.D. 1923, aff'd. N.J. Superior Court, Appellate Division, May 10, 1985 (A-1264-84T5), Cert. den. 101 N.J. 321 (1985):

> Although we recognize that corroboration of student testimony is not required, it has long been established that student testimony must be examined with great caution. See, e.g. In the Matter of the Tenure Hearing of Portia Williams, decided by the Commissioner August 27, 1981, aff'd State Board March 24, 1982, aff'd Docket No. A-4036-81T3 (App. Div., December 15, 1982). (at 1926)

Moreover the Commissioner was fully cognizant of the fact that she may make her own independent findings of fact, although due consideration must be given to the opportunity of the ALJ to observe the parties and their witnesses.

After her full review of this matter, the Commissioner finds respondent's exceptions to be without merit. She specifically rejects his assertion that because inconsistency or apparent conflict existed in the testimony of student witnesses this leads to

the conclusion that their testimony is not to be believed. That certain of the district's allegations elicited conflicting testimony is not in and of itself evidence that the allegations are untrue only that they remain disputed by the respondent. It is clear from the record that the ALJ considered all testimony and weighed it according to the credibility of the witnesses and the plausibility of its content. The Commissioner finds no basis in the record for overturning the credibility assessments of the ALJ who had the benefit of observing the witnesses first hand.

The Commissioner notes that her own review reveals that variances in testimony so criticized by the respondent were in the individuals' recollections of or failure to recall minute details of the respective incidents, some of which occurred as long as five years earlier, not the underlying actuality of the occurence of the incidents themselves. Moreover, none of the testimony so criticized by respondent can fairly be said to have been crucial in reaching either the ALJ's or the Commissioner's ultimate conclusions in this matter.

In considering the appropriate penalty to be imposed in this matter, the Commissioner is compelled by the record to agree with the ALJ's recommendation that the respondent be dismissed from his tenured teaching position in the State-Operated School District of the City of Paterson. In reaching this conclusion she was particularly cognizant of the important role served by members of the teaching profession:

> ***they are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a

> degree of self-restraint and controlled behavior rarely requisite to other types of employment. As one of the most dominant and influential forces in the lives of the children, who are compelled to attend the public schools, the teacher is an enormous force for improving the public weal. Those who teach do so by choice, and in this respect the teaching profession is more than a simple job; it is a calling.
>
> In the Matter of the Tenure Hearing of Jacque L. Sammons, 1972 S.L.D. 302, 321.

The charges against the respondent in this matter are serious, involving seven separate instances of either corporal punishment or unjustified physical extending back to 1988. As aptly stated by the ALJ in her initial decision:

> A review of the factual findings herein amply demonstrates that Mr. Harrell is sadly lacking in the self restraint and self control so necessary to an effective and successful teacher. Indeed, the evidence herein discloses a pattern of conduct by Mr. Harrell where he deals with incidents of misconduct, either real or perceived, in a physically aggressive manner, at times causing injury to his students.
>
> In a society which is becoming ever more violent, it is essential that teachers be exemplars of problem solving that does not resort to physical aggression. Mr. Harrell failed to discharge that important responsibility to his students. Indeed, his actions may unfortunately give a clear signal to his students that physical aggression is an appropriate and acceptable response. (Initial Decision, at p. 60)

The Commissioner further notes that in addition to these charges, respondent was also found to have used profane language to students D.F. and N.I., and to have fallen asleep on a number of occasions in the course of his duties. As also noted by the ALJ

> This conduct, in and of itself, would not warrant dismissal. However, when viewed as part of the total record, it further demonstrates that Mr. Harrell's action[s] show little respect for his students and diminish the teaching profession. (Initial decision, at p. 61)

Accordingly, the Commissioner adopts the initial decision for the reasons expressed therein and as indicated above. Respondent is hereby dismissed from his tenured teaching position as of the date of this decision. It is further ordered that pursuant to N.J.A.C. 6:11-3.6(a)(1), a copy of the final decision in this matter be forwarded to the State Board of Examiners for its review and, in its discretion, further appropriate action.

COMMISSIONER OF EDUCATION

APRIL 22, 1993

DATE OF MAILING - APRIL 22, 1993

73-93

EDU #6474-92
C # 73-93
SB # 30-93

IN THE MATTER OF THE TENURE HEARING OF EDDIE LEE HARRELL, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY.	:	STATE BOARD OF EDUCATION DECISION

Decided by the Commissioner of Education, April 22, 1993

For the Petitioner-Respondent, Carroll & Weiss
(Gregory G. Johnson, Esq., of Counsel)

For the Respondent-Appellant, Bucceri & Pincus
(Louis P. Bucceri, Esq., of Counsel)

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

September 1, 1993

Date of mailing 03 SEP 1993

74-93

ERNA O'NEILL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, tenured clerk-typist, alleged Board violated her tenure and seniority rights by abolishing her full-time position and continuing to employ part-time nontenured staff to perform the same type of functions.

ALJ concluded that when petitioner's position was abolished, she had less seniority than any other clerk-typist, and was offered a position as a per-diem clerk-typist for the maximum number of hours authorized which she declined. The ALJ further found that the new part-time clerk-typist position which was established is not the same as the abolished position, and that the Board has demonstrated valid reasons based upon its budgetary constraints and the available work load for maintaining its present staffing.

ALJ determined that petitioner's tenure and seniority rights were not violated and ordered the petition dismissed with prejudice.

Commissioner adopted the findings and determination in the initial decision.

APRIL 26, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4322-92
AGENCY DKT. NO. 253-6/92

ERNA O'NEILL,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,
Respondent.

Alfred F. Maurice, Esq., for petitioner (Springstead & Maurice, attorneys)

Robert T. Tessaro, Esq., for respondent

Record Closed: February 1, 1993 Decided: March 17, 1993

BEFORE **EDITH KLINGER**, ALJ:

This matter is the appeal of Erna O'Neill from the termination of her employment by respondent as a result of a reduction in force (RIF). On June 4, 1992, O'Neill filed a verified petition with the Commissioner of the Department of Education alleging that her employment was terminated while the Fort Lee Board of Education continued to employ nontenured staff performing the same type of functions, in violation of her tenure and seniority rights, pursuant to *N.J.S.A.* 18A:17-2, *N.J.S.A* 18A:6-9, *N.J S.A.* 18A.6-10, and Title 6 of the *New Jersey Administrative Code*. Respondent filed its answer on June 5, 1992, and the Department of Education transmitted the matter to the Office of Administrative Law on June 11, 1992, as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The hearing was held on January 6, 1993, but the record was held open in order to allow the parties to submit briefs. The record closed on February 1, 1993, when all submissions were received from the parties.

STIPULATION OF FACTS

The parties stipulated to the following facts:

1. Erna O'Neill was a tenured clerk typist in the employ of the Fort Lee Board of Education (Board) from July 1, 1987 to June 30, 1992.

2. On or about April 14, 1992, O'Neill was notified that she was the subject of a RIF and that her employment would be terminated effective June 30, 1992.

3. Petitioner's notice of termination was given by Alan W. Sugarman, Ph.D., Superintendent of Schools

4. On April 15, 1992, a memorandum was sent from Juanita Adams, grievance chairperson of the Fort Lee Education Association (Association) to Dr. Sugarman. She objected to the termination of O'Neill while the Board continued to employ nontenured staff performing the same type of functions

5. On May 13, 1992, a request was submitted to Dr. Sugarman from Ms. Adams requesting a list of part-time employees performing clerical duties with their hours and length of service.

6. On June 8, 1992, Dr. Sugarman provided information to Ms. Adams in response to the request in the May 13, 1992 memorandum.

7. On May 19, 1992, Dr. Sugarman directed the Fort Lee District's principal to post a job vacancy for clerk typist.

8. On July 27, 1992, the Board offered O'Neill a part-time, per diem job for twenty-five hours a week at $9 75 per hour as a clerk typist without health benefits.

10. Petitioner declined the Board's offer of part-time employment.

11. Petitioner's position, from which she was the subject of a RIF, provided health benefits and salary as contained in the collective-bargaining agreement.

ISSUES TO BE RESOLVED

The major issue to be resolved is whether the Board can terminate a tenured, full-time employee while retaining part-time, nontenured employees The other issues are whether the Board is obligated to create a full-time job for O'Neill and whether O'Neill has done anything to mitigate her damages since her termination on September 1, 1992.

REVIEW OF TESTIMONY

O'Neill was hired as a full-time clerk typist in the library at the Fort Lee High School building in July 1987.

During the summer months when the library was closed, O'Neill worked in the guidance department or the central office. From the first day of school until the week after Thanksgiving, she worked in the library. From then until after Christmas, she was sent to the central office to assist in preparing the budget. After the new year, she returned to the library, where she remained until the beginning of the summer vacation. This was generally the pattern of her employment except for one month when she was sent to help an assistant principal whose secretary was out ill.

O'Neill has had no other employment since her termination, but she testified that she has been looking for work on a regular basis. She explained that she refused the part-time job offered to her by the Board because she needed the salary and medical benefits that went with the full-time position.

Dr. Alan W. Sugarman is Superintendent of Schools in the Fort Lee District (District). He testified that at the time of O'Neill's termination in 1992, there were no full-time clerk typists with less seniority than O'Neill. All of the less senior and nontenured clerk typists were employed on a part-time basis. O'Neill was offered a part-time position but refused it.

She has asked the District to create a full-time clerk typist position by displacing several nontenured part-time employees, to create a job for her in one location, or to assign her on a part-time basis to several locations.

Sugarman explained that this can not be done. Part-time clerk typists work from 8:30 a.m. to 1:30 p.m., five days a week. Some also serve as lunch aides as well as clerical aides. The one hour of lunch-aid service may be worked during or after the five hours of clerical work.

There are six schools in the District. A part-time clerk typist is assigned to each school. Most of their job requirements must be performed in the morning hours. Every morning, it is their responsibility to call the parents of absent or late students and find out the reasons. Each school in the District has approximately 400 students, of which five to eight percent, or thirty-two students, are absent on a daily basis. The clerical aide begins to make calls at 9:30 and continues until all parents have been reached. After 1:30 p.m., there is no work of any significance left to do. Sugarman testified that the job duties do not justify expanding any of the part-time positions to full-time positions.

According to Sugarman, the clerical positions in five of the six schools cannot be consolidated because the duties are simultaneous in five different locations. The schools are separated geographically and no individual could fill more than one clerk typist position.

There is a seventeen-hour-per-week clerk typist position in the central office and one position for an individual to work as needed. The seventeen-hour position was also abolished by the Board effective approximately one week after the hearing date.

Sugarman testified that O'Neill's prior position in the library was eliminated and was never filled. A vacancy notice was posted on May 19, 1992, for a part-time clerk typist at the central attendance office, where new enrollments in the District are processed. The function of this office differs from that of the attendance office at Fort Lee High School, where O'Neill occasionally worked. The high-school attendance office tracked absences and tardiness of the students. Therefore, O'Neill's duties were not assigned to a part-time employee when her position was abolished.

O'Neill and Juanita Adams, grievance chairman of the Association, who testified on petitioner's behalf, thought that there were part-time clerk typists who were freely sent to different schools to work. Sugarman testified that in his thirteen years as Superintendent of the District, he had the power to prioritize clerk typist assignments as required; however, his policy has been to assign people permanent responsibilities. These employees are rarely asked to work elsewhere.

O'Neill and Adams also believed that there were part-time clerk typists working more than twenty-five hours a week. They did not, however, take into consideration that they were paid for only twenty-five hours a week and some also performed lunch duty One clerk typist particularly singled out by Adams apparently has a child in the school in which she works and might remain in the building after her working hours without compensation. Sugarman testified that the Board has authorized workweeks of no more than twenty-five hours for part-time clerical aides.

Based upon the evidence, I **FIND** the following **FACTS**: O'Neill had the least seniority of the full-time clerk typists employed by the Board. Her position as Library Clerk I was abolished because of budget constraints and was not filled by anyone O'Neill was offered a part-time clerk typist position but refused it. The new clerk typist position is not the same as the Library Clerk I position which was abolished. It is the same or an equivalent position to the ones occupied by the nontenured employees. The part-time clerical positions cannot be consolidated because they are necessarily performed at different geographical locations at the same time of day. The available work load does not justify the expansion of any of these positions to a full-time one. O'Neill has been placed on a preferred eligibility list.

DISCUSSION OF LAW AND CONCLUSIONS

I **FIND** that the Board has demonstrated valid reasons. based upon its budgetary constraints and the available work load, for maintaining its present staffing pattern. When O'Neill's position was abolished, she had less seniority than any other full time clerk typist and was offered a position as a per diem clerk typist for the maximum number of hours authorized. As long as she did not receive worse treatment than the nontenured per diem clerk typists, her seniority rights were not violated. *Klinger v. Cranberry Tp. Bd. of Ed.*, 190 *N.J. Super.* 354, 358 (App. Div. 1982). "Boards of education need not structure programs or positions solely to accommodate employee rights." *Polo v. Bergen Vo.-Tech. Schools*, 92 *N.J.A.R.*2d (Vol. 4) 230, 233, (Dep't of Educ), citing *Eftychiou v. Bergenfield Bd. of Ed.*, 1990 *S.L.D.* __ (Comm'r of Educ , July 19, 1990) (slip op. at 20). I therefore **CONCLUDE** that

petitioner's tenure and seniority rights pursuant to *N.J.S.A.* 18A:17-2 have not been violated.

Petitioner has attempted to argue that the staffing in the District as regards employees in the category of clerk typist is in violation of the collective-bargaining agreement between the Board and the Association. I **CONCLUDE** that these contractual issues are not within the jurisdiction of the Commissioner of Education and, therefore, not within the jurisdiction of the undersigned; they should be addressed in the appropriate forum.

For the reasons above, I **CONCLUDE** that petitioner is entitled to no relief which can be granted by the Commissioner of Education.

ORDER

It is hereby **ORDERED** that the petition of Erna O'Neill be **DISMISSED WITH PREJUDICE**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

March 17, 1993
DATE

Edith Klinger
EDITH KLINGER, ALJ

Receipt Acknowledged:

3/19/93
DATE

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 25 1993
DATE

OFFICE OF ADMINISTRATIVE LAW

md/e

APPENDIX

WITNESSES

For petitioner:
Erna O'Neill
Juanita Adams

For respondent:
Dr. Alan W. Sugarman

EXHIBITS
(Exhibits stipulated into evidence)

A Letter, Sugarman to O'Neill, April 14, 1992
B Memorandum, Adams to Sugarman, April 15, 1992
C Memorandum, Adams to Sugarman, May 13, 1992
D Information on per diem personnel
E Vacancy Notice
F Employment offer, July 27, 1992
G Rejection of settlement offer, August 18, 1992
H 1992 - 93 Secretaries' Salary Guide

J-1 Stipulation of Facts

R-1 1992 - 93 Secretaries' Salary Guide
R-1a Seniority of full-time clerk typists
R-1b Collective-bargaining agreement
R-2 Three resolutions of Fort Lee Board, April 13, 1992
R-3 List of part-time clerical positions
R-4 Board payroll voucher

ERNA O'NEILL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner notes that the petitioner's exceptions and the Board's reply essentially reiterate the arguments presented to the ALJ which were fully and fairly considered by her in the initial decision.

Upon careful and independent review of the record, the Commissioner agrees with the findings and conclusions of the ALJ that petitioner's tenure and seniority rights pursuant to N.J.S.A. 18A:17-2 have not been violated by the Board in the abolishment of her full-time clerk typist position.

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

COMMISSIONER OF EDUCATION

APRIL 26, 1993

DATE OF MAILING - APRIL 26, 1993

74-93

EDU #4322-92
C # 74-93
SB # 27-93

ERNA O'NEILL,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION THE BOROUGH OF FORT LEE, BERGEN COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, April 26, 1993

For the Petitioner-Appellant, Springstead & Maurice (Alfred F. Maurice, Esq., of Counsel)

For the Respondent-Respondent, Robert T. Tessaro, Esq.

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

September 1, 1993

Date of mailing 03 SEP 1993

75-93

IN THE MATTER OF THE TENURE	:	
HEARING OF WILLIAM MACIACH,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF JERSEY CITY,	:	
HUDSON COUNTY.	:	
	:	

SYNOPSIS

State-operated school district certified four tenure charges of inefficiency against teacher.

Parties reached an amicable resolution in this matter and submitted a Settlement Agreement. Commissioner approved the agreement and dismissed the matter subject to compliance with the settlement terms.

APRIL 26, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6564-92
AGENCY REF. NO. 306-7/92

IN THE MATTER OF THE TENURE HEARING OF WILLIAM MACIACH, STATE OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY.

David F. Corrigan, Esq., for the School District
(Murray, Murray & Corrigan, attorneys)

Philip Feintuch, Esq., for William Maciach
(Feintuch, Porwich & Feintuch, attorneys)

Record Closed: March 18, 1993 Decided: March 18, 1993

BEFORE **MARYLOUISE LUCCHI-McCLOUD,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on August 27, 1992 for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and 52:14F-1 to -13.

On the hearing day the parties came to an amicable resolution of the matter and submitted a Settlement Agreement. Having reviewed the record and the settlement terms I **FIND:**

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

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is further **ORDERED** that the proceedings in this matter be concluded.

I hereby **FILE** my Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

3/18/93
Date

MARYLOUISE LUCCHI-McCLOUD, ALJ

Receipt Acknowledged:

3/23/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 26 1993
Date

OFFICE OF ADMINISTRATIVE LAW

am

J-CV-
EDU 6564-92
Settlement Agreem

1. This Agreement is being entered into to resolve the tenure proceedings in the above matter.

2. William Machiach agrees to resign as teacher in the Jersey City School ~~System~~ District effective June 30, 1993.

3. The School District agrees that Machiach is to be given his salary increment for the 1992-1993 school year. Machiach's salary for this year will be ~~$46650 from 9/1/92 - 2/1/93 and $46,990 from 2/1/93 through June 30, 1993~~. Machiach will be paid for this school year, commencing September 1, 1992.

4. The School District agrees to withdraw the tenure charges.

5. The District is entering into this agreement to save the costs of litigation, because it will achieve the main result of the tenure charges: the removal of William Machiach as a teacher and in recognition of the years of service Machiach has provided the District.

6. William Machiach represents that he has discussed the matter with his attorney and agrees with its terms.

Dated: March 15, 1993

For the School District

David F. Cormican

FOR WILLIAM MACIACH

PHILIP FEINMAN

OAL DKT. NO. EDU 6564-92

IN THE MATTER OF THE TENURE	:	
HEARING OF WILLIAM MACIACH,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF JERSEY CITY,	:	
HUDSON COUNTY.	:	
	:	

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

The Commissioner approves the settlement terms as they comport with the Cardonick standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846) The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

APRIL 26, 1993

DATE OF MAILING - APRIL 26, 1993

76-93

76-93

DOROTHY LOFFREDO AND PAT WILLIAMS TURNER,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioners, tenured secretaries with respondent aver their salaries were reduced by clerical error in violation of N.J.S.A. 18A:17-2 and sought restoration of such monies.

Parties agreed to a settlement in this matter. Commissioner approved the settlement, and ordered the petition dismissed.

APRIL 26, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6212-92
AGENCY DKT. NO. 323-7/92

DOROTHY LOFFREDO &
PAT WILLIAMS TURNER,
Petitioners,
v.
BOARD OF EDUCATION,
THE CITY OF TRENTON,
COUNTY OF MERCER,
Respondent.

Richard A. Friedman, Esq., for petitioners (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Thomas W. Sumners, Jr., Esq., for respondent (Sumners, Council & Inniss, P.C., attorneys)

Record Closed: March 10, 1993 Decided: March 18, 1993

BEFORE **STEVEN C. REBACK,** ALJ:

This matter was transmitted to the Office of Administrative Law on April 12, 1992, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

The parties have agreed to a settlement and have prepared a stipulation of dismissal indicating the terms thereof, which is attached and fully incorporated herein.

OAL DKT. NO. EDU 6212-92

DOROTHY LOFFREDO AND PAT WILLIAMS TURNER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

APRIL 26, 1993

DATE OF MAILING - APRIL 26, 1993

77-93

DAWN V. REYNOLDS,

PETITIONER,

V.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner, teaching staff member, alleged Board violated her tenure rights when it transferred her from an administrative position to a teaching position.

Initial decision determined petitioner had had no formal appointment to an administrative position. Board did not know that petitioner was claiming title of principal and performing the job duties without authorization. ALJ concluded petitioner was not entitled to equitable relief requiring District to recognize her as tenured in a principal/administrator's position. Thus, transfer was not a violation of any tenure rights pursuant to N.J.S.A. 18A:28-5. Petition was dismissed.

Commissioner adopted findings and determination in initial decision.

APRIL 28, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1161-92
AGENCY DKT. NO. 6-1/92

DAWN V. REYNOLDS,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,
Respondent.

Philip Feintuch, Esq., for petitioner (Feintuch & Porwich, attorneys)

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

Record Closed: February 1, 1993 Decided: March 16, 1993

BEFORE **EDITH KLINGER**, ALJ:

Petitioner, Dawn V. Reynolds, alleges that her tenure rights pursuant to *N.J.S.A.* 18A:28-6 were violated when respondent, the State-Operated School District of Jersey City (District), removed her from an administrator's position and transferred her to a teaching position. Reynolds filed a petition with the Commissioner of the Department of Education on January 10, 1992. The District filed its answer on February 5, 1992. On February 13, 1992, the Department of Education transmitted the matter to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The hearing was held on November 30, 1992, but the record was held open in order to allow the parties to submit briefs. The record closed on February 1, 1993, when the final submission was received from the parties.

At a prehearing conference with the parties held on April 27, 1992, it was determined that the following were the issues to be decided at hearing:

1. Is the petition timely pursuant to *N.J.A.C.* 6:24-1.2?

2. Did petitioner serve in the position of principal at the Adult Learning Center from September 27, 1988 to October 20, 1991?

3. If it is determined that petitioner was not a principal from September 27, 1988 to October 20, 1992, is the remainder of her petition moot?

4. If it is determined that petitioner was a principal during the relevant time period, did petitioner gain tenure as a principal pursuant to *N.J.S.A.* 18A:28-5?

5. If so, were petitioner's tenure rights violated when she was assigned as a classroom teacher on October 20, 1991?

6. If so, to what relief is petitioner entitled?

REVIEW OF EVIDENCE

Most of the facts in this matter are not in dispute. I **FIND** the **FACTS** set forth in the following summary to be uncontested.

Reynolds has been employed for sixteen years in the school district. She holds certificates in early-childhood education and elementary education; she has held a principal/supervisor certificate since 1985.

When she first came to the school district, she was employed as a fifth-grade teacher. She then became a sixth-grade teacher.

On September 1, 1988, Louis Lanzillo, assistant superintendent/personnel of the Jersey City Public Schools, notified Reynolds that pending official action by the Jersey City Board of Education (Board), she was being transferred from her position as teacher at Public School No. 15 to teacher at the Adult Learning Center (ALC) effective September 8, 1988. Reynolds's immediate supervisor in the new position was John Cash, then director of adult education for the school district. She interviewed with Cash for the position, and he gave her the title of administrator of the ALC; she was evaluated by Cash under this title.

The ALC is a self-contained facility which is part of the school district. There were twelve members of its faculty, nine of whom were certificated teaching personnel. Reynolds acted as supervisor to all of them and performed their evaluations. She called and conducted faculty meetings, monitored existing instructional programs, assessed needs, and made recommendations to the director of adult education. In addition, Reynolds supervised the noninstructional staff. She ordered supplies, signed off on purchase orders, and she certified the payroll.

Reynolds stated that she took a leadership role in curriculum development in administration, held conferences, conducted in-service and outside training of staff, and made budget proposals. She also interviewed and hired teaching-staff members with the consent of the director.

Students attending the ALC were adults or sixteen- and seventeen-year-old pupils who had been signed out of the regular school program by their parents. Students graduating from the ALC received a diploma upon successfully completing the General Equivalency Diploma (GED) program. For this purpose, Reynolds signed certifications that the students had completed the program requirements.

In addition to the above, Reynolds was responsible for conferring with the director concerning needed repairs to the schools. She also met with parents of students, disciplined teaching-staff members and students, and signed the records required by the school district as the administrator of the program.

When she assumed the job of administrator, her salary did not change from her teacher's salary. She asked Cash why she was being paid a teacher's salary as an administrator.; however, she could not recall his explanation. At no time did Reynolds have any teaching duties at the ALC.

Reynolds admits that she had no written notification that she was appointed by the Board to the position of administrator of the ALC. She stated that this title was conferred upon her by the director of adult education for the District.

Reynolds received the position after the prior administrator was removed for not having an administrator/supervisor certificate. She was interviewed by Cash at the Board offices in August 1988. No one else participated in the interview.

At no time did Reynolds communicate with anyone other than Cash with respect to any personnel or administrative action she took at the ALC. She gave him all of her evaluations of the instructional and noninstructional staff.

Following the State takeover of the school district in October 1989, Dr. Eloise Forster became the state assistant superintendent of the District. She testified that the new District was required to conduct an assessment of the existing staff for the purpose of reorganizing the District. By statute, they had to assess the central office, administrative, and supervisory staff within six months of the takeover. They also had to perform an assessment of the school principals by means of criteria written into the takeover statute. Reynolds was not one of the people assessed.

Between October 1989 and April 1991, the assessment process was conducted by an external evaluation team. Forster, the other assistant superintendent, and the superintendent of the District contributed to the process.

A corrective action plan was formulated during the monitoring period prior to the State's takeover of the District. A reorganization of the adult education program was part of the plan but was put off because of time and priority factors. The adult education program was not reorganized until 1991.

The assessment determined that the adult education program did not merit a directorship due to the drop in enrollment. This position was abolished and the program was placed within the jurisdiction of the director of the Education/Business Alliance (EBA). In February 1991, the ALC was under the supervision of Dr. Charles Epps, then acting director. It is now headed by a supervisor.

The reorganization affected the ALC in other ways. It had to be relocated because it occupied a rented site that was too expensive. The new District then assessed its effectiveness relative to its cost, program, staff, and student achievement. At the end of the first year, they corrected what Forster referred to as glaring problems: staffing, lack of certification of certain teachers, and a program too costly for its size.

In regard to staffing, it was determined that the ALC does not have a static enrollment like a regular school program. Students enter and leave the program at will. Forster said that the District found that because she was not teaching, it was not cost effective to maintain Reynolds on the staff of the ALC. No one knew initially that she was performing administrative functions.

When this fact came to light during a subsequent investigation, Marilyn Roman, the director of the EBA, wrote a memorandum to Reynolds on September 24, 1991, stating the following:

> It has come to my attention you may be or have been performing formal evaluations on your colleagues. I understand that you may have also assumed certain tasks, such as evaluating plan books, sending students home and docking compensation for lateness.
>
> With respect to formal evaluations, such supervisory tasks are outside the scope of your responsibility for the State Operated School district. However well intended, please cease these tasks immediately.
>
> With respect to assistance to colleagues, certainly on an informal basis a senior teacher helping others has always been welcomed and encouraged in the teaching profession.
>
> Thank you for your timely cooperation.

Reynolds was transferred to a classroom teaching position on October 20, 1992, with no decrease in salary.

Both Cash and the adult education program were evaluated. It was found that Cash functioned independently in his role as director of adult education. He circumvented the chain of command and school district procedures and policies. His appointment of Reynolds to a nonteaching administrator's position is an example of this circumvention. The duties that Reynolds was performing were authorized by Cash on his own accord. There is no documentation that shows Reynolds was granted this authorization by the Board prior to the takeover.

Epps testified that from what was learned of Cash's responsibilities as director of the Center between 1988 and 1991, it was Cash's job that Reynolds was performing.

According to Epps, the ALC is a program, not a school. It has always had a head teacher, not a principal. The head teacher should have been teaching in the classroom, not acting as administrator as Reynolds did.

Based upon the testimony in this matter, I make the following **FINDINGS OF FACT**:

1. Reynolds was appointed by the Board of the District to the position of head teacher at the ALC beginning September 1988.

2. She was not appointed as principal of the ALC by the Board; the ALC has never had a principal and there is no record of her appointment to this position by the Board.

3. Reynolds was made principal/administrator of the ALC by Cash, who did not have the authority to make the appointment.

4. Cash, without authorization, assigned Reynolds the duties of his position, and she did not perform the teaching duties assigned to her by the Board.

5. When this was discovered by the District, Reynolds was ordered to discontinue her unauthorized administrative activities immediately.

6. Reynolds had reason to know that she was not serving as the principal of ALC because she was not appointed to the position by the Board, she was not receiving a principal's salary, and she was not performing functions in the school district as a principal, such as attending meetings at the Board with other principals from the school district.

7. On October 20, 1992, Reynolds was transferred from the position as head teacher at the ALC, where her services were not needed, to another teaching position in the District.

DISCUSSION OF LAW AND CONCLUSIONS

It is settled law that only the Board has the authority to appoint or promote staff. These appointments and promotions are made pursuant to formal Board action. I

therefore **CONCLUDE** that Cash, the director of the ALC, did not have the authority to appoint and promote Reynolds to a position of principal at the ALC. He, In fact, created a *de facto* principal position and assigned to Reynolds what would appear to have been his duties.

The cases relied on by petitioner may be distinguished because their facts are materially different from those in the present case. In each and every one of the cases cited, the teaching staff members acquired their positions and/or duties by the action of a board of education.

In this case, neither the Board nor the District are bound by the acts of Cash, since they did not have knowledge that Reynolds was claiming the title of principal and performing the duties of the job without authorization. Because of the circumstances, Reynolds was in a better position than the Board to know that she was doing a job other than the one to which she had been appointed. She was a teacher with no teaching duties, she was acting as a principal without being given a principal's salary, she was not treated as an administrator outside of the ALC and Cash's office, and she had no formal appointment to an administrative position by the Board. I therefore **CONCLUDE** that Reynolds is entitled to no equitable relief requiring the District to recognize her as tenured in a principal/administrator's position.

On October 20, 1992, the Board simply transferred her from one teaching position in the District to another with no decrease in salary. I **CONCLUDE** that this transfer is within the power granted to the Board and, therefore, it was not in violation of any tenure rights of petitioner pursuant to ***N.J.S.A.*** 18A:28-5. For this reason, I **CONCLUDE** that Reynolds is entitled to no relief because of the transfer.

ORDER

It is **ORDERED** that the petition of Dawn V. Reynolds is hereby **DISMISSED WITH PREJUDICE** since she is entitled to no relief.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

March 16, 1993
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

3/18/93
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 22 1993
DATE

OFFICE OF ADMINISTRATIVE LAW

md/e

APPENDIX

WITNESSES

For Petitioner:

Dawn V. Reynolds

For respondent:

Michael Donahue

Dr. Charles Epps

Dr. Eloise Forster

EXHIBITS

P-1 Evaluations, 1989

P-2 Evaluations, 1991

P-3 Evaluations of teaching staff by Reynolds

P-4 Evaluations of nonteaching staff by Reynolds

P-5 Memoranda, Reynolds to Staff

R-1 Memorandum, Roman to Reynolds, September 24, 1991

R-4 Notification of transfer by the Board, September 1, 1988

R-5 Job Description, Elementary Principal

R-6 Job Description, High School Principal

OAL DKT. NO. EDU 1161-92

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

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

Upon review of the record and recommendation of the Administrative Law Judge to dismiss the Petition of Appeal, the Commissioner agrees with and adopts as her own the findings and conclusions of the ALJ for the reasons expressed in the initial decision.

COMMISSIONER OF EDUCATION

APRIL 28, 1993

DATE OF MAILING - APRIL 28, 1993

78-93

ANTHONY POLO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BERGEN COUNTY VOCATIONAL/ TECHNICAL SCHOOL BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, a tenured teacher, alleged he was entitled by virtue of his tenure and seniority to displace either an individual teaching plumbing or one teaching building maintenance courses.

ALJ found petitioner lacked the appropriate endorsements to teach either of these courses. ALJ determined that petitioner's skilled trades endorsement was not a comprehensive one which allowed him to teach every trade in diverse fields, and that he would need a specific "plumbing and pipe fitting" endorsement to teach plumbing. ALJ also found that petitioner's Teacher of Industrial Arts endorsement did not qualify him to teach custodial training which requires a PPSO (production, personal or service occupations) endorsement. ALJ denied petitioner's requested relief.

Commissioner adopted the findings and determination in the initial decision.

MAY 3, 1993

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8947-91
AGENCY DKT. NO. 286-7/91

ANTHONY POLO,
Petitioner,
v.
BOARD OF EDUCATION OF THE VOCATIONAL SCHOOLS OF THE COUNTY OF BERGEN,
Respondent.

Robert A. Fagella, Esq., for petitioner
(Zazzali, Zazzali, Fagella & Nowak, attorneys)

Philip Scalo, Esq., for respondent

Record Closed: October 20, 1993 Decided: March 19, 1993

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

An Equal Opportunity Employer

Statement of the Case

This is the second of two successive appeals regarding the tenure and seniority rights of a tenured carpentry teacher employed by a county vocational school district.

Originally, in April 1990, the Board of Education of the Vocational Schools of the County of Bergen ("Bergen Voc-Ed") reduced petitioner Anthony Polo ("Polo") from full-time to a 3/7th-time position for the 1990-91 academic year. Last year, in a matter entitled *Polo v. Bergen Cty. Vo-Tech Schs.* (*Polo I*), 92 *N.J. A.R.* 2d (Vol. 4) 230 (Comm'r Jan 30, 1992), *modified* 92 *N.J.A.R.* 2d (EUD) 459 (St. Bd. Aug. 5, 1992), *appeal docketed*, No. A256-92-T2 (N.J. App. Div. Sept. 18, 1992), the State Board decided that both petitioner and another carpentry teacher, Ralph Rossi, had equal credit for seniority purposes and, therefore, that the district was entitled to reduce Polo to part-time while retaining Rossi in a full-time position.

The following year, in June 1991, Bergen Voc-Ed notified Polo that he would continue in essentially the same part-time position for the 1991-92 academic year. Although this notification did not represent a genuine change in assignment, Polo brings the present suit raising two issues which were never determined on their merits in the first suit: First, what is the scope of the skilled trades endorsement on Polo's instructional certificate? Is it limited to specified areas, such as carpentry or brick and masonry, or is it a general endorsement covering other trades, such as plumbing or electrical construction? Second, does Polo's industrial arts endorsement authorize him to teach a course on custodial training?

Procedural History

On July 30, 1991, Polo filed his verified petition with the Commissioner of Education ("Commissioner"), challenging his assignment to only part-time employment for 1991-92. Bergen Voc-Ed filed its answer on September 3, 1991. Subsequently, on September 20, 1991, the Commissioner forwarded this matter, known as *Polo II*, to the Office of Administrative Law ("OAL") for hearing as a contested case.

At an earlier stage in these proceedings, *Polo II* had been consolidated for hearing along with similar or related claims of two other teachers in the district; however, all of the other cases have been either settled or dismissed.[1] Bergen Voc-Ed also moved to dismiss the second Polo suit as untimely and violative of the single controversy doctrine. While Polo successfully withstood this motion to dismiss, the Commissioner carefully circumscribed the issues which remain:

> Petitioner Polo timely filed his petition within 90 days of learning that the Board allegedly intended to assign individuals to positions that they had not filled in the 1990-91 school year in the 1991-92 school year. Petitioner claims three individuals, including a new plumbing teacher named Mark Levy, enjoy less seniority or no tenure entitlement over him. Thus, the Commissioner concurs with the ALJ that the matter should proceed as a new cause of action to the Office of Administrative Law for adjudication on the merits of Petitioner Polo's claims. The Commissioner stresses that the review of Polo's claims for 1991-92 is limited solely to newly assigned individuals for the 1991-92 school year.
>
> *Boles v. Bergen Cty. Vo-Tech. Schs*, 92 *N.J.A.R* 2d (Vol. 4A) 554 (Comm'r Sept. 10, 1992), *aff'd* (St Bd Jan 6, 1993) [at 559].

Meanwhile, the OAL conducted hearings on July 27 and 29, 1992. Witnesses and exhibits are listed in the appendix Both parties filed briefs by September 25, 1992. After the Commissioner issued his interlocutory ruling, both parties filed supplemental briefs by October 20, 1992.

Only two newly-hired teachers fit the Commissioner's description of individuals holding assignments, claimed by Polo in 1991-92, which had not been filled in the

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[1]See *Boles v. Bergen Cty. Vo-Tech. Schs.*, 92 *N.J.A.R.* 2d (Vol. 4A) 554 (Comm'r Sept. 10, 1992), *aff'd* (St. Bd. Jan. 6, 1993) (partial summary decision); *Boles v Bergen Cty. Vo-Tech Schs. (Boles II)*, OAL DKT. EDU 5392-92, (Aug. 24, 1992), *adopted* (Comm'r Oct. 5, 1992) (settlement).

prior 1990-91 school year. One is Mark Levy, who teaches plumbing. The other is Bruce Suraka, who teaches custodial training.[2]

Findings of Fact

Many of the material facts are set forth in the first case and are incorporated herein by reference. *Polo I*, 92 *N.J.A.R.* 2d at 231-232. At the second hearing, Polo offered greater details concerning his occupational training and experience; the types of instructional certificates which he held; and his teaching assignments. I **FIND** the following additional facts:

Anthony Polo obtained his high school equivalency diploma in or about 1962 and earned a bachelor of science degree in 1978 from Montclair State College, where he majored in industrial arts Before he began teaching at Bergen Voc-Ed in 1971, Polo held a variety of odd jobs in what might be loosely called construction work. From 1954 to 1964, he was self-employed as a general contractor. He was "always open to whatever job came along." Often he did carpentry or masonry work, which might include applying brick veneer, erecting the foundation of a house, or pouring concrete. Occasionally he did plumbing jobs, like installing heating systems or putting in sinks When working on an addition to an existing house, he served as jack-of-all trades, doing everything from excavating the site to raising the roof

During 1960 to 1970, Polo performed extensive renovations and repairs on several old houses or multi-family dwellings, which he owned and managed. One of these houses he built himself in 1964. Renovations which he made include installing a hot water heating system, running copper pipes from a basement furnace, and rewiring of the building and placing of new electrical outlets. Since most of his electrical work was on properties owned by either himself or friends and relatives,

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[2]On June 9, 1992 Polo served notice by certified mail on Mark Levy, advising him of the pendency of this matter and of his opportunity to apply to intervene or participate in this proceding. Mr. Levy did not respond Polo was unable to give notice to Bruce Suraka, however, because his name did not appear on the master seniority list furnished by respondent and his identity was unknown to Polo until after the hearing had commenced.

he did not usually have the finished jobs inspected by an underwriting outfit. From time to time, he also assisted his brother, who is a licensed electrician.

Between 1971 and 1973, he held supervisory positions for three different construction companies. In this capacity, he acted as job foreman, coordinating the activities of other trade specialists, but not doing any actual plumbing and electrical work himself. For one of these companies, he functioned as the layout person, which involved reading blueprints and making sure that the building plans were properly implemented. In his last supervisory position, he worked for a company which supplies precast concrete.

Significantly, Polo cannot establish that he worked full-time for six years in any trades other than carpentry and masonry. He did not keep records and cannot allocate the amount of time spent doing electrical work, plumbing, or other specialized trades. Polo never served an apprenticeship as a plumber or an electrician. Although Polo is a member of the bricklayers, masons and plasters union, he does not belong to any union or guild for plumbers or electricians.

When Polo started working for Bergen Voc-Ed, he did so under an emergency instructional certificate, issued in September 1971, as teacher of skilled trades with approved occupational experience in "building construction." Shortly thereafter, in August 1972, he obtained a permanent instructional certificate endorsed simply as teacher of "skilled trades." He also holds a certificate endorsed as "teacher of industrial arts," which was issued in August 1978.

In a series of three affidavits, Ida Graham, current director of the Bureau of Teacher Education and Academic Credentials ("Bureau") at the Department of Education, provided the historical context of the skilled trades endorsement. Despite the absence of any specific skill area printed on the certificate, "[t[here was no intent by the [Education Department] that issuance of a certificate of 'Teacher of Skilled Trades' would be a blanket certificate usable in any of the skilled trade areas." Indeed, a letter, written in August 1980 by Dr. Fred A. Price, Graham's predecessor as director at the Bureau, explained that the designation of the specific skills area was omitted on the certificate with the advent of computerized certificates in the 1970's because the multiplicity of skilled trade areas presented a "computer programming problem." Nevertheless, issuance of the skilled trade

certificate was "based on specific experience in the skilled trades to be taught." In or about 1975, "complaints of misuse of the certificates caused [the Department] to return to the pre-computer method of indicating the specific skill trade area on the certificate itself."

Department files reflect that Polo's permanent skilled trades certificate was issued in 1972 "with approved occupational experience in the category of 'Building Construction.' " That particular category was discontinued in 1983 and is no longer issued by the Department. According to Graham's second affidavit, the categories of "carpentry" and "brick and stone masonry," which predate 1983 and still exist today, are "much narrower" than the former category of "building construction." Her third affidavit elaborates, however, that building construction "was not a comprehensive certificate and could not subsume any other designated area under the Skilled Trades Certificate."

When Bergen Voc-Ed began considering curriculum changes which might adversely affect Polo's employment, assistant superintendent Anthony Miller suggested that Polo ought to protect himself by obtaining specific endorsements in the areas of his occupational experience. As Polo recalls their conversation, Miller told him to apply for particular endorsements in carpentry and masonry. Consequently, in January 1982, Polo obtained an instructional certificate endorsed as "teacher of carpentry" and "teacher of brick and stone masonry."[3] To qualify for these endorsements, he presented documentation of six years of full-time experience in each trade. Graham's first affidavit recites that six separate years of experience is required for each designated category, and that "[t]he experience used to obtain one endorsement cannot be co-mingled with or credited to another endorsement under the skilled trade certificate." It is undisputed that Polo never applied for a specific endorsement in any other skilled trade category, such as plumbing and pipefitting.

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[3]Additionally, the certificate has a third endorsement as "teacher of vocational technical related subjects," but this case does not involve any claim under that endorsement.

In his early years at Bergen Vo-Ed, Polo had taught a course in building mechanics, covering "virtually anything that would be done in home construction." *Polo I*, 92 *N.J.A.R.* 2d at 231. Elaborating on his earlier testimony, Polo explained that the course content encompassed not only carpentry and wall-building, but also blueprint-reading, electrical wiring, and plumbing and heating systems. The impact of this supplemental testimony is undercut, however, by Polo's reliance on his own three-year course outline, which reveals that the objective of the tenth-grade year was for students to become acquainted with tools and materials of masonry work and woodworking; that the objective of the eleventh-grade year was to progress to "more complicat[ed] bricklaying" and "more intricate woodworking;" and that not until the twelfth year were students introduced to "basic" welding, electrical wiring, and plumbing. Nevertheless, Bergen Vo-Ed does not deny that building mechanics, as taught by Polo in the early to mid-1970's, included the teaching of some aspects of drafting, electrical wiring and plumbing. For the last fifteen or so years, however, Polo has taught a much narrower course devoted exclusively to carpentry.

Presently, Polo seeks to displace Mark Levy, who holds a skilled trades certificate in the category of "plumbing and pipefitting" and who started employment as a teacher of "plumbing" in 1991-92. Alternatively, Polo contends that he should have been offered the opportunity to teach "custodial training," which instead was given to newcomer Bruce Suraka in 1991-92. While the record does not contain much information about the recently-hired Suraka, Bergen Vo-Ed takes the position that a course in janitorial or custodial work must be taught by the holder of a PPSO endorsement as a "teacher of production, personal or service occupations."

Although it is no longer part of this case due to the Commissioner's interlocutory ruling, Polo made a similar argument that he was entitled to teach the "building maintenance" courses taught in 1991-92 by Howard Rozic and Harold Winters, each of whom has considerably less years of service than Polo.[4] Rozic

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[4]Like custodial training, the "building maintenance" refers to the upkeep and repair skills needed to work as a "building superintendent" in such facilities as offices, schools, hotels, and apartment buildings.

started working as a vocational teacher in the district in 1986 and Winters in 1987.[5] Admittedly, neither possessed a PPSO endorsement at the time of initial hire. Rozic acquired his PPSO endorsement in April 1991 and Winters in November 1988. Their names appear under "industrial arts" on the district's latest seniority list. As previously noted, Polo has an industrial arts endorsement. Recognizing that it may have made past mistakes in determining the proper certificate and seniority category for Rozic and Winters, Bergen Vo-Ed still insists that Polo cannot currently teach custodial training without a PPSO endorsement.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that Polo lacked the appropriate endorsements to teach the plumbing or custodial training courses in 1991-92.

Under current regulations, the holder of an endorsement as a teacher of skilled trades is authorized "to teach skilled trades courses in the area of his or her State-approved occupational experience in all public schools." *N.J.A.C.* 6:11-6.2(a)(27). Thus, the skilled trades endorsement is not a "blanket certificate" usable in all of the skilled trade areas, but rather is restricted to the particular area in which the applicant has demonstrated sufficient work experience. At one time, the regulations actually listed thirty-five separate trade categories, starting with "air conditioning and refrigeration" and continuing through "welding." 16 *N.J.R.* 1646(a) (July 2,1984); 16 *N.J.R.* 2788(a) (Oct. 15, 1984). "Plumbing and pipefitting" was distinct from "carpentry" which, in turn, was distinct from "brick and masonry." There was no comprehensive endorsement allowing one person to teach every trade in fields as diverse as "aircraft mechanics," "baking," "millwright" and "upholstering." While the enumerated list was deleted in the most recent version, the present regulations clearly retain the requirement of "State-approved occupational experience." 22 *N.J.R.* 1882(a) (June 18, 1990); 22 N.J.R. 3240(a) (Oct. 15, 1990). Prior to September 1, 1992, an applicant for a skilled trades endorsement

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[5]In addition, Rozic had been a teacher of the handicapped in the district since the 1970's.

must have been able to show "six years of approved full-time experience" in each skilled trade for which approval is sought. *N.J.A.C.* 6:11-8.1 [recodified in 1990 from *N.J.A.C.* 6:11-8.3].[6]

What is troublesome about this case is the difficulty of determining the scope of the "building construction" category recognized in 1972 but now defunct. Neither side has pointed to any past or present regulations or official Department publication which might help to delineate the parameters of this category. All that we know is that building construction was "broader" than carpentry or brick and masonry, but "narrower" than all the skilled trades combined. Given the known set of facts, the most satisfactory conclusion is that the skilled trades endorsement in building construction authorized Polo to do exactly what he did, which was to expose students to a few of the basic principles of plumbing and electrical wiring as an adjunct to a survey course focused on the carpentry and masonry techniques of home-building. The building construction endorsement does not signify that Polo has the necessary background to teach a course devoted entirely to plumbing, for which he must obtain the more specific skilled trades endorsement in "plumbing and pipefitting."

Similarly, there is confusion over what certificate is needed in 1991-92 to teach the course called custodial training. Before 1983, "custodial training" was one of the categories available under the skilled trades endorsement. *See New Jersey Regulations & Standards For Certification* (22d ed. 1976). In March 1983, the Department revised its list of approved vocational occupations, omitting "custodial training" from the skilled trades list and creating a new category called "building

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[6]Since September 1, 1992, the applicant must be able to show "at least four years of successful work experience in the relevant trade or occupation as approved by the employing district" and satisfy new requirements including passage of a State test of basic communication skills and completion of a State-approved district training program. *N.J.A.C.* 6:11-8.2.

maintenance" under the heading of "production, personal or service occupations."[7] This change was formally ratified in the 1984 version of the certification regulations. Significantly, Polo possesses neither the old skilled trades endorsement in custodial training nor the new PPSO endorsement in building maintenance.

Polo attempts to rely on his endorsement as "teacher of industrial arts." Such endorsement permits its holder to teach "industrial arts," defined as including "graphic arts, drafting, woodworking, metal working, arts and power mechanics," in all public schools. *N.J.A.C.* 6:11-6.2(a) (13). Custodial training or building maintenance does not fall within these general subject areas. Typically, the industrial arts endorsement is held by teachers of shop or design and technology classes in local middle schools and high schools, as opposed to the more intensive occupational preparation provided to students in county vocational schools. Bergen Vo-Ed has not offered traditional industrial arts courses as part of its curriculum in over ten years. Because Polo lacks the PPSO endorsement, he was not entitled to teach custodial training in 1991-92.

Order

It is **ORDERED** that relief requested by Polo is denied.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days

[7]Presumably, the skilled trades are in the nature of crafts, whereas the service occupations are more service-oriented and require less artisanship. The terms "custodial training" and "building maintenance" appear to be used interchangably.

and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

March 19, 1993
Date

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

3/23/93
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 26 1993
Date

Joyce LaVecchia
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Witnesses

1. Anthony A. Polo, carpentry teacher, Bergen County Vocational school district

2. Anthony Miller, assistant superintendent, Bergen County Vocational school district

List of Exhibits

No.	Description
P-1	Copy of instructional certification endorsed as teacher of skilled trades, issued August 1972
P-2	Copy of instructional certificate endorsed as teacher of carpentry, teacher of vocational-technical related subjects and teacher of brick and stone masonry, issued January 1982
P-3	Copy of instructional certificate endorsed as teach of industrial arts, issued August 1978
P-4	Copy of educational services certificate endorsed as coordinator of cooperative industrial education, issued June 1979
P-5	Copy of BSci degree issued by Montclair State College, dated August 31, 1978
P-6	Copy of the minutes of the regular meeting of the county board of vocational education held on July 20, 1971

P-7 Copy of a letter to Anthony S. Polo from Bergen County Vocational-Technical Schools, dated August 11, 1971

P-8 Copy of teacher's contract, dated August 9, 1971

P-9 Copy of course of study outline for building mechanics, undated

P-10 Copy of brochure on course offerings at the Northeast Bergen Technical Education Center, undated

P-11 id. Copy of course of study outlines at the Bergen County Vocational Schools-Rockleigh, undated

P-12 Copy of seniority list as of June 30, 1991

P-13 Copy of proof of mailing, dated November 20, 1991

P-14 Resume of Anthony A. Polo

P-15 Seniority list as of June 30, 1992

P-16 Supplemental proofs of mailing, dated July 28, 1992

P-17 Certification of Ida Graham, dated August 11, 1992

R-1 id. Transcript of the hearing in *Polo I* held on April 29, 1991

R-2 Affidavit of Ida Graham, dated July 7, 1992

R-2 (a) Copy of a letter to the Bergen County Vocational-Technical School from the Department of Education, dated August 8, 1980

(b)id Copy of an extract of the booklet entitled New Jersey Regulations and Standards for Certification published by the Department of Education (22d ed. 1976)

(c) Clean copy of R-2(b)

R-3 id Copy of a letter to Robert Fagella, Esq. from Philip Scalo, Esq., dated February 26, 1992

R-4 id. Letter to Robert Fagella, Esq., from Philip Scalo, Esq., dated June 12, 1992

R-5 id. Copy of a letter to Philip Scalo, Esq. from Robert A. Fagella, Esq., dated June 15, 1992

R-6 id. Copy of a letter to Robert A. Fagella, Esq. from Philip Scalo, Esq., dated July 15, 1992

R-7 id. Copy of a letter to Philip Scalo, Esq. from Robert A. Fagella, Esq., dated July 24, 1992

R-8 Copy of a letter to Robert Fagella, Esq. from the Office of Philip Scalo, Esq., dated July 24, 1992

R-9 Copy of memorandum to College Teacher Education Deans, et al. from Dr. Celeste M. Rohrer regarding Revised List of Occupations for Vocational Education, dated March 9, 1983

R-10 id. Copy of a letter to the Bergen County Superintendent of Schools from the New Jersey Department of Education, dated September 15, 1991

R-11 Copy of affidavit of Ida Graham, dated August 31, 1992

OAL DKT. NO. EDU 8947-91

ANTHONY POLO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BERGEN COUNTY VOCATIONAL/ TECHNICAL SCHOOL BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and Board's reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4. Petitioner additionally submitted a reply to the Board's reply exceptions. There is no provision for such a submission under N.J.A.C. 1:1-18.4, therefore, these were not considered by the Commissioner.

It is noted that petitioner's exceptions and the Board's reply essentially reiterate the arguments presented in post-hearing submissions which the Commissioner finds were fully and fairly considered by the ALJ in the initial decision.

Upon a careful and independent review of the record in this matter, the Commissioner agrees with the findings and conclusions of the Office of Administrative Law for the reasons clearly expressed in the initial decision.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law denying petitioner's requested relief and adopts it as the final decision in this matter.

COMMISSIONER OF EDUCATION

MAY 3, 1993

DATE OF MAILING - MAY 3, 1993

79-93

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

SYNOPSIS

Petitioners, two unsuccessful candidates for Board membership, sought inquiry into alleged violations of election laws with respect to procedure involving appointment and certification of challengers, N.J.S.A. 18A:14-15 and 14-16.

ALJ found that while there were irregularities, there was insufficient proof that the will of the people was thwarted and that the technical violations were sufficient to invalidate the election results. Petition was dismissed.

Commissioner adopted findings and determination in initial decision.

MAY 3, 1993

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NOS. EDU 3002-92 and
EDU 3003-92
AGENCY DKT. NOS. 89-4/92 and
90-4/92

IN THE MATTER OF THE SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE BOROUGH OF FAIRVIEW, BERGEN COUNTY.

Joseph Rutolo, Esq., for petitioners Sheryl Fall and Catherine Stone

Dennis Oury, Esq., for respondents
(Oury, Mizdol & Brovarone, P.C., attorneys)

Record Closed: February 1, 1993 Decided: March 15, 1993

BEFORE **MARYLOUISE LUCCHI-McCLOUD,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Sheryl Fall and Catherine Stone, both unsuccessful candidates for seats on the Board of Education in the Borough of Fairview (board), submitted a written request to the Commissioner of Education (Commissioner) dated April 9, 1992, requesting an inquiry into alleged violations of the annual school election held on April 7, 1992, pursuant to *N.J.S.A.* 18A:14-63.

The matter was transmitted to the Office of Administrative Law (OAL) on April 24, 1992, for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The matter was set down for a hearing on September 9, 1992, however, due to a death in the family of the petitioners' attorney, that date

was adjourned. The hearing did take place on September 15, 1992, at the South Hackensack Municipal Building, 227 Philips Avenue, South Hackensack, New Jersey.

The hearing record was left open for posthearing submission by the parties. That date was originally to be sometime in the latter portion of October 1992. The parties requested transcripts of the proceedings in order to prepare posthearing submissions. Due, however, to difficulty in obtaining the transcripts, the parties were delayed in producing their posthearing submissions. After repeated attempts to determine a date upon which posthearing submissions would be submitted, attorneys for both sides finally received the transcripts and posthearing submissions were prepared, the last of which was received by mail on February 1, 1993. That is the date the record closed in this case. All requests for extensions of time to file and for extensions of time to leave the record open were made by counsel as joint applications and were granted for good cause.

At the time of the hearing, both cases were consolidated due to the fact that they arose out of one single letter submitted and signed by both petitioners. That letter, however, was sent to the Department of Education twice, thereby generating two different cases. All of these allegations contained within the letter apply equally to both petitioners, and both petitioners asked that the case be heard as one case. That request was granted, and the matters were consolidated.

Also prior to the onset of the hearing, the attorney for the petitioners indicated that he was requesting solely and exclusively a procedural inquiry regarding the appointment of challengers and the dissemination of information regarding the election. He conceded that even if sustained, the allegations which were being brought forth as to election irregularities in the town of Fairview would not require invalidation of the school board election since they would not be sufficient to have changed the outcome or be sufficient enough to be considered a thwarting of the will of the people.

Also, certain paragraphs in the initial petition were withdrawn by the petitioners prior to the start of the hearing. The second paragraph was one of those removed. It alleged that absentee voters were physically present at polling places attempting to vote in person, thereby casting votes. The other portion withdrawn alleged that the petitioners were denied access to the polling district except to vote.

These two paragraphs were stricken from the original petition and they constitute paragraphs two and four. The hearing began with respect to the other aspects alleged to have been infractions.

The attorney for petitioners indicated that the only procedural inquiry they were requesting was with respect to the procedure involved in appointing challengers during the school board election as well as the question of dissemination of information regarding the school election.

TESTIMONY

Pat Caufield testified during the time of the hearing. He was the board secretary and has been employed by the board for seven years. He is a tenured employee and he has never represented any other board. He has participated in seven annual school elections and no one exists to oversee him.

He stated that he familiar with state law in a general sense. He also stated that he knows some of what goes into the appointment of challengers.

The witness stated that he is usually present in the district and he also visits them during elections. He acknowledged that it is normal to appoint some challengers. He stated that this was the only election which had been contested in the seven years with which he is acquainted. He stated that he had a list of challengers submitted by Mr. Pizzichillo, who acted as campaign manager for some of the candidates. This document was received March 5, 1992. It has only the signature of Mr. Pizzichillo; it does not contain any addresses of the challengers. These challengers were for candidates Dolecki, Kahn, and Talamini. Nine challengers were appointed in all.

No other documents were submitted on the appointment of any challengers, and no documents were received regarding challengers with the signatures of Dolecki, Kahn, or Talamini.

The secretary then typed up the badges for the challengers, and no other certification was obtained or produced regarding the challengers or how they are

appointed. The witness was shown a copy of *N.J.S.A.* 18A:14-15, which deals with the appointment of challengers, as well as *N.J.S.A.* 18A:14-16, which deals with certification of appointment. In essence, the first provision indicates that challengers shall be appointed in writing, signed by the candidate, specifying the names and addresses of the challengers and the polling district for which they are severally appointed. It further states that this shall be filed with the secretary of the board of education not later than five days preceding the election. The second provision found in *N.J.S.A.* 18A:14-16 requires that the secretary of the board of education shall make a certificate of the appointment of the challengers and the polling district for which they are severally appointed, which shall be submitted by the challengers to the election officers of said respective district

The witness stated that he was not entirely familiar with these provisions. He acknowledged that he did not receive a document signed by the candidates appointing challengers and that he did not file a certification.

Testimony was also presented from Charles Stone, who is the husband of Catherine Stone, one of the petitioners. His wife was a candidate in the school election, and on April 7, 1992, he was at Day Street at the Anderson School polling place with his wife between 6:00 and 9:00 p.m. Sometime during that time frame, he was introduced to Frank Pizzichillo and also saw Mr. Caufield.

He stated that there was a conversation between his wife and Mr. Caufield regarding the procedures and that the discussion included an inquiry regarding a package of electoral materials which his wife had not received; she asked Mr. Caufield about the reason for this. According to the witness, Mr. Caufield responded that "he forgot."

On cross-examination, the witness acknowledged that he helped his wife distribute flyers and gave her moral support in the election. He never delivered or received absentee ballots.

He does not know who else was present during the conversation that he described, although he said there was a policeman he did not recognize. Mr. Stone stated that there were a number of people "hanging out" in the area where the

conversation took place. The witness was unable to recall what Mr. Caufield was wearing. He believes that his wife started the conversation, but he is not certain.

The witness testified that his wife first realized three or four days to one week prior to the election that she did not receive a package of materials. This was based upon what his wife told him. She never informed him of how she determined that she had not received some form of information which should have been sent.

Sheryl Fall and Karen Foglio were other candidates who were running with his wife. The witness does not know if the other two individuals received their package of materials. The witness also did not know if his wife ever complained or made a request for the materials prior to the day of the election.

The witness acknowledged writing a May 5, 1992 letter addressed to the undersigned detailing his conversations on April 7, 1992, and having it notarized. He acknowledged that it was typed by his wife, but that he did read the letter before signing it. According to him, his wife thought that the incident discussed was important. He acknowledged that if his wife asked him to do something, he would in fact do it. He indicated that he came to this tribunal at the request of his wife.

Catherine Stone, one of the petitioners in this matter, also testified during the hearing. This is the first time that she ran for office at the school board, she was unsuccessful. She acknowledged receiving a document regarding ballot position date on February 14, 1992 (J-1c). She did appear on that date, although not all candidates were there. Mr. Caufield was present. She stated that no other documents were attached to the document which she received. She also indicated that no documents were given out on February 14, 1992.

The witness acknowledged receiving a document which indicated that it was a calendar of dates regarding the upcoming school election (J-1h). She stated that it was received in the mail with a number of other documents, along with a booklet, in a manila envelope.

She also acknowledged receiving a memo dated January 19, 1992, in a package along with a booklet. (J-1f). There was a document on financial and ethical considerations, and the school election dates were on another document.

The witness stated that she did not recall receiving anything else. She did not recall ever receiving anything regarding the appointment of challengers; she did not know about the function of challengers. She did not know what, if anything, other candidates received. She became aware of that on the day of the election from Ms. Fall, her copetitioner, as well as from the county superintendent's office. She attempted to act as a challenger at one of the schools; however, someone told her that she had to leave, and she was told to call Karen Foglio. She then moved to the Lincoln School and developed another problem trying to enter. While at the Lincoln School, she and her husband were outside, and she introduced him to Frank Pizzichillo. Mrs. Stone stated that she was told that the laws had to be enforced. She told Mr. Pizzichillo that they did not receive a package of information, and he told her that she should speak with Mr. Caulfield.

She spoke with Mr. Caufield and asked why she had not received the information. According to the witness, he responded that he forgot. No specifics of the package were discussed.

The witness did acknowledge that she received documents on financial disclosure and one on ethics as well as other documents. She stated, however, that as of April 7, 1992, she was unfamiliar with election laws, and the information that she had was from the county superintendent's office.

Mrs. Stone stated that her husband was incorrect when he testified that she knew about the information prior to the day of the election. She stated that it was not until that day that she was aware that there was information she had not received.

Sheryl Fall, also a petitioner, testified. She, too, was a candidate for the board of education in the election of April 7, 1992. She stated that she did receive a number of items which have been marked R-1a through R-1d prior to April 7, 1992. These were all received by her at home in the mail. She also received J-1i, which was a calendar, in the mail in the same package containing the other materials. She did not recall getting anything else. She also did not recall anything regarding challengers. She did have a conversation with the county superintendent's office.

The witness was later told that she was not allowed in the polling places because papers for her to be a challenger had not been filed. She did not know the procedure. Other than for voting, she had never attempted to enter polling districts.

The witness was not present during the conversation between Mrs. Stone and either Mr. Pizzichillo or Mr. Caufield. Also, the witness does recall having received a document along with others which has been marked J-1i, which states on page four that Thursday April 2, 1992, was the last day for candidates to file for appointment of challengers and alternates with the secretary of the board of education. She stated that she did not know if any of the other individuals received this.

This testimony concluded the petitioner's case.

It should also be noted that at the time the two paragraphs were withdrawn from the original complaint, the petitioners also withdrew all allegations of impropriety against Frank Pizzichillo in his personal capacity. As a result, those are also no longer under consideration.

The respondent began its case by calling Frank Pizzichillo. He has been a school teacher for thirty years with the Fairview Board of Education. He has been on the board of education for twenty of those years and has run seven times. He also acted as campaign manager for Kahn, Dolecki, and Talamini, who were opposing Mr. Foglio and petitioners Stone and Fall. He indicated that he was not a candidate in this particular election. The witness stated that he sends out a calendar of things that candidate need to do. This was also done before his tenure with the board of education.

On the day of the election, the witness was at the Lincoln School handing out campaign cards. He was introduced by Mrs. Stone to Mr. Stone at approximately 7:00 or 8:00 p.m, and the three of them spoke. The witness had never met Mr. Stone prior to the conversation on that date. There was a large group of people near them. They spoke about one of the Stones' children who apparently had arthritis. The witness remembers what he referred to as mild "chit chat."

The witness stated that Mr. Caufield was not present and that he never saw the Stones speaking with Mr. Caufield; he only saw Mr. Caufield inside the building.

Although the witness and Mr. Caufield did not run together in the school board elections, he characterized them as being "on the same team."

The witness maintained that he never discussed legality with Mrs. Stone and her being present at a polling district, and he does not recall what information beyond the calendar in the packet which was discussed that he received prior to the election.

Patrick Caufield was then recalled. He testified that he made two mailings, one for ballot position, which included items R-1a through d, and a second mailing which was general, including J-1i. He said that those mailings went to all candidates. He physically mailed them and only one came back as undeliverable, which was the one addressed to Mr. Kahn. None of the other packets was returned. He stated that he sent the same information to all of the candidates.

According to Mr. Caufield, neither Mrs. Stone nor Ms. Fall ever requested other information from him. They did not request to have challengers present on election day. He was located in his office that night and denied ever having said that he forgot to send out any information. He denied having had any conversation with them.

The witness testified that J-1i went out to all candidates. This was the calendar that mentioned the deadline for the appointment of challengers. No form was sent for the specific purpose of appointing challengers along with the calendar.

FINDINGS OF FACT

Based upon the evidence adduced at the hearing, including the testimony and documents in evidence, and having given fair weight thereto, I **FIND** the following facts in this matter.

Testimony regarding alleged violations of statutorily prescribed procedures dealt with several different areas.

The first paragraph that alleged a violation in the petition states that during the entire election process, board of education trustees consistently misused their

powers. The board secretary failed to supply appropriate documentation and/or information to the opposing candidates regarding electoral procedures including *N.J.S.A.* 18A:14-14 re: appointment of challengers. The testimony on this particular area indicates that the board secretary sent packets of information, which all included the same information, to all candidates. One of the petitioners acknowledges having received the calendar, which specifies the last date for filing for appointment of challengers. Whether or not this was completely explained to the satisfaction of the petitioners is not at issue here. The question is whether or not the board secretary supplied appropriate documentation and/or information to all candidates regarding electoral procedures, including the School Election Law found in Title 18A I **FIND** as a matter of fact that information regarding the School Election Law was sent to all candidates personally by Pat Caufield, the board of education secretary.

Further allegations were made that the petitioners were not permitted into the polling districts to insure that improper electioneering, among other violations, would be kept in check,. This left the incumbent representatives, their challengers, and the incumbents themselves unsupervised. Therefore, when the tabulations from the machines were read, only the incumbent representatives were entitled to view and call the tallies. It is further alleged that this was found to be a violation of *N.J.S.A.* 18A:14-18 (powers). There has been no testimony that improper electioneering occurred in this case. No challengers were appointed for Mrs. Stone or Ms. Fall; that alone, however, does not indicate that improper electioneering or other violations took place at polling places during the election. It is impossible to jump to a conclusion that because petitioners did not have challengers present, improper or illegal activity must have occurred, absent some form of testimony that such actions did take place.

I further **FIND** that paragraphs two and four were withdrawn prior to the hearing.

The only violations that have become apparent as a result of this inquiry are a violation of *N.J.S.A.* 18A:14-15, involving the appointment of challengers. This states that challengers shall be appointed in writing, signed by the candidate, specifying the names and addresses of the challengers and the polling district for which they are severally appointed, which shall be filed with the secretary of the

board of education not later than five days preceding the election. In this case, I **FIND** that although a list of challengers was supplied to the secretary of the board of education, it was not signed by the candidates involved and did not specify the names and addresses of the challengers who were being appointed.

I further **FIND** a violation of *N.J.S.A.* 18A:14-16, requiring certification of appointment. That provision states that the secretary of the board of education shall make a certificate of the appointment of the challengers and the polling districts for which they are severally appointed, which shall be submitted by the challengers to the election officers of said respective polling districts.

I **FIND** the above to be the operational facts in this case.

DISCUSSION AND CONCLUSIONS

Having found that no evidence was produced at the inquiry to support petitioners' allegation that the board of education trustees consistently misused their powers and that the board secretary failed to supply appropriate documentation and/or information to the opposing candidates regarding electoral procedures, including *N.J.S.A.* 18A:14-15 (appointment of challengers), I **CONCLUDE** that said paragraph be and hereby is **DISMISSED.**

In finding insufficient evidence to show that there was improper electioneering or other violations as a result of incumbent representatives and their challengers being unsupervised at polling places as alleged in paragraph five of the petition I **CONCLUDE** that said paragraph be and hereby is **DISMISSED.**

I further **CONCLUDE** that paragraphs two and four were withdrawn by the attorney for the petitioner and are hereby **DISMISSED.**

While these paragraphs were the substance of the complaints for violations, it did become apparent that two violations of the School Election Law did in fact occur in this case. Those violations consisted of the violation of *N.J.S.A.* 18A:14-15 regarding the appointment of challengers who shall be appointed in writing, signed by the candidate, specifying the names and addresses of the challengers and the polling district for which they are severally appointed, which shall be filed with the

secretary of the board of education no later than five days preceding the election. Clearly, this did not occur in this case.

The other violation which came forward during the inquiry was that of *N.J.S.A.* 18A:14-16, which involved certification of appointment. It states that the secretary of the board of education shall make a certificate of the appointment of the challengers and the polling districts for which they are severally appointed, which shall be submitted by the challengers to the election officers of said respective polling districts.

It is clear from the testimony of Mr. Caufield that he was unacquainted with the specifics of these two provisions and did not comply with them. However, while there is no question that there are irregularities, I **CONCLUDE** that they are insufficient proof to sustain the petitioner's allegations of election irregularities pursuant to the complaint.

I **FIND** and **CONCLUDE,** as did the Commissioner in *In the Matter of the Annual School Election Held in the Township of Pittsgrove, Salem County*, 1976 *S.L.D.* 585 at 589, that:

> The Commissioner concludes that, taken as a whole, the testimony falls far short of that needed to invalidate an election. It is well established that elections are to be given effect whenever possible and are not to be set aside unless it can be shown that the will of the people was thwarted, was not properly expressed, or could not fully be determined.

The testimony in the instant matter does, indeed, fall far short of that needed to sustain petitioner's allegations that the violations would have been sufficient to invalidate the election. There is no evidence that the will of the people was thwarted by the outcome of the election. While there were several violations, those violations, as discussed, appear technical in nature. While they require immediate correction for all future elections, they are not sufficient to show that the will of the people was thwarted by the outcome of the election. Accordingly, petitioner has failed to demonstrate that the will of the people was thwarted, was not properly expressed, or could not fully be determined.

ORDER

Therefore, it is **ORDERED** that petitioner's complaint be and hereby is **DISMISSED.** It is further **ORDERED** that the will of the electorate must be given full effect.

I hereby **FILE** my Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

3/15/93
Date

MARYLOUISE LUCCHI-McCLOUD, ALJ

Receipt Acknowledged:

3/17/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 22 1993
Date

OFFICE OF ADMINISTRATIVE LAW

am/e

APPENDIX

WITNESSES

For petitioner:

Pat Caufield
Charles Stone
Catherine Stone
Sheryl Fall

For respondent:

Frank Pizzichillo
Pat Caufield

EVIDENCE

J-1a	Packet of materials regarding April '92 Fairview school board election
J-1b	Booklet: *Be Part of a Great American Heritage*
J-1c	Letter dated February 11, 1992, from Patrick Caufield
J-1d	Memo to school board secretaries dated January 22, 1992, from Dr. Robert E. Boose
J-1e	Handwritten letter dated March 24, 1992, from Frank Pizzichillo
J-1f	Memo dated January 1992 from Evelyn Ford re 1992 school board elections
J-1g	Official results from the election of April 7, 1992
J-1h	Letter dated March 5, 1992, to all candidates from Patrick Caufield re subject dates for school election
J-1i	New Jersey Department of Education, Division of Finance, dates for school election procedures -- related budget procedures (revised 1992 annual election)
J-1j	Nominating petition for annual school election dated January 22, 1992, for Frank S. Foglio
J-1k	Nominating petition for annual school election dated January 22, 1992, for Frank S. Foglio
J-1l	Nominating petition for annual school election dated February 10, 1992, for Catherine Stone

J-1m	Nominating petition for annual school election dated January 30, 1992, for Sheryl Fall
J-1n	Letter dated April 10, 1992, to Catherine Stone from Maureen R. Keller
P-1	May 5, 1992 letter to the Hon. Marylouise Lucchi-McCloud from Charles R. Stone
R-1	Calendar of 1992 school election dates
R-1b	Calendar of 1992 school election dates
R-1b	Flyer entitled "Attention: Prospective school board candidates"
R-1c	Memorandum dated January 1992 from Evelyn Ford re campaign financial disclosure requirements
R-1d	Booklet: *Be Part of a Great American Heritage*

OAL DKT. NOS. EDU 3002-92 AND EDU 3003-92

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

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

Upon review of the record and recommendation of the Administrative Law Judge to dismiss the complaint, the Commissioner agrees with and adopts as her own the findings and conclusions of the ALJ. The matter is hereby dismissed for the reasons well expressed in the initial decision.

COMMISSIONER OF EDUCATION

MAY 3, 1993

DATE OF MAILING - MAY 3, 1993

81-93

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

MAY 6, 1993

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE BOROUGH OF KEANSBURG, MONMOUTH COUNTY.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held April 20, 1993 in the school district of the Borough of Keansburg, Monmouth County, were as follows:

	AT POLLS	ABSENTEE	TOTAL
Michael W. Stark	364	14	378
Manuel (Manny) Flores	301	12	313
Robert A. Corby	243	8	251
Mary Lou Razzano	206	45	251
Noel Orlando Garcia	205	33	238
Dolores Bartrum	192	42	234
Jon Stokes (write-in)	3	0	3
Raymond O'Hare (write-in)	1	0	1
Francis J. Peters (write-in)	1	0	1
Dennis Smith (write-in)	1	0	1

Pursuant to N.J.S.A. 18A:12-15(c), due to a tie vote for the third member of the Board of Education as noted above, an automatic recheck of voting machines was conducted by the office of the Monmouth County Superintendent of Schools, an authorized representative of the Commissioner of Education, on Monday, April 26, 1993 at the Voting Machine Warehouse on Halls Mills Road in Freehold Township.

As a result of the recheck, no change to the above-listed totals was discovered.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of her authorized representative and adopts it as her own.

Accordingly, the Commissioner finds and determines that Michael W. Stark and Manuel (Manny) Flores were elected to full terms of three years each on the Board of Education of the Borough of Keansburg and that a tie vote exists for the remaining term.

Therefore, in accordance with N.J.S.A. 18A:12-15c, the Commissioner directs that a special election shall be held to fill the resultant vacancy, such election to be limited to Candidates Robert A. Corby and Mary Lou Razzano and to be held on the earliest date possible in view of the prohibition on special elections within 20 days before or after the June 8, 1993 primary elections (N.J.S.A. 18A:14-3) and the need to accommodate absentee ballot notices pursuant to N.J.S.A. 18A:14-25.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 6, 1993

DATE OF MAILING - MAY 6, 1993

82-93

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

MAY 6, 1993

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

The announced results of the balloting for General Fund proposition of the Board of Education at the annual school election held April 20, 1993 in the School District of the Borough of Stanhope, Sussex County, were as follows:

GENERAL FUND	AT POLLS	ABSENTEE	TOTAL
Yes	150	1	151
No	150	2	152

Pursuant to a letter request from the Stanhope Board of Education dated April 23, 1993, the Commissioner of Education directed her representative from the Office of the Sussex County Superintendent of Schools to conduct a recount of the ballots cast. This recount was conducted on April 26, 1993 in the office of the Sussex County Board of Elections.

At the conclusion of the recount, the tally of the votes cast was as follows:

GENERAL FUND	AT POLLS	ABSENTEE	TOTAL
Yes	151	1	152
No	149	2	151

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of her authorized representative and adopts as her own the findings as set forth above.

Accordingly, the Commissioner finds and determines that the result of the balloting was that the General Fund proposition passed by one vote.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 6, 1993

DATE OF MAILING - MAY 6, 1993

83-93

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF ANDOVER, SUSSEX COUNTY.	:	
	:	

MAY 6, 1993

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF ANDOVER, SUSSEX COUNTY.	:	
	:	

The announced results of the balloting for one member of the Board of Education for a full term of three years at the annual school election held April 20, 1993 in the school district of the Township of Andover, Sussex County, were as follows:

	AT POLLS	ABSENTEE	TOTAL
Philip T. Heuston	154	0	154
James P. Gates	153	1	154

Pursuant to N.J.S.A. 18A:12-15c, due to a tie vote for the member of the Board of Education as noted above, an automatic recheck of the ballots was conducted by the office of the Sussex County Superintendent of Schools, an authorized representative of the Commissioner of Education, on Monday, April 26, 1993 in the office of the Sussex County Board of Elections.

As a result of the recheck, no change to the above-listed totals was discovered.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of her authorized representative and adopts it as her own.

Accordingly, the Commissioner finds and determines that a tie vote exists between Candidates Heuston and Gates for a three-year term.

Therefore, in accordance with N.J.S.A. 18A:12-15c, the Commissioner directs that a special election shall be held to fill the vacancy and that such election be held on the earliest date possible in view of the prohibition on special elections within 20 days before or after the June 8, 1993 primary election (N.J.S.A. 18A:14-3) and the need to accommodate absentee ballot notices pursuant to N.J.S.A. 18A:14-25.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 6, 1993

DATE OF MAILING - MAY 6, 1993

84-93

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

MAY 6, 1993

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE BOROUGH OF CLIFTON, PASSAIC COUNTY.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for the current expense proposition of the Board of Education at the annual school election held on April 20, 1993 in the School District of the City of Clifton, Passaic County, were as follows:

AT POLLS		ABSENTEE		TOTAL	
For	Against	For	Against	For	Against
1,621	1,627	34	40	1,655	1,667

Pursuant to a letter request on behalf of the Board from Assistant Board Secretary Karen Perkins dated April 21, 1993, an authorized representative of the Commissioner of Education from the Office of the Passaic County Superintendent of Schools was directed to conduct a recount of the machine ballots cast. The recount was conducted on April 26, 1993, at the voting machine warehouse in Paterson.

At the conclusion of the recount of machine ballots, the tally stood unchanged. Absentee ballots were not recounted by the Commissioner's representative, as the Commissioner lacks jurisdiction to undertake such recount pursuant to N.J.S.A. 19A:57-24.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of her authorized representative and adopts as her own the findings set forth above.

Accordingly, the Commissioner finds and determines that the current expense question submitted by the Board at the annual school election held on April 20, 1993, was not approved by the voters.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 6, 1993

DATE OF MAILING - MAY 6, 1993

85-93

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF GREENWICH, WARREN COUNTY.	:	
	:	

MAY 6, 1993

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF GREENWICH, WARREN COUNTY.	:	
	:	

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held April 20, 1993 in the school district of the Township of Greenwich of Stewartsville, Warren County, were as follows:

	AT POLLS	ABSENTEE	TOTAL
Michael Mannix	75	0	75
Mary E. Amicucci	69	0	69
William Hanley	46	0	46
Rodger Pogue	45	1	46

Pursuant to N.J.S.A. 18A:12-15c, due to a tie vote for the third member of the Board of Education as noted above, an automatic recheck of the voting machines was conducted by the office of the Warren County Superintendent of Schools, an authorized representative of the Commissioner of Education, on Tuesday, April 27, 1993 at the office of the Warren County Superintendent of Schools.

The results of the recount were as follows:

	AT POLLS	ABSENTEE	TOTAL
Michael Mannix	75	0	75
Mary E. Amicucci	69	0	69
William Hanley	46	0	46
Rodger Pogue	45	1	46
Donna Kobler	2	0	2

The final count on the tie vote remained the same.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of her authorized representative and adopts it as her own.

Accordingly, the Commissioner finds and determines that Michael Mannix and Mary E. Amicucci were elected to full terms of three years each on the Board of Education of the Township of Greenwich and that a tie vote exists for the remaining term.

Therefore, in accordance with N.J.S.A. 18A:12-15c, the Commissioner directs that a special election shall be held to fill the resultant vacancy, such election to be limited to Candidates William Hanley and Rodger Pogue and to be held on the earliest date possible in view of the prohibition on special elections within 20 days before or after the June 8, 1993 primary election (N.J.S.A. 18A:14-3) and the need to accommodate absentee ballot notices pursuant to N.J.S.A. 18A:14-25.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 6, 1993

DATE OF MAILING - MAY 6, 1993

86-93

86-93

JOSEPH S. O'BRIEN,

PETITIONER,

V.

BOARD OF EDUCATION OF THE VOCATIONAL SCHOOLS IN THE COUNTY OF UNION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

MAY 10, 1993

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10443-91
AGENCY DKT. NO. 376-10/91

JOSEPH S. O'BRIEN,
Petitioner,
v.
BOARD OF EDUCATION OF THE VOCATION SCHOOLS IN THE COUNTY OF UNION,
Respondent.

Richard J. Kaplow, Esq., for petitioner
(Weinberg & Kaplow, attorneys)

Edward J. Kologi, Esq., for respondent

Record Closed: April 5, 1993 Decided: April 5, 1993

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

This matter was transmitted to the Office of Administrative Law on November 13, 1991 for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

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

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

I hereby **FILE** my initial decision with the **DIRECTOR OF THE DIVISION OF FAMILY DEVELOPMENT** for consideration.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 7th Floor, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 5, 1993
Date

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

4/6/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 08 1993
Date

OFFICE OF ADMINISTRATIVE LAW

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APR 5 9 AM '93

Law Offices
EDWARD J. KOLOGI
628 North Wood Avenue
Linden, New Jersey 07036
(908) 486-8877
Attorney for Respondent

JOSEPH S. O'BRIEN,

Petitioner

vs.

BOARD OF EDUCATION OF THE VOCATIONAL SCHOOLS IN THE COUNTY OF UNION

Respondent

BEFORE THE STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

O.A.L. DOCKET NO.: EDU-10443-91

CIVIL ACTION

STIPULATION OF SETTLEMENT

This matter having been amicably adjusted by the parties hereto, it is agreed and stipulated as follows:

1. Respondent agrees to pay to Petitioner the sum of $3,500.00 plus the value of pension contributions totaling $664.00 in full and final settlement of any and all claims, past, present or future, of any type whatsoever, Petitioner has or may have against Respondent.

2. By agreeing to make such payment, Respondent does not admit any liability or wrongdoing, nor does it agree that Petitioner has a meritorious cause of action. Respondent's agreement to remit such payment is predicated solely upon the economic considerations of pursuing this matter through several days of hearings and possible further appeals.

3. The payment by Respondent as aforesaid shall constitute a full and final settlement of any and all claims set forth in a certain action filed before the State of New Jersey Commissioner of Education captioned *Joseph S. O'Brien v. Board of Education of the Vocational Schools in the County of Union, OAL Docket No.: EDU-10443-91,* which action shall be deemed dismissed as part and parcel of the settlement agreement herein.

4. Petitioner agrees to provide Respondent with an executed Release as to Respondent, its agents, servants, and employees as to any and all claims past, present, or future.

5. Respondent shall enjoy no further obligations whatsoever with respect to Petitioner or his past employment, other than to make payment as aforesaid.

Attorney for Petitioner

By: _____
RICHARD KAPLOW, ESQUIRE

Attorney for Respondent

By: _____
EDWARD J. KOLOGI, ESQUIRE

Dated: March , 1993

OAL DKT. NO. EDU 10443-91

JOSEPH S. O'BRIEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE VOCATIONAL SCHOOLS IN THE COUNTY OF UNION,	:	DECISION
RESPONDENT.	:	

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

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

COMMISSIONER OF EDUCATION

MAY 10, 1993

DATE OF MAILING - MAY 10, 1993

87-93

A.W., on behalf of his minor child, L.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

MAY 10, 1993

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2715-93

AGENCY DKT. NO. 48-3/93

A. W., ON BEHALF OF HIS MINOR CHILD, L. W.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,

Respondent.

Karen E. Moore, Esq., for petitioner

Kenneth R. Hampton, Esq., for respondent

Record Closed: March 30, 1993 Decided: April 6, 1993

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

A. W., a resident of Jersey City, Hudson County, and physical custodial parent of L. W., enrolled in the Alternate Education Program of the school district of the City of Bayonne, Hudson County, sought judgment of the Commissioner of Education allowing the student to continue her attendance in the Bayonne district until court-ordered custody matters were settled finally and/or until at least close of the 1992-93 school year.

A petition for emergent relief filed in the Department on March 25, 1993 was transmitted to the Office of Administrative Law on March 26, 1993 for hearing as a contested case in accordance with *N.J.S.A.* 52:14F-1 *et seq.*

The matter came on for hearing on March 30, 1993, at which time the parties entered into settlement discussions and advised that a settlement had been reached; the settlement terms are set forth in the attached stipulation of settlement.

I have reviewed the record and stipulation of settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures on the agreement;

2. The settlement fully disposes of all issues in controversy, is in the interest of parties and public and should be implemented forthwith.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 7th Floor, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 6, 1993
Date

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

4/8/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 13 1993
Date

OFFICE OF ADMINISTRATIVE LAW

amr

A. W. on behalf of his minor child, L. W.

Petitioner

vs.

Bayonne Board of Education

Respondent.

State of New Jersey
Office of Administrative Law

OAL Docket No. - EDU 2715-
Agency Ref. No. 48-3/93

STIPULATION OF SETTLEMENT

1. L. W. will be permitted to attend the Alternate Education Program in the Bayonne School District from March 31, 1993 until completion of the school year in June, 1993.

2. On the last day of school in June, 1993 a transfer will be issued to L. W. if the physical custody remains with A. W. and his residence is other than Bayonne, N. J.

3. This shall not be construed as a basis for the Petitioner to present to any Court a request to enroll L. W. in the Alternate Education Program in the Bayonne School School District beyond the end of the June, 19 school year.

4. Should future physical custody of L. W. be changed to a person residing in Bayonne, N.J., then L. W. shall be enrolled in the Bayonne School District even if beyond the end of June, 1993.

5. It shall be the responsibility of the Petitioner to provide to the Bayonne Board of Education any future Court Orders regarding custody of L.W.

In consideration of the above the Petitioners hereby withdraw and dismiss the Petition of Appeal.

Dated: 3/30/93

KAREN E. MOORE
Attorney for Petitioners

Dated: 3/30/93

KENNETH R. HAMPTON
Attorney for Respondents

OAL DKT. NO. EDU 2715-93

A.W., on behalf of his minor child, L.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

MAY 10, 1993

DATE OF MAILING - MAY 10, 1993

88-93

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE MANALAPAN-ENGLISHTOWN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

MAY 12, 1993

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
MANALAPAN-ENGLISHTOWN REGIONAL : DECISION
SCHOOL DISTRICT, MONMOUTH COUNTY. :
:

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held April 20, 1993 in the Manalapan-Englishtown Regional School District representing the Township of Manalapan, Monmouth County, were as follows:

	AT POLLS	ABSENTEE	TOTAL
Michele Cottesmann	969	21	990
Lucille Benedetti	962	14	976
Gloria Close	944	13	957
Michele Stipelman	820	13	833
Judith V. Warn	698	7	705
Paul Beinert*	595	11	606

Pursuant to a letter request from Candidate Michele Stipelman dated April 23, 1993, the Commissioner of Education directed her representative from the Office of the Monmouth County Superintendent of Schools to conduct a recount of the votes cast for

* It is noted that on all of the individual and combined Statements of Results, the Board Secretary spelled this candidate's name Paul Binert, yet on all machines rechecked, the spelling was Paul Beinert.

members of the Board. This recount was conducted on Friday, April 30, 1993 at the Voting Machines Warehouse on Halls Mills Road in Freehold Township.

As a result of the recount, the tally of the votes cast on the voting machines was as follows:

	AT POLLS	ABSENTEE	TOTAL
Michele Cottesmann	969	21	990
Lucille Benedetti	962	14	976
Gloria Close	944	13	957
Michele Stipelman	820	13	833
Judith V. Warn	697	7	704
Paul Beinert	595	11	606

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of her authorized representative and adopts it as her own.

Accordingly, the Commissioner finds and determines that Michele Cottesmann, Lucille Benedetti, and Gloria Close were elected to full terms of three years each on the Board of Education of the Manalapan-Englishtown Regional School District representing the Township of Manalapan.

COMMISSIONER OF EDUCATION

MAY 12, 1993

DATE OF MAILING - MAY 12, 1993

89-93

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE TOWN-	:	COMMISSIONER OF EDUCATION
SHIP OF WALL, MONMOUTH COUNTY.	:	DECISION
	:	

MAY 13, 1993

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE TOWN- : COMMISSIONER OF EDUCATION
SHIP OF WALL, MONMOUTH COUNTY. : DECISION
:

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held on April 20, 1993 in the school district of the Township of Wall, Monmouth County, were as follows:

CANDIDATES	AT POLLS	ABSENTEE	TOTAL
Diane M. Noorigian	484	4	488
Phyllis Bower	432	11	443
Richard L. Keller	405	9	414
Pat Smith	403	5	408
Diane (De) Hearn	394	13	407
Sandra F. (Sandi) Freeman	326	5	331

Pursuant to a letter request from Candidate Pat Smith, the Commissioner of Education directed her representative from the Office of the Monmouth County Superintendent of Schools to conduct a recount of the votes cast for members of the Board. This recount was conducted on Monday, May 3, 1993 at the Voting Machines Warehouse on Halls Mills Road in Freehold Township.

As a result of the recount, no change to the above-listed totals was discovered.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of her authorized representative and adopts it as her own.

Accordingly, the Commissioner finds and determines that Diane M. Noorigian, Phyllis Bower, and Richard L. Keller were elected to full terms of three years each on the Board of Education of the Township of Wall.

COMMISSIONER OF EDUCATION

MAY 13, 1993

DATE OF MAILING - MAY 13, 1993

90-93

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE TOWNSHIP OF TEWKSBURY, HUNTERDON COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

MAY 13, 1993

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWN-	:	DECISION
SHIP OF TEWKSBURY, HUNTERDON	:	
COUNTY.	:	
	:	

The announced results of the balloting for the General Fund at the annual school election held on April 20, 1993 in the school district of the Township of Tewksbury, Hunterdon County, were as follows:

GENERAL FUND	AT POLLS	ABSENTEE	TOTAL
Yes	204	3	207
No	199	8	207

Pursuant to a letter request from Kenneth J. Gross, Superintendent, Tewksbury Township School for Tewksbury Township Board of Education, dated April 22, 1993, the Commissioner of Education directed her representative from the Office of the Hunterdon County Superintendent of Schools to conduct a recount of the ballots cast for the General Fund proposition. This recount was conducted on April 29, 1993 at the Tewksbury Township Old Turnpike School, Califon.

As a result of the recount, no change to the above-listed totals was discovered.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of her authorized representative and adopts as her own the findings as set forth above.

Accordingly, the Commissioner finds and determines that the General Fund Budget for the 1993-94 school year was defeated at the annual school election held on April 20, 1993 in the Township of Tewksbury.

COMMISSIONER OF EDUCATION

MAY 13, 1993

DATE OF MAILING - MAY 13, 1993

91-93

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
LONG BRANCH, MONMOUTH COUNTY.	:	
	:	

MAY 13, 1993

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
LONG BRANCH, MONMOUTH COUNTY.	:	
	:	

The announced results of the balloting for the General Fund tax levy to support the budget of the Board of Education of the school district of the City of Long Branch, Monmouth County, held on April 20, 1993 were as follows:

GENERAL FUND	AT POLLS	ABSENTEE	TOTAL
Yes	210	6	216
No	211	6	217

Pursuant to a petition by the Long Branch Board of Education, the Commissioner of Education directed her representative from the Office of the Monmouth County Superintendent of Schools to conduct a recount of the votes cast. This recount was conducted on Friday, April 30, 1993 at the Voting Machines Warehouse on Halls Mills Road in Freehold Township.

As a result of the recheck, no change to the above-listed totals was discovered.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of her authorized representative and adopts it as her own.

Accordingly, the Commissioner finds and determines that the General Fund tax levy was not approved by the voters of the district.

COMMISSIONER OF EDUCATION

MAY 13, 1993

DATE OF MAILING - MAY 13, 1993

92-93

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF NEPTUNE CITY, MONMOUTH COUNTY.	:	
	:	

MAY 13, 1993

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH : DECISION
OF NEPTUNE CITY, MONMOUTH COUNTY. :
:

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held on April 20, 1993 in the school district of the Township of Neptune City, Monmouth County, were as follows:

CANDIDATES	AT POLLS	ABSENTEE	TOTAL
Randy Reynolds	211	32	243
John Long	196	33	229
Arlene Sciarappa	221	0	221
Michael Balzarano, Jr.	178	32	210
William Sciarappa	199	0	199
Marjorie Nealon	168	0	168

Pursuant to a letter request from Candidate William Sciarappa, the Commissioner of Education directed her representative from the Office of the Monmouth County Superintendent of Schools to conduct a recount of the votes cast for members of the Board. This recount was conducted on Monday, May 3, 1993 at the Voting Machines Warehouse on Halls Mills Road in Freehold Township.

As a result of the recount, no change to the above-listed totals was discovered.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of her authorized representative and adopts it as her own.

Accordingly, the Commissioner finds and determines that Randy Reynolds, John Long, and Arlene Sciarappa were elected to full terms of three years each on the Board of Education of the Borough of Neptune City.

> The record of this matter shall immediately be transmitted to the Office of Administrative Law where an inquiry is pending***. The purpose of this transmittal is to supplement the record of the inquiry and to permit any responsive statement made by those persons at the time of the recount, which are contained in the report of the Commissioner's representative, to be subject to further inquiry under oath as deemed appropriate by the ALJ. This decision is binding upon the parties unless a contrary determination is rendered by the Commissioner upon receipt and review of the initial decision to be issued by the Office of Administrative Law. (In the Matter of the Annual School Election Held in the School District of Shamong Township, 1986 S.L.D. 2438, 2440)
>
> IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 13, 1993

DATE OF MAILING - MAY 13, 1993

94-93

J.B. and N.B., as guardians ad litem of J.B., AND J.B., INDIVIDUALLY,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parents appealed determination of Board denying their son J.B. admission to high school chapter of National Honor Society.

ALJ found the selection committee consisting of 5 faculty members uniformly utilized the same selection process to evaluate the credentials of all 50 applicants. Therefore, ALJ found nothing invalid with selection process. ALJ determined petitioners failed to show Board acted in an arbitrary, capricious or unreasonable manner. Petition was dismissed.

Commissioner adopted findings and determination in initial decision.

MAY 17, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2385-92
AGENCY REF. NO. 43-2/92

J.B. and N.B. AS GUARDIANS *Ad Litem*
OF J.B. and J.B., INDIVIDUALLY,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP
OF JEFFERSON, MORRIS COUNTY,
Respondent.

Richard J. Schachter, Esq., for petitioners
(Schachter, Trombadore, Offen, Stanton & Pavics, attorneys)

Diane Alexander-McCabe, Esq., for respondent
(Maraziti, Falcon & Gregory, attorneys)

Record Closed: January 5, 1993 Decided: April 5, 1993

BEFORE **MARYLOUISE LUCCHI-McCLOUD,** ALJ:

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

Petitioners J.B. and his parents, Joseph B. and N.B., as guardians *ad litem*, appealed the determination by the respondent, Board of Education of the Township of Jefferson, denying J.B. admission into the Jefferson Township High School chapter of the National Honor Society. The matter was transmitted to the Office of Administrative Law (OAL) on April 2, 1992, for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The matter was given hearing dates of September 1 and 2, 1992.

It is undisputed that J.B. was denied entry into Jefferson Township Honor Society.

The record was originally to close on November 30, 1992 with the submission of posthearing memoranda by both sides. The time was extended until January 5, 1993 due to the fact that the parties wished to obtain transcripts of the proceedings. On that date the record closed. Subsequently an extension of the time to file the initial decision was obtained for good cause by the undersigned until April 5, 1993.

LEGAL STANDARD

In this case the burden rests on the petitioners to show by a preponderance of the credible evidence that the decision of the Jefferson Township High School's Honor Society committee was arbitrary and capricious and an abuse of discretion. It should be made clear from the outset that this case is not one of substituted judgment by the undersigned as to whether J.B. is an appropriate candidate.

UNDISPUTED FACTS

A number of the facts in this case are not in dispute. J.B. was in his junior year at Jefferson Township High School when he applied for membership in the National Honor Society (NHS).

The selection process includes the committee receiving a list of juniors and seniors with a 3.5 grade point average (GPA) or better. A ballot is then presented to each faculty member and they are asked to rate the individual students. Faculty members respond only to those individuals that they feel they are able to. In the 1991-1992 school year that is the subject of this litigation 100 students were on the list. A selection committee then takes the numbers which are submitted by the teachers and gives the individuals a rank. Fifty of the 100 were given letters to apply by way of resume. Of those 50, J.B. was ranked 35.

The selection commitee for NHS consists of five members who can vote either to give membership to an individual, to deny membership or are free to abstain

should they feel the need to. The vote in this case was zero to five against membership in NHS for J.B.

The selection committee consists of five members appointed by Mr. Ross who is the principal. Myrna Speert is the advisor to the National Honor Society but not a voting member on the committee. She has also been the advisor for the math league and her role with the National Honor Society (NHS) as advisor has gone for approximately 10 years. Her role is to help students with activities and to facilitate the selection process for NHS. The other members on the committee for NHS included Sylvio Crespo, James Wynne, Randy Evans, Judy Van Dunk and Linda Weir.

These individuals evaluated those potential members for the NHS for the year in question.

As these facts are not in dispute, I **FIND** them to be operational facts in this case.

DISPUTED FACTS

This case arises essentially out of a dispute over two separate and distinct question.

The first one alleged is that the committee inappropriately or incorrectly weighed the activities which J.B. listed in making its determination not to extend membership in the NHS to him. The second contention is that there was a conflict of interest in existence which involved Linda Weir and the B. family which would, according to the petitioners, make it impossible for her to vote in a fair and impartial manner on his participation.

Lengthy testimony was taken regarding J.B.'s participation in sports as well as his achievements, character and service.

Joseph B. (petitioner J.B.'s father) testified that Mrs. Weir is the girls' varsity head coach. Mr. B. had been involved in school athletics and had experienced difficulties relating to both Mrs. Weir and her husband regarding the athletic program.

Mr. B. also indicated that he felt that it was unfair that he was not given specific reasons for the rejection in writing although he requested them by way of letter to Mr. Ross dated December 4, 1991.

On January 7, 1992 Mr. Ross appealed on behalf of his son to the board of education and present at this meeting were Mr. Ross, Ms. Healy an associate of Mr. Schachter's firm, as well as Mr. Schachter. Additionally Joseph B.'s wife was present with him.

During that meeting Mr. Ross informed them that Mrs. Weir's credentials were above approach and he did not find any conflict to exist. He also denied that Mrs. Weir had ever expressed reservations about her ability to vote with respect to J.B.

J.B. had particpated in an oratorical championship which involved six months of preparation both in and out of school. He was also named academic athlete in his sophomore year for wrestling and maintained a grade point average (GPA) of 4.62 and made first team all conference in that sport. He was also named academic athlete in his junior year which was 1992 in two sports, those being wrestling and soccer.

Mr. B. explained that practice for sports lasted somewhere between two and three hours every day for both soccer and wrestling except if it was the day of a game.

Joseph B. stated that he was disturbed by the rejection and completely dissatisfied by the reasons for it. He stated that he felt that the rejection was due somehow as a result of reprisals for his participation in the soccer committee. He had begun participation in the soccer committee in order to improve the girls' program. He was the head and it consisted of concerned parents as well as girls and other coaches and officials along with board of education members.

This committee was founded in October 1991. At that time he felt the present program in the school was not up to the level it should be. During this period of time Mrs. Weir was the soccer coach for the girls. Her husband was also the head wrestling coach for the boys who had stepped down in the fall of 1989 due at least in

part to parental pressure. Joseph B. acknowledged that he had supported efforts to bring in a new coach other than Mr. Weir.

Mr. B. stated that he had never been advised of any problems with J. and has had only positive feedback regarding his son.

Mr. B. stated that he felt the decision was unfair for a number of reasons which he enumerated as follows:

1. He felt that his son's achievements were self-evident.

2. He was disturbed also by the process since three of the five people who voted had little or no experience with his son.

3. Mr. Wynne and Ms. Van Dunk cast negative votes but had no contact at all with J.B.

It is the impression of J.B.'s father that he has been the victim of "blackballing."

The witness did acknowledge that he neither met nor contacted Mrs. Weir but did feel that Mrs. Weir knows who he is and what organization he was with.

N.B. also testified during the hearing. She stated that when she learned of J.B.'s rejection from the NHS she was stunned. She had never previously been informed of any problems. Her son was involved with athletics which included soccer on the varsity team as well as varsity wrestling. He also participated in the math league and the biology league as well as student council in his freshman and sophomore years.

J.B. also acted as an assistant coach with the younger children in midget wrestling. He volunteered for the safe drive program run by students on Friday and Saturday nights and worked for the program prior to receiving his drivers license.

The witness stated that on the January 7, 1992 appeal to the board of education Mr. Ross the principal stated that Mrs. Weir had expressed some

reservation about voting on J.B. although Mr. Ross indicated that he had full confidence in Mrs. Weir.

J.B., the student we have been discussing, also testified. He is 17 years of age and attends Jefferson Township High School. He was just entering his senior year. He had been handed an instruction sheet on how to be eligible for the NHS. He received no further instructions and he wrote down his in school activities and honor classes on the resume sheet that was provided. The information he received did not say anything about out of school activities.

J.B. stated that he had been a member of student council as well as PDP which is the peer development program. In that program juniors and seniors act as guidance counselors for other students. It also has a steering committee which makes initial selections of individual to join. Teachers then select the individuals to participate from that list.

J.B. also testified that he participated in the HOBY seminar as well as the state oratorical contest. He practiced for the state oratorical contest approximately two hours per day between September 1991 and April 1992.

In addition to those activities he played soccer which require practice from two to three hours every day and also participated in wrestling whose practices also ran from two to three hours every day. He also was involved in wrestling outside the school and this had a time constraint of approximately two hours on two to three other days.

The witness described that he participated in safe ride in his junior year on Friday and Saturday nights.

After a period of time had passed a ditto was posted with the names of those individuals selected.

After observing the posting he spoke with the principal, Mr. Ross, who said that he had been observed talking to his girlfriend during a PDP meeting and that he also had displayed problems with other team mates. He was however informed that he could appeal the decision.

J.B. did appeal to Mr. Ross, Mrs. Speert and Mrs. Togno. On January 7, 1992 the appeal went to the full board of education.

J.B. indicated that he participates in classroom discussions and also volunteers for committees. He stated that he was aware of his father's active role in upgrading the girls' soccer program and that previously he had also been involved in trying to upgrade the boys' varsity wrestling. J.B. indicated that the individuals on the committee were Mrs. Weir, Mr. Evans, Ms. Van Dunk, Mr. Crespo and Mr. Wynne. Mr. Crespo was advisor to the student council and was also involved in PDP. Mr. Evans was the advisor on safe ride but not while J.B. was there, as a result there was no interaction between them.

J.B. stated he had no involvement with Ms. Van Dunk nor Ms. Wynne. He did know Mrs. Weir who had taught him freshman gym and health.

He stated that he spoke with Mr. Ross after the appeal had been denied and was told that he should learn from the experience and try again next year at which time Mr. Ross gave him the two reasons listed above.

J.B. felt that the decision was unfair and he did not know how three teachers, (specifically Van Dunk, Wynne, and Evans) could vote against him since they had no involvement with him.

J.B. acknowledged that when he had Mrs. Weir for a teacher she had given him A's in every marking period. While he was involved with student council he had never been an officer.

That testimony concluded the petitioner's case.

The respondent began its case with the testimony of Myrna Speert. She is a math teacher at the high school but is also advisor to the National Honor Society (NHS) as well as the math league. She has been the NHS advisor for approximately ten years and her role is to help the students with activities and facilitate the selection process for NHS. The witness described at great length the selection process which begins in September when they receive a list of juniors and seniors

with a GPA of 3.5 or better. A ballot is presented to each of the faculty members and they are asked to rate the students. Faculty members respond only to those that they feel they are able to. In the year in question 100 students were on the list and by taking the numbers assigned to them they were then ranked. Fifty of the 100 were given letters to apply and submit a resume and J.B. fell at number 35.

The five faculty members and a witness meet one afternoon for lengthy discussions and have packets regarding the applicants. The members are picked for their knowledge of the school as well as the activities in which they are involved. A discussion ensues and then a vote on the student occurs. It is necessary for the student to receive three out of five votes by the committee. It should be noted that Ms. Speert acts only as the advisor and does not vote on these occasions.

When individual students are not known by certain faculty members they use the information given to them by other faculty members in order to arrive at a decision. In this case J.B. was known to three members of the committee although Mrs. Speert does not know J.B.

Mrs. Speert is also a part of the appeal committee.

The witness stated she recalled nothing being discussed with her about any potential conflict of interest. She also pointed out that any member who felt that a potential conflict might exist was free to abstain from the vote. In the case of J.B. the vote was zero to five against admission. No mention of conflict was made.

Subsequently a meeting was called for an appeal and a vote was taken. On the appeal the vote was zero to three against admission.

Mrs. Speert said that she was asked about the math league but was unable to identify J.B. as being a participant. Mr. Crespo, Mr. Evans and Mrs. Weir knew J.B.

She stated that Mr. Crespo indicated he knew that J.B. was on the student coucil as an advisor and was active in science. He mentioned that he did not recall J.B. participating in any committees or in the biology league. He was also not aware of J.B.'s involvement in planning for the blood bank which was not yet functional.

Mrs. Speert recalls that there was discussion about J.B. being involved in soccer and also his participation in the oratorical contest.

Out of the 50 students who ultimately sent in resumes 23 members were inducted into the NHS. The areas that they looked at were character, leadership and service combined with the student's total GPA. This then gave them a tabulated rank. She stated that Mr. Evans knew J.B. from the peer development program PDP and the safe ride program. He had recalled that J.B. had participated at least one evening. He also mentioned that J.B. attended PDP meetings.

The witness stated that Mrs. Weir did not discuss knowledge of J.B. although she did respond to a question as to whether or not he was a captain or a co-captain of an athletic team. According to her Mrs. Weir and Ms. Van Dunk had no specific input with respect to J.B. during the process.

The witness explained that the math league consists of six competitive exams yearly the results of which are then used for the high schools to compete with one another. Those tests are given at 2:15 in the afternoon.

She also described the biology league as being somewhat similar to the math league in the fact that it was competitive and involved exams being taken. She stated that she believed J.B. took one math league test.

With respect to student council it meets during the school day and the individual would have to miss a class or other period in order to attend.

Mrs. Speert stated that the committee rates an individual if as few as three teachers respond or as many as 25 do so in order to obtain the teacher ranking. The responses given by the faculty members are anonymous. The original 100 candidates are known to the faculty in advance however the final 50 were not.

The witness stated that Mr. Crespo indicated he had no knowledge of J.B. participating in the biology league.

Mrs. Speert also related that information had been brought forward by Mr. Evans stating that J.B. was at a PDP meeting however he was not involved in the

discussion but was in fact talking to someone else. He had not been invited to the PDP planning group.

Ms. Speert also explained concern over the fact that J.B.'s rank was approximately 35 out of the total 50 possible candidates. She indicated some concern that the resume might have been somehow inflated and gave the example of science. She was also concerned about a line at the end which indicated "soon to be" blood bank.

The witness once again reiterated that Mrs. Weir never expressed any reservations about her ability to vote in a fair and impartial manner.

The principal of the high school, Robert J. Ross, also testified. In addition to his other job responsibilities as principal he is responsible for the NHS. This includes choosing advisors and the selection committee as well as setting up the process for appeals. It is his obligation to publish the rules and see to it that the procedure is followed. He stated that he picks an advisor by choosing a person with an interest in academics such as Mrs. Speert who has held that position for 10 years. The committee itself changes from year to year. The committee members are chosen for their expertise in a variety of areas. Someone was chosen in the field of athletics and that was Mrs. Weir. With respect to the area of music, PDP and safe ride Mr. Evans was chosen. Mr. Crespo served as the student council advisor.

Mr. Ross stated that he has no input on the selection of the individual students unless and until there is an appeal. If the individual is not selected they have one week in which to write a letter of appeal. If an appeal is filed Mr. Ross, Mrs. Speert and Mr. Togno listens to the original five committee members and then vote on whether or not the candidate should be granted admission. He did acknowledge that there have been successful appeals filed.

In this case J.B. did appeal. The witness spoke with the father who asked who the individuals were on the committee. During this conversation J.B.'s father said that Mrs. Weir should not have been permitted on the committee. Mr. Ross however reinterated that he has confidence in Mrs. Weir. Mr. Ross also spoke with Mrs. Speert and asked if Mrs. Weir had influenced the committee in any way either for or

against J.B.'s admission to the NHS. He stated that her reply was that Mrs. Weir had said little if nothing.

After the appeal process had been exhausted he received a letter asking for specifics from Joseph B. He did not supply that information to Mr. B.

He later called in J.B. after he had been unsuccessful and Mr. Togno was also present. They told him that his academic record was very good however he needed bolstering in service and leadership.

Mr. Ross stated he received another letter from Joseph B. asking for specific reasons for denial. Mr. Ross answered the letter without specifics. Subsequent to this Mr. B. came in and did talk to him regarding the question of depth of service at which time Mr. Ross related the PDP incident which he had observed with J.B. speaking to another individual.

On January 7, 1992 an appeal was made to the full board of education.

According to the witness Mrs. Weir never expressed any reservations at all about voting in the matter.

Mr. Ross acknowledged that Mr. B.'s participation in the parents group to upgrade soccer was common knowledge. In 1989 Mr. Weir was involved with a parents group regarding the wrestling team although the witness did not recall whether or not Mr. B. was the organizer. Subsequent to this Mr. Weir who had been the wrestling coach stepped down for several reasons.

The witness admitted there is no question about J.B.'s involvement in soccer and wrestling as well as the oratorical contest.

Mr. Weir has now returned to coaching and coaches two different sports. According to the witness the wrestling committee does not recall Joseph B. as being the leader of that committee.

The witness stated that on the July 7, 1992 board of education meeting regarding the appeal he did not say anything about Mrs. Weir approaching him

about making any statement at all about whether or not whether or not she should vote.

Randolph Evans also testified at the time of the hearing. He is a guidance counselor at the school and is the advisor for the safe ride as well as PDP and a program called "Each One, Reach One" and also teaches adaptive physical education. He too was a member of the selection committee.

He stated that first he looked at the resume and then looked at the courses written down. Each individual who has reached this point has already passed the scholarship question and as a result he would cross out anything which dealt with scholarship alone. He stated he would then go back through the resume and look for areas that dealt with service.

He acknowledged that there is no doubt about J.B.'s participation in soccer or wrestling. Instead he would circle safe ride, PDP, HOBY seminar and Spanish honor society. He stated that he would look for leadership in these items.

With respect to safe ride he stated that J.B. had signed up for one night and as a result he gave him neither a plus nor a minus for that category. In PDP he spoke about a meeting in which J.B. arrived late and spent his time speaking with another individual and not paying attention. This was the first meeting in which he had participated and as a result the witness gave him neither a plus nor a minus for that particular aspect.

Mr. Crespo also spoke of student council and indicated that J.B. was involved but not to a significant extent. He also stated that he would put HOBY more in a scholarship category. He did however, give him a plus with respect to HOBY participation and the state oratorical competition. As a result he gave J.B. a minus in the category of service a minus in the category of leadership and a plus in the category of scholarship. He did not go further than that into the question of character. As a result of the foregoing he voted no for admission.

Mr. Crespo also stated that he did not feel that J.B. participated to the extent should have with the bio league. He also asked Mrs. Speert with respect to the math league and asked Mrs. Weir whether or not J.B. was a captain or co-captain of any

sport team. Mrs. Weir did not volunteer any information other than a response to the question she was asked.

The witness indicated that one of the things to which he would look with respect to leadership was whether or not J.B. was a captain. He was not. The witness did acknowledge that there is a significant amount of time involved in both soccer and wresting making it impossible to participate in many other activities

The witness knew what HOBY was however he did not know specifically what a HOBY seminar was. He acknowledged that there is a leadership component to HOBY and as a result gave it, as he put it "a small plus." The witness also stated that he gave J.B. a neutral for participation in PDP due to the fact that he had been able to attend only one meeting before the NHS committee began. The meeting began at 4:00 p.m. and J.B. was late although the witness acknowledged it was probably due to some form of athletic practice. The meeting itself goes until 10:00 p.m. This was a training sesssion on what to look for when meeting with eighth graders. He noted that J.B. was talking a good deal of the time during the meeting. Mr. Ross, and Mr. Crespo were also present at the time.

The witness give J.B. a minus for biology league since Mr. Crespo indicated his participation was insufficient. He also received information from Mr. Crespo that J.B.'s participation in student council was also not sufficiently satisfactory.

Linda Weir also testified during the hearing. She has been a teacher at the school for nine years and has also acted as a coach. She has taught health as well as physical education and been involved in the girls soccer on a varsity level as well as cheerleading. Soccer extends from August through November each season. In the winter months from December through March she is involved in cheerleading. She was selected as a committee member for NHS by Mr. Ross.

She stated that she knows J.B. because he was a student in her health and physical education class and that he received A's in both of her classes.

The witness stated that she did not know Joseph B. and had never met him nor spoken with him. She testified that she did not feel that there was a conflict in voting upon the potential entry into the NHS for J.B.

She did acknowledge that she knew there was a group of parents who were involved in the coaching question. Mr. Knowles had told her this however no names were mentioned and she was not aware that Joseph B. was on the committee at the time the NHS committee met.

In 1987 and 1988 her husband had been coaching wrestling. She did know that there was a parents' committee but she does not recall Mr. B.'s name with regard to that.

She described the system for choosing students for NHS which included being given a sheet with class rank based upon teacher rankings. She stated that she then looks at the resume. Mrs. Weir stated that she was asked by one of the individuals of J.B. was a captain and she responded that she did not think so.

She was interested in both math and bio league since they involved after school tests. She asked Mr. Crespo if J.B. had continued but was told he had taken only one test. Mrs. Speert stated that she did not know of him even though he listed math league. The information she received at the meeting was that although he participated in safe ride he had only worked on one particular night. She was also informed that with respect to PDP he was talking while the meeting was going on. She however was more concerned that he was not active in the planning phases. She also did not count the blood bank since his resume listed "soon to be" which showed that he was not involved in the planning phase for the blood bank.

According to the witness she looks for leadership in captains of sport teams as well as chairman of committees and looks for anything else that shows the person is involved in planning of activities. She stated that she found this aspect lacking in J.B. She also indicated that she looks for continuity to see that the individuals improved and go more into depth in certain areas rather than changing those activities in which they are involved from year to year.

The witness acknowledged that J.B. certainly had the appropriate acacemics credentials. She also agreed that J.B. exhibited commitment when it came to both wrestling and soccer although she felt there was lack of follow through on the biology league.

James Wynne also testified during the hearing. He teaches vocal and electronic music at the high school. He has been there for 11 years although this is his twentieth year as a teacher. He has served on the NHS committee although he does not know J.B. He stated that he uses what is in "black and white" as well as what is said and uses the teacher rank and resume in making his decision. He explained that he would discount soccer and wrestling and that he would also discount honors since that goes into the academic portion.

According to him PDP starts in the junior year and it was too soon to tell whether or not that would be a positive factor. The same holds true for safe ride.

The witness did acknowledge that both HOBY and the oratorical award stood out in his mind as positive things.

The only thing he recalls Mrs. Weir as having said was that J.B. was a member of sport teams.

The witness did not consider abstaining because he did not know J.B. Instead he had all the information available to him in order to make a decision.

He acknowledged that he was aware of the depth of commitment J.B. had made to both wrestling and soccer.

Silvio Crespo also testified during the hearing. He has been a teacher of science for 26 years and has been an advisor to the student council for 20 years. He also serves as an advisor to PDP and is on the NHS committee. He is acquainted with J.B.

The witness then went through the selection process as it occurs and then indicated that he reads the individual's biography to see how it fits into those categories that they are looking at. He stated that soccer and wrestling gave this candidate an excellent record in athletics so he received a plus for that. He negated any weight that might have been given to honors english, science or history as well as algebra since all those were academics and already taken into account. He did not count biology league competition because J.B. did not make many appearances. The same held true for math league. With respect to PDP, J.B. was in the organization

but the witness found no depth of service or leadership with respect to that. He also weighed in the question of safe ride however, due to the fact that J.B. did not participate much, that did not weigh heavily in his mind. With respect to honors earth science, biology and Spanish, these were academic subjects and therefore already counted.

The witness stated with respect to the HOBY seminar he was in a "quandry" because he had a question over the word "seminar." He was unable to remember whether or not J.B. was their representative.

He also indicated that participation in the state oratorical contest and becoming a winner indicated good participation but did not show service and leadership to him.

He also discarded the portion of the resume that said "soon to be" blood bank.

As a result of these things the witness found that J.B.'s depth of service was not sufficient and he had not shown sufficient leadership.

When asked whether athletics were considered a service the witness stated that he did consider them to be a "low plus" in the service category. According to him service was the giving over of time and helping the school and the larger community. He was also aware that participation in sports requires a tremendous committment as the time and energy.

Elizabeth Fuselaier also testified during the hearing on behalf of the petitioner. She is an attorney employed by Mr. Schachter's office who represents the petitioner. She stated that she attended a board of education meeting in January 1992 with Mr. Schachter as well as Mr. and Mrs. B. and recalled a discussion regarding Mrs. Weir. According to her Mr. Ross stated that at some point Mrs. Weir had approached him and indicated she might have some bias and perhaps should not vote with respect to J.B.

J.B. was also recalled and he explained both the incident when he was talking during a PDP meeting and was late. According to him he was not disturbing anyone and no one said anything to him at the time.

He explained that with respect to biology league he had been contacted by Mrs. Hopper and while he said he would be interested in participating he had a conflict with wrestling and soccer. In all he stated that he took two tests. He did participate in the oratorical contest and had attended one Friday evening with respect to the safe ride program.

FINDINGS OF FACT

In addition to those undisputed facts listed above and having heard the testimony of the witness and having assessed their credibility I **FIND** the following to be fact:

1. J.B. applied for a membership in the NHS in 1992.

2. J.B. was denied entry into NHS after committee evaluation.

3. Originally 50 candidates were possible and the field was narrowed to 50 with J.B. remaining on spot 35 in that heirarchy. Of those 50 who were asked to submit resumes only 23 members were inducted into the NHS from that chapter that particular year.

4. It is without question that J.B.'s academic record qualified him for consideration for entry into the NHS.

5. Five members of the committee voted with respect to J.B.'s application and the total at the conclusion of the vote was zero to five against recommending membership for J.B.

6. An appeal was subsequently held at the request of J.B. and after a review of the materials that appeal proved to be unsuccessful by a vote of zero to three.

7. In addition to excellent academic credentials J.B. is involved in soccer as well as wresting which constitutes a major time infringement on J.B. leaving him little time to participate in many other activities in which he

would either like to participate or feels it would be in his best interest to participate.

8. Of those five individuals, Mrs. Weir, Mr. Wynne, Mrs. Van Dunk, Mr. Evans and Mr. Crespo all voted unanimously not to extend invitation to join the local chapter of NHS to J.B.

9. Of the five individuals listed above Mr. Wynne and Mrs. Van Dunk had no prior involvement with J.B.

10. Although J.B.'s father has been involved in upgrading the sports programs at the school and may have experienced some difficulty with respect to Mr. Weir who is married to Mrs. Weir on the committee, there is no evidence that Mrs. Weir was unable to vote in a fair and impartial manner.

11. Even assuming, but not deciding, that Mrs. Weir had some kind of inner conflict which would make it difficult for her to vote on the matter, it is clear from the testimony that she did nothing either overtly or covertly to influence other members of the committee to vote against J.B. and his admission to the NHS. In fact the only indication of input from Mrs. Weir is that when asked whether or not J.B. was a captain of any particular sport team she indicated that he was not. Mere conjecture does not rise to the level of provable conflict.

Even assuming but not deciding that Mrs. Weir did in fact have a conflict, which she in no way used to influence others, she would still have been free to abstain. Had she abstained from the vote the outcome would remain the same and the vote would then stand at zero to four against admission in the NHS.

DISCUSSION

It is well established in school law decisions that the Commissioner has jurisdictional authority to determine disputes over admisisons to the National Honor Society. *J.B.A. and A.M.A. v. Board of Education of the Borough of Bernardsville*, 4 *N.J.A.R.*, 136, 145. It must be noted however that the Commissioner has maintained

in matters brought before him in this area that his review is limited. The Commissioner has not and will not intervene in a determination regarding Honor Society eligibility unless the local board's action has been shown to be arbitrary, capricious or unreasonable. *See, J.B.A. and A.M.A. v. Bernardsville Board of Education*, 4 *N.J.A.R.* at 152 (". . . it is not [the Commissioner's] desire or intention to substitute his judgment for that of local board of education, administrators or teachers carrying out the responsibilities in the many selection processes in which they are continually engaged.")

It would perhaps, be best off to start with respondent's contention that the petitioners have no right to disclosure of the specific reasons supporting respondent's decision against selection to the NHS. Respondent's claim that this is contrary to the law and the guidelines set forth by the National Honor Society. While respondents argue that this does not fall into the right to know law it follows logically that while these are not kept as permanent records and any note taken during the discussions of the committee may be destroyed lost or disposed over time may not insulate the committee from having to come forward and indicate the reasons for their rejection should a hearing be requested before the Commissioner of Education. It is clear that under *J.B.A. and A.M.A. v. Bernardsville Board of Education*, 4 *N.J.A.R.* 136 reasons must be given indicating why an individual was turned down for admisison. While that case relied in large part on the language in a prior edition of the National Honor Society handbook some guidance can be found in the handbook presently being used published in 1987 which on page 36 states the following:

> Procedural Matters
>
> While students not selected for membership in the NHS are not legally entitled to any kind of formal hearing or other kind of due process, common courtesy would suggest that they be graciously received, along with their parents, and that the selection process be reexplained to them.
>
> This does not mean that the students or their parents have a right to see the evaluation sheets or other papers which may have been used by the faculty council in making their decisions or selection. In recent years, a number of parents have made such demands, and a few have claimed that a federal law, The Family Educational Rights and

> Privacy Act of 1974 (FERPA), required school personnel to make such documents available to them.
>
> In our opinion this contention is without merit. FERPA does not require that most school records be available to parents (or to students themselves if they are over 18 years of age) but, in most cases, materials used by the faculty council are not, and should not be, school records as contemplated by the federal law. They are, rather, working papers of the teachers involved, unless and until they are made a permanent part of the student's personnel file or some other school file. If these papers are retained, however they may well become records in the terms of the law, and they not only become available to the parents upon demand but also cannot be destroyed if once requested by the parents.
>
> It should be noted incidently that even in absence of the applicability of FERPA, any papers in the possession of school personnel are subject to a demand for production in court should some kind of litigation be initiated to which they are relevant. (emphasis supplied)
>
> To avoid these problems, most faculty councils merely do not retain their working papers after they reach their decisions, preparing only a summary sheet listing those students who were considered, and those who were selected, showing in addition, perhaps, total scores of all students considered. In case of a protest, such a summary sheet can be reviewed by the principal and the part showing a particular student's score can even be shown to the parents in substantiation of the student's non-selection. Requests or demands that members of the faculty council should be presented for interrogation on how each member evaluated the complaining student, should be firmly but politely refused.

While there is much commendable to be said for not disclosing the reasons that go behind the decision-making process for entry into the NHS, the opposite theory must be looked at. Any individual who feels that they have been treated in a discriminatory manner or that the board has acted arbitrarily, capriciously or unjustly in their case would, without doubt, need information as to how the committee reached its decision in order to be able to determine whether or not that decision was based reasonably upon the evidence presented before it. It cannot be thought that the manner in which an agency or committee weighs and evaluates evidence and comes to a conclusion cannot at any time be reviewed to determine whether or not those actions were arbitrary, capricious or an abuse of discretion. To apply a

blanket and absolute prohibition against looking at those reasons that went into the decision-making process would be tantamount to saying that any decision made by any committee on behalf of membership in the NHS would stand whether well reasoned in nature or the result of arbitrary, capricious and unreasonable exercises of discretion. Surely the principle of protection of deliberation is not meant to take away the ability of any reviewing body to see whether or not that action was reasonable or fell severely short of that goal. To never permit discussion of what went into the decision would mean that all decisions no matter how absurd, arbitrary, capricious or unreasonable would remain and would be entirely insulated from challenge. That certainly is not intended by the language used.

Having passed the question of whether or not that information should have come in in the first place and may be considered in making this decision we now turn to whether or not the decision itself was reasonble given the information available or whether it was somehow arbitrary, capricious or unreasonable.

Before beginning that discussion it is important to note that J.B. who appeared to testify is a fine young man with excellent academic credentials and a great dedication to sports in both soccer and wrestling. Those sports take a significant amount of his time and make it difficulty to participate in other activities. He has displayed both in the documentary evidence that was presented as well as by way of his demeanor during his testimony and the testimony itself that he is bright, articulate and an extremely capable young man. It must also be noted that the standard in this case is that the petitioner must prove by a preponderance of the credible evidence that the decision of the committee in denying J.B. membership into the NHS was arbitrary and capricious and an unreasonable exercise of discretion. It is not unfortunately a case of substituted judgment. Whether or not the undersigned would have chosen J.B. to participate in the National Honor Society has no bearing upon the outcome of this case.

The first question that must be addressed is whether or not there was a conflict of interest with respect to Mrs. Weir and her ability to vote on J.B.'s potential membership in the NHS. I have found above and do hereby reinterate that I do not find any conflict sufficient that Mrs. Weir would be unable to vote in this matter. Even assuming *arguendo* that Mrs. Weir should have abstained there is no indication from any of the witnesses that Mrs. Weir did or say anything in order to influence

the other members of the committee to vote in a manner adverse to the petitioner. As a result of this, even excluding Mrs. Weir's vote, and treating it as though she had abstained, the vote would remain zero to four against admission into the NHS for J.B.

Additionally petitioners argue that because two of the five members of the committed were not personally acquainted with J.B., they were not in a position to vote upon whether or not he should be admitted. I **FIND** no merit in this contention since the vote is brought about by information received from questionnaires handed out to all faculty members which are then returned to the committee and those individuals who are acquainted with the petitioner have the opportunity to fill out the boxes next to the petitioner's name. Beyond this information is shared among the members of the committee regarding the individual such as whether or not he had been serving as a team captain or other things of that nature. The mere fact that two members did not have personal knowledge of a candidate does not invalidate the vote when they have received sufficient information upon which they may make a judgment. Parenthetically it should be pointed out that it would be almost impossible to have one committee with five people in which every single member of the committee would have personal knowledge of every single student applying for membership in the NHS. I therefore **FIND** no merit in the contention that due to the fact that two individuals had no knowledge of J.B. prior to the evaluation procedure the vote must be voided.

Subsequent to the initial committee decision the principal reviewed this matter and determined to uphold the decision of the faculty council. I agree with the determination of the principal. I **FIND** nothing invalid with the process itself in terms of its assessment of the character and service portions regarding the individual. Indeed, as stated by Judge LaVecchia in *Hook v. Board of Ed. of the Borough of South Plainfield*, 92 ***N.J.A.R.*** 2d 333, I am hard pressed to criticize a faculty council for soliciting additional information from teachers who may have had more contact with a student, in order to evaluate the somewhat subjective assessment of a student's character. It is difficult to image that a five-member faculty council in any high school could, without reaching beyond its membership, be able to satisfactorily assess a student's character. *See, Hook, supra,* 333.

In this case the process was not done in bad faith, not did its result constitute an abuse of discretion.

All this having been said it must be pointed out once again that this is a student who shows great promise and has great things ahead of him. Nothing in this opinion is meant in any way to minimize those accomplishments which he has already achieved and he will no doubt continue to achieve and do well.

CONCLUSION

In conclusion, I am persuaded the by argument of the board that petitioners have failed to show that the actions of the board were arbitrary and capricious and an unreasonable exercise of their discretion and have further failed to state a claim upon which relief should be granted, and therefore the petition of appeal in this matter be and hereby is **DISMISSED.**

I hereby **FILE** my Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

4/5/93
Date

MARYLOUISE LUCCHI-McCLOUD, ALJ

Receipt Acknowledged:

4/7/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 08 1993
Date

OFFICE OF ADMINISTRATIVE LAW

am

APPENDIX

Witnesses

For petitioner:

Joseph B.
N.B.
J.B.
Elizabeth Fuselaier
J.B. (rebuttal witness)

For respondent:

Myrna Speert
Robert J. Ross
Randolph Evans
Linda Weir
James Wynne
Silvio Crespo

Evidence

J-1, Ev. Letter of November 20, 1991 to Mr. Robert Ross from Joseph B.

J-2, Ev. Letter of November 21, 1991 to Mr. Robert Ross from Joseph B.

J-3, Ev. Letter of November 25, 1991 to Mr. Robert Ross from J.B.

J-4, Ev. Letter of November 29, 1991 to Mr. Robert Ross from Joseph B.

J-5, Ev. Letter of December 3, 1991 to Joseph B. from Mr. Robert Ross

J-6, Ev. Letter of December 4, 1991 to Mr. Robert Ross from Joseph B.

J-7, Ev. National Honor Society Handbook

J-8, Ev. Excerpts from the Jefferson Township Student Handbook

P-1, Ev. Memorandum from Joseph B. concerning the Girl's Youth Soccer Committee

P-4, Ev. Student Progress Reports for J.B. for periods ending June 22, 1990; June 21, 1991 and November 1991

P-5, Id only - Statement of December 19, 1991 of Fred Pietrowsky

P-6, Id only - Letter dated April 6, 1992

P-7, Id only - Copy of American Legion Boys State Booklet

P-8, Ev. Letter of Fred Pietrowski, dated 12/19/91

R-1, Ev. Ballot received by every faculty member

R-2, Ev. Survey Sheet received by 50% of the original NHS nominees requesting a list of activities for consideration by NHS faculty council selection committee

R-3, Ev. Survey Sheet response received from J.B.

R-4, Ev. Summary Sheet provided to each faculty member of the NHS Selection Committee

R-5, Ev. Letter of December 10, 1991 from Mr. Robert Ross to Joseph B.

R-6, Ev. Letter of December 6, 1991 from Mr. Sheldon Rubin to Mr. Schachter, Esq.

R-7, Ev. Letter of December 30, 1991 from Joseph B. to Robert Ross

R-8, Ev. Letter of January 23, 1992 from Mr. Richard Reilly to Mr. and Mrs. B.

R-9, Ev. Letter of January 29, 1992 to Mr. Richard Reilly from Joseph B.

R-10, Ev. Letter of February 1992 from Mr. Richard Reilly to Joseph B.

OAL DKT. NO. EDU 2385-92

J.B. and N.B., as guardians ad litem of J.B., AND J.B., INDIVIDUALLY,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions by petitioners were untimely filed pursuant to the requirements of N.J.A.C. 1:1-18.4 and are, consequently, excluded from consideration herein, together with the reply thereto submitted by the Board.

Upon a careful and independent review of the record of this case, the Commissioner is in agreement with the findings and conclusions of the ALJ and adopts them as the final decision in this matter.

In reaching this determination, the Commissioner was fully mindful that in her review of this matter she could not substitute her own judgment as to whether J.B. was an appropriate candidate for membership in the Honor Society, but rather such review had to be confined to determining whether the decision of the committee denying J.B. Honor Society membership was arbitrary, capricious, or an unreasonable exercise of its discretion.

The Commissioner notes that from a pool of 50 qualified candidates only 23 were selected for Honor Society membership. This necessarily required that 27 students were rejected, which in no way diminishes the accomplishments and achievements of those individuals not selected, but rather suggests that the selection process utilized had to provide a methodology of distinguishing among an exceedingly qualified pool of applicants. The Commissioner further notes that there is no indication in the record that the process used to evaluate J.B. deviated in any respect from the process utilized to evaluate all the other candidates.

Accordingly, the Commissioner determines that the decision of the Jefferson Township High School's Honor Society Committee regarding J.B. was not arbitrary, capricious or an abuse of its discretion. Therefore, the within Petition of Appeal is dismissed for the reasons well set forth by the ALJ in her initial decision.

COMMISSIONER OF EDUCATION

MAY 17, 1993

DATE OF MAILING - MAY 17, 1993

94-93

EDU #2385-92
C # 94-93
SB # 33-93

J.B. AND N.B., as guardians ad litem of J.B., AND J.B., INDIVIDUALLY,

PETITIONERS-APPELLANTS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, May 17, 1993

For the Petitioners-Appellants, Schachter, Trombadore, Offen, Stanton & Pavics (Richard J. Schachter, Esq., of Counsel)

For the Respondent-Respondent, Rand, Algeier, Tosti & Woodruff (Robert M. Tosti, Esq., of Counsel)

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

October 6, 1993

Date of mailing 08 OCT 1993

95-93

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

MAY 17, 1993

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

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held on April 20, 1993, in the school district of the City of Camden, Camden County, were as follows:

CANDIDATES	AT POLLS	ABSENTEE	TOTAL
Rev. Edwin Martinez	1,419	6	1,425
Jerrothia Riggs	1,322	10	1,332
Jose "Popsie" Rodriguez	957	4	961
Gary McGahee AKA Casbah Salaam	957	0	957
Brenda Vallecilla-Gonzalez	794	7	801
B. Alicia Santos	606	4	610
Ernest Still	325	10	335
Gilbert Shepherd	286	9	295

Pursuant to an April 21, 1993 letter request from Mr. William R. Bostic, Esq., on behalf of Gary McGahee, the Commissioner of Education directed an authorized representative to conduct a recount of the machine ballots cast. The recount was conducted on May 5, 1993 at the Voting Machine Warehouse, South Jersey Port Corporation, Camden. The absentee ballots were recounted by the Camden County Board of Elections also on May 5, 1993.

At the conclusion of the recount, the totals were as follows:

CANDIDATES	AT POLLS	ABSENTEE	PAPER BALLOTS	TOTAL
Rev. Edwin Martinez	1,421	6	9	1,436
Jerrothia Riggs	1,303	10	8	1,321
Jose "Popsie" Rodriguez	963	4	5	972
Gary McGahee AKA Casbah Salaam	955	0	8	963
Brenda Vallecilla-Gonzalez	798	7	5	810
B. Alicia Santos	620	4	4	628
Ernest Still	334	10	2	346
Gilbert Shepherd	285	9	2	296

Although there were some minor changes in totals, the names of the three winning candidates remain the same as those derived from the balloting of April 20, 1993. Therefore, it is recommended by the Commissioner's representative that the results as announced at the conclusion of the election remain unaltered.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of her authorized representative and adopts it as her own.

Accordingly, the Commissioner finds and determines that Rev. Edwin Martinez, Jerrothia Riggs and Jose Rodriguez were elected to full terms of three years each on the Board of Education of the City of Camden at the annual school election held on April 20, 1993.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 17, 1993

DATE OF MAILING - MAY 17, 1993

96-93

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

MAY 17, 1993

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

The announced results of the balloting for six members of the Board of Education for three full terms of three years each were as follows:

CANDIDATES	AT POLLS	ABSENTEE	TOTAL
Brian Paladino	1,045	63	1,108
Irwin J. Stolz	966	60	1,026
Harold E. Pavlick	904	68	972
Frank L. Baldino	925	46	971
Sam Garofalo	893	50	943
Angelo DeLellis	517	20	537

Pursuant to a letter of application from Frank L. Baldino dated April 27, 1993, the Commissioner of Education directed her representative from the Office of the Bergen County Superintendent of Schools to conduct a recheck of the votes cast on the voting machines. This recheck was conducted on May 5, 1993 at the County Voting Machine Warehouse, Carlstadt.

At the conclusion of the recheck of the votes cast on the voting machines, the tally remained unchanged.

A letter from the Bergen County Board of Elections was received by the Bergen County Office of Education on May 6, 1993, wherein it was notified of the results of an absentee ballot recount

held on May 4, 1993. The results of this recount were reported by that letter as follows:

	Previous Total	Recount
Harold E. Pavlick	68	
Brian Paladino	63	
Irwin J. Stolz	60	
Sam J. Garofalo	50	
Frank L. Baldino	46	47
Angelo DeLellis	20	

The tally now stands as follows:

CANDIDATES	AT POLLS	ABSENTEE	TOTAL
Brian Paladino	1,045	63	1,108
Irwin J. Stolz	966	60	1,026
Harold E. Pavlick	904	68	972
Frank L. Baldino	925	47	972
Sam Garofalo	893	50	943
Angelo DeLellis	517	20	537

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of her authorized representative and adopts the findings as her own.

Accordingly, pursuant to the provisions of N.J.S.A. 18A:12-15c, the Commissioner directs the conduct of a special election to be held within 60 days of April 20, 1993 and restricted to the two candidates receiving the same number of votes for the third Board seat as indicated above.

IT IS SO ORDERED.

MAY 17, 1993

COMMISSIONER OF EDUCATION

DATE OF MAILING - MAY 17, 1993

97-93

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

MAY 17, 1993

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

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held on April 20, 1993, in the school district of the Township of Pennsauken, Camden County, were as follows:

CANDIDATES	AT POLLS	ABSENTEE	TOTAL
John Figueroa, Sr.	1,202	16	1,218
David B. Fleming	1,106	18	1,124
Sal Buono	1,043	13	1,056
Tim Bowe	1,026	19	1,045
Terrence Kelley	1,007	10	1,017
Philip Smith Burnham, II	867	7	874

Pursuant to a letter request from Mr. Tim Bowe, defeated candidate, dated April 28, 1993, the Commissioner of Education directed an authorized representative to conduct a recount of the machine ballots cast. The recount was conducted on May 5, 1993 at the Voting Machine Warehouse, South Jersey Port Corporation, Camden. The absentee ballots were recounted by the Camden County Board of Elections also on May 5, 1993.

At the conclusion of the recount, the totals remained unchanged and were as follows:

CANDIDATES	AT POLLS	ABSENTEE	TOTAL
John Figueroa, Sr.	1,202	16	1,218
David B. Fleming	1,106	18	1,124
Sal Buono	1,043	13	1,056
Tim Bowe	1,026	19	1,045
Terrence Kelley	1,007	10	1,017
Philip Smith Burnham, II	867	7	874

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of her authorized representative and adopts it as her own.

Accordingly, the Commissioner finds and determines that John Figueroa, Sr., David B. Fleming and Sal Buono were elected to full terms of three years each on the Board of Education of the Township of Pennsauken at the annual school election held on April 20, 1993.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 17, 1993

DATE OF MAILING - MAY 17, 1993

98-93

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP : DECISION
OF EAST AMWELL, HUNTERDON COUNTY. :
:

SYNOPSIS

Defeated candidate requested recount of votes cast for Board membership.

Following recount, Commissioner's representative found that after including 36 write-in votes for said defeated candidate, the recount resulted in a reversal of the announced results of the balloting held on April 20, 1993 with defeated candidate prevailing over the announced winner.

Commissioner set aside findings of her representative. Commissioner determined that pursuant to N.J.S.A. 19:49-5, the 36 write-in ballots must be voided as they were not cast in the appropriate place on the machine. Therefore, Commissioner found original results were sustained. Matter was ordered transmitted to Office of Administrative Law to supplement the record of the pending inquiry.

MAY 14, 1993

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP : DECISION
OF EAST AMWELL, HUNTERDON COUNTY. :
:

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held April 20, 1993 in the school district of the Township of East Amwell, Hunterdon County, were as follows:

CANDIDATES - 3-YEAR TERM	AT POLLS	ABSENTEE	TOTAL
Judith DiGiandomenico	396	4	400
Gerard Tarabakia	393	3	396
James Mianecki	386	3	389
Darlys Maksymovich	36	0	36
John Russell	20	2	22
Jim Hall	17	0	17
Les Hamilton	1	0	1
Tom Weiss	1	0	1

The announced results of the balloting for one member of the Board of Education for a one-year unexpired term at the annual school election held April 20, 1993 in the school district of the Township of East Amwell, Hunterdon County, were as follows:

CANDIDATES - 1-YEAR TERM	AT POLLS	ABSENTEE	TOTAL
Claude Case	177	5	182
Jim Hall	178	0	178
Darlys Maksymovich	3	0	3
Ilona English	1	0	1
Hill	1	0	1

Pursuant to a letter request from Ed Pagan, Jr., Esquire for James M. Hall, defeated candidate, dated April 23, 1993, an authorized representative of the Commissioner of Education from the Office of the Hunterdon County Superintendent of Schools was directed to conduct a recount of the ballots cast. The recount was conducted on April 29, 1993 at the East Amwell Township School, Ringoes.

AS A RESULT OF RECOUNT

CANDIDATES - 3-YEAR TERM	AT POLLS	ABSENTEE	TOTAL
Judith DiGiandomenico	396	4	400
Gerard Tarabakia	393	3	396
James Mianecki	386	3	389
Darlys Maksymovich	37	0	37
John Russell	20	2	22
Jim Hall	17	0	17
Les Hamilton	1	0	1
Tom Weiss	1	0	1

CANDIDATES - 1-YEAR TERM	AT POLLS	ABSENTEE	TOTAL
Jim Hall	213	0	213
Claude Case	177	5	182
Darlys Maksymovich	4	0	4
Ilona English	1	0	1
Hill	1	0	1
CWR	1	0	1

Included in the above totals are 36 write-in votes for Jim Hall and 1 write-in vote for Darlys Maksymovich that appeared on Lines 6 and 7. All other votes appeared on write-in line 5. Although the machines had been programmed to lock out votes on lines 4, 6-12, some voters had managed to open those write-in slots. It must be noted that a voter could easily believe line 6 was appropriate since both write-in slots 5 and 6 are above the candidate's name that appeared on the ballot. The 33 votes on line 6 for write-in candidate Hall all came from one machine where the write-in slots all appear to be half above one ballot position and half above another.

In addition to the above, the following totals were cast on line 4.

Jim Hall	16
Darlys Maksymovich	3
John Russell	1
Kris Polhemus	1

These votes were not included since it was impossible to determine whether they should be applied to the three-year term or the one-year term.

Furthermore, Jim Hall also received 1 vote on line 13 and line 17. These were also not included since they were so far removed from the ballot lines used, it was impossible to determine whether they should be applied to the three-year term or the one-year term.

Additionally, all of the line 4, 13 and 17 votes, if included, do not materially affect the outcome.

Votes for the candidates on the ballot were voided. Each of the candidates appearing on the ballot for three-year terms received one vote. The candidate appearing on the ballot for the one-year term received 2 write-in votes.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of her representative in this matter. Such report assigns to Jim Hall, a defeated candidate for a one-year seat on the East Amwell Board of Education, 36 write-in votes, resulting in a reversal of the announced results of the balloting held on April 20, 1993 for such seat on the Board in favor of Mr. Hall over Mr. Claude Case. The

Commissioner cannot accept the report of her representative for the reason which follows.

N.J.S.A. 19:49-5 establishes that "[b]allots voted for any person whose name does not appear on the machine as a nominated candidate for office are herein referred to as irregular ballots. *** An irregular ballot must be cast in its appropriate place on the machine, or it shall be void and not counted." See also, In the Matter of the Annual School Election Held in the School District of Shamong Township, Burlington County, 1986 S.L.D. 2438, 2446, 2453-54. Given that slot 5 was the appropriate slot, pursuant to N.J.S.A 19:49-5, for write-ins for the one-year term, only those votes recorded in slot 5 may be counted for write-in candidates.

Accordingly, the Commissioner rejects that conclusion found in her representative's report assigning 36 additional write-in votes to Jim Hall from lines 6 and 7. Consequently, the results of the voting in East Amwell stand as originally announced with respect to the one-year term. Accordingly, Claude Case was elected to said seat on the East Amwell Township Board of Education.

In so finding, the Commissioner notes that questions regarding how or where voters may have believed they were to cast write-in votes is more properly an issue to be addressed in the inquiry now pending in this matter before the Office of Administrative Law. As found in the Shamong, supra, matter, therefore:

> The record of this matter shall immediately be transmitted to the Office of Administrative Law where an inquiry is pending into the allegations ***. The purpose of this transmittal is to supplement the record of the inquiry and to permit any responsive statements made by those persons at the time of the recount, which are

contained in the report of the Commissioner's representative, to be subject to further inquiry under oath; as deemed appropriate by the ALJ. This decision is binding upon the parties unless a contrary determination is rendered by the Commissioner upon receipt and review of the initial decision to be issued by the Office of Administrative Law. (Shamong, supra, at 2440)

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 14, 1993

DATE OF MAILING - MAY 17, 1993

99-93

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
PASSAIC, PASSAIC COUNTY.	:	
	:	

MAY 20, 1993

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE CITY OF PASSAIC, PASSAIC COUNTY.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for the Proposals for the Board of Education at the annual school election held April 20, 1993 in the school district of the City of Passaic, Passaic County, were as follows:

PROPOSAL 1		PROPOSAL 2		PROPOSAL 3	
YES	NO	YES	NO	YES	NO
1,133	330	1,104	525	1,100	539

Pursuant to a letter request from Henry Lee for the Passaic Board of Education dated April 28, 1993, an authorized representative of the Commissioner of Education from the Office of the Passaic County Superintendent of Schools was directed to conduct a recount of the machine ballots cast. The recount was conducted on May 3, 1993, at the Voting Machine Warehouse, Paterson.

At the conclusion of the recount, the ballots for the Proposals changed as follows:

PROPOSAL 1		PROPOSAL 2		PROPOSAL 3	
YES	NO	YES	NO	YES	NO
1,288	381	1,088	569	1,095	542

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of her authorized representative and adopts as her own the findings set forth above. Accordingly, the Commissioner finds and determines that the Proposals for the school district of the City of Passaic were passed.

It is noted in the record that the request by the Board for recount was due to a report by the poll workers at districts 11A and 15 that no votes were cast for proposals #1 and #2.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 20, 1993

DATE OF MAILING - MAY 20, 1993

101-93

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE TOWNSHIP OF RIDGEFIELD PARK, BERGEN COUNTY.	COMMISSIONER OF EDUCATION DECISION

MAY 24, 1993

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE TOWNSHIP OF RIDGEFIELD PARK, BERGEN COUNTY.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for six members of the Board of Education for three full terms of three years each were as follows:

CANDIDATES	AT POLLS	ABSENTEE	TOTAL
Joseph Picone	518	9	527
Raymond J. Dwyer, Jr.	454	7	461
Robert Thiemann	435	6	441
Mary Ann Foldi	376	15	391
Lorraine DiArchangel	289	20	309
Thomas A. Blumenthal	236	2	238

Pursuant to a letter of application from Lorraine DiArchangel dated April 21, 1993, the Commissioner of Education directed her representative from the office of the Bergen County Superintendent of Schools to conduct a recheck of the votes cast on the voting machines. This recheck was conducted on May 3, 1993, at the County Voting Machine Warehouse, Carlstadt.

At the conclusion of the recheck of the votes cast on the voting machines, the tally remained unchanged.

There was no request for a recount of the absentee ballots.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of her authorized representative and adopts as her own the findings set forth above.

Accordingly, the Commissioner finds and determines that Joseph Picone, Raymond J. Dwyer, Jr. and Robert Thiemann were elected to full terms of three years each on the Board of Education of the School District of the Township of Ridgefield Park.

However, insofar as the recount in this matter was conducted upon an allegation that district 6 and 8 machines malfunctioned and because this allegation is the subject of an inquiry now before the Office of Administrative Law,

> [the] record of this matter shall immediately be transmitted to the Office of Administrative Law where an inquiry is pending***. The purpose of this transmittal is to supplement the record of the inquiry and to permit any responsive statements made by those persons at the time of the recount, which are contained in the report of the Commissioner's representative, to be subject to further inquiry under oath as deemed appropriate by the ALJ. This decision is binding upon the parties unless a contrary determination is rendered by the Commissioner upon receipt and review of the initial decision to be issued by the Office of Administrative Law. (In the Matter of the Annual School Election Held in the School District of Shamong Township, 1986 S.L.D. 2438, 2440)

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 24, 1993

DATE OF MAILING - MAY 24, 1993

102-93

SHEILA FUHRMANN, AL GAYZIK, JOANNA HAINES, BARBARA MUGLIA AND DAVID OLIVER,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MIDDLESEX ET AL., MIDDLESEX COUNTY,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioning citizens alleged violation of Board policy in Board President's determination not to allow public comment at April 15, 1992 Board meeting. Petitioners sought declaration that actions of that Board meeting were null and void.

ALJ concluded Board did not violate either its own policy or applicable law when it determined not to permit public participation at April 15 meeting. ALJ found Board policy was to allow and encourage public participation at meetings but not to require it in all circumstances.

Commissioner adopted findings and determination in initial decision.

MAY 26, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5274-92
AGENCY DKT. NO. 234-5/92

SHEILA FUHRMANN, AL GAYZIK, JOANNA HAINES, BARBARA MUGLIA AND DAVID OLIVER,
Petitioners,
v.
BOARD OF EDUCATION OF THE BOROUGH OF MIDDLESEX, GERALD D'ANGELO, ARTHUR LIMING, JR., GERALDINE MONACO, RICHARD ROY, ROBERT SHERR III, CHRISTINA STEFFNER, FREDERICK SZELES, JR., ROSEMARY WALSH AND DENNIS SWITAJ,
Respondents.

Joan E. Dowling, Esq., for petitioners

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

Record Closed: March 18, 1993 Decided: April 8, 1993

BEFORE **ROBERT S. MILLER**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this case, petitioners seek to have the Commissioner of the Department of Education determine and declare that all meetings of the respondent Board of Education shall be opened to the public, that the public must be allowed to participate in such meetings by being allowed to speak, and that all actions taken by the respondent Board of Education at its meeting of April 15, 1992, are null and void.

The petition in this case was filed on or about May 27, 1992. Respondent filed an answer on or about June 23, 1992. On July 14, 1992, the matter was filed in the Office of Administrative Law (OAL) for determination as a contested case, pursuant to the provisions of the New Jersey Administrative Procedure Act.

A prehearing conference was conducted by telephone on November 24, 1992. The parties agreed that there were two issues requiring resolution:

1. Was the meeting of April 15, 1992, conducted in violation of adopted and promulgated policies of respondent?

2. Was it arbitrary, unreasonable or capricious on the part of respondent, Board of Education, to deny public participation at the April 15, 1992, meeting?

On January 20, 1993, the parties filed a Joint Stipulation of Facts, and suggested that such stipulation obviated the need for an evidentiary hearing. Accordingly, the hearing scheduled for January 29, 1993, was adjourned. Briefs and reply briefs were subsequently filed.

During the course of another telephone conference, held on March 18, 1993, it was agreed that it would be unnecessary to decide the second issue set forth in the prehearing order and that the first issue would be modified to read as follows:

> Was the meeting of April 15, 1992, conducted in violation of adopted and promulgated policies of respondent and of applicable law?

Finally, counsel agreed that the record would be closed as of March 18, 1993, and that I would thereafter render a decision, without having conducted an evidentiary hearing, on the basis of the stipulated facts and applicable law.

As indicated, the essential facts in this matter are relatively simple and undisputed. As gleaned from the stipulation of facts, they are as follows:

FACTS

On April 14, 1992, the Board of Education ("Board") held its annual reorganization meeting. At that meeting, the Board readopted its Policy Manual in its entirety. Among the policies readopted was a policy entitled "Public Participation at Regular and Special Board Meetings." This policy reads as follows:

> All regular and special meetings of the Middlesex Board of Education are open to the public. All actions of the Board will be taken openly and the deliberations leading to Board action shall be likewise conducted openly. The public is invited to attend these Board meetings and will be given limited time to voice opinions or problems.
>
> The Board recognizes its responsibility to conduct the business of the district in an orderly and efficient manner and will, therefore, require reasonable controls to regulate public presentations to the Board. A person wishing to be heard by the Board shall first be recognized by the President who shall request the name and address of the speaker. The speaker shall proceed with comments as briefly as the subject permits. The President is responsible for the orderly conduct of the meeting and shall rule on such matters as the time to be allowed for public discussion, the appropriateness of the subject being presented and the suitability of the time for such a presentation. The Board as a whole shall have the final decision in determining the appropriateness of all such rulings.
>
> [Exhibit B attached to Joint Stipulation of Facts]

Also readopted at the April 14, 1992 meeting, was a policy captioned "Suspension of Policy." This reads as follows:

> The operation of any section or sections of Board policies not established by law or contracts may be temporarily suspended by a majority vote of Board members present at a regular or special meetings.
>
> [Exhibit C attached to Joint Stipulation of Facts]

On April 15, 1992, a special meeting of the Board was conducted. This meeting was duly advertised to members of the public. (Copies of the public notice and of the minutes of the April 15, 1992 meeting are attached to the Joint Stipulation of Facts as Exhibits D and E, respectively.)

At the April 15, 1992, meeting, it was announced by the Board through its President and the Board attorney that there would be no "public forum" that evening due to the extensiveness of the agenda. The "public forum" is an opportunity provided by the Board for members of the public to ask questions or to make comments regarding Board issues.

The minutes of the April 15, 1992 meeting reflect that no motion to "suspend policy" was made or voted upon by the Board prior to its decision not to conduct a "public forum" that evening. By entering into the stipulation, the Board in no way concedes that such a motion was required either by Board policy or by law.

As reflected by the minutes of meetings, on at least four dates in 1987 and 1988, a "public forum" was conducted during Board meetings, and on at least sixteen dates during 1987, 1988, 1989 and 1990, no "public forum" was conducted during Board meetings. (See Exhibits F and G attached to the Joint Stipulation of Facts.)

ISSUE AND ANALYSIS

As noted above, the issue in this case is whether the Board meeting of April 15, 1992, was conducted in violation of Board policies and of applicable law. For the reasons to be expressed hereafter, I am of the opinion that this question should be answered in the negative.

First, petitioners have cited no authority, statutory or case law, indicating that public participation at meetings of boards of education is required as a matter of law. On the contrary, the New Jersey Open Public Meetings Act (the "Sunshine Law"), N.J.S.A. 10:4-6 to -21, provides as follows:

> Except as provided by subsection b. of this section all meetings of public bodies shall be open to the public at all times. Nothing in this act shall be construed to limit the discretion of a public body to permit, prohibit or regulate the active participation of the public at any meeting.
>
> [N.J.S.A. 10:4-12a]

Furthermore, applicable case law, although predating the Sunshine Law, supports respondents' position that such participation is not required. See, Howard v. Jefferson Township Board of Education, 1967 S.L.D. 280, 282, and Moore v. Roselle Board of Education, 1973 S.L.D. 526, 534-535 ("The Commissioner has previously held that there is no requirement in law for such an opportunity for public participation in school board matters").

Additionally, our courts have attached a presumption of validity to local board of education actions, declaring that such actions should be upheld unless there is a showing that such board action is either arbitrary, capricious or unreasonable. Thomas vs. Morris Township Board of Education, 89 N.J. Super. 327 (App. Div. 1965), aff'd 46 N.J. 581 (1966). There has been no showing whatever to this effect.

Petitioners' argument that the Board violated its own policy is based on the following sentence: "The public is invited to attend these Board meetings and will be given limited time to voice opinions or problems." (Exhibit B attached to Joint Stipulation of Facts) Petitioners emphasize the word "will" and argue that it should be read as mandatory. Respondents, on the other hand, point to other sections of the policy stating that the president of the Board is responsible for ruling on such matters as "the time to be allowed for public discussion, "and" the suitability of the time for such a presentation" (Ibid.) Respondents say that, read in context, the word "will" should be interpreted as permissive, not mandatory.

There was no direct evidence presented, either testimonial or otherwise, respecting the intention of the Board when it adopted the policy in question. Consequently, I must attempt to render an opinion on this question, which amounts to little more than guesswork, although informed by experience, common sense, and past practice.

In this regard, I must reject petitioners' argument because it would have the effect of putting the Board in a straitjacket. Although public input into the decision-making process is clearly desirable, there will inevitably be meetings when meaningful public participation is not practical because of the length of the agenda, the complexity of matters to be discussed, limitations of time, and other factors. It is not likely that the Board intended that the public must be allowed to participate under any and all conditions. This conclusion is buttressed, moreover, by the conceded fact that no "public forums," i.e., public participation, had occurred in at least sixteen Board meetings held during the preceding fifteen years. Such past

practice is some evidence, although indirect, of Board intention. In short, I am of the opinion that the policy of the Board is to allow and to encourage public participation at meetings, but not to require it in all circumstances.

CONCLUSION AND ORDER

For the reasons expressed above, I **CONCLUDE** that the Board did not violate either its own policy or applicable law when it failed to permit public participation in the meeting of April 15, 1992, and, accordingly, that the petition filed herein should be **DISMISSED**. It is so **ORDERED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

April 8, 1993
Date

Robert S. Miller
ROBERT S. MILLER, ALJ

Receipt Acknowledged:

4/12/93
Date

Maureen K. Miller
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 15 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

ej

SHEILA FUHRMANN, AL GAYZIK, JOANNA HAINES, BARBARA MUGLIA AND DAVID OLIVER,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MIDDLESEX ET AL., MIDDLESEX COUNTY,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by petitioners pursuant to the provisions of N.J.A.C. 1:1-18.4, as were replies thereto by the Board.

In their exceptions, petitioners reiterate the major arguments of their filings before the ALJ, and note in addition their disagreement with the ALJ's use of prior minutes to infer a "past practice" with which he deems the Board's actions to be consistent, arguing that these meetings are distinguishable, either in form or content, from the meeting under dispute herein. Petitioners further note their disagreement with the ALJ's characterization of their position as "straightjacketing" the Board, claiming that the policy at issue, properly followed, still provides ample flexibility to the Board.

In reply, the Board notes that even if the Board had never conducted a meeting without a "public forum," it would still have

been within its discretion to do so on April 15, 1992, both as a matter of law and under pertinent district policies; therefore, petitioners' objection to the ALJ's "past practice" inference is of no import. Even if it were, petitioners' attempt to distinguish past regular Board meetings where no public sessions were held must fail because it rests solely on what petitioners judge to be "important," in this case the nonrenewal of certain staff member(s) as opposed to budget approval, election schedule changes or development of bid specifications.

Upon careful review of the record of this matter, the Commissioner concurs with the ALJ that the Board meeting of April 15, 1992 was conducted fully in accord with law and applicable Board policy. In so holding, the Commissioner reiterates that boards of education have the lawful authority, and need the operating flexibility, to regulate public participation at board meetings. She further notes that the policy controlling herein does not on its face preclude a determination that under a particular set of circumstances, no public forum will be held, so that the absence of a Board motion to suspend policy on this particular occasion was neither procedurally necessary as a matter of routine operation nor warranted as a consequence of disagreement by other members of the Board as to the President's ruling. Nor is there any indication in the present record that this ruling was so arbitrary or unreasonable as to permit the Commissioner to substitute her judgment for that of the Board.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 26, 1993

DATE OF MAILING - MAY 26, 1993

103-93

IN THE MATTER OF THE TENURE HEARING OF KATHLEEN CONNORS-RYAN, FREEHOLD REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY.	
AND	COMMISSIONER OF EDUCATION
KATHLEEN CONNORS-RYAN, PETITIONER,	DECISION
V.	
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY, RESPONDENT.	

MAY 26, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
CONSOLIDATED CASES

BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,
Petitioner,
v.
KATHLEEN CONNORS-RYAN,
Respondent,

OAL DKT. NO. EDU 3621-92
AGENCY DKT. NO. 58-3/92

AND

KATHLEEN CONNORS-RYAN,
Petitioner,
v.
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,
Respondent.

OAL DKT. NO. EDU 3656-92
AGENCY DKT. NO. 11-1/92

Michael J. Gross, Esq., for Board of Education of the Freehold Regional High School District (Kenney, Gross & McDonough, attorneys)

Dennis M. Barlow, Esq., and **Stanley I. Kielbowicz, Esq.**, for Kathleen Connors-Ryan (Barlow and Kielbowicz, attorneys)

Record Closed: March 1, 1993 Decided: April 15, 1993

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

These matters commenced on January 16, 1992, when Kathleen Connors-Ryan, a tenured teaching staff member in the Freehold Regional High School District, filed a petition with the Commissioner of Education seeking an Order compelling the Board of Education of the Freehold Regional High School District (hereinafter Board) to grant her request for an extension of her leave of absence in order to personally care for another child who suffered from febrile convulsions. On January 29, 1992, the Board filed an Answer to the Petition wherein it noted that Ms. Connors-Ryan had been granted a leave of absence from February 1990 through September 1991 for maternity and postnatal care reasons and defended its September 1991 decision to deny an additional leave of absence extension request to allow Ms. Connors-Ryan to care for an older child whom she alleged was ill. The Board also responded that it had in effect granted Ms. Connors-Ryan an additional leave from September 1991 through December 1991after Ms. Connors-Ryan asserted that she was entitled to an additional leave of absence without pay under the Family Leave Act, *N.J.S.A.* 34:11B-1 to 16. On May 18, 1992, this matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to 21 and N.J.S.A. 52:14F-1 to 13.

On January 31, 1992, in accordance with the Tenure Employees' Hearing Law, *N.J.S.A.* 18A:6-10 to 18.1, the Board certified to the Commissioner charges that Ms. Connors-Ryan had abandoned her teaching position and had been insubordinate when she refused to return to her position in December 1991, when instructed to do so by the Board. A response on behalf of Ms. Connors-Ryan was filed on April 13, 1992, and on May 15, 1992 the matter was transmitted to the Office of Administrative Law as a contested case.

A prehearing conference was conducted on August 24, 1992, at which time the two matters were consolidated for hearing. Also at that time a schedule was established for submission and determination of a motion by the Board to dismiss the petition filed by Ms. Connors-Ryan for lack of jurisdiction. The motion papers and a response were filed as scheduled, and on December 2, 1992, the undersigned issued a Letter Order granting the Board's motion to dismiss all claims arising out of the Family Leave Act, *N.J.S.A.* 34:11B-1 to 16 and denying the motion to dismiss the remaining allegations of the petition. Thereafter on January 19, 1993, the first

date scheduled for the hearing in these matters, the parties appeared before the undersigned to commence the hearing as scheduled. After several hours of discussion between the parties on that date, however, they advised that they had reached a settlement, the language and terms of which were read into the record as follows:

> The Freehold Regional High School District Board of Education and Kathleen Connors-Ryan hereby agree to the following terms:
>
> 1. Kathleen Connors-Ryan shall submit an irrevocable letter of resignation from her employment with the District, effective June 30, 1991.
>
> 2. The Freehold Regional High School District Board of Education shall provide to Kathleen Connors-Ryan a letter to prospective employers from Dr. Harvey Casey and Mr. Walter Zuber, which shall read as follows:
>
> "Dear :
>
> Please be advised that Mrs. Kathleen Connors-Ryan has been employed by this District from September, 1977 through June 30, 1991. During Ms. Connors-Ryan's employment she has consistently had positive evaluations in all social studies and psychology classes.
>
> Mrs. Connors-Ryan resigned from the District effective June 30, 1991.
>
> Sincerely,
>
> Harvey Casey
> Principal/Marlboro High School
>
> or
>
> Walter J. Zuber
> Assistant Superintendent/Personnel
>
> or
>
> Both."
>
> 3. The parties agree that the terms of this settlement shall not be publicized by the parties.
>
> 4. The Board agrees to withdraw with prejudice Docket # EDU 3621-92.

5. Kathleen Connors-Ryan agrees to withdraw with prejudice Docket # EDU 3656-92.

Ms. Connors-Ryan was then sworn and questioned concerning her voluntary acceptance of the terms of the agreement. In response to questions from the undersigned, she testified that she had heard the terms read into the record by counsel for the Board and that she agreed that what was read into the record were the terms to which the parties had agreed. She further testified that she felt she had had sufficient time to consider the matter and to discuss it with her attorneys, Mr. Barlow and Mr. Kielbowicz, who had represented her throughout these proceedings. She further indicated that she had been satisfied with her attorneys' services and that she had no questions about any of the terms of the agreement. Finally, Mr. Connors-Ryan testified that accepting the settlement terms had been a voluntary decision on her part and that no one had placed any undue pressure on her or had coerced her to enter into the agreement. The attorneys agreed to provide a signed, written document setting forth the terms which had been read into the record to be attached to the initial decision settlement. The Board ratified the agreement that evening. On February 16, 1993, however, the undersigned received a facsimile transmission from Ms. Connors-Ryan herself, forwarding a copy of the settlement agreement which she had signed on February 15, 1993, but on which she had changed the effective dates from June 30, 1991 to February 15, 1993. Her cover letter indicated that she had a problem with the June 30, 1991, date "since I was granted a leave by the Board and was not due back until September 2, 1991." She further indicated that she felt to make the resignation retroactive to June 1991 was extremely inappropriate and served no legitimate purpose. Thereafter, discussions by telephone conference call took place between counsel for both parties and the undersigned wherein the attorney for the Board indicated that he had no problem with changing the June 30, 1991 date to September 2, 1991, since in fact she had been on an officially approved leave until that date. The Board was unwilling to agree to the February 15, 1993, however, because in it's view such a date would, after the fact, provide Ms. Connors-Ryan with the approved leave to which she had alleged she was entitled and which the Board had denied. The agreement as executed by Ms. Connors-Ryan on February 15, 1993, is attached hereto and made a part hereof.

By letter dated February 25, 1993, counsel for Ms. Connors-Ryan advised that she now felt that she had been coerced into the settlement agreement and wished to have the settlement set aside.

By letter dated March 1, 1992, the undersigned advised the parties that the agreement placed upon the record on January 19, 1993, was a binding agreement, that the fact that the agreement was oral was relevant only to the paperwork necessary to closeout the file and that a signed written agreement usually provided by the parties was only a convenience and a courtesy to the judge so that he or she would not have to recite the terms. The letter further advised that the record would be considered closed as of March 1, 1993, and an initial decision would be issued.

Based upon all of the foregoing, I **CONCLUDE** that the present case is one which is appropriate for settlement pursuant to the principles annunciated in *Cardonic v. Board of Education of the Borough of Brooklawn*, EDU 7093-81, 7094-81, dec'd April 6, 1983 by the State Board of Education. The charges herein reveal no allegation of affirmative wrongdoing; although the word "insubordination" is used in the charges, the facts relevant to that charge are the same facts relevant to the allegation that Ms. Connors-Ryan abandoned her position, i.e., she failed to return to her position when the Board advised her that no further approved leave would be forthcoming. Although the Board disagreed that the circumstances set forth by Ms. Connors-Ryan warranted an additional extension of her leave of absence, at all times the Board was aware of Ms. Connors-Ryan's position and her reasons therefor, and, accordingly, the Board was able to arrange for long-term substitutes so that no disruption to educational continuity occurred. Ms. Connors-Ryan was on an approved leave of absence prior to the certification of the tenure charges and therefore, these proceedings involve no salary payments pursuant to *N.J.S.A. 18A;6-14.* Although the decision is exclusively for the State Board of Examiners to make, the charges do not appear to be of the degree of seriousness as they would require action by the State Board of Examiners for revocation or suspension of respondent's certificate.

Furthermore, if the tenure charges were to be upheld following a hearing on the merits, pursuant to *N.J.S.A.* 18A:66-36 Ms. Connors-Ryan would forfeit her rights to deferred retirement benefits based upon her fourteen years of creditable service. Although the Legislature has provided for absolute forfeiture of pension rights for those members removed for cause before they are eligible to actually receive retirement benefits, a voluntary resignation prior to removal for cause will permit Ms. Connors-Ryan to avoid the effect of the mandatory forfeiture provisions on her deferred retirement benefits. *Widdis v. Retirement System*, 238 *N.J. Super.* 70 (App. Div. 1990). Preservation of pension rights is a legitimate concern for the Commissioner when considering proceedings involving tenure charges. *In re Fulcomer,* 93 *N.J. Super.*404, 421 (App.Div. 1967).

For all these reasons, I **CONCLUDE** that the public interest does not require a plenary hearing to fully determine the issues in this case and I, therefore, recommend to the Commissioner of Education the approval of this settlement as an appropriate voluntary resolution of this matter entirely consistent with the law and philosophy expressed in *Cardonic v. Board of Education of the Borough of Brooklawn,* supra.

With respect to Ms. Connors-Ryan's allegations that the settlement agreement was coerced, I saw no evidence of that on January 19, 1993, and when she was specifically asked, under oath, whether anyone had coerced her or placed undue influence upon her to enter into the agreement, she had responded in the negative. A settlement agreement between parties to a law suit is a contract. *Nolan v. Lee Ho,* 120 *N.J.* 465, 472 (1990). The party seeking the extraordinary remedy of reopening a case or issues previously resolved by a voluntary settlement must demonstrate by clear and convincing proof that the agreement was the result of fraud, undue influence or duress, or mutual mistake as to a material fact. Other standard reasons for rescission of settlement agreements include substantial failure of consideration, nonperformance or breach or other such compelling circumstances. A settlement cannot be vacated because the party later determines that he or she had made a bad deal or because he finds the contract less profitable to him than he had anticipated when the contract was made. The cases cited by the Court in *Nolan v. Lee Ho, supra,* in tracing its approach to setting aside settlement agreements were all resolved against the parties seeking rescission. Each time the Court emphasized that the claimant had been represented by competent legal counsel, had been fully apprised of the settlement agreement's terms and had entered into the agreement knowingly and voluntarily. In the present matter there is no question that Ms. Connors-Ryan was represented throughout by competent, legal counsel; she testified under oath in response to a question from the undersigned that she had been satisfied with the services provided by her attorneys.

With respect to the "effective date" in the settlement agreement which is disputed by Ms. Connors-Ryan, she is in fact correct that she had been officially granted a leave of absence up to and including September 2, 1991. During a telephone conference call between counsel and the undersigned, the attorneys agreed that September 2, 1991, would be an appropriate effective date and indicated that the original agreement had used June 30, 1991, probably inadvertently.

Accordingly, it is hereby **ORDERED** that the terms of the settlement agreement which were read into the record on January 19, 1993, and which are quoted hereinabove are hereby **MODIFIED** to substitute September 2, 1991 for June 30, 1991, each time that date appears. It is further **ORDERED** that the parties are bound by the terms of their agreement as set forth in the stipulation of settlement quoted hereinabove and as modified by this order and these proceedings are hereby **DISMISSED WITH PREJUDICE**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

April 15, 1993
Date

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

4/15/93
Date

Maureen E. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 21 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

am

OAL DKT. NOS. EDU 3621-92 and 3656-92 (CONSOLIDATED)

IN THE MATTER OF THE TENURE HEARING OF KATHLEEN CONNORS-RYAN, FREEHOLD REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY.	:	
AND	:	COMMISSIONER OF EDUCATION
KATHLEEN CONNORS-RYAN,	:	DECISION
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	
RESPONDENT.	:	

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

The Commissioner approves the settlement terms as they comport with the Cardonick standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846) The Commissioner additionally notes that she is in full agreement with the ALJ's determination with respect to Ms. Connors-Ryan's attempt to seek recision of this negotiated settlement agreement. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

MAY 26, 1993

DATE OF MAILING - MAY 26, 1993

COMMISSIONER OF EDUCATION

104-93

AIDA MUELLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, part-time Spanish teacher who was on preferred eligibility list, alleged Board violated her tenure rights by hiring a nontenured teacher for a full-time Spanish position. Petitioner was subsequently restored to a part-time position.

ALJ concluded petitioner's tenure rights were violated. ALJ found petitioner acquired tenure on February 1, 1992. Board erred in failing to offer petitioner full-time position that arose prior to the part-time position. ALJ ordered Board to place petitioner in full-time position retroactive to September 1, 1992 with compensation.

Commissioner agreed with ALJ's legal analysis if petitioner were tenured. However, Commissioner remanded matter to OAL for further findings of fact and conclusions of law pertaining to petitioner's tenure status as such status is not clear from the record.

MAY 26, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6561-92
AGENCY DKT. NO. 291-6/92

AIDA MUELLER,
Petitioner,
v.
BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT,
Respondent.

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

James P. Granello, Esq., for respondent

Record Closed: March 3, 1993 Decided: April 14, 1993

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

Aida Mueller, petitioner, alleges the Hunterdon Central Regional High School Board of Education, respondent, violated her tenure rights when it hired a nontenured full-time Spanish teacher for the 1992-93 school year.

This matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14B-1 through -15 and N.J.S.A. 52:14F-1 through -13. After notice, a prehearing conference was conducted by telephone and, among other things, it was agreed that all essential facts could be stipulated and that the matter could proceed on motion and cross-motion for summary judgment. A joint stipulation of facts and six exhibits were submitted and counsel then filed papers supporting their respective motions.

FACTUAL BACKGROUND

The parties submitted and I **FIND** as fact:

1. Petitioner Aida Mueller possesses Teacher of Spanish and Teacher of French endorsements on her instructional certificate.

2. The Hunterdon Central Regional High School Board of Education is responsible for all of the students within the Hunterdon Central Regional High School District of Hunterdon County.

3. Petitioner was first employed on a full-time basis by the Board for the period September 1, 1988 through January 30, 1989 as a replacement teacher for a teacher on maternity leave.

4. Effective February 1, 1989 Petitioner was employed by the Respondent Board of Education through June 30, 1989 on a full-time basis as a Teacher of Spanish. Petitioner filled a teaching vacancy during the period February 1, 1989 through June 30, 1989. She contends that she was not a "replacement teacher" during this period. The Board of Education assumes for the purpose of these motions for summary decision that this half-year period did count towards her tenure in the district.

5. Petitioner was employed during the 1989-90 school year as a two-fifths time Spanish Language Teacher within the Hunterdon Central Regional High School District. This employment was not on a replacement teacher/substitute basis.

6. Petitioner was employed during the period September 1, 1990 through June 30, 1991 as a four-fifths time Spanish Language Teacher by the Respondent Board of Education. Petitioner was not employed on a replacement teacher/substitute basis during this period of time.

7. Petitioner was employed for the period September 1, 1991 through June 30, 1992 as a four-fifths time Spanish Language Teacher by respondent Board of Education. Petitioner was not employed as a replacement teacher/substitute.

8. On or about April 28, 1992 Petitioner was advised that her contract would not be renewed for the 1992-93 school year. At the same time, the Board of Education advised Lynn Luster, a non-tenured Teacher of Spanish and the only non-tenured Teacher of Spanish at that time (assuming Petitioner's tenure), that she would not be renewed for the following school year. Ms. Luster holds certifications in Spanish and English. Petitioner had the least seniority of all the tenured Teachers of Spanish.

9. On May 21, 1992 the Board of Education posted a full-time Teacher of Foreign Language position to begin September 1, 1992. At that time, the Board of Education was seeking teachers with dual German and Spanish certification. (See Exhibit "A.")

10. The Petition of Appeal in the instant matter was filed with the Commissioner of Education on or about June 22, 1992 and received by the Board of Education on June 25, 1992.

11. Lynn Luster, a non-tenured teacher, was reappointed to a full-time position of Teacher of Foreign Language by motion of the Board of Education on June 23, 1992 for the 1992-93 school year to begin on September 1. 1992. Ms. Luster's assignment was a full-time Teacher of Spanish assignment. (See Exhibit "B.")

12. In a letter dated July 1, 1992 the Board of Education through its Superintendent of Schools, Raymond Farley, advised Petitioner that she would be recommended for "a part-time, tenured teaching position for the 1992-93 school year." Ms. Mueller was subsequently advised that she was employed on a three-fifths time basis for the 1992-93 school year as a Teacher of Spanish to begin on September 1, 1992. (See Exhibit "C.")

13. On July 15, 1992 the Board of Education posted a vacancy for a Foreign Language Teacher with dual certification in Spanish and German. (See Exhibit "D.")

14. Unable to find a candidate with German and Spanish certifications, on July 28, 1992 the Board of Education advertised for a full-time Spanish Teacher to be available September 1, 1992. (See Exhibit "E.") The Board of Education had authorized filling a vacant full-time Spanish teaching position within the district by Lynn Luster prior to the July 28, 1992 posting and prior to the time that the Board of Education appointed Petitioner to a three-fifths position for the 1992-93 school year.

15. At the September 21, 1992 Board of Education meeting the Board of Education moved the Petitioner to a position of four-fifths time Teacher of Spanish retroactive to September 1, 1992. Petitioner actually began working as a four-fifths time teacher on September 1, 1992. (See Exhibit "F.") As a result, Petitioner's continuing employment with the Board of Education and the level of compensation and benefits has not changed since she held a four-fifths position at the end of the 1991-92 school year.

16. In addition to Lynn Luster, two (2) additional non-tenured first year teachers were employed by the Board of Education to fill the full-time Teacher of Spanish positions within the district for the 1992-93 school year effective September 1, 1992 by action of the Board of Education taken on September 21, 1992. They were Mr. Robert Baca and Mr. Gregory Mantore. (See Exhibit "F.") Mr. Baca was offered a full-time Teacher of Spanish position by the Board of Education on or about July 31, 1992 and accepted said position on or about August 15, 1992. Mr. Mantore was offered a full-time Teacher of Spanish position by the Board of Education on or about August 10, 1992 and accepted said position on or about August 10, 1992.

PARTIES' ARGUMENTS

Respondent

The respondent Board assumes for the sake of this argument that the petitioner has acquired tenure in the District and that a non-tenured teacher was hired to fill the full-time vacancy posted in July 1992. Based on the facts stipulated above, petitioner claims she acquired tenure as of February 2, 1992 as a Spanish teacher and seeks full-time employment based on a vacancy for a full-time Spanish teacher on the basis of being notified in April 1992 that her position would be eliminated for the following school year. However, on September 22, 1992, the Board restored the petitioner to her 4/5-time Spanish teaching position retroactive to September 1. In effect, her employment as a ten-month teacher was not interrupted.

The Board relies on Gainer v. Wayne Bd. of Ed., OAL DKT. EDU 7545-90 (July 8, 1991), adopted, Comm'r of Ed. (Aug. 26, 1991). In Gainer, the petitioner was employed as a part-time supplemental teacher and acquired tenure. She was notified she would not be reemployed because of a reduction in force (RIF). She sought a full-time vacancy that occurred because of the untimely death of an English

teacher. Gainer applied for consideration for the full-time position but the Board took no action on her request. Thereafter, the Board appointed Gainer to her part-time position before the opening of school. At the same meeting, the Board appointed a nontenured teacher to the vacant English teaching position.

In Gainer, the Board argued that Gainer's seniority rights were never triggered as she was reemployed in her part-time supplemental teaching position for the following school year. The Administrative Law Judge agreed that her seniority rights were never triggered because she was restored to her previous position at the start of the next school year. The Commissioner adopted the Administrative Law Judge's conclusions but found that a RIF did take place and that, in fact, Gainer was recalled as a part-time supplemental teacher. The Commissioner found Gainer was "saved harmless by virtue of such recall." Slip op. at 15. The Commissioner stated, "She may not lay claim to any other position when she has suffered no reduction in compensation, has had no reduction in duties, and has not been dismissed." Id.

The petitioner has also relied on Lichtman v. Ridgewood Bd. of Ed., 93 N.J. 362 (1983) to support the position that she is entitled to a full-time vacant position over a non-tenured teacher. However, in Lichtman, the appellant's part-time position had been eliminated. The court held that her position was eliminated and by law her seniority acquired in a part-time librarian position entitled her to full-time employment over a non-tenured employee. She was entitled to invoke her seniority rights under N.J.A.C. 6:3-1.10. The court found no distinction between full-time and part-time positions when it came to the award and calculation of seniority. Gainer and Lichtman both hinge upon the continuation or elimination of the affected employee's position. In comparing these cases with the present matter, it is clear that this matter is controlled by Gainer.

Because the petitioner was recalled to her 4/5-time position, her seniority rights were not invoked and she has no right to claim any other position at this time.

If there had been only one vacancy in the district for a Spanish teacher and that vacancy was a full-time position, the Board agrees that, assuming the petitioner is tenured, she would be eligible to fill that position over a non-tenured teacher. However, that is not the case. Two positions were filled during the summer months in the Spanish area: the first was the petitioner's position and the second was a full-time Spanish position.

The Board submitted a certification of its Director of Humanities who is responsible for the hiring and termination of all teachers in the foreign language department. He iterates that, as stipulated, the Board sought a person certified in Spanish and German because of needs in both areas. Final staffing needs were not determined until the end of June or later. In consideration of the foregoing, the Board has acted properly in all respects.

Petitioner

The petitioner concedes that, initially, it appears that Gainer supports the Board's contentions. However, Gainer's attorneys filed an appeal with the State Board of Education from the Commissioner's decision. Nevertheless, Gainer has no precedential value in this case.

The Board violated the petitioner's tenure rights when it failed and refused to appoint her to the vacant full-time Spanish position. The tenure laws are clear in establishing the scope and purpose of the petitioner's tenure rights and protections. Given her employment history and Spanish endorsement, the petitioner gained tenure within the district as of February 2, 1992 pursuant to N.J.S.A. 18A:28-5. Tenure is a legislatively created status and no exceptions or limitations to tenure on the basis of policy decisions, administrative convenience or other nonstatutory rationales are permitted.

The petitioner was notified in late April 1992 that she would not be reemployed for the 1992-93 school year. This was a RIF. And, as a tenured teacher, the petitioner immediately was covered by the guarantees in N.J.S.A. 18A:20-12, which states

> If any teaching staff member shall be dismissed as a result of such reduction, such person shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal, if and when such vacancy occurs and in determining seniority, and in computing length of service for reemployment, full recognition shall be given to previous years of service . . . .

Because of her employment under an instructional certificate with a Teacher of Spanish endorsement, the petitioner was entitled to placement on the district's preferred eligible list and seniority list in the category of secondary Spanish. N.J.S.A. 18A:28-12 and -13; N.J.A.C. 6:3-1.10(l)19.

After the end of the 1991-92 school year, the petitioner was advised that the Board would fill, among other positions within the Spanish Department, a full-time teacher of Spanish position. The petitioner, on or about June 22, 1992, filed the present petition of appeal asserting her entitlement to a full-time teaching position pursuant to her tenure status and applicable statute and code.

Because of her statutory placement on the preferred eligible list in the Spanish category, the petitioner had an absolute right to the vacant full-time Spanish position. Statue and code mandate this outcome. In particular, N.J.S.A. 18A:28-12 states that a tenured teacher on a preferred eligible list must be reemployed whenever a vacancy occurs in a position for which such person shall be qualified. Simply stated, the petitioner was, by statute, on a preferred eligible list for reemployment as of April 28, 1992. Prior to the end of the 1991 school year and certainly after the Board posted a notice of vacancy for a full-time Spanish teacher position on July 28, 1992, the petitioner had a statutory entitlement to a full-time Spanish teacher position.

N.J.S.A. 18A:28-12 is clear. An employee must be rehired from a preferred eligible list whenever a vacancy occurs. The vacancy in question came into being prior to the time the petitioner was reemployed on a 4/5-time basis. The petitioner was entitled to fill the full-time Spanish teacher vacancy that first came about in June 1992 and was posted in July 1992, not the so-called vacancy in the part-time position eventually given to her for the 1992-93 school year. The obligation of a board of education to recall an employee from the preferred eligible list must be deemed to occur whenever the vacancy itself comes into existence, not at a later time so as to permit the Board to rearrange positions to establish after-the-fact vacancies that may be used to circumvent the statute and teachers' tenure rights.

Baruffi v. Morris Hills Reg'l School Dist. Bd. of Ed., 1990 S.L.D. 702, holds that a vacancy, within the meaning of N.J.S.A. 18A:28-12, comes into being at the moment it is created. In Baruffi, two teachers who were notified of a RIF under date of April 25 and effective June 30, 1989, were found entitled to reemployment in

vacancies that opened in May 1989, the day they were posted. In the present case, the vacancy at issue occurred in June 1992 and the Board may not avoid this fact and the attendant legal responsibilities. A board of education cannot terminate or reduce a tenured teacher while retaining a nontenured teacher.

The Commissioner promulgates seniority regulations, but these regulations do not address the rights of tenured employees vis-a-vis nontenured employees. Rather, seniority provides a mechanism for determining respective rights among tenured teachers in the event of a RIF. Seniority is accrued as a consequence of tenure and is acquired only after tenure is achieved. Whatever seniority distinctions may exist among tenured teachers, seniority cannot limit a teacher's tenure rights over nontenured teachers. Seniority was never intended to limit a teacher's tenure rights and any limitation, particularly concerning nontenured teachers, would contravene the legislative policy by improperly limiting tenure rights.

Here, the Board terminated the petitioner's employment. The petitioner was tenured as a teacher. As a result, her tenure rights extend to all assignments covered by her instructional certificate(s). Her certificate and Spanish endorsement provide the relevant scope of her tenure rights. The Board could not terminate or reduce her employment while employing a nontenured teacher in a full-time Spanish position. In Dennery v. Passaic Valley High Sch., 251 N.J. Super. 144 (App. Div. 1991), the court upheld a tenure claim for an individual who held, but had not previously used, a Supervisor endorsement. The court's decision indicates the value, importance and obligation of filling vacant positions with tenured employees.

The cases do not permit a board of education to RIF a tenured teacher, regardless of whether the teacher had been employed on a full- or part-time basis, and then pass over that employee who was on a preferred eligible list pursuant to N.J.S.A. 18A:28-12 for a vacant position within the appropriate category in favor of a nontenured teacher.

DETERMINATION

It is well settled that a petitioner has failed to state a claim upon which relief can be granted unless she is actually subject to a loss of position and reduction in pay pursuant to a RIF. In Andreula v. Hoboken Bd. of Ed., OAL DKT. EDU 6537-84 (Dec. 18, 1984), aff'd Comm'r of Ed. (Jan. 31, 1985), a physical education teacher's

claim was declared moot because, although the teacher, like the petitioner here, was notified that his position would be abolished for the next school year, he subsequently was rehired before the start of that year. If there is no RIF, no rights are triggered under N.J.S.A. 18A:28-12. In the present case, there was a RIF. The petitioner was notified by letter that she would not be reemployed for the 1992-93 school year. Once the RIF occurred, the petitioner's full panoply of rights attached. According to the stipulations, the Board had authorized filling a vacant full-time Spanish teaching position by a nontenured teacher prior to the July 28, 1992 posting and prior to the time the Board appointed the petitioner to a 3/5-time position.

Although many of the same actions occurred in Gainer and here, the timing is different. It is true that the petitioner was, in effect, saved harmless by virtue of appointment on September 21, 1992 to a 4/5-time position. She has suffered no reduction in duties and has not been dismissed. Her restoration, however, occurred after her rights to a full-time position were triggered by virtue of the RIF. Even if her tenured status were not stipulated for purposes of this argument, I would **FIND** that the petitioner achieved tenure status on February 1, 1992. Whether her tenure was in a part-time position or a full-time position, she may assert seniority rights to a full-time position held by a nontenured teacher following a RIF.

As the Commissioner, State Board and Appellate Division held in Edison Tp. Education Ass'n v. Edison Bd. of Ed., OAL DKT. EDU 9457-92 (Nov. 14, 1983), aff'd Comm'r of Ed. (Dec. 29, 1983), aff'd St. Bd. (Aug. 8, 1984) aff'd N.J. App. Div. (Feb. 26, 1986, A-515-84T7) (unreported), seniority rights are not assertable at the convenience of a board. Rather, "When a position becomes available, teachers on a seniority list are to be so placed immediately, as determined by such list." Slip op. at 23. These conditions obtain in the present case.

On April 28, 1992, the petitioner received a nonrenewal notice (RIF). She was a tenured teaching staff member at the time. All rights attached by action of law; the petitioner was required to do nothing to activate her tenure and seniority rights. On June 23, 1992, a nontenured teacher was hired for a full-time Spanish teaching position. A week later, the superintendent wrote to the petitioner stating that he would recommend her for a part-time, tenured position for the 1992-93 school year. On July 15, a full-time Spanish-German position was advertised. On July 28, the posting was changed to a full-time Spanish position.

It is clear the Board hired a nontenured teacher for a full-time Spanish position for 1992-93 before it hired the petitioner for a part-time position for 1992-93. The Board compounded this when, on September 21, 1992 it hired two other full-time Spanish teachers and the petitioner on 4/5-time retroactive to September 1, 1992. Inasmuch as the harm was done on June 23, it is not necessary to address the September 21 action.

Having considered all facts and arguments put forward, I **FIND:**

1. The petitioner was a tenured teaching staff member in the employ of the Hunterdon Central Regional High School District when, on April 28, 1992 she received an official communication stating that she would not be employed in September 1992.

2. The Board posted a full-time Spanish-German position on May 21, 1992.

3. On June 23, 1992, the Board hired Lynn Luster, a nontenured teacher for a full-time Spanish teaching position beginning in September 1992.

In Baruffi, above, the Commissioner said, "Petitioners were subject to abolishment of their positions in April 1989. Therefore, when the vacancies for ISS/Remedial positions became open in May 1989, petitioners should by virtue of their tenure rights have been assigned to them as they were qualified for the positions. " Slip op. at 16. 1990 S.L.D. at 714. And, as the State Board of Education noted in Szpiech v. Hopatcong Bd. of Ed., OAL DKT. EDU 5950-84 and EDU 5951-84 (Feb. 13, 1985), aff'd Comm'r of Ed. (Apr. 1, 1985), aff'd in part, rev'd as to relief, St. Bd. (Feb. 4, 1987),

> [W]e reiterate that, as we concluded after extensive analysis in Capodilupo v. Bd. of Ed. of the Town of West Orange, decided by the State Board, September 3, 1986, appeal pending, Docket #A-943-86T7, the position in which a teaching staff member achieves tenure and to which tenure protection attaches is either one of those specifically enumerated in N.J.S.A. 18A:28-5 or some other employment with a board for which a certificate is required, either instructional, educational services or administrative and supervisory. See Howley v. Bd. of Ed. of the Township of Ewing, 1982 S.L.D. 1328, aff'd by the State Board, June 1, 1983. Although the scope of a tenurable position is limited by the certification qualifying a member for assignment within the position, once tenure is achieved, tenure protection extends to service in all assignments within the scope of the endorsement qualifying the member for

> service within his tenured position. Capodilupo, supra. Slip op. at 5. 1985 S.L.D. 2731, 2733.
>
> And, perhaps most tellingly,
>
> We now hold that a tenured part-time teaching staff member with proper certification can claim, as against a nontenured applicant, seniority rights in seeking appointment to a full-time position that is within the specific categories covered by the certification and that has responsibilities identical to those of the part-time position in which employment was actually held. Lichtman v. Ridgewood Bd. of Ed., 93 N.J. 362 (1983).

See also, Ellicott v. Frankford Bd. of Ed., 251 N.J. Super. 342 (App. Div. 1991).

I **CONCLUDE** that the tenure rights of Aida Mueller were violated when a nontenured person was hired for a full-time Spanish teaching position on or about June 23, 1992 while Mueller, a tenured teacher in the Spanish category, was on a preferred eligible list pursuant to N.J.S.A. 18A:28-12. Mueller enjoyed tenure rights to all positions for which her certificate qualified her, including the full-time Spanish teaching position that was given to a nontenured person on June 23, 1992.

Accordingly, I **ORDER** the appointment of Aida Mueller to a full-time Spanish teaching position retroactive to September 1, 1992 together with back pay and other economic emoluments of employment, including appropriate pension fund adjustment.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

14 APRIL 1993
Date

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

4/15/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 20 1993
Date

OFFICE OF ADMINISTRATIVE LAW

km

EXHIBITS

A Job Posting, May 21, 1992
B Reappointments for the 1992-93 school year, June 23, 1992
C Excerpt, Board Minutes, regular meeting of July 20,. 1992
D Job Posting, July 15, 1992
E Job Posting, July 28, 1992
F Excerpt, Board Minutes, regular meeting, September 21, 1992

AIDA MUELLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Board cites three exceptions. The first avers that the ALJ below should not have found as a fact that petitioner achieved tenure on February 1, 1992 insofar as the ALJ reached such conclusion by relying, in part, on an assumption agreed to by the Board for the purposes of the cross-motions for summary decision only. Said assumption, the Board claims, is set forth in paragraph four of the joint stipulation of facts which states:

> Effective February 1, 1989 Petitioner was employed by the Respondent Board of Education through June 30, 1989 on a full-time basis as a Teacher of Spanish. Petitioner filled a teaching vacancy during the period February 1, 1989 through June 30, 1989. She contends that she was not a "replacement teacher" during this period. The Board of Education assumes for the purpose of these motions for summary decision that this half-year period did count towards her tenure in the district.

The Board seeks a remand of this matter for a plenary hearing to determine whether petitioner's employment satisfied the statutory criteria under N.J.S.A. 18A:28-5.

Exception two submits the ALJ erred in concluding that Petitioner's tenure rights were violated when a nontenured person was hired to fill a full-time position effective September 1, 1992. The Board reiterates that it was unable to find a candidate with German and Spanish endorsements and that it advertised on July 28, 1992 for two full-time positions to be available September 1, 1992. It claims that none of the nontenured teachers began working prior to petitioner on September 1, 1992. The Board submits the vacancy in question occurred as of September 1, 1992 even though the hiring might have occurred earlier. Thus, the Board contends, petitioner did not lose her previous employment status.

Exception three would have the Commissioner apply the holding of Mary Ann Gainer v. Board of Education of the Township of Wayne, Passaic County, 1991 S.L.D. 1347 to the within matter, claiming that petitioner herein was "'saved harmless" (Exceptions, at 2, citing Gainer at 1361) because her tenure rights to her former position were restored.

The Board seeks reversal of the ALJ's decision and that the Petition of Appeal be dismissed with prejudice.

Upon careful and independent review of the instant matter, the Commissioner concludes that the ALJ below has accurately discerned that, accepting the facts as stipulated, the instant matter is distinguishable from Gainer, supra, because of the timing of the vacancies posted by the Board. Notwithstanding the Board's complaint that it could not secure the services of a combination

German-Spanish teacher, that position was not the first posted. Rather, on June 23, 1992 it hired a nontenured teacher for a full-time Spanish teaching position, one for which petitioner was qualified. Because petitioner had been riffed on April 28, 1992, her status on the preferred eligibility list mandated that the Board first offer her the full-time Spanish position. The full-time Spanish-German position was not advertised until July 15. Thus, the Board abridged petitioner's tenure rights as of June 23, 1992.

However, notwithstanding this determination, the Commissioner is troubled by the ALJ's conclusion regarding petitioner's tenure status. While the Commissioner concurs with the ALJ's analysis of the law applicable in this matter, the record before her will not permit a conclusion regarding the threshold issue of whether petitioner is in fact a tenured employee in respondent's district. On page nine of the initial decision the ALJ concludes that petitioner achieved tenure status on February 1, 1992. However, he does not set forth the basis upon which such conclusion is drawn. Inquiry to establish petitioner's tenure status is not aided, moreover, by the Board's exceptions. While the Board has attempted in the joint stipulation of facts to reserve its right to challenge petitioner's claim of tenure resulting from the period of employment from February 1, 1989 to June 30, 1989, its own Answer admits those pleadings set forth in the Petition of Appeal at paragraph 4, which state:

> ***Petitioner filled a teaching vacancy during the period between February 1, 1989 through June 30, 1989. She was not a "replacement teacher" during this time period.

Matters are further muddied by observation of paragraph two of the Board's Answer which states:

As to paragraph 5 of the petition of appeal, respondent Board denies petitioner was not a "replacement teacher" during the 1989-90 school year, and in fact she replaced a non-tenured teacher, Rosa Borga, who was granted maternity leave for the 1989-90 school year.

Hence, because the Commissioner must be vigilant in protecting the employment rights of not only petitioner but also of all individuals whose employment could be affected by a determination in this case, a remand to the Office of Administrative Law is required for further findings of fact and conclusions of law pertaining to whether petitioner is tenured in respondent's district.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 26, 1993

DATE OF MAILING - MAY 26, 1993

104-93

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(104-93)

AIDA MUELLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,	:	DECISION OF REMAND
RESPONDENT.	:	

AUGUST 18, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL FOR MOOTNESS
OAL DKT. NO. EDU 5122-93
AGENCY DKT. NO. 291-6/92
(EDU 6561-92 ON REMAND)

AIDA MUELLER,
Petitioner,
v.
BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT,
Respondent.

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

James P. Granello, Esq., for respondent

Record Closed: July 1, 1993 **Decided:** July 7, 1993

BEFORE BRUCE R. CAMPBELL, ALJ:

Aida Mueller, petitioner, alleged the Hunterdon Central Regional High School Board of Education, respondent, violated her tenure rights when it hired a nontenured full-time Spanish teacher for the 1992-1993 school year.

The matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14B-1 through -15 and N.J.S.A. 52:14F-1 through -13. After notice, a prehearing conference was conducted and it was agreed that all essential facts could be stipulated and that the matter could proceed on motion and cross-motion for

summary judgment. A joint stipulation of facts and six exhibits were submitted. Counsel then filed papers supporting their respective motions.

On April 14, 1993, an initial decision issued ordering the appointment of Aida Mueller to a full-time Spanish teaching position retroactive to September 1, 1992 together with back pay and emoluments.

On May 26, 1993, the Commissioner remanded for further findings of fact and conclusions of law concerning the petitioner's tenure in the district. On June 22, 1993, counsel for the Board advised this judge that it no longer wished to contest the matter. On July 1, 1993, the judge received a letter dated June 29, stating:

> This letter will serve to confirm that the respondent, Hunterdon Central Regional High School District Board of Education, no longer wishes to contest the issue of the tenure status of the petioner, Aida Mueller, in connection with the above-referenced matter. . . .

The respondent having conceded the petitioner's tenure status, I **FIND** and **CONCLUDE** that there no longer is a justiciable matter before me. Accordingly, the petition of appeal is **DISMISSED FOR MOOTNESS**.

It is so **ORDERED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

7 JULY 1993
Date

Bruce R. Campbell
BRUCE R. CAMPBELL,, ALJ

Receipt Acknowledged:

7/9/93
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 13 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

acw

JAMES P. GRANELLO
COUNSELLOR AT LAW
530 PROSPECT AVENUE
LITTLE SILVER, NEW JERSEY 07739

(908) 842-4114
FAX (908) 747-8469

JAMES P. GRANELLO
MEMBER N.Y. & N.J. BARS

HUNTERDON COUNTY OFFICE
ONE CAPNER STREET
FLEMINGTON, NEW JERSEY 08822
(908) 806-3111

ALL REPLIES TO LITTLE SILVER

June 29, 1993

Hon. Bruce R. Campbell
Office of Administrative Law
Quakerbridge Plaza, Bldg. #9
CN 049
Trenton, New Jersey 08625

JUL 1 11 01 AM '93
RECEIVED

Re: Aida Mueller v. Hunterdon
Central Board of Education
OAL Docket No. EDU 6561-02

Dear Judge Campbell:

This letter will serve to confirm that the respondent, Hunterdon Central Regional High School District Board of Education, no longer wishes to contest the issue of the tenure status of the petitioner, Aida Mueller, in connection with the above-referenced matter. Accordingly, we will comply with the decision rendered by the Commissioner of Education that petitioner is to be placed in a full-time position retroactive to September 1, 1992 with compensation.

Very truly yours,

James P. Granello

JPG:slh

cc: Stephen B. Hunter, Esq.
Raymond Farley, Superintendent

OAL DKT. NO. EDU 5122-93

AIDA MUELLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,	:	DECISION OF REMAND
RESPONDENT.	:	

The record and initial decision on remand rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties. Upon careful and independent review of the record of this matter, the Commissioner concurs with the conclusion of the ALJ that the matter is moot. She so decides because the Board conceded that petitioner is tenured in the district and agreed in the letter of June 29, 1993 submitted to the ALJ through its counsel that it will comply with the Commissioner's decision of May 26, 1993 directing that petitioner be placed in a full-time position retroactive to September 1, 1992 with compensation.

The Petition of Appeal is hereby dismissed for mootness.

AUGUST 18, 1993

COMMISSIONER OF EDUCATION

DATE OF MAILING - AUGUST 18, 1993

105-93

IN THE MATTER OF THE TENURE	:	
HEARING OF NORBERTO RAMOS, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP OF	:	DECISION
IRVINGTON, ESSEX COUNTY.	:	
	:	

MAY 26, 1993

IN THE MATTER OF THE TENURE	:	
HEARING OF NORBERTO RAMOS, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP OF	:	DECISION
IRVINGTON, ESSEX COUNTY.	:	
	:	

For the Board, Nicholas Celso, III, Esq.
(Schwartz, Simon & Edelstein)

Whereas, this matter was opened before the Commissioner of Education on January 25, 1993 by way of tenure charges of incapacity, unbecoming conduct and other just cause against respondent, a custodian under tenure in the school district; and

Whereas, respondent was directed to file an answer to these charges by notices from the Bureau of Controversies and Disputes dated January 27, 1993 and February 23, 1993; and

Whereas, no reply was received from respondent, resulting in issuance on March 17, 1993 of a letter sent by regular and certified mail, advising respondent that unless an Answer were received from him or his attorney within ten (10) days, the charges against him would be deemed admitted and the Commissioner would render a decision on a summary basis; and

Whereas, respondent signed a receipt for delivery of the certified letter on March 19, 1993, but has to date failed to file a response to the charges; now therefore,

IT IS ORDERED this 26TH day of May 1993 that Summary Judgment is granted to the Board and respondent is dismissed from his tenured employment as of the date of this decision.

Mary Lee Fitzgerald
COMMISSIONER OF EDUCATION

MAY 26, 1993

DATE OF MAILING - MAY 26, 1993

106-93

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
PERTH AMBOY, MIDDLESEX COUNTY.	:	
	:	

MAY 26, 1993

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF : DECISION
PERTH AMBOY, MIDDLESEX COUNTY. :
:

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held on April 20, 1993 in the School District of the City of Perth Amboy, Middlesex County, were as follows:

CANDIDATES	AT POLLS	ABSENTEE	TOTAL
Carmen J. Fernandez	1,293	21	1,314
Timothy J. Dacey	1,251	35	1,286
Arnold A. Cohen	1,174	31	1,205
Ali Rodriguez, Jr.	1,102	15	1,117
Lisa Nanton	1,071	39	1,110
William Petrick	1,043	39	1,082

Pursuant to a letter request from Lisa Nanton and William Petrick, defeated candidates, dated April 30, 1993, an authorized representative of the Commissioner of Education from the Office of the Middlesex County Superintendent of Schools was directed to conduct a recount of the machine ballots cast. The recount was conducted on May 6, 1993 at the Voting Machine Warehouse in Edison.

At the conclusion of the recount, the tally stood unchanged and was as follows:

CANDIDATES	AT POLLS	ABSENTEE*	TOTAL
Carmen J. Fernandez	1,293	21	1,314
Timothy J. Dacey	1,251	35	1,286
Arnold A. Cohen	1,174	31	1,205
Ali Rodriguez, Jr.	1,102	15	1,117
Lisa Nanton	1,071	39	1,110
William Petrick	1,043	39	1,082

* The absentee ballot counts are reported as provided by the Board of Education on the Regular/Combined Statement of Result of School Election.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of her authorized representative and adopts it as her own.

Accordingly, the Commissioner finds and determines that Arnold A. Cohen, Timothy J. Dacey and Carmen J. Fernandez were elected to full terms of three years each on the Board of Education of the School District of the City of Perth Amboy at the annual school election held on April 20, 1993.

IT IS SO ORDERED.

Maryanne Fitzgerald
COMMISSIONER OF EDUCATION

MAY 26, 1993

DATE OF MAILING - MAY 26, 1993

107-93

107-93

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF SOUTH BOUND BROOK, SOMERSET	:	
COUNTY.	:	

MAY 26, 1993

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF SOUTH BOUND BROOK, SOMERSET	:	
COUNTY.	:	

The announced results of the balloting for three members of the Board of Education for full terms of three years each and one member of the Board of Education for an unexpired term of one year at the annual school election held on April 20, 1993 in the School District of the Borough of South Bound Brook, Somerset County, were as follows:

FULL THREE-YEAR TERM

CANDIDATES	AT POLLS	ABSENTEE	TOTAL
Amy J. Wacker	71	1	72
Marie DeLoach (Write-In)	2	0	2
Ann Fives (Write-In)	1	0	1
Joann Schubert (Write-In)	1	0	1
Carol Kemp (Write-In)	1	0	1
Hank Barnett (Write-In)	1	0	1
Arlene Lih (Write-In)	1	0	1
Helen Fives (Write-In)	1	0	1
Mary DeLoach (Write-In)	1	0	1
Richard Smith (Write-In)	0	1	1
Robert Barber (Write-In)	0	1	1

UNEXPIRED ONE-YEAR TERM

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Harold Parks (Write-In)	0	1	1

Pursuant to the requirements of N.J.S.A. 18A:12-15c regarding vacancies in the membership of a board of education caused

as a result of two or more candidates receiving an equal number of votes, a recount was conducted at the order of the Somerset County Superintendent of Schools in determining the results of the election. Absentee ballots were recounted by the Somerset County Board of Elections. The recount was conducted on May 6, 1993 at the Somerset County Board of Election Office, Administrative Building, 20 Grove Street, Somerville, at the Somerset County Board of Elections Voting Machine Warehouse, Route 206 South, Hillsborough Township, and at the Somerset County Superintendent of Schools Office, 6 Kirby Avenue, Somerville.

At the conclusion of the recount, the tally stood unchanged and was as follows:

FULL THREE-YEAR TERM

CANDIDATES	AT POLLS	ABSENTEE	TOTAL
Amy J. Wacker	71	1	72
Marie DeLoach (Write-In)	2	0	2
Ann Fives (Write-In)	1	0	1
Joann Schubert (Write-In)	1	0	1
Carol Kemp (Write-In)	1	0	1
Hank Barnett (Write-In)	1	0	1
Arlene Lih (Write-In)	1	0	1
Helen Fives (Write-In)	1	0	1
Mary DeLoach (Write-In)	1	0	1
Richard Smith (Write-In)	0	1	1
Robert Barber (Write-In)	0	1	1

UNEXPIRED ONE-YEAR TERM

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Harold Parks (Write-In)	0	1	1

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of her authorized representative and adopts as her own the findings set forth above.

The Commissioner therefore finds and determines that Amy J. Wacker and Marie DeLoach were elected to full terms of three years each, and Harold Parks was elected to an unexpired term of one year on the Board of Education of the School District of the Borough of South Bound Brook, Somerset County.

The Commissioner further finds and determines that the remaining nine write-in candidates for full three-year term, namely, Ann Fives, JoAnn Schubert, Carol Kemp, Hank Barnett, Arlene Lih, Helen Fives, Mary DeLoach, Richard Smith, and Robert Barber, each received an equal number of votes at the annual school election held on April 20, 1993, and directs that a special election shall be held pursuant to N.J.S.A. 18A:12-15c and in consideration of N.J.S.A. 18A:14-3. In so directing, the Commissioner notes that the candidates must be qualified by law and desire to serve on the Board of Education.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 26, 1993

DATE OF MAILING - MAY 26, 1993

107-93

107-93

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF BERKELEY, OCEAN COUNTY.	:	
_____	:	

MAY 26, 1993

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP : DECISION
OF BERKELEY, OCEAN COUNTY. :
:

The announced results of the balloting for three members of the Board of Education for full terms of three years each, one member for an unexpired one-year term, and the General Fund proposition at the annual school election held April 20, 1993 in the School District of the Township of Berkeley, Ocean County, were as follows:

THREE-YEAR TERM

CANDIDATES	AT POLLS	ABSENTEE	TOTAL
Patricia H. Moore	1,277	54	1,331
Raymond L. Smith	990	58	1,048
Margaret Geffken	986	36	1,022
Stephen Lazorchak	949	60	1,009
Wilfred E. Venet	932	33	965
Josephine Roeder	875	38	913

UNEXPIRED ONE-YEAR TERM

CANDIDATES	AT POLLS	ABSENTEE	TOTAL
Carmen F. Amato, Jr.	972	44	1,016
Patricia Dobrzelecki	688	26	714
Curtis Clark	311	22	333

GENERAL FUND

GENERAL FUND	AT POLLS	ABSENTEE	TOTAL
Yes	542	34	576
No	522	56	578

In response to a letter dated April 26, 1993 from Wilfred E. Venet and Stephen Lazorchak, defeated candidates, requesting a recount of the candidate vote, and a letter from Elaine M. Clay, Secretary of the Berkeley Township Board of Education, requesting a recount of the votes cast for the General Fund proposition, an authorized representative of the Ocean County Superintendent of Schools was directed to conduct a recount of the votes cast for these questions. The recount was conducted on May 3, 1993 at the Ocean County Voting Machine Warehouse, Dover Township. At the conclusion of the recount, the tally stood as follows:

THREE-YEAR TERM

CANDIDATES	AT POLLS	ABSENTEE	TOTAL
Patricia H. Moore	1,277	54	1,331
Raymond L. Smith	990	58	1,048
Margaret Geffken	986	36	1,022
Stephen Lazorchak	945	60	1,005
Wilfred E. Venet	932	33	965
Josephine Roeder	875	38	913

UNEXPIRED ONE-YEAR TERM

CANDIDATES	AT POLLS	ABSENTEE	TOTAL
Carmen F. Amato, Jr.	972	44	1,016
Patricia Dobrzelecki	688	26	714
Curtis Clark	311	22	333

GENERAL FUND

GENERAL FUND	AT POLLS	ABSENTEE	TOTAL
Yes	522	34	556
No	522	56	578

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of her authorized representative and adopts as her own the findings set forth above.

Accordingly, the Commissioner finds and determines that Patricia H. Moore, Raymond L. Smith, and Margaret Geffken were elected to full terms of three years each and Carmen F. Amato, Jr. was elected to the one-year unexpired term on the Berkeley Board of Education, and the General Fund proposition was defeated in the School District of the Township of Berkeley, Ocean County.

Mary Lee Fitzgerald
COMMISSIONER OF EDUCATION

MAY 26, 1993

DATE OF MAILING - MAY 26, 1993

108-93

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF NORTH ARLINGTON, BERGEN	:	
COUNTY.	:	
_____	:	

MAY 26, 1993

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH : DECISION
OF NORTH ARLINGTON, BERGEN :
COUNTY. :
:

The announced results of the balloting for membership on the Board of Education for two full terms of three years each were as follows:

CANDIDATES	AT POLLS	ABSENTEE	TOTAL
Joseph Ricciardelli	765	8	773
Peter Massa	753	10	763
Anthony Ottaino	749	9	758
Anthony Calabrese	694	9	703

Pursuant to a letter of application from Anthony Ottaino, defeated candidate, dated April 21, 1993, the Commissioner of Education directed her representative from the office of the Bergen County Superintendent of Schools to conduct a recheck of the votes cast on the voting machines. This recheck was conducted on May 5, 1993, at the County Voting Machine Warehouse, Carlstadt.

At the conclusion of the recheck of the votes cast on the voting machines, the tally stood as follows:

CANDIDATES	AT POLLS	ABSENTEE	TOTAL
Joseph Ricciardelli	765	8	773
Peter Massa	753	10	763
Anthony Ottaino	749	9	758
Anthony Calabrese	692	9	701

There was no request for a recount of the absentee ballots.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of her authorized representative and adopts as her own the findings set forth above.

While the recount revealed minor change in the tally, the final results remained the same. Thus, the Commissioner finds and determines that Joseph Ricciardelli and Peter Massa were elected to full terms of three years each on the Board of Education of the Borough of North Arlington.

COMMISSIONER OF EDUCATION

MAY 26, 1993

DATE OF MAILING - MAY 26, 1993

110-93

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF SOUTHERN	:	DECISION
REGIONAL SCHOOL DISTRICT, OCEAN	:	
COUNTY.	:	
_____	:	

MAY 26, 1993

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF SOUTHERN	:	DECISION
REGIONAL SCHOOL DISTRICT, OCEAN	:	
COUNTY.	:	
	:	

The announced results of the balloting for three candidates for the Southern Regional Board of Education for one three-year term at the annual school election held on April 20, 1993 in the Long Beach Island School District, Ocean County, were as follows:

CANDIDATES	AT POLLS	ABSENTEE	TOTAL
Donald S. Myers	325	11	336
John F. Furey, Jr.	301	5	306
Harry P. Howard	141	3	144

In response to a letter request dated April 25, 1993 from L. Gilbert Farr, Esq., who represents John E. Furey, Jr., defeated candidate, a recount was held by an authorized representative of the Commissioner of Education from the office of the Ocean County Superintendent of Schools. The recount was conducted on May 3, 1993 at the Ocean County Voting Machine Warehouse, Dover Township, by the Ocean County School Business Administrator.

At the conclusion of the recount, the announced results were unchanged. This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of her authorized representative and adopts as her own the findings set forth above.

The Commissioner finds and determines that Donald S. Myers was elected to a full term of three years on the Board of Education of the Southern Regional School District

M. Ch. Fitzgerald

COMMISSIONER OF EDUCATION

MAY 26, 1993

DATE OF MAILING - MAY 26, 1993

111-93

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF OLD BRIDGE, MIDDLESEX COUNTY.	:	
	:	

MAY 26, 1993

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP : DECISION
OF OLD BRIDGE, MIDDLESEX COUNTY. :
:

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held on April 20, 1993 in the School District of the Township of Old Bridge, Middlesex County, were as follows:

CANDIDATES	AT POLLS	ABSENTEE	TOTAL
Georgette Marinaccio	1,366	8	1,374
Frank R. Weber	1,293	8	1,301
Kathleen A. Quick	1,282	11	1,293
George B. Landreth	1,231	9	1,240
Lawrence J. Redmond, Jr.	1,146	8	1,154
Mitchell P. Geier	1,115	4	1,119
Mary Jane Szebenyi	970	9	979
Timothy Allan Davis	439	3	442

Pursuant to a letter request from George B. Landreth, defeated candidate, dated April 23, 1993, an authorized representative of the Commissioner of Education from the Office of the Middlesex County Superintendent of Schools was directed to conduct a recount of the machine ballots cast. The recount was conducted on April 27, 1993 at the Voting Machine Warehouse in Edison.

At the conclusion of the recount, the tally stood unchanged and was as follows:

CANDIDATES	AT POLLS	ABSENTEE*	TOTAL
Georgette Marinaccio	1,366	8	1,374
Frank R. Weber	1,293	8	1,301
Kathleen A. Quick	1,282	11	1,293
George B. Landreth	1,231	9	1,240
Lawrence J. Redmond, Jr.	1,146	8	1,154
Mitchell P. Geier	1,115	4	1,119
Mary Jane Szebenyi	970	9	979
Timothy Allan Davis	439	3	442

* The absentee ballot counts are reported as provided by the Board of Education on the Regular/Combined Statement of Result of School Election.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of her authorized representative and adopts it as her own.

Accordingly, the Commissioner finds and determines that Georgette Marinaccio, Kathleen A. Quick and Frank R. Weber were elected to full terms of three years each on the Board of Education of the School District of the Township of Old Bridge.

The Commissioner further directs that a copy of this decision be transmitted to the Office of Administrative Law where inquiries are pending into the conduct of the above-captioned election, the results of which remain binding on the parties unless and until a contrary determination is rendered by the Commissioner upon receipt and review of the initial decision(s) on inquiry issued by the Office of Administrative Law.

IT IS SO ORDERED.

MAY 26, 1993

DATE OF MAILING - MAY 26, 1993

Mary Lee Fitzgerald
COMMISSIONER OF EDUCATION

112-93

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
MAINLAND REGIONAL SCHOOL	:	DECISION
DISTRICT, CONSTITUENT DISTRICT OF	:	
NORTHFIELD, ATLANTIC COUNTY.	:	
_____	:	

MAY 26, 1993

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
MAINLAND REGIONAL SCHOOL : DECISION
DISTRICT, CONSTITUENT DISTRICT OF :
NORTHFIELD, ATLANTIC COUNTY. :
:

The announced results of the balloting for two members of the Board of Education from the constituent district of Northfield for full terms of three years each at the annual school election held on April 20, 1993, in the School District of Mainland Regional, Atlantic County, were as follows:

CANDIDATES	AT POLLS	ABSENTEE	TOTAL
Randy Knowles	608	4	612
Benjamin H. Sooy, III	605	3	608
Lars Hyberg	606	1	607
Philip Holner	1	0	1
Len Smith	1	0	1
Rosemary O'Dowd	1	0	1
Bob Matthews	1	0	1

Pursuant to a written request from Mr. Lars Hyberg, defeated candidate, dated April 27, 1993, the Commissioner of Education directed an authorized representative to conduct a recount of the machine ballots cast. The recount was conducted on May 11, 1993 at the Voting Machine Warehouse, Dolphin Avenue, Northfield. Absentee ballots were recounted at the same location by personnel from the County Board of Elections.

At the conclusion of the recount, the tally stood as follows:

CANDIDATES	AT POLLS	ABSENTEE	TOTAL
Randy Knowles	611	4	615
Benjamin H. Sooy, III	605	3	608
Lars Hyberg	606	1	607
Philip Holner	1	0	1
Len Smith	1	0	1
Rosemary O'Dowd	1	0	1
Bob Matthews	1	0	1

Although there were some minor changes, the names of the two winning candidates remain the same as those derived from the balloting of April 20, 1993. Therefore, it is recommended by the Commissioner's representative that the results as announced at the conclusion of the election remain unaltered.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of her authorized representative and adopts it as her own.

Accordingly, the Commissioner finds and determines that Randy Knowles and Benjamin H. Sooy, III were elected to full terms of three years each on the Mainland Regional Board of Education at the annual school election held on April 20, 1993.

IT IS SO ORDERED.

MAY 26, 1993

Mary Lee Fitzgerald
COMMISSIONER OF EDUCATION

DATE OF MAILING - MAY 26, 1993

113-93

B.J. AND L.F., by their parents and guardians, L.J. and D.F.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parents sought determination that respondent Board should be required to reimburse them in part for the costs of private schools since Board did not ensure the safety of their children when they were enrolled in the district's high school by refusing to discipline students involved in altercations with their children. Board contended it did all it could reasonably be expected to do under the circumstances.

ALJ concluded petitioners were not entitled to reimbursement for costs of private schools. None of the incidents occurred on school premises nor adjacent to school premises. Further, the Board took reasonable actions to ameliorate the situation including filing criminal proceedings. Petition was dismissed.

Commissioner adopted findings and determination in initial decision, specifically noting it is well-established in law that a board has the right to discipline a student for conduct occurring away from school premises but that the record in this matter does not substantiate petitioners' allegations that Board's actions were arbitrary, capricious or unreasonable.

MAY 27, 1993

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1047-92
AGENCY DKT. NO. 10-1/92

B. J. AND L. F., BY THEIR PARENTS AND GUARDIANS, L. J. AND D. F.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK,
Respondent.

Margaret A. Holbrook, Esq., for petitioners

Joanne Butler, Esq., for respondent
(Young, Tarshis, Dimiero & Sayovitz, attorneys)

Record Closed: March 5, 1993 Decided: April 19, 1993

BEFORE **DIANA C. SUKOVICH**, ALJ:

PROCEDURAL HISTORY

On January 15, 1992, a petition was filed with the Department of Education (Department) on behalf of B. J. (petitioner) and L. F. (petitioner), seeking partial reimbursement by the Board of Education of the Township of Teaneck (respondent or Board) of costs incurred for the education of petitioners in private schools. The matter was transmitted by the Department to the Office of Administrative Law on

February 7, 1992 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13.

Hearings were held on November 17, 1992 and January 28, 1993. Initial briefs were filed on February 16, 1992. Petitioners filed a reply brief on February 29, 1993; and respondent, on March 5, 1993, on which date the record was closed.

NATURE OF THE CASE

Petitioners allege that, commencing in the spring of 1991, while they were students at Teaneck High School (High School or School), they were harassed and physically attacked in the community and on the streets going to and from school by a group of students in the Township of Teaneck (Teaneck) public school system and that such attacks escalated until approximately September 17, 1991. It is also alleged that the adult petitioners consulted with the principal of the High School throughout this period seeking assistance in protecting B. J. and L. F.; that while some security was provided in the school, no security was provided outside of the school; and the principal was unable to guarantee petitioners' safety. Petitioners further allege that their parents approached respondent's Superintendent of School and that he could not assure them that the attacks would not continue. Finally, petitioners allege that subsequent to September 17, 1991, on which date L. F. was injured, petitioners withdrew their children from the High School and enrolled them in private schools.

As noted hereinabove, petitioners seek a determination that respondent should be required to reimburse them, in part, for the costs of the private schools. More specifically, petitioners argue that the Board should reimburse them in the same amount as out-of-district students pay to attend school in Teaneck.

Respondent argues that it did all, if not more, than it could have done and was required to do in the circumstances and that in any event, it is not responsible to ensure the safety of students outside of school premises.

FINDINGS OF FACT

B. J. and L. F. and L. J. and D. F., their mothers, respectively, testified on petitioners' behalf. High School and Board administrators testified for respondent.

Their testimony was not inconsistent in most material aspects. The Board's arguments regarding those areas in which there are discrepancies (communications among the individuals in question, actions taken by respondent regarding the incidents in question, as well as generally regarding safety matters and discipline and the geographic location of some of the incidents vis-a-vis the High School) are consistent with the record.

Based upon a review of the entire record, I **FIND** the following to be **FACTS**.

The Board operates five elementary schools, two middle schools, the High School and one alternative school in Teaneck. Respondent is responsible for the education of approximately 4400 pupils, approximately 1300 of whom are students at the High School. The school day commenced at 8:15 a.m. and ended at 2:50 p.m.

At the time in question, and at the current time, Joseph White (White) and Peter Turnamian (Turnamian) were assistant principals at the High School. James Delaney (Delaney) was principal of the High School, and Dr. Howard Morris (Morris) was superintendent of the Teaneck School District.

L. F. is a 17-year-old male resident of Teaneck. His mother is D. F. L. F. attended the High School until September 1991. B. J. is also a 17-year-old male resident of Teaneck. He attended the High School until November 1991 and thereafter recommenced attendance at the High School in September 1992. L. J. is B. J.'s mother.

On approximately October 2, 1990, G. F., who was not a student at the High School, walked up to B. J.'s classroom and addressed B. J. in a harassing manner from the hallway. G. F. was accompanied by B. P., D. J., and J. H., who were students at the High School. G. F. had gone into the High School looking for B. J. He yelled into B. J.'s classroom, as indicated, directing remarks to B. J., but was not physically aggressive. G. F. was a student at another Teaneck school at the time in question.

This incident, as well as other alleged incidents involving G. F. during the summer of 1990, were reported to White at a meeting with him attended by L. J. and the father of another student, J. K., on October 3, 1990. A teacher at the High School had also reported that G. F. was on the premises of the School. After meeting with

the parents, White and Turmanian spoke to D. J. and J. H. and warned them of the consequences of intimidation, harassment and fighting. In addition, Turmanian filed trespass charges against G. F. with the Teaneck police department.

During the spring of 1991, B. J. had heard, through individuals whose identity cannot be determined from the record, that B. P. had been making threats against him, more specifically, that B. P. had said he would "cut B.J.'s throat. " On one occasion, B.J. also heard B.P. saying that the latter would "get" B.J. At the time, B. J. did not report any such threats to High School officials, officials of the Board, nor to local police. B.J. did tell his mother, in the spring of 1991, that he was being harassed by a group of youths. L.J. went to the High School during this general time period and met with Delaney. J.K.'s father was also present. In this general time period, B. J. was leaving school early to avoid contact with the students in question after school. L. J. was told by Delaney that nothing could be done unless incidents occurred on school premises. During the summer of 1991, J.B. was active on a local baseball team. He did not report any problems to his mother during that period.

In September 1991, B. J. reported to his mother that a group of young people were harassing him. On September 14, 1991, a Saturday, a dance was held at the Women's Club in Teaneck. The dance was not sponsored by the High School, and no School chaperones were provided. The dance was not held after a school function. The site was located in a main shopping center approximately seven to eight blocks from the High School, a distance of somewhat less than one mile.

B.J., L.F. and their friend, J.K., attended. The three left the Women's Club at approximately 1:00 a.m. While walking on Grayson Street, towards the High School, they realized that they were being followed by a group of youths. The latter included P.H. and B.P. B.J. told L.F. and J.K. that the group was following B.J. At some point, B.J. left J.K. and L.F. In the vicinity of Grayson Street near Palisade Avenue and Queen Anne Road, someone in the group, which now consisted of 5 to 10 individuals, asked for B.J. L.F. responded that B.J. was not with them. In fact, B.J. was farther up on the walkway. At this point, L.F. was punched in the back of his head. J.K was also attacked. A fight ensued, which altercation lasted for approximately 10 to 15 minutes. L.F. defended himself. He ended up lying on the ground, as did J.K. The other youths left. L.F. and J.K. thereupon went to the latter's

house. L. F. stayed for a very short period of time and then went to his own house. He told his parents what had happened.

B. J. subsequently went home and learned of the attack. He then went to the home of a Mr. March, a teacher at the High School. B. J. is a friend of March's son. B. J. and March thereafter went to L. F.'s house. L. F. was home by then. L. F.'s eyes were red and black, and his clothes were disheveled.

B.J. called his mother from J.K.'s house at approximately 1:15 a.m. She took both him and J.K. to the Teaneck police station. L.J. filed a police report. Statements were taken from both her and her son. J. K., B. P. and P. H. were identified as individuals who were part of the group who had been following B. J. and his friends.

By the time L.F. arrived home on September 14, 1991, his eyes were partially closed, his lips were bleeding and swollen, his clothes were disheveled, and he had black and blue marks on his face. After he had removed his clothes, D.F. observed black and blue marks all over his body. D.F. suggested that the incident be reported to the police and L. F. responded in the negative, expressing fears that that would make the situation worse. Not wanting to "pressure him," she told him to go to bed. The next morning, a Sunday, D.F. drove L.F. to J.K.'s house to determine what had happened. L.F. "begged" her not to do anything regarding the matter. D.F. did not go to the High School regarding the incident because it had occurred on a weekend and did not involve L.F. traveling to and from school.

The incident was not reported to High School administrators until September 18, 1991. B.J. and L.F. attended school on September 16 and 17, 1991, the following Monday and Tuesday, respectively. B. J. was accompanied to school by his mother. On both days, B.J. was driven home by March. There were no incidents regarding B.J. at school on Monday and Tuesday. D.F., L.F.'s mother, was not aware of any problems regarding L.F. prior to September 14, 1991.

A second incident involving L.F. occurred on September 17, 1991. At approximately 3:15 p.m., some 25 minutes after school dismissal, L.F., while enroute home, was confronted by K.R. in proximity to the intersection of Margaret Street and Selvage Avenue in Teaneck. K.R. was with a group of five to ten youths. K.R.

swung at L.F., and the latter tried to defend himself. Someone broke up the encounter. This incident occurred at a location across a Route 4 bridge, spanning a five-lane highway, and one long city block away from the High School, a distance of at least 150 yards. This location is not visible from immediately outside Teaneck High School. The only point within the High School from which this location is visible is the third-floor cafeteria; however, the site is visible from the cafeteria only during those months when the trees lining Margaret Street are bare, a situation which did not exist at the time in question.

After this incident, L. F. continued home. Several minutes later, he was confronted by a group of youths, which group did not, at this time, include K. R., in the area of Selvage Avenue and Alicia Street. The group included P.T. One of the youths swung at L. F., and a fight ensued. The altercation lasted for five to ten minutes. L. F. ended up on the ground. He was hit with fists and was stomped. Again, someone stopped the confrontation.

L. F. subsequently went home. No one was present, and he called his mother, who works in New York City. L. F. informed his mother that they "did it again." His mother immediately left for home, taking a taxi cab because it was the fastest means of transportation. She arrived some 45 minutes to one hour later. By this time, L. F.'s clothes were torn and he had bruises on his body, including on his knees. The School was closed by the time she arrived home. D. F. called her physician, Dr. Robert Adair (Adair), and made an appointment with him for L. F. for 9:00 a.m. the following morning. Adair's report of the examination indicated that L. F. had sustained multiple contusions and abrasions of the face, neck, torso, elbows and back, as well as bilateral ecchymosis of the eyes and a cervical sprain.

L. F. had become withdrawn subsequent to the September 14, 1991 incident. He became even more withdrawn subsequent to the September 17, 1991 incidents. He expressed fears to his mother regarding returning to the School. D. F. decided, after the September 17, 1991 incidents, that L. F. could not return to the High School.

B. J. was not involved in any incidents on Monday nor Tuesday of the week in question. He was not with L. F. on September 17, 1991, when the incidents involving the latter occurred. B. J. subsequently learned of them from another individual and,

in turn, B. J. told his mother about them. In addition, D. F. told L. J. of the injuries which L. F. had sustained on September 17, 1991.

On September 17, 1991, subsequent to the incidents which occurred on that day, L. F.'s father took L. F. to the Teaneck police station. A report was filed. L. F. was interviewed by a police officer. L. F. identified K. R. and D. J. as being part of the group which confronted him on September 17, 1991. Police personnel subsequently filed a complaint against K. R.

Subsequent to L. F.'s appointment with Adair on September 18, 1991, L. J., B. J., D. F., and L. F. went to the School to meet with Delaney to report the incidents of both September 14 and September 17, 1991, as well as to demand assurances of protection for their children. J. K. and his father also met with them at this time. The individuals met for approximately one hour. L. J. and D. F. requested assurances regarding the safety of their sons, both on and off school premises. Delaney responded that the Board could not undertake action to protect pupils off school property and that such protection was out of the High School's control. L. J. also told Delaney at this meeting of the incidents which had occurred involving B. J. during the prior year. D. F. showed Delaney a bill and report from Adair. She also told Delaney that L. F. did not want to return to the High School, that L. F. was withdrawn and upset, and that she felt this was an unhealthy situation and feared for his safety. As found, Delaney indicated there was little he could do because the incidents in question did not occur on school premises. D. F. expressed the opinion that Delaney should consider the locations where students lived, in proximity to the High School.

Immediately after the meeting with Delaney, the group of parents and students went to Board of Education offices and met with Morris. Petitioners informed Morris of the incidents in question and asked what could be done to ensure the safety of the students. Petitioners sought assurances that the pupils would be protected, as well as guarantees concerning their safety, both on and off school premises. This was the first time that Morris had ever met with L. J. and D. F. The parents were visibly upset regarding the safety of their sons and the impact of problems in the community on their school involvement. D. F. showed Morris Adair's bill and report. Morris told D. F. and L. J. that it was not within his power, nor responsibility, to ensure the safety of students in the community, but that he would do whatever had to be done to ensure the safety of their children on school

premises. D. F. informed Morris that she had decided to withdraw L. F. from the High School. Morris voiced the opinion that that was a "mistake" and "unfortunate." He assured her that respondent could provide an educational environment for L. F. D. F. told Morris that she wanted respondent to pay for L. F.'s tuition in another school. Morris responded in the negative, indicating that he would recommend against such reimbursement. Morris offered his efforts to assist L. J. and D. F. with whatever he could do in working with them, parents, and law enforcement officials, as well as other Township officials, to help the situation. Morris met with petitioners for approximately 45 minutes to one hour. One of the other parents present, most likely L. J., also expressed a determination to withdraw his/her child from respondent's schools and requested tuition reimbursement. Morris again responded in the negative. Requests were made that Morris ensure the safety of students off premises and on weekends. Again, Morris indicated he could not do so. Morris felt that respondent had no jurisdiction to discipline students regarding either incident. More specifically, Morris told the parents that he would work with them and with police officials. He indicated that he would act as a liaison. He also informed the parents that discipline could be imposed on students for incidents occurring off Teaneck school premises only if they occured in relation to school-related activities or activities held on school premises during non-school hours. Morris also expressed the view that events occurring in the community in general were the responsibility of police department officials, not respondent.

Immediately after the meeting held on September 17, 1991, Delaney notified White that an incident had occurred and directed White to conduct an investigation. White immediately commenced such an investigation, speaking via telephone and/or in-person with B. J. and L. F., as well as with J. K., A. W., D. P., D. J., and P. H. At the time, A. W. was the girlfriend of L. F. and was present during the September 17, 1991 incidents. White obtained oral statements from all these individuals, with the exception of A. W., who refused to give a statement. White also obtained written statements from P. H. and D. J. White questioned L. J. and B. J. regarding both the September 14 and September 17, 1991 incidents. The statements of P. H. and D. J. indicated that L. F. was an aggressor in the incidents.

White was not aware of any incidents involving petitioners subsequent to October 3, 1990 until the September 18, 1991 meeting. None of the youths

implicated in the incidents were in school at the time White commenced his investigation. He spoke with L. F. on September 19, 1991, as L. F. was leaving the school nurse's office. B. J. was also present at this time. White spoke with them briefly, as the two youths were in a hurry. At the time. L. F. was in the process of signing out of school. As a general procedure, school officials cannot force students to provide statements. As a result of this investigation, White learned of the incident which had happened on September 14, 1991.

Based upon his investigation, White determined that there had been an altercation following a dance at the Womens Club on September 14, 1991, in which J. K. and L. F. were involved, along with B. P., P. H., J. G., and others, and that B. J. was not involved in this incident. White also concluded that L. F. was involved in another altercation on September 17, 1991, which occurred some 25 minutes after the dismissal of school, and that B. J. was also not involved in this incident. White also determined that he was unable to identify the initial aggressors because of the conflicting statements given. White prepared a memorandum to Delaney regarding his investigation on September 20, 1991, in which he set forth the results of the investigation.

High School officials concluded that discipline of the pupils involved should not be imposed because it was not possible to determine the aggressors, because such incidents occurred off school property, and because they were not related to school activities. No students were disciplined regarding the September 14 and September 17, 1991 incidents. This lack of discipline resulted from the fact that the September 14, 1991 incident occurred off school premises, on a weekend, and was in no way related to any activities sponsored by respondent. Similarly, the September 17, 1991 incidents occurred after school and not on the premises of any Teaneck school.

Several days after September 17, 1991, two incidents involving B. J. occurred. On one evening, at approximately 9:00 p.m., as B. J. approached his house, he observed B.P. and J.G. sitting on the front curb. B. J. went to a neighbor's house and waited until B. P and J. G. left. On another occasion, B. J. went to the schoolyard of a Teaneck public school, the Bryant School, during evening hours. J. G. was present and chased B. J. around a corner. They stopped in the vicinity of B. J.'s house.

Neither of these incidents were reported to High School personnel, Board personnel, nor local police officials.

By the end of the meeting held on September 18, 1991, D. F. had determined to transfer L. F. to another school. L. F. was in the eleventh grade at this time. D. F. called L. F.'s godmother, who lives on Long Island, New York, and asked her to investigate the schools on Long Island. Both D. F. and her husband, L. F.'s father, work in New York, New York. D. F. considered arranging for L. F. to live with his godmother and attend school on Long Island. This possibility did not come to fruition because of perceived problems with Long Island schools. D. F. also applied for admission for L. F. to other schools, whose identity cannot be determined from the record, but ascertained that there were waiting lists. D.F. was also concerned about safety factors regarding some of the other schools considered. For this reason, she determined that L. F. should not attend a public school in New York City. She also felt that public schools in other communities in proximity to Teaneck, such as Bergenfield, Hackensack and Bogota, were not sufficiently safe. D. F. also had concerns that L. F. would encounter problems with youths in the community if he had to wait for public transportation at certain times.

On approximately September 19, 1991, prior to the completion of White's investigation, D. F. commenced transfer proceedings on behalf of L. F. Following his transfer from the High School, L. F. enrolled in the Dwight School, which is located in New York, New York. The yearly tuition is $12,500. Total expenses, including other costs, are $13,675. L. F. has been awarded a $5,000 annual scholarship. L. F. commutes to the Dwight School via public bus transportation at a daily cost of $7.00. Assuming a 180-day school year, the total transportation costs approximate $1,260. The total annual net cost for L. F. at the Dwight School is approximately $9,935. The Dwight School was on a list of schools provided to D. F. by a school counselor.

D. F. was able to pay for L. F.'s tuition and expenses at the Dwight School during his first year there, at least in part, from funds received through a loan which she took against her pension. D. F. commenced working extensive hours during L. F.'s second year at the Dwight School in order to meet expenses. D. F. arranged for a payment plan with the Dwight School which requires monthly payments of $652.50. At the time of hearings, D. F. was working from 8:30 a.m. until 11:00 p.m. in order to maintain payments.

Subsequent to his transfer to the Dwight School, during the winter of 1991-92, L. F. returned to Teaneck High School to attend activities. One was an activity referred to as a Lip Synch Talent Show; the other was a dance. Both activities were attended by some of the individuals who were participants in the September 14 and September 17, 1991 incidents. No problems were experienced by L. F. when he attended these activities nor at other times in Teaneck generally, subsequent to his transfer to the Dwight School. As of the time he attended activities at the High School, L. F. believed that the disputes which had previously existed among himself and other youths were settled. At the time of hearings in this matter, L. F. did not believe that he would be at risk if he returned to Teaneck High School. D. F. does not want L. F. to return to Teaneck High School, in part, because of continued concerns regarding his safety. In addition, D. F. does not want to interrupt the structure of L. F.'s education. She views the Dwight School as being "different" from the High School. Classes at the Dwight School are much smaller, allowing for more individual attention from teachers. In addition, D. F. is able to attend more school activities at the Dwight School without taking full days off from work because of its proximity to her employment.

B. J. transferred to the Laurinberg Institute, a private school located in Laurinberg, North Carolina, on November 22, 1991. B. J. attended the High School from September 17, 1991 until the transfer. In the interim, B. J. was escorted to school by March. During that period, no incidents involving B. J. were reported to School or Board administrators. B. J. attended the Laurinberg Institute for the remainder of the 1991-92 school year. Tuition at the Laurinberg Institute was $5,000 per term, or $10,000 annually. B. J. received $2700 in annual financial aid. L. J. incurred costs of some $775 to have someone drive B. J. back and forth between the Laurinberg Institute and his residence during holidays and other vacations.

B. J. returned to the High School as a student in September 1992. Since his return to the School, B. J. has not been involved in any incidents relating to harassment, intimidation, or assaults. No incidents have been reported regarding the participants in the September 1991 altercations with L. F. Since his return to Teaneck High School, B. J. has become closely associated with B. P. and J. G.

B. J. returned to Teaneck High School because L. J. could no longer afford to keep him at the Laurinberg Institute. She is a single parent, responsible for the support of B. J. In addition, another child, a college student, resides with L. J. and B. J. L. J. is obligated to repay the Laurinberg Institute $700 financial aid because B. J. did not continue at the facility. In addition, an outstanding balance of $332 is owed on B. J.'s account. L. J. initially learned of the Laurinberg Institute from a recommendation of a counselor at the High School. L. J. subsequently contacted public school districts and communities in proximity to Teaneck, more specifically, Englewood and Bergenfield. She ascertained that it would cost approximately $8,000 to $10,000 to send B. J. to a public school in another community.

Respondent charges $10,000 annually to out-of-district youngsters to attend public school in Teaneck.

The imposition of discipline of students by High School administrators is dependent upon the individual circumstances of each case and the relationship of an incident to the safety and security of the High School. Discipline is generally not imposed for off-campus occurrences, except when such incidents occur at a school-related activity or where the off-campus behavior is a direct violation of recent disciplinary actions or warnings. It is not respondent's practice to police areas in Teaneck generally to ensure the safety of students at all times. During the past several years, Board representatives have worked in a cooperative effort with Teaneck officials, as well as religious and civic leaders, in addressing incidents occurring within the Teaneck community generally. In order to address community concerns, Board personnel have engaged in activities such as individual and group counselling, conflict resolution instruction, and extra-curricular activities at the High School.

At the times in question in 1991, there were two assistant principals at the High School. The assistant principals were each assigned to specific classes of students and were charged with investigating any incidents that occurred. White was responsible for a group that included B. J. and L. F. It was the practice at the High School that two school administrators would stand outside the main entrances until the majority of students left school premises, after school, generally from 2:50 p.m. until 3:10 p.m. This was done in order to ensure that there were no problems on both sides of the building. By the time the incidents in question occurred on September 17, 1991,

administrators were inside the building. No staff member saw the altercations in question or any indications of problems. School personnel can generally detect problems developing if they note a large group of students walking in the same direction after school. In addition to White, it was the practice of the principal and a truant officer, who is a retired policeman, to stay outside of the High School near a main entrance on Elizabeth Avenue, after school. A warning bell rings before school, at 8:10 a.m. White, as well as other personnel, including the truant officer, are outside on school grounds in the morning before classes start.

In general, School administrators report assaults occurring off-school premises to police officials. School administrators, including White, view occurrences off-school premises as not falling within the Board's jurisdiction, but as police matters. Incidents occurring on school premises are dealt with depending on the circumstances of each case. As found, discipline may be imposed on students for off-school premises if safety at the High School might be affected. However, the school has limited options if students involved in incidents subsequently withdraw. If school administrators can clearly identify perpetrators in incidents occurring on school premises, in general, a suspension of between one to five days is imposed.

A school related activity is one either sponsored by a school, related to curriculum development or a club activity, or to interscholastic activities, field trips, conferences, seminars, etc. As found, discipline occurring off-school premises may be imposed if an incident relates to a school activity. Board personnel generally receive any police reports regarding incidents occurring off-school premises and during non-school hours. Board personnel may investigate such incidents. Respondent generally has a close working relationship with Teaneck police personnel, as well as personnel in other school districts in the vicinity of Teaneck. In order to ease tensions generally in Teaneck, the Board, as found, has conducted community dialogues, working with local agencies, and Board counselors, in providing programs within school settings. Respondent also funds peer counseling activities and a jobs program for "disaffected youths." Within school settings, progressive discipline guidelines are followed. Board personnel also work closely with crisis intervention groups, which organizations sponsor activities in school settings for "behaviorally disaffected" youths In order to encourage the resolution of conflicts without violence.

Teaneck consists of approximately five square miles. At Morris' initiation, Teaneck police personnel patrol on a regular schedule in the vicinity of the High School on immediately surrounding streets. They patrol between 7 a.m. and 7:30 a.m. during school days, and during the school day, as well as after school until 4:00 p.m. Police personnel are also present at School activities held during evening hours. In addition, the Board makes provisions for its own security personnel to be present at activities during evening hours.

CONCLUSIONS

The Commissioner of the Department is charged generally with resolving disputes involving the school laws. *N.J.S.A.* 18A:6-9. Applicable statutory provisions incorporate the goal of providing a thorough and efficient system of free and public schools for all children in New Jersey. *Id.* §4. A thorough and efficient system of free public schools shall include adequately equipped, sanitary and secure physical facilities. *Id.* § 5.

The duty of school personnel to exercise reasonable supervisory care for the safety of students entrusted to them, and their accountability for any injuries resulting from a failure to discharge such duty, are well recognized in New Jersey, *Titus v. Linberg*, 49 *N.J* 66 (1967) (*Titus*). A school may be liable in the commission of acts as well as the neglect or failure to act.

The standard of care imposed upon school personnel is that degree of care which a person of ordinary prudence charged with comparable duties would exercise under the same circumstances. *Caltavuturo v. Passaic*, 124 *N.J. Super.* 361 (App. Div. 1973) (*Caltavuturo*). The imposition of such duty on school personnel is based upon the recognition that the relationship between a child and school authorities is not a voluntary one. The child must attend school and is subject to school rules and disciplines. In turn, school authorities are obligated to take reasonable precautions for the safety and well being of the child. *Jackson v. Hankinson and Bd. of Ed. of New Shrewsbury*, 51 *N.J.* 230 (1968) (*Jackson*).

The imposition of a duty of reasonable care upon school personnel exists in situations occurring on school property, relating to school-provided services and, in certain circumstances, relating to occurrences not, strictly speaking, on school

property but in school-sanctioned areas. The Court in *Titus* held that school officials could be held responsible for injury sustained by a student struck with a paper clip from an elastic band by another student outside on school grounds shortly prior to the start of classes in the morning. The Court noted, in part, that it was reasonable for students to commence arriving at school premises some 15 minutes prior to the official start of classes and that the principal knew of the situation. "Obviously the students would be expected to and could properly come to the school grounds during some short period before the classrooms actually opened. They customarily begin coming at 8 A.M. and that was reasonable." *Titus* at 75.

The court in *Caltavuturo* found a local school board subject to potential liability for injuries sustained by a student who, on his way home for lunch following his school patrol duties, was injured while going through a hole in a fence surrounding city property adjacent to the school playground. The court noted in pertinent part that for some twelve years, the school had routinely used the area adjacent to school premises as a playground and that there was no natural dividing line indicating where school property ended and municipal-owned land began. *Caltavuturo* at 365. "For all practical purposes, it formed an integral part of the school ground to which the duty to supervise fairly extended." *Id.* at 367.

Similarly, a school board may be liable for injuries sustained by a pupil on a school bus. Where school officials provide transportation to and from school on a school bus, their obligations continue during the course of the transportation. *Jackson* at 235.

Some support exists for petitioner' argument that a local school board shall be liable for the safety of students off school premises and that such liability may include reimbursement of tuition for alternative schooling, based upon the decision in *M.P. and T.P. v. BOE of the Twp. of Delran*, OAL Dkt. No. EDU 3446-85 (December 18, 1985) (*Delran*). *Delran* involved a petition by the parents of R.P. R.P. was subjected to verbal and physical assault, threats of violence, and harassment over a four-month period by an identified group of students in the Delran Middle School which she attended. The local board of education was aware of the problems from their inception. The incidents in question occurred on and off school grounds, but mostly on school premises or in conjunction with school-sponsored activities. The incidents included verbal abuse on school grounds, an instance of harassment at

R.P.'s home on Halloween night, harassing telephone calls, and a verbal and physical assault after a school-sponsored basketball game. R.P. was so distraught after the game, that her parents decided to keep her at home until the local board resolved the situation. The board eventually proposed to remove R.P. from her normal scheduling to avoid confrontations, without discipline to the harassing students. R.P.'s mother was denied the opportunity to participate in any meeting which would include the harassing students. Finding such proposal unacceptable, petitioners unilaterally decided to remove R.P. to the Cinnaminson school district, necessitating the payment of approximately $4,000 for the remaining and succeeding academic years.

The presiding administrative law judge (ALJ) found that the local board failed to discharge its supervisory duty to R.P., criticizing the board's handling of policy matters. He determined that the board was obligated to reimburse R.P.'s parents, under the particular circumstances of the case, for the unilateral placement outside of the school district, analogizing to reimbursement for unilateral placement in the context of special education cases. The ALJ also directed that the local board establish guidelines to end the conflict between the parents and students involved, at the completion of which reimbursement would end and R.P. would be returned to the Delran school district. The Commissioner affirmed, noting the exceptional circumstances of the case.

I am persuaded that petitioners are not entitled to reimbursement. None of the incidents in question occurred on school premises nor adjacent to school premises. In addition, none of the incidents occurred in relation to school-sponsored activities nor in areas which, for practical purposes, can be viewed as functionally an extension of the school premises. The incidents in question in this case, are not analogous to the extenuating circumstances which existed in the *Delran* case. None of the incidents in question in the instant matter occurred on school premises. In addition, in contrast to the situation in *Delran*, Board personnel took reasonable actions available to them in efforts to ameliorate the situations resulting in the September 14 and September 17, 1991 incidents, including the filing of criminal proceedings. It is unreasonable, and not required by applicable legal principles, to require respondent to ensure the safety of its students throughout the Township of Teaneck. As the Board argues, such is the responsibility of police personnel.

In light of the results of White's investigation, respondent's determination not to impose discipline on any of the students involved in the incidents in question was not an abuse of its discretion. As found, respondent did institute procedures, even prior to September 1991, to facilitate the resolution of disputes among students in a nonviolent manner. It also cooperated with police and other Township officials.

In reaching the determination that respondent is not liable to reimburse petitioners for costs incurred for private education, I do not minimize the seriousness of the altercations in which petitioners were involved, especially L.F. I note, however, that even if a basis for liability by respondent was supported, that B.J.'s arguments have substantially less merit than those of L.F. The record does not support findings of any physical attacks on B.J. The incidents relating to B.J. which occurred subsequent to September 17, 1991 were never reported to School or Board officials. In addition, I note that the withdrawal of L.F. from the Teaneck school system hampered the ability of School administrators to continue their investigation. There is no evident reason for L.F's continued attendance at a private school. As found, L.F. attended several functions at the School subsequent to his transfer, without incident. It is also reasonable to conclude, based on the record in this case, that D.F., at least in part, has kept L.F. at the Dwight School because of considerations other than those relating to safety concerns. Although such considerations may be understandable, there is no persuasive argument that their expense should be borne by public tax funds.

Respondent argues that petitioners do not have standing to contest the discipline, or lack thereof, imposed on other students. In light of my determination that petitioners are not entitled to tuition reimbursement, it is not necessary to reach this issue.

Based upon the above findings of fact, I **CONCLUDE** that petitioners are not entitled to reimbursement for the costs of their private school placement by respondent. Their petition should be dismissed.

ORDER

It is hereby **ORDERED** that petitioners' petition for reimbursement by respondent of the cost of private school tuition incurred on their behalf be, and is, hereby **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

April 19, 1993
Date

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

4/20/93
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties: Joyce LaVecchia

APR 20 1993
Date

OFFICE OF ADMINISTRATIVE LAW

le/njf

APPENDIX

LIST OF WITNESSES

For Petitioner L.F.:

L.F.
D.F.

For Petitioner B.J.:

B.J.
L.J.

For Respondent:

Joseph White
Dr. Harold Morris

LIST OF EXHIBITS IN EVIDENCE

P-1 Map
P-2 Street index map
P-3 Laurinburg Institute payment plans
P-4 Letter dated August 26, 1992
P-5 Transmittal memo
P-6 Letter dated September 18, 1991
P-7 Physician statement for insurance forms
P-8 Corrected invoice
P-9 Invoice
P-10 Letter dated September 26, 1991
R-3 Memorandum dated October 3, 1991
R-1 Investigation report dated September 17, 1991

R-2 Investigation report dated September 15, 1991
R-4 Statement dated September 19, 1991 by P.H.
R-5 Statement of D.J.
R-6 Memorandum dated September 20, 1991

B.J. AND L.F., by their parents and guardians, L.J. and D.F.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions by petitioners and the Board's reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4.

Petitioners except to the ALJ's determination that the Board's failure to discipline students involved in the altercations involving B.J. and L.F. was not an abuse of discretion because it was not possible to determine who the aggressors in the fights were. Petitioners allege that testimony and Mr. White's report indicate that the other students were the aggressors.

Petitioners additionally aver that the ALJ failed to comment on a point which they argued in all briefs and oral arguments before her, i.e., that the way to protect students in a situation such as this is to institute discipline, not to provide security outside of the school grounds. Petitioners assert that districts will take this decision as an endorsement of the failure of school boards to undertake disciplinary actions. Petitioners

further contend that the ALJ's decision sends a message to aggressive students that as long as an assault takes place off school premises, schools do not care.

The Board avers that the ALJ relied upon more than who the aggressors in the altercations were in making her finding that the Board did not abuse its discretion in not disciplining the students involved. The Board states that in making such finding the ALJ also considered that no incident occurred on school premises or in relation to school-sponsored activities, nor in areas which can be viewed as functional extensions of school premises, and that the Board personnel took reasonable steps to ameliorate the situations giving rise to both incidents, including the filing of criminal charges.

The Board submits that, contrary to petitioners' assertions, this decision does not act as an endorsement for school boards to resist imposition of discipline for off-school premises activities but, rather, effectively endorses district activities designed to address off-campus behavior by utilizing constructive means, in addition to discipline. The Board avers that the decision does not conclude that discipline cannot be imposed for behavior which has occurred off school grounds. It maintains that the ALJ merely concluded that it is unreasonable, and not required by applicable legal principles, to require school boards to insure the safety of its students throughout the municipality, as this is the responsibility of police personnel.

Upon careful and independent review of the record, the Commissioner agrees with the findings and conclusions of the ALJ denying petitioners reimbursement for costs incurred for private

education. At the onset, lest there be any confusion, the Commissioner notes that it is well established in law that a board has a right to discipline a pupil for conduct occurring away from school premises where such is reasonably necessary for a student's physical or emotional safety and well-being or for reasons relating to the safety and well-being of other students, teachers or school property. (See R.R. v. Board of Education of the Shore Regional High School District, 109 N.J. Super. 337 (Chan. Div. 1970).) But in making her determination in this matter, the Commissioner believes that the record before her does not support petitioners' allegation that the Board acted in an arbitrary, capricious, or unreasonable manner with respect to its actions in connection with the altercations involving L.F. and B.J.

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

COMMISSIONER OF EDUCATION

MAY 27, 1993

DATE OF MAILING - MAY 27, 1993

114-93

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
TOMS RIVER REGIONAL SCHOOL	:	DECISION
DISTRICT, TOWNSHIP OF DOVER,	:	
OCEAN COUNTY.	:	
_____	:	

MAY 27, 1993

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE TOMS RIVER REGIONAL SCHOOL DISTRICT, TOWNSHIP OF DOVER, OCEAN COUNTY.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held April 20, 1993 in the Toms River Regional School District, Township of Dover, Ocean County, were as follows:

CANDIDATES	AT POLLS	ABSENTEE	TOTAL
Linda Garvey	2,660	39	2,699
Meera Malik	2,331	19	2,350
Elizabeth (Betty) Vasil	2,279	33	2,312
Mark Case	2,097	24	2,121
Brenda Carter	1,934	35	1,969
Walter S. Gradzki	1,848	22	1,870
Vincent J. Vivona	1,213	36	1,249
Robert E. Stone, Jr.	854	15	869
Joseph N. Amore	496	12	508

Pursuant to a letter request dated April 27, 1993 from Mark Case, a defeated candidate, an authorized representative of the Commissioner of Education from the Office of the Ocean County Superintendent of Schools was directed to conduct a recount of the machine votes cast. The recount was conducted on May 3, 1993 at the Ocean County Voting Machine Warehouse, Dover Township, by the Ocean County School Business Administrator.

At the conclusion of the recount, the announced results were unchanged and the tally stood as follows:

CANDIDATES	AT POLLS	ABSENTEE	TOTAL
Linda Garvey	2,660	39	2,699
Meera Malik	2,331	19	2,350
Elizabeth (Betty) Vasil	2,279	33	2,312
Mark Case	2,097	24	2,121
Brenda Carter	1,934	35	1,969
Walter S. Gradzki	1,848	22	1,870
Vincent J. Vivona	1,213	36	1,249
Robert E. Stone, Jr.	854	15	869
Joseph N. Amore	496	12	508

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of her authorized representative and adopts as her own the findings set forth above.

Accordingly, the Commissioner finds and determines that Linda Garvey, Meera Malik, and Elizabeth (Betty) Vasil were elected to full terms of three years each on the Board of Education of the Toms River Regional School District, Township of Dover.

COMMISSIONER OF EDUCATION

MAY 27, 1993

DATE OF MAILING - MAY 27, 1993

115-93

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF SOUTH BRUNSWICK,	:	DECISION
MIDDLESEX COUNTY.	:	
	:	

MAY 27, 1993

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
TOWNSHIP OF SOUTH BRUNSWICK, : DECISION
MIDDLESEX COUNTY. :
:

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held on April 20, 1993 in the School District of the Township of South Brunswick, Middlesex County, were as follows:

CANDIDATES	AT POLLS	ABSENTEE	TOTAL
Gail Barcelo	719	11	730
Marci Abschutz	652	8	660
Bryan J. Laurita	584	3	587
David Avins	584	2	586
John Oliveira	569	3	572
Edward T. McGrady, Jr.	413	4	417
Lois Tugya	212	3	215

Pursuant to an April 29, 1993 letter request from Martin K. Indik, Esq., on behalf of David Avins, defeated candidate, an authorized representative of the Commissioner of Education from the Office of the Middlesex County Superintendent of Schools was directed to conduct a recount of the machine ballots cast. The recount was conducted on May 6, 1993 at the Voting Machine Warehouse in Edison.

At the conclusion of the recount, the tally stood unchanged and was as follows:

CANDIDATES	AT POLLS	ABSENTEE*	TOTAL
Gail Barcelo	719	11	730
Marci Abschutz	652	8	660
Bryan J. Laurita	584	3	587
David Avins	584	2	586
John Oliveira	569	3	572
Edward T. McGrady, Jr.	413	4	417
Lois Tugya	212	3	215

* The absentee ballot counts are reported as provided by the Board of Education on the Regular/Combined Statement of Result of School Election.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of her authorized representative and adopts it as her own.

Accordingly, the Commissioner finds and determines that Marci Abschutz, Gail Barcelo and Bryan J. Laurita were elected to full terms of three years each on the Board of Education of the School District of the Township of South Brunswick at the annual school election held on April 20, 1993.

COMMISSIONER OF EDUCATION

MAY 27, 1993

DATE OF MAILING - MAY 27, 1993

116-93

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

MAY 27, 1993

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

The announced results of the balloting for the General Fund Tax Levy in the 1993-94 School Budget of the Board of Education of the Borough of Montvale at the annual school election held on April 20, 1993 were as follows:

GENERAL FUND	AT POLLS	ABSENTEE	TOTAL
Yes	119	36	155
No	162	7	169

Pursuant to a letter of application from Mrs. Marian Latz, Board Secretary, Montvale Board of Education, dated April 27, 1993, the Commissioner of Education directed her representative from the Office of the Bergen County Superintendent of Schools to conduct a recheck of the votes cast on the voting machines for the General Fund Tax Levy of the School Budget. This recheck was conducted on May 10, 1993, at the County Voting Machine Warehouse, Carlstadt.

At the conclusion of the recheck of the votes cast on the voting machines, the tally remained unchanged.

Furthermore, upon request of the district, a court order was issued to the Bergen County Board of Elections to conduct a recheck of the absentee ballots cast for the General Fund Tax Levy

of the 1993-94 School Budget. This recheck was held on Tuesday, May 4, 1993 by members of the Bergen County Board of Elections.

At the conclusion of the recheck of the absentee ballots, the results were as follows:

GENERAL FUND	PREVIOUS TOTAL	RECOUNT
Yes	36	35
No	7	

As a result of the voting machine recount and the absentee ballot recount, the following represents the grand total:

GENERAL FUND TAX LEVY	VOTING MACHINES	ABSENTEE BALLOT	GRAND TOTAL
Yes	119	35	154
No	162	7	169

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of her representative and adopts the above information as her own.

Accordingly, the Commissioner finds and determines that the General Fund Tax Levy question was defeated in the Borough of Montvale.

COMMISSIONER OF EDUCATION

MAY 27, 1993

DATE OF MAILING - MAY 27, 1993

117-93

J.R., by his parents and legal guardians, PETITIONERS, V. BOARD OF EDUCATION OF THE BLACK HORSE PIKE REGIONAL SCHOOL DISTRICT, CAMDEN COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION ON MOTION

MAY 27, 1993

J.R., by his parents and legal guardians,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BLACK HORSE PIKE REGIONAL SCHOOL DISTRICT, CAMDEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

This matter has come before the Commissioner by way of Petition of Appeal and Motion for Emergent Relief filed on May 17, 1993 seeking, inter alia, an order 1) directing the Board to maintain the status quo for J.R. to stay put in his current educational program pending the final outcome of this matter; 2) ordering that the prior suspensions against J.R. be vacated and expunged from his record due to the Board's denial of J.R.'s due process rights and/or because said suspensions were arbitrary and capricious; 3) restraining the Board from retaining J.R. due to loss of credit from absences caused by improper suspensions; and 4) ordering the Board to afford J.R. his due process rights prior to implementing any future suspension.

By letter dated May 17, 1993 the Board was provided a period of five working days to file an Answer to the Petition and Motion, which documents were received on May 24, 1993.

Petitioners claim their son is a non-handicapped student in the Board's high school who, during the 1992-93 school year, has been suspended nine times. They aver that contrary to New Jersey's Constitution, Tibbs v. Board of Education of the Township of Franklin, 59 N.J. 506 (1971) and Goss v. Lopez, 419 U.S. 565 (1975), the Board failed to provide him due process pertaining to such suspensions. Moreover, petitioners contend that J.R. will suffer immediate and irreparable harm unless a stay of the Board's letter of May 6, 1993 issues, which letter advised J.R. that any future suspension would lead to expulsion. They submit the Commissioner must order the Board to hold a due process hearing prior to consideration of any future suspension because they claim the Board will use suspension absences to reduce J.R.'s attendance credit and cause him to be improperly retained.

Citing Crowe v. DeGioia, 90 N.J. 126 (1982), petitioners suggest the harm to J.R. is severe and may be irreparable. They claim if the Board is not restrained from suspending J.R. at will, he will be at risk of being retained and will needlessly miss more days of school. They aver further that J.R. is at risk of being expelled and that the Board must be restrained from disregarding J.R.'s right to a free public education. Finally, regarding the balancing of equities in this case, they submit the harm to the Board is "nominal" to maintain J.R. in his current educational placement and to provide him a full due process hearing before issuing any future suspensions.

The Board's Answer recites its version of the disciplinary measures meted J.R. during the current school year and acknowledges that J.R. has a constitutional right to a free public education.

However, it denies that the Board has failed to prove J.R.'s conduct created a danger to persons or property or disruption of the educational process. The Board also claims it has afforded him all due process, and it thus claims the suspensions in question were not arbitrary or capricious.

The Board affixes to its Answer affidavits from the Superintendent of Schools and the Vice Principal regarding J.R.'s disciplinary record, and a copy of its policy on student absences and excuses, Policy JED. The Board submits it abided by it in disciplining J.R. Moreover, it does not contest that J.R. is entitled to the status quo maintenance of his position with the school district provided it is understood that the status quo is subject to the district's rules and regulations pertaining to student absences and excuses as set forth in Policy JED. It further submits that J.R. must continue to comply with the Board's concerns that he maintain good order and discipline within the school district. It denies any harm to J.R. is severe or irreversible and relies on its Policy JED for the reasonableness of its procedures regarding absences and excuses.

The Board would have the Commissioner deny petitioners' application for emergent relief and dismiss what it deems to be a frivolous action.

The Commissioner of Education designates her authority to decide this emergent relief matter to Assistant Commissioner Elena J. Scambio pursuant to N.J.S.A. 18A:4-34.

Upon careful review of the papers submitted in this matter, the Assistant Commissioner denies Emergent Relief for failure to meet the Crowe v. DeGioia, supra, standards. In so deciding, it is

observed that no where in petitioners' pleading is it established that J.R. is currently suspended or that there is a suspension pending. Similarly, no where is it established in the pleadings that petitioners have been noticed that J.R. has lost or shall lose credit for any course he now studies. Hence, petitioners and J.R. suffer from no imminent, irreversible or irreparable harm. They have also failed to demonstrate a likelihood of succeeding on the merits of any claim of harm to themselves or their son. In other words, petitioners herein are attempting to foreclose future action by the Board, insofar as the record indicates that J.R. is currently in school and is not now subject to any form of disciplinary action. Consequently, the instant Motion for Emergent Relief is not ripe for adjudication. The Assistant Commissioner so finds and dismisses the Motion for Emergent Relief.

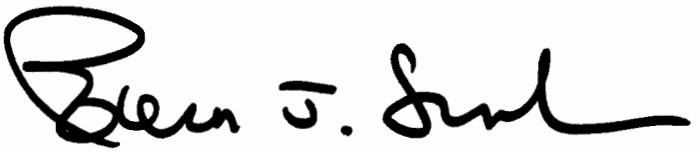
However, in so determining, the underlying claims of arbitrary action by the Board based on improper calculation of absences, as well as those allegations dealing with due process violation, shall proceed to the Office of Administrative Law for adjudication in the usual course. It is further determined that the Motion for Emergent Relief is dismissed without prejudice to petitioners to renew their motion at the Office of Administrative Law should J.R. be subject to actual disciplinary action hereafter or upon J.R.'s actually being noticed of the Board's intention to deny him course credit or his actually being denied course credit.

Finally, as to petitioners' prayer that J.R. be provided a full hearing in advance of any attempt to expel him, the Assistant Commissioner directs the Board that if expulsion is contemplated, it is required to provide a full due process hearing, as well as a

child study review. See R.R. v. Board of Education of Shore Regional High School District, 109 N.J. Super. 237 (Chan. Div. 1970). See also N.J.A.C. 6:28-2.8(g).

Accordingly, for failure to meet the standards articulated by the Court for pendente lite restraints, the Motion for Emergent Relief is denied, without prejudice, and the matter shall proceed to the Office of Administrative Law for a plenary hearing on the merits of petitioners' claims.

IT IS SO ORDERED.



ASSISTANT COMMISSIONER OF EDUCATION

MAY 27, 1993

DATE OF MAILING - MAY 27, 1993

117-93

31-94A

(See #117-93)

AMENDED DECISION

J.R., by his parents and legal guardians,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BLACK HORSE PIKE REGIONAL SCHOOL DISTRICT, CAMDEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

MARCH 1, 1994

J.R., by his parents and legal guardians,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BLACK HORSE PIKE REGIONAL SCHOOL DISTRICT, CAMDEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed without prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 1, 1994

DATE OF MAILING - MARCH 1, 1994

118-93

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF UPPER PITTSGROVE, SALEM	:	
COUNTY.	:	
	:	

JUNE 3, 1993

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE TOWNSHIP OF UPPER PITTSGROVE, SALEM COUNTY.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for one member of the Board of Education for a one-year unexpired term at the annual school election held April 20, 1993 in the school district of the Township of Upper Pittsgrove, Salem County, were as follows:

ONE-YEAR TERM	AT POLLS	ABSENTEE	TOTAL
Polly B. Deal	265	0	265
Herbert J. Wentzell	265	0	265

Pursuant to N.J.S.A. 18A:12-15, the Commissioner of Education directed her authorized representative to conduct a recount of the ballots cast for the two Board candidates receiving an equal number of votes at the April 20, 1993 school election. The recount was conducted on May 11, 1993, at the office of Salem County Superintendent of Schools in Woodstown.

At the conclusion of the recount, the tally of the uncontested ballots counted, including the absentee ballot tally as reported by the County Board of Elections, for the two candidates receiving an equal number of votes stood as follows:

ONE-YEAR TERM	AT POLLS	ABSENTEE	TOTAL
Polly B. Deal	266	0	266
Herbert J. Wentzell	263	0	263

There were two (2) ballots identified by the Commissioner's representative as requiring a ruling by the Commissioner which were, therefore, not counted. Of the 546 total ballots cast, 529 were counted for the two candidates, two (2) ballots were questioned and fifteen (15) ballots were blank.

The two (2) questioned ballots were marked C-1 and C-2 for determination by the Commissioner.

C-1 has a vote cast for write-in candidate Ralph McQuade and a vote cast for Herbert J. Wentzell.

C-2 has a vote cast for both candidates, Polly B. Deal and Herbert J. Wentzell.

The questioned ballots would not have a bearing on the final outcome of the election as the difference in the tally was three (3) votes.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of her authorized representative and adopts it as her own.

With respect to the two disputed ballots, the Commissioner notes that it is well established that ballots containing more votes than there are seats available will be voided; therefore, C-1 and C-2 are not to be counted and the tally on recount remains as reported by the Commissioner's representative above. In the Matter

of the Annual School Election Held in the School District of the Township of Monroe, Gloucester County, 1973 S.L.D. 212, affirmed State Board 1974 S.L.D. 1413

Accordingly, the Commissioner finds and determines that Polly B. Deal was elected to a one-year unexpired term on the Upper Pittsgrove Township Board of Education at the annual school election held on April 20, 1993. The Commissioner further notes that an inquiry into the general conduct of this election is presently pending before the Office of Administrative Law (OAL) and directs that a copy of the within decision be forwarded to OAL for inclusion in the record of the inquiry.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 3, 1993

DATE OF MAILING - JUNE 3, 1993

119-93

DEBORAH KALAPOS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, tenured learning disabilities consultant, challenged Board's recoupment of alleged salary overpayment of $999 made to petitioner due to clerical error during 1991-92 school year. Petitioner contended she did not agree to deductions in paychecks of January 17, and 31, 1992.

ALJ concluded there was no agreement between parties that petitioner would reimburse Board. A board of education cannot require the reimbursement of monies paid in error through no fault of the employee. (Trenton Education Association v. Trenton Bd. of Ed.) Board was ordered to repay petitioner $999. Moreover, ALJ denied pre-judgment interest, finding Board did not act in bad faith nor did it deliberately violate any statute or rule.

Commissioner aodpted findings and determination in initial decision.

JUNE 3, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3618-92
AGENCY DKT. NO. 54-2/92

DEBORAH KALAPOS,
Petitioner,
v.
TRENTON BOARD OF EDUCATION,
MERCER COUNTY,
Respondent.

Kathleen A. Naprstek, Esq., for the petitioner (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Thomas W. Sumners, Jr., Esq., for the respondent (Sumners, Council & Inniss, attorneys)

Record Closed: March 12, 1993 Decided: April 23,1993

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

This matter concerns the recoupment by the respondent, the Trenton Board of Education (Trenton), of an alleged salary overpayment during the 1991-92 school year. The petitioner, Deborah Kalapos, filed a petition challenging the recoupment, and the matter was transmitted to the Office of Administrative Law on May 15, 1992, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The matter was initially scheduled for a prehearing conference on August 10, 1992, and was adjourned at the request of the respondent. The conference was rescheduled and took place on August 18, 1992. During the conference, Martin Sumners, Esq., represented the respondent, and Richard A. Friedman, Esq., represented the petitioner. Both agreed that the only issues in the matter are (1)

whether Trenton had the right to recoup the amount of the overpayment and (2) whether the petitioner agreed to the recoupment. Also, the parties discussed the possibility of a settlement and of preparing a stipulation of facts in lieu of a hearing.

It was decided that the conference would be continued on September 3, 1992. This conference date was adjourned at the request of the petitioner, and was rescheduled for September 25, 1992. Because of my conflict, the conference was adjourned and took place on September 29, 1992. On that date, the parties indicated that there would be no settlement and that there was a need for a brief hearing as to the issue of whether the petitioner agreed to the recoupment. Since this is an affirmative defense issue, the Board was ordered to present its proofs first at the hearing. The hearing was scheduled for December 11, 1992, and was adjourned at the request of the respondent. The hearing took place on January 25, 1993. Both parties submitted briefs on March 5, 1993, and neither submitted a reply brief within the specified period. The record closed on March 12, 1993.

The parties stipulated to the following:

1. The petitioner is a certified and tenured learning disability consultant employed by the respondent since September 1, 1970.

2. In December of 1991, the petitioner was advised by respondent's payroll supervisor, Belinda Pinckney, that she had been overpaid $999 due to a clerical error.

3. Deductions in petitioner's pay were made in paychecks dated January 17, 1992, and January 31, 1992, to recover the overpayment.

4. There is a dispute between respondent and petitioner as to whether petitioner agreed to the deductions.

5. The above facts constitute the entire and complete stipulation of facts in this matter.

At the hearing, Ms. Pinckney stated that she first met the petitioner in 1991 when there was a problem with the computer-generated paychecks issued to the petitioner. In December 1991, Ms. Pinckney found out that there was an overpayment of $999 in a paycheck dated October 11, 1991. The petitioner does not deny that there was an overpayment; however, because she received irregular salary payments at that time (R-1), the petitioner was not aware of the overpayment when she received the October 11, 1991 check.

After she discovered the overpayment, Ms. Pinckney spoke to the petitioner by telephone, informed the petitioner of the overpayment and told her that the amount of the overpayment would be taken out of the next paycheck. According to Ms. Pinckney, the petitioner was concerned about having the amount taken out of the next paycheck because of the Christmas holiday, and they discussed the possibility of installment deductions in January. During this conversation, Ms. Pinckney stated that the petitioner had no objection to the reimbursement and had verbally agreed to the reimbursement.

Ms. Pinckney stated that she did not talk to her supervisor or Trenton's attorney before she called the petitioner, and she did not think that this reimbursement violated the petitioner's rights. Ms. Pinckney indicated that the current procedure is for the employee to come to the payroll office and sign a written reimbursement agreement. However, Ms. Pinckney was not sure when this procedure went into effect and whether her call to the petitioner occurred before the procedure was adopted. Ms. Pinckney denied telling the petitioner that she had to pay the amount of the overpayment. However, Ms. Pinckney did not advise the petitioner that she did not have to pay back the money. Ms. Pinckney stressed that she only told the petitioner the amount of the overpayment and the arrangement for reimbursement.

Ms. Kalapos confirmed that she spoke to Ms. Pinckney before Christmas regarding the October 11, 1991 overpayment. Ms. Kalapos stated she was surprised since she was not aware of the overpayment. According to petitioner, Ms. Pinckney told her the amount of the overpayment and that Trenton was going to take that amount out of her next paycheck. Ms. Kalapos stated that no one informed her that she did not have to reimburse Trenton and it was her understanding that the only option she had dealt with the arrangement for the payment. After the reimbursement, Ms. Kalapos was informed that she could have refused to reimburse Trenton.

Both parties agree that the case law has clearly established that a board of education cannot require the reimbursement of monies paid in error through no fault of the employee, Trenton Educ. Ass'n v. Trenton Bd. of Educ., 1986 S.L.D. 2415, Galop v. Hanover Bd. of Educ., 1975 S.L.D. 358, Honaker v. Hillsdale Bd. of Educ., 1980 S.L.D. 898, and Conti v. Montgomery Bd. of Educ., OAL DOCKET NO. EDU 7118-84 (April 25, 1985), rev'd, Comm'r of Educ. (June 10, 1985), rev'd, State Bd. (July 2, 1986).

Although Trenton recognizes that it cannot mandate the reimbursement, it contends that it is entitled to retain the money in this matter since Ms. Kalapos voluntarily agreed to the reimbursement and that she should be estopped from vacating the agreement.

Kathleen A. Naprstek, Esq., on behalf of the petitioner, disagrees and argues that Ms. Kalapos never voluntarily agreed to the reimbursement and, as a matter of law, she is entitled to the return of the money.

After reviewing the testimony of the parties, I agree with the petitioner's argument. Ms. Kalapos was never informed that she had the option of retaining the money paid in error. It is clear from the testimony that the only option given to Ms. Kalapos was the arrangement of the reimbursement. The fact that she requested a delay cannot be construed as a voluntary agreement to make the payment since she didn't think she had a choice. In order for the Board to be entitled to retain the money it has to show that the petitioner was aware that she had the right to retain the money and that she waived this right and voluntarily agreed to the reimbursement. See, Shebar v. Sanyo Business Sys. Corp., 111 N.J. 276, 290-91 (1988). The facts clearly established that there was no such waiver since Ms. Kalapos was not aware that she had the option.

Therefore, I **CONCLUDE** that there was no agreement between the parties that Ms. Kalapos would reimburse the respondent and I **ORDER** the respondent to repay $999 to the petitioner.

In her brief, Ms. Naprstek suggests that the petitioner is entitled to pre-judgment interest pursuant to N.J.A.C. 6:24-1.16. A request for interest was included in the petition filed by Ms. Kalapos. Ms. Naprstek noted that in the 1986 Trenton Educ. Ass'n case, and in a recent case, Trenton Bd. of Educ. v. Trenton Ed. Ass'n, Agency Dkt. No. 455-9192 (Comm'r of Educ., Jan. 22, 1993), Trenton was

admonished by the Commissioner of Education as to its efforts to obtain reimbursement of overpayments. Trenton did not respond to the petitioner's request for interest in its brief.

Having reviewed the provisions of N.J.A.C. 6:24-1.16, I **CONCLUDE** that the petitioner is not entitled to pre-judgment interest. Trenton has taken the position in this matter that the petitioner agreed to the reimbursement and, even though I disagree, I **CONCLUDE** that its position was not taken in bad faith nor was it a deliberate violation of any statute or rule. Further, there is a factual difference between this case and the two prior Trenton decisions cited above. In the two prior cases, there was no allegation of an agreement by the parties as to the reimbursement.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 7th Floor, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 23, 1993
Date

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

April 27, 1993
Date

Maureen L. Kelly
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 30 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

cad

EXHIBITS ADMITTED INTO EVIDENCE:

For the Petitioner:

None

For the Respondent:

R-1 Listing of salary payments made to Deborah Kalapos for the period between January 4, 1991, and September 11, 1992

WITNESSES:

For the Petitioner:

Deborah Kalapos

For the Respondent:

Belinda Pinckney

OAL DKT. NO. EDU 3618-92

DEBORAH KALAPOS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon careful and independent review of the record of this matter, the Commissioner concurs with the ALJ's findings of fact and conclusions of law which establish that respondent is not entitled to recoup an overpayment paid to petitioner. See Trenton Education Association v. Trenton Board of Education, 1986 S.L.D. 2415.

Accordingly, for the reasons expressed in the initial decision, the Petition of Appeal is dismissed, with prejudice.

COMMISSIONER OF EDUCATION

JUNE 3, 1993

DATE OF MAILING - JUNE 3, 1993

120-93

IRA SWEET,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
JEFFREY OSOWSKI, DIRECTOR OF SPECIAL EDUCATION, NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning citizen alleged Board violated federal and state special education laws and implementing regulations by subjecting students with disabilities to inappropriate psychological testing (Slosson Intelligence Test) at the time of their periodic updates and triennial evaluations. Petitioner sought investigation by respondent Division of Special Education; request was denied for lack of jurisdiction.

ALJ dismissed petition for failure to state cause of action. ALJ found selection of tools for evaluating is a matter left to professional judgment of those individuals who are immediately involved with students, provided that tests used meet general criteria of regulations. Petitioner's papers demonstrated his complaint was fundamentally one of professional disagreement about general value of Slosson Test even for purposes consistent with its intended and accepted usage. Division was therefore correct in finding complaint investigation procedure inappropriate in this instance. Petition was dismissed noting that claims of improper use in individual cases are properly resolved through due process proceedings.

Commissioner adopted findings and determination in initial decision, noting that while there is debate about use and validity of Slosson and other intelligence tests, such debate cannot in itself serve as a basis to allege violation of law and compel investigation where the alleged facts and circumstances do not otherwise warrant.

JUNE 3, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING MOTION TO DISMISS
OAL DKT. NO. EDU 110-93
AGENCY DKT. NO. 485-10/92

IRA SWEET,
Petitioner,
v.
JEFFREY OSOWSKI, DIRECTOR OF SPECIAL EDUCATION, NEW JERSEY STATE DEPARTMENT OF EDUCATION,
Respondent.

Ira Sweet, *pro se*

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

Record Closed: March 9, 1993 Decided: April 20, 1993

BEFORE **JOSEPH F. MARTONE,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The petitioner filed a petition of appeal with the Commissioner of Education on October 27, 1992, alleging that the school district of the Township of Jackson has violated Federal and State special education laws and implementing regulations by subjecting students with disabilities to inappropriate psychological testing at the time of their triennual reevaluations. Accordingly, petitioner sought an investigation of this allegation by the Division of Special Education. The matter was transmitted to the Office of Administrative Law (OAL) on January 6, 1993, for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

On November 20, 1992, prior to the transmittal of this matter to the OAL, attorney for respondent filed an answer and a notice of motion to dismiss the petition for failure to state a claim or for summary disposition.

The matter was assigned to the undersigned Administrative Law Judge (ALJ) on February 26, 1993, and a telephone conference was scheduled for March 9, 1993. The telephone conference was held on March 9, 1993 and on that date, the parties agreed that they would rely upon their prior submissions with respect to the motion to dismiss or for summary decision. Accordingly, the record closed on March 9, 1993, with respect to the submissions on the motion and petitioner's responses thereto.

NATURE OF THE MOTION

In this matter, attorney for respondent has made a motion to dismiss or, in the alternative, for summary decision. Motion practice in the OAL is governed by the provisions of *N.J.A.C.* 1:1-12.1 to 12.7. These provisions do not specifically deal with a motion to dismiss such as has been made by respondent in this matter. However, *N.J.A.C.* 1:1-12.5(b) provides that a motion for summary decision may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.

While respondent has sought an order for summary decision as an alternative, the nature of respondent's motion is to dismiss for failure to state a claim upon which relief can be granted. Such a motion is not included within the New Jersey Uniform Administrative Procedure Rules, *N.J.A.C.* 1:1-1.1 to -21.6. However, *N.J.A.C.* 1:1-1.3(a) provides that in the absence of a rule, a judge may proceed in accordance with the New Jersey Court Rules provided the rules are compatible with the purposes of achieving just results, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

Rule 4:6-2e of the New Jersey Court Rules permits a party to file a motion with briefs if the party is seeking the dismissal of a case for failure to state a claim upon which relief can be granted. The courts approach with great caution applications for dismissal under this rule and have indicated that such a motion should be granted only in the rarest of instances and after it has been accorded meticulous and indulgent examination. *Printing Mart v. Sharp Electronics*, 116 *N.J.* 739, 771-772. In

ruling on a motion to dismiss for failure to state a claim, all of the facts alleged in a complaint and the legitimate inferences drawn therefrom are deemed to be admitted. *Polk v. Schwartz,* 166 *N.J. Super.* 292 (App. Div. 1979). As was indicated in the *Printing Mart* case, the court is obligated to search the complaint in depth and with liberality in order to ascertain whether a cause of action may be gleaned even from obscure statements of a claim. *C.B. Snyder Realty Co. v. Seeman Bros. Inc.*, 79 *N.J. Super.* 88 (App. Div. 1963).

In order to apply the foregoing principals in this matter, it is necessary to determine which of petitioner's pleadings must be examined in order to determine whether a cause of action has been stated. In order to make this determination, it is necessary to examine the regulations governing this proceeding.

GOVERNING REGULATIONS

Pursuant to the provisions of 20 *U.S.C.A.* §2831(a), the United States Secretary of Education is authorized to issue such regulations as are considered necessary to reasonably ensure that there is compliance with the specific requirements and assurances required by Federal education laws. Pursuant to this authority, the Secretary has adopted regulations found at 34 *C.F.R.* §300.660 to 300.662. Section 300.660 requires each state education agency (SEA) to adopt written procedures for resolving any complaint that meets the requirements of §300.662 by providing for the filing of a complaint with the SEA. Section 300.661 requires each SEA to include in its complaint procedures a time limit of 60 calendar days after a complaint is filed to carry out an independent on-site investigation if the SEA determines that such an investigation is necessary, give the complainant the opportunity to submit additional information about the allegations in the complaint, review all relevant information and issue a written decision setting forth findings of fact and conclusions and the reasons for the SEA's final decision. Section 300.662 provides that an organization or individual may file a signed written complaint which must include a statement that a public agency has violated a requirement of part B of the Act, and the facts on which the statement is based.

Pursuant to the foregoing requirements, *N.J.A.C.* 6:28-9.2(a) designates the Director of the Division of Special Education or his or her designee as being responsible for reviewing, investigating and taking action on any signed written complaint of substance regarding the provisions of special education and/or related services. The regulation goes on to require that the Division of Special Education

shall complete such an investigation within 60 calendar days after a written complaint is received. *N.J.A.C.* 6:28-9.2(c) provides that a report of findings, conclusions and, when warranted, the required corrective actions shall be sent to the parties involved. Finally, *N.J.A.C.* 6:28-9.2(d) provides that upon receipt of the complaint investigation report, either party may appeal the findings and/or recommendations by filing a petition with the Commissioner of Education in accordance with *N.J.A.C.* 6:24 or the United States Secretary of Education in accordance with 34 *C.F.R.* 76.781.

DISCUSSION

Based upon the foregoing provisions, it now appears clear that the complaint which must be closely examined to determine whether its states a claim upon which relief can be granted is petitioner's letter of October 5, 1992 which was received by the Division of Special Education on September 20, 1992 (Exhibit C-1). This one-page letter had attached to it a four-page excerpt from the *Seventh Mental Measurement Yearbook* (Exhibit C-2) and 25 psychological evaluations variously referred to as either updates prior to a student's entering high school or periodic updates. These evaluations were dated between May 22, 1989 (Exhibits C-3, C-4 and C-10), to March 27, 1990 (Exhibit C-11). Each of these evaluations indicated that the Slosson Intelligent Test was administered as part of the evaluation. The majority of these evaluations indicated that the Wechsler Intelligence Scale for Children-Revised (WISC-R) had been previously administered to the student.

In his letter, petitioner alleges that his complaint relates to noncompliance with special education laws and to inappropriate psychological evaluations. Petitioner alleges that the psychologist at the Jackson School District continues to use the Slosson test as a basis for evaluating students intellectual levels. Petitioner asserts that based upon the Seventh Mental Measurements Yearbook the Slosson test appears to be available as a quick screening device. However, the uncritical use of the Slosson test as a substitute for Wechsler or Binet instruments is ill-advised. The letter of complaint also sets forth that it is of concern to the petitioner that in many cases attempts are made to justify the Slosson test scores when results are not consistent with Wechsler results.

In his letter of response, the Director of the Division of Special Education indicates that the Division has reviewed the complaint and has determined that petitioner's concerns were not within the jurisdiction of the Division to investigate in

accordance with *N.J.A.C.* 6:28-9.2. The Director further advises petitioner of his right to appeal this determination to the United States Secretary of Education or to the Commissioner of Education.

While the Director's letter does not specifically set forth the grounds or basis for his determination that petitioner's concerns are not within the jurisdiction of the Division to investigate, respondent's Answer to the Petition of Appeal does elaborate on these reasons. Paragraph 11 of respondent's answer indicates that the value of the (Slosson) test is a matter of professional judgment or opinion and the value of the test is irrelevant to the question of whether the Division of Special Education has jurisdiction to investigate the complaint. In paragraph 12 of the Answer, respondent states that the value of the Slosson test is irrelevant to the issue of whether the Division of Special Education has jurisdiction to investigate the complaint. Paragraph 13 states that the allegations are a matter of opinion or professional judgment. Finally, in the Thirteenth Separate Defense, respondent asserts that it is not the function of the Department of Education to evaluate standardized tests that meet the requirements of *N.J.A.C.* 6:28-3.4(d)(5) but rather this is left to the professional judgment of the professional administering the test.

The position taken by the respondent in this matter has the support of Federal authorities. In response to an inquiry concerning reliance on the basis of an IQ score, Robert R. Davila, Assistant Secretary, stated at 18 IDELR1231 (May 1, 1992):

> In the evaluation process, the role of professional judgment in decision-making cannot be overlooked. In terms of the scores that a student obtains during testing, the true score falls somewhere along a confidence interval . . . Decisions about this score value are left to the judgment of the professional administering the test. See, 34 *C.F.R.* §300.532(a)(3).
>
> In 34 *C.F.R.* §300.532(a)(3), a foundation is provided for the use of professional judgment in the interpretation of evaluation data used for the determination of student eligibility for special education and related services.

In this matter, petitioner asserts that psychologists in the Jackson school district continued to use the Slosson test as a basis for evaluating students intellectual levels and asserts that in many cases efforts are made to justify the Slosson test scores when results are not consistent with WISC-R results. No additional information is provided by petitioner. Thus, the Division of Special Education has been left to guess in what way petitioner asserts that the Slosson tests has been inappropriately used. Each of

the evaluations provided by petitioner make it clear that these are updates prior to the student entering high school or they are part of a triennial reevaluation. Thus, it may be that the psychologist possesses other data, materials and information relating to the student's intellectual assessment and that the Slosson test is merely being utilized to confirm other assessments. In addition, it appears clear that the school psychologist, in comparing the Slosson test results with prior WISC-R testing, is making the determination that the test results are relatively similar and that there has been no significant change on the part of the student.

As attorney for respondent points out, the *Seventh Mental Measurements Yearbook* does not indicate that the Slosson test should never be used. Even if it is assumed that the *Seventh Mental Measurements Yearbook* is a learned treatise, *Fed R. Evid.* 803(18), it still amounts to no more than the opinion of the author. There may be other professionals who do not agree with the opinions expressed by the author of the *Seventh Mental Measurements Yearbook*.

The choice of a standardized test is left to the professional judgment of the child study team, and its members, as long as the test meets the four criteria established in *N.J.A.C.* 6:28-3.4(d)(5). However, the selection of tools for evaluating is a matter that is left to the professional judgment of those individuals who are immediately involved with the student.

Thus, although the assertions in petitioner's letter of complaint must be taken as true, petitioner has cited no authority to establish that respondent has an obligation and responsibility to investigate decisions made by experts in their professional judgment. The type of inquiry which the petitioner seeks in this matter is best made at a due process hearing convened pursuant to 20 *U.S.C.A.* §1415. (b) and involving the professionals responsible for the evaluation of the special education student. It is only then that all of the facts and circumstances giving rise to the decision made by the school psychologist or other expert to use a particular test can best be evaluated and its validity determined.

DECISION AND ORDER

Based upon the foregoing, it is hereby **ORDERED** that petitioner's appeal be **DISMISSED** for failure to state a cause of action.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

April 20, 1993
Date

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

4/22/93
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 27 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

WITNESSES

None

LIST OF EXHIBITS

C-1 Petitioner Letter of October 5, 1992
C-2 Excerpt from The Seventh Mental Measurements Yearbook
C-3 Psychological Evaluation dated May 22, 1989
C-4 Psychological Evaluation dated May 22, 1989
P-5 Psychological Evaluation dated May 25, 1989
C-6 Psychological Evaluation dated May 25, 1989
C-7 Psychological Evaluation dated May 25, 1989
C-8 Psychological Evaluation dated May 25, 1989
C-9 Psychological Evaluation dated May 25, 1989
C-10 Psychological Evaluation dated May 22, 1989
C-11 Psychological Evaluation dated March 27, 1990
C-12 Psychological Evaluation dated January 30, 1990
C-13 Psychological Evaluation dated January 25, 1990
C-14 Psychological Evaluation dated March 23, 1990
C-15 Psychological Evaluation dated February 13, 1990
C-16 Psychological Evaluation dated December 7, 1989
C-17 Psychological Evaluation dated January 25, 1990
C-18 Psychological Evaluation dated March 22, 1990
C-19 Psychological Evaluation dated March 22, 1990
C-20 Psychological Evaluation dated January 26, 1990
C-21 Psychological Evaluation dated February 20, 1990
C-22 Psychological Evaluation dated March 19, 1990
C-23 Psychological Evaluation dated March 20, 1993
C-24 Psychological Evaluation dated June 16, 1989
C-25 Psychological Evaluation dated February 26, 1990
C-26 Psychological Evaluation dated January 26, 1990
C-27 Psychological Evaluation dated October 12, 1989
C-28 Letter of Director, Division of Special Education dated October 13, 1992

IRA SWEET,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
JEFFREY OSOWSKI, DIRECTOR OF SPECIAL EDUCATION, NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by petitioner pursuant to the provisions of N.J.A.C. 1:1-18.4. Respondent requested an extension of time in which to submit a reply to these exceptions, which request was denied on grounds that it would impede issuance of the Commissioner's determination within the 45-day statutory deadline. Subsequently, respondent filed a motion to suppress petitioner's exceptions because they included as exhibits documents not introduced into evidence in proceedings before the ALJ. The Commissioner declines to entertain this motion, as it raises issues properly within the purview of reply exceptions and was submitted well beyond the period permitted for such replies; however, in so declining, the Commissioner notes that the disputed documents, while in fact not introduced into evidence, are included in the record of this matter as transmitted to the Commissioner by the Office of Administrative Law.

In his exceptions, petitioner first argues that the ALJ erred in dismissing his appeal based on the original letter requesting a complaint investigation rather than on the contents of his petition and amended documentation, which, he claims, contain ample basis to demonstrate that his challenge to the Division of Special Education's determination did indeed deserve a hearing on the merits. Petitioner further contends that the ALJ erred in considering and weighing petitioner's substantive evidence in deciding a motion to dismiss for failure to state a claim, rather than confining himself to the sufficiency of petitioner's pleadings as would have been proper in a matter of this type. Finally, petitioner claims that he was denied discovery by respondent pending the outcome of its motion to dismiss, and that had he had such discovery and the proper opportunity to present his evidence, he would have been able to demonstrate that the Division of Special Education had jurisdiction to investigate his complaint.

Upon careful review of this matter, the Commissioner concurs with the ALJ that the Petition of Appeal should be dismissed.

It is clear from the letter and supporting attachments originally filed with the Division of Special Education, as well as from the further explication and clarification provided by petitioner in conjunction with the instant appeal, that the essence of petitioner's complaint--no matter how he casts it or how much of the requested information he may have been able to obtain from respondent on discovery had his case proceeded--is his professional belief that a particular testing instrument is uniformly inappropriate for use in special education evaluations of any type and should be disallowed altogether in this context. However,

petitioner's own filings demonstrate--nor does he claim otherwise--that the disputed test is not being used in initial evaluations or for placement purposes, nor is it being routinely used as the sole standardized instrument in the periodic updates and re-evaluations of which petitioner complains; to the contrary, it is being used in a manner consistent with its stated purposes as derived from petitioner's own supporting papers, with its administration and interpretation in each child's case left to the judgment and discretion of the evaluating professional. Under these factual circumstances, where the issue is manifestly one of disagreement in professional judgment rather than of generally improper use, the Division of Special Education acted appropriately in determining, after review of petitioner's letter and supporting papers, that petitioner's concerns were not of the type proper for pursuit through the complaint investigation procedure set forth in N.J.A.C. 6:28-9.2.

The Commissioner further notes that, while it is evident that there is a lively academic and professional debate about the use and validity of the Slosson Intelligence Test, and indeed, of most standardized intelligence tests, such debate cannot in itself serve as a basis to allege violation of law, and hence warrant investigation or interdiction, when a professional exercises his trained judgment and lawful discretion and generally elects to use a particular instrument even in the face of stated disagreement by another professional, so long as the test is being used, as herein, consistent with its accepted purpose. In cases where such use may be individually inappropriate, as noted by the ALJ, remedy lies in use of available due process proceedings.

Accordingly, the initial decision of the Office of Administrative Law dismissing the Petition of Appeal is affirmed for the reasons expressed therein together with the reasons set forth above.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 3, 1993

DATE OF MAILING - JUNE 3, 1993

121-93

MICHAEL FACCONE ET AL.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioners, 14 high school teachers, challenged Board's withholding of their salary and adjustment increments due to excessive absenteeism or unsatisfactory evaluations.

ALJ dismissed appeals of five petitioners who did not appear at hearing. Following review of record, testimony and evidence, ALJ concluded Board's withholding of increments of remaining petitioners was not arbitrary, without rational basis or induced by improper motives. ALJ affirmed withholdings.

Commissioner adopted findings and determination in initial decision, noting ALJ did address each petitioner's individual circumstances before affirming withholdings.

JUNE 3, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 220-90
AGENCY DKT. NO. 367-12/89

MICHAEL FACCONE, MARY DOMBROWSKI, ROSEMARY HURTADO, JEROME KACPROWICZ, MONICA MEADE-STEPHENS, SUSAN VELARDI, JOSEPH MICELI, MARGARET SULLIVAN, JOHN ZAUCHA, DAWN DENT, MARSHA BROOKS, ROOSEVELT WRIGHT, ANDREW WASHINGTON AND DAVID HAINES,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, COUNTY OF HUDSON,
Respondent.

Philip Feintuch, Esq., for petitioners (Feintuch, Porwich and Feintuch, attorneys)

David F. Corrigan, Esq., for respondent (Murray, Murray & Corrigan, attorneys)

Record Closed: November 17, 1992 Decided: April 20, 1993

BEFORE **JOSEPH F. MARTONE,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners challenge the withholding of their salary increments and salary adjustments claiming that they were inappropriately withheld in violation of *N.J.S.A.* 18A:29-14. This matter was transmitted to the Office of Administrative Law (OAL) on January 10, 1990, for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The matter was then scheduled for a telephone prehearing conference before the Honorable Ward R. Young, ALJ, on April 11, 1990. The telephone prehearing conference was adjourned at the request of the attorney

for petitioners due to his unavailability and it was rescheduled for May 9, 1990. It was thereupon assigned to the undersigned ALJ.

The telephone prehearing conference scheduled for May 9, 1990, was adjourned due to the illness of attorney for respondent, and it was rescheduled for May 21, 1990. A telephone prehearing conference was held on May 21, 1990 and a prehearing order was entered on May 31, 1990 settling the procedures in this matter. A hearing was scheduled for October 24, 26, 30 and 31 and November 2 and 14, 1990.

On June 27, 1990, attorney for respondent filed a motion to dismiss the petition of appeal for failing to comply with the ninety day time limit set forth in *N.J.A.C.* 6:24-1.2. By letter dated July 25, 1990, attorney for respondent withdrew the motion. The scheduled hearings on October 24 and 26, 1990 were adjourned at the request of attorney for respondent. The hearings scheduled for October 30 and 31, 1990 were adjourned due to court scheduling conflicts. The hearing scheduled for November 2, 1990 was adjourned due to a death in the family of attorney for respondent. The hearing of November 14, 1990 was adjourned at the joint request of both attorneys in order to afford them an opportunity to prepare and submit a stipulated statement of facts in order to avoid the necessity for a hearing. The matter was rescheduled for November 27, 1990, but this was adjourned at the joint request of both attorneys since neither was available on that date and neither had taken steps to prepare the joint stipulation of undisputed facts.

When counsel failed to submit the agreed upon stipulation of facts by January 19, 1991, a hearing was rescheduled for April 19, 1991. The hearing commenced on that date with the expectation that counsel would submit stipulated facts. No facts were stipulated at that time and when the hearing was not concluded on that date the hearing was rescheduled to continue on the earliest available dates which were September 19 and 25, 1991.

The hearing concluded on September 25, 1991. Both attorneys requested that the record remain open pending their receipt of transcripts and that they be given an opportunity to submit written closing arguments. The attorneys agreed to provide written closing arguments including proposed findings of fact and conclusions of law 45 days after their receipt of transcripts in this matter.

Both attorneys submitted legal arguments on or about May 19, 1992. Through inadvertence on the part of the ALJ, the record remained open pending receipt of additional submissions. It was eventually determined by the ALJ to close the record on November 17, 1992, and that no further submissions were to be accepted from the parties.

Because of the extensive testimony and voluminous documentary evidence, and because of the long delays between hearing dates and between the conclusion of the hearing and the consideration of the record for this Initial Decision an extension of time to render this Initial Decision was required.

Petitioners Mary Dombrowski Rosemary Hurtado, Marsha Brooks, Roosevelt Wright and David Haines failed to appear at any of the scheduled hearing dates in this matter and accordingly with respect to these five petitioners the petition shall be deemed to have been abandoned.

FACTUAL DISCUSSION

Michael Faccone

Petitioner Michael Faccone, a math teacher assigned to Dickinson High School was subject to the withholding of his salary increment for school year 1989-90 for unsatisfactory ratings (J-1).

Mr. Faccone testified that in June, 1989, he was advised by Ann Butler, Principal of Dickinson High School that his increment was to be withheld. He indicated that he had received no notification prior to that time.

Mr. Faccone was provided an Observation/Evaluation Report dated February 23, 1989 (Exhibit D-1) by Anita R. DeRosa, Supervisor of Compensatory Mathematics. Mr. Faccone testified that at the meeting following the evaluation, he met with Ms. DeRosa and she advised him that she did not like the looks of his plan book and that he lacked objectives and examples. Mr. Faccone admitted that he did not have objectives in the plan book, but that they were exhibited on the board for the students. Mr. Faccone also indicated that Ms. DeRosa advised him that she did not like the way he was dressed and for that reason he was given an unsatisfactory rating in the category of exhibiting of professional attitude and manner. Mr. Faccone testified that there is no dress code in the Jersey City school system, but

admitted that he had been previously advised by another administrator concerning the need to dress professionally. With respect to the unsatisfactory rating regarding implementing and enforcing school rules, administrative regulations and board policy, Mr. Faccone believed that this had to do with his attendance.

Mr. Faccone testified that he was evaluated again on May 25, 1989 by Ms. Butler (Exhibit D-2). He indicated that he received one unsatisfactory rating because she did not like his plan book.

On cross-examination, Mr. Faccone testified that he was never previously a warned by anyone concerning his attendance. Mr. Faccone indicated that in 1987 he was absent 97 days, but that no one told him that 97 absences during the year was not satisfactory. In school year 1987-88 he was absent approximately 28 days, and in 1988-89 he was absent for 30 or more days, but he felt that these absences were satisfactory under the circumstances since they were for legitimate reasons. He indicated that when he was absent he was replaced by a substitute teacher who may or may not have been licensed. However, he felt that certified substitute teachers are able to teach as well as he.

Mr. Faccone also testified that on the date of his evaluation by Ms. DeRosa he was considered late because he was not standing in front of his room. However, he indicated that he was in his class when the bell rang and that Ms. DeRosa's statement that he was five minutes late is inaccurate.

On redirect examination Mr. Faccone testified that he was out 97 days in 1986-87 because he was waiting for surgery on a knee which he hurt in a work related incident.

Anita DeRosa, Program Supervisor of Mathematics, testified that on February 23, 1989, she observed Mr. Faccone and prepared an Observation/Evaluation Report (Exhibit D-1). Ms. DeRosa testified that she gave Mr. Faccone an unsatisfactory rating in the category "assesses needs and evaluates progress of pupils" because there were no student improvement plans available for her review and there were no test grades recorded in the role book for the students in the class. In addition, Mr. Faccone was given an unsatisfactory for employing effective organization and planning because there was no plan book. Ms. DeRosa explained that a plan book is important because it is necessary to know the skills that a teacher wants to teach to the students and a plan book organizes a teacher's thoughts. A plan book also

insures that a teacher follows a prescribed curriculum and it is necessary for continuity. Ms. DeRosa testified that in the absence of a plan book, the students are being cheated of a guide for their education. Ms. DeRosa also testified that she gave an unsatisfactory to Mr. Faccone in the category of exhibiting professional attitudes and manner because he was five minutes late to class thereby not giving his students his fullest attention. Ms. DeRosa also indicated that she gave an unsatisfactory to Mr. Faccone in the category implementing and enforcing school rules, administrative regulations and board policy because he engaged in a game with the students where the winning student or would not have homework assigned over the weekend. Ms. DeRosa indicated that it is contrary to board of education policy not be assign homework. Finally, Ms. DeRosa indicated that she advised Mr. Faccone that his attendance needed improvement. She explained that continuity of instruction for the students is important and that if a teacher is not present the students are being deprived of an education. She explained that this class was a basic skills class and it is necessary that the students have the benefit of having a teacher to teach them properly. She indicated that when a teacher is absent, other teachers are asked to cover and the covering teacher may have no knowledge of mathematics. As a result the education of the students is disrupted and in some instances there is no instruction.

On cross-examination Ms. DeRosa indicated that Mr. Faccone did not assign homework at the end of his class and that the policy of the school district is to require homework assignments for each class. She also indicated that she did not consider Mr. Faccone's absences in arriving at any of the unsatisfactory performance ratings. Ms. DeRosa also indicated that the individual student improvement plans were not available in the classroom but that Mr. Faccone indicated that they would be made available. She also indicated that she did not recall following up to see if the plans were available. She also indicated that Mr. Faccone was not addressing those skills and student weaknesses necessary in order to have the students pass the high school proficiency test, which was the purpose of the class. Ms. DeRosa also indicated that when she questioned Mr. Faccone as to why he was five minutes late he said that it was because he was clearing the hall of students. She indicated that this is not part of his teaching duties when he has an obligation to be in class on time.

On redirect examination, Mr. Faccone indicated that he was absent in school year 1986-87 (Exhibit D-5) because he sustained a work related injury in June 1985. In January 1986 he had a knee operation because of this injury.

Ann E. Butler, a Principal in the Jersey City School District also testified that she conducted an evaluation of Mr. Faccone on May 25, 1989 (Exhibit D-2). She indicated that she recalled speaking to Mr. Faccone regarding his absentee record because he was absent 35 days for that school year. She indicated that a teacher's absences effects his ability to teach because it takes away from teaching and the learning by the students. She testified that substitutes are provided or other teachers are assigned during their on-call periods to cover the class, and if a lesson plan is left, the substitute will follow it. If there is no lesson plan the substitute will try to get something from the department chairperson to keep the students busy. However, a substitute or a teacher who covers usually babysits. She indicated that there is a difference between the regular teacher teaching and a substitute or on-call teacher. On cross-examination Ms. Butler indicated that she probably spoke to Mr. Faccone concerning his absenteeism and she used the word "probably" because she could not remember exact dates when she spoke to him about his absenteeism.

Ms. Butler indicated that based upon the evaluation of Mr. Faccone she recommended the withholding of his increment. She indicated that on her Observation/Evaluation Report (Exhibit D-2) an unsatisfactory rating was given to Mr. Faccone for employing effective organization and planning because he failed to have his plan book available. she stated that teachers are required to have plan books at all times. Ms. Butler also testified that Mr. Faccone failed to have objective to the lesson as to what the students were going to be learning on the date of her evaluation. Finally, Ms. Butler indicated that her recommendation to withhold Mr. Faccone's increment was based only upon her report, and that one unsatisfactory rating is a sufficient basis for denying an increment.

Mr. Faccone testified on rebuttal that Ms. Butler evaluated him only one time. Mr. Faccone testified that he has a plan book but the lesson that Ms. Butler came in to observe was not in the plan book because he had started to review with the class. As a result, he had to put something together while Ms. Butler was present. He indicated that he had finished all course instruction for the year and that he was reviewing for the final exam. Accordingly, Mr. Faccone testified that the plan book existed and it was in the classroom but that they only plan for that day was to review material for the final exam.

Jerome Kacprowicz

The employment increment of Jerome Kacprowicz, a history teacher, for the 1989-90 school year was withheld for the reason of chronic and excessive absenteeism (Exhibit J-1). Mr. Kacprowicz testified that prior to the denial of this increment he was never disciplined in any manner.

Mr. Kacprowicz testified that the school board does not have any kind of attendance policy and that the rule of thumb has been that a teacher is entitled to use sick days up to the amount in the teacher's sick leave bank. If a teacher is out a certain number of days within a 30-day period, the teacher is required to provide a medical doctor's explanation for the absences.

Mr. Kacprowicz testified that in none of the years that he was sick did he ever exceed the number of days in his sick leave bank. He also has never been denied any increment as a result of being absent.

Mr. Kacprowicz identified his Annual Performance Report dated June 23, 1989 (Exhibit D-14). He testified that he was not aware until August , 1989, that the principal, Ann E. Butler recommended against his increment because of excessive absenteeism. He indicated that Ms. Butler never communicated her concern regarding his absences and never advised that his increment was in jeopardy based upon his attendance record.

On cross-examination Mr. Kacprowicz testified that his absences of 31 days for the 1986-87 school year (Exhibit D-8) and his absences of 32 days for the 1987-88 school year (Exhibit D-9) were satisfactory because his absences were for legitimate reasons. He admitted that at the time of his evaluation that he reviewed his Observation/Evaluation Report of March 31, 1987 (Exhibit D-11) wherein it was suggested that he reduce his absences to benefit his students, the school and himself because a teacher is a role model. Mr. Kacprowicz also indicated that he was aware of the Observation/Evaluation Report of January 14, 1988 (Exhibit D-12) which indicated that better teacher attendance is beneficial to students, school and teacher. Finally, Mr. Kacprowicz indicated that he reviewed the Observation/Evaluation Report of March 15, 1989 (Exhibit D-13), also indicating that his attendance needed improvement.

Mr. Kacprowicz testified that when he was absent he made sure that he sent in assignments for his students in order to maintain continuity with his classes.

Ms. Butler identified the teacher attendance records for Mr. Kacprowicz (Exhibits D-8, D-9 and D-10). She indicated that her prior testimony regarding how teacher absences effects the educational services received by students applies equally to a history teacher as to a teacher of mathematics. Ms. Butler testified that when she signed Mr. Kacprowicz's Annual Performance Report (Exhibit D-14) she mistakenly recommended him for an increment but that she corrected this mistake and she indicated that the reason for recommending the denial of the increment was based on his excessive absenteeism. Ms. Butler testified that she spoke to Mr. Kacprowicz every year concerning his poor attendance. She recalls telling him on prior occasions that he was out too much and that she would recommend withholding his increment. However, nothing ever came of it. She testified that she previously recommended withholding the increment of Mr. Kacprowicz but that the school board did not follow through.

On cross-examination Ms. Butler testified that Mr. Kacprowicz was aware prior to June 23, 1989 that his increment was in jeopardy because a letter was sent advising him of this. She admitted that in no year did Mr. Kacprowicz use in excess of the number of sick days accumulated in his sick leave bank. Ms. Butler stated that while there was no comparative measurement of the effect of the absences of Mr. Kacprowicz on his students, that it is incredible to believe that the students got everything they should have out of the class because of his absences.

Susan Velardi

Susan Velardi's employment increment for the 1989-90 school year was withheld for the reason of chronic or excessive absenteeism (Exhibit J-1). Ms. Velardi testified that she had resigned from the school district in February, 1990. At the time of her resignation she was employed as a mathematics teacher at Dickinson High School.

Ms. Velardi testified that prior to the withholding of her increment, she had never been disciplined in any fashion. She indicated that in September, 1986, she fell accidentally in school, hit her head and slid down the stairs and as a result she was absent on those days shown as "s.a." on her teacher attendance record for school year 1987-87 (Exhibit D-15). In addition, Ms. Velardi testified that in 1987 and 1988, she was out on various days because of severe migraine headaches and medication caused by the September, 1986 injury.

Ms. Velardi testified that for the 1988-89 school year, she was out 177 days, which is virtually the entire school year, because she was a passenger in a car involved in an accident (Exhibit D-17). Ms. Velardi testified that she did not exceed her sick leave bank for 1988-89 and that at the beginning of the year she had sufficient days in her sick leave bank to cover any absences. She testified that no one advised her at that time that as a consequence of her involvement in the automobile accident that her increment was in jeopardy. She did indicate that she received the certified letter in the summer of 1989 saying that the school board was meeting concerning her increment.

On an Observation/Evaluation Report of April 21, 1988, (Exhibit D-18) there is noted that teacher attendance is an area needing improvement. The same is true with regard to the Observation/Evaluation Report of March 28, 1988 (Exhibit D-19).

Ms. Velardi testified that in the year 1988-89 she did not receive any communication from respondent that because she was out for virtually the entire school year her increment was going to be denied.

Ann Butler, Principal of Dickinson High School, testified that Ms. Velardi came in the first two days of school year 1988-89, and then commenced requesting leaves of absences for the balance of the entire year. As a result there were problems with covering Ms. Velardi's mathematics class. Because of these absences, Ms. Velardi was not present to teach and there was no way to measure her performance. Because of the inability to evaluate Ms. Velardi's performance, Ms. Butler indicated that her increment was recommended to be withheld.

On cross-examination Ms. Butler indicated that Ms. Velardi's requests for leaves of absences were approved by the Board of Education and that they were apparently for legitimate purposes.

Monica Meadē-Stephens

The employment increment of Monica Meade-Stephens for 1989-90 was withheld for reason of chronic and excessive absenteeism (Exhibit J-1). Mrs. Stephens is a Spanish teacher assigned to Dickinson High School. She testified that prior to the withholding of this increment she was never disciplined or denied an increment.

Ms. Stephens testified that in August 1989, she was notified by letter that the school board was to consider the denial of her increment. She indicated that prior to that letter she was never counseled or notified that her absences may have an impact on her increment.

Ms. Stephens indicated that in the 1986-87 school year she had two leaves of absence beginning in January, 1987, when she had her eighth operation for diverticulitis. Her teacher attendance record for 1986-87 (Exhibit D-20) shows 119 days absent. Ms. Stephens was also absent a total of 55 days in 1987-88 (Exhibit D-21). She explained that she has a condition as a result of her operations called ulcerative colitis. Ms. Stephens indicated that she was not advised during that school year that any of her illnesses or absences would result in action being taken against her and that no action was taken against her. For school year 1988-89 Ms. Stephens was absent for 43 days for the same reasons. She indicated that the school was aware of her illness but at no time did anyone advise her that her absences are a detriment to her teaching efforts or that they may impact on her getting an increment.

On cross-examination Ms. Stephens indicated that every time she was absent it was because she was ill and that her illness prevented her from performing her teaching duties. Ms. Stephens indicated that even though she was absent for extended periods in prior school years, and even though she was having sporadic relapses, her increments were not withheld in those prior years.

Ann Butler testified that she discussed her attendance record with Ms. Stephens quite often. She testified that in January, 1988, Ms. Stephens' absences were becoming excessive, and that she inquired of Ms. Stephens concerning her absences. She indicated that Ms. Stephens's students were getting upset because of her absences and the resulting impact on their grades and their futures. After her discussion with Ms. Stephens, there was some improvement in her attendance in February, and March, 1988. However, in April, 1988, Ms. Stephens was absent 15 days and she was absent for 9 additional days in May and June, 1988. According to Ms. Butler, she again spoke to Ms. Stephens concerning her excessive absences, prior to the close of the 1987-88 school year.

Ms. Stephens attendance record improved slightly for the 1988-89 school year. She was absent 43 days as opposed to 55 days for the prior school year. However, Ms. Butler indicated that 43 days absent is a significant amount of time and it is

difficult to obtain substitute Spanish teachers. Ms. Butler testified that she again discussed the excessive absences with Ms. Stephens during school year 1988-89, and that the response of Ms. Stephens was to explain her illnesses, and the pressures and difficulties she was facing in her personal life. Ms. Butler explained that the bottom line was that a teacher is required to be present in order to teach students and that the record did not show improvement. Ms. Butler indicated that discussions with Ms. Stephens occurred quite often.

Ms. Butler testified that following an evaluation on March 15, 1989, she discussed with Ms. Stephens her absences and excessive latenesses.

Ms. Butler indicated on cross-examination that she recommended the withholding of Ms. Stephens' increment on the basis of excessive absenteeism and excessive lateness. Ms. Butler also testified that a pool substitute teacher was assigned to the school and that she has a certification in Spanish. She was assigned to substitute when a Spanish teacher was absent. However, Ms. Butler also indicated that if two Spanish teachers were absent, the pool substitute would only be able to replace one of them.

Ms. Butler also admitted that prior evaluations did not mention excessive absenteeism. However, she indicated that she verbally advised Ms. Stephens of her excessive absences at the time of the prior evaluations.

Margaret Sullivan

The 1989-90 employment increment of Margaret Sullivan was withheld for reasons of chronic and excessive absenteeism (Exhibit J-1). Ms. Sullivan is assigned to Ferris High School teaching Spanish to Hispanic students. Ms. Sullivan testified that in March, 1989, she received a letter from Mr. Matthews indicating that there was some concern about her attendance. At that time, she had been absent 10 or 11 days. Ms. Sullivan indicated that she met with Mr. Matthews and he told her that if she continued to show improvement in her attendance there would be no increment withholding. She indicated that between March and June, 1989, she was absent two or three times. However, she had a sufficient number of days in her sick leave bank to cover these absences. She also indicated that she is allowed sick leave and personal leave of 16 days in any school year without any loss of pay. Ms. Sullivan indicated that the most absences that she had in prior years was 19 days involving

illnesses and deaths in the immediate family. She also indicated that she is not aware of any board policy concerning absences.

Ms. Sullivan testified that over the years her students continually improved and that they had a satisfactory success rate as a result of her instruction.

Ms. Sullivan testified that after the discussion with Mr. Matthews in March, 1989, no further discussion occurred concerning her attendance.

On cross-examination, Ms. Sullivan indicated that the Observation/Evaluation Report of December 12, 1986 (Exhibit D-29) suggested improvement in her absenteeism. In addition, the Observation/Evaluation Report of March 17, 1988 (Exhibit D-30) indicated that Ms. Sullivan should attempt to improve her attendance record and that teacher absences impact heavily on the continuity of instruction. Ms. Sullivan also identified a memorandum addressed to her referring to a meeting on May 9, 1989, advising that she had been late 39 days and absent 12 days (Exhibit D-32).

Ms. Sullivan testified that in the post-evaluation conference for the evaluation of March 17, 1988, the evaluator did not mention attendance.

Mr. Terrence Matthews, Principal of Ferris High School, testified that on October 13, 1987, a memo addressed to the faculty was sent out advising them that the school district was attempting to improve faculty attendance based on a State and local board initiative (Exhibit D-36). An attendance improvement plan was developed and submitted to the superintendent and a goal of 97 percent attendance was established.

Mr. Matthews testified that the attendance improvement plan was implemented by discussions with staff members, posting of percentage of attendance for students and faculty for each month and providing copies to the faculty and keeping a log on latenesses and attendance. Mr. Matthew indicated that the approach they were looking at was not so much number of days absent but "instances" of absence. He explained that if a teacher was out five days with the flu, that was considered one instance of absence. A figure of seven or more instances of absence resulted in a conference with individuals concerning their attendance. Eventually, after a period of time, some individuals were recommended to have their increments withheld because of their pattern of absences over a period of years.

Mr. Matthews testified that Ms. Sullivan's attendance for the 1986-87 school year (Exhibit D-35) of 14 days absent at one or two days at a time is disruptive of the educational process. Ms. Sullivan's absences for the 1987-88 school year totaling 19 days (Exhibit D-37) is less then satisfactory. Finally, based upon Ms. Sullivan's absences for the 1988-89 school year (Exhibit D-38) consisting of 13 days absent it was recommended that her increment be withheld.

Mr. Matthews indicated that when he was considering withholding Mr. Sullivan's increment, it was narrowed down to a number of teachers which he felt had enough warning and enough conferences. These teacher were given an opportunity for a hearing, but Ms. Sullivan failed to request such a hearing. As a result, it was recommended that her increment be withheld.

Mr. Matthews testified that a teacher's absences effect students because a student cannot be taught if a teacher is not present. With a substitute, the quality of the teaching is not the same. Mr. Matthews also testified that Ms. Sullivan was late a substantial number of times and that she was advised as to the negative impact of the latenesses. Mr. Matthews testified that lateness is an absence for a period time. However, because Ms. Sullivan's increment was withheld for absenteeism, the ALJ held that evidence related to lateness was irrelevant to these proceedings.

Mr. Matthews testified that information was given to teachers alerting them that if they were out more than a certain number of days their increment would be denied. A teacher was warned once they hit seven instances of absences, that the increment may be denied in the discretion of the administration. However, it would depend upon the circumstances of the absences and the teacher's historical pattern of absences. On cross-examination Mr. Matthews further indicated that while there was no specific written policy with respect to the number of absences required for withholding of an increment, that it would depend upon the circumstances of each case and that it is an educational judgment depending on the circumstances and the teacher's historical pattern of absences.

On rebuttal, Ms. Sullivan testified that all of her absences were for reasons of personal illness. She also indicated that when she spoke with Mr. Matthews in March, 1989, he was the only one who spoke to her concerning her absences and

that he advised her that the letter was a formality and that if she showed improvement no action would be taken and her increment would not be withheld.

Joseph Miceli

The employment increment and adjustment increment of Joseph Miceli was withheld for school year 1989-90 for reasons of chronic and excessive absenteeism (Exhibit J-1). Mr. Miceli testified that he is an instrumental teacher/band director at Ferris High School, and in connection with his position he is in school at 8:30 a.m. and most of the time he leaves between 5:00 and 5:30 p.m. He is also coordinator of the music department.

Mr. Miceli testified that none of his prior evaluations mentioned attendance. The first time he was aware that attendance was of concern was as a result of a letter he received on March 8, 1989, wherein Mr. Matthews advised that he was recommending the withholding of any monetary compensation. No one from the administration met with him to discuss his attendance prior to that letter. Following that letter, Mr. Miceli requested a meeting. At that meeting, Mr. Miceli specifically advised that he was absent due to illnesses consisting of an occasional virus and on other occasions because he suffers from what he called a "spastic colon" which causes diarrhea. Up until the date Mr. Miceli received the letter he was absent twelve days. In addition, he testified that in no school year was he absent more than 21 days, which occurred in 1983-84. Mr. Miceli testified that he never received any warning whatsoever that his increment was in jeopardy prior to March, 1989.

On cross-examination Mr. Miceli indicated that prior to March, 1989, he was never advised in writing that his attendance needed improvement. Mr. Miceli's Observations/Evaluation Report of February 12, 1987 (Exhibit D-40) indicates attendance as a area needing improvement to enable students to attain a sense of continuity of the subject being taught. However, Mr. Miceli testified that he was never notified formally that his attendance would result in withholding of an increment. In addition, the Annual Performance Report of June 15, 1987 (Exhibit D-41) indicates that attendance is an area needing improvement. Likewise, the Observations/Evaluation Report of April 28, 1988 (Exhibit D-42) indicates attendance must be improve as per district and State requirements so that students can sense continuity of subject being taught. Mr. Miceli denied having received a memo addressed to him from Terrence Matthews dated February 15, 1989 (Exhibit D-43). With respect to Mr. Miceli's absences by year (Exhibit D-44) Mr. Miceli indicated that

it is possible it might be off by a day but it appears to be a correct record of his absences.

Terrence Matthews identified the attendance record of Mr. Miceli for school year 1986-87 (Exhibit D-45), his attendance record for 1987-88 (Exhibit D-46), and a memo listing Mr. Miceli's absences by various years (Exhibit D-44). Mr. Matthews testified that the absences by year dating back to 1973-74 was obtained from the attendance records on file in the school.

Mr. Matthews also testified that the memo dated February 15, 1989 to Mr. Miceli (Exhibit D-43) was sent to him on that date. He stated that he discussed Mr. Miceli's attendance with him on many occasions over the years. He indicated that these discussions were to the effect that Mr. Miceli had to improve his attendance, that his absences were too high and that while he sympathized with the reasons it was having a negative impact. Mr. Matthews testified that Mr. Miceli gave as the reasons for his absences that his son was ill.

Mr. Matthews testified that he recommended the withholding of Mr. Miceli's increment for 1989-90 because Mr. Miceli had been warned in the two prior school years, and his record of attendance was not getting any better.

On cross-examination Mr. Matthews indicated that Mr. Miceli's past record of absences was considered and that his improvement from twenty-one days absent in 1986-87 to sixteen days in 1988-89 was not a sufficient improvement. In addition, Mr. Matthews testified that he knows Mr. Miceli received the memo of February 15, 1989 (Exhibit D-43), because they discussed its contents.

Mr. Matthews testified that Mr. Miceli's sporadic absences had an effect on the continuity of education because the instruction process is not occurring even though the youngsters are being covered. Other teachers cover the class on their on-call periods.

William Millevoi also testified that at the time of his Observations/Evaluation Report of February 12, 1987, he discussed with Mr. Miceli the need to improve his attendance. (Exhibit D-4). He also indicated that attendance was discussed with Mr. Miceli at the time of the Annual Performance Report dated June 15, 1987 (Exhibit D-41), and at the time of the Observation/Evaluation Report of April 28, 1988 (Exhibit D-42). He testified that he discussed with Mr. Miceli his attendance problem on

many occasions. Mr. Millevoi indicated that when a faculty member is out in excess of eight days as set forth in the Observation/Evaluation Report of February 12, 1987 (Exhibit D-40). This violates the policy set forth in the memo of October 13, 1987 (Exhibit D-36) and that a warning is necessary.

Mr. Millevoi testified that the reduction in the number of Mr. Miceli's absences over the years was a numerical improvement but not an educational improvement.

John Zaucha

The employment increment of John Zaucha for school year 1989-90 was withheld for reasons of chronic and excessive absenteeism (Exhibit J-1). Mr. Zaucha testified that he had been employee for seventeen years and that he had never been denied an increment until school year 1989-90. He testified that the first notification that his increment was going to be denied was by letter received by him in August, 1989.

Mr. Zaucha testified that in school year 1988-89 he was teaching at both Dickinson High School and Ferris High School on a split schedule. He teaches cooperative industrial education which is a program for special education students.

Mr. Zaucha testified that in school year 1988-89 he was evaluated by Richard O'Brien, Vice-principal of Ferris High School. He indicated that he spends most of his time at Ferris High School because his office is there but he reported to Dickinson High School every day. His evaluations during the 1988-89 school year were excellent and he was recommended for an increment (Exhibit D-55). Accordingly, he had no knowledge that his increment was in jeopardy until August, 1989.

Mr. Zaucha testified that he received a letter listing how many times he had been absent and indicating that absences are a basis for withholding an increment. At that time he had thirteen or fourteen absences. He also testified that he received a letter dated March 8, 1989, stating that a decision had been made to withhold his increment (Exhibit D-53).

Mr. Zaucha recalls that mention was made at a faculty meeting concerning a policy regarding absences. During the course of the 1988-89 school year he was absent fourteen sick and two personal days and the collective bargaining agreement allows fourteen sick and two personal days. This amounted to seven or nine

instances of absence. He also indicated that he was only absent more than sixteen days in the 1986-87 school year.

Mr. Zaucha testified that he recalls Mr. O'Brien's speaking to him on one occasion which may have been the prior year concerning his absentee record. At that time Mr. Zaucha told Mr. O'Brien that he was sick.

Mr. Zaucha identified an Annual Performance Report dated June 20, 1988, wherein the improvement action to be taken was that Mr. Zaucha would try to improve attendance to comply with state mandates (health permitting). Mr. Zaucha indicated that he understood that the State mandate refers to the school average for attendance and that the desired attendance was 97 percent. He also indicated that faculty meetings occurred at which attendance improvement was discussed.

Mr. Zaucha testified that it was not until February 15, 1989 (Exhibit D-52) that he was advised that there was going to be a financial impact upon him. After that date, Mr. Zaucha testified that he was only out two additional days.

Terrence Matthews testified that Mr. Zaucha was absent 19 days during school year 1986-87 (Exhibit D-49) for school year 1987-88 there were sixteen absences (Exhibit D-50), and for school year 1988-89 there were sixteen absences (Exhibit D-51). Mr. Matthews then identified the letter sent to Mr. Zaucha on February 15, 1989 (Exhibit D-52). As a result of this letter Mr. Zaucha came into see Mr. Matthews and advised him that his son was ill. However, Mr. Matthews said that on March 8, 1989 he forwarded a letter to Mr. Zaucha advising him that he was going to recommend that his increment be withheld based on a pattern of absenteeism (Exhibit D-53). Mr. Matthews also identified a memo dated June 21, 1989 (Exhibit D-54) outlining the number of days absent from school years 1979-80 through 1988-89. The purpose of this was to bring to Mr. Zaucha's attention his pattern of excessive absences. This was considered in recommending an increment withholding on the basis that the attendance pattern was detrimental to the school and to the educational process. Mr. Matthews indicated that the fourteen sick days per year provided to teachers by the collective bargaining agreement are in case of necessity but they are not to be abused. The negotiated agreement provides for bank days and Mr. Matthews indicated that the intent of the sick leave bank days was to enable individuals to accumulate days in case of a long-term illness to avoid major financial problems.

Richard O'Brien, vice-principal of Ferris High School, testified that he had occasions to discuss with Mr. Zaucha his attendance record in the Fall, 1987. At that time Mr. Zaucha indicated that there were some family problems that were impeding his attendance and it involved getting a babysitter, or if the children were sick that some one had to watch the children. In the Spring, 1988, another conversation occurred at which time Mr. Zaucha indicated that he was going to work to improve his attendance.

Mr. O'Brien identified Mr. Zaucha's Annual Performance Report dated June 1, 1989 (Exhibit D-55) wherein it is indicated that Mr. Zaucha should improve his attendance. Mr. O'Brien indicated that he had discussed attendance a couple of times with Mr. Zaucha. Mr. O'Brien indicated that he recommended that Mr. Zaucha receive his increment based upon his teaching performance.

Dawn Dent

The 1989-90 employment increment for Dawn Dent was withheld for reasons of unsatisfactory evaluations and chronic and excessive absenteeism (Exhibit J-1). Ms. Dent testified that she had been employed for eight years as a special education teacher for neurologically impaired students at Lincoln High School. Prior to being denied an increment in the 1989-90 school year, she had never suffered the loss of an increment. In addition she was never previously disciplined in any fashion. Ms. Dent testified that prior to the denial of her increment she was never given any indication that her work effort or her attendance were not satisfactory.

Ms. Dent first became aware of a problem with her teaching performance being unsatisfactory around January 24, 1989 when she was so advised by John Pacifico, Principal at Lincoln High School. On that date Mr. Pacifico called her into his office and advised her that he was going to give her a poor evaluation and withhold her increment. Mr. Pacifico then evaluated Ms. Dent within five minutes after that conversation.

Ms. Dent identified the Observation/Evaluation Report of January 24, 1989 (Exhibit D-56). Ms. Dent indicated that as a special education teacher her instruction differs from student to student. She indicated that at no time was she ever notified by Mr. Pacifico or any one as to what was needed at the time of her evaluation. In addition, she was not advised at the time of the evaluation that her attendance was of some concern. However, attached to the Observation/Evaluation Report of

January 24, 1989 was Ms. Dent's attendance record from school year 1983-84 through January 19, 1989 (Exhibit D-56). Ms. Dent testified that through January 20, 1989 she had been absent thirteen days. In the prior year she was absent seventy-one days because she had been in a car accident. Ms. Dent testified that none of her leave requests for the prior year had been denied. In school year 1986-87 Ms. Dent was out twenty-four days, in the year before that she was out nineteen and one-half days and the year previous twenty-one days. Ms. Dent indicated that she did not lose pay for any of those days because she had sufficient days in her sick leave bank to cover these absences.

Ms. Dent testified that she was subsequently evaluated by Mr. DiNardo on February 28, 1989 (Exhibit D-57). Ms. Dent indicated that there was no discussion possible with Mr. DiNardo concerning this evaluation. She testified that she was satisfied with the success of her students since the goals of the students were reached in all cases.

On cross-examination Ms. Dent identified a memo received by her on March 2, 1989 (Exhibit D-58). She indicated that the memo accurately reflected her attendance record. She also indicated that she teaches special education and that this is specialized area. Ms. Dent stated that she first became aware that her attendance was unsatisfactory when she received her evaluation in 1989. Ms. Dent identified an Annual Performance Report dated May 10, 1989 (Exhibit D-59) which recommended that Ms. Dent not receive an increment and which indicated the necessity to improve her performance in various areas and to improve her attendance.

John Pacifico, Principal of Dickinson High School, and former principal of Lincoln High School, identified Ms. Dent's attendance record for school year 1986-87 (Exhibit D-60), for school year 1987-88 (Exhibit D-61) and for school year 1988-89 (Exhibit D-62).

Mr. Pacifico testified that he first commenced discussing Ms. Dent's attendance record with her the first year he arrived at Lincoln High School. Generally he discussed with her that time lost in the classroom can never be made up and that everyone should try to come in even when they have reasons not to come in. He indicated that Ms. Dent always showed an interest in trying to improve and that whatever the medical problems were she said she would try to do better.

Mr. Pacifico testified that the absence of a teacher effects the educational process because the time can never be made up, that the time is lost to the student forever and there is nothing that anyone can do to recover it. A substitute can never do a fraction of what is expected of the professional staff. They are filling in and they often use emergency lesson plans. He indicated that what is expected of teachers is considerably more than what can be obtained with a person with minimal training.

Mr. Pacifico indicated that he sent a letter dated March 2, 1989, to Ms. Dent advising her that her increment would be withheld. Her attendance after that letter was sent did not improve.

With respect to the evaluation of January 24, 1989 (Exhibit D-56), Mr. Pacifico indicated that when he observed this class it was not a good class, that Ms. Dent's record keeping was not very good, that her planning was poor and that her instruction technique left much to be desired. In addition, under professionalism he indicated that her attendance and personal grooming needed attention. Her mid-term examination was poor.

Mr. Pacifico testified that on a number of occasions Ms. Dent came to school inappropriately dressed, and that as role models teachers are required to dress in a professional manner. Mr. Pacifico also indicated that the subsequent evaluation of Ms. Dent on February 28, 1989, by Mr. DiNardo (Exhibit D-57) was also unsatisfactory.

Mr. Pacifico denied the occurrence of an incident in December, 1988, when he allegedly yelled at Ms. Dent in front of her students.

On cross-examination, Mr. Pacifico testified that he had no indication other than subjective evidence that the success of the children in Ms. Dent's class was less than other classes. However, he testified that if teachers don't come to school regularly and do not dress professionally they are communicating to the students how little they care about them.

Mr. Pacifico testified that he did not make up his mind to recommend the withholding of Ms. Dent's increment until after the evaluation by Mr. DiNardo, the District-wide Supervisor of Special Education. He also indicated that while there was

an improvement in Mr. DiNardo's evaluation over his evaluation, he felt that Mr. DiNardo saw some things differently.

Andrew Washington

Andrew Washington's 1989-90 employment increment was withheld based on unsatisfactory ratings (Exhibit J-1).

Mr. Washington, a fifth grade teacher at PS Number 3 testified that he was first notified in April, 1989, that his increment was in jeopardy. Mr. Washington testified that he is no longer employed in the school district and that he left in June, 1990.

Mr. Washington identified an Observation/Evaluation Report dated October 26, 1988 (Exhibit D-63), but indicated that he did not know why he received unsatisfactory ratings from Ms. Cosgrove. He testified that after the evaluation there was a very short meeting but no detailed discussion occurred.

Mr. Washington also identified an Observation/Evaluation Report dated December 21, 1988 (Exhibit D-64), by Marsha Leff, Principal of the school. Mr. Washington also indicated that he did not really have a discussion with Ms. Leff following this evaluation.

Finally, Mr. Washington identified an Observation/Evaluation Report dated February 14, 1989 (Exhibit D-65), and also indicated that he did not really meet with the evaluator after the evaluation.

With respect to the unsatisfactory rating on the report of February 14, 1989, Mr. Washington indicated that he received it because two students in his class were disruptive and he was unable to effectively discipline the entire class. Mr. Washington felt the unsatisfactory ratings he received were incorrect based upon his prior years of teaching experience and the fact that he was able to use effective teaching techniques.

Mr. Washington identified the Annual Performance Report of June 23, 1989 (Exhibit D-66). He indicated that this was the first time that he was aware that he was not recommended for reemployment and that he was not recommended for an increment.

On cross-examination, Mr. Washington indicated that his class was occasionally disruptive. He testified that on the second day of class one of the students knocked everything off of his desk and the student was removed by the principal. Other students who were disruptive were removed from his class by his supervisors. Mr. Washington indicated that the disruptions in his classroom were sporadic. When questioned concerning the evaluations indicating that he needed improvement in his management of the classroom, Mr. Washington stated that he does not recall any of his supervisors ever speaking with him about this.

Mr. Washington testified that there were about twenty-five or twenty-six children in his class and some of them were troublesome and others were a joy. Some of the students required a disproportionate amount of attention for disciplinary reasons.

Mary Ann Wallace, Principal of PS Number 3, also known as the Frank R. Conwel School testified that she performed the Observation/Evaluation Report of February 14, 1989 (Exhibit D-65) and indicated that this report was given to Mr. Washington with the notation referring to numerous incidents. Ms. Wallace testified that because Mr. Washington was new to the building, and because he was evaluated poorly by his supervisor, she tried to work with Mr. Washington helping him improve so that he would not fail in his teaching. As a result they spent much time together, with her visiting his classroom when needed and being there when he had a problem. The children in his class were frequently sent to her. A subsequent evaluation showed failing grades for Mr. Washington but Ms. Wallace testified that Mr. Washington appeared to be trying. As a result on February 14, 1989 Ms. Wallace spend from 11:00 a.m. until 2:30 p.m. observing Mr. Washington's class. Her presence eliminated the discipline problem he was experiencing. However, no matter what was done, Mr. Washington could not correct the discipline problem in the class.

Ms. Wallace testified that she worked with Mr. Washington almost daily trying to relieve the problems that were being created in the classroom by his lack of classroom control. There were disruptive activities throughout the entire day. One girl who was a discipline problem in Mr. Washington's class was moved to another fifth grade class where she was not a discipline problem. Ms. Wallace also testified that on another occasion, a child urinated on the floor and Mr. Washington said that it was not the first time that the child had done that. The child was reassigned to another fifth grade teacher.

Ms. Wallace testified that it is the responsibility of the classroom teacher to maintain control of the classroom. She indicated that Mr. Washington's class was an unusual situation and there was not another class in the building which was not being controlled by the teacher.

Ms. Wallace indicated that the class given to Mr. Washington was typical in its distribution of students but its behavior became unbelievably atypical. Ms. Wallace stated that were three other black teachers in the school ,which is predominantly Hispanic, and that their performance has been fine. On occasion, the fifth grade class was split into reading groups and math groups and the other teacher handling the split group did not experience the problems of disruption that Mr. Washington experienced. Mr. Washington was always cooperative and was a very willing worker. However, because of the classroom disruption there was a serious loss of learning.

Ms. Wallace testified that she recommended that Mr. Washington not be reemployed on the Annual Performance Report (Exhibit D-66) because the safety of the children in his classroom could not be secured.

On cross-examination Ms. Wallace indicated that the improvement between the three Observation/Evaluation Reports were the result of her interpretation of Mr. Washington's efforts but not of the fact of learning. Ms. Wallace indicated that the unsatisfactory ratings revolved around Mr. Washington's inability to maintain discipline in the classroom and a total lack of the control over the students.

Ms. Wallace indicated that she agreed with the recommendation to withhold Mr. Washington's increment because an increment is a reward for demonstrated success.

Mary Dombrowski, Rosemary Hurtado, Marsha Brooks, Roosevelt Wright and David Haines

The increments of the above-named individuals were withheld for the reasons stated in the resolution the Board of Education (Exhibit J-1). While a petition was filed by or on behalf of these petitioners, they failed to appear for the purpose of presenting their reasons for challenging the withholding of their respective increments. At the hearing, respondent moved to dismiss the petition of these five

individuals and the ALJ indicated that he would find that these individuals had abandoned their petition and an appropriate order would be entered.

LEGAL DISCUSSION

Annual increments are "in the nature of a reward for meritorious service to the school district" and entitlement to an increment is related "to the teachers' qualifications, performance or quality of teaching services rendered." *North Plainfield Education Assoc. v. Bd. of Ed. of North Plainfield, 96 N.J.* 587, 593 (1984); *see also Bernards Township Board of Education v. Bernards Township Education Association,* 79 *N.J.* 311, 321 (1979).

N.J.S.A. 18A:29-14 authorizes a board of education to withhold a teacher's increment for inefficiency or other good cause. Such a decision is a discretionary action and may not be upset unless found to be patently arbitrary, without rational basis or induced by improper motives. *Kopera v. West Orange Bd. of Ed.*, 60 *N.J. Super.* 288, 294 (App. Div. 1960). On appeal, the Commissioner is not to substitute his or her judgment for that of the evaluator's, and the scope of the Commissioner's review is to determine whether the board has a reasonable basis for its factual basis for its factual conclusion. *Id.* at 295. It should be determined on appeal whether the underlying facts were as those who made the evaluations claimed, and whether it was unreasonable for them to conclude as they did upon those facts, bearing in mind that they are experts without bias or prejudice and are closely familiar with the surrounding circumstances. *Id.* at 296-297. In such an appeal, the burden of proving unreasonableness is on the teacher.

In cases of increment withholding based upon chronic or excessive absenteeism, the foregoing principles apply. However, certain additional and somewhat confusing principles have been established by virtue of court and administrative decisions.

In *Trautwein v. Bound Brook Bd. of Ed.*, 1980 *S.L.D.* 1539 (App. Div. April 8, 1980), *certif. den.* 84 *N.J.* 469 (1980), the decision of a board of education to withhold a teacher's increment on the basis of excessive absenteeism was upheld by the Appellate Division. In that case, the teacher had a record of "excellent" to "good" classroom performance. However, the Board of Education reasoned that the teacher's total of 12 days absent during the school year when considered in light of her prior annual average of 20.6 days absent per school year diminished her

effectiveness and deprived students of quality teaching and continuity of instruction to which they were entitled. In the absence of a showing that the board's actions were arbitrary or unreasonable or in any way constituted an abuse of legislatively vested discretion, the Appellate Division held that its decision should be affirmed.

In *In the Matter of the Tenure Hearing of Sheets*, 1979 *S.L.D.* 790, rev'd, Comm'r of Educ., 1979 *S.L.D.* 800, rev'd, State Board, 1980 *S.L.D.* 1536, it was held that chronic absenteeism may be grounds for discipline because of the disruption of the continuity of instruction, even if a teacher's classroom performance is satisfactory and even if the absences are for an approved leave or sick days to which the teacher is entitled.

In *Borelli v. Bd. of Ed., Borough of Rutherford,* 1985 *S.L.D.* 1848, it was held that past absences over a reasonably relevant period of time may be considered, where it establishes a pattern of absenteeism which has continued into the school year in which the action to withhold is taken. Under *Borelli,* the local board may evaluate all the years in contention to determine whether there is continuity of conduct creating a pattern, the cumulative effect of which has a deleterious impact on the delivery of educational services.

In *Transky v. Bd. of Ed., City of Trenton*, 1989 *S.L.D.* 1509 *aff'd,* State Board, 1989 *S.L.D.* 1531, it was held that a local board need not make a prima facie showing that a teacher's performance was lessened by absenteeism or that the discontinuity of instruction was proved by the board. Rather, it is necessary for the board to show that the concern for continuity of instruction was considered by the board when weighing its decision to withhold an increment and by the supervisors during the period in which the excessive absenteeism was occurring.

In *Smith v. Bd. of Ed., City of Trenton,* OAL Dkt. No. EDU 5255-88 (March 6, 1989), *adopted,* Comm'r of Educ. (April 18, 1989), the Commissioner found that the local board had applied a mechanistic policy of prohibiting an arbitrary five percent or more "incidental" days absent as excessive or improper. It was held that in order for an increment withholding to be upheld there must be clear evidence of the school principal and the board having considered (1) the nature of the illness and not just the number of absences and (2) the impact of the absences on continuity of instruction. The consideration of these two elements cannot be mechanistic and cursory. Finally, the local board must demonstrate that the concern for the

continuity of instruction was specifically conveyed to the teacher during the period in which the excessive absenteeism was occurring. 1989 *S.L.D.* at 1507-1508.

In *Kuehn v. Bd. of Ed. of the Twp. of Teaneck,* 1983 *S.L.D.* 1582, a teacher was absent more than 90 days during the school year because of serious illness. The board of education had an unwritten practice that any staff member absent more than 90 days in a school year is ineligible for an increment in the following school year. The State Board of Education held that the determination of the local board that the teacher's absence exceeding 90 days, in and of itself, is sufficient reason for the increment withholding, without consideration of the particular circumstances for the absence, is arbitrary and without any demonstrated rational basis.

The burden of proving that a teacher's excessive absenteeism is not harmful to the education process rests with the teacher and not with the Board of Education. *Angelucci et al. v. Bd. of Ed. of West Orange*, 1980 *S.L.D.* 1066, *aff'd* State Board (Feb. 4, 1981); *Transky v. Bd. of Ed., City of Trenton, supra.*

While it may appear that the holdings in *Smith* and *Kuehn* and other similar cases, which require a local board to consider the nature of the teacher's illness and not merely the number of days absent, are inconsistent with the holdings in *Trautwein, Borelli* and *Angelucci,* such is not necessarily the case. In *Smith* and *Kuehn*, the local board attempted to apply an arbitrary standard to absences which occurred in a single school year. In such a case, the local board is required to consider the reasons for the teacher's absences, and not merely the number of absences. However, if the local board has considered a teacher's absences in a current year in light of the teacher's past absences over a reasonably relevant period of time, and it finds a pattern of absenteeism which has continued, the cumulative effect of which is a deleterious impact on the delivery of educational services, it may withhold the increment. In such a case, the reasons for the teacher's absences are irrelevant since they are harmful to the educational process.

To summarize, a school district may withhold a teacher's increment for chronic and excessive absenteeism:

(1) If the teacher has failed to render teaching services to the school district (*North Plainfield, supra*); or

(2) If at the time it determined that a teacher's absences were excessive, the school district considered either (a) the nature of the teacher's illness and not merely the number of days absent (*Smith* and *Kuehn*), or (b) a continuing pattern of absences over several recent years having a cumulative deleterious impact on the delivery of educational services (*Trautwein*, *Borelli* and *Angelucci*);

(3) If the school district's concern for continuity of instruction was considered when weighing the decision to withhold the teacher's increment (*Transky);*

(4) If the school district's concern as to the effect of the teacher's absences on the continuity of instruction was made known to the teacher during the period when the absences occurred (*Smith*); and

(5) If the teacher has failed to meet the burden of proving that the absences were not harmful to the educational process (*Angelucci* and *Transky*).

ANALYSIS WITH RESPECT TO EACH PETITIONER

It is now necessary to review the testimony and documentary evidence respecting the increment withholding as to each of the petitioners in light of the foregoing legal discussion.

Michael Faccone

Michael Faccone's 1989-90 increment was withheld based upon an Observation/Evaluation Report dated February 23, 1989 (Exhibit D-1) by Anita R. DeRosa, Supervisor of Compensatory Mathematics and an Observation/Evaluation Report dated May 25, 1989 (Exhibit D-2) by Ann E. Butler, Principal. Ms. DeRosa testified that Mr. Faccone received an unsatisfactory rating in the category assessing the needs and evaluating the progress of pupils because he had no student improvement plans available and no test grades were recorded by him in the role book for the students in the class. In addition, he was given an unsatisfactory for employing effective organization and planning because he had no plan book. Ms. DeRosa stated that a plan book is important in order to know the skills to be taught to students and it is a way of organizing a teacher's thoughts. It also insures that a teacher follows a prescribed curriculum and it is necessary for continuity of instruction. Ms. DeRosa gave an unsatisfactory to Mr. Faccone in the category of exhibiting professional attitude and manner because he was five minutes late to

class. Ms. DeRosa also gave an unsatisfactory to Mr. Faccone for implementing and enforcing school rules, administrative regulations and board policy because he failed to give homework to the students as directed by school district policy. Finally, Ms. DeRosa advised Mr. Faccone that his attendance needed improvement. However, she indicated that she did not consider Mr. Faccone's absences in arriving at any of the unsatisfactory performance ratings.

Ann Butler, Principal, testified that she gave an unsatisfactory rating to Mr. Faccone for employing effective organization and planning because he failed to have his plan book. She explained that teachers are required to have plan books at all times. In addition, she indicated that Mr. Faccone failed to have an objective for the class's lesson setting forth what the students were going to be taught on the date of the observation.

Mr. Faccone testified that he had his plan book available for review, but that Ms. DeRosa did not like its looks because it lacked objectives and examples. Mr. Faccone admitted that he did not have objectives in the plan book but that they were exhibited on the board for the students. Mr. Faccone also indicated that Ms. DeRosa also advised him that she did not like the way that he was dressed and for that reason he was given an unsatisfactory with respect to exhibiting professional attitude and manner. Finally, with respect to the unsatisfactory rating regarding implementing and enforcing school rules, administrative regulations and board policy, Mr. Faccone believed that this had to do with his attendance. Mr. Faccone indicated that the unsatisfactory rating given to him by Ms. Butler was because she did not like his plan book.

With respect to the testimony presented by the parties I **FIND** that the underlying facts were as to those who made the evaluation claimed. I **FIND** that on the occasion of both evaluations, Mr. Faccone failed to have his plan book available. I **FIND** that on February 23, 1989, Mr. Faccone was late for class. I **FIND** that there were no student improvement plans available for review and that no test grades were recorded in the role book for students in the class. I **FIND** that on that date, Mr. Faccone failed to assign homework to the students, contrary to school district policy. In addition, I **FIND** that on May 25, 1989, Mr. Faccone failed to have his plan book available and failed to have an objective for the lesson. In this regard I **FIND** that Mr. Faccone has not established that it was unreasonable for the evaluators and the school board to conclude, based upon the foregoing facts, that Mr. Faccone's 1989-

90 increment should be withheld, and I **CONCLUDE** that their action should be affirmed.

Jerome Kacprowicz

Jerome Kacprowicz's increment was withheld for reasons of chronic and excessive absenteeism. It is undisputed that in the three years prior to the withholding of his increment, Mr. Kacprowicz was absent 31 days in school year 1986-87 (Exhibit D-8), 32 days in the school year 1987-88 (Exhibit D-9) and 38 days in school year 1988-89 (Exhibit D-10). It is also undisputed that at the time of his annual evaluation on March 31, 1987 (Exhibit D-11) on January 14, 1988 (Exhibit D-12) and on March 15, 1989 (Exhibit D-13), Mr. Kacprowicz was advised by his supervisors of their concern for his absenteeism and he was advised that this was an area needing improvement. In addition, Ms. Butler, the school principal, testified that she spoke to Mr. Kacprowicz every year concerning his poor attendance, but nothing ever came of it.

In this matter respondent has established that Mr. Kacprowicz's supervisors had a concern about his continuing pattern of absences and their effect on the continuity of instruction being provided to his students and they expressed that concern both in their evaluation reports and in their discussions with him. In each of the evaluations (Exhibits D-11, D-12, and D-13), his supervisor suggested that Mr. Kacprowicz reduce his absences to benefit students, school and self. In addition, the reference in the evaluations to planning, pacing and assessment of student progress was related to the fact that Mr. Kacprowicz 's absences were causing delays in the students' completion of course requirements. Finally, the concern as to the continuity of instruction was clearly made known to Mr. Kacprowicz not only during the period in which the absences occurred by means of the evaluation report of March 15, 1989 (Exhibit D-13), but also was made known to him by the prior years' evaluations (Exhibit D-11 and D-12).

Under the terms of the collective bargaining agreement (Exhibit P-1) every teacher is entitled annually to 14 days of sick leave (Article 30) and two personal business days (Article 35). Mr. Kacprowicz's absences during 1988-89 as well as during the preceding two years far exceeded these numbers.

As discussed above, the burden of proving that a teacher's excessive absenteeism is not harmful to the education process rests with the teacher. In this regard, Mr. Kacprowicz testified that when he was absent he always made sure that

he sent in assignments for his students in order to maintain continuity with his classes. This testimony is insufficient to meet the burden of showing a lack of harm to the education process, particularly in view of the evidence that Mr. Kacprowicz' absences were causing delays in the students' completion of course requirements.

As a result, I **FIND** that respondent's absences of 38 days in 1988-89 exceeded the 16 days allowed by the collective bargaining agreement, and was excessive when considered in light of his pattern of absences of 32 days and 31 days in the two proceeding school years. I **FIND** that respondent considered the concern for the continuity of instruction and made known this concern to Mr. Kacprowicz during the period in which excessive absenteeism was occurring. In addition, I **FIND** that Mr. Kacprowicz failed to prove that his excessive absenteeism was not harmful to the education process. Accordingly, I **CONCLUDE** that it has not been established that respondent's action in withholding the increment of Jerome Kacprowicz was patently arbitrary, without rational basis or induced by improper motives, and that its action should be **AFFIRMED**.

Susan Velardi

The increment of Susan Velardi was withheld for school year 1989-90 for reasons of excessive absenteeism. During the preceding school year 1988-89, Mr. Velardi was absent a total of 177 days. It is not disputed that these absences were for a valid purpose, Ms. Velardi having been involved in a car accident.

There is no dispute that at the time Ms. Velardi was evaluated during school year 1987-88 (Exhibit D-18 and D-19) she was advised that her attendance was an area needing improvement. However, there is no indication that Ms. Velardi was advised by respondent during the 1988-89 school year that her supervisors were concerned as to the continuity of instruction or that they made known this concern to her. They could not advised her of this because she was absent for virtually the entire year.

Annual increments are in the nature of a reward for meritorious service to the school district, serve the purpose of encouraging quality in performance and entitlement to an increment is related to the teacher's performance or quality of teaching services rendered. *North Plainfield Education Assoc. v. Bd. of Ed. of North Plainfield, supra*. When viewed in this light it becomes clear that Ms. Velardi failed to provide any type of service, meritorious or otherwise so as to be entitled to an

increment. Because Ms. Velardi failed to render teaching services to the school district, I **FIND** that the action of respondent in withholding the increment of Susan Velardi for chronic and excessive absenteeism based on her absences of 177 days during the school year 1988-89, particularly when viewed in light of her prior year's absences, was not patently arbitrary, without rational basis or induced by improper motives. Accordingly, I **CONCLUDE** that respondent's action should be **AFFIRMED**.

Monica Meade-Stephens

Monica Meade-Stephens' 1989-90 increment was withheld due to chronic and excessive absences. She was absent 119 days during school year 1986-87 (Exhibit D-20), 55 days during school year 1987-88 (Exhibit D-21), and 43 days during school year 1988-89 (Exhibit D-22). It is undisputed that her absences were for legitimate reasons of illness and that her illness prevented Ms. Stephens from performing her teaching duties on the days she was absent.

Ann Butler, Principal, testified that she discussed with Ms. Stephens her attendance record very often. She inquired of Ms. Stephens' concerning the reasons for the absences. She also testified that Ms. Stephens' students were becoming upset because of her absences and because of the impact on their grades and their futures. Ms. Butler testified that in Ms. Stephens' Annual Performance Report dated May 15, 1987 (Exhibit D-23), and in an Evaluation Report dated March 15, 1989 (Exhibit D-24), concerns about Ms. Stephens' excessive absences and the need to improve her attendance were expressed to her.

With respect to Ms. Stephens, it cannot be disputed that her absences of 43 days during school year 1988-89 and her absences of 55 days and 119 days in the two years preceding, amount to chronic and excessive absenteeism. In addition, through the testimony of Ms. Butler, I **FIND** that it was established that the nature of Ms. Stephens' illness and reasons for her absences were considered. Through the testimony of Ms. Butler, I **FIND** that it was established that the concern for continuity of instruction was considered by Ms. Stephens' supervisor and that this concern was made known to Ms. Stephens during the period in which the excessive absenteeism was occurring. Finally, I **FIND** that Ms. Stephens has failed to meet her burden of showing that her excessive absenteeism was not harmful to the education process. In fact, the testimony of Ms. Butler to the effect that Ms. Stephens' students were getting upset because of her absences and the impact on their grades and their futures tends to show that her absences were having an adverse impact on the education process.

Based upon the foregoing, I **FIND** that Ms. Stephens has failed to establish that the actions of the respondent in withholding her 1989-90 increment based upon chronic and excessive absenteeism was patently arbitrary, without rational basis or induced by improper motives. Accordingly, I **CONCLUDE** that respondent's action in denying Ms. Stephens' annual increment for 1989-90 should be **AFFIRMED**.

Margaret Sullivan

Margaret Sullivan's increment for school year 1989-90 was withheld based upon chronic and excessive absenteeism based on her absences for the 1988-89 school year consisting of 13 days (Exhibit D-38).

There is no evidence in the record to establish that respondent considered the nature of Ms. Sullivan's illnesses when it determined that Ms. Sullivan's record of absences was excessive. On the other hand, I **FIND** that respondent established that it considered her absences of 14 days in 1986-87 and 19 days in 1987-88 in determining whether her 13 days absent in 1988-89 was excessive. While her 19 absences for the 1987-88 school year exceeded the number of sick and personal days given to a teacher by the collective bargaining agreement (Exhibit P-1) it appears to have been the only year in which this occurred. The decision in *Trautwein, supra,* is very similar to the factual scenario involving Ms. Sullivan. In that case, the teacher was absent 12 days during the school year. When that was considered in light of her prior annual average of 20.6 days absent per school year, the board concluded that the 12 days absences diminished the teacher's effectiveness and deprived the students of quality teaching and continuity of instruction to which they were entitled. See, also, *Borelli, supra.*

I **FIND** that Ms. Sullivan's principal, Terrence Matthews, expressed his concern to Ms. Sullivan by letter dated March 8, 1989 (Exhibit D-28) that her absenteeism was having a detrimental effect on the learning process. In addition, I **FIND** that this concern was also expressed by memo dated February 15, 1989 (Exhibit D-34). Finally, I **FIND** that Ms. Sullivan has failed to bear her burden of proving that her excessive absenteeism was not harmful to the education process.

Accordingly, I **FIND** and **CONCLUDE** that the action of respondent in withholding Ms. Sullivan's 1989-90 increment is not patently arbitrary, without a rational basis or induced by improper motives and should be **AFFIRMED**.

Joseph Miceli

Joseph Miceli's employment and adjustment increments were withheld for school year 1989-90 for reasons of chronic and excessive absenteeism. Mr. Miceli indicated that a record of his absences dating back to school year 1973-74 dated June 16, 1989 (Exhibit D-44) appeared to be a correct record of his absences. This indicated that for the 15 years commencing September 1973 and ending June 1988, he was absent a total of 278 days or 18.5 days per year. For school year 1986-87 Mr. Miceli was absent 21 days (Exhibit D-45), for school year 1987-88 he was absent 19 days (Exhibit D-46) and for school year 1988-89 he was absent 16 days (Exhibit D-47).

Mr. Miceli testified that none of his prior evaluations mentioned attendance, and that the first time he was aware that attendance was of concern was as a result of a letter he received on March 8, 1989. However, the evaluation report of February 12, 1987 (Exhibit D-40) indicates that attendance is an area needing improvement, and that improvement in attendance is necessary to enable students to attain a sense of continuity of the subject being taught. In addition, Mr. Miceli's Annual Performance Report of June 15, 1987 (Exhibit D-41) indicates attendance as a performance area needing improvement and that the improvement action is to reduce to one-third the number of absences of 86-87. Likewise, the evaluation report of April 28, 1988 indicated under areas needing improvement that attendance must be improved as per district and State requirements so that students can sense continuity of subject being taught. By memo dated February 15, 1989 (Exhibit D-43), Terrence Matthews, Principal of Ferris High School notified Mr. Miceli that as of that date he had been absent 12 times and that excessive absence has a negative effect on his teaching assignment. The memo inquired of any outstanding mitigating circumstances and that the principal should be made aware of these. Mr. Matthews also testified that he discussed with Mr. Miceli his attendance on many occasions over the years. These discussions were to the effect that Mr. Miceli had to improve his attendance, that his absences were too high, and that while he sympathized with the reasons it was having a negative impact.

With respect to Joseph Miceli I **FIND** that his supervisors established that they considered the nature of his illnesses when they determined that his absences were excessive. I **FIND** that their concern for the continuity for instruction was considered when deciding whether to withhold Mr. Miceli's increment. In addition, I **FIND** that the concern as to continuity of instruction was made known to Mr. Miceli during the

period in which the excessive absenteeism was occurring. Finally, I **FIND** that Mr. Miceli has failed to sustain the burden of proving that his excessive absenteeism was not harmful to the education process. Therefore, I **CONCLUDE** that the action of respondent in withholding the employment increment and adjustment increment of Joseph Miceli for school year 1989-90 was not patently arbitrary, without rational basis or induced by improper motives and should be **AFFIRMED**.

John Zaucha

The employment increment of John Zaucha for school year 1989-90 was withheld based on chronic and excessive absenteeism. Mr. Zaucha was absent 19 days during school year 1986-87 (Exhibit D-49), 16 days for school year 1987-88 (Exhibit D-50) and 16 days for school year 1988-89 (Exhibit D-51). By memo dated June 21, 1989 (Exhibit D-54) Terrence Matthews, Principal at Ferris High School, advised Mr. Zaucha that from school year 1979-80 through school year 1987-88, Mr. Zaucha had been absent a total of 117 days or an average of 13 days per year.

Mr. Zaucha indicated that mention was made at a faculty meeting concerning the policy regarding absences. He also testified that he was only absent more than 16 days in the 1986-87 school year. He recalled a supervisor speaking to him on one occasion in a prior year concerning his record of absences. However, Mr. Zaucha admitted that in his Annual Performance Reports of June 20, 1988 (Exhibit D-48) and June 1, 1989 (Exhibit D-55), it was indicated that attendance was an area needing improvement since it exceeded the State mandate. Mr. Zaucha also admitted receiving the memorandum dated February 15, 1989 (Exhibit D-52) advising him that he had been absent 13 times and that this excessive absence has a negative effect on his teaching assignment. By this memo he was further advised that if there were any outstanding mitigating circumstances to advise the principal. Finally, Mr. Zaucha admitted receiving the letter of March 8, 1989 (Exhibit D-53) recommending the withholding of his increment based upon the conclusion that the pattern of absenteeism has a detrimental effect on the learning process.

With the exception of school year 1986-87 when he had 19 absences, Mr. Zaucha's record of absenteeism did not exceed the 16 days allotted to him under the collective bargaining agreement. However, as is indicated in the letter of March 8, 1989 (Exhibit D-53) Mr. Zaucha's supervisor determined that his absences during the school year 1988-89 together with his prior record of absenteeism has a detrimental effect on the learning process.

In this matter, I **FIND** that respondent considered both the nature of Mr. Zaucha's illnesses and his continuing pattern of absences in recent years. I **FIND** that respondent has shown that concern for continuity of instruction was considered by it when weighing its decision to withhold Mr. Zaucha's increment. In addition, I **FIND** that the respondent established that it considered the impact of Mr. Zaucha's absences on the continuity of instruction. I **FIND** that respondent established that the concern of respondent as to the continuity of instruction was made known to Mr. Zaucha not only during the period in which the excessive absenteeism was occurring but also in prior school years. Finally, I **FIND** that Mr. Zaucha has not established that his excessive absenteeism was not harmful to the educational process. Accordingly, I **CONCLUDE** that in the case of John Zaucha the withholding of his 1989-90 increment was not patently arbitrary, without rational basis or induced by improper motives and accordingly, it should be **AFFIRMED**.

Dawn Dent

The employment increment of Dawn Dent for 1989-90 was withheld for reasons of unsatisfactory evaluations and chronic and excessive absenteeism.

I will first consider the unsatisfactory evaluation reports as to Dawn Dent. The Observation/Evaluation Report dated January 24, 1989 (Exhibit D-56) was conducted by John Pacifico and gave to Ms. Dent four unsatisfactory ratings out of a total of seven. An evaluation report of February 28, 1989 by Thomas P. DeNardo (Exhibit D-57) gave two unsatisfactory ratings out of seven performance factors to Ms. Dent. Mr. Pacifico testified as to the bases and reasons for his negative evaluations.

I have closely scrutinized the testimony of Ms. Dent with respect to the unsatisfactory evaluation reports. She indicated that she first became aware of the problem with unsatisfactory teaching performance on January 24, 1989, when Mr. Pacifico called her into his office and advised her that he was going to give her a poor evaluation and withhold her increment. Mr. Pacifico then evaluated Ms. Dent within five minutes after that conversation. She testified that at no time was she ever notified by Mr. Pacifico or anyone as to what was needed at the time of her evaluation. In addition, when she was subsequently evaluated by Mr. DeNardo on February 28, 1989, Ms. Dent indicated that there was no discussion possible with Mr. DeNardo concerning his evaluation. Finally, she testified that she was satisfied with the success of her students since the goals of the students were reached in all cases.

She indicated that as a special education teacher her method of instruction differs from student to student.

In this matter, I **FIND** that Ms. Dent has provided no testimony or documentary evidence to show that the underlying facts were not as claimed by those who made the two evaluations of her. Accordingly, I **FIND** that Ms. Dent has failed to show that the withholding of her increment based upon unsatisfactory evaluations was patently arbitrary, without rational basis, or induced by improper motive.

An additional basis for the withholding of Ms. Dent's increment was chronic and excessive absenteeism. Ms. Dent was absent 17 days in school year 1988-89 (Exhibit D-62), 71 days in school year 1987-88, because of her involvement in a car accident (Exhibit D-61), 24 days in school year 1986-87, 19.5 days in school year 1985-86, 21 days in 1984-85 and 40 days in 1983-84 (attachment to Exhibit D-56). Ms. Dent testified that she was not advised at the time of her evaluation on January 24, 1989 that her attendance was of some concern. However, the evaluation report (Exhibit D-56) indicates that her attendance record reflected a very high level of absenteeism and that lost instruction time to students due to faculty absences can never be made up. In addition, Mr. Pacifico testified that he commenced discussing Ms. Dent's attendance with her in the first year he arrived at Lincoln High School. He testified that the absence of a teacher effects the educational process because the time can never be made up that time is lost to the student forever and that there is nothing anyone can do to recover it.

With respect to the withholding of Ms. Dent's increment on the basis of chronic and excessive absenteeism, I **FIND** that respondent considered a continuing pattern of absences by Ms. Dent over several recent years when it determined that her absences were excessive. I **FIND** that respondent has shown that the concern for continuity of instruction was considered when weighing the decision to withhold Ms. Dent's increment. In addition, I **FIND** that respondent has established that this concern as to continuity of instruction was made known to Ms. Dent during the period in which the excessive absenteeism was occurring. Accordingly, I **CONCLUDE** that it was not patently arbitrary, without rational basis or induced by improper motives for respondent to withhold Ms. Dent's increment for the school year 1989-90 and that this action should be **AFFIRMED**.

Andrew Washington

Mr. Washington's 1989-90 employment increment was withheld based on unsatisfactory ratings. The evaluation report of October 26, 1988 (Exhibit D-63) gave Mr. Washington unsatisfactory ratings in the categories of assessing needs and evaluating progress of pupils, utilizing effective instructional techniques and establishing a rapport with pupils, staff and/or parents and community. The evaluation report of December 21, 1988 (Exhibit D-64) gave unsatisfactory ratings to Mr. Washington with respect to employing effective organization and planning and utilizing effective instructional techniques. Finally, Mary Ann Wallace conducted an evaluation on February 14, 1989 and gave to Mr. Washington an unsatisfactory rating with respect to implementing and enforcing school rules, administrative regulations and board policy and she indicated that this evaluation was based on numerous incidents with no visible signs of improvement.

I have carefully scrutinized the testimony of Mr. Washington with respect to these evaluation reports. With respect to the report dated October 26, 1988, Mr. Washington indicated that he did not know why he received unsatisfactory ratings. With respect to the evaluation report of December 21, 1988, he indicated that he did not really have a discussion with the evaluator following this. Finally, with respect to the evaluation report of February 14, 1989, he testified that he did not really meet with the evaluator, Ms. Wallace after the evaluation. He indicated that he received the unsatisfactory rating on the report of February 14, 1989 because two students in his class were disruptive and he was unable to effectively discipline the entire class. He felt that the unsatisfactory ratings he received were incorrect based upon his prior years of teaching experience and the fact that he was unable to use effective teaching techniques. Nowhere in his testimony did Mr. Washington dispute the factual basis for the evaluator's conclusions.

With respect to these evaluations, Mary Ann Wallace, school principal, testified that she made numerous attempts to work with Mr. Washington trying to help him improve so that he would not fail in his teaching. The problem with Mr. Washington was that he was unable to control the children in his classroom, and they were frequently sent to her. Certain of the children were transferred to another class following which they presented no discipline problem. Ms. Wallace testified that she worked with Mr. Washington almost daily trying to relieve the problems that were being created in the classroom by his lack of control but that there were disruptive activities throughout the entire day. Ms. Wallace testified that it is the responsibility of the classroom teacher to maintain control of the classroom. There was not another class in the building which was not being controlled by the teacher.

In *Friedelbaum v. Bd. of Ed., Manalapan-Englishtown Reg. H.S. District,* OAL Dkt. No. EDU 4417-83 (June 12, 1984), adopted by the Commissioner (July 26, 1984), the failure of a teacher to control and discipline the students in the classroom was held to be a rational basis for withholding an increment. With respect to Mr. Washington I **FIND** that he has had failed to establish that the underlying facts were not as those who made the evaluations claimed them to be. Accordingly, I **FIND** that the withholding of Mr. Washington's increment for the 1989-90 school year was not patently arbitrary, without rational basis, or induced by improper motive and should be **AFFIRMED**.

DECISION AND ORDER

I **CONCLUDE** with respect to **MARY DOMBROWSKI, ROSEMARY HURTADO, MARSHA BROOKS, ROOSEVELT WRIGHT** and **DAVID HAINES**, that these nonappearing parties no longer request relief, and in accordance with *N.J.A.C.* 1:1-14.4(a), it is **ORDERED** that their appeals be **DISMISSED**.

Based upon the foregoing discussion, it is **ORDERED** that the withholding of the 1989-90 increments of **MICHAEL FACCONE, JEROME KACPROWICZ, SUSAN VELARDI, MONICA MEADE-STEPHENS, MARGARET SULLIVAN, JOSEPH MICELI, JOHN ZAUCHA, DAWN DENT** and **ANDREW WASHINGTON** is hereby **AFFIRMED**, and their appeals are hereby **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

April 20, 1993
Date

Joseph P. Martone
JOSEPH P. MARTONE, ALJ

Receipt Acknowledged:

4/21/93
Date

Maureen M. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 27 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

LIST OF WITNESSES

For Petitioners:

Michael Faccone
Jerome Kacprowicz
Susan Velardi
Monica Meade-Stephens
Margaret Sullivan
Joseph Miceli
John Zaucha
Dawn Dent
Andrew Washington

For Respondent:

Anita DeRosa
Ann Butler
Terrence Matthews
William Millevoi
Richard O'Brien
John Pacifico
Mary Ann Wallace

LIST OF EXHIBITS

J-1	Resolution of respondent adopted on August 30, 1989
P-1	Collective Bargaining Agreement between respondent and Jersey City Education Association
D-1	Observation/Evaluation Report dated 2/23/89 (Faccone)
D-2	Observation/Evaluation Report dated 5/25/91 (Faccone)
D-3	Annual Performance Report dated 6/27/89 (Faccone)
D-4	Memo from Principal Butler to Faccone dated 3/7/89

D-5 Attendance Record 1986-87 School Year (Faccone)
D-6 Attendance Record 1987-88 School Year (Faccone)
D-7 Attendance Record 1988-89 School Year (Faccone)
D-8 Attendance Record 1986-87 School Year (Kacprowicz)
D-9 Attendance Record 1987-88 School Year (Kacprowicz)
D-10 Attendance Record 1988-89 School Year (Kacprowicz)
D-11 Observation/Evaluation Report dated 3/31/87 (Kacprowicz)
D-12 Observation/Evaluation Report dated 1/14/88 (Kacprowicz)
D-14 Annual Performance Report dated 6/23/89 (Kacprowicz)
D-15 Attendance Record 1986-87 School Year (Velardi)
D-16 Attendance Record 1987-88 School Year (Velardi)
D-17 Attendance Record 1988-89 School Year (Velardi)
D-18 Observation/Evaluation Report dated 4/21/88 (Velardi)
D-19 Observation/Evaluation Report dated 3/28/88 (Velardi)
D-20 Attendance Record 1986-87 School Year (Meade-Stephens)
D-21 Attendance Record 1987-88 School Year (Meade-Stephens)
D-22 Attendance Record 1987-88 School Year (Meade-Stephens)
D-23 Annual Performance Report dated 5/15/87 (Meade-Stephens)
D-24 Observation/Evaluation Report dated 3/15/89 (Meade-Stephens)
D-25 Attendance Record 1986-87 School Year (Hurtado)
D-26 Attendance Record 1987-88 School Year (Hurtado)
D-27 Attendance Record 1988-89 (School Year (Hurtado)
D-28 Letter of Principal Matthews to Margaret Sullivan of 3/8/89
D-29 Observation/Evaluation Report dated 12/26/6 (Sullivan)
D-30 Observation/Evaluation Report dated 3/17/88 (Sullivan)
D-31 Letter of Vice Principal Millevoi dated 5/17/88 (Sullivan)
D-32 Memo from Vice Principal Santiago - undated (Sullivan)
D-33 Letter of Principal Matthews dated 2/1/89 (Sullivan)
D-34 Memo from Principal Matthews dated 2/15/89 (Sullivan)
D-35 Attendance Record 1986-87 School Year (Sullivan)
D-36 Memo to Faculty dated October 13, 1987
D-37 Attendance Record 1987-88 School Year (Sullivan)
D-38 Attendance Record 1988-89 School Year (Sullivan)
D-39 Excessive Lateness Record as of June 1989 (Sullivan)
D-40 Observation/Evaluation Report dated 4/28/88 (Miceli)
D-41 Annual Performance Report dated 6/1587 (Miceli)
D-42 Observation/Evaluation Report dated 4/28/88 (Miceli)
D-43 Memo from Principal Matthews dated 2/15/89 (Miceli)

D-44 Memo from Principal Matthews dated 6/16/89 (Miceli)
D-45 Attendance Record 1987-87 School Year (Miceli)
D-46 Attendance Record 1988-89 School Year (Miceli)
D-47 Attendance Record 1988-89 School Year (Miceli)
D-48 Annual Performance Report dated 6/20/88 (Miceli)
D-49 Attendance Record 1986-87 School Year (Zaucha)
D-50 Attendance Record 1987-88 School Year (Zaucha)
D-51 Attendance Record 1988-89 School Year (Zaucha)
D-52 Memo from Principal Matthews dated 2/15/89 (Zaucha)
D-53 Letter from Principal Matthews dated 3/8/89 (Zaucha)
D-54 Memo from Principal Matthews dated 6/21/89 (Zaucha)
D-55 Annual Performance Report dated 6/1/89 (Zaucha)
D-56 Observation/Evaluation Report dated 1/24/89 (Dent)
D-57 Observation/Evaluation Report dated 2/28/89 (Dent
D-58 Memo from Principal Pacifico dated 3/2/89 (Dent)
D-59 Annual Performance Report dated 5/10/89 (Dent)
D-60 Attendance Record 1986-87 School Year (Dent)
D-61 Attendance Record 1987-88 School Year (Dent)
D-62 Attendance Record 1988-89 School Year (Dent)
D-63 Observation/Evaluation Report dated 10/26/88 (Washington)
D-64 Observation/Evaluation Report dated 12/21/88 (Washington)
D-65 Observation/Evaluation Report dated 2/14/89 (Washington)
D-66 Annual Performance Report dated 6/23/89 (Washington)
D-67 Memo from Principal Leff dated 4/20/89 (Washington)

OAL DKT. NO. EDU 220-90

MICHAEL FACCONE ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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

Petitioners' exceptions as to the ALJ's findings largely reiterate those arguments presented at hearing and in their post-hearing submission. Petitioners contend the ALJ erred in applying the case law applicable in increment withholding matters to the facts of each of their circumstances. Further, they aver that North Plainfield Education Association v. Board of Education of North Plainfield, supra, is inapplicable to this matter because that case dealt with an issue of time spent in the military and how that time affected the 90-day appeal period to the Commissioner. Petitioners find Bernards Township, supra, inapposite also because the case at hand does not deal with arbitration. Finally, petitioners object to the ALJ's reliance on Kopera, supra, contending that the Kopera case involved language contained in the

rules of the West Orange school board, which policy specified which terms had to be met before a teacher was entitled to an increment. Petitioners advance that such facts are not at issue herein.

Petitioners submit that the sole authority which allows a school district to withhold an increment is N.J.S.A. 18A:29-14, and that contrary to the requirements of such law, the Board's action in withholding their increments was arbitrary.

Petitioners seek reversal of the initial decision and restoration of their increments. Contrary to petitioners' exceptions, the Commissioner concurs wholly with the ALJ's recitation of the case law applicable in withholding cases, as set forth in the initial decision under the heading "Legal Discussion" at pages 24-27. The Commissioner commends the ALJ for expressing simply and accurately what, upon first blush, might appear to be a "somewhat confusing" body of case law. (Initial Decision, at p. 24)

More specifically, the Commissioner rejects petitioners' attempt to shift from the petitioner the burden of demonstrating unreasonableness in the Board's action to withhold increments. See, Kopera, supra, wherein it is stated:

> ***[W]e think the Commissioner should have determined (1) whether the underlying facts were as those who made the evaluation claimed, and (2) whether it was unreasonable for them to conclude as they did upon those facts, bearing in mind that they were experts, admittedly without bias or prejudice, and closely familiar with the mise en scene; and that the burden of proving unreasonableness is upon the appellant. (emphasis supplied) (60 N.J. Super. at 296-297)

Further, the Commissioner rejects petitioners' attempt to distinguish their facts from the applicable principles of law as found in such cases as North Plainfield, supra. While North Plainfield, for example, did deal with a timeliness issue, it also

stands for the proposition cited by the ALJ below, concerning the nature of annual increments, "a reward for meritorious service to the school district" (North Plainfield, 96 N.J at 593) (Accord, Bernards Township, 79 N.J. at 321.) Similarly, the Commissioner concurs with the ALJ that the burden of proving that a teacher's excessive absenteeism is not harmful to the educational process rests with the teacher not the Board. See Angelucci et al., 1980 S.L.D. at 1077 wherein it is stated:

> ***The Commissioner further determines that the argument that the teachers' absences did not lessen their performance improperly places the burden of proof on the Board, rather than the teacher, where it belongs.

See also, Transky, supra.

Having found the standards in increment withholdings were properly articulated and applied to the facts herein by the ALJ, it only remains to note in regard to Ms. Sullivan's and Mr. Miceli's fact patterns that even though a teaching staff member's absences do not exceed the statutorily granted number of days available to the employee for sick leave, the Board may nonetheless withhold an increment when it determines that the number of absences is excessive after considering the nature of those absences and when it apprises the employee during the period in question of its concern that such absences negatively affect the educational process of those students entrusted to the employee's care. Smith, supra, Kuehn, supra and Bass, supra In regard to Sullivan, Miceli and the other petitioners herein, the Commissioner's review of the record satisfies her that the ALJ's findings of fact and conclusions of law support the Board's determination to withhold each petitioner's increment in this matter. Consequently, petitioners' individual

circumstances are deemed to have been fully and fairly addressed in the initial decision and their exceptions to the contrary are hereby dismissed as being without merit.

Accordingly, for the reasons expressed in the initial decision as augmented herein, the instant Petition of Appeal is dismissed, with prejudice.

COMMISSIONER OF EDUCATION

JUNE 3, 1993

DATE OF MAILING - JUNE 3, 1993

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EDU #220-90
C #121-93
SB # 35-93

MICHAEL FACCONE ET AL.,

PETITIONERS-APPELLANTS,

V.

BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, June 3, 1993

For the Petitioners-Appellants, Feintuch, Porwich & Feintuch (Philip Feintuch, Esq., of Counsel)

For the Respondent-Respondent, Murray, Murray & Corrigan (David Corrigan, Esq., of Counsel)

The State Board of Education concurs with the Administrative Law Judge that none of the nine petitioners in this case have demonstrated that the withholding of their increments for 1989-90 was arbitrary or unreasonable.[1] Kopera v. West Orange Bd. of Education, 60 N.J. Super. 288 (App. Div. 1960). Nor have any of them shown that the district Board[2] failed to consider the

1 We note that while the petition in this case was filed in December 1989, due to adjournments and delays by both parties, the Administrative Law Judge did not issue his initial decision until April 20, 1993. We further note that although the Commissioner's decision was appealed to the State Board on June 30, 1993, the matter was in abeyance until March 1994 at appellant's request. At that time, briefing by the parties resumed.

2 We note that the withholdings challenged here occurred in August 1989. On October 4, 1989, the district Board was removed and a State-operated school district was created by Administrative Order issued by the State Board of Education pursuant to N.J.S.A. 18A:7A-15.

June 6 1994

circumstances of their absences. Kuehn v. Board of Education of the Township of Teaneck, 1983 S.L.D. 1581.

The record also supports the conclusion that the Board conveyed its concern for the impact of each petitioner's absences on the continuity of instruction. We stress, however, that this was not a prerequisite to the Board's action herein. Kochman v. Board of Education of the Borough of Keansburg, decided by the State Board, October 6, 1993.[3] Accordingly, to the extent that it may be read to require that concern regarding the impact of absences on the continuity of education be communicated to the affected staff member prior to withholding his increment for absenteeism, we modify the Commissioner's decision. Kochman, supra.

With this modification, the State Board of Education affirms the decision of the Commissioner.

July 6, 1994

Date of mailing _____

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3 In Kochman, we found that there was no legal requirement in an increment withholding case that concern for the impact of absences be communicated to the staff member, and we expressly overruled all previous decisions of the Commissioner which, as this one, included this as a prerequisite to the withholding of an increment.

122-93

122-93

IN THE MATTER OF THE TENURE	:	
HEARING OF BONNIE LOTT, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP OF	:	DECISION
WILLINGBORO, BURLINGTON COUNTY.	:	

SYNOPSIS

Board certified tenure charges of unbecoming conduct against elementary school art teacher who had pled guilty of possession of marijuana in excess of 50 grams.

Initial decision found that although Board and respondent had originally attempted to negotiate a settlement in this case, an executed copy of the proposed settlement was not returned by the respondent and the matter, therefore, proceeded to hearing. ALJ found respondent guilty of unbecoming conduct and found that the nature of incident was of such a serious nature that it outweighed any evidence of excellence in proficiency which may have been demonstrated by respondent. Distinguishing this matter from Valenti which involved a disorderly offense, ALJ found matter herein warranted loss of employment.

Commissioner adopted findings and determination in initial decision and ordered respondent dismissed from her tenured position as of date of Commissioner's decision and forwarded matter to State Board of Examiners for further appropriate action.

JUNE 3, 1993

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2384-92S
AGENCY DKT. NO.64-3/92

BOARD OF EDUCATION OF WILLINGBORO, COUNTY OF BURLINGTON,
Petitioner,
v.
BONNIE LOTT,
Respondent.

Lisa James, Esq., for petitioner (Hill Wallack, attorneys)

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

Record Closed: March 23, 1993 Decided: April 21, 1993

BEFORE **JEFF S. MASIN**, ALJ:

Bonnie Lott, an elementary school art teacher employed by the respondent Board of Education, was arrested on September 4, 1990 by the Willingboro Police Department and charged with possession of marijuana in excess of 50 grams, possession with intent to distribute, manufacturing marijuana over 5 pounds and possession within 1,000 feet of a school.[1] She ultimately pled guilty to possession of the marijuana, which consisted of 64 plants which she concededly was growing in the backyard of her home in Willingboro. The plea was to an offense classified as a crime of the fourth degree, pursuant to *N.J.S.A.* 2C:35-10a(3).

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1 This charge was dropped when it was discovered that her home was not within 1,000 feet from a school.

Following her plea and a period of time during which the attorneys for the parties to this proceeding engaged in an attempt to reach an accord concerning Ms. Lott's employment status with the district, the Board voted to certify tenure charges to the Commissioner of Education under *N.J.S.A.* 18A:6-10. Ms. Lott filed an answer to the charges and the matter was transmitted to the Office of Administrative Law ("OAL") as a contested matter, pursuant to N.J.S.A. 52:14B-1 to -21 and *N.J.S.A.* 52:14F-1 to -13. Following transmittal to the OAL, a prehearing conference was held on June 30, 1992 and a prehearing order was entered by Administrative Law Judge Jeff S. Masin on July 7, 1992.

The Board of Education moved for summary judgment by motion filed on August 26, 1992. Ms. Lott cross-motioned for summary decision on September 29, 1992. After receiving briefs from the parties, the undersigned ruled in a decision on motion issued on November 1, 1992 that the conduct in which the respondent had engaged and to which she had pled guilty in the criminal case was beyond any dispute "conduct unbecoming a public school teacher" and that as such the Board was entitled to summary judgment as to the commission of a tenure offense under the Act. At the same time, the decision concluded that since Superior Court Judge Cornelius Sullivan had ruled at the time of Ms. Lott's sentencing that her conduct did not touch upon her employment, the issue of whether Ms. Lott had forfeited her position as a result of the conviction pursuant to *N.J.S.A.* 2C:51-2 was foreclosed and could not be litigated in this administrative proceeding. Further, the decision on motion considered the respondent's argument that the Board of Education had, during the period prior to the vote on tenure charges, entered into an enforceable agreement not to bring tenure charges against the respondent. The decision denied summary decision in favor of the respondent on this issue, concluding that additional proofs were necessary on issues regarding the nature of the negotiations between the parties. Finally, the decision held that if the tenure charges were not barred by any such enforceable agreement, the issue of the proper penalty to be imposed upon the respondent could only be determined after the presentation of evidence from both parties on the question. Thus, the case was set down for hearing on these remaining issues.

A hearing was held before Judge Masin on February 24 and 26, 1993. Thereafter, the attorneys filed briefs and closing arguments. The record closed upon receipt of the Board's reply brief, which was received on March 23, 1993.

THE ALLEGED AGREEMENT
The Evidence

Ms. Lott asserts that in the course of negotiations between her then attorney, Steven R. Cohen, Esq., of the firm of Selikoff & Cohen, P.A. and the Board's former attorney, James P. Granello, an agreement was reached under which the Board would not bring tenure charges against her in return for her agreement to accept a suspension, undergo drug monitoring and random drug testing. The Board denies that the negotiations entered into by Mr. Granello and the respondent's attorney ever produced a binding agreement which would prevent the Board from certifying the current tenure charges.

Initially, the negotiations over the future of Ms. Lott's employment with the Board commenced at the time of her sentencing. Mr. Granello was present at the sentencing, as was Mr. Charles Goldstein, Esq., then an associate of the Selikoff & Cohen firm. In a letter written to Mr. Goldstein on April 15, 1991, one week after the April 8 sentencing hearing, Mr. Granello set forth his understanding of the terms of the agreement which he believed that he and Mr. Goldstein had negotiated subsequent to the sentencing. The agreement provided that the Board would forego tenure charges if Ms. Lott agreed to a suspension without pay from February 25, 1991 to the end of the 1990-91 school year, would agree that following the completion of her drug monitoring under the terms of her probation as imposed by the Court, she would, while working for the Board, submit to drug monitoring every other month on random dates as selected by the Board for a period of one year and would test drug free, and would agree to random drug testing over an additional four year period, twice a year, on dates selected by the Board, and would test drug free. The letter also confirmed information that the respondent was likely to be subject to a reduction in force ("RIF") at the end of the 1990-91 school year as a result of declining enrollment in the district. *N.J.S.A.* 18A:28-9. The letter noted that if such a reduction in force occurred that she would be placed on a preferential hiring list for possible future employment, pursuant to *N.J.S.A.* 18A:28-12. The last paragraph of the letter read

> Please have your client sign the original of this letter and return same to my attention for filing with the district's personnel office.

The signature of Mr. Granello followed and then, after the cc:'s, the following

> I have read the terms set forth in this letter and, after conferring with my attorney, agree to be bound by its terms.

A space was provided for Ms. Lott's signature, as well as that of a witness, and a date line was provided.

No response was received to the April 15 letter until June 12, when Mr. Goldstein responded with both a letter and what he termed as a "Proposed Settlement Agreement." This document contained provisions which were not among those set forth in Mr. Granello's April 15 letter. Specifically, the "Agreement" provided for the suspension of Ms. Lott for the period from February 25, 1991 through the end of the 1991 contractual year and continued health benefits "at least to the end of that school year," the one year period for random drug testing every other month as proposed by Mr. Granello, and the 4 year period of twice a year random testing as proposed by Mr. Granello. However, in addition to these provisions the proposed agreement added a provision which required that "upon expungement of LOTT'S arrest and conviction the BOARD shall be directed to expunge any record of her suspension by the BOARD" and another provision which provided that the "BOARD agrees, . . . that neither it, nor its officers, . . . will communicate or disclose the terms of this **Agreement And General Release** or settlement as described herein unless required to do so by law."

Mr. Granello responded to this letter and the "Proposed Agreement" in a letter written on June 13. He told Mr. Goldstein that he was "somewhat taken aback by the long delay" in receiving a response to his April 15 letter. He noted that the "proposed settlement agreement is not signed by your client, which makes me wonder whether your client understands what is being proposed on her behalf." He then turns to the terms proposed in Mr. Goldstein's draft and notes that he questions the validity of the expungement condition due to issues regarding credit for service and attendant seniority considerations and that he also "cannot believe you are including matters that already have been identified in the public record both in Court and by the Board minutes" in the proposed non-communication provision. He closes his response

> I ask that these matters be considered by you and that the proposed agreement and release be modified accordingly.

On August 16, having heard nothing in response to his June 13 letter and having learned that Mr. Goldstein was apparently no longer associated with Selikoff & Cohen, Mr. Granello wrote to the firm asking that it provide a response to the "modifications contained in my letter dated June 13, 1991."

The trail of events now becomes a bit murky, as the stage shifts partially from correspondence to telephone communications. According to the time records maintained by Mr. Cohen, he spoke to Mr. Granello on October 14, 1991 and that same day's note shows the entry "draft settlement agreement & make revisions." Thereafter, the October 17 record lists 2 calls to the client and a call to the Board attorney. On October 21 the slip reveals an entry "Revisions to documents," followed with an entry for October 23 which reads "Meet w/client re: settlement agreement" and "further revisions to Granello letter."

On October 23 Mr. Cohen wrote to Mr. Granello. This letter purports to relate to a prior discussion regarding the terms of the settlement agreement. It encloses a "Settlement Agreement and General Release." Mr. Cohen relates that he has deleted language in paragraph #3 of the "earlier draft" of the document "as you have requested." He also notes that he has maintained "the language of paragraph (4) in the draft Agreement which simply requires that the terms of the Agreement remain confidential unless disclosure is required 'by law'." He then states

> My understanding is that you have indicated to Mr. Goldstein that you will advise the Board that maintaining this aspect of the Agreement is appropriate.

After referring to a clarification of the meaning of the phrase "test drug free," Mr. Cohen concludes by requesting that Mr. Granello "return two fully executed copies of the Agreement to me. I will, in turn, forward a copy to Ms. Lott." The "Agreement And General Release," attached to the letter, bore a signature "Bonnie Lott," and the signature of a witness, and provided signature lines for the "Board Secretary" and the "Board President," as well as for a witness.

In explanation of the events of the October 14-23 period, Mr. Cohen testified at the hearing that he took over the Lott case after Mr. Goldstein left the firm. His time slips indicate that he reviewed the file on October 14. He then contacted Mr. Granello concerning the issues of concern raised by Mr. Granello in the June 13 letter to Mr. Goldstein. As he interprets the time slips and recalls the situation, he spoke to Mr. Granello on the 14th and agreed to remove the expungement language. As for Granello's concerns over the language of the non-disclosure provision contained in Mr. Goldstein's draft agreement, he told Granello "Jim, you know, of course, that's something which is required by law, it's already been disclosed and the language covers it" and said that he saw no problem with it. Mr. Granello responded that he also saw no problem and Mr. Cohen said that he would make the necessary changes and get back to him. Cohen then revised the document and gave it to his secretary to type. On October 17, he called Ms. Lott and told her of the conversations with Granello and the proposed revisions. She approved them and he called Granello and told him that Ms. Lott had approved the changes and that in effect it was a "done deal." He read the proposed revised language to Mr. Granello and Granello approved it. During this conversation, Mr. Cohen advised the Board attorney that if the proposed revisions were acceptable he would call his client in and have her sign it after which he would send the agreement to Granello "as soon as he could." After receiving Mr. Granello's approval of the revisions over the phone during this conversation, Mr. Cohen did in fact contact Ms. Lott, met with her on October 23, and she then signed the document. The October 23 "Agreement and General Release" was the agreement as it was discussed with Mr. Granello in the telephone conversation of the 17th.

Mr. Granello testified that he recalled one telephone conversation with Mr. Cohen which took place about a week before he received Mr. Cohen's October 23 letter on October 25. Mr. Granello generally returns his phone calls the same day, but if he is in at the time of a call no phone log is normally made. October 14 was Columbus Day and Mr. Granello may have been out of the office that day, although the office was open. Mr. Granello has no billing record showing him as having spoken to Mr. Cohen on the 14th. As for the 17th, his records show that he did some work for the Board that day, but there is no specific reference to anything involving Mr. Cohen. It is possible that a short telephone call may not have been listed on his

billing records. From his review of the billing records Mr. Granello would conclude that there was no extensive telephone conversation on the 14th or on the 17th.

As for his recollection of the one phone call that he does recall having with Ms. Lott's counsel, Mr. Granello stated that Mr. Cohen told him that he, Cohen, had reviewed the file and the June 13th letter and said that he would send a revised version of the Goldstein draft to Granello, one which would address the concerns raised about the provisions of the original. Mr. Granello said "Fine, send it on," but he does not recall that the exact language of Mr. Cohen's proposed revisions was read over the phone or that the solution to the concerns were "conceptualized" during the conversation. He cannot recall how he handled the matter from this point onward. However, at the end of the conversation he believed that the attorneys had reached an understanding.

Following the receipt of Mr. Cohen's letter of October 23, Mr. Granello sent the "draft of the Settlement Agreement and General Release" on to Board Secretary Lee Muller. The letter reads in part

> It would be my suggestion to receive an update from Bill Hybbeneth as to the likelihood of Ms.Lott returning to the district during the school year. I believe the Board should be aware of this situation before this Settlement Agreement and General Release is approved.

On December 30, Mr. Granello advised Mr. Cohen by letter of the Board's intention to proceed with tenure charges. In response, Mr. Cohen sent Mr. Granello a letter dated January 2, 1992 in which he explained "As far as Ms. Lott is concerned, it is her position that she had a binding agreement with the . . . Board . . . as evidenced by your letter dated April 15, 1991." Mr. Cohen warned that any failure to comply with this agreement by instituting tenure charges would be considered a breach of the agreement. He attached to the letter a copy of the April 15 Granello letter, this copy bearing a signature, purportedly that of Bonnie Lott. The date under her signature is apparently 4/26/91. There is no mention in Mr. Cohen's letter of the discussions which he had with Mr. Granello in October and of any purportedly binding agreement as to a modified version of the April 15 Granello proposal, incorporating therein revisions partially in line with the Goldstein draft of June 12.

Mr. Granello replied to this letter on January 3. In that letter he refers to a telephone conversation which he apparently had with Mr. Cohen that day in which Mr. Cohen told him that the "original signed letter," that is the original of the April 15th proposal, "remains in your file and that you cannot explain why it wasn't returned to me." He details the history of negotiations after the purported signing of the April 15 letter, never sent to him, and argues that the proposed draft issued by Mr. Goldstein in June appears to be at odds with any suggestion that the April 15th proposal had ever been accepted as the "binding agreement" by Ms. Lott and her attorneys. In conclusion, Mr. Granello rejects the suggestion that there ever was a "mutual meeting of the minds as to the terms of an agreement with" Ms. Lott.

In an affidavit filed by Mr. Granello in connection with the motions for summary decision, he notes that in late November, 1991, he advised Mr. Cohen that the Board was only willing to forego tenure charges if Ms. Lott was willing to resign. When the Board determined that she was unwilling to do so the letter of December 30 was issued.

Discussion

Initially, it is difficult to understand how Mr. Cohen could have taken the position in his letter of January 2, 1993 that the April offer from Mr. Granello had been accepted by his client such that it constituted a binding agreement. After the terms of that offer were conveyed to Mr. Goldstein and following the period of silence during the later part of April and May until the June 12 response, the letter of June 12, with the attached "Proposed Settlement Agreement," was in no way an acceptance of the Board's terms as expressed by Mr. Granello. While it did not reject the provisions of the April 15 letter, it supplemented them with at least two significant proposed terms regarding confidentiality and expungement which were in no way referred to in the Board's proposal, and which I **FIND** were, given the nature of the matter, material terms which necessarily had to be resolved for the entire agreement to be accepted by both parties. The addition of these terms to those originally proposed by the Board's attorney placed the issue of whether or not to accept the agreement as now modified into the hands of the Board. When Mr. Granello promptly responded to Mr. Goldstein the very next day, June 13th, he made it plain that the Board was not comfortable with the newly suggested form of the proposal and he suggested that Mr. Goldstein and his client review the Board's

objections and respond with appropriate revisions. Thus, as of the 13th of June, the parties had not reached an accord, they were still disputing the exact nature and parameters of their agreement. No binding offer and acceptance had occurred. The parties were simply negotiating, jockeying for the best and most appropriate terms as they each saw their interests.

Of course, despite the clear evidence from the documentary record of the fact that no accord had been reached as of June 13th, in his letter of January 2, 1992 Mr. Cohen included, and sought to rely upon, the strange and unexplained copy of the April 15 Granello letter bearing the purported signature of Ms. Lott, purportedly signed by her on April 26, just 11 days after the Granello proposal was dated. Where this signed acceptance of the Board's terms, sans any modifications such as those proposed by Mr. Goldstein in his June 12 letter, was throughout the period April - December remains unexplained, except for the reference to its being in the Selikoff and Cohen file. Assuming the authenticity of both the Lott signature and the date of April 26, the record is clear that neither Ms. Lott nor her attorney ever sent this signed document, which clearly would have bound the Board, to either Mr. Granello or to his client, nor did they ever suggest, throughout the whole course of dealing up to the letter of January 2 that the original unamended Board proposal had in fact been accepted in writing, or even in thought, by Ms. Lott. Given these facts, the appearance of the signed letter as part of the Cohen response to Mr. Granello's December 30 letter advising that the Board would proceed with tenure charges can only be explained as either (1) a letter signed by Ms. Lott, who then decided, with or without the advice of counsel, that she should seek better terms and thus the letter was never mailed; (2) a letter signed by Ms. Lott and then somehow overlooked by Mr. Goldstein, who proceeded to seek other terms apparently oblivious to the fact that his client had already accepted the original offer; (3) a letter signed and then purposely held aside while better terms were sought, but which was nevertheless available to be resurrected from the file if the attempt at better terms failed, or (4) a letter which was not signed in April, 1991, but which was signed much later and put forward as a defense to the institution of tenure charges after the attempt to secure modifications of the Board proposal was unsuccessful. As this last possibility is one which does not assume the authenticity of the dating of the document at the purported time and carries with it serious implications which I deem unwarranted by the circumstances and the persons involved, I believe that the most logical explanation is that Mr. Goldstein chose not to forward the signed letter or to even

mention its existence as he sought additional terms which he and his client felt to be advantageous to her. Regardless of the exact reason why it was not sent to Mr. Granello before January, since Mr. Goldstein took no action to simply accept the April proposition, but chose instead to communicate what was in effect a counter proposal to Mr. Granello, I **FIND** that the April 15 offer was never accepted by Ms. Lott or by her attorneys on her behalf and that the attempt to reach a mutual agreement entered a new phase with the counter offer and Mr. Granello's immediate negative response thereto, that is, his June 13 letter in which he rejected the additional terms proposed by Mr. Goldstein and sought to have Mr. Goldstein revise his offer.

The focus now shifts to the occurrences of October. Following Mr. Granello's August letter seeking to find out what was happening in regard to his June 13 letter, the first contact was initiated by Mr. Cohen. Whether there was one or two phone conversations, the theory upon which Ms. Sapakie proceeded at trial was that the binding agreement arose through the oral discussion of terms between Messrs. Cohen and Granello on October 17. According to Mr. Cohen's thesis, by the end of this call he and his adversary had reached total agreement and what is more, the Board attorney had in no way suggested that the agreement reached was not final and thus binding, not in any way subject to any further approval by the Board.

Mr. Cohen's recall of the details of the October 17 call was far more extensive than that of Mr. Granello. Yet, even assuming that Mr. Cohen did read the exact language of the proposed modification of the Goldstein June 12 proposal to Mr. Granello and even assuming that Mr. Granello suggested, even directly stated, that these modifications were so satisfactory in respect to the concerns that he had expressed on June 13 that Mr. Cohen could conclude in his mind that there was a "done deal," nevertheless, this belief and the Board attorney's satisfaction with the arrangements does not automatically render the agreement binding. While it is true that if parties intend to be bound by an oral agreement, a written memorialization of the contract is not necessary for enforcement purposes, *Bistricer v. Bistricer*, 231 *N.J. Super.* 143 (Ch. Div. 1987), the entire circumstances of the matter, including any evidence bearing upon the understandings of the parties as well as the course of dealing, must be examined to determine their intentions.

According to Mr. Granello, at the time that he received Mr. Goldstein's June proposal he had only spoken to the Board about the terms of the proposal that he had made to Ms. Lott's attorney in the April 15 letter. The terms added by Goldstein relating to confidentiality and expungement were never topics of conversation between he and the Board. When he replied and received no further answer from Mr. Goldstein, and subsequently when he resumed talks with Mr. Cohen some 4 months later, he did not first go back to his principals to discuss these added terms. Thus, when he spoke to Mr. Cohen he may have expressed general satisfaction as to the fact that the two men appeared to understand what was needed to settle their differences, but he did not suggest that he had the Board's authorization to agree to the additional term regarding confidentiality which was new at the time of the Goldstein proposal and not part of the Board's original settlement offer. In fact, Mr. Granello points to the language of the letter of October 23, in which Mr. Cohen refers to the idea of his advising the Board as to the propriety of the confidentiality provision as modified. To Mr. Granello, this suggests that Mr. Cohen full well knew that he, Granello, needed to take the now revised proposal back to his board for final approval, and not merely for a ministerial signature, which is precisely the characterization of the required action which Mr. Cohen testified that he foresaw as necessary.[2]

Based upon the testimony and the documentary evidence, I **CONCLUDE** that the parties did not reach an agreement on the terms and conditions under which the Board of Education would agree to forego a tenure charge against Ms. Lott up to October 14, 1991. Thereafter, I **FIND** that Mr. Cohen and Mr. Granello spoke once or twice, but that only on October 17 did they reach a conceptual agreement that certain modifications to the original counterproposal of Mr. Goldstein's June 12 letter would settle the terms upon which such an agreement

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2 The fact that Mr. Granello apparently was aware of a possible change in the status of Ms. Lott's position vis-a-vis the RIF is not in itself a factor which suggests that the Board simply was attempting to avoid the consequences of a previously completed bargain. If the agreement was not binding as of the conclusion of the Cohen-Granello exchanges, the fact that it was not may play into the hands of the Board as it seeks to prevent Ms. Lott's return to active teaching in the district, but this is merely a consequence of the circumstances.

would rest. Further, I **FIND** that Mr. Cohen did read to Mr. Granello wording that Mr. Granello indicated sounded acceptable to him. Mr. Cohen did tell Mr. Granello that he would be presenting these terms, as revised, to his client. He then prepared the revised Settlement Agreement and Release, and had his client sign it. He then forwarded the signed document to Mr. Granello.

I **FIND** no indication that Mr. Granello ever told Mr. Cohen that the Board of Education was committed to a settlement by the discussion which he was having with Mr. Cohen. At the same time, I **FIND** that he did not specify to his adversary on the telephone that the acceptable language which he, Granello, had heard from Mr. Cohen was likely to be rejected by the Board, this despite any indications that Mr. Granello had about the possibility of the RIF not depriving Ms. Lott of her position. Clearly, Mr. Granello had apparent authority to negotiate on behalf of the Board and there is no indication that he did anything or said anything directly to dissuade Mr. Cohen from this understanding.

I **FIND** that Mr. Cohen prepared the Settlement Agreement for the signature of the principals involved as a matter of course. However, from his letter to the Board attorney of October 23, it seems quite evident that he, Mr. Cohen, knew that the Board had to be satisfied by its attorney as to the propriety of this term regarding confidentiality and disclosure, a term not found in the Board's original proposal and a term which the Board attorney had indicated concern about ever since it was proposed by Mr. Goldstein. Thus, Mr. Cohen had reason to believe that the attorney did not have actual authority to bind the Board, but instead could negotiate within parameters and then go back to the Board for final approval. This should have been especially evident given the seriousness of the matter, involving as it did an agreement by a public board of education to refrain from seeking tenure action against a staff member who had admitted criminal responsibility for a drug offense, a matter already publicized and thus fraught with potential for public interest and concern. While Mr. Cohen might now argue that the assurance to the Board was a mere formality, given the nature of this case such an argument is less than persuasive.

Based upon the above, I **CONCLUDE** that the negotiations between Mr. Cohen and Mr. Granello in October did not result in an agreement which was binding upon the Board of Education prior to their having an opportunity to review

and approve the results of the negotiations. I further **CONCLUDE** that Mr. Cohen had reason to understand that the process of arriving at a binding agreement to preclude tenure charges in exchange for an agreement to certain conditions was not final at the time that he concluded his telephone conversation with Mr. Granello on the 17th. As such, I **CONCLUDE** that the Board was not bound to refrain from instituting tenure charges against Ms. Lott.

THE APPROPRIATE DISCIPLINARY ACTION

Ms. Lott engaged in an activity which constituted unbecoming conduct for a public school teacher. The undisputed record demonstrates that during her 11 years as a teacher of art in the Willingboro district she was praised for her work and her commitment. The record contains no blemishes; on the contrary it contains many positives. That Ms. Lott was a very fine teacher cannot be doubted from this record. In addition, her testimony indicates that during the time following her suspension she has taken advantage of the time to obtain further education, taking graduate level courses for which she has obtained outstanding grades. Ms. Lott offered that if asked she could incorporate drug awareness into her art classes, something she had not previously been asked to do. She felt that "she had a lot to offer."

The witness testified that after her conviction she continued to live in Willingboro for some time. Students often came by to offer to help her with yard work. Some asked her when she was coming back to school and said that they missed her. She heard no negative conversations about herself.

Ms. Lott explained that she believes that teachers should be examples to the students they teach. She called herself a "product of society" and noted that what happened to her could happen to the children's relatives. She is learning to overcome her mistake and trying to better herself. She believes that it is important to "turn a negative into a positive." She did not realize the "seriousness of growing the marijuana." The incident "shook her," made her "see the light." She "had not paid much attention to the legalities," although on cross-examination she admitted that she knew at the time of the offense that possession of marijuana was illegal. If she now can help someone to not get involved "it would be "110%" better." She can help others to avoid mistakes from her own personal experience.

The Board of Education presented one witness with regard to the appropriate action to be taken against the respondent due to her involvement in criminal conduct involving marijuana. William C. Lonkart, a member of the Board of Education since April 1990, was a member of the Board at the time of Ms. Lott's arrest. He does not know her personally. According to Mr. Lonkart, the Board reviewed the police reports of the arrest and ultimately determined that possession of over 50 grams of marijuana required dismissal from employment in the district. The Board has an active policy to promote an anti-drug attitude in the district, including signs placed in the schools and counseling. He pointed to a Board policy, adopted January 11, 1982, entitled "Teaching About Drugs, Alcohol And Tobacco," but he conceded that he was not specifically aware of the statutes cited within that policy. Mr. Lonkart also noted that there had been newspaper publicity surrounding Ms. Lott's arrest and her suspension and that he was "constantly asked by people - what happened with the case."

Mr. Lonkart explained that although the Board did originally enter into settlement discussions concerning the future employment of the respondent, it ultimately determined that permitting Ms. Lott to remain on staff would have sent the wrong message, *i.e.* "its okay to do drugs." The message which her dismissal sent was that it was not okay, that drugs were "wrong," and that it did not matter who the person was.

The witness acknowledged that he had not personally reviewed the teacher's performance evaluations, but it was "possible" that other members of the Board did so, perhaps including the members of the personnel committee of which he is not a part. However, Mr. Lonkart did agree that he was aware that Ms. Lott had a "clean" record as a teacher, although he did not recall that she had been described as "excellent" or "outstanding." In conclusion, Mr. Lonkart added that it did not make a difference as to how Ms. Lott was characterized in regard to her abilities, she simply "didn't belong in the district."

Ms. Lott presented testimony from her probation officer Jeffrey A. Finer and from Chief Burlington County Probation Officer J. Edward Paglione to the effect that she successfully completed the terms and conditions of her probation, including the drug testing ordered as a part of the probation.

Discussion

The nature of a penalty to be imposed on a school employee who violates the state's laws against the use and/or possession of controlled dangerous substances has been the source of recurrent consideration by administrative law judges and the Commissioner. While the determination that such conduct is improper has been made without difficulty, the decision as to how to balance the need for serious and clear action against persons who violate these laws while taking into account their past records of performance and the specific facts of the particular violations has proven more difficult.

There is no question that even one incident of improper conduct on the part of a school employee can support a termination of that employee's tenure, if the incident is sufficiently flagrant. The factors which affect the determination of the fitness to teach are broad in scope and are not necessarily limited to classroom proficiency. *Gish v. Board of Education of Paramus*, 145 *N.J. Super.* 96, 105 (App. Div. 1976), *certif. den.* 74 *N.J.* 251 (1977), *cert. den.* 434 *U.S.* 879 (1977). Here, the Board's position is that the nature of the incident, involving a criminal conviction for a drug offense, is in and of itself of such a serious nature that it outweighs any evidence of excellence in "proficiency" which may have been demonstrated by Ms. Lott.

Initially, a word must be said regarding the Board policy cited by Mr. Lonkart. The policy refers to a "philosophy that drug abuse includes any physical or mental state resulting from the use of a drug for any purpose other than its medically prescribed use, and that this mental and/or physical effect precludes realization of the educational potential of the individual." The policy then refers to the "objectives of the drug education curriculum" as "rooted in the Board's belief that prevention requires education and that the most important aspect of the policies and guidelines . . . should be the education of each individual student to the dangers of drug use." Finally, the policy makes it the responsibility of the Superintendent to review the guideline's "for staff members in conducting drug education and dealing with drug abuse." The 1982 policy cites *N.J.S.A.* 18A-4-28.7, since repealed, which dealt with workshops for teachers on drug education, and *N.J.S.A.* 35-4, also since repealed, which provided for teaching classes on the nature and effect of alcoholic drinks and narcotics.

It seems clear from the text and the citations that the Board's 1982 policy regarding "Teaching About Drugs, Alcohol and Tobacco," while indicative of the Board's concern for promoting an anti-drug abuse message to its students and, of course, impliedly to its employees as well, is not itself a policy meant to serve as a vehicle which either intends to direct and control the actions of faculty members in regard to their personal conduct or to serve as a tool for disciplining such persons. The entire thrust here is one of education. While the policy is itself inappropriate as a vehicle for discipline, it nevertheless does serve to point out the direction that the Board wished to go, indeed was mandated to go, in promoting a message concerning the avoidance of illicit drug use. The lack of a distinct Board policy upon which to premise action is not an impediment to discipline under the statute in the case of a criminal conviction for illegal possession of a controlled dangerous substance.

A review of case law reveals that the issue of what is the appropriate discipline is at least to some degree fact sensitive. *In The Matter of The Tenure Hearing of Jeffrey Wolfe, School District of The Township of Randolph*, 1980 *S.L.D.* 721, the Commissioner considered a case where an Administrative Law Judge upheld a dismissal of a tenured teacher who had been charged with growing marijuana on his premises and possession of more than 25 grams of marijuana. Mr. Wolfe was granted a conditional discharge as a first time offender, pursuant to ***N.J.S.A.*** 24:21-27. The Appellate Division affirmed the Commissioner's decision, noting

> [T]he charges involve the cultivation, growth and possession of narcotics. There is a strong legislative policy of concern about the problem of drugs in the public schools...The evidence of Wolfe's guilt of the charges stands unrefuted and they involve a peculiarly sensitive area. No evidence of mitigating circumstances or personal hardship was presented.
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> [1981 *S.L.D.* 1537, 1539]

In the more recent case of *The Tenure Hearing of Robert P. Valenti, School District of The Township of Monroe*, OAL DKT. NO. EDU 4926-89, Commissioner's Decision 177-89 (March 6, 1990), the teacher was also arrested for possession of marijuana. The amount involved was one hand rolled cigarette and an additional 2.5 grams. The violation was of the disorderly persons statute, rather than of the

criminal statute. The teacher had been employed in the district for 20 years and the testimony of a number of witnesses indicated that he was an outstanding educator. While the administrative law judge weighed the offense versus the proofs as to the teacher's proficiency and concluded that removal was not warranted and a forfeiture of 120 days pay was appropriate, the Commissioner raised the penalty to a 180 day forfeiture and also ordered that Mr. Valenti not receive an increment. Thus, in Valenti, the Commissioner appears to have determined that there are some cases of marijuana possession that do not call for removal. The reasoning for this conclusion is not stated at any length, but it appears that the Commissioner agreed with Judge Holmes' analysis that the "single disorderly act, when viewed in the light of petitioner's exemplary record of 20 years, does not compel one to the conclusion that loss of tenure and termination is the only legitimate penalty."

In the case at bar, the facts present a case of possession of 64 marijuana plants grown in the yard of the respondent's home. The respondent stands convicted of a criminal offense, not a disorderly offense as was Mr. Valenti. No conditional discharge or other pretrial release was involved, as in *Wolfe*. The amount possessed and the circumstances of the possession, while apparently for personal use, was nevertheless far different that that in *Valenti,* where the marijuana consisted of the single cigarette and the 2.5 grams found in the possession of the teacher and a companion in a bar parking lot. With the facts of this case, the significance of the mitigating evidence of the teachers' fine performance as an educator fades in comparison with the *Valenti* mix of a very limited amount of marijuana, no evidence of ongoing cultivation of a personal "crop" and a disorderly conviction. The factors that may have allowed Mr. Valenti to survive may not be so applicable to Ms. Lott.

Teachers ". . . are professionals to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self restraint and controlled behavior rarely requisite in other types of employment." *In The Matter of the Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional, Camden County,* 1972 *S.L.D.* 302, 321. As such, those educators who flaunt the law, especially in the area of illicit involvement with drugs, must be prepared to pay a very heavy price for their lack of lawfulness. While I recognize that the drug involved here is not one of

the so-called "hard" drugs and that the respondent has an exemplary record, I am nevertheless constrained to agree with the Board that Ms. Lott's conduct requires that she lose her tenure.

It is **ORDERED** that the respondent's employment as a tenured teacher in the district be terminated.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

April 21, 1993
Date

JEFF S. MASIN, ALJ

Receipt Acknowledged:

4/22/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 27 1993
Date

OFFICE OF ADMINISTRATIVE LAW

EVIDENCE LIST

FOR THE PETITIONER:

P-1 Letter dated January 2, 1992 from Steven R. Cohen, Esq. to James P. Granello, Esq., with attached letter of agreement dated April 15, 1991

P-2 Package of documents transmitted to the Commissioner of Education from Lee Muller, Board Secretary, Willingboro Board of Education, consisting of Tenure Charges against Bonnie Lott with written Statement of Evidence; response from Ms. Lott; Certificate of Determination and Proof of Service; and a copy of a letter to Ms. Lott from Lee Muller, Board Secretary, stating the Board's action.

P-3 Five news article clippings regarding Bonnie Lott

P-4 Policy Statement of the Willingboro Board of Education *Teaching about Drugs, Alcohol and Tobacco*, File 6142.7, adopted 1/11/82

P-5 Three telephone messages from Tom Matthews, Steve Cohen and Joel Scharf

P-6 Letter dated October 28, 1991 from James P. Granello to Lee Muller with attached 3-page invoice for legal services rendered

P-7 Letter dated October 25, 1991 from James P. Granello to Lee Muller regarding revised draft of a Settlement Agreement and General Release pertaining to Bonnie Lott

P-8 Letter dated January 3, 1992 from James P. Granello to Steven R. Cohen, Esq., re: Bonnie Lott

FOR THE RESPONDENT:

R-1 Letter dated June 12, 1991 from Charles H. Goldstein to James P. Granello, Esq., with attached Proposed Agreement and General Release

R-2 Letter dated June 13, 1991 from James P. Granello to Charles H. Goldstein, Esq., regarding proposed settlement agreement

R-3 Letter of agreement dated April 15, 1991 from James P. Granello to Charles H. Goldstein, Esq.

R-4 Letter dated August 16, 1991 from James P. Granello to Selikoff and Cohen

R-5	Letter dated October 23, 1991 from Steven R. Cohen to James P. Granello, Esq., with attached Agreement and General Release
R-6	Three Chargeable Time Slips, dated 10/14/91, 10/17/91 and 10/21/91
R-7	Page 34 of interrogatories
R-8	Pages 31, 32 and 33 of interrogatories
R-9	Pages 28, 29 and 30 of interrogatories
R-10	Letter dated May 5, 1992 from J. Edward Paglione, Vicinage Chief Probation Officer, Probation Department of Burlington County, to Steven R. Cohen, Esq., regarding Bonnie Lott
R-11	Certification of James P. Granello in Support of Motion for Summary Judgment dated August 18, 1992, with attached Exhibits A through G
R-12	Fifteen Observations and Evaluations of Bonnie Lott
R-13	Letter/notice dated April 30, 1991 from William F. Hybbeneth, Jr., to Ms. Bonnie Lott
R-14a, b & c	Burlington County College credit information for Bonnie Lott
R15	Medical Personnel Pool Employee Performance Evaluation for Bonnie Lott, dated 1/27/92

OAL DKT. NO. EDU 2384-92

IN THE MATTER OF THE TENURE	:	
HEARING OF BONNIE LOTT, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP OF	:	DECISION
WILLINGBORO, BURLINGTON COUNTY.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions by respondent and the Board's reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4.

Upon careful and independent review of the record including the exceptions advanced by respondent, the Commissioner determines that such exceptions pertain to issues which were fully and fairly considered and resolved by the ALJ and need not be herein reiterated. The Commissioner hereby adopts the findings and conclusions of the ALJ, including the recommended penalty, as the final decision in this matter for the reasons clearly articulated in the initial decision.

Accordingly, it is ordered that respondent be dismissed from her tenured teaching position in the Willingboro School District as of the date of this decision. This matter shall be forwarded to the State Board of Examiners for review and action as it deems appropriate pursuant to N.J.S.A. 6:11-3.6(a)(1).

COMMISSIONER OF EDUCATION

JUNE 3, 1993

DATE OF MAILING - JUNE 3, 1993

122-93

EDU #2384-92
C # 122-93
SB # 36-93

IN THE MATTER OF THE TENURE :
HEARING OF BONNIE LOTT, SCHOOL :
DISTRICT OF THE TOWNSHIP OF : STATE BOARD OF EDUCATION
WILLINGBORO, BURLINGTON COUNTY. : DECISION
:

Decided by the Commissioner of Education, June 3, 1993

For the Petitioner-Respondent, Hill Wallack (Lisa James, Esq., of Counsel)

For the Respondent-Appellant, Selikoff & Cohen (Carol H. Sapakie, Esq., of Counsel)

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

November 3, 1993
Date of mailing 05 NOV 1993

123-93

123-93

IN THE MATTER OF THE TENURE	:	
HEARING OF ROBERT BRYANT, SCHOOL	:	COMMISSIONER OF ~~EDUCATION~~
DISTRICT OF THE CITY OF ORANGE	:	DECISION
TOWNSHIP, ESSEX COUNTY.	:	
	:	

JUNE 3, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9332-92
AGENCY REF. NO. 486-10/92

IN THE MATTER OF THE TENURE HEARING OF ROBERT BRYANT, SCHOOL DISTRICT OF THE CITY OF ORANGE TOWNSHIP, ESSEX COUNTY.

Raymond L. Hamlin, Esq., for the School District
(Ashley & Charles, attorneys)

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

Record Closed: April 8, 1993 Decided: April 22, 1993

BEFORE **MARYLOUISE LUCCHI-McCLOUD,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on November 30, 1992 for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and 52:14F-1 to -13.

Prior to hearing the parties came to an amicable resolution of the matter and submitted a Settlement Agreement. Having reviewed the record and the settlement terms I **FIND:**

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

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is further **ORDERED** that the proceedings in this matter be concluded.

I hereby **FILE** my Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

4/22/93
Date

MARYLOUISE LUCCHI-McCLOUD, ALJ

Receipt Acknowledged:

4/23/93
Date

Maureen R. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 29 1993
Date

Joyce LaVecchia
OFFICE OF ADMINISTRATIVE LAW

am

APR 8 10 10 AM '93

BUCCERI & PINCUS, ESQS.
1200 Route 46
Clifton, NJ 07013-2440
(201) 773-5665
Counsel for Respondent

IN THE MATTER OF THE TENURE HEARING OF ROBERT BRYANT, SCHOOL DISTRICT OF THE CITY OF ORANGE.	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW O.A.L. DOCKET NO. EDU 09332-92 AGENCY REF. NO. 486-10/92 **SETTLEMENT AGREEMENT**

The parties hereto, wishing to amicably resolve the dispute between them, do hereby agree as follows:

1. Robert Bryant was originally employed by the Orange Board of Education (the 'Board') as a Teacher of Social Studies in September, 1971. Mr. Bryant also served as Social Studies Department Chairman until that position was eliminated in 1991.

2. Until the field trip of June 10, 1992, which was the basis for the charges filed in this matter, Mr. Bryant's teaching career was not only unblemished, it was commendable. He was selected as an outstanding teacher through the New Jersey Governor's Teacher Recognition Program in 1987, received a certificate of achievement from the Orange School District in 1988 for outstanding contributions to the high

3-

school and has received many other accolades. His abilities in dealing with and helping adolescents are well known.

3. The field trip of June 10, 1992 was designed as both a fund raising event for the Peer Leadership Program and as a reward for the student participants in that program. The Peer Leadership Program is designed to instill leadership qualities and values of self-esteem in students, particularly in an urban environment. Mr. Bryant has been a primary organizer and adult leader of that program for many years. It has been a very successful program in the Orange School District.

4. At the time the charges were filed, the Board was given information as to the events which allegedly transpired on June 10, 1992 from sources which, after thorough investigation, have been established as erroneous in many significant respects.

5. It is unquestionably true that errors in judgment were made by Mr. Bryant, particularly with regard to his allowing the trip to proceed when some of the scheduled chaperones failed to appear and when bus transportation proved to be inadequate to accommodate all who wished to attend. Subsequent investigation has established that these errors were not the result of a negligent or careless attitude, but rather one based on Mr. Bryant's genuine, but misplaced,

desire to avoid disappointing over 100 high school students who were present and were excitedly anticipating the excursion to Cheesequake State Park.

6. Although student rowdiness led to a premature termination of the trip, there were no injuries or damage resulting from the events of June 10, 1992.

7. Allegations with regard to student drinking during the trip have not been substantiated and it is clear that no such conduct was permitted or ignored by Mr. Bryant or any of the other adult supervisors.

8. There is no evidence to support allegations of intentional misrepresentations, deceptive tactics or a 'scheme' of any type. No abuse of funds collected has been established and parental consents were sought from the students who were scheduled for the trip. All monies outstanding were promptly turned over to school authorities.

9. Failures to comply with Board policy appear to have resulted from ignorance of those policies and not intentional disregard.

10. Every effort was made by Mr. Bryant to monitor and control student behavior. Those efforts proved insufficient due to the failure of several chaperones to appear for the trip.

11. Based on the Board's investigations, it is apparent that while some sanctions are appropriate in this matter, the sanction of dismissal is not warranted. It is indeed apparent that Mr. Bryant's abilities are needed at Orange High School.

12. Since Mr. Bryant is willing to acknowledge his failings in regard to this trip and since it is apparent that the experience has alerted him to the areas of urgent concern on the part of the Board and the community, it is the desire of the Board that the pending tenure charges against Mr. Bryant be withdrawn and dismissed, with prejudice.

13. It is further stipulated by Mr. Bryant that he understands and agrees to the statements set forth herein and as to the proposed settlement. Mr. Bryant agrees to accept, without contest, the Board's decision with respect to its intended action to withhold his 1993-94 salary increment. Mr. Bryant further agrees to waive any claim to back salary for the period of his suspension without pay.

14. The stipulations and agreements set forth in this document are made as part of this settlement. In the event this settlement is not approved by the appropriate authorities, it is agreed that nothing set forth herein may be used as evidence in any subsequent proceedings.

15. The parties agree that the pursuit of this litigation through plenary hearing is not in the best interests of the students, parents or the community constituting the Orange School District. Rather, this settlement is in the best interests of all concerned and, in particular, is in the public interest. The standards set forth in The Tenure Hearing of Frank Cardonick, 1983 S.L.D.____ (St. Bd., 4/6/83) have been met.

16. Both parties have had legal representation and are aware of their respective rights to litigate the issues in this case with a final decision to be made by the Commissioner of Education as an alternative to settlement. The decision to enter into this settlement rather than to avail themselves of the right to litigate has been made of their own free will without duress or coercion.

17. The parties acknowledge that this settlement must be approved by the Office of Administrative Law and the Commissioner of Education. In the event such approvals are not forthcoming, the parties will be returned to the status quo pending at the time when this settlement was adopted and this agreement shall be null and void.

18. All terms of this agreement are material and shall be controlled by the laws of the State of New Jersey.

This document may not be altered except by the written consent of all parties.

19. The parties signing below hereby acknowledge that they have been duly authorized to enter into this agreement. A copy of the Board's resolution adopting this agreement is attached hereto.

WHEREFORE, this Agreement is signed and sealed by the parties as and for their act and deed.

For Petitioner
Orange Board of Education

_____, President

_____, Secretary

_____
Raymond Hamlin, Esq.
Board Attorney

Dated:

For Respondent, Robert Bryant

_____
Robert Bryant

_____
Louis P. Bucceri, Esq.
Attorney for Robert Bryant

Dated: 4/7/93

BUCCERI AND PINCUS
COUNSELORS AT LAW
1200 ROUTE 46
CLIFTON, NEW JERSEY 07013-2440
TELECOPIER (201) 773-2170
(201) 773-5665

APR 8 10 10 AM '93

SHELDON H. PINCUS
MEMBER N.J. & D.C. BARS
LOUIS P. BUCCERI
GREGORY T. SYREK

MARY J. HAMMER
MEMBER N.J. & N.Y. BARS

April 7, 1993

Hon. Marylouise Lucchi-McCloud, A.L.J.
Office of Administrative Law
185 Washington Street
Newark, NJ 07102

Re: In the Matter of the Tenure Hearing
of Robert Bryant, School District of
the City of Orange
O.A.L. Docket No. EDU 9332-92
Agency Ref. No. 486-10/92

Dear Judge Lucchi-McCloud:

Enclosed please find an original and one (1) copy of a Settlement Agreement reached by the parties to this matter. It is requested that Your Honor review same. If it is acceptable, we request issuance of a decision approving same and submitting it to the Commissioner of Education for her review.

Thank you for your consideration of this matter.

Respectfully submitted,

Louis P. Bucceri

/mab
cc: Raymond Hamlin, Esq.

OAL DKT. NO. EDU 09332-92

IN THE MATTER OF THE TENURE	:	
HEARING OF ROBERT BRYANT, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF ORANGE	:	DECISION
TOWNSHIP, ESSEX COUNTY.	:	
	:	

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

The Commissioner approves the settlement terms as they comport with the Cardonick standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846) The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

JUNE 3, 1993

DATE OF MAILING - JUNE 3, 1993

124-93

124-93

W.H.V.P. AND J.P.V.P., on behalf of their minor child, T.L.V.P.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON ET AL., MIDDLESEX COUNTY,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

JUNE 4, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
DENYING APPLICATION FOR
EMERGENT RELIEF
OAL DKT. NO. EDU 4851-93
AGENCY DKT. NO. 154-5/93

W.H.V.P. AND J.P.V.P.,
ON BEHALF OF THEIR
MINOR CHILD T.L.V.P.,
Petitioners,
v.
BOARD OF EDUCATION
OF THE TOWNSHIP OF
EDISON, MIDDLESEX
COUNTY, DR. JOSEPH
KRESKEY, AND CEDRIC
RICHARDSON,
Respondents.

W.H.V.P. and J.P.V.P., petitioners, *pro se*

James E. Stahl, Esq., for respondents (Borrus, Goldin, Foley, Vignuolo, Hyman and Stahl, attorneys)

BEFORE **JOSEPH F. FIDLER**, ALJ:

The petitioners seek emergent relief from a three-day suspension scheduled to begin June 1, 1993. In their petition to the Commissioner of the Department of Education filed pursuant to *N.J.S.A.* 18A:6-9 on May 24, 1993, the petitioners allege that the respondents have violated district policies and have denied T.L.V.P. due process prior to the imposition of discipline, contrary to *Goss v. Lopez*, 419 *U.S.* 565 95 *S.Ct.* 729, 42 *L.Ed.* 2d 725 (1975).

T.L.V.P. is a graduating senior in respondents John P. Stevens High School. In their request for relief, the petitioners ask that the suspension not be enforced on June 1, 2, and 3, or any other date, for the following reasons:

1. This action could cause irreparable harm by having a negative impact on his final marking period grade, final exam grade and his college acceptance to Colgate, if Colgate should decide to re-evaluate his status at the end of the year.

2. The Supreme Court has ruled that education is a legal right that cannot be taken away without due process of law, which we have not been granted by the respondents.

As noted, the petition and application for emergent relief was filed with the Commissioner of the Department of Education on May 24, 1993. The Department of Education transmitted the matter to the Office of Administrative Law on May 25, 1993, for a hearing on the application for emergency relief, pursuant to *N.J.A.C.* 1:1-12.6. Argument and brief testimony on the application for emergent relief was heard on May 27, 1993, and for the reasons which follow, the application is denied.

The petitioners assert that their disagreement with the respondents arises from a fighting incident following a basketball game between Sayreville High School and J.P. Stevens High School on January 26, 1993. T.L.V.P. acknowledged that he had admitted to a police detective that he was large cause of the fight. However, although he admitted that he was an instigator, he stated that the backed away from the altercation and did not fight. Within a day or two after the incident at the basketball game, T.L.V.P. and his father met with high school Principal Cedric Richardson. The petitioners acknowledged that they were told T.L.V.P. would be barred from basketball games and wrestling matches for the remainder of the year. T.L.V.P. denied being told by any school administrator that he was prohibited from attending all evening activities. Principal Richardson testified to the contrary. It was his recollection that he told T.L.V.P. that he would not be permitted to attend after school or evening activities for the remainder of the school year. Two other administrators were present.

T.L.V.P.'s parents assert that they were unaware of the ban from all evening activities and it is stipulated that they were not provided with written notice of the prohibition. However, student government advisor Christine Polyak testified that

she had attempted to recruit T.L.V.P. to serve on a committee for an event which would take place during the evening hours. It was her testimony that she clearly recollected T.L.V.P. telling her that he could not attend an evening activity because of discipline from the Sayreville altercation. T.L.V.P. further informed Ms. Polyak that he had spoken to Mr. Richardson and was told that he could not be there for the event.

It is undisputed that T.L.V.P. attempted to attend a "Mr. J.P.S." contest being held in the high school auditorium on the evening of February 26 or 27, 1993. After purchasing a ticket and sitting down, T.L.V.P. was approached by a security guard who told him that his name was on a list and that he would have to leave. T.L.V.P. acknowledged that he was upset and that when he got up, he said in a somewhat loud and boisterous manner that it was "like Hitler," meaning tyrannical. T.L.V.P. was with C.M., another student who allegedly was not allowed to attend after school activities. According to T.L.V.P. he got his money back and left with C.M. However, they felt that it was unfair that they could not stay for the performances and they went to the back door of the auditorium and decided that they would dance across the stage. As T.L.V.P. put it, "they wouldn't let us watch, so we'd be in it." While a student was performing in the contest, T.L.V.P. and C.M. waked behind him on the stage for five or ten seconds and then left the building. T.L.V.P. denied that he grabbed his crotch while on stage, but Ms. Polyak, who observed the incident, testified that it appeared to her that both T.L.V.P. and C.M. grabbed their crotches while they were on stage.

By letter to Superintendent of Schools Dr. Joseph A. Kreskey dated March 5,1993, the petitioners appealed from "a proposed suspension of five days" for T.L.V.P. arising from his attendance at the evening activity on or about February 26, 1993, and for reentering the auditorium and briefly appearing on stage prior to again leaving. This letter to the superintendent establishes that the petitioners had at least oral notice of the proposed suspension. By letter to the petitioners dated March 9, 1993, Dr. Kreskey stated that he had carefully considered the issues related to their appeal of the five-day suspension which resulted from T.L.V.P.'s "unauthorized attendance and disruption of a program at John P. Stevens High School on February 27, 1993." Dr. Kreskey reduced the five day suspension to three days because the parents had never been informed in writing that T.L.V.P. was barred from attending evening activities at the high school.. The parents were informed that his decision regarding the incident could be appealed to the Board of Education. The parents pursued this appeal and an informal hearing was conducted

on April 13, 1993. It was agreed that a further meeting would be scheduled and the date of April 28, 1993, was acceptable to the petitioners. However, the respondent Board denied the petitioner's appeal of the three-day suspension in the privileged session of its meeting on April 27, 1993. The three-day suspension was originally scheduled to commence on May 5, 1993. However, by letter to Dr. Kreskey dated April 30, 1993, the petitioners advised that they would be appealing the decision of the Board of Education and the scheduled suspension was not imposed. The Board thereafter scheduled the suspension to commence on June 1, 1993. The petitioners seek emergent relief from the scheduling of the suspension, asserting irreparable harm will result.

However, T.L.V.P. acknowledged in his testimony that his academic courses and by 11:48 a.m. each day. He has missed nine days of school this year, five of which were excused. He has been accepted for college at Colgate.

This is the substance of the record on the application for emergent relief. Based upon this record, I **CONCLUDE** that the petitioners have failed to meet the standards for granting emergent relief articulated by the New Jersey Supreme Court in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). While a three-day suspension will deprive T.L.V.P. of academic classes for three mornings, the petitioners have failed to demonstrate how he would experience irreparable harm if their motion were denied. The potential impact of the suspension on his final marking period grades and final exam grades is speculative. It is also speculation to suggest that his suspension will affect his college acceptance, since information about the suspension will appear only in the student's confidential records which are not provided to colleges.

The petitioners have also failed to demonstrate a likelihood of prevailing on the merits of the matter. To determine whether T.L.V.P. knew or should have known that he was prohibited from attending evening activities at the school for the remainder of the school year will require credibility determinations which would be made only after a full hearing. However, it is undisputed that T.L.V.P. reentered the school auditorium after being informed that he must leave. He and another student thereafter walked onto the stage while a performance was in progress. Such open defiance of the authority of a teacher or person having authority over him constitutes cause for suspension pursuant to *N.J.S.A.* 18A:37-2. The petitioners thereafter received at least oral notice of the proposed suspension, since they brought an appeal to the superintendent of schools which specifically referenced

the proposed suspension and the reason for it. The petitioners were permitted to express their disagreements with the proposed suspension in writing and in person to the school administrators. Ultimately, the Board of Education denied the petitioners' appeal and advised that a three-day suspension would be imposed. In *Goss v. Lopez, Supra.*, at 581, the Supreme Court determined that students facing temporary suspension have interest qualifying for protection of the Due Process clause, and due process requires, in connection with a suspension of ten days or less, that the student be given oral or written notice of the charges against him, and if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. Given this standard, the petitioners have not demonstrated a likelihood of prevailing on their allegation that T.L.V.P.'s due process rights were violated by the respondents.

The relative hardship to the parties in granting or denying emergency relief must be considered. T.L.V.P. faces a three-day suspension which will deprive him of academic classes for three morning. Any other hardship appears to be speculative. The respondents have a substantial interest in maintaining discipline and providing a safe and orderly school environment for the Board's students. The hardship to the respondents would likely be greater if the relief is granted than the hardship to the petitioners if the relief is denied. Finally, the petitioners have failed to demonstrate that the public interest compels the granting of emergency relief to them.

Based upon all of the foregoing, I **CONCLUDE** that the petitioners have failed to meet the standards for granting emergent relief. Accordingly, I **ORDER** that the petitioners' application for emergent relief is denied. A hearing on the merits of the issues raised in the petition of appeal shall be convened as expeditiously as possible if the petitioners wish to pursue their appeal.

This order on application for emergency relief may be adopted, modified or rejected by **Commissioner of the Department of Education**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **Commissioner of the Department of Education** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

May 28, 1993
Date

Joseph F. Fidler
JOSEPH F. FIDLER, ALJ

lam

EXHIBITS

See attachments to petition

WITNESSES

For the petitioners:

T.L.V.P.
J.P.V.P.

For the respondents:

Cedric Richardson
Christine Polyak

OAL DKT. NO. EDU 4851-93

W.H.V.P. AND J.P.V.P., on behalf of their minor child, T.L.V.P.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON ET AL., MIDDLESEX COUNTY,	:	DECISION ON MOTION
RESPONDENTS.	:	

The limited record of this emergent relief matter, including the initial decision and tape of the hearing, have been reviewed. No exceptions were filed by the parties.

Based on her independent review of the matter, the Commissioner concurs with those findings of the ALJ determining that petitioners have failed to meet the standards for pendente lite restraints as articulated in Crowe v. DeGioia, 90 N.J. 126 (1982). Accordingly, for those reasons expressed in the initial decision dated May 28, 1993, the Motion for Emergent Relief is denied. The Commissioner directs that the matter proceed to a hearing on the merits of petitioners' claims in the usual course.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 4, 1993

DATE OF MAILING - JUNE 4, 1993

125-93

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF FRANKLIN, WARREN COUNTY.	:	
	:	

JUNE 8, 1993

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP : DECISION
OF FRANKLIN, WARREN COUNTY. :
:

The announced results of the balloting for three members of the Board of Education for three-year terms at the annual school election held on April 20, 1993 in the School District of Franklin Township of Washington, Warren County, were as follows:

CANDIDATES	AT POLLS	ABSENTEE	TOTAL
Thomas Zak	131	1	132
Rudolph DiGilio	126	0	126
Elizabeth K. Lynch	116	1	117
Keith Matlock	110	1	111
Susan Lynah	91	1	92
Barbara Zawoysky	6	0	6
Karen Bullivant	2	0	2
Julius DrJileo	1	0	1
Bonnie Hamler	1	0	1
Thomas W. Vasko	1	0	1
Arnot Erb	1	0	1
Robert Hopek	0	1	1

Pursuant to a request by Keith Matlock, defeated candidate, under N.J.S.A. 18AA:14-63.2, a recount was conducted by an authorized representative of the Commissioner of Education from the Office of the Warren County Superintendent of Schools on May 21, 1993 in the Office of the Warren County Superintendent of Schools. The Warren County Election Board submitted and verified the absentee ballot count. Persons present were Kathy Matlock, Keith Matlock, Rudolph DiGilio, Elizabeth Lynch and Jean Hopek.

The envelope containing the election materials had been unsealed by a staff member in the county superintendent's office prior to the recount. A copy of the poll list was requested by Keith Matlock who is contesting the procedure.

At the conclusion of the recount, the tally stood as follows:

CANDIDATES	AT POLLS	ABSENTEE	TOTAL
Thomas Zak	132	1	133
Rudolph DiGilio	126	0	126
Elizabeth K. Lynch	117	2	119
Keith Matlock	110	1	111
Susan Lynah	91	1	92
Barbara Zawoysky	6	0	6
Karen Bullivant	2	0	2
Julius DrJileo	1	0	1
Bonnie Hamler	1	0	1
Thomas W. Vasko	1	0	1
Arnot Erb	1	0	1
Robert Hopek	0	1	1

With the recount votes as listed, the results of the election as originally announced are not changed by the recount.

This completes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of her representative and adopts the findings therein as her own.

The Commissioner finds and determines that the results of the election as announced are confirmed by the recount. Thomas Zak, Rudolph DiGilio, and Elizabeth K. Lynch are the three winning candidates for seats on the Franklin Township Board of Education in Warren County.

The Commissioner further directs that a copy of this decision be transmitted to the Office of Administrative Law where an

inquiry is pending into the conduct of the above-captioned election, the results of which remain binding on the parties unless and until a contrary determination is rendered by the Commissioner upon receipt and review of the initial decision on inquiry issued by the Office of Administrative Law.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 8, 1993

DATE OF MAILING - JUNE 8, 1993

126-93

126-93

ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION, ESSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF COMPLIANCE,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, Educational Services Commission, appealed state audit requiring return of $1.06 million in unexpended funds for 1987 fiscal year.

Initial decision concluded Commission must refund to the State the surplus remaining at the end of the 1987 fiscal year. Nothing in legislation controlling disbursement of disputed funds or Commission's enabling legislation allows Commission to retain surplus funds. Also, Commission must prevent double billing. (N.J.S.A. 18A:6-51 to 70) ALJ found if Commission seeks greater statutory powers or needs more money to meet cash flow difficulties, it should address those concerns to the Legislature. Commission was ordered to repay the State.

Commissioner adopted findings and determination in initial decision and directed petitioner to refund the unexpended funds under dispute.

JUNE 8, 1993

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10535-91

AGENCY DKT. NO. 381-10/91

ESSEX COUNTY
EDUCATIONAL SERVICES
COMMISSION,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF
EDUCATION, DIVISION OF COMPLIANCE,

Respondent.

Edward F. Petit-Clair, Esq., for petitioner

Arlene Goldfus Lutz, Deputy Attorney General, for respondent
(Robert J. DelTufo, Attorney General of New Jersey, attorney)

Record Closed: November 25, 1992 Decided: April 26, 1993

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

Statement of the Case

This is an appeal by the Essex County Educational Services Commission ("Commission") from a state audit requiring return of some $1.06 million in

unexpended funds for the 1987 fiscal year. An educational services commission is a public agency established in one or more counties under *N.J.S.A.* 18A:6-51 to 70 for the purpose of contracting with local school districts to furnish educational services to children. Essentially, the dispute involves the interplay between the enabling legislation for educational services commissions and the statutory authority for Chapter 192/193 and Chapter I services which the Commission had contracted to deliver.[1]

State education officials construe the statutory scheme as requiring the Commission to charge only the actual cost of its services and to refund any excesses to be used to help more children. Additionally, state officials contend that allowing the Commission to retain the surplus would constitute double billing of amounts for which the Commission had already been reimbursed under another state aid program. On the other hand, the Commission argues that it is exempt from the refund requirement because an educational services commission is not a local school district. Moreover, the Commission alleges that it must keep the surplus to offset cash flow problems and as a reserve against extraordinary expenses.

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[1]Chapters 192 and 193 of the Laws of 1977, codified at *N.J.S.A.* 18A:46A-1 and 18A:46-19.1 respectively, provide funding for certain auxiliary and remedial services to handicapped children in private and parochial schools. Chapter I of the federal Education Consolidation and Improvement Act of 1981 ("ECIA"), 20 *U.S.C.A.* §§3801 to 3876, provided funding for basic skills improvement programs. ECIA was repealed by *Pub. L.* 100-297, effective July 1, 1988, but large parts have been readopted as amendments to Title I of the Elementary and Secondary Education Act of 1965, 20 *U.S.C.A.* §§2701 to 3386.

Procedural History

In February and March 1989, a team of auditors from the Department of Education ("Department") conducted a full-scale review of the Commission's accounting and business practices for the period July 1, 1987 through June 30, 1988. On May 2, 1989, the Department's compliance division released an audit report, which identified a total of $1,056,907 in unexpended Chapters 192/193 and E.C.I.A. Chapter I surplus, and demanded that the Commission repay that sum to the State Treasurer. By letter dated May 30, 1989, the Commission appealed on the basis that "return of these monies would result in the inability to conduct the aforesaid programs." Accordingly, on February 7, 1991, the Department held an informal first-level audit meeting at which the Commission was invited to provide additional documentation "to refute or clarify any aggrieved items." On May 3, 1991, Edward D. Kent, chief of the bureau of auditing, issued a letter upholding the findings of the audit report.

Thereafter, on May 14, 1991, the Commission appealed the ruling to the next-highest level, stating that it wanted to challenge the "legal basis" on which the Department claimed return of these funds. A second-level appeal hearing was held on June 21, 1991. On July 25, 1991, Thomas King, acting director of the compliance division, issued a decision concluding that the laws concerning governance and management of educational services commissions "mirror those same structures" in local school boards, that the Commission is not a private profit-making enterprise, and that unexpended Chapters 192/193 and Chapter I funds must be returned to the State.

Finally, on October 21, 1991, the Commission filed a petition of appeal with the Commissioner of Education ("Commissioner"). On November 18, 1991, the Commissioner transmitted this matter to the Office of Administrative Law ("OAL") for hearing as a contested case. The OAL held hearings on September 14, 15 and 16, 1992. Witnesses and exhibits are listed in the appendix. Both parties filed briefs and replies by November 25, 1992.

Findings of Fact

All of the material facts are undisputed. I **FIND:**

Local school districts must furnish Chapters 192/193 services to nonpublic schools located within their boundaries, either by performing such services themselves or by contracting with public or private agencies to do so. Such services include compensatory education for improvement of communication proficiency, English as a Second Language, supplementary instruction, home instruction, speech correction services, and evaluation and classification of handicapping conditions. Similarly, local districts must use Chapter I funds to provide compensatory education services to "deprived children." Again, the local districts may either provide such services themselves or may contract with other public or private agencies.

Created in July 1979, the Commission is authorized by the State Board of Education to offer auxiliary and remedial services under contract with local school districts. Over the last thirteen years, the Commission has grown dramatically. It now serves the educational needs of roughly 10,000 students, employs a staff of 365 people, and has an annual budget totaling $19 million. Although only eight local districts are members, at one time the Commission had contracts with as many as 135 local districts.[2]

Contracts for the 1987-88 school year uniformly obligated the local district to pass along to the Commission the full per-pupil amount received in state aid, regardless of the actual costs of that particular service. Significantly, Warren Buehler, executive director of the Commission from its inception until 1992, admitted that the Commission did not consider actual costs in fixing its fees and

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[2]While the Commission lacked the legal authority in 1987-88 to enter into contracts with nonmember districts, see *N.J.S.A.* 18A:6-63, it nevertheless freely did so, with the knowledge and tacit approval of the Department. Recently, the statute was amended to conform to existing practice by allowing educational services commissions to enter into contracts with school districts, "whether member districts of the commission or not." *L.* 1989, *c.* 254, effective July 1, 1990.

would collect whatever sum the State was willing to pay to the local district. Indeed, the standard contract for Chapters 192/193 services then in use by the Commission does not establish a separate price, but commits the local district to a ten-month billing cycle "equal to the projected and actual student counts." A related contractual term provides that, if a district is eligible for the funding of vehicles or trailers used as classrooms, the district "agrees to pay over to the [Commission] all such funding received from classrooms used in the delivery of 192 services[.]"

Apparently, the county superintendent of schools, who represents the Commissioner at the county level, had reviewed and approved this billing arrangement. Nonetheless, Melvin Wyns, director of the Department's bureau of school finance, criticized the pricing arrangement as seemingly saying, "Give us what you have and we will try to spend what you give us. " According to Mr. Wyns, the practice of automatically handing all of the money over to the Commission allowed it "to gain access to all funds whether it [was] really necessary or not" and "made it easier for the local districts to abrogate their responsibility." In his view, the Commission must charge only its allowable costs and must return any remaining surplus, "which goes into a pot of money to provide additional requests for [future] services."[3]

Much of the Commission's proof at the hearing dealt with its cash flow problems and operational difficulties, which the Department properly regards as irrelevant to the narrow legal issues of this case. While the Department is sympathetic to many of the Commission's legitimate concerns, its basic position is that the Commission must act within the existing legislative framework and that any remedy lies with the Legislature and not the Executive Branch.

Often the Commission's complaints were directed to the perceived failure by the Legislature to grant it sufficient powers or to appropriate adequate funds to carry out its assigned tasks. Illustratively, Mr. Buehler recounted that, at the time of

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[3]Mr. Wyns drew a technical distinction between "operation expenses" or general overhead, which are borne proportionally by all member districts, and "contracted services expenses," which are charged directly to the district using a particular service. *Compare N.J.S.A.* 18A:6-62 with *N.J.S.A.* 18A:6-63. See also, *N.J.S.A.* 18A:6-51, which defines these terms.

its formation in 1979, the Commission lacked any revenue for start-up costs. Consequently, the Commission had to borrow money from a bank until local districts began paying for services. However, in 1981 the Attorney General's Office issued an advisory opinion that the Commission does not possess the statutory authority to borrow money.[4] Thus, the Commission is prohibited from borrowing funds needed to make capital investments or meet unforeseen contingencies.

In the same vein, Mr. Buehler described cash shortages caused by the delay of some local districts in paying their bills. Under the standard contract for Chapters 192/193 services, the local district must make payment in ten monthly installments due "by the 30th of the month in which the services are provided." Several of the largest districts, including Newark and East Orange, were habitually late in making payments. As a result, the Commission experienced difficulty meeting its payroll, particularly in September and October when the new academic year had just begun. But, as noted in the Deputy Attorney General's brief, this "is a collection problem, not one of the State's making." Moreover, the Commission had various options available which it chose not to use. It could, for instance, have sued the deadbeat districts for payment; discontinued delivery of services pending receipt of overdue amounts; or refused to enter into new contracts with slow-paying districts. Revealingly, Mr. Buehler stated that he had tried unsuccessfully "dozens of times" to get the State to pay the Commission directly. Here too, the Commission 's real unhappiness is with the law itself, which requires that state aid be funneled through the local districts rather than sent directly to the provider.

Likewise, Mr. Buehler maintained that the Commission needed more money because the law required it to engage in collective negotiations with its teaching staff.[5] In 1977-78, the Commission granted salary increases well in excess of any

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[4]This legal advice is contained in an unpublished letter opinion, dated February 2, 1981, to the Department from the Attorney General's Office.

[5]*N.J.S.A.* 18A:6-66 mandates that employees of educational services commissions "shall enjoy the same rights and benefits as are enjoyed by persons holding office, position or employment under a public school district board of education."

increase in state aid and had to make up the difference out of "reserves." Mr. Buehler also claimed that the Commission needed to generate reserves to comply with other legal mandates, like the purchase in 1986 of one hundred trailer units at a cost of three million dollars over three years or, more recently, the planned retrofitting of facilities to provide handicapped access.[6]

As a result of the audit, the Department demanded refund of a "surplus" or "profit" of Chapters 192/193 funds amounting to $922,370 and Chapter I funds amounting to $134,537. On behalf of the Department, Mr. Wyns explained that the main reason for the existence of this surplus was the Commission's failure to deduct other funding received under the Teacher Quality Employment Act ("TQEA"). Robert Ortley, one of the state auditors who examined the Commission's records, also attributed the surplus to double billing for services already reimbursed under TQEA. Unfortunately, the Commission's records do not itemize how much of TQEA revenue was spent for teachers' salaries incurred to deliver contracted services. Following generally accepted accounting principles, Mr. Ortley matched "like revenues against like expenditures" to arrive at "net contractual orders." In making his calculations, he assumed that "TQEA aid was properly spent and fully spent." While the Commission steadfastly denied that TQEA aid should be offset against contractual billings, it never challenged the mathematical computation during the

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[6]The purchase of new trailers was necessitated by tougher fire-safety standards imposed by the Department of Community Affairs after the Great Adventure Amusement Park fire. The questions of whether the Commission must retrofit existing vehicles to comply with the new requirements of a barrier-free code is the subject of a separate appeal currently pending before the Department of Education. *Essex County Educ. Serv. Comm'n v. N.J. Dept. of Educ.*, OAL Dkt. EDU. 8946-91.

[7]The Teacher Quality Employment Act, *N.J.S.A.* 18A:29-5.1 to 5.12, dispensed state aid to local school districts and educational services commissions to assist them in meeting new minimum salary requirements for teachers. Originally TQEA aid was granted only to local school districts, *L.* 1985, *c.* 321, effective Sept. 9, 1985, but the law was expanded to include educational services commissions, *L.* 1986, *c.* 9, effective March 28, 1986.

proceedings below. At the hearing, it produced no expert testimony that Mr. Ortley's methodology was wrong.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that the Commission must refund to the State the surplus remaining at the end of the 1987 fiscal year.

An educational services commission is a "public body" brought into being for the purpose of providing educational services to public school districts. As a public body, it must act within its express or implied authority. *Remedial Educ. & Diag. Servs. Inc. v. Essex Cty. Educ. Servs. Comm'n*,191 *N.J. Super.* 524, 527 (App. Div. 1983), *certif. den.* 97 *N.J.* 601 (1984). It is different from a local school district, and does not possess the same broad statutory powers. Unlike a local school district, an educational services commission cannot borrow funds from banks or other lending institutions. *See*, n. 4, *supra*. Nor may an educational services commission delegate or subcontract its responsibilities to a private profit-making organization, since "such person or entity is not subject to public accountability." *Remedial Educ.*, at 529. *See also, Att'y Gen. Formal Op.* 1981- No. 1. Numerous recommendations and proposals to confer on such commissions the full status of a "local educational agency" have never met with success. *E.g., Senate Bill* No. 1501(1984); *Report of the Educational Services Commissions Study Committee* (April 25, 1984); *Internal Department Memorandum by Maryann Peifly*, dated April 10, 1980.

Comparisons which the Commission makes between itself and approved private agencies are false. Nothing in its enabling legislation allows an educational services commission to earn a profit. Had the Legislature so intended, it would have said so. *Remedial Educ.*, at 528. Indeed, the language of *N.J.S.A.* 18A:6-63 conveys the opposite intent, by authorizing an educational services commission to decide what services it will offer and then directing that, "It shall determine the *costs of providing such services* and may enter into contracts with member school districts to provide such services." (Emphasis added). Such language suggests that the Legislature wanted educational services commissions to recover the full amount expended for providing the service, but not to keep amounts over and above costs. More likely, the Legislature anticipated that an educational services commission

"would probably experience a lower per pupil cost by providing services directly rather than though subcontracts with private agencies." *Remedial Educ.*, at 528. Certainly the Commission's practice of routinely charging whatever the market will bear, without any reference to actual costs, runs directly counter to its statutory obligation to fix the costs before setting the price.

Read in the context of the categorical aid programs, the conclusion becomes even more compelling. Both *N.J.S.A.* 18A:46A-14, which governs Chapter 192 funds, and *N.J.S.A.* 18A:46-19,8, which governs Chapter 193 funds, contain identical provisions:

> In the event the expenditure incurred by any district is less than the amount of State aid received, the district shall refund the unexpended State aid after completion of the school year.These refunds shall be paid no later than by December 1.

Refunds from prior years are used to create a pool of funds to pay for additional services to children. Recently, in a case raising exactly the same legal issue, an administrative law judge held that "the obvious intent of both statutes is to insure that the identified children receive the needed services" and, further, that it would thwart such legislative intent if an educational services commission were allowed to retain unused monies. *Middlesex Cty. Educ. Servs. Comm'n v. Dept. of Educ.*, OAL DKTS. EDU 2030-92 and 1479-91 (Oct. 30, 1992) (slip op. at 8). Although an educational services commission is not itself a local school district, it acts as the agent or alter ego of the local district in providing the services. Accordingly, it receives the dedicated funds subject to the same conditions and restrictions imposed on the local district. Support for this interpretation comes from the language of N.J.S.A. 18A:6-67, which authorizes educational services commissions to enter into contracts and "receive and administer funds and grants from any individual or agency[.]" As noted in the *Middlesex* case, the word "administer" does not connote ownership, but rather means "to manage or conduct" or "to serve in the conduct of affairs, in the application of things to their uses." *Middlesex*, at 8.

Similarly, school districts must either use Chapter I funds within two years or return the unused portion to the State which, in turn, must return the money to the federal government. *See* 20 *U.S.C.A.* §3874. Failure to comply with this federal requirement exposes the State to potential liability. By the same reasoning

previously applied to Chapters 192/193 funds, a state instrumentality like an educational services commission must comply with the underlying conditions which attach to the grant of federal aid. One public entity responsible for proper use of the aid money cannot escape the restrictions by the simple expedient of channeling the funds to another public entity acting as its agent for delivery of services.

Another persuasive reason for requiring the Commission to restore the surplus funds is to prevent double billing. Until its repeal in July 1990, *N.J.S.A.* 18A:6-62.1 provided that "tuition rates" charged by educational services commissions for 1985-86 and subsequent school years "shall be determined after excluding the applicable salaries funded by section 7 of [the TQEA law] (N.J.S.A. 18A:29-5.6)." The Department urges that the "plain meaning" of this statute is that minimum salary state aid must be deducted from the amount charged by educational services commissions for contracted services. However, the Commission insists that the fees for service which it charges to contracting school districts do not constitute "tuition." Generally, the term "tuition" should be accorded its customary meaning, which, in the sense used here, means "the price of or payment for instruction." *D.S. v. East Brunswick Twp. Bd. of Educ.*, 188 *N.J. Super.* 592, 608 (1983), *certif. den.* 94 *N.J.* 529 (1989). *See also Webster's New International Dictionary* 2461 (3rd Ed. Unabridged 1976). Clearly, teachers' salaries are an indispensable part of the "cost of providing such services," which *N.J.S.A.* 18A:6-63 requires educational services commissions to determine when contracting with local school districts. It necessarily follows that the Legislature must have intended that state subsidies for teachers' salaries be excluded from charges to local districts, so that educational services commissions will not be compensated twice for the same services.

Other points raised by the Commission may be dealt with quickly. Rights and obligations of the parties are governed by the law in effect at the relevant time period, not by subsequent amendments. Courts have long followed a general rule of statutory construction that favors prospective application of statutes. *Gibbons v. Gibbons*, 86 *N.J.* 515, 521 (1981). Therefore, the fact that the Legislature later amended the law to add *N.J.S.A.* 18A:6-62(b), which allows educational services commissions to meet expenses from "anticipated surpluses to be generated by fees for programs or surpluses," has no bearing in this matter. If anything, it only strengthens the conclusion that the Commission lacked the authority to generate a surplus in 1987-88, because otherwise the new language would be superfluous.

Furthermore, the Single Audit Act of 1984, 31 *U.S.C.A.*§§ 7501 to 7507, which establishes uniform audit requirements for state and local governments receiving federal funds, does not assist in resolving the substantive issues. *See* 1984 *U.S. Code Cong. & Admin. News* 3955. Since the Commission is a regulated entity which may function only within its delegated powers, it may not retain windfall monies that were illegally acquired. In any event, the Commission fits the definition of "subrecipient" under 31 *U.S.C.A.*§ 7501(15). A subrecipient is an entity which "receives Federal financial assistance through a State or local government," but does not include the beneficiary of such assistance. As the explanatory material cited by the Commission makes clear, "a subrecipient's performance would be measured against meeting the objectives of the Federal assistance award." This merely confirms that the Commission receives federal funds subject to the same restrictions imposed on local school boards.

Unexpectedly, the Department requested in post-hearing submissions that any relief should extend beyond the year in question to cover "all unexpended funds from all years." But the transmittal documents forwarded by the Department to the OAL were limited to the audit for 1987-88. More importantly, the factual record developed by the parties was limited to that particular year and the legal arguments focused on the law at that time. It would be highly prejudicial to allow the Department to expand the scope of the hearing after all the evidence is in and the record has closed .

In conclusion, the Commission is bound by the existing law, which must be interpreted in light of the overriding legislative purpose to benefit children. The Commission must operate within its statutory plan, and a state administrative agency is not free to read unwarranted meanings into an unambiguous statute, "even to subserve a supposedly desirable policy not effectuated by the act as written." *Remedial Educ.*, at 528. If the Commission seeks greater statutory powers or needs more money, it should address those concerns to the Legislature.

Order

It is **ORDERED** that the Commission deliver its check in the amount of $1,056,907, payable to "Treasurer, State of New Jersey," to the Department.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 7th Floor, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 26, 1993
Date

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

4/27/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 29 1993
Date

Joyce LaVecchia
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Witnesses

1. Warren W. Buhler, former executive director/superintendent, Essex County Educational Services Commission

2. Melvin Wyns, director of the Bureau of School Finance, Division of Compliance, Department of Education

3. Robert William Ortley, supervising auditor, Bureau of Auditing, Department of Education

List of Exhibits

No.	Description
P-1	Copy of a memorandum to Walter J. McCarrol from Vito Gagliardi re Report of the Educational Services Commission Study Committee, dated April 25, 1984, with attachments
P-2	Copy of administrative agency advice to Gustav H. Ruh from M. Kathleen Duncan, Deputy Attorney General, dated February 2, 1981
P-3	Copy of a memorandum to the Directors of Educational Services Commissions from Marianne Peifly, dated April 10, 1980, with attachments
P-4	Copy of Senate Bill No. S-1501 (1984)
P-5	Copy of an audit report of Essex County Educational Services Commission by the New Jersey State Department of Education for the period July 1, 1987 to June 30, 1988

P-6 Copy of the collective bargaining agreement between the Essex County Educational Services Commission and the Education Services Teachers Association, for 1986 to 1988

P-7 id. Copy of an excerpt from the Federal Register, Volume 52, No. 219, page 4 (November 13, 1987)

P-8 Id. Copy of a letter to Warren W. Buhler from Robert J. Swissler, dated October 23, 1989

P-9 id. Copy of an audit report by Samuel Klein & Co. for the school year 1987-88

P-10 Copy of a sample contract for Chapter 192/193 services for the school year 1987-88

P-11 Copy of a sample contract for Chapter I services for the school year 1987-88

R-1 Copy of a letter to Mary Spillane from Richard M. Kaplan, dated May 2, 1989

R-2 Copy of the results of the Level I audit appeal meeting to Warren W. Buhler from Edward D. Kent, dated May 3, 1991

R-3 Copy of a letter to Edward D. Kent from Warren W. Buhler, dated May 30, 1989

R-4 Copy of a letter to Thomas J. King from Warren W. Buhler, dated May 14, 1991

R-5 Copy of the results of the Level II appeal to Warren W. Buhler from Thomas J. King, dated July 25, 1991

OAL DKT. NO. EDU 10535-91

ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION, ESSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF COMPLIANCE,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's May 14, 1993 exceptions were untimely filed pursuant to N.J.A.C. 1:1-18.4, having been received beyond 13 days from the decision's mailing date of April 29, 1993. A primary statement in support of the initial decision was timely filed by respondent on May 7, 1993.

Upon review of the record, the Commissioner fully concurs with the analysis and conclusions of the ALJ above. As found by the ALJ, the law governing the central issue herein is clear, and any operational limitations it may cause, or be perceived to cause, are addressed not by disregarding the law, but by seeking appropriate legislative redress. Neither do changes in the law subsequent to the period under dispute (Fiscal Year 1987) exonerate petitioner from its actions; to the contrary, petitioner should not now be allowed to benefit from its disregard of the law then in effect.

Accordingly, the initial decision of the Office of Administrative Law directing petitioner to refund the unexpended funds under dispute herein is affirmed for the reasons well stated by the ALJ.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 8, 1993

DATE OF MAILING - JUNE 8, 1993

126-93

EDU # 10535-91
C # 126-93
SB # 40-93

ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION, ESSEX COUNTY,

PETITIONER-APPELLANT,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF COMPLIANCE,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, June 8, 1993

For the Petitioner-Appellant, Edward F. Petit-Clair, Esq.

For the Respondent-Respondent, Arlene G. Lutz, Deputy Attorney General (Fred DeVesa, Acting Attorney General)

The State Board of Education affirms the decision of the Commissioner of Education, substantially for the reasons expressed by the Administrative Law Judge in his Initial Decision, which the Commissioner adopted. We, however, deny respondent Department of Education's motion seeking an award of prejudgment and post-judgment interest. Not only has respondent failed to follow the procedural requirements set forth in N.J.A.C. 6:24-1.16, but has also failed to demonstrate that such relief is warranted in this case. N.J.A.C. 6:24-1.16(b)(2)(c). See Bd. of Educ., City of Newark, Essex Cty. v. Ruth Levitt and Esther E. Sasloe, 197 N.J. Super. 239 (App. Div. 1984).

December 1, 1993

Date of mailing 03 DEC 1993

127-93

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF LAKEWOOD, OCEAN COUNTY.	:	
	:	

SYNOPSIS

Petitioner, defeated candidate for one-year unexpired term on Board, alleged irregularities in conduct of 1992 election. Recount, separately requested and incorporated in the record of inquiry, did not change outcome of election.

Initial decision dismissed petition as moot. As a consequence of the passage of time, i.e. the conduct of a subsequent election, there was no relief which might be granted to petitioner as a result of 1992 election because there was no longer a seat on Board even if petitioner prevailed.

Commissioner adopted findings and determination in initial decision, noting that disputed seat was no longer available and further finding that insufficient facts were pled to arrive at determination regarding whether Board's counsel ought be disqualified from representing Board in this case.

JUNE 8, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION DISMISSAL
OAL DKT. NO. EDU 3467-92
AGENCY REF. NO. 173-4/92

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY

Edward R. Lowenstein, petitioner, *pro se*
Richard K. Sacks, Esquire, for respondent

Record Closed: April 19, 1993 Decided: April 26, 1993

BEFORE LILLARD E. LAW, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Edward R. Lowenstein, a defeated candidate for a one-year unexpired term on the Board of Education of the Township of Lakewood (Board) alleges irregularities in the conduct of the annual school election held on April 7, 1992. Petitioner requested that the Commissioner of Education (Commissioner) conduct a recount of the election together with an inquiry of the alleged irregularities.

On May 5, 1992, a representative of the Commissioner conducted a recount of the ballots cast in the Board election held on April 7, 1992, who found, in part, that:

> Although the recount resulted in altered tallies of the ballots cast at the polls, the final results were not sufficiently different to change the outcome of the election. (Commissioner's Decision, May 28, 1992, at p.2)

The Commissioner therefore held:

> Accordingly, the Commissioner finds and determines that Warren Deutsch, Thomas F. Hampton, and Evelyn Feigin were elected to full three-year terms each, and that Donald Berkman was elected to a one-year unexpired term on the Board of Education of the Lakewood Township School District at the annual school election held on April 7, 1992.
> (Commissioner's Decision, May 28, 1992, at p. 3)

On May 13, 1992, petitioner's request for an inquiry was transmitted to the Office of Administrative Law (OAL). Petitioner alleges the following irregularities:

1. The closing down of machines - while people were still in the building at Clifton Avenue School wishing to vote - Dee Irwin, Board Secretary being unable to rectify the matter properly due to her being unable to reach the Election Board at 9:00 - Absentee Ballots were used apparently for 9 voters, however, other left. Changes improperly done on absentees.

2. Change in number in count from 17-71 in Don Berkman's count in District 7B Barton Hall LVE.

3. Discrepancies with a voter and/or voters between Oak Street School and Spruce Street School, as witnessed by several persons.

4. Figures between Berkman and Feign (sic) in Clark School.

5. Failure of my opponent Donald Berkman to have a paid for or printed by on his literature (lack of proper I.D. by law).

6. Figure dispute between other #'s (Petitioner's Petition of Appeal, dated April 10, 1992).

In a supplementary petition, dated May 10, 1992, petitioner requested that the additional allegations be added:

1. As stated in Point 1 of the original inquiry as to the polls closing down at Clifton Avenue School, etc. Mrs. Evelyn Feigen (sic) Board President and Candidate interfered in the process, as did Warren Deutsch, Candidate and then Vice President of the Board and also Alan Haller, member of the Board and Mrs. Feigen's (sic) campaign manager, and witnessed by myself and others - ruling made here by Board Attorney Richard Sacks (which may place him in conflict).

2. Discrepancy with ballot count due to use of absentee ballots and manner by which they were recorded.

3. Counting of tallies done in two separate rooms causing conflicting counts between both areas.

4. Mr. Pugliesi's name could have either been blocked out or completed deleted ...

5. Misleading information supplied by the PTA's - to the voting public.
   (a) Numbers wrong on one year seat.
   (b) Failure to notify voters that Mr. Pugliesi had withdrawn (literature handed out after his withdrawal) but nothing indicating such.

   (Petitioner's supplemental to the original Petition of Appeal, May 5, 1992)

On July 21, 1992, petitioner sent a facsimile (fax) letter to the Atlantic City OAL requesting that he be relieved of (the Board's) Mr. Sack's discovery request. Petitioner's fax also requested that Richard K. Sacks be removed as counsel to the Board, alleging a conflict of interest in the instant matter. Petitioner asserted he intended to call Mr. Sacks as one of his witnesses.

On July 22, 1992, the undersigned acknowledged receipt of petitioner's motion.

On July 23, 1992, Mr. Sacks addressed a letter to the undersigned, with a courtesy copy to petitioner and others, wherein counsel objected to petitioner's request not to provide discovery. Mr. Sacks stated, in part, that it would be impossible to adequately prepare a defense on behalf of the Board from the information supplied in the petition. Mr. Sacks, therefore, insisted that the Board's request for discovery be honored.

In his letter dated July 23, 1992, Mr. Sacks also addressed petitioner's request to remove him as counsel to the Board. Mr. Sacks observed, correctly, that without a formal motion and affidavits in support of his removal, this court should not consider petitioner's request.

Mr. Sacks also asserted that he was not in receipt of petitioner's letter dated May 5, 1992, (petitioner's supplemental petition) addressed to Maureen R. Keller, Bureau of Controversies and Disputes (Department of Education) until July 21, 1992.

Mr. Sacks suggested that petitioner be directed to provide Board counsel with copies of all correspondence he had submitted in connection with his appeal.

On or about July 26, 1992, the parties were given notice that the hearing would be held on August 10, 1992, at the Lakewood Municipal Building commencing at 9:00 a.m.

On July 29, 1992, the undersigned initiated a telephone conference with petitioner and counsel for the Board, which is reported below as follows:

> Gentlemen:
>
> Pursuant to our telephone conference held on July 29, 1992, in the above entitled matter, the following procedures were settled:
>
> 1. Complainant, Edward Lowenstein, shall comport with requirements of *N.J.A.C.* 1:1-12.1 *et seq.* and in particular *N.J.A.C.* 1:1-12.4 (a) with regard to his motion, filed by way of Facsimile dated July 21, 1992, seeking to disqualify Richard Sacks, Esquire, from representing the Lakewood Township Board of Education; and
>
> 2. Complainant, Edward Lowenstein, shall request, in writing, on or before August 5, 1992, an adjournment of the hearing scheduled for August 5, 1992, (sic) in the above entitled matter; and
>
> 3. Complainant, Edward Lowenstein, shall comport with the Discovery provisions, pursuant to *N.J.AC.* 1:1-10.1 *et seq.*
>
> The above represents the agreements reached by the parties and this tribunal as a result of the telephone conference held on July 29, 1992. In the event there are any questions, please do not hesitate to arrange for a conference call.

On August 5, 1992, petitioner, by way of fax, sent the following notarized document as a motion and affidavit to the undersigned:

> Edward R. Lowenstein, of full age, being duly sworn according to law, upon his oath deposes and says:
>
> 1. I am the complainant in the above captioned matter.
>
> 2. I wish to have the matter which is scheduled for August 10, 1992, adjourned to a later date so that:

a. I can have time to locate all witnesses, some of whom are unavailable at the moment due to being on vacation, and working only 10 months of the year.

b. So that I can have time to comport with the Discovery provisions, referred to in our telephone conversation (conference) held on July 29, 1992 and cited in your letter of July 30, 1992.

3. Also, I wish to have Mr. Sacks, disqualified from representing the Board of Education in the above entitled matter: Because he was a participant in the election, and activities I am challenging, and I plan to call him as a witness. As also discussed in my fax to you on July 21, 1992 and cited in my complaint.

Subsequently, on August 7, 1992, the undersigned issued the following:

Gentlemen:

In response to Mr. Lowenstein's Motion and Affidavit dated August 5, 1992 and received in this office August 7, 1992, I have made the following determinations:

1. Mr. Lowenstein's Motion for the Adjournment of the scheduled hearing for August 10, 1992, in the above entitled matter is hereby **GRANTED.**

2. Mr. Lowenstein's Motion to Disqualify Richard K. Sacks, Esquire, from representing the Board of Education of the Township of Lakewood in the above entitled matter is hereby **DENIED.** Mr. Lowenstein's "Affidavit" is insufficient and lacks specific facts upon which to base a determination that Mr. Sacks should be disqualified from representing the Board of Education.

In *Pressler,* Current *N.J. Court Rules,* Comment R. 1:6-6. Evidence on Motion: Affidavits: Judge Pressler comments as follows:

In contrast to discovery proceedings, in which responses containing hearsay and other inadmissible material may be perfectly appropriate, (*See* R. 4:17-4 and Comment thereon), affidavits in support of Motions must be limited to the affiant's personal knowledge of such facts as he is competent to testify to and as are admissible in evidence. Hence, affidavits by attorneys (and *pro se* litigants) of facts relating to them by and within the primary knowledge of their clients constitute, in effect, objectionable hearsay. *See Murray v. Allstate Ins. Co.,* 209 *N.J. Super.* 163, 169 (App. Div. 1986). Nor, of course, are the requirements

> of the Rule met by affidavits containing argument, other forms of hearsay and general factual or legal conclusions. Personal knowledge, the mandate of the Rule, clearly excludes facts based merely on "information and belief." *See, e.g., Patrolman's Benev. Assn. v. Montclair,* 70 *N.J.* 130, 134, n.1 (1976).
>
> 3. As a consequence of Mr. Lowenstein's Motion having been **DENIED,** Mr. Lowenstein is therefore prohibited from calling Richard K. Sacks, Esquire, as a witness in Lowenstein's case-in-chief.
>
> This constitutes my ruling on Mr. Lowenstein's Motions and a subsequent hearing date will be established and set down at the convenience of the parties.

On September 8, 1992, the instant matter was rescheduled to be heard on November 19, 1992, at the Lakewood Municipal Building commencing at 9:00 a.m.

On October 2, 1992, petitioner telephone the undersigned's secretary to request an adjournment of the hearing scheduled for November 19, 1992. The reason given, as it appears on the OAL Adjournment Form states that "petitioner having surgery."

In a letter to the parties dated October 6, 1992, the undersigned stated as follows:

> Gentlemen:
>
> During my absence from chambers on Friday, October 2, 1992, Mr. Lowenstein telephoned and spoke with my secretary, Mrs. Lillie Harris, to request an adjournment of the hearing in the above entitled matter, scheduled for November 19, 1992. Mrs. Harris advised Mr. Lowenstein that it would be necessary for him to have the consent of the Board's attorney before I would consider whether or not to grant the adjournment. As of this date, I have heard nothing further from Mr. Lowenstein.
>
> I wish to remind all concerned that this matter was transmitted to the Office of Administrative Law on May 13, 1992, as a consequence of Mr. Lowenstein's appeal from an election held on April 7, 1992. I also note that a hearing was originally scheduled for August 10, 1992 and adjourned at the request of Mr. Lowenstein. I am constrained to add that my calendar is rapidly filling up with a few days now open for February and March 1993, otherwise, the matter will be scheduled in April or beyond.

> It is my considered opinion that this matter should move forward on the date of November 19, 1992, as scheduled.
>
> In the event you have any questions concerning this matter, please do not hesitate to arrange for a conference call.

The hearing scheduled for November 19, 1992, was adjourned at petitioner's request. Nothing more was heard from petitioner.

On April 7, 1993, the Board, by way of letter, requested that the instant matter be dismissed, with prejudice, on the grounds that the issues were now moot. Counsel for the Board observed that petitioner sought to overturn the 1992 Lakewood Board annual school election and, particularly, his defeat as a candidate for a one-year term on the Board. Counsel further observed that since the annual school election for 1993 was scheduled for Tuesday, April 20, 1993, and the term of the position which petitioner sought will be concluded, there is no basis to proceed to hearing.

A conference telephone call was initiated by the undersigned on April 19, 1993, with petitioner and counsel for the Board. The Board set forth its request to dismiss for mootness and petitioner objected.

DISCUSSION AND CONCLUSIONS

The record clearly demonstrate that petitioner requested the adjournment of the scheduled hearings to be held on August 10, 1992 and November 19, 1992. The first request was honored in order for petitioner to prepare for the hearing. The second request was granted because petitioner asserted he was in need of surgery and would not be available for the hearing. As a consequence of the passage of time, *i.e.*, the conduct of a subsequent election, there is no relief which might be granted to petitioner as a result of the 1992 annual school election.

The seat on the Board for which petitioner was a candidate was for a one-year unexpired term. That term expired in April 1993, subsequent to the annual school election which was held on April 20, 1993. Therefore, there is no seat on the Board available to petitioner even if he were to prevail in his claim and challenge.

It has been well established that the Commissioner does not decide moot issues. *See Weehawkin Education Association v. Board of Education of the Township of Weehawkin, Hudson County,* 1978 *S.L.D.* 924, 925. Therein, the Commissioner quoted the court in the matter of *In Moss Estate, Inc. v. Metal & Thermit Corporation,* 73 *N.J. Super.* 56 (Chan. Div. 1962) where it said at 67 that:

> ...It is the policy of the courts to refrain from advisory opinions, from deciding moot cases, or generally functioning in the abstract, and "to decide only concrete contested issues conclusively affecting adversary parties in interest." *Borchard, Declaratory Judgments,* (2*d ed* 1941), pp. 34-35.

I **CONCLUDE** that the matters presented by petitioner are now moot.

I **CONCLUDE,** therefore, there is no justiciable issue now before this tribunal nor the Commissioner.

ORDER

Accordingly, there is no necessity for the Commissioner to rule on the points raised in petitioner's Petition of Appeal and, therefore, the **PETITION IS DISMISSED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

26 April 1993
Date

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

4/30/93
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 5 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

lmh

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF LAKEWOOD, OCEAN COUNTY.	:	
	:	

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

Mr. Lowenstein first notes that he has not yet received from the County Superintendent of Schools reimbursement of $38 he tendered for the purposes of conducting a recount of the vote tally in this district. The Commissioner notes for the record that such exception is not appropriately addressed in this, a separate matter from the recount sought in the case. Accordingly, such exception is not considered in the Commissioner's disposition of this case.

Mr. Lowenstein's next exception would have the Commissioner consider each of the arguments he advanced in his request for an inquiry of the 1992 school election notwithstanding the determination of the ALJ below that the matter is moot by the passage of time and the 1993 election because he believes that the same concerns could have or did arise in the school election held in April of this year. Toward such consideration, Mr. Lowenstein summarizes each of the alleged irregularities he presented in his written request for an inquiry.

Mr. Lowenstein's third exception would have the Commissioner also consider his contention that the Board's attorney cannot represent the Board in this case due to an alleged conflict of interest. Mr. Lowenstein seeks reversal of the ALJ's denial of his request to disqualify the Board's attorney due to insufficient facts made in support of such request.

Last, Mr. Lowenstein claims in exceptions that the Office of Administrative Law failed to reschedule the hearing in this case prior to next year's election, as per his several requests, instead scheduling a telephone conference one day before the next election on April 20, 1993.

Mr. Lowenstein seeks reversal of the initial decision for the above-stated reasons.

Upon careful and independent review of the record of this matter, the Commissioner concurs with those findings and determinations embodied in the initial decision rendered by the Office of Administrative Law in this case, finding, in particular, that the instant matter is rendered moot by the school election of April 20, 1993 given that the disputed seat expired and further finding that insufficient facts were pled to arrive at a determination regarding whether the Board's counsel ought be disqualified from representing the Board in this case.

As to Mr. Lowenstein's contention that the alleged irregularities of the school election in Lakewood in 1992 recurred or could have recurred in the 1993 election or other future elections, the Commissioner notes that the laws of New Jersey provide a mechanism for redressing any such allegations through N.J.S.A. 18A:14-63.12 to be filed within 5 days of any school election.

Finally regarding Ms. Lowenstein's contention that OAL failed to reschedule his hearing despite his attempts to do so by telephone, Mr. Lowenstein provides no proofs to support such contention. Without such demonstration, the Commissioner accepts the ALJ's version of the procedural history of this matter.

Accordingly, for the reasons expressed in the initial decision, the instant Petition of Appeal is dismissed, with prejudice.

COMMISSIONER OF EDUCATION

JUNE 8, 1993

DATE OF MAILING - JUNE 8, 1993

128-93

128-93

IN THE MATTER OF THE TENURE :

HEARING OF HOWARD SMITH, : COMMISSIONER OF EDUCATION

SCHOOL DISTRICT OF THE TOWNSHIP : DECISION

OF IRVINGTON, ESSEX COUNTY. :

:

SYNOPSIS

Board certified charges of incapacity, unbecoming conduct and other just cause against respondent, tenured teaching staff member. Board sought dismissal and/or reduction in salary due to alleged theft of vehicle, criminal involvement with former student, supplying false information, etc.

Having considered evidence and testimony of witnesses, ALJ determined Board had just cause for dismissal of respondent and for forfeiture of his tenured position due to degree of moral turpitude involved in respondent's activities particularly in involving himself in illegal activities with a former student.

Commissioner concurred with ALJ's dismissal of respondent from his tenured position due to his pattern of unacceptable behavior even though Commissioner did disagree with determination that Board proved Charge 11. Commissioner ordered his dismissal as of date of this decision and referred matter to State Board of Examiners for further appropriate action.

JUNE 9, 1993

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 419-92
AGENCY DKT. NO. 380-10/91

SCHOOL DISTRICT OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,
Petitioner,
v.
HOWARD SMITH,
Respondent.

Nicholas Celso, III, Esq., and **Jeffrey A. Bennett,** Esq., for petitioner
(Schwartz, Pisano, Simon & Edelstein, attorneys)

Tanya Pushnack Friedman, Esq., for respondent
(Zazzali, Zazzali, Fagella & Nowak, attorneys)

Record Closed: March 9, 1993 Decided: April 23, 1993

BEFORE **ARNOLD SAMUELS**, ALJ:

This matter involves tenure charges by the petitioner, School District of the Township of Irvington, against respondent, a tenured staff member, for dismissal or reduction in compensation pursuant to *N.J.S.A.* 18A:6-10 to -29.

PROCEDURAL HISTORY

The Board of Education of the Township of Irvington (Board) certified and filed the tenure charges with the Commissioner of Education against the respondent, Howard Smith, on October 18, 1991. The statement of charges alleges that respondent is guilty of incapacity, conduct unbecoming a teacher, and conduct constituting other just cause, which, if true, would warrant dismissal or reduction in salary. An answer denying the charges and asserting affirmative defenses was filed by respondent with the Commissioner of Education on January 10, 1992.

The matter was transmitted to the Office of Administrative Law (OAL) by the Commissioner of Education on January 15, 1992, for hearing and determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13.

A prehearing conference was held at the OAL on May 19, 1992, identifying the issues, fixing hearing dates, scheduling discovery, and regulating other procedural aspects of the forthcoming hearing. The resulting prehearing order is dated May 29, 1992.

The hearing was held in the OAL on September 15, 16, 17, 18, October 1 and December 15, 1992. The witnesses who testified and the documentary exhibits marked in evidence are listed in the Appendix attached to this decision. The parties filed posthearing briefs, and the record closed on March 9, 1993, when the last submission from counsel was received.

ISSUES

The issues, as set forth in the prehearing order, are:

A. Did the acts of the respondent, as alleged in the charges, constitute unbecoming conduct or other just cause for dismissal pursuant to *N.J.S.A.* 18A:6-10 to -29?

B. If the charges or any of them are proven, is the penalty of dismissal justified, or should a different penalty be imposed?

THE CHARGES

The specific charges against the respondent, as set forth by the Board, are as follows:

Charge No. 1: During the 1990-91 school year, September through May, Mr. Smith did commit an act of theft and/or alternatively unlawfully possessed stolen property belonging to one Elias Vitoroulis. (1989 Chevrolet Van, VIN No. 1GBEG25K8K7158849).

Charge No. 2: During the 1990-91 school year, September through May, Mr. Smith did commit an act of theft and/or alternatively unlawfully possessed stolen property belonging to one Julie Knittner. (1988 Honda Accord, VIN No. JHMCA5362JC112529 (N.Y.).)

Charge No. 3: Mr. Smith knowingly received the aforementioned stolen vehicles from one Shawn Leverette. Shawn Leverette is a former student in the Irvington School Board District. Mr. Smith met Shawn Leverette as a result of employment with the Irvington Board of Education.

Charge No. 4: During the 1990-91 school year, Mr. Smith failed to report his arrest and subsequent admittance into pretrial intervention. When the Board subsequently learned of same through independent sources, Mr. Smith was suspended with pay pending indictment. His failure to notify the Board of his status, however, resulted in confusion and inconvenience to the Board, as well as uncertainty regarding his ability to fulfill his professional duties, and was in violation of Board directives to report same thereby constituting a failure to follow administrative orders.

Charge No. 5: Mr. Smith forged a document purporting to be a receipt or bill of sale for the purchase of the aforementioned vehicle of Elias Vitoroulis which was presented to the Irvington Police with the intent of deceiving the police as to the lawful ownership of the Chevrolet Van.

Charge No. 6: Mr. Smith used a duplicate Social Security number on his application for employment and on his W-2 form, thereby deceiving the Board with respect to his prior out-of-state arrest record and revocation of teaching certificate.

Charge No. 7: Mr. Smith used an incorrect date of birth on his application for employment and on his W-2 form, thereby deceiving the Board with respect to his prior out-of-state arrest record and revocation of teaching certificate.

Charge No. 8: Mr. Smith continued to distort his employment record by using the aforementioned duplicate Social Security number on update of employee records, throughout his employment with the Irvington Board of Education, thus continuing to deceive the Board.

Charge No. 9: When completing his employment application and interview, Mr. Smith failed to disclose the fact that his teacher's certificate had been revoked in Florida.

Charge No. 10: When completing his employment application and interview, Mr. Smith failed to disclose that he had a criminal arrest and conviction for the offense of "disorderly conduct."

Charge No. 11: Mr. Smith failed to provide accurate information concerning the status of his New Jersey Teacher Certification, to wit: that it was listed under an alternative Social Security number and that it had been revoked and/or suspended.

By virtue of his theft and/or possession of a stolen van, a stolen car, and failure to report his status following arrest; criminal involvement with a former student of the Irvington Schools, failing to supply accurate information about his Social Security number and date of birth on initial application and subsequent update information sheets, and omitting to reveal his prior arrest record and certificate revocation, Mr. Smith has been engaged in a pattern of unbecoming conduct, insubordination, demonstrated incapacity and conduct constituting other just cause for dismissal, and/or reduction in salary.

TESTIMONY AND EVIDENCE

A man named Elias Vitoroulis owned one of the vehicles, a 1989 Chevrolet Van, involved in the theft and/or possession of stolen property charges against respondent. Mr. Vitoroulis testified that the van had been stolen from in front of his house in Linden, New Jersey, in June 1990. He reported the theft to the police immediately. Three months later, in September 1990, Mr. Vitoroulis received a summons in the mail for parking the van illegally. Because the date on the ticket was after the date of the theft, Mr. Vitoroulis brought it to the police. The van was recovered by the police sometime thereafter and returned to Mr. Vitoroulis. However, it had been damaged, and the witness had to expend between $4,000 and $5,000 for repairs before it could be sold. Mr. Vitoroulis testified that, among other things, the dashboard had been broken out and the radio was gone.

Counsel produced a document that appeared to be a bill of sale, dated January 20, 1990, purportedly signed by Mr. Vitoroulis. This document indicated, on its face, that Mr. Vitoroulis had sold the van to Howard Smith for $10,988. Mr. Vitoroulis examined the document on the witness stand and unequivocally stated that the signature was not his and that he never received money from Mr. Smith. He also said that he never saw the document or Mr. Smith before, and that his name on the

signature line was misspelled. *See* Exhibit P-1. In order to confirm his testimony, Mr. Vitoroulis produced three checks that he had written in March and April 1991, drawn on his bank account. The signatures on these checks were positively identified by Mr. Vitoroulis as his own.

Anita Biggs, an expert handwriting analyst and document examination specialist, was given handwriting and signature samples belonging to Howard Smith to compare with the purported bill of sale. After comparing the handwriting and signature samples of both Mr. Smith and Mr. Vitoroulis, Ms. Biggs offered the following opinions:

(1) The signature of Elias Vitoulis [*sic*] at the bottom of Exhibit P-1, the bill of sale, was not written by the same hand that signed the signature of Elias Vitoroulis in the samples of the Vitoroulis signature seen in Exhibit P-2, the checks drawn on his bank account;

(2) The signature of Howard Smith on Exhibit P-1, the purported bill of sale, was written by the same hand that signed Howard Smith's signature on Mr. Smith's handwriting samples. The sample signatures were seen on letters previously written by Mr. Smith to the State of New Jersey, the Board of Education, and to his attorney;

(3) The printed handwriting, as well as the questioned signature of Mr. Vitoroulis on P-1, the bill of sale, was penned by the same hand that wrote the sample letters belonging to Howard Smith.

Ms. Biggs's testimony was unequivocal and convincing. When asked about the degree of certainty of her opinions, Ms. Biggs replied that she had no question about the identification of Howard Smith's handwriting and the fact that he wrote the bill of sale himself and signed Mr. Vitoroulis's name (misspelled) on the signature line. When asked if she could state the statistical margin of error in the reliability of her opinion, Ms. Biggs said that the proofs show a possible error factor of one to many millions.

George Venturi, a lieutenant in the Irvington Police Department, testified that while on duty, he was informed about a call to police headquarters from someone

who received a notice about an unpaid parking ticket for a Chevrolet van. However, the vehicle identified on the ticket had been reported stolen months earlier. Lt. Venturi decided to tour the location noted on the ticket. While driving around the block and checking the parked cars, Lt. Venturi saw a man (later identified as Howard Smith) driving a van that fit the description of the stolen vehicle, but with a different license plate number. The man parked the van and went into a house on Lenox Avenue.

The lieutenant asked for a registration check on the vehicle and was informed that it was registered to Howard Smith, and not listed as stolen. Lt. Venturi then examined the vehicle identification number (VIN) plate inside the front windshield of the van. That number matched the VIN on the stolen van. He also noticed that the steering column on the vehicle was damaged.

The lieutenant knocked on the door of the house into which the driver of the van had gone. The man who opened the door was the same person (identified in this tribunal by the lieutenant as Mr. Smith) who parked the van. When asked about the van, Mr. Smith said that he had recently purchased the vehicle and had a valid registration for it. A woman in the house, identified as Howard Smith's fiancée, produced a registration and title, which bore the same license plate number that was on the van, but bearing a different VIN. Lt. Venturi informed Mr. Smith that he was under arrest for possession of a stolen motor vehicle, and he was taken into custody.

Lt. Venturi searched the interior of the van. He found a set of license plates on a back seat that were registered to Elias Vitoroulis, for the Lincoln automobile that had also been stolen from in front of his house in Linden at or about the same time that the van was stolen. *See* Exhibit P-8.

Mr. Smith's fiancee produced a form of bill of sale, which Mr. Smith claimed would prove that he purchased the van. The lieutenant noted that the VIN on the bill of sale did not match the VIN on the vehicle or on Mr. Vitoroulis's original registration. The witness further testified that in addition to the broken steering column, the van had a broken door and ignition locks, typical of a stolen vehicle. Lt. Venturi called Mr. Vitoroulis, who told him that he never sold his van, but that it had been stolen.

Before leaving the premises on Lenox Avenue, Lt. Venturi checked the registrations of three other vehicles parked in the driveway. Mr. Smith's fiancée indicated that two of the cars were hers and one belonged to Mr. Smith. A computer check revealed that one of the three vehicles, a 1988 Honda Accord, bearing a New York registration, was a stolen car. A visual check revealed that its ignition lock was broken and the radio was missing from the dashboard. The car had previously been reported stolen in Cranford, New Jersey, and belonged to a woman who lived in Hawthorne, New York. Lt. Venturi took custody of the vehicle from Mr. Smith's fiancée, who told the lieutenant that it was Howard Smith's car. The vehicle, which also had a damaged steering column, was impounded and towed away.

Lt. Venturi's testimony was straightforward and credible.

Richard Winowski, a sergeant in the Irvington Police Department who was assigned to the auto theft squad, investigated the incident described by Lt. Venturi. On the day after the arrest, Sgt. Winowski interviewed Howard Smith, who told him that the van had been brought to him by Shawn Leverette, a former student of his at the Irvington High School, and that he paid cash to Mr. Leverette for the vehicle. Mr. Smith claimed that he did not know it had been stolen. During the interview, Mr. Smith also told Sgt. Winowski that Shawn Leverette, accompanied by another man, had brought several other vehicles to him at various times, but that he had no knowledge of the present location of these vehicles. See Exhibit P-20, Sgt. Winowski's written report.

When asked about the Honda automobile, Mr. Smith told the sergeant that it had been brought to his house by Shawn Leverette, who only asked him to hold it for him. Mr. Smith claimed that he did not know it was a stolen vehicle either.

A computer record check disclosed that a person named Shawn Leverette had an arrest record as a juvenile and as an adult, relating to car thefts. The Irvington Police Department attempted to contact Mr. Leverette, who did not respond, and that aspect of the investigation was not continued.

A record check relating to Howard Smith, using the date of birth of April 21, 1942, and Social Security number 262-23-9269, given to the police by Mr. Smith, did not disclose an arrest record.

Guy Ferri, Assistant Superintendent of Schools in Irvington, is custodian of the school's personnel records and is in charge of recruiting and hiring for the Board. Although Mr. Smith, a mathematics teacher in the high school, was arrested in September 1990, he did not report the matter to anyone in the school system. However, Mr. Ferri began hearing rumors that Mr. Smith had been arrested for auto theft, and he began making inquiries of the Irvington Police Department. Mr. Ferri then was able to obtain copies of the police reports, Exhibits P-3 and P-20. The matter was then discussed with the personnel committee of the Board of Education in October or November 1990. The Board decided that it could not allow Mr. Smith to continue interacting with his students. On November 15, the Superintendent of Schools wrote to the respondent and suspended him from his position, with pay, until the investigation was completed, and pending further direction of the Board. *See* Exhibits P-23 and P-24.

Mr. Ferri testified that he received nothing but sparse information from the police until the spring of 1991, when he learned that the respondent had applied for a pretrial intervention program (PTI). This information came from the police, not from Mr. Smith, who had never contacted Mr. Ferri or any of the other administrators or Board members regarding his status. On March 15, 1991, Mr. Ferri wrote to the respondent and informed him that the Board had learned of the PTI admission resulting from charges of car theft approximately six months earlier. The letter advised Mr. Smith that the Board would discuss the situation at a closed session meeting on March 20, 1991, and that the discussion could result in disciplinary action against him, including suspension without pay, as well as possible further action. The letter, sent to Mr. Smith's address in New Brunswick by certified and regular mail, was returned to the Board marked "moved, left no address, unable to forward, return to sender." According to Mr. Ferri, the respondent still had not communicated with the Board or its staff.

The Board meeting on March 20, 1991, resulted in a decision to withhold Mr. Smith's increments for the following school year, although his pay was continued. Mr. Smith did not appear. In an attempt to get Mr. Smith to respond, another letter

was sent to him on April 3, 1991, but addressed to the home of his fiancée on Lenox Avenue in Irvington. This was the location at which he had been arrested the previous September, as recorded in Lt. Venturi's report. The respondent was asked to contact Mr. Ferri as soon as possible and he was reminded not to engage in any outside employment because he was still receiving full salary and benefits. Mr. Ferri testified that the Board was anxious to determine and be kept informed of the respondent's status because they had continuing problems obtaining a replacement for him. Mathematics and science teachers were scarce, and the Board was unable to recruit anyone for any definite period of time because the Board did not know if there would be a vacancy. Therefore, the administration had to use substitute teachers and move current staff members around on a month-to-month basis. *See* Exhibit P-28.

Mr. Ferri stated that Mr. Smith finally called him in April 1991, and they spoke about the respondent's status at that time. Mr. Smith indicated only that there had not been an indictment, but that he had appeared in court. Because there had been no final resolution of the matter, Mr. Smith could not provide definitive information about the future. Mr. Ferri asked him to keep him informed. The report from Mr. Smith was vague, and did not give Mr. Ferri enough information about the respondent's status to enable the Board to make any longer term personnel decisions. Mr. Ferri did not know at that time if he could offer a contract to anyone else for any particular period of time. In addition, Mr. Smith said nothing about PTI or the status of his application, and Mr. Ferri did not know if he would be admitted to the program.

According to Mr. Ferri, Mr. Smith failed to contact him again, as was requested in April, for at least several months thereafter. On August 9, 1991, Mr. Ferri wrote to Mr. Smith, by certified mail addressed to both locations, New Brunswick and Irvington, advising the teacher that plans were being made for the opening of school. The respondent was told that it was important for him to contact Mr. Ferri regarding his plans, in the event the Board would permit his return to teaching. The letter asked for a call no later than August 23, 1991, and Mr. Smith was told that his failure to do so might be considered as an abandonment of his position, with the possibility of disciplinary action. *See* Exhibit P-36.

Mr. Smith answered this letter and informed Mr. Ferri that he was willing and able to continue teaching at the high school without any restrictions. However, no information was given about the status of his criminal case. Because the respondent's status was still uncertain, Mr. Ferri hired a permanent substitute to begin work in the fall of 1991.

When cross-examined, Mr. Ferri stated that the policy manual requires that a teacher must report any change that might affect his or her status to the Superintendent, and that Mr. Smith did not satisfy this requirement. On the few occasions when he did make contact, the information was too vague to enable the Board to make any decisions about a resumption or continuation of his employment. In addition, Mr. Smith never responded to notices to attend Board meetings at which his situation and the possibilities of adverse personnel action were being discussed. Even when asked about his status in the April 1991 telephone conversation with Mr. Ferri, the respondent simply said that he had not been indicted and that he had been to court a couple of times. He said nothing about the PTI application and its timing.

Mr. Ferri first received some definitive advice about the PTI situation in the late spring and summer of 1991. However, this information came from the police, not the respondent, and the Board still had no knowledge of its terms, duration, or progress.

Mr. Ferri's testimony then turned to details relating to other charges, numbers 6 through 11, that involved the respondent's use of two different Social Security numbers and two or three different dates of birth on various forms and documents connected to his employment. Mr. Smith's failure to disclose a teaching certificate revocation in Florida and a prior disorderly conviction was also addressed in this testimony.

Mr. Ferri first became aware of the discrepancies in June 1991 when the Office of the Essex County Superintendent of Schools, as part of an ongoing monitoring program, informed him that the county had no record of Mr. Smith's teaching certification. Such certificates are routinely filed with the Office of the County Superintendent, and a copy is included in the employer board's records. Mr. Ferri was surprised because he had a copy of the respondent's certificate in his personnel file. *See* Exhibit J-1(1). A computer check by the county Superintendent then

disclosed a Howard Smith with the same Social Security number that appeared on the Board's copy, 261-66-0617. However, the computer printout also showed that the certificate ~~had~~ been revoked. *See* Exhibit P-30.

Mr. Ferri became concerned because there was a possibility that if the certification had been previously revoked, a teacher might have been employed in the district who was not properly certified.

Mr. Ferri then checked other records in his possession and noted that a different Social Security number was recorded for Mr. Smith on various documents, including the most recently filed W-2 withholding tax statement, an annual personnel update sheet, and the respondent's original employment application. These bore Social Security number 262-23-9269. *See* Exhibit J-1(3) and P-35. The same Social Security number was also recorded on a transcript from Kean College of New Jersey. *See* Exhibit P-31. On the other hand, the school personnel file indicated that the first Social Security number, 261-66-0617, was shown on a transcript from Kean College of New Jersey, Exhibit P-31, and on an earlier transcript from the University of Florida, Exhibit P-32. A more comprehensive University of Florida transcript also bore the same number. *See* Exhibit P-33.

While checking the above documents and other papers in Mr. Smith's file, Mr. Ferri noted that the respondent also had used different dates of birth on various records he had submitted. One transcript from the University of Florida, Exhibit P-33, showed a year of birth of 1942; another, P-34, showed 1943. A Rutgers University Graduate School of Education transcript listed the year of birth as 1942, while three documents in the Board's file listed the respondent's year of birth as 1944.

It was also noted that the 1942 date of birth was listed for Mr. Smith in the police reports and possession of stolen motor vehicle records of September 26, 1990, relating to the possession of stolen cars. These records also listed his Social Security number as 262-23-9269.

All of the above created a great deal of confusion in Mr. Ferri's mind, and he continued to investigate. This led to his discovery of the revocation of the respondent's Florida teaching certificate in 1972, following a disorderly conduct

arrest in that state. This led to a question: If the Florida revocation was communicated to New Jersey, had the New Jersey certification also been revoked at the time Mr. Smith was hired and teaching in the Irvington School District? At first, Mr. Ferri did not know, but he subsequently found out that the New Jersey certificate had been marked with a revoked notation and that the Florida certificate was subsequently reinstated.

The uncertainty about Mr. Smith's certification status in New Jersey continued into 1992. Two exhibits shed some light on the question: The first, Exhibit R-5, is a letter from the New Jersey Department of Education, Bureau of Teacher Education and Academic Credentials, to Mr. Smith, dated July 8, 1981, acknowledging an inquiry from Mr. Smith. He was told that the New Jersey Department of Education was in touch with the State of Florida concerning the certification in that state, and that the respondent would be notified as soon as possible regarding his request for certification for teacher of mathematics in New Jersey. The second document is more recent, dated July 31, 1992, during the pendency of the instant hearing, from the New Jersey Department of Education to the respondent's attorney. This letter, Exhibit R-2, indicates that New Jersey is a member of the Interstate Reciprocity Contract between the states, and that a notice dated April 8, 1972, had been received from Florida concerning revocation of Mr. Smith's certificate in that state. As a matter of procedure, a revoked flag was entered into the computer on Mr. Smith's New Jersey certificate. In June 1991, further information was received from Florida confirming that Mr. Smith's certificate was again valid there. Therefore, the revocation reference that had been entered in New Jersey was removed from the computer file at that time.

The Director of the Division of Teacher Certification in the New Jersey Department of Education later advised that Mr. Smith's certificate had never been actually revoked in New Jersey. The revocation reference or flag was only placed onto the computer record pending the receipt of information from Florida. This information was not received until June 1991, when the flag was removed. *See* Exhibit R-8.

When asked if he knew why the two different Social Security numbers on the teaching certificate and the employment application did not raise an inquiry, Mr. Ferri said that the person who interviewed Mr. Smith probably did not notice the

discrepancy. He also noted that a request on the application for identification of other states in which the respondent held certificates was left unanswered.

On further cross-examination about his claim that teachers have a duty to report changes that would affect their status as employees, Mr. Ferri stated that the requirement appears in the policy manual and that teachers regularly and routinely do report such changes to him, such as prolonged illness, forthcoming birth of a child, and other matters that might cause a prolonged absence. He did not know if an arrest would automatically change a person's status, but he felt that Mr. Smith had a duty to report it and to keep the Board informed. He repeated his original testimony indicating that when he finally was able to contact the respondent and ask questions, Mr. Smith's advice was vague and did not give enough information about his status to enable the Board to make personnel decisions. In addition, after the one conversation they had in the spring of 1991, Mr. Smith failed to update his status, and Mr. Ferri had to wait and ask the Board attorney to obtain information from the police.

Counsel pointed out to Mr. Ferri that the employment application did not ask about prior arrests or revocation of teaching licenses in other states. His response was that such information is of sufficient importance that it should be disclosed, because it can seriously affect the Board's decision to hire a new teacher. His opinion was that the failure to ask the questions does not eliminate the obligation to disclose such vital information.

The respondent, Howard Smith, testified in his own behalf. He began by explaining the reasons why he possessed multiple identification. He said that his first Social Security number, 261-66-0617, was acquired in 1964, and he used it in connection with many jobs he had in the state of Florida. He misplaced the card four years later, so he applied for and obtained another card and number in 1968, which was Social Security number 262-23-9269.

The respondent stated that his actual date of birth is April 21, 1944. He began using the false year of birth, 1942, when he was sixteen years old, in order to obtain work as a caddy at a golf course. Applicants were required to be eighteen years of age. After that, according to Mr. Smith, he continued to use the 1942 year of birth for his driver's license, in college, and in other positions, including teaching, in the

state of Florida. After moving to New Jersey in 1974, the respondent continued to use the false year of birth, 1942, for other purposes, such as graduate school at Rutgers, and at a part-time job at the Passaic Community College. He also used that date of birth for an instructor's position at Rutgers in 1975 or 1976, at Plainfield High School in 1982, and then in Irvington High School in 1985.

Mr. Smith knew that his Florida teacher's certificate was revoked in 1972. It was reinstated in 1981 when Florida contacted him as part of a review of all revoked licenses. However, he first needed to obtain a temporary certificate, and he was required to return to Florida in 1981 for testing. See Exhibit R-4. The permanent, five-year certificate, was issued to him in September 1981, bearing a birthdate of 04-21-42. Mr. Smith then applied for and obtained his New Jersey teacher's certificate. However, he did not inform the New Jersey authorities that his Florida certificate had been revoked at one time. When asked why he did not disclose this, respondent replied that no one ever asked him.

When asked why his transcript from the University of Florida, Exhibit P-34, lists his year of birth as 1943, Mr. Smith stated that it must be an error, because he told them it was 1942, stating that he never used 1943 as a year of birth.

The respondent then furnished details relating to his various residences. Mr. Smith has owned a home for the past twenty years in Sanford, Florida, where he spends time when school is not in session. After residing in New Brunswick since 1977, the respondent established a residence on Lenox Avenue in Irvington, in the house owned by his wife, the same woman who was identified as his fiancee at the time of his arrest in 1990.

At one point, the respondent maintained both addresses, New Brunswick and Irvington, which may explain why the Board had difficulty reaching him after he was arrested.

Explaining his acquisition of the Chevrolet van, Mr. Smith testified that he was looking for a used van and that a man named Victor, whom he knew, told the witness that he knew of one that could be bought. This was in June 1990. A few days later, according to Mr. Smith, a man came to his home with the van and said his name was Elias and that he owned the vehicle. They discussed the sale and

negotiated a price. Elias wanted $10,000, but he did not have the certificate of title. Mr. Smith replied that he would give him one-half of the money, $5,000, and would pay the balance when he received the title. The respondent said that he paid the man $5,000 in cash. Referring to the bill of sale, Exhibit P-1, respondent said that the document was already printed out, with the signature of Elias Vitoroulis on it. Mr. Smith said that he then signed it.

According to the respondent's testimony, the man never brought the title back, and he never had to pay the second $5,000. He thought that was a good deal, because the vehicle only cost him $5,000. Respondent said that license plates were on the van, but he registered it himself and obtained his own new license plates. When asked how he could do that without a title, Mr. Smith said that he took his brother's title to a different vehicle and used that instead. Therefore, he ended up paying $5,000 for the van, in cash, and he never heard from "Elias" again.

Contradicting the testimony of Lt. Venturi, Mr. Smith said that he was not using the van when he was arrested, because while he was in Florida that summer, someone broke into the vehicle and removed the radio and speakers. He denied saying that he purchased the van from Shawn Leverette, and he also denied telling Sgt. Winowski, who interviewed him the day after he was arrested, that the van was brought to him by Shawn Leverette or that he paid Mr. Leverette for it. Mr. Smith further also denied the sergeant's statement indicating that the respondent said that Shawn Leverette brought the Honda automobile to his residence and asked him to hold on to it for him.

Asked about the man named Victor, who presumably initiated the sale of the van to the respondent from "Elias," Mr. Smith testified that he knew Victor before the incident occurred but that he never saw him again.

Referring further to Shawn Leverette, the respondent acknowledged that the young man had been a student of his and that he was graduated from the high school in June 1990. He also said that Mr. Leverette lived in his fiancée's (now his wife's) house on Lenox Avenue during the summer of 1990, and had been "hanging around" a lot after graduation from high school. Mr. Smith asked Shawn Leverette to live there while he was gone that summer to Florida, because he wanted some protection from vandalism in an otherwise empty house.

Referring again to the Honda automobile, respondent said that the vehicle was at the house when he returned from vacation at the end of the summer in 1990. Shawn Leverette told him it was his, but he left the car there. According to Mr. Smith, Shawn Leverette had free access to the house, had his own keys, and could do anything he wanted with regard to the residence. Mr. Smith further testified that Shawn Leverette never came by and moved the car, nor did he, respondent, drive the vehicle.

When cross-examined about his purchase of the van, Mr. Smith indicated that the $10,000 price (more accurately close to $11,000) was the price selected by "Elias." However, he acknowledged that the bill of sale does not refer to $5,000 down. The man named Elias was a complete stranger to him, but he did not hesitate giving him the $5,000 in cash. Mr. Smith said that although he never had ownership or title to the vehicle, he had the van. In addition to not acquiring title to the vehicle, Mr. Smith acknowledged that he did not have insurance coverage for it. Asked if this was a usual occurrence, respondent said that he always buys cars for cash because people won't take checks; he has purchased four cars that way in the last five years.

Asked why he would purchase a vehicle without knowing that he could have the title, Mr. Smith replied that, "When getting a good deal, you take it. It might be hot, but that's a chance you take." He said that this van was a good deal.

Asked about his use of his brother's Florida title to register the vehicle, Mr. Smith said that the VIN used for his New Jersey registration was the same as the VIN on his brother's title, and that his brother signed his own van over to him, with the title, so he could get the newly-purchased Chevrolet van registered in New Jersey. Respondent said that his brother kept his van, but only signed the title over. Mr. Smith acknowledged lying to the New Jersey Division of Motor Vehicles in order to obtain a registration for the Chevrolet van.

Asked about the obvious damage to the van, the respondent replied that he noticed it when he returned from Florida, and that the radio and speakers had been ripped out. He did not mention the broken steering column, door lock, or ignition lock. Mr. Smith did not report the damage to the police. He said that he just let the

vehicle sit on the street, unrepaired and open, for twenty-six days until he was arrested.

Further testimony from the respondent relating to Shawn Leverette disclosed that the young man had possession of the house on Lenox Avenue in Irvington alone during the summer of 1990, because Mr. Smith's fiancee had accompanied him to Florida. At the time, Mr. Leverette was eighteen years old, and respondent did not know if he was employed. Asked about the length of their relationship, Mr. Smith replied that they became friends when he was Mr. Leverette's teacher at Irvington High School in 1986-87.

Returning to his purchase of the Chevrolet van, Mr. Smith indicated that it was worth $20,000 to 30,000 if new, and perhaps one-third to one-half of that if used. He did not remember the mileage on the odometer, but he knew it was a 1989 vehicle when he bought it in June 1990 for $5,000. When asked about the two different spellings of Mr. Vitoroulis's name on the bill of sale, Mr. Smith replied that he did not read it before he signed it. He was not bothered by the fact that the seller had no title, and he made no attempt to contact the seller afterward, even though he had the address on the bill of sale. In addition, although he acquired the van on June 20, 1990, it remained standing on the street, unregistered and without license plates, until late August when he returned from Florida and brought his brother's title certificate back so the vehicle could be registered. Mr. Smith testified further that when he registered the van, he used the insurance information from four other cars that he owned, which were parked on the street or in his driveway. Additionally, the respondent was unable to produce any evidence that he paid State sales tax when he registered the vehicle. Asked how the Division of Motor Vehicles permitted that, the respondent answered that he probably told the Division that the vehicle was given to him by his brother as a gift.

Mr. Smith noted that the VIN on the bill of sale, Exhibit P-1, is accurate, although he has no title or other documents other than the registration. He said that he never intended to obtain a title certificate. According to the respondent, such things as titles and other paperwork are not important and never were important to him in connection with any cars he has acquired.

The respondent was asked to identify all other motor vehicles that he currently owns. Mr. Smith identified four cars, one Chrysler, one Horizon, and two Citations. These did not include the Chevrolet van and the Honda, both of which were involved in the September 1990 arrest. Counsel then produced a computerized return of a Division of Motor Vehicles inquiry in July 1992, for motor vehicles registered to the respondent. The only vehicle listed as being registered in Mr. Smith's name is the Chrysler. (However, the search was made almost two years after the arrest, and counsel did not pursue the matter for identification of registrations in 1990. See Exhibit P-38.)

It was also noted that the same document included details relating to Mr. Smith's driver's license, which expires in June 1994. The year of birth on his driver's license is 1942.

Asked again about his denial of the statement in Sgt. Winowski's report that he obtained the Chevrolet van from Shawn Leverette and paid him for it, Mr. Smith repeated that denial, but when asked what he did tell the sergeant, the respondent stated that he could not remember.

Following up further on Mr. Smith's assertion that he paid $5,000 in cash for the van, counsel asked where he got the money. Mr. Smith said that he withdrew the funds from certain bank accounts, certificates of deposit, or money market funds that he specifically named. When asked, he identified five such sources of funds as the only accounts or certificates he possessed at the time. Counsel then subpoenaed the account records from these institutions, and on the next hearing day he confronted Mr. Smith with the statements. None of these accounts showed withdrawals during the time in question. When asked to explain, the respondent stated that now he is not sure where he obtained the cash.

While copies of Mr. Smith's income tax returns were not produced in connection with his use of Social Security numbers and dates of birth, the respondent acknowledged that he has used both of his Social Security numbers on tax returns in the past.

FINDINGS OF FACT AND CONCLUSIONS

At the beginning of the hearing, the parties stipulated and agreed to ten facts, set forth in Exhibit J-1, with exhibits attached. The ten stipulations of fact are as follows:

1. Howard Smith was certified as a teacher of mathematics in the state of New Jersey in 1981.

2. Howard Smith was certified as a teacher of mathematics in the state of Florida from 1965-1971.

3. Howard Smith's teaching certificate in the state of Florida was revoked in 1972 after the Florida Department of Education learned of Smith's prior arrest.

4. Howard Smith's teaching certificate in the state of Florida was subsequently reinstated in or about 1981.

5. Howard Smith was hired by the Irvington Board of Education in the fall of 1985 as a mathematics teacher and has continued serving in that capacity until the time of his suspension on October 17, 1991, pursuant to the subject tenure charges.

6. Howard Smith has utilized two Social Security numbers: (1) 262-23-9269; and (2) 261-66-0617.

7. Howard Smith has listed two dates of birth: (1) April 21, 1942; and (2) April 21, 1944.

8. In September of 1990, Howard Smith resided at 94 Manor Crescent, New Brunswick, New Jersey.

9. In September of 1990, Howard Smith's fiancée, Yvonne Finley, resided at 27 Lenox Avenue in Irvington, New Jersey.

10. On April 3, 1991, Howard Smith was accepted into pretrial intervention, completed the program during the summer of 1992, and criminal charges against him were dismissed by Order of Judge Thomas Brown on September 6, 1991.

After having heard the testimony, observed the witnesses, reviewed the exhibits, and considered the arguments of counsel, I **FIND** the following additional facts by a preponderance of the credible evidence:

11. The uncontroverted facts, as set forth in the foregoing discussion, are incorporated herein by reference, and need not be repeated.

12. The respondent acquired, used, and operated a stolen Chevrolet van, knowing it had been stolen.

13. The respondent did not purchase the van from its owner, Elias Vitoroulis. The vehicle had been stolen from Mr. Vitoroulis.

14. The respondent himself wrote a purported bill of sale for the vehicle and signed Mr. Vitoroulis's name as seller. This was a forgery, drawn and executed solely by Mr. Smith.

15. The respondent then attempted to legitimize his acquisition of the van by having it registered in his own name. This registration was accomplished without an originating title and without insurance coverage. The respondent used a registration given him by his brother, applicable to a different vehicle, and he supplied false insurance information. Although he claimed that he paid $5,000 in cash for the vehicle, Mr. Smith did not pay sales tax on the transaction, claiming it was a gift from his brother.

16. Respondent also acquired, possessed, and stored a stolen Honda automobile. He had reason to know that this vehicle was stolen.

17. The license plates from another vehicle, a Lincoln, stolen from Mr. Vitoroulis at or about the same time that the van was stolen, were in plain sight on a seat in the stolen van referred to above.

18. Mr. Smith was involved in the acquisition of the above stolen cars with Shawn Leverette, a June 1990 graduate of Irvington High School. Mr. Leverette was in respondent's class several years earlier and the two became friends at that time. Mr. Leverette supplied the stolen automobiles to Mr. Smith.

19. The respondent failed to inform the Board or the administration of his arrest in September 1990. That information first became available to Mr. Smith's superiors two months later, in November 1990. The information was not supplied by the respondent, but by the Irvington Police after inquiries were made by school personnel.

20. In November 1990, after the Board learned of the car theft charge, Mr. Smith was suspended with pay.

21. Thereafter, Mr. Smith did not contact the Board until early April 1991. The advice he gave to Mr. Ferri about the progress of the criminal charges was vague, and the Board was unable to plan for the possible return of the respondent or, in the alternative, whether to offer a contract to a replacement teacher.

22. All of the information contained in the exhibits and testimony referred to above relating to Mr. Smith's long-term and continuing use of two different Social Security numbers and two different dates of birth are accepted as fact. These inconsistencies in the respondent's records, when discovered by the Board, caused justifiable confusion and apprehension, particularly relating to the question of whether Mr. Smith's teaching credentials were in order.

23. In connection with the foregoing, the respondent had failed to disclose to the Board, at the time he was first hired and thereafter, that his Florida teaching certificate had been revoked and that such revocation had caused

the New Jersey Department of Education to enter a revoke flag into its computer on Mr. Smith's certificate in 1972. The revocation reference was first removed from the computer file in June 1991, although the Florida certificate was restored some years earlier. Thus, the status of Mr. Smith's New Jersey teaching certification was in doubt at the time he applied for the position in Irvington and continually thereafter, until almost a year after his suspension on the subject charges.

24. Although Mr. Smith's employment application did not ask about revocation of teaching certificates, Mr. Smith did not answer the question that asked for a listing of certifications in other states.

LEGAL DISCUSSION

In any case involving tenure charges, a board of education has the burden of proving the truth of the charge or charges by a preponderance of the competent and credible evidence. *In the Matter of the Tenure Hearing of Arlene Dusel, School District of the Borough of Sayreville, Middlesex County,* 1978 *S.L.D.* 526; *In the Matter of the Tenure Hearing of Madeleine Ribacka, Sussex-Wantage Regional School District, Sussex County,* 1978 *S.L.D.* 929; *In the Matter of the Tenure Hearing of Fred Brown, School District of the City of Bayonne,* 1970 *S.L.D.* 239.

Eleven charges of incapacity, conduct unbecoming a teacher, and conduct constituting other just cause were filed by the Board against the respondent. Four of the eleven charges relate to his conduct in connection with the stolen automobiles that were the subject of his arrest in September 1990. Another charge involved Mr. Smith's failure to report his arrest and failure to keep the Board informed of his progress through the criminal-justice system leading to his acceptance into the PTI program. Three of the charges involve the respondent's use of incorrect or alternate Social Security numbers and dates of birth on various forms involving his employment. Two charges dealt with the questionable status of Mr. Smith's teaching certificate, as it was affected by the Florida revocation. One charge involved the respondent's failure to disclose a disorderly conduct arrest and conviction in Florida on his employment application.

N.J.S.A. 18A:28-5, dealing with the tenure of teaching staff members, provides:

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

See also N.J.S.A. 18A:6-10 to -29.

The charges involved in this matter, if true, can constitute conduct unbecoming a teaching staff member or other just cause under the statute. However, although the charges generally also refer to incapacity, none of the allegations against the respondent claim that he was not capable of the teaching duties that were assigned to him, nor were any complaints registered about the performance of his duties when he was teaching.

If it is determined that the charges or any of them are true, it then becomes necessary to address the question of the appropriate penalty action to be taken. The statute, *N.J.S.A.* 18A:28-5, speaks of dismissal or reduction in compensation. Factors to be taken into account in making a penalty determination include the nature and circumstances of the incidents or charges, the teacher's prior record and present attitude, the effect of such conduct on the maintenance of discipline among the students, and the likelihood of such behavior recurring. *In the Matter of the Tenure Hearing of Frederick Ostergren, School District of Franklin Township, Somerset County,* 1966 *S.L.D.* 185, 187; *In the Matter of the Tenure Hearing of William H. Kittell, School District of the Borough of Little Silver,* 1972 *S.L.D.* 535, 541; *In re Fulcomer,* 93 *N.J. Super.* 404 (App. Div. 1967).

Also, in determining the respondent's fitness to continue in the position, the pronouncement in *Redcay v. State Board of Education*, 130 *N.J.L.* 369 (S. Ct. 1943), *aff'd,* 131 *N.J.L.* 326 (E&A 1944) serves as a concise guideline:

> Unfitness for a task is best shown by numerous incidents. Unfitness for a position under the school system is best evidenced by a series of incidents. Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but it might also be shown by many incidents. Fitness may be shown either way.
>
> [*Redcay* at 371.]

The Commissioner of Education has also commented on the seriousness of charges that arise from a teacher's violation of the law.

> Teachers are public employees who hold positions demanding public trust, and in such positions, they teach, inform, and mold habits and attitudes, and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher. When a teacher deliberately and willfully violates the law, as in this matter, and consequently violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner.
>
> [*In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson, Ocean County*, 1974 *S.L.D.* 97, 98-99.]

See also In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Blackhorse Pike Regional, Camden County, 1972 *S.L.D.* 302, 321; *In the Matter of the Tenure Hearing of Mark Blasko, School District of the Township of Cherry Hill, Camden County*, 1980 *S.L.D.* 987.

In such a role, a teacher's actions carry a great deal of potential to influence students, whether for good or bad. It is precisely because of this potential that allegations of improper conduct by a teacher must be closely scrutinized, and where proved to be true, dealt with firmly.

CONCLUSIONS AS TO THE CHARGES

Charges 1, 2, 3, and 5 all relate to the respondent's activities in connection with the stolen cars discussed above. The respondent knowingly and intentionally acquired, possessed, and used stolen cars. He executed a false bill of sale for one of the vehicles, and he forged the owner's signature. Mr. Smith also applied for and obtained fraudulent registrations for the stolen vehicles. In addition, he was involved in this activity with a student, Shawn Leverette, in the high school in which he taught.

It is **CONCLUDED** that the petitioner has proven Charges 1, 2, 3, and 5.

Charge No. 4

As set forth in the discussion and findings of fact above, the respondent failed to report his arrest, and he did not notify the Board of his progress and status for many months following. This resulted in uncertainty and inconvenience to the Board, which needed advance notice in order to keep the mathematics teacher position filled.

Mr. Smith's protestations that he did not know of the Board's policy that teachers should keep the administration advised of status changes that could affect their employment is not accepted. That is a simple, commonsensical, and fundamental policy that respondent and all teaching staff members should routinely know about, and Mr. Smith is charged with such knowledge. The Board need not prove that such a written policy had been "served" upon Mr. Smith.

The respondent also argued that the Board never contacted him to find out about his status. Besides not being true (Mr. Ferri testified that attempts at contact were unanswered), the burden was not on the Board to chase after the respondent for information that should have been periodically and openly forthcoming from the teacher. Mr. Smith was being paid his full salary while suspended, and the least he could do was to maintain frequent and regular contact with his employer. He did not even appear at a Board meeting when he was notified that a possibly adverse personnel action against him was to be considered.

It is **CONCLUDED** that the petitioner has proved Charge No. 4.

Charge No. 6

It is true that the respondent used different Social Security numbers on his teaching certificate, employment application, and W-2 forms, but it is **CONCLUDED** that the petitioner has not proved that this fact, standing alone, deceived the Board with respect to respondent's prior out-of-state arrest record and revocation of his Florida teaching certificate, although it confused the Board. No proof was adduced to indicate that the Board noticed the discrepancies or checked on either Social Security number. It is noted, however, that on more than one occasion, the respondent attempted to put the onus for his lack of nondisclosure on the Board, which may not have performed sufficient background checks. Such a theory is

unacceptable, because it does not relieve any applicant or employee from the duty to disclose. See overall conclusions as to penalty.

Charge No. 7

This charge refers to Mr. Smith's use of an incorrect date of birth on his application for employment and on his W-2 form. As stated in connection with Charge No. 6 above, it is **CONCLUDED** that the Board has not proved that this fact, standing alone, deceived the Board with respect to the respondent's prior out-of-state arrest record and revocation of his Florida teaching certificate. However, see overall conclusions as to penalty.

Charge No. 8

This charge refers to Mr. Smith's continual distortion of his employment record by using the duplicate Social Security number to update employee records (different from the Social Security number on his teaching certificate), thus continuing to deceive the Board. It is **CONCLUDED** that consistent with the conclusions regarding Charges 6 and 7 above, the petitioner has not proved that the continuing use of the alternate Social Security number, by itself, continued to deceive the Board, although it confused the Board. See overall conclusions as to penalty.

Charge No. 9

When he completed his Irvington employment application and was interviewed, the respondent failed to disclose the fact that his teacher's certificate had been revoked in the state of Florida. By virtue of the fact that he left the inquiry about teaching certificates in other states blank on his application, Mr. Smith avoided and evaded his responsibility to indicate the status of that certificate.

It is therefore **CONCLUDED** that the petitioner has proved Charge No. 9.

Charge No. 10

This refers to Mr. Smith's failure to disclose his prior arrest and conviction for a disorderly-conduct offense. Although it is true that the respondent did not include

any disclosure on his employment application or the accompanying interview that he had been arrested and convicted of disorderly conduct in Florida sometime in the past, there is no question on the application that even remotely touches on this subject. The last page asks for any supplemental information that will aid the applicant's candidacy, but it does not ask for anything that might detract from it. There is also no evidence that the question was asked in the interview, either directly or indirectly. Furthermore, no proofs were adduced that might tend to indicate how relevant or important that information might have been or if there was any nexus between the conduct leading to the conviction and Mr. Smith's employment. How long before 1985 was the conviction? Was the respondent very young or was he a mature man at the time? What conduct was involved and what would its effect be on making current judgments of the man's character?

While it is true that the petitioner has proved that Mr. Smith did not disclose this information, as stated in the one-sentence Charge No. 10, it is **CONCLUDED** that the Board has not proved that the nondisclosure is a proper "charge" under the circumstances.

Charge No. 11

The respondent did fail to provide accurate information regarding the status of his New Jersey teaching certificate. It was issued to him in January 1982, three to four years before he applied for the Irvington teaching position. He had been using his second Social Security number (262) for fifteen to twenty years before that, and he used the same number on his employment application and other forms he filled out during his employment in Irvington. However, he had inexplicably used the older (261) Social Security number on his New Jersey teaching certificate. This resulted in understandable confusion between the county Superintendent and the administrators in Irvington.

Mr. Smith testified that he was in touch with Florida educational authorities in 1980-1981 regarding the teaching certificate that was revoked there in 1972. He was told that he needed three recommendations as part of the process leading to a temporary certification and restoration of his certificate. In July 1981, the New Jersey Department of Education informed him that they were in touch with Florida concerning his certificate from that state. Therefore, the respondent knew that his

Florida certificate had previously been revoked and that New Jersey was looking into the situation. Since the "flag" was not removed from the New Jersey records until 1991, Mr. Smith could not have received earlier assurance from New Jersey that the record was clear.

By not informing the Irvington Board that he ever had a Florida certificate, he thus avoided informing them of the New Jersey action related to that certificate (even though Florida issued his new certification in September 1981).

It is therefore **CONCLUDED** that the petitioner has proved Charge No. 11.

CONCLUSIONS RELATING TO PENALTY

In attempt to mitigate penalty, the respondent has cited a series of prior cases wherein it was held that various offenses committed by teachers did not warrant dismissal and loss of tenure, but lesser penalties instead. *See In the Matter of Tenure Hearing of Consuelo Garcia, Midland Park Board of Ed.*, 1970 *S.L.D.* 335 (where tenure charges were dismissed because violations were deemed to be trivial); *In the Matter of the Tenure Hearing of Joseph Murphy, Manalapan Board of Ed.*, 1984 *S.L.D.* 174 (October 24, 1984) (where a mistake in judgment did not constitute unbecoming conduct); *In the Matter of the Tenure Hearing of Robert P. Valenti, Sch. Dist. of Monroe* (Comm. of Ed. March 6, 1990) (where it was held that a teacher's possession of marijuana was conduct unbecoming, but a suspension and forfeiture of salary resulted because of mitigating circumstances such as the fact that it was an isolated incident and the teacher had an unblemished record); *In the Matter of the Tenure Hearing of Gregg W. Molinaro, Sch. Dist. of Parsippany-Troy Hills* (Comm. of Ed. June 26, 1989), *aff'd* (State Bd. of Ed. June 6, 1990) (where harassing phone calls were considered to be conduct unbecoming a teacher, but the single incident resulted only in a forfeiture of increments and four months' salary); *In the Matter of the Tenure Hearing of Richard Pappa, Sch. Dist. of Twp. of Old Bridge* (Comm. of Ed. February 4, 1988) (where a conviction for open lewdness resulted in a salary forfeiture of 120 days and increment withholding); *In the Matter of the Tenure Hearing of Martin Lieb, School Dist. of West Orange* (Comm. of Edu. July 1, 1985) (where a similar public lewdness offense resulted in suspension instead of termination). Respondent also cited *In the Matter of the Tenure Hearing of Richard Rumage, Sch. Dist. of Twp. of Woodbridge* (Comm. of Edu. July 22, 1980), which

resulted in a dismissal of tenure charges against a guidance counselor convicted of conspiracy and bookmaking. The offense was considered to be an isolated incident not involving students and not occurring on school property. The respondent there merely forfeited two months' salary.

The respondent argues that the foregoing examples are comparable to his situation, which had no effect on the administration of the school, did not involve students or teachers, and occurred off school property. Mr. Smith further argues that any difficulties which arose due to his arrest and admission into PTI were a function of the Board's own frustration with the criminal-justice system.

The petitioner disagrees with the foregoing analysis, and cites other cases in which dismissals of teachers were sustained following criminal activities. The Board claims that the examples cited by the respondent are all distinguishable from the instant matter, and that those cases all involved teachers with long-standing records of employment in their districts, single incidents of disorderly persons or petty disorderly persons' offenses, and total separation from the student body.

It is **CONCLUDED** that the examples cited by respondent in support of his plea for a lesser penalty than removal are pale by comparison with the degree of moral turpitude involved in Mr. Smith's activities. The conduct that gave rise to the charges that have been proved are unbecoming anyone, not only a teacher, and it is particularly egregious when a teacher involves himself in illegal activities with a student.

As for the use of two Social Security numbers and two or three birth dates, the use of multiple identification by a person can be used to defraud the Internal Revenue Service, avoid and confuse creditors, and sidetrack credit agencies, law enforcement authorities, and others who check prior records for credentialing purposes. The respondent has explained that he first falsified his date of birth when he was a teenager in order to get a job as a caddy at a golf course. Once having achieved his purpose, why did he continue this falsification for decades thereafter, including the University of Florida, Rutgers University in 1975, his Florida teaching certificate in 1981, and on the occasion of his arrest by the Irvington Police in September 1990?

Similar comments apply to the respondent's use of two Social Security numbers. When he obtained the second number, ostensibly because he lost his card in 1968, he used the second number for many years, but then inexplicably resumed using the first number, for example, on his New Jersey teaching certificate obtained in 1981 or 1982. Interestingly, his employment application and other updated forms in the Irvington School District contained the second Social Security number, while the New Jersey teaching certificate contains the first.

While the petitioner has not proved that respondent intentionally engaged in this course of misidentification for the specific purposes of deceiving the Board and hiding his problems in Florida, his conduct had that effect at the time he was employed. It later confused the county's Superintendent of Schools as well as the Irvington Board and created an overall impression of deception.

The respondent argues that, in many instances, the Board never asked for specific information and did not perform checks and investigations that might have led to disclosure. While that may be true, the burden nevertheless was on the respondent to make full disclosure of his background, particularly when he knew about the Florida certificate revocation and about his use of different identification devices. This course of conduct on his part was unbecoming generally. That conduct cannot be excused and condoned simply because the New Jersey educational authorities may not have been sufficiently alert and did not conduct in-depth investigations.

It is also appropriate to comment on the respondent's attempt to invoke his admission and discharge from PTI as constituting a lack of evidence of any wrongdoing. The dismissal of a criminal charge as a result of entering PTI is not a determination that the individual was not guilty of the conduct complained of; only that the matter was "adjusted." *R.* 3:28(c)(1). A note to *R.* 3:28 points out that "[a] defendant's consideration for admission [to PTI] must be measured according to his/her amenability to correction, responsiveness to rehabilitation and the nature of the offense." The respondent was not "cleared" of the criminal charges, but he was given an opportunity to avoid ordinary prosecution by receiving early rehabilitative services as an alternative to prosecution and to deter future criminal or disorderly behavior.

An evaluation of the witnesses who testified has also been instrumental in leading to the conclusions contained herein. The respondent's witnesses were believable and straightforward in their testimony. On the other hand, much of Mr. Smith's testimony was confused, uncertain, glib, and much less than credible. He found himself continually trapped in contradictions and shifting accounts of the events in question. His explanations for the use of multiple identification devices were inadequate and many of his attempts to deal with the specifics of the car theft allegations were absurd and beyond belief.

It is therefore ultimately **CONCLUDED** that the respondent has given the Board just cause for dismissing him and for causing a forfeiture of his tenure protection, pursuant to *N.J.S.A.* 18A:6-10 to -29. Under the circumstances, the penalty of dismissal is not excessive or unreasonable.

ORDER

It is therefore **ORDERED** that the respondent be **DISMISSED** from his position as a tenured teaching staff member employed by the School District of the Township of Irvington, Essex County.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 7th Floor, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 23, 1993
Date

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

April 27, 1993
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 29 1993
Date

OFFICE OF ADMINISTRATIVE LAW

ms/e

APPENDIX

LIST OF WITNESSES

Elias Vitoroulis
(Nick Vitoroulis, translator)
George Venturi
Anita Biggs
Richard Winowski
Guy Ferri
Howard Smith

LIST OF EXHIBITS

P-1	Bill of Sale
P-2	Vitoroulis's canceled checks
P-3	Irvington Police Department incident report
P-4	Irvington Police Motor Vehicle computer search
P-5	Motor Vehicle certified information abstract 0096021
P-6	Vehicle registration card
P-7	Motor Vehicle certified information abstract 032909
P-8	Irvington Police Department motor vehicle search and license plate -- ERK-14F
P-9	Police tow report - van
P-10	Irvington Police Department computer motor vehicle search
P-11	Police report - Honda
P-12	Complaint
P-13	Biggs's curriculum vitae
P-14	Handwritten letter to Department of Labor from Howard Smith
P-15	Typed letter to John D'Angelo from Howard Smith
P-16	Handwritten letter to Shiro from Smith
P-17	Expert report, July 2, 1992
P-18	Addendum to expert report, July 14, 1992
P-19	Return receipt card

P-20 Irvington Police report additional information sheet, Sgt. Richard Winowski
P-21 Arrest query
P-22 Signed Miranda warning
P-23 Letter to Smith from Venible, November 15, 1990
P-24 Letter to Smith from D'Angelo, November 29, 1990
P-25 Letter to Smith from Ferri, March 15, 1991
P-26 Letter to Smith from Ferri, March 15, 1991
P-27 Envelope addressed to Howard Smith
P-28 Letter to Smith from Ferri, April 3, '99' [*sic*]
P-29 Letter to Smith from D'Angelo, June 17, 1991
P-30 Computer report regarding certificate holder's status
P-31 Kean College transcript
P-32 University of Florida, Gainsville, transcript
P-33 University of Florida, Gainsville, transcript
P-34 Transcript, Sanford, Florida
P-35 Application for employment
P-36 Letter to Smith from Ferri, August 9, 1991
P-37 Letter to Smith from Ferri, June 7, 1991
P-38 Motor vehicle certified information abstract 0096018
P-39 Statement savings account records, Howard Savings Bank, Account No. 01-10-87229670
P-40 Account statement, First Fidelity Bank, Account No. 8557200631
P-41 Account statement, First Fidelity Bank, Account No. 4032010129
P-42 NOW account statement, City Saving, Account No. 085-403979-9

J-1 Joint Stipulation of Facts

R-1 Letter from Sgt. Richard Winowski to Shawn D. Leverette, asking for contact, October 29, 1990
R-2 Letter from Ida D. Graham, Director, Department of Education, Office of Teacher Certification and Academic Credentials, to Ms. Tanya Friedman, July 31, 1992
R-3 Letter from Howard Smith to Guy C. Ferri, August 12, 1991
R-4 Letter from Administrator, Teacher Certification, State of Florida, Department of Education, to Howard Smith, March 9, 1981

R-5 Letter from Celeste M. Rorro, Associate Director, New Jersey Department of Education, Division of Field Services, Bureau of Teacher Education and Academic Credentials, to Howard Smith, July 8, 1981

R-6 Group of letters from Howard Smith seeking employment

R-7 Debit memos from First Fidelity Bank to Howard Smith, December 18, 1989 and May 18, 1990

R-8 Letter from Tanya Pushnack Friedman to Ida Graham, Director, Division of Teacher Certification, New Jersey Department of Education, September 24, 1992, with handwritten response by Ms. Graham to questions propounded by Ms. Friedman, September 28, 1992

IN THE MATTER OF THE TENURE	:	
HEARING OF HOWARD SMITH,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF IRVINGTON, ESSEX COUNTY.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Respondent requested and was granted an extension until May 17, 1993 to submit exceptions which were timely filed on that date. The Board's reply exceptions thereto were timely filed in accordance with N.J.A.C. 1:1-18.4.

Respondent Smith excepts to the ALJ's findings and conclusions with respect to charges 4, 9, and 11 and the recommended penalty. Arguments of the parties are presented, by charge, below.

Charge 4

Respondent avers that the ALJ erred in imputing knowledge of the Board's policy requiring teachers to apprise the Board of changes which affect their employment to him and then concluding that he failed to inform the Board of his arrest in September 1990. He alleges that the Board's "policy" was never introduced into evidence and, therefore, its existence was based solely upon the hearsay testimony of Mr. Ferri and not corroborated by any other evidence. Respondent maintains that, although hearsay may be admissible in an administrative proceeding, it must be supported by

a residuum of legally competent evidence to an extent sufficient to provide assurances of reliability and to avoid the appearance of arbitrariness. Respondent alleges that the residuum rule was violated by the ALJ's finding here.

The Board asserts that, contrary to respondent's contention, Mr. Ferri's awareness of the Board's policy is not hearsay but rather is predicated on his firsthand knowledge of it. The Board maintains that his testimony about what the policy means and how it has been applied provided better information than the policy itself could have. The Board maintains that Ferri's personal testimony regarding the policy satisfies the requirement of the residuum rule. Further, it avers that if respondent disagreed with Ferri's testimony regarding the policy, he was free to subpoena the manual, which he did not.

Charge 9

Respondent alleges the ALJ erred in his conclusion here by finding that because respondent had left the inquiry regarding certificates in other states blank on his application to Irvington, he had avoided and evaded his responsibility to indicate the status of his Florida certificate. Respondent contends that the application did not specifically ask about revocations in other states; therefore, he had no duty to disclose and, absent such a duty, there can be no failure. Respondent further argues that by the time he applied to Irvington in 1985, his Florida teaching certificate had been reinstated for over four years.

The Board takes strong exception to respondent's argument stating:

> ***Respondent advances the fallacious view that in the absence of a specific inquiry by hiring board of education, applying teachers are thereby relieved of any moral, ethical and professional duty to report prior certificate revocations. Petitioner vehemently disagrees, and respectfully urges the Commissioner to adopt a posture that imposes minimal standards of forthrightness and integrity upon all professional teachers.***
> (Board's Reply Exceptions, at p. 3)

Charge 11

Respondent excepts to the ALJ's finding that he failed to provide accurate information regarding the status of his New Jersey teaching certificate, i.e., that it was listed under another social security number and that it had been revoked and/or suspended. Respondent asserts that his New Jersey certificate was never revoked, nor was he notified or aware that the New Jersey State Department of Education (DOE) had entered a "revoke flag" for the purpose of indicating his previous Florida revocation.

The Board avers that although respondent may not have been fully aware that the DOE had entered a revoke flag against his teaching certificate, he was contacted by the DOE in July 1991 and informed that it had been in touch with Florida regarding his certificate there. The Board asserts that respondent was aware at the time of his application to Irvington that there had been an investigation by the DOE that, as far as he knew, had not been fully resolved. The Board maintains that respondent was, therefore, duty-bound to inform it of his situation.

Penalty

Respondent contends that the ALJ erred in considering all of the charges against him, even those determined not to be proven, in arriving at the penalty to be imposed.

Respondent also objects to the ALJ's considering the sustained charges separately rather than merging them into one charge for penalty determination purposes. He asserts that Charges 1, 2, 3, 4 and 5 related to the possession and receipt of stolen vehicles, failure to report his arrest, and forgery of the bill of sale, are all part of the same incident which requires them to be merged and the penalty considered as if there was one charge or offense.

The Board argues that the ALJ's conclusion that respondent's course of conduct was "unbecoming generally" was properly based on the behaviors which formed the foundation for Charges 6, 7, 8, and 10. It asserts that although the ALJ held that each of these acts, standing separately, did not rise to the level of unbecoming conduct, he considered that under the totality of circumstances, taken in the aggregate, they denote a course of unbecoming conduct generally. In support of its argument, the Board cites In the Matter of the Tenure Hearing of M. William Cowan, 224 N.J. Super. 737 (App. Div. 1988) at 751:

> [T]here need not be a residuum of competent evidence to prove each act considered***so long as "the combined probative force of the ***relevant competent evidence" sustains the***ultimate finding of unbecoming conduct.

The Board further asserts that respondent's argument regarding the merging of Charges 1-5, 9 and 11 misstates what the ALJ actually did and misconstrues the law of merger. It contends

that the ALJ did, in fact, consider all of the charges together in finding respondent's conduct to be unbecoming. He likewise again considered all of the charges together in fixing the penalty. The Board urges that this is exactly what the law of merger requires. The Board further argues that even if respondent's assertion may have some foundation in law, it is inappropriate

> ***because each of the charges represents a separate act of misconduct. For example, the theft of the Chevrolet Van (Charge No. 1) is not part of the theft of the Honda from a different owner (Charge No. 2). Receipt of the stolen vehicles from a former student (Charge No. 3) represents the distinct transgression of involvement of a former student. Failure to report to the Board his arrest for theft of the vehicles (Charge No. 4), again is a separate offense -- it is the failure to report the arrest, not the underlying theft -- that is wrongful. Forgery of a bill of sale (Charge No. 5) is a distinct crime which is not necessarily fully encompassed by the theft of the Chevrolet Van. It is clear that Smith could have stolen the Van without forging a bill of sale. Failure to report his prior arrest and conviction in Florida (Charge No. 9) on his employment application certainly has nothing to do with the foregoing charges.***
>
> (Board's Reply Exceptions, at p. 6)

Upon a thorough and independent review of the record, the Commissioner is in agreement with the findings and conclusions of the ALJ that the Board has proven Charges 1, 2, 3, 4, 5 and 9 for the reasons clearly articulated by the ALJ in his initial decision. She does, however, disagree with his determination that Charge 11 has been proven by the Board. This charge specifically alleges:

> Mr. Smith failed to provide accurate information concerning the status of his New Jersey Teacher Certification, to wit: that it was listed under an alternative Social Security number and that it had been revoked and/or suspended.

The Commissioner observes that the record in this matter supports respondent's argument that his New Jersey teaching

certificate was never revoked. (See Exhibit R-8.) Additionally, the record does not substantiate that respondent knew or should have known that the New Jersey State Department of Education had entered a revoke flag against his certificate. Respondent admittedly provided a social security number for his certificate which differed from the one listed on his school records creating an inconsistency which, no doubt caused the Board confusion and apprehension particularly when attempting to verify his teaching credentials. Nonetheless, the Commissioner finds this act, standing alone, insufficient to establish that the Board has proven unbecoming conduct or other just cause on the part of respondent with respect to this charge.

The Commissioner determines that the remaining exceptions advanced by the respondent are without merit. She, categorically rejects his argument with respect to a teaching position applicant having no duty to disclose certificate revocation in other states on an employment application unless the question is specifically asked. The Commissioner has previously addressed the importance of teachers accurately presenting their credentials to their employing board, (see In the Matter of the Tenure Hearing of Peter J. Deer, Board of Education of the Borough of Palisades Park, 1975 S.L.D. 752) and further finds that individuals who engage in overt or covert misrepresentation or omission in this regard are breaching standards of ordinary truth and morality which cannot be tolerated from one in an educator's unique position. Teachers are pivotal forces in the lives of children and their conduct must always be representative of that extraordinary trust.

The Commissioner also rejects respondent's arguments regarding allegations of hearsay and failure to satisfy the residuum with respect to the Board's policy requiring teachers to keep the administration advised of status changes which could affect their employment. She finds that respondent had a professional obligation to notify the Board of his arrest. Moreover, as stated by the ALJ:

> That is a simple, commonsensical, and fundamental policy that respondent and all teaching staff members should routinely know about, and Mr. Smith is charged with such knowledge. The Board need not prove that such a written policy had been "served" upon Mr. Smith.
> (Initial Decision, at p. 25)

With respect to the appropriate penalty to be imposed in this matter, the Commissioner is in full agreement with the ALJ's recommendation that respondent be dismissed from his position. This determination was compelled since the within sustained charges are serious in nature and serve to demonstrate a pattern of behavior which is unacceptable for an individual in any profession but particularly intolerable from one who is an educator of children.

Accordingly, for the reasons expressed in the initial decision and modified herein, respondent is terminated from his tenured teaching position in the school district of the Township of Irvington as of the date of this decision. It is further ordered that, pursuant to N.J.A.C. 6:11-3.6(a)(1), a copy of this decision be forwarded to the State Board of Examiners for its review and, in its discretion, further appropriate action.

Marylee Fitzgerald
COMMISSIONER OF EDUCATION

JUNE 9, 1993

DATE OF MAILING - JUNE 9, 1993

129-93

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF WILLINGBORO, BURLINGTON	:	
COUNTY.	:	
_____	:	

JUNE 15, 1993

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held on April 20, 1993 in the School District of the Township of Willingboro, Burlington County, were as follows:

CANDIDATES	AT POLLS	ABSENTEE	TOTAL
JoAnn Carter	1,804	8	1,812
Everline Reid Smith	1,612	6	1,618
Ed Holley	1,476	7	1,483
Margaret Reynolds	1,387	6	1,393
Marcellus D. Smith	1,363	8	1,371
William Lonkart	1,309	7	1,316
Alice Carmenita McIntosh	990	4	994
Hosey Best	376	2	378
Altamese Wilson	295	0	295

Pursuant to a letter request from Margaret A. Reynolds, defeated candidate, dated April 22, 1993, an authorized representative of the Commissioner of Education from the Office of the Burlington County Superintendent of Schools was directed to conduct a recount of the machine ballots cast. Absentee ballots were recounted by the Burlington County Board of Elections. The recount was conducted on May 4, 1993 at the Burlington County Board of Elections Office, Mount Holly, and at the Burlington County

E129-93 129-93

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY.

COMMISSIONER OF EDUCATION

DECISION

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Everline Reid Smith	1,612	6	1,618
Ed Holley	1,476	7	1,483
Margaret Reynolds	1,381*	6	1,387*
Marcellus D. Smith	1,363	8	1,371
William Lonkart	1,309	7	1,316
Alice Carmenita McIntosh	990	4	994
Hosey Best	376	2	378
Altamese Wilson	295	0	295

Pursuant to a letter request from Margaret A. Reynolds, defeated candidate, dated April 22, 1993, an authorized representative of the Commissioner of Education from the Office of the Burlington County Superintendent of Schools was directed to conduct a recount of the machine ballots cast. Absentee ballots were recounted by the Burlington County Board of Elections. The recount was conducted on May 4, 1993 at the Burlington County Board of Elections Office, Mount Holly, and at the Burlington County

*These numbers were originally given as 1,387 and 1,393, respectively, reflecting an error on the Combined Statement of Election Result submitted by the Board of Education to the County Superintendent's office. The numbers corrected herein, although differing from those reported on the combined statement, are the actual announced results of the election.

Superintendent of Elections Office, Lumberton, and at the Burlington County Superintendent of Schools Office, Mount Holly.

At the conclusion of the recount as reported by the Commissioner's authorized representative, the tally stood as follows:

CANDIDATES	AT POLLS	ABSENTEE	TOTAL
JoAnn Carter	1,800	8	1,808
Everline Reid Smith	1,608	6	1,614
Ed Holley	1,482	7	1,489
Margaret Reynolds	1,378	6	1,384
Marcellus D. Smith	1,357	8	1,365
William Lonkart	1,307	7	1,314
Alice Carmenita McIntosh	989	4	993
Hosey Best	375	2	377
Altamese Wilson	294	0	294

* * * * *

The Commissioner has reviewed the report of her authorized representative and adopts as her own the findings set forth above.

Accordingly, the Commissioner finds and determines that JoAnn Carter, Everline Reid Smith, and Ed Holley were elected to full terms of three years each on the Board of Education of the School District of the Township of Willingboro, Burlington County.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 15, 1993

DATE OF MAILING - JUNE 15, 1993

130-93

130-93

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

JUNE 15, 1993

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

The announced results of the balloting for the budget question at the annual school election held on April 20, 1993, in the school district of the Borough of Pitman, Gloucester County, were as follows:

GENERAL FUND	AT POLLS	ABSENTEE	TOTAL
YES	519	7	526
NO	548	4	552

Pursuant to N.J.S.A. 18A:14-63.3 and a letter request from the Pitman Board of Education, dated April 27, 1993, the Commissioner of Education directed her authorized representative to conduct a recount of the paper ballots cast for the budget question at the April 20, 1993 school election. The recount was conducted on May 19, 1993, at the office of the Gloucester County Superintendent of Schools in Sewell.

At the conclusion of the recount, the tally of ballots counted, including absentee ballots as reported by the County Board of Elections, stood as follows:

GENERAL FUND	AT POLLS	ABSENTEE	TOTAL
YES	525	7	532
NO	560	4	564

There were no ballots voided. No ballots were contested. Of the 1,143 ballots counted, 58 were left blank on the budget question. Although there was a change in tally, the results of the election were unaltered.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of her authorized representative and adopts it as her own.

Accordingly, the Commissioner finds and determines that the General Fund proposition for the school district of the Borough of Pitman was, as originally announced, defeated by the voters at the annual school election on April 20, 1993.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 15, 1993

DATE OF MAILING - JUNE 15, 1993

131-93

D.W., on behalf of her minor child, G.L.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE GREATER EGG HARBOR REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

JUNE 15, 1993

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

ORDER
EMERGENCY RELIEF
OAL DKT. NO. EDU 5476-93
AGENCY DKT. NO. 200-6/93

D.W., ON BEHALF OF HER MINOR SON, G.L.,
Petitioner,
v.
BOARD OF EDUCATION OF THE GREATER EGG HARBOR REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,
Respondent.

BEFORE **JEFF S. MASIN**, ALJ:

This matter having come before the Office of Administrative Law as a request for emergent relief and the parties having presented testimony and legal argument and for the reasons set forth in the oral decision contained on the accompanying tape recording of the hearing;

It on this // day of June, 1993, **ORDERED** that the request for emergent relief be **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days,

this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

June 11 1993
Date

JEFF S. MASIN, ALJ

OAL DKT. NO. EDU 5476-93

D.W., on behalf of her minor child, G.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE GREATER EGG HARBOR REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The record of this matter and the Initial Decision on Motion of the Office of Administrative Law have been reviewed.

This matter has come before the Commissioner by way of Petition of Appeal with Motion for Emergent Relief filed on June 10, 1993 by D.W., on behalf of her minor son, G.L., seeking a stay of the Board's determination denying G.L. participation in graduation ceremonies to be held on June 11, 1993 and denying his high school diploma based on his failing U.S. History with a grade of 68.

D.W. contends the Board failed in its obligation to provide support to her son in accord with his Individualized Education Program (IEP) as a classified student, which resulted in his failing U.S. History, albeit that G.L. was declassified in May 1993 and had been advised by his guidance counselor in a letter dated March 10, 1993 that he was in jeopardy of failing English and U.S. History because G.L. would not agree to transfer to a lower level.

The matter was transferred without Answer to the Office of Administrative Law on June 10, 1993 as a matter cognizable under the Commissioner's jurisdiction pursuant to N.J.A.C. 6:24-1.2 because G.L. is no longer a classified student.

Pursuant to her authority under N.J.S.A. 18A:4-32, the Commissioner has designated Assistant Commissioner Elena Scambio to decide this matter in her stead.

The ALJ determined that emergent relief must be denied because the facts underlying the claims raised by D.W., involving special education standards, were too "complicated and difficult" to be able to make a showing, in the emergent relief hearing, of a likelihood of prevailing on the merits of her claims as required by Crowe v. DeGioia, 90 N.J. 126 (1982), the case articulating the standard for the granting of pendente lite restraints.

Upon review of the record, the Assistant Commissioner concurs with the Administrative Law Judge that the issue of granting a diploma to G.L. is not one which can be resolved absent a full hearing of the merits; thus, the granting of emergent relief on this issue is denied. However, the Assistant Commissioner finds and determines that petitioner's request for emergent relief relative to attendance at graduation shall be granted due to the serious concerns which she finds regarding the March 10, 1993 decision to maintain G.L. in his U.S. History and English classes and the declassification of G.L. on May 10, 1993 of his senior year in high school, only one month prior to graduation day. These are deemed serious concerns for the reasons set forth below.

On April 30, 1992, an IEP was developed for G.L., which included goals and objectives for social studies and English skills

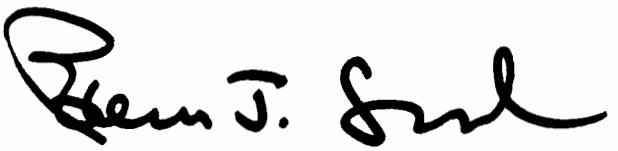
G.L. was to develop. On March 10, 1993, G.L.'s mother, D.W., received a letter from Thelma Habron, guidance counselor, memorializing a meeting of the previous day, which indicated that G.L.'s teachers in English and social studies had recommended that he be transferred to a lower level but that G.L. did not want to have those classes changed. The letter also conveys that D.W. agreed with the teachers' recommendations that G.L. should be transferred but she would not insist on the change. The letter goes on to state that the teachers and English supervisor decided not to force the change because it could result in a disruptive situation for the teachers and students. Thus, they allowed him to remain in his present English and social studies classes "***with the understanding that he would be responsible for the possible consequences i.e. not graduating with his class." (Exhibit R-1) Of import relative to this letter is the fact that there is no indication whatsoever that the child study team, which developed and had responsibility for G.L.'s IEP, had any knowledge and input into the educational decisions that were being made relative to a classified student which would, if true, constitute a serious violation of N.J.A.C. 6:28-3.1(a)2 and 3.6(j), particularly when it is apparent that G.L. was failing to succeed in courses specifically addressed in his IEP.

Moreover, a review of the information provided on the declassification document of May 10, 1993, makes it clear that with only one month to go to graduation, G.L. had only "marginal performance in History, English, and Physical Education." (Exhibit J-1). Such generalities do not provide specific evaluative data assessing G.L.'s progress in meeting his IEP goals and objectives,

which would provide the basis for a determination that he had successfully completed his IEP, thus warranting declassification.

Accordingly, given the factual circumstances available on the limited record before her, the Assistant Commissioner determines that G.L. shall be allowed to participate in the graduation ceremonies on June 11, 1993 but will not receive a diploma. The issue of whether he is entitled to a diploma must await an expedited hearing on the merits of D.W.'s claims that G.L. was improperly placed in the mainstream without adequate educational support. This hearing shall specifically address whether a violation of law occurred when G.L. was left to continue in academic courses addressed in his IEP without a determination being made by the child study team as to the appropriateness of such a decision in light of agreement by teachers, guidance personnel, supervisor and parent that he was not succeeding in the courses in question and needed to be in lower level classes. Also to be assessed is the propriety of declassifying G.L. one month prior to graduation when his performance in courses specifically addressed in his IEP was only marginal. Given these issues which must be addressed, the matter appears to be properly the subject of the due process provisions for special education, N.J.A.C. 6:28-2.7.

IT IS SO ORDERED.



JUNE 15, 1993

ASSISTANT COMMISSIONER OF EDUCATION

DATE OF MAILING - JUNE 15, 1993

132-93

LYNDA GORDON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SPRINGFIELD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JUNE 15, 1993

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT/WITHDRAWAL
OAL DKT. NO. EDU 5577-92
AGENCY DKT. NO. 272-6/92

LYNDA GORDON,
Petitioner,
v.
BOARD OF EDUCATION OF THE SPRINGFIELD PUBLIC SCHOOLS,
Respondent.

Irwin Weinberg, Esq. and **Richard J. Kaplow**, Esq., for petitioner (Weinberg and Kaplow, attorneys)

Yale L. Greenspoon, Esq., for respondent

Record Closed: March 23, 1993 Decided: 4/22/93

BEFORE **ARNOLD SAMUELS**, ALJ:

On June 17, 1992, the petitioner, Lynda Gordon, filed a verified petition with the Commissioner of Education, alleging that she was improperly required by the respondent to submit to a psychiatric examination, that she was wrongfully transferred from her tenured teaching position, and that her salary and adjustment increments for the 1992-93 school year were improperly withheld. The respondent filed an answer containing separate defenses on July 16, 1992, and on July 23, 1992,

the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) for hearing and determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13. An amended petition of appeal was filed with the OAL on August 13, 1992.

A prehearing conference was held at the Office of Administrative Law on December 15, 1992, at which time the parties engaged in settlement discussions, and on January 29, 1993, counsel advised that the parties had agreed to a settlement. On March 23, 1993, a written agreement and withdrawal of request for hearing was filed with the OAL. A copy of the document, signed by the petitioner and a representative of the Springfield Board of Education, is attached hereto and made a part hereof.

Based on the foregoing, it is **CONCLUDED** that the dispute has been resolved, and that petitioner has withdrawn her request for hearing and relief. It is **ORDERED** that the withdrawal be approved pursuant to *N.J.A.C.* 1:1-19.2. Therefore, I **ORDER** that this matter be returned to the agency for appropriate disposition.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 7th Floor, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 22, 1993
Date

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

May 13, 1993
Date

Maureen L. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 19 1993
Date

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

ms

RECEIVED
MAR 23 10 51 AM '93
STATE OFFICE

Agreement

This Agreement made this day of February, 1993, by and between:

THE BOARD OF EDUCATION OF THE SPRINGFIELD PUBLIC SCHOOLS, with principal offices located at Florence M. Gaudineer School, South Springfield Avenue, (P.O. Box 210), in the Township of Springfield, County of Union, and State of New Jersey, sometimes hereinafter referred to as the "Board"

and

LYNDA GORDON, residing at 100 Stone Hill Road, Apt. N2, in the Township of Springfield, County of Union and State of New Jersey, sometimes hereinafter referred to as "Gordon"

WITNESSETH:

WHEREAS, the Board demanded that Gordon undergo a psychiatric and medical examination and,

WHEREAS, Gordon resisted undergoing said examination and,

WHEREAS, the Board assigned Gordon to do and perform certain curriculum duties and removed her from her classroom teaching functions and,

WHEREAS, the Board denied Gordon her salary increment and salary adjustment for the school year 1992-1993 and,

WHEREAS, Gordon filed a Petition with the Commissioner of Education contesting the Board's right to order a psychiatric examination and also asserting that the Board improperly denied her a salary increment and a salary adjustment for the school year 1992-1993 and,

WHEREAS, the parties hereto held a pre-hearing conference with the Office of Administrative Law and,

WHEREAS, an amicable solution was suggested by the Office of Administrative Law to the Petition and,

WHEREAS, the parties have arrived at an amicable settlement and solution to the Petition,

NOW, THEREFORE, in consideration of the mutual covenants and for other good and valuable considerations, it is agreed by and between the parties hereto, as follows:

1. Gordon agrees to undergo a psychiatric examination, at her expense, and submit a report of the findings to the Board. There shall be no furnishing of any medical records or medical history to the said physician other than a list of drug prescriptions that she is taking.

2. Gordon will submit to a psychiatric examination within twenty (20) days of the submission of this agreement to the Board.

3. In consideration of the foregoing, the Board agrees to restore Gordon's 1992-1993 salary increment and salary adjustment which has been withheld, retroactive to the start of the 1992-1993 school year. The restoration of the said salary increment and salary adjustment shall occur by the Board adopting a resolution to that effect at the last Board meeting scheduled for February, 1993.

4. The parties hereto further agree that the current assignment of Gordon to a basic skills resource room assignment

is acceptable to her and shall not be challenged.

5. Any resolutions denying Gordon her salary increment and salary adjustment which were made part of her personnel file be and the same shall be withdrawn and rescinded of record.

6. Any letters of reprimand for insubordination dated June 17, 1992, or any other such letters, shall be withdrawn from Gordon's personnel file.

7. In consideration of the foregoing, Gordon agrees that upon the adoption of a Board resolution restoring Gordon's salary increment and salary adjustment for 1992-1993 she will formally withdraw her Petition in a letter, a form of which is attached hereto as Exhibit "A".

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals or caused these presents to be signed by their proper corporate officers and their proper corporate seal to be hereto affixed, the day and year first above written.

Attest:

THE BOARD OF EDUCATION OF THE SPRINGFIELD PUBLIC SCHOOLS

By

Witness:

Lynda Gordon

WEINBERG AND KAPLOW, P.A.
A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW
80 MORRIS AVENUE
SPRINGFIELD, NEW JERSEY 07081

(201) 379-5757

FAX (201) 379-5790

IRWIN WEINBERG
MEMBER OF DIST. OF COLUMBIA BAR
RICHARD J. KAPLOW
JAMES M. WEINBERG

January 1993

Honorable Arnold Samuels
Office of Administrative Law
185 Washington Street
Newark, New Jersey 07102

Re: Lynda Gordon v. The Board of Education
of the Springfield Public Schools
OAL Docket No. EDU-05577-92 N
AGENCY Ref. No. 272-6/92

Dear Judge Samuels:

The parties to the above Petiton have amicably adjusted the matters before the Office of Administrative Law and the Petitioner, Lynda Gordon, hereby requests that the Petition be withdrawn and of no further effect.

Very truly yours,

WEINBERG AND KAPLOW, P.A.

IW:LC

By: Irwin Weinberg

Ex "A"

OAL DKT. NO. EDU 5577-92

LYNDA GORDON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SPRINGFIELD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

The Commissioner does take this opportunity, however, to remind school boards that settlement agreements cannot be implemented unless and until they have been approved by her.

COMMISSIONER OF EDUCATION

JUNE 15, 1993

DATE OF MAILING - JUNE 15, 1993

133-93

133-93

LOUIS GIELE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF SECAUCUS, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JUNE 15, 1993

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8944-91
AGENCY DKT. NO. 316-8/91

LOUIS GIELE,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN OF SECAUCUS, HUDSON COUNTY,

Respondent.

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

John L. Molinelli, Esq., for respondent
(Maycher & Molinelli, attorneys)

Record Closed: May 5, 1993 Decided: May 10, 1993

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

On or about August 21, 1991, petitioner, Louis Giele, filed a petition of appeal with the Commissioner of Education alleging that respondent, the Board of Education of the Town of Secaucus, had improperly hired out-of-district coaches for the assistant football coaching position. More particularly, petitioner alleged that he was a qualified in-district teaching staff member and should have been offered the coaching position. Respondent filed an answer on September 12, 1991, alleging that petitioner was not a qualified candidate for the assistant coach position within the meaning of *N.J.A.C.* 6:29-3.3 and requesting that the Commissioner dismiss the petition with prejudice.

NEW JERSEY IS AN EQUAL OPPORTUNITY EMPLOYER

On September 20, 1991, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A telephone prehearing conference was held on November 21, 1991, at which time the issues were isolated and a hearing was scheduled for June 8 and 9, 1992, at the OAL, 185 Washington Street, Newark, New Jersey 07102.

Settlement conferences were held on June 8, 1992, and the parties agreed to a settlement, subject to the approval of the Board of Education of the Town of Secaucus. As a result of the settlement having been reached, the hearing was adjourned.

The parties have prepared the attached Stipulation of Settlement, which was approved by the Board of Education, indicating the terms of the settlement.

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

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

2. This settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days

and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 7th Floor, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 10, 1993
Date

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

5/11/93
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 14 1993
Date

Joyce LaVecchia
OFFICE OF ADMINISTRATIVE LAW

jrp/dgi/e

STIPULATION OF SETTLEMENT
OAL DKT. NO. EDU 8944-91
AGENCY DKT. NO. 316-8/91

LOUIS GIELE,

Petitioner,

v.

SECAUCUS BOARD OF EDUCATION, HUDSON COUNTY,

Respondent.

The parties having reached a settlement of the issues raised herein, it is hereby agreed as follows:

1. Petitioner's claims for reinstatement and/or compensation for the assistant football coach position for 1991 and 1992 are withdrawn, with prejudice.

2. The respondent, without admission of liability, shall pay to petitioner the sum of $1,255.00 on or before July 9, 1992.

3. The parties, including their agents and employees, shall make no statement or comment to any person, including a newspaper reporter, as to the terms of this settlement other than the following:

   "Litigation has been settled amicably between the parties with an agreement regarding compensation and future eligibility for the position."

4. Petitioner shall not apply for the assistant football coach position through the 1993 (Fall) year. As an exception, petitioner may apply for the position if the current head coach (1) is no longer in the position, and (2) his replacement specifically requests Mr. Giele as an assistant.

Stephen B. Hunter, Esq.

Louis Giele, Petitioner

John L. Molinelli, Esq.

Constantino Scerbo, Superintendent
Secaucus Board of Education

6/8/93

Date

OAL DKT. NO. EDU 8944-91

LOUIS GIELE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF SECAUCUS, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

The Commissioner is somewhat perplexed that a settlement agreement signed by the parties in June 1992 is just now being presented to her for approval, and hereby reminds school boards that settlement agreements cannot be implemented unless and until they have been approved by the Commissioner of Education.

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

COMMISSIONER OF EDUCATION

JUNE 15, 1993

DATE OF MAILING - JUNE 15, 1993

134-93

134-93

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, ATLANTIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
PETER FRALEIGH,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning Board sought declaratory judgment from Commissioner to require its members, specifically respondent, to abide by its duly adopted rules and cease and desist from tape recording executive session Board meetings closed to public under Open Public Meetings Act (OPMA).

ALJ determined Commissioner of Education lacks jurisdiction to resolve issue as to whether a public body can prohibit tape recording by members under OPMA. Controversy herein did not relate primarily to areas of educational specialization so as to involve Commissioner's jurisdiction. Superior Court has jurisdiction over this matter. Petition was dismissed. Respondent's counter-petition was dismissed as untimely.

Commissioner adopted findings and determination in initial decision.

JUNE 14, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION ON MOTION AND ORDER
OAL DKT. NO. EDU 619-93
AGENCY REF. NO. 16-1/93

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, ATLANTIC COUNTY,
Petitioner,
v.

PETER FRALEIGH,
Respondent.

Clement F. Lisitski, Esquire, for petitioner

Nelson C. Johnson, Esquire, for respondent, (Sills, Cummins, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: April 7, 1993 Decided: April 26, 1993

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Board of Education of Hamilton Township (Board), seeks declaratory judgment by way of an order from Commissioner of Education (Commissioner) to require its members, specifically Peter Fraleigh, to abide by its duly adopted rules pursuant to *N.J.S.A.* 18A:11-1, and for Peter Fraleigh to cease and desist from tape recording Board meetings closed to the public under the provisions of the "Open Public Meetings Act" (OPMA) *N.J.S.A.* 10:4-6 *et seq.*

This matter was transmitted from the Commissioner to the Office of Administrative Law (OAL) on January 27, 1993, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15, and *N.J.S.A.* 52:14F-1 to -13. Oral arguments by the parties was heard on February 1, 1993, on an application for emergent relief by the Board. The oral argument was heard at the Atlantic City OAL, Atlantic County Civil Courthouse, Atlantic City, New Jersey.

Thereafter, on February 2, 1993, the undersigned issued an Order and Denied the Board's request for a restraining Order *pendite lite*.

Subsequently, on March 5, 1993, respondent filed its Answer to the Board's Petition of Appeal, together with a counter petition for declaratory judgment requesting that the Commissioner declare the Board's conduct violative of the OPMA; and, declare the Board's bylaw 0168 null and void as an abuse of the Board's discretion.

Respondent also propounded and served a Motion to Dismiss the Board's Petition on the grounds that the Commissioner lacked jurisdiction in the instant matter. A return date of March 16, 1993, at 9:00 a.m. was established.

Oral argument on respondent's counter petition and motion to dismiss was heard on March 16, 1993. The parties relied, in part, upon the certifications of its clients together with legal briefs in support of the respective positions. Subsequent to the oral argument, this tribunal reserved on respondent's counter petition and issued an oral decision that jurisdiction lies with the Commissioner.

In the meantime, March 15, 1993, the Commissioner issued her Decision on Motion affirming this tribunal's denial of the Board's application for emergent relief. In her decision, however, the Commissioner raised the issue as to whether or not incidental jurisdiction lies within her authority with respect to the instant matter. Therein, the Commissioner said:

> In moving to this matter on the merits, however, the Commissioner notes that, while the question of a school board member's duty to abide by policy he or she believes unlawful is appropriately brought to this forum, the question ultimately underlying this matter, the taping of meetings by a member of a public body and the validity of a policy prohibiting it, raises an issue which appears to be purely within the purview of the Open Public Meetings Act (OPMA) and therefore outside the Commissioner's incidental

> jurisdiction under *Sukin v. Northfield Board of Education,* 171 *N.J. Super.* 184 (App. Div. 1979).
>
> Accordingly, the initial decision of the Office of Administrative Law denying emergent relief is affirmed and this matter directed to proceed to hearing as scheduled, with the *proviso* that argument be heard and a determination made as to the Commissioner's jurisdiction to decide the fundamental OPMA question underlying this controversy.
>
> IT IS SO ORDERED.
>
> (Commissioner's Decision on Motion, pp.5, 6).

As a consequence of the Commissioner's statement concerning the OPMA, respondent renewed his Motion to Dismiss the instant matter on the basis the Commissioner lacks jurisdiction under the OPMA. The Board objected to respondent's application, contending, among other things, that there is no procedure in the Administrative Code concerning a renewed Motion.

This tribunal, *sua sponte,* granted respondent's application to renew his Motion to Dismiss based upon the Commissioner's Order, "...that argument be heard and a determination made as to the Commissioner's jurisdiction to decide the fundamental OPMA question underlying this controversy." (Commissioner's Decision on Motion at p. 6).

BACKGROUND FACTS

Under New Jersey Education Law, Boards of Education are granted general mandatory powers and duties, pursuant to N.J.S.A. 18A:11-1 which provides, in part, as follows:

> The Board shall -
>
> ...
>
> b. Enforce the rules of the State Board;
>
> c. Make, amend and repeal rules, not in consistent with this title or with the rules of the State Board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees ... and

d. perform all acts and do all things, consistent with law and the rules of the State Board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district.

Pursuant to this statutory authority, the Board has adopted Policy 0168

RECORDING BOARD MEETINGS, which states as follows:

The Board of Education directs the creation and maintenance of an official record of the formal proceedings of the Board and will permit the unofficial recording of Board meetings in accordance with its bylaw.

MINUTES

The Board shall keep reasonably comprehensible minutes of all its meetings showing the time and place, the members present, the subject considered, the actions taken, the vote of each member, information sufficient to explain the actions taken, and any other information required to be shown in the minutes by law.

Minutes of Public Meetings shall be public records signed by the Business Administrator, and filed in the Secretary's office in a Minute Book as the permanent record of the official acts of this Board.

Minutes of Private Meeting shall be filed in the Secretary's office and placed separate from the Minute Book until the time, if any, when the proceedings may be made public. At that time, the Minutes shall be public records and shall be filed in the regular Minute Book.

The Secretary shall provide each Board member with a copy of the Minutes no later than two days before the next regular Board meeting.

SOUND RECORDING

The Business Administrator shall make a sound recording of all open portions of regular and special meetings. Closed/Executive Sessions will not be taped. (Recorded) A copy of the tape will be made available within the district office (or other appropriate location) within five working days after the Board meeting. Each tape will be retained and available for public listening for a period of twelve months.

RECORDING BY THE PUBLIC

Any member of the public may record the proceedings of a public meeting of the Board in a

manner that does not interrupt the proceedings, inhibit the conduct of the meeting or distract Board members or other observers present at the meeting.

The Board will permit the use of a tape recorder, still or movie camera, or video tape camera only when notice of such intended use has been given to the Board five days in advance of the meeting. No more than one movie or video camera(s) may be in use at any time, and any camera must be operated in an inconspicuous location in the meeting room.

The presiding officer shall determine when any recording device interferes with the conduct of a Board meeting and may order that an interfering device be removed.

Any record of a Board meeting that is made available to persons other than the maker of the record and set forth as a true and accurate record of that meeting must be open to inspection by the Board and may be copied by by this Board at the Board's expense.

N.J.S.A. 10:4-14

Adopted: 6 April 92

The Board contends, and respondent admits, that in or about the month of June of 1992, respondent began the use of a tape recorder in both the public session and the executive session of the Board. The Board further contends, among other things, that respondent's action to record executive sessions is violative of its bylaw 0168 and is counter to the OPMA with regard to confidentiality.

RESPONDENT'S ORIGINAL MOTION TO DISMISS-LEGAL ARGUMENTS

Respondent acknowledges that the Board's authority to adopt bylaws governing its meetings. However, respondent believes that he has the right to record all discussions of the Board to which he is a party. In support of his Motion to Dismiss, respondent relies upon the New Jersey Wire Tapping and Electronics Surveillance Control Act. (Act) *N.J.S.A.* 2A:156A-1 *et seq.* Respondent further relies upon the Federal statute 18 *U.S.C.S.* §2510 *et seq.*, Wire Interception and Intersection of Oral Communications. Respondent cites *N.J.S.A.* 2A:156A-4 which provides as follows:

> It shall not be unlawful under this Act for:
>
> ...
>
> (d) a person not acting under color of law to intercept a wire or oral communication, where such person is a party to the communication ... unless such communication is intercepted or used for the purpose of committing any criminal or torturous act in violation of the Constitution or Laws of the United States or of this State or for the purpose of committing any other injurious act ...
>
> Any person who unlawful intercepts or uses such communication as provided for in this paragraph shall be subject to the civil liability established in Section 24 of this Act, in addition to any other criminal or civil liability imposed by law.

Respondent contends that he is a party to all of the Board's discussion in Executive Session. He asserts that he has a right under the above statutory provision to record all oral communications to which he is a party provided his tape recordings are not "used for the purpose of committing any criminal or tortuous act," or "injurious act." Respondent contends that he intends to make no use of the tape recordings except for his own personal reference in order that he may have a permanent verbatim record of the Board's discussion. Under the statute cited above, respondent asserts he has a lawful right, protected by the New Jersey Legislature, to tape record all communications to which he is a party.

Respondent also acknowledges that the Act provides for penalties in the event respondent should disclose the contents of his tape recordings to third parties. These penalties may be criminal in nature, *N.J.S.A.* 2A:156A-3 and/or civil in nature, *N.J.S.A.* 2A:156A-24.

Respondent asserts that as a member of the Hamilton Township Board of Education and as a "person" defined by the Act, he has certain rights and responsibilities not only under Title 18A, but also under the New Jersey Wire Tapping and Electronic Surveillance Control Act. Respondent contends that the dispute between respondent and the Board can not be resolved without an determination of his rights under the New Jersey Wire Tapping and Electronics Surveillance Control Act. This issue, he contends, has nothing to do with Title 18A under the Education Law. Consequently, he argues, the Commissioner is not

empowered to rule upon such an issue. He contends, therefore, the Board's petition must be dismissed for lack of jurisdiction.

The Board contends, among other things, that the Commissioner has jurisdiction over the instant matter because it concerns the Board's bylaw in particular and its policies in general. The Commissioner's jurisdiction extends to the conduct of a closed session under the OPMA and where respondent, a Board member, refuses to follow the Board's policy with respect to tape recording of closed sessions and the taking of minutes. It contends that the Commissioner shall decide all controversies and disputes arising under the School Laws. *N.J.S.A.* 18A:6-9; *In re Masiello,* 25 *N.J.* 590 (1958).

The Board argues that the New Jersey Wire Tapping and Electronic Surveillance Control Act is a criminal statute that does not make criminal the act of tape-recording conversations when the person taping is one of the communicators. The Board asserts that no one has alleged that respondent has committed a criminal act by taping the closed sessions. Nor does the fact that the act is not criminal provide authority for the act to be permissible in a civil context. The Board argues that the criminal wire-tapping statute is not relevant concerning whether or not respondent can or cannot tape closed sessions of a Board meeting. It is relevant, however, that the issue to be determined arises in the context of respondent as a member of the School Board; an organization that by law has the authority to make rules for its governance and for its operation, pursuant to *N.J.S.A.* 18A:11-1.

The Board contends that it is further relevant that it has made rules, in the form of an adopted bylaw, which prohibits the taping of closed Board sessions. The permission to hold such closed Board sessions is granted under the authority of the OPMA.

The Board argues that by adopting Policy 0168 it has furthered the objections of the OPMA by safeguarding the public interest and individual rights and precluding the possibility, through carelessness or otherwise, that tape recordings of the closed sessions would walk into the hands of third parties. It contends that it has further opened communications among its members and those appearing before it at closed sessions, by prohibiting the taping of the closed sessions.

The Board contends that the Wire Tap Law is irrelevant to this controversy which involves enforcement by a Board of its bylaws and policies with respect to

individual Board members. Therefore, respondent's Motion to Dismiss should be denied.

The Board further argues that respondent's counter petition should be dismissed. Although respondent's motion seeks a declaration that the Board's conduct is violative of the OPMA, the petition does not seek to void any action taken by the Board. Consequently, the Board argues, the matter is moot. The Board also asserts that respondent's counter petition alleging violations of the OPMA by the Board has been brought after the forty-five (45) days, as prescribed in *N.J.S.A.* 10:4-15.

LEGAL ARGUMENTS WITH RESPECT TO RESPONDENT'S RENEWED MOTION TO DISMISS AND THE BOARD'S MOTION TO DISMISS RESPONDENT'S COUNTER-PETITION

The Commissioner correctly notes in her Decision on Motion that the ultimate question in this proceeding "raises an issue which appears to be purely within the purview of the OPMA," and as a result "outside the Commissioner's incidental jurisdiction."

The Board relies upon *N.J.S.A.* 18A:11-1 as its authority to adopt bylaw 0168. Clearly, the Board does have authority to adopt bylaws. Nevertheless, *N.J.S.A.* 18A:11-1 grants the Board only the authority to establish rules for its *own* government. If the Board decides that it will be its official policy that executive sessions will not be recorded *by the School Board itself*, so be it. But query, does the Board have the power to proscribe the conduct of an individual member?

There was no authority within Title 18A which vests the Board with the power to dictate how each school board member should take personal notes of the Board meetings. If bylaw 0168 is allowed to stand, then what behavior will the Board restrict next? What other behavior will it prohibit under the guise of "rule-making"? In the name of maintaining security, does the Board have the authority to require that each Board member surrender their personal notes at the end of each executive session? Worse yet, could the Board pass a bylaw that prohibits the use of pen, pencil and paper because of the potential that confidential information may leak from its executive sessions?

Taken to extreme, could the Board require its members to take an oath of secrecy as a condition to participating in executive sessions in order to preserve its expressed need for absolute confidentiality of executive session? Clearly, these restrictions would be unreasonable and in violation of the First Amendment.

The OPMA requires that adequate minutes of all meetings, including executive session meetings, be maintained and available to the public. See *N.J.S.A.* 10:4-14. To argue that respondent should not be allowed to personally tape record executive sessions because the OPMA does not specifically require the creation o f a verbatim record simply misses the point. The respondent seeks only accuracy in government. He believes that in order to properly discharge his duties, it is necessary for him to have a verbatim record of all the Board's proceedings. As stated by the Court in *Sudol v. Borough of North Arlington,* 137 *N.J. Super.* 149 (1975),

> Accuracy in reporting the transactions of a public governing body should never be penalized, particularly in a democracy, where truth is often said to be supreme ...If a shorthand record of such a meeting is more accurate than longhand notes, then the use of shorthand is to be approved; and if the making of a tape record is a still better method of memorializing the acts of a public body, it should be encouraged. *Sudol* at *154-155.*

The above reference quote was taken from a California decision, *i.e., Nevens v. City of Chino,* 233 *Cal. App.* 2d 775, 44 *Cal. Rptr.* 50 (1965).

With respect to the issue of "incidental" jurisdiction, respondent encourages this court to look at those cases where the Commissioner has exercised incidental jurisdiction involving the OPMA. A good example is the decision in *Voll and Brandes v. Board of Education of the Village of Ridgewood,* OAL Dkt. No. EDU 2772-85. In the *Voll* decision, there was a challenge to a school board's actions taken to reorganize a school district. A question arose concerning whether any of the decisions made towards reorganization were made at meetings in violation of the OPMA. While the facts of that case are quite dissimilar from this one, and while the Commissioner did in fact exercise jurisdiction in that case, the *Voll* decision is instructive of just what "incidental" jurisdiction is all about. The first thing you need is a dispute which is primarily under school law. When OPMA is incidentally involved, then the Commissioner can touch on it as part of her duties to rule on the primary educational issue. There are no educational issues involved in the dispute between these parties.

The primary issue here is, does a School Board have the power to restrict an individual member's efforts to make use of a tape recorder to memorialize discussions held in executive session? The Board's power to adopt the bylaw is in question, but it is a power that is circumscribed by OPMA and the First Amendment, not to mention the Wire Tapping and Electronic Surveillance Control Act. The primary issue does not fall under Title 18A, but rather under OPMA and the other related constitutional provisions and statutory enactments.

The Municipal Land Use Law empowers Planning Boards to adopt bylaws governing its meetings. The Faulkner Act empowers Township Committees and City Councils to adopt bylaws governing its meetings. The Optional Charter Law empowers County Board of Chosen Freeholders to adopt bylaws governing their meetings. Nearly every municipal agency throughout the State of New Jersey has the power to adopt bylaws governing its meetings. So too does the School Board have the power to adopt bylaws governing its meetings. However, it is respectfully submitted that the School Board does not have the authority to dictate to an individual member how he or she will proceed in taking notes, or in some other fashion memorializing, the discussions of the School Board.

This court can take judicial notice of the fact that there has been a revolution in technology. There are now laptop computers and other handheld systems which can assist those individuals with the facility to type or take shorthand in the making of a permanent memorialization of discussions made in that person's presence. The end result through the use of such technology is often typed notes or a verbatim transcript. Can the School Board adopt a bylaw prohibiting such a person, who happens to be an elected member of the Board, from bringing a laptop computer or such other device with them to a meeting?

As noted above, there are many hundreds of governmental agencies throughout the State of New Jersey that have been empowered by the Legislature to adopt bylaws governing the conduct of their meetings. Whether or not an individual member should be forced to accept the minutes of the body itself made in compliance with OPMA, or should be permitted to make their own record of what was said, is clearly a question that falls under OPMA, not a question that falls under Title 18A.

When making her admonishment concerning OPMA in her Decision on Motion, the Commissioner cites *Sukin v. Northfield, D.O.E.*, 171 *N.J. Super.* 184 (App. Div.

1979). The language contained in *Sukin* is sparse and the Court is not as explicit as one would hope in giving direction concerning the Commissioner's jurisdiction under OPMA. However, it is clear that the Commissioner's jurisdiction under OPMA is only "incidental" and is exercised only as it relates to "controversies under the school laws." The Commissioner has opined - and this writer believes correctly - that this dispute "raises an issue which appears to be purely within the purview of the OPMA."

Another case instructive on the issue of incidental jurisdiction is *Swede v. City of Clifton,* 22 *N.J.* 303 (1956). At page 312 of the *Swede* decision, the Supreme Court stated:

> Administrative discretion is special and limited, contained by the declared legislative policy to be executed by the agency and the specific means provided by the lawmaker to that end. The legislative grant is inclusive of such authority as is by fair implication and intendment incident to the agency's essential function and purpose; and where there is reasonable doubt of the existence of a particular power, the power is denied.

Clearly, the Commissioner has expressed "reasonable doubt" as to her jurisdiction, and with good cause. The Commissioner appears reluctant to venture a ruling on such a novel question under OPMA.

In addition to the *Swede* decision, *see also Sherran v. Progressive Life Ins. Co.,* 182 *N.J. Super.* 237, 250 (1981) wherein the Appellate Division stated:

> Absent "explicit statutory grant of power," no such jurisdiction may be assumed by an administrative agency. Where there is reasonable doubt that a particular power resides in an administrative agency, the power is denied.

As this Court knows, OPMA at *N.J.S.A.* 10:4-15 vests primary jurisdiction of all actions under OPMA with the Superior Court. While respondent does not challenge the Commissioner's right to incidentally hear an OPMA question when ruling upon a school law question, the respondent does challenge the Commissioner's jurisdiction to hear a question which is purely within the purview of the OPMA and outside the Commissioner's incidental jurisdiction.

Any decision in this case will have far-reaching implications, extending to all members of public agencies subject to the requirements of the OPMA. The Commissioner's "proviso" concerning her jurisdiction creates what is tantamount to a presumption that jurisdiction of this matter lies with the Superior Court.

THE BOARD'S POSITION

POINT I

THE WITHIN PETITION SEEKING TO HAVE BOARD, BYLAWS WITH RESPECT TO ITS GOVERNANCE UPHELD INVOLVES A CONTROVERSY AND DISPUTE ARISING UNDER SCHOOL LAWS AND IS PROPERLY BEFORE THE COMMISSIONER OF EDUCATION

It is clear that the Commissioner of Education is empowered to decide legal controversies and disputes arising under school laws or State Board regulations and his decisions have the force of law. *N.J.A.C.* 6:5-1.1 (a) and *N.J.A.C.* 6:5-1.2 (a) (1).

It is a also clear and beyond dispute that under the OPMA, the Board of Education of may conduct a closed session if the subject of the session the public body intends to discuss meets one of the nine (9) exceptions set forth in *N.J.S.A.* 10:4-12 (b).

It is undeniable that if the Board passes the proper resolution and otherwise complies with the Act, it has the right to go into closed session to discuss those matters set forth in the exceptions.

It is also indisputable that the OPMA requires only the taking of minutes at regularly scheduled board meetings and nothing in the Act requires verbatim transcripts. *See, Hudanich v. Avalon,* 183 *N.J. Super.* 244, 258, (Law Div. 1981), and *Caldwell v. Lambrou,* 161 *N.J. Super. 284* (Law Div. 1978).

Thus, there is no question before this Court that deals specifically with the OPMA insofar as the petition is concerned. The only question before this Court is whether or not the Board's bylaw's, and in particular, bylaw 0168, which it has

adopted pursuant to New Jersey School Law, is valid and enforceable. In other words, is the bylaw reasonable?

This court, when denying the first Motion to Dismiss brought on the basis of lack of jurisdiction by respondent, stated that it considered Board bylaw 0168 to be reasonable.

The *Matawan Teachers Ass'n v. Board of Education,* 223 *N.J. Super.* 504 (App. Div. 1988) case held that a local board is bound by its bylaws even if the law did not require as strict a procedure as set forth in the bylaws. In that case, the standard for reviewing bylaws was established to be whether or not the bylaw conflicts directly or indirectly with any authorizing statute.

The respondent insists that he has the right to tape closed sessions. Certainly that right does not arise by any language in the OPMA. Hence, respondent must look elsewhere to establish his right. Respondent attempted to look to the wire tap statute as an authorization and right granted to him to tape closed sessions, when the issue was raised as to whether or not the Commissioner had jurisdiction in light of the wire tap statute. This tribunal rightfully ruled that the Commissioner had jurisdiction since the decision that the Commissioner is confronted with is one that deals with school law. It raises the issue of the reasonableness of a bylaw.

Once it is established, as it is clearly in the law, that taping of closed sessions is not required by the OPMA, then the Act no longer governs the reasonableness of the bylaw, and should no longer be looked to in order to determine the same.

In other words, there is no fundamental OPMA question underlying the within controversy. The question is whether or not the bylaws which petitioners allege are being violated are reasonable and therefore should be upheld and enforced.

There are a couple of cases that are instructive in this regard. In the matter of *Howard v. Board of Education of the Township of Jefferson,* 167 *S.L.D.* 267, a member of the Board challenged the validity of a policy adopted by the Board requiring participation in its high school accident insurance program as a requisite for participation in the schools interscholastic athletic program. The board's position was that it had broad discretionary rule making power to authorize or approve such regulation. It claimed that the rule was wisely conceived to protect parents from financial loss in the event of athletic injury to the children, established a reasonable condition precedent to participation in the interscholastic athletic program and

therefore was not an arbitrary or capricious misuse of the board's rule making power.

The Commissioner found that the policy requiring participation in the pupil accident insurance coverage as a condition precedent to participation in the interscholastic athletic program was inconsistent with the provisions of *N.J.S.A.* 18:14-105.2 which expressly prohibited the Board from requiring any pupil electing not to participate in accident insurance coverage to pay any part of the cost or premiums. The Commissioner looked to reasonableness and whether the bylaw conflicted directly or indirectly with any authorizing statute.

In the *Donnelly v. Board of Education of the Township of Maurice River,* OAL Dkt. No. EDU 3631-79, Agency Docket No. 212-5/79A, decided May 1, 1980, the petitioner alleged that the Board improperly filled a vacancy on the board and did not assign a reasonable amount of time for public comment at its meetings. Although the Administrative Law Judge referred to the OPMA when considering the appointment to the vacant seat, in dealing with the validity of the policy that limited public participation, it was decided by the Court on the basis of reasonableness and not on the basis of the OPMA. Why? Because the OPMA does not speak to public participation but under the *N.J.S.A.* 10:4-7. The statute only provides for the right of the public to be present at all meetings of public bodies, and to witness in full detail all phases of the deliberation, policy formulation, and decision making of public bodies.

Of course, the argument could have been made that the statute should be interpreted to provide for public participation. However, none of the cases required the same and it really is not an issue that falls within the OPMA. It is merely an issue as to the reasonableness of the policy; the same issue that is in this case before this administrative court.

However, there are cases where the Commissioner of Education has decided matters before it which also involve rulings concerning the OPMA as it related directly to actions taken as a result of closed sessions held pursuant to the Act. One matter in which this occurred is *Voll v. Ridgewood Board of Education,* 1986 *S.L.D.* 883. In that case, the Board of Education of the Village of Ridgewood took action to reorganize the school district with respect to grade levels being located in particular buildings, and the allocation and assignment of personnel.

The Board's actions were challenged before the Commissioner by two residents, one of whom was an attorney who was an unsuccessful candidate for board membership. The challengers argued generally that the Board violated the OPMA, whereby it did not give the public at large an opportunity to have sufficient input into the reorganization plan and the reorganization plan was arbitrary, capricious and unreasonable.

The Board argued that the reorganization plan was reasonable, that its meetings were in conformity with the OPMA and, even assuming violations of the Act, subsequent public action taken at public meetings cured any such violations or were time-barred. Since the actions taken which might not have conformed to the provisions of the Act are voidable and proceedings brought by any person must be brought within 45 days after the action sought to be voided has been made public, any challenge was out of time. *N.J.S.A.* 10:4-15.

The Administrative Law Judge found that were it not for questions that have arisen concerning the OPMA, the question as to whether or not the Board's approval of the reorganization was arbitrary and unreasonable would survive the attack of the petitioners. The action taken to adopt the reorganization was voidable due to violations of the OPMA. It is interesting to note that two-thirds of the discussion in the decision related to the OPMA.

Exceptions were filed with the Commissioner by both parties. After the Commissioner set forth in detail the exceptions, his discussion for ten pages of the decision concerned compliance with the OPMA.

Concerning the issue of timeliness, he held that in filing its challenge under the Act, since the petitioner appealed to the Commissioner of Education and not the Superior Court, the 45 day Statute of Limitations was inapplicable and 90 day Rule of *N.J.A.C.* 6:24-1.2 applied.

Therefore, certain of the closed session meetings that were held and resulted in the action of the reorganization, were within the purview of the consideration of the Commissioner. The Commissioner did find the OPMA was violated and, therefore, voided the action.

Without question, the *Voll* case involved an issue that arose under the school law similar to the matter now before this tribunal. The issue that arises under the

school law is whether or not a policy is reasonable. The issue involves also whether a policy must be followed until and if it is ever determined to be invalid; not the opposite, of refusing to follow a policy until it has been established as being reasonable. This is the crux of the issue before the Commissioner.

How does the OPMA enter into this case? Much of the rationale that supports the policy of the Board and determines its reasonableness is the same rationale that the Legislature applied in establishing the nine exceptions to the OPMA when closed sessions may be held. Other than the rationale used by the Board being similar to the rationale employed by the Legislature in establishing exceptions, the OPMA does not apply to the issue with respect to the reasonableness of the policy that prohibits taping by a Board member or staff attending closed sessions. There is certainly no specific provision of the OPMA that anyone can point to that circumscribes the power of a Board to adopt the bylaw dealing with taping closed sessions. In addition, the other bylaws that were referred to herein dealing with the President presiding at the meetings and the taking of reasonably comprehensive minutes are not issues that must be decided by looking at the OPMA, but are issues that are decided on basis of their reasonableness. Certainly, the Board's bylaws in those two instances are consistent with the Act.

The petition deals with the adoption of bylaws and not the taking of a particular action which one can claim is taken in violation of the OPMA such as was the case in the *Voll* decision cited, *supra*.

The Commissioner has decided other matters where action has been challenged as being arbitrary, capricious and unreasonable as well as being taken in a manner that has violated the OPMA.

In *Buff v. North Bergen Board of Education,* 1981 *S.L.D.* 340, a teacher brought an action for wrongful termination in violation of the Tenure Act, its contract and in violation of the OPMA. The Board had voted for termination at a closed session. The OAL Judge's decision which was affirmed by the Commissioner, was that the termination was done in violation of the OPMA, was politically motivated and was arbitrary, capricious and unreasonable.

In *Plainfield Education Association v. Plainfield Board of Education,* C. D. 308-84, 24 Sep. 84, OAL Dkt. No. EDU 8613-83, Agency Dkt. No. 352-9183A, 1984, petitioner challenged the validity of action taken by the board of abolishing four

supplemental teaching positions on the grounds that the action violated certain sections of the OPMA, the adequate notice section and refusal to hold public discussion. The OAL Judge ruled in favor of the petitioner agreeing that the action taken was not done in conformity with the OPMA. The Commissioner upheld the decision and also ordered that besides reinstatement, mitigated back pay shall be given the teachers. See also, *Brown v. Pemberton Township Board of Education,* C. D. 257-85, 25 Jul 85, affd., OAL Dkt. No. EDU 5935-84, Agency Dkt. No. 247-7184, where an administrative assistant to the superintendent challenged the Board's action terminating him as illegal, improper, based in part on political considerations and that action was taken in violation of the OPMA. The OAL Judge found that the Board did not violate the OPMA and its action was reasonable. The Commissioner found that the Board violated the OPMA but sufficient corrective or remedial action had been taken subsequently regarding any procedural defects. The State Board and Appellate Division affirmed the Commissioner's decision.

Another matter that involved school law and the OPMA was the case of *Kiamie v. North Haledron Board of Education,* 1980, *S.L.D.* 1099. Petitioner alleged that the action of the Board in recertifying tenure charges against him was in violation of school law statutes and the OPMA. The OAL Judge found no violation of the OPMA. The court expressed the concerns of Governor Byrne on signing the bill into law that as the idea of open government became a reality, thoughts were expressed as to whether administrative bodies could "continue to carry out all their administrative tasks without undue delay" and whether the law would "engender costly litigation based on frivolous grounds." Reversed by Commissioner; OAL decision upheld by the State Board of Education.

It is the Board's position that the Counter-Petition in this matter is the costly litigation referred to in *Kiamie* and is based upon frivolous grounds.

Thus, although no provision the OPMA directly determines the validity of the bylaws in question, if the Act needed to be considered, the cases cited are strong precedent for the Commissioner's ability and responsibility to do so.

POINT II

THE COUNTER-PETITION SHOULD BE DISMISSED AS IT MERELY SEEKS A DECLARATION THAT THE BOARD'S CONDUCT IS VIOLATIVE OF THE OPEN PUBLIC MEETINGS LAW, DOES NOT SEEK TO VOID ANY ACTION TAKEN AS A RESULT OF ANY VIOLATION OF SAID LAW, AND HAS BEEN BROUGHT AFTER THE TIME PERIOD TO BRING SUCH AN ACTION HAS EXPIRED.

N.J.S.A. 10:4-15 gives one authority to bring suit to void an action allegedly taken in violation of the OPMA. Any such action shall be brought within 45 days after the action sought to be voided has been made public.

The Counter-Petition in this matter was filed on February 17, 1993. The Certification provided by Abromo Vallese sets forth the dates of each closed session and any action that was taken as a result of the closed sessions. The last closed session held in which any action was taken September 21, 1992, was held more than 45 days prior to the Counter-Petition being filed.

If one were to accept the argument of the Commissioner in the *Voll* case, and apply the 90 day rule of *N.J.A.C.* 6:24-1.2, the same would apply as it has been more than 90 days prior to filing the Counter-Petition that any closed session resulting in action taken has been held.

In the matter of *Emmett F. McWilliams v. Board of Education of Bridgewater-Raritan School District,* 1980 *S.L.D.* 1439, petitioner charged that the Board failed to evaluate his performance as Superintendent of Schools as required by education law and violated his alleged tenure rights to continue to be employed as superintendent.

Petitioner also alleged that he had not been given advance notice under the OPMA that the Board would discuss his performance on meetings held on October 11 and December 20, 1977 and a subsequent meeting in June 1978.

The Board denied tenure existed and claimed that termination was a proper exercise of its discretionary authority.

The hearing examiner opined that an action should have been filed within the 45 day time limit before a court of competent jurisdiction pursuant to the mode of relief specified by *N.J.S.A.* 10:4-15. The Commissioner agreed with the hearing examiner stating: "Petitioner having failed to seek such relief prior to the proceedings in the instant matter is statutorily prohibited from seeking such relief at this time," referring to the 45 day provision in *N.J.S.A.* 10:4-15. *Id.* at 1445, aff'd by the State Board of Education.

Likewise, respondent herein is statutorily prohibited from proceeding on his Counter-Petition which should be dismissed.

The Counter-Petition seeks no injunctive relief. It is the position of the Board that the Counter-Petition is merely an attempt to engage in a fishing expedition to determine if technical violations of the Act can be found in order to embarrass Board members. It is being brought as a retaliatory measure for the Board insisting that its policy be followed whether it was Mr. Fraleigh who was following same or any other Board member. The Counter-Petition should be dismissed as moot, dilatory, not timely, and due to a failure to state a claim upon which relief can be granted.

Even if the Counter-Petition was brought in time, which it was not, the matter should not be one determined by the Commissioner, as obviously the only issue raised by the Counter-Petition is one that falls within the OPMA.

Obviously, the defense to the Petition is that the bylaw is invalid. Therefore, the Counter-Petition is not necessary to raise that issue.

It is interesting to note that *Sukin v. Northfield Board of Education,* 171 *N.J. Super.* 184 (App. Div. 1979) resulted in the Court sending to the Commissioner of Education the issue dealing with the OPMA rather than determine the question itself, as the issue related to controversies under the school laws.

In that case, a former school principal fought to overturn the decision of the Board of Education to discontinue her employment in her position as principal. The trial court had sent two counts of the complaint to the Commissioner of Education as they dealt with allegations that the plaintiff's right to a fair hearing had been denied under *N.J.S.A.* 18A:6-10 and 18A:27-10 *et seq.*

The trial judge then dismissed the count of the complaint dealing with the OPMA on the basis that any defects were cured by remedial action taken pursuant to *N.J.S.A* 10:4-15. The Appellate Court reversed the Chancery Division judge not because it disagreed with the reasoning of the trial judge concerning the dismissal of the OPMA matter, but on the basis that where an administrative agency of the State has primary jurisdiction to determine the underlying controversy between the parties, a trial judge should not undertake to decide the issues presented under the OPMA, but shall refer those issues to the appropriate administrative agency.

This tribunal has already decided in the first Motion to Dismiss brought by respondent that the dispute arises under the school law. The Commissioner has primary jurisdiction. She has incidental jurisdiction to determine issues arising under the OPMA as they relate to the controversy under the school laws.

The controversy under the school law in this matter relates to the passage of bylaws and their enforcement. The OPMA questions that are raised by the Counter-Petition have nothing to do with the passage of the bylaws and those issues that are raised before the Commissioner in the Petition.

DISCUSSION AND CONCLUSIONS

Our courts have recognized that "New Jersey has a history of commitment to public participation in government and to the corresponding need for an informed citizenry." *South Jersey Pub v. N.J. Expressway,* 124 *N.J.* 478 (1991) at 486-487. That tradition favoring the public's right to be informed about governmental actions is reflected in the Open Public Meetings Act, *N.J.S.A.* 10:4-6 *et seq.* and the Right to Know Law, *N.J.S.A.* 47:1A-1 *et seq.*

With regard to the Board's motion that respondent's counter-petition should be dismissed on the grounds that it was brought before the Commissioner beyond the 45 day statutory provision (*N.J.S.A.* 10:4-15) and beyond the 90 day regulatory provision (*N.J.A.C.* 6:24-1.2 (c)), I agree. The facts, set forth herein before, clearly demonstrate that respondent's counter-petition was filed well beyond the statutory and regulatory time constraints.

I **CONCLUDE**, therefore, that respondent's counter-petition was brought before this tribunal out of time and is hereby **DISMISSED.**

With regard to the Commissioner's jurisdiction and the OPMA, the instant matter is one of first impression.

The Commissioner of Education is authorized by *N.J.S.A.* 18A:6-9,"to hear and determine .... all controversies and disputes arising under the school laws ...." While it is true that the courts have "repeatedly 'reaffirmed the great breadth of the Commissioner's powers" 'under this jurisdictional grant, *Hinfey v. Matawan Regional Board of Education,* 77 *N.J.* 514, 525 (1978); nevertheless, the case law demonstrates that the Commissioner's jurisdiction is limited to matters primarily and directly arising under the school laws. *In the Matter of New Jersey Ed. Ass'n v. Trenton Board of Education,* 92 *N.J.A.R.* 2d. 481, 489 (Department of Education) the Administrative Law Judge (ALJ) discussed examples of the Commissioner's lack of jurisdiction where it was said:

> [T]he Commissioner's authority over education matters is broad and his powers to effectuate a thorough and efficient education in the public schools are expansive. *In re: Trenton Board of Education,* 176 *N.J. Super.* 553 (App. Div. 1980), aff'd 86 *N.J.* 327 (1981). However, in recent cases, the Commissioner has defined and limited that jurisdiction to matters directly arising under the school laws. The Commissioner does not have jurisdiction to decide issues arising from an employment contract between a janitor and a school board. *Larson v. Piscataway Board of Education,* OAL Dkt. No. EDU 1445-81 (January 7, 1982) aff'd, Comm. (February 18, 1982) rev'd State Board of Education (October 6, 1982). He does not have jurisdiction to decide issues arising from a contract between a milk supplier and a board. *Rainer's Dairies v. Board of Education of Collingswood,* 1967 *S.L.D.* 260. Nor can he exercise jurisdiction over a contract dispute between an architect and a board of education, *Poole v. Passaic,* 1978 *S.L.D.* 1039 or interpret a contract in a tenure dispute. *Salley v. Newark,* 1984 *S.L.D.* 1714.

In general, "school law" disputes are limited to those arising under Title 18A. *Fair Lawn Board of Education v. Mayor of Fair Lawn,* 143 *N.J. Super.* 259, 266, (Law Div. 1976), aff'd 153 *N. J. Super.* 480 (App. Div. 1977). Where the controversy does not arise under the school laws, it is outside the Commissioner's jurisdiction even though it may pertain to school personnel. *East Brunswick Board of Education v. Township of Council of East Brunswick,* 48 *N.J.* 94, 102 (1966). Moreover, many

decisions of the State Board of Education have recognized that the Commissioner of Education does not have jurisdiction in cases where administrative expertise is not involved. *See, Pennetta & Sons, Inc., v. North Bergen Board of Education,* OAL Dkt. No. EDU 3648-82 (April 22, 1983), aff'd Commissioner (May 27, 1983), (involving a contractual dispute over which the Commissioner did not have subject matter jurisdiction).

As recognized by ALJ Springer in *Pennetta, supra,* "under some circumstances, the Commissioner of Education has 'incidental' or 'ancillary' jurisdiction to consider a noneducational issue in order to resolve fully a related educational issue properly before [her]." Such was not the case, however, in *Pennetta,* since there was no underlying educational issue to which jurisdiction over the noneducational issues might attach. The issues raised therein were exclusively questions of contract law. It was noted, however, that the *Sukin* case, *supra,* presents an example which allows that the Commissioner may determine issues presented under the Open Public Meetings Act, *N.J.S.A.* 10:4-6 to -21, *if* they occur in the context of a school law controversy over which she has "primary jurisdiction."

In *Sukin, supra,* the court was faced with a challenge to the dismissal of a complaint in the Chancery Division based on alleged violations of the OPMA. The court reversed the Chancery Division and transferred the complaint to the Commissioner of Education, where three other points of the original complaint had already been transferred. The court reasoned that *N.J.S.A.* 10:4-15 did not give exclusive jurisdiction to the Superior Court as an action in lieu of prerogative writs. Instead, the court concluded that the Commissioner of Education had concurrent jurisdiction over the matter if the issue arises under the school laws. In the court's words:

> [t]he Commissioner of Education has complete power to hear and determine all controversies and disputes arising under the school laws. *N.J.S.A.* 18A:6-9. We are equally satisfied that the Commissioner had additional incidental jurisdiction to determine issues arising under the Open Public meetings Act as they relate to controversies under the school laws. After the Commissioner has acted, further review may be sought by way of appeal to the Appellate Division pursuant to R. 2:2-3(a)2 and R. 2:5-1(e) In that manner the authority of the Commissioner as well as the prerogative writ jurisdiction conferred upon the Superior Court by *N.J.S.A.* 10:1-15 may both be fully exercised. (citations omitted).
>
> [*Sukin, supra,* 171 *N.J. Super.* at, 187].

Thus, while *Sukin* makes it clear that the Commissioner of Education can exercise incidental jurisdiction over OPMA questions, it is just that -- "incidental." First, there must be a determination that the Commissioner has primary jurisdiction over the underlying controversy between the parties. Further research has disclosed no additional reported decisions which provide further illumination of the Commissioner's incidental jurisdiction over OPMA issues such as those implicated in the instant matter. Respondent correctly points to *Voll v. Ridgewood Board of Education,* OAL Dkt. No. EDU 2772-85 (February 26, 1986), adopted with modification by Commissioner (April 14, 1986), as an example of the Commissioner's proper exercise of incidental jurisdiction over OPMA issues where the underlying controversy -- the reorganization of school districts -- was directly related to school law.

In the instant matter, while there is a plausible argument made pointing to a remote connection to school law by virtue of the school board meetings content, the true underlying controversy here arises under the OPMA. It is the OPMA which governs the holding of such closed or executive meetings of public bodies; school boards among them. More specifically, it is the OPMA which serves as the guideline as to the manner in which executive sessions are administered. *See, N.J.S.A* 10:4-12, 13.

The primary issue to be resolved in this matter is: whether a public body (board of education) can prohibit, by bylaw, the tape recording of its closed executive sessions? There is no particular school law at issue here. As noted by respondent, the underlying controversy is more generic in nature; *i.e.,* it can easily be viewed as arising in the context of other public bodies' meetings; planning boards for example, among others. *In Sudol v. North Arlington,* 137 *N.J. Super.* 149 (Ch. Div. 1975), the court discussed the propriety of a municipal council barring a citizen from tape recording its public meetings. The court held that the citizen was entitled to record the proceedings of the public meetings noting New Jersey's enactment of the "Sunshine Law" (*N.J.S.A.* 10:4-6 to -21) and its public policy that the general public has the right to be fully informed on the actions of its elected officials. *Id.* at 153.

The underlying controversy here does not relate primarily to areas of educational specialization. Compare, *Abbott v. Burke,* 100 *N.J.* 269, 301 (1985). Thus, the Commissioner's expertise on educational matters does not need to be invoked here. This novel OPMA matter is best left to the Superior Court, which, under *N.J.S.A.* 10:4-15, has jurisdiction over this matter in which an action taken by a public body at a meeting, arguably, does not confirm with the OPMA.

I **CONCLUDE,** therefore, that the Commissioner of Education lacks jurisdiction to resolve the issue as to whether a public body can prohibit the tape recording of its closed executive sessions under the Open Public Meetings Act.

ORDER

Accordingly, the Board's application for a declaratory judgment is **DENIED** and its PETITION OF APPEAL is hereby **DISMISSED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

26 April 1993
Date

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

4/30/93
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 5 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

lmh

OAK DKT. NO. EDU 619-93

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, ATLANTIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
PETER FRALEIGH,	:	DECISION
RESPONDENT.	:	

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

Upon careful review, the Commissioner concurs with the ALJ that respondent's cross-petition was untimely filed and that the fundamental question raised by petitioner in its Petition of Appeal properly arises under the Open Public Meetings Act rather than the school laws and is therefore outside the Commissioner's jurisdiction.

Accordingly, the initial decision of the Office of Administrative Law, dismissing both the Petition of Appeal and respondent's cross-petition, is affirmed for the reasons expressed therein.

IT IS SO ORDERED.

JUNE 14, 1993

COMMISSIONER OF EDUCATION

DATE OF MAILING - JUNE 15, 1993

135-93

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
KINGSWAY REGIONAL HIGH SCHOOL	:	DECISION
DISTRICT, CONSTITUENT DISTRICT	:	
OF WOOLWICH TOWNSHIP, GLOUCESTER	:	
COUNTY.	:	
_____	:	

JUNE 17, 1993

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE KINGSWAY REGIONAL HIGH SCHOOL DISTRICT, CONSTITUENT DISTRICT OF WOOLWICH TOWNSHIP, GLOUCESTER COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The announced results of the balloting for two candidates of the Kingsway Regional Board of Education for one term of three years at the annual school election held April 20, 1993, in the constituent school district of the Township of Woolwich, Gloucester County, were as follows:

CANDIDATES	AT POLLS	ABSENTEE	TOTAL
Judith A. M. Steward	114	0	114
William Gunning	221	4	225

Pursuant to N.J.S.A. 18A:14-63.2 and a letter of request from Judith A. M. Steward, defeated candidate, dated April 30, 1993, the Commissioner of Education directed her authorized representative to conduct a recount of only the ballots cast for the members of the school board at the Woolwich Township Hall polling place on April 20, 1993. The recount was conducted on May 20, 1993, at the Office of the Gloucester County Superintendent of Schools in Sewell.

At the conclusion of the recount for the two candidates, the tally of the uncontested ballots counted, including absentee ballots, stood as follows:

CANDIDATES	AT POLLS	ABSENTEE	TOTAL
Judith A. M. Steward	114	0	114
William Gunning	221	4	225

Of the 337 ballots cast at the polls, one was voided and one was left blank. The balance of the 335 ballots were counted and included in the tally.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of her representative and adopts the findings therein as her own.

The Commissioner thus finds and determines that the results of the recount tally remain unchanged. Accordingly, William Gunning was elected to serve a three-year term on the Kingsway Regional Board of Education for the constituent district of Woolwich Township.

COMMISSIONER OF EDUCATION

JUNE 17, 1993

DATE OF MAILING - JUNE 17, 1993

136-93

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	
SCHOOL DISTRICT OF THE BOROUGH	:	COMMISSIONER OF EDUCATION
OF NEW MILFORD, BERGEN COUNTY.	:	DECISION
	:	

JUNE 17, 1993

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE :
SCHOOL DISTRICT OF THE BOROUGH : COMMISSIONER OF EDUCATION
OF NEW MILFORD, BERGEN COUNTY. : DECISION
:

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held April 20, 1993 in the School District of the Borough of New Milford, Bergen County, were as follows:

CANDIDATES	AT POLLS	ABSENTEE	TOTAL
Steven LePage	1,010	38	1,048
Lori Barton	821	151	972
Randi Duffie	864	24	888
Fred D. Martens	720	143	863
Gary Ramella	707	139	846
Glenn A. Luciano	758	22	780
Pam Borntrager	235	15	250

Pursuant to a letter request dated April 30, 1993 from Fred D. Martens, a defeated candidate, an authorized representative of the Commissioner of Education from the Office of the Bergen County Superintendent of Schools was directed to conduct a recount of the votes cast. The recount was conducted on May 10, 1993, at the County Voting Machine Warehouse, Carlstadt.

At the conclusion of the recount, the tally stood as follows:

CANDIDATES	AT POLLS	ABSENTEE*	TOTAL
Steven LePage	1,010	38	1,048
Lori Barton	821	151	972
Randi Duffie	864	24	888
Fred D. Martens	720	143	863
Gary Ramella	707	139	846
Glenn A. Luciano	758	22	780
Pam Borntrager	235	15	250

*The Bergen County Board of Elections conducted a recount of the absentee ballots on May 18, 1993, the results of which are reflected herein.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of her authorized representative and adopts as her own the findings set forth above.

The Commissioner finds and determines that Steven LePage, Lori Barton and Randi Duffie were elected to full terms of three years each on the Board of Education of the School District of the Borough of New Milford.

COMMISSIONER OF EDUCATION

JUNE 17, 1993

DATE OF MAILING- JUNE 17, 1993

137-93

137-93

MAXINE J. PIJEAUX,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ORANGE TOWNSHIP, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, nontenured Superintendent of Schools whose employment was terminated pursuant to her employment contract, sought payment for unused sick and vacation time claiming Board unlawfully reduced her last year's salary. Petitioner also sought to amend prehearing order and petition to add second count concerning validity of Board's vote on her termination.

Initial decision concluded petition primarily involved matters of contractual interpretation and alleged breach of contract and thus are more properly addressed elsewhere. Petition was dismissed without prejudice. ALJ also denied petitioner's motion to amend petition as it would deprive Commissioner of opportunity to review filing and direct proceedings on issues raised by Commissioner herself. Petitioner's claims regarding validity of Board's vote to terminate her should more properly be brought before Commissioner as new cause of action.

Commissioner adopted findings and determination in initial decision noting she was not thereby making a finding on timeliness of filing of new petition.

JUNE 17, 1993

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

DECISION ON MOTION
OAL DKT. NO. EDU 9852-92
AGENCY DKT. NO. 501-11/92

MAXINE J. PIJEAUX,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ORANGE TOWNSHIP, ESSEX COUNTY,
Respondent.

James P. Granello, Esq., for petitioner

Raymond L. Hamlin, Esq., for respondent
(Ashley & Charles, attorneys)

Record Closed: April 16, 1993 Decided: May 3, 1993

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

Pre-heard on March 12, 1993 when issues were isolated, this matter is now before the administrative law judge on petitioner's motions (1) to amend the prehearing order "to correct for errors and to clarify that the issue of jurisdiction [of the Commissioner of Education] will be decided along with the motion to amend the petition;" and (2) to amend the petition to add a second count alleging Board action in giving 90-day notice of employment termination on June 9, 1992 was void because two Board members at the time illegally held their positions under *N.J.S.A.* 18A:12-2.2 since they were not registered Essex County voters, falsely swore they were and were thus immediately disqualified from office. Judgment for full back pay to end of contract term on December 31, 1992 was sought.

Petitioner's motions were filed on March 17, 1993 and March 26, 1993. The Board's opposing response was filed April 7, 1993. Petitioner's reply memorandum was filed April 16, 1993. The record on motion is complete.

I

The superintendent's employment contract of January 2, 1990 (J-1) for a term of three years from January 1, 1990 to December 31, 1992 "unless earlier terminated" provides in paragraph 3 that no tenure in position would accrue during the term, in paragraph 10 for paid annual vacation of 22 days for each 12 months of employment, and in paragraph 16 for 12 sick leave days in any calendar year that if unused might be carried over for subsequent years or paid to her on cessation of employment. Paragraph 17C governing "termination of employment contract" provides that on unilateral termination by the Board the "employee shall be entitled to payment for any accrued unused sick and vacation time." But paragraph 10 dealing with "vacations" provides that on termination of employment by the Board before end of term, "the employee shall be paid no more than five (5) unused accrued vacation days during the employment term at the salary rate then in effect."

Petitioner demands payment for all unused accrued sick days; the Board does not object to that. She disputes the Board's claim she is not entitled to payment for more than five accrued unused annual leave days; she claims all such accrued annual vacation days.

She argues the Board unlawfully reduced her last year's salary by refusing to credit her with all unused vacation time on termination, an act said by her to contravene *N.J.S.A.* 18A:17-19 providing "the salary of a superintendent shall not be reduced during his term of office." In addition, it was urged, by establishing her contract for three years, the Board "in effect set her salary and fringe benefits pursuant to *N.J.S.A.* 18A:29-4.1," and thus for that reason by statute could not be reduced by refusal to pay full unaccrued vacation time on termination. In neither instance, however, in my view, do petitioner's claims bear upon statutory entitlement sufficient to invoke the Commissioner's jurisdiction; rights to compensation and payments on termination are clearly established within the four corners of her employment contract and are not affected by statutorily predicated

benefits or entitlement. As urged by the Board, petitioner's contract is unique unto her and there are no special policy considerations impacting upon proper contractual interpretation. At issue merely, it seems to me, is construction, legal interpretation and application of paragraphs 10 and 17C of a written employment contract, which are contradictory, in order to determine whether as Pijeaux alleges the Board breached it and, if so, to fix damages therefor. Thus viewed the issue does not lie within dispute resolution jurisdiction of the Commissioner of Education under *N.J.S.A.* 18A:6-9; it is more properly cognizable in judicial forum. *Cf., South Orange-Maplewood Education Association v. Board of Education of South Orange-Maplewood*, 146 *N.J. Super.* 457, 462 (App. Div. 1977); *Love v. Board of Ed., Trenton*, 1988 *S.L.D.* -- (St. Bd. August 2, 1989); slip op. at 7-9; *Paladino v. Board of Ed., Township of Lacey, Ocean County*, 1989 *S.L.D.* -- (St. Bd. February 1, 1989); slip op. at 4-7; and *cf., Burley v. Prudential Ins.*, 251 *N.J. Sup.* 493, 500 (App. Div. 1991) (". . . where two clauses in a contract clearly conflict, the more specific provision . . . usually controls over the more general. . .").

I **CONCLUDE** the petition of appeal (in its so-called first count) involves matters of contractual interpretation and alleged breach, matters that are more properly addressed and resolved elsewhere. The count is **DISMISSED**, without prejudice nevertheless, to whatever rights petitioner has in appropriate forum.

II

Petitioner's motion to amend the petition to add a second count, though raising an issue between the same two parties, presents a new cause of action. It challenges power of the Board to act lawfully to give 90-day notice of termination of employment if such action were taken by including votes of two "disqualified" Board members. Uniform Administrative Procedure Rules in *N.J.A.C.* 1:1-6.2(a) provide:

> Unless precluded by law or constitutional principle, pleadings may be freely amended when, in the judge's discretion, an amendment would be in the interest of efficiency, expediency and the avoidance of overtechnical pleading requirements and would not create undue prejudice.

The administrative rule suggests liberality but is not a mirror image of a rule of Superior Court (*R.* 4:9-1) that provides:

> A party may amend his pleading as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is to be served, and the action has not been placed upon the trial calendar, at any time within 20 days after it is served. . .

In Superior Court practice the motion is liberally granted and is without consideration of ultimate merits of the amendment. *See, City Check Cashing v. National State Bank*, 244 *N.J. Super.* 304, 308-309 (App. Div. 1990). "Ultimate merits" deal with whether the claim can be successfully refuted or defended. Here, deciding whether to permit amendment ought not attempt to resolve whether the claim is timely under *N.J.A.C.* 6:24-1.2 (the 90-day rule) or whether action of two Board members in voting to terminate petitioner was valid as that of *de facto* members not challengeable by third parties or the public. In *Monsees v. Board of Ed., Borough of Bloomingdale*, 1982 *S.L.D.* 1409-10, it was noted:

> A *de facto* school officer is one who has entered into possession of a school office and assumed to exercise the functions thereof by virtue of an apparent election or appointment that is illegal or irregular. 78 *Corpus Juris Secundum*, § 133, *p.* 876. . . It is well-established that the acts of a *de facto* officer are valid and may not be challenged and set aside on the grounds that he did not hold title *de jure*. The acts of a *de facto* school officer, which a *de jure* officer would be authorized to do, are, if performed in the prescribed manner, as valid and binding on the public and third persons as the acts of *de jure* officers, and authority to act cannot be questioned collaterally. This is true even though the acts are performed pending a contest or *quo warranto* proceeding that subsequently terminates in the ouster of the *de facto* officer from office. 78 *C.J.S.*, § 133, *p.* 877. *See also, Oliver v. Jersey City,* 63 *N.J.L.* 634, 636-43 (E. & A. 1899). There can be no question, therefore, that, in general the acts in which [the member] participated while he occupied a seat on the Board, were validly performed and are not subject to challenge by reason of the fact that he was *de facto* and not *de jure*. . .

Only as against a successor in office to a *de facto* board member is it said illegal tenure is invalid from inception. *Cf., Visotelex v. City Council Garfield*, 113 *N.J. Sup.* 263, 267 (App. Div. 1971).

As events have proceeded, the petition's first count raised issues beyond jurisdiction of the Commissioner to resolve. While the proposed second count amendment might raise issues properly before the Commissioner, raising is attempted in the Office of Administrative Law by motion rather than by origination and initiation first directly with the Commissioner in usual way under *N.J.S.A.* 18A:6-9. The reason petitioner seeks to amend here is to bring the second count within the 90-day limiting period of *N.J.A.C.* 6:24-1.2 by having it date back to time of filing of petition six months ago on November 23, 1992. *See*, petitioner's letter memorandum, April 13, 1993, at p. 2. Without attempting to suggest whether petitioner is correct in her contention about dating back, I believe better practice on motion to amend a dismissed petition with a new cause of action is to decline to do so, without prejudice, in order that petitioner may re-file the petition directly with the Commissioner of Education. The practice will avoid occasion for the Office of Administrative Law to be the place for exerting personal or subject matter jurisdiction on its own without giving the Commissioner opportunity to declare the amended petition to be a contested case under the Administrative Procedure Act. In *In Re Kallen*, 92 *N.J.* 14, 20 (1983), the Supreme Court said:

> An agency head has the exclusive right to decide contested cases in administrative hearings. As we recently wrote: Because the agency has the statutory jurisdiction to set and enforce regulatory policy, the final decision in contested cases is entrusted solely to the agency head. *In Re Uniform Administrative Rules*, 90 *N.J.* at 96. The Legislature's intent to give agency heads final decision-making power is embodied in at least three statutory provisions. First, *N.J.S.A.* 52:14B-10(c) gives the head of an agency the power to "adopt, reject or modify the recommended report and decision of an ALJ. Second, *N.J.S.A.* 52:14F-7(a) provides . . . nothing in this amendatory and supplementary act shall be construed to deprive the head of any agency of the authority . . . to determine whether a case is contested or to adopt, reject or modify the findings of fact and conclusions of law of any administrative law judge. Third, *N.J.S.A.* 52:14F-8(b) provides that no ALJ shall hear a contested case in which the agency head has determined to conduct the hearing directly and individually.

To allow amendment here would deprive the Commissioner of opportunity to conduct the hearing on issues raised directly and by herself.

Based on the foregoing, I **HOLD** petitioner's motion to amend the petition in a second count would be contrary to interests possessed by the Commissioner of Education and should not, therefore, be allowed. The motion is **DENIED**, without prejudice, nevertheless, to re-filing the petition before the Commissioner in usual way.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 7th Floor, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 3, 1993
Date

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

May 7, 1993
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 10 1993
Date

OFFICE OF ADMINISTRATIVE LAW

amr

EXHIBIT

J-1 Employment agreement dated January 2, 1990

MAXINE J. PIJEAUX,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ORANGE TOWNSHIP, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by petitioner pursuant to N.J.A.C. 1:1-18.4. No reply was filed by the Board.

In her exceptions, petitioner renews her argument that the Commissioner does in fact have jurisdiction to decide contractual issues which are incidental to claims under school laws such as she invokes to allege improper reduction in salary during term of employment (N.J.S.A. 18A:17-19) and violation of district salary policy (N.J.S.A. 18A:29-4.1). She further reiterates her claim that her proposed amendment should have been considered under N.J.A.C. 1:1-6.2, which expressly permits petitions to be amended after they have been transmitted by the agency head; there is no reason, petitioner avers, for the ALJ to have insisted on the Commissioner's acceptance of the amendment in order for her allegations to be heard.

Upon review of the record, the Commissioner concurs with the ALJ that, notwithstanding her invocation of provisions of Title

18A, petitioner's claim does not sufficiently implicate education law to warrant the Commissioner's exercising jurisdiction over what is fundamentally a contractual matter.

As noted by the ALJ, resolution of this matter hinges on interpretation of contractual language, and the remedy provided will arise from the terms of the contract rather than from entitlement under education law. Although petitioner invokes N.J.S.A. 18A:17-19, the State Board has previously held that this statute, which prohibits reduction in salary during the superintendent's term of office, does not apply to termination claims, as the "term in office" ends upon the superintendent's termination. Paladino, supra, 1989 S.L.D. 3063 at 3066 Further, the Commissioner does not deem petitioner's employment contract to be a "salary policy" within the meaning of N.J.S.A. 18A:29-4.1, so that invocation of this statute to implicate the Commissioner's jurisdiction is inapposite as well. Therefore, the Commissioner finds, as did the ALJ, that this matter is fundamentally a contractual dispute more properly cognizable in the judicial forum than as a controversy before the Commissioner under the Administrative Procedures Act.

Having so found, the Commissioner concurs with the ALJ that petitioner's claims regarding the validity of the Board's vote to terminate should more properly be brought to the Commissioner as a new cause of action rather than as an amendment to a petition raising claims which have proven to be outside the Commissioner's jurisdiction, so that the Commissioner may duly consider whether these claims constitute a proper controversy before her and raise any issues she may wish to address prior to transmittal for hearing.

Accordingly, the initial decision of the Office of Administrative Law is affirmed for the reasons expressed therein, together with the additional reasons set forth above. The Petition of Appeal is dismissed without prejudice to any rights petitioner may have to pursue her contractual claims in an appropriate forum. The Motion to Amend is denied without prejudice to filing the claims included therein as a petition before the Commissioner pursuant to N.J.A.C. 6:24-1.1 et seq. However, in so ruling, the Commissioner expressly declines to make a finding herein on the timeliness of any such filing pursuant to N.J.A.C. 6:24-1.2(c) and cautions against construing her decision above as an automatic waiver of filing deadline should petitioner be found to have filed out of time.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 17, 1993

DATE OF MAILING - JUNE 17, 1993

138-93

SHIRLEY D. MOSLEY, MOTHER AND GUARDIAN AD LITEM OF DAVID MOSLEY AND DAVID MOSLEY, INDIVIDUALLY,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION ON MOTION
V.	:	
THOMAS C. LANE, IV, SUPERINTENDENT OF SCHOOLS, BOARD OF EDUCATION OF THE CITY OF BRIDGETON, ET AL., CUMBERLAND COUNTY	:	
RESPONDENT.	:	

JUNE 16, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON EMERGENT RELIEF
OAL DKT. NO. EDU 5605-93
AGENCY REF. NO. 206-6/93

SHIRLEY D. MOSLEY, MOTHER AND GUARDIAN AD LITEM OF DAVID MOSLEY AND, DAVID MOSLEY INDIVIDUALLY,
Petitioners,

v.

THOMAS C. LANE, IV, SUPERINTENDENT OF SCHOOLS, CITY OF BRIDGETON BOARD OF EDUCATION AND HELEN BURGER, PRESIDENT OF THE BOARD OF EDUCATION OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY
Respondents.

Shirley D. Mosley, petitioner, pro se
David Mosley, petitioner, pro se

A. Paul Kienzle, Jr., Esquire, for respondents

Record Closed: June 15, 1993 Decided: June 16, 1993

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners seek emergent relief and an order from the Commissioner of Education (Commissioner) to allow petitioner David Mosley to participate in the

graduation exercises of the Board of Education of the City of Bridgeton (Board) High School on June 17, 1993. The Board has denied petitioner David Mosley the privilege of participating in the Bridgeton High School graduation exercises based upon petitioner's violations of the Board's duly executed policy entitled, "Guidelines for Participation in Graduation." (R-1)

On or about June 10, 1993, petitioner David Mosley filed an Order to Show Cause and Restraint against Glenn Earl, Cumberland County Superintendent of Schools before the Superior Court of New Jersey, Chancery Division, Cumberland County. Subsequently, on June 11, 1993, Shirley D. Mosley and David Mosley filed a civil action before the Superior Court of New Jersey, Chancery Division, Cumberland County against the herein respondents. Petitioners' amended complaint was for injunctive relief to compel the herein respondents to refrain from barring petitioner David Mosley from his Senior Class Baccalaureate to be held on June 13, 1993 and the Commencement exercises to be held on June 17, 1993.

On June 14, 1993, at 3:36 p.m. petitioners' papers filed before the Superior Court were transmitted to the Office of Administrative Law (OAL) for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The Commissioner of Education requested that this matter be conducted on an emergent basis and the undersigned was so advised at approximately 3:45 p.m. on June 14, 1993. Arrangements were made to conduct the hearing in Cumberland County at the Upper Deerfield Municipal Court on June 15, 1993. The emergent hearing was conducted on June 15, 1993, and the record closed on that date.

Oral arguments were heard together with testimonial and documentary evidence taken at the hearing. Based upon the arguments and evidence adduced at the hearing, I **FIND** the following **FACTS** in the instant matter:

On November 10, 1992, the Board adopted a policy entitled "Guidelines for Participation in Graduation." This Board policy provides for the conduct of pupils prior to and during the annual graduation exercises. It provides in relevant part as follows:

OAL DKT. NO. EDU 5605-93

I. **Behavior During School Year**

a. Suspension from school

...

(2) Class B and C - Exclusion from Graduation after Fourth Suspension or 15 days, whichever comes first ...

The herein record demonstrates that petitioner David Mosley was suspended for a total of 19 days during the course of the 1992 -93 school year. Petitioner was suspended from school for four days for his disrespectful behavior toward a teacher; for five days for the sexual harassment of a female track member; and, for ten days for threats to a security monitor, an employee of the Board.

Petitioner David Mosley admitted on the record that he was aware of the Board's policy with respect to the Guidelines for participation in the graduation exercises. David Mosley further admitted that the Guidelines were fully explained to him. On or about November 24, 1992, Mr. John D'Apolito, Assistant Principal, conducted a class meeting where all senior class members received a copy of the Board's policy. Subsequently, on January 26, 1993, there was a parents meeting held at the Bridgeton High School to explain the Guidelines and their implications for the senior class. Those parents who attended the January 26, 1993, meeting were identified by a sign-in sheet. On January 27, 1993, Assistant Principal D'Apolito sent copies of the Board's policies concerning graduation to all of those parents who did not attend the parents' meeting on January 26, 1993. Petitioner Shirley D. Mosley did not attend the January 26, 1993 parents meeting where the Guidelines were explained. She further denies she received the Guidelines through the mail because she was in the process of moving at that time. However, the mail sent to Shirley D. Mosley was not returned to the Bridgeton High School as undelivered.

The incident which resulted in petitioner David Mosley's ten day suspension occurred on April 20, 1993. It was alleged that David Mosley threaten Kevin Robinson, a security hall monitor in the employ of the Board. It was alleged that Mr. Robinson requested that Mr. Mosley accompany Robinson to the Assistant Principal's Office. Mr. Mosley is alleged to have used profanity and threatened Mr. Robinson. Mr. Mosley is alleged to have said that "he would fuck him up and get a ball bat to beat him." Petitioner David Mosley denies he made such a threat.

In any event, petitioner David Mosley was suspended for a term of five days for the use of profanity, and for a period of five days for threatening Mr. Robinson. Subsequently on April 29, 1993, a Board Hearing Panel was convened to determine whether or not David Mosley should be permitted to return to his normal classroom activities or, in the alternative, that he be assigned to an alternative educational program. Petitioner David Mosley was in attendance at the hearing with his stepfather. In addition, three members of the Board were present together with five teaching staff members. The Board Hearing Panel did find, as fact, that David Mosley threaten Kevin Robinson and that he used profanity. The Hearing Panel recommended that David Mosley be given the chance to return to school. However, if any further problems arose, David Mosley was to be removed from the high school track team and would not be allowed to go "on the grass."[1]

The Board Hearing Panel made its recommendations without the knowledge of David Mosley's prior suspension record.

Subsequent to the incident between petitioner Mosley and Mr. Robinson on April 20, 1993, Mr. Robinson filed a criminal complaint against petitioner David Mosley before the Bridgeton Municipal Court. Petitioner Mosley entered a plea of "not guilty" to the complaint and the Municipal Court Judge imposed a "90 day rule." The 90 day rule was invoked which required that petitioner Mosley and Mr. Robinson have no contact with one another during that period of time.

The record demonstrates that on May 12, 1993, Assistant Principal D'Apolito was in contact with petitioner Shirley D. Mosley to advise her that petitioner David Mosley would not be eligible to go "on the grass."

The record further demonstrates that petitioner, who is 18 years of age, will not be deprived of his diploma. Rather, he is to receive his diploma subsequent to the graduation exercises.

1. "Going on the grass" are those activities leading up to and involved with the year end graduation ceremonies.

Petitioner Shirley D. Mosley contends, among other things, that she was unaware that she could have contested David's ten day suspension when it was imposed. David Mosley asserts, among other things, that he was not allowed to refute the allegations against him and that the ten day suspension is too harsh a penalty.

DISCUSSION AND CONCLUSIONS

The respondent Board of Education promulgated its policy, "Guidelines for Participation in Graduation" pursuant to its powers under N.J.S.A. 18:11-1 which provides that:

> the Board shall -
> ...
> c. make, amend and repeal rules, not inconsistent with this title or with the rules of the State Board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district ...

Subsequent to the Board adopting this policy on November 10, 1992, petitioner David Mosley was given a copy of the policy on November 24, 1992. Petitioner David Mosley admits that he received a copy of the policy and that he was aware of its requirements. The policy was fully explained to him. The record discloses that petitioner David Mosley was suspended from school for a total of 19 days during the course of the 1992-93 school year. Petitioner David Mosley's 19 day suspensions exceeded the Board's policy by four days.

In the Matter of R.F. v. Park Ridge Board of Education, 93 N.J.A.R. 2d. (EDU 79) the Commissioner adopted the ALJ's recommendation that the petitioning students be barred from the senior high school graduation as a consequence of their violations of the Park Ridge Board's policy concerning the use of alcohol. The Commissioner determined that the Board had the authority to promulgate rules, regulations and policies for pupil conduct and that the Board's action was neither arbitrary nor capricious.

I therefore **CONCLUDE** that the Bridgeton Board of Education was entirely within its general and discretionary authority to promulgate the policy of Guidelines for Participation in Graduation. Thomas v. Board of Education of Morris Township, 89 N.J. Super. 327 (App. Div. 1965).

I **FURTHER FIND AND CONCLUDE**, that petitioner David Mosley was in violation of the Guidelines as a result of the 19 day suspensions from school during the 1992-93 school year.

I **CONCLUDE** that petitioner has failed to demonstrate any irreparable harm to be visited upon him by his exclusion from the Board's graduation exercises to be held on June 17, 1993. United States v. Pavenick, 197 F. Supp. 257 (D. N.J. 1961).

ORDER

Accordingly, it is hereby **ORDERED** that the determination of the Board of Education of the City of Bridgeton to exclude the petitioner David Mosley from its graduation exercises on June 17, 1993, is hereby **SUSTAINED.**

It is **FURTHER ORDERED** that the petition of Shirley D. Mosley and David Mosley be and is hereby **DISMISSED.**

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

16 June 1993
Date

Lillard E. Law
LILLARD E. LAW, ALJ

lmh

OAL DKT. NO. EDU 5605-93

SHIRLEY D. MOSLEY, MOTHER AND GUARDIAN AD LITEM OF DAVID MOSLEY AND DAVID MOSLEY, INDIVIDUALLY, PETITIONER, V. THOMAS C LANE, IV, SUPERINTENDENT OF SCHOOLS, BOARD OF EDUCATION OF THE CITY OF BRIDGETON, ET AL., CUMBERLAND COUNTY, RESPONDENTS.	COMMISSIONER OF EDUCATION DECISION ON MOTION

The record and Initial Decision on Motion rendered by the Office of Administrative Law on June 16, 1993 have been reviewed. Upon careful consideration of the record, the Commissioner concurs fully with the thorough decision of the Office of Adminsitrative Law finding that petitioner David Mosley was in violation of the Board's "Guidelines for Participation in Graduation" as a result of his 19 days of suspension from school during the 1992-93 school year, and thus that he has failed to meet the standards for the extraordinary grant of pendente lite restraints as articulated in Crowe v. DeGioia, 90 N.J. 126 (1982).

Accordingly, the Board's determination to exclude petitioner Mosley from its graduation exercises on June 17. 1993 is sustained and the petition of appeal is hereby dismissed, with prejudice.

IT IS SO ORDERED.

Mary Ann Fitzgerald
COMMISSIONER OF EDUCATION

JUNE 16, 1993

DATE OF MAILING - JUNE 17, 1993

139-93

BOARD OF EDUCATION OF THE BOROUGH OF LITTLE FERRY AND S.H., on behalf of S.P.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

JUNE 18, 1993

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 5861-92
AGENCY DKT. NO. 375-8/92

BOARD OF EDUCATION OF THE BOROUGH OF LITTLE FERRY AND S.H., ON BEHALF OF S.P.,
Petitioners,
v.
BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD PARK,
Respondent.

Stanley Turitz, Esq., and **Laura J. Manzione**, Esq., for petitioners
(Ferrara, Turitz, Harraka & Goldberg, attorneys)

Lester Aron, Esq., and **Frank D'Ambra**, Esq., for respondent
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: April 7, 1993 Decided: May 3, 1993

BEFORE **DIANA C. SUKOVICH**, ALJ:

Petitioners filed a petition with the Department of Education on August 4, 1992, seeking an Order requiring respondent to place S.P. back on its student role and arrange a schedule wherein S.P. could attend the Bergen County Academy for the Advancement of Science and Technology on a share-time basis. Petitioners

filed a motion for emergent relief, and that matter was transferred to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13.

The parties reached a resolution of the emergent relief request, and a Consent Order was entered on August 20, 1992.

Conferences were subsequently conducted and the parties entered into settlement negotiations of the plenary matter. The parties reached a resolution of the matter, and an executed Stipulation of Dismissal and Settlement was filed on April 7, 1993, on which date the record was closed. Attached herewith is a copy of the stipulation.

I have reviewed the record and the settlement presented, and I **FIND**:

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

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

May 3 1993
Date

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

5/6/93
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 6 1993
Date

Joyce L. Vaccaro
OFFICE OF ADMINISTRATIVE LAW

le/e

SILLS CUMMIS ZUCKERMAN RADIN
TISCHMAN EPSTEIN & GROSS, P.A.
One Riverfront Plaza
Newark, New Jersey 07102-5400
(201) 643-7000
Attorneys for Respondent.

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OFFICE

BEFORE THE COMMISSIONER OF EDUCATION
OF THE STATE OF NEW JERSEY

OAL DOCKET NO. EDU-05861-92N
AGENCY REF. NO. 375-8/92

LITTLE FERRY BOARD OF EDUCATION and SHERYL HAVEL, on behalf of S.P.,

Petitioner,

-vs-

RIDGEFIELD PARK BOARD OF EDUCATION,

Respondent.

Civil Action

STIPULATION OF DISMISSAL AND SETTLEMENT

WHEREAS, the Plaintiff, the Little Ferry Board of Education and Sheryl Havel, have compromised and settled their claims against the Defendant, Ridgefield Park Board of Education;

NOW, THEREFORE, it is hereby stipulated and agreed by and between the undersigned attorneys for the Plaintiff and Defendant that the Complaint of the Petitioner and all causes of action set forth therein as against the Respondent, are hereby dismissed on the merits, with prejudice, and without costs or attorneys' fees; and it is further

STIPULATED AND AGREED that for the 1992-1993 and the 1993-1994 school years that Respondent, Ridgefield Park Board of Education shall (a) allow S.P. to attend the Berge County Academy for the Advancement of Science and Technology on a shared-time

basis; (b) not remove S.P. from its student roll; (c) give S.P. full credit towards graduation for the courses taken at the Berge.. County Academy for the Advancement of Science and Technology; and (d) make every reasonable effort to arrange a schedule which will allow S.P. to meet the local minimum six (6) subject requirement of policy 581A.

FERRARA, TURITZ, HARRAKA
& GOLDBERG, P.C.
Attorneys for Petitioners

By: _____
STANLEY TURITZ

DATED: April 2 , 1993

SILLS CUMMIS ZUCKERMAN RADIN
TISCHMAN EPSTEIN & GROSS, P.A.

By: _____
LESTER ARON

DATED: March 31, 1993

OAL DKT. NO. EDU 5861-92

BOARD OF EDUCATION OF THE BOROUGH OF LITTLE FERRY AND S.H., on behalf of S.P.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

COMMISSIONER OF EDUCATION

JUNE 18, 1993

DATE OF MAILING - JUNE 18, 1993

140-93

IN THE MATTER OF THE TENURE :

HEARING OF CHARLES GWINNETT, : COMMISSIONER OF EDUCATION

SCHOOL DISTRICT OF THE CITY OF : DECISION

UNION CITY, HUDSON COUNTY. :

:

SYNOPSIS

Board certified tenure charges of unbecoming conduct against respondent custodian. Thereafter, he was suspended without pay pending tenure charges concerning his unsatisfactory job performance.

Following consideration of evidence and testimony of witnesses, ALJ determined Board had proved pattern of unbecoming conduct warranting respondent's dismissal from employment. (Cowan)

Commissioner adopted findings and determination in initial decision and directed dismissal of respondent as of date of her decision.

JUNE 21, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU ~~7691-92~~ 7621-92
AGENCY DKT. NO. 411-8/92

CITY OF UNION (HUDSON COUNTY)
BOARD OF EDUCATION,
Petitioner,
v.
CHARLES GWINNETT,
Respondent.

Louis C. Rosen, Esq., for petitioner
(Patino-Treat and Rosen, attorneys)

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

Record Closed: March 18, 1993 Decided: May 3, 1993

BEFORE **DIANA C. SUKOVICH**, ALJ:

PROCEDURAL HISTORY

On August 6, 1992, tenure charges were filed with the Union City (City) (Hudson County) Board of Education (Board or petitioner) against Charles Gwinnett (Gwinnett or respondent), a tenured custodian employed by respondent. The Board certified the charges on August 27, 1992. The matter was thereafter transmitted by the Department of Education (Department) to the Office of Administrative Law on

October 1, 1992 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13.

Telephone conferences were conducted and hearings were held on January 20, 22 and February 5, 1993. Initial briefs were filed on March 5 and 9, 1993 on behalf of respondent and petitioner, respectively. Respondent filed a reply brief on March 18, 1993, on which date the record was closed. Petitioner did not file a reply brief.

NATURE OF THE CASE

Petitioner charged respondent with conduct unbecoming a staff member and sought dismissal of respondent. More specifically, the Board issued five charges against respondent. The tenure charges characterized each as constituting unbecoming conduct and warranting dismissal of respondent. The issues, broadly speaking, are whether petitioner has proved the charges, whether they constitute unbecoming conduct, and what, if any, discipline should be imposed upon respondent.

STIPULATION

The parties stipulated that respondent attained tenure as of February 1, 1992.

FINDINGS OF FACT AND CONCLUSIONS REGARDING CHARGES

Findings and conclusions are hereinafter articulated regarding each charge. Preliminarily, background/general findings are articulated.

In general, I am more persuaded by the witnesses offered on behalf of petitioner than the testimony of respondent. As is addressed in the subsequent findings of fact, although respondent admitted to certain allegations, including an April 16, 1992 incident in which he was found lying on the boiler room floor, he denied the occurrence of a similar type of incident on May 19, 1992. He admitted yelling at a school principal when upset and at a librarian, but denied cursing at superiors, co-workers, and being generally aggressive verbally with them. Respondent admitted to carrying a gun knife, a weapon described in more detail hereinafter, to protect himself at night after he had been mugged, but Gwinnett

denied carrying such weapon on school property, although he admitted that on many occasions he went directly from being out all night drinking in Hoboken to his job, at approximately 5:30 a.m., when it still could be expected to be dark.

The witnesses presented by respondent, who, all except one, were employees of the Board, were believable and straight-forward in their testimony. The evidence demonstrates attempts to help and counsel respondent to overcome whatever problems he might have had, which impacted upon his job performance. As reflected in the findings of fact, respondent was promoted to head custodian at one point because it appeared that his attitude and behavior had changed.

Respondent's testimony as a whole was not credible, except in certain respects highlighted hereinafter. He failed to demonstrate any ulterior motives or arbitrariness or capriciousness on the part of the Board or its employees concerning respondent. Some of the actions of cleaning personnel employed by the Board, who were fearful of respondent, in not reporting certain incidents to superiors, were understandable.

The Board argues that the fact that the evidence offered by petitioner in support of certain of the charges may be uncorroborated hearsay is not determinative. In this respect, the Board relies on *Matter of Tenure Hearing of Cowan*, 224 *N.J. Super.* 737 (App. Div. 1988) (*Cowan*). I am not persuaded by this analysis.

The board in *Cowan* affirmed the dismissal of a tenured teacher based upon various acts of verbal and physical abuse of students over a period of some ten years, deemed to constitute unbecoming conduct. Proof of certain of the charges apparently consisted of uncorrborated hearsay, although the Commissioner apparently viewed a particular memorandum by the appellant to be an admission of an assault, while the court apparently did not. *Cowan* at 749. The court nevertheless concluded that application of the residuum rule does not require that hearsay evidence of the assault in question be ignored. The court noted in this respect the following:

> Applying the residuum rule requires identifying the 'ultimate findings of fact' that must be supported by a residuum of competent evidence. Here the 'ultimate findings of fact' was

> that during the years 1974, 1975, 1980, 1982 and 1984 appellant engaged in one or more of eleven acts of alleged misconduct that were 'unbecoming'. Alternatively, one might characterize as the 'ultimate finding of fact' that appellant was engaged in a course of unbecoming conduct of which the acts charged were examples. Whether each of the acts charged is viewed as unbecoming, as corrborative evidence that one or more of the other acts charged were unbecoming conduct, or only as examples of a course of unbecoming conduct, there need not be a residuum of competent evidence to prove each act considered by the Commissioner so long as the 'combined probative force of the relevant hearsay and the relevant competent evidence' sustains the Commissioner's ultimate findings of unbecoming conduct. *Cowan* at 750-751 (citation omitted).

Although several of the charges in the instant matter are similar in nature, they involve disparate allegations of conduct falling into different categories. In addition, the evidence in question consisted of uncorroborated hearsay regarding specific allegations not, in my judgment, sufficiently reliable upon which to base findings of fact and was contradicted by respondent's testimony.

BACKGROUND/GENERAL FINDINGS OF FACT

I **FIND** the following to be **FACTS**.

Gwinnett was initially employed by respondent, effective May 3, 1990, pending a criminal check. He was assigned to the Robert Waters School (Robert Waters). By letter dated September 24, 1990, the Board was notified by the Office of Criminal History Review of the Department that respondent was disqualified from employment based upon a conviction for a crime considered to be disqualifying in nature. The disqualification was based on Gwinnett's conviction of writing indecent letters to minors.

By letter dated October 1, 1990, from Carl Johnson (Johnson), the Board's secretary, Gwinnett was notified of the disqualification and informed that his employment was terminated effective October 1, 1990. Gwinnett thereafter appealed the disqualification determination. On October 19, 1990, the Office of Criminal History Review issued a determination that respondent was rehabilitated and was no longer considered disqualified from employment. As a result, Gwinnett

was reinstated as a custodial employee of respondent. He was again assigned to Robert Waters.

On December 2, 1991, respondent was transferred to the Hudson Elementary School (Hudson) as acting head custodian. The head custodian at Hudson was on sick leave at the time. Respondent was transferred, at least in part, because he held the appropriate black seal license. Upon the death of the former head custodian at Hudson, respondent applied for appointment to the position by letter dated January 2, 1992 sent to Johnson. He was formally appointed to that position, effective February 1, 1992. Gwinnett was advised of this determination by letter dated January 31, 1992 sent by Johnson. An individual with a black seal license is required to check and maintain boilers in the school. In the position of head custodian, respondent functioned as a custodian and, consistent with respondent's general practices, received extra pay for the added duties.

Respondent worked in the position of head custodian at Hudson until May 28, 1992, when he was suspended, with pay, because of an arrest and criminal charge arising from events occurring on May 23, 1992. More specifically, respondent was charged with possession of a weapon, a gun-knife, for unlawful purpose, in violation of *N.J.S.A.* 2C:39-4e. The underlying events occurred off-school premises, during non-working hours. The criminal charges were disposed of by the entry of a guilty plea by respondent to an ordinance violation in municipal court. Gwinnett thereafter returned to work and continued his employment until he was suspended without pay on August 27, 1992, pertaining to the current tenure charges.

Stanley Sanger (Sanger) is the principal of Robert Waters and held this position at all times relevant to this matter. Carl Johnson (Johnson) is secretary to the Board and was in that position at all times relevant to the current matter.

John Mielo (Mielo), currently and the times in question, was principal of Hudson. He is responsible for academics and the state of facilities, including cleanliness. Melo generally arrives at Hudson between 6:15 a.m. and 7:15 a.m.

There are approximately 550 students at Hudson. The staff includes professional employees as well as three cleaning women and two custodians, James Berian (Berian) and James Dulack (Dulack).

Nephtali Cruz is the direct supervisor of the cleaning/custodial staff. Cruz's responsibility includes periodic meetings with the principal, inspecting the building, insuring that supplies are available, etc. It is Mielo's practice to hold monthly meetings with staff. If there are any concerns regarding custodial staff, Mielo's general practice is to communicate with Cruz, and vice versa. Cruz's direct supervisor is a Mr. Calabria (Calabria), who, in turn, reports to Johnson. Mielo also communicates with Johnson regarding any custodial concerns. Cruz generally supervises all custodial duties, including buying supplies and being responsible for anything pertaining to custodians. Cruz's practice is to check each school in the City on a daily basis to assure that they are clean as well as to check the performance of custodians. He is responsible for approximately ten schools, sixty custodians, and fifty cleaning personnel. Cruz meets with Johnson every morning to discuss pertinent matters. Johnson's routine is to always take notes regarding communications and meetings. All records regarding workers are maintained by Johnson.

Cruz's hours of employment are from 8:00 a.m. until 3:00 p.m. Cleaning personnel work from 6:00 a.m. to 3:00 p.m. or from 2:30 p.m. to 4:30 p.m. Respondent's hours of employment are from 5:30 a.m. to 2:30 p.m.

Both Waters and Hudson are elementary schools. They contain grades kindergarten though eighth, with students ranging in ages between five and thirteen years.

Paz Perazza is a cleaning woman at Hudson. Perazza's hours of employment are from 10:00 a.m. to 12:00 p.m. Carolyn Jacques (Jacques) is employed as a cleaning person by respondent at Hudson. In addition, she is also employed by Nu-Way, a food company, which provides lunches at City schools. She assists in distributing lunches at Hudson. She cleans from the hours of 6:00 a.m. until 8:00 a.m. and 2:30 p.m. until 4:30 p.m. Hours in the interim are spent on her duties for Nu-Way.

Seventy five percent of custodial staff speak Spanish. They follow a "routine" and, it is reasonable to infer, do not experience substantial problems in performing their job duties because of language problems.

COUNT 1 - - -

Count 1 of the tenure charges contains statements not strictly relevant to an articulation of charges. The essence of Count I, however, is that respondent failed to carry out his duties in a proper manner when assigned to Robert Waters and that he was found lying on the floor unconscious at Hudson on April 16, 1992.

PERFORMANCE OF DUTIES

The allegations pertaining to respondent's performance of duties at Robert Waters revolve around three dates, on which communications were conducted with and concerning respondent, February 13, 1991, February 14, 1991, and March 6, 1991. In this respect, the tenure charges state that:

1. By letter dated February 13, 1991, Sanger advised Johnson of the need for Gwinnett to improve the latter's working relationship with fellow custodial staff, teachers, and administration; be more thorough in cleaning floors and stairwells and report to work during snow conditions and perform snow removal. Sanger noted that Gwinnett "had lost self-control and had yelled at the school principal and head custodian." Sanger also noted that Gwinnett "seemed to resent authority and seemed disturbed when told to perform various duties."

2. Gwinnett met with Johnson on February 14, 1991, at which meeting respondent admitted to "losing his self-control and cursing at fellow workers." Respondent promised to try to 'clean up his act.'

3. In an evaluation dated March 6, 1991, Sanger noted some improvement in respondent's performance and commented on the need for Gwinnett to continue to make improvements which 'we had discussed with Mr. Johnson concerning attitude and job performance.'

FINDINGS OF FACT

There is no dispute that Sanger sent Johnson a letter dated February 13, 1991 setting forth those areas, which are reflected in Count I, in which Sanger believed that Gwinnett needed to improve. The parties also do not dispute that Gwinnett discussed the matter with Johnson in a meeting held on February 14, 1991, nor that a

subsequent March 6, 1991 evaluation generally found that respondent had improved his performance. Gwinnett admitted, to both Johnson and in his testimony, to certain problems in his performance at Robert Waters. The fact that there were some deficiencies is generally corroborated in the evidence. Based upon a review of the entire record, I **FIND** the following to be additional facts.

Prior to the transfer to Hudson, Cruz received complaints from teachers at Robert Waters regarding Gwinnett. Several days prior to February 13, 1991, Sanger orally advised Johnson that he (Sanger) was dissatisfied with Gwinnett's performance at Robert Waters. Sanger also communicated to Johnson that Sanger thought respondent was sorry for his actions and expressed the hope that Gwinnett could be rehabilitated. Sanger indicated that he would be sending a letter to this effect to Johnson. Sanger did so, by letter dated February 13, 1991. Johnson set forth the areas of concern regarding respondent's performance as follows:

1. Respondent seemed to "resent authority." Sanger noted that respondent had to become more receptive to performing duties assigned by the head custodian and school principal and that Gwinnett seemed "perturbed" when told to perform duties.

2. Respondent had to improve his working relationship with other custodial staff, teachers, and administrators.

3. Respondent had to become "more thorough in cleaning floors, stairwells, etc."

4. Respondent had to report to work during snow conditions and realize that it was a custodian's obligation to share the responsibility of snow removal duties.

5. On a number of occasions, Gwinnett "lost his self control and yelled back at the school principal and head custodian" Sanger noted in this respect that respondent would appear to be remorseful after such incidents but never really maintained self control. (Ex. P-3)

Johnson met with respondent on February 14, 1991 to discuss Sanger's concerns. He first asked if respondent wanted a union representative present but Gwinnett declined.

One matter discussed at the February 14, 1991 meeting was an incident in which Gus Bachman (Bachman), the supervisor of maintenance, had taken an outside vendor through the Robert Wood School, regarding tile work. Gwinnett accompanied them. Respondent communicated to Johnson that Gwinnett had become upset because C. Garcia, head custodian, yelled at respondent, who was not authorized to go with Bachman or the vendor. Respondent, in fact, got into a "shouting match" with Garcia. It was Johnson's perception at the time in question that Garcia is a "very hands on type," a person who "likes to give orders," and that respondent does not "like to take" them. However, he received no specific information regarding incidents of respondent "losing control" and "cursing" in his communications with respondent. Respondent also complained that Garcia always yelled at Gwinnett in front of other people. He requested a transfer. Respondent also told Johnson that he (Gwinnett) felt he got along fine with other custodians, and that he only had problems with Garcia.

He also stated that he felt he cleaned Robert Wood well. Regarding snow removal duties, Gwinnett communicated that respondent had a part-time job on weekends and therefore could not be available to assist with shoveling duties on Saturdays and Sundays. He also pointed out that Garcia, who lives in Camden, New Jersey, was not required to report on Saturdays and Sundays for snow related duties, because of the long commute involved. Respondent admitted to losing control and occasionally cursing. In fact, respondent displayed an inappropriate demeanor and at least occasionally cursed while on the premises of Robert Wood during employment hours prior to February 14, 1991.

Johnson subsequently spoke to other individuals and received information to the effect that respondent got along fairly well with other custodial staff members. He therefore did not take any further action regarding the incident with Bachman. Johnson advised Gwinnett at the February 14, 1991 meeting that yelling and cursing was not the way for respondent to handle problems, especially when a principal was involved. Johnson concluded that formal action against respondent was not needed. Johnson did not conduct any further investigation regarding whether or not respondent performed his cleaning functions satisfactorily because it is the re-

sponsibility of a school principal to evaluate custodians. The head custodian is required to relay directives of the principal to custodians. Head custodians do not evaluate custodians.

At the meeting held on February 14, 1991, Johnson warned respondent that the latter's term of employment was scheduled to end on June 30, 1991 and that his rehiring would be based on an annual evaluation. Gwinnett promised Johnson that respondent would attempt to "clean up his act."

Respondent, in fact, got into a "shouting match" with Garcia. Respondent did not get along with Sanger. This was at least partly because Gwinnett was upset because, to respondent's knowledge, Sanger utilized an employee who did not have a black seal for boiler work. Respondent was also annoyed because Garcia did not have this license. Gwinnett expressed these viewpoints to Calabria and Bachman. Respondent yelled at Sanger on one occasion.

It is the principal who determines who operates the boiler in a school. Johnson told Gwinnett on February 4, 1991 that Sanger wanted Garcia to be the boiler man. Respondent indicated that he had expressed to Sanger that Gwinnett intended to complain to Calabria and that Sanger did not react favorably. Gwinnett indicated that this was the source of the problems between respondent and Sanger. In fact, Gwinnett resented the fact that Garcia operated the boiler. On February 14, 1991, respondent agreed that he had to improve his relationship with his co-workers, specifically, Sanger and Garcia.

Sanger subsequently evaluated respondent on March 6, 1991. Respondent was found to be above average in many areas, including the performance of his job duties. He was found to be satisfactory in a substantial number of areas, including professional attitude and manner, punctuality and attendance, ability to work with other personnel, and acceptance of criticism and suggestions. Regarding ability to work with others, Sanger indicated that Gwinnett had showed improvement. Sanger evaluated respondent as outstanding in the latter's communication skills. No areas of "improvements needed" and "unsatisfactory" were indicated. (Ex. P-5, p. 1).Sanger's written comments indicated that respondent had shown improvement

and consistency in performing his duties, that respondent was very effective when performing duties, and that respondent needed to continue to make improvements concerning his attitude and job performance.

The evaluation was thereafter sent to Johnson. Sanger also orally told Johnson that Sanger believed that respondent had really improved.

In general, respondent has a "standing rule" that custodians be available after snow storms for cleaning functions. However, it is left to the head custodian to decide when such is necessary. Johnson was aware in early 1991 of at least one occasion when there was no response from Gwinnett to snow shoveling detail. He was also aware that Gwinnett had indicated unavailability because of part-time employment. In fact, the head custodian is not required to report for snow related duties. No discipline was ever taken against respondent because of failure to participate in such activities. However, Johnson informed Gwinnett that he (Johnson) wanted to know particular weekends when respondent would not be available. No issues regarding snow removal functions pertaining to respondent developed, to Johnson's knowledge, subsequent to February 1991. In speaking to Sanger subsequent to the February 14, 1991 meeting, Johnson and Sanger agreed that no additional future problems, were expected from respondent.

Respondent was reemployed for the next school year, 1991/1992, and as found, was assigned to Robert Waters. Prior to appointing respondent to the head custodian position at Hudson, Johnson spoke with Miele. The latter informed Johnson that respondent's performance at Hudson, since December 1991, was satisfactory.

It was Johnson's perception that it might be good for respondent to assume the position of chief head custodian at Hudson. Johnson did not communicate any prior "problems" with Gwinnett to Miele prior to the determination on this question, because he felt that respondent was "rehabilitated" and because he did not want to "prejudice" Miele. Mielo did not object to the appointment of respondent, having no reason to believe that Gwinnett could not do the job and being in need of a custodian with a black seal license.

Based upon his observations, Cruz concluded that respondent satisfactorily performed his duties when first assigned to Hudson. Eventually, starting in February 1992, Cruz started receiving complaints from respondent's co-workers regarding Gwinnett's behavior. Gwinnett performed satisfactorily at Hudson until approximately January 1992.

As of March 1992, Mielo began learning of comments from cleaning women assigned at Hudson that respondent was "gruff" and a "little pushy" with them. Because Mielo did not view the situation as one involving complaints against respondent, he (Mielo) did not call respondent in to speak to him about the matter.

CONCLUSIONS

It is clear that respondent yelled at Sanger on one occasion. Whatever the reason, respondent's behavior was uncalled for and constituted unbecoming conduct. Any perceived problems should have been dealt with in a different manner. As found, respondent communicated his beliefs regarding assignment of the boiler man. There is no excuse for respondent yelling at Sanger.

However, I am not persuaded that the Board has proven by a preponderance of the credible evidence that Gwinnett did not sufficiently perform cleaning duties nor comply with requirements concerning snow removal duty. Any evidence regarding cleaning duties consisted of uncorrborated hearsay of a general nature. Gwinnett denied any deficiencies in the performance of cleaning duties. Respondent advised Johnson that he (Gwinnett) was not available for snow removal duties on Saturdays and Sundays because of a part-time job. At least one other custodian, Cruz, was apparently excused from snow removal duty because of a long commute. Petitioner introduced no evidence of clear policies and practices regarding snow removal duties, including exemptions therefrom. When apprised of the reasons for respondent's unavilability, Johnson merely advised Gwinnett to inform him (Johnson) of the specific dates on which Gwinnett would not be available. Neither Johnson nor anyone else disciplined or formally noticed respondent that Gwinnett had to be available on any particular days which may have conflicted with part-time employment.

I **CONCLUDE** that respondent yelled at Sanger on one occasion prior to February 13, 1991, and that such constituted conduct unbecoming a worker. I also **CONCLUDE** that petitioner has not demonstrated by a preponderance of the credible evidence that respondent did not perform cleaning duties nor participate in snow removal duties as required prior to February 13, 1991.

APRIL 16, 1992

FINDINGS OF FACT

I am persuaded that petitioner has demonstrated by a preponderance of the credible evidence that Gwinnett was found lying on the floor of the boiler room at Hudson on the morning of April 16, 1992. There is no dispute that respondent, at the time, had a problem with alcohol. He was living with his mother, with whom he did not get along. It is also clear from the record that his routine was to leave work, in his own words, "to hang out" on the streets of Bayonne, drinking until the early hours of the morning. Soon afterwards, he would report for work. Gwinnett does not deny that he was out drinking on the evening of April 15, 1992. His testimony was that he fell asleep at his desk and, inferentially, ended up lying on the floor because he was tired. I do not find this testimony to be crecible. The testimony of Petitioner's witnesses established that respondent consistently slept on the job subsequent to his transfer to Hudson, commencing in February 1991.

Based on a review of the record, I **FIND** the following to be additional **FACTS**.

Respondent arrived a little early on the day in question, at approxiamtely 5:30 a.m., because he had been out drinking, in his own words, half of the night on APRIL 15, 1992. He was found on the floor in the boiler room by two cleaning personnel. He was assisted off the floor and into a chair. Johnson spoke to Cruz sometime between 1:00 and 1:30 p.m. and informed Cruz what had happened. Cruz warned respondent that such behavior could not be tolerated. Respondent continued working until 2:30 p.m. He spoke to Johnson several days later. Gwinnett was advised that the Board would not tolerate such behavior.

Mielo went down to the boiler room, at approximately 7:30 a.m. on April 16, 1992. Respondent was putting out garbage pails. Gwinnett told Mielo that he was okay. Mielo notified Cruz, who subsequently arrived and proceeded to the basement. Cruz later informed Mielo that he (Cruz) had had to awaken respondent. Mielo indicated that he (Mielo) had earlier spoken to respondent and that Gwinnett had seemed okay. Mielo had also called Johnson. Johnson inquired if respondent was drunk, and Mielo indicated that Gwinnett was outside taking out garbage cans. As found, Johnson subsequently met with respondent regarding the matter.

Mielo communicated to Johnson that there was no evidence of alcohol on school premises and that Gwinnett seemed to have personal problems because his mother had thrown him out of the house. Cruz reported to Johnson that Gwinnett had said he had been out drinking the night before and was just tired. Cruz spoke to Gwinnett, giving respondent a verbal warning. No action was taken against respondent.

CONCLUSIONS

Respondent stresses that he was not unconscious on April 16, 1992, but fell asleep because he was tired due to the fact that he had been out drinking until shortly before reporting to work. I am not persuaded by this analysis.

A requirement that petitioner prove that respondent was, in a medical sense, "in an unconscious state" would be too literal an interpretation of the tenure charges. It is clear that respondent was, at the very least, feeling the effects of his drinking bout and was, in layman's terms, "passed out." I do not find credible his testimony that he merely fell asleep at his desk and fell off the chair. In any event, I am persuaded that even if respondent was "merely" sleeping on the job, that such conduct constitutes conduct unbecoming an employee.

I **CONCLUDE** that petitioner demonstrated by a preponderance of the credible evidence that Gwinnett was lying on the floor on the morning of April 16, 1992 in the boiler room at Hudson, either asleep or "passed out," which condition resulted from the effects of drinking alcoholic beverages until shortly before he reported to work that morning and that such conduct constitutes conduct unbecoming an employee.

COUNT 2

Count 2 alleges that Gwinnett did not report to work on April 29, 1992 without notice to the Board; that on May 4, 1992, Johnson requested medical documentation to substantiate Gwinnett's absence, that no medical documentation has ever been provided, and that the actions of respondent in absenting himself without notice to the Board and without documentation of illness, when requested, demonstrate disregard for duties and the safety and welfare of students, faculty and staff and, therefore, conduct unbecoming a staff member.

FINDINGS OF FACTS

Mielo testified that on April 29, 1992, he arrived at Hudson at approximately 6:30 a.m. to find Jacques and Perazza outside the school unable to gain access, although the gymnasium lights were on. Mielo admitted the staff but could not find respondent, although Gwinnett should have been at work at that time. A check of respondent's time card revealed that Gwinnett had not punched in. After opening the building, Mielo called an employee at another school who came to Hudson to start the boilers. Mielo called respondent's house and was told by a female, presumably respondent's mother, that Gwinnett had left for work at 5:10 a.m.

Respondent did not report during the entire day. Both Johnson and Mielo testified that Gwinnett, to their knowledge, did not call the Board number used for reporting absences, which is referred to as the "sick line." Miela also contacted Joseph Calibria at the central office to see if respondent had called in.

Mielo discussed the matter with respondent on April 30, 1992. Mielo testified that Gwinnett informed the principal that respondent had had an argument with his mother, left for work, got sick and left the school to go to a lady friend's house. This testimony was generally confirmed by the testimony of other witnesses.

On May 1, 1992, respondent executed a form stating that he was absent on April 29, 1992 because he had had diarrhea and was upset. Respondent requested that he be docked a day's pay. Respondent was not paid for April 29, 1992.

By letter dated May 4, 1992, Johnson, referencing a provision of an applicable union agreement, requested that respondent provide medical documentation to substantiate his absence. Respondent testified that he did not do so because he was advised by a union officer that he (Gwinnett) was not required to do so. Gwinnett opined that he did not need a physical examination because he knew what was wrong with him, he had a drinking problem. Gwinnett testified that he had been out drinking the night before April 29, 1992, until shortly before reporting to work on that date.

Respondent testified that he attempted to call the school to report his absence. More specifically, he stated that he attempted to call, from a pay telephone near his girlfriend's apartment, the central office as well as Mielo's office, but not the office monitored by Mielo's secretary. Respondent indicated that he went to Hudson. Gwinnett testified that he had memorized the applicable phone numbers and left a message on the "sick line" answering machine that he would not be at work. He was not able to reach Mielo, or anyone else, at Hudson.

On cross-examination, respondent stressed that he was "hanging out" on the "street" the night before but was not drinking. He also noted that although he does not wear a wrist watch, his girlfriend had a clock in her apartment. Respondent could not understand why he should have to testify in this respect, noting that he had been docked for his absence. Respondent also testified that he was aware it was his obligation to call if he were going to be absent because of sickness. He indicated he left a message on the sick line answering machine. However, personnel responsible for monitoring the answering machine reported to Johnson that no message had been received from Gwinnett. Respondent also was aware from communications with Johnson that an absent employee is required to call the principal of his school. By his own testimony, he did not attempt to call back later in the day. Gwinnett indicated that he did not provide medical documentation in part because he did not want to pay a physician's fee, expressing the belief that it was the obligation of respondent to do so.

Discipline was not taken against Gwinnett because of his nonappearance on April 29, 1992 or for any other reason pertaining to that date.

At the hearings, petitioner's counsel read a section of the applicable union contract, which appears to provide authority for a school to request medical documentation if there is a pattern of continued absences. Johnson testified that he felt that there was a pattern of absences developing by respondent. Johnson also testified that no follow-up action was taken by Hudson personnel regarding the lack of medical documentation.

It is clear that respondent was absent from work on April 29, 1992. His testimony in this respect generally was not credible. I found petitioner's witnesses to be more credible in this respect. In addition, respondent's testimony that he was not drinking the night before, in light of his testimony that he had a severe drinking problem at this time and that his habit was to routinely "hang out" on the "street" drinking with friends, is not believable. It is also not believable that respondent would not have attempted to call Mielo's secretary. It is also noteworthy that Gwinnett made no efforts to communicate with Hudson personnel later in the day regarding his absence. In light of his general lack of credibility, and his lack of efforts to reach Mielo later in the day, I do not find credible respondent's testimony that he tried to call the sick line on the morning of April 29, 1992. The Board's general practice was to operate an answering machine on the sick line, and it would be highly unlikely that normal procedures would not have been followed on that particular day.

However, I am not persuaded that petitioner has demonstrated a sufficient basis for finding that Gwinnett violated any policies by failing to provide medical documentation. There was no testimony regarding Board nor Hudson policies and practices in this respect, other than a brief reference to a union provision which possibly may allow school personnel to request medical documentation if a pattern of absences has developed. In any event, it is questionable whether two absences would constitute a "pattern."

Based upon a review of the entire record, I **FIND** the following to be additional **FACTS**.

Respondent failed to report for work on April 29, 1992. It is reasonable to infer that he initially went to Hudson but left because of feeling ill. Gwinnett had been out the evening before drinking, returned home, had an argument with his mother, and left for his job at approximately 5:15 a.m.,and it is reasonable to infer that he was feeling ill because of the effects of the previously consumed alcoholic beverages. Upon leaving Hudson, with the outside door locked and the boiler not operating, he proceeded to a girlfriend's house. It is reasonable to infer that respondent made no efforts on April 29, 1992 to contact either the sick line nor Hudson personnel to report his absence. Respondent was aware at the time of a requirement that he do so.

Johnson subsequently requested, on May 4, 1992, that respondent provide medical documentation for his failure to report to work on April 29, 1992. Gwinnett did no do so because of advice from union personnel and because respondent did not want to incur the cost of a physician's examination. The policies and practices of petitioner and Hudson regarding the provision of medical documentation by employees cannot be determined with specificity from the record.

On May 1, 1992, respondent excuted a document pertaining to his absence on April 29, 1992, requesting that he be docked a day's pay. Respondent was not paid for April 29, 1992.

It is important for school personnel to report absences so that substitute personnel can be arranged. It is especially important for custodial/boiler employees to so report so that school premises can be opened for other employees and the boiler can be turned on.

CONCLUSIONS

As found, respondent failed to comply with a requirement that he provide notice of his absence on April 29, 1992. His failure to do so, and his absence itself,

constitute unbecoming conduct. This is especially so in light of the importance of a custodial/boiler person's attendance so that the school can be opened and the boiler turned on for the start of the school day.

I **CONCLUDE** that petitioner has established by a preponderance of the credible evidence that respondent was absent without notice on April 29, 1992 and that such constitutes conduct unbecoming a staff person.

COUNT 3

Count 3 alleges that on May 9, 1992, Gwinnett was asked by the school librarian, Edna Antenucci (Antenucci), to replace furniture in the library which had been moved to allow the removal of a copy machine and that respondent became very angry and abusive when asked by Antenucci to put the furniture back.

The Board offered into evidence a copy of a May 5, 1992 memorandum sent to Mielo by Antenucci regarding the incident in question. This memorandum was forwarded to Johnson. Antenucci was not presented as a witness.

The content of Antenucci's memorandum is essentially reflected in the allegations of Count 3. Antenucci stated that on May 5, 1992, Gwinnett was sent to the library at Hudson to help move a copy machine. In order to accomplish this, furniture had to be removed. Antenucci noted that Gwinnett became "very angry and abusive" (emphasizing "abusive" by underlining it) when he was asked by her to put the furniture back. She also noted that respondent's "attitude & his comments were very nasty and uncalled for and he spoke in terms that I find very unaceptable (sic)." (Ex. P-12, p. 1).

Johnson testified that he met with respondent on May 18, 1992, regarding this incident and that Gwinnett acknowledged that his behavior was wrong. Gwinnett also informed Johnson that respondent had already apologized to Antenucci. Respondent could not remember specifically what he said to Antenucci but admitted to Johnson that he "had had a bad day that day." Johnson warned respondent that continued infractions could lead to disciplinary actions, including the withholding of increments or dismissal. Respondent informed Johnson that he (Gwinnett) had been attending meetings of Alcoholic Anonymous (AA) for a drinking problem and that

these meetings were helping. Johnson warned respondent about possible drinking problems on the job. Johnson's testimony was corroborated by notes written by him at the time in question.

Gwinnett testified that Antenucci, who was elderly, insisted on having furniture immediately moved and ordered him around. Gwinnett testified on cross-examination that he yelled at Antenucci on the day in question, but that he did not curse at her. He could not recall specifically what had been said, although he noted that she was "very annoyed." He acknowledged that he should not have yelled at her. He noted in this respect that he does not go to work every day with "a clear head" because of his "problems." He acknowledged that he later apologized to Antenucci. Gwinnett could not recall the specifics of his conversation with Johnson on May 18, 1992, although he did note that he was attending AA meetings for a drinking problem.

Based upon a review of the entire record, I **FIND** the following to be additional **FACTS**.

On May 9, 1992, Antenucci, who was elderly, and the librarian at Hudson, asked respondent to move furniture so that a computer could be installed. Respondent did so. Antenucci later requested that respondent put the furniture back. Although the exact content of their communications cannot be determined from the record, it is reasonable to infer that she communicated to Gwinnett that she wanted the furniture put back immediately. Respondent yelled at her. He later apologized. Respondent subsequently spoke to Johnson regarding the matter, indicating that he had an alcohol problem and was attending AA meetings.

CONCLUSIONS

Respondent exhibited an inability to properly deal with a co-worker, Antenucci, on May 9, 1992. Even if she had insisted that he immediately put the furniture back in its place upon request, and even if such request was unreasonable (which, parenthetically, is not demonstrated from the record) yelling at her was not a proper response. I **CONCLUDE** that petitioner has demonstrated by a preponderance of the credible evidence that respondent yelled at Antenucci on April 19, 1992, when she, in her capacity as school librarian, requested that he put

back furniture which he had previously moved on that day in the library and that such conduct constitutes conduct unbecoming a staff employee.

COUNT 4

Count 4 essentially alleges that on two occasions on May 19, 1992, respondent was found lying face down on the floor or at his desk in the boiler room incapable of performing his duties. More specifically, Count 4 alleges that respondent was discovered at approximately 5:55 a.m., by Jacques and Perazza, lying on the floor underneath the sink in the boiler room. It is also alleged that at approximately 6:15 a.m., he was found with his face down asleep at the desk in the boiler room. Respondent is described as apparently being under the effects of alcohol on both occasions.

FINDINGS OF FACT

Perazza and Jacques testified that on the morning of May 19, 1992, they, as well as a milk vendor, could not gain entry to Hudson upon reporting to work, although they repeatedly knocked on the outside door. The door was locked but the lights were on in the gymnasium, indicating to them that respondent should have been on duty. They eventually gained entry shortly after 6:00 a.m., when Berian arrived and opened the door. The women went directly to the boiler room to pick up their keys and punch their time cards. They testified that they found respondent lying on the floor, face down, underneath a sink, which is located to the rear of the room. They went to locate Berian and the vendor, who returned with them to the boiler room. Both women testified that they thought respondent was either dead or very sick. The vendor initially suggested calling an ambulance. However, Berian helped respondent up and sat him on a chair. Based on respondent's demeanor and actions, all felt that respondent was intoxicated. Perazza detected an odor of alcoholic beverages.

Jacques emphasized in her testimony that Gwinnette was not moving and that she thought he was either sick or dead. She had never seen him on the floor before, and he appeared to be unconscious.

Perazza testified that although the vendor wanted to call an ambulance, Berian was convinced that respondent was drunk. Berian and the milk vendor picked respondent up and placed him in a chair. The women then left to perform their duties. Even as being lifted up, respondent appeared to be unconscious and did not immediately wake up. Berian and the vendor had to awaken Gwinnett. Respondent sat down and could not get up on his own. He remained sleeping with his arms folded and his head down on the table desk. Perazza observed that he appeared to fall if not supported and had no balance.

Mielo testified that at approximately 6:50 a.m., Dulack reported that respondent had been found sitting face down at the desk in the boiler room. Dulack indicated that Gwinnett was not able to respond to requests to clean yards. Mielo went to the custodian's office and observed respondent in this position. Respondent did not answer a call when Mielo called him. Mielo then notified Cruz, who immediately came to Hudson. Both Mielo and Cruz went to the boiler room and, as they both testified, observed respondent, still apparently sleeping at the desk. Cruz finally succeeded in waking respondent. Cruz and Mielo testified that respondent became belligerent when told he had been sleeping and stated that he was ill. Cruz then counseled respondent to call in sick and see a doctor for any physical ailment. Respondent replied "F- this . . .," punched out, and left the building without permission.

Respondent testified that he could not recall the specifics regarding any incidents on May 19, 1992, but stated that he might have dozed off and been awakened by Cruz. Gwinnett testified that after completing cleaning duties, he sat down at his desk, put his head down and fell asleep. He acknowledged that Cruz and Mielo saw him sleeping that day and that Cruz woke him up. He testified, however, that that was the only time he was awakened that day. He was certain he was not found nor left unconscious on the floor on May 19, 1992. He admitted punching out and going home after being awakened, but denied using foul language. He denied that he was drunk on the job or consumed alcoholic beverages on the job. He acknowledged yelling, but denied cursing or using obscene language. He acknowledged that Cruz told him to go home if he was not feeling well and to get help for his drinking problem. Gwinnett indicated to Cruz that this was not necessary because he was attending AA meetings.

Johnson testified that he spoke to Cruz at approximately 9 a.m. to 10 a.m. and that Cruz advised that Gwinnett had been belligerent, screaming, cursing, and punched out and left the building. At this point, Johnson concluded that the time for conferences with respondent had ended and that official action should be recommended.

By letter dated May 20, 1993, Johnson detailed recent incidents of what was deemed to be unprofessional conduct by respondent and advised Gwinnett that the Board would consider possible disciplinary measures, including dismissal. Johnson noted in this letter that Gwinnett had not revealed any medical conditions causing such behavior in discussions with Johnson and that Gwinnette's action and demeanor led Johnson to believe that Gwinnette had a drinking problem. Johnson noted in this respect "slow, lazy-like actions and speech . . ." (Ex. P-17, p. 1). Johnson concluded that the matter would be presented to the Board on May 29, 1992 and that petitioner might consider possible disciplinary measures, including dismissal. Gwinnett did not respond to the letter.

I am persuaded by the evidence offered on behalf of petitioner. The testimony of Perazza, Cruz, Johnson and Jacque was persuasive, corroborated by the documentary evidence, consistent on direct and cross-examination, and consistent with each other. Respondent's testimony was not believable.

Based upon a review of the entire record, I **FIND** the following to be additonal facts.

Respondent reported to work at his regular time on May 19, 1992. However, it is reasonable to infer that he did not leave the outside door to Hudson open. Upon arriving at Hudson at approximately 5:15 a.m., Perazza and Jacques found the building locked. Berian subsequently arrived, at approximately 6:15, and opened the door. The women proceeded to the boiler room, where they observed respondent lying face down on the floor under a sink towards the rear of the room. Although they called to him several times, he did not respond. He appeared to be unconscious and was not moving. They summoned Berian and a milk vendor. The latter two individuals attempted to wake respondent, by turning him and jostling him. They were not able to do so. Berian and the vendor lifted respondent by

Gwinnett's arms and seated him in a chair at the desk in the boiler room. Berian was then able to arouse respondent by yelling at him.

Mielo was subsequently informed of the incident. He proceeded to the boiler room, where he found Gwinnett seated at the desk, not moving and apparently asleep, with his arms folded and his head on the desk. Mielo called to respondent, but Gwinnett did not respond. Mielo called Cruz, and the two men found respondent in the same way. They were eventually able to wake respondent. Respondent indicated that he was not feeling well, but refused an offer by Cruz to have a physician called or to be assisted in going to a doctor's office. At this point, respondent yelled at Cruz and Mielo, and articulated an obscenity, "F...this . . .," punched out, and left the building. It is reasonable to infer, that respondent's condition was the result of, at least in part, the intake of alcoholic beverages.

The incident was reported to Johnson. By letter dated May 20, 1992, Johnson advised respondent that this incident as well as others would be reported at a meeting of the Board on May 24, 1992. Gwinnett did not respond to this letter.

CONCLUSIONS

It is apparent that respondent's behavior on May 19, 1992 constituted conduct unbecoming a staff employee. I **CONCLUDE** that the Board has demonstrated by a preponderance of the credible evidence that respondent was either unconscious or sleeping on the morning of May 19, 1992, lying on the floor of the boiler room at Hudson; that he was subsequently sleeping while seated at the desk in the boiler room on the morning of that day; that when confronted by Cruz and Mielo, Gwinnett articulated an obscenity, punched out, and left the premises. I also **CONCLUDE** that this behavior constitutes conduct unbecoming a staff employee.

COUNT 5

As found hereinabove, Gwinnett was arrested on May 23, 1992. He was suspended with pay by respondent on May 28, 1992, pending formal action, based on the criminal charge. Count 5 alleges, in part, that upon suspension, he was required to surrender his keys and that a subsequent search of a locked desk drawer in the boiler room revealed pornographic materials. Based upon further

investigations, it was concluded that said materials belonged to Gwinnett and that staff members had previously observed respondent looking at such materials while at work on school premises. County 5 also alleges, in pertinent part, that respondent on various occasions had in his possession on school premises what is referred to as a "gun-knife."

POSSESSION OF MAGAZINE

FINDINGS OF FACT

The parties do not dispute that following respondent's suspension, Cruz asked other custodians at Hudson questions regarding a locked drawer in the desk located in the boiler room. Cruz testified that he was informed by custodial personnel that only respondent had a key for the drawer and that Gwinnett kept was viewed as pornographic materials in it.

Respondent surrendered his keys to Cruz on May 28, 1992. When the drawer was opened, a magazine was found. It is the petitioner's position that such magazine is "pornographic" and should not be on school premises. The magazine was moved into evidence as Exhibit P-23.

Cruz testified that subsequent to May 19, 1992, to his knowledge, respondent was not at work for approximately ten days. When respondent returned, Gwinnett informed Cruz that respondent had been arrested in Hoboken. Johnson subsequently gave Cruz a letter dated May 28, 1992, from Johnson and Raphael Fraguela (Fraguela), respondent's president, to give to Gwinnett. This letter advised respondent that Gwinnett was being suspended with pay because of the criminal charges against him, pending formal action of the Board.

Upon giving Gwinnett the letter, Cruz took possession of respondent's custodial keys. Cruz testified that prior to that date, he had asked respondent why a drawer in the desk was locked. On one day when Gwinnett was absent, Cruz asked custodial personnel why the drawer, which contained supplies for cleaning personnel, was kept locked with a pad lock. Cruz testified that he was informed that "pornographic" books were left in the drawer. Cruz was also informed that no one other than Gwinnett used the drawer, although other personnel might periodically

sit at the desk. It was Cruz's belief that Gwinnett kept on his possession keys, including the key that would open the drawer in question, at all times. Cruz did not have the key to the padlock. It was a private lock, not of the type generally used in city schools. Cruz queried Mielo, other custodians, and cleaning personnel as to whether or not they had a key and was informed that no one other than respondent had a key to the lock.

As indicated, upon opening the drawer following respondent's suspension, Cruz found the magazine in question. He took it to Johnson. In addition to the magazine, there was a tape and tools in the drawer. Mielo corroborated Johnson's testimony that Johnson informed the principal that a magazine had been found in the drawer in question.

On May 28, 1992, the Board adopted a resolution suspending Gwinnett with pay pending further investigation and possible action; withholding increments to respondent for the 1992-1993 year; and determining that the administration should consider and determine whether tenure charges should be filed against respondent for determination of the Board. The bases cited in the resolution for the action were as follows: Respondent was found lying on the floor of the school premises in an unconscious state on April 16, 1992; respondent in the past exhibited "slow, lazy-like actions and speech consistent with intoxication"; respondent acted in a "belligerent manner" with fellow workers and superiors; respondent admitted, on May 18, 1992, that he was attending AA meetings for his "problem"; on May 19, 1992, Gwinnett was found face down at his desk at 6:50 a.m. and could not be initially aroused; when Cruz finally awakened Gwinnett on that date, respondent acted in a hostile manner and proceeded to "punch out" and leave the school premises, swearing; and Gwinnett was arrested on May 23, 1992 and charged with possession of and brandishing in public a single "gun-knife" (Ex. P-21).

Johnson testified that Gwommett took no action to overturn the Board's action of May 28, 1992 and did not file grievances. Respondent does not dispute that he received copies of the letter and the Board's resolution.

Gwinnett testified in detail regarding the allegations contained in Count 5. He indicated that the desk in question is a small wooden one, containing one drawer on the left-hand side and three drawers on the right. The drawer in question, which

was a middle drawer, was locked. He stated that he kept tools and personal papers in it, as well as keys which were used by cleaning personnel. Respondent stated that he did not put the padlock in question on the drawer, but that it was there when he began employment at Hudson. It was his belief that a janitor had previously placed the key on the drawer. Based on his recollection, another custodian had given him keys, including the one in question. Respondent also testified that on March 12, 1992, he had extra keys made and gave them to Berian. Respondent stated that he had never seen the magazine in question prior to the tenure charges and that it was not his. It was his practice that he would give the cleaning personnel the keys they utilized as needed. The drawer in question is approximately two inches deep and three-feet wide. Respondent testified that other individuals in addition to Berian also had a key to the locked drawer. Respondent stressed in his testimony that Cruz found the magazine after respondent had left the premises of the school, inferring that someone else had placed it in the desk. On cross-examination, he noted that although he was previously convicted of writing indecent letters to minors, he went for "help" and was found by the Department to be rehabilitated.

Respondent did not dispute that he did not take any action concerning his suspension nor the withholding of an increment. He noted in this respect that he did not "really" read the copy of the Board's resolution given to him. He also testified that he did not show the document to anyone else in order to better understand it. He did, however, understand that he was suspended because of his arrest and that an increment had been withheld. Respondent did not confer with union personnel at that point. Respondent acknowledged receiving and reading Johnson's letter of June 1, 1992. He estimated that the withheld increment approximated $1,500.

Petitioner has not demonstrated by a preponderance of the credible evidence that the magazine in question was brought into Hudson by respondent. Respondent's testimony in this respect was credible, specific, and consistent on direct and cross-examination, except for initial difficulty by respondent in communicating the exact location of the drawer in question. I do not find this to be material. The Board's evidence in this respect consists solely of uncorroborated hearsay. It presented no evidence to refute petitioner's testimony that the padlock was present when Gwinnett commenced employment at Hudson and that he subsequently gave a copy of the key to the padlock to Berian.

Based upon a review of the entire record, I **FIND** the following to be additional facts.

At a meeting held on May 28, 1992, the Board issued a resolution suspending Gwinnett, with pay. Respondent was advised of this action by a letter dated June 1, 1992 from Johnson, which letter was given to Gwinnett by Mielo, at Johnson's directive. Johnson also told Gwinnett to turn in the latter's custodial keys to Cruz, which respondent did on May 28, 1992. Upon receiving the keys, Cruz opened the drawer in the custodian's desk, which drawer had had a pad lock on it for some time. He found a magazine, the content of which is as stated in Exhibit P-23, as well as some papers and a tape.

The padlock was on the drawer in question at the time respondent transferred to Hudson. Other employees, in addition to respondent, had possession of a key to open the drawer in question.

CONCLUSIONS

I **CONCLUDE** that petitioner has not proven by a preponderance of the credible evidence that respondent brought the magazine in question onto the premises of Hudson. It is therefore not necessary to determine whether the magazine is "pornographic" and whether possession of it on school premises constitutes a basis for disciplinary action.

POSSESSON OF GUN-KNIFE

FINDINGS

The remaining charge is, as indicated, that respondent had possession on school premises of a weapon referred to as a gun-knife. Gwinnett was arrested on May 23, 1992, at approximately 2:51 a.m., and charged with possession of a weapon for unlawful purposes, *N.J.S.A.* 2C:29-4e, by Hoboken police. The circumstances concerning the arrest are pertinent to determining whether respondent had possession of a gun-knife on school premises.

The Board presented the testimony of Sergeant. James Tuminaro (Tuminaro), who is custodian of records and evidence at the Hoboken Police Department. Tuminaro brought to the hearing the actual gun-knife which was found on respondent's possession at the time of the arrest and described it in detail. Copies of the pertinent complaint, arrest report and warrant were also moved into evidence.

Respondent does not dispute Tuminaro's testimony, the accuracy of the documents pertaining to his arrest, nor the circumstances relevant to the arrest. Respondent was arrested at the vicinity of Fourth and Jackson Streets in Hoboken. He was found to have in his possession, in a pocket, a gun-knife, an instrument having a blade of approximately four inches in length contained in a holster with a clip on the front of the holster.

As its name denotes, and based on the testimony of Tuminaro and a review of the documents in question, it is apparent that the instrument in question resembles a small caliber hand gun, but that it has the blade of a knife. The gun-knife was composed in part of a pistol grip, that appeared to be a hammer, but had no trigger mechanism or cylinder. A solid stainless steel mechanism was attached to the pistol grip which, when extended, revealed a sharp four-inch blade. A clip on the holster allows the gun-knife to be attached to one's waist. As described by Tuminaro, the blade can be folded into the handle and must be pulled out manually. There is a release mechanism on the hand gun to the rear of the blade, which Tuminaro described as being similar to the "hammer" of a gun, which mechanism locks the blade into place when the blade is extended. The blade can be folded back down. The blade itself contains markings indicating that it is made of stainless steel. Tuminaro testified that he had received a gun-knife confiscated from respondent in the ordinary course of police business and that evidence had followed the usual "chain of custody."

Jacques testified that respondent had, on Hudson premises, shown her what appeared to be a small, dark, hand-gun. She stated that Tuminaro had shown her the gun-knife taken from respondent on May 22, 1992 at the hearings in the instant matter and that it appeared similar in size and color to what respondent had shown her, although she could not be certain that it was the same object. Jacques also indicated that respondent had told her that he carried it for his protection. In this respect, she noted that she had observed Gwinnett coming to school on several

occasions with noticeable cuts and lacerations on his forehead and cheek. On the first such occasion, respondent told her that he had been mugged. She saw the instrument on school premises in February 1992, subsequent to February 14, 1992, on which date a female coworker had been mugged in the morning on the way to the school. While in the custodian's office at approximately 9 a.m., respondent showed her the weapon and indicated that he carried it in a back pocket. She also testified that she told an employee of a vendor, a Juana, about the weapon, and that Juana told Jacques that she (Juana), too, had seen it.

Respondent admitted in his testimony that he was carrying a gun knife, for which he was arrested, for protection, because he had previously been mugged. He insisted that he had never brought it onto school premises. He did, however, acknowledge that he believed it was more dangerous to be out at night and that he carried the weapon at night for protection. Respondent testified that he often went directly from "drinking," "hanging out" on the streets of Hoboken, to his employment, arriving at approximately 5:30 a.m. when, he acknowledged, it would usually be dark.

Respondent testified that he was arrested during Memorial Day weekend and returned to work the following Tuesday. He informed Mielo that he had to report to court the next day. The principal, in turn, told Johnson what had happened. Respondent appeared in court as scheduled, and the charge was downgraded to a disorderly person's charge, which was to be heard in Hoboken municipal court on July 15, 1992. The charges were dropped because of lack of prosecution. Respondent informed Johnson of this development, and the latter requested documentation. Respondent testified that he obtained the requested data and returned to work on July 22, 1992. The criminal matter was later reopened, on approximately August 5, 1992. Respondent returned to court, pled, and received a $250 fine, a suspended sentence, and a requirement of 12 hours community service. Respondent pled guilty under a municipal ordinance violation of disturbing the peace. From July 22, 1991 until his suspension, Gwinnett worked at a Board administration office. He received vacation pay until August 31, 1991.

I am persuaded by the evidence offered on petitioner's behalf. Jacques impressed me as a credible witness. Respondent does not dispute that he carried the gun-knife, at least off school premises, because of safety concerns. As the Board

argues, his testimony that he never brought it to school is not credible in light of the fact that he often reported for work directly from the "streets." As petitioner argues, it is reasonable to infer that it was dark at least a good portion of the time when respondent reported to work in the mornings. Although not 100 percent certain, Jacques believed that that object which respondent showed her on Hudson premises was the same as that shown to her by Tumenaro and reflected in pictures taken at the hearings. I am persuaded that it was.

Based upon a review of the entire record, I **FIND** the following to be additional **FACTS**.

Sometime in February 1992, after February 14, 1992, respondent had on his possession, while at work at Hudson, a weapon which can be described as a gun-knife. It consisted of a holster, with a clip allowing the instrument to be attached to one's waist. It also consisted of a sharp, stainless steel blade, essentially a knife, approximately four inches in length. There was a mechanism on the gun-knife which allowed the blade, once extended, to be locked into place. The blade could then be folded back into the handle.

CONCLUSIONS

Respondent's concern regarding the possession of an instrument such as a gun-knife on school premises is warranted.I am persuaded, and so **CONCLUDE**, that the posesssion of the gun-knife in question by respondent on school premises in February 1992 constitutes conduct unbecoming an employee.

CONCLUSIONS REGARDING PENALTY

The Commissioner of the Department generally has jurisdiction to hear and determine controversies and disputes arising under the school laws. *N.J.S.A.* 18A:6-9. Every public school janitor of a school district shall, unless appointed for a fixed term, hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except as a result of a reduction of the number of janitors in the district or except for neglect, misbehavior or other offense, pursuant to the manner prescribed in *N.J.S.A.* 18A:6-9. *Id.* at 17-3.

No person shall be dismissed if he is under tenure of office, position or employment in a public school system except for inefficiency, incapacity, unbecoming conduct, "or other just cause." Such action can only be taken after a hearing held pursuant to applicable statutory provisions, after written charges of the cause of complaint. *Id.* at 6-10. Upon certification of charges to the Commissioner, a local board may suspend the person against whom such charges are made, with or without pay. If a determination of the charges by the Commissioner is not made by the Commissioner within 120 calendar days after certification of the charges, then full salary of the individual in question shall be paid beginning on the 121st day until such determination is made. A dismissal of the charges shall result in reinstatement with full pay from the first day of any suspension. *Id.* at 6-14.

Respondent advances arguments regarding each charge to the effect that, even if proven, they do not justify removal. Each of the charges upheld hereinabove evidence actions of an extremely serious nature.

Although respondent argues against the credibility of all witnesses presented on behalf of petitioner, it is clear from the record that the Board's personnel treated him in a fair manner. Notwithstanding prior complaints regarding Gwinnett, evidenced in the record, and the fact that Gwinnett yelled at Sanger, Johnson recommended that Gwinnet be promoted to head custodian at Hudson because it appeared that respondent had improved his attitude and performance. Indeed, for a brief period of time, he appeared to make an effort to improve his performance and did so between February and March of 1991. Neither Johnson nor Cruz took immediate disciplinary action against respondent as other events occurred, even after the April 16, 1992 incident and complaints of co-workers and Antenucci. It was not until May 20, 1992, that the Board noticed respondent, as a result of the May 19, 1992 incident, that petitioner would consider disciplinary measures against Gwinnett, including dismissal. As brought out through petitioner's evidence, subsequent discovery that Gwinnett might have brought a weapon onto school property, in light of the prior occurrences, convinced Board personnel that tenure charges should be brought. I am persuaded that the charges sustained, when considered in their totality, justify dismissal of Gwinnett.

As noted, *Cowan*, involved certification of charges against a tenured employee by a local board of education, including eleven charges of alleged misconduct occurring between 1974 and 1984. The Commissioner, confirming an initial decision of an administrative law judge, found that over ten years, the appellant had committed various acts of verbal and physical abuse of students. The court affirmed a dismissal. It noted that although appellant appeared to be an experienced, capable, and generally well-liked teacher, he had an "uncontrollable temper, that over the past ten years has led him to abuse students verbally and physically." *Cowan* at 741.

The school administration had dealt with each incident as it occurred, finally forwarding to the Commissioner charges that resulted in dismissal. The court rejected appellant's contention that earlier charges were too stale to be the basis for a finding of unbecoming conduct. It noted in this respect that appellant was informed contemporaneously of each instance of alleged misconduct and that the local board's responses were " measured, supportive, continuing and patient, until it finally realized that appellant's temper is uncontrollable. He could not have been surprised by the charges, nor could he have mistaken the local board's forbearance as acquience. *Cowan* at 742. (citation omitted)

As in *Cowan*, respondent dealt with each incident involving Gwinnett as it arose. He was spoken to by superiors, warned, and when deemed appropriate, granted a promotion. There is no question that the Board could have imposed disciplinary action sooner than it did. However, as the court noted in *Cowan*, respondent's patience should not be viewed as acquiesence. The incidents in the current matter occurred over a much shorter time period, some two years, than those relevant to *Cowan*. There is no apparent reason they should not be considered in their totality. In addition, the fact that respondent committed such serious infractions within a fairly short period of employment with respondent argues for his dismissal.

I **CONCLUDE** that respondent should be dismissed, based on the charges sustained hereinabove, in their totality, which demonstrate a pattern of conduct unbecoming an employee by respondent.

ORDER

It is hereby **ORDERED** that respondent be dismissed from his position of employment with petitioner as of the effective date of final agency action in this matter.

It also **ORDERED** that the allegations of Count 1 pertaining to Sanger and to April 16, 1992, be and are **UPHELD**; that allegations of Count 1 pertaining to the peformance of cleaning duties and participation in snow related duties be and are hereby **DISMISSED**; that Count 2 as it pertains to Gwinnett's absence on April 29, 1992, without notice be and is hereby **UPHELD**; that Count 2 as it pertains to the provision of medical documentation be and is hereby **DISMISSED**; that Count 3 be and is hereby **UPHELD**; that Count 4 be and is hereby **UPHELD**; that Count 5 as it pertains to possession of a magazine be and is hereby **DISMISSED**; and that Count 5 as it pertains to possession of a gun-knife be and is hereby **UPHELD**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

May 3, 1993
Date

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

5/5/93
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 6 1993
Date

Joyce LaVecchia
OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

LIST OF WITNESSES

For Petitioner:
James Tuminaro
Carl Johnson
Paz Parezza
Nephtaly Cruz
John Mielo

For Respondent:
Charles Gwinnett

LIST OF EXHIBITS IN EVIDENCE

J-1	Letter dated May 8, 1990
P-1	Letter dated September 24, 1990
P-2	Letter dated October 1, 1990
P-3	Johnson's notes dated February 13, 1991
P-4	Johnson's notes dated February 14, 1991
P-5	Non-Instructional Employee Evaluation dated March 6, 1991
P-6	Letter dated January 2, 1992
P-7	Letter dated January 31, 1992
P-8	Johnson's notes dated April 16, 1992
P-9	Memorandum dated April 30, 19992
P-10	Leave Time Form dated May 1, 1992
P-11	Letter dated May 4, 1992
P-12	Memorandum dated May 5, 1992
P-13	Non-Instructional Employee Communication dated May 12, 1992
P-14	Certification of Carolyn Jacque dated May 28, 1992
P-15	Certification of Paz Parezza
P-16	Letter to Johnson from Mielo, Cruz and Dulack
P-17	Letter dated May 20, 1992
P-18	Complaint, Arrest Report, and Warrant
P-19	Letter dated May 28, 1992
P-21	Resolution dated May 28, 1992
P-22	Letter dated June 1, 1992
P-20a, b & c.	Photographs of gun-knife

DKT. NO. EDU 7621-92

IN THE MATTER OF THE TENURE	:	
HEARING OF CHARLES GWINNETT,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
UNION CITY, HUDSON COUNTY.	:	
	:	

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

Respondent would reverse those conclusions of the ALJ pertaining to: the allegations of Count 1 regarding Mr. Sanger and the events of April 16, 1992; the allegations of Count 2 pertaining to respondent's absence on April 29, 1992 without notice; the allegations of Counts 3 and 4; and the allegations of Count 5 as to the possession of a "gun-knife" on school premises. Additionally, respondent excepts to the determination that he should be penalized by the termination of his employment. He would have the Commissioner consider the charges in the context of his having had alcohol, personal and behavior problems, which he submits he has since taken steps to control. In support of these contentions, respondent reiterates those arguments presented at the hearing and elaborated on in his post-hearing brief emphasizing his disagreement with the credibility determinations made by the ALJ regarding the witnesses for the Board.

Upon careful and independent review of the record of this matter, the Commissioner agrees with the findings of fact, credibility determinations, and resultant conclusions of law of the Office of Administrative Law in this case. In so stating, the Commissioner notes the absence of transcripts of the hearings below. In accord with In re Morrison, 216 N.J. Super. 143 (App. Div. 1987) and Parker v. Dornbierer, 140 N.J. Super. 185 (App. Div. 1976), it is observed that the Commissioner's standard of review of factual determinations made by the hearing officer is "whether the findings could reasonably have been reached on sufficient credible evidence present in the record considering the proofs as a whole and with due regard to the opportunity of the one who heard the witnesses to judge their credibility." (emphasis in text) (Parker, at 188) Under such scrutiny and absent citations from the transcript of the hearing, the Commissioner accepts as her own the ALJ's credibility determinations, as well as the factual predicates upon which such findings were based regarding the charges against respondent herein. Respondent's exceptions challenging such credibility and factual findings are thus dismissed as being without merit.

Finally, concerning respondent's argument regarding penalty, the Commissioner's review of the record comports with the ALJ's, which leads to the conclusion that the charges of which respondent has been found guilty are extremely serious in nature, that the Board's personnel treated him in a fair manner, and that respondent has demonstrated a pattern of unbecoming conduct sufficient to warrant dismissal from his tenured employment as a custodian in the Board's employ. See Cowan, supra.

Accordingly, for the reasons expressed in the initial decision, as augmented herein, respondent is dismissed as of the date of this decision, based on the charges sustained in the initial decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 21, 1993

DATE OF MAILING - JUNE 22, 1993

D.B. AND K.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning parents of seventh grader (D.B.) sought to require Board to provide them access to a teacher's notes concerning their son's school work. Teacher had told D.B. that she had a personal notebook concerning D.B.'s work.

Pursuant to N.J.A.C. 6:3-2.1 wherein "pupil record" is defined, ALJ concluded petitioners had no legal right of access to a teacher's personal notes made as a memory aid because they have been explicitly excluded from definition of pupil record.

Commissioner adopted findings and determination in initial decision.

JUNE 22, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8921-92
AGENCY DKT. NO. 474-10/92

D.B. AND K.B.,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,
Respondent.

Carl Cavagenaro, Esq., for petitioners (Reuss and Cavagenaro, attorneys)

Frank DiDomenico, Esq., for respondent

Record Closed: April 5, 1993 Decided: May 13, 1993

BEFORE **NAOMI DOWER-LA BASTILLE**, ALJ:

The parents of D.B. filed a petition seeking to require the Board of Education of the City of Vineland (Board) to provide them access to a teacher's written notes concerning their son's school work. On November 16, 1992, the Commissioner of Education transmitted the matter to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 to -10.

A prehearing was held on February 16f, 1993. The parties agreed to stipulate the facts and proceed on motion for summary decision. The record closed on April 5, 1993, with receipt of the responding brief. The issues identified at prehearing were these:

> Do parents have a legal right to review a teacher's written evaluation notes concerning a student? Is the Board obligated by law to order the teacher to produce personal notes which are records not kept or required to be kept by the Board?

Stipulated Fact Summary

During the 1991-1992 school year, D.B. was in the seventh grade at the Anthony Rossi Intermediate School in Vineland, where he had an English teacher named Mrs. Steelman. D.B., his parents and Steelman agreed that D.B. would keep a notebook for his daily assigned homework, Steelman would sign to verify the assignment and D.B.'s parents would sign to verify the work was performed. On May 28, 1992, Steelman advised D.B. she had a personal notebook concerning D.B.'s work. The next day, the Bs asked the school principal to inspect Steelman's personal notebook. He denied the request but offered a review and copies of all D.B.'s school records. Appeal was made to the Superintendent of Schools who responded on July 8, 1992, that the principal properly denied a request to see Steelman's personal notes which were not official school records. The Bs reviewed D.B.'s permanent record file on July 23, 1992, which did not contain Steelman's notes. On August 18, 1992, the Bs' attorney asked for reconsider. After no response was received, this petition was filed.

Conclusion and Disposition

N.J.S.A. 18A:36-19 was amended by L. 1977 c. 346 §1 to comply with the Federal Family Educational Rights and Privacy Act of 1974 (FERPA). N.J.A.C. 6:3-2.1 et seq., was also amended to comply with Federal law on May 7, 1975. 7 N.J.R. 251 (1975). FERPA specifically excludes from the definition of pupil records:

> (i) records of instructional . . . personnel . . . which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute." 20 U.S.C. 132g(a)(4)(B).

N.J.A.C. 6:3-2.1, as amended with the intention to conform to the FERPA exclusion, defines pupil record:

> "Pupil record" means information related to an individual pupil gathered within or outside the school system and maintained within the school system, regardless of the physical form in which it is maintained. Essential in this definition is the idea that any information which is maintained for the purpose of second party review is considered a pupil record. Therefore, information recorded by any certified school personnel solely

> as a memory aid, not for the use of a second party, is excluded from this definition.
>
> (emphasis added)

A more comprehensive discussion of the definition of pupil records can be found in GVD v. Ramapo-Indian Hills Bd. of Ed., 6 N.J.A.R. 480 at 490-497 (1983). In fact, N.J.A.C. 6:3-2.3(a) prohibits boards from compiling any pupil records other than those defined as such in the regulation, which describes mandatory and permitted pupil records. The exclusions, as noted above, are not pupil records and a board is prohibited from compiling and maintaining them. Parents may not be denied access to pupil records of their children unless a board obtains a court order denying access. N.J.A.C. 6:3-2.6(a)5.

The stipulated facts are that D.B.'s teacher told him that she had personal notes concerning D.B.'s school work after she and his parents had agreed upon a method of monitoring his completion of homework by their signatures in D.B.'s homework notebook confirming the assignments and their completion. I note that neither D.B. nor anyone else has ever seen these personal notes which were said to exist, but for purposes of this decision, I will assume that they do in fact exist. In the context of these facts, it is clear to me that the teacher made her own notes as a memory aid concerning the boy's homework notebook, since she did not retain it in her possession. Any evaluative comments or grading specifically relating to the homework would have appeared in the boy's notebook which his parents would see, since they had to sign the book. Any formal grading, some of which may have been based on homework, would appear in official school records. The Board's official records do not contain the teacher's personal notes. They were for her own use and not for communication to any other person.

Petitioners express concern that the teacher may reveal her personal notes to other school staff for use in evaluating their son's performance in the future. No factual basis for this concern has been offered. I cannot hypothesize any rational basis for this concern. After the teacher has graded the pupil and no longer has him in her classes, the notes would be superfluous. The pupil records would contain resultant grades and those grades can and often are explained at parent-teacher conferences. Petitioners also express concern that the teacher will orally relate the substance of her notes to other staff members. Again, no factual or rational basis for this concern appears.

I **CONCLUDE** that petitioners have no legal right of access to a teacher's personal notes made as a memory aid under the above-cited statutes and regulations because they have been explicitly excluded from the definition of pupil records. Further, no other person has either physical or legal access to them based on the facts of this case. The teacher has not revealed any notes, although she told D.B. they existed in May 1992.

The law and regulations cited concern pupil records, access and the confidentiality of information in them. Petitioners suggest that oral statements of a teacher concerning her own observations of a pupil can be enjoined, which infers the possibility of a discovery deposition or inquiry as to what a teacher said, when, to whom, for what reason it was spoken and from what source it came. Based on the facts and legal conclusions in this case, there is no right to such an injunction or inquiry. Only if petitioners had evidence of breach of the confidentiality defined and required by statutes and regulation, could a remedy be sought. There is no such evidence and, absent information to the contrary, it cannot be assumed that a teacher will violate law and must therefore be enjoined from violation.

Because I have **CONCLUDED** that petitioners have no legal right of access to the personal notes in a teacher's possession which are not pupil records, I do not reach the issue of whether the Board has authority to order a teacher to disclose them. I have no doubt however, that depending on the nature of a claim and specific factual circumstances, a teacher could be required to disclose notes relating to and made in the course of duty as an employee of a school district. Such a claim is not presented here.

It is therefore **ORDERED** that the petition of D.B. and K.B. be **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 7th Floor, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 13, 1993
Date

Naomi Dower LaBastille
NAOMI DOWER-LA BASTILLE, ALJ

Receipt Acknowledged:

5/18/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 21 1993
Date

OFFICE OF ADMINISTRATIVE LAW

jz

OAL DKT. NO. EDU 8921-92

D.B. AND K.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon review of the record, the Commissioner agrees with and adopts as her own the finding and conclusions of the Administrative Law Judge. The petition is therefore dismissed.

COMMISSIONER OF EDUCATION

JUNE 22, 1993

DATE OF MAILING - JUNE 22, 1993

142-93

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

JUNE 22, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 2317-92
AGENCY DKT. NO. 72-3/92

ELISSA A. KISH,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF ELMWOOD PARK BERGEN COUNTY,
Respondent.

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

Matthew P. DeMaria, Esq., for respondent

Record Closed: May 19, 1993 Decided: May 21, 1993

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

On March 20, 1992, petitioner, Elissa Kish, filed a petition of appeal with the Commissioner of Education alleging that respondent, Board of Education of the Borough of Elmwood Park, had improperly failed to appoint her to the position of departmental facilitator, appointing instead nontenured supervisors to that position. Petitioner requested that she be reinstated to the position of departmental facilitator or to any other position to which she had seniority and/or a tenure claim.

Respondent filed an answer to the petition on March 25, 1992, contending that petitioner had failed to state a cause of action and that respondent had acted within the requirements of the law. Respondent contended that petitioner is not entitled to the "new stipended part-time position entitled, facilitator."

On March 30, 1992, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The case was assigned to Judge Mumtaz Bari-Brown on April 30, 1992, and a telephone prehearing conference was scheduled for June 1, 1992. On that date, a telephone prehearing conference was held. The issues were isolated and a hearing was scheduled for March 1 and 2, 1993, at the Office of Administrative Law.

In response to petitioner's motion, Judge Bari-Brown, on February 25, 1993, ordered that petitioner be permitted to amend her petition of appeal to include an additional issue as to her entitlement to the position of director of curriculum based on seniority and tenure. On or about February 25, 1993, the matter was reassigned to the undersigned judge.

As a result of settlement conferences held between the parties, the parties agreed to settle this matter and the hearing was not held. The parties have prepared the attached Stipulation of Settlement indicating the terms of settlement, which is attached and incorporated herein.

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

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

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and

therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 7th Floor, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 21, 1993
Date

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

5/25/93
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 27 1993
Date

Joyce LaVecchia
OFFICE OF ADMINISTRATIVE LAW

dgi/e

MAY 19 10 06 AM '93

LAKE AND SCHWARTZ
ATTORNEYS AT LAW
2109 Pennington Road
Trenton, N.J. 08638
(609) 771-6767
ATTORNEYS FOR

Plaintiff *Elissa Kish* *vs.* *Defendant* Board of Ed. of the Borough of Elmwood Park	**Before The Commissioner of Education, State of New Jersey** *Docket No. EDU - 2317-92* Agency Docket No. 72-3/92 *CIVIL ACTION*

Stipulation of Settlement

The parties to this cause of action have agreed to settle this dispute based on the following terms:

1. Petitioner, Elissa Kish, shall be assigned as of May 1, 1993 to the position of Reading Resource Teacher/Facilitator Generalist which has been approved by the Superintendent for the County of Bergen and which shall require a supervisor's certificate and which is considered a supervisor position for tenure purposes.

2. Petitioner shall be compensated at an annual salary of $59,401.00 for the 1992-1993 school year, prorated from May 1, 1993 to June 30 1993 which amount shall be $11,880 and in all subsequent years of employment shall receive all increments and other emoluments to which she is entitled.

3. Petitioner shall receive retroactive compensation of $3000 per annum fro the date on which the position of " Facilitator " was first filled (September 1, 1991) to May 1, 1993.

4. Petitioner's workyear and workload as a Facilitator shall be the same as for other Facilitator positions.

5. The Respondent, Board of Education, shall take all necessary measures to notify the Teachers Pension and Annuity Fund that Petitioner has been reemployed retroactive to the date on which the position of Facilitator was created, which is September 1 1991 and shall make all appropriate contributions from that date forward so as to provide to Petitioner employment credit from September 1, 1991 to May 1, 1993.

6. In the event that the position of Reading Resource Teacher/Facilitator Generalist is abolished while Petitioner is employed in this capacity, the Respondent agrees to recognize Petitioner's seniority in the District and assign Petitioner to such category of position in which Petitioner has seniority and if it is determined that Petitioner does not have seniority to any existing category of position, then the Respondent agrees to continue Petitioner's employ as a classroom teacher at a salary rate based on the top of the teachers' salary guide until Petitioner has acquired twenty five years of service and contribution to the Teachers Pension and Annuity Fund. In consideration therefore, Petitioner agrees to tender her resignation from her employ with the Respondent effective upon the completion of twenty five years of service and contibution to the Teachers Pension and Annuity Fund.

7. In consideration of the terms set forth in this Agreement Petitioner agrees to withdraw the Petition of Appeal in this cause of action with prejudice.

Robert M. Schwartz for the Petitioner.

Matthew P. DeMaria for the Respondent.

Elissa A. Kish

Elissa A. Kish

Elmwood Park Bd. of Ed.

OAL DKT. NO. EDU 2317-92

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

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

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

COMMISSIONER OF EDUCATION

JUNE 22, 1993

DATE OF MAILING - JUNE 22, 1993

143-93

ELAINE HINCKLEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JUNE 22, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7809-92
AGENCY DKT. NO. 428-9/92

ELAINE HINCKLEY,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN,
Respondent.

Kenneth I. Nowak, Esq., for petitioner (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Howard M. Newman, Esq., for respondent (Kalac, Newman, Lavender & Campbell, attorneys)

Record Closed: May 17, 1993 Decided: May 17, 1993

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

STATEMENT OF CASE

This matter was transmitted to the Office of Administrative Law on October 7, 1992 for a hearing pursuant to N.J.S.A. 52:14B-1 through -15 and N.J.S.A. 52:14F-1 through -13.

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

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

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

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded. I further note that the parties have agreed to waive the right to file exceptions and cross-exceptions.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

17 MAY 1993
Date

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

5/19/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 21 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

km

KALAC, NEWMAN, LAVENDER & CAMPBELL
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(908)671-6100
Attorneys for Respondent

STATE OF NEW JERSEY
BEFORE THE COMMISSIONER OF EDUCATION
Docket No. 428-9/92

ELAINE M. HINCKLEY,

Petitioner,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN,

Respondent.

STIPULATION OF SETTLEMENT

WHEREAS, on September 11, 1992, Elaine M. Hinckley (hereinafter "Hinckley") filed a Petition against the Middletown Township Board of Education (hereinafter "Board") seeking inter alia recognition of tenure rights and certain payments and reimbursements; and

WHEREAS, the parties have decided to amicably resolve this controversy.

NOW, THEREFORE, the parties stipulate settlement as follows of the within controversy as follows:

1. Hinckley is deemed a tenured employee of the Middletown Township School District as of June 12, 1992, holding an instructional certificate with endorsements in elementary education and teacher of the handicapped.

2. Hinckley is to be reimbursed the sum of $876.52 for lost wages for the period of June 12, 1992 through June 30, 1992,

3. Hinckley is to be reimbursed the sum of $385.04 for medical bills paid by her.

KALAC, NEWMAN, LAVENDER & CAMPBELL
Attorneys for the Middletown Township Board of Education

Dated: By: Howard M. Newman

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
Attorneys for Elaine M. Hinckley

Dated: 5/13/93 By: Kenneth I. Nowak

OAL DKT. NO. EDU 7809-92

ELAINE HINCKLEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

JUNE 22, 1993

DATE OF MAILING - JUNE 22, 1993

14493

144-93

PAUL METZGER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning teaching staff member alleged Board violated his tenure and seniority rights by failing to offer him a supervisory position while he was first on a preferred eligibility list as ordered by prior 1979 Commissioner decision. Petitioner appealed to Superior Court for enforcement of said decision. Board claimed petition was filed untimely.

ALJ found petition was not out-of-time. Superior Court had remanded matter to Commissioner for enforcement of decision in proper forum. Matter thus was not subject to 90-day rule. Moreover, ALJ found that when supervisory position was eventually re-established, individual other than petitioner had greater seniority in supervisory category. Petition was dismissed.

Commissioner adopted findings and determination in initial decision.

JUNE 22, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4577-92
AGENCY DKT. NO. 268-6/92

PAUL METZGER,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO,
Respondent.

Joel S. Selikoff, Esq., for petitioner (Selikoff & Cohen, attorneys)

Lisa H. James, Esq., for respondent (Hill, Wallack, attorneys)

Record Closed: March 29, 1993 Decided: May 13, 1993

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

Paul Metzger, petitioner, alleges and the Willingboro Board of Education, respondent, denies that the Board violated his tenure and seniority rights by failing to offer him a supervisory position while he was on a preferred eligibility list.

This case began as a complaint in the Superior Court, Burlington County, pursuant to R. 4:67-6. The rule grants jurisdiction to the court to enforce a decision of an administrative agency. The petitioner alleged in Superior Court that an October 23, 1979 Commissioner of Education decision was violated when the

respondent Board appointed another person to a supervisory position instead of the petitioner. The petitioner stated he became aware of this appointment on January 11, 1991. An attempt by the Board and local teacher union to resolve the matter was unsuccessful and the action was filed on July 16, 1991.

The background of the action involves a Commissioner of Education decision dated October 23, 1979. In that case, the petitioner challenged a reduction in force (RIF) and the resulting reduction in his salary because of his reversion from a coordinator position to a classroom teacher position. He also claimed to be tenured as a subject supervisor.

The Commissioner found that the petitioner had been employed in September 1972 as a teacher and was also assigned duties as department chair of health and physical education. The petitioner began his duties as coordinator of health and physical education in September 1974. He was properly certified in all positions held. The petitioner was notified by letter of February 15, 1978 that his transfer from coordinator to classroom teacher would be effective February 21, 1978.

Based on a hearing examiner report and a review of the pleadings, evidence and testimony, the Commissioner decided that the Board properly exercised its statutory and discretionary authority to reduce its force through the elimination of the coordinator position for economic reasons. N.J.S.A. 18A:28-9. The petitioner's transfer to a classroom teacher position was approved. The Commissioner also determined that the petitioner was tenured as supervisor of health and physical education. The Commissioner directed the Board to notify the petitioner of his sole placement on a preferred eligible list because of his seniority pursuant to N.J.S.A. 18A:28-9 et seq. The Commissioner also advised the Board to replace the title of coordinator with the title of supervisor in the event the position were to be reinstated.

It is stipulated that neither the transfer to a teaching position nor the salary adjustment reflected adversely on the petitioner's performance. The petitioner remained in the classroom teacher position until September 1, 1992 when he became Supervisor of Physical of Education, Health Education, Driver Education and Social Studies at Willingboro High School.

Prior to September 1, 1976, the Board used the title "Department Chairman" to refer to individuals who acted as immediate supervisors of teachers in particular curriculum areas. During that time, department chairmen were not required to possess certification as supervisors under N.J.A.C. 6:11-9.6. Beginning September 1, 1976, the Board required all individuals serving as department chairmen to hold a New Jersey supervisory certificate pursuant to Board Policy No. 4111 (J-3).

During the time that the petitioner served as coordinator of health and physical education, 1974-February 21, 1978, the persons serving as first level supervisors of teachers in the subject area of health education, physical education and driver education were referred to as "department chairman of health and physical education" at each school. This title was retained after the district-wide position of coordinator of health and physical education was abolished in 1978. By April 1989, the Board had eliminated the position title "department chairman" in favor of a more limited number of full-time "supervisor of instruction" positions. The persons holding these positions were given particular curriculum areas to supervise.

William Roller was employed by the Board as department chairperson in the science department at the Levitt Junior High School in the 1968-69 school year. In the 1969-70 and 1970-71 school years, Roller was employed as a teacher and department chairperson of physical education at the Levitt Junior High School. During the 1971-72 school year, he was employed as a teacher and department chairperson of physical education at John F. Kennedy Senior High School. In or about January 1972, Roller obtained a supervisory certificate. During the academic years 1972-73 through 1984-85, Roller was employed as an assistant principal at the Levitt Junior High School as well as the Memorial School. In 1984-85, Roller served as physical education department chairperson at John F. Kennedy High School. On September 3, 1985, he was appointed to continue in the position of department chairperson of physical education at John F. Kennedy High School for the 1985-86 school year. However, on October 31, 1985, Roller was transferred to the position of department chairperson of physical education and driver education at Willingboro High School. In 1986-87, he was transferred to the position of department chairperson of physical education at John F. Kennedy High School. In 1987-88 and 1988-89, Roller continued to perform the duties of department chairperson of physical education and driver education at John F. Kennedy High School.

In 1989-90, Roller was employed as supervisor of instruction of physical education, health and driver education at Willingboro High School and John F. Kennedy Junior High School. In 1990-91 and 1991-92 Roller continued in that position. His responsibilities are contained in Exhibit J-4.

Exhibit J-5 is a document the Board prepared and relied on to determine the identity of the individual it believed to be entitled to the supervisor of instruction-physical education, health education and driver education position. The Board has not offered the petitioner the position of supervisor of instruction in the curriculum area of physical education, health education and driver education at any time since June 30, 1974.

On July 16, 1991, the petitioner filed a certified complaint in the Superior Court of New Jersey, Chancery Division, Burlington County, alleging that the Board, by creating the position of supervisor of health and physical education and appointing Roller to the position, failed to comply with the Commissioner's October 23, 1979 decision.

After originally assuming jurisdiction, the court reviewed the papers and, on June 8, 1992, referred the matter to the Commissioner of Education for determination and resolution. In an accompanying letter, the court explained its reasons for the referral.

The matter was transferred to the Department of Education which, in turn, transmitted it to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14B-1 through -15 and N.J.S.A. 52:14F-1 through -13. After notice, a telephone conference was held on October 13, 1992 with counsel and the judge then assigned. Among other things, it was decided that the issues to be resolved are (1) was the petitioner's claim filed on July 16, 1991 out-of-time to attack an appointment made in 1989 and (2) was the petitioner or William Roller the more senior staff member qualified when the position was reestablished.

Thereafter, the matter was assigned to me. Counsel and I conferred by telephone on February 16, 1993 and counsel represented that, in consideration of the stipulations filed with the Superior Court, the matter could proceed on motion and cross-motion for summary judgment, supplemented, if necessary, by limited testimony on a narrow question.

On February 17, 1993, I took limited testimony by telephone and counsel thereafter filed their moving and supporting papers.

ARGUMENTS

Respondent

The Board states its motion should be granted because there are three separate reasons that the petition should be dismissed as untimely. First, according to the petitioner's testimony, he became aware of Roller's assignment as a supervisor of instruction of health and physical education on January 11, 1991. He states he immediately went to his union to challenge Roller's entitlement to the job. Whatever may have happened, he did not institute a complaint in the Superior Court, Chancery Division until July 16, 1991. The six-month gap between his notice of the Board's action appointing Roller to the position and his filing of a complaint renders the current petition untimely.

N.J.A.C. 6:24-1.2(c) provides that a petitioner has only 90 days from notice of a Board's action to file a petition with the Commissioner of Education. That the petitioner sought to challenge the action in the Superior Court does not enlarge the time. The matter clearly was an issue for the Commissioner of Education to determine, not the Superior Court. The Chancery judge agreed and referred the matter to the Commissioner. At that point, the petitioner was out-of-time to seek relief before the Commissioner.

If the petitioner decided to seek relief in the Superior Court first, he still had an obligation to do so within 90 days from his notice of the action because he sought relief from a discretionary decision of the Board. The 90-day requirement is for the benefit of boards so that they will not have to defend discretionary decisions made years ago. Further, the petitioner does not get another 90 days from the time another forum determines it does not have jurisdiction. In *Riely v. Hunterdon Central High Bd. of Ed.*, 173 *N.J. Super.* 109 (App. Div. 1980), the court stated that a petitioner cannot gamble on a favorable ruling from another forum and then seek relief from the Commissioner if the petition is then out-of-time. *Id.* at 114. It is reasonable to infer that the petitioner sought relief in the Superior Court because he was out-of-time to file a petition with the Commissioner, although the Commissioner obviously provides the proper forum.

Second, the petition is untimely because the Board eliminated a position title "department chairman" in favor of the position title "supervisor of instruction" in April 1989. Roller has held the position of supervisor of instruction-health and physical education since the 1989-school year. In a relatively small district, the petitioner should have known prior to January 1991 that the Board created the position of supervisor of instruction.

The petitioner should have known that Roller held that position prior to January 1991. The petitioner testified that as an adaptive health teacher, he was required to go from school to school to instruct special education pupils in physical education. He held that position in 1989-90. Although he denied having been to Willingboro High School during that time period it is unlikely he would not have gone to the only high school in the district at the time. Also, he knew Roller prior to the time that he was in the coordinator position. This creates an inference that he would have had contact with him to know what position Roller was holding in 1989-90. Also, by law, each assignment by the Board has to be voted on at a public meeting. Roller was appointed to the supervisor of instruction position at the June 1989 public meeting. The petitioner stated he does not attend such meetings. The public meetings still serve to give everyone constructive notice of which positions are being created and who fills them. Thus, the petitioner knew or should have known of the appointment before January 11, 1991 based on the Board's public action.

Third, and last, if the petition is not dismissed for the above reasons, the petitioner should have challenged Roller's supervisor appointment in the 1984-85. In 1984-85, Roller held the title of department chair rather than supervisor of instruction. However, if what the petitioner says is true, that he has more seniority than Roller, then he had more seniority in 1984. Clearly, if the petitioner believed he was going to be supervised by someone with less seniority regardless of title, he should have raised his entitlement to the supervisory position then. The Commissioner's decision placing him on a preferred eligibility list in 1979 would have made him aware of his entitlement. Therefore, the petition was actually untimely 90 days after the petitioner had notice that Roller was supervising him in the fall of 1984.

No matter what date one counts as the date the petitioner had notice of the Board's action, July 16, 1991 is well beyond the 90-day administrative time limit for bringing a petition of appeal. Therefore, the Board demands that the petition be dismissed.

Petitioner

The petitioner argues that N.J.A.C. 6:24-1.16 allows relaxation of any rule in the Chapter where not to do so would work an injustice or where strict adherence to the rule would be unnecessary or inappropriate. To apply the 90-day rule, N.J.A.C. 6:24-1.2(c), would work an injustice in this case, would be unnecessary and inappropriate within the strict wording of the rule.

First, the petitioner's cause of action was not one in which he initiated a contested case before the Commissioner under the school laws. Rather, it was an action to enforce a previous Commissioner's decision. In that context, he had every right to initiate the matter in court under the court rule which specifically related to enforcement actions. He did so. The court did not dismiss the action on grounds of timeliness or jurisdiction, but was prepared to rule on the merits until it decided it needed the administrative expertise of the agency that issued the decision in question. Clearly, it would be unjust to now dismiss the action and therefore deny the petitioner enforcement of the earlier Commissioner's ruling, including the element of whether the respondent violated the earlier decision, simply because the petitioner did not first bring this matter to the Commissioner within 90 days of January 11, 1991.

The petitioner chose to bring his dispute to an appropriate forum that had authority and jurisdiction to rule on it. The fact that the court chose otherwise should not serve to allow the Board to avoid a ruling on the merits. As noted in Pressler, Current N.J. Court Rules, Comment R. 4:67-6 (1993), the rule was promulgated because there was not a comprehensive statutory response designed to provide such a mechanism. To penalize the petitioner because he used the judicial procedure established by court rule to end confusion over how to enforce decisions of administrative agencies, instead of using the jurisdiction of the Commissioner (with the requisite 90-day rule), would allow the Board to sidestep a ruling on the merits of this matter on a technicality.

The court was satisfied that the petitioner brought his action in a timely manner and that the court had jurisdiction over the question. The agency to which the matter was transferred should be required to act on the merits of the transfer. The court transferred the case to the agency in order to obtain the agency's expertise. If the court had no jurisdiction over the matter, it would be entirely

appropriate to require the petitioner to meet all procedural requirements of the agency that had jurisdiction; that is, the agency before which he filed originally. The petitioner cites a rent control board case for the proposition that the court will not exercise primary jurisdiction unless authorized to do so. Glynn v. Park Tower Apartments, Inc. 213 N.J. Super. 357 (App. Div. 1986). The Appellate Division clearly stated that ordinarily a court should transfer a matter, over which it does not have jurisdiction, to the agency that does. But transfer will not be ordered in such matters where the plaintiff cannot satisfy the procedural requirements of the agency, including timeliness limitations.

Unlike Glynn, the court here did have jurisdiction to decide the merits of the case. Furthermore, the petitioner brought this action to that court in a timely manner. Because he did, the Commissioner should relax the 90-day rule and issue a decision on the merits of this matter. See also, Kaczmarek v. New Jersey Turnpike Authority, 77 N.J. 329 (1978).

The Board's reliance on Riely, above, is misplaced. Proceeding to an arbitration is not analogous to filing an action in the Superior Court which is expressly authorized by court rule. Moreover, unlike the present case, Riely sought an action before the Commissioner whereas the petitioner here was ordered before the Commissioner.

Finally, the Board argues at p. 4 of its brief that the matter should be deemed untimely based on certain inferences it claims should reasonably be drawn from the minimal testimony in the record. For purposes of this motion, the testimony is useless. The petitioner testified that Roller did not become supervisor of instruction-health and physical education until 1990-91, and not the preceding year. Even assuming that the stipulation is correct, the testimony fails to establish by a preponderance of the evidence that the petitioner became aware January 11, 1991 that Roller was serving in the disputed position. The petitioner's testimony as to when he learned of this fact stands unchallenged by any contradictory testimony. Accordingly, the Board's arguments furnish no basis on which to conclude that the facts are other than as the petitioner has stated.

DETERMINATION

The first issue to be decided is whether the petitioner's claim filed on July 16, 1991 was an out-of-time attack on an appointment made in 1989. The short

answer is no. The petitioner brought a summary proceeding to enforce agency orders pursuant to R. 4:67-6. The rule applies to all actions by a state administrative agency as defined in the New Jersey Administrative Procedures Act, N.J.S.A. 52:14B-1 through -13. The rule applies to actions brought to enforce a written order or determination whether final or interlocutory. The rule requires that the action be brought in the Superior Court Law Division or in any other court having statutory jurisdiction over the specific matter. The rule is designed to give trial divisions of the Superior Court broad jurisdiction to deal with enforcement proceedings, required to be brought by way of a summary action, but to preserve fully the jurisdiction of the Appellate Division to review the merits of state agency determinations pursuant to R. 2:2-3(a)(2).

The petitioner's case meets all criteria established by the rule and related rules. The petitioner had a School Law Decision in his favor on the record. He sought enforcement of that decision in the proper forum. There being some leeway in the decision's language, the court wisely transferred the matter to the Commissioner of Education. See, Judge Gottlieb's letter of June 8, 1992 to counsel. The judge points out that he avoids the peril of trying to read the Commissioner's mind merely by referring the matter to the Commissioner.

The petitioner did not attempt to open this matter before the Commissioner. Had Judge Gottlieb had no reservations about the language, he was prepared to rule. In consideration of these concededly unique circumstances, I **CONCLUDE** that the action is timely. A court of competent jurisdiction has asked the Commissioner to apply her expertise to guide the court's judgment. The matter having come on in this way, it is not subject to the 90-day rule.

The second issue is whether the petitioner or William Roller was the more senior qualified staff member when the subject position was reestablished. Among the documents submitted are Exhibits J-5, J-6 and J-7. Exhibit J-5 lists physical education supervisors at the district's secondary schools for the years 1960-61 through 1989-90. Roller's name first appears in the 1969-70 school year at Levitt Junior High School. It appears again in 1970-71 at Levitt and in 1971-72 at John F. Kennedy High School. Metzger's name appears for the first time in 1972-73 at John F. Kennedy High School. It appears at the same school for the 1973-74 school year. Neither name appears again until Roller's name appears in the 1984-85 school year at John F. Kennedy High School. Roller is shown at Willingboro High School for

1985-86 and again at John F. Kennedy High School for 1986-87, 1987-88 and 1988-89. He then appears under Willingboro High School for the 1989-90 school year.

Exhibit J-7 shows Roller's professional history in the district. In 1968-69 he served as a Science Department chairperson. In 1969-70 through 1971-72 he served as a physical education teacher and department chairperson. From 1972-73 through 1983-84 he was an assistant principal. From 1984-85 through 1988-89 he served as physical education teacher and department head. From 1989-90 through 1991-92, he is listed as a supervisor.

Exhibit J-6 shows Metzger's professional history. In 1972-73 and 1973-74 he was a physical education teacher and department chairperson. From September 1974 until February 21, 1978, he was coordinator of health and physical education. He is listed as a teacher from February 21, 1978 through 1991-92.

Exhibit J-7 shows Roller as a department chair from 1968-69 through 1971-72. He served as an assistant principal from 1972-73 through 1983-84. From 1984-85 through 1988-89 he is shown as a department head. From 1989-90 through 1991-92 he is shown as a supervisor.

It is stipulated that prior to September 1, 1976, the Board used the title department chairman to refer to persons who performed as immediate supervisors of teachers in particular curriculum areas. In that period, department chairmen were not required to hold supervisor certification. Beginning September 1, 1976, the Board required all persons serving in the department chairman position to hold supervisory certification pursuant to Board Policy No. 4111.

It is also stipulated that Roller has held supervisor certification since January 1972 and Metzger, since September 1974.

When Metzger was the subject of a reduction in force on February 21, 1978, Roller was serving as an assistant principal. In the School Law Decision that is at the center of this case, the Commissioner held that the petitioner held the categorical position of subject supervisor in accordance with N.J.A.C. 6:3-1.10(k). (See, now, N.J.A.C. 6:3-1.10(l). There have been five amendments of this Code subsection since the School Law Decision of October 23, 1979). The Commissioner determined the petitioner was tenured as supervisor of health and physical education. He directed the Board to notify the petitioner "of his sole placement on

a preferred eligibility list due to his seniority . . . ." The Commissioner also advised the Board to replace the title of coordinator with the title of supervisor if the position were reinstituted.

In terms of service at the department head level or above, Roller is clearly senior to Metzger. The language in the 1979 decision, particularly the reference to sole placement, was correct at the time. However, time and events move forward. Since the 1979 decision, Roller served six years as an assistant principal, five years as a department head and then was appointed to the supervisor position controverted here. Prior to Metzger's first department chair position, Roller occupied a similar position for four years. Each person enjoys the benefit of tacking on subsequent service in other categories to the service in previously held categories.

Having reviewed the service records and having considered all documents and testimony in this matter, I **FIND** that William Roller is senior to Paul Metzger in the supervisor category. Metzger's seniority calculation was triggered by the February 1978 reduction in force. At the time, he may well have been the only person on the preferred eligible list in this category. Subsequently, however, Roller's assignment was changed. In the 1989-90 school year, he was made supervisor of instruction of physical education, health and driver education at the high school and junior high school. It is this position that Metzger claims.

If someone with greater seniority than Metzger did not exist, the Board would be required to offer the supervisor position to Metzger before appointing someone, with lesser seniority than Metzger, from within the system or from going outside the system to make an appointment. The facts are that Roller does exist and enjoys greater seniority in the supervisor category than Metzger. Accordingly, I **FIND** and **CONCLUDE** that as long as Roller holds the controverted position, Metzger has no claim to it.

I **ORDER** the petition of appeal **DISMISSED** on that basis.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

13 MAY 1993
Date

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

5/14/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 20 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

km

WITNESSES

Paul Metzger

EXHIBITS

J-1 Job Description, Coordinator of Health & Physical Education, June 12, 1972, 2 pp.

J-2 Commissioner of Education Decision, Metzger v. Willingboro Board of Education, October 23, 1979, 4 pp.

J-3 Board Policy No. 4111, July 27, 1981

J-4 Job Description, Supervisor of Instruction, February 1984, 2 pp.

J-5 List of physical education supervisors, secondary level, 1960-61 through 1989-90, 2 pp.

J-6 Service History, Dr. Paul Metzger, 2 pp.

J-7 Service History, William Roller, 2 pp.

J-8 Copy of Supervisor's Certificate, Paul Metzger, September 1970

J-9 Copy of Verified Complaint filed in Superior Court of Burlington County, July 16, 1991, 5 pp.

OAL DKT. NO. EDU 4577-92

PAUL METZGER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review of the record, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge and adopts the initial decision as the final decision in the matter for the reasons well stated therein.

Accordingly, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

JUNE 22, 1993

DATE OF MAILING - JUNE 22, 1993

145-93

S.M.,
PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBURY, GLOUCESTER COUNTY,
RESPONDENT.

COMMISSIONER OF EDUCATION
DECISION ON MOTION

JUNE 21, 1993

S. M., PETITIONER, V. BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBURY, GLOUCESTER COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION ON MOTION

For Petitioner, S.M., Pro Se
For Respondent, Michael Brennan, Esq. (Labrum and Doak)

This matter was opened before the Commissioner on June 17, 1993 by way of a Petition of Appeal and Request for Emergent Relief filed by Sandra Martin on behalf of her daughter, R.M., seeking an order from the Commissioner permitting R.M. to participate in graduation ceremonies from Woodbury High School on June 19, 1993. R.M. was notified on June 16, 1993 that she would not be graduating due to her failing Geometry, a course into which she was transferred in March 1993 because she was failing Algebra II. Petitioner avers that to deny her attendance at the graduation ceremonies is improper because she had tried to be removed from Algebra II earlier in the year but was refused by the math committee, and because she was transferred into a geometry class so late in the year, she could not then pass the final.

Pursuant to the Commissioner's authority under N.J.S.A. 18A:4-34, Dr. Elena Scambio, Assistant Commissioner for Urban and Field Services, was designated to hear and decide the matter.

On June 18, 1993 the oral arguments of the parties were heard by way of telephonic conference call. Upon consideration of those arguments, emergent relief was denied due to petitioner's failure to meet the standards for the granting of injunctive relief set forth in Crowe v. DiGioia, 90 N.J. 126, 132-134 (1982), namely, that petitioner will suffer

irreparable harm if not allowed to attend the graduation ceremony or that she had a likelihood of prevailing on the merits of her claim that it was improper to deny her participation in graduation. A weighing of the arguments of the parties led the Assistant Commissioner to conclude that while the district was not without flaw in its handling of R.M.'s mathematics requirements for graduation, it was not likely that R.M. could demonstrate that it was arbitrary, capricious or unreasonable that she be denied attendance at the graduation ceremonies because R.M. had previously taken and failed both Algebra II and Geometry and that she had high absenteeism through cuts in Geometry after being transferred there in March.

In denying emergent relief, the Assistant Commissioner urged that R.M. enroll as soon as possible in summer school and that the district assist her in this endeavor by advising her on an appropriate mathematics course, other than Algebra II or Geometry, that will meet graduation requirements.

Accordingly, the Motion for Emergent Relief is denied and the Petition of Appeal dismissed given that graduation occurred on June 19, 1993, thus mooting the necessity for any further proceedings in this matter.

IT IS SO ORDERED.

JUNE 21, 1993

DATE OF MAILING - JUNE 23, 1993

Glenn J. Gerl

ASSISTANT COMMISSIONER OF EDUCATION

146-93

204-90
(119+-91)

146-93

IN THE MATTER OF THE TENURE :
HEARING OF ROBERT B. OLEK, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT, OF THE CITY OF : DECISION ON REMAND
GARFIELD, BERGEN COUNTY. :
:

SYNOPSIS

State Board remanded for hearing a tenure matter involving Commissioner's dismissal of respondent teacher and coach for possession of hypodermic syringes, marijuana, steroids and other prescription drugs for which he did not have valid prescription. Commissioner had determined on Board's Motion for Summary Judgment that teacher's offenses warranted forfeiture of employment pursuant to N.J.S.A. 2C:51-2 as they may not have occurred on school property or engaged pupils but did intimately touch on his role as teacher.

State Board directed analysis of facts to determine nexus between offense and employment and to consider all mitigating circumstances, as it is unclear whether Commissioner fully considered such factors. (Moore, Arocha) ALJ found factual record on hearing demonstrated that respondent's offenses touch and involve his employment to the extent of meriting forfeiture pursuant to N.J.S.A. 2C:51-2. ALJ found that although there were such mitigating factors as respondent's prior satisfactory record in classroom and lack of disciplinary problems with Board prior to incident, these cannot be considered mitigating circumstances within the meaning of a forfeiture analysis. They are thus insufficient to outweigh serious nature and circumstances of respondent's offenses. ALJ ordered that respondent forfeit his employment as teacher and coach.

Commissioner concurred with ALJ's finding that a sufficient nexus between offense and employment had been established for respondent to have forfeited his position as teacher, and that mitigating factors did not outweigh such forfeiture. Commissioner referred matter to State Board of Examiners for appropriate action.

JUNE 28, 1993

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1944-92

AGENCY DKT. NO. 51-2/89

STATE BOARD NO. 36-91

(EDU 8346-90 AND EDU 2640-89 -- ON REMAND)

SCHOOL DISTRICT OF THE CITY OF GARFIELD, BERGEN COUNTY,

Petitioner,

v.

ROBERT B. OLEK,

Respondent.

Toni Belford Damiano, Esq., for petitioner
(Damiano and Cerrutti attorneys)

Robert Graves Rosenberg, Esq., Special Counsel, for petitioner

Sanford R. Oxfeld, Esq., for respondent
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Record Closed: March 26, 1993 Decided: May 10, 1993

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

PROCEDURAL HISTORY

On December 9, 1988, the Garfield Board of Education (Board) suspended respondent, a teacher, after a search of his home by the County Prosecutor's Office revealed the presence of hypodermic syringes, a small quantity of marijuana, and large amounts of steroids and other prescription drugs for which respondent did not have a valid prescription. On March 15, 1989, the Board certified charges of conduct unbecoming a teaching staff member against respondent. On April 6, 1989, respondent filed an answer denying that he had engaged in conduct unbecoming a teacher. On April 11, 1989, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 54:14B-1 to -15 and *N.J.S.A.* 54:14F-1 to -13.

After notice to all parties, a prehearing conference was held on May 25, 1989. In July of 1989, respondent pled guilty to the following charges: Possession of a hypodermic syringe or needle, in violation of *N.J.S.A.* 2C:36-6; possession of a prescription legend drug, in violation of *N.J.S.A.* 2A:170-77.8; and obtaining a prescription legend drug unlawfully, in violation of *N.J.S.A.* 2A:170-77.5 (J-2). He was sentenced on November 14, 1989 (J-3).

In August of 1989, the Board filed a motion for summary decision. During the time the motion was pending, the parties entered into settlement discussions which resulted in a settlement agreement. Thereafter, respondent challenged the agreement, contending that he should not be held to its terms. The undersigned administrative law judge concluded that the terms of the settlement agreement were binding and respondent appealed. The Commissioner of Education voided the agreement and remanded the case on October 11, 1990, for hearing on the merits of the tenure charges.

On remand, the Board renewed its motion for summary decision, seeking respondent's removal by means of the forfeiture statute, *N.J.S.A.* 2C:51-2. Respondent maintained that the forfeiture provisions did not apply because the offenses, which did not involve controlled dangerous substances, did not satisfy the required elements of the statute. On May 15, 1991, the undersigned administrative law judge recommended granting the Board's motion. The undersigned judge

determined that respondent's disorderly person offenses involving the possession and unlawful use of steroids and other related offenses touched and involved his position as a public school teacher and coach. The undersigned concluded that the State's strong policy against encouraging or condoning the use of drugs, respondent's close contact with students, the seriousness of the offense, and the violation of the public trust that has occurred with the infraction make respondent's continued employment incompatible with the duties required by the position. On June 27, 1991, the Commissioner adopted the administrative law judge's recommended decision, concluding that respondent had forfeited his position and granting the Board's motion for summary decision.

Of import, the Commissioner determined that he had jurisdiction to invoke the forfeiture statute. He indicated that he did so in the instant case because while the "specific offenses of which Olek was convicted may not 'involve' his employment in the sense they did not occur on school property, engage school pupils, or center on school affairs, they so 'intimately' touch upon his role as a teacher that his continued service in that position is simply not viable."

The Commissioner concurred with the passages from *Moore v. Youth Correctional Institute*, 230 *N.J. Super.* 374 (App. Div. 1989), *aff'd,* 119 *N.J.* 256 (1990) and *Arocha and Gonzalez v. Hudson County Area Vocational and Technical Schools BOE*, OAL DKT. EDU 9293-83 (July 2, 1984), *adopted,* Comm'r of Ed. (August 16, 1984), *rejected on other grounds*, State Board (April 8, 1985), quoted by the undersigned in her initial decision, as well as with her application of those passages to the instant matter.

More particularly, the Commissioner held that he was wholly unpersuaded by Olek's arguments that because his offenses involved steroids, rather than controlled dangerous substances, the holdings of *Arocha* and *Gonzalez* should not apply to him. The Commissioner determined that the policy set forth in *Arocha* and *Gonzalez* was no less applicable to steroids than to marijuana. For purposes of analyzing whether an offense "touches upon" school employment, the Commissioner stated the fact "that steroids are not controlled dangerous substances within the legislative and regulatory definition of that term is manifestly a distinction without a difference."

Thus, the Commissioner determined that "while his offenses did not directly involve students or his school district, while employed as a teacher Olek undisputedly used and possessed steroids in contravention of law and public policy. His offense is the more egregious in that he did so from a unique position, that of a science teacher, who by training would be presumed by students to have some clinical knowledge of the use and effects of drugs; that of mentor, whom students demonstrably admired and to whom they frequently turned for advice about body building and fitness independent of his coaching activities and that of former wrestling coach, a person viewed as an obvious authority with respect to physical development." Thus, the Commissioner concluded that under all of the circumstances, it seems undisputable that Olek's infraction "casts a shadow over [him] as to make his continued service appear incompatible with the traits of trustworthiness, honesty and obedience to law." *Moore,* 230 ***N.J. Super.*** at 270.

In particular, the Commissioner noted that respondent's conduct has violated precisely the duty to avoid conduct that encourages or condones drug use that has been set down as a cardinal rule for all "contact" school employees, not merely teachers, who were explicitly held to an even higher standard of conduct by the State Board of Education. *Arocha and Gonzalez, supra,* at 8.

Respondent filed an appeal to the State Board from the decision of the Commissioner challenging the Commissioner's finding of a nexus without additional proceedings in his application of *Arocha* to the facts of this case.

On March 4, 1992, the State Board reversed the Commissioner's decision to grant summary judgment to the Board and remanded for further proceedings. More particularly, the State Board determined that the limited record in the instant case did not enable it to undertake the careful examination required by *Moore* or permit a finding on the relationship between respondent's employment and the offenses to which he pleaded guilty. The State Board indicated the following:

> We are unable to determine on the record whether respondent was employed as a wrestling coach at the time of his arrest, the specific period of time in which he was employed in such capacity, the specific coaching assignment or assignments he held, the duties and responsibilities of such assignments and the qualifications required thereof. It is axiomatic that a determination of the nexus between an

> offense and employment necessarily requires agreement on the employment held or sufficient evidence to permit such a factual determination.

The State Board continued:

> As in *Moore*, careful examination of the facts, including respondent's employment and the qualifications required thereof, is necessary in order to determine whether the offenses to which respondent pleaded guilty, involving the use and possesion of steroids found in his home, touched or involved his employment in the district so as to warrant imposition of the harsh penalty of forfeiture. Such analysis must also include consideration of all mitigating circumstances. *Moore, supra* at 268, *Arocha, supra* slip op. at 8. In that the Commissioner found that the nature of respondent's offenses precluded the applicability of mitigating factors, it is unclear whether he fully considered such factors or provided respondent with ample opportunity to demonstrate their existence and pertinence.

The State Board determined that its holding in *Arocha* could not be applied automatically to the facts of this case so as to eliminate the necessity for such a thorough analysis. More particularly, the State Board determined that steroids constitute a class of substances distinguished in their nature from those which they intended to address in *Arocha.* The fact that they are not controlled dangerous substances cannot be regarded as a "distinction without a difference." Thus, the State Board, on the limited record before them, declined to expand its holding in *Arocha*, which permitted a finding of forfeiture merely upon showing that the convicted employee had significant student contact to encompass offenses involving steroids.

On March 16, 1992, this matter was remanded to the undersigned judge for proceedings consistent with the State Board's decision of March 4, 1992. The matter was assigned to the undersigned judge on March 20, 1992, and a prehearing conference scheduled for May 18, 1992. A conference was held on May 18, 1992, at which time the parties agreed that the filing of a Notice of Appeal with the Appellate Division did not divest all lower courts of jurisdiction pending a decision on the appeal. A hearing was scheduled for December 10, 11, and 17, 1992.

As a result of a possible settlement being reached in this matter, the hearing was adjourned to January 22, 1993. The matter was not resolved, and the hearing was held on January 22, 1993. At the conclusion of the hearing in this matter, the parties submitted briefs, and the record closed on March 26, 1993, the day established for the last submission in this matter. Witnesses who testified and exhibits considered in deciding this case are listed in the attached appendix.

TESTIMONY

First to testify was James Tantillo, principal of Garfield High School for twenty-three years. He has known Mr. Olek, a chemistry, physics, and earth science teacher, for a number of years. Noting that the building is under his auspices, the witness is familiar with the sports program. Mr. Olek made a request to be a wrestling coach, and he was so designated in 1988-89. Tantillo witnessed Olek participate as a coach on a daily basis, he saw Mr. Olek on the gym floor with students, and he stated that Olek went to the wrestling meets. Noting that wrestling was a winter sport, Tantillo stated that the team's practice began the day after Thanksgiving; Olek's incident occurred two weeks later. There had been no official wrestling match yet. Prior to the 1988-89 school year, Olek made himself present in the gym area during the wrestling season. As a teacher, Olek had every reason to be in the gym to assist or encourage the boys.

Tantillo, who had observed Olek as a teacher, stated that Mr. Olek's performance in the classroom is satisfactory and that he had good evaluations. The witness observed changes in Olek's behavior; Olek was weightlifting and was more aggressive. During the 1986-87 school year, Olek volunteered to take the students to the gym in Pompton Lakes, apparently to weightlift and to get in shape. In 1986-87 and 1987-88, Tantillo witnessed Olek, who had volunteered his services, on the floor assisting students in weightlifting and exercise. Tantillo had not encouraged Olek to assist. He recalled that the health teacher indicated that Olek might know about books on steriods and, thus, Tantillo spoke to Olek about steroids. Olek was knowledgeable and suggested reading material on steroids for students to do a paper for the health teacher.

On cross-examination, the witness indicated that the students had asked Olek for books on steroids for a paper for health. Olek had indicated that the books would be in the library. The librarian came to Mr. Tantillo and said that there was such an interest in the subject and that they should have such books on the shelf. In addition, the health teacher spoke to Tantillo at least two years prior to the incident. Tantillo spoke to Olek, who wanted the students to know about the bad effects of steroids.

Tantillo indicated that Don DeLuca was the head wrestling coach in 1988-89; the assistant wrestling coach was Charles Rigoloisi. Stipends were paid to them for which board action was required. He was not aware that Olek had not received the money and opined that if not, it was because of the incident. Olek was recommended by Franklyn Marrel Dawson, the athletic director, for the 1988-89 year. The athletic director decides who will be coach and confers with Tantillo. Agreeing that the board makes appointments, the witness was not sure that there was a board resolution in regard to Olek. Since coaches are generally appointed in advance to an open slot, it was possible to put Olek in the position and have the resolution approved at the December board meeting. If he was not appointed by the board, it was due to the allegations.

The witness had no board resolution appointing Olek and had not looked for such a resolution. Tantillo indicated, however, that Olek was an assistant coach on recommendation of the athletic director and superintendent. If Olek was appointed coach, he would have received something in writing. Questioned as to whether Olek had received something in writing for 1988-89, the witness indicated that Dawson told him that there was verbal notification. Tantillo believed that if Olek had not been approved at the November meeting, Olek was to be approved at the December board meeting. Tantillo noted that the alleged incident occurred on December 7, and he spoke to Olek on December 8. Olek did whatever he did in the wrestling program during the little more than the week he served in that position. He indicated that Olek, a spectator of the progam for many years (prior to 1988-89), had previously applied to be coach but had not received the appointment.

Tantillo indicated that Garfield has weight rooms where the students can work out, since weightlifting is an activity in physical education. Olek is not responsible

for weight training during the day. The head coach of the particular sport oversees the weight room as necessary for its athletes.

On redirect examination, the witness indicated that he had seen Olek in the weight room, which is available for all staff members, when the students were there. However, he did not observe Olek helping the students.

Next to testify was Susan Scudillo, a guidance counselor at Garfield, who has a master's degree in counseling. She is a certified teacher and is the substance awareness coordinator in charge of the Substance Awareness Program. As coordinator, for which she is certified, she originates programs of prevention, education, curriculum, and deals with students with problems. Scudillo has workshops for teachers and she is a referral source for employees. She stated that the school has a long and detailed antidrug policy, which was in the booklet distributed to students and faculty each year. The policy presently, and in 1988-89, includes the illegal use of drug paraphernalia. Hypodermic needles are considered paraphernalia. Scudillo had Olek as a chemistry teacher when she was in high school and later knew him as a colleague. She knew him in 1988-89 when she was part-time coordinator. She is presently a full-time employee.

The witness is the announcer for the wrestling team and, consequently, she goes to matches. During 1987-88, she regularly observed Olek at matches. She saw him talking to students and videotaping certain matches. Noting that videos are commonly used to teach, she indicated that Olek's tapes were used for the team. She also saw Olek talking to wrestlers prior to the match.

On cross-examination, Scudillo indicated that she has a master's degree in human services and not science. Steroids were not considered to be a CDS in the policy in 1988-89, but they are now. No particular drugs are listed. Prescription legend drugs were not permissible without clearance from the nurse. Scudillo was not responsible for the handbook and did not have a copy of it with her. She noted that Carol Scudillo mentioned on J-1 is her mother. The witness received no particular instructions from her mother, a member of the Board of Education, who knew that she was coming to testify. She did not think that Olek taped every match, and could not respond to whether he taped some students at different matches or if the students asked Olek to tape the matches for them. She never heard Olek yell to

a wrestler as to a particular move to make or saw Olek show a student how to make a particular move.

On recross, the witness indicated that the drug policy is updated each year; a handbook exists for 1988-89. She noted that Olek's body changed and he became more muscular. The form of his body changed since the time she was a student and also from the time she started teaching in 1978 until 1988. She admitted, however, that anybody who worked out could have a similar change.

Next to testified as Franklyn Marrel Dawson, Jr., employed by petitioner as chairman of physical education and supervisor of K-12 for the entire district. He served as the athletic director of the high school for twenty-six years and has been employed by Garfield for thirty-three years. During the 1988-89 school year, he was athletic director of Garfield High School in charge of all coaches at the high school. He recommended the hiring of coaches and specifically recommended that Olek be hired as a coach. He indicated that Olek was hired. More particularly, he referred to P-1, the appointment of winter coaches, and noted that Olek's name appears as assistant coach effective November 1, 1988. It was signed by the board members. (There was an objection by one member to Mr. Olek.)

Dawson has known Olek for quite a few years, and Olek taught his son. He recalled that Olek was very enthusiastic about wrestling. He helped out and taped wrestlers in the high school during the matches for Coach DeLuca in order to train the wrestlers. Prior to 1988, Olek was not a coach; he just helped. He was an "enthusiastic volunteer." The students considered him a wrestling enthusiast; they considered him a coach only when he was a coach. After November 1, 1988, he was issued keys and he was a coach for that season. Payment would have occured after the season, February or March 15, but Olek was no longer a coach at that time.

On cross-examination, Dawson indicated that although there are no weightlifting clubs at the school, many students lift weights; it is not confined to a particular sport. He stated that he found Olek's enthusiasm commendable; he taped the matches at his own expense. He recalled that Olek applied for the position of head coach three or four years before (around 1982 or 1983), but the position went to Mr. Kotwica. Subsequently, DeLuca assumed the duties. Dawson stated that when Olek got the job, he believed that Olek should have the appointment.

Dawson believed that the assistant coach position that Olek received was posted. However, he could not recall if he asked Olek to take the job because nobody had applied.

On redirect examination, Dawson indicated that in 1988-89, he was aware of the bad aspects of steroids and discouraged their use. Although he could not recall this specifically, he alleged that coaches preach this all of the time because they were aware of the use and misuse of steroids. There was a firm antisteroid policy, and Dawson believed that he spoke to coaches regarding illegal drug use, which was an ongoing problem. In addition, in the middle and elementary schools, students are taught not to use steroids. Dawson would look at the physique of a student, and if it appeared that the student was taking steroids, Dawson would discuss what to do about it with the coach and the principal. He indicated that coaches never get tenure, and there was no requirement that Olek be appointed as a wrestling coach. He would not have recommended Olek for the position if he had a criminal record.

ARGUMENTS OF COUNSEL

Of import, petitioner argues that the requirements ordered by the State Board of Education have been fulfilled and that Olek's position should be forfeited. According to petitioner, the only issue is whether, applying the Supreme Court's rationale in *Moore*, the offenses to which Olek pled guilty involved or touched his employment. Petitioner asserts that there is a clear and obvious nexus between the offenses to which respondent pled guilty and respondent's employment as a teacher and coach.

Petitioner asserts that while Olek's offenses did not directly involve students or his school district, Olek indisputably used and possessed steroids in controvention of law and public policy while employed as a teacher. According to petitioner, Olek's offense is more egregious in that he did so from a unique position: That of a science teacher, who had clinical knowledge of the use and effects of drugs; that of mentor who students demonstrably admired and to whom they frequently turned for advice about bodybuilding and fitness independent of his coaching activities; and that of a wrestling coach, a person viewed as an obvious authority with respect to physical development. According to petitioner, even accepting as true Olek's voiced objections to steroids, the discrepancy between his words and actions would speak

volumes to students. Further, the nature of Olek's offenses and circumstances surrounding this discovery militate against the finding that it represented an isolated error in judgment or other situation where mitigating factors could fairly be said to come into play.

Petitioner asserts that the act for which Olek pled guilty clearly touched upon his employment pursuant to *N.J.S.A.* 2C:51-2. The open and notorious media coverage of Olek and his offenses clearly diminish and prohibit his ability to act as a role model. Petitioner asserts that Olek, according to all of the testimony and relevant facts and evidence, has lost the right to be a role model and teacher within the Garfield Board of Education. Petitioner questions how Olek could prohibit or even consider stopping students from using illegal steroid drugs when he himself participated in the use of illegal drugs. The very concept of a role model is to set an example to the student athletes that drug use may be dangerous or even deadly. Petitioner asserts that Olek's use of prescription legend drugs and his guilty plea to the use and possession of steroids and drug paraphernalia is demonstrative of his inability to perform his job. This created an anti-role model status and, clearly, he cannot lead, direct, or teach without causing harm to his students. The very nature of the offenses to which Olek pled guilty clearly touched his office, thereby forfeiting his position pursuant to the statute. Petitioner further asserts that even assuming *arguendo* that the drug offenses to which Mr. Olek pled guilty do not touch his office, his right to maintain his office has been forfeited because he has committed an offense which involves dishonesty.

Respondent asserts that Olek has not forfeited his position as a tenured teaching staff member. Referring to the State Board decision, respondent asserts that there really is very little doubt as to precisely what it is that respondent did for the district and the period in which he did it. According to respondent, there are a number of mitigating factors that exist in support of Olek. First, his evaluations have all been laudatory and there was nothing in the evaluations to show any decrease in his teaching performance towards the end of his period of employment with the Garfield Board of Education. Second, steroids are not part of the science curriculum whatsoever and, in fact, were not part of the student policy handbook on drugs in 1988-89.

Additionally, the athletic director found it commendable that Olek had voluntarily, as a faculty member and not as a coach, videotaped certain students wrestling at the request of the students so that their performance could be reviewed. He did this at his own expense, on his own time, and without reimbursement. Further, the State Board and the New Jersey Supreme Court consider forfeiture to be "a harsh penalty." It has now been established that Olek acted as a coach for less than two weeks. Respondent asserts that merely being the second assistant wrestling coach for a period of two weeks is insufficient to mandate a forfeiture. The Board has been able to establish nothing more than that Olek has been the second assistant wrestling coach for a period of approximately one or two weeks. It has been unable to establish any nexus between the offenses to which Olek pled guilty and his duties and responsibilities in the district.

More importantly, there is no indication that Olek at any time counseled any student, athlete, or faculty member, either on the school property or anywhere else, to use steroids or that, in fact, he even discussed steroids with anyone. Respondent thus submits that there is absolutely no nexus between Olek's offenses and his employment as an earth science teacher and his short assignment as second assistant wrestling coach. Citing Scudillo's testimony that anyone who went to a gym and worked out three days a week could have a similar physique to Olek's, respondent alleges that there is not even anything in Olek's demeanor or physical appearance which in any way suggests that he was advocating, endorsing, or even admitting publicly the use of steroids.

Respondent maintains that the board has made this case a *cause celebre* and the board, having created this swirl of controversy, should not now be allowed to claim that Mr. Olek should not be employed as an earth science teacher because of the attendant publicity. Respondent further points out that there is no possible tenure for Olek as a second assistant wrestling coach and that even if there were, he has only been employed in that position for much less than two weeks. Accordingly, if Olek were reinstated to the classroom, there is no requirement that he be given a wrestling coach position or a weight-room monitoring position. The Board would be absolutely within its power to put Olek back into the science classroom and limit his employment to that situation. There is absolutely no nexus whatsoever concerning Olek's primary employment as a science teacher, who in recent years has

taught earth science (evidently sometimes physics), and his guilty plea involving the personal use of steroids.

FINDINGS OF FACT

1. Robert Olek is a chemistry, physics, and earth science teacher.

2. Olek requested to be a wrestling coach, and he was appointed as a wrestling coach in 1988-89. He was recommended by Athletic Director Dawson. His name appears as assistant coach as of November 1, 1988.

3. Jc' DeLuca was the head wrestling coach during the 1988-89 school year, loisi was an assistant wrestling coach.

4. Olek served as a wrestling coach for one or two weeks. He was on the gym floor with students and was to attend the wrestling meets. Because of the fact that wrestling practice began the day after Thanksgiving, and his arrest occurred two weeks later, he had not attended any official wrestling matches at that time.

5. Olek's performance in the classroom was satisfactory and he had good evaluations.

6. James Tantillo, principal of Garfield High School, observed changes in Olek's behavior; Olek was weightlifting and became more aggressive.

7. Olek's body changed, and he became more muscular.

8. During the 1986-87 school year, Olek volunteered to take the students to a gym in Pompton Lakes, apparently to weightlift and to get in shape.

9. In 1986-87 and 1987-88, Olek volunteered his services and was on the floor of the gym assisting students in weightlifting and exercise.

10. Olek was not responsible for the weight rooms. Olek utilized the weight room, which was available for all staff members, when the students were there.

11. Olek was knowledgeable about steroids and suggested reading material on steroids for students who wished to do a paper for the health teacher. Olek helped the students and wanted them to know the bad effects of steroids.

12. Prior to the 1988-89 school year, Olek was a spectator of the wrestling program for many years. He had previously applied to be coach but had not received the appointment. He made himself available in the gym area during the wrestling season.

13. During the 1987-88 school year, Olek went to wrestling matches. He talked to students and videotaped certain matches. Olek would talk to wrestlers prior to the match.

14. There is a long and detailed anti-drug policy of the school. The policies were made known to students and teachers in a booklet distributed to all school personnel each year. The policy presently, and in 1988-89, includes the illegal use of drug paraphenalia.

15. Franklyn Marrel Dawson, athletic director of the high school, was aware of the bad aspects of steroids. He discouraged their use to coaches, and he spoke to coaches regarding illegal drug use, which was an ongoing problem. If a student was taking steroids, he would discuss what to do about it with the coach and the principal.

DISCUSSION

At issue in the instant case is the scope of the State Board's remand and the impact to be adduced therefrom. It is clear that the State Board indicated the following:

> We are unable to determine on the record whether respondent was employed as a wrestling coach at the time of his arrest, the specific period of time in which he was employed in such capacity, the specific coaching assignment or assignments he held, the duties and responsibilities of such assignments and the qualifications required thereof. It is axiomatic that a determination of the nexus between an offense and employment necessarily requires agreement on the employment held or sufficient evidence to permit such a factual determination.

The State Board continued:

> As in *Moore*, careful examination of the facts, including respondent's employment and the qualifications required thereof is necessary in order to determine whether the offenses to which respondent pleaded guilty, involving the use and possession of steroids found in his home, touched or involved his employment in the district so as to warrant imposition of the harsh penalty of forfeiture. Such analysis must also include consideration of all mitigating circumstances.

Based upon the above, at issue is quite simply an inquiry into whether the offenses committed by respondent involved or touched on Olek's employment to the extent meriting forefeiture. This requires, according to the State Board, careful examination of the facts and the evaluation of various factors in the "involve and touch" analysis. *See Moore, supra,* 230 *N.J. Super.* at 374.

The facts in the instant matter are set forth above. Of import, Olek was arrested on December 6, 1988, for the following offenses: Possession of marijuana, in violation of *N.J.S.A.* 2C:35-10(a)4; possession of drug paraphernalia, in violation of *N.J.S.A.* 2C:36-2; possession of hypodermic needles, in violation of *N.J.S.A.* 2C:36-6; possession of prescription legend drug without a valid prescription, in violation of *N.J.S.A.* 2A:170-77.8; unlawful sale of prescription legend drugs, in violation of *N.J.S.A.* 2A:170-77.9; and obtaining unlawfully prescription legend drugs, in violation of *N.J.S.A.* 2A:170-15.

At the time of his arrest, respondent was employed at Garfield High School as a science teacher and an assistant wrestling coach. Respondent had been performing the duties of a wrestling coach for approximately one week at the time of his arrest. In July 1989, the respondent pled guilty to the following charges: Possession of

hypodermic needles, in violation of *N.J.S.A.* 2C:36-6; possession of a prescription legend drug [steroids], in violation of *N.J.S.A.* 2A:170-77.8; and unlawfully obtaining legend drugs, in violation of *N.J.S.A.* 2A:170-77.5.

The testimony presented at the hearing indicates that the qualifications of an assistant wrestling coach are an enthusiasm for wrestling, recommendation of the athletic director, and no criminal record. Prior to respondent's arrest, he held all of the necessary qualifications. The testimony of the witnesses did not indicate the full extent of respondent's responsibilities as an assistant coach or as a science teacher. However, it did indicate that an assistant coach attends matches and practices, is aware of the school's strong anti-steroid policy, and apparently reports to the coaches any students who are suspected of using steriods.

In performing the necessary analysis of the nexus between the offenses and the respondent's employment, there is a need to assess the gravity of Olek's offenses. This is determined by reviewing the nature of the crimes, their context, and the identity of the victim. *Moore*, 119 *N.J.* at 269. The offenses committed by respondent are of the type that relate to the obtaining and possession of drugs and drug paraphernalia. Although steroids are not classified as controlled dangerous substances, many types of steroids, especially those that are injected intramuscularly (such as anabolic steriods), are very addictive and can produce behavioral results such as aggression and depression. *State v. Trastèr*, 610 *So.* 2d 572, 573 (Fla. Dist. Ct. App. 1992).

In addition, due to the dangerous side effects of certain steroids, the public perception of steroids is negative. *Fourcade v. City of Gretna*, 598 *So.* 2d 415 (La. Ct. App. 1992). The events leading up to and surrounding respondent's arrest were not disclosed at the hearing. However, even though respondent may have administered the drugs at home, the effects of steroids on respondent were apparent to certain school personnel. The principal stated that respondent was weightlifting and was noticeably more aggressive. Clearly, steroids impacted Olek during school hours. In light of the dangerous nature of the drugs possessed by Olek, their potential for abuse, and the possibly adverse effect his drug involvement had on the school population, the gravity of Olek's offense is apparent.

It is clear from respondent's role as a teacher and a coach at the school that he was in a position to influence the students. In his position as an assistant coach, respondent was responsible for enforcing the school's anti-steroid policy and inevitably discussing the subject with the athletes and other students. Despite respondent's warning to students concerning the bad effects of steroid use, he possessed and was involved with steroids. Respondent's possession and apparent involvement with steroids adversely effected his ability to enforce the school's strong anti-steroid policy and counsel students on the evils of steroid use. This type of double message sends a conflicting signal to students. Olek's actions, speaking louder than words, could impart to some students the belief that the school condoned the use of steroids.

In addition, respondent's possession of steroids diminishes his image as a role model, thereby reducing his effectiveness as a teacher. It is generally understood that teachers act as role models for many students. In Olek's case, it is evident that at least some of the students regarded him as a role model. This is evidenced by the fact that some students approached him on the subject of steroids. As a role model, respondent bore a responsibility to the school and its students to obey the law and practice what he preached to the students.

However, prior to imposing forfeiture on respondent, a review of any mitigating circumstances is necessary. Respondent did not testify at the hearing or produce any documentation concerning any mitigating circumstances. The testimony of the witnesses revealed that respondent was never disciplined by the school board prior to this incident. In addition, respondent performed satisfactorily for many years in the classroom as a teacher, and he received good evaluations. While these atttributes may be considered mitigating "factors," and serve in some small measure to militate against forfeiture, they cannot be considered mitigating "circumstances."

In this case, mitigating circumstances relate to the reasons why respondent committed the offenses, the circumstances surrounding the incident, and why a similar incident will not occur in the future. No such circumstances were presented by respondent. I am therefore of the view that the mitigating factors which were presented are insufficient to outweigh the serious nature and circumstances of Olek's offenses, as discussed above and argued by petitioner. In sum, I **CONCLUDE**

that a careful examination of the facts in this case reveals that respondent's offenses touch and involve his employment to the extent meriting forfeiture pursuant to *N.J.S.A.* 2C:51-2.

ORDER

It is hereby **ORDERED** that petitioner's motion for summary decision is **GRANTED** and that respondent has forfeited his employment as a teacher and a wrestling coach with the Garfield Board of Education.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 7th Floor, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 10, 1993
Date

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

5/12/93
Date

Maureen R. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 15 1993
Date

Joyce LaVecchia
OFFICE OF ADMINISTRATIVE LAW

le/jrp/dgi/e

APPENDIX

LIST OF WITNESSES

For petitioner:

James Tantillo
Susan Scudillo
Franklin Marrell Dawson, Jr.

EXHIBITS IN EVIDENCE

J-1 Resolution No. 16, dated March 9, 1989 (3 pages)
J-2 Conviction, plea of guilty, dated July 13, 1989
J-3 Notice of sentence from municipal court, dated September 14, 1989

P-1 Resolution of Board of Education, dated November 1, 1988

IN THE MATTER OF THE TENURE	:	
HEARING OF ROBERT B. OLEK,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT, OF THE CITY OF	:	DECISION ON REMAND
GARFIELD, BERGEN COUNTY.	:	
	:	

The record of this matter and the initial decision on remand of the Office of Administrative Law have been reviewed. Timely exceptions were filed by respondent pursuant to N.J.A.C. 1:1-18.4. No reply was filed by the Board.

In his exceptions, respondent argues that the ALJ has been biased against him from the outset as indicated by the procedural history of this case, wherein the ALJ has repeatedly misconstrued the law so as to effectuate respondent's dismissal. This bias is further reflected, respondent avers, in findings of fact which are unsupported in the record. Specifically, regarding Finding No. 4, all respondent did was hand out equipment in his capacity as second assistant coach; regarding Finding No. 6, the ALJ fails to note that the principal who supposedly observed changes in respondent's behavior never noted those changes in any observation, evaluation or memo; regarding Finding No. 7, the changes in respondent's body were not necessarily due to steroid use, as the ALJ clearly wants the Commissioner to infer; regarding Finding No. 8, respondent's offer occurred prior to the period at issue herein and there was no

evidence to support the ALJ's supposition that the purpose of the anticipated gym trip (which never materialized) was for students to weightlift and get in shape; regarding Finding No. 9, respondent was never in charge of students in the weight room (as correctly found in Finding No. 10), and testimony established no more than that respondent was present in the room at the same time as students, as all faculty were allowed to be; regarding Finding No. 11, the ALJ fails to sufficiently emphasize that respondent advised students on the ill effects of steroids in full accord with Board policy; regarding Findings Nos. 12 and 13, the ALJ ignores the fact that respondent's role at prior wrestling matches was limited to spectator and photographer and did not include advising participants on their wrestling; and regarding Finding No. 14, the ALJ has confused steroids, on which there was no districtwide policy at the time of the offenses at issue herein, with controlled dangerous substances, on which there was.

Also ignored by the ALJ, according to respondent, were mitigating factors in his support. These include the absence of any indication that his teaching performance suffered during the period at issue, the absence of reference to steroids in curriculum and district policy during that time, and the fact that the Athletic Director commended respondent for volunteering, as a faculty member, to videotape students on his own time and at his own expense.

Finally, respondent emphasizes that this is a forfeiture proceeding, not a determination on tenure charges of unbecoming conduct, and argues that the only possible nexus between respondent's offense and employment established by the Board--the necessary precondition to any forfeiture determination--was that

respondent served as an assistant wrestling coach for one week. This nexus, respondent avers, is insufficient to warrant the harsh penalty of forfeiture, particularly in view of the fact that respondent has no tenure as a coach and need not ever again be employed in that capacity. Moreover, respondent's short-term tenure as coach was known to the State Board at the time of its decision, so that if such a nexus were in itself sufficient for forfeiture, the State Board would have so ruled and not remanded the matter for hearing. Neither did the offenses occur on school time or property or implicate students, nor was there any indication whatsoever that respondent either as earth science teacher or coach, counseled anyone, faculty or student, to use steroids. The ALJ's inference that steroid use was apparent in respondent's appearance and behavior is supported by no evidence other than the testimony of the principal and is actually belied by facts such as respondent's appointment as coach and the absence of any referral to problems in his evaluations and observations. There is no evidence that respondent was more of a role model than any other teacher, and to the extent that his continuing viability as an educator has been compromised by the controversy surrounding this matter, it is the result of the Board's making the case a "cause celebre" and generating negative publicity on which it should not now be allowed to rely to respondent's detriment.

Upon careful review of this matter, the Commissioner concurs with the ALJ that respondent has, by his conviction for various offenses involving steroids, forfeited his employment with the Garfield School District. As noted by the ALJ, respondent was in a position to influence students, both as teacher and coach. As

teacher, evidence shows that students viewed him as a wrestling enthusiast and source of knowledge on steroids; thus, respondent's actions would undermine any silence he may have kept or speak louder than any words he may have uttered on the ill effects of steroids. As coach, however short a period he may have actually served due to truncation of his appointment by the incidents at issue herein, the fact remains that his offenses occurred even as he undertook a job wherein it was well established that he would be directly responsible for monitoring and discouraging student steroid use.

Nor is the Commissioner pursuaded by respondent's arguments that he need never again be appointed as coach and that any compromising of his position as teacher is due to the Board's actions and should not be held against him. Respondent's arrest and conviction are matters of public record, and knowledge of them among parents and students cannot be undone. To hold that he may now return to the school community so long as he is not appointed as coach would effectively send a message that his illegal steroid use was acceptable because not undertaken in a manner directly related to specific teaching duties or specifically affecting teaching performance.

The Commissioner further rejects respondent's contention that the ALJ confused standards for forfeiture with those for unbecoming conduct. To the contrary, the Commissioner finds that the ALJ analyzed the issues correctly and afforded respondent the full adversarial hearing and opportunity to present mitigating factors directed by the State Board in its decision refusing to find

forfeiture on the prior record, which had been developed on a summary judgment basis.[1]

Accordingly, the initial decision of the Office of Administrative Law, finding that a nexus between offense and employment has been established sufficient for respondent to have forfeited his position as teacher in the Garfield school district, is affirmed for the reasons expressed therein together with the further explication set forth above. This matter is further referred to the State Board of Examiners for action as it deems appppropriate pursuant to N.J.A.C. 6:11-3.6(a).[2]

IT IS SO ORDERED.

JUNE 28, 1993

DATE OF MAILING - JULY 28, 1993

COMMISSIONER OF EDUCATION

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[1] Although not applicable to the disposition of this matter, which arose under prior law as properly applied by the ALJ at page 16 above, the Commissioner here notes for the record that subsequent to the State Board's decision in this matter, both criminal and food and drug law were amended to specifically classify anabolic steroids as "controlled dangerous substances" and treat their illegal use in the same manner as other such substances, so that the distinction between steroids and the marijuana at issue in Arocha, supra, on which the State Board's refusal to accept summary judgment largely rested, no longer exists. P.L. 1992, c. 71, amending and repealing various statutes, legislative statement at N.J.S.A. 2A:170-77.8.

[2] The Commissioner notes respondent's offer to provide a transcript of proceedings before the ALJ if "somebody from the Commissioner's office" would call him and so request. (Exceptions, at pp. 14-15) The Commissioner emphasizes, however, that it is the obligation of the parties, not contingent on any request by the Commissioner, to provide such transcripts if they are to be considered in rendering final decision. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987)

147-93

147-93

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

SYNOPSIS

Pursuant to application for inquiry into alleged violations signed by a candidate in accordance with N.J.S.A. 18A:14-63.12, Commissioner determined to conduct inquiry.

ALJ found there was a defeat of a legal vote which would have changed result of election, as it would have broken the tie that occurred for the third seat on the Board. Will of the electorate was thwarted. (Wene) ALJ concluded irregularity was sufficient to require that a new election be held. Runoff election between two candidates was ordered.

Commissioner adopted findings and determination in initial decision, noting in response to petitioner's exceptions that sole relief available in this inquiry was a new election as it is beyond Commissioner's authority or any judicial forum to tally a vote not actually cast. Commissioner directed school district to proceed with special election pursuant to N.J.S.A. 18A:14-3 and 14-25.

JUNE 24, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4006-93
AGENCY DKT. NO. 94-4/93

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE BOROUGH OF KEANSBURG

Marylou Razzano, petitioner, pro se

Record Closed: May 28, 1993 Decided: May 28, 1993

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

Pursuant to an application for inquiry into alleged violations signed by a candidate in accordance with N.J.S.A. 18A:14-63.12, the Commissioner of Education determined to conduct an inquiry in the annual school election held on April 20, 1993, in the Keansburg Borough School District.

The matter was transmitted on an expedited basis to the Office of Administrative Law pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. An inquiry was conducted on May 28, 1993 at the Hazlet Township Municipal Building. Seven persons were heard and nine documents were admitted into evidence.

From the parol and documentary evidence, it is clear that there was an irregularity in the school election conducted on April 20, 1993, in the district. For the reasons discussed below, the will of the electorate was thwarted and, therefore, a new election must be held.

FINDINGS OF FACT

The following **FACTS** are essentially undisputed and I adopt them herein.

1. At some time shortly after 5 p.m. on April 20, 1993, Marylou Razzano met her cousin Anthony Michael Grieco near the New Point Comfort Fire Department in Keansburg.

2. The Building served as the polling place for District 6 in the annual school election.

3. Ms. Razzano walked with Mr. Grieco to the polling place.

4. Mr. Grieco entered and, a few minutes later, returned stating he had been told he could not vote.

5. Mrs. Razzano entered the poll and was told that Mr. Grieco had requested an absentee ballot and, therefore, could not cast a ballot at poll.

6. Ms. Razzano's running mate, Dolores Bartram, tried to contact the Board Secretary.

7. Upon being contacted, Board Secretary Edith L. Chmiel, was advised that a voter had been denied the opportunity to cast a ballot because told he was on the absentee ballot list when, in fact, his brother was named on the list.

8. Secretary Chmiel went to the District 6 poll.

9. She inquired of Judge Irene Durnien what had happened.

10. The judge advised that Mr. Grieco's name was on the absentee ballot list.

11. Secretary Chmiel asked the judge to check the registration book.

12. The Secretary stated each poll receives lists of persons who have requested absentee ballots.

13. Pink slips are inserted in the registration books at the page for each person named on the absentee ballot list.

14. Upon examining the register, the Secretary and judge discovered that the page for Anthony Michael Grieco was not marked by a pink slip and the name Anthony Michael Grieco did not appear on the absentee ballot list.

15. There was a pink slip at the page for Michael Anthony Grieco and that name does appear on the absentee ballot list.

16. The Secretary informed the judge, "This man should have been allowed to vote."

17. This occurred in the period between 7 and 7:30 p.m.; polls were open until 9 p.m.

18. The Secretary instructed workers that Anthony Michael Grieco had the right to vote if he returned to the poll.

19. The judge agreed.

20. The Secretary then spoke to either Ms. Bartram or Ms. Razzano and stated that Anthony Michael Grieco was eligible to cast a ballot.

21. Anthony Michael Grieco had left home to attend a required driver education class and could not be reached.

22. Anthony Michael Grieco, although eligible, did not cast a ballot in the Keansburg Borough Annual School Election held on April 20, 1993.

DETERMINATION

Anthony Michael Grieco and Michael Anthony Grieco are related, but are not the same person (P-3, P-4). Michael Anthony Grieco applied for and received an absentee ballot for the annual school election. Anthony Michael Grieco attempted to vote at the District 6 poll, but was turned away as described in the findings, above.

The judge of election and a poll worker both stated they heard Mr. Grieco give his last name only. The worker then asked, "Are you Michael?" Mr. Grieco answered yes. She then advised him that he could not vote. The worker then called the judge who looked at the register and agreed with the worker. Nicole Palmiotto, appointed a challenger by candidates Garcia, Razzano and Bartrum, stated that she heard Mr. Grieco say, "Anthony Michael Grieco." She was writing down the name of each person who came into the poll and she wrote his name that way (P-6). The judge insists had Mr. Grieco said anything to clarify the situation, they would have checked. The poll workers stated she does not recall checking the book for similar names. Both women stated they felt bad about the error and told the Secretary to tell Mr. Grieco to come back and the situation would be corrected.

This was Mr. Grieco's first experience voting in a school election. In a sworn statement (P-4), he asserts that had he been allowed to cast a ballot, he would have voted for Noel Orlando Garcia, Marylou Razzano, and Dolores Bartrum. He also states he would have voted yes on the budget question.

A review of the list of persons receiving absentee ballots for the annual school election of April 20, 1993 reveals that Michael Anthony Grieco, 84 Bayview Avenue, Keansburg, is listed (R-3). The poll list for the District 6 (R-2) does not show the signature of Anthony Michael Grieco or of Michael Anthony Grieco. The combined statement of result of school election (R-1) shows the following:

CANDIDATES	Votes Counted For Candidates		
	At Polls	Absentee	Total
Noel Orlando Garcia	205	33	238
Michael W. Stark	364	14	378
Manuel (Manny) Flores	301	12	313
Robert A. Corby	243	8	251
Mary Lou Razzano	206	45	251
Dolores Bartram	192	42	234
Dennis Smith	1		1
Raymond O'Hare	1		1
Jon Stokes	3		3
Francis J. Peters	1		1

Elections are to be given effect whenever possible. Wene v. Meyner, 13 N.J. 185 (1953). The Law Division in Wene set forth the rule.

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

Under this clear direction, I would have no difficulty upholding the results of this election if two or more votes separated the third and fourth persons arranged in order of votes received. However, there is a tie for third place in this matter, there was the defeat of a legal vote which would have been counted and that vote would have changed the result of the election.

Under these circumstances, I **CONCLUDE** that the irregularity in this election was sufficient to require that a new election be held. It is **ORDERED** that a runoff election between candidates Robert A. Corby and Marylou Razzano be held as soon as practicable.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 7th**

Floor, CN 500, Trenton, New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

28 MAY 1993
Date

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

6/1/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 4 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

jz

WITNESSES

Marylou Razzano
Anthony M. Grieco
Edith Chmiel
Dolores Bartram
Theresa Gallo
Irene Durnien
Nicole Palmiotto

EXHIBITS

For petitioner:

P-1 Letter, Razzano to Fitzgerald, April 21, 1993, two pp.

P-2 Sworn statement of Marylou Razzano, May 27, 1993

P-3 Sworn statement of Michael Anthony Grieco, May 27, 1993

P-4 Sworn statement of Anthony Michael Grieco, May 27, 1993

P-5 Sworn statement of Nicole Palmiotto, May 27, 1993

P-6 List of voters at District 6 kept by Challenger Palmiotto

For respondent:

R-1 Combined statement of results of school election, April 21, 1993, 7 pp.

R-2 Poll list, District 6, April 20, 1993, 5 pp.

R-3 List of persons receiving absentee ballots for annual school election, April 20, 1993, 3 pp.

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

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. A letter of exception was filed by petitioner, wherein she stressed that the relief she sought was not a new election, but rather, that the thwarted vote at issue herein be counted in her favor, thereby obviating the need for a special tie-breaking election.

Upon review, the Commissioner concurs with the ALJ that an irregularity occurred which was shown to have affected the outcome of the election, so that a new election is warranted. Wene, supra In so holding, the Commissioner notes that the sole relief available in inquiries of this type, which do not reach to questions of the validity or tabulation of particular ballot(s), is a new election; it is beyond the authority of the Commissioner, or of any judicial forum, to tally a vote not actually cast even when it has been proven that the person who would have cast it was wrongly prevented from voting.

Accordingly, the initial decision of the Office of Administrative Law is affirmed for the reasons expressed therein, and the School District of the Borough of Keansburg directed to

proceed with a special election between Candidates Robert A. Corby and Mary Lou Razzano to be held on the earliest possible date consistent with the prohibition on special elections within 20 days before or after the June 8, 1993 primary elections (N.J.S.A. 18A:14-3) and the need to accommodate absentee ballot notices (N.J.S.A. 18A:14-25).*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 24, 1993

DATE OF MAILING - JUNE 28, 1993

* The Commissioner notes that such new election was also dictated by the result of her decision on recount dated May 6, 1993, which found the tie vote between Candidates Razzano and Corby to have persisted, so as to require a runoff election pursuant to N.J.S.A. 18A:12-15(c).

148-93

RODNEY BOND,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning parent alleged district reorganization regarding student attendance reassignments was adopted in violation of Open Public Meetings Act and civil and parental rights of handicapped students. Petitioner contended Board refused to entertain public input. All special education questions were dismissed as being without basis in fact or law.

ALJ concluded Board could not delegate to its superintendent authority imposed upon it by statutes. Authority to relocate classes is within compass of Board's discretionary powers. ALJ concluded record showed no Board resolution conferring on its superintendent the authority to assign grades and classes to specific school buildings. Case law requires that final decision should be by vote of Board. However, to reassign grades and classes to original locations would be "foolhardy" now. ALJ, however, directed Board to adhere to statutes and code henceforth particularly with regard for effectuating by resolution and recording in the official minutes those things properly done by Board.

Commissioner adopted findings and determination in initial decision.

JUNE 28, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6610-92
AGENCY DKT. NO. 408-8/92

RODNEY BOND,
Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF CAMDEN,
Respondent.

Lloyd D. Henderson, Esq., for petitioner

Karen Murray, Esq., for respondent (Murray, Murray & Corrigan, attorneys)

Record Closed: April 2, 1993 Decided: May 17, 1993

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

PROCEDURAL HISTORY

This matter came on by request for emergent relief filed with the Commissioner of Education on August 27, 1992. Rodney Bond, petitioner, sought an order enjoining and restraining the Camden Board of Education from instituting and carrying out plans to change the placement of certain 8th grade pupils from East Camden Middle School to Woodrow Wilson High School and to change the placement of certain 5th grade pupils from McGraw Elementary School to East Camden Middle School.

The Department of Education transmitted the matter to the Office of Administrative Law for disposition pursuant to N.J.S.A. 52:14B-1 through -15 and N.J.S.A. 52:14F-1 through -13. Because of the application for emergent relief, the Department and this Office agreed that the matter would be heard promptly. The moving papers were received at the Office of Administrative Law on Monday, August 31, 1992. Oral argument on the motion for emergent relief was heard at 3 p.m. on Tuesday, September 1, 1992. The Board presented a copy of its answer to the petition at hearing.

The petition of appeal is stated in three counts. In Count One, the petitioner asserts he made inquiries about a rumored change of assignment of fifth grade classes from the McGraw Elementary School to East Camden Middle School and of eighth grades from East Camden Middle School to Woodrow Wilson High School. At a board meeting on June 29, 1992, the petitioner asked if this were the board's intent. He received no definitive reply. The petitioner states the Board avoided making any decisions at this meeting. In or about August 1992, the Board sent certain parents letters concerning placement changes for the school year. This, in the petitioner's view, violated the Open Public Meetings Act. For himself "and other similarly situated parents" the petitioner argues this would seriously affect them. The petitioner further charges he can find no public notice of the Board's actions creating the reassignments. He asks that the actions be voided and that the Board be enjoined from carrying out the reassignments.

In Count Two, the petitioner alleges that in making its reassignment decision, the Board violated the Education of Handicapped Children Act [now, the Individuals with Disabilities Education Act] as to handicapped pupils. He cites N.J.A.C. 6:28-2.2. This count also alleges that the civil rights of affected persons were violated. He asks relief against the Board for refusing to entertain public input concerning this decision and voiding of such actions as were taken. He would also have the reassignments enjoined.

In Count Three, the petitioner alleges the Board violated the Individual Educational Plans of affected handicapped children. By way of relief, he would have the reassignments enjoined until and unless adequate counseling and preparation of affected parents and their children can be accomplished. He also seeks relief against the Board for refusing to entertain public input concerning a critical decision.

At hearing, the petitioner's argument generally followed the petition. The petitioner says he received "abbreviated" minutes of the June 29, 1992 Camden Board of Education Meeting. He concedes the minutes are designated "approved." He contends, however, that the minutes do not record any decision made on reassignment of classes. He also states the superintendent of schools misrepresented facts to him. He believes a decision was made, yet the Board denied it publicly.

The Board argues that the matter was first raised in the Superior Court, Law Division, but Judge Davies decided to take no action. The petitioner then filed before the Commissioner of Education. He did not provide the Board's counsel with moving papers until August 31.

Having heard and considered the arguments of counsel, I denied the request for emergency relief. The petitioner could make no showing of immediate harm, no showing of irrefutable harm and his likelihood of prevailing on the merits was arguable at best. Further, balancing the relative hardships to the parties in granting or denying the relief, the decision had to go in favor of the respondent. Crowe v. DeGioia, 90 N.J. 126 (1982).

All special education questions were dismissed as being without basis in fact or law. The Individuals with Disabilities Education Act is remedial legislation and congressional intent that it be liberally construed is clear. However, one still must have standing and there still must be justiciable issue. The petitioner has no standing and classified pupils are not effected by the reassignment he objects to.

The Open Public Meetings Act establishes the right of the public to witness in full detail all phases of the deliberating, policy formation and decision making of public bodies. The statue generally requires that the public be given advance notice of an the right to attend meetings of public bodies and that all discussions and official actions, unless specifically exempted by the act, take place in public. There are nine statutory exceptions in all. In 1979, the Appellate Division of Superior Court decided that the Commissioner of Education has jurisdiction to determine issues arising under the Open Public Meetings Act as they relate to controversies under the school laws. Sukin v. Northfield Bd. of Ed., 171 N.J. Super. 184 (App. Div. 1979). Thus, if the petition of appeal was timely under the Open Public Meetings Act, the Commissioner has jurisdiction to consider the question. Counsel were directed to brief the issue.

The order denied the request for emergent relief whether argued on a standing theory or on the traditional criteria of temporary restraints. The order dismissed all special education questions raised as without basis in fact or law. Finally, the viability of any Open Public Meeting Act issue was ordered argued on the papers by counsel.

Upon review, the Commissioner adopted the judge's findings and conclusions that the petitioner failed to meet the standards articulated for emergent relief and that the issue concerning special education was without basis in fact or law. The Commissioner also agreed that the Open Public Meetings Act challenge should be argued.

Counsel were given a schedule for discovery and for submissions. For good cause shown, the time was enlarged. The Board submitted its final papers on March 15, 1993. The petitioner's papers were due on March 30, 1993. None were received. Allowing three days for the movement of mail, I closed the record on April 2, 1993.

DETERMINATION

The Board produced the agenda and minutes of its regular meeting of June 29, 1992 (R-1) and a certification of its School Business Administrator/Board Secretary (R-3). The secretary's certification states that he attends all Board workshop and regular meetings and is responsible to maintain Board records and minutes of all meetings. The secretary further states he attended the June 29, 1992 regular meeting and that the Board did not take a recorded vote on the transfer of several grades to different schools in the 1992-93 school year. It was not an agenda item. The grade reassignments have been discussed by the superintendent with the Board at the May workshop meeting and again at its June 25, 1992 workshop meeting.

A workshop meeting is regularly held on the Thursday before the regular monthly meeting of the Board unless the Board decides to conduct it immediately prior to the regular meeting. The regular monthly meeting of the Board is held on the last Monday of each month. All workshop meetings are open to the public and are noticed as are regular meetings. No official action is taken at workshops and a quorum is not required for the meeting to proceed.

During the superintendent's discussion with the Board at the May and June 1992 workshop sessions, the superintendent advised the Board of reassignments he would be making and the reasons for them.

The reassignments were not placed before the Board for a vote because the Board has for some time given the superintendent the administrative authority to take such actions on class/grade reassignments among buildings to provide suitable facilities and to accommodate the educational and staffing requirements of the district. The superintendent has effected other grade/class reassignments on this authority and with only discussion with the Board.

The secretary also certifies that at no time during the public session of the June 29 1992 meeting did either Mr. or Mrs. Bond ask if a vote had been taken by the Board on the reassignments. The secretary also states he has seen the letters dated July 9 and July 14, 1992 sent to parents by the principal of East Camden Middle School (R-2, J-1). The letters were not prepared by the secretary or the superintendent and erroneously indicate that the Board took action on June 29, 1992. The Board did not take any action on July 29, 1992 concerning reassignment of grades. The district, however, began meetings with parents regarding the transfer in July and August 1992.

The Board argues that, since it took no action, there cannot be an Open Public Meetings Act issue. N.J.S.A. 10:4-15 provides for challenging any action taken by a public body at a meeting which does not conform with the provisions of the act. Such an action shall be avoidable. In this case, there is no official Board action which can be subject to an Open Meetings Act claim. Any question of whether the superintendent had managerial authority, as compared to the Board, to implement the grade reassignments is not an Open Meetings Act issue. The act is not the appropriate vehicle by which to attempt to mandate certain governmental action. At its June 29, 1992 regular meeting, the Board's actions, policies and agenda were in full compliance with the act. That the subject of grade reassignments arose during the public section of the meeting does not show action by the Board. The public is free to raise whatever issues it chooses, which is precisely what Mr. and Mrs. Bond did. Contrary to the petitioner's claims, there is no mention in the record of his asking if a vote had been taken. Petitioner knew that day that no vote had been taken. However, he filed an Open Meetings Act claim despite the absence of Board action.

On these bases, the Board asks dismissal of the petition. No responsive papers were filed by the petitioner.

DETERMINATION

The posture of the case is somewhat awkward. Despite a breakdown in communications, specifically the letters from the Middle School principal to parents, there was no Open Meetings Act violation here. The meeting was properly noticed, the agenda was followed, minutes were kept and the public was allowed a period to express concerns and seek information. The record, however, reveals a problem that the Commissioner must address even in the absence of an Open Public Meetings Act violation.

A local board of education cannot delegate to its superintendent authority imposed upon it by statute. The cases conclude from the general enabling statutes that the authority to relocate classes is within the Board's discretionary powers.

The superintendent may not execute the discretionary powers of the Board. She or he may make recommendations regarding the organization of schools within the district. The Board may or may not follow the superintendent's advice, but a final decision should provide for public participation and a vote by the Board. Powers that may be conferred upon the superintendent are customarily granted by a resolution of the board.

A board of education cannot confer upon its superintendent a power imposed by statute upon the board. Witchell v. Board of Education of Passaic, 1966 S.L.D. 159, 161; Nixon v. Board of Education of Pleasantville, 1938 S.L.D. 56, 57 (March 15, 1934). While there is no explicit authority conferred upon boards to relocate classes, the cases conclude from the general enabling statutes that this authority is within the compass of a board's discretionary powers. N.J.S.A. 18A:11-1 provides

> The board shall . . . make, amend and repeal rules . . . for its own government and the transaction of its business and for the government and management of the public schools . . . .

In cases involving the relocation of classes, this language is cited as the statutory authority granting power to local boards to establish and change

attendance areas. Hussnatter v. Board of Education of Newton, 1986 S.L.D. 2667; In re Miller, 1973 S.L.D. 409; Marcewicz v. Board of Education of Pascack Valley, 1972 S.L.D. 619; Wassmer v. Board of Education of Wharton, 1967 S.L.D. 125.

In addition, N.J.S.A. 18A:33-1 has also been cited as conferring upon local boards the power to establish and change school attendance areas. N.J.S.A. 18A:33-1 provides:

> Each school district shall provide, for all children who reside in the district and are required to attend the public schools therein and those who reside therein or elsewhere and are entitled or permitted to attend the schools of the district pursuant to law, suitable educational facilities including proper school buildings and furniture and equipment, [and] convenience of access thereto . . . .

Morean v. Board of Education of Montclair, 1963 S.L.D. 154; Ditlon v. Board of Education of Oceanport, 1963 S.L.D. 131; Gunsberg v. Board of Education of Teaneck, 1962 S.L.D. 163.

Further, in Schults v. Board of Education of Teaneck, 86 N.J. Super. 29 (App. Div. 1964) the court decided that because a local school board has the statutory power to discontinue a school, it logically follows that it has the power to convert one of its schools into a central sixth grade facility.

From these cases, it can be inferred that, because the power to relocate classes is a discretionary power conferred upon local boards by statute, they cannot delegate this authority to the superintendent.

In Paddock v. Board of Education of Demarest, 1974 S.L.D. 435, a local board delegated, by written policy, the authority to assign pupils to grades kindergarten through four to the superintendent. The facts of Paddock are distinguishable from the present case because Paddock involved the assignment of individual pupils within the same grade in the same school whereas the present case involved the relocation of entire classes or grades from one school to another. In addition, in Paddock the hearing examiner characterized the guidelines for pupil assignments as board policy. It is within the purview of a superintendent's authority to administer policy determinations of a board. In re Jones, 1971 S.L.D. 520; N.J.A.C. 6:11-9.3(a). The Commissioner characterized the assignment of kindergarten pupils as a "management" prerogative of local boards of education (N.J.S.A. 18A:11-1). Paddock above, at 440.

While the superintendent may not execute the Board's discretionary powers to relocate classes, she or he may make recommendations regarding the organization of schools within the district. N.J.A.C. 6:11-9.1. In many cases, the Board acts to reorganize schools and classes within its district upon the proposal of the superintendent. Hussnatter, above, at 2667; South Mountain Civic Association v. Board of Education of Millburn, OAL DKT. EDU 587-83 (July 13, 1983), adopted Comm'r of Ed. (Aug. 29, 1983);Feigen v. Board of Education of Livingston, 1976 S.L.D. 886; Wassmer, above, at 125. However, the Board need not follow the advice of the superintendent "for it has the authority to make the ultimate determination." Wassmer, above, at 127.

It is of utmost importance that in making its "ultimate determination," the board provides opportunity for public input. "The ultimate inquiry with respect to whether adequate opportunity for public input was provided is whether, given all of the circumstances surrounding the decision making process, the Board can be said to have acted in an arbitrary, capricious or unreasonable way." Hussnatter, above, at 2683. Adequate public input has a direct effect upon whether a board's decision was reasonable. The delegation of discretionary powers to the superintendent alone would hinder a court's ability to evaluate the adequacy of this process.

The board's delegation of decision making powers to the superintendent also means that the decision cannot be put to a vote. In cases dealing with the procedural fairness of school district reorganization, the Commissioner has evaluated the voting process. For example, in Feigen, the Commissioner found that the board's approval of a plan to merge two elementary schools at a private meeting was illegal and that its subsequent vote was pro forma. Feigen above, at 890-91. In Hussnatter, the Commissioner found that, while the board acted hastily, the fact that there was public input and that the board voted only after such input established good faith on the part of the board. Hussnatter, above, at 2682.

Powers that may be conferred upon the superintendent should be memorialized in a formal manner. In Board of Education v. Apetz, 1962 S.L.D. 167, the State Board of Education conferred upon the County Superintendent of Schools the power to approve emergency provisions for the accommodation of school pupils. This was done by resolution. In that case, the Commissioner upheld a county superintendent's refusal to approve a school building for emergency use. Id. at 169. Similarly, a local board delegated to its superintendent the power to assign pupils to

grades kindergarten through four by written policy. Paddock, above, at 436. Without a specific delegation of authority, the superintendent can only perform those ministerial duties specified in N.J.S.A. 18A:17-20 et seq. and N.J.A.C. 6:11-9.1.

CONCLUSION

Based on the foregoing analysis, I **CONCLUDE** that a board of education cannot delegate to its superintendent authority imposed upon it by statute. The cases examined conclude from the general enabling statutes that the authority to relocate classes is within the compass of the Board's discretionary powers. It is proper for a superintendent to make recommendations regarding the organization of schools within her or his district, and the board may or may not follow the superintendent's advice. A final decision should provide for public input and a vote by the Board. Powers that may be conferred upon the superintendent are customarily granted by a resolution of the board.

I **FIND** and **CONCLUDE** that the record here shows no resolution of the Board conferring on its superintendent the authority to assign grades and classes to specific school buildings. Even if such authority were granted by resolution, however, it would be improper for the superintendent to exercise that authority unilaterally. The case law requires that the final decision should provide for public input and a vote by the board.

The reassignment of the subject grades and classes to their original locations would be a foolhardy exercise at any time and particularly at this point in the school year. However, the lapse found is not de minimis. The Camden Board of Education is **DIRECTED** to adhere assiduously to the prescriptions of statute and code henceforth with particular regard for effecting by resolution and recording in the official minutes those things properly done by the Board. It is so **ORDERED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

17 MAY 1993
Date

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

5/9/93
Date

Maureen P. Kelly
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 21 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

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EXHIBITS

R-1	Agenda and minutes, regular meeting, Camden Board of Education, June 29, 1992, 211 pp. plus attachments
R-2	Letter, R.J. Macrina to Dear Parents, July 9, 1992
R-3	Certification of Leon Freeman, March 11, 1993, 3 pp.
J-1	Letter, R.J. Macrina to Dear Parents, July 14, 1992

OAL DKT. NO. EDU 6610-92

RODNEY BOND,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon review of the record and initial decision, the Commissioner agrees with and adopts as her own the findings and conclusions of the Administrative Law Judge.

COMMISSIONER OF EDUCATION

JUNE 28, 1993

DATE OF MAILING - JUNE 28, 1993

149-93

IN THE MATTER OF THE TENURE :

HEARING OF SAMUEL BRACIGLIANO, : COMMISSIONER OF EDUCATION

SCHOOL DISTRICT OF ELMWOOD PARK, : ORDER

BERGEN COUNTY. :

:

SYNOPSIS

Board certified tenure charges of conduct unbecoming a teaching staff member against respondent principal due to indictment on 28 criminal charges. New Jersey Superior Court ordered forfeiture of his position in March 1992. Thereafter, respondent resigned from his position.

ALJ found there were no facts in dispute. By court order of March 31, 1992, petitioner forfeited his tenured position. ALJ ordered return of file to Commissioner and tenure charges considered dismissed without prejudice. In event conviction is reversed on appeal and an issue arises as to effect of resignation or the need to proceed with the tenure charges, this matter may be retransmitted to OAL for hearing.

Commissioner aodpted findings and determination in ALJ's order.

JUNE 28, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER -
ADMINISTRATIVE RETURN OF CONTESTED CASE DISMISSED WITHOUT PREJUDICE
OAL DKT. NO. EDU 4632-91
AGENCY DKT. NO. 70-3/91

IN THE MATTER OF THE TENURE HEARING OF SAMUEL R. BRACIGLIANO

BEFORE **JAYNEE LaVECCHIA**, DIRECTOR:

On March 21, 1991, the Elmwood Park Board of Education certified tenure charges of unbecoming conduct against Samuel Bracigliano. The certification contained twenty-eight charges each alleging a violation of the New Jersey Criminal Code, specifically *N.J.S.A.* 2C:14-2(b), 2C:24-4(a) and 2C:30-2(a). Each charge related to a count of a twenty-eight-count indictment. Petitioner filed a timely answer denying the charges. The matter was transmitted to the Office of Administrative Law on May 7, 1991, for a contested case hearing pursuant to *N.J.S.A.* 52:14B-1 *et seq.* and 52:14F-1 *et seq.*

On July 16, 1991, upon joint application of the parties, the matter was placed upon the inactive list until January 17, 1992 or resolution of the underlying criminal matter, whichever occurred first. A second order of inactivity was entered on January 16, 1992 continuing inactive status until April 17, 1992.

On March 30, 1992, the petitioner was found guilty of counts twenty-five, twenty-six, twenty-seven and twenty-eight; not guilty verdicts were entered on the remaining counts. Judgment was entered sentencing petitioner to custody for ten

years on count twenty-five, to a consecutive seven-year sentence on count twenty-six, and to a concurrent seven-year period on count twenty-eight. The court also ordered, pursuant to *N.J.S.A.* 2C:51-2, defendant to forfeit his position as a principal and teacher of the Board of Education of the Borough of Elmwood Park.

N.J.S.A. 2C:51-2 provides that any person holding public employment who is convicted of an offense of the third degree or above or of an offense touching or involving his employment shall forfeit his position; such forfeiture shall take effect either upon a finding of guilt, if the court so orders, or upon sentencing, unless the court orders a stay of such forfeiture. In the instant matter, the court ordered forfeiture of the position in its oral opinion of March 30, 1992, memorialized in the judgment of conviction issued March 31, 1992. As of that date, Mr. Bracigliano no longer had any rights to his position as a principal and teacher with the Elmwood Park Board of Education.

In addition, Mr. Bracigliano has resigned from his position with the Elmwood Park School District. He informed the Office of Administrative Law that he had no interest in appearing and testifying in this matter. The Board has separately informed the Office of Administrative Law that in light of the conviction and his resignation, there is no need to prosecute further the tenure charges, unless the conviction is overturned, in which case the Board would rely on the resignation and seek to proceed with the tenure charges.

There are no facts in dispute. By court order of March 31, 1992, petitioner has forfeited his tenured position. I find there are no issues remaining to be decided in this contested matter at this time. Therefore, I **ORDER** the return of this file to the Commissioner of Education and the tenure charges considered dismissed without prejudice. In the event the conviction is reversed on appeal and an issue arises as to the effect of the resignation or the need to proceed with the tenure charges, this matter may be retransmitted to the Office of Administrative Law for hearing.

May 20, 1993
DATE

Jaynee LaVecchia
JAYNEE LaVECCHIA, DIRECTOR

OAL DKT. NO. 4632-91

IN THE MATTER OF THE TENURE	:	
HEARING OF SAMUEL BRACIGLIANO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF ELMWOOD PARK,	:	ORDER
BERGEN COUNTY.	:	
	:	

The record and Order for Administrative Return of a Contested Case rendered by the Office of Administrative Law in this tenure charge matter have been reviewed. The Commissioner is in agreement with the order given respondent's automatic forfeiture of his tenured position as a principal in the Elmwood Park School District ordered by New Jersey Superior Court due to his convictions in March 1992 and respondent's subsequent resignation from the district.

Accordingly, the tenure charges against respondent are dismissed without prejudice.

JUNE 28, 1993

COMMISSIONER OF EDUCATION

DATE OF MAILING - JUNE 28, 1993

150-93

150-93

JANET THAXTON,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CAMDEN COUNTY VOCATIONAL SCHOOL DISTRICT,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning student appealed district's refusal to let her complete coursework to graduate Licensed Practical Nursing (LPN) program due to her grade of F in clinical performance.

ALJ found petitioner had been given a policy statement which warned dismissal would follow an F in clinical procedure. Moreover, petitioner was given a hearing wherein all her evaluations and rebuttals were considered. ALJ concluded petitioner received all procedural due process required by law. Further, ALJ concluded policy and grading system of LPN program in clinical performance was reasonable and ALJ could not eliminate or change any of the numerical evaluations under the relevant case law. Thus, nothing in petition stated a claim for which relief might be granted. Petition was dismissed. However, if petitioner discovers that a student between 1985 and 1991 with a record of F in clinical studies was permitted to graduate, she may request Commissioner to remand or reopen her case solely on the limited point of equal treatment of all those with F's in clinical studies.

Commissioner adopted findings and determination in initial decision.

JUNE 28, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7794-92
AGENCY DKT. NO. 403-8/92

JANET THAXTON,
Petitioner,
v.
BOARD OF EDUCATION OF CAMDEN COUNTY VOCATIONAL SCHOOL DISTRICT,
Respondent.

Janet Thaxton, petitioner, *pro se*

William C. Davis, Esq., on behalf of respondent (Davis, Reberkenny & Abramowitz, attorneys)

Record Closed: April 9, 1993 Decided: May 24, 1993

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

Janet Thaxton filed a petition on August 24, 1992, seeking to be readmitted to the Board's licensed practical nursing (LPN) program to complete four weeks of school and graduate. On October 7, 1992, the Commissioner transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -10.

On December 10, 1992, I wrote to the parties suggesting we proceed by summary decision motion on the papers since respondent's defense was failure to state a claim for which relief may be granted. In January 1993 the parties met to match the documents of record and I numbered them in February. The record therefore consists of 100 numbered documents or pages which petitioner submitted

with her petition and her proposed interrogatories (C-1). Respondent filed its brief and motion to dismiss on March 18, 1993, and I received petitioner's response on April 9, 1993, when the record closed.

The following operative facts are taken directly from petitioner's statements and submissions:

1. Janet Thaxton was admitted to the Board's LPN program in September 1990 for a one year course of study including both classroom and clinical instruction which was to conclude in August 1991. She was dismissed from the program on July 2, 1991, about 4 1/2 weeks before graduation because she received a grade of "F" in clinical performance.

2. Thaxton was given a copy of policies of the LPN program which she signed. Policy no. 5 states: "Clinical evaluations are graded as Pass/Fail. A failure in this area means dismissal irregardless of academic standing" (p. 48). Evaluations are not averaged. A single evaluation below 36 points is a "possible termination."

3. Clinical instructors have a standardized evaluation form which reviews nine specific areas of student conduct and grades them with a point system of five levels:

unsatisfactory	(2)
marginal	(4)
acceptable	(6)
commendable	(8)
outstanding	(10)

The conduct reviewed is:

1. Professional responsibility and accountability;
2. Awareness and understanding of safety in nursing practice;
3. Application of principles of medical asepsis;
4. Application of nursing process;
5. Versatility in nursing practice;
6. Professional attitude in job performance;
7. Initiative in nursing practice;
8. Effective communication with instructor, supervisors, peers and patients; and
9. Attendance.

The instructor also includes comments, which may contain facts and opinions supporting the grades given, caveats and specific directives to the student.

4. The total points in all categories are added up. For example, a marginal rating (4 points) in all 9 categories would yield 36 points. The total points are then graded as follows:

Satisfactory	54 or more points
Re-evaluation or probation	36 to 53 points
Possible termination	35 points or less

5. Part of petitioner's clinical instruction took place in JFK Hospital where she was assigned to the medical/surgical rotation from October 18 to December 21, 1990. R.N. Brooks, Director of the LPN Program graded Thaxton 58 on December 6, 1990 (page 6).

6. R.N. Scott graded Thaxton 46 on December 21, 1990. Although Scott forgot to grade one category, if it had been graded "acceptable" as were 6 of 8 other categories, her points (52) would still not have taken her out of the probationary level. Scott made extensive comments supporting her grading of unsatisfactory in the safety category and restated specific directives emphatically (pages 8, 9).

7. On February 4, 1991, R.N. Scott graded Thaxton 34, finding her unsatisfactory in professional responsibility and accountability, awareness and understanding of safety in nursing practice and in effective communication with instructor, supervisors, peers and patients. Scott included four pages of specific comments and restated directives (page 14 *et seq.*)

8. After Scott's evaluation, which placed Thaxton in the "possible termination" category, Director Brooks spoke at length with petitioner about incidents noted by Scott and told her she would be under instructor Mehl for the rest of the week and that if an incident occurs in anyway similar to [those stated by Scott] she would be dismissed immediately with no needed conversation (page 88).

9. For Thaxton's clinical work in pediatrics from February 4 to February 22, 1991, at Cooper Hospital, R.N. Mehl graded her 62. Six categories were rated acceptable, two commendable and one outstanding. This was the best evaluation Thaxton received (page 30).

10. For the period April 30 to May 17, 1991, Thaxton was assigned to obstetrics, where R.N. Noga evaluated her with a grade of 58. All categories were rated "acceptable" except for attendance, which was outstanding. Thus only attendance brought Thaxton above the "satisfactory" marker of 54 (page 33).

11. On June 28, 1991, R.N. Scott notified Director Brooks that petitioner had made a medication error (page 34). In petitioner's rebuttal to this document, dated July 1, 1991, she stated, "I realize it was my fault for not checking the doctor's orders to see if there was any change" (page 41).

12. On July 2, 1991, Flax Brooks, Director of the LPN Program summarized Thaxton's clinical performance, after review of evaluations, as follows:

> The first clinical evaluation of December 1990 indicated that Janet was weak in identifying priorities related to the patient, that she was quick to justify her actions was more interested in advanced skills than basic nursing care and her responses to the instructor were often irrelevant to the subject being discussed. This evaluation was done by me and Janet counselled.
>
> After being transferred to Mrs. Scotts' group the following clinical evaluation noted difficulty in applying B/P Cuff and performing vital signs. Janet also applied a medication to the R thermometer before insertion and was unable to locate the medication sheet she stated she saw with instructions for use. At this time it was stressed she must not do any treatments without the instructors knowledge, and will ask questions of the instructor if in doubt. She was also told she must be aware of the patients care requirements and diagnosis before initiating care. All documented and attached to her evaluation. On 2/4/91 she received a marginal and unsatisfactory clinical evaluation and placed on probation. She refuted what was said and at this point her clinical experience required her to move to a specialty (pediatrics). From peds. she went to mental health and obstetrics. Now that she has returned to med/surg nursing her original behavior has reoccurred resulting in an incident of a medication error. Because of her unsafe clinical performance overall her grade for clinical is an F and she will be terminated. Additional documentation is in Janet's file. [page 44]

13. On July 10, 1991, petitioner filed a grievance request with R. Sanders Haldeman, Superintendent of Schools, which resulted in a grievance meeting before Dr. Charles H. Ebbecke on July 16, 1991. Ebbecke obtained all Thaxton's evaluations, read her rebuttal and convened a group consisting of DiNardo, Director of the Technical Institute, R.N. Brooks, Director of the LPN Program,

and instructors Scott and Noga to participate in the grievance meeting with Thaxton. At the prehearing meeting of this group, Noga stated that although she gave Thaxton a grade of 58, she was at the bottom of her clinical team. Scott explained why she regarded the medication error on June 26 as serious and noted that her main concern about Thaxton's nursing practices was her inability to admit a mistake and learn from it rather than continuing to make excuses why it had happened in an effort to displace blame (page 50).

14. Dr. Ebbecke then convened the appeal hearing with staff and petitioner, which lasted about an hour. Although Thaxton was unaware at the time of what Scott and Noga had stated to Ebbecke before the hearing, it appeared in the minutes which she received subsequently. Petitioner included a rebuttal to it along with a rebuttal to each critical evaluative comment and factual episode related by her instructors in the appeal package she presented to the Board of Education on March 18, 1992 (pages 1 to 54).

15. At the grievance hearing on July 19, 1992, Dr. Ebbecke asked DiNardo about the method of notifying students of the grievance procedure, which is in the Technical Institute Handbook. The Handbooks are placed on a table at student orientation for distribution. Petitioner never received one. As a result, petitioner was unaware that formal grievance procedures were available at earlier times upon receipt of evaluations. Ebbecke also inquired as to why several evaluations were not in the package he received. Mehl's had been lost and had to be replaced. Another which petitioner believed existed for a brief assignment at the mental institution, did not exist. Dr. Ebbecke noted that the evaluation form is somewhat difficult to interpret but is usually reviewed by the teacher and student and then signed. Initially, Thaxton misread Scott's evaluations and believed she was graded marginal instead of unsatisfactory (page 51).

16. Dr. Ebbecke noted petitioner's signature on the statement of policy she received, stating he was satisfied that she had been kept up-to-date on her progress and had received procedural due process. Some evaluative comments were discussed by staff and verbally rebutted by Thaxton, who argued with instructor Noga about the correct procedure to take an apical pulse rate. Dr. Ebbecke upheld the decision to dismiss petitioner from the program (page 52).

17. Petitioner next filed an extensive appeal document (pages 1-54) with the Board of Education on March 18, 1993, which was preliminarily reviewed by Dr. Ebbecke. Dr. Ebbecke reviewed all the rebuttal material and some additional instructional materials which consideration of the rebuttal led him to call for. He then made a report to the Superintendent recommending denial of the appeal, enclosing four exhibits (pages 60 to 90).

18. The Superintendent sent the entire package to the Board, which denied the appeal based on Dr. Ebbecke's report and attachments on May 20, 1992 (page 67).

19. On July 30, 1992, petitioner wrote a letter of appeal to the Commissioner of Education (page 57, 58) and on August 20, 1992, she was sent a copy of the regulations concerning appeals (page 56).

20. Petitioner's letter to the Commissioner, filed rebuttals and set of interrogatories in this file (C-1) demonstrate the kind of hearing she wishes to present. For example, she wants to demonstrate that evaluation statements are untrue (especially Noga's and Scott's), and that a statement Dr. Ebbecke made is untrue. She states records and investigation were denied to her (page 58). She wishes to present witnesses' statements (and possibly testimony) on these points.

21. Enclosed with the petition are examples of the kind of testimony involved (pages 94 to 100). Noelle Gill's is a criticism of actions of instructor Scott and others of the same nature as those made by petitioner. Kathy Seconler's statement related how she heard Scott tell about ten students of the seriousness of Thaxton's medication error in June 1991. She also states that other students were not written up for actions similar to Thaxton's, that Scott listened to hearsay about students, that Scott called out a lot, or left early and that students in her group missed clinical time.

Conclusion and Disposition

A complaint may not be dismissed through motion to dismiss for failure to sate a claim upon which relief can be granted where a cause of action is suggested by the facts and a theory of actionability may be articulated by amendment. In the very earliest stages of litigation, such a motion should be rarely granted, our Supreme

Court has held. *Printing Mart - Morristown v. Sharp Electronics Corp.*, 116 *N.J.* 7309, 772 (1989). We must assume the facts as asserted by the plaintiff are true and give her the benefit of all inferences that may be drawn in her favor. In the instant case, the filed petition constitutes a very substantial record fully setting forth the petitioner's rebuttals to her evaluations and to every step of the appeal procedures. The appeal document is not comparable to complaints filed in courts. It contains the entire paper record of petitioner's grading and appeals and is more like a record for summary judgment on the record.

The kind of discovery and investigation petitioner wants is also clearly revealed because petitioner sent me copies of her proposed interrogatories (C-1) which consist of 31 questions to R.N. Noga, 89 questions to R.N. Scott and 164 questions to Director Brooks. I cannot fully relate all of the areas covered. For example, petitioner seeks to probe the entire educational and work experience of the teachers, the exact method and mental processes behind each evaluation of petitioner (and of some other students), the conversations the teacher had with petitioner or other students, each incident in which petitioner figured, directions the teachers gave to students, and the nature of the workloads and assignments of students. In addition to the above, she asks the Director to relate all matters concerning grievance procedures, education and training background of Scott and Noga, how she grades the effectiveness of instructors, how many students they had, how many were dismissed, what state requirements are for students in regard to administering medications, whether, in effect, the specific directives given by her instructors were correct, what procedures she would use if a classroom instructor might not like a particular student, and whether and how Brooks knew she had been married to an Iranian. She asks for names, addresses and telephone numbers of all students in her clinical group in 1990-1991. There is no question that the interrogatories are oppressive within the meaning of *N.J.A.C.* 1:1-10.1(c) and that almost all of them seek material which is not relevant to the issue of grading as it has been defined by applicable case law.

The discovery and numerous statements of petitioner in the paper record demonstrate that petitioner's trial plan is to attack not only the evaluations, but the validity of every underlying opinion, judgment and fact and the qualifications, character, and procedures of the teachers and director. One very specific part of that intention is to prove that R.N. Scott "slandered" petitioner. In short, petitioner seeks to have all unfavorable evaluations removed and have the hearer substitute his judgment for those of certified personnel and change her grade in clinical practice

from an F to a pass, which would result in invalidating her dismissal from the program. Alternatively, a part of her theory is that she was not accorded due process because she was not specifically handed a copy of grievance procedures or orally reminded of what they were with respect to evaluations. She believes she would have been able to remove those of Scott from her record. Finally, a part of her theory also implicates allegations that her teachers had some kind of personal animosity toward her. As to Scott, her main factual basis for this is that Scott "lied" about petitioner's work, that Noga had previously given her husband a low grade and that Brooks asked if she was still married to an Iranian.

The Due Process Issue

For purposes of this issue I assume that petitioner never saw the grievance procedure concerning evaluations printed in the Technical Handbook, that no one explained it to her, and that she first learned of it from DiNardo on July 2, 1991, after she was given her termination notice. She then filed a grievance together with a 10 page rebuttal, and notified Dr. Ebbecke that she had never had the opportunity to make use of the grievance procedure to rebut adverse evaluations. When petitioner filed her appeal documents with the Board, typed rebuttals to all the evaluations and to staff statements made on the day of the grievance meeting were included. Dr. Ebbecke reviewed the new materials prior to reporting his recommendation through the Superintendent to the Board. Ebbecke concluded at the grievance meeting that petitioner had received "procedural due process" during the grading process.

This case concerns a grade in clinical procedures and an academic dismissal. It is not a school disciplinary proceeding in which a student is punished for alleged misconduct, in which due process requires that a petitioner have rights to confrontation and to calling witnesses in a hearing before a Board of Education. *Tibbs v. Bd. of Ed. of Tp. of Franklin*, 114 *N.J. Super.* 287 (App. Div. 1971) aff'd on concurring opinion below of *J.S.C. Kolovsky* 59 *N.J.* 506 (1971). The due process required in a case such as this is set forth in *Bd. of Curators, University of Mo. v. Horowitz*, 435 *U.S.* 78, 55 *L. Ed.* 2d 124, 98 *S. Ct.* 948 (1978). In that case, the facts were that a medical school student who was in her final year on a probationary basis after being advised of dissatisfaction with her clinical performance and mostly unfavorable evaluations by several independent physicians was notified by a faculty committee and the dean that she was being dropped from the school. The student made a written appeal to the provost, who approved the decision. Without deciding

the question of property interest, the Court held that due process was satisfied because the school fully informed respondent of the facility's dissatisfaction with her clinical progress and the danger that this posed to timely graduation and continued enrollment and that the ultimate decision to dismiss was careful and deliberate. No hearing was required. The Court noted that there is a significant difference between failure of a student to meet academic standards and the violation by a student of valid rules of conduct. "This difference calls for far less stringent procedural requirements in the case of an academic dismissal." Id at 435 *U.S.* 86.

Petitioner was given a policy statement which warned dismissal would follow an F in clinical practice. She was given an evaluation grade in the probation range and then one below passing. She could have been dropped at that point, but was warned again before an incident in June, which precipitated a final grade of "F" and dismissal. Petitioner here was given a hearing (grievance meeting) the hearer of which considered all her evaluations and written and oral rebuttals. The decisions of both the Superintendent's hearing officer and the Board of Education, before which petitioner placed additional statements and rebuttals, were clearly careful and deliberate. I **CONCLUDE** petitioner received all the procedural due process required by law.

The Substantive Due Process Issue

The Court in *Horowitz* noted that one reason why no hearing was required on academic evaluations was because it rested on the academic judgment of school officials that *Horowitz* did not have the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress toward that goal:

> Such a judgment is by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary proceeding. Like the decision of an individual professor as to the proper grade for a student in his course, a determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision making. [Id. at 90]

In Regents of *University of Michigan v. Ewing* 474 *U.S.* 214, 882 Ed. 2d. 523, 106 *S. Ct.* 507 (1985), the Court revisited the substantive issue. *Ewing* failed a comprehensive examination required for a special medical program, receiving 235 versus the passing score of 345. The university refused to allow him to retake the

exam and after a review of his record in detail the Promotion and Review Board voted to drop him from the program. After giving *Ewing* an opportunity to be heard, the Medical School executive committee denied his appeal and twice subsequently denied him readmission. *Ewing* claimed other students had routinely been given a second opportunity to take the test. The University claimed his dismissal was justified by his academic record. Although the school admitted that all other students who failed were allowed to retake the test, after a hearing, no arbitrary or capricious action was found. The Court held:

> When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.
>
> . . .
>
> Added to our concern . . . is a reluctance to trench on the prerogatives of state and local educational institutions and our responsibility to safeguard their academic freedom.
>
> . . .
>
> [The Court is] far less suited to evaluate the substance of the multitude of academic decisions which are made daily by faculty members of public educational institutions . . .
> [id at 474 *U.S.* 226]

The Court noted that the "narrow avenue for judicial review" precluded any conclusion that the decision to dismiss was such a substantial departure from accepted academic norms as to demonstrate that the faculty did not exercise professional judgment, since *Ewing's* academic record was good reason for dismissal. To be overturned, the school's academic judgment would have had to be beyond the pale of reasoned academic decision making when viewed in light of *Ewing's* school record.

In a footnote (14), the Court noted that even if some other students with more incompletes or low grades were allowed to retake the exam and were not dropped, the Court was in no position to say that these students were "similarly situated" with *Ewing* so as to support any claim of different treatment of other students. The Court described promotion decisions as "insusceptible" to rigorous judicial review, presumably because each student's entire academic record is unique.

An instructor's assignment of a grade is an academic decision based on many factors. Clinical study grades are inescapably more subjective than written test grades because they are based on many factors. For this reason courts generally do

not hear cases involving grade determinations. A teacher's grade determination is not arbitrary because a student does not believe that his or her grade was appropriate. Difference of opinion is not a basis for overturning a grade. Furthermore, a low grade does not suggest bias or bad faith. Since the U.S. Supreme Court's holdings and those of the State Supreme Courts which have considered the issue have been well known for some years, there is not much New Jersey case law on the subject of changing grades. There have been some cases in which the Commissioner has reviewed a Board's or teacher's grading policies, as distinguished from the grade given to an individual student.

In *K.C. v. Bd. of Ed. of Collingswood*, 1973 *S.L.D.* at 348, a teacher gave a student an A in Art the first semester, an F the second and an F for the year. The student argued that the teacher should have averaged the grade. The Commissioner held that a grading system which required averaging for major courses only was reasonable and that the student had not proved her grade was discriminatory or uniquely applied to her.

In *Talarsky v. Edison Bd. of Ed.*, 1977 *S.L.D.* 862, 867, a principal changed a student's grade from an F to a D in accordance with a Board's unwritten policy that, upon review, a principal was permitted to do so. The Commissioner found the policy and Board decision rational and "entitled to a presumption of correctness" because there was no evidence they acted as the result of bias, prejudice or bad faith. Their decision was "not without rational basis." An action of the local board which lies within the area of its discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives." *Kopera v. West Orange Bd. of Ed.*, 60 *N.J. Super.* 288, 294 (App. Div. 1960). The *Kopera* standard remains the most authoritative in New Jersey case law, since the others cited are not from our appellate court.

In a recent OAL decision adopted by the Commissioner, a parent sought to change a failing final grade of a student. *E.C. v. Bd. of Ed. of Twp. of Mahwah*, OAL Dkt. No. EDU 9590-89 (January 2, 1991), aff. Commissioner 12-91. The parent argued that the teacher should have "curved" the test results, which he decided not to do "in his professional discretion." The final grade was determined by a weighted average which was stated in a published policy via a student handbook. There was also a board policy setting forth an appeal process for administrators to review grades to prevent arbitrariness. The principal and department heads review the grades prior to a decision by the superintendent. A trial type hearing was not

permitted although the Board offered to allow E.C. one-half hour to make a presentation. ALJ Springer noted:

> . . .it does not follow that petitioner must be afforded a trial-type hearing with sworn testimony and cross-examination of opposing witnesses. Under some circumstances an informal appearance before the Board will satisfy due process requirements. cf. *Donaldson v. No. Wildwood Bd. of Ed., N.J.* 236, 246 (1974). What process is due in a particular setting is partly a function of the importance of the interest affected *Woodland Private Study Group v. DEP*, 109 *N.J.* 62, 74 (1987). It would seriously undermine respect for the teacher's legitimate authority if any student unhappy with a particular grade could demand a hearing. [emphasis added]

The ALJ then concluded that the petition failed to state a claim for which relief may be granted.

The ALJ's reasons which were adopted by the Commissioner, were:

> . . . Significantly, petitioner does not allege that the teacher was biased against his child on the basis of race, religion, ethnic origin, gender, or political affiliation or because of the exercise of any constitutionally protected right. This is not, for example, a case where a student allegedly received lower grades because her sincere religious beliefs precluded her from dissecting a frog, saluting the flag, studying evolution or attending sex education classes. Nor is this a situation where the Commissioner might conceivably want to intervene to enforce a paramount state educational policy, such as the improper use of grades as a disciplinary device, *Talarsky v. Edison Twp. Bd. of Ed.*, 1977 *S.L.D.* 862 (Comm'r July 29, 1977) and *Wermuth v. Bernstein*, 1965 *S.L.D.* 121 (Comm'r Aug. 31, 1965), or to coerce students to purchase a gym uniform in violation of their right to a "free" public education, *V.F. v. Haddon Heights Bd. of Ed.*, 1988 *S.L.D.* __ (Comm'r June 28, 1988).
>
> Here petitioner's pleadings, taken as true, present an honest difference of opinion about a teacher's judgment call, nothing more or less. Absent a clear showing that the actions complained of resulted from bias, bad faith, arbitrariness, statutory violation or constitutional infirmity, a petition seeking to change a final grade is "without merit." *Talarsky*, 1977 *S.L.D.* at 870-71. Generally, courts will not override an academic decision unless it represents "such a substantial departure from accepted academic norms as to demonstrate that the faculty did not exercise professional judgment." *Regents of Univ. of Michigan v. Ewing*, Supra, at 277 . . . Likewise, the Commissioner is loath to substitute his judgment for that of the classroom teacher, without more than a mere assertion that someone deserves a better grade.
> [emphasis added]

The ALJ's rationale is most persuasive. I have already **CONCLUDED** that petitioner received procedural due process and note that the process was very similar to that discussed in the E.C. case, which is closely on point. I now **CONCLUDE** that the policy and grading system of the L.P.N. program in clinical studies is reasonable. The policy clearly provides that an F from any instructor, not an F as an average of the grades of all instructors, will result in dismissal. The reasons why this is a reasonable policy are alluded to by our Supreme Court in the Horowitz case, where the medical school's decision rested on academic judgment of school officials that Horowitz did not have the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress toward that goal. The court remarked that in a medical school context, competence in clinical courses is as much a prerequisite to graduation as satisfactory grades in other courses. Like petitioner, Horowitz was proficient in the "book learning" required,

I also **CONCLUDE** that the system of evaluation used by all the clinical instructors is reasonable. The nine categories, five grade levels, point totaling and point total assessments serve to standardize to the extent possible an academic area in which judgments are by nature more subjective. This is because the grades do not result from test scores, but rather from observations of skills and techniques in actual conditions of practice. The form of the evaluative instrument alone records the grade, *i.e.*, the academic opinion of the instructor. The comments, notes and directives of the instructor on the forms or appended to them are simply informational material for the student, often indicating a basis for an instructor's opinion. I **CONCLUDE** that I cannot eliminate or change any of these numerical evaluations under the relevant case law. In short, nothing in the petition states a claim for which relief may be granted.

Since the policy of basing a dismissal on one F is reasonable, the passing evaluations given by some instructors are irrelevant. The documentation clearly shows that the student had notice of the policy, and by evaluations given, had notice that point totals fell within the probationary range (Scott, December 21, 1990 evaluation) and within the fail category (Scott February 4, 1991). Notwithstanding that F, petitioner was allowed to continue so long as no other incident related to patient safety occurred, to see if she improved. The official F and dismissal determination followed after a review of her entire record. The Director (Brooks, who was also an instructor) clearly considered all the evaluations, but gave great weight to the patient safety and communication factors, as apparently the other

reviewing bodies did in upholding the dismissal. It is simply untrue that a single incident reported by instructor Scott was the basis of the dismissal.

Alleged personal dislike of Scott for petitioner, even if assumed to exist, would not change my conclusions. No legal precedent supports the theory that all students have a right to an instructor who likes them. The professionalism of an academic precludes use of personal bias in evaluation and the academic judgment is relied upon. There is no allegation in the petition of racial discrimination or that other students with Fs in clinical studies were allowed to graduate. Referring again to the parallel E.C. decision, petitioner did not allege in her complaint that Scott or the school was biased against her because of race, religion, ethnic origin, gender or political affiliation or because of the exercise of a constitutionally protected right: such bias, if proved, would render a school's decision arbitrary. Only improper motives, not differences of opinion with the evaluations could support a conclusion of arbitrariness. I **CONCLUDE** that the petitioner's documents demonstrate no more than a difference of opinion with an instructor's evaluations and with the respondent's decision to dismiss. That being so, petitioner fails to state a claim on which relief can be granted. I so **CONCLUDE**.

I am aware that petitioner did not have an opportunity in discovery to obtain certification from the school that no other students with Fs in clinical studies were permitted to graduate. I order that respondent certify whether or not, between 1985 and 1991, any student with a record of F in clinical studies was permitted to graduate. This certification shall be filed or attached to respondent's exceptions to the Commissioner and may, depending on its content, be used by petitioner, as a basis to request the Commissioner to remand or reopen her case solely on that limited point, *i.e.,* of equal treatment of all those who received Fs in clinical studies who were permitted to graduate notwithstanding that grade. Before availing herself of such an option, petitioner should recall the caveat of the Supreme Court: the other students would have to be similarly situated. It is difficult, if not impossible to prove this because no two students have an identical record.

It is therefore **ORDERED** that the petition be **DISMISSED** and that respondent submit the above described certification directly to he Commissioner.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

May 24, 1993
Date

Naomi Dower LaBastille
NAOMI DOWER-LABASTILLE, ALJ

Receipt Acknowledged:

5/25/93
Date

Maureen K. Kiley
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 28 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

/cae

OAL DKT. NO. EDU 7794-92

JANET THAXTON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CAMDEN COUNTY VOCATIONAL SCHOOL DISTRICT,	:	DECISION
RESPONDENT.	:	

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

Upon review of the record, the Commissioner agrees with and adopts the findings and recommendation of the Administrative Law Judge for the reasons expressed in the initial decision. Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

JUNE 28, 1993

DATE OF MAILING - JUNE 28, 1993

151-93

GENEVIEVE CIRASA et al.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Eight consolidated appeals involved challenges by school employees to the abolition of their respective positions due to reorganization of state-operated school district. Petitioners alleged their positions were not central and administrative staff in nature and maintained district violated various federal and state antidiscrimination statutes in eliminating them.

ALJ concluded all petitioners occupied central administrative or supervisory staff positions which were abolished as a result of reorganization. He further concluded that the Commissioner did not have subject matter jurisdiction to adjudicate the claims arising solely under federal law. He found that materials submitted by petitioners regarding alleged violations of New Jersey antidiscrimination laws raise certain factual questions precluding disposition of these matters by summary decision. ALJ dismissed all petitions except for claims brought by the petitioners of the Baldwin group under state civil rights and antidiscrimination statutes.

Commissioner adopted findings and determination in initial decision.

JUNE 28, 1993

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

ORDER GRANTING
PARTIAL SUMMARY DECISION

OAL DKT. NO. EDU 5277-92
AGENCY DKT. NO. 198-5/92
Department of Education

GENEVIEVE CIRASA,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON,
Respondent.

LUCILLE WALSH,
Petitioner
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON,
Respondent.

OAL DKT. NO. EDU 5278-92
AGENCY DKT. NO. 163-4/92

GAIL HUNTINGTON,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON,
Respondent.

OAL DKT. NO. EDU 5279-92
AGENCY DKT. NO. 162-4/92

JOSEPH KAYAL,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON,
Respondent.

OAL DKT. NO. EDU 5280-92
AGENCY DKT. NO. 168-4/92

WILLIAM KOPCHO,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON,
Respondent.

OAL DKT. NO. EDU 5281-92
AGENCY DKT. NO. 165-4/92

RALPH RUDNICK,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON,
Respondent.

OAL DKT. NO. EDU 5282-92
AGENCY DKT. NO. 164-4/92

MARY BALDWIN,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON,
Respondent.

OAL DKT. NO. EDU 5283-92
AGENCY DKT. NO. 167-4/92

RAYMOND LEOPIZZI,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON,
Respondent.

OAL DKT. NO. EDU 5284-92
AGENCY DKT. NO. 166-4/92

Louis P. Bucceri, Esq. for petitioner Genevieve Cirasa
(Bucceri & Pincus, attorneys)

James V. Segreto, Esq. for petitioners Mary Baldwin, Gail Huntington, Joseph Kayal, William Kopcho, Raymond Leopizzi, Ralph Rudnick and Lucille Walsh
(Segreto & Segreto, attorneys)

Gregory G. Johnson, Esq. for respondent
(Carroll & Weiss, attorneys)

Record Closed: April 12, 1993 Decided: May 14, 1993

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

Statement of the Case

These eight consolidated appeals involve challenges by school employees to the abolition of their respective positions in connection with the reorganization of the State-Operated School District of the City of Paterson ("Paterson" or "District") under *N.J.S.A.* 18A:7A-34 to 52. Presently, the matter comes before the Office of Administrative Law ("OAL") on Paterson's motion for summary decision dismissing the petitions.

Basically, three issues are raised by the papers in support of and opposed to the motion: first, whether the positions formerly occupied by petitioners fall within the category of "central and administrative staff" as that term is used in *N.J.S.A.* 18A:7A-44, and, if so, what are the consequences;. second, whether the Commissioner of Education ("Commissioner") has subject matter jurisdiction over federal civil rights and antidiscrimination claims; and, third, whether a sufficient factual dispute exists to require a hearing on allegations by the seven petitioners represented by Mr. Segreto (collectively, the "Baldwin group") that the actions taken by Paterson constitute invidious discrimination based on race, age or gender in violation of state law, particularly the Law Against Discrimination , *N.J.S.A.* 10:5-1 to 10:5- 42.

For the reasons which follow, partial summary judgment must be granted in Paterson's favor on the first and second issues. However, a hearing must be held to make factual findings on the third issue relating to the Baldwin group's discrimination claims under state law.

Procedural History

On May 6, 1992, petitioner Genevieve Cirasa filed her petition with the Commissioner. Unlike the Baldwin group, she did not raise any discrimination claim, but only contended that Paterson had acted arbitrarily, capriciously and unreasonably by failing to retain her in a supervisory capacity. Shortly thereafter, on April 28, 1992, the Baldwin group filed their separate petitions, and, on June 18, 1992, an amendment to the original petitions. On June 26, 1992, Paterson filed its answer and affirmative defenses to the Cirasa petition and, on or about July 1, 1992, its answers to the Baldwin group's amended petitions. Subsequently, on July 14, 1992, the Commissioner transmitted all eight cases to the OAL for hearing. By

consent order entered on September 21, 1992, the OAL consolidated them all for hearing.

Recently, on March 9, 1993, Paterson filed a notice of motion for summary decision pursuant to *N.J.A.C.* 1:1-12.5, together with a legal brief and five supporting affidavits or certifications.[1] On March 29, 1993, Ms. Cirasa filed her opposing paper, which include a legal brief and two affidavits.[2] Next, on March 31, 1993, the Baldwin group filed its opposing papers, comprised of a legal brief and seven affidavits and attached exhibits.[3] Last, on April 12, 1993, Paterson filed its reply brief.

(1) Meaning of the Term "Central Administrative and Supervisory Staff"

All of the material facts needed to resolve this issue are set forth in the existing record. These facts are undisputed and are largely a matter of public record. **I FIND** the following facts:

On August 7 1991, the State Board of Education ordered the state takeover of the Paterson school district. In taking such a drastic measure, the State Board declared that a comprehensive investigation had "show[n] clearly a picture of long term educational failure, managerial and administrative ineptness, and the failure of the Paterson Board of Education to develop and implement governance practices

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[1]Supporting documents consist of affidavits by various top District officials including Dr. Laval S. Wilson, state-district superintendent; Dr. Clarence Hoover, assistant superintendent of curriculum and instructions; Barbara Mortimer, business administrator; Jack McGee, state assessment unit coordinator, and Dr. John A. Nolan, director of personnel. Counsel for the District also submitted a certification attaching numerous documents

[2] Ms. Cirasa's papers consist of her own and her counsel's affidavits.

[3]Each of of the Baldwin group petitioners filed an affidavit. Previously, the Baldwin group had supplied a copy of the deposition of Dr. Laval Wilson held on March 17 and 18, 1993. Later, on April 23, 1993, their counsel filed his own supplemental certification.

aimed at addressing the District's myriad of managerial and educational problems."[4] Local school officials tacitly acknowledged the existence of these conditions, and their inability to correct such problems on their own, by not contesting the state takeover. Also on August 7, 1991, the State Board appointed Dr. Laval Wilson to a five-year term as state district superintendent and charged him with responsibility over the conduct and supervision of the state-operated school district. It expressed confidence in Dr. Wilson's "outstanding record of accomplishment as a school leader" and his "extensive experience as an urban district superintendent."[4]

As an immediate consequence of the creation of the state-operated school district, the former positions of superintendent and the three top executive administrators were immediately abolished. Moreover, the newly-appointed state district superintendent had only six months to prepare a plan for reorganization of the District's central administrative and supervisory staff and to evaluate all individuals serving in that capacity. Dr. Wilson delegated to Jack McGee the task of identifying which Paterson employees fell within that description. Mr. McGee was originally a member of the state team assigned to assist the District during the transition period. In November 1991, he left State employment and became an employee of the District.

After consulting with high-level administrators from the Jersey City State-Operated School District who had experience in conducting a central office evaluation and reorganization, Mr. McGee prepared a list of 59 Paterson staff members considered to hold central administrative or supervisory positions. Included on the list were the eight individuals who have brought these appeals. According to the McGee affidavit, he made his recommendation "after reviewing their job description, locating their placement and classification on district payroll and staff lists, and assessing the duties encompassed within the scope of their positions."

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[4]*Mulhern v. Paterson Bd. of Educ.*, 1991 *S.L.D.* 1086, 1091, 1092 (St. Bd. Aug. 7, 1991); see also, *Mulhern v. Paterson Bd. of Educ.*, 1991 *S.L.D.* 1089, 1091 (St. Bd. Aug. 7, 1991).

Two months after his appointment as state district superintendent, Dr. Wilson issued a memorandum regarding the evaluation of all central administrative and supervisory staff. That memorandum, dated November 7, 1991, fully discloses the standard used by Dr. Wilson in making his selection of who would be subject to evaluation:

> The only staff members included within this statutory mandate are individuals currently employed within central office instructional and non-instructional supervisory and administrative job categories.Other employee categories, such as teacher, instructional aide, or support staff are not included in this specific evaluation process, nor are school-based administrative and supervisory employees.

At the same time, Dr. Wilson sent a letter to the 59 affected persons, including the eight petitioners, notifying each "that the position you presently hold in the district will be abolished at the time of the reorganization." Further, the letter stated that, "Individuals whose positions are to be abolished, however, may be rehired based on the staffing needs of the district as well as evaluations of those individuals conducted during development of the reorganization plan." None of the eight objected to their inclusion as central administrative or supervisory staff until after the evaluation process had been completed and the decision had been made not to rehire them.

During the intervening six months, Dr. Wilson arranged for the 59 individuals to be evaluated formally by one of six outside consultants under the coordination of Mr. McGee. On January 30, 1992, Dr. Wilson reviewed and approved the final evaluation reports prepared by the consultants. These reports consist of standard forms which rate the employee's performance on a five-point scale, from "distinguished" to "unsatisfactory," in various categories, such as ability to manage, ability to make decisions, responsiveness to others, and creativity. In addition to a composite or "summative" rating, the forms contain a section to record the strengths and weaknesses of each individual. Generally, the petitioners involved in these cases received average or acceptable ratings. Six of them had a summative rating of "competent" (the middle range), one had a rating of "commendable" (the next-to-highest rating) and one had a rating of "fair" (the next-to-lowest rating).

On the same date that he reviewed the evaluation reports, Dr. Wilson also conferred with the assistant superintendents responsible for the particular department to which each employee was assigned. Dr. Clarence Hoover, assistant superintendent for curriculum and instruction, recommended against appointing the Baldwin group petitioners to a central administrative or supervisory position. Similarly, Barbara Kaye Mortimer, the business administrator, recommended against appointing Ms. Cirasa to a central administrative or supervisory position. By letter dated February 6, 1992, Dr. Wilson informed each petitioner that he had decided not to offer him or her a central administrative or supervisory position in the reorganized district, but that each "would receive 60 days pay at your current salary." None of the petitioners actually lost their employment in the District. Instead, each had the opportunity to transfer to another nonsupervisory position at a lesser salary. However, Ms. Walsh and Ms. Cirasa chose to retire rather than to accept a "demotion."

Some generalizations apply to all or nearly all of the petitioners. All performed what Dr. Hoover characterized as "district-wide administrative responsibilities" or "supervised staff district-wide in a particular program." All, except Walsh and Cirasa, were required by their prior job descriptions to hold an appropriate administrative certificate with a supervisor endorsement, as distinguished from an instructional or educational services certificate.[5] All but Leopizzi and. Cirasa were engaged in developing curricula, providing technical assistance to teachers and principals, and conducting special programs in their fields of specialty. All of the Baldwin group were members of the Paterson Administrators' Association, the collective negotiating unit representing administrators rather than teachers. All of

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[5]There are three basic types of certificates that an educator may acquire: instructional, administrative, and educational services. *N.J.A.C.* 6:11-2.3. In addition to the three types of certificates, the State Board has also designated "special endorsements" under each type of certificate. *Ibid.* These endorsements coincide with the educational subjects or positions that share common attributes and thus are grouped under a particular certificate. *Dennery v. Bd. of Educ.*, No. A-23/24, (N.J. April 8, 1993) (slip op. at 7) . A "supervisor endorsement" to an administrative certificate is required for supervisors of instruction who do not hold a school administrator's or principal's endorsement. State regulations define a supervisor as "any school officer who is charged with authority and responsibility for the continuing direction and guidance of the work of instructional personnel." *N.J.A.C.* 6:11-9.3(c).

the Baldwin group held positions located in the Division of Curriculum and Instruction under the direction of Dr. Hoover. Ms. Cirasa, on the other hand, was located in the Division of Business Services under the direction of the business administrator, Barbara Kaye Mortimer.

Although the parties were unable to enter into a formal stipulation of facts, the material facts regarding each individual petitioner's assignments and job function are not genuinely in dispute. Mary Baldwin started working as a teacher in the former Paterson school district in September 1958. Ten years later, in September 1968, she became a "supervisor of home economics." Her training includes a master's degree from Montclair State College in the field of educational administration and supervision. She holds the required administrative endorsement as supervisor of home economics, as well as several other certificates including teacher of home economics. At the time of the reorganization, her job description outlined her duties to include "supervises all school or district programs in Home Economics;" [p]repares curriculum guides for all courses connected with Home Economics;" "[a]dvises teachers in the selection and use of materials;" and "[a]ssists in hiring and placing Home Economic teachers." An affidavit by Dr. Hoover further discloses that Ms. Baldwin was in charge of supervising "approximately 30 subject area teachers." When the reorganization took effect in February 1992, Ms. Baldwin was transferred to a classroom teaching position.

Gail Harrington started working for the Paterson district in January 1977, originally as a teacher of English as a Second Language ("ESL"). In October 1980, she became acting, and later permanent, "coordinator of gifted and talented." She has a master's degree from William Paterson College plus thirty graduate credits. Notwithstanding the use of the word "coordinator" in her title, the job description required her to hold a supervisor endorsement.[6] In addition to the supervisor endorsement, she holds various other certificates including teacher of ESL and elementary school teacher. As set forth in her job description, her duties included: "assists in planning, developing, advising and coordinating a program in the schools for gifted and talented students;" "communicates such programs to the staff, the

[6]Coordinator of Gifted and Talented" is not an officially recognized title under the regulations governing issuance of certificates, *N.J.A.C.* 6:11-1.1 to -11.20.

administration, and the public;" "visits classrooms for supervisory purposes;" "recommends equipment, supplies and textbooks;" and "assumes responsibility for a productive system of in-service training." Moreover, Dr. Hoover's affidavit recites that Ms. Huntington "supervised approximately 50 to 68 subject area teachers." As a result of the reorganization, she reverted back to her old job as a teacher of English as a Second Language.

Joseph Kayal started as an elementary school teacher in the Paterson district in December 1957 and became a physical education teacher in September 1960. After serving as assistant supervisor in 1967 and then as acting supervisor in 1973, he became the "supervisor of physical education" in September 1977. He has a master's degree from Seton Hall University and holds several endorsements, including supervisor of physical education and teacher of physical education. Pursuant to the job description, his duties included: "develops and supervises an effective and comprehensive curriculum of physical education for all pupils;" "recommends improvements in playgrounds, fields, and gymnasia;" "assists in preparing the budget for physical education;" and, "evaluates all physical education teachers." Again, Dr. Hoover's affidavit reflects that Mr. Kayal "supervised approximately 84 subject area teachers." In his own affidavit, Mr. Kayal states that he "was assigned to a group of special schools." After the reorganization, he returned to a regular teaching position.

William Kopcho has worked for the Paterson district as an elementary teacher starting in September 1967, as a school psychologist starting in September 1970, and as "supervisor of special services" starting in July 1981. He obtained a master's degree from Seton Hall University and has completed a sixty-credit graduate certification course in psychology. Aside from the necessary endorsement as a supervisor, he also has endorsements in school psychology and in several teaching areas. According to the job description, his duties included: "oversees curriculum guide development and instructional methodology guide development at all levels of special education;" "advises teachers and administrators in selection and use of Special Education materials;" "provides staff leadership;" and "assists in the hiring and evaluations of teachers of Special Education." Essentially, Mr. Kopcho agrees with this summary of his responsibilities, but he points out that, as one of several "sector" or "cluster" supervisors, he "was assigned to seven specific schools in the district." Dr. Hoover notes that Mr. Kopcho "supervised approximately 130 subject

area teachers." Since the reorganization, Mr. Kopcho has resumed his prior assignment as a school psychologist.

Raymond Leopizzi was hired by the district as an elementary school teacher in November 1973 and became a compensatory education teacher in September 1977. Beginning in September 1980, he served in an administrative position with various successive titles, once known as "coordinator of basic skills" and presently as "supervisor of funded programs." Despite the word "coordinator" in the old title, the occupant of the position must hold a supervisor certificate. Mr. Leopizzi possesses a principal's endorsement (which apparently was treated as equivalent to a supervisory endorsement for this purpose), and an endorsement as an elementary school teacher. According to the old job description, the duties included: "monitors the Basic Skills Improvement Program to maintain compliance with State rules and regulations;" "evaluates the effectiveness of the Basic Skills Improvement Program and staff;" and "prepares necessary reports and records related to the program." Both sides agree that Mr. Leopizzi's role was to monitor the use of Chapter I and Chapters 192/193 funds in approximately fifteen nonpublic schools.[7] In his affidavit, Mr. Leopizzi elaborates that he "didn 't coordinate the activities of any Paterson School district personnel but rather coordinated funded programs in the parochial schools which were eligible to be beneficiaries of our funded programs." Subsequent to the reorganization, Mr. Leopizzi returned to teaching duties as a basic skills instructor.

Ralph Rudnick came to the district in February 1955 as a teacher, served as head of the social studies department in September 1971, and became "supervisor of social studies" in July 1975. He has a master's degree from Montclair State College and has completed his course requirements at the doctorate level. Besides an endorsement as supervisor of social studies, he holds teaching endorsements in

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[7]Chapter I of the federal Education Consolidation and Improvement Act of 1981 ("ECIA"), 20 *U.S.C.A.* §§3801 to 3876, provided funding for basic skills improvement programs. ECIA was repealed by Pub. L. 100-297, effective July 1, 1988, but large parts have been readopted as amendments to Title I of the Elementary and Secondary Education Act of 1965, 20 *U.S.C.A.* §§2701 to 3386. Chapters 192 and 193 of the Laws of 1977, codified at *N.J.S.A.* 18A:46A-1 and 18A:46-19.1 respectively, provide funding for certain auxiliary and remedial services to handicapped children in private and parochial schools.

social studies and English. Among other duties, his job description included: "develops, implements, and coordinates the curriculum in social studies to provide rich and varied experiences;" "arranges and conducts workshops and in-service training programs in Social Studies;" "provides leadership in planning and executing all activities connected with the schools' Social Studies programs;" and "assists in hiring and placing Social Studies teachers." Dr. Hoover's affidavit avers that Mr. Rudnick "supervised approximately 34 secondary level subject area teachers." Because of the reorganization, Mr. Rudnick was transferred to a department-head position.

Lucille Walsh began working for the district as a school nurse in May 1953. Next, she became a guidance counselor in September 1969. Ultimately, she became a "coordinator of substance abuse" in August 1971. She has a nursing degree, a master's degree in personnel, and numerous graduate credits. Although she happens to hold a supervisor endorsement, that particular administrative certificate does not appear to be necessary for the job of "coordinator of substance abuse." Instead, the job description supplied by Paterson, entitled "drug education coordinator," requires a certificate "as a teacher in either health or guidance." Ms. Walsh meets these qualifications because she has both an educational services endorsement in student personnel services and an instructional endorsement as teacher of health education. She also has a valid emergency endorsement on her educational services certificate as "substance awareness coordinator." According to the job description, her duties included: "plans district's drug education program;" "assists in curriculum development and the selection of instructional aids for the program;" "represents the district with public agencies and private organizations concerned with juvenile drug abuse and narcotic education;" and "supervises the preparation of reports and statistical data related to the drug program." Dr. Hoover reports that Ms. Walsh actually exercised supervisory authority over seven substance awareness coordinators, one drug free aide and two secretaries. In her opposing affidavit, Ms. Walsh does not deny that she performed this function. As previously noted, Ms. Walsh resigned "under protest" rather than accept reassignment to a guidance counselor position. Ms. Walsh explained that, as a veteran, "if [she] had returned to the Guidance Counsel position, it would have severely diminished [her] pension."

Genevieve Cirasa began her employment in the district as a clerical worker-secretary in December 1968. Paterson acknowledges that she acquired tenure in that position. Thereafter, in 1976, she was promoted to "supervisor of accounts." Later, the title was changed to "assistant supervisor of accounts," without any change in job duties or salary. Unlike the other petitioners, Cirasa does not have a certificate authorizing her to work in the public school system. Nor does her job description require her to hold any certificate. Nevertheless, the parties concur that she performed supervisory duties. Ms. Cirasa admits that her "primary area of supervision was the District's account payable department." Her duties set forth in her job description included: "supervises and allocates the duties in the bookkeeping department;" "screens orders before issuing to vendors;" "follows through on all irregularities in shipping and invoicing;" and "screens invoices before processing for payment." Barbara Kaye Mortimer, the business administrator, confirmed that Ms. Cirasa "supervised about eight accounts payable clerks." Like Ms. Walsh, Ms. Cirasa submitted her resignation rather than "tolerate the disgrace of working as a secretary in my own department."

Based on these undisputed facts and the applicable law, **I CONCLUDE** that all petitioners occupied "central administrative and supervisory staff" positions which were abolished as a result of the reorganization.

Once the State takes over the operation of a mismanaged local school district, the wholesale restructuring process proceeds in three well-defined phases. "[U]pon creation of the State-operated district," the four top management positions of "chief school administrator and those executive administrators responsible for curriculum, business and finance, and personnel" are immediately "abolished." ***N.J.S.A.*** 18A:7A-44(a) Clearly, the the word "abolished" refers to the right of the incumbents to occupy those positions rather than to the responsibilities attached to those positions, since someone in the State-operated district still must perform those vital functions.

Within the next six months, the State district superintendent "shall prepare a reorganization of the district's *central administrative and supervisory staff* and shall evaluate all individuals employed in central administrative and supervisory positions." ***N.J.S.A.*** 18A:7A-44 (b). (Emphasis added). Employees falling within this category automatically lose their positions as soon as the reorganization is

implemented. The controlling statute expresses this result in clear and emphatic language: "Notwithstanding any other provision of law or contract, the positions of the central administrative and supervisory staff, instructional and noninstructional, . . . shall be abolished upon the reorganization of the State-operated school district's staff." *N.J.S.A.* 18A:7A-44(c).

Staff members subject to this provision are not precluded from consideration in filling vacancies. Thus, subsection (c) of *N.J.S.A.* 18A:7A-44 continues: "The State district superintendent may hire an individual whose position is so abolished, based upon the evaluation of the individual and the staffing needs of the reorganized district staff." But such person has no legal entitlement to be hired in a central administrative or supervisory capacity. Again, the statutory language is unequivocal: "Employees or officers not hired for the reorganized staff shall be given 60 days notice of termination or 60 days' pay. *The notice or payment shall be in lieu of any other claim or recourse against the employing board or school district based on law or contract.*" (Emphasis Added). Persons whose positions have been abolished by operation of this statute may assert a claim to "any position to which the employee may be entitled by virtue of tenure or seniority within the district." In order to emphasize, however, that such persons have no legal claim to their old positions, subsection (c) concludes: "No employee whose position is abolished by operation of this subsection shall retain any right to tenure or seniority in the positions abolished herein."

The third and final phase of restructuring the district's management concerns the evaluation and possible dismissal of building principals. *N.J.S.A.* 18A:7A-45. In marked contrast to the truncated procedures governing "abolishment" of central administrative and supervisory staff, building principals are afforded more elaborate due process protections. Subsection (b) of *N.J.S.A.* 18A:7A-45 provides that an assessment unit appointed by the State district superintendent shall conduct on-site evaluations of each building principal in accordance with standards published by the Commissioner. See *N.J.A.C.* 6:7-1.1 to 2.2. Even principals with unsatisfactory performance ratings do not automatically forfeit their positions. At the completion of an evaluation period "of not less than 12 months," the State district superintendent "may dismiss any tenured building principal for inefficiency, incapacity, unbecoming conduct or other just cause" by bringing formal charges under the Tenure Employees Hearing Law. *N.J.S.A.* 18A:7A-45(c).

As Governor Thomas Kean remarked in connection with his conditional veto of an earlier version of the school takeover law, "[D]ue process is a dynamic term. It is not cast in stone. The amount of process due to an individual depends upon the situation. Simply put, what process is 'due' depends on the social desirability of the objects to be achieved balanced against the potential individual deprivation. It is my strong belief that the crisis found in failing school districts requires a more flexible approach to determining who shall lead the schools back to sound educational practices." *Governor's Message to the General Assembly on Assembly Bill No. 2927* (June 25, 1987). Ultimately, the Legislature made a determination that central administrative and supervisory staff are entitled to less procedural safeguards than building principals.

Statutes which, like the takeover law, are remedial in nature must be construed generously to effectuate the legislative purpose. *Sabella v. Lacey Twp.*, 204 *N.J. Super.* 55, 59 (App. Div. 1985); *Carianni v. Schwenker*, 38 *N.J. Super.* 350, 361 (App. Div. 1955); *McCarroll v. Jersey City Bd. of Educ.*, 13 *N.J.A.R.* 1, 63 (1989). Enabling legislation authorizing the creation of a State-operated school district confers broad powers on the State district superintendent "to perform all acts and do all things consistent with law necessary for the proper conduct, maintenance and supervision of the schools in the district." *N.J.S.A.* 18A:7A-35(e). See also, *N.J.S.A.* 18A:7A-38. *In re Mantone*, OAL DKT. EDU 4472-92 (Jan. 28, 1993), *adopted,* Comm'r (March 17, 1993) (slip op. at 2). While the phrase "central administrative and supervisory staff" is not expressly defined anywhere in the takeover law, it is used in its most expansive sense *"to include but not be limited to* the superintendent of schools, secretary of the board of education, school business manager, and assistants and clerks thereto." *N.J.S.A.* 18A:7A-35(e) (Emphasis Added). Terms like "include" are words of enlargement and not of limitation, and the examples specified thereafter are merely illustrative, especially where the word "including" is followed by the phrase "but not limited to." *Jackson v. Concord Co.*, 54 *N.J.* 113, 127 (1969).

Cases interpreting the school takeover law have uniformly recognized the wide latitude accorded to the new State district superintendent in selecting the personnel who comprise central office staff. Illustratively, in *Errico v. Jersey City Bd. of Educ.*, No. A-6157-90T1 (App. Div. Oct. 26, 1992), the Appellate Division upheld the removal of appellants, without any opportunity for a hearing, as the result of the State reorganization of the Jersey City school system. One of the appellants had the

title "chief clerk" and the other the title "supervisor of pupil transportation." Applying *N.J.S.A.*18A:7A-44 , the Court declared that"when a board of education is removed and a State-operated district is established, the positions affected are automatically abolished upon reorganization of the State-operated school district and reemployment of displaced individuals is within the discretion of a State district superintendent." (slip op. at 4). Although *Errico* involved an appeal from an agency decision of the Merit System Board rather than the Commissioner, the outcome does not depend on that distinction. Similarly, in *Van Dyke v. State-Operated Sch. Dist. of Jersey City*, 91 N.J.A.R. 2d (Vol. 4) 43 (EDU), the Commissioner and the State Board affirmed the abolition of the positions of five supervisors who, for the most part, had received "acceptable" performance evaluations after the State takeover. Holding that petitioners retained no tenure or seniority rights to a supervisory position, the Commissioner commented that "the only 'bumping' rights they could exert would related to *nonsupervisory* positions to which their tenure or seniority entitled them." (at 46).

N.J.S.A. 18A:7A-44 establishes a two-part test for determining which positions fall within its scope: whether the particular position is "administrative" or "supervisory;" and, if so, whether the particular position belongs to the "central" office as opposed to being building-based. Given the blurred lines of responsibility and confused organizational structure typical of a mismanaged local school district, the State district superintendent is not bound by the outgoing administration's assignment of functions or duties.[8] What truly matters is the function which each employee should be performing in an effectively-managed school system.

By this standard, petitioners fit within the statutory category. Unquestionably, they are "administrators" or "supervisors." Except for Ms. Walsh and Ms. Cirasa, their job descriptions required them to hold a supervisory endorsement. Each of them performed an administrative or supervisory function, which involved oversight and evaluation of instructional staff, monitoring the effectiveness of an educational

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[8]Indeed, the Commissioner made an express finding at the time of the State takeover of Paterson that the "district's organizational chart(s) have not accurately represented the organizational structure under which the district operated." *Mulhern*, 1991 *S.L.D.* at 1079.

program, or directing the activities of other district employees. It is not significant that petitioners may have lacked "policy-making authority." Ordinarily the local board of education should be setting broad policy guidelines and the administrators and supervisors are simply charged with implementing that policy. *McCarroll, supra, 13 N.J.A.R.* at 17 to 23. Furthermore, the superintendent and the top executive assistants, who arguably might play some role in developing policy, were abolished as soon as the State-operated district was created. Nothing in the statutory scheme suggests that lower or middle-level managerial staff cannot be regarded as administrators or supervisors. Likewise, it is not pertinent that, since they did not represent management in labor negotiations, petitioners could join an employee collective negotiating unit. To the contrary, the fact that the Baldwin group petitioners belonged to the negotiating unit for administrators only strengthens the conclusion that they are administrative staff.

Equally evident is the fact that petitioners have district-wide responsibilities and, therefore, are members of "central" office staff. *See, e.g., Kornberg v. North Bergen Bd. of Educ.,* 1981 *S.L.D.* 736, 740-741 (Comm'r May 9), comparing the duties of a school administrator "authorized to direct *district* operations and programs" with those of a building principal who is "the head of a school." *See also, Sandri v. Bergen Cty. Vocational Sch. Dist.*, 1986 S.*L.D.* __(Comm'r June 11), wherein the Commissioner regarded supervision over child study team functions as "bespeaking a 'district-wide' approach to providing student services and a broader range of responsibilities" than supervision at a building-level. (Slip op. at 20.) In this regard, it is of no moment that some of petitioners were "cluster" supervisors assigned to a certain number of school buildings, a common practice in the larger school districts with many separate facilities. Similarly, it is inconsequential that the supervisor for funded programs performed his assigned duties in various nonpublic schools scattered throughout the district. In both situations, the function was not narrowly building-based, but entailed wider responsibilities implicating the operation of the district as a whole.

Both Ms. Walsh and Ms. Cirasa present unusual circumstances which deserve special treatment. Ms. Walsh had the title of coordinator of substance abuse, which is not normally a supervisory position. Rather, a specific statute provides that, "[t]he position of substance awareness coordinator shall be separate and distinct from any other employment position in the district, including, but not limited to district

guidance counselors, school social workers and school psychologists." *N.J.S.A.* 18A:40A-18.(b). Anyone serving as a substance awareness coordinator must hold an educational services certificate. *N.J.A.C.* 6:11-11.5. Additionally, the statutory responsibilities of a substance awareness coordinator entail delivery of direct services, such as giving counseling services for students, serving as a resource for substance abuse information, and devising intervention strategies for substance abusers. *N.J.S.A.* 18A:40A-18(c). Nonetheless, it appears without contradiction that Ms. Walsh exceeded the legitimate confines of her job title and was actually engaged in supervising other drug abuse counselors. Insofar as Ms. Walsh was working out-of-title in the role of a supervisor, the State district superintendent acted properly when he abolished her position.[9]

Unlike all the other petitioners, Ms. Cirasa does not have any certificate whatsoever. A teaching-staff member must possess the appropriate credentials or "certification" to achieve tenured status. *Dennery v. Bd. of Educ.*, No. A-23/24 (N.J. April 8, 1993) (slip op. at 6); *Spiewak v. Bd. of Educ.*, 90 *N.J.* 63 (1982). Accordingly, she has no tenure or seniority right to a supervisory position. Before the advent of the school takeover law, the Paterson school administration could have switched her to a nonsupervisory position at any time. Certainly the takeover law cannot be interpreted to confer on Ms. Cirasa any greater rights to a supervisory position than she would otherwise possess. *See N.J.S.A.* 18A:7A-36, prohibiting the appointment to any position "unless the person shall hold an appropriate certificate as prescribed by the State Board of Examiners."

In light of the ruling that petitioners have no legal entitlement to their former supervisory positions, it is unnecessary to consider the District's defense that Ms.

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[9]Since substance awareness coordinator is not inherently a supervisory position, the preferable approach would have been to offer Ms. Walsh the opportunity to remain as a regular substance abuse counselor, at the reduced salary scale applicable to nonsupervisory work. But, at the worst, it was harmless error for the State district superintendent to offer her a lateral transfer to a guidance counselor position within the scope of her educational services certificate. *Cf. Ellicott v. Bd. of Educ.*, 251 *N.J. Super.* 342 (App. Div. 1991) (speech correctionist with dual endorsements on her educational services certificate entitled to employment as learning consultant).

Walsh and Ms. Cirasa knowingly and voluntarily waived their rights by resigning from employment.

Two issues raised by the Baldwin group petitioners, which go beyond the scope of the pleadings and prehearing order, will nevertheless be quickly laid to rest. At the same time that petitioners rely on their purportedly favorable evaluations, they simultaneously attack the validity of those evaluations which were prepared by outside consultants. Petitioners assert that under *N.J.S.A.* 18A:7A-42(b) the State district superintendent may only delegate the evaluation task to "subordinate officers or employees in the district." It is difficult to imagine how petitioners suffered any harm when their evaluations were performed by independent evaluators rather than by subordinates of the individual accused of being biased against them. In any event, the State district superintendent has all the powers of the displaced board of education under the Public Schools Contracts Law, which includes the authority to enter into contracts for professional services. *N.J.S.A.* 18A:7A-35(d).

Petitioners contend that the reorganization of the central office was defective due to the failure to obtain the Commissioner's prior written consent. As support for this proposition, petitioners rely on *N.J.S.A.* 18A:7A-42(a) (3), which authorizes the State district superintendent to make all personnel determinations regarding employment, transfer and removal of officers and employees "subject to the approval of the commissioner or his designee." On its face, the language does not seem to require that the Commissioner give *advance* approval to every routine personnel determination in a State-operated district. More likely, the Commissioner has the option of disapproving any personnel decision or, as here, an aggrieved party may appeal an adverse action to the Commissioner for review. Even if advance approval is required, the statute does not require that it be done in writing. Uncontradicted proofs establish that Commissioner Ellis did in fact give his oral approval of the reorganization via telephone on February 3, 1992. Most importantly, however, the approval provision is inapplicable to the streamlined reorganization procedures at *N.J.S.A.* 18A:7A-44, which mandated that petitioners' positions be automatically "abolished" by operation of law.

(2) Subject Matter Jurisdiction Over Federal Civil Rights Claims

Apart from the challenge to the meaning and coverage of the school takeover law itself, the Baldwin group also seeks to litigate in this forum various claims arising under assorted federal civil rights and antidiscrimination laws, namely the Civil Rights Act of 1871, 42 *U.S.C.A.* §1983, Title VI of the Civil Rights Act of 1964, 42 *U.S.C.A.* §2000d, Title IX of the Education Amendments of 1972, 29 *U.S.C.A.* §§1681 to 88, and the Age Discrimination in Employment Act of 1967, 29 *U.S.C.A.* §§ 621 to 634. Earlier, the same seven petitioners had filed similar charges against the District, alleging violations of federal civil rights law, with the Equal Employment Opportunity Commission ("EEOC"). On February 29, 1993, the Area Director of the EEOC issued a determination in each case that "the evidence obtained does not support the Charging Party's allegations" and that "there is no reasonable cause to believe that there has been a violation of either of the statute(s)." Consequently, the EEOC closed its investigation, leaving the Charging Parties the option to "pursue this matter by filing a private suit against respondent."

Although *N.J.S.A.* 18A:7A-35(h) obligates the State district superintendent to "ensure that the district is in compliance with all federal and State laws, rules and regulations relating to equal employment opportunities, affirmative action and minority business opportunities," that particular statute does not create a separate remedy or cause of action cognizable before the Department of Education or any other state administrative agency. Other than *N.J.S.A.* 18A:7A-35(h), petitioners cite no federal or state statute said to confer jurisdiction on a state administrative agency to try the federal claims.

In general, state administrative agencies lack subject matter jurisdiction over federal civil rights actions. 14A *C.J.S.* §451 (1991). For instance, in *Patzer v. Board of Regents,* 763 *F.* 2D 851, 857 (7th Cir. 1985), the Court of Appeals noted that, "While it is an unsettled question whether state courts have jurisdiction over Title VII actions, . . . *there is no doubt that state administrative agencies have no jurisdiction.*" (Emphasis added). New Jersey is one of the jurisdictions which allows its state courts to entertain suits brought under federal civil rights statutes. *Peper v. Princeton Univ. Bd. of Trustees,* 77 *N.J.* 55, 77 (1978) ("state courts have concurrent jurisdiction with federal courts over Title VII actions.") Administrative agencies, however, belong to the executive branch of government and do not necessarily exercise the same

powers as "courts." *In re Tenure Hearing of Tyler,* 236 *N.J. Super.* 478, 486 (App. Div. 1989), *certif. den.*, 121 *N.J.* 615 (1990). Their adjudicative function "are actually an aspect of their regulatory powers and, in essence, do not embrace or constitute an exercise of judicial authority." *In re Uniform Adm'v Procedure Rules,* 90 *N.J.* 85, 93 (1982). Review of several leading New Jersey civil rights cases on appeal from state administrative agencies suggests that the inquiry is invariably framed in terms of state statutes. *See, e.g., Balsey v. North Hunterdon Bd. of Educ.,* 117 *N.J.* 434 (1990); *Jackson v. Concord Company,* 54 *N.J.* 113 (1969); *Gilchrist v. Bd. of Educ.,* 155 *N.J. Super.* 358 (App. Div. 1978). Further support for this result derives from *Shepard v. Bd. of Educ.*, 207 *F. Supp.* 341 (D.N.J. 1962) where the federal district court in New Jersey referred a §1983 action to the Department of Education for exhaustion of administrative remedies available under state (not federal) law. Absent any statutory or case law authority for a state administrative agency to apply federal civil rights law, jurisdiction will not be presumed to exist.

Of course, a discriminatory practice made illegal under federal law may also be illegal under state law, permitting a state administrative agency to assert jurisdiction by applying its own law. *Holt v. Continental Group, Inc.*, 631 *F. Supp.* 653, 657 (D. Conn. 1985), aff'd 788 *F.* 2d 3 (2d Cir. 1986), *cert. den.* 479 *U.S.* 839 (1986). Often New Jersey looks to analagous federal standards for guidance in interpreting state statutes and to promote uniformity in the law. *Grigoletti v. Ortho Pharmaceutical Corp.*, 118 *N.J.* 89, 97 (1990); *Peper*, at 81.

(3) Need for Hearing on State Civil Rights Claims

It is well settled that the Commissioner of Education and the Director of the Division on Civil Rights have concurrent jurisdiction in discrimination cases concerning education. *Hinfey v. Matawan Reg. Bd. of Educ.,* 77 *N.J.* 514 (1978). *Accord, Balsey,* 117 *N.J.* at 446. Here the Commissioner has the predominant interest because discrimination allegedly occurred in a public education setting. Allegations of employment discrimination based on race, age or gender raise potential violations of both the school laws, *N.J.S.A.* 18A:6-6, and the Law Against Discrimination, *N.J.S.A.* 10:5-4 and -12.

The classic statement of the standard to be used in resolving a motion for summary disposition was articulated in *Judson v. Peoples Bank & Trust Co.,* 17 *N.J.* 67,

73-77 (1954). When considering whether to grant the motion, the role of the judge is to determine whether there is a genuine issue as to a material fact, but not to decide the issue if he finds it to exist. A party opposing a motion is not to be denied a hearing unless the moving party sustains the burden of showing clearly the absence of a genuine issue of material fact. All inferences of doubt are drawn against the movant in favor of the opponent of the motion. The papers supporting the motion are closely scrutinized and the opposing papers are indulgently treated. And it is not to be concluded that palpably no genuine fact exists merely because the evidence opposing the claimed fact strikes the judge as being incredible. Particularly apt in the present circumstances is the following warning:

> . . . [W]here the subjective elements of willfulness, intent or good faith of the moving party are material to the claim or defense of the opposing party, a conclusion from the papers alone that palpably there exists no genuine issue of material fact will ordinarily be very difficult to sustain. The telltale factor of demeanor in the presence of the trier of fact often assumes such vital importance in such cases that the opposing party should generally not be denied the opportunity to have the moving party, or its officers, appear on the witness stand before the trier of fact. [Citations Omitted] Indeed, subjective elements aside, a note of caution has been sounded as to any case where the opposing party must prove his claim or defense from what he can draw from the other party. *Judson,* at 76.

Recently, in a civil rights case involving a claim of reverse discrimination, the Director of the Division on Civil Rights held that an administrative law judge had "improperly made credibility determinations and otherwise weighed the evidence" when he erroneously granted a motion to dismiss the complaint at the end of complainant's proofs. *Hutchings v. Bridgeton Bd. of Educ.*, DKT. CRT 7954-89 (Civil Rights May 5, 1992). Remanding the matter for completion of the hearing, the Director ruled that the complainant had presented more than a scintilla of evidence on all elements of a *prima facie* case.

Without going into details now, the affidavits and other material submitted by petitioners here raise sufficient factual disputes and credibility questions to withstand the District's motion for summary disposition on this point. Suffice it to say that there is sworn evidence which, if believed, would support a finding that the District retained other supervisors with poorer performance evaluations while not rehiring petitioners; that some of petitioners had little personal contact with Dr.

Hoover who supposedly made observations of their effectiveness and productivity; that the decision not to hire petitioners was already made before they had any opportunity to respond to their evaluations; that Dr. Wilson has made public expressions of his desire to increase the number of minorities among the administrative staff; and that some of petitioners overheard ambiguous comments which might be perceived as indicative of bias. Taken together, these factors could conceivably give rise to an inference that the employment decisions were motivated by improper considerations.

Order

It is **ORD ED** that part summary decision is granted in favor of respondent, dismissing the petition of Gen ieve Cirasa.

And it is further **ORDERED** that summary decision is granted in favor of respondent, dismissing the petitions of the seven petitioners of the Baldwin group, except for claims brought under state civil rights and antidiscrimination statutes.

This order granting partial summary decision is being submitted under *N.J.A.C.* 1:1-12.5(e) for immediate review. This recommended order may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make the final decision in this matte If the commissioner of the Department of education does not adopt, modify or ect this order within forty-five (45) days and unless such time limit is otherwise extended, this recommended order shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this order was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 7th Floor, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 14, 1993
Date

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

5/19/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 19 1993
Date

Joyce LaVecchia
OFFICE OF ADMINISTRATIVE LAW

al

OAL DKT. NOS. EDU 5277-92, 5278-92, 5279,92,
5280-92, 5281-92, 5282-92, 5283-92 AND 5284-92 (CONSOLIDATED)

GENEVIEVE CIRASA et al.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions of Petitioner Cirasa and those of Petitioners Baldwin, Walsh, Huntington, Kayal, Kopcho, Rudnick, and Leopizzi (hereinafter referred to as the "Baldwin Group") were timely filed in accordance with N.J.A.C. 1:1-18.4. No exceptions were filed by the respondent District.

Petitioners' exceptions reiterate the arguments presented in their briefs in opposition to the District's summary judgment motion considered by the ALJ in reaching his initial decision. The Baldwin Group excepts, inter alia, to the ALJ's determination that their positions were "central administrative and supervisory staff" in nature and, thus, subject to elimination under the reorganization.

Exceptions further reassert Petitioner Cirasa and the Baldwin Group's claims that N.J.S.A. 18A:7A-44 mandates that decisions on who should be retained after reorganization be made on

the basis of the specified evaluation process and continuation of the functions of the positions under reorganization. Petitioners allege that since they received positive summative evaluative ratings and their respective functions continue to be performed in the District, the District was obligated to rehire them to their positions.[1]

The Baldwin Group further excepts to the ALJ's determination that the Commissioner of Education does not have subject matter jurisdiction to decide its various claims arising under assorted federal civil rights and antidiscrimination laws, and cites cases which it asserts support its contention that the Commissioner is obligated to decide these issues.

Upon a careful and independent review of the record in this matter, the Commissioner finds the exceptions advanced by petitioners to be without merit and hereby adopts as her own the findings and conclusions of the ALJ in his initial decision.

The Commissioner agrees with the ALJ's determination that all of the petitioners occupied "central administrative and supervisory staff" positions which were abolished as a result of the reorganization for the reasons clearly articulated in the initial decision. She also noted with interest that the record establishes that petitioners were notified in November 1991 that each of their

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[1] Exceptions of Petitioner Cirasa additionally objected to the ALJ's conclusion that she had no right to tenure in a supervisory position because she has no supervisory certification. Petitioner asserts that the fact that she could not gain tenure under N.J.S.A. 18A:28-5 due to a lack of certification does not mean that her tenure under N.J.S.A. 18A:17-2 did not extend to the position she held. It is here noted that, from the record, the Commissioner makes no judgment as to whether Petitioner Cirasa is tenured as such determination is immaterial to the disposition of this matter.

respective positions was subject to abolishment under the reorganization yet none of them challenged or protested their inclusion as "central administrative or supervisory staff" until months later when the evaluation process had been completed and the decision made not to rehire them.

The Commissioner finds petitioners' claim to an "entitlement" to their prior positions under N.J.S.A. 18A:7A-44 by virtue of the fact that they received positive summative evaluative ratings and the fact that the duties of their positions continued under reorganization to be fallacious. She determines that the clear language of N.J.S.A. 18A:7A-44 is permissive rather than mandatory with respect to the rehiring of individuals displaced in reorganization and accepts the ALJ's well-stated analysis of this statutory provision:

> ***[T]he State district superintendent "shall prepare a reorganization of the district's central administrative and supervisory staff and shall evaluate all individuals employed in central administrative and supervisory positions" N.J.S.A. 18A:7A-44(b) (Emphasis added). Employees falling within this category automatically lose their positions as soon as the reorganization is implemented. The controlling statute expresses this result in clear and emphatic language: "Notwithstanding any other provision of law or contract, the positions of the central administrative and supervisory staff, instructional and noninstructional,...shall be abolished upon the reorganization of the State-operated school district's staff." N.J.S.A. 18A:7A-44(c)
>
> Staff members subject to this provision are not precluded from consideration in filling vacancies. Thus, subsection (c) of N.J.S.A. 18A:7A-44 continues: "The State district superintendent may hire an individual whose position is so abolished, based upon the evaluation of the individual and the staffing needs of the reorganized district staff." But such person has no legal entitlement to be hired in a central administrative or supervisory capacity.***
>
> (ALJ's Initial Decision, at pp. 13-14)

The Commissioner further concurs with the ALJ's determination that she does not possess subject matter jurisdiction to adjudicate the Baldwin Group's various federal civil rights and antidiscrimination claims for the reasons outlined by him in the initial decision at pages 20-21, and finds the petitioner's exception submissions to the contrary unpersuasive in this regard. She does, however, also agree with the ALJ's finding that affidavits and other material submitted by petitioners raise certain factual disputes and credibility questions regarding alleged violations of New Jersey antidiscrimination laws, subject matter which is within the concurrent purview of the Commissioner of Education and the Director of Division on Civil Rights, which precludes the disposition of these issues by summary decision.

Accordingly for the reasons set forth in the initial decision of the Office of Administrative Law, the Commissioner dismisses the petition of Genevieve Cirasa. Further, she dismisses the petitions of the seven Baldwin Group petitioners except for their claims brought under State civil rights and antidiscrimination statutes.

COMMISSIONER OF EDUCATION

JUNE 28, 1993

DATE OF MAILING - JUNE 28, 1993

151-93

EDU #5277-92, 5278-92, 5279-92, 5280-92, 5281-92, 5282-92, 5283-92 and 5284-92 (consolidated)
C # 151-93
SB # 41-93

GENEVIEVE CIRASA, ET AL.,

PETITIONER-APPELLANT,

V.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, June 28, 1993

For the Petitioner-Appellant, Bucceri & Pincus
(Louis P. Bucceri, Esq., of Counsel)

For the Respondent-Respondent, Carroll & Weiss
(Robert Merryman, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein on the points of appeal currently before us filed by petitioner Genevieve Cirasa.

December 1, 1993

Date of mailing 03 DEC 1993

152-93

152-93

F.H. AND S.H., parents of G.H., PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
NORTH WARREN REGIONAL HIGH SCHOOL DISTRICT, WARREN COUNTY, RESPONDENT.	:	DECISION

SYNOPSIS

Petitioning parents challenged "short-term" suspension of their son G.H. for conduct endangering students' safety and welfare and striking a teacher at school function. Petitioners contended G.H. was denied procedural due process prior to suspension.

Following consideration of testimony and evidence, ALJ concluded matter was properly handled by school administration and G.H. was fully accorded his due process rights to be given notice of charges, to have evidence of involvement and to have opportunity to explain as required by Goss. Thus, suspension was properly imposed. Petition was dismissed.

Commissioner adopted findings and determination in initial decision.

JUNE 28, 1993

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5020-92
AGENCY DKT. NO. 271-6/92

F. H. AND S. H., PARENTS OF G. H.,
Petitioners,
v.
NORTH WARREN REGIONAL HIGH SCHOOL DISTRICT, WARREN COUNTY,
Respondent.

Edward J. Gaffney, Jr., Esq., for petitioners

Craig U. Dana, Esq., for respondent
(Morris, Downing & Sherred, attorneys)

Record Closed: April 20, 1993 Decided: May 14, 1993

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

F. H. and S. H., parents of G. H., have alleged that on May 19, 1992, G. H. was suspended by North Warren Regional High School, Warren County, Board of Education, for nine days out of school for "conduct constituting a danger to the physical well-being of other pupils, *N.J.S.A.* 18A:37-2, and striking a teacher in the face, *N.J.S.A.* 18A:37-2.1," and suspended from attending school activities until January 3, 1993. The conduct was alleged to have occurred May 15, 1992 while G. H. was attending a school function in the auditorium. The suspension, a so-called "short-term" suspension pursuant to Section 528 of Board policy, was imposed, it was alleged, without benefit of procedural due process of law in that G. H. was denied opportunity to respond to charges against him, to present his version of the event or to explain content of a video tape made of the scene and later considered

by the Board. In a petition of appeal filed with the Commissioner of the Department of Education on June 15, 1992, petitioners sought judgment requiring G. H. be afforded a proper due process hearing to explain his response to allegations, vacating the order of suspension, expunging G. H.'s student file of all letters of reprimand, and requiring the Board to investigate conduct of a teacher involved in the incident. In answer filed by the Board on June 25, 1992, the sequence of events was generally admitted, but failure to provide informal due process hearings was specifically denied; the Board sought dismissal of petition. The Commissioner transmitted the matter to the Office of Administrative Law on July 1, 1992 for hearing and determination as a contested case in accordance with *N.J.S.A.* 52:14F-1 *et seq*.

The matter came on for prehearing conference on September 11, 1992. An order was entered establishing, *inter alia*, hearing dates on January 19, 20, and 22, 1993, at the Office of Administrative Law in Newark.

The order specified these issues:

1. Whether an appropriate *Goss* hearing (*Goss v. Lopez*, 419 *U.S.* 565, 581 (1975)) was conducted and G. H. afforded his constitutional rights of due process of law;

2. If not, whether a new *Goss* hearing should thereupon be conducted by a district designee; and

3. If yes, whether the suspension of G. H. as imposed was properly based on evidence of an alleged assault, assuming Board decision hereinbelow carried a presumption of correctness and validity and/or, in that case, whether the matter should be remanded to the Board for reconsideration.

It was stipulated G. H. no longer attends school in the district.

Hearings scheduled on January 19, 20, and 22, 1993 were continued on March 2 and 16, 1993, when testimony was completed. Thereafter, time for posthearing submissions having elapsed, the record closed on April 20, 1993. *See*, Rm-2 by Board; there was none filed by petitioners.

Application by the Board by motion for imposition of costs against petitioners' attorney for non-appearance without notice on January 19, 20, and 22, 1993 was considered by the administrative law judge and is subject of a separate written ruling. *See*, Rm-1; as to it, there was no response by petitioners' attorney.

EVIDENCE AT HEARING

I

Called by petitioners, Jeanette Bennett, a teacher of biology and environmental science employed at the high school since 1986, was asked about prior training in matters of student discipline. She replied she had been trained in such matters in workshops and in graduate school. The event of May 15, 1992, a "battle of bands," was advertised, she said, as a concert for students in which student bands, each playing 30-minute segments, competed. Door prize was one-third of the gate; the event was held in the auditorium of the high school. Participants were required to submit a list of songs first to ensure no offensive lyrics were presented. The concert would feature "heavy metal" music, that is, music loud with percussion and heavy guitars, often to a fast beat. She was not specifically made aware, however, she said, bands would be playing "heavy metal." During a rehearsal, she said, she did not hear such music but did hear "hard rock." The event provided for five chaperones: three male teachers and three female teachers. Though no professional security personnel were contracted for, she said, routine for such events had a municipal policeman hired. About 300 students, with some adults, attended.

The incident occurred at 7:45 p.m. With another teacher chaperone, Sally Long, Bennett was standing at the rear when she saw some students in the first eight rows of the auditorium move into forward rows. As she stood up, music tempo changed. As she came forward, about five students from the second row jumped over backs of auditorium seats onto other students on the floor at the front row. Bennett tried to stop them; she was tripped. The students began to "mosh," a form of slow dancing, in which bodies were thrown into each other from side to side. As Bennett yelled to stop the activity, other students jumped up and ran forward. Bennett began pulling them off backs of students, all boys, by their shirts. One such student was G. H. He and others had just jumped on the pile of students on the

floor. As she grabbed his shirt, she said, G. H. turned around and hit her with the back of his right hand on the right side of her face. She was not wearing glasses. The blow was hard. She knew G. H. by name and thought he knew hers. As another chaperone came up, she said to G. H. "If you don't stop pulling and flailing your arms, and if you hit me again, I'll hit you back." With help of other chaperones, G. H. was taken away. Bennett's leg was hurt when she was tripped by another student before G. H. hit her. Bennett went to the stage and from there cautioned the crowd. The concert resumed and ended about 11 p.m.

A parent in attendance on the first aid squad helped Bennett clean a bloody cut on her knee and put ice on her swollen face.

Bennett said when G. H. hit her, she felt in physical danger; his arms and elbows were flailing. Students in the pile were screaming for those on top to "get off." Several students were asked to leave the auditorium that night because of their insubordination.

Bennett met with G. H.'s parents the morning of May 19, and with Rodney R. Rufe, vice principal in charge of discipline. G. H. was present at part of the meeting, entering after it began, when he was sent for as arranged by Rufe. She was given a note from G. H. (P-1), handed to her then without other explanation:

> May 18, 1992. Dear Mrs. Bennett, I am sorry for inadvertently hitting you during the battle of the bands. Before I end this apology note, I would like to clear my name by reassuring you that I never intended to hit you or anyone else. [Signed] G. H. and S. M. H.

During cross-examination, Bennett revealed further she had taken seminars on student confrontations and had chaperoned concerts and dances before. She was senior class advisor. The event on May 15 was a senior class fund-raiser, proctored by five teacher chaperones, attended by several other teachers and some 20 to 30 parents. Senior class members assisted with tickets, refreshments and acted as door persons. Though four chaperones were paid, she said, she herself was not paid. In past years, the same sort of function was run in the same way, featuring loud rock and roll music and proctored by four chaperones. No dancing was ever permitted before or on this occasion.

Later, in presence of a policeman, Sgt. John Cramer, G. H. said in Bennett's presence (then in the furnace room) to Cramer that even if he, Cramer, had pulled him, G. H. would have hit out as he did upon Bennett. In effect, she said, G. H. admitted he hit her and intended to do so.

She said she considered filing juvenile charges against G. H. when the sergeant inquired but later decided after consultation with administrators and advisors not to do so.

She reported the incident in writing to the vice principal the following Sunday, May 17, and met with him on Monday morning, May 18. She then met with G. H.'s parents on May 19 at the high school in the vice principal's office. G. H. came in later, as he was then in class. She explained what happened; the vice principal said he had explained the situation to the parents.

Called by petitioners, Rodney R. Rufe, vice principal, testified he has been employed by the Board for 22 years. He is in charge of discipline. After events of May 15, and after his investigation, he initiated disciplinary procedures and potential student sanction that culminated in his letter to G. H.'s parents on May 19 imposing a nine-day suspension "pending further investigation." P-2. He said he first learned of the incident from teacher Dolan on May 15; Bennett reported to him on Sunday, May 17. He contacted the parents by phone on Monday, May 18, to tell them G. H. was involved in the Friday night incident and to caution that discipline would be invoked. He asked them for a conference that took place on Tuesday morning, May 19, at the school, when he explained the "moshing" incident and the circumstance of G. H.'s striking a teacher. He asked G. H. be present. He had an earlier meeting with G. H. on Monday, May 18, he said, to tell him the precise charge: that according to Rufe's information, G. H. was involved in a situation with other students that endangered their safety and welfare. He was told of the other charge of striking a teacher. Rufe asked G. H. for a reply but, he said, G. H. said he didn't remember and seemed puzzled. He left the room and Rufe called his parents. Rufe's meeting with G. H. lasted about 15 or 20 minutes. The suspension was imposed later. A video tape was reviewed by the parents later, Rufe said. Again, he said he specifically informed the parents orally what the charges were and why G. H. was to be suspended: for endangering safety of others, five days and for striking a

teacher, four days, a total of nine days. Rufe told the parents they could appeal to the principal. They did and were given a reply. *See*, R-2. The parents appeared before the Board of Education on Tuesday, May 26, at its night meeting; the Board itself reviewed the videotape and investigation reports before speaking to parents.

The Board voted to affirm the suspension as imposed.

On cross-examination [by the Board], Rufe noted he had been vice principal/disciplinarian for 11 years. He indicated again he met and interviewed the chaperones, Bennett and Dolan, and discussed the matter in depth with Bennett. Other students involved in the situation were identified; a list was made; other teachers were interviewed preparatory to preferring charges against other students for use of profanity and endangering safety. Rufe again noted he explained fully the two charges against G. H. when he came to his office. He asked specifically if G. H. wished to respond. He said G. H. disagreed with the charge of endangerment, saying he was just "dancing" as were the other students. Rufe said G. H. knew he was accused of hitting Bennett but he had no response. Rufe suggested he should give the matter more thought. He also reminded G. H. he had admitted his complicity to Sgt. Cramer, but G. H. had no response to that. Rufe informed him it was a serious matter and thought an apology at least was in order. G. H.'s response then was non-committal. It was at this juncture Rufe called the parents and spoke to the mother. G. H.'s involvement was explained and a conference for the next day, May 19, was set.

Born April 18, 1976, G. H. is 17 years old. He no longer attends North Warren Regional High School. He attends Notre Dame High School, a parochial school in East Stroudsburg, Pennsylvania, as a commuter. He testified the program began in the school auditorium about 7:30 or 8:00 p.m., when bands played "heavy metal," a fast, heavy, hard-driving drum beat. "Moshing" is usually done, he said, by slamming into one another, just for fun and not to harm. He had done this before at school dances, he said, when chaperoning teachers did not stop it. He was with three other friends and went outside during change of bands. Someone said "We're going to mosh." About 15 students seated at the front stood up and began to slam into each other. It was all in good fun, he said. He joined in and at one time was on the bottom as people piled on and off. No one told them to stop, he said.

The next thing G. H. knew, he said, was that someone grabbed him from behind by the scruff of his neck and swung him around. He said he did not know who. He said he was not flailing his arms wildly. He was pulled around and Bennett was right in his face. She waived her fist in his face, he said. He asked, "What did I do?" She replied, "You hit me." He said he did not respond. He added these phrases in his testimony: "I don't think I hit her" and "I don't recall if I hit her." He was told first to sit in the rear of the auditorium for 15 minutes. He was brought to another room where Bennett said to another teacher that he was the one who hit her. He replied, "I didn't." He said she seemed hurt. Sgt. Cramer came into the room; to him, he denied he hit Bennett and said if he did, he did not intend to hit her.

On Monday, May 18, in study hall, G. H. said to vice principal Rufe that as far as he knew, he did not hit Bennett. He conceded he knew was in trouble.

On May 19, he and his parents met with Rufe. He was asked to wait outside for 15 minutes and then returned. His parents told him to get an apology note from their car, a note he had written the night before. P-1. He handed the note to Bennett and said, "Sorry." He said she replied, "Thanks." He said no one discussed the charges against him. He said he received nothing in writing concerning the charges, did not review a videotape and was asked no questions. He did not appear himself before the Board of Education the following week.

G. H. is 5 feet 10 inches tall and weights 135 pounds. Bennett is about 5 feet tall, he said.

He admitted "mosh" dancing could be dangerous.

S. H., G. H.'s mother, in testimony said she was first informed of her son's suspension on Monday, May 18, about 3:30 p.m. when called by her husband at home. He had received a call from vice principal Rufe, who told him his son was being suspended for a situation that occurred the previous Friday night when G. H. was said to have hit a teacher. The mother then called the high school and spoke to the vice principal's secretary to fix an appointment for the following morning. She conceded Rufe had indicated to her husband the matter was serious. On Tuesday, May 19, about 8 a.m., she and her husband met Rufe in his office. They reviewed a

video tape of the so-called "battle of the bands"; without any sound, it showed students dancing around and jumping. Bennett told them G. H. had hit her as she was trying to stop "mosh" dancing, when she tried to pull him and another student from the pile. The mother said she was appalled at her son's conduct at the time. The vice principal explained a suspension of nine days was in order.

The parents received Rufe's formal letter of May 19 (P-2) the next day. They called Rufe questioning the wording because, as she said, the letter did not say the hitting was inadvertent or accidental and the parents were worried about his school record. They went to school on May 26, prior to the Board meeting. They questioned Rufe about the apparent disparity in lengths of suspensions imposed upon their son and other students involved in the melee. The mother inquired why there were no administrators or police present at the concert, why Bennett pulled G. H. across the stage, why she clenched her fist, why another boy was not suspended, and whether she could then speak to the superintendent of schools. She did so the next day. She sought to get a copy of school policy regarding discipline but conceded she had a copy of a student handbook issued to all students each year. She appeared before the Board of Education on Tuesday, May 27, about 7:30 p.m. with her husband and parents of other students. They were asked if they wanted individual hearings, but those parents concerned agreed to be heard as a group and went into another room.

The concerns of the parents after interview with Rufe were answered by the principal's letter (Jack D. Sweet), dated May 26, which is R-2 in evidence.

Petitioners rested.

II

Called by the Board, John Cramer testified he has been employed by Blairstown Police Department for 15 years and is a detective sergeant. On Friday, May 15, then assigned to an evening duty shift, he received a call for assistance from North Warren High School about 8:46 p.m. There had been an incident, he was told by a teacher, and students were milling about inside a hall next to the auditorium, students the teacher had ousted from the auditorium who were trying to get back in. At the time he responded the incident was over, he said; the scene had settled

down. He spoke to Bennett and identified some of the students involved, one of whom was G. H. He was told by Bennett that G. H. had been in a "moshing" incident and had struck her in the face. He spoke both to G. H. and Bennett in the custodian's room. G. H. said, "Looks like I'm in trouble now." They discussed what occurred; G. H. admitting he was "involved." He said he felt someone grab him and that he intended to strike whoever it was who grabbed him. Cramer asked, "What if that person were a police officer?" G. H. said "I would have been in bigger trouble." He asked whether Bennett wanted to press charges; she replied she would defer decision until talking with administration. He told G. H. if the charges were filed, he would have to appear in juvenile court. No charges were ultimately filed.

DISCUSSION

Principal focus of this matter is petitioners' assertion G. H.'s suspension was not only wrong but attended by the Board's failure to afford him "a proper due process hearing to explain his response to the allegations." *See*, petition at 4. The alleged denial of due process before sanction of suspension has been termed denial of a right to a *Goss* hearing. As argued by the Board, the Supreme Court of the United States has held that a student has a property interest in a public education that is protected by the Constitution's due process clause and, as a result, a student may not be denied that property interest without compliance with minimum due process procedures. In *Goss v. Lopez*, 419 *U.S.* 565, 582, 95 *S.Ct.* 729, 740 (1975), the court differentiated between suspensions of long and short terms. Those of ten days or less are known as short-term suspensions; those involving more than ten days and expulsions are known as long-term sanctions. Involved here is the sanction imposed by North Warren Regional High School of G. H.'s nine-day suspension, five days for engaging in dangerous slam dancing, four days for striking a teacher. The sanction was thus short-term. Minimum due process requirements for such suspensions are (1) the student be given oral or written notice of charges against him; (2) if the student denies the charges, he is entitled to an explanation of the evidence that forms the basis for them; and (3) the student is to be given opportunity to present his side of the story. *Id.* at 581, 95 *S.Ct.* at 740. The court said that in a practical sense such procedures require the school disciplinarian informally to discuss the allegations of misconduct with the student shortly after occurrence. The court emphasized a student is not entitled to a formal adversarial trial-type proceeding because the burden on school officials would be educationally onerous. The student

or parents as his agents should be given opportunity to explain or extenuate the charges. New Jersey school law has recognized implications of *Goss* and has had occasion in the past to underscore student rights to due process. *See, Tibbs v. Board of Ed., Franklin Township*, 59 *N.J.* 506 (1971), affirming 114 *N.J. Super.* 287 (App. Div. 1970); *and see*, most recently, decision of the Commissioner in *R. W. v. Board of Ed., Hunterdon Central Regional High School*, 93 *N.J.A.R.* 2d (EDU) 113, 114-5 (December 17, 1992) (suspension procedure reviewed and approved).

Sequence of events in the matter was not seriously challenged. G. H. attended a school auditorium concert on May 15, engaged with others in proscribed slam dancing during the concert and stuck a teacher in the face when she attempted to pull him from a pile of student bodies. Confronted by the teacher and a police officer after the melee subsided, he admitted his activity and the striking of the teacher. After the teacher's report to school administrators, the parents were called, informed of potential suspension, invited to an interview, and given results of the school disciplinarian's investigation the following Tuesday. In the meantime, G. H., knowing full well the nature of accusations against him, prepared and presented in his own handwriting a letter of apology significant more for its acknowledgment of notice than for its seemingly apologetic tone. The following week the parents met with the school Board individually and with other parents in a group. Their questions were answered by the principal's letter on May 26.

Any assertion the notice and process afforded G. H. was less than his due is a proposition that falls of its own weight. The evidential case put forward by petitioners, indeed, was less a complaint the process was not fair than that G. H. was singled out for punishment while others went unpunished, that the teacher herself was an aggressor, that the entire school affair was poorly administered and that G. H.'s only culpability was for an inadvertence. The case for petitioners was thus characterized by recrimination and was but poorly served by G. H.'s testimonial equivocation.

CONCLUSION

Based on the foregoing, I **CONCLUDE** the entire school matter was properly handled by school administration and that G. H. was fully accorded his due process rights to be given notice of charges against him, to know evidence of involvement

and to have opportunity to explain it, as required by *Goss*. He and his parents as agents were fully and fairly apprised of circumstances supporting the charges; the suspension that resulted was thus properly imposed. Their claim for vacating the order of suspension, for expungement of student records, for an order requiring the Board to "investigate the conduct" of a teacher, and for all other forms of related relief is **DENIED**. Board action is **SUSTAINED**. The petition is **DISMISSED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 7th Floor, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 14, 1993
Date

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

5/19/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 21 1993
Date

OFFICE OF ADMINISTRATIVE LAW

amr

EXHIBITS

P-1 Letter of G. H. to Mrs. Bennett, dated May 18, 1992, expressing apology for "inadvertently hitting you during the battle of the bands . . ."

P-2 Letter of vice principal to petitioners, dated May 19, 1992, announcing nine-day suspension of G. H. for cause

R-1 Sketch diagram of auditorium and stage

R-2 Letter of principal to parent S. F., dated May 26, 1992

Rm-1 Board's letter application for costs, dated January 29, 1993

Rm-2 Board's letter memorandum of law, dated April 15, 1993

OAL DKT. NO. EDU 5020-92

F.H. AND S.H., parents of G.H., PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
NORTH WARREN REGIONAL HIGH SCHOOL DISTRICT, WARREN COUNTY, RESPONDENT.	:	DECISION

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Although petitioners filed exceptions, they were untimely pursuant to N.J.A.C. 1:1-18.4. Moreover, because petitioners were represented by counsel at the hearing and have not applied for a change of representation, such exceptions are not made a part of the Commissioner's review of this case.

Upon careful and independent review of the record of this matter, the Commissioner fully supports the ALJ's findings of fact and conclusions of law which establish that G.H. was accorded his due process rights under the circumstances of this matter and that the incident which formed the basis of the appeal was properly handled by school administration.

Accordingly, the instant Petition of Appeal is dismissed, with prejudice.

JUNE 28, 1993

COMMISSIONER OF EDUCATION

DATE OF MAILING - JUNE 28, 1993

153-93

A.W. AND S.W. ON BEHALF OF THEIR MINOR CHILD, D.M.H.,
PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,
RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

JUNE 22, 1993

A.W. AND S.W. ON BEHALF OF THEIR MINOR CHILD D.M.H., PETITIONERS, V. BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

For Petitioners, Abraham Weldon, Pro Se
For Respondent, Robert Martinez, Esq. (Martinez and Jennings)

This matter was opened before the Commissioner by way of a petition of appeal with request for emergent relief filed on June 18, 1993, wherein petitioners sought a determination that their daughter be allowed to participate in graduation exercises pending resolution of an underlying dispute regarding grant of her diploma, such dispute being based on the respondent school district's inability to obtain transcripts of ninth grade work completed in a nonpublic school. It is undisputed that D.M.H. has otherwise met requirements for graduation.

Pursuant to N.J.S.A. 18A:4-34, the Commissioner designated Assistant Commissioner Elena Scambio to decide this matter in her stead, and a hearing was conducted via telephonic conference on June 21, 1993.

Upon consideration of the information obtained from the parties during the telephonic hearing, the Assistant Commissioner, with the agreement of the acting superintendent, Joan McAndrew, determined that (1) D.M.H. shall attend graduation on June 22, 1993, (2) Dr. Scambio will contact the nonpublic school in Philadelphia in an effort to obtain verbal verification of D.M.H.'s successful completion of ninth grade and

(3) if such contact by Dr. Scambio is unsuccessful, D.M.H. will be granted a diploma given that she has met all the state requirements for graduation, including those for high school proficiency testing.

Accordingly, no further proceedings in this matter need be scheduled as the issues have been amicably resolved between the parties.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

JUNE 22, 1993

DATE OF MAILING - JUNE 28, 1993

154-93

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
BRIDGEWATER-RARITAN REGIONAL	:	DECISION
SCHOOL DISTRICT, SOMERSET COUNTY.	:	
	:	

JUNE 29, 1993

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
BRIDGEWATER-RARITAN REGIONAL : DECISION
SCHOOL DISTRICT, SOMERSET COUNTY. :
:

The announced results of the balloting for two members of the Board of Education from Bridgewater Township for full terms of three years each at the annual school election held on April 20, 1993 in the Bridgewater-Raritan School District, Somerset County, were as follows:

BRIDGEWATER TOWNSHIP

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
John P. Tracy	1,545	35	1,580
Alan R. Erlich	1,442	31	1,473
Joseph L. Campion	1,443	23	1,466
Lawrence P. Powers	1,361	25	1,386
Alan Machonis (Write-In)	0	1	1
Machonis (Write-In)	0	1	1

Pursuant to a letter request from Joseph L. Campion, defeated candidate, dated April 27, 1993, an authorized representative of the Commissioner of Education from the Office of the Somerset County Superintendent of Schools was directed to conduct a recount of the ballots cast in Bridgewater Township. Absentee ballots were recounted by the Somerset County Board of Elections. The recount was conducted on May 6, 1993 at the Somerset County Board of Elections Office, at the Somerset County Board of Elections Voting Machine Warehouse and at the Somerset County Superintendent of Schools Office.

At the conclusion of the recount, the outcome was unchanged and the tally stood as follows:

BRIDGEWATER TOWNSHIP

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
John P. Tracy	1,545	35	1,580
Alan R. Erlich	1,442	31	1,473
Joseph L. Campion	1,443	23	1,466
Lawrence P. Powers	1,359	25	1,384
Mickey Mouse (Write-In)	1	0	1
Alan Machonis (Write-In)	0	1	1
Machonis (Write-In)	0	1	1

* * * * *

The Commissioner has reviewed the report of her authorized representative and adopts as her own the findings set forth above.

Accordingly, the Commissioner finds and determines that Alan R. Erlich and John P. Tracy were elected to full terms of three years each on the Board of Education of the Bridgewater-Raritan Regional School District, Somerset County.

IT IS SO ORDERED.

Maryleen Fitzgerald

COMMISSIONER OF EDUCATION

JUNE 29, 1993

DATE OF MAILING - JUNE 29, 1993

155-93

155-93

IN THE MATTER OF THE SPECIAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF EDISON, MIDDLESEX COUNTY.	:	
	:	

JUNE 29, 1993

IN THE MATTER OF THE SPECIAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP : DECISION
OF EDISON, MIDDLESEX COUNTY. :
:

The announced results of the ballots cast at the Washington School polling place for two members of the Board of Education for terms of two years each at the special school election held on February 24, 1993 in the School District of the Township of Edison, Middlesex County, pursuant to N.J.S.A. 18A:9-10, were as follows:

Polling Place - Washington School

Candidate	Votes Cast
Gwynne Kesselman	67
John Tudor	66
Harold R. Maxwell	40
David Dickinson	36
Barry F. Miller	27
K. Karl Kovach	25
Dr. Bill Suriano	24
Dee Maurice Bruguier	21
Eleanore Both	21
Ann Ungerer	20
Herbert H. Daugherty	16
Mark Lubonski	13
Raymond S. Heck	12
Thomas A. Clemintone, Sr.	10
Dr. Leonard K. Eng	10
Joseph F. Montalbano	10
Nanci Gulya	8
Frank A. Alfonso	7
Harvey Dultz	7
Edward M. Kaplan	7
Philip G. Labasi, Esq.	7
Frank Grammatica	6
John J. Jarema	5
John H. Richardson	4
Guy J. Fecci	3

Candidate	Votes Cast
William T. O'Leary	3
Ralph Errico	2
Frank Gavigan	2
Susan Hidi	2
Peter J. Kunz	2
Peter J. Schwalje	2
Randy H. Silverman	2
Roman E. Kilar	1
Louis R. Nagy, Sr.	1
Mariam J. Singer	1
Walter R. Stochel, Jr.	1
Carlos L. Wells	1
Thomas J. Moroney	0
Carl Perlin	0
Herb Way	0
Steven R. Wyse	0

Pursuant to a letter request from defeated candidate Barry F. Miller dated March 3, 1993, an authorized representative of the Commissioner of Education from the Office of the Middlesex County Superintendent of Schools was directed to conduct a recount of the ballots cast at the Washington School polling place. The recount was conducted on March 15, 1993 at the Voting Machine Warehouse in Edison.

At the conclusion of the voting machine recount by the County Superintendent of Schools, there was no change in the vote reported by the Board Secretary on the District Combined Statement of Result of School Election, and the unchanged tally stood as follows:

Polling Place - Washington School

Candidate	Votes Cast
Gwynne Kesselman	67
John Tudor	66
Harold R. Maxwell	40
David Dickinson	36
Barry F. Miller	27
K. Karl Kovach	25
Dr. Bill Suriano	24
Dee Maurice Bruguier	21
Eleanore Both	21
Ann Ungerer	20

Candidate	Votes Cast
Herbert H. Daugherty	16
Mark Lubonski	13
Raymond S. Heck	12
Thomas A. Clemintone, Sr.	10
Dr. Leonard K. Eng	10
Joseph F. Montalbano	10
Nanci Gulya	8
Frank A. Alfonso	7
Harvey Dultz	7
Edward M. Kaplan	7
Philip G. Labasi, Esq.	7
Frank Grammatica	6
John J. Jarema	5
John H. Richardson	4
Guy J. Fecci	3
William T. O'Leary	3
Ralph Errico	2
Frank Gavigan	2
Susan Hidi	2
Peter J. Kunz	2
Peter J. Schwalje	2
Randy H. Silverman	2
Roman E. Kilar	1
Louis R. Nagy, Sr.	1
Mariam J. Singer	1
Walter R. Stochel, Jr.	1
Carlos L. Wells	1
Thomas J. Moroney	0
Carl Perlin	0
Herb Way	0
Steven R. Wyse	0

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of her authorized representative and adopts as her own the findings set forth above. The Commissioner further notes, that the high vote-getters herein were also the winning candidates districtwide.

Accordingly, the Commissioner finds and determines that Gwynne Kesselman and John Tudor were elected to terms of two years each on the Edison Township Board of Education.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 29, 1993

DATE OF MAILING- JUNE 29, 1993

156-93

IN THE MATTER OF THE TENURE :
HEARING OF SHARON FEINSOD, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF : DECISION
LINDEN, UNION COUNTY. :
:

SYNOPSIS

Board certified tenure charges of unbecoming conduct against respondent, English teacher with over 20 years of unblemished service, based on several alleged incidents involving inappropriate comments to students and one alleged incident involving a student forced to kneel.

Having considered the testimony of witnesses and evidence in record, ALJ found respondent's conduct in several instances was sufficiently unprofessional and inappropriate to be considered unbecoming, but did not warrant dismissal. ALJ found corporal punishment as defined in N.J.S.A. 18A:6-1 did not occur in kneeling incident which did not involve force or intent to harm and instead reflected gross insensitivity to student. ALJ recommended penalty of permanent forfeiture of 120 days salary withheld, withholding of subsequent year's increments, and participation in program of professional development and training.

Commissioner adopted findings and determination in initial decision.

JUNE 30, 1993

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1157-92
AGENCY DKT. NO. 14-1/92

IN THE MATTER OF THE TENURE HEARING OF SHARON FEINSOD, SCHOOL DISTRICT OF THE CITY OF LINDEN, UNION COUNTY.

Howard Schwartz, Esq., for petitioner Linden Board of Education
(Schwartz & Barkin, attorneys)

Richard A. Friedman, Esq., for respondent Sharon Feinsod
(Zazzali, Zazzali, Fagella & Nowak, attorneys)

Record Closed: April 9, 1993 Decided: May 24, 1993

BEFORE **MARYLOUISE LUCCHI-McCLOUD,** ALJ:

This matter concerns tenure charges brought against the respondent, Sharon Feinsod, which were certified by Anthony Del Sordi, the Secretary of the Board of Education of the City of Linden on January 16, 1992. The matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case on February 13, 1992 pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to -13.

A prehearing was held in the matter on June 18, 1992 and a settlement conference was set down for August 3, 1992. As the matter was not settled, hearing dates were given for October 8, 14, 15, 19, and 22, 1992. Of those dates the October 8, 1992 date was adjourned due to illness of the undersigned. The matter actually was heard over a period of dates that exceeded those originally scheduled. Hearings were held on the following days: October 14, 15, 19 and 22, 1992 as well as December 1 and 3, 1992. At the close of the hearings the record was left open for

briefs to be filed by the parties. The original schedule had briefs being filed on January 19, 1993 with any response necessary to be filed by January 27, 1993. The parties jointly requested an extension of the time to file to February 2, 1993 with any response necessary by February 9, 1993.

After receipt of the briefs, the undersigned requested additional information which had not been included, although requested, from one of the parties. A new posthearing submission schedule was entered into. The respondent's supplementary brief was to be received on or before March 29, 1993 and the petitioner was given until April 9, 1993 for any response that was believed to be necessary. On April 9, 1993 the record closed.

ISSUES

The question in this case is whether or not the charges brought against Sharon Feinsod, a tenured teacher, employed by the City of Linden Board of Education in Union County, can be sustained. Should those charges be sustained, the question then turns to whether or not there is some mitigating or excusing factor with respect to those charges, which would make the penalty less than the requested termination.

The charges as outlined in the statement of charges are found in P-1 in evidence. It should be noted that although there are twenty-three paragraphs along with a concluding generic paragraph involved in the statement of charges, Ms. Feinsod is essentially being charged with conduct which is unprofessional, does not demonstrate good behavior and is unbecoming a teaching staff member. The other paragraphs of the charges are essentially specifications of the individual incidents which the Board alleges support the conclusion that Ms. Feinsod had engaged in conduct which is unprofessional and unbecoming.

During the course of the hearing paragraphs fourteen and twenty-three were dismissed from the specifications. Also in posthearing submissions the petitioner board of education, upon careful review of the testimony acknowledged that there was no supporting evidence of charge number twenty-two in the statement of charges and therefore requested that it be withdrawn. That request has been granted.

Dismissal is sought by the Board of Education pursuant to *N.J.S.A.* 18A:6-10.

STIPULATED FACTS

Prior to the onset of the hearings both sides entered into a number of stipulated facts (J-1). Both sides agree the following to be fact:

1. Respondent graduated from Weequahic High School, Newark, New Jersey in 1966.

2. Respondent received a Bachelor of Arts in English from American University, Washington, D.C. in March 1970.

3. In 1974, respondent received an M.A. in Humanities from Kean College, Union, New Jersey.

4. Respondent has completed thirty-two credits above her Masters at Montclair State College, in administrative curriculum development.

5. Respondent holds the following certifications and licenses from the New Jersey Board of Examiners:

   a. Secondary English
   b. Speech Arts
   c. Drama
   d. Principalship and Supervisor of Instruction

6. Respondent has been employed by the Linden Board of Education from September 1970 to date.

7. Respondent took a maternity leave during September 1, 1975 through June 30, 1976 and from April 30, 1979 through June 30, 1979.

8. Respondent took a sabbatical during the 1982-83 school year.

9. Respondent was suspended without pay as of January 16, 1992. In accordance with *N.J.S.A.* 18A:6-14, respondent began to receive her pay on the 121st day after said date. Respondent collected unemployment benefits during the first 120 days of her suspension.

These facts having been stipulated to by the parties, I **FIND** to be operational facts in this case.

TESTIMONY

Before dealing with the testimony of the individual witnesses it should be pointed out that many of the actions or "incidents" are not disputed as having occurred. The dispute arises over whether or not they are serious or even noteworthy or whether they are things which occur in the normal course of teaching. Essentially, this is a case of varied perception from witness to witness.

The first witness to testify was Alvin Coplan who has been the assistant superintendent at the Linden Board of Education for the previous ten years although he has worked for the board of education for 42 years. He is acquainted with Sharon Feinsod. During the time that the investigation into the tenure charges took place the superintendent was Thomas W. Long. Mr. Long disqualified himself from having anything to do with the charges or the investigation. Mr. Coplan went through what had been told him regarding each of the individual charges in the case and what statements had been given him. His testimony is not set out here at length due to the fact that his knowledge came from statements from other individuals. He had no personal knowledge of the events which are being charged. He did however acknowledge that after an alleged incident with L.M. which he became aware of, he generated a memo (R-2, Ev.) indicating that it would be in the best interests of all concerned that the respondent avoid any contact, whatsoever, with L.M. It also indicated that L.M. would receive English instruction through other means until further notice.

L.M. also testified during the hearing. She was 12 years old and at the time of the alleged incident was in the seventh grade in Ms. Feinsod's English class.

She stated that on November 13, 1991 Ms. Feinsod read a number of grades out loud to people in the class and told people how they were doing. According to L.M. she stated, "Miskie, failing, failing, failing." L.M. spoke with her friends and told her parents. It should be noted that Miskie is not the student's entire last name, and is being used here only in the context of the quotation of what was said during the incident according to the witness.

Her parents later went down to speak to Mr. Parker at the school.

L.M. stated that Ms. Feinsod had called her "Miskie" before, at which time she had asked Ms. Feinsod to call her by her right name. She indicated that this occurred on two or three occasions. According to her Ms. Feinsod said that that's the name she had called L.M.'s sister a number of years before.

On November 14, 1991 L.M. was in homeroom in Mr. Sullivan's class when Ms. Feinsod took her out to the hall and spoke with her. L.M. characterized the tone of voice as yelling. She was told to follow Ms. Feinsod to the classroom and told to kneel behind the desk, although she was visible to the members of the class as far as both her head and feet went.

L.M. stated that she started to cry at which point Ms. Feinsod asked, "What's the matter did someone in your family die?" L.M. testified rather emotionally that she thought of her grandfather who had died and was extremely upset by the comment.

She was then told to get her books from Mr. Sullivan's room. She then went back into Ms. Feinsod's room and was once again kneeling. The bell rang and the first period students came in and L.M. was still in the same position. She stated that several children came up to speak to Ms. Feinsod who said that she couldn't speak with them because she was having a conference. According to L.M. after the bell rang she asked to go to class and was told that she could not by Ms. Feinsod who placed her hand on L.M. shoulder. L.M. indicated that she did not feel free to leave. She stated that Ms. Feinsod was "hovering" over her. L.M. left the classroom eight minutes before the bell rang again at the end of class.

The witness stated that at one point Ms. Feinsod asked if she wanted to go home. Then she further said that she was not going to.

After the incident L.M. went on to her next class. She then told her friend Jennifer what had occurred and also told her parents on the same day.

According to her Ms. Feinsod also said "there's only two ways to go through life with or without a sense of humor." The witness stated that she is afraid of Ms. Feinsod. After this incident L.M. never went back to her class.

The witness did go to school in December and went to the nurse's office during third period. While she was lying on a cot furthest from the door Ms. Feinsod came in and gave her what she referred to as a nasty look. Ms. Feinsod then asked the nurse to use the phone.

L.M. related another incident in which she was doing paper work at the principal's office and Ms. Feinsod came in. At that point Ms. Black who works in the office sent L.M. on an errand. She went back to the office and Ms. Feinsod was there a second time. At that point she went to the library and does not know where Ms. Feinsod went.

The witness testified on cross-examination that during the November 14, 1991 incident, some of the children who had come close to the desk could hear the conversation between herself and Ms. Feinsod although some could not. She indicated that she spoke to Becky and Jan at lunch and thinks that she might have spoken with M.S. that night.

L.M. indicated that she had received a progress report which indicated a borderline fail from Ms. Feinsod and had failed important tests and quizzes during the semester. She also received several progress reports in other areas. She spoke with her mother in mid-October after the progress reports had been issued about her mother having a lot of meetings. Her mother responded that she would cut the meetings down in order to help her daughter with her homework. L.M. stated that for a progress report in science and social studies she was told she could not use the phone. The witness's mother teaches language arts and would get upset with her grades.

L.M. recounted having had a conversation with her mother in which her mother stated that the respondent "sounds like a real asshole." This occurred before the November 14, 1991 incident.

Joseph S. Placa also testified during the hearing. He is the principal at McManus School and has been so since 1979. He is acquainted with Ms. Feinsod who has been assigned to that building since then. He also knows Mrs. M. and L.M. Mr. Placa testified regarding the phone call that was made from the nurse's office by Ms. Feinsod on December 5, 1991 and indicated that the faculty is not supposed to use the nurse's phone and it is only for the nurse's use. He produced a memo (P-10) which was an informal observation indicating that Ms. Feinsod was late to a "common prep" conference due to her use of the phone at that time. That particular memo had a response written by Ms. Feinsod in which she stated that there was no common prep period held on 12/5/91. She also indicated in the memo that she was not aware that the nurse's phone could not be used by faculty members.

Mr. Placa stated that on November 14, 1991 he saw Ms. Feinsod and told her that L.M.'s parents might come in to meet with them to have a parental conference. He had seen Mr. Long on the morning of November 14, but that was the day that Mr. Long disqualified himself and Mr. Coplan took over looking into the matter. Mr. M. however, did not wish to meet with Ms. Feinsod. A meeting was arranged with Mr. Coplan, the witness, Ms. Feinsod and possibly Ms. Black at which time Ms. Feinsod was asked what had happened regarding L.M. The witness stated that Ms. Feinsod agreed that she had asked L.M. to kneel because she wanted privacy to talk over the incident which was alleged to have occurred on November 13, 1991.

This witness also met with M.S.'s parents because of a problem that she had experienced with Ms. Feinsod. As a result of the problem which had occurred M.S. refused to go back to class and indicated she was frightened of Ms. Feinsod.

T.W., a student at the school who knows L.M. also testified. He indicated that during the "kneeling incident" he was in Ms. Feinsod's classroom during the study hall first period and saw L.M. there. According to him she was next to Ms. Feinsod kneeling near the file cabinet and he was able to see her from his seat. He was able

to see her face partially and noted that she was not smiling. She was in the room for approximately 43 to 45 minutes and left 10 or 15 minutes before the end of the period. He was able to observe L.M. crying and Ms. Feinsod talking to her.

He acknowledged that he did not see L.M. try to get up but he did see Ms. Feinsod place her hand on L.M.'s shoulder.

The witness stated that he heard Ms. Feinsod ask L.M. if she would like to go home and then said, "You can't."

According to the witness L.M. was already kneeling in that position when he arrived at the classroom. He was unable to remember how long she cried but did state that Ms. Feinsod spoke loudly to her.

Deposition testimony was also taken and put in evidence of students M.D. and M.P. M.D. testified that he did observe L.M. kneeling next to Ms. Feinsod's desk during the study hall on November 14, 1991. He was seated in the middle of the classroom and was approximately 10 to 15 feet from her desk. He observed L.M. on her knees but was not able to hear anything that Ms. Feinsod said to L.M. He admitted that he did not observe them through the entire class. He did not recall seeing L.M. cry although he acknowledged that her face was red but was unable to distinguish whether it was due to crying or embarrassment.

M.P. stated by way of deposition that she too was in the study hall on November 14, 1991 and observed approximately that which was described by M.D. regarding L.M. kneeling next to Ms. Feinsod's desk. She was unable to hear or make out any conversation between the two of them. She did recall that L.M. was crying but did not know for how long a period of time it went on.

M.S. was the next witness to testify. She is one of the children listed as being the object of improper behavior on the part of Ms. Feinsod in addtion to L.M.

M.S. testified that she had been in Ms. Feinsod's English class in November 1991. There came a time on a particular day during fifth period when she went to her locker and Ms. Feinsod pulled her over and told her that she was not doing well

in class. Ms. Feinsod later asked her up to the desk and told her that she got a D and said that her test average was 66. M.S. was upset about this. She was trying to talk with Ms. Feinsod and was crying. Ms. Feinsod told her to go to homeroom and stop crying. When she arrived at her homeroom the teacher asked what was wrong. Someone later came to get her with a pass and brought her back to Ms. Feinsod's class. Ms. Feinsod said she was missing vocabulary pages and M.S. went to her locker to get the book. Ms. Feinsod told M.S. to stop crying and asked what was the matter with her. Ms. Feinsod finally called Ms. Amabile and said to M.S., "I need a witness." During this period of time M.S. stated she was crying and was making strange sounds. Ms. Amabile put her arm around the child to comfort her. Ms. Feinsod asked what was wrong.

M.S. also testified that Ms. Feinsod told her that whatever was said in that room should not leave that room.

M.S. had never received a progress report and believed she had good test grades. She stated that Ms. Feinsod told her that she might "up" the grade to a C but that for now M.S. would have to "eat it."

She and Ms. Feinsod along with Ms. Amabile went into a storage room to have a conversation. She was still crying in the storage room although she was never asked if she wished to go either to see the school nurse or to talk with Ms. Feinsod at a later date.

M.S. went home and later told her parents what had occurred. They subsequently wrote a letter to Mr. Placa complaining of the incident. M.S. testified that she was too scared to go back to her class.

She stated that she and L.M. are in the same English class and that at some point L.M. told her about the kneeling incident after M.S. told L.M. about the incident involving the conversation with Ms. Feinsod.

On cross-examination L.M. stated that she never asked if she could terminate what was going on during the conversation or go to the nurse's office. She did state that she was crying and was told that crying would not help her.

M.S. stated that while they were in the storage room she was hyperventilating and making strange noises that Ms. Feinsod indicated were scaring her. She did acknowledge that Ms. Feinsod never actually threatened her or threatened to punish her and she did not think that anything like that would occur due to the fact that Ms. Amabile was present. She was however, crying and having difficulty breathing. The conversation ended with Ms. Feinsod saying that what was said in that room should stay in that room.

M.S. went home and did not wish to speak with her father about the matter but did talk to her mother.

S.C.P-M. also testified. She is the mother of L.M. and testified almost in essence as a fresh complaint type of witness. Her daughter related the November 13, 1991 incident where Ms. Feinsod had, according to her daughter, told her she was failing. L.M. had been crying and told her mother how Ms. Feinsod had been cruel to her. She stated that her daughter said that Ms. Feinsod's exact words were, "Miskie, failing, failing, failing." She stated that her daughter had previously complaining about being called Miskie.

The witness stated she spoke with Mr. Placa and told him that the classroom was no place for humiliation or sarcasm.

She stated she did not learn about the kneeling incident until November 15, 1991 at which time she took her daughter to speak with Mr. Coplan. According to her L.M. was petrified and did not wish to go to school on November 15. She did not return on the following Monday but went back on Tuesday or Wednesday.

The witness then recounted essentially that which L.M. had stated occurred. She did acknowledge telling her daughter that Ms. Feinsod was an asshole although she did not remember when she did so.

J.S. also testified and is one of the students about whom allegations of misconduct on the part of Ms. Feinsod were made. She is now a high school student but previously had attended McManus. According to her she had problems with Ms. Feinsod which included being verbally abused and embarrassed by Ms. Feinsod. She stated that Ms. Feinsod said her mother did not "raise her right" and used to

compare her with Ms. Feinsod's own daughters. This occurred in approximately 1990 and she told her mother that she did not wish to go back to school. She stated that her mother called Mr. Placa in order to transfer her out of the English class but was told it could not be done. As a result she stayed in that class all year.

On cross-examination she indicated that in the first month she had a good relationship with Ms. Feinsod. She acknowledged that she did not speak to the guidance counsellor or to other teachers about the problem that she was having. She did receive a number of detentions during April and May and was upset because this caused her to miss softball. It was not until 1991 that she discussed having had problems with Ms. Feinsod with L.M.

K.S. who is the mother of J.S. testified that her daughter had complained about Ms. Feinsod during the course of the year in 1990. Her daughter indicated that she did not wish to go to school and her mother met with Mr. Placa who suggested a meeting with Ms. Feinsod. This meeting did not occur.

This witness concluded the testimony for the board of education. A motion to dismiss charges for failure to make out a *prima facie* case was made on behalf of the respondent. That motion was denied for the reasons stated on the record at the time.

The petitioner began its case by calling Judyth Black who is a secretary with the school system for 12 years. Between 1991 and 1992 she worked at McManus and before that at the business office from 1986 to 1991. Before that she worked at a different school also.

She stated she knew Ms. Feinsod through back to school night with her own children. They were also coworkers although they did not socialize.

The witness is the building representative and goes to meetings and tells members about those meetings.

She stated she was not at a meeting with Mr. Placa and never heard Ms. Feinsod say that she made L.M. kneel.

She was however present on the day upon which Ms. Feinsod and L.M. were in the principal's office. At that point L.M. was at a desk with the phone. The desk was located approximately 12 feet behind the counter. Ms. Feinsod came in and said she wanted to use the phone. According to the witness students and teachers both used that phone. When Ms. Feinsod said she wanted to use the phone Ms. Black got up and told Mr. Placa. He then said that L.M. should go to the library although she did not remember who told L.M. Ms. Feinsod said absolutely nothing to L.M. and there was no physical contact between them. She did not see them stare at each other and did not observe any interaction. Nobody told Ms. Feinsod to leave the area and Mr. Placa did not say anything to Ms. Feinsod. According to the witness Ms. Feinsod would sometimes come and use the phone.

The witness did indicate that she understood that L.M. and Ms. Feinsod were not to be together and that is why she went in to speak with Mr. Placa. She acknowledged that there are pay phones available in the building. She also indicated that she was unable to observe the two of them when she went into Mr. Placa's office to speak with him.

Thomas Walter Long also testified and is the former superintendent of schools. He began his career with the board of education as a teacher in 1951 and continued in his career in education until becoming superintendent between 1986 and 1992. Ms. Feinsod worked at his direction and was also under his supervision between 1970 and 1973. He stated that he was familiar with her performance after that in his capacity as a supervisor and both as assistant superintendent as well as superintendent.

According to the witness there was both a professional and personal relationship between Ms. Feinsod, her husband and himself. Ms. Feinsod's husband is also a teacher and had headed a committee of educators who had backed this witness when he ran for freeholder at one time. According to him Ms. Feinsod only helped to the extent of organizing a coffee klatch. After 1970 there was no involvement with politics.

A significant amount of testimony was taken which dealt with an alleged dislike or discomfort between L.M.'s mother and Mr. Long This allegedly arose out of a decision by the district not to rehire Mrs. M. as a teacher.

Due to the fact that Mr. Long disqualified himself from participation in the investigation of this incident and took no part in the determination of what happened in dealing either with the students or Ms. Feinsod and the other adults this testimony was of no import.

Sondra Wunder was the next witness called by the respondent. She is a speech and language therapist and is in her fifth year in the Linden system. She works with children with communication problems and moves between five different buildings. She is at the McManus school two times a week, one-half day each time. She knows Ms. Feinsod as a teacher at McManus but has no relationship with her outside the school.

On November 14, 1991 she was at the McManus school and went into Ms. Feinsod's study hall in the morning although she did not recall exactly when. At that time she had broken a fingernail and went to ask Ms. Feinsod for an emery board. The door was open at the time.

She stated that the seating arrangements had students at desks lined up facing the teacher and she observed Ms. Feinsod and L.M. She saw the girl next to Ms. Feinsod on her knees with her feet out back crying with her hands near her eyes. Ms. Wunder stated that she asked for the emery board and was told that this was not a good time but that she should come back later. She was unable to hear any conversation between Ms. Feinsod and L.M.

She stated that she observed Ms. Feinsod sitting in a relaxed manner and that Ms. Feinsod had her hand gently resting on L.M.'s shoulder. She never saw her move that hand. According to the witness they were approximately a half dozen students in the room. She did not hear them say anything that she could recall and L.M. did not say anything to the witness.

M.A. testified that he had also been in Ms. Feinsod's English class during 1990-91 when J.S. was. He knew her and they were friends. He stated that he did not recall anything insulting or personal by way of comment made by Ms. Feinsod to J.S. Ms. Feinsod did speak to J.S. about chewing gum and spoke to her about the manner in which she was sitting in a chair as not being ladylike. He also recalled Ms. Feinsod

speaking to J.S. about talking in class to which Jessica replied, "Okay," but then went back to talking. He did not recall Jessica being spoken to differently than any other students.

Kathleen Rich who is a teacher in Linden for 28 years also testified. During the 1990-91 school year she taught seventh grade science at McManus. She is acquainted with Ms. Feinsod in school and also attended her daughter's bat mitzvah the preceding year. She has known Ms. Feinsod for 10 to 12 years. She also stated that she knows J.S. and had her as a student in 1990-91.

According to Ms. Rich she had problems with J.S. talking in class and being disruptive. This matter was resolved between them and later on J.S. came up and apologized. After this things got better. There was an occasion when the witness had lunch with Ms. Feinsod at which time Ms. Feinsod related that she too had spoken to J.S. about her behavior.

The witness stated that she also knew L.M. who was not doing particularly well in her class at the time. She did not however, speak to the parents of L.M. prior to November 1991.

Andrea J. Amabile also testified. She is a social studies teacher and has taught for 29 years. Eight of those years have been at the McManus school. She knew L.M. and had her as a student between September 1991 and April 1992. She also knows Ms. Feinsod and they are friends although they rarely meet outside school more than perhaps two times a year.

She stated that her classroom is number 214 and is down the hall approximately 30 feet from 209 which is Ms. Feinsod's. Room 208 is across from there and is a temporary classroom however in November 1991 the janitors were preparing the room for use for gifted and talented students and as a result it resembled a storage area. There were a number of projects left over in room 208. She stated that Ms. Feinsod stepped in with M.S. and asked her to be a witness. According to her Ms. Feinsod said the marking period ended and M.S. was getting a D at which point the child started to cry and did not say anything. Ms. Feinsod mentioned an assignment she had not turned in but M.S. said that she had done it and went to her locker. She came back with the assignment. Upon her return M.S. w a s

crying again. Ms. Amabile stated she put her arm around M.S. and rubbed her back and asked if she wanted a drink of water. She responded that she did not. M.S. kept apologizing for crying and saying, "I'm sorry, this is the way I get."

The witness stated that M.S. never asked if she could leave the room.

When Ms. Feinsod finished marking the paper that M.S. had brought her she stated that she would change the D to a C but said she had to get the "bubble sheets." Meredith was still crying and she nodded and left. According to the witness Ms. Feinsod's tone was normal and she never raised her voice. She acted in a businesslike manner and there was no physical contact between Ms. Feinsod and M.S. Ms. Feinsod did ask at the end if M.S. needed a tissue and she said no.

During the transaction Ms. Feinsod was approximately five feet from M.S. and the witness was close enough to have her hand on M.S. to comfort her. The only suggestion of leaving the room was that of going to the locker to get the assignment.

The witness also stated that she had L.M. in her class until Easter. L.M. was doing D work in her class and got a progress report that was signed by the family. She later met with L.M.'s parents in February 1992 but had never met with them before.

On cross-examination Ms. Amabile stated that she remembered Ms. Feinsod saying to M.S. "why are you making that noise?" and telling her to stop crying. The witness indicated that she did not know what had occurred prior to her being asked to enter the room as a witness.

Ms. Amabile did acknowledge that Ms. Feinsod said to M.S., "What goes on in this room stays in this room." M.S. nodded however did not respond verbally. According to her Ms. Feinsod never specifically said not to discuss the matter with her parents. At no time did Ms. Feinsod ever block M.S.'s means of egress.

Sharon Feinsod also testified on her own behalf. She has been employed by the Linden school system since 1970 and has taught a number of grades. She stated

that she was evaluated in most of the years in which she taught although she was not evaluated from September 1973 to 1979.

In 1990-91 she had J.S. in class. In the beginning of the year J.S. was cooperative and her demeanor and behavior was relatively appropriate. In the late fall and early winter, according to the witness, she became "flip and non-compliant." She stated that J.S. would come in and "plop down on the chair and put her head down on her arms on the desk" with some frequency. Ms. Feinsod stated that she asked her to please sit up and she detailed the behavioral problems which she perceived as having occurred with J.S. These included J.S. rocking her chair backward or sitting with her feet on the bars of the desk. She also stated that J.S. would talk during class or chew gum. Ms. Feinsod said that she knew that J.S. had had a problem with Ms. Rich however that problem had apparently resolved itself.

The witness gave J.S. six or seven detentions for the whole year and they were scattered throughout. At one time she recalled Jessica saying she was missing softball practice. Ms. Feinsod informed her that she was missing it because of her own conduct.

She stated that no one spoke to her regarding J.S. and was unaware of any problem until she first learned of the allegations on December 20, 1991 when she received the charges.

The witness acknowledged having told J.S. that she did not believe her mother raised her to behave in this manner. According to her she treated J.S. the same as any of the other students.

The witness also indicated the first time that she knew of anything about an allegation about her windows being improperly opened during the winter was when she received tenure charges in December 1991. In the fall of 1991 the classroom windows were opened sometimes but never at inappropriate times. According to her there was a major problem with the heating system in the building. As a result it was necessary to open the windows. She acknowledged not allowing the children to keep their coats on because they were not permitted to. According to her it was difficult for them to write or have motor control if they were wearing jackets or coats because there was not enough room between them. She felt it was

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healthy for them to wear jackets.

In 1991-92 M.S. was in her English class along with L.M. Sometime in middle of November M.S. had a grade that came out to a D which was somewhere between 70 and 74. On November 19 she was given a "bubble" master computer sheet by Mr. Placa with a section that allows for behavioral comments. She stated that M.S. did not get a progress report, and as of October 10 through 15 had approximately a C average. She was only given a borderline failure. The witness stated that she sometimes sends reports out for positive things. After the first marking period ended and before the grades went out she became concerned about M.S.'s grades. She had already given the "bubble sheet" to Ms. Black on November 21 later when she went over she saw the D she checked it and ascertained that it was in fact a D. In class she looked and saw that M.S. had received a grade in the C range and walked over to her desk and handed it to her. According to the witness M.S. asked if she was getting a C and was told no and then asked if she was getting a D and was told yes. She was told to come up to Ms. Feinsod's desk and asked why she was getting a D. They had a discussion and she seemed upset when she left. Five minutes later Ms. Feinsod wrote a pass for her to come back at 3:05 and gave it to another student, S.L.

M.S. came back to her at 3:05 and was crying and asked why she was getting a D. Ms. Feinsod explained she has missed an assignment although M.S. said she had done them all. According to the witness the conversation took place in a normal tone of voice and M.S. never asked to leave.

Ms. Feinsod stated that she was not at all concerned about the fact that M.S. was crying since, according to her, it is not unusual for students to cry over grades. She asked if there were any problems at home and M.S. did not say anything about any problems.

She was told she could get the materials and Ms. Feinsod would correct them and try to retrieve the "bubble sheet" however if she could not get it then she might have to "eat it" until the report card came back. According to Ms. Feinsod M.S. did not respond.

Ms. Feinsod acknowledged saying the conversation should not leave the room. She explained this as meaning that she felt it was not the concern of the rest of the class.

She then heard Ms. Amabile in room 208. The witness described that she felt uncomfortable and felt that something was "preordained" due to the prior allegation against her. She stated she then assumed a defensive posture and felt it would be to both herself and the student's advantage to have a witness present. She stated that she told M.S. that. Her tone was normal and professional at all times. At no time did the child ask to leave, request a drink of water or ask to see the nurse. Ms. Feinsod acknowledged that she at no time considered terminating this conversation.

She stated they then went diagonally across the hall to room 208 which was a classroom although it was used as a substitute room while others were being painted and a number of projects were stored in there. It was also used as a book room.

The witness stated she had no physical contact with M.S. and asked Ms. Amabile to listen. M.S. started to cry when she heard mention of the grades. The witness told her she could get her book if she had it and she did so and returned quickly. She handed the book to Ms. Feinsod who then opened the book to correct it. While this was going on Ms. Amabile was comforting M.S. and had her arm around her.

The witness tesitified that she never thought to touch the child even in a comforting manner because she did not want it to be misconstrued, once again in light of the prior allegations against her.

During this transaction M.S. was making what the witness characterized as a "snorting" noise. Ms. Feinsod asked if she was all right using a normal tone and according to her M.S. said she gets like this when she cries.

Ms. Feinsod did acknowledge having said that the noises were scaring her. She asked if M.S. wanted a tissue but that was declined. Ms. Feinsod then finished grading the book and told M.S. that she would change her grade to a C. She told her she would try to retrieve the "bubble sheet" and eventually was able to do so and did change the grade to a C.

Ms. Feinsod also testified at length about the incident involving L.M. She stated that initially she had a good rapport and did acknowledge calling her "Miskie" which she felt was a cute and shortened form of her last name, and that it somehow fit the child. According to the witness L.M. had never said she was unhappy about the reference and that the shortened form of the name had no ethnic or religious connotation in the witness's mind. She did not become aware until approximately November 18, 1991 or November 15, 1991 that there was a claim that this constituted an ethnic slur.

On November 18, 1991 Mr. Placa and a police officer came in and there was a report filed. Prior to the November 14, 1991 date she was never approached by anyone about the use of "Miskie" as a name she used for L.M. She stated that she only used it in the classroom and that her tone was what she characterized as affectionate. She testified that she had nicknames for two other students only.

The witness stated that she did give some grade information out in English class on November 13, 1991. The class had come in and said they had gotten their grades from a previous class and wanted them from her. She stated that she told the class that she had only done the quizz averages which were 25 percent of the grade. She then indicated that she would go around the room in a U-shape and give each individual child the option of hearing their grade. She did not recall having done it on any other occasion and characterized this not as grades but as "ballpark indicators." She did go around the room and ask each individual child if they wanted to know. She then told the child. She stated that when she got to L.M. she asked if the child wanted the information and she responded Yes. Ms. Feinsod acknowledged that she said to her, "It is failing." She did not recall using the word "Miskie" and stated that the comment was made in a normal tone of voice. L.M. did not respond. Ms. Feinsod testified that she thinks she made a joke and said something along the lines of "Aren't we going to see you for five years?" as if to say that she might be in trouble because of it. According to the witness L.M. laughed. During this period of time there were approximately 24 or 25 students in the classroom and most of those students wanted their grades.

Turning to the November 14, 1991, incident she stated that she did have a conversation with L.M. She approached the child because she had been told by Mr. Placa that Mr. and Mrs. M. had gone to see Mr. Coplan and Mr. Long and were

annoyed about something that had occurred Mr. Feinsod said she asked what they were upset about of Mr. Placa and he was very vague but said it was about something that she had said to L.M. that was insulting. Ten to 15 minutes after her conversation with Mr. Placa she spoke with L.M. in homeroom. She went to Mr. Sullivan's homeroom where L.M. was located which was near Ms. Feinsod's room and asked Mr. Sullivan if she could speak with L.M. in her own homeroom. According to her Mr. Sullivan assented and L.M. went with her to the room.

Ms. Feinsod stated that she went to L.M. because she was perplexed about what she could possibly have said. She also wondered why the parents did not come to her but instead went to the superintendent of schools. She stated she asked L.M. in a normal voice to come to her homeroom and no conversation occurred between the classrooms.

The witness stated that she has taken students out of other classes before with the permission of the other teachers. She walked in and went to her desk and L.M. was standing to her left. According to her she asked L.M. what she had said and characterized her tone as "slightly subnormal." L.M. responded that Ms. Feinsod had said she had failed. Ms. Feinsod said that she then pointed to a stack of essays and said that she could not possibly have told her that she was failing for the marking period since she had not graded all of the essays yet. During this point L.M. was standing. There was no verbal response. At that moment she got very red in the face and her eyes filled up with tears. Ms. Feinsod acknowledges saying, "L., nobody died." Her explanation is that this was not a life and death situation and she had no awareness that L.M. had experienced a death in the family. She told L.M. they needed to talk about this and was concerned about a misconception. She stated that she was consistent in her tone of voice. She then suggested that L.M. go get her books and come back, which she did. Ms. Feinsod sat at her desk and asked L.M. to come around to her left behind the file cabinet so they could talk privately. The child did so. According to the witness she offered L.M. a footstool which she did not want, and also offered her a chair which she did not want. Instead, she "plopped down" on the floor. The bell rang and classes changed. Ms. Feinsod asked L.M. what she said that had upset her and L.M. did not respond. She also asked if L.M. thought that she would deliberately say anything to hurt her to which L.M. shrugged her shoulders but made no verbal response. The child was crying, although Ms. Feinsod testified that she was not concerned about it.

The witness stated that this was a very private conversation in a soft spoken voice carried out in a caring tone, trying to impress upon the child that it was okay to tell her if she did not like something. She indicated that the conversation with L.M. continued over a number of different subjects and L.M. was crying on and off. She stated that she never yelled at L.M. She did send a note to Mr. Batinas asking if it was all right to speak with L.M. and got a verbal response that this was okay.

The witness stated that she never directed L.M. to kneel behind the file cabinet. She denies ever pushing Lisa down and stated that she did not recall touching her. She finally gave her a pass to go back to Mr. Batinas and L.M. took her books and left. At no time during this transaction did L.M. complain that she was uncomfortable.

On cross-examination Ms. Feinsod stated that although L.M. was crying she did not terminate the conversation. She acknowledged that she felt that L.M. had lied and hurt the witness. As a result she wanted to know what was said that was misperceived.

Ms. Feinsod acknowledged keeping L.M. out of her other class and kept her next to her at her desk. She felt it was important for L.M. to keep down for the purposes of privacy.

The witness also testified that the two incidents involving the phone, the first at the nurse's office, and the second in the outer office of the principal's area could not be construed as contact with L.M. She did acknowledge that L.M. was there but she had no verbal contact nor physical contact with her. She felt that she was permitted to use those phones. She also testified that she felt that her right to be in the office outside the principal's area was greater than L.M. She stated that that is why she requested that Ms. Black have L.M. moved since her rights exceeded those of L.M.'s.

With respect to the nurse's office she stated that she had equal rights to be in the nurse's office as L.M. and was approximately six feet from the child but had no contact with her.

Petitioner also presented other student witnesses during the hearing. C.S. testified that he was in the same class as L.M. He did hear Ms. Feinsod call L.M. by the name Miskie on one occasion but did not recall when.

He stated that during the fall Ms. Feinsod opened the window about an inch or so because the heat was on quite high.

The witness also testified that on November 13, 1991 Ms. Feinsod asked if people wanted to hear their averages and he said that he thought L.M. asked for hers. At no time did he recall hearing he say "Miskie, failing, failing, failing."

P.L. also was a student in Ms. Feinsod's homeroom and remembers on November 14, 1991 L.M. came in. At that time she went over to Ms. Feinsod and they were speaking. He did not hear the conversation nor was he paying attention. This went on for the entire homeroom period. He was unable to observe her facial expression and neither individual moved from their locations.

Maria Loiacano who was the school nurse testified that she knew Ms. Feinsod as a colleague although had no social relationship with her. She remembered the date that L.M. was in the office and Ms. Feinsod came in. L.M. was lying on a cot and Ms. Feinsod came in a few minutes later and asked to use the phone. She had done this on other occasions. This witness stated that she knew of no policy prohibiting members of the staff from using the nurse's phone. She did not hear Ms. Feinsod say anything to L.M. and observed no physical contact or interaction between the two of them. She stated there was a distance of approximately six to seven feet between them.

Janice Tyburczy who is also a teacher employed by the Linden board of education testified. She testified in mitigation that Ms. Feinsod has participated in producing Thanksgiving baskets and would include the witness's special education class in this project. She also invited the witness's students to attend when there were certain poets or writers that came in to speak.

D.C. testified that she had been a student of Ms. Feinsod and was in English class with L.M. She recalled Ms. Feinsod having called her Miskie several times and that L.M. never responded.

She was present on November 13, 1991 and recalled Ms. Feinsod giving out grade information. She stated that Ms. Feinsod said that if the individual students wanted the grade information she would give it and the witness did want that information. She did not remember about L.M. and did not hear Ms. Feinsod say "Miskie, failing, failing, failing." According to this witness Ms. Feinsod stayed at her desk and called out the individual names and asked if they wanted their grades. If they were failing she called them up to the desk.

R.K. also testified and stated that he was in homeroom on November 14, 1991 when L.M. was located there. According to him she was there for most of the homeroom period although he did not hear what was said. He did not observe any physical contact between Ms. Feinsod and L.M., although he saw that they were deep in conversation.

Charlotte Gessler testified as a witness with respect to mitigation. She is the LDTC for Linden and a member of the Child Study Team for special education. She knows Ms. Feinsod and stated that on a number of occasions Ms. Feinsod had given some of the special education teachers the opportunity to send students to a poet in residence activity. She also participated in the preparation of food baskets and an education fair.

In addition to these mitigation witnesses a number of evaluations were entered into evidence that make up Sharon Feinsod's record of observations and reports during her career.

FINDINGS OF FACTS

This case deals with a number of different allegations which deal predominantly with behavior toward three specific students, L.M., M.S., and J.S. In addition under the individual specifications number twenty-three and number fourteen were dismissed and number twenty-two was withdrawn by the petitioning school board. Besides the conduct between Ms. Feinsod and these three students there is also an allegation that Ms. Feinsod unreasonably keeps her classroom windows open at inappropriate times. She refused to permit her students to keep their coats on, even in view of the chilling room temperature that she has created. Based upon the testimony in this case, I **FIND** that this particular allegation has not

been sustained by a preponderance of the credible evidence due to the fact that there has been testimony by individuals in addition to Ms. Feinsod that during the period of time in question problems existed with the heating system requiring the opening of windows.

For clarity the findings of fact will be done in this case in paragraph form dealing with each of the three students that are alleged to have been victims of improper and unbecoming conduct by Ms. Feinsod.

Having heard the testimony of the witnesses, and having assessed their credibility I **FIND** that this case deals not so much in a dispute over fact but more so in a dispute over perception as to what has occurred. There is no question that on November 13, 1991 Ms. Feinsod informed a number of the students in her class of their test scores. Her explanation is that she read the students' test scores if they requested it. Ms. Feinsod acknowledges telling L.M. "it is failing," and while she does not agree that she stated "Miskie, failing, failing, failing I **FIND** as fact that she did inform L.M. that her grade was that which was failing. Even if these grades were given at the request of the student I **FIND** that it is a humiliating practice to inform one child within the hearing of others, whether the entire class or only those in the immediate surroundings of the student involved, that their grade is failing. As a result I **FIND** that charge number one has been sustained.

Ms. Feinsod is also accused of improperly addressing L.M. by an abbreviation of her name and calling her "Miskie" to which the student objects. In the statement of charges Ms. Feinsod is charged with calling the child by this name and using it as an ethnic slur. While Ms. Feinsod had admitted and I **FIND AS FACT** that she has called L.M. by an abbreviation of her last name there is a complete absence of testimony in this case that the name is used as an ethnic slur or that it has any ethnic or religious connotation. As a result, I **FIND** that although L.M. had requested that Ms. Feinsod not address her in that manner the use of the nickname itself did not constitute an ethnic or religious slur. As a result paragraph two is sustained in part, however, the reference to the name being used as an ethnic slur has not been proved by a preponderance of the credible evidence.

There is also no question that Ms. Feinsod had L.M. removed from another classroom by requesting her presence from another teacher. While it is true Ms.

Feinsod had no authority over the individual classroom that she asked the teacher to have L.M. leave in order to speak with her the evidence does not sustain an inference that she improperly pulled L.M. from the class. I further **FIND** that there is insufficient evidence to show that the conduct which occurred between Ms. Feinsod and L.M. in the hallway could be considered as badgering. As a result, I **FIND** that charge number three has not been proved by a preponderance of the credible evidence.

There is no question that Ms. Feinsod brought L.M. to her classroom and had a conversation with the child and caused the child to cry. While I **FIND** that L.M. perceived Ms. Feinsod to have yelled at her during the conversation I further **FIND** that the tone of voice did not amount to that of yelling however was severe enough to be frightening.

L.M. was directed to stay near Ms. Feinsod's desk and knelt down during the conversation. She remained in this position for a substantial period of time from homeroom through the study hall and during this period of time a conversation ensued. Both her feet and her face were visible to students of the class and she was crying which was also visible.

I **FIND** that although Ms. Feinsod placed her hand on L.M.'s shoulder she did not use physical force in order to push the child down or prevent her from remaining in the position in which she was. Notwithstanding this lack of physical force I **FIND AS FACT** that keeping L.M. in a position kneeling next to a file cabinet on view to a large number of students both in homeroom and study hall during a conversation in which the child was crying is humiliating and shows an extreme lack of sensitivity on the part of the teacher. Ms. Feinsod's explanation that this position afforded her privacy for her conversation with L.M. is specifically rejected by the undersigned. It is clear that while the content of the conversation may not have been heard by the class the student was visible to them and her demeanor which included crying was equally as visible. As a result, I **FIND** that charge number five has been sustained although charge number six and seven have not been proved by a preponderance of the credible evidence. Notwithstanding that, it is also clear that the position in which L.M. was during the conversation was uncomfortable and distressing to the student. I also accept as fact the testimony of L.M. that she is to some degree afraid of Ms. Feinsod based upon the transactions which have occurred between them.

With respect to the memo in which Ms. Feinsod was not to have any contact with L.M. it is clear that at least on two incidents, one at the nurse's office and one in the administration office, Ms. Feinsod was present when L.M. was there. During these transactions however no verbal or physical contact took place and while at the very least Ms. Feinsod should have, based upon the memo she received, had the good sense and intelligence to avoid the situation, she did not. That however is not the issue and I do not **FIND** these to be deliberate attempts to intimidate or harass L.M. It should be noted however that the undersigned accepts that L.M. feels very strongly that Ms. Feinsod, by her very presence, was intimidating. As a result of the foregoing, I **FIND** that charges nine, ten and eleven, while the events themselves did occur, do not amount to intentional violations of the restraining memo or intentional attempts to intimidate L.M.

With respect to the incidents involving M.S. I **FIND** that on Thursday, November 21, 1991 Ms. Feinsod informed M.S. of her grade at which time M.S. began to cry and experienced extreme distress. I therefore **FIND** that charge number twelve has been sustained by a preponderance of the credible evidence and **FIND** that the testimony of M.S. was in fact credible.

Perhaps most distressing of this incident is the fact that Ms. Feinsod advised the student that any and all discussions that they had were to stay within that room. While Ms. Feinsod explains this to mean that it should not be repeated to other members of the class there is absolutely no way a student could understand that statement to mean anything other than that the conversations were not to be repeated to anyone. This would appear to include one's parents. There is nothing that should bar a child from discussing their education, be it the positive, or the negative aspects with their parents. As a result, I **FIND** that the charge number thirteen has been sustained by a preponderance of the credible evidence.

Ms. Feinsod continued her conversation with M.S. while M.S. was crying and Ms. Feinsod summoned Ms. Amabile as a witness to the incident. M.S. was crying to the extent that she was making unusual sounds yet no concern was portrayed by Ms. Feinsod with respect to her health at this point. While Ms. Feinsod contends that M.S. did not say she wished to leave I **FIND** that Ms. Feinsod is the individual who is the adult and in the position of power here. She exercises supervisory control and

authority over a child and it would not be up to the child to break off a discussion without some indication from the teacher that it might be appropriate to do so. I further **FIND** that Ms. Feinsod did not suggest that the interview terminate nor make any request as to whether or not M.S. wished to be seen by the nurse. As a result I **FIND** that charges in paragraphs fifteen, sixteen and seventeen have been proved by a preponderance of the credible evidence.

The last student who alleges improper conduct by Ms. Feinsod for the purposes of this hearing is J.S. J.S.'s allegations come from a period of time one year before the allegations of M.S. and L.M. While she reported having had problems with Ms. Feinsod to her family action was not taken at that time. While I accept that J.S. feels that she has been picked on by Ms. Feinsod I do not **FIND** that Ms. Feinsod's conduct based upon the testimony presented is sufficient to be considered unbecoming based upon the evidence presented at the hearing.

Based upon the above Findings of Fact I hereby **FIND** that the charges as indicated in the modified form above have been sustained against Ms. Feinsod and that she has displayed unbecoming conduct toward at least two students.

In addition having reviewed the mitigation testimony and all of the evaluations that were submitted into evidence for the purposes of this case I further **FIND** that Sharon Feinsod has had no prior disciplinary actions and has had good evaluations which were entered into evidence as exhibits R-7A through K and R-8A through K. Beyond that she has participated in certain extracurricular activities which include the production of Thanksgiving baskets and other things which are highly commendable in nature.

LEGAL DISCUSSION

The petitioner claims that the respondent has engaged in corporal punishment with respect to L.M. and as such dismissal would be appropriate. *N.J.S.A.* 18A:6-1 prohibits the infliction of corporal punishment due to the fact that I have found that corporal punishment did not occur in this case that question need not be addressed.

The testimony of the students in this case was sincere and based upon their perceptions of what occurred. This includes not only those students who complain

of conduct but those students who were witnesses. It is clear in life that what one person perceives during an incident is not necessarily what the next person perceives. It is clear that Ms. Feinsod has generated some very strong feelings among some of the persons with whom she has come in contact. Her conduct was at the very least insensitive to certain students, and, even if not meant to be, gave the impression that she was uncaring and unconcerned about the feelings of these children. By the same token a large number of students have been helped and taught by Ms. Feinsod and apparently taught well as judged by the lack of other complaints over the long period of time in which she has been a teacher. I have reviewed the cases as cited by counsel for both sides and have to balance the severity of the conduct involved in this case with a long and persuasively good career. If nothing else can be impressed upon the respondent in this case the very fact that children are a precious commodity with sensitivities that must be appropriately addressed must come through loud and clear.

CONCLUSION AND ORDER

Having balanced the finding of conduct unbecoming with the nature of the conduct as well as the mitigating evidence in this case I have determined to recommend to the Commissioner of Education that an appropriate penalty for the finding of Conduct Unbecoming a Teacher as indicated in the Findings of Fact above would be:

1. The permanent forfeiture of the 120 salary withheld from her following certification of the original charges; and

2. The withholding of the subsequent year's salary and adjustment increments, however it must be noted that this would not preclude a return to the regular salary guide subsequently but merely establishes that such a return is within a board's discretionary prerogative rather an automatic entitlement.

The greatest concern is the fact that there is substantial evidence in the record demonstrating an underlying pattern of Ms. Feinsod's interaction with students which is a cause for concern. While this conduct is not found sufficient, based upon its being weighed against the mitigating factors as well as the many years of service

to require dismissal, it is extremely disquieting and cannot be ignored. Therefore, it is further recommended that the board provide for, and Ms. Feinsod participate in, a program of continuing education and/or in-service training including but not limited to, child development, behavioral management and psychology of learning, so as to improve her ability to understand the needs of different types of children and better comport her own behavior and expectations to them.

It is therefore **ORDERED** that the above provisions, be and hereby are implemented in this case.

I hereby **FILE** my Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSISONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 7th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

5/24/93
Date

MARYLOUISE LUCCHI-McCLOUD, ALJ

Receipt Acknowledged:

5/25/93
Date

DEPARTMENT OF EDUCATION

MAY 27 1993
Date

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

am

APPENDIX

WITNESSES

For respondent:

Judyth Black
Thomas Walter Long
Sondra Wunder
M.A.
Kathleen RIch
Andrea J. Amabile
Sharon Feinsod
C.S.
P.L.
Frank T.L.
Maria Loiacono
Janice Tyburczy
D.C.
S.K.
L.L.
R.K.
Charlotte Gessler
Linda Hulanick

For petitioner:

Alvin Coplan
L.M.
Joseph S. Placa
T.W.
M.S.
S.C.P.-M.
J.S.
K.S.

EVIDENCE

J-1, Ev.	Stipulation of facts
J-2, Ev.	Transcript of deposition testimony of M.D. and M.P. only
P-1, Ev.	Tenure charges re: Sharon Feinsod
P-2, Ev.	Memo to Sharon Feinsod from Alvin Coplan, Nov. 19, 1991
P-3, Ev.	Incident Report dated Nov. 22, 1991 from Marc and Louise S.

P-4, Ev.	Letter from J.S. dated Nov. 25, 1991
P-5, Ev.	Statement of T.W. dated Nov. 26, 1991
P-6, Ev.	Statement of A.H. dated Nov. 26, 1991
P-7, Ev.	Notes of conversation with Sharon Feinsod dated Nov. 27, 1991
P-8, Ev.	Teaching schedule
P-9, Ev.	Memo to Alvin Coplan dated Dec. 5, 1991
P-10, Ev.	Informal observation resport dated Dec. 10, 1991
P-11, Ev.	Memo re S.'s decision dated Dec. 9, 1991
P-12, Ev.	Clan roster
P-13, Id, only	Deposition transcript of Sharon Feinsod dated Sept. 25, 1992
P-14, Id, only	Deposition transcript of Sharon Feinsod dated Sept. 30, 1992

R-1, Ev.	June 6, 1989 evaluation attachment
R-2, Ev.	Dec. 6, 1991 Feinsod/S. parental conference
R-3, Id. only	Diagram
R-4, Id. only	Chronology beginning Nov. 14, 1991 (4 pages)
R-5, Id. only	Copy of newspaper article dated Nov. 2, 1990
R-6, Ev.	Diagram

R-7 <u>Respondent's Evaluations</u>

(a) May 20, 1980
(b) May 28, 1981
(c) May 28, 1982
(d) May 1984
(e) May 1985
(f) May 1986
(g) May 1987
(h) May 1988
(i) May 1989
(j) May 1990
(k) May 1991

R-8 Observations

(a) March 20, 1980
(b) March 3, 1981
(c) March 17, 1982
(d) March 7, 1984
(e) May 5, 1984
(f) April 10, 1986
(g) March 4, 1987
(h) March 10, 1988
(i) Jan. 17, 1989
(j) May 1, 1990
(k) March 25, 1991

OAL DKT. NO. EDU 1157-92

IN THE MATTER OF THE TENURE	:	
HEARING OF SHARON FEINSOD,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
LINDEN, UNION COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Pursuant to N.J.A.C. 1:1-18.4, timely exceptions were filed by both respondent and the Board, and a reply to the Board's exceptions was filed by respondent.*

In her exceptions, respondent raises the overall objection that the ALJ adopted the Board's error and applied the wrong standard in assessing unbecoming conduct, confusing less-than-perfect judgment with truly unbecoming behavior and faulting a teacher for extreme and idiosyncratic student responses to actions and statements which do not, in themselves, rise to the level of unbecoming conduct. She further reiterates her post-hearing claim that the testimony of L.M., on which the ALJ heavily relied, is both uncorroborated and incredible.

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* The Commissioner also notes respondent's letter advising her of a potential reason for recusal and stating the lack of objection on the part of either respondent or the Board to the Commissioner's deciding this matter notwithstanding such potential. Upon review of respodent's letter, the Commissioner finds no necessity to recuse herself in this matter and duly renders the within determination.

With respect to the various individual charges, respondent cites portions of testimony from transcripts provided with her exceptions to demonstrate how: the ALJ's findings on Charges 1 and 2 (announcing failing grade in class and calling L.M. "Miskie") reflect situations which may have been unfortunate and were perhaps indicative of mistakes in judgment, but definitely could not be characterized as unbecoming conduct; the ALJ's findings on Charge 5 (directing L.M. to kneel) misconstrued events and statements and failed to take respondent's motivation into account, ignoring clear evidence that respondent merely sought privacy for a sensitive discussion and was entirely benign in her actions and intentions; the ALJ's finding that L.M. was afraid of respondent (Charge 8) is belied by L.M.'s conduct at hearing when respondent was present; and the ALJ's findings on Charges 12 through 17 (inflicting emotional distress and prohibiting a student from revealing the content of her discussion with respondent) were based on statements taken out of context and blame a student's extreme reaction to news of a low grade on a teacher who was merely performing ordinary duties and had no reason to think that the student's response was anything more than a typical adolescent overreaction.

Respondent concludes that although none of the charges should be sustained, assuming arguendo that any of them are, they do not constitute unbecoming conduct and the penalty ordered by the ALJ is too severe when compared to other cases where the conduct at issue was far worse than respondent's. In the Matter of the Tenure Hearing of Patricia Jo Murphy, School District of the City of New Brunswick, Middlesex County, 92 N.J.A.R. 2d (EDU) 527; In the Matter of the Tenure Hearing of Samuel Ivens, Toms River Regional School District, Ocean County, 1977 S.L.D. 960; In the Matter of the Tenure

Hearing of David Brody, School District of the Borough of East Paterson, Bergen County, 1972 S.L.D. 565.

The Board, on the other hand, contends that the ALJ erred in concluding that respondent had not inflicted corporal punishment, stressing that any punishment intending to cause bodily pain or suffering constitutes corporal punishment, particularly in view of the high standard of self-control to which teachers have been held in prior tenure matters. In the matter herein, the Board avers, respondent kept a student kneeling for half an hour, causing her to lose freedom of control over her own body, and insisted on pressing an unpleasant and inappropriate discussion, upsetting and humiliating her. Such action clearly constitutes corporal punishment, and fully warrants a penalty of dismissal in view of the fact that the incidents at hand were serious and unprovoked, respondent's lack of remorse and otherwise defiant attitude bode ill for her continued presence in a school setting where students are demonstrably afraid of her, and the mitigating factors presented do not compensate for the gravity of respondent's actions. In the Matter of the Tenure Hearing of William H. Kittell, School District of the Borough of Little Silver, Monmouth County, 1972 S.L.D. 535

Upon careful review of this matter, the Commissioner has determined to affirm the decision of the ALJ for the reasons set forth below.

Initially, the Commissioner finds the ALJ's summations of testimony, assessments of witness credibility, overall characterization of underlying situations and specific findings of fact to be fully supported by a voluminous record including transcripts of all days of hearing. The Commissioner further concurs that, under the particular circumstances herein, the charges

proven with respect to L.M. do not constitute corporal punishment within the meaning of N.J.S.A. 18A:6-1, as there was no use of physical force and no deliberate intent to harm in respondent's treatment of L.M., which amounted instead to a gross insensitivity to the obvious discomfort and humiliation suffered by the student as a result of the situation respondent initiated and then allowed to continue.

It is this same insensitivity that characterizes the behavior proven of respondent in other situations as well, which behavior, contrary to respondent's claim, clearly constitutes conduct unbecoming a teaching staff member rather than a series of infelicities in professional judgment. In order for a district to maintain the environment necessary for students to learn and develop in an appropriate manner, teaching staff members must be expected to comport themselves with a reasonable degree of understanding and sensitivity toward the students in their charge. Behavior of the type at issue in this matter displays, at the very least, a callousness and lack of awareness that cannot be explained away by claims of occasional misjudgment and which the Commissioner cannot countenance by finding that it does not rise to the level of unbecoming conduct.

The Commissioner also notes that such behavior has previously been found to warrant a penalty consistent with that imposed by the ALJ, and that the cases cited by the Board in arguing for dismissal involved a type and degree of conduct (including findings of corporal punishment) far beyond what has been committed by respondent herein. In the Matter of the Tenure Hearing of Mary Ellen DiPillo, School District of Randolph Township, Morris County, decided October 30, 1992, 93 N.J.A.R. 2d (EDU) 13; In the Matter of

the Tenure Hearing of Anne Boyd, Matawan-Aberdeen Regional School District, Monmouth County, decided July 10, 1992 The Commissioner likewise notes that respondent had been employed by the district without incident and with good evaluations for over 20 years prior to the incidents underlying the charges herein. Therefore, the Commissioner fully concurs with the ALJ's directive that, in order to recognize respondent's prior unblemished record while still addressing the problems evident in her conduct* and impressing upon her and others the seriousness of such conduct, the appropriate penalty is for respondent to undergo a program of professional development and training so as to improve her understanding of and ability to handle the students placed in her charge and to suffer a loss of 120 days pay plus withholding of any employment and adjustment increments she would have received for the 1992-93 school year.

Accordingly, the initial decision of the Office of Administrative Law is affirmed for the reasons expressed therein together with the further explication set forth above.

IT IS SO ORDERED.

JUNE 30, 1993

DATE OF MAILING - JUNE 30, 1993

COMMISSIONER OF EDUCATION

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* The Commissioner here notes that, based upon review of the transcripts, particularly respondent's own testimony, these problems appear to be manifestations of a consistent attitude, as opposed to one-time losses of control such as occurred in Murphy, supra, which respondent cites in support of her argument that she should suffer a lesser penalty than that imposed by the ALJ and endorsed by the Commissioner above.

157-93

157-93

WILLIAM R. BAUSMITH,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT, BOARD OF EDUCATION OF THE NORTH HUNTERDON REGIONAL HIGH SCHOOL DISTRICT, AND BOARD OF EDUCATION OF THE HUNTERDON COUNTY VOCATIONAL SCHOOL DISTRICT, HUNTERDON COUNTY,	:	COMMISSIONER OF EDUCATION
	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioner, vocational teacher riffed from Hunterdon Central, claimed entitlement to position in North Hunterdon by his tenure and seniority rights. Petitioner alleged carpentry program was transferred to North Hunterdon or, alternatively, that North Hunterdon and Central were part of a newly formed vocational school district.

ALJ concluded petitioner had no claim to employment by North Hunterdon on statutory or equitable grounds. ALJ further concluded that rif was procedurally correct, as decision to permit five students to attend a class at North Hunterdon and to rif petitioner and place him on eligibility list was clearly within Board's authority. (N.J.S.A. 18A:28-9 and 28-12) Petition was dismissed.

Commissioner adopted findings and determination in initial decision emphasizing that, under particular circumstances of this matter, allowing five students to attend North Hunterdon for carpentry program, thus eliminating carpentry program at Central, did not constitute transfer of program within meaning of N.J.S.A. 18A:28-6.1 so as to entitle petitioner to assert claim at North Hunterdon.

JULY 2, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8916-92
AGENCY DKT. NO. 315-7/92

WILLIAM R. BAUSMITH,
Petitioner,
v.
BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT, BOARD OF EDUCATION OF THE NORTH HUNTERDON REGIONAL HIGH SCHOOL DISTRICT AND HUNTERDON COUNTY VOCATIONAL SCHOOL DISTRICT BOARD OF EDUCATION,
Respondents.

Sanford R. Oxfeld, Esq., for petitioner (Balk, Oxfeld, Mandell & Cohen, attorneys)

James P. Granello, Esq., for respondent Hunterdon Regional High School District

Philip E. Stern, Esq., for respondent North Hunterdon Regional High School District (Rand, Algeier, Tosti & Woodruff, attorneys)

Robert L. Alexander, Esq., for respondent Hunterdon County Vocational School District (Alexander & Bartlett, attorneys)

Record Closed: April 21, 1993 Decided: May 24, 1993

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

William R. Bausmith, petitioner, a vocational teacher reduced in force from the Hunterdon Central High School, claims a position at North Hunterdon Regional High School by tenure or seniority right. The claim alleges a program was transferred from Hunterdon Central Regional High School to North Hunterdon Regional High School or, alternatively, that both schools are part of a newly formed vocational school district.

The matter was opened before the Commissioner of Education and the respondents filed answers. The Department of Education transmitted the matter to the Office of Administrative Law for disposition as a contested case pursuant to N.J.S.A. 52:14B-1 through -15 and N.J.S.A. 52:14F-1 through -13. Following several conferences of counsel conducted by telephone, the matter proceeds to judgment on the papers, no material facts being in dispute.

FACTUAL BACKGROUND

The following facts are essentially undisputed. William R. Bausmith, petitioner, was employed by the Hunterdon Central Regional High School District (Central) in September 1974 as a vocational carpentry instructor. He has been employed continuously by Central since that time and has acquired a tenure status in the district. The petitioner holds certificates and endorsements in carpentry, industrial arts and cooperative industrial education. On or about April 27, 1992, the Central superintendent of schools notified the petitioner that the petitioner would not be offered a contract for the 1992-93 school year and that he would be placed on a preferred eligibility list and notified if a teaching position within the scope of his certifications and seniority occurred.

The parties also stipulate that, at all times relevant, the North Hunterdon Regional High School District (North) has discontinued or closed no public schools or any one or more of the grades encompassed by the district. At all times relevant, Central has discontinued or closed no public schools or any one or more of the grades encompassed by the district. At all times relevant, the Hunterdon County

Vocational School Board of Education (Vocational) has discontinued or closed no public schools or any one or more of the grades encompassed by the district.

Presently, five pupils from Central attend the Building Trades class at North. As of May 12, 1992, the member schools of the Vocational district have not ratified any agreements to implement any programs within the Vocational School District.

At all times relevant, the petitioner has had no employment relationship with North. Vocational came into existence by resolution of the Hunterdon County Board of Freeholders on May 12, 1992. Prior to that date, vocational-technical education in Hunterdon County was provided by agreement among the regional high schools as Local Area Vocational Schools (LAVS). There are no municipal high schools in Hunterdon County. Vocational has never had and presently does not have teachers, pupils or facilities. Vocational does have a full-time superintendent and a part-time attorney.

ARGUMENTS

Petitioner

The petitioner asserts he is a tenured employee of Central. He has never been employed by North. On April 27, 1992, he was notified that he would not be offered a contract for the 1992-93 school year because of a reduction in force in his department. During the 1992-93 school year, five pupils from the petitioner's department were sent to North to attend building trades classes. The petitioner argues that because these pupils were transferred from one school to another, he was entitled to be transferred to that school. N.J.S.A. 18A:28-6.1 and N.J.S.A. 18A:46-24. The petitioner also states that, although at all relevant times the members of the Vocational district had not ratified any agreements to implement any programs within Vocational, such an agreement was contemplated.

Because the tenure act should be liberally construed to achieve its goals, statutes touching on tenure should be liberally construed also. When read together, N.J.S.A. 18A:28-6.1 and N.J.S.A. 18A:46-24 provide tenure protection. In the present case, the petitioner is a tenured employee. He was not offered a contract because of a reduction in force. However, that reduction was necessitated by the fact that five of his pupils were transferred from Central to North.

Simply because Central was not discontinued, there should not be a per se ruling against the petitioner. The purpose of the Tenure Act is to afford protection to teachers. The statutes were meant to be liberally construed and as such this case fits squarely within the intent of the act. The petitioner's pupils were transferred. The schools comprising Vocational, while not ratifying an agreement, contemplated such an agreement. Presently, the petitioner is not working for a school district. However, a teacher at North has been given the opportunity to teach the affected transfer students. In order to pursue the spirit of the Tenure Act, it is necessary to take a broad meaning from the statutes. The petitioner should have been given a position at North.

Central

Central maintains that the petitioner has failed to allege any facts that could give rise to a claim against it under the education laws of this state. N.J.S.A. 18A:28-9 specifically permits a board of education to reduce the number of teaching staff members because of a reduction in the number of pupils in a particular area of instruction; e.g., building trades. To date, no vacancy has occurred in Central which would give rise to recall of the petitioner pursuant to law.

In addition, the petitioner misstates the stipulation that five Central pupils attend building trades classes at North. The petitioner describes it as follows: "During the 1992-93 school year five students from his department were sent to North Hunterdon to attend building trade classes." Stip. 6. The petitioner's position seems to be that because pupils were transferred from one school to another he was entitled to be transferred to that school. At no time did Central transfer pupils to North. The pupils attend on a voluntary basis courses that are no longer given at Central.

North

North submitted a certification by its high school principal that five central pupils presently attend building trades classes at North. North contends the petitioner has no right to any position with North. The petitioner's claim is erroneously based upon statutes and regulations addressed to a sending-receiving relationship. No such relationship exists in this matter.

First, no program has been transferred from Central to North. Rather, five pupils from Central presently take a building trades class at North. The petitioner cannot claim that five pupils constitute a program.

Second, the agreements among the represented schools of the Vocational district have not been ratified. No programs have been ratified in the Vocational district. Because no program was transferred from Central to North and because the agreement among the signatory schools of the Vocational district has yet to be ratified, the petitioner's claims are without merit.

The petitioner erroneously bases his claim to a position at North upon N.J.S.A. 18A:28-6.1. The statute addresses tenure upon discontinuance of a school, not merely a program. In the present matter, no school or any one or more of the grades has been discontinued.

If the petitioner's argument were accepted, any school district that accepts even one pupil from another school district would have to surrender tenure and seniority rights to teaching staff members of the other school district. For example, a teacher in New Jersey possessing a Special Education certificate whose school sends a special education pupil to another public school district in accordance with the pupil's individualized education program would, upon a reduction in force, have tenure and seniority rights in the other school district, irrespective of its location in a State. Such an outcome is plainly absurd and misconstrues the plain language and intent of the statute.

The petitioner attempts to weave the existence of Vocational into his request for relief by claiming that North is a member of Vocational. However, Vocational noted in its answers to interrogatories that agreements are under consideration and no decision to ratify or not to ratify has been made. Thus, the member schools of Vocational have yet to implement any program.

The petitioner may not torture the statutes and interfere with the status of school districts. North has had no relationship whatsoever with the petitioner. There are simply no legal or factual issues to support the petitioner's request for relief.

Vocational

Vocational points out that it did not exist when the petitioner received notice that his contract would not be renewed for the subsequent school year. Vocational has no teachers or pupils.

The petitioner argues the newly created Vocational district has not ratified the agreement to provide programs between the Hunterdon County Board of Freeholders and the four regional high school districts. Ratification is irrelevant and the outcome of this litigation would be the same had Vocational ratified the agreement. The agreement simply does not affect teaching staff at North or Central.

The agreement provides, in part, "it is presently anticipated and all parties agree, that the Boards' (North and Central) will remain the employers of staff and shall pay all salary costs and student supply costs for the programs." It is also provides, "it's intent (the agreement) and purpose is for vocational education within Hunterdon to be provided in essentially the same manner as formerly provided (that would be programs at North and Central), but under the authority of a Vocational Board of Education, at least during the initial four years of the program period . . . ." If ratified, Vocational would not have teachers, pupils or facilities, but rather would oversee and manage the program and use state and federal aid which is paid to the county school board pursuant to the Quality Education Act of 1990.

The petitioner's claim also must fail because the law, N.J.S.A. 18A:15-5 et seq., allows local school districts to provide vocational programs notwithstanding that vocational programs are also available at county financed vocational schools. The petitioner is entitled to relief against Vocational only if students are received by Vocational as a result of the discontinuance of a school or the discontinuance of a grade within a school. N.J.S.A. 18A:28-6. The concept is that under those specific circumstances, the teaching staff would follow the pupils. Since Vocational is receiving no pupils and does not expect to receive any pupils until the 1996 school year, the petitioner's claim must be dismissed.

There has been no discontinuance of a school or a grade within a school. There has been a discontinuance of a program or class in construction trades and pupils have been sent to another school because five pupils do not justify running a program at Central.

The petitioner has failed to establish that he gave three months' notice of his election to join the staff of Vocational as required by N.J.S.A. 18A:28-6.1. Similar time limitations have been held as a bar to tenure rights. The petitioner's claim must be dismissed.

DETERMINATION

N.J.S.A. 18A:28-6.1 provides

> Whenever, heretofore or hereafter, any board of education in any school district in this state shall discontinue any high school, junior high school, elementary school or any one or more of the grades from kindergarten through grade 12 in the district and shall, by agreement with another board of education, send the pupils in such schools or grades to such other district, all teaching staff members who are assigned for a majority of their time in such school, grade or grades and who have tenure of office at the time such schools or grades are discontinued shall be employed by the board of education of such other district in the same or nearest equivalent position; provided that any such teaching staff member may elect to remain in the employ of the former district in any position to which he may be entitled by virtue of his tenure and seniority rights by giving notice of said election to the boards of education in each of the school districts at least three months prior to the date on which such school, grade, or grades are to be discontinued. Teaching staff members so employed in such other district shall have their rights to tenure, seniority, pension and accumulated leave of absence, accorded under the laws of this state, recognized and preserved by the board of education of that district. Any periods of prior employment in such sending district shall count toward the acquisition of tenure in the other district to the same extent as if all such prior employment had been in such other district.

The Supreme Court of New Jersey had occasion to review this statute in In re Jamesburg High School Closing, 83 N.J. 540, 547 (1980). The court found the terms of the statute unequivocal:

> The words of the statute require exactly what they say . . . fundamental principles of statutory instruction require that [i]f the [statutory] language is plain, unambiguous and uncontrolled by other parts of the act or other acts upon the same subject the court cannot give it a different meaning.

The plain language of this statute contemplates the discontinuance of a high school, junior high school, elementary school or any one or more of the grades from

kindergarten through grade 12. In the present case, however, no school or grade has been discontinued. Five pupils from Central voluntarily attend North for a building trades course. They have not been transferred to North and remain enrolled at Central. Central appears to have decided that it is more efficient to send five pupils to North for the course than to keep the respondent on active status. This is a decision clearly within the compass of Central's authority.

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

> Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article. [N.J.S.A. 18A:28-9 through -14.]

Having reviewed the stipulated facts and having considered all arguments, I **FIND** that the petitioner is a victim of declining enrollments or other economic considerations such that Central decided to eliminate his position via N.J.S.A. 18A:28-9. N.J.S.A. 18A:28-12 provides that a person dismissed as a result of such reduction shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified. I **FIND** that Central has complied with N.J.S.A. 18A:28-12.

I **CONCLUDE** that William R. Bausmith, petitioner, has no claim to employment by the North Hunterdon Regional High School Board of Education on statutory or equitable grounds. I also **CONCLUDE** that the reduction in force affecting Bausmith was procedurally and substantively correct. Accordingly, I **DETERMINE** there is no relief that can be afforded the petitioner.

The petition of appeal is therefor **DISMISSED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

24 MAY 1993
Date

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

5/26/93
Date

Maureen K. Ridley
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 2 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

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EXHIBITS

North Hunterdon Regional

Exhibit A Central's answer to respondent's interrogatory No. 11

Exhibit B Certification of Thomas Finnegan, North Hunterdon Regional High School principal, January 26, 1993

Exhibit C Vocational School District's answers to respondent's interrogatory No. 6

OAL DKT. NO. EDU 8916-92

WILLIAM R. BAUSMITH, PETITIONER, V. BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT, BOARD OF EDUCATION OF THE NORTH HUNTERDON REGIONAL HIGH SCHOOL DISTRICT, AND BOARD OF EDUCATION OF THE HUNTERDON COUNTY VOCATIONAL SCHOOL DISTRICT, HUNTERDON COUNTY, RESPONDENTS.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by petitioner pursuant to N.J.A.C. 1:1-18.4, as were replies thereto by respondents North Hunterdon Board of Education and Hunterdon Central Board of Education. Reply exceptions by respondent Hunterdon County Vocational Board of Education were untimely filed, being due on June 17, 1993, but not received until June 21, 1993.

In his exceptions, petitioner reiterates his claim that proper construction of the tenure laws, which must be read as to their intent, as well as to their specific language, demands that he be offered a position at North Hunterdon in that his reduction in force (RIF) was necessitated by the transfer (not "voluntary" enrollment, as stated by the ALJ) of five students from his program at Hunterdon Central to the same program at North Hunterdon; tenure

law will not permit districts to transfer students from one school so as to create "declining enrollment" and then claim that the riffed teacher has no entitlement to a position in the other school merely because the first school was not "discontinued."

In reply, respondent Boards urge that the language of N.J.S.A. 18A:28-6.1 is plain and, as such, was correctly found by the ALJ not to be controlling herein. They further state that, as properly set forth by the ALJ, no students were transferred and there is at present no ratified agreement operating in the newly created, but not yet functional, county vocational district.

Upon careful review of this matter, the Commissioner concurs with the ALJ that Hunterdon Central's decision to eliminate its carpentry program as being unwarranted by available student enrollment was entirely within its discretionary prerogative, and that agreement to permit the five students still wishing to take the course to attend North Hunterdon for this limited purpose does not, under the particular circumstances of this matter, constitute a transfer of either students or program within the contemplation of N.J.S.A. 18A:28-6.1 so as to entitle petitioner to assert a claim at North Hunterdon.

In so holding, the Commissioner is mindful that discontinuance of program, as opposed to school or grade as specified in statute, has been found by the Supreme Court to fall within the purview of N.J.S.A. 18A:28-6.1, and to the extent that the initial decision implies the contrary, the Commissioner clarifies such implication herein. However, the Commissioner determines that the circumstances of the present matter do not

warrant a conclusion that petitioner's program was "taken over" by another employing entity so as to permit him to assert a tenure claim there. Lois Shelko v. Board of Education of the Mercer County Special Services School District, Mercer County, 1984 S.L.D. 2023, Supreme Court decision reversing Appellate Division's affirmance (1983 S.L.D. 1639) of State Board decision (1982 S.L.D. 1563) reversing Commissioner (1981 S.L.D. 1013)

Accordingly, with the above clarification, the initial decision of the Office of Administrative Law is affirmed and the Petition of Appeal dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 2, 1993

DATE OF MAILING - JULY 2, 1993

158-93

IN THE MATTER OF THE TENURE HEARING OF MILLICENT SMITH, SCHOOL DISTRICT OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

JULY 2, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2838-92
AGENCY REF. NO. 59-3/92

IN THE MATTER OF THE TENURE HEARING OF MILLICENT SMITH, BRIDGETON SCHOOL DISTRICT

A. Paul Kienzle, Jr., Esquire, (Casarow, Casarow and Kienzle, attorneys) for petitioner, School District of the City of Bridgeton

Kenneth A. Sandler, Esquire, (Selikoff and Cohen, attorneys) for respondent, Millicent Smith

Record Closed: March 28, 1993 Decided: May 12, 1993

BEFORE **EDGAR R. HOLMES, ALJ:**

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

This matter was transmitted to the Office of Administrative Law (OAL) to be heard as a contested case pursuant to the Administrative Procedure Act, *N.J.S.A.* 52:14B-1 to -15; the act creating the OAL, *N.J.S.A.* 52:14F-1 to -13; and the act establishing jurisdiction in the Commissioner of Education to hear tenure cases in the public school system, *N.J.S.A.* 18A:6-10 to -30.1

The Bridgeton Board of Education (BOE), by its Superintendent Thomas C. Lane IV, (Lane,) certified the following charges against the respondent, Millicent Smith, a tenured teacher at the Cherry Street School:

Charge No. 1:

Ms. Smith has been insubordinate to the administration at Cherry Street School in her responses to reasonable communications by the administration and outbursts in the presence of students and staff in the 1990-91 school year.

Charge No. 2:

Ms. Smith, in her teaching duties at Cherry Street School in 1990-91, prepared inadequate lesson plans and at times, had no plan book ready and available (September 24 and October 22, 1990) and failed to have plans available for substitute teacher on February 19, 1991. Ms. Smith has exhibited a lack of careful planning and sound preparation in the teaching duties she last performed for the Bridgeton Board of Education.

Charge No. 3:

Ms. Smith during the 1990-91 school year engaged in conduct that was clearly unbecoming a teacher wherein she committed numerous acts of abuse of the children in her care. Ms. Smith, on a number of different occasions, struck, slapped, hit and otherwise engaged in acts of corporal punishment against the elementary students at Cherry Street School. Ms. Smith, in her time teaching at Cherry Street School, inflicted physical, mental, and emotional punishment that was both outrageous and totally improper. Ms. Smith engaged in punishments of the children that were abusive including the physical assaults of the children, the improper assigning of large sentence writing requirements, withholding of lunches, acts of intimidation, very poor teacher-pupil interaction, and failure to care and protect students in her charge.

Charge No. 4:

Ms. Smith has exhibited conduct unbecoming a teacher and/or insubordination due to excessive absenteeism and excessive tardiness. Ms. Smith has been excessively absent and excessively tardy since the onset of her employment with the Bridgeton Board of Education in the 1984-85 school year, both at the Bridgeton Middle School and the Cherry Street School. The absences and tardiness demonstrate a lack of concern for the education progress of the students in Ms. Smith's institutional

charge as well as a lack of concern for the continuity of the educational program in the school district.

Charge No. 5:

At Cherry Street School during the 1990-91 school year, Ms. Smith failed to provide proper teaching to students at the Cherry Street School, failed to teach effectively, failed to follow routines required for effective teaching and guidance of students in her care. Her actions in failure to follow routines, her extremely poor classroom evaluations and failure to support students in their quest for knowledge make it clear that Ms. Smith should be terminated as a teaching staff member.

Charge No. 6:

Ms. Smith has engaged in numerous acts of conduct unbecoming a teacher while in the employ of the Bridgeton School District including:

(a) Taking lunches away from students as a form of alleged discipline.
(b) Engaging in extreme insubordination and improper conduct toward supervisors.
(c) Returning to school in the evenings when no one else was present and at times when she was absent during the day.
(d) Failed to properly communicate and engage in appropriate parent relations.
(e) Missing parent conferences at the time report cards were due.
(f) Demonstrated total lack of caring and positive attitude toward children in her care.

Charge No. 7:

Ms. Smith has failed to control, properly supervise and engage in proper classroom management for her class at the Cherry Street Elementary School during the 1990-91 school year. Ms. Smith's classroom appeared unorganized, poorly disciplined, chaotic, and Ms. Smith failed to engage in proper classroom management.

CLOSING OF RECORD

The respondent, Millicent Smith, denied all of the charges and a hearing was conducted at various locations in Cumberland County over a period of eleven days beginning January 4, 1993 and ending on February 5, 1993. The record closed on March 28, 1993, upon receipt of additional documentary evidence, briefs and final written argument.

BACKGROUND

Millicent Smith (Smith) was formerly a student in the Bridgeton School District. When she graduated from Glassboro College she was recruited by Lane to teach in the Bridgeton system because he wanted local people to return and teach in the community. She began her career as a basic skills teacher and served more than five years in this capacity. When a reduction in force (RIF) occurred in 1989, Smith "bumped" into a classroom position teaching second grade at the Cherry Street School. This was her first classroom assignment. She began in the 1990-91 school year.

CHARGE NO. 1

The first charge, which alleges insubordination, results from a single incident which occurred on September 28, 1992. On that date, near the end of the day, two students in Smith's class began to fight. Smith broke up the fight and was scratched in the process. Another teacher from an adjacent classroom took the two students to the "office." Smith sent referral forms to the office describing the children's behavior.

Rebecca Guess (Guess) was the Vice Principal at Cherry Street School at that time. She sent the two pupils back to Smith's room with the referral forms indicating that the students were not to return to school unless accompanied by their parents. Smith was concerned that the two students had not received any "definite punishment." She challenged Guess over the intercom. Smith demanded to know if "that was all she was going to do" to the two students. Guess did not want to discuss the matter over the intercom and after school Guess and Smith discussed the incident further. Guess warned Smith that her language on the intercom was unacceptable. Although this occurred after school on that day, there were still

teachers, parents and pupils present who heard the comments. Smith never repeated this behavior towards administrators again.

Insubordination is synonymous with disobedience, it is an unwillingness to submit to authority. It is more than being merely argumentative or fractious. In this case it appears that Smith's tone of voice constituted the gravamen of the complaint because the words themselves: "is that all you are going to do," are no more than an inquiry. The words were delivered in an impatient and angry voice. I understand why Guess was affronted. Certainly what Guess was doing, requiring the parents to return with the children, was appropriate under the circumstances. But Smith was not refusing to obey an order or school regulation. Smith was agitated and reacted too quickly when she misperceived that the children were not being disciplined. This does not rise to the level of insubordination. Since it never occurred again it cannot be considered a serious breach of faculty discipline. The incident is instructive however, in that it begins to illuminate Smith's views on discipline.

I **FIND** and **CONCLUDE** that the Board of Education has failed to prove by a preponderance of the credible evidence that respondent Smith was insubordinate to the administration at Cherry Street School in the presence of the students and staff in the 1990-91 school year.

CHARGE NO. 2

Charge Number 2 goes to the alleged failure of Smith to prepare lesson plans and/or to prepare adequate lesson plans on specific dates. On September 24, 1990 and on October 22, 1990, Smith acknowledges that she was late in submitting her lesson plans to Principal Coyne for review. Smith testified that on both occasions she completed her lesson plans later on the day they were due, and left them in the Principal's mailbox at his office.

Guess testified that a substitute teacher for Smith's class told her that Smith left her no lesson plans on February 19, 1991. However, the substitute teacher testified at the hearing that Smith did leave lesson plans on that day. In support of this testimony, Smith's sister testified that she dropped off the plans for the substitute at the school on her way to work that day.

In addition Smith's Annual Performance Report (P4) deals specifically with her planning performance. Under the heading General Planning the report reads as follows:

> Planning was satisfactory. The plan book was usually available and up to date. There was a problem with its availability when substitutes were present. Ms. Smith disputed this.

Principal Coyne, the person who reviews each teacher's plan book weekly, also conducted a classroom evaluation and prepared a report (P8). In his report Coyne assigns an "s" (satisfactory) to Smith in two areas which pertain to the maintenance of a lesson plan book.

> 1. Lesson plan book is available and up-to-date, with clear and logical plans that include objectives/skills, procedures, materials and follow-up.
>
> 2. Lesson plans indicate instructional alignment, continuity and sequence.

I **FIND** that Smith failed to have lesson plans available for the prinicipal's inspection on September 24 and October 22, 1990.

I also **FIND** that Smith corrected this deficiency on September 24 and October 22, 1990.

I **FIND** that Smith did provide her substitute with lesson plans on February 19, 1991.

I **FIND** that there is no evidence that Smith's lesson plans were inadequate.

Therefore, I **FIND** and **CONCLUDE** that the Board of Education has failed to prove by a preponderance of the credible evidence that Smith's lesson plans were inadequate or unavailable in 1990/91 to the extent that her conduct required discipline.

CHARGE NO. 3

The third charge alleges physical, mental, and emotional abuse. The BOE alleges that Smith punished children in her class by physical assault, improper writing assignments, withholding lunches, acts of intimidation, very poor teacher-pupil interaction, and "failure to care and protect students in her charge."

Smith was removed from her classroom duties and returned to Basic Skills because the BOE determined that she was not fulfilling her classroom responsibilities in March 18, 1991.

The BOE replaced Smith with Jean Schupann, a basic skills teacher and an aide, Henrietta Jones. Within a month of taking over the class, the students began to complain to Schupann and Jones about Smith's behavior towards them. Jones testified that the children initiated the discussions by telling her she "was nicer" than their old teacher (Smith). She named several students who later testified. They told her about a variety of inappropriate actions such as slamming heads on desk, standing a student in a corner "all day;" throwing a child's shoes in the trash, pushing a child into a desk, and a child poked in the eye with a pencil. Jones reported this to Schupann who then questioned the children herself about the incidents. On April 24, 1991, Schupann gave Coyne a handwritten note containing these allegations (P4). Coyne said he had been advised by a board member to interview Schupann and this is what prompted the note. Thereafter Coyne personally interviewed the children in the presence of Jones. He said he did not lead the children but asked them if there was anything they wanted to talk about. They told him they wanted to talk about Smith. The children then repeated their allegations of abuse to Coyne and he memorialized their allegations (P15).

Coyne, Lane and Guess met and decided to advise Division of Youth and Family Services (DYFS) about the alleged abuse as required by law. A DYFS worker than interviewed the children in the presence of staff. Of course the children were later interviewed by counsel for both parties. When the children testified at the OAL hearing, most were telling their stories for the seventh time, at least.

The events occurred during the 1990-91 school year when the children were seven to nine years old and in second grade. When the children testified, they were in the fourth grade and were nine to eleven years old. This lapse of time is evident in their testimony.

The first child witness was F.M., a nine year old girl. She testified that she observed Smith "hit" children in the class. She said Smith "pulled J. by the arm," "threw S. in a closet, and threw K.'s head down on the desk." F.M. also testified that Smith "busted her lip" when she pushed F.M.'s head down on the desk. F.M. also described Smith as "rude" and very "nasty" and said Smith was "bossy" and placed children out in the hall or in the corner for no reason. F.M. could not recall that she went to the nurse accompanied by another student or that she had hugged Smith or written notes to her telling Smith she loved her when asked these questions on cross examination. She did recall that she often had in-school detention and was "failing" when Smith was her teacher. F.M.'s mother testified that her daughter told her Smith would not let students go to the bathroom and that Smith pushed her, but she did not believe her daughter at the time.

L.S. is a boy. His chief complaint was that Smith jabbed him in the eye with a pencil. He also said that if students did not put their heads down on the desk when asked to do so, or looked up when they were to have there heads down, Smith would "bang your head down on the desk."

L.S. described the pencil in the eye incident as follows: he was tapping V.M. on the back with the eraser end of his pencil because Smith was trying to get V.M.'s attention. When Smith saw him do that, she turned him around and said "don't poke people with a pencil." As she did so, she started waving the pencil around in his face and it "stuck."

L.S. said he went to the nurse who removed it with tweezers and then he told the principal. (Neither the nurse or principal recall such an incident).

L.S. also testified that Smith said to him "That's what you get for messing with other people." He showed a small scar on his cheek under his eye which appeared to be the size and shape of a chicken pox scar or pencil point. He alleged this was the scar from the pencil point.

L.S. also recalled that Smith always spoke "mean" to her students. He transferred out of Smith's room in November 1990.

When asked on cross examination why he sent Smith a Valentine and visited her after he was out of her class, he replied, "she wasn't always mean to me, she just

poked me in the eye." He later stated, "Just because she poked me in the eye doesn't mean I have to hate her forever."

J.C. a boy, said he witnessed Smith "bang" students heads on desks. He named three or four students whose heads had been "banged." He claimed that Smith pushed him onto a desk and he fell to the floor. He denied that this occurred because he was fighting. He said he was not a fighter. He did not look like a fighter.

S.J. an eleven year old girl, was in Smith's class in 1990-91. She said she witnessed Smith shove F. M.'s head down on the desk "hard." (She winced when she described the action). She complained that Smith sent them to the office when they were bad but Schupann gave them another chance.

E.G. gave the impression that she had spent many hours rehearsing what she would say. She came to the witness stand with great pressure of speech and very animated. She spoke swiftly, fluently and used very descriptive language. She began by saying that "in the beginning she (Smith) seemed like a regular teacher, then she became a monster teacher, she punched J., shoved S., put her nails in me. She was violent. Everyone disliked her."

E.G. also testified that "J.C. fell down. He was making funny faces." "She (Smith) told him to shut up. J.C. said she 'talked mean' ." "Smith asked J.C. 'what did you say?' and the desk fell back. J.C. started to cry." Then E.G. said in an aside "Boys don't show their tears." She said "J.C.'s mom came up to school."

E.G. described an incident involving S.B.

> S.B. was talking to Francis. Ms. Smith told S.B. to shut her mouth. She said 'Shut your mouth right now or you'll regret you didn't.' S.B. said 'you're not my ma.' Then S.B. got her name on the board and two checks. S.B. started flipping her shoes on and off. Ms. Smith took S.B.'s shoes, when she wouldn't put them on and threw them in the trash can and put S.B. in the closet. Ms. Smith dug her nails into S.B. 's arm, pushed her into the closet.

E.G. also said she saw Smith take F.M. by the back of the head and slam her hard onto the desk once when F.M. wouldn't tell Smith what she and S.J. were talking about.

E.G. also complained that Smith dug her nails into her arms and shoved her into her seat on two occasions and made her stand in the corner from 9:15 until lunch time. It made her knees hurt. She claimed that when Smith came to talk to her, she (E.G.) just hummed. As a result, E.G. had to stay after school.

E.G. claimed that Smith frequently told students to "shut up." She complained that Smith made her write sentences 15, 30 or 100 times for punishment.

She recalled that Smith poked L.S. in the eye with a pencil. She recalls that L.S. was "pencil fighting."

S.M. a girl, said during direct examination that all she remembered was that Smith shoved her and "made them make valentines." On cross examination she also recalled that Smith stayed in the supply closet for ten and fifteen minutes at a time. (Prior witnesses also mentioned that Smith often went into the supply closet for long periods of time. Smith later explained that she was preparing materials for class). S.M. also recalled that the whole class had to write sentences when the class was "bad."

S.M. recalled that L.S. was pencil fighting in the hall. She explained that pencil fighting consisted of trying to break the other person's pencil first. If you did you were entitled to give the other person "five free hits." She claimed she was watching the pencil fight intently because she had "bet" on the winner. She said L.S. was hit on the outside of the right eye. She said it was L.S.'s own pencil which poked him in the eye. She said everyone shouted" 'his eye is bleeding. So Ms. Smith said 'Let me see.' 'Hmmm,' she said, 'Go to the nurse.'"

S.M. also testified that she received two "D's" when Smith was her teacher, but made the honor roll when Schupann was her teacher. She also recalled writing a letter to Smith but said it was because Schupann made them write the letter.

S.M. recalled that Smith "slammed" F.M.'s head on the desk. She admitted that she once got into a fight which Smith had to break up and for which her mother had to come to school.

M.F., a ten year old boy, proudly claimed to be an honor roll student. He said he didn't know what to make of Smith as a teacher. She was all right at first but soon "began hollering, shoving students heads down on desks and writing 'stuff' for

punishment." He recalls Smith telling E.G. she would "kick her ass." He said Smith frequently told students to "shut up."

M.F. said that when Smith punished them by making them put their heads down on the desk that she "didn't want their eyes showing." If Smith saw you looking, "she would shove your head down real hard." He said "she busted a girl's lip doing that." He also recalled that Smith banged his head down along with others whom he named. He recalled that "she threw J.C. into a desk" and refused to permit others to go to the bathroom. He recalled three students who "used the bathroom on themselves." (School Nurse Janet Page testified that she observed Smith's students wet themselves more frequently than other second graders. She said this stopped after Schupann took over the class).

M.F. also recalled that Smith pushed S.B. into a closet and "stabbed" L.S. in the eye. He said she used to "yank your clothes and pull your arm."

On cross examination M.F. admitted that he did not see Smith stab L.S. in the eye, he only repeated what L.S. told him.

L. F., a girl, recalled that L.S. was pencil fighting and Smith grabbed his pencil and cut him in the eye. She recalls seeing blood.

She also recalls that Smith slammed her head down but claims she was unhurt. She recalls that on one occasion Smith kicked her desk over. She recalls that Smith put S.B. in the closet and took her shoes off and put them in the trash can.

L.F. did not see F.M. get a "busted lip" but recalls that F.M. told her about the incident. She recalls that Smith put her hand up to E.G. in a threatening manner but did not hit her.

L.F. recalled "wetting herself" when Smith would not let her go to the bathroom. She said S.B. also "wet" herself and that F.M. had to run home to go to the bathroom.

F.M. also recalled that Smith told students to "sit your ass down!"

On cross examination she acknowledged that after Smith left the classroom she visited Smith but could not recall how often.

J.H. transferred out of the Cherry Street School because G., a boy in her class, continually made sexual contact with her. She said that Smith told her she would take care of it but it did not stop.

J.H. also recalled that Smith banged her head down on the desk and banged others too.

On cross examination J.H. was asked why she wrote a note to Smith saying "I love you, you the best teacher I ever had." She answered "But this is only an expression, most kids write to their teachers."

S.B., an eleven year old girl, recalled that Smith frequently "slammed kids" heads down on desks. She vividly recalled her own embarrassment when it happened to her. She recalled F.M.'s "busted lip." She recalled when Smith broke up a pencil fight involving L.S. and while waving a pencil at L.S., "hit him on the corner of his eye."

She recalled that Smith pushed her into a closet and threw her shoes into the trash. She said Smith returned her shoes to her at the end of the day.

S.B. also "wet herself" after pleading with Smith to allow her to go to the bathroom. The nurse gave her dry pants to wear. She also recalled three other students who "went to the bathroom on themselves."

She opined that "Ms. Smith wasn't right for a teacher. Most teachers don't curse or hit children."

She also opined that Smith went "into the closet and drank because she acted mean when she came out."

On cross examination she identified a note to Smith as her own and disowned another note which appeared to be in the same handwriting. She acknowledged that she never saw Smith drinking in the closet.

E.B. was the last former 1990-91 student to testify and he testified on Smith's behalf. His mother and Smith are friends. He began his testimony by opining that Smith was a good teacher. He said she helped him and he got mostly A's and B's. He

characterized his fellow students as "getting into trouble." They would "pick fights, steal, not do their work." As punishment they were made to eat lunch with Smith or were denied an opportunity to watch videos. He said Smith did not "press" anyone's head on the desk or hit and grab students.

On cross examination E.B. could not recall a fight between L.F. and S.B., he could not recall S.B. getting her head pushed down or being thrown against a closet, he did not see F.M.'s cut lip, nor did he remember L.S. getting stabbed in the eye. He did remember that S.B.'s shoes were thrown in the trash by "someone" in the class. He did not remember G. bothering J.H. He did recall other kids talking about being pushed around. He remembered that Smith was not in the class "a lot of times."

Janet Page, the school nurse, testified that Smith's students wet their pants more frequently than other second grade students. She had no recollection of L.S. having a pencil wound to the cheek. Page recalled and recorded F.M.'s lacerated lip.

Warren Burch, the physical education teacher, and Barbara Cuff, the art teacher, both testified that they had difficulty with Smith's class. Burch taught the class from 11:40 a.m. to 12:20 p.m. once a week, in 1990-91, immediately following lunch. He reported to Coyne that "the kids complained they had to rush to eat lunch and their stomachs hurt." He said this occurred four to five times and he was required to spend three to four minutes just settling the class down.

Barbara Cuff testified that she taught art to Smith's students after lunch on Wednesdays. When she arrived on some occasions the students would be eating their lunch. The protocol was for teachers to have the class ready for the special teachers. Smith's class was seldom ready for Cuff and time was wasted as they ate lunch or cleaned up after lunch.

Coyne confronted Smith about this problem and Smith admitted to him that she was using lunch detention as a punishment. She held the children in detention before she gave them lunch rather than after they had lunch. This resulted in the children needing time to eat when the specials came to the room.

Some of the children complained about sentence writing. Guess, Coyne and Lane met and reviewed papers found in children's' desks. They thought the amount of sentence writing Smith gave to the students by way of discipline was excessive. However, the evidence they obtained was insufficient to establish this.

Smith denied striking students or banging heads. She said that she utilized assertive discipline technique. She said that one technique she utilized was to require individual students, and at times the whole class, to take a time out and put their heads down on the desk.

Smith opined that the children who accused her, their parents, Guess, Coyne, Burch and Cuff, were all lying.

Smith called a character witness from her church to testify on her behalf. She advised that Smith is an Assistant Youth Leader and the Clerk at the 7th Day Adventist Church in Bridgeton. She said Smith encouraged the children in the Church, contributed to Black History Month and performed a skit for the children. She said that Smith was a caring person.

Evelyn Gilbert was a teacher's aide in 1990-91. She was in the classroom next to Smith. She said she was frequently in Smith's classroom and never saw Smith abuse a student. Both she and Smith described the children in the class as difficult at best; that many of them had been retained or classified.

Florine Davis and Mary Hall were substitute teachers in Smith's class during her absences in 1990 and 1991. Davis described Smith's class as disruptive, argumentative and rude. However, Davis' educational background consisted entirely of college level secretarial courses. She was the substitute who corroborated Smith's claim that she did prepare lesson plans on February 19 and 20, 1991.

Mary Hall also substituted for Smith in the 1990-91 school year. She is still employed by the District as an attendance officer. She substituted for Smith on five different occasions in 1990-91. She described Smith's class as rowdy; they talked, left their seats and conducted pencil fights.

Cynthia Kates was a special education teacher at Cherry Street School in 1990-91. She is still employed by the Bridgeton School District, at the West End School. She was in the second grade pod at Cherry Street, between Smith's class and the Basic Skills class. A pod is a very large room divided into classrooms by room dividers opening into a central space for a hallway. There are no doors.

She advised that Smith consulted her about discipline techniques. She observed Smith utilizing assertive discipline techniques such as writing names on the board, followed by check marks for each infraction of the rules. She observed Smith utilizing sentence writing and lunch detention. She frequently observed unruly behavior in Smith's classroom and thought that other second grade classes were better behaved than Smith's. She also said she never observed any physical conduct between Smith and a student. She saw no inappropriate behavior. She also said that the behavior of the class did not improve under Schupann. She did say that the proper use of lunch detention included permitting the children to eat first.

DISCUSSION OF CREDIBILITY

There are too many conflicts regarding the alleged wound to L.S.'s eye to make a finding that Smith jabbed him with a pencil. One could as easily conclude that L.S. jabbed himself during a pencil fight. This is what S.M. apparently saw. In addition, L.S. said he went to the nurse and principal to complain. Neither remembers this. From the testimony and demeanor of both of them, it was clear that they have formed an opinion that Smith is not a competent teacher. Therefore, if L.S. had gone to either of them as he claimed he had, one of them would have been sure to remember it.

I **FIND** that the BOE failed to prove by a preponderance of the credible evidence that Smith assaulted L.S. with a pencil or was the cause of an injury to his eye or cheek.

The testimony concerning Smith's rough handling of children in her class was persuasive. Nearly every child reported having their head "banged" down on a desk at one time or another. Each child reported seeing it done to others. The nurse's notes corroborate F.M.'s "busted lip."

J.C.'S testimony was quite straightforward. He said Smith banged his head on the desk as well as the head of others. I believe him.

Most of E.G.'s testimony was corroborated by others. However, she appeared so animated, rehearsed and eager that, if standing alone, her testimony would have been suspect. Nevertheless, on balance she was believable.

S.M. was an observant and intelligent witness. She shed more light on the incident involving L.S.'s eye than anyone else. She also described the incident in which Smith banged F.M.'s head on the desk. She was a credible witness.

M.F. was also an intelligent and straightforward witness with an ability for description. He clearly identified the punishment of putting your head down on the desk. He explained that Smith would push a child's head down on the desk if the child's eyes were showing. This was the most reasonable and probable explanation for what children identified as "head banging." He also described her rough handling of students. He observed her push students. He said "she used to yank your clothes and pull your arm." He was incensed when he reported how she withheld bathroom privileges from some children causing them "to use the bathroom on themselves." He was also able to differentiate between direct evidence and hearsay. He admitted he had only heard that Smith jabbed L.S. in the eye; he said did not see it. I believe his testimony.

L.F. also vividly recalled "wetting herself" in Smith class because she was denied the opportunity to go to the bathroom. She said Smith pushed her head down on the desk but that she was unhurt. She recalled Smith kicking her desk over, and that Smith put S.B. in the closet and put her shoes in the trash. Her testimony was also straightforward and believable.

F.M. only recalled that Smith talked meanly to students. "Sit your ass down!" Nevertheless, her testimony corroborated what others described of Smith's demeanor.

J.H. complained to Smith that G. was sexually accosting her. Smith failed to protect her. She also recalled having her head banged and saw Smith do it to others. She was articulate and thorough. I believed her testimony also.

S.B. corroborated head banging, and F.M.'s "busted lip." She reported feelings of embarrassment at having her head pushed down. She said Smith pushed her into the closet and threw her shoes in the trash and did not return them until after school. She also wet herself after pleading to go to the bathroom to no avail. She too, was credible.

S.B. summed it up best when she remarked that "Ms. Smith wasn't right for a teacher, most teachers don't curse or hit children."

These incidents are corroborated by the testimony of the various children. Smith's propensity to punish and demean children was observed by Principal Coyne (See Charge No. 4). Smith's propensity to punish and demean children is also implicit in her rage when Guess did not punish the two children who fought in Smith's classroom in a manner satisfactory to Smith even though the actions of Guess were reasonable and well taken.

I **FIND** that Smith punished children during quiet time by pushing their heads down on the desk, causing injury to F.M., and pain and embarrassment to others.

I **FIND** that Smith handled children roughly; that she pushed and shoved children in her class; that she tugged and pulled on their clothes and arms.

I **FIND** that Smith withheld lunch from children as punishment.

I **FIND** that Smith spoke to the children in a demeaning fashion telling them to "sit their asses down" and using other expressions which were disrespectful.

I **FIND** that Smith punished children by withholding bathroom privileges.

I **FIND** that Smith punished S.B. by throwing her shoes into the trash.

I **CONCLUDE** that Smith's conduct constituted physical, mental and emotional abuse and violates *N.J.S.A.* 18A-6.1, the prohibition against corporal punishment.

CHARGE NO. 4

The 4th charge alleges excessive absenteeism and excessive tardiness. Exhibits P35 through P49 document Smith's absenteeism and tardiness from January 1985 through the 1989-90 school year. During all this time Smith was a basic skills teacher at the Bridgeton Middle School. According to her principal Jerry Benfer, when a basic skills teacher is absent, no substitute is provided.

These records are difficult to reconcile. Nevertheless, it clearly appears that Smith was absent 19 days during the 1986-87 school year, 21½ days during the 1987-88 school year; 10 days in the 1988-89 school year and 15 days during the 1989-90

school year. Most absences were for illness, although a few were for professional leave, personal leave or a death in the family.

Smith was also put on Notice by Benfer on several occasions that her tardiness was not acceptable. On September 30, 1985, he notified her that she was late three times in the first month of the school year. By November 18 of 1985, Smith had already been late eight times. She was apparently not late again during the balance of that school year.

On December 18, 1987, Benfer advised Smith in writing that he "observed a recurring pattern of lateness to school again this year." He threatened her with a hearing before the Superintendent of Schools. On several occasions, according to Benfer and Lane, they counseled Smith concerning her lateness and absences. However, none of these matters ever resulted in a disciplinary action or the withholding of increments. In fact, during this period of time Smith acquired tenure. It is against this background however, that Smith's attendance record for the critical school year 1990-91 is compared.

In the 1990-91 school year Smith was absent 23½ days. One absence may have been recorded mistakenly. On one occasion Coyne sent Smith to another second grade teacher's class to observe, and she was mistakenly recorded as absent.

Smith was also late in the 1990-91 school year. By December 5, 1990, Coyne had already documented seven latenesses.

In December 1990, Smith was absent on four consecutive days. These absences coincided with a meeting she was to have with Lane concerning alleged inadequacies in her classroom and in her teaching skills. In March of 1991, Smith was removed from the classroom and returned to special assignments. Her record of tardiness and absenteeism was one of the factors in this decision.

Excessive absences are a sufficient cause for the Commissioner to terminate a teacher when it appears that the absences have created a significant, adverse effect on school children notwithstanding the absences were in connection with a physical ailment plaguing the teacher. *In the Matter of the Tenure Hearing of Jerome Kacprowicz,* 93 ***N.J.A.R.*** 2d. (EDU) 147, 151.

Smith never explained her absences or tardiness except occasionally to say to Benfer or Coyne that she had diarrhea. It appears that she may have suffered from irritable bowel syndrome. Smith presented Matthew P. Soff, M.D., a gastroenterologist as a witness on her behalf. He described irritable bowel syndrome as the second leading cause of missed work or absenteeism. It is characterized by severe diarrhea, cramps and weakness.

Soff's report was presented to the Board of Education only during the actual plenary hearing in this matter. The Board of Education pointed out that Smith only sought Soff's advice after she was removed as a classroom teacher and has not regularly consulted him since. In addition, Soff's notes indicate that one of her concerns when she met with him on December 4, 1992, was that she was going to "be fired."

In the cases collected in *Kacprowicz supra* the teacher's absences were more flagrant than Smith's absences. Nevertheless, I **FIND** that Smith's absences were frequent and far exceeded the ten day allotment of sick days for teacher's in the Bridgeton School District.

I also **FIND** that Smith's tardiness was excessive.

These two factors must be considered in determining whether Smith should be removed or disciplined. In isolation the two factors are insufficient to remove a tenured teacher. They must be considered along with evidence that the children in the teacher's care suffered a significant, adverse effect.

CHARGE NO. 5

The fifth charge goes directly to Smith's competence and effectiveness during the 1990-91 school year. The allegations are that Smith failed to teach effectively and properly and failed to follow routines. In addition, the BOE cites Smith's poor classroom evaluation and a failure "to support students in their quest for knowledge."

The evidence in support of these charges went primarily to the teaching of reading and the introduction of evaluations performed during the 1990-91 school year.

Smith was evaluated several times during the school year. These evaluations were as casual as a drop-in visit by the principal or superintendent, to a planned and prescheduled observation resulting in a written document shared with the teacher.

On September 28, 1990, Coyne visited Smith's class and concluded that Smith's classroom was "a mess" and "discipline (was) not being addressed."

On October 5th, 1990, Lane visited the classroom and told Coyne he was concerned about the "condition of the room."

On October 10, 1990, Coyne visited again an found the room in "chaos." On the 12th Coyne also noted "chaos" and the teacher "reprimanding her children."

On November 29, 1990, Coyne conducted a prescheduled formal classroom evaluation of Smith. Coyne found that Smith had subject matter competency and knew appropriate instructional techniques and procedures. He also found that her recordkeeping and planbook were up-to-date. On this occasion he noted that her classroom appearance was "conducive to learning and appropriate to lesson/activity."

However, he also made extensive notes concerning Smith's classroom demeanor. The notes dealing with demeanor are reproduced here in full as follows:

> The scheduled time for the observation was 12:25 - 1:05 as per Ms. Smith's request. When I arrived at 12:25, Ms. Smith requested that I give her about five minutes to allow her students to finish up at the lavatory. I sat out in the pod and was appalled by what I witnessed. During the five minutes I sat there, I did not hear one kind work spoken to the class. Ms. Smith constantly berated, threatened, and reprimanded the class as they stood in line. I waited for the class to enter and be seated. Then I entered the room to observe a math lesson, the same lack of human relations that I witnessed in the hallway continued in the classroom. The entire lesson from 12:30-1:20 was overshadowed by continual verbal threats, reprimands, verbal bribery and intimidation. I did not feel comfortable in this classroom. I was bothered by the treatment of the children by Ms. Smith. This will be addressed later in this report.

Later in the report Coyne added additional explanatory notes to his evaluation:

> Classroom control is completely unsatisfactory. This class is being controlled by intimidation and fear. I did not see any assertive discipline techniques. The class is getting too many mixed signals from the teacher. They have no idea as to where they stand with Ms. Smith. The basically received the same treatment whether they cooperated or not. As the class proceeded, Ms. Smith said, "Remember the rules" over, and over, and over. At this point in the school year, the command should be unnecessary if a discipline plan has been established. Discipline should be secondary within the classroom. In this lesson, continual disciplining prevailed. More than once, Ms. Smith stated, "If you don't ....then ...." Towards the end of the observation, children were told to put their heads down at the slightest infraction.
>
> Instructional time was not effectively utilized. A lesson consumed by discipline is not an effective lesson. The time spent should have been devoted to teaching, not continual reprimands.
>
> ...I was concerned by the situation in which a child was given the job of passing out paper. A minute later, this job was taken away because Ms. Smith felt that the child wasn't moving quickly enough. ...
>
> I did not witness positive teacher-pupil interaction. I watched the body language and facial expressions of the class. Most appeared unhappy or indifferent. Most sat with heads propped up with arms. I finally saw a child crack a smile at 12:52 when the baseball game began (a math game). The human relations employed with the class leave much to be desired....

Guess was the Vice Principal at the Cherry Street School in 1990-91. She has earned several certifications in the appropriate educational fields for her position. She is certified in K to 8, in guidance and student personnel, and as a principal. She has been employed for 22 years by the BOE and taught second grade at Cherry Street School for 16 years. She was Curriculum Supervisor for two years and assistant principal for four years.

Guess discussed the reading program at Cherry Street School with reference to the second grade. All of Smith's students utilized Houghton Mifflin's reading books; Adventures, Carousels and Discoveries, depending upon the student's proficiency. Each series contains three "magazines" or separate units for purpose of measurement.

At a minimum, each student in Bridgeton School District is expected to complete six magazines (two complete books) per school year. As a student completed a magazine, the students reading record was to be submitted to Guess, who tracked each student's progress. It was ultimately Guess' decision when a student would move on to the next magazine. A teacher was not to begin the next magazine until Guess had reviewed the child's progress and authorized the child to move. There is a wide discrepancy between the records kept by Guess and the records kept by Smith in her Squibbs Class Record Book.

According to Guess, the pacing scheduled for reading in each group suggests completing the first book (three magazines) by the end of December. She testified that Smith had not submitted a single magazine test to her for any child by the end of December. Smith's Book indicates that she tested her Adventures I and Carousels reading groups on the first magazine on November 26, 1990.

This discrepancy cannot be explained. The very best that can be said for Smith is that she utterly failed to report her students reading progress to Guess in a timely fashion thus endangering the children's class standing or leaving them vulnerable to repeating the second grade. In any case, there is absolutely no evidence that any of Smith's students, at the time Smith was transferred out of her class on March 18, 1991, could have completed six magazines by the end of the school year.

Pamela Garwood, also a second grade teacher indicated that in her experience, the average class could complete one book by the end of January, spending two months on the first magazine, six to eight weeks on the second magazine and finishing the third magazine by the end of January. Smith was not on this pace at all. Garwood did acknowledge that pace depends upon the class to some degree and that classes move at different speeds.

All of the certified teachers except Smith indicated that Smith's class was about average in reading when the school year began. One group was a magazine behind pace for the second grade, one group was on schedule and the third group was a magazine ahead of the scheduled pace.

I **FIND** that the credible evidence indicates that Smith failed to teach reading effectively and properly and failed to follow proper procedures.

I also **FIND** that Smith's classroom evaluation and other evidence of her teaching skills clearly indicate that she has failed to support her students in their quest for knowledge.

CHARGE NO. 6

This charge alleges that Smith "engaged in numerous acts of conduct unbecoming a teacher." The charges are quite specific. They include the charges of:

a. withholding student's lunches for discipline;
b. insubordination;
c. working in the school at night when she was absent during the day;
d. failure to communicate properly with parents;
e. missing parent conferences; and
f. demonstrating a lack of caring and positive attitude towards children in her care.

I have already described how Smith withheld lunches for discipline. I have dismissed the insubordination charge. I have also described Smith's lack of caring and positive attitude toward the children in her care. This leaves individual specification c, d, and e to be discussed.

> c. Returning to school in the evenings when no one else was present and at times when she was absent during the day.

There was no rule against working at night. When told to stop coming in at night by Lane, Smith stopped. She explained that she was there to prepare plans and class materials. She was there at night when she was sick preparing lesson plans for the substitute. This charge cannot be sustained.

> d. Failed to properly communicate and engage in appropriate parent relations.

The mother of F.M. testified that on one occasion she and Smith "got into it" at school. B.M. said that Smith kept telling her how "bad" her child was and this

caused an argument between them which ended with B.M. telling Coyne she wanted to "pop" Smith. B.M. said that during the course of the argument Smith made the following comments to her:

"You don't pay my salary;"
"Tell you mother why I pushed you" (to F.M. who was present)
"The whole damn class is crazy and I got other things on my mind, I don't need this shit."
"I don't like your child."

B.M. said she told Smith that she "wouldn't pay the salary of a teacher like you" and asked Coyne to change her daughter's teacher. (Coyne's notes indicate that the date this occurred on was November 2, 1990.)

B.M. seemed to harbor no ill will towards Smith. Coyne did not change F.M. to another class and B.M. and Smith continued frequent telephone discussions, some of which, according to B.M., were "good."

Smith recalled a conversation with B.M. in which B.M. called her a "bitch" but denied all of the remarks attributed to her by B.M. No other party was present to confirm or deny that these remarks were made by Smith. However, B.M. reported the comments immediately to Coyne who recalled some of them.

Because B.M. appeared to hold no hostility to Smith and took equal blame for causing the shouting match between them, she appeared to be telling the truth. I believed her because she seemed to be reluctant to hurt Smith and was anxious to share the blame for their argument.

e. Missing parent conferences at the time report cards were due.

On the 13th and 14th of November, 1990, parent/teacher conferences were scheduled and report cards were due. Smith was absent and Guess observed at least one pair of parents come for the conference and Smith was not there to conference with them. In her testimony Smith did not think this was significant. She seemed to blame the parents for not confirming their appointments.

I **FIND** that Smith failed to properly communicate and engage in appropriate teacher/parent relations with B.M. on November 2, 1990.

I also **FIND** that Smith missed at least one teacher/parent conference in November 1990.

These are factors to be considered in determining if Smith should be disciplined for conduct committed in 1990-91 in the Cherry Street School.

CHARGE NO. 7

The seventh charge alleges failure to control, properly supervise and engage in proper classroom management in the Cherry Street School in 1990-91. The specific elements of the charge are that Smith's classroom appeared unorganized, poorly disciplined, chaotic and that Smith failed to engage in proper classroom management.

While Lane, Coyne and Guess all remarked that Smith's classroom was chaotic or a "mess," her peers generally agreed that her classroom appearance was satisfactory. In addition, Lane admitted that he was a "neatness nut."

Smith obviously attempted to make her room conducive to learning. She purchased numerous teaching aids and instructional materials from Jean Scaroni, who operated an educational store for teachers.

During Coyne's prearranged observation of Smith on November 29, 1990, he marked her "satisfactory" in classroom appearance. Coyne also worked with Smith after this conference and reports that her classroom organization and classroom management actually improved during that brief time. Unfortunately, Coyne became ill and could not supervise Smith any longer. She apparently needed close classroom supervision.

Smith's failure to discipline her class properly has been set forth at length in discussion of prior charges, as has her failure to teach effectively.

Therefore, while I am satisfied that Smith's classroom did not always meet Lane's high standard of neatness, I am disinclined to hold that a messy classroom is a

ground for determining that a teacher is not competent. If a good teacher kept a messy classroom, I am sure it would only be the occasion for some good natured banter between the teacher and the administration.

LEGAL STANDARD

In the recent case of *In the Matter of the Tenure Hearing of Charles Courtney,* 92 *N.J.A.R.* 2d. (EDU) 399, ALJ Springer summarized the holding in *Redcay vs. State Board of Education,* 130 *N.J.L.* 369, 371 (Sup. Ct. 1934), aff'd 131 *N.J.L.* 326 (E & A 1944). That case has long stood for the proposition that "(u)nfitness for a position in the school system may be shown by a single incident, if sufficiently flagrant, but is 'best shown by numerous incidents.'" *Courtney, supra.* p. 403. In addition, ALJ Springer cites *In re Alfano,* 1979, *S.L.D.* ____ (Comm'r Oct. 23, 1979) for the proposition that "(s)chool officials need not wait until some child is badly injured before removing a teacher prone to violence." *Courtney, supra.,* p. 403.

In this matter the BOE has established by a preponderance of the evidence that Smith punished children by pushing their heads down on desks, by handling them roughly, by tugging and pulling on their clothes and arms, by withholding lunch and bathroom privileges from them and by speaking to them in a demeaning manner, causing physical, mental and emotional pain, in violation of the statute prohibiting corporal punishment, *N.J.S.A.* 18A-6.1. These were repeated acts over a period of months. These are also acts which constitute conduct unbecoming a teacher. I therefore **CONCLUDE** that Smith committed conduct unbecoming to a member of the teaching profession.

The tenure statute includes "other just cause" as a ground for dismissing a tenured teacher. *N.J.A.C.* 18A:6-10. These grounds are not defined in the statute. Under *Redcay, supra.* 371, individual incidents of unfitness may be viewed in the conglomerate.

The BOE has established here, by a preponderance of the credible evidence, that Smith was frequently both absent and tardy to an excess, that she failed to effectively and properly teach reading, failed to follow proper procedures and failed to support her students in their quest for knowledge. Finally, she failed to communicate effectively and properly with a parent and missed a parent conference.

I **FIND** and **CONCLUDE** that the BOE has demonstrated other just cause to dismiss Smith from her tenured position by a preponderance of the credible evidence.

ULTIMATE CONCLUSION AND ORDER OF DISPOSITION

For all these reasons I **CONCLUDE** that the tenure charge of unbecoming conduct is **SUSTAINED.**

I **FURTHER CONCLUDE** that there is just cause to **SUSTAIN** the tenure charges against Smith.

I **ORDER** that Millicent Smith be discharged from her teaching position in the Bridgeton School District.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

May 12, 1993
Date

Edgar R. Holmes
EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

5/14/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 19 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

FOR PETITIONER:

J.M. COYNE
REBECCA GUESS
THOMAS LANE
HERIETTA JONES
TEN STUDENTS: F.M., L.S., J.C., S.J., E.G., S.M. M.F., L.F., J.H., AND S.B.
JANET PAGE
JERRY BENFER
WARREN BURCH
BARBARA CUFF
B.M. THE MOTHER OF F.M.
KENNETH KLING
CAROL BOWE
SANDRA RICHTER

FOR RESPONDENT:

EVELYN GILBERT
FLORINE DAVIS
CYNTHIA KATES
PAMELA GARWOOD
CAROLINE SMITH
MARY HALL
E.B., A STUDENT
S.B. - E.B.'S MOTHER
MATTHEW SOFF
JEAN SCHUPPAN
JEAN SCARANI
MILLICENT SMITH
JOYCE BREWER

DOCUMENTS IN EVIDENCE

FOR PETITIONER:

P-1 TWO PAGES OF A STENO PAD, PRINCIPAL'S NOTES
P-2 ONE PAGE OF A STENO PAD, PRINCIPAL'S NOTES
P-3 ONE PAGE OF A STENO PAD, PRINCIPAL'S NOTES
P-4 ANNUAL PERFORMANCE RECORD - MS. SMITH
P-5 LESSON PLANBOOK OF SMITH'S
P-6 MEMO FROM COYNE TO SUPERINTENDENT
P-7 SCHEMATIC OF DATES AND COMPLAINTS
P-8 CLASSROOM EVALUATION REPORT
P-9 LETTER SCHEDULING MEETING
P-10 LETTER SCHEDULING MEETING
P-11 LETTER SCHEDULING MEETING
P-12 SUPERINTENDENT'S SUMMARY OF THE MEETING
P-13 SMITH'S ATTENDANCE RECORD 1990-91
P-14 MRS. SCHUPPAN'S REPORT RE: ABUSE, APRIL 4, 1991
P-15 COYNE'S NOTES OF INTERVIEWS WITH CHILDREN
P-16 MEMO - COYNE TO LANE RE: ABUSE
P-17 LETTER FROM LANE APRIL 24, 1991, MONITOR SMITH
P-18 ROUGH NOTE TO SELF FROM COYNE RE: J.H.'S MOTHER
P-19 NOTE FROM JANET PAGE SCHOOL NURSE, RE: SPLIT LIP
P-20 LETTER TO COYNE RE: SMITH FROM LANE RE: INVESTIGATION
P-21 INTERDEPARTMENTAL CORRESPONDENCE OCTOBER 2
P-22 INTERDEPARTMENTAL CORRESPONDENCE OCTOBER 9
P-23 INTERDEPARTMENTAL CORRESPONDENCE FEBRUARY 28
P-24 PACING FOR READING (2 PAGES)
P-25 READING SCORES UNKNOWN STUDENT
P-26 READING SCORES UNKNOWN STUDENT
P-27 READING SCORES UNKNOWN STUDENT
P-28 READING SCORES UNKNOWN STUDENT
P-29 READING SCORES UNKNOWN STUDENT
P-30 READING SCORES UNKNOWN STUDENT
P-31 READING SCORES UNKNOWN STUDENT
P-32 READING SCORES UNKNOWN STUDENT
P-33 READING RECORDING SHEET

P-34 MEMO TO MS. SMITH RE: LACK OF SUBSTITUTE PLANS
P-35 TO P-49 MEMORANDA OF ABSENCES AND LATENESS
P-50 "SPECIAL CLASSES SCHEDULE"
P-51 OFFICE NOTES
P-52 PERSONAL HISTORY FORM
P-53 TOTAL PERFORMANCE RECORD MARCH 24, 1986
P-54 CLASSROOM EVALUATION MARCH 13, 1989 WITH REBUTTAL
P-55 ANOTHER EVALUATION FORM NOVEMBER 24, 1987

FOR RESPONDENT:

R-1 CLASSIFICATION INTERROGATORIES #17
R-2 INTERROGATORIES #48
R-3 INTERROGATORIES #49
R-4 INTERROGATORIES #17D
R-5 CERTIFICATION OF INTERROGATORIES
R-6 NOTE FROM F.M. TO SMITH
R-7 NOTE FROM F.M. TO SMITH
R-8 L.S.'s VALENTINE
R-9 ENVELOPE OF E.G.
R-10 S.F.'s NOTE
R-11 J.H.'s NOTE
R-12 J.H.'s NOTE
R-13 S.B.'S NOTE
R-14 S.B.'s NOTE
R-15 NOTE TO SMITH
R-16 NOTE TO SMITH
R-17 TO R-24 NOT IN EVIDENCE (PHOTOS OF CLASSROOM)
R-25 SUBSTITUTE'S LETTER TO SMITH JANUARY 28,1991
R-26 SUBSTITUTE'S LETTER TO LANE RE: CONFERENCE MARCH 4, 1991 (LETTER OF EXPLANATION)
R-27 E.B.'s LETTER
R-28 CURRICULUM VITAE
R-29 LETTER INDICATING HER DISEASE, FEBRUARY 1992
R-30 SUMMARY OF JANUARY 19, 1993
R-31 EVALUATION: MAY 18, 1990
R-32 EVALUATION: DECEMBER 11, 1989

R-33 EVALUATION: FEBRUARY 1, 1988
R-34 EVALUATION: FEBRUARY 25, 1988
R-35 EVALUATION: FEBRUARY 25, 1986
R-36 CERTIFICATES OF APPRECIATION FROM PARENT APPRECIATION PANEL 1987/88 SCHOOL YEAR; JUNE 8, 1988;
R-37 CERTIFICATES OF APPRECIATION FROM PARENT APPRECIATION PANEL 1988/89 SCHOOL YEAR; MAY 31, 1989
R-38 STUDENT OF THE WEEK CERTIFICATE
R-39 ALL ABOUT ME DOCUMENT
R-40 CERTIFICATE OF GOOD BEHAVIOR
R-41 BIRTHDAY CARD
R-42 LESSON PLANS FEBRUARY 19, 1990
R-43 S.J. TIME RECORD
R-44 REFERRAL FORM
R-45 WRITING ASSIGNMENTS
R-46 MRS. PIERCE'S WRITING ASSIGNMENT
R47 TO R-54 CHILDRENS' NOTES TO MS. SMITH
R-55 SQUIBBS CLASS RECORD NO. NINE
R-56 NOT ADMITTED
R-57 ATTENDANCE CARD FOR FEBRUARY 1991

IN THE MATTER OF THE TENURE HEARING OF MILLICENT SMITH, SCHOOL DISTRICT OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Respondent filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. However, the Board's request to file cross-exceptions was untimely filed and was therefore denied.

Respondent cites seven exceptions to the ALJ's findings and conclusions regarding Charge Three, one of which raises grave concerns regarding the initial decision rendered by the Office of Administrative Law. Such exception states:

> The ALJ's credibility findings are further undermined by his reference to a witness who did not appear at hearing and his finding that this witness was credible. (Exceptions, at p. 26)

The Commissioner has scanned the transcripts provided in the record, which are not inclusive of all the days of hearing conducted in this case. Her review, like that of respondent's attorney, reveals no child witness whose initials are S.M. The record does indicate that respondent's attorney addressed a letter dated May 20, 1993 to the ALJ who heard the matter, seeking a clarification as to whom the ALJ referred in mentioning S.M. as a child witness in the case.

The record transmitted to the Commissioner is devoid of any resolution or clarification regarding such letter, except that the exceptions note that a conference call was placed among the ALJ and counsel for both parties in the matter after the ALJ's receipt of the letter of May 20, 1993. Without a full set of transcripts from which to attempt to resolve such confusion, and absent any disposition issuing from the ALJ following counsel's letter of May 20, 1993 or the conference call placed thereafter, the Commissioner is compelled to remand the case to the Office of Administrative Law for amendment to the initial decision explaining to whom the ALJ referred at pages 10 and 16 of the initial decision.

It bears emphasizing that the remand in this matter is directed solely to the ALJ for the singular purpose of clarifying what witness, if not S.M., testified. Consequently, the Commissioner stresses that this remand does not constitute a reopening of the record in any sense, and in remanding, she reserves judgment on the merits of this matter until such testimony is properly identified.

IT IS SO ORDERED.

JULY 2, 1993

DATE OF MAILING - JULY 2, 1993

COMMISSIONER OF EDUCATION

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(158-93)

IN THE MATTER OF THE TENURE	:	
HEARING OF MILLICENT SMITH,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION ON REMAND
OF BRIDGETON, CUMBERLAND	:	
COUNTY.	:	
	:	

SYNOPSIS

Board certified tenure charges of unbecoming conduct, incapacity and other just cause against respondent, tenured teaching staff member, including acts of corporal punishment against elementary students. Commissioner remanded matter to ALJ for singular purpose of clarifying to whom ALJ referred in mentioning S.M. as a child witness.

Remand clarified references to child witnesses. ALJ found in initial decision that based on testimony of witnesses and evidence presented, respondent's behavior warranted dismissal from her tenured position, albeit that some of the charges were not sustained.

Having reviewed the record and transcripts submitted in this matter, the Commissioner concurred with ALJ that Board had proven charges of incompetency and unbecoming conduct against respondent citing, inter alia, In re McRae, In re Booth, N.J.S.A. 18A:6-1 (corporal punishment) and Board's attendance policy. Commissioner directed matter be forwarded to State Board of Examiners for further appropriate action.

SEPTEMBER 1, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2838-92
AGENCY REF. NO. 59-3/92

IN THE MATTER OF THE TENURE HEARING OF MILLICENT SMITH, BRIDGETON SCHOOL DISTRICT

A. Paul Kienzle, Jr., Esquire, (Casarow, Casarow and Kienzle, attorneys) for petitioner, School District of the City of Bridgeton

Kenneth A. Sandler, Esquire, (Selikoff and Cohen, attorneys) for respondent, Millicent Smith

Record Closed: March 28, 1993 Decided: May 12, 1993

BEFORE **EDGAR R. HOLMES, ALJ:**

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

This matter was transmitted to the Office of Administrative Law (OAL) to be heard as a contested case pursuant to the Administrative Procedure Act, *N.J.S.A.* 52:14B-1 to -15; the act creating the OAL, *N.J.S.A.* 52:14F-1 to -13; and the act establishing jurisdiction in the Commissioner of Education to hear tenure cases in the public school system, *N.J.S.A.* 18A:6-10 to -30.1

The Bridgeton Board of Education (BOE), by its Superintendent Thomas C. Lane IV, (Lane,) certified the following charges against the respondent, Millicent Smith, a tenured teacher at the Cherry Street School:

Charge No. 1:

Ms. Smith has been insubordinate to the administration at Cherry Street School in her responses to reasonable communications by the administration and outbursts in the presence of students and staff in the 1990-91 school year.

Charge No. 2:

Ms. Smith, in her teaching duties at Cherry Street School in 1990-91, prepared inadequate lesson plans and at times, had no plan book ready and available (September 24 and October 22, 1990) and failed to have plans available for substitute teacher on February 19, 1991. Ms. Smith has exhibited a lack of careful planning and sound preparation in the teaching duties she last performed for the Bridgeton Board of Education.

Charge No. 3:

Ms. Smith during the 1990-91 school year engaged in conduct that was clearly unbecoming a teacher wherein she committed numerous acts of abuse of the children in her care. Ms. Smith, on a number of different occasions, struck, slapped, hit and otherwise engaged in acts of corporal punishment against the elementary students at Cherry Street School. Ms. Smith, in her time teaching at Cherry Street School, inflicted physical, mental, and emotional punishment that was both outrageous and totally improper. Ms. Smith engaged in punishments of the children that were abusive including the physical assaults of the children, the improper assigning of large sentence writing requirements, withholding of lunches, acts of intimidation, very poor teacher-pupil interaction, and failure to care and protect students in her charge.

Charge No. 4:

Ms. Smith has exhibited conduct unbecoming a teacher and/or insubordination due to excessive absenteeism and excessive tardiness. Ms. Smith has been excessively absent and excessively tardy since the onset of her employment with the Bridgeton Board of Education in the 1984-85 school year, both at the Bridgeton Middle School and the Cherry Street School. The absences and tardiness demonstrate a lack of concern for the education progress of the students in Ms. Smith's institutional

charge as well as a lack of concern for the continuity of the educational program in the school district.

Charge No. 5:

At Cherry Street School during the 1990-91 school year, Ms. Smith failed to provide proper teaching to students at the Cherry Street School, failed to teach effectively, failed to follow routines required for effective teaching and guidance of students in her care. Her actions in failure to follow routines, her extremely poor classroom evaluations and failure to support students in their quest for knowledge make it clear that Ms. Smith should be terminated as a teaching staff member.

Charge No. 6:

Ms. Smith has engaged in numerous acts of conduct unbecoming a teacher while in the employ of the Bridgeton School District including:

(a) Taking lunches away from students as a form of alleged discipline.
(b) Engaging in extreme insubordination and improper conduct toward supervisors.
(c) Returning to school in the evenings when no one else was present and at times when she was absent during the day.
(d) Failed to properly communicate and engage in appropriate parent relations.
(e) Missing parent conferences at the time report cards were due.
(f) Demonstrated total lack of caring and positive attitude toward children in her care.

Charge No. 7:

Ms. Smith has failed to control, properly supervise and engage in proper classroom management for her class at the Cherry Street Elementary School during the 1990-91 school year Ms. Smith's classroom appeared unorganized, poorly disciplined, chaotic, and Ms. Smith failed to engage in proper classroom management.

CLOSING OF RECORD

The respondent, Millicent Smith, denied all of the charges and a hearing was conducted at various locations in Cumberland County over a period of eleven days beginning January 4, 1993 and ending on February 5, 1993. The record closed on March 28, 1993, upon receipt of additional documentary evidence, briefs and final written argument.

BACKGROUND

Millicent Smith (Smith) was formerly a student in the Bridgeton School District. When she graduated from Glassboro College she was recruited by Lane to teach in the Bridgeton system because he wanted local people to return and teach in the community. She began her career as a basic skills teacher and served more than five years in this capacity. When a reduction in force (RIF) occurred in 1989, Smith "bumped" into a classroom position teaching second grade at the Cherry Street School. This was her first classroom assignment. She began in the 1990-91 school year.

CHARGE NO. 1

The first charge, which alleges insubordination, results from a single incident which occurred on September 28, 1992. On that date, near the end of the day, two students in Smith's class began to fight. Smith broke up the fight and was scratched in the process. Another teacher from an adjacent classroom took the two students to the "office." Smith sent referral forms to the office describing the children's behavior.

Rebecca Guess (Guess) was the Vice Principal at Cherry Street School at that time. She sent the two pupils back to Smith's room with the referral forms indicating that the students were not to return to school unless accompanied by their parents. Smith was concerned that the two students had not received any "definite punishment." She challenged Guess over the intercom. Smith demanded to know if "that was all she was going to do" to the two students. Guess did not want to discuss the matter over the intercom and after school Guess and Smith discussed the incident further. Guess warned Smith that her language on the intercom was unacceptable. Although this occurred after school on that day, there were still

teachers, parents and pupils present who heard the comments. Smith never repeated this behavior towards administrators again.

Insubordination is synonymous with disobedience, it is an unwillingness to submit to authority. It is more than being merely argumentative or fractious. In this case it appears that Smith's tone of voice constituted the gravamen of the complaint because the words themselves: "is that all you are going to do," are no more than an inquiry. The words were delivered in an impatient and angry voice. I understand why Guess was affronted. Certainly what Guess was doing, requiring the parents to return with the children, was appropriate under the circumstances. But Smith was not refusing to obey an order or school regulation. Smith was agitated and reacted too quickly when she misperceived that the children were not being disciplined. This does not rise to the level of insubordination. Since it never occurred again it cannot be considered a serious breach of faculty discipline. The incident is instructive however, in that it begins to illuminate Smith's views on discipline.

I **FIND** and **CONCLUDE** that the Board of Education has failed to prove by a preponderance of the credible evidence that respondent Smith was insubordinate to the administration at Cherry Street School in the presence of the students and staff in the 1990-91 school year.

CHARGE NO. 2

Charge Number 2 goes to the alleged failure of Smith to prepare lesson plans and/or to prepare adequate lesson plans on specific dates. On September 24, 1990 and on October 22, 1990, Smith acknowledges that she was late in submitting her lesson plans to Principal Coyne for review. Smith testified that on both occasions she completed her lesson plans later on the day they were due, and left them in the Principal's mailbox at his office.

Guess testified that a substitute teacher for Smith's class told her that Smith left her no lesson plans on February 19, 1991. However, the substitute teacher testified at the hearing that Smith did leave lesson plans on that day. In support of this testimony, Smith's sister testified that she dropped off the plans for the substitute at the school on her way to work that day.

In addition Smith's Annual Performance Report (P4) deals specifically with her planning performance. Under the heading General Planning the report reads as follows:

> Planning was satisfactory. The plan book was usually available and up to date. There was a problem with its availability when substitutes were present. Ms. Smith disputed this.

Principal Coyne, the person who reviews each teacher's plan book weekly, also conducted a classroom evaluation and prepared a report (P8). In his report Coyne assigns an "s" (satisfactory) to Smith in two areas which pertain to the maintenance of a lesson plan book.

> 1. Lesson plan book is available and up-to-date, with clear and logical plans that include objectives/skills, procedures, materials and follow-up.
>
> 2. Lesson plans indicate instructional alignment, continuity and sequence.

I **FIND** that Smith failed to have lesson plans available for the prinicipal's inspection on September 24 and October 22, 1990.

I also **FIND** that Smith corrected this deficiency on September 24 and October 22, 1990.

I **FIND** that Smith did provide her substitute with lesson plans on February 19, 1991.

I **FIND** that there is no evidence that Smith's lesson plans were inadequate.

Therefore, I **FIND** and **CONCLUDE** that the Board of Education has failed to prove by a preponderance of the credible evidence that Smith's lesson plans were inadequate or unavailable in 1990/91 to the extent that her conduct required discipline.

CHARGE NO. 3

The third charge alleges physical, mental, and emotional abuse. The BOE alleges that Smith punished children in her class by physical assault, improper writing assignments, withholding lunches, acts of intimidation, very poor teacher-pupil interaction, and "failure to care and protect students in her charge."

Smith was removed from her classroom duties and returned to Basic Skills because the BOE determined that she was not fulfilling her classroom responsibilities in March 18, 1991.

The BOE replaced Smith with Jean Schupann, a basic skills teacher and an aide, Henrietta Jones. Within a month of taking over the class, the students began to complain to Schupann and Jones about Smith's behavior towards them. Jones testified that the children initiated the discussions by telling her she "was nicer" than their old teacher (Smith). She named several students who later testified. They told her about a variety of inappropriate actions such as slamming heads on desk, standing a student in a corner "all day;" throwing a child's shoes in the trash, pushing a child into a desk, and a child poked in the eye with a pencil. Jones reported this to Schupann who then questioned the children herself about the incidents. On April 24, 1991, Schupann gave Coyne a handwritten note containing these allegations (P4). Coyne said he had been advised by a board member to interview Schupann and this is what prompted the note. Thereafter Coyne personally interviewed the children in the presence of Jones. He said he did not lead the children but asked them if there was anything they wanted to talk about. They told him they wanted to talk about Smith. The children then repeated their allegations of abuse to Coyne and he memorialized their allegations (P15).

Coyne, Lane and Guess met and decided to advise Division of Youth and Family Services (DYFS) about the alleged abuse as required by law. A DYFS worker than interviewed the children in the presence of staff. Of course the children were later interviewed by counsel for both parties. When the children testified at the OAL hearing, most were telling their stories for the seventh time, at least.

The events occurred during the 1990-91 school year when the children were seven to nine years old and in second grade. When the children testified, they were in the fourth grade and were nine to eleven years old. This lapse of time is evident in their testimony.

The first child witness was F.M., a nine year old girl. She testified that she observed Smith "hit" children in the class. She said Smith "pulled J. by the arm," "threw S. in a closet, and threw K.'s head down on the desk." F.M. also testified that Smith "busted her lip" when she pushed F.M.'s head down on the desk. F.M. also described Smith as "rude" and very "nasty" and said Smith was "bossy" and placed children out in the hall or in the corner for no reason. F.M. could not recall that she went to the nurse accompanied by another student or that she had hugged Smith or written notes to her telling Smith she loved her when asked these questions on cross examination. She did recall that she often had in-school detention and was "failing" when Smith was her teacher. F.M.'s mother testified that her daughter told her Smith would not let students go to the bathroom and that Smith pushed her, but she did not believe her daughter at the time.

L.S. is a boy. His chief complaint was that Smith jabbed him in the eye with a pencil. He also said that if students did not put their heads down on the desk when asked to do so, or looked up when they were to have there heads down, Smith would "bang your head down on the desk."

L.S. described the pencil in the eye incident as follows: he was tapping V.M. on the back with the eraser end of his pencil because Smith was trying to get V.M.'s attention. When Smith saw him do that, she turned him around and said "don't poke people with a pencil." As she did so, she started waving the pencil around in his face and it "stuck."

L.S. said he went to the nurse who removed it with tweezers and then he told the principal. (Neither the nurse or principal recall such an incident).

L.S. also testified that Smith said to him "That's what you get for messing with other people." He showed a small scar on his cheek under his eye which appeared to be the size and shape of a chicken pox scar or pencil point. He alleged this was the scar from the pencil point.

L.S. also recalled that Smith always spoke "mean" to her students. He transferred out of Smith's room in November 1990.

When asked on cross examination why he sent Smith a Valentine and visited her after he was out of her class, he replied, "she wasn't always mean to me, she just

poked me in the eye." He later stated, "Just because she poked me in the eye doesn't mean I have to hate her forever."

J.C. a boy, said he witnessed Smith "bang" students heads on desks. He named three or four students whose heads had been "banged." He claimed that Smith pushed him onto a desk and he fell to the floor. He denied that this occurred because he was fighting. He said he was not a fighter. He did not look like a fighter.

S.J. an eleven year old girl, was in Smith's class in 1990-91. She said she witnessed Smith shove F. M.'s head down on the desk "hard." (She winced when she described the action). She complained that Smith sent them to the office when they were bad but Schupann gave them another chance.

E.G. gave the impression that she had spent many hours rehearsing what she would say. She came to the witness stand with great pressure of speech and very animated. She spoke swiftly, fluently and used very descriptive language. She began by saying that "in the beginning she (Smith) seemed like a regular teacher, then she became a monster teacher, she punched J., shoved S., put her nails in me. She was violent. Everyone disliked her."

E.G. also testified that "J.C. fell down. He was making funny faces." "She (Smith) told him to shut up. J.C. said she 'talked mean' ." "Smith asked J.C. 'what did you say?' and the desk fell back. J.C. started to cry." Then E.G. said in an aside "Boys don't show their tears." She said "J.C.'s mom came up to school."

E.G. described an incident involving S.B.

> S.B. was talking to Francis. Ms. Smith told S.B. to shut her mouth. She said 'Shut your mouth right now or you'll regret you didn't.' S.B. said 'you're not my ma.' Then S.B. got her name on the board and two checks. S.B. started flipping her shoes on and off. Ms. Smith took S.B.'s shoes, when she wouldn't put them on and threw them in the trash can and put S.B. in the closet. Ms. Smith dug her nails into S.B. 's arm, pushed her into the closet.

E.G. also said she saw Smith take F.M. by the back of the head and slam her hard onto the desk once when F.M. wouldn't tell Smith what she and S.J. were talking about.

E.G. also complained that Smith dug her nails into her arms and shoved her into her seat on two occasions and made her stand in the corner from 9:15 until lunch time. It made her knees hurt. She claimed that when Smith came to talk to her, she (E.G.) just hummed. As a result, E.G. had to stay after school.

E.G. claimed that Smith frequently told students to "shut up." She complained that Smith made her write sentences 15, 30 or 100 times for punishment.

She recalled that Smith poked L.S. in the eye with a pencil. She recalls that L.S. was "pencil fighting."

S.M. a girl, said during direct examination that all she remembered was that Smith shoved her and "made them make valentines." On cross examination she also recalled that Smith stayed in the supply closet for ten and fifteen minutes at a time. (Prior witnesses also mentioned that Smith often went into the supply closet for long periods of time. Smith later explained that she was preparing materials for class). S.M. also recalled that the whole class had to write sentences when the class was "bad."

S.M. recalled that L.S. was pencil fighting in the hall. She explained that pencil fighting consisted of trying to break the other person's pencil first. If you did you were entitled to give the other person "five free hits." She claimed she was watching the pencil fight intently because she had "bet" on the winner. She said L.S. was hit on the outside of the right eye. She said it was L.S.'s own pencil which poked him in the eye. She said everyone shouted" 'his eye is bleeding. So Ms. Smith said 'Let me see.' 'Hmmm,' she said, 'Go to the nurse.'"

S.M. also testified that she received two "D's" when Smith was her teacher, but made the honor roll when Schupann was her teacher. She also recalled writing a letter to Smith but said it was because Schupann made them write the letter.

S.M. recalled that Smith "slammed" F.M.'s head on the desk. She admitted that she once got into a fight which Smith had to break up and for which her mother had to come to school.

M.F., a ten year old boy, proudly claimed to be an honor roll student. He said he didn't know what to make of Smith as a teacher. She was all right at first but soon "began hollering, shoving students heads down on desks and writing 'stuff' for

punishment." He recalls Smith telling E.G. she would "kick her ass." He said Smith frequently told students to "shut up."

M.F. said that when Smith punished them by making them put their heads down on the desk that she "didn't want their eyes showing." If Smith saw you looking, "she would shove your head down real hard." He said "she busted a girl's lip doing that." He also recalled that Smith banged his head down along with others whom he named. He recalled that "she threw J.C. into a desk" and refused to permit others to go to the bathroom. He recalled three students who "used the bathroom on themselves." (School Nurse Janet Page testified that she observed Smith's students wet themselves more frequently than other second graders. She said this stopped after Schupann took over the class).

M.F. also recalled that Smith pushed S.B. into a closet and "stabbed" L.S. in the eye. He said she used to "yank your clothes and pull your arm."

On cross examination M.F. admitted that he did not see Smith stab L.S. in the eye, he only repeated what L.S. told him.

L. F., a girl, recalled that L.S. was pencil fighting and Smith grabbed his pencil and cut him in the eye. She recalls seeing blood.

She also recalls that Smith slammed her head down but claims she was unhurt. She recalls that on one occasion Smith kicked her desk over. She recalls that Smith put S.B. in the closet and took her shoes off and put them in the trash can.

L.F. did not see F.M. get a "busted lip" but recalls that F.M. told her about the incident. She recalls that Smith put her hand up to E.G. in a threatening manner but did not hit her.

L.F. recalled "wetting herself" when Smith would not let her go to the bathroom. She said S.B. also "wet" herself and that F.M. had to run home to go to the bathroom.

F.M. also recalled that Smith told students to "sit your ass down!"

On cross examination she acknowledged that after Smith left the classroom she visited Smith but could not recall how often.

J.H. transferred out of the Cherry Street School because G., a boy in her class, continually made sexual contact with her. She said that Smith told her she would take care of it but it did not stop.

J.H. also recalled that Smith banged her head down on the desk and banged others too.

On cross examination J.H. was asked why she wrote a note to Smith saying "I love you, you the best teacher I ever had." She answered "But this is only an expression, most kids write to their teachers."

S.B., an eleven year old girl, recalled that Smith frequently "slammed kids" heads down on desks. She vividly recalled her own embarrassment when it happened to her. She recalled F.M.'s "busted lip." She recalled when Smith broke up a pencil fight involving L.S. and while waving a pencil at L.S., "hit him on the corner of his eye."

She recalled that Smith pushed her into a closet and threw her shoes into the trash. She said Smith returned her shoes to her at the end of the day.

S.B. also "wet herself" after pleading with Smith to allow her to go to the bathroom. The nurse gave her dry pants to wear. She also recalled three other students who "went to the bathroom on themselves."

She opined that "Ms. Smith wasn't right for a teacher. Most teachers don't curse or hit children."

She also opined that Smith went "into the closet and drank because she acted mean when she came out."

On cross examination she identified a note to Smith as her own and disowned another note which appeared to be in the same handwriting. She acknowledged that she never saw Smith drinking in the closet.

E.B. was the last former 1990-91 student to testify and he testified on Smith's behalf. His mother and Smith are friends. He began his testimony by opining that Smith was a good teacher. He said she helped him and he got mostly A's and B's. He

characterized his fellow students as "getting into trouble." They would "pick fights, steal, not do their work." As punishment they were made to eat lunch with Smith or were denied an opportunity to watch videos. He said Smith did not "press" anyone's head on the desk or hit and grab students.

On cross examination E.B. could not recall a fight between L.F. and S.B., he could not recall S.B. getting her head pushed down or being thrown against a closet, he did not see F.M.'s cut lip, nor did he remember L.S. getting stabbed in the eye. He did remember that S.B.'s shoes were thrown in the trash by "someone" in the class. He did not remember G. bothering J.H. He did recall other kids talking about being pushed around. He remembered that Smith was not in the class "a lot of times."

Janet Page, the school nurse, testified that Smith's students wet their pants more frequently than other second grade students. She had no recollection of L.S. having a pencil wound to the cheek. Page recalled and recorded F.M.'s lacerated lip.

Warren Burch, the physical education teacher, and Barbara Cuff, the art teacher, both testified that they had difficulty with Smith's class. Burch taught the class from 11:40 a.m. to 12:20 p.m. once a week, in 1990-91, immediately following lunch. He reported to Coyne that "the kids complained they had to rush to eat lunch and their stomachs hurt." He said this occurred four to five times and he was required to spend three to four minutes just settling the class down.

Barbara Cuff testified that she taught art to Smith's students after lunch on Wednesdays. When she arrived on some occasions the students would be eating their lunch. The protocol was for teachers to have the class ready for the special teachers. Smith's class was seldom ready for Cuff and time was wasted as they ate lunch or cleaned up after lunch.

Coyne confronted Smith about this problem and Smith admitted to him that she was using lunch detention as a punishment. She held the children in detention before she gave them lunch rather than after they had lunch. This resulted in the children needing time to eat when the specials came to the room.

Some of the children complained about sentence writing. Guess, Coyne and Lane met and reviewed papers found in children's' desks. They thought the amount of sentence writing Smith gave to the students by way of discipline was excessive. However, the evidence they obtained was insufficient to establish this.

Smith denied striking students or banging heads. She said that she utilized assertive discipline technique. She said that one technique she utilized was to require individual students, and at times the whole class, to take a time out and put their heads down on the desk.

Smith opined that the children who accused her, their parents, Guess, Coyne, Burch and Cuff, were all lying.

Smith called a character witness from her church to testify on her behalf. She advised that Smith is an Assistant Youth Leader and the Clerk at the 7th Day Adventist Church in Bridgeton. She said Smith encouraged the children in the Church, contributed to Black History Month and performed a skit for the children. She said that Smith was a caring person.

Evelyn Gilbert was a teacher's aide in 1990-91. She was in the classroom next to Smith. She said she was frequently in Smith's classroom and never saw Smith abuse a student. Both she and Smith described the children in the class as difficult at best; that many of them had been retained or classified.

Florine Davis and Mary Hall were substitute teachers in Smith's class during her absences in 1990 and 1991. Davis described Smith's class as disruptive, argumentative and rude. However, Davis' educational background consisted entirely of college level secretarial courses. She was the substitute who corroborated Smith's claim that she did prepare lesson plans on February 19 and 20, 1991.

Mary Hall also substituted for Smith in the 1990-91 school year. She is still employed by the District as an attendance officer. She substituted for Smith on five different occasions in 1990-91. She described Smith's class as rowdy; they talked, left their seats and conducted pencil fights.

Cynthia Kates was a special education teacher at Cherry Street School in 1990-91. She is still employed by the Bridgeton School District, at the West End School. She was in the second grade pod at Cherry Street, between Smith's class and the Basic Skills class. A pod is a very large room divided into classrooms by room dividers opening into a central space for a hallway. There are no doors.

She advised that Smith consulted her about discipline techniques. She observed Smith utilizing assertive discipline techniques such as writing names on the board, followed by check marks for each infraction of the rules. She observed Smith utilizing sentence writing and lunch detention. She frequently observed unruly behavior in Smith's classroom and thought that other second grade classes were better behaved than Smith's. She also said she never observed any physical conduct between Smith and a student. She saw no inappropriate behavior. She also said that the behavior of the class did not improve under Schupann. She did say that the proper use of lunch detention included permitting the children to eat first.

DISCUSSION OF CREDIBILITY

There are too many conflicts regarding the alleged wound to L.S.'s eye to make a finding that Smith jabbed him with a pencil. One could as easily conclude that L.S. jabbed himself during a pencil fight. This is what S.M. apparently saw. In addition, L.S. said he went to the nurse and principal to complain. Neither remembers this. From the testimony and demeanor of both of them, it was clear that they have formed an opinion that Smith is not a competent teacher. Therefore, if L.S. had gone to either of them as he claimed he had, one of them would have been sure to remember it.

I **FIND** that the BOE failed to prove by a preponderance of the credible evidence that Smith assaulted L.S. with a pencil or was the cause of an injury to his eye or cheek.

The testimony concerning Smith's rough handling of children in her class was persuasive. Nearly every child reported having their head "banged" down on a desk at one time or another. Each child reported seeing it done to others. The nurse's notes corroborate F.M.'s "busted lip."

J.C.'S testimony was quite straightforward. He said Smith banged his head on the desk as well as the head of others. I believe him.

Most of E.G.'s testimony was corroborated by others. However, she appeared so animated, rehearsed and eager that, if standing alone, her testimony would have been suspect. Nevertheless, on balance she was believable.

S.M. was an observant and intelligent witness. She shed more light on the incident involving L.S.'s eye than anyone else. She also described the incident in which Smith banged F.M.'s head on the desk. She was a credible witness.

M.F. was also an intelligent and straightforward witness with an ability for description. He clearly identified the punishment of putting your head down on the desk. He explained that Smith would push a child's head down on the desk if the child's eyes were showing. This was the most reasonable and probable explanation for what children identified as "head banging." He also described her rough handling of students. He observed her push students. He said "she used to yank your clothes and pull your arm." He was incensed when he reported how she withheld bathroom privileges from some children causing them "to use the bathroom on themselves." He was also able to differentiate between direct evidence and hearsay. He admitted he had only heard that Smith jabbed L.S. in the eye; he said did not see it. I believe his testimony.

L.F. also vividly recalled "wetting herself" in Smith class because she was denied the opportunity to go to the bathroom. She said Smith pushed her head down on the desk but that she was unhurt. She recalled Smith kicking her desk over, and that Smith put S.B. in the closet and put her shoes in the trash. Her testimony was also straightforward and believable.

F.M. only recalled that Smith talked meanly to students. "Sit your ass down!" Nevertheless, her testimony corroborated what others described of Smith's demeanor.

J.H. complained to Smith that G. was sexually accosting her. Smith failed to protect her. She also recalled having her head banged and saw Smith do it to others. She was articulate and thorough. I believed her testimony also.

S.B. corroborated head banging, and F.M.'s "busted lip." She reported feelings of embarrassment at having her head pushed down. She said Smith pushed her into the closet and threw her shoes in the trash and did not return them until after school. She also wet herself after pleading to go to the bathroom to no avail. She too, was credible.

S.B. summed it up best when she remarked that "Ms. Smith wasn't right for a teacher, most teachers don't curse or hit children."

These incidents are corroborated by the testimony of the various children. Smith's propensity to punish and demean children was observed by Principal Coyne (See Charge No. 4). Smith's propensity to punish and demean children is also implicit in her rage when Guess did not punish the two children who fought in Smith's classroom in a manner satisfactory to Smith even though the actions of Guess were reasonable and well taken.

I **FIND** that Smith punished children during quiet time by pushing their heads down on the desk, causing injury to F.M., and pain and embarrassment to others.

I **FIND** that Smith handled children roughly; that she pushed and shoved children in her class; that she tugged and pulled on their clothes and arms.

I **FIND** that Smith withheld lunch from children as punishment.

I **FIND** that Smith spoke to the children in a demeaning fashion telling them to "sit their asses down" and using other expressions which were disrespectful.

I **FIND** that Smith punished children by withholding bathroom privileges.

I **FIND** that Smith punished S.B. by throwing her shoes into the trash.

I **CONCLUDE** that Smith's conduct constituted physical, mental and emotional abuse and violates *N.J.S.A.* 18A-6.1, the prohibition against corporal punishment.

CHARGE NO. 4

The 4th charge alleges excessive absenteeism and excessive tardiness. Exhibits P35 through P49 document Smith's absenteeism and tardiness from January 1985 through the 1989-90 school year. During all this time Smith was a basic skills teacher at the Bridgeton Middle School. According to her principal Jerry Benfer, when a basic skills teacher is absent, no substitute is provided.

These records are difficult to reconcile. Nevertheless, it clearly appears that Smith was absent 19 days during the 1986-87 school year, 21½ days during the 1987-88 school year; 10 days in the 1988-89 school year and 15 days during the 1989-90

school year. Most absences were for illness, although a few were for professional leave, personal leave or a death in the family.

Smith was also put on Notice by Benfer on several occasions that her tardiness was not acceptable. On September 30, 1985, he notified her that she was late three times in the first month of the school year. By November 18 of 1985, Smith had already been late eight times. She was apparently not late again during the balance of that school year.

On December 18, 1987, Benfer advised Smith in writing that he "observed a recurring pattern of lateness to school again this year." He threatened her with a hearing before the Superintendent of Schools. On several occasions, according to Benfer and Lane, they counseled Smith concerning her lateness and absences. However, none of these matters ever resulted in a disciplinary action or the withholding of increments. In fact, during this period of time Smith acquired tenure. It is against this background however, that Smith's attendance record for the critical school year 1990-91 is compared.

In the 1990-91 school year Smith was absent 23½ days. One absence may have been recorded mistakenly. On one occasion Coyne sent Smith to another second grade teacher's class to observe, and she was mistakenly recorded as absent.

Smith was also late in the 1990-91 school year. By December 5, 1990, Coyne had already documented seven latenesses.

In December 1990, Smith was absent on four consecutive days. These absences coincided with a meeting she was to have with Lane concerning alleged inadequacies in her classroom and in her teaching skills. In March of 1991, Smith was removed from the classroom and returned to special assignments. Her record of tardiness and absenteeism was one of the factors in this decision.

Excessive absences are a sufficient cause for the Commissioner to terminate a teacher when it appears that the absences have created a significant, adverse effect on school children notwithstanding the absences were in connection with a physical ailment plaguing the teacher. *In the Matter of the Tenure Hearing of Jerome Kacprowicz,* 93 *N.J.A.R.* 2d. (EDU) 147, 151.

Smith never explained her absences or tardiness except occasionally to say to Benfer or Coyne that she had diarrhea. It appears that she may have suffered from irritable bowel syndrome. Smith presented Matthew P. Soff, M.D., a gastroenterologist as a witness on her behalf. He described irritable bowel syndrome as the second leading cause of missed work or absenteeism. It is characterized by severe diarrhea, cramps and weakness.

Soff's report was presented to the Board of Education only during the actual plenary hearing in this matter. The Board of Education pointed out that Smith only sought Soff's advice after she was removed as a classroom teacher and has not regularly consulted him since. In addition, Soff's notes indicate that one of her concerns when she met with him on December 4, 1992, was that she was going to "be fired."

In the cases collected in *Kacprowicz supra* the teacher's absences were more flagrant than Smith's absences. Nevertheless, I **FIND** that Smith's absences were frequent and far exceeded the ten day allotment of sick days for teacher's in the Bridgeton School District.

I also **FIND** that Smith's tardiness was excessive.

These two factors must be considered in determining whether Smith should be removed or disciplined. In isolation the two factors are insufficient to remove a tenured teacher. They must be considered along with evidence that the children in the teacher's care suffered a significant, adverse effect.

CHARGE NO. 5

The fifth charge goes directly to Smith's competence and effectiveness during the 1990-91 school year. The allegations are that Smith failed to teach effectively and properly and failed to follow routines. In addition, the BOE cites Smith's poor classroom evaluation and a failure "to support students in their quest for knowledge."

The evidence in support of these charges went primarily to the teaching of reading and the introduction of evaluations performed during the 1990-91 school year.

Smith was evaluated several times during the school year. These evaluations were as casual as a drop-in visit by the principal or superintendent, to a planned and prescheduled observation resulting in a written document shared with the teacher.

On September 28, 1990, Coyne visited Smith's class and concluded that Smith's classroom was "a mess" and "discipline (was) not being addressed."

On October 5th, 1990, Lane visited the classroom and told Coyne he was concerned about the "condition of the room."

On October 10, 1990, Coyne visited again an found the room in "chaos." On the 12th Coyne also noted "chaos" and the teacher "reprimanding her children."

On November 29, 1990, Coyne conducted a prescheduled formal classroom evaluation of Smith. Coyne found that Smith had subject matter competency and knew appropriate instructional techniques and procedures. He also found that her recordkeeping and planbook were up-to-date. On this occasion he noted that her classroom appearance was "conducive to learning and appropriate to lesson/activity."

However, he also made extensive notes concerning Smith's classroom demeanor. The notes dealing with demeanor are reproduced here in full as follows:

> The scheduled time for the observation was 12:25 - 1:05 as per Ms. Smith's request. When I arrived at 12:25, Ms. Smith requested that I give her about five minutes to allow her students to finish up at the lavatory. I sat out in the pod and was appalled by what I witnessed. During the five minutes I sat there, I did not hear one kind work spoken to the class. Ms. Smith constantly berated, threatened, and reprimanded the class as they stood in line. I waited for the class to enter and be seated. Then I entered the room to observe a math lesson, the same lack of human relations that I witnessed in the hallway continued in the classroom. The entire lesson from 12:30-1:20 was overshadowed by continual verbal threats, reprimands, verbal bribery and intimidation. I did not feel comfortable in this classroom. I was bothered by the treatment of the children by Ms. Smith. This will be addressed later in this report.

Later in the report Coyne added additional explanatory notes to his evaluation:

> Classroom control is completely unsatisfactory. This class is being controlled by intimidation and fear. I did not see any assertive discipline techniques. The class is getting too many mixed signals from the teacher. They have no idea as to where they stand with Ms. Smith. The basically received the same treatment whether they cooperated or not. As the class proceeded, Ms. Smith said, "Remember the rules" over, and over, and over. At this point in the school year, the command should be unnecessary if a discipline plan has been established. Discipline should be secondary within the classroom. In this lesson, continual disciplining prevailed. More than once, Ms. Smith stated, "If you don't ....then ...." Towards the end of the observation, children were told to put their heads down at the slightest infraction.
>
> Instructional time was not effectively utilized. A lesson consumed by discipline is not an effective lesson. The time spent should have been devoted to teaching, not continual reprimands.
>
> ...I was concerned by the situation in which a child was given the job of passing out paper. A minute later, this job was taken away because Ms. Smith felt that the child wasn't moving quickly enough. ...
>
> I did not witness positive teacher-pupil interaction. I watched the body language and facial expressions of the class. Most appeared unhappy or indifferent. Most sat with heads propped up with arms. I finally saw a child crack a smile at 12:52 when the baseball game began (a math game). The human relations employed with the class leave much to be desired....

Guess was the Vice Principal at the Cherry Street School in 1990-91. She has earned several certifications in the appropriate educational fields for her position. She is certified in K to 8, in guidance and student personnel, and as a principal. She has been employed for 22 years by the BOE and taught second grade at Cherry Street School for 16 years. She was Curriculum Supervisor for two years and assistant principal for four years.

Guess discussed the reading program at Cherry Street School with reference to the second grade. All of Smith's students utilized Houghton Mifflin's reading books; Adventures, Carousels and Discoveries, depending upon the student's proficiency. Each series contains three "magazines" or separate units for purpose of measurement.

At a minimum, each student in Bridgeton School District is expected to complete six magazines (two complete books) per school year. As a student completed a magazine, the students reading record was to be submitted to Guess, who tracked each student's progress. It was ultimately Guess' decision when a student would move on to the next magazine. A teacher was not to begin the next magazine until Guess had reviewed the child's progress and authorized the child to move. There is a wide discrepancy between the records kept by Guess and the records kept by Smith in her Squibbs Class Record Book.

According to Guess, the pacing scheduled for reading in each group suggests completing the first book (three magazines) by the end of December. She testified that Smith had not submitted a single magazine test to her for any child by the end of December. Smith's Book indicates that she tested her Adventures I and Carousels reading groups on the first magazine on November 26, 1990.

This discrepancy cannot be explained. The very best that can be said for Smith is that she utterly failed to report her students reading progress to Guess in a timely fashion thus endangering the children's class standing or leaving them vulnerable to repeating the second grade. In any case, there is absolutely no evidence that any of Smith's students, at the time Smith was transferred out of her class on March 18, 1991, could have completed six magazines by the end of the school year.

Pamela Garwood, also a second grade teacher indicated that in her experience, the average class could complete one book by the end of January, spending two months on the first magazine, six to eight weeks on the second magazine and finishing the third magazine by the end of January. Smith was not on this pace at all. Garwood did acknowledge that pace depends upon the class to some degree and that classes move at different speeds.

All of the certified teachers except Smith indicated that Smith's class was about average in reading when the school year began. One group was a magazine behind pace for the second grade, one group was on schedule and the third group was a magazine ahead of the scheduled pace.

I **FIND** that the credible evidence indicates that Smith failed to teach reading effectively and properly and failed to follow proper procedures.

I also **FIND** that Smith's classroom evaluation and other evidence of her teaching skills clearly indicate that she has failed to support her students in their quest for knowledge.

CHARGE NO. 6

This charge alleges that Smith "engaged in numerous acts of conduct unbecoming a teacher." The charges are quite specific. They include the charges of:

a. withholding student's lunches for discipline;
b. insubordination;
c. working in the school at night when she was absent during the day;
d. failure to communicate properly with parents;
e. missing parent conferences; and
f. demonstrating a lack of caring and positive attitude towards children in her care.

I have already described how Smith withheld lunches for discipline. I have dismissed the insubordination charge. I have also described Smith's lack of caring and positive attitude toward the children in her care. This leaves individual specification c, d, and e to be discussed.

> c. Returning to school in the evenings when no one else was present and at times when she was absent during the day.

There was no rule against working at night. When told to stop coming in at night by Lane, Smith stopped. She explained that she was there to prepare plans and class materials. She was there at night when she was sick preparing lesson plans for the substitute. This charge cannot be sustained.

> d. Failed to properly communicate and engage in appropriate parent relations.

The mother of F.M. testified that on one occasion she and Smith "got into it" at school. B.M. said that Smith kept telling her how "bad" her child was and this

caused an argument between them which ended with B.M. telling Coyne she wanted to "pop" Smith. B.M. said that during the course of the argument Smith made the following comments to her:

"You don't pay my salary;"
"Tell you mother why I pushed you" (to F.M. who was present)
"The whole damn class is crazy and I got other things on my mind, I don't need this shit."
"I don't like your child."

B.M. said she told Smith that she "wouldn't pay the salary of a teacher like you" and asked Coyne to change her daughter's teacher. (Coyne's notes indicate that the date this occurred on was November 2, 1990.)

B.M. seemed to harbor no ill will towards Smith. Coyne did not change F.M. to another class and B.M. and Smith continued frequent telephone discussions, some of which, according to B.M., were "good."

Smith recalled a conversation with B.M. in which B.M. called her a "bitch" but denied all of the remarks attributed to her by B.M. No other party was present to confirm or deny that these remarks were made by Smith. However, B.M. reported the comments immediately to Coyne who recalled some of them.

Because B.M. appeared to hold no hostility to Smith and took equal blame for causing the shouting match between them, she appeared to be telling the truth. I believed her because she seemed to be reluctant to hurt Smith and was anxious to share the blame for their argument.

e. Missing parent conferences at the time report cards were due.

On the 13th and 14th of November, 1990, parent/teacher conferences were scheduled and report cards were due. Smith was absent and Guess observed at least one pair of parents come for the conference and Smith was not there to conference with them. In her testimony Smith did not think this was significant. She seemed to blame the parents for not confirming their appointments.

I **FIND** that Smith failed to properly communicate and engage in appropriate teacher/parent relations with B.M. on November 2, 1990.

I also **FIND** that Smith missed at least one teacher/parent conference in November 1990.

These are factors to be considered in determining if Smith should be disciplined for conduct committed in 1990-91 in the Cherry Street School.

CHARGE NO. 7

The seventh charge alleges failure to control, properly supervise and engage in proper classroom management in the Cherry Street School in 1990-91. The specific elements of the charge are that Smith's classroom appeared unorganized, poorly disciplined, chaotic and that Smith failed to engage in proper classroom management.

While Lane, Coyne and Guess all remarked that Smith's classroom was chaotic or a "mess," her peers generally agreed that her classroom appearance was satisfactory. In addition, Lane admitted that he was a "neatness nut."

Smith obviously attempted to make her room conducive to learning. She purchased numerous teaching aids and instructional materials from Jean Scaroni, who operated an educational store for teachers.

During Coyne's prearranged observation of Smith on November 29, 1990, he marked her "satisfactory" in classroom appearance. Coyne also worked with Smith after this conference and reports that her classroom organization and classroom management actually improved during that brief time. Unfortunately, Coyne became ill and could not supervise Smith any longer. She apparently needed close classroom supervision.

Smith's failure to discipline her class properly has been set forth at length in discussion of prior charges, as has her failure to teach effectively.

Therefore, while I am satisfied that Smith's classroom did not always meet Lane's high standard of neatness, I am disinclined to hold that a messy classroom is a

ground for determining that a teacher is not competent. If a good teacher kept a messy classroom, I am sure it would only be the occasion for some good natured banter between the teacher and the administration.

LEGAL STANDARD

In the recent case of *In the Matter of the Tenure Hearing of Charles Courtney,* 92 *N.J.A.R.* 2d. (EDU) 399, ALJ Springer summarized the holding in *Redcay vs. State Board of Education,* 130 *N.J.L.* 369, 371 (Sup. Ct. 1934), aff'd 131 *N.J.L.* 326 (E & A 1944). That case has long stood for the proposition that "(u)nfitness for a position in the school system may be shown by a single incident, if sufficiently flagrant, but is 'best shown by numerous incidents.'" *Courtney, supra.* p. 403. In addition, ALJ Springer cites *In re Alfano,* 1979, *S.L.D.* ___ (Comm'r Oct. 23, 1979) for the proposition that "(s)chool officials need not wait until some child is badly injured before removing a teacher prone to violence." *Courtney, supra.,* p. 403.

In this matter the BOE has established by a preponderance of the evidence that Smith punished children by pushing their heads down on desks, by handling them roughly, by tugging and pulling on their clothes and arms, by withholding lunch and bathroom privileges from them and by speaking to them in a demeaning manner, causing physical, mental and emotional pain, in violation of the statute prohibiting corporal punishment, *N.J.S.A.* 18A-6.1. These were repeated acts over a period of months. These are also acts which constitute conduct unbecoming a teacher. I therefore **CONCLUDE** that Smith committed conduct unbecoming to a member of the teaching profession.

The tenure statute includes "other just cause" as a ground for dismissing a tenured teacher. *N.J.A.C.* 18A:6-10. These grounds are not defined in the statute. Under *Redcay, supra.* 371, individual incidents of unfitness may be viewed in the conglomerate.

The BOE has established here, by a preponderance of the credible evidence, that Smith was frequently both absent and tardy to an excess, that she failed to effectively and properly teach reading, failed to follow proper procedures and failed to support her students in their quest for knowledge. Finally, she failed to communicate effectively and properly with a parent and missed a parent conference.

I **FIND** and **CONCLUDE** that the BOE has demonstrated other just cause to dismiss Smith from her tenured position by a preponderance of the credible evidence.

ULTIMATE CONCLUSION AND ORDER OF DISPOSITION

For all these reasons I **CONCLUDE** that the tenure charge of unbecoming conduct is **SUSTAINED.**

I **FURTHER CONCLUDE** that there is just cause to **SUSTAIN** the tenure charges against Smith.

I **ORDER** that Millicent Smith be discharged from her teaching position in the Bridgeton School District.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

May 12, 1993
Date

Edgar R. Holmes
EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

Date

OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

FOR PETITIONER:-

J.M. COYNE
REBECCA GUESS
THOMAS LANE
HERIETTA JONES
TEN STUDENTS: F.M., L.S., J.C., S.J., E.G., S.M. M.F., L.F., J.H., AND S.B.
JANET PAGE
JERRY BENFER
WARREN BURCH
BARBARA CUFF
B.M. THE MOTHER OF F.M.
KENNETH KLING
CAROL BOWE
SANDRA RICHTER

FOR RESPONDENT:

EVELYN GILBERT
FLORINE DAVIS
CYNTHIA KATES
PAMELA GARWOOD
CAROLINE SMITH
MARY HALL
E.B., A STUDENT
S.B. - E.B.'S MOTHER
MATTHEW SOFF
JEAN SCHUPPAN
JEAN SCARANI
MILLICENT SMITH
JOYCE BREWER

DOCUMENTS IN EVIDENCE

FOR PETITIONER:

P-1 TWO PAGES OF A STENO PAD, PRINCIPAL'S NOTES
P-2 ONE PAGE OF A STENO PAD, PRINCIPAL'S NOTES
P-3 ONE PAGE OF A STENO PAD, PRINCIPAL'S NOTES
P-4 ANNUAL PERFORMANCE RECORD - MS. SMITH
P-5 LESSON PLANBOOK OF SMITH'S
P-6 MEMO FROM COYNE TO SUPERINTENDENT
P-7 SCHEMATIC OF DATES AND COMPLAINTS
P-8 CLASSROOM EVALUATION REPORT
P-9 LETTER SCHEDULING MEETING
P-10 LETTER SCHEDULING MEETING
P-11 LETTER SCHEDULING MEETING
P-12 SUPERINTENDENT'S SUMMARY OF THE MEETING
P-13 SMITH'S ATTENDANCE RECORD 1990-91
P-14 MRS. SCHUPPAN'S REPORT RE: ABUSE, APRIL 4, 1991
P-15 COYNE'S NOTES OF INTERVIEWS WITH CHILDREN
P-16 MEMO - COYNE TO LANE RE: ABUSE
P-17 LETTER FROM LANE APRIL 24, 1991, MONITOR SMITH
P-18 ROUGH NOTE TO SELF FROM COYNE RE: J.H.'S MOTHER
P-19 NOTE FROM JANET PAGE SCHOOL NURSE, RE: SPLIT LIP
P-20 LETTER TO COYNE RE: SMITH FROM LANE RE: INVESTIGATION
P-21 INTERDEPARTMENTAL CORRESPONDENCE OCTOBER 2
P-22 INTERDEPARTMENTAL CORRESPONDENCE OCTOBER 9
P-23 INTERDEPARTMENTAL CORRESPONDENCE FEBRUARY 28
P-24 PACING FOR READING (2 PAGES)
P-25 READING SCORES UNKNOWN STUDENT
P-26 READING SCORES UNKNOWN STUDENT
P-27 READING SCORES UNKNOWN STUDENT
P-28 READING SCORES UNKNOWN STUDENT
P-29 READING SCORES UNKNOWN STUDENT
P-30 READING SCORES UNKNOWN STUDENT
P-31 READING SCORES UNKNOWN STUDENT
P-32 READING SCORES UNKNOWN STUDENT
P-33 READING RECORDING SHEET

P-34 MEMO TO MS. SMITH RE: LACK OF SUBSTITUTE PLANS
P-35 TO P-49 MEMORANDA OF ABSENCES AND LATENESS
P-50 "SPECIAL CLASSES SCHEDULE"
P-51 OFFICE NOTES
P-52 PERSONAL HISTORY FORM
P-53 TOTAL PERFORMANCE RECORD MARCH 24, 1986
P-54 CLASSROOM EVALUATION MARCH 13, 1989 WITH REBUTTAL
P-55 ANOTHER EVALUATION FORM NOVEMBER 24, 1987

FOR RESPONDENT:

R-1 CLASSIFICATION INTERROGATORIES #17
R-2 INTERROGATORIES #48
R-3 INTERROGATORIES #49
R-4 INTERROGATORIES #17D
R-5 CERTIFICATION OF INTERROGATORIES
R-6 NOTE FROM F.M. TO SMITH
R-7 NOTE FROM F.M. TO SMITH
R-8 L.S.'s VALENTINE
R-9 ENVELOPE OF E.G.
R-10 S.F.'s NOTE
R-11 J.H.'s NOTE
R-12 J.H.'s NOTE
R-13 S.B.'S NOTE
R-14 S.B.'s NOTE
R-15 NOTE TO SMITH
R-16 NOTE TO SMITH
R-17 TO R-24 NOT IN EVIDENCE (PHOTOS OF CLASSROOM)
R-25 SUBSTITUTE'S LETTER TO SMITH JANUARY 28,1991
R-26 SUBSTITUTE'S LETTER TO LANE RE: CONFERENCE MARCH 4, 1991 (LETTER OF EXPLANATION)
R-27 E.B.'s LETTER
R-28 CURRICULUM VITAE
R-29 LETTER INDICATING HER DISEASE, FEBRUARY 1992
R-30 SUMMARY OF JANUARY 19, 1993
R-31 EVALUATION: MAY 18, 1990
R-32 EVALUATION: DECEMBER 11, 1989

R-33 EVALUATION: FEBRUARY 1, 1988
R-34 EVALUATION: FEBRUARY 25, 1988
R-35 EVALUATION: FEBRUARY 25, 1986
R-36 CERTIFICATES OF APPRECIATION FROM PARENT APPRECIATION PANEL 1987/88 SCHOOL YEAR; JUNE 8, 1988;
R-37 CERTIFICATES OF APPRECIATION FROM PARENT APPRECIATION PANEL 1988/89 SCHOOL YEAR; MAY 31, 1989
R-38 STUDENT OF THE WEEK CERTIFICATE
R-39 ALL ABOUT ME DOCUMENT
R-40 CERTIFICATE OF GOOD BEHAVIOR
R-41 BIRTHDAY CARD
R-42 LESSON PLANS FEBRUARY 19, 1990
R-43 S.J. TIME RECORD
R-44 REFERRAL FORM
R-45 WRITING ASSIGNMENTS
R-46 MRS. PIERCE'S WRITING ASSIGNMENT
R47 TO R-54 CHILDRENS' NOTES TO MS. SMITH
R-55 SQUIBBS CLASS RECORD NO. NINE
R-56 NOT ADMITTED
R-57 ATTENDANCE CARD FOR FEBRUARY 1991

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

AMENDED INITIAL DECISION
OAL DKT. NO. EDU 2838-92
AGENCY REF. NO. 59-3/92

IN THE MATTER OF THE TENURE HEARING OF MILLICENT SMITH, BRIDGETON, SCHOOL DISTRICT

A Paul Kienzle, Jr., Esquire, for petitioner, School District of City of Bridgeton (Casarow, Casarow and Kienzle, attorneys)

Kenneth A. Sandler, Esquire, for respondent, Millicent Smith (Selikoff and Cohen, attorneys)

Record Closed: March 28, 1993 Decided: May 12, 1993

BEFORE **EDGAR R. HOLMES, ALJ:**

This matter was remanded to the Administrative Law Judge (ALJ) by ORDER of the Commissioner dated July 2, 1993, for the sole purpose of "explaining to whom the ALJ referred at Pages 10 and 16 of the Initial Decision" filed on May 12, 1993.

The Commissioner refers to S.M. S.M., a student, did not testify at the hearing.

The testimony attributed to S.M. on Page 10 and commented on at Page 16 was a continuation of the testimony of E.G. who referred to S.M. in her testimony.

A reference to S.M. on Page 15 should be changed to E.G.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

7/14/93
Date

Edgar R Holmes
EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

7/19/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 21 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

psa

IN THE MATTER OF THE TENURE HEARING OF MILLICENT SMITH, SCHOOL DISTRICT OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY.	:	COMMISSIONER OF EDUCATION DECISION ON REMAND

The Initial Decision and the Amended Initial Decision rendered in this matter by the Office of Administrative Law have been reviewed. Respondent filed timely exceptions thereto pursuant to N.J.A.C. 1:1-18.4. However, while the Board sought to submit reply exceptions untimely, such request was denied.

The exceptions to both decisions aver the ALJ rendered an inconsistent and incoherent credibility determination regarding the testimony of E.G., which, when coupled with that which she casts as the ALJ's prejudicial and erroneous ruling cited in her principal exceptions, provide further grounds to overturn the ALJ's finding on Charge No. 3. Respondent submits that the ALJ's credibility findings are entitled to no deference and that an order overturning his findings and conclusions should be issued. In the alternative, respondent seeks a remand of this matter for a new hearing before a different ALJ. In support of the latter proposition, respondent cites Matter of Wolf, 231 N.J. Super. 365 (App. Div. 1989).

Because the Commissioner expressly reserved judgment on the merits of this matter until her receipt of the amended initial

decision, and for the sake of clarity in reviewing the matter, respondent's exceptions filed previously are herein restated as follows:

> [Respondent cites seven] exceptions to the ALJ's findings and conclusions on Charge No. 3:
>
> The ALJ erred in failing to administer the oath or affirmation required under N.J.A.C. 1:1-15.8 to the pupil witnesses who were the only witnesses who allegedly had personal knowledge of the allegations of Charge No. 3 on corporal punishment and related issues; accordingly, the ALJ's findings and conclusion premised on such incompetent testimony must be overturned.
>
> The ALJ erred in allowing the Board to present evidence on issues of which Respondent had received no notice in advance of hearing, thus violating the "fair notice" requirements of due process and warranting reversal of the ALJ's rulings on those allegations of the Board.
>
> The ALJ erred in failing to allow counsel for Respondent to properly cross-examine and impeach the credibility of the Board's pupil witnesses and further prejudged through a statement made on the record a significant corporal punishment issue prior to Respondent's presentation of her defense.
>
> The ALJ's credibility findings are further undermined by his reference to a witness who did not appear at hearing and his finding that this witness was credible.
>
> Respondent excepts to the ALJ's credibility findings with respect to the accusation of pupil F.M. as they are inconsistent with the testimony of the nurse whom the ALJ identifies as a corroborating witness.
>
> The ALJ erred in sustaining the Board's charges of withholding lunches as the evidence clearly showed that Respondent had deprived no one of their lunches, had used collective lunch detention for her whole class only on three occasions; further, the Board's notice was deficient on this allegation.
>
> (Exceptions, Table of Contents)

***

***Respondent excepts to all of the ALJ's findings on Charge No. 3, ID at 17. [More specifically] that the evidence does not preponderate in support of the allegation that "Smith punished children during quiet time by pushing their heads down on their desk." ***Respondent excepts to the ALJ's [disallowing] records regarding composition of the class in terms of the number of referrals to special education classes and disciplinary records [and] to the ALJ's [omitting] important facts [she avers are] critical to an assessment of Charge No. 3. (At p. 36)

***

The ALJ's findings of fact with regard to Charge No. 4 are incorrect based on the evidence adduced at hearing and, as a matter of law, fail to acknowledge the Board's obligations under the New Jersey Law Against Discrimination. (at p. 38)

***

The ALJ erred in his findings on Charge 5 on two grounds: one, that he ignored the statutory law requiring that [a tenure charge] of "inefficiency" ***[be] preceded by the statutorily required 90-day improvement period*** and therefore was not properly brought by the Board; and two, that [the ALJ] failed to consider and weigh the entirety of the evidence including but not limited to Board exhibits showing Respondent in a favorable light and the substantive testimony of Respondent. (at p. 42)

***

With respect to the ALJ's findings on Charge No. 6, Respondent first excepts to the reinstatement of [the ALJ's] ruling from Charge No. 3 on the withholding of lunches. Next, Respondent excepts to the ALJ's finding that Respondent engaged in unbecoming conduct by her "fail(ure) to properly communicate and engage in appropriate teacher/parent relations with B.M. on November 2, 1990." (ID at 25) (at p. 49)

***

Respondent excepts to the ALJ's implicit findings with regard Charge No. 7 only insofar as he states that "her failure to discipline her class properly has been set forth at length in discussion of prior charges, as her failure to teach effectively. Respondent [argues that she] has set out the substance of her exceptions on those issues, ante. (at pp. 52-53)

In summary, respondent contends she is not guilty of conduct unbecoming a teaching staff member and she excepts to the ALJ's conclusion that she should be dismissed from her tenured position in the Board's employ. The Commissioner will address such exceptions seriatim.

Respondent accurately assesses the three prongs identified by the court for the testimony of child witnesses. See State in the Interest of R.R., 79 N.J. 97, 113 (1979). However, the Commissioner is persuaded that while not entirely in keeping with the third requirement, that is, that the child understands that he will be punished in some way should he lie to the court, the ALJ's means of assuring the child would testify truthfully is deemed appropriate due to the tender age of the witnesses. In so concluding, the Commissioner notes in particular the ALJ's rationale when challenged by respondent's counsel on how he prepared the children to testify. (TR. 1/13/93 at 94-95) That the ALJ exacted a promise from the pupils to tell the truth, as a means of avoiding "scaring" or "threatening" the children does not constitute plain error on the ALJ's part in meeting the requirement to "[evince] from the witness a solemn commitment to speak the truth on pain of *** punishment." (R.R., supra, at 109) This conclusion is bolstered by recognizing that the administrative forum is a quasi-judicial one; the discussion in R.R. involved "***the circumstances under which the testimony of an infant witnesses will be deemed properly admissible in the course of a court proceeding." (emphasis supplied) (at 102) By contrast, the judgment of the ALJ presiding in an administrative hearing to determine whether an infant witness is competent to testify is entitled to considerable deference and, in

the Commissioner's judgment, has not been abused under the facts of this case. (N.J.A.C. 1:1-15.8(b)) Hence, respondent's exception in this regard is dismissed as being without merit.

Similarly, the Commissioner finds sufficient nexus between the interrogatories respondent propounded regarding alleged reports of stress incontinence among students in her class to warrant consideration of such allegations and those of the related question of alleged deprivation of lavatory privileges as part of Charge No. 3. Further, because respondent herself propounded interrogatories on the specifics of Charge No. 3, received further information regarding the second graders' bathroom habits and, in fact, conducted depositions of each child, she may not now be heard to have been surprised by the testimony adduced at hearing of these young children. Moreover, the ALJ's finding of fact regarding respondent's withholding bathroom privileges follows the ALJ's discussion of Ms. Smith's "propensity to punish and demean children.***" (Initial Decision, at p. 17) The Commissioner finds that such conclusions are part and parcel of Charge No. 3 which specifically allege that respondent "engaged in punishments of the children that were abusive" and included "acts of intimidation." (Id., at p. 2) The Commissioner finds the same conclusion must be drawn regarding respondent's objection noted in the transcripts of being surprised by E.G.'s testimony that respondent allegedly placed Sa.J. in the closet as a punishment for misbehaving.

Respondent's next two exceptions deal with credibility determinations arrived at by the ALJ regarding Charge No. 3, the first of which alleges a limitation on respondent's counsel's right of cross-examination of pupils, the second dealing with the

testimony of E.G. The Commissioner has carefully reviewed all testimony among the students in those transcripts provided, as well as the testimony of the adult witnesses, and finds, notwithstanding respondent's exceptions to the contrary, that there is more than sufficient corroboration among the witnesses to sustain a finding that respondent is guilty of the allegations set forth at page 17 of the Initial Decision. In so concluding, the Commissioner adopts the ALJ's disposition of the objections to the children's testimony as embodied in the transcript dated January 12, 1993, as well as his credibility determinations of the student testimony as embodied at pages 15-16. The Commissioner so finds cognizant of the apparent typographical error in initials regarding E.G.'s testimony. A review of E.G.'s testimony reveals that she was a credible witness, made more so by the corroboration of others.

Among those conclusions drawn by the ALJ in the initial decision regarding Charge No. 3, the Commissioner finds particularly egregious Ms. Smith's pushing pupils' heads down on the desk, on repeated occasions, as a means of quieting her young charges or as a disciplining technique. See TR. 1/12/93 at 10, 47, 55, 107-108, 125, 135, 147, 198, 201-203. The record provides abundant evidence that this demeaning behavior, in and of itself, constitutes a sound basis for dismissal. As found by the ALJ, such aspect of the conduct alleged in Charge No. 3 constitutes physical and emotional abuse and violates N.J.S.A. 18A:6-1, the prohibition against corporal punishment. Accordingly, respondent's exceptions regarding Charge No. 3 are dismissed as being without merit, and those findings and conclusions of the ALJ concerning those charges are hereby affirmed, with the clarification regarding withholding

lunches that such term "withholding lunches" shall be construed to mean that respondent detained children in her classroom during lunch period, and delayed their eating lunch as a disciplinary tactic.

Respondent's exceptions regarding Charge No. 4, dealing with alleged excessive absences and tardiness, first challenge the ALJ's findings of fact regarding the 1990-91 school year and also for school years 1986-87, 87-88, 88-89, and 89-90. In such exception, respondent suggests the correct absentee figure for the 1990-91 school year should be 20 days, but for the other years, simply states that she cannot accept the tabulations of the ALJ because the figures are, as noted by the ALJ, "difficult to reconcile." Because respondent offers no alternative numbers or proofs as to why the ALJ's calculations are in error, the Commissioner accepts those findings of fact regarding respondent's absences and tardiness for all years in question, except the 1990-91 school year. As to that school year, the Commissioner accepts, for the sake of argument, and because the ALJ conceded that one such absence in that school year may have been misstated, that 20 days is the correct figure. Nevertheless, based upon a review of such absences, the Commissioner concurs with the ALJ's finding that respondent's tardiness was excessive, that her absences were frequent and that she far exceeded the annual ten-day allotment of sick days permitted in petitioner's district.

Moreover, the Commissioner finds no merit in respondent's argument that she was entitled, as a consequence of her having had irritable bowel syndrome, to reasonable accommodation for a handicapping condition during the 1990-91 school year pursuant to N.J.S.A. 10:5-5 insofar as she has suggested no accommodation in

her exceptions befitting the condition that the Board should have observed, and also because without the transcript of Dr. Matthew Soff's testimony, it is not clear in the record whether in fact respondent did have the condition of irritable bowel syndrome, which she claims entitles her to reasonable accommodation of a handicapping condition. R-29 in evidence, a letter from Dr. Soff, dated February 20, 1992, indicates that he had seen respondent "several times during 1991 for functional bowel disease." R-30 in evidence, a later letter dated January 19, 1993 addressed to respondent's attorney, indicates that as of February 1991, her diagnosis was functional bowel disease, but that that condition improved by June 14, 1991. By December 4, 1992, she had developed irritable bowel syndrome, but as of January 19, 1993, the doctor's diagnosis of respondent's condition referred to functional bowel disease, not irritable bowel syndrome. Moreover, the physician indicates that treatment of functional bowel syndrome "is easily controlled with diet, medical follow up, medical support and simple non-addicting medication." (R-30, at p. 2) The doctor concluded "[h]er prognosis is actually quite good from a functional bowel point of view" and further that "***there is no reason why she should not be able to carry out her activities as a full time elementary school teacher."(Id.) Hence, even granting, arguendo, that the ALJ erred in stating that "[t]he Board of Education pointed out that Smith only sought Soff's advice after she was removed as a classroom teacher and has not regularly consulted him since" (Exceptions, at p. 39, quoting Initial Decision at p. 19), respondent has failed to demonstrate that she suffered from any

disorder for which N.J.S.A. 10:5-5 applies, or that the Board failed to provide reasonable accommodation of any such handicapping condition.

Respondent's exceptions to Charge No. 5 first allege that the charges of this count should have been filed as an inefficiency charge, with a 90-day improvement period, not an incapacity charge. Respondent charges that the ALJ did not consider this argument in the initial decision. In this regard, the Commissioner first notes that Charge No. 5 states:

> At Cherry Street School during the 1990-91 school year, Ms. Smith failed to provide proper teaching to students at the Cherry Street School, failed to teach effectively, failed to follow routines required for effective teaching and guidance of students in her care. Her actions in failure to follow routines, her extremely poor classroom evaluations and failure to support students in their quest for knowledge make it clear that Ms. Smith should be terminated as a teaching staff member. (Initial Decision, at p. 3)

The Commissioner further observes the distinctions among inefficiency, incompetency and incapacity. Incapacity connotes the presence of a physical or mental condition or sickness which prevents the individual from performing the duties of the position. The record herein presents no proof that respondent has lost the physical or mental capacity to perform as a teaching staff member. However, respondent does aver that the district has charged her with incompetency instead of inefficiency. The standard for distinguishing between the charges of inefficiency and incompetency has been addressed in the case captioned In the Matter of the Tenure Hearing of Inez McRae, School District of Trenton, 1977 S.L.D. 572, 584 wherein it is stated:

> ***Notwithstanding respondent's contention that inefficiencies did, in fact, exist, the hearing examiner finds that respondent demonstrated gross

> ineptness in performing the responsibilities of a classroom teacher. The testimony of the supervisors clearly portrays this ineptness. Whether the ineffectiveness in this case results from lack of effort or from indifference, the hearing examiner finds that respondent failed to measure up to even minimal standards of satisfactory teaching. Respondent's lack of adequate and thorough planning demonstrated a dereliction of duty. Her lack of discipline and class control was so gross as to rise above a charge of minimal inefficiency to incompetency.***

See also In the Matter of the Tenure Hearing of Edna Booth, School District of the Township of West Orange, 1985 S.L.D. 722, 759:

> In the Matter of the Tenure Hearing of Patricia Nafash, Ridgefield Bd. of Ed., decided by the Commissioner March 12, 1984, summarizes well the important distinction between an incompetency charge as opposed to one of inefficiency. It reads in part:
>
> > "***The charge of incompetence, as distinguished from the charge of inefficiency, presumes that the proofs in support of the charge will demonstrate that respondent is so lacking in competency to perform the responsibilities of classroom teacher that the requirements of the 90-day improvement period, required for a charge of inefficiency, N.J.S.A. 18A:6-11, would be a useless exercise. (See, Tenure Hearing of Inez McRae, 1977 S.L.D. 572, 584.) Incompetence requires proof that that the affected person, regardless of the assistance offered by certified supervisors, does not have the ability or capacity to be an effective teacher. School Dist. of Tp. of East Brunswick, Middlesex Cty. v. Renee Sokolow***."

The Commissioner's review of the record and transcripts submitted in this matter leaves no doubt that a charge of incompetency, not inefficiency, is appropriately levied against respondent in this matter. The ALJ summarized well the underlying infirmity in respondent's teaching where, at page 17 of the initial decision, he stated: "Smith's propensity to punish and demean

children was observed by Principal Coyne (See Charge No. 4). Smith's propensity to punish and demean children is also implicit in her rage when [Vice Principal] Guess did not punish the two children who fought in Smith's classroom in a manner satisfactory to Smith even though the actions of Guess were reasonable and well taken." The totality of this record makes it entirely clear that respondent demonstrated gross ineptness in performing the duties of a classroom teacher. The mismanagement of her classroom, particularly regarding disciplining students, combined with her instructional deficiencies, and her inappropriate actions with colleagues and parents strongly demonstrate that affording a 90-day improvement period pursuant to the filing of inefficiency charges would have been useless. She so finds, notwithstanding respondent's exceptions to Charge No. 5 , and noting that there was inconsistent testimony on exactly how many readers she in fact accomplished before being removed out of the classroom in March of 1991. See Initial Decision at pp. 19-21.

Consequently, the ALJ's recommendation to dismiss respondent from her tenured teaching position in the employ of the Board is adopted for the reasons expressed by the ALJ and clarified herein. Accordingly, IT IS ORDERED that respondent be dismissed from her teaching position as of the date of this decision. The matter shall be forwarded to the State Board of Examiners pursuant to N.J.A.C. 6:11-3.6(a)(1) for review and action as it deems appropriate.

COMMISSIONER OF EDUCATION

SEPTEMBER 1, 1993

DATE OF MAILING - SEPTEMBER 1, 1993

158-93

EDU #2838-92
C # 158-93
EDU #6759-93
C #212+-93
SB # 55-93

IN THE MATTER OF THE TENURE :
HEARING OF MILLICENT SMITH, : STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF THE CITY : DECISION
OF BRIDGETON, CUMBERLAND COUNTY. :
:

Remanded by the Commissioner of Education, July 2, 1993

Decided by the Commissioner of Education, September 1, 1993

For the Petitioner-Appellant, Millicent Smith, pro se

For the Respondent-Respondent, Casarow, Casarow & Kienzle (A. Paul Kienzle, Jr., Esq.)

On March 3, 1992, the Board of Education of the City of Bridgeton (hereinafter "Board") certified seven tenure charges against Millicent Smith (hereinafter "respondent"), a tenured teaching staff member. Those charges, as delineated in the Board's Statement of Evidence in Support of Charges, included "conduct unbecoming a teaching staff member, insubordination, incapacity, incompetency, unfitness for service, neglect, and other just cause."

On May 12, 1993, an Administrative Law Judge ("ALJ") concluded that the Board had proven by a preponderance of the credible evidence that respondent was guilty of unbecoming conduct in that she had "punished children by pushing their heads down on desks, by handling them roughly, by tugging and pulling on their clothes and arms, by withholding lunch and bathroom privileges from them and by speaking to them in a demeaning manner, causing

APRIL 13, 1994

physical, mental and emotional pain...." Initial Decision, slip op. at 26. The ALJ further concluded that the Board had established that respondent "was frequently both absent and tardy to an excess, that she failed to effectively and properly teach reading, failed to follow proper procedures and failed to support her students in their quest for knowledge..." Id. The ALJ recommended that respondent be dismissed from her tenured position.

On July 2, 1993, the Commissioner of Education remanded this matter to the ALJ for the sole purpose of clarifying the initials used for one of the child witnesses. On remand, the ALJ provided such clarification.

On September 1, 1993, the Commissioner adopted the ALJ's findings and conclusions and directed respondent's dismissal. The Commissioner found "particularly egregious Ms. Smith's pushing pupils' heads down on the desk, on repeated occasions, as a means of quieting her young charges or as a disciplining technique....The record provides abundant evidence that this demeaning behavior, in and of itself, constitutes a sound basis for dismissal." Commissioner's Decision on Remand, slip op. at 38.

The respondent, acting pro se, has filed the instant appeal from the decision of the Commissioner.

After a thorough review of the record, we affirm the decision of the Commissioner to dismiss respondent from her tenured employment, as modified herein.

We agree with the Commissioner that the Board has proven those tenure charges alleging respondent's unbecoming conduct in committing numerous acts of physical, mental and emotional abuse against her students and in failing to properly communicate with

parents, along with that charge alleging excessive absenteeism and tardiness.

However, for the reasons that follow, we reject the Commissioner's determination that the tenure charge alleging respondent's incompetency was also demonstrated by the Board in this instance. Respondent contended that Charge 5, alleging that she had failed to provide proper teaching, to teach effectively or to follow routines required for effective teaching during the 1990-91 school year, should properly have been filed as an inefficiency charge, with a 90-day improvement period. The Commissioner, however, found that the record demonstrated that "affording a 90-day improvement period pursuant to the filing of inefficiency charges would have been useless." Id. at 43. As pointed out by the Commissioner:

> The charge of incompetence, as distinguished from the charge of inefficiency, presumes that the proofs in support of the charge will demonstrate that respondent is so lacking in competency to perform the responsibilities of classroom teacher that the requirements of the 90-day improvement period, required for a charge of inefficiency, N.J.S.A. 18A:6-11, would be a useless exercise....Incompetence requires proof that the affected person, regardless of the assistance offered by certified supervisors, does not have the ability or capacity to be an effective teacher.

In the Matter of the Tenure Hearing of Renee Sokolow, decided by the Commissioner, 1982 S.L.D. 1358, 1362, aff'd by the State Board, 1983 S.L.D. 1645.

Unlike the Commissioner, however, we find that the Board failed in such proof. In support of such charge, the Board, which has the burden of demonstrating respondent's incompetency by a preponderance of the credible evidence, relied upon several letters

and performance evaluations from the 1990-91 school year, subsequent to respondent's achievement of tenure. While we find that these documents do support the conclusion of the ALJ and Commissioner that respondent failed to teach effectively and properly during that limited period, we cannot conclude on such basis that the Board demonstrated her incompetency within the tenure statute.

In In the Matter of the Tenure Hearing of Edna Booth, decided by the Commissioner, May 31, 1985, aff'd by the State Board, April 1, 1987, aff'd, Docket #A-3985-86T8 (App. Div. 1987), incompetency charges were dismissed against a tenured teacher where the deficiencies relating to the charges of incompetency in respondent's job performance were restricted to the 1982-83 and 1983-84 school years. Prior thereto, the respondent had received favorable evaluations related to her job performance. Consequently, it was concluded that the record did not demonstrate that the respondent therein was so lacking in competency that the 90-day improvement period would have been a useless exercise. See also In the Matter of the Tenure Hearing of Frank J. Napoli, decided by the Commissioner, February 16, 1988, aff'd by the State Board, December 1, 1988, aff'd, Docket #A-2301-88T3 (App. Div. 1990); In the Matter of the Tenure Hearing of April Renee Bradley, decided by the State Board, February 6, 1991.

In this case, the evidence in support of the incompetency charge does not demonstrate that respondent's teaching performance was unsatisfactory during her service in the district prior to 1990-91. Nor does that charge include such an allegation. In fact, the incompetency charge is expressly limited to her service during that one year. See Certified Tenure Charges and Statement of

Evidence in Support of Charges.[1] In view of respondent's previous service and her achievement of tenure, we cannot conclude that the Board has demonstrated that she lacked the ability to be an effective teacher.[2] Indeed, in a performance evaluation from the previous school year, respondent was described as having "developed into an effective instructor." Exhibit R-31, in evidence. Nor is there any evidence indicating the existence of some underlying condition which undermined respondent's abilities and rendered her incapable of effectively performing her duties.

Thus, under the circumstances, we find that the Board failed to satisfy its burden of proof in demonstrating incompetency, and we therefore dismiss that particular charge. While the record may well support a charge of inefficiency, such a charge could not be sustained since respondent was not afforded the written notice and a 90-day correction period required by N.J.S.A. 18A:6-11. See, e.g., In re Booth, supra. The rationale underlying this rule is that a teacher whose teaching effectiveness is called into question after years of meritorious service in a school district should, in recognition of that contribution, be afforded an opportunity to demonstrate that he or she is still capable of effective teaching. In the Matter of the Tenure Hearing of Donald Rowley, decided by the State Board, 1984 S.L.D. 2006, 2007, rev'd on other grounds, Docket #A-4666-83T7 (App. Div. 1985).

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1 While we recognize that 1990-91 apparently was the first year in which respondent was assigned to a specific classroom, we note that she had previously served in the district in an instructional capacity as a teacher of basic skills and had acquired tenure as a teacher.

2 We note that although favorable past performance does not preclude incompetency charges, it does serve to demonstrate the ability to perform satisfactorily. In re Napoli, supra.

Again, however, we fully concur with the Commissioner's conclusions on those remaining charges which were found to be proven, including unbecoming conduct. Under the circumstances, we find that dismissal of respondent from her tenured position is the appropriate penalty. See In the Matter of the Tenure Hearing of David Fulcomer, 93 N.J. Super. 404 (App. Div. 1967). Like the Commissioner, we find that respondent's conduct towards her students, as well established on the record, alone warrants her dismissal.

Consequently, as modified herein, we affirm the decision of the Commissioner to dismiss respondent from her tenured employment.

Robert A. Woodruff recused himself from consideration of this matter.

Exceptions are noted.

April 13, 1994

Date of mailing APR 15 1994

159-93

CHRISTOPHER DANIEL AND WARREN D. MOXLEY,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioners, two tenured teaching staff members, challenged hiring of out-of-district holders of county substitute certificates as football coaches alleging violation of N.J.A.C. 6:29-3.3.

ALJ found Board did violate regulation dealing with hiring of holder of county substitute certificate as athletic coach. However, since neither petitioner could be considered an applicant as of July 17, 1991, date of appointment of out-of-district applicants to be assistant football coaches, the only relief available to petitioners was to order Board to fully comply with dictates of N.J.A.C. 6:29-3.3 as interpreted by Commissioner.

Commissioner adopted determination of ALJ that Board violated applicable law and directed that Board henceforth comply with N.J.A.C. 6:29-3.3. Commissioner further affirmed determination that one petitioner effectively removed himself as candidate for coaching position by neglecting to attend interview meetings. Commissioner reversed initial decision in its determination with respect to other petitioner who remained a qualified candidate for position at issue. Board was directed to reimburse said petitioner the appropriate stipend for 1991-92 school year.

JULY 2, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9958-91
AGENCY DKT. NO. 366-10/91

CHRISTOPHER DANIEL AND WARREN D. MOXLEY,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON,
Respondent.

Kenneth I. Nowak, Esq., for petitioners (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Nicholas Celso, III, Esq., for respondent (Schwartz, Simon & Edelstein, attorneys)

Record Closed: April 7, 1993 Decided: May 21, 1993

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners, who are tenured teaching staff members of respondent, challenge the hiring as football coaches of individuals from outside of the school district, alleging a violation of N.J.A.C. 6:29-3.3. The matter was transmitted to the Office of Administrative Law (OAL) on October 25, 1991, for hearing as a contested case. It was then scheduled for a telephone prehearing conference, which occurred on January 21, 1992. Following the prehearing conference, a prehearing order was entered on January 24, 1992, settling the procedures to be followed in this matter. A hearing was scheduled for May 29, 1992.

In accordance with the prehearing order, a Joint Stipulation of Facts with attached joint exhibits (Exhibit C-1) was submitted to the Administrative Law Judge (ALJ) on May 22, 1992.

A hearing was held and concluded on May 29, 1992. At the conclusion of the hearing, the parties requested that the record remain open in order to afford them the opportunity to make written submissions within thirty days after their receipt of a transcript of the hearing.

Upon their receipt of the transcript in this matter, the attorneys found that the transcript of the hearing of May 29, 1992 was incomplete. Missing from the transcript was a portion of the direct examination of Brian Erickson his cross-examination, the direct and cross-examination of Chester L. Parlavecchio, and the rebuttal testimony of both petitioners.

In order to reconstruct the record of the missing portion of the transcript, the attorneys for the respective parties were directed to provide submissions and on December 30, 1992, the ALJ determined that he would be able to reconstruct the record of testimony which was not recorded at the hearing. In addition, he directed that the parties provide the written submissions, whereupon the record would close. After the receipt of final submissions in this matter, the record closed on April 7, 1993.

FACTUAL DISCUSSION

The essential facts in this matter are not disputed. As indicated above, the parties to this matter agreed to stipulate the following facts by means of a Joint Stipulation of Facts (Exhibit C-1):

Petitioner Christopher Daniel (Daniel) was certified as a teacher of social studies in August 1991 (Exhibit J-1). Petitioner Warren D. Moxley (Moxley) was certified as a teacher of science in June 1985 (Exhibit J-2).

Daniel began employment in the Irvington School District in September, 1984, as a high school history teacher, which employment has continued to the present time. He coached girls volleyball in the Irvington School district from 1985 to 1990, during which time he served as head coach. He also served as an assistant football coach from 1986 to 1991. Daniel was regularly evaluated as a coach in the years in

which he coached a sport in the Irvington School District (Exhibits J-3A through J-3G).

In or about October or November, 1990, Daniel signed an initial intention form indicating his desire to serve as assistant football coach for 1991-92, and he subsequently signed a guideline for coaches for 1991-92 (Exhibit J-4). Daniel was not appointed to the position of assistant football coach for the 1991-92 school year.

Moxley began employment in the Irvington School District in September, 1984, as a high school science teacher, and his employment has continued to the present date. He coached boys basketball in the Irvington School District from 1984-85 through 1991-92. He began coaching football in 1985-86, and has served as an assistant football coach from that date through 1990-91 school year. He was regularly evaluated as a coach in the years in which he coached a sport in the Irvington School District (Exhibits J-5A through J-5J).

In or about late February, 1991, Moxley signed an initial intention form indicating his desire to be coach in 1991-92 (Exhibit J-6). He was not appointed to the position of assistant football coach for the 1991-92 school year.

On or about March 8, 1991, the Irvington School District posted vacancies for coaching football for the 1991-92 school year, including the minimum requirements (Exhibit J-7). Requirements for the position are contained in the March 8, 1991, posting of the vacancies, the job descriptions and duties for assistant coaches are set forth in the Board policy entitled "Athletic Coach" (Exhibit J-8) and in the duties of assistant coach (Exhibit J-9).

On June 12, 1991, the Board of Education approved the hiring of five assistant football coaches for the 1991-92 school year, all of whom were then teachers in the school district (Exhibit J-10). On July 17, 1991, the Board of Education approved the hiring of four additional assistant football coaches for the 1991-92 school year. They were Mark Parlavecchio, Louis Paradiso, Ralph Pacifico and Frank Mattiace (Exhibit J-11). Mr. Pacifico had experience as a football assistant for one year at West Orange High School, a baseball assistant for one year at Montclair Academy. Mr. Mark Parlavecchio had experience as a football assistant for four years at Bloomfield High School and as a wrestling assistant for two years at Nutley High School. Mr. Paradiso had experience as a football assistant for two years at Arson-Neuman College and for four years at Bloomfield High School. Mr. Mattiace had experience as a football

assistant for one year at Montville High School and for one year at Bloomfield High School.

The named individuals were not teaching-staff members or otherwise employed by the Irvington School District at the time of their coaching appointments or during the 1991-92 school year. Mr. Parlavecchio is a dentist, Mr. Paradiso and Mr. Mattiace are self-employed.

On September 4, 1991, respondent applied to the county superintendent for approval to hire Mark Parlavecchio as an assistant football coach (Exhibit J-14). Approval was issued by the Essex County Superintendent of Schools on or about September 21, 1991 (Exhibit J-15). On September 4, 1991, respondent also applied for approval to hire Mr. Paradiso as a football coach (Exhibit J-16). Approval was issued on or about September 17, 1991 (Exhibit J-16A). Respondent also applied for approval to hire Mr. Pacifico as an assistant football coach. Approval was issued on or about October 4, 1991 (Exhibit J-17). On December 4, 1991, respondent applied for approval to hire Mr. Mattiace as an assistant football coach (Exhibit J-18). Approval was issued on or about December 13, 1991 (Exhibit J-19).

A county substitute teacher certificate was issued to Mr. Mattiace on or about November 12, 1991 (Exhibit J-20), to Mr. Parlavecchio on or about October 31, 1988 (Exhibit J-21), to Mr. Paradiso on or about October 31, 1988 (Exhibit J-22), and to Mr. Pacifico on or about September 25, 1989 (Exhibit J-23).

The stipend paid to each assistant football coach in 1991-92 was $2,933, except to Mr. Pacifico who was paid $2,582.

The first and only witness called by petitioners as a part of their direct case was Edward T. Ryscavage, Jr. In addition to being an English teacher in respondent's school district, he was the head football coach for five years and was previously assistant football coach for six years. In addition, he was girl's soccer coach for a total of seven years. He was also head girl's basketball coach. He served as head football coach from 1986 through 1990.

Mr. Ryscavage testified that he never had any problems with the performance of either of petitioners. He identified certain board of education policies, which set forth the qualifications for coaching (Exhibit J-8). He indicated that there is no reason why either of petitioners was not qualified.

On cross-examination, Mr. Ryscavage testified that he was told on March 6, 1990, by Athletic Director Bruce Essing that he would not be reappointed as head football coach. Various reasons were given to him, including the fact that a change was needed in the football program and there was a "black/white situation." However, Mr. Ryscavage indicated that he did not know the reasons for his being replaced. He also testified that he considered each and every one of the duties set forth in the Irvington Board of Education policy with respect to athletic coaches (exhibit J-8), in order to complete the evaluations of petitioners. He also indicated that he used the duties of an assistant coach, which is included in the coaching handbook and which was initiated in 1978 (Exhibit J-9), in order to evaluate petitioners. He stated that all of the assistant coaches received this list of duties and he took all of the items in this list of duties into account when he evaluated petitioners.

Bruce Essing, Athletic Director at Irvington, testified for respondent. He indicated he became athletic director in November 1989, and that he had been a teacher and an assistant football coach. He described the procedure by which applications and appointments for coaching were made. He testified that the head coaches of the various teams would ask all current assistants if they desired to be considered for a position the following year. He would then meet with the athletic committee of the school board to discuss what positions were available and review the list of applicants. Mr. Essing indicated he would make recommendations for appointments. He admitted receiving a form from both Moxley (Exhibit J-6) and Daniel (Exhibit J-4), indicating their desire to serve in an assistant coaching position for football for the 1991-92 school year.

In December, 1990, Mr. Essing recommended petitioners for assistant football-coaching positions for the 1991-92 school year. However, in March 1991, respondent's athletic committee expressed dissatisfaction with the football program and the team's record. The committee's concerns included the lack success of the program, safety of concerns for the participants, academic problems, lack of success in the non-varsity teams and lack of college recruitment of student athletes. In particular, he testified that team members suffered an unreasonably high number of injuries which caused the committee to focus on both student safety and academics. Accordingly, Mr. Essing's recommendations were withdrawn, the application process was opened and it was decided to post all football-coaching positions to see who would apply. The posting was made (Exhibit J-7) and Mr. Essing testified that he

spoke to all of the coaches from the prior season and urged them to remain interested and keep their applications pending.

In June, 1991, Chester L. (Chet) Parlavecchio was hired as the new head football coach to replace Mr. Ryscavage. Guidelines for the assistant position were developed and Mr. Essing met with all candidates and had them sign that they would agreed to the guidelines. These guidelines were never approved by the school board.

Mr. Essing testified that Moxley twice failed to appear for a scheduled meeting with him to discuss these guidelines, but Moxley remained a candidate for the position. He indicated in late June or early July, 1991, when the final decisions were being made about the assistant football-coaching positions which were still available, both petitioners remained as candidates and both were considered, although they were rejected.

As a result of discussions with the new football coach, guidelines were developed for assistant football coaches (Exhibit J-4B). Mr. Essing then arranged for meetings with applicants for assistant football coaches and for the purpose of discussing these guidelines. However, he indicated that he did not meet with Moxley. There were two appointments made, but Mr. Moxley failed to attend and he did not complete and sign the guidelines (Exhibit J-4B).

Mr. Essing also testified that he met with Brian Erickson, who advised him that Moxley missed every Tuesday football practice in order to attend graduate school. He was advised that Moxley's graduate course commenced at 5 p.m. and that practice started at 4 p.m. He indicated that the guidelines for coaches was prepared because of Moxley's failure to attend practice.

Mr. Essing also testified that the eighth grade football program under Moxley's direction was being run in a slip-shod fashion. There were poor techniques in tackling and he was concerned about the safety of participants. In addition, Head Coach Ryscavage stated to Mr. Essing during the 1989 season that he did not know what offense Mr. Moxley was running because it was not that which was designed by Mr. Ryscavage.

Mr. Essing indicated that the minimum requirements for coaches as set forth in the announcement of March 8, 1991 (Exhibit J-7) was not met by Moxley.

Accordingly, he withdrew his recommendation to hire Moxley in 1991. On the other hand, Mr. Essing indicated that he was impressed by the applications of those individuals who were eventually appointed as assistant football coaches (Exhibits J-12A, 12B, 12C and 12D).

Mr. Essing testified with respect to Mr. Daniel, that while he was included in his original recommendation, that there were letters in the file indicating that he exhibited a less than professional demeanor. It was indicated that Mr. Daniel was involved in unsportsmanlike conduct and used profanity. Another factor which was disappointing was that prior to the 1990 season, there is an elementary football clinic and that Mr. Daniel failed to attend the clinic, even though his attendance had been approved. In particular, other than coaching football at Irvington, Daniel had no strong football background and had only played high school junior varsity football.

Mr. Essing testified that he interviewed all applicants, including Daniel. He indicated that Daniel said he did not believe that he would be able to work well with the new head coach. After the appointment of other applicants, Mr. Essing indicated that Daniel filed a grievance. However, Mr. Essing indicated that Daniel stated to him that if he had been appointed as assistant football coach, he would not have accepted.

On cross-examination, Mr. Essing admitted that the school district advertised in the newspaper only for the head football coach and not for assistant football coaches.

Mr. Essing testified that when he first met with new coach Chet Parlavecchio, the new coach was very concerned about the quality of the assistants. They both wanted to find the nine best qualified assistants. He indicated that some of the previous assistant coaches were satisfactory and met the necessary standards. In order for the four additional coaches to be hired, Mr. Essing indicated that respondent had to get the county superintendent to approve before they reported to work. All four were paid in December, 1991. All were told that they were hired subject to paperwork and they were not permitted on the field to coach until the county superintendent's approval had been obtained. Mr. Essing indicated that Mark Parlavecchio was on the field without county superintendent approval until November 21, 1991, and he also admitted the others were on the field prior to approval.

Mr. Essing indicated that weight was given to a New Jersey teaching certificate and that no greater weight was given to a substitute teaching certificate than to a regular teaching certificate. He indicated that Mr. Paradiso, to his knowledge, was employed as a substitute during the school year. He indicated that candidates for the positions must satisfy the qualifications of the district in order to be appointed. He admitted that the guidelines (Exhibit J-4B) were never adopted or approved by the Board of Education, but they were what was expected of the assistant coaches for the upcoming season. He felt that these are requirements for assistant coaches which should be expected by every school district for every year.

Mr. Essing testified that he discussed the assistant coaches with the new head coach and that the new head coach felt that some of them did not have a commitment and a dedication to the game. He also indicated that these had limited knowledge and he called them "check-cashers." He testified that the athletic committee meeting discussed four concerns. These were the football team's win-loss record, community relations, college success, and lack of supervision and control over the sub-varsity level with participants not being taught fundamentals. He indicated that the four outside appointees had superior qualifications. However, he admitted that the four outside coaches did not sign the guidelines (Exhibit J-4B).

On redirect, Mr. Essing indicated that the four outside appointees who were on the field during practices were acting under the supervision of the head football coach. He also indicated that when application was made of the county superintendent for approval, each of the four had their substitute certificates (Exhibits J-20, J-21, J-22, and J-23). He indicated that all four were willing to adhere to the guidelines.

Guy Charles Ferri, Assistant Superintendent of Schools, indicated that he serves in a dual capacity as assistant superintendent for personnel and as the superintendents representative to the athletic committee. He is the immediate supervisor of the athletic director. His primary goals are to raise the level of personnel and the expectations of personnel. He indicated that the major focus was on greater student safety and greater academic achievement through a rise in the level of athletics. Because of the existing program, very few children who were interested and eligible were actually participating in athletics, and the focus was on safety and academics.

Mr. Ferri stated that the four appointments were with his concurrence. He was looking for individuals who could teach proper techniques for safety reasons. He was impressed with their dedication, knowledge, success, safety and prior involvement with the new head coach in a successful program. He felt that the four appointees were better qualified than the petitioners. He indicated that the evaluations of petitioners were clearly made without much thought and with no depth into what went into them. He indicated that Moxley was not qualified because he was not dedicated and has insufficient knowledge to fulfill the duties of the position. However, he felt Moxley was qualified to be an assistant basketball coach. In addition, he felt that Daniel was not dedicated and had insufficient knowledge to be qualified to be a football assistant coach.

Brian R. Erickson was called to testify in this matter. He indicated that he was as assistant football coach in 1990 and he worked with Moxley. They worked together in developing the athletic skills of all eighth grade students in the district. Of the forty to forty-five who showed up at first, twenty to twenty-five students remained and were academically and physically eligible to participate in football.

Mr. Erickson testified that his and Moxley's duties were to supervise the students getting ready, handing out equipment to them, explaining the use of equipment and supervising safety at practices. They supervised the prepractice warmup and they reviewed the fundamentals of the game.

Mr. Erickson testified that he would get out of school at 3:10 p.m. and would arrive at the practice site at 3:30 p.m. Practice was scheduled to start at 4:00 p.m. and it lasted one hour until the football helmets were received in October, 1990, at which point practices lasted one and one-half hours. It would then take approximately twenty minutes to get everyone out of the practice facility, and generally all of the participants were out by 5:45 p.m.

Mr. Erickson testified that from October to November 1990, Moxley left football practice around 5:00 p.m. once every week on Tuesdays. He testified that he spoke to Mr. Essing about this situation but that he never spoke to Moxley. He indicated that it was not a comforting feeling to be left alone to supervise the practices and that he became angered. It was strenuous and tiring since he was a new teacher. However, he also indicated that he was able to handle the situation.

Mr. Erickson testified that he reapplied for the position of assistant football coach for the 1991-92 season but indicated to Essing that he was not interested in coaching the eighth grade level because he wanted to be involved with the varsity. He ultimately decided that he did not want to coach any longer, and withdrew his name from consideration.

On cross-examination, Mr. Erickson indicated that the team got their football helmets about the first week of October, 1990, at which time they began practicing until 5:30 p.m. He further indicated that he expressed his concern to Mr. Essing in October, 1990, as to Moxley's leaving early.

Mr. Erickson testified that when Moxley was present that they got along well. He indicated that he had no problems with Moxley when he was there and he further indicated that Moxley was familiar with football fundamentals.

Chester L. Parlavecchio testified that he was employed as a physical education teacher and head football coach commencing in May or June, 1991. He indicated that he interviewed Daniel in June, 1991. At that time, Daniel told him that he was not sure he wanted to continue coaching. He indicated that at the time of the interview there was only one month left before football season would commence and that there was a lack of interest on the part of Daniel.

On cross-examination, Mr. Parlavecchio indicated that he discussed the football program with Daniel. He further indicated that Daniel got up and walked out of the meeting after saying that he was not sure he wanted to continue coaching.

On rebuttal Daniel testified that when he met with Coach Parlavecchio in early June, 1991, they talked about both the problems and the positives of the football program at Irvington. He indicated that he had been connected with the football program for six years. He felt that the students participating in football were lacking in their diets and did not have sufficient calcium. In addition, there were too many transient students.

Daniel testified that when he was asked if he would like to continue as an assistant football coach, he responded that he was not sure at this time because of personal problems. He then indicated that Coach Parlavecchio said that the coach would get back to him. However, Coach Parlavecchio never did get back to him.

Daniel denies walking out of the meeting. He eventually was advised by Mr. Essing on the next to last or last day of the school year that he was not being rehired.

On cross-examination, Daniel testified that he stated in responding to coach Parlavecchio "I am not sure, I need more time to make a decision". He reiterated that Coach Parlavecchio was to get back to him.

On rebuttal, Moxley testified that in the spring 1991, he was a teacher in the school district and he submitted his letter of intent to serve as an assistant football coach for the 1991-92 season. He indicated that he saw Mr. Essing in the halls of the school and Mr. Essing never said anything to him about missing any meetings or that he was directed to attend any meetings with him. Moxley admitted that he did not meet with Essing and denies that he was directed to meet with him or that he missed any such meetings. He indicated that he was interviewed by Coach Parlavecchio.

On cross-examination, Moxley testified that he did not remember any meeting with Mr. Essing being brought to his attention, but cannot say that it never happened. He further indicated that it is possible that such a meeting was scheduled but he does not recall. Finally, he indicated that he was pretty sure that if a meeting was scheduled he would have made it, but that he cannot swear to this under oath.

LEGAL DISCUSSION AND ANALYSIS

The employment of coaches and staff in a school district is a prerogative of the local board of education. N.J.S.A. 18A:11-1. Tenure does not attach to a coaching position, and a teacher has no right to employment in a coaching position. Koslick v. Bd. of Ed. of the Twp. of Edison, decided by the Commissioner August 20, 1986, rev'd. State Board, April 1, 1987, aff'd N.J Superior Court, Appellate Division, November 18, 1987.

In selecting coaches, a district board of education must be guided by N.J.A.C. 6:29-3.3, which states:

> (a) Any person not certified as a teacher and not in the employ of a district board of education shall not be permitted to organize public school pupils during school time or during any recess in the school day for purposes of instruction, or coaching or for conducting games, events or contests in physical education or athletics.

(b) School districts shall be permitted to employ any holder of a New Jersey teaching certificate to work in the interscholastic athletic program provided that the position has been advertised.

(c) In the event there is no qualified and certified applicant, the holder of a county substitute certificate is authorized to serve as an athletic coach in the district in which he or she is employed for a designated sports season, provided that:

1. The district chief school administrator demonstrates to the county superintendent that:

   i. The vacant coaching position had been advertised; and

   ii. There was no qualified applicant based on the written standards of the district board of education;

2. The district chief school administrator will provide a letter to the county superintendent attesting to the prospective employee's knowledge and experience in the sport in which he or she will coach; and

3. Approval of the county superintendent shall be obtained prior to such employment by the district board of education. The 20-day limitation noted in N.J.A.C. 6:11-4.4(i) shall not apply to such coaching situations.

The first issue to be resolved is whether petitioners were, in fact, applicants for the position for assistant football coach so as to preclude the hiring of holders of a county substitute certificate under the provisions of N.J.A.C. 6:29-3.3(c). In the case of Daniel, he admitted that at the time that he was interviewed by Coach Chet Parlavecchio that he was not sure if he wanted to be an assistant football coach and that he needed more time to make his decision. He indicated that Coach Parlavecchio was to get back to him, although why this was necessary or appropriate is unclear. It would seem that if Daniel was the one who was to make a decision as to whether he wanted to be considered for the position, that the obligation was on him to notify Coach Parlavecchio of his decision.

Moxley testified on rebuttal that he never had a meeting with Mr. Essing brought to his attention. On cross-examination, he further elaborated that he does not remember that any such meeting was scheduled but he cannot say it never happened. He further indicated that it was possible that he was notified of such a meeting but he does not recall. Mr. Essing indicated that each of the applicants for the position was to meet with him to go over the guidelines and was requested to

indicate whether they would accept these guidelines. He further indicated that Moxley missed two scheduled meetings.

In order to be an applicant for employment or a position, something more than merely calling oneself an applicant is required. If interviews or meetings are scheduled in order for an applicant to be considered for the position, an applicant is required to attend such interviews and meetings. At such meetings, the applicant is required to affirmatively indicate a continuing interest in the position. Common sense dictates that if an applicant for a position fails to attend interviews or meetings for a position, or attends such interviews or meetings but indicates an unwillingness to accept the position, such an individual has an insufficient basis to claim status as an applicant for the position.

Based upon the foregoing, I **FIND** that neither Daniel nor Moxley were applicants for the position of assistant football coach as of July 17, 1991.

The determination that petitioners were not applicants for the position of assistant football coach does not conclude this matter. In the petition of appeal, petitioners assert that respondent violated the Education laws, and N.J.A.C. 6:29-3.3 in particular, and seek a finding to that effect. Under the provisions of N.J.A.C. 6:29-3.3(c), if there is no qualified and certified applicant for a coaching position, the holder of a county substitute certificate may serve as a coach if the district chief school administrator demonstrates to the county superintendent that the vacant coaching position has been advertised and demonstrates that there was no qualified applicant based on the written standards of the district. In such a case, the district chief school administrator is required to provide a letter to the county superintendent attesting to the prospective employee's knowledge and experience in the sport. Finally, approval of the county superintendent is required to be obtained prior to such employment by the district.

I **FIND** that respondent failed to comply with the requirements of N.J.A.C. 6:29-3.3(c)1.i. by failing to advertise for the vacant assistant football coach's positions as required. As was testified to by Mr. Essing, the school district advertised in the newspaper only for the head football coach position and not for assistant football coaches.

Additionally, I **FIND** that respondent violated the provisions of N.J.A.C. 6:29-3.3(c)3 by employing four assistant football coaches prior to receiving the approval

of the county superintendent before such employment. While there was no direct testimony as to when each of the four assistant coaches were on the field, it was admitted by Mr. Essing that each of them was on the field prior to the county superintendent's approval. However, he further testified that the four outside appointees were acting under the supervision of the head football coach and that when the applications were made for the county superintendent's approval, each of the four had their substitute certificates. The 1991 football schedule reveals that football practice commenced on August 17, 1991 (Exhibit J-13). The county superintendent approved Mark Parlavecchio on November 21, 1991 (Exhibits J-15 and J-16), Mr. Paradiso on September 17, 1991 (Exhibit J-16 and J-16A), Mr. Pacifico on October 4, 1991 (Exhibit J-17), Mr. Mattiace on December 13, 1991 (Exhibits J-18 and J-19).

Since there have been findings that respondent violated the regulation dealing with the hiring of a holder of a county substitute certificate as an athletic coach, the next issue to be resolved is what remedy is available under these circumstances. In Capraro v. Woodbridge Tp. Bd. of Educ., 91 N.J.A.R.2d (EDU) 17, the ALJ and the Commissioner of Education found that the board of education acted in violation of this regulation by employing an out-of-district applicant when an in-district applicant was not otherwise disqualified from being named to the coaching position. However, because the in-district applicant who was improperly denied the position of coach was not a named petitioner, it was determined that he was not entitled to relief in that matter. Accordingly, the only relief provided in that matter was to order the board of education to fully comply with the dictates of regulation as interpreted by the Commissioner of Education in Chambers v. Bd. of Educ. of the Twp. of Neptune, 1985 S.L.D. 1379. In view of my prior finding that neither of petitioners was in fact an applicant as of July 17, 1991, which is the date of appointment of out-of-district applicants to be assistant football coaches, the only relief available to petitioners in this matter is to order the respondent to fully comply with the dictates of N.J.A.C. 6:29-3.3 as interpreted by the Commissioner of Education.

DECISION AND ORDER

Based upon the foregoing, it is hereby **ORDERED** that the relief sought by petitioners Daniel and Moxley, directing that they be instated to the assistant football coach positions for 1991 and be paid the stipends lost, plus interest, is hereby **DENIED**. It is further **ORDERED** that respondent Board of Education of

Irvington is hereby directed to fully comply with the requirements of N.J.A.C. 6:29-3.3 as interpreted by the Commissioner of Education.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 7th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 21, 1993
Date

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

5/25/93
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 28 1993
Date

Janice LaVecchia
OFFICE OF ADMINISTRATIVE LAW

lam

APPENDIX

LIST OF WITNESSES

For petitioners:

Edward T. Ryscavage, Jr.
Christopher Daniel
Warren D. Moxley

For respondent:

Bruce Essing
Guy Charles Ferri
Brian R. Erickson
Chester L. Parlavecchio

LIST OF EXHIBITS

C-1	Joint Stipulation of Facts
J-1	Daniel certificate as teacher of social studies
J-2	Moxley certificate as teacher of science
J-3A	Daniel evaluation April, 1985
J-3B	Daniel evaluation June 6, 1986
J-3C	Daniel evaluation November 25, 1986
J-3D	Daniel evaluation June 15, 1987
J-3E	Daniel evaluation July 10, 1989
J-3F	Daniel evaluation November 25, 1989
J-3G	Daniel evaluation November 9, 1991
J-4A	Letter of intention regarding coaching status for 1991-92 school year
J-4B	Guidelines for coaches
J-5A	Moxley evaluation February 25, 1986
J-5B	Moxley evaluation November 26, 1986
J-5C	Moxley evaluation March 11, 1987
J-5D	Moxley evaluation November 23, 1987

J-5E	Moxley evaluation February 20, 1988
J-5F	Moxley evaluation February 5, 1989
J-5G	Moxley evaluation December 1, 1988
J-5H	Moxley evaluation November 25, 1989
J-5I	Moxley evaluation 89/90
J-5J	Moxley evaluation November 19, 1990
J-6	Moxley letter of intent dated February 15, 1991
J-6B	Moxley letter of intent dated October 9, 1990
J-7	Notification regarding coaching vacancies
J-8	Board Policy number 358 regarding athletic coach
J-9	Duties of an assistant coach
J-10	Regular Board Meeting Minutes of June 12, 1991 (excerpt)
J-11	Regular Board Meeting Minutes of July 17, 1991 (excerpt)
J-12A	Pacifico application for coaching position
J-12B	Mark Parlavecchio application for coaching position
J-12C	Paradiso application for coaching position
J-12D	Mattiace application for coaching position
J-13	1991 football dates and schedule
J-14	Application and approval to hire Mark Parlavecchio
J-15	Coaching approval for Mark Parlavecchio
J-16	Application for approval to hire Paradiso
J-16A	Coaching approval dated December 17, 1991 for Paradiso
J-17	Coaching approval dated October 4, 1991 for Pacifico
J-18	Application for approval to hire Mattiace
J-19	Coaching approval dated December 13, 1991 for Mattiace
J-20	Substitute teacher certificate for Mattiace dated November 12, 1991
J-21	Substitute teacher certificate for Mark Parlavecchio dated October 31, 1988
J-22	Substitute teacher certificate for Paradiso dated October 31, 1988
J-23	Substitute teacher certificate for Pacifico dated September 25, 1989

CHRISTOPHER DANIEL AND WARREN D. MOXLEY,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Pursuant to N.J.A.C. 1:1-18.4, timely exceptions were filed by petitioners and respondent, as was a reply to petitioners' exceptions by respondent.

In their exceptions, petitioners concur with the ALJ's finding that respondent Board violated the provisions of N.J.A.C. 6:29-3.3(c)3, but contest the finding that petitioners were no longer candidates for the positions at issue and therefore not entitled to relief as a result of the Board's improper actions. Petitioners cite to numerous places in the transcript of hearing to show unrebutted testimony from the Board's own witnesses establishing that petitioners were still being considered for the disputed positions up through and including the final selection process. This being so, it is of no import that petitioners may have missed a meeting or appeared hesitant in early interviews, assuming arguendo that these contentions are true; what matters is that they, qualified teachers from within the district, remained in

the applicant pool and were rejected by the Board in favor of sub-certified, out-of-district candidates contrary to the provisions of law.

The Board in turn argues that it did comply with law inasmuch as nowhere is it required that positions be advertised in newspapers or any other particular location, so long as the position is advertised and the Board can demonstrate that it has no qualified in-district applicants, which the Board deemed petitioners not to be in view of the lack of interest evinced in their comments and actions and in view of Athletic Director Essing's assessment that neither was sufficiently qualified.

Upon careful review of this matter, the Commissioner adopts the ALJ's determination that the Board violated controlling regulation, but rejects in part the determination that petitioners were not appplicants and so cannot claim any remedy in the instant proceeding.

With respect to the Board's actions, the Commissioner stresses that the intent and proper operation of the regulation at issue herein is well established, that athletics is part of the total educational program and, in hiring coaches, a board must first look to in-district staff, then to fully certificated staff from without the district, and only then to holders of substitute certificates as approved by the County Superintendent. John H. Chambers, Jr. v. Board of Education of the Township of Neptune, Monmouth County, 1985 S.L.D. 1363; Skip Norcross v. Board of Education of the North Hunterdon Regional High School District, Hunterdon County, 1991 S.L.D. 1154, affirmed State Board February 5, 1992; Vincent J. Capraro et al. v. Board of Education of the

Township of Woodbridge, Middlesex County, 1991 S.L.D. 1625 In the instant matter, even assuming that petitioners were not qualified candidates, the Board erred in failing to solicit teachers with standard certificates from outside the district before resorting to candidates with county substitute certification, notwithstanding any other qualifications they may hold; for this purpose, an in-district advertisement of the type relied upon by the Board is clearly inadequate and cannot serve to meet the requirements of law.* Neither was it proper for the Board to rely, as it did throughout the latter part of its application process, solely on the outside applicant pool recommended by the new Head Coach based on his prior experience in working with them. Although the record does not support any inference that the Board acted in bad faith, or indeed, out of anything more than ignorance of controlling regulation and a sincere intention to improve its sports program, the fact remains that the manner in which it proceeded was seriously flawed.

With respect to the question of the relief owed petitioners as a result of the Board's errors, review of the hearing transcript, as well as the ALJ's summations of testimony, confirms petitioners' contention that they remained applicants through the final selection process but were ultimately rejected by the Board. In determining that petitioners were not qualified, the Board relied on perceptions by Athletic Director Essing and newly appointed Head Coach

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* The Commissioner notes that this internal advertisement was apparently accepted by the County Superintendent as evidence that the position was properly advertised prior to granting approval for hiring of substitutes (Transcript, p. 163; Exhibits J-14, J-16 and J-18 do not include referenced attachments), and that such acceptance does not alter any findings herein that the Board's actions were in error.

Parlavecchio that petitioners had a less than enthusiastic attitude and did not previously perform the duties of assistant coach (Exhibit J-9) in an acceptable manner, notwithstanding prior evaluations (Exhibits J-3 and J-5) consistently indicating satisfactory performance, and on its overall desire to "revamp" the football program in light of its safety, community relations and win-loss history. In effect, as evidenced by the testimony of Essing, Parlavecchio and Assistant Superintendent Ferri, a judgment was made that petitioners, while minimally qualified, were less attractive candidates than the successful applicants. However, the law does not permit a Board to make such distinctions unless based on clearly stated and properly advertised criteria, or on reasonable expectations for candidate response to application procedures. According to the Board's promulgated criteria (Exhibits J-7, J-8, J-9, Stipulation of Facts No. 16), petitioners were qualified applicants and neither ever effectuated a formal withdrawal of application; the question thus becomes whether the Board's finding them unqualified in the final analysis was a sustainable judgment.

In this regard, the further criteria applied by Essing and Parlavecchio (Exhibit J-4B) are a valid basis for such judgment, as all applicants were notified of these expectations and made aware that they would be a condition of successful candidacy. In Petitioner Daniel's case, it is noted that 1) Daniel specifically agreed to abide by such criteria, which were prospective in nature, and that notwithstanding any equivocation in his conversation with the head coach, he never withdrew either his application or his written consent to abide by the specified guidelines. There is, therefore, no basis on which the Board could properly have found him

unqualified. In Petitioner Moxley's case, however, notwithstanding his claims to have "forgotten" whether he ever missed any appointments regarding his candidacy, Essing's testimony as to what transpired is credible and the record is clear that all candidates were informed of these appointments and their purpose. Moxley neither attended the meetings, consistently referred to in the hearing transcript as "interviews," nor offered any explanation other than that he had forgotten about them; nor did he ever sign the agreement document that would have memorialized his understanding of the district's expectations for coaching positions. While the failure of the successful applicants to sign the agreement document created an inconsistency among treatment of applicants so that Moxley's failure to sign is not in itself fatal to his candidacy, the Commissioner concurs with the ALJ that, notwithstanding his nominal meeting of the originally promulgated qualifications for Assistant Football Coach, Moxley's failure to attend two interview meetings was an entirely reasonable and proper basis for the Board to conclude that he was no longer a viable applicant.

Accordingly, the initial decision of the Office of Administrative Law is affirmed in its determination that the Board violated applicable law, and the Board is directed to henceforth comply in full with the provisions of N.J.A.C. 6:29-3.3 as interpreted in established case law. The initial decision is further affirmed in its determination that Petitioner Moxley, by his actions and omissions, effectively removed himself from viable candidacy for the positions at issue and is not entitled to relief

herein. The initial decision is reversed, however, in its determination with respect to Petitioner Daniel, as he was and remained a qualified candidate for the position at issue and is therefore due the appropriate stipend for the 1991-92 school year, which amount the Board is directed to reimburse forthwith.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 2, 1993

DATE OF MAILING - JULY 2, 1993

160-93

160-93

ANNE GRETE MAZZIOTTA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JULY 15, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8483-92
AGENCY DKT. NO. 467-9/92

ANNE GRETE MAZZIOTTA,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY,
Respondent.

Richard J. Kaplow, Esq., for petitioner
(Weinberg and Kaplow, attorneys)

Aron M. Schwartz, Esq., for respondent
(Vogel, Chait, Schwartz and Collins, attorneys)

Record Closed: June 2, 1993 Decided: June 4, 1993

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

This matter was transmitted by the Department of Education to the Office of Administrative Law as a contested case on October 29, 1992 as the result of the filing of a verified petition wherein Anne Mazziotta sought reinstatement to her position as a guidance counselor. A prehearing conference was scheduled to be conducted by the undersigned administrative law judge on February 8, 1993. However, on that date counsel advised me that the parties seriously were considering the possibility of settlement. Thus, the prehearing conference was adjourned until February 26, 1993.

Prior to the new prehearing conference date, I was advised by counsel that a tentative settlement had been reached. Thereafter, a fully executed stipulation of dismissal was submitted to me. The essential terms of the agreement provide for payment of $3,243.00 to petitioner in return for her agreement to dismiss the pending action.

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

1. The parties voluntarily have agreed to the settlement as evidenced by the signatures of counsel appearing on the stipulation of dismissal; and

2. The settlement fully disposes of all issues in controversy and is consistent with law.

I therefore **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and, accordingly, I approve the settlement and order that the parties comply with its terms and that these proceedings be **CONCLUDED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 7th Floor, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 4, 1993
Date

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

6/8/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 11 1993
Date

OFFICE OF ADMINISTRATIVE LAW

amr

JUN 2 11 16 AM '93

Attorney(s): Vogel, Chait, Schwartz and Collins

Office Address & Tel. No.: 77 Headquarters Plaza, North Tower, Morristown, NJ 07960
(201) 538-3800

Attorney(s) for Respondent

ANNE GRETE MAZZIOTTA, Petitioner, *vs.* TOWN OF BOONTON PUBLIC SCHOOLS, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY Agency Ref. No. 467-9/92 OAL *DOCKET NO.* EDU 08483-92N *CIVIL ACTION* **Stipulation of Dismissal**

The matter in difference in the above entitled action having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the same be and it is hereby dismissed without costs against either party.

Dated: May *19* 93

VOGEL, CHAIT, SCHWARTZ AND COLLINS

By _____
Aron M. Schwartz
Attorney(s) for Respondent

WEINBERG AND KAPLOW, P.A.

By _____
Attorney(s) for Petitioner

3a

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RECEIVED
MAY 28 10 46 AM '93
STATE OF

May 24, 1993

Richard J. Kaplow, Esq.
Weinberg and Kaplow, P.A.
80 Morris Avenue
Springfield, New Jersey 07081

Re: Mazziotta v. Town of Boonton Public Schools
Our File No. 13678-P

Dear Mr. Kaplow:

Enclosed please find settlement check in the above-referenced matter in the amount of $3,243.00. Also enclosed is a Stipulation of Dismissal which I ask that you sign and forward to Administrative Law Judge Weiss.

Thank you for your cooperation.

Very truly yours,

VOGEL, CHAIT, SCHWARTZ AND COLLINS
A Professional Corporation

Aron M. Schwartz

AMS:sm
Enclosure

cc: Honorable Stephen G. Weiss, ALJ √

OAL DKT. NO. EDU 8483-92

ANNE GRETE MAZZIOTTA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

Mary Lee Fitzgerald
COMMISSIONER OF EDUCATION

JULY 15, 1993

DATE OF MAILING - JULY 15, 1993

161-93

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE CITY	:	COMMISSIONER OF EDUCATION
OF GARFIELD SCHOOL DISTRICT,	:	DECISION
BERGEN COUNTY.	:	
	:	

JULY 19, 1993

OAL DKT. NO. EDU 4005-93

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE CITY	:	COMMISSIONER OF EDUCATION
OF GARFIELD SCHOOL DISTRICT,	:	DECISION
BERGEN COUNTY.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before her and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 19, 1993

DATE OF MAILING - JULY 19, 1993

162-93

162-93

ROYAL BURROWS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RAMAPO INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, former Director of Buildings and Grounds from October 1982 until September 30, 1991, filed verified complaint in Law Division of Superior Court, Bergen County,claiming tenure in Director's position because at one point during his employment he allegedly functioned without having a fixed term and was employed as janitor (N.J.S.A. 18A:17-3). Moreover, petitioner emphasized his status as an exempt fireman and argued that Board violated Open Public Meetings Act (OPMA). Petitioner sought reinstatement with compensation. Parties entered into consent order transferring to Commissioner all issues raised by petitioner in his initial complaint filed in Superior Court.

ALJ determined petitioner was employed the entire time in question for fixed periods of time. ALJ found Board at no time appointed petitioner for an indefinite period. Therefore, petitioner did not gain tenure pursuant to N.J.S.A. 18A:17-3. Nor was he tenured under N.J.S.A. 40A:14-60 in that he was not an officer. It was not necessary to determine whether petitioner was employed as janitor pursuant to N.J.S.A. 18A:17-3. ALJ concluded Board substantively complied with OPMA pertaining to the meeting held on September 30, 1991 except to extent that resolution adopted prior to going into executive session did not state the time when and circumstances under which the matters discussed therein would be disclosed to the public but that subsequent action taken by Board in public session terminating petitioner's employment should not be rendered void because of such noncompliance with OPMA. Board's motion for summary judgment was granted. Petition was dismissed.

Commissioner adopted findings and determination in initial decision.

JULY 19, 1993

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1999-92

AGENCY DKT. NO. 8-1/92

ROYAL BURROWS,

Appellant,

v.

RAMAPO INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION,

Respondent.

PeterA. Jeffer, Esq., for petitioner

Allan P. Dzwilewski, Esq., for respondent
(Green and Dzwilewski, attorneys)

Record Closed: April 21, 1993 Decided: June 4, 1993

BEFORE **DIANA C. SUKOVICH,** ALJ

PROCEDURAL HISTORY

On November 21,1991, Royal Burrows (Burrows or petitioner), filed a verified complaint in lieu of perogative writ in the Law Division of Superior Court, Bergen County, seeking relief pertaining to action taken by the Ramapo-Indian Hills Regional High School District Board of Education (Board or respondent). On January

2, 1992, a Consent Order was entered transferring the matter to the Commissioner of the State Department of Education (Department) for treatment of the matter as a petition to consider a controversy pursuant to *N.J.S.A.* 18A:6-9. The matter was thereafter transmitted by the Department to the Office of Administrative Law on March 17, 1992 for determination as a contested case pursuant to *N.J.S.A.*52:14F-1 to 13. Respondent filed an initial answer to the petition on January 30, 1991; and an amended answer, on April 23, 1992.

Telephone conferences were conducted on September 22, 1992, October 20, 1992, and March 4, 1993. Respondent filed a motion for summary decision on Februar 9, 1993. Petitioner filed a brief in opposition to the motion on March 24, 1993. The Board filed a reply on April 21, 1993, on which date the record was closed. A hearing previously scheduled for March 15, 1993 was adjourned to June 28, 1993, pending resolution of the motion in question.

NATURE OF THE CASE

Burrows was employed by respondent in the title of Director of Buildings and Grounds (Director) from October 1982 until September 30, 1991. At a meeting held on September 30, 1991, the Board terminated his employment for cause. Petitioner is an exempt fireman in the State of New Jersey and holds an exempt fireman's certificate from the Borough of Midland Park (Midland Park).

The parties dispute the nature of petitioner's employment, whether or not he achieved tenure in the position of Director, and whether or not action taken by respondent at the September 30, 1991 meeting violated the Open Public Meetings Act, *N.J.S.A.* 10:4-1-21 (OPMA). There is no dispute that the Board's action terminating Burrow's employment did not comport with statutory and regulatory requirements regarding action taken against tenured employees of local school districts.

Petitioner argues that he obtained tenure in the Director's position because, at one point during his employment by respondent, he functioned without having a fixed term; that he was employed as a "janitor" as that term is used, in *N.J.S.A.* 18A:17-3 and therefore was eligible for tenure; and that the Board violated the OPMA at its meeting of September 30, 1991. Petitioner argues for reinstatement to

the position of Director with accrued pay and benefits, granting of tenure, counsel fees and costs, and such other relief as may be warranted.

Respondent argues that petitioner was not employed as a "janitor" pursuant to *N.J.S.A.* 18A:17-3; that assuming he was, he held the position of Director for fixed terms and therefore did not attain tenure pursuant to applicable statutory provisions; and that the OPMA was not violated.

FINDINGS OF FACT

A motion for summary decision may be granted if the papers and discovery demonstrate that no genuine issue exists regarding any material fact and that the moving party is entitled to prevail as a matter of law. In order for an adverse party to prevail, it must set forth specific facts showing a genuine issue of material fact which can only be determined at an evidentiary proceeding. If the adverse party fails to meet his burden of proof, summary decision, if appropriate, shall be entered. *N.J.A.C.* 1:1-12.5. In considering motions for summary decision, any inferences of doubt regarding whether an issue of material facts exist must be construed in favor of the opposing party. *Judson v. Peoples Bank & Westfield,* 17 *N.J.* (1954).

Allan Dzwilewski (Dzwilewski), respondent's counsel, and Burrows filed certifications on behalf of respondent and petitioner, respectively. Based upon a review of petitioner's complaint, respondent's answers, and the documents filed in relation to the Board's motion for summary decision, I **FIND** the following to be **FACTS.**

Petitioner joined the Midland fire company in May 1960. Petitioner became an exempt member of the Midland fire department in May of 1968.

The formal job description of the position of Director is as stated in Exhibit A to Dzwilewski's certification. Burrows was initially employed by the Board in the position of Director in October 1982. By resolution adopted on October 18, 1982, the Board appointed Burrows to the position of Director for a period of twelve months for the period November 1, 1982 until June 30, 1983, at an annual prorated salary of $27,000.

The Board reappointed Burrows, at a meeting held on November 14, 1983, for the 1983-84 school year, at an annual salary of $29,320. He was reappointed on June 25, 1984 for the 1984-85 school year, with an annual salary of $31,372. At a meeting held on June 24, 1985, the Board reappointed petitioner to the Director position for the 1985-86 school year. His salary was to be determined upon the completion of renegotiations. On March 24, 1986, the Board determined to reappoint petitioner to the same position for the 1986-87 school year, at an annual salary of $42,175. He was reappointed at a meeting of the Board on June 15, 1987 for the 1987-88 school year, at an annual salary of $45,549. At a meeting held on June 27, 1988, the Board reappointed Burrows to the Director position for the 1988-89 school year. The minutes of this meeting state that the salary was to be determined at the completion of negotiations. At a December 5, 1988 meeting, the Board approved an annual salary for petitioner of $49,193 for the 1988-89 school year. Burrows was reappointed for the 1989-90 school year at a Board meeting held on April 10, 1989. His annual salary was $52,882. The Board reappointed Burrows at a meeting held on June 25, 1990 to the position of Director for the 1990-91 school year. Minutes of that meeting state that his salary was to be determined at the completion of negotiations. Petitioner served without an employment contract for the 1990-91 and 1991-92 school years. At a meeting held on June 24, 1991, Burrows was reappointed for the 1991-92 school year, subject to the execution of a contract or letter of employment upon completion of negotiations. Petitioner functioned as the Director until September 30, 1991 and was terminated prior to the completion of negotiations.

Petitioner has never been employed by respondent in any position other than that of Director. Minutes of all applicable meetings reference the appointments not only of petitioner, but of other individuals, as reappointments of specified professional or administrative personnel. The appointment of petitioner to the position of Director, as well as the subsequent reappointments, were based upon recommendations of respondent's Superintendent of Schools (Superintendent).

Prior to the reappointments, petitioner had previously received a form of contract, pursuant to the applicable resolutions, which was for a specific school year. The format and standardized content of this employment contract form is as stated in "Exhibit K" to Dzwilewski's certification. The form provided, in part, that either

party could terminate the contract by giving 60 days' written notice of intention to terminate, but that in the absence of any provision for a definite number of days' notice, the contract would run for the full term indicated therein. The Board has never taken any action to change the employment contract/resolution procedures used in appointing Burrows to the Director position.

Effective September 17, 1991, petitioner was placed on administrative leave with full pay and benefits until further notice by Dr. John C. Pennoyer (Pennoyer), respondent's Superintendent. During the period of administrative leave, Burrows was not to perform any of his employment duties and not to return to the district, before, during, or after working hours, unless prior arrangements were made directly with Pennoyer. Burrows was also to immediately turn over district property, including keys and a district truck, in his possession. Burrows was informed of these determinations by a letter from Pennoyer dated September 17, 1991. This letter also notified petitioner that Pennoyer would discuss any action to place petitioner on administrative leave, including the reasons for the decision, with the Board at a meeting to be held on September 30, 1991; that this discussion would take place in executive session; that Burrows would have the right to request that the discussion be held in public session; and that if petitioner were going to request that the matter be discussed in public, he should notify Pennoyer, in writing, no later than 11:00 a.m. on September 27, 1991. The stated reasons for these actions pertained to allegations of alleged misappropriation of district property and other possible improprieties. The letter reflected a conference held between Pennoyer and Burrows on September 17, 1991.

Petitioner retained the services of counsel prior to September 30, 1990. Dzwilewski sent Peter Jeffer (Jeffer), petitioner's counsel, a September 26, 1991 letter, which letter confirmed oral communications. The letter stated that petitioner's personnel file was available to be picked up but reiterated that, pursuant to the Superintendent's directive, Burrows was not permitted on district premises and that, confirming telephone conversations, the Superintendent intended to recommend to the Board that Burrows' employment be terminated upon 60 days' written notice and that it was anticipated that such recommendation would be made and acted upon at a September 30, 1991 Board meeting. Jeffer received this letter on September 27, 1991.

By letter dated September 26, 1991, Jeffer requested an opportunity to address the Board. Dzwilewski contacted Jeffer regarding procedures whereby Jeffer and Burrows would appear before the Board prior to its consideration and/or action regarding petitioner's employment status. Petitioner requested that he be allowed to address the Board during its executive session. Jeffer inquired as to the approximate time that the executive session would commence. An intent was not indicated to attend the earlier portion of the meeting. Counsel for respondent advised that a number of routine matters would be acted upon and estimated that the executive session would commence at approximately 9:00 p.m. Jeffer did not lodge any objections to these procedures.

These procedures were memorialized in a letter dated September 27, 1991, from Dzwilewski to Jeffer. This letter noted that the request ato address the Board would be granted subject to the following conditions:

1. Jeffer's appearance before the Board was deemed not to be a hearing nor adversarial, but to provide Burrows with an opportunity to make a statement to respondent. Jeffers would not be allowed to question nor cross-examine. Jeffer's appearance would be scheduled in executive session sometime after 9:00 p.m., on September 30, 1991. Jeffer would be provided a reasonable time in which to make a statement; however, the Board reserved its right to determine the duration of such statement, as circumstances warranted. The Board meeting would be held at the Indian Hills High School (School), and Jeffer was to meet Harry Stein at the principal's office. Stein would escort Jeffer to a waiting room. A Board representative would then escort Jeffer to the executive session when the Board was ready to consider the matter.

2. After Jeffer's statement was concluded, Board members would be permitted an opportunity to ask questions for clarification. Jeffer would be excused in order for the Board to continue its deliberations. Any Board action related to Burrows' employment status would be taken in public session after conclusion of the executive session.

Prior to receipt of Dzwilewski's letter, a decision was made on petitioner's behalf to keep the matter private rather than to request a public hearing.

The Board, in fact, did meet on September 30, 1991. The procedures as outlined in Dzwilewski's letter of September 27, 1991 were followed on September 30, 1991, except that Jeffer and Burrows were given a second opportunity to address the Board in its executive session.

On September 30, 1991, the Board initially conducted a portion of its public meeting, which dealt with matters not related to Burrows. The Board then went into executive session, at approximately 8:55 p.m. The minutes of the meeting state, in pertinent part, that at 8:55 p.m. a motion was offered, seconded, and unanimously carried to recess the regular meeting and move into closed executive session to discuss personnel, negotiations and litigation. The Board reconvened in public session at 12:19 a.m. At that point, the Board approved a resolution terminating Burrows' employment as Director upon 60 days' written notice.

Petitioner and Jeffer arrived at the School on September 30, 1991 at approximately 9:00 p.m. Upon arrival, they were met by an employee of the school system and escorted to a room on one side of the School. They remained in this room for two hours. They were subsequently escorted to a room on the other side of the School, in proximity to the room in which the Board was meeting. Petitioner and his attorney were allowed, and did, address the Board during its executive session. Jeffer and Burrows were present at the public portion of the meeting when the Board acted to terminate petitioner's employment.

CONCLUSIONS

The Commissioner of the Department is generally empowered to hear and determine all controversies and disputes arising under the school laws. *N.J.S.A.* 18A:6-9. As noted hereinabove, the parties entered into a Consent Order transferring to the Commissioner all issues raised by petitioner in his initial complaint filed in Superior Court .

The essential issue in the current matter is whether petitioner was a tenured employee of the Board at the time of his termination on September 30, 1991. The applicable tenure statute for janitorial employees provides that:

> Every public school janitor of a school district shall, unless he is appointed for a fixed term, hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except as the result of the reduction of the number of janitors in the district made in accordance with the provisions of this title or except for neglect, misbehavior or other offense and only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title. *Id* §17-3 (emphasis added).[1]

Pertinent statutory provisions also provide for tenure, in certain situations, of exempt firemen holding positions with local school boards. *N.J.S.A.* 40A:14-60 provides in pertinent part as follows:

> Whenever any person possessing an exempt fireman certificate holds an office, position or employment of the State, or a county or municipality or a school board or board of education for an indeterminate term, such person shall hold his office, position or employment during good behavior and shall not be removed therefrom for political reasons but only for good cause after a fair and impartial hearing.
>
> For the purposes herein no term of office, position or employment of any such person shall be deemed to be fixed by law or coterminous with that of a noncontinuous appointing or employing board or body; provided, however, that in no event is it intended that this provision shall apply to appointments made for a fixed or stated period of time. *N.J.S.A.* 40A:14-60 (emphasis added).

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[1] Pursuant to the referenced statutory provision, no person who is under tenure of office, position or employment, during good behavior and efficiency in a public school system, shall be dismissed or reduced in compensation except for inefficiency, incapacity, unbecoming conduct, or other just cause, subsequent to a hearing conducted pursuant to certain specified requirements. *N.J.S.A.* 18A:6-10.

Petitioner relies on *N.J.S.A.* 40A:14-64, which provides that:

> Whenever an exempt fireman holds a State, county, municipal or a board of education office not created by the Constitution, he shall hold such office during good behavior and shall not be removed unless for good cause after a fair and impartial hearing, provided he has or shall have served in said office for a term of 3 consecutive years. *N.J.S.A.* 40A:14-64.

I am persuaded by respondent's argument that petitioner held a "position or employment," not an "office," with the Board and that *N.J.S.A.* 40A:14-60, not *N.J.S.A.* 40A:14-64, is controlling.

It is clear from the statutory language that both *N.J.S.A.* 18A:17-3 and *N.J.S.A.* 40A:14-60 confer tenure only if the individual in question has not been appointed to fixed terms. It is also clear that petitioner was employed, the entire time in question, for fixed periods of time. The fact that employment contracts were not executed for the 1990/91 and 1991/92 school years is not determinative. The crucial fact is that Burrows was reappointed by the Board for specific terms, for particular school years. It is evident that he was initially appointed for a fixed term and that he was subsequently reappointed to a series of fixed one-year terms. The pertinent Board minutes reflect appointments by resolution for each relevant school year. As respondent argues, pursuant to *N.J.S.A.* 18A:17-3, appointment to a fixed term is determinative. The execution of contracts was administerial, implementing the import of the applicable resolutions approved by the Board.

Petitioner argues that he was employed for an indeterminate period of time during a "gap," evidenced by Board determinations of October 18, 1982 and November 14, 1983, pertaining to the 1982/83 and 1983/84 school years, respectively. He argues that he therefore achieved tenure pursuant to the applicable statutory provisions. I am not persuaded by this argument. It is clear that each appointment in question was for a fixed, specific period of time and that the Board at no time appointed Burrows for an indefinite period.

For similar reasons, petitioner did not gain tenure pursuant to *N.J.S.A.* 40A:14-60. As the Board argues, any such claim would, of necessity, be based on Burrows' employment with respondent.

I am persuaded, and so **CONCLUDE**, that at all times during his employment with respondent, Burrows was appointed by the Board for fixed, specific periods of time and that he was never appointed for an undetermined, indefinite period. I therefore **CONCLUDE** that petitioner did not attain tenure pursuant to *N.J.S.A.* 18A:17-3 and *N.J.S.A.* 40A:14-60. It is therefore not necessary to determine whether petitioner was employed as a "janitor" pursuant to *N.J.S.A.* 18A:17-3. The only remaining question is whether respondent violated the OPMA at the meeting of September 30, 1991.

The OPMA reflects a policy fostering public involvement in government and the conduct of government open to the public. *N.J.S.A.* 10:4-7. The requirement of advance notice of public meetings is essential to achievement of the legislative policies reflected in the OPMA. 'Adequate Notice' is defined as written advance notice of at least 48 hours, providing the time, date, location, and, to the extent known, the agenda of any regular, special or rescheduled meeting. Such notice shall state whether formal action may or may not be taken and shall be prominently posted in at least one public place reserved for such announcements; mailed, telephoned, telegrammed or hand-delivered to at least two newspapers designated to receive such notices; and filed with the clerk of the municipality when the public body's geographic boundaries are co-extensive with that of a single municipality, with the clerk of the county when the public body's geographic boundaries are co-extensive with that of a single county; and with the Secretary of State if the public body has statewise jurisdiction. Annual notices and revisions thereof in compliance with pertinent statutory provisions obviate the need for additional notice for each meeting. *Id.* §8(d). At least once annually, every public body shall post, and maintain posted throughout the year, in a designated place, mailed to appropriate newspapers, and submitted to specific persons, a schedule of the regular meetings to be held during the succeeding year. If such schedule thereafter is revised, revisions shall be posted, mailed and submitted within seven days therof. *Id.* §18. Any person may request a copy of the public body's regular meeting schedule. *Id.* §19.

In addition to requiring adequate public notice of meetings, the OPMA mandates that at the commencement of each meeting, a public announcement be made that the meeting was properly noticed or, if not, detailing the emergent

nature of the subject matter of the meeting and the reasons why adequate notice could not be provided. *Id.* §10. Except as specifically provided, no public body shall hold a meeting unless adequate notice thereof has been provided to the public. *Id.* §9. No person or public body shall fail to invite a portion of its members to a meeting thereof to circumvent the provisions of the OPMA. *Id.* §11.

Except as specified, all meetings of public bodies shall be open to the public at all times. However, nothing in the OPMA is intended to limit the discretion of a public body to permit, prohibit or regulate the active participation of the public at any meeting. *Id.* §12.(a).

The OPMA articulates nine exceptions to the requirement of open meetings. On their face, the only one applicable to the current proceeding is that contained in *N.J.S.A.* 10:4-12(b)(8), which provides that:

> Any matter involving the emloyment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any specific prospective public officer or employee or current officer or employee employed or appointed by the public body, unless all the individual employees or appointees whose rights could be adversely affected, request in writing that such matter or matter be discussed at a public meeting. *Id.* §12(b)(8).

Prior to excluding the public from a meeting to discuss any matters pertaining to statutory exceptions, the public body is mandated to adopt a resolution at a public meeting stating the general nature of the subject to be discussed and, as precisely as possible, the time when, and the circumstances under which the discussion in closed session can be disclosed to the public. *Id.* §13. Minutes of public meetings shall be available to the public. *Id.* §14. Each public body shall keep "reasonably comprehensible minutes" of all meetings, showing the time and place, the members present, subjects considered, actions taken, the vote of each member, and any other information required to be shown by law. *Ibid.*

The OPMA provides remedies for non-conforming actions. Any action taken by a public body at a meeting which does not conform with the provisons of the OPMA, shall be voidable in a proceeding in lieu of prerogative writ in Superior Court, which proceeding may be brought by any person within 45 days after the action sought to

be voided has been made public.[2] A public body may take corrective or remedial action by acting *de novo* at a public meeting in conformity with the OPMA and any other applicable law regarding any actions which may otherwise be voidable. Any action for which advance public notice of at least 48 hours is provided as required by law shall not be voidable solely for failure to conform with any notice required in the OPMA. *Id.* §15(a). Any party, including any member of the public, may institute a proceeding in lieu of prerogative writ to challenge any action taken by a public body on the grounds that such action is void for the statutorily stated reasons. If a court shall find that the action taken at a meeting does not conform to the provisions of the OPMA, the court shall declare such action void. *Id.* §(b)[3].

In his certification, Burrows states, in pertinent part, that the School "is a very large school." He also avers that when he arrived with counsel on the evening in question, he and Jeffer were met by a representative of the school system and taken, as found hereinabove, to a room on the other side of the School. He states that they "were not allowed, even to go near the room where the school Board was meeting" and that this situation ". . . raised my suspicions because I was wondering if they were discussion (sic) my employment in hearing from people and keeping that very fact from me." Burrows further states that he was not informed at any time that the Board was in executive session and that "Essentially my attorney and I were confined to a room and told not to leave until they sent for us. We stayed in this room for two (2) hours. When we were finally admitted to the room, we were escorted to the Board room on the other side of the school. My attorney asked for an indication as to what the problems were, and we were not told what the charges were against me. We were merely allowed to guess what these charges could possibly have been." (petitioner's Certification, p. 3).

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2 It is noted that petitioner apparently did not comply with the requirement that proceedings be filed within 45 days of the action in question. The verified complaint initially filed by Burrows in the Law Division contains a stamped receipt date of November 21, 1991, which date was not within 45 days of the September 30, 1991 Board meeting. However, in light of the fact that this question was not addressed by the parties, I reach no determinations in this respect.

3 Although the OPMA references a proceeding in lieu of prerogative writ, the pertinent Consent Order, on its face, transferred all claims initially raised by petitioner, including those pertaining to the OPMA, to the Commissioner for determination. Those pertaining to the OPMA are therefore addressed in this decision.

Petitioner argues that Pennoyer's letter of September 17, 1991 did not inform Burrows that a recommendation would be made to terminate his employment and that the September 26, 1991 letter was the first notice he received that the Board was going to consider such termination. Petitioner also argues that at no time was he or counsel advised that the effect of the decision not to request a public hearing would be to "exclude us" from the Board's deliberations concerning petitioner's employment. Counsel argues that upon arriving at the School, he and Burrows were "immedidiately ushered into a closed room and incarcerated there for over 2 hours . . . We were not allowed in the hallway or in the adjacent cafeteria area. Apparently, and we are not sure of this, a hearing was taking place concerning my client's employment without him being present. If, on the other hand, we had been informed that we would be waiving our rights to be present during this hearing by requesting a private session, our decision might have been different. Our whole desire in this litigation is the opportunity to confront our accusers. We had hoped that this hearing would avail us of that opportunity event (sic) though Mr. Dzwilewski indicated that it was not adverserial in nature." (brief, pp. 10-11). Petitioner also avers that he and counsel were never advised that the Board had gone into executive session. Burrows argues that it was not until three days before this meeting that he and counsel were informed that the Board was considering termination and that they did not have a right to be present during whatever deliberations took place.

Pennoyer's letter of September 17, 1991 provided notice that the Board would hold a meeting on September 30, 1991 regarding the Superintendent's determination to temporary relieve Burrows of his position. Although not specifically stating that termination would be considered on September 30, 1991, the clear import of the letter was that petitioner's employment status would be on the agenda.

The September 26, 1991 letter to petitioner's counsel provided Burrows with adequate notice of the Board meeting to be held on September 30, 1991. As found, this letter was received by Burrows' counsel on September 27, 1991, in excess of the 48-hour notice required by the OPMA. In addition, Dzwilewski communicated to Jeffer, by telephone, prior to September 27, 1991 that the Board would consider petitioner's employment status at the meeting to be held on September 30, 1991.

Contrary to petitioner's contentions, the OPMA does not require that a detailed notice of the nature of business to be discussed nor the time that a public body will convene in executive session be provided. There is no question that the discussion of Burrows' employment status was the proper subject matter of a meeting in executive session. As found, petitioner never requested that such deliberations be conducted in a public meeting. There was no requirement that Burrows or his counsel be allowed to address the Board during executive session, although, as found, petitioner's request in this respect was granted.

The certifications filed on behalf of petitioner and respondent and their arguments regarding what transpired in reference to Jeffers' and Burrows' freedom to leave the room to which they were escorted prior to the executive session differ in material respects. Burrows' certification is conclusionary in nature and does not allude to any specific facts regarding his allegation that he and Jeffer were prevented from leaving the room in question. The general scenerio argued by respondent is consistent with the letter of September 27, 1991. As found, the executive session commenced at 8:55 p.m., and petitioner and counsel arrived at the School at approximately 9:00 a.m. As respondent argues, it is apparent that petitioner and counsel attended all of the public portion of the meeting that they could have, given their arrival time. However, assuming a dispute in the facts in this respect, such dispute is not material to resolution of the issues presented in this case.

The public session conducted prior to the executive session addressed matters totally unrelated to petitioner. As noted, petitioner's request to be present at the executive session was granted, although he had no right to be present. Burrows and his counsel attended the subsequent public portion of the meeting which dealt with Burrows' employment status and the Board's action in approving the resolution terminating petitioner's employment.

Petitioner's contention that he was not given sufficient notice of the effect of "waiver" of a public hearing is without merit. Petitioner was not a tenured employee, and he therefore was not entitled to a hearing regarding action against his employment status nor statements of the charges, as required by *N.J.S.A.* 18A: 6-10 & 11. In any event, the two letters previously sent to petitioner and his counsel provided notice that the Board would be considering action against Burrows' employment status because of allegations regarding improprieties. As found, the

September 27, 1991 letter clearly stated that Burrows and Jeffer would be excused in order for the Board to continue its deliberations. Petitioner cites no basis to support a claim that they could not be so excused while the Board deliberated in executive session. I also place some emphasis on the fact that petitioner was represented by counsel throughout the proceedings. It is reasonable to conclude that Jeffer was familiar with the requirements of the OPMA. Burrows had a right to appear at the public hearings pursuant to the OPMA. As found, he was present at the portion of the public hearing on September 30, 1991 at which the Board voted to terminate him and based upon his arrival time that evening, it is apparent that he was not able to be present at the earlier portion of the public hearing. As discussed, he did not have a right to be present at the executive session. Respondent allowed him and his counsel an opportunity to present a statement to the Board, at petitioner's request, and the parameters of their appearances were reasonable and communicated to Jeffer prior to the date in question.

As noted, Burrows argues that the resolution adopted by the Board prior to going into closed session was statutorily defective. As found, petitioner and his counsel were present during the closed session. The minutes of that session are not available to this judge, and it therefore cannot be determined whether or not they were advised regarding the subsequent disclosure of the matters discussed. The Board, referencing attached letters, argues in its reply brief that it has been willing to release the minutes, but that petitioner has objected. The referenced letters were not filed. However, I am persuaded that the unavailability of the minutes of the executive session are not determinative to resolution of the motion in this respect.

It is clear that the general nature of the subject to be discussed, personnel matters and litigation, was disclosed. The Board complied with the requirements of *N.J.S.A.* 10:4-13(a). However, it did not comply with the requirement of Section (b) of that provision that a public body adopt a resolution prior to going into closed session, which resolution must state the time when and circumstances under which the discussion conducted in closed session can be disclosed to the public. However, the nature, quality and effect of non-compliance in fashioning a corrective remedy for violations of the OPMA must be considered. Substantial compliance carries some weight, and relief should be appropriate to the particular situation. *Matawan Educ. Assn v. Matawan-.Aberdeen Ed. Bd.*, 212 *N.J. Super.* 328 (Law Div. 1986). In this instance, the Board acted on the matter pertaining to petitioner immediately after

termination of the closed session in a public session, and petitioner and his counsel were present. Since the Board substantially complied with provisions of the OPMA, I am persuaded that the fact that they did not state in the resolution proceeding going into executive session the circumstances regarding which the matter discussed therein would be released to the public is not a fatal defect.

I **CONCLUDE** that respondent substantially complied with the OPMA pertaining to the meeting held on September 30, 1991, except to the extent that the resolution adopted prior to going into executive session did not state the time when and circumstances under which the matters discussed therein would be disclosed to the public, but that the subsequent action taken by the Board in public session terminating petitioner's employment should not be rendered void because of such non-compliance with the OPMA.

ORDER

It is hereby **ORDERED** that the Board's motion for summary decision be and is hereby **GRANTED**; that Burrows' petition be and is hereby **DISMISSED**; and that the hearing previously scheduled for June 28, 1993 be and is hereby **ADJOURNED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

June 4, 1993
Date

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

6/8/93
Date

Maureen R. Reller
DEPARTMENT OF EDUCATION

JUN 11 1993
Date

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

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ROYAL BURROWS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RAMAPO INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

The Board's exceptions indicate that it wholeheartedly supports the ultimate conclusions reached by the ALJ but avers that one correction and/or amendment to the record needs to be brought to the Commissioner's attention, i.e., that portion of the initial decision on page 16 which indicates that the Board did not state the circumstances under which matters discussed in Executive Session on September 30, 1991 would be disclosed to the public. As its first point of contention, the Board avers that since the matter was being decided on a summary judgment basis, it accepted as true certain allegations because they were deemed to be immaterial and/or not germane to that motion so as to enable an undisputed statement of material facts. However, the Board emphasizes in its exceptions that it, in fact, complied with the requirements of the Open Public Meetings Act (OPMA) in this regard and attaches for the

Commissioner's review the notice for the meeting in question which clearly states "Information from the Closed Meeting will be made public at the discretion of the Board or otherwise authorized by law." (Exceptions, Ex. L, at p. 3)

The Board also avers that since it acted upon the disputed matter in Public Session on September 30, 1991 immediately after the conclusion of the Executive Session, there was no specific need to identify further "the time when and circumstances under which the matters discussed therein would be disclosed to the public...." (Initial Decision, at p. 16) It is the Board's contention that such public action did disclose the matter when the Board, upon the recommendation of the superintendent, voted to terminate Burrows' employment.

Upon review of the record, the initial decision and the Board's exceptions, the Commissioner accepts the findings and conclusions of the ALJ as set forth in the initial decision. The Commissioner notes for the record the Board's arguments set forth above do not render inaccurate the ALJ's conclusion that contrary to N.J.S.A. 10:4-13(b), no resolution relative to "disclosure" was adopted prior to the Board going into Executive Session because the exceptions do not in any manner demonstrate that a "disclosure" resolution was actually adopted pursuant to this statutory requirement. Therefore, it is determined that no correction and/or amendment to the initial decision is warranted.

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

COMMISSIONER OF EDUCATION

163-93

IN THE MATTER OF THE TENURE	:	
HEARING OF ALBERT DONOHUE,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF JERSEY CITY,	:	
HUDSON COUNTY.	:	
	:	

JULY 19, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 2224-92
AGENCY DKT. NO. 57-3/92

IN THE MATTER OF THE TENURE HEARING OF ALBERT DONOHUE, STATE OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY.

David F. Corrigan, Esq., for petitioner (Murray, Murray & Corrigan, attorneys)

Gregory T. Syrek, Esq., for respondent (Bucceri and Pincus, attorneys)

Record Closed: June 7, 1993 Decided: June 16, 1993

BEFORE **DANIEL B. Mc KEOWN**, ALJ, t/a:

This matter was transmitted to the Office of Administrative Law on March 26, 1993, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a letter/stipulation indicating the terms thereof, which is attached and fully incorporated herein.

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

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

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

June 15, 1993
Date

Daniel B. McKeown, ALJ (AR
DANIEL B. Mc KEOWN, ALJ, t/a

Receipt Acknowledged:

JUNE 18, 1993
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 22 1993
Date

Joyce LaVecchia
OFFICE OF ADMINISTRATIVE LAW

ej

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1200 ROUTE 46
CLIFTON, NEW JERSEY 07013-2480-2440
TELECOPIER (201) 773-2170
(201) 773-5665

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
JUN 7 11 23 AM '93

SHELDON H. PINCUS
MEMBER N.J. & D.C. BARS
LOUIS P. BUCCERI
GREGORY T. SYREK

MARY J. HAMMER
MEMBER N.J. & N.Y. BARS

June 2, 1993

Hon. Beatrice S. Tylutki, A.L.J.
Office of Administrative Law
9 Quakerbridge Plaza
CN 049
Trenton, NJ 08625

Re: In the Matter of the Tenure Hearing
of Albert Donohue, State Operated
School District of Jersey City
O.A.L. Docket No. EDU 02224-92
Agency Ref. No. 57-3/92

Dear Judge Tylutki:

In response to your letter of May 25, 1993, please be advised that the signed Stipulation of Settlement was sent to Judge McKeown at the O.A.L. on April 20, 1993. I am enclosing a duplicate copy of the agreement and my cover letter. If any further information is needed, please advise me.

Respectfully yours,
BUCCERI & PINCUS, ESQS.

By: Gregory T. Syrek

/mab
cc: David F. Corrigan, Esq.

BUCCERI AND PINCUS
COUNSELORS AT LAW
1200 ROUTE 46
CLIFTON, NEW JERSEY 07013-2440
TELECOPIER (201) 773-2170
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GREGORY T. SYREK

MARY J. HAMMER
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June 2, 1993

Hon. Beatrice S. Tylutki, A.L.J.
Office of Administrative Law
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Trenton, NJ 08625

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of Albert Donohue, State Operated
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O.A.L. Docket No. EDU 02224-92
Agency Ref. No. 57-3/92

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In response to your letter of May 25, 1993, please be advised that the signed Stipulation of Settlement was sent to Judge McKeown at the O.A.L. on April 20, 1993. I am enclosing a duplicate copy of the agreement and my cover letter. If any further information is needed, please advise me.

Respectfully yours,
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By: Gregory T. Syrek

/mab
cc: David F. Corrigan, Esq.

BUCCERI AND PINCUS
COUNSELORS AT LAW
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RECEIVED
STATE OF N.J.
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SHELDON H. PINCUS
MEMBER N.J. & D.C. BARS
LOUIS P. BUCCERI
GREGORY T. SYREK

MARY J. HAMMER
MEMBER N.J. & N.Y. BARS

April 20, 1993

Hon. Daniel McKeown, A.L.J.
Office of Administrative Law
9 Quakerbridge Plaza
CN 049
Trenton, NJ 08625

Re: In the Matter of the Tenure Hearing
of Albert Donohue, State Operated
School District of Jersey City
O.A.L. Docket No. EDU 02224-92
Agency Ref. No. 57-3/92

Dear Judge McKeown:

Enclosed please find the original and one copy of a Memorandum of Agreement in this matter. I am also enclosing a copy of a letter from Mr. Corrigan to me indicating that the State-Appointed Superintendent reviewed and approved the terms of the agreement.

If you have any questions, please do not hesitate to contact me.

Respectfully yours,
BUCCERI & PINCUS, ESQS.

By: Gregory T. Syrek

/mab
cc: David F. Corrigan, Esq.

MURRAY, MURRAY & CORRIGAN
COUNSELLORS AT LAW
25 SYCAMORE AVENUE
LITTLE SILVER, N.J. 07739
(908) 747-2300

FAX NO. (908) 758-8095

ROBERT EMMET MURRAY
MEMBER N.Y. & N.J. BARS
KAREN A. MURRAY
MEMBER D.C., N.Y. & N.J. BARS
DAVID F. CORRIGAN
MEMBER N.J. BAR

CHERIE L. MAXWELL
MEMBER D.C., TX & N.J. BARS
REGINA WAYNES JOSEPH
MEMBER N.Y. & N.J. BARS
DERLYS GUTIERREZ CONGETT
MEMBER N.J. BAR

CAMDEN COUNTY OFFICE
WILSON BUILDING, OFFICE 1107
130 NORTH BROADWAY
CAMDEN, N.J. 08102

OCEAN COUNTY OFFICE
44 WASHINGTON STREET
TOMS RIVER, N.J. 08753
(908) 286-0550

April 8, 1993

APR 12 Rec'd

Gregory T. Syrek, Esq.
Bucceri and Pincus
Counselors at Law
1200 Route 46
Clifton, NJ 07013-2440

RE: In the Matter of the Tenure Hearing
of Albert Donohue, State-Operated
School District of Jersey City
O.A.L. Docket No.: EDU-02224-92
Our File No.: 99,198R

Dear Mr. Syrek:

Enclosed please find executed Memorandum of Agreement in the above captioned matter.

Dr. Scambio has not signed the agreement because she is presently on a leave of absence. However, I can represent that this settlement was approved by her prior to her leaving. Accordingly, would you return a fully executed contract to myself.

Thank you for your attention to this matter.

Very truly yours,

MURRAY, MURRAY & CORRIGAN

David F. Corrigan

DAVID F. CORRIGAN

DFC/ar
Enclosure

cc: Victor Demming, Acting State District Supt. (w/enc.)
Charlotte Kitler, Esq., General Counsel (w/enc.)

2d

MEMORANDUM OF AGREEMENT

This Agreement is made this 19th day of ~~December~~ April, 1993, ~~1992~~, by and between the State Operated School District of the City of Jersey City, with offices at 346 Claremont Avenue, Jersey City, New Jersey 07305, hereinafter referred to as the "District,"

AND

Albert Donohue, whose home address is P.O. Box 1697, Rutherford, New Jersey 07070, hereinafter referred to as "Donohue."

WITNESSETH:

WHEREAS, Donohue is a tenured teaching staff member employed in the State Operated School District of the City of Jersey City and has been so employed for approximately 30 years; and

WHEREAS, on or about February 5, 1992, tenure charges of conduct unbecoming a teacher were filed against Donohue; and

WHEREAS, the tenure charges were certified to the Commissioner of Education on March 2, 1992; and

WHEREAS, in lieu of proceeding with the tenure charges in accordance with the Tenure Employees' Hearing Law, the District and Donohue desire to enter into an agreement stipulating the terms of Donohue's separation from his employment as a teacher with the District and his retirement as a teacher.

NOW, THEREFORE, in consideration of the mutual promises of the parties and in exchange for the consideration more particularly noted below, it is hereby agreed:

1. Donohue will submit an irrevocable letter of resignation from all employment with the District effective at the close of business on June 30, 1993. This letter of resignation will be accepted by the District. The resignation is for purposes of retirement.

2. The District agrees to withdraw, with prejudice, the tenure charges of conduct unbecoming a teacher bearing Agency Docket No. 57-3/92 and O.A.L. Docket No. EDU 2224-92.

3. The District agrees to continue to pay Donohue his full salary through the effective date of his resignation, June 30, 1993. In addition, Donohue participates in a summer payment plan, pursuant to N.J.S.A. 18A:29-3. He shall receive all sums to which he is entitled as a result of such participation.

4. All continued salary payments made to Donohue between the date of this Agreement and June 30, 1993 shall be paid in the normal course of business, net of normal payroll deductions for State and Federal income taxes and pension contributions.

5. Until June 30, 1993, the District agrees to continue to provide Donohue with all health insurance coverages presently provided to other teaching staff members in the

District. The insurance coverages involved herein are set forth in the current collective negotiations agreement between the District and the Jersey City Education Association.

6. Upon Donohue's resignation for purposes of retirement and consistent with his rights under the Consolidated Omnibus Reconciliation Act of 1986 ("COBRA"), Donohue shall be able to purchase, at his own cost and expense, the insurance coverages presently provided to other teaching staff members in the District or he shall be able to obtain health insurance coverage through the Division of Pensions (Teachers Pension and Annuity Fund), as provided by N.J.S.A. 52-14.32f. The insurance coverages involved herein are set forth in the current collective negotiations agreement between the District and the Jersey City Education Association or as provided by the Division of Pensions (Teachers Pension and Annuity Fund). As noted in paragraph 5, the District will provide insurance coverage through June 30, 1993 and, if applicable and exercised, Donohue's rights under COBRA will commence at that time.

7. The collective negotiations agreement between the District and the Jersey City Education Association provides for reimbursement for unused accumulated sick leave upon resignation and/or retirement. Donohue retains his right to such reimbursement and his rights will be determined by the express provisions of the collective negotiations agreement.

8. Donohue shall be entitled to all other contractual benefits, as provided to other teachers under the terms of the current collective negotiations agreement between the District and the Jersey City Education Association, until June 30, 1993.

9. The District and Donohue agree that the settlement of the charges brought by the District is justified for the following reasons:

(a) The charges made by the District against Donohue must be viewed in the context of a lengthy, meritorious teaching career in the District;

(b) The June 30, 1993 resignation of Donohue can result in an economic saving to the District in that Donohue's salary will terminate at that point. If the charges were fully litigated, Donohue would be entitled to salary until at least the issuance of the decision of the Commissioner of Education. Given the number of witnesses for both the petitioner and respondant, the possible need for the scheduling of additional hearing dates and the normal timetable for such matters, the Commissioner's decision might not be issued until the late spring of 1993 or afterwards;

(c) The parties will not be required to undergo the time and substantial expense of further litigation.

(d) If fully litigated, this case would require the testimony of students and numerous employees of the District,

both for the District and for Donohue. Such testimony would disrupt the educational process in the District.

(e) The public interest would best be served by resolving the present controversy.

(f) Donohue has an interest in resolving this matter to permit his retirement without the distraction and stress of defending himself against the charges.

10. Donohue is aware that, as a result of the charges brought against him, this matter may be referred to the State Board of Examiners. However, in light of the scheduled retirement of Donohue as a teacher, recognizing his many valuable years of teaching service in the school district and the potential cost of pursuing such an action against a retiree, the District believes that such a referral would not be necessary or appropriate under the circumstances and recommends against same.

11. The District and Donohue acknowledge that Donohue is entitled to a pension by virtue of his employment as a teacher in the State of New Jersey. The District agrees to comply with all of the rules and regulations of Donohue's retirement program in providing information required either by Donohue or by the retirement program. The District shall bear no responsibility for any matter related to his pension program to deny, limit, reduce or modify his pension.

12. The District and Donohue acknowledge that the terms of this Agreement are contingent upon the review and

approval of both the Office of Administrative Law and the Commissioner of Education. In the event that either agency disapproves of the terms of settlement, this Agreement shall be null and void and the parties shall return to the same positions which they held prior to this settlement.

13. The parties recognize that each has been represented by legal counsel of his or its own choosing and that each signs this Agreement as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein.

14. This Agreement shall be subject to the laws of the State of New Jersey.

15. All terms of this Agreement are deemed material. This document may not be altered, amended or modified or revoked except by an instrument executed in writing by the parties.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

Albert Donohue

Dated: Aug. 17, 1993

Gregory T. Syrek
Attorney for Albert Donohue

Dated: 4/17/93

Elena J. Scambio,
State District Superintendent

Dated:

David F. Corrigan
Attorney for District

Dated: 4/9/93

ALBERT DONOHUE
P.O. BOX 1697
RUTHERFORD, NEW JERSEY 07070

December , 1992

Elena Scambio, Superintendent
State-Operated School
District of Jersey City
346 Claremont Avenue
Jersey City, NJ 07305

Re: Letter of Resignation

Dear Dr. Scambio:

I hereby resign from my employment as a teaching staff member employed by the Jersey City School District effective June 30, 1993. This resignation is to permit my retirement at that time and is expressly conditioned upon the approval of the Memorandum of Agreement dated December , 1992, between the District and myself by the Office of Administrative Law and the Commissioner of Education and shall be null and void if the terms of that Agreement are not so approved. This resignation is otherwise irrevocable.

Respectfully submitted,

Albert Donohue

/lg

ak

OAL DKT. NO. EDU 2224-92

IN THE MATTER OF THE TENURE	:	
HEARING OF ALBERT DONOHUE,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF JERSEY CITY,	:	
HUDSON COUNTY.	:	
	:	

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

The Commissioner approves the settlement terms as they comport with the Cardonick standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846) The matter is hereby dismissed, subject to compliance with the terms of the settlement.

Mary Ann Fitzgerald
COMMISSIONER OF EDUCATION

JULY 19, 1993

DATE OF MAILING - JULY 19, 1993

164-93

ESPERANZA ANASTASIO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON ET AL., PASSAIC COUNTY,	:	DECISION
RESPONDENTS.	:	
	:	

JULY 19, 1993

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 3623-92
AGENCY DKT. NO. 371-10/91

ESPERANZA ANASTASIO,
Petitioner,
v.
THE STATE SCHOOL DISTRICT OF THE CITY OF PATERSON, DORIS SMITH, IN HER CAPACITY AS ACTING PASSAIC COUNTY SUPERINTENDENT OF SCHOOLS, AND THE NEW JERSEY STATE OFFICE OF TEACHER CERTIFICATION,
Respondents.

Louis P. Bucceri, Esq., for petitioner
(Bucceri & Pineus, attorneys)

David Earle Powers, Deputy Attorney General, for respondents New Jersey State Board of Examiners and the New Jersey State Office of Teacher Certification (Robert J. DelTufo, Attorney General of New Jersey, attorney)

Russell J. Schumacher, Esq., for respondents, State School District of the City of Paterson and Doris Smith

Record Closed: June 15, 1993 Decided: June 15, 1993

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

This matter was transmitted to the Office of Administrative Law on May 15, 1992 for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

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

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

June 15, 1993
Date

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

6/16/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 22 1993
Date

Joyce LaVecchia
OFFICE OF ADMINISTRATIVE LAW

al

BUCCERI & PINCUS, ESQS.
1200 Route 46
Clifton, NJ 07013-2440
(201) 773-5665
Counsel for Petitioner

JUN 15 11 12 AM '93

ESPERANZA ANASTASIO, Petitioner,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
v.	:	AGENCY REF. NO. 371-10/91 O.A.L. DOCKET NO. EDU 03623-92N
THE STATE SCHOOL DISTRICT OF THE CITY OF PATERSON, DORIS SMITH, In her capacity as Acting Passaic County Superintendent of Schools, and THE NEW JERSEY STATE OFFICE OF TEACHER CERTIFICATION, Respondent.	:	**STIPULATION OF SETTLEMENT**

The parties hereto, desiring an amicable resolution of the above-captioned litigation, do hereby stipulate and agree as follows:

1. Petitioner, Esperanza Anastasio (hereinafter 'Ms. Anastasio'), was employed in September, 1983, by the Paterson School District (hereinafter 'Paterson') as a Bilingual Science Teacher pursuant to emergency certification in that area. At that time Ms. Anastasio was not a United States citizen.

2. While her employment continued, Ms. Anastasio pursued full certification and completed all requirements for a Comprehensive Science endorsement in December, 1985. In April, 1986, the respondent Office of Teacher Certification (hereinafter 'OTC') issued a teaching certificate endorsed for Comprehensive

Science to Ms. Anastasio. The certificate had an expiration dat of April, 1991, due to the fact that Ms. Anastasio was not yet a citizen.

3. In October, 1986, Ms. Anastasio became a United States citizen.

4. In November, 1986, Ms. Anastasio was issued a permanent, regular endorsement as a Bilingual/Bicultural Teacher since she had completed all requirements and was a citizen.

5. As of November, 1986, Ms. Anastasio achieved tenured status in Paterson.

6. Ms. Anastasio's employment continued in Paterson. In May of 1991, Ms. Anastasio was requested to present evidence of her citizenship to the Passaic County Superintendent's office. She did so and was then verbally advised that her Science endorsement had lapsed in April, 1991.

7. Ms. Anastasio filed an application for a permanent Science endorsement in August, 1991.

8. Ms. Anastasio resumed her employment as a Bilingual Science teacher in September, 1991.

9. On September 25, 1991, she was notified that her employment would cease as of September 30, 1991, because OTC refused to reissue her Science certificate on the grounds that her National Teacher Examination (NTE) grade from 1985 was no longer a passing grade in 1991, although it had been a passing grade in 1985.

10. Ms. Anastasio received a passing grade on the NTE in March, 1992.

11. Ms. Anastasio received a new endorsement for Biological Science, dated May, 1992, in June, 1992.

12. Ms. Anastasio returned to active duty as a teacher in Paterson in September, 1992.

Based on the foregoing, the parties agree as follows:

1. Ms. Anastasio will be retroactively placed at Level 9, MA+30 of the 1992-93 Paterson Teacher Salary Guide, effective September 1, 1992. Any back salary due from that date will be paid to Ms. Anastasio within thirty (30) days of approval of this Agreement by the Commissioner of Education.

2. The Paterson School District recognizes and acknowledges that Ms. Anastasio continues to be a tenured teaching staff member within its employ with all rights conferred pursuant to N.J.S.A. 18A:28-5. Ms. Anastasio's seniority will be calculated continuously from September, 1983, to the present and thereafter as long as her employment continues, excluding only the nine (9) month period of hiatus in her employment in 1991-92 from the total. Tenure is recognized based on Ms. Anastasio's continuous certification as a Bilingual teacher.

3. For purposes of contractual salary longevity, Ms. Anastasio will be considered to have completed nine (9) full years of creditable employment as of September 1, 1992.

4. All accumulated sick leave credited to Ms. Anastasio as of September 30, 1991, will continue to be credited to her for all purposes as of September 1, 1992.

5. In return for compliance with this Agreement, Ms. Anastasio agrees to withdraw and dismiss the above-captioned litigation against all respondents, with prejudice. The Paterson School District hereby withdraws and dismisses any crossclaims against all other respondents, with prejudice.

6. This Agreement shall not constitute contractual past practice or precedent for contractual purposes as to any person not a party hereto.

7. Upon approval of this Agreement by the Office of Administrative Law and the Commissioner of Education, the status of Ms. Anastasio's tenure and seniority rights as set forth herein shall be established as a matter of law.

8. The parties respectively acknowledge that each has had ample opportunity to seek independent legal counsel or other advice regarding this Agreement, and that each is signing this Agreement freely and voluntarily, without coercion, duress or pressure from the other party.

9. By entering this Agreement, each party releases and discharges the other with respect to all claims or rights arising out of the hiatus in Ms. Anastasio's employment during the 1991-92 school year. This release does not apply to the right to enforce the terms of this Agreement. This release does not apply to the issues raised in the matter known as Esperanza Anastasio

v. New Jersey State Board of Examiners, et al., O.A.L. Docket No. EDU 3622-92N, Agency Ref. No. 31-1/92 and that litigation is not settled or withdrawn by virtue of this stipulation and Agreement.

10. This Agreement is subject to approval by the Office of Administrative law and the Commissioner of Education and will not take effect unless such approvals are received.

FOR THE PETITIONER:

Esperanza Anastasio

Esperanza Anastasio

Dated: 3/26/93

Louis P. Bucceri, Esq.

Dated: 3/26/93

FOR THE RESPONDENT STATE-OPERATED SCHOOL DISTRICT OF PATERSON

Laval S. Wilson

Dr. Laval S. Wilson

Dated: 6/14/93

Russell J. Schumacher

Russell J. Schumacher, Esq.

Dated: 6/14/93

FOR THE RESPONDENT OFFICE OF TEACHER CERTIFICATION and RESPONDENT PASSAIC COUNTY SUPERINTENDENT OF SCHOOLS

David Earle Powers,
Deputy Attorney General

Dated: 29 March 1993

OAL DKT. NO. EDU 3623-92

ESPERANZA ANASTASIO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON ET AL., PASSAIC COUNTY,	:	DECISION
RESPONDENTS.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

JULY 19, 1993

DATE OF MAILING - JULY 19, 1993

165-93

GLORIA RECI,

PETITIONER,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

JULY 19, 1993

OAL DKT. NO. EDU 1953-93

GLORIA RECI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before her and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 19, 1993

DATE OF MAILING - JULY 19, 1993

166-93

BUENA PLUMBING,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HARRISON AND RUSSO PLUMBING AND HEATING, GLOUCESTER COUNTY,	:	DECISION
RESPONDENTS.	:	

JULY 19, 1993

OAL DKT. NO. EDU 4854-93

BUENA PLUMBING,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HARRISON AND RUSSO PLUMBING AND HEATING, GLOUCESTER COUNTY,	:	DECISION
RESPONDENTS.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before her and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 19, 1993

DATE OF MAILING - JULY 19, 1993

167-93

J.P.D., on behalf of his son, J.C.D.,

PETITIONER,

V.

BOARD OF EDUCATION OF RIVER DELL REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

JULY 19, 1993

OAL DKT. NO. EDU 1955-93

J.P.D., on behalf of his son, J.C.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF RIVER DELL REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before her and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 19, 1993

DATE OF MAILING - JULY 19, 1993

168-93

BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
A.E. AND B.E.,	:	DECISION
RESPONDENTS.	:	

JULY 21, 1993

BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
A.E. AND B.E.,	:	DECISION
RESPONDENTS.	:	

This matter having come to the attention of the Commissioner of Education by way of Petition of Appeal from the Bloomfield Board of Education (Board) filed on December 11, 1992 seeking tuition payments from A.E. and B.E., parents of R.E., for school years 1988-89, 1989-90, 1990-91 and through March of the 1991-92, together with interest and costs pursuant to N.J.S.A. 18A:38-1 (a), (b), (d), (e) or (f), averring that said pupil was not a resident, nor was domiciled in the Township of Bloomfield at any time during the school years in question; and

Whereas by notices dated January 11 and April 20, 1993 and by letter sent return receipt requested, certified mail dated May 17, 1993 respondents herein were advised to file an Answer; and

Whereas no Answer or other communication has been forthcoming from respondents; now therefore,

Pursuant to N.J.A.C. 6:24-1.4(e), the Commissioner deems admitted each count in the Petition of Appeal and thus summary judgment is hereby granted the Board of Education.

Accordingly, the Commissioner finds and determines that tuition is due and owing the Board in the amounts specified in the Petition of Appeal at pages 5 and 6, although without costs, which the Commissioner is not entitled to grant, but with pre-judgment interest pursuant to N.J.A.C. 6:24-1.16(a).

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 21, 1993

DATE OF MAILING - JULY 21, 1993

169-93

IN THE MATTER OF THE SPECIAL SCHOOL ELECTION HELD IN THE MATAWAN-ABERDEEN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

JULY 21, 1993

OAL DKT. NO. EDU 5367-93

IN THE MATTER OF THE SPECIAL SCHOOL ELECTION HELD IN THE MATAWAN-ABERDEEN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before her and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 21, 1993

DATE OF MAILING - JULY 21, 1993

170-93

SOMERSET HILLS SCHOOL INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
JOHN ELLIS, COMMISSIONER OF EDUCATION, AND THOMAS J. KING, ACTING DIRECTOR, DIVISION OF COMPLIANCE, STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioner, private school for the education and treatment of emotionally disturbed boys, appealed decision of Division of Compliance which affirmed decision of Bureau of Auditing on reimbursable costs. Division found petitioner failed to meet minimum number of instructional days (180) in 1987-88 school year, thus requiring petitioner to refund portion of tuition that was paid to petitioner by sending districts that year.

ALJ concluded money was an overpayment that was obviously not earned since school was actually in session for 170 days. ALJ also found no justification for invocation of doctrine of estoppel. ALJ affirmed decision on reimbursable costs. Petition was dismissed.

Commissioner adopted findings and determination in initial decision.

JULY 21, 1993

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3750-91
AGENCY DKT. NO. 54-3/91

SOMERSET HILLS SCHOOL, INC.,
Petitioner,
v.
JOHN ELLIS, COMMISSIONER OF EDUCATION, AND THOMAS J. KING, ACTING DIRECTOR, DIVISION OF COMPLIANCE, STATE DEPARTMENT OF EDUCATION,
Respondents.

Jerrold D. Goldstein, Esq., for petitioner

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

Record Closed: April 28, 1993 Decided: June 10, 1993

BEFORE **ARNOLD SAMUELS**, ALJ:

The petitioner, Somerset Hills School, Inc., appeals from a determination by the respondent Division of Compliance in the State Department of Education that petitioner failed to meet the mandated minimum number of instructional days (180) in the 1987-88 school year. The Division's decision requires petitioner to refund a portion of the tuition that was paid to petitioner by sending districts for that year.

PROCEDURAL HISTORY

The original determination in this matter was made by the Bureau of Auditing in July 1990. That was affirmed by the Acting Director of the Division of Compliance in the State Department of Education in January 1991. The petitioner, a private school for children with disabilities, filed a verified petition contesting the decision with the Commissioner of Education on March 7, 1991. The respondents filed an answer on April 8, 1991, denying the allegations in the petition and asserting various affirmative defenses. The Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) on April 12, 1991, for hearing and determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13.

A prehearing conference was held in the OAL on November 14, 1991. The resulting prehearing order defined and limited the issues to be decided, provided for discovery, scheduled the hearing, and regulated other procedural aspects of the matter.

In April 1992, respondents filed a motion relating to discovery. This motion was withdrawn approximately one month later, after the parties resolved the outstanding problems. Following an adjournment of the hearing because of the conflicting commitments of counsel, the hearing was held in the OAL in Newark, New Jersey, on February 17 and 18, 1993. The witnesses who testified at the hearing are listed in the appendix, as are brief descriptions of the documentary exhibits marked in evidence. Posthearing briefs and replies were filed by both parties, and the record closed on April 28, 1993.

ISSUES

The issues were defined in the prehearing order, as follows:

A. 1. Whether petitioner complied with the 180-day school year requirement for purposes of the tuition payment program.

2. Whether petitioner had a right to rely on the State monitoring reports, instructions, and evaluations in the conduct of the school.

B. Whether the Commissioner of Education is seeking to impose a penalty on the petitioner that was not in existence at the time of the alleged violations.

C. Whether it was necessary to have a certified school nurse on the school premises as opposed to a registered nurse.

Issue C, above, was separately resolved by the parties prior to the hearing and was withdrawn as an issue by the petitioner at the beginning of the first day of hearing.

SUMMARY OF THE DISPUTE

The petitioner is a private school for the education and treatment of emotionally disturbed boys, and is approved as a private school for the disabled by the New Jersey Department of Education, Division of Special Education. At the present time, approximately 72 percent of its students are residentially placed on a full-time basis, and 28 percent are day placements. There were no day placements at the school in 1987-88, the school year in question. At that time, all of the students were in residence. The educational fees are paid by various sending school districts, and the Department of Youth and Family Services (DYFS) most often pays the residential component of the costs.

The petitioner school, like other approved private schools for the disabled, must comply with applicable state regulations relating to tuition and other financial procedures. These regulations require a minimum of 180 days of pupil instruction between September 1 and June 30, and for the extended school year program on the days of pupil instruction between July 1 and August 30. *N.J.A.C.* 6:20-4.1(a)1. The actual allowable cost per pupil and tuition rate charge is based on the 180-day minimum, according to a prescribed formula. A contractual agreement first fixes the tentative tuition rate, based on the school's estimate, which follows the cost for the previous year. Adjustments are made when the actual cost per pupil becomes known. The 180-day minimum is important because the per diem rate per pupil is determined by using that minimum number.

In early 1990, the Bureau of Auditing of the State Department of Education performed in in-depth final audit of the operations of the Somerset Hills School for the 1987-88 school year. A determination was made by the auditors that the school

was only in session for 170 instructional days, rather than the 181 days claimed. Charges to the sending districts had been based on the required 180 days, and payments from the districts were received accordingly. When the Bureau of Auditing calculated the cost per pupil based on 170 days, the cost was less, and the school was ordered to refund the difference to the sending districts. The school disagreed, claiming that the school had been in session for at least 180 instructional days; that the 1987-88 school calendar was almost identical to the 1986-87 calendar; and that the 1986-87 calendar had been approved, as having provided at least 180 days, by a State Department of Education mid-year monitoring team.

Among the arguments advanced by the petitioner are the following: That the Commissioner of Education should be estopped from denying compliance for the 1987-88 calendar, a year and a half after the fact, because the school relied on the 1986-87 monitoring result in fixing the 1987-88 calendar and then changed its position in reliance on that approval; that the refund demanded by the respondents constitutes a penalty, which was not provided for in the regulations prior to 1990; and that the respondents attempted to revise the regulations in 1990 to provide for a penalty without complying with the Administrative Procedures Act.

The first and primary question to be answered is whether the school was actually in session, for instructional purposes, for 180 or more days in the 1987-88 school year. If so, then the demand for reimbursement to the sending districts should fail. On the other hand, even if the school was actually in session for instructional purposes for 170 days, as claimed by the respondents, are the respondents entitled to prevail in demanding the refund?

TESTIMONY AND EVIDENCE

Jerome P. Amedeo, Executive Director of the Somerset Hills School, provided background information about the orientation of the school. He indicated that 70 percent of the emotionally-disturbed boys attending the residential treatment center arrive there from psychiatric hospitals. The others are placed by the courts and by local school districts. The students range in age from seven to fourteen, all of whom were in full-time residence in the 1987-88 school year. Referring to the State Department of Education monitoring system, Mr. Amedeo recalled that a team of monitors visited the school in January 1987 to conduct a review of operations for the

1986-87 school year. The team remained for three days, interviewing staff people, reviewing documentation and student files, manuals, calendars, and other procedures, and checking for compliance with codes and standards. This resulted in a report issued at the end of January 1987, containing detailed findings and some requested changes. See Exhibit P-1.

Mr. Amedeo called particular attention to Section 4.4 of the report, which states that "the School complies with State standards regarding number of days and hours within the day for instruction." Supporting documentation and efforts used by the monitors to reach this conclusion included the school calendar and master schedule, staff interviews, and program observations. The monitoring report indicated compliance with the 180-day minimum requirement for 1986-87.

The school dealt with the changes and corrective actions suggested in the monitoring report promptly, as evidenced by correspondence received by the petitioner after a follow-up monitoring visit in March 1987. The team was pleased with the progress made to correct areas of noncompliance and a conditional approval was removed, permitting the school to accept new students. Mr. Amedeo was advised that a final three-year approval would be granted contingent upon successful completion of a remedial plan. No mention was made of any deficiency in the number of instructional days listed in the school calendar for 1986-87.

Mr. Amedeo then addressed the audit report for the following year, 1987-88. The school calendar for that year is virtually identical to the calendar for the previous year, which had been approved in the January 1987 monitoring report. When the last letter of 1986-87 approval was received in December 1987, Exhibit P-3, the 1987-88 school year was already underway.

The six days that were disapproved in September 1987 were September 1, 2, 3, 4, 7, and 8. The calendar entries for these days included three days of "returning teaching staff" (one of which was listed as an optional day), two days of "teacher orientation and training," and one day of "staff orientation (all staff must attend)." On the next day, Wednesday, September 9, the calendar states "1987-88 academic classes commence at 8:55 a.m."

Also disallowed in the audit report were October 14, 15, and 16, 1987, listed on the calendar as "team treatment meetings with DYFS caseworkers." Two additional

days later in the year, March 30 and 31, 1987, were also listed on the calendar as "team treatment meeting with DYFS caseworkers."

The audit report deducted the above 11 days from the 181 days reported by the school for the year, resulting in 170 allowed instructional days, ten days short of the required 180. Since the tuition collected by the school from sending districts was based on the 180-day minimum, application of the formula used to fix the cost per pupil resulted in a lower actual cost per pupil because of the missing ten days. That means that the sending districts would have overpaid, and a refund is sought by the respondents for the difference.

Recognizing the problem caused by the calendar descriptions that resulted in this discrepancy, Mr. Amedeo first took issue with the auditing finding relating to the "teacher orientation and training" days. He testified that, even though the calendar states that academic classes commence on a later day, only the new teachers are in training. The others, according to Mr. Amedeo, work with the children or give them recreation. He stated that, generally, on such a day there are four hours of classes for the children. A similar explanation was given for the days listed as "team treatment meetings with DYFS caseworkers." Mr. Amedeo said that teachers not scheduled to meet with the caseworkers also work with children or give them recreation on these days.

One difference noted by Mr. Amedeo relating to these days is that the school encourages the children to go home, if feasible, and approximately one-third of them take advantage of the opportunity. However, since many children remain, they cannot be left to their own devices, and some teachers are obliged to work with them. According to Mr. Amedeo, the same situation occurs during the 30 days of the academic year when the school is technically closed. Some of the children are able to go home, but others cannot and must therefore remain. The same arrangement is often necessary during holiday recesses and on weekends, when museum trips are planned, an activity which the school considers to be part of the educational component.

Mr. Amedeo stated that midway through the 1987-88 year, he felt safe in assuming that the calendar for that year was in good order for 181 instructional days, because in January 1987, the monitoring team posed no objection to the

identical calendar for the previous year. He also saw no problem in counting the teacher orientation and team treatment days as regular instructional days because, although 30 percent of the students were not present or required to be present on any one such day, that 30 percent figure does not remain constant, but changes from one day to another.

Jacqueline Meyer, a teacher of the handicapped at the Somerset Hills School, testified that it is common practice for her to teach when the school is not in session, such as on holidays, during vacations, and on other days not listed for instruction in the calendar. She also stated that the educational process is not adversely affected on any of those days, even though 30 percent of the students might not be in attendance. According to Ms. Meyer, a student not present on any such day is caught up afterwards on an individualized basis. As for the recreational activities that sometimes take place on those days, Ms. Meyers stated that some of them have a place in the educational component.

Referring to the ten or eleven days in question, Ms. Meyer testified that except for a few days when she was on her honeymoon, she was present at the school, teaching students in accordance with her lesson plans.

Douglas C. Osborne, a certified public accountant and business manager/comptroller at the Somerset Hills School, previously worked in the State Department of Education, auditing and monitoring private schools for the handicapped. Mr. Osborne testified that Department of Education personnel working at the monitoring level do not have the final word in approving or disapproving a school's operation. He said that final approvals take place later, on a higher level. However, he indicated that because final approvals often arrive well after the fact, the monitoring reports are used by the administration for future planning.

Mr. Osborne called attention to certain notes appended to the manual issued to State Department of Education auditors containing procedures to be used in their audits of schools for students with disabilities. *See* Exhibit J-4. The notes consist of examples to be followed by the auditors in reviewing financial statements. In June 1990, "Appendix M" was added to these examples. This note illustrates a deduction to be taken in allowable tuition rates when the number of days in session for a ten-

month school year program is 179 days of pupil instruction, instead of the required 180 days. The reduction is referred to in the text of this note as a "penalty."

Mr. Osborne stated that since Appendix M was inserted into the manual in June 1990, after the 1987-88 year, that example should not be used in the audit for the 1987-88 year. According to Mr. Osborne, there was no penalty in effect prior to June 1990, and, therefore, the petitioner should not be subject to a reduction even if the number of instructional days was less than the required 180 in 1987-88.

In Mr. Osborne's opinion, the school had a right to rely on approvals given by the State monitors for previous years, when the calendar was fixed for the year in question. He said that since teacher orientation and team treatment days were allowed by the monitors for the 1986-1987 year, it was reasonable for the school to follow the same procedure, in the absence of notice to the contrary.

When asked, on cross-examination, if he thought that the school should receive the same payment from the sending district for 170 instructional days as for 180 days, Mr. Osborne referred to the regulations and the Instructional Manual, which, prior to 1990, contained no indication of a penalty.

Dennis Moyer, an educational program specialist in the Bureau of Policy and Planning of the State Department of Education, monitored the Somerset Hills School in January 1987 for the 1986-87 year. He testified that at the time of the monitoring, there was no reason for him to review the calendar for the following year, 1987-88. He stated that the December 11, 1987 letter of approval sent to the petitioner, Exhibit P-3, referred only to the 1986-87 year, and that the approval only dealt with the school's compliance with the corrective action plan to remedy deficiencies found in January 1987.

Mr. Moyer further testified that someone else on the monitoring team, Ms. Coles, was assigned to review the 1986-87 calendar, to determine if it contained 180 instructional "in session" days. She reported that the calendar did comply with the requirement.

While unable to speak for Ms. Coles about the procedures she used in checking the calendar, Mr. Moyer said that if he were to perform that task and the day was

listed for "teacher orientation and training," without more, he would not consider it a student day. The reason for this would be his assumption that students are not involved in teacher orientation and training. A student day, in Mr. Moyer's opinion, is a day in which the children are expected to be in school.

In addition, once he looked further down the calendar and saw a day listed when classes were to commence, he would assume that day to be the first pupil day. Reviewing exhibit P-6, the 1986-87 calendar, he would think that instructional classes were to commence on Monday, September 8, and that earlier teacher orientation and training days would not be pupil instructional days.

Looking again at the calendar for October 1986, he noted that October 7, beginning after 2:45 p.m., is the first day of a long weekend for students. Three days of team treatment meetings with DYFS caseworkers follow on October 8, 9, and 10. Then, the calendar indicates that resident students return on the evening of Sunday, October 12, and that classes resume on Monday morning, October 13. Mr. Moyer's assumption, based on the above, is that the long weekend days between October 8 and October 13 did not involve instructional days, and he would disqualify the team treatment days for that reason.

However, Mr. Moyer stated that he would ordinarily make further inquiry about the eliminated days if he found that the total for the year was less than 180. He did not know if Ms. Coles did that. However, assuming that Ms. Coles might have asked and been told that instruction was being given on those days, except for the 30 percent of the students encouraged to go home, he would then speak to an administrator and seek further information. Even so, if the administrator gave him the same information, he would still have a difficult time approving these days, because, according to Mr. Moyer, the school cannot unilaterally determine that a child does not have to attend school, and even encourage him to go home on an instructional day. He said that each pupil should be required to have the same number of school days, which number should be at least 180, except for illness, religious holidays, or individually excused absences or where a child study team determines that a particular student does not need 180 days. In support of this opinion, Mr. Moyer recalled the prior testimony by Mr. Amedeo indicating that the school encouraged as many students as possible to go home on the days in question.

Mr. Moyer recognized that the 1987-88 calendar is virtually the same as that for the previous year, and he does not know why or how Ms. Coles accepted the disputed days on the 1986-87 calendar. There had been no change in policy or requirements from one year to the next, although a full audit was not performed for the earlier year, as it was for 1987-88, when the same kind of days that had been accepted by Ms. Coles for the earlier year were disallowed.

Frank Domin, an auditor in the State Department of Education, testified about the procedures involved in a full scope audit of an entire school year, which is a verification of a school's operations for that year. He explained that, unlike the audit, a monitoring is primarily done as a test in order to look for compliance with regulations.

Mr. Domin indicated that the full scope audit for the 1987-88 school year commenced in August 1989. He checked the actual ten-month calendar against the listing on the school calendar, exhibit P-5, and then added up the number of days. The result was 170 days in session, ten days short of the required 180. In addition to the calendar, Mr. Domin also looked at the school registers, which were checked against the calendar. This was also part of an attempt to confirm enrollment. Discrepancies were found, and some registers showed classes on days that did not appear as such on the calendar. In order to solve some of these discrepancies, lesson plans and curriculum guides were needed, but were not available, nor could Mr. Domin obtain teacher schedules.

Mr. Domin stated that the auditors need documentation in order to show school days, but no such documentation was produced. For example, after reviewing every register and the records for each child, the auditors found no markings or attendance records for any students on the first five contested days in September 1987. No students were marked absent, out sick, or late. This indicated that attendance was not taken. Mr. Domin then concluded that the teacher orientation days were just that, not required instructional days.

The auditors performed the same review as above in an attempt to document the five team treatment days in October 1987 and March 1988, with the same result. The registers contained no absences, no tardiness, and no markings of any kind for any of the students. The same conclusion was reached for those days.

After arriving at the above conclusions, Mr. Domin changed the tuition calculation based on 170 days rather than the required 180 days. He explained that the tuition rate determination begins with an allowance based on a projection from prior experience and is then balanced out after the actual data is obtained. In this case, the audited cost to be allowed would become a fraction less than one, because of the shortage of days in session. This resulted in less allowable tuition cost billing than was obtained with the mandated 180 days.

Mr. Domin stated that Appendix M in the auditor's manual did not change anything and did not amend the code. He said that it was put into the manual as a clarification because, previously, no school had failed to be in session for the required 180 days. He further explained that the addition of Appendix M to the auditing manual, an example that was not included in earlier similar notes, did not change anything because the formula in the regulation, *N.J.A.C.* 6:20-4.1(a)2, has always been relied on as the method for determining the actual cost per pupil. He acknowledged that the word "penalty" was never used before, but that still did not change his opinion about the ongoing nature of the accounting practice.

Mr. Domin repeated that the ten disallowed days were not the same as any of the other days in session, because there were no scheduled classes on record for those days and no physical evidence to show that they were regular school days. The only written references to those days were the calendar entries stating that these were teacher orientation or team treatment days. He acknowledged that the applicable regulation, *N.J.A.C.* 6:20-4.1(a), does not define the meaning of "actually in session." He also knew of no requirement for lesson plans to be retained, and he confirmed that the audit was begun more than a year after expiration of the 1987-88 school year.

Mr. Domin stated that the shortage, 170 days instead of 180, has resulted in a demand by the respondent for payment back to the sending districts of approximately $124,000.

In order to reinforce his previous testimony, Mr. Domin stated that he allowed Memorial Day, May 30, 1988, as a valid instructional day. He said that even though this was a holiday, the school was able to document the fact that it was in session on

that day. On the other hand, the ten days in question could not be supported with any documentation.

Jerome P. Amedeo was recalled to testify as a rebuttal witness for the petitioner. He attempted to provide more definitive information about the monitoring of the 1986-87 year and the same days that had been allowed by Ms. Coles. Mr. Moyer had previously testified that he did not know if Ms. Coles had asked any questions or checked further into the situation. Mr. Amedeo stated that she did confer with him and asked many questions. She also interviewed two or three teachers. However, Mr. Amedeo did not say if Ms. Coles specifically asked questions about the ten days in contention.

FINDINGS OF FACT

1. The school calendars for 1986-87 and 1987-88 were identical in many respects. Both calendars contained three days in the beginning of September for teacher or staff orientation and training. The 1987-88 calendar also lists three days that are not provided for on the 1986-87 calendar for returning teaching staff.

2. All of the above days in early September precede the calendar entry for the day when classes are to commence.

3. The two calendars also provide for three days in October and two days in March or April designated as team treatment meetings with DYFS caseworkers.

4. Eleven days listed on the 1987-88 school calendar carry such descriptions or designations: teacher orientation and training, returning teaching staff, staff orientation, and team treatment meetings with DYFS caseworkers.

5. The three team treatment meeting days in October 1987 follow immediately after an entry on the calendar indicating a long weekend for students, and the two team treatment meeting days in March 1988 are

listed on the calendar for days immediately following the day on which spring recess begins.

6. A State monitoring team visited the school in January 1987, midway through the 1986-87 school year, and checked for compliance with applicable codes and standards. Certain areas of noncompliance were found, and a remedial or corrective action plan was put into effect. The school successfully remediated the deficiencies that were found. No deficiencies were found in the school calendar, and the resulting approval by the monitors did not deal with that subject. Such monitoring is not done for every plan. Exhibit P-3, the letter to the school from the Manager of the Bureau of Programs and Services, stated that the 1986-87 monitoring was completed and that programmatic approval to operate was granted. The letter stated that the next monitoring was scheduled for 1989-90. This indicates that monitoring is only scheduled for one year out of three.

7. No evidence was adduced to indicate that a full scope audit for the 1986-87 school year was conducted.

8. No evidence was adduced to indicate that a mid-year monitoring was done for or during the 1987-88 school year. However, a full scope audit for 1987-88 did take place in August 1989. The eleven calendar days that are the subject of this dispute were disallowed as a result of the audit.

9. The respondent was unable to produce any documentation to show that the eleven days in question were regular instructional days or days that school was in session. No lesson plans, curriculum guides, or attendance records were produced for those days. The only record relating to the eleven days are the calendar entries.

10. Those students who were able to do so were encouraged to leave the school and go home during the eleven days in question. Thirty percent of the students did go home.

11. Since all the students resided at the school, those who remained on those days were occupied by some of the staff, who offered recreational

activities and/or instruction. This was attended to by those staff members who were not involved in teacher orientation and training or team treatment meetings with DYFS caseworkers.

12. Although eleven days in the 1987-88 calendar were disallowed, only ten days are in contention, because the calendar provided for 181 days.

LEGAL DISCUSSIONS AND CONCLUSIONS

The basic procedures for determining tuition rates to be paid to approved private schools for individuals with disabilities are set forth in *N.J.A.C.* 6:20-4.1. It is obvious that actual allowable costs for the ten-month school year program are based on a minimum of 180 days of pupil instruction. *N.J.A.C.* 6:20-4.1(a)1.

This regulation further provides that

> "Average daily enrollment" for the purpose of determining the actual cost per pupil shall be the sum of the days present and absent of all school pupils enrolled in the register(s) of the school divided by the number of days the approved private school for the handicapped was actually in session rounded to the nearest four decimal places, except in no event shall the divisor be less than 180 days.
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> [*N.J.A.C.* 6:20-4.1(a)2.]

The regulation does not specify the procedure to be used when the number of days that a school is actually in session is less than 180. This is the *required minimum*, even though the divisor should be no less than 180 days, as set forth in the regulation. The average daily enrollment is represented by the dividend (numerator). If the dividend is less than 180, the tuition rate would necessarily fluctuate downward, because the fraction is less than one.

The key inquiry, however, is whether the petitioner complied with the 180-day school year requirement. Stated another way, was the school actually in session, for instructional days, for 180 or more days during the ten-month 1987-88 year?

Again, the regulations provide no definitive standard to assist in a determination whether a given day should be counted as a day in session.

After reviewing all the evidence, it is **CONCLUDED** that the school was actually in session, for instructional days, for 170 days, not 180 or 181 days. This conclusion is based on the following factors:

Six of the days in question occurred before Wednesday, September 9, 1987, the day on which, according to the calendar, academic classes were to commence. Those earlier days are listed as days on which teaching staff was returning and teacher orientation training was held.

Five of the days in question are reserved on the calendar for team treatment meetings with DYFS caseworkers. These days immediately follow the beginning of a long weekend and the spring recess.

The testimony clearly indicates that students were encouraged, wherever possible, to absent themselves from school and return home on all of these days. The fact that only 30 percent of them were able to do so on any such day does not change the situation. How can school actually be in session when the students need not be there and they are encouraged to go home instead? Obviously, since all of the students resided at the school, those who remained and did not go home on the days in question could not be left totally to their own devices. However, the fact that some of the teachers worked with these students or supervised recreational activities does not convert the day into one where the school was actually in session.

A good deal of petitioner's argument revolves around the fact that many similar days provided for in the previous year's calendar, 1986-87, were not challenged, and, in fact, were seemingly allowed by the monitoring team. The 1986-87 monitoring team did not disapprove of calendar days identical to those in contention here. The reasons for the acceptance of these days by the monitoring team are unexplained, and it is fruitless to speculate about the actions of that team. However, the 1986-87 year was not subjected to an in-depth full-scale audit, which might have produced a more particularized result for the teacher orientation and team treatment days. It is noted that Mr. Osborne testified that a monitoring does not produce a final approval. Unfortunately, without knowing that these days were subject to being questioned, the school modeled its 1987-88 calendar on the calendar for the previous year. The school year in question was then completed,

long before petitioner knew of the problem. That situation has led the petitioner to argue that the respondent should be equitably estopped from disallowing the days in question.

The legal authorities cited by the petitioner relating to the doctrine of estoppel are clearly recognized. However, this matter involves a further element, the application of estoppel against a governmental agency.

> The doctrine of estoppel is not applied to a governmental agency performing a governmental function to the same extent as it is against individuals and private corporations. 1 *A.L.R.* 2*d* 349; 19 *Am. Jur.*, sec. 168, *p.* 820; *Bayonne v. Murphy & Perrett Co.*, 7 *N.J.* 298, 311 (1951). It has been invoked by our courts in order to prevent *manifest wrong and injustice*. However, it is clear that to invoke the doctrine against a municipality, the circumstances would have to be extreme. See *Vogt v. Belmar*, 14 *N.J.* 195 (1954); *Springfield Tp. v. Beasley*, 19 *N.J. Super.* 147 (Ch. Div. 1952), and *Johnson v. Hospital Service Plan of N.J.*, 25 *N.J.* 134 (1957).
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> [*Feldman v. Urban Commercial, Inc.*, 70 *N.J. Super.* 463, 477-78 (Ch. Div. 1961); emphasis in original.]

The considerations governing whether a particular case and the equities there presented warrant application of an estoppel should be assessed according to the criteria mentioned in *Tubridy v. Consolidated, etc., Pension Com.*, 84 *N.J. Super.* 257 (App. Div. 1964). This case addressed the granting of the retirement pension by the Consolidated Police & Firemen's Pension Fund Commission.

> The applicability of the doctrine of estoppel against public agencies and officials is quite limited, to guard against use thereof to injure the public interest. Although there is growing liberality in entertaining the rule in certain areas, see *Gruber v. Mayor and Tp. Com. of Raritan Tp.*, 39 *N.J.* 1, 18 (1962), each case stands on its own facts. "The precise nature and extent" of the plaintiff's "good faith reliance" on the official action or inaction relied on must be weighed against the public interests involved. *Id.*, at p. 19. So judged here, the plaintiff's asserted equities lack such weight as to justify what we find to be a plain violation of a statute designed to protect the interests of all pensioners within its purview, present and prospective.
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> [*Id.* at 264.]

Although it is most often held that estoppel will not be used to bar governmental action, there have been a few instances where estoppel has been

permitted to prevent such action. *Anske v. Borough of Palisades Park*, 139 *N.J. Super.* 342 (App. Div. 1976) effectively addressed the policy concerns in applying the estoppel doctrine when it stated, "[e]quitable principles of estoppel will be applied against public bodies where interests of justice, morality and common fairness dictate that course." *Id.* at 348. *See also Dambro v. Union County Park Commission,* 130 *N.J. Super.* 450, 454 (Law Div. 1974).

The petitioner's claim can satisfy several of the criteria needed in order to apply an estoppel. The school did take a position (promulgation of the calendar) in reliance on the respondents' allowance of a similar prior calendar, and the petitioner presumably did so in good faith. In addition, the tuition charged to the sending districts was based on the school's assumption that at least 180 instructional days had been provided for.

However, the demand for an estoppel falls short in one important area. As concluded above, the days in question were not and should not have been considered to be days in which the school was in session. This was true for 1986-87, as well as 1987-88, and the fact that the monitoring team erred or overlooked the problem does not convert the improperly credited days into bona fide instructional days.

In this respect, the equities do not favor the petitioner, because it might be said that the school was unjustly enriched in both school years due to billing and payment received for days that should not have been included in the required number of days in session. It is true that the petitioner changed its position in reliance on the 1986-87 monitoring period; however, the change in position enabled it to receive monies to which it was not entitled in the first place.

Therefore, no manifest wrong and injustice has been committed against the petitioner that would justify the invocation of an estoppel. There are no interests of justice, morality, and common fairness that dictate the need for an estoppel. As for the public interest, payment to the petitioner by the sending districts of tuition costs for days when the school was not actually in session represent the expenditure of public funds that should not have been so disbursed.

It is therefore **CONCLUDED** that an estoppel should not be applied to prevent the action sought to be taken by the respondents.

Another argument advanced by the petitioner is that the demand by the respondents for reimbursement constitutes the imposition of a penalty that was not provided for in the regulations in the 1987-88 school year. This argument primarily relies on the addition of Appendix M to the procedural manual in 1990. *See* Exhibit J-4. Like the other notes in this exhibit, Appendix M does not change the regulatory scheme, nor does it promulgate a new regulation. The respondents are correct in asserting that Appendix M is merely an additional illustration of the kinds of situations that can arise under the regulation, and the method of calculation is set forth as an example.

The use of the word "penalty" in Appendix M is unfortunate. "A penalty is a sum of money of which the law exacts payment by way of punishment for doing some act that is prohibited or omitting to do some act that is required to be done." 70 *C.J.S. Penalties* § 2 (1987).

The respondents are not exacting a penalty against petitioner for having included ten extra days in the calendar. Instead, the tuition rate formula has been recalculated in accordance with the lesser number of actual days in session, and the school is being asked to refund the overpayments to the sending districts.

Admittedly, the sudden and unexpected request for a substantial amount of money in reimbursement creates an obvious difficulty for the petitioner, but the money was an overpayment that was obviously not earned when it was received. Again, the equities favor those who expended funds that should not have been charged them in the first place, and the petitioner will have to deal with the economic pressure as best it can.

Based upon the above, it is further **CONCLUDED** that the petitioner's arguments relating to the imposition of a penalty cannot be sustained. Despite the language used in Appendix M, the respondents are not seeking to punish the petitioner and are not imposing a penalty against it. The demand for a refund is based instead on the application of accounting principles following an audit that has disclosed the more accurate status of the 1987-88 cost per pupil.

It is therefore ultimately **CONCLUDED** that the petitioner did not comply with the 180-day school year requirement for purposes of the tuition payment program, and the petitioner has not shown good cause to set aside or reverse the decision of the Division of Compliance, which affirmed the decision of the Bureau of Auditing on reimbursable costs.

ORDER

It is therefore **ORDERED** that the petition be **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

June 10, 1993
Date

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

6/11/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 15 1993
Date

OFFICE OF ADMINISTRATIVE LAW

le/e

APPENDIX

LIST OF WITNESSES

Jerome P. Amedeo
Jacqueline Meyer
Douglas C. Osborne
Dennis Moyer
Frank Domin

LIST OF EXHIBITS

P-1	Monitoring Report, January 1987
P-2	Letter to Jerome P. Amedeo from Nadia Delonas
P-3	Letter to Jerome P. Amedeo from Nadia Delonas, December 11, 1987
P-4	Letter to Jerome P. Amedeo from Dennis Moyer, February 19, 1987
P-5	1987-88 school calendar
P-6	1986-87 school calendar
J-1	Letter to Jerome P. Amedeo from Edward D. Kent
J-2	Letter to Jerrold D. Goldstein, Esq. from Thomas J. King, January 14, 1991
J-3	Report of Examination (Audit Report) - Operations for July 1, 1987 through June 30, 1988
J-4	Notes to Financial Statements from Procedural Manual, pages 61-96 (?) and Appendix M

OAL DKT. NO. EDU 3750-91

SOMERSET HILLS SCHOOL, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
JOHN ELLIS, COMMISSIONER OF EDUCATION, AND THOMAS J. KING, ACTING DIRECTOR, DIVISION OF COMPLIANCE, STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENTS.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. It is noted that exceptions were filed by Jerome Amedeo, Executive Director of petitioner, rather than by petitioner's attorney of record as required by N.J.A.C. 1:1-5.1. Therefore, such exceptions will not be considered herein. Respondents filed timely exceptions in accordance with N.J.A.C. 1:1-18.4.

Respondents' exceptions support the ALJ's initial decision and urge the Commissioner to adopt this decision in its entirety.

Upon a careful and independent review of this matter, the Commissioner agrees with and adopts the findings of the Administrative Law Judge for the reasons well-stated in the initial decision. The Petition of Appeal is, therefore, dismissed.

JULY 21, 1993

DATE OF MAILING - JULY 21, 1993

COMMISSIONER OF EDUCATION

170-93

EDU #3750-91
C # 170-93
SB # 42-93

SOMERSET HILLS SCHOOL, INC.,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
JOHN ELLIS, COMMISSIONER OF EDUCATION, AND THOMAS J. KING, ACTING DIRECTOR, DIVISION OF COMPLIANCE, STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, July 21, 1993

For the Petitioner-Appellant, Jerrold D. Goldstein, Esq.

For the Respondent-Respondent, Arlene G. Lutz, Deputy Attorney General (Deborah T. Poritz, Attorney General of New Jersey)

The decision of the Commissioner of Education is affirmed for the reasons expressed by the Administrative Law Judge.

February 2, 1994

Date of mailing FEB 04 1994

171-93

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN SOUTHERN	:	COMMISSIONER OF EDUCATION
REGIONAL SCHOOL DISTRICT, OCEAN	:	DECISION
COUNTY.	:	
	:	

JULY 21, 1993

OAL DKT. NO. EDU 4008-93

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN SOUTHERN REGIONAL SCHOOL DISTRICT, OCEAN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before her and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 21, 1993

DATE OF MAILING - JULY 21, 1993

172-93

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SOUTHERN REGIONAL SCHOOL DISTRICT, CONSTITUENT DISTRICT OF STAFFORD TOWNSHIP, OCEAN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

JULY 21, 1993

OAL DKT. NO. EDU 4007-93

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SOUTHERN REGIONAL SCHOOL DISTRICT, CONSTITUENT DISTRICT OF STAFFORD TOWNSHIP, OCEAN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before her and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 21, 1993

DATE OF MAILING - JULY 21, 1993

173-93

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF OLD BRIDGE, : DECISION
MIDDLESEX COUNTY. :
:

SYNOPSIS

Petitioner, defeated candidate in Board of Education election, requested inquiry into qualifications of Intervenor Marinaccio who was elected to Board. Petitioner contended intervenor was not a registered voter in district at time of submission of her petition and at time of her election, thus violating N.J.S.A. 18A:12-1.

ALJ found intervenor was not a lawfully registered voter at time she filed her petition for candidacy and she was not a registered voter at time of her election to Board since she failed to vote in general elections for four consecutive years resulting in her name being removed from active rolls. Intervenor was ordered removed from Board and her replacement was to be appointed by County Superintendent of Schools as mandated by N.J.S.A. 18A:12-15(a).

Commissioner adopted findings and determination in initial decision. Commissioner directed intervenor's removal from position and her replacement for reasons expressed by ALJ.

JULY 27, 1993

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4003-93S
AGENCY DKT. NO. 99-4/93

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF OLD BRIDGE, MIDDLESEX COUNTY

Elias L. Schneider, Esq., for petitioner Mitch Geier (Brigiani, Gelzer, Cohen & Schneider, attorneys)
William T. Yadlon, Esq., for intervenor Georgette A. Marinaccio
Harold G. Smith, Esq., for the Board of Education of the School District of Old Bridge (Wilentz, Goldman & Spitzer, attorneys)

Record Closed: June 16, 1993 Decided: June 30, 1993

BEFORE **JEFF S. MASIN**, ALJ:

Petitioner Mitch Geier seeks an order removing Intervenor Georgette Marinaccio from her position as an elected member of the Board of Education of the Old Bridge School District. She was elected to a seat on the Board by the voters of the District on April 20, 1993. By letter dated April 26, 1993, Mr. Geier requested that the Commissioner of the State Department of Education conduct an inquiry into the election, specifically in regard to his complaint that Ms. Marinaccio was not a registered voter in the District at the time of the submission of her petition and at the time of her election and therefore, not eligible for election. The Commissioner transferred the matter to the Office of Administrative Law ("OAL") for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1-21 and *N.J.S.A.* 52:14F-1-13.

After the case was transferred to the OAL, Ms. Marinaccio sought to intervene and an order allowing intervention was issued by this judge on May 24, 1993. Thereafter, the parties agreed to a Stipulation of Facts and agreed that the case could be decided based upon that stipulation without the necessity of a hearing. The Stipulation was received on June 16, 1993.

THE STIPULATED FACTS

The parties have stipulated the following facts, paraphrased from the Stipulation:

1. Ms. Marinaccio was elected to the Board on April 20, 1993, with the highest vote total of the three successful candidates.

2. She last voted in a general election on November 8, 1988.

3. After November 8, 1988, Ms. Marinaccio only voted in school board elections.

4. She voted in annual school board elections on April 5, 1988, in April 1991, and in April 1992.

5. On April 29, 1993, Ms. Marinaccio was advised by the Board of Elections that pursuant to *N.J.S.A.* 19:31-5 she was being removed from the active to the inactive voter list and thus she was no longer a "registered voter," this due to her failure to vote in a general election in the past four consecutive years.

6. Ms. Marinaccio's first notification of the Board of Elections attempt to remove her registration form from the active to the inactive registered voter's list was on April 20, 1993 when she attempted to vote in the Board of Education election.

7. She re-registered to vote on April 21, 1993 at the County Board of Elections.

8. The Middlesex County Board of Elections began pulling the voting sheet for four year nonvoters from the election books in February and March, 1993.

9. The clerical staff of the Board of Elections proceeded to remove the names of the four year nonvoters from the active voter list on the computer. The names being purged from the computer of Old Bridge voters was not completed until April 1, 1993.

10. Ms. Marinaccio's name was still on the computer list on March 17, 1993 and her name was not physically purged from the list until March 30, 1993.

All of the above stipulations are incorporated in this initial decision as **FINDINGS OF FACT**.

APPLICABLE STATUTES

N.J.S.A. 19:31-5 provides that if a registered voter

> does not vote at any general election during 4 consecutive years his original and duplicate permanent registration and record of voting forms shall be removed to the inactive file and he shall be required to register before being allowed to vote at any subsequent election.

N.J.S.A. 18A:14-10 requires that a nominating petition for a candidate for election to a school board

> shall be addressed to the secretary of the board of education of the district and therein shall be set forth:
>
> . . .
>
> d. That the person so endorsed is legally qualified to be elected to the office.
>
> Accompanying the nominating petition and to be filed therewith, there shall be a certificate signed by the person endorsed in the petition, stating that:
>
> a. He is qualified to be elected to the office for which he is nominated . . . .

N.J.S.A. 18A:12-1 sets forth qualifications for board members.

> Each member of any board of education shall be a citizen and resident of the district, or of such constituent district of a consolidated or regional district as may be required by law, and shall have been such for at least one year immediately preceding his appointment or election, he shall be able to read and write, shall be registered to vote in the district, ...

DISCUSSION

The inquiry as to the eligibility of Ms. Marinaccio to be a member of the school board arises from the admitted fact that she did not vote in a general election after November 8, 1988 up to the time of the April 20, 1993 school board election, a period exceeding four years. The stipulated facts and the representations in Ms. Marinaccio's affidavit indicate that the process of removing the "original and duplicate permanent registration and record of voting forms" from the active to the inactive file had not been completed as of the date upon which Ms. Marinaccio filed her nominating petition. The issues at the heart of the matter appear to be whether her failure to vote in the general elections did in fact serve to change her status as an active voter, whether her having voted in intervening school board elections preserved her status as an active registrant, whether the fact that she was not notified of the intention of the Board of Elections to remove her name from the active list until after the date of the election is of any significance in regard to her status at the time of the election, and whether the fact that she re-registered on April 21 and was thus properly registered at the time of her taking office is of any significance.

The plain wording of the statute, *N.J.S.A.* 19:31-5, requires that action be taken to remove the voter's forms from the active rolls where the voter has failed to vote in general elections for a period of four consecutive years. The term "election" as used in this legislation has been interpreted by the Attorney General in Formal Opinion 1965-No. 3, issued October 8, 1965, where the Attorney General concluded that the term did not include school board elections, which were determined not to be "general elections," "primary elections," "municipal elections," or "special elections," the four categories of "elections" included in the definition of the term "election" contained at *N.J.S.A.* 19:1-1. The Attorney General's Opinion is entitled to considerable weight and is generally viewed by the courts as "strongly persuasive." *Clark v. Degnan*, 163 *N.J.Super.* 344 (Law Div. 1978), modified on other

grounds and affirmed, 83 *N.J.* 393 (1980). A review of the analysis contained in that opinion supports reliance thereon. Thus, the fact that Ms. Marinaccio has voted in school board elections during the four consecutive years during which she did not vote does not affect the application of *N.J.S.A.* 19:31-5.

The statutory requirement for the removal of the registration forms from the active to the inactive file is triggered by the fact of a lack of voter participation in the voting process in "elections" during a period of four consecutive years. The fact that the ministerial task of actually transferring files and forms and changing computerized records has not been accomplished by any given date after the voter has not voted for the four consecutive year period does not affect the fact that the voter's lack of activity has run afoul of the "evil" that the legislation was aimed at. In other words, where a voter fails to vote for four consecutive years, the Legislature has seen fit that his or her status as an active registrant end, subject to reinstatement arising by the action of the voter to renew his or her active status by the act of re-registration. The trigger for inactive status is the four years of inactivity, not the ministerial work needed to effectuate the change in the records. Thus, the fact that all of the required changes had not occurred as of the date of the filing of the petition is irrelevant to the question of Ms. Marinaccio's eligibility to stand for election. Her four years of consecutive non-voting was completed in November 1992, not first at some point in 1993. Thus, Ms. Marinaccio was ineligible at the time that she filed for candidacy, as well as on the date of the election.

The ineligibility which affects a voter failing to exercise the franchise during a four year consecutive period is not dependent upon the giving of any form of notice to the voter. *N.J.S.A.* 19:31-15 specifically eschews the need for notice

> In all counties when the transfer of any person's permanent registration form is to be made to the death file or is to be made to the inactive file because such person did not vote at any election during four consecutive years, . . . , no notice of such proposed action need be given to such registered person and such person's name and registry address need not be published as required in this section.

Any notice provided to the ineligible voter by the Board of Elections is only a discretionary courtesy. Presumably, at the time that the actual removal of the forms occurs, the Board advises the voter and this does allow the voter to act so as to

reactivate his or her status. However, this is not a statutory obligation. Thus, the lack of any notice to Ms. Marinaccio prior to the election on April 20 does not serve to prevent the determination that she was not an eligible voter at the time of the election, or even before, at the time of the filing of the nominating petition, which is the crucial date for eligibility, *DeLay, Sr. v. Bd. of Ed. of Township of New Hanover*, OAL DKT. NO. EDU 5284-90, (Final Decision, February 22, 1991).

CONCLUSION AND ORDER

Based upon the stipulated facts and the legal analysis stated above, I **FIND** that Georgette A. Marinaccio was not a lawfully registered voter at the time that she filed her petition for candidacy for the Old Bridge Board of Education and I also **FIND** that she was not a registered voter at the time of her election to the Board on April 20, 1993. Therefore, I **CONCLUDE** that she was not lawfully elected to serve on the Board. Her removal from the Board is therefore required. Her replacement is to be appointed by the County Superintendent of Schools, as mandated by *N.J.S.A.* 18A:12-15(a).

It is **HEREBY ORDERED** that Georgette A. Marinaccio be removed from the Old Bridge Board of Education and that the Middlesex County Superintendent of Schools appoint a replacement to fill the vacancy.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 30, 1993
Date

JEFF S. MASIN, ALJ

Receipt Acknowledged:

7/2/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 7 1993
Date

OFFICE OF ADMINISTRATIVE LAW

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF OLD BRIDGE,	:	DECISION
MIDDLESEX COUNTY.	:	
	:	

The record and initial decision rendered in this matter have been reviewed. Intervenor filed timely exceptions pursuant to N.J.A.C. 1:1-18.4.

Intervenor raises anew those arguments posed at the hearing below. More specifically, she would have the Commissioner find first, that she was duly registered to vote on the crucial date for election, that is, the date on which she filed her petition, as evidenced by the fact that her name at that point had not been removed as a non-voter by the officials of the Middlesex County Board of Elections. She also argues that equity requires a finding that she was properly registered as a voter on March 17, 1993 and was qualified, therefore, to run for a school board seat. To decide otherwise, she contends, would demean the school board election as a second-class election and, further, would suggest that the County Board of Elections' records are not to be relied upon. Finally, intervenor avers that the ALJ failed to address the equities of intervenor's momentary lapse of registration as distinguished from the DeLay, supra, matter. She claims the lapse in registration was in part caused by the failure of the County Board of Elections to

remove permanent registrations before the filing of petitions for the school election. She observes that the momentary lapse in registration was cured immediately as compared to the four-year lapse as was the case in DeLay.

Upon careful and independent review of the record of this matter, the Commissioner concurs with the findings and determination of the ALJ that Georgette A. Marinaccio was not a lawfully registered voter at the time she filed her petition for candidacy for the Board of Education in Old Bridge for the reasons expressed in the initial decision. The Commissioner further concurs with the ALJ that, based upon the strict reading of the statutes in question in concert with Attorney General Opinion 1965-No.3, issued October 8, 1965, she was not eligible to be seated as a school board member, as a result of her not having been a registered voter. The Commissioner's review of the exceptions convinces her that the ALJ fully and fairly disposed of the concerns raised in said submission and, therefore, they are dismissed as being without merit.

Accordingly, IT IS hereby ORDERED that Georgette A. Marinaccio be removed from the Board of Education of Old Bridge and that the Middlesex County Superintendent of Schools appoint a replacement to fill the vacancy on the Board of Education of the School District of Old Bridge.

Leo J. Klein

ACTING COMMISSIONER OF EDUCATION

JULY 27, 1993

DATE OF MAILING - JULY 27, 1993

173-93

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(173-93)

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION ON MOTION
OF OLD BRIDGE, MIDDLESEX COUNTY.	:	
_____	:	

SETPEMBER 21, 1993

OAL DKT. NO. EDU 04003-93S

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION ON MOTION
OF OLD BRIDGE, MIDDLESEX COUNTY.	:	
	:	

For Petitioner-Respondent, Elias L. Schneider, Esq.
(Brigani, Cohen & Schneider, P.A.)

For Board, Warren Wilentz, Esq.

For Intervenors, Anat Gorden, Esq.
(Wilentz, Goldman & Spitzer)

This matter has come before the Commissioner of Education on September 2, 1993 by way of Application for Emergent Relief and Order (motion for stay of the Commissioner's decision dated July 27, 1993 with request for reopening and reconsideration) sought by Intervenor Georgette A. Marinaccio, who was removed as a member of respondent Board of Education based on a stipulation of facts by direction of the Commissioner of Education decision dated July 27, 1993.

By letter dated September 2, 1993, the Board and Petitioner-respondent Mitch Geier (Geier) were directed to submit a response to intervenor's submissions. Geier's attorney submitted a response on September 9, 1993. The Board filed no response. On Monday, September 13, 1993, intervenor submitted a reply to Geier's reply brief. Such submission is not provided for in regulation and, thus, is not considered in the disposition of this matter.

Intervenor presents two arguments in seeking a stay and reconsideration of the Commissioner's decision. The first contention claims that under case law, election laws do not confirm the right of qualified persons to become candidates, but rather, only establish the parameters governing the orderly conduct of primary elections. She alleges, as she did during the hearing, that she was removed from the Board due to a technical flaw in her registration, but adds now that a reading of N.J.S.A. 18A:12-1 and N.J.S.A. 19:4-1 taken "as a whole in the context of Title 18A, requires the qualification that a board member be a 'qualified' registered voter, rather than a 'technically' registered voter." (Intervenor's Brief, at p. 8, relying on N.J.S.A. 18A:12-1) Intervenor avers that the legislative history of N.J.S.A. 18A:12-1 compels a finding that her having failed to vote in the past four years in a general or primary election does not render her an unqualified candidate, but instead, merely an unregistered one. She cites, among other cases, Alston v. Mays, 152 N.J. Super. 509, 517 (Law Div. 1977) in support of this proposition.

She contends further that the 1965 Attorney General's Opinion, relied on by both the ALJ and Commissioner in directing her removal is inapposite to this case in that it has nothing to do with qualification for public office, but rather, establishes the parameters governing the orderly conduct of election under N.J.S.A 19:31-5. She submits that because election laws are to be construed liberally so as to effectuate their intent to provide a broad right of franchise to the voters, she should prevail on the merits of her claim, pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982).

Intervenor's second argument alleges she will meet the Crowe, supra, standards because there exists ambiguity as to whether she was technically a registered voter on the date of the school Board election that would thereby qualify her as a Board member. In support of this contention, she claims now, contrary to the stipulation of facts submitted in the hearing below, that she voted during the governor's election on November 4, 1989 and at a general election on November 8, 1988. She buttresses this claim by stating that while the "blue sheet" (Intervenor's Brief, at p. 1) record from the Board of Elections did not reveal proof of this voting because she filed a change of address form exactly thirty (30) days before the governor's election, "[s]he has been told that a subpoena of the Board of Elections record could prove that she voted at this 'general' election based on the 'blue sheets' as well as the 'white sheets' saved during an election." (Intervenor's Brief, at pp. 1-2) In support of this claim, she submits her own certification. She also submits a certification from Dr. Quirk, Old Bridge Board Secretary and election official, suggesting that she was a registered voter based on his verification with the Board of Elections via a memorandum he developed to the Board dated March 19, 1993. Intervenor alleges that she has been told that an affidavit was filed when Dr. Quirk originally verified the registration status of all Board candidates in the memo of March 1993, but intervenor submits she has been unable to locate this affidavit.

Intervenor claims there will be irreparable harm to her and her constituents were she to be removed from the Board insofar as she is involved in a committee to interview negotiators for the Board negotiation team regarding the teachers' contract. Thus, she

claims the status quo must be maintained during her appeal of the Commissioner's decision to the State Board of Education. She contends also that maintaining the status quo will not inconvenience Geier or the Board, thus submitting that the balance of equities tips heavily in her favor.

Geier's reply claims intervenor has failed to show any new evidence, insofar as intervenor is on record as having known or suspected that she voted in the 1989 gubernatorial election. Instead, Geier argues that intervenor has failed to bring forward any proof that she so voted. Geier further contends that intervenor has failed to show due diligence in bringing forth proof that she did participate in the November 1989 general election, and that the information in the affidavit she now brings before the Commissioner is nothing more than hearsay. Geier claims, in contrast, that intervenor's statement that she voted in the 1989 Gubernatorial election is contradicted in the record of the hearing conducted by the Office of Administrative Law by Exhibit B, the certification of Victoria Ricci of the Board of Election, originally filed with Geier's Petition of Appeal and also attached to response to the motion for stay and reconsideration and reopening. Said certification states that the Board of Elections determined that intervenor was a four-year non-voter. He also attaches Exhibit C a letter dated September 7, 1993, again from Mrs. Ricci, restating her position that intervenor last voted in the 1988 November general election.

Geier bolsters his contention by observing that intervenor stipulated to the ALJ at the hearing before the Office of Administrative Law that she had not voted in any school board

elections after November 8, 1988. In support of this contention, Geier affixes Exhibits J and L, the stipulations submitted to the ALJ at the hearing below.

Geier further claims intervenor has failed to demonstrate the standards for the withdrawal of a stipulation of fact under Cartwright v. Atlas Chemical Industries, Inc., 593 P. 2d 104, 18 A.L.R. 4th 180 (Okla. Ct. App. 1978), first because it is unclear as to whether the fact stipulated to is untrue, insofar as she has still produced no evidence of her voting in the 1989 election. Second, Geier argues intervenor's argument fails the Cartwright standards because the application to stay the Commissioner's decision due to the alleged faulty stipulation is untimely and, third, because it is unclear if good cause has been show as to why this alleged fact has not been substantiated previously to contradict a stipulation made three months earlier.

In response to intervenor's claim of constitutional right to be a candidate for board election as a result of her being qualified to vote, albeit unregistered, Geier claims there are no constitutional rights which are invoked in regard to school board elections, especially the right to vote. Further, Geier claims the factual issue as to whether intervenor was on the computer rolls of the Board of Elections is also irrelevant in determining the qualifications to vote in school board elections, for the same reasons given for why the constitutional right to vote is inapplicable to intervenor's position.

Finally, Geier claims that intervenor's arguments are either factually oriented, that is, whether she voted in the 1989 Gubernatorial election, or are misapplications of constitutional law

to a political subdivision or creation of the Legislature. Geier claims that the Commissioner does not act as a new factfinder. He claims that intervenor had a fair trial and, thus, her claims are not properly before the Commissioner now.

Because of intervenor's request to bring new facts to the record in seeking a stay, the Commissioner has determined to reopen and reconsider her decision of July 27, 1993. Upon careful review of such Request for Stay and for Reconsideration and Reopening, the Commissioner determines that no basis exists for alteration of her earlier findings and conclusions and, thus, that the stay should be denied.

Intervenor's claim that her constitutional right to be a candidate for a seat on the Board has been abridged because she was a qualified, albeit an unregistered, voter on the date of the school election in question, can be disposed of by the recent New Jersey Supreme Court decision in Raymond Lesniak v. John Budzash, 133 N.J. 1, 12 (1993). Therein, the Court held that voters must be registered in order to be considered "qualified" to sign a party nomination petition under the terms of N.J.S.A. 19:23-7. Although intervenor's argument revolves around her qualification to be a candidate herself, Lesniak stands for the proposition that one cannot be qualified to vote unless he is registered to vote. Hence, intervenor's argument that she was inappropriately removed from office because she remained qualified to vote, even though she was not registered to do so, must fail.

Similarly fallacious is intervenor's contention that statutes governing orderly conduct of an election cannot be read in concert with other applicable law to establish qualifications for

public office. The Attorney General, in a 1980 Formal Opinion, effectively refuted this contention in his treatment of a similar question regarding the qualification of candidates for the State Legislature:

> ***Although the Constitution provides no definitive guide as to the time when this constitutional requirement must be satisfied, the procedural provisions of the election laws do impose certain requirements. In this regard, a candidate for the Legislature is obliged to file a petition with the Secretary of State to appear either on the primary election ballot or directly on the general election ballot. N.J.S.A. 19:13-3, 19:13-9, 19:13-6, 19:23-24. A candidate nominated for office in a petition must annex to such petition a certificate indicating, among other things, that "the candidate is a resident of and a legal voter in the jurisdiction of the office for which the nomination is made." N.J.S.A. 19:13-8, 19:23-15. Likewise, an individual nominated by write-in votes must thereafter file a similar certificate of acceptance. N.J.S.A. 19:23-16. In view of these statutory requirements, a candidate for the Legislature must be entitled to the right of suffrage at the time of filing a petition or, alternatively, at the time of filing a certificate accepting a write-in nomination.
>
> (Formal Opinion No. 5 - 1980)

In applying this opinion to candidates for Board membership, the Commissioner has specifically found that such candidates must meet the requirements of N.J.S.A. 18A:12-1, excepting as to length of residency, which is calculated by the express terms of the statute from the date of appointment or election, on the date they file their nominating petitions pursuant to N.J.S.A. 18A:14-10. This statute requires, analogous to those cited in the Attorney General Opinion above, a certification from the candidate that he is "qualified to be elected to the office for which he is nominated" and

> ***In the Commissioner's estimation, "qualified to be elected to said office" can mean nothing other than meeting the qualifications for board

> membership plainly set forth in N.J.S.A. 18A:12-1, among which is registration to vote in the district.*** Christopher De Lay, Sr. v. Board of Education of the Township of New Hanover, Burlington County, and Thomas S. King Jr., 1991 S.L.D. 298, 301

Thus, at the time of filing her nominating petition, intervenor in this matter was required by N.J.S.A. 18A:14-10a to certify that she was then qualified to be elected to the office for which she was nominated. Because she was, based on the only acceptable information now available, not registered to vote at the time of her filing a nominating petition, she was not qualified to assume a seat on the district's Board of Education pursuant to N.J.S.A. 18A:12-1. Lesniak, supra

As to intervenor's claim of new facts, the information tendered in intervenor's submission brings no new facts to light, but merely offers speculation as to documents that might exist regarding her voting history. Therefore, no basis exists for upsetting the Commissioner's findings and conclusions of her July 27, 1993 decision which were predicated upon a stipulation of facts submitted by the parties on Motion for Summary Decision. The only evidence that could serve to alter the Commissioner's ruling of July 27, 1993 would be a certification from the Board of Elections, or an order from a court of appropriate jurisdiction, attesting to the fact that the County Board of Elections erred in removing intervenor from the ranks of registered voters pursuant to N.J.S.A. 19:31-5. If intervenor believes that the determination made by the County Board of Elections was in error, she must appeal through the proper authority above such body inasmuch as the Commissioner of Education has no authority to overrule a determination of a County Board of

Elections. Should intervenor secure such a correction, the Commissioner of Education will, upon invervenor's request, reopen the matter for further consideration.

Accordingly, for the reasons set forth above, for failure to meet the criteria for the grant of pendente lite restraints as articulated in Crowe v. De Gioia, supra, and for failure to bring to the record facts which would alter the Commisioner's decision of July 27, 1993, the Motion for Stay is denied and the Commissioner's prior decision reaffirmed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 21, 1992

DATE OF MAILING - SEPTEMBER 22, 1992

173-93

EDU #4003-93S
C # 173-93
C #222+-93
SB # 43-93

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF OLD BRIDGE, : DECISION ON MOTION
MIDDLESEX COUNTY. :
:

Decided by the Commissioner of Education, July 27, 1993

Decision on motion by the Commissioner of Education, September 21, 1993

For the Petitioner-Respondent, Brigiani, Gelzer, Cohen & Schneider (Elias L. Schneider, Esq., of Counsel)

For the Respondent, Wilentz, Goldman & Spitzer (Harold G. Smith, Esq., of Counsel)

For the Intervenor-Appellant, Anat Gordon, Esq.

Petitioner in this matter was an unsuccessful candidate for a position on the Board of Education of the Township of Old Bridge in the annual school election held on April 20, 1993. He alleged that the successful candidate had not been a registered voter either when she filed her petition or at the time of the election and, therefore, had not been eligible for election to the Board.

The matter was transmitted to the Office of Administrative Law (OAL) where the successful candidate was granted the status of intervenor, and it was agreed by the parties that the merits of this case would be decided on the basis of a stipulation of facts. That stipulation established that Intervenor had not voted in a general election in the past four consecutive years and that, for this

Oct. 6, 1993

reason, on March 30, 1993 her name had been physically removed from the active voter list.

By Initial Decision issued on July 7, 1993, and on the basis of the stipulation between the parties, the Administrative Law Judge (ALJ) concluded that the Intervenor had not been a registered voter at the time of her election and, so, was not qualified for membership on the Board pursuant to N.J.S.A. 18A:12-1. Stressing that N.J.S.A. 19:31-15 specifically provides that notice need not be given before transferring a person's registration to the inactive file for failure to vote in any general election during the previous four years, the ALJ concluded that the Intervenor had not been lawfully elected to serve on the Board. The ALJ therefore recommended her removal.

By decision of July 27, the Commissioner adopted that ALJ's recommendation. He directed that Intervenor be removed from the Board and that the County Superintendent of Schools appoint a replacement to fill the vacancy.

On August 5, 1993, Intervenor appealed the Commissioner's decision to the State Board of Education. Additionally, by application filed on September 2, 1993, Intervenor sought emergent relief from the Commissioner in the form of a stay of the decision of July 27.

On September 21, the Commissioner denied Intervenor's motion for stay. Intervenor now seeks that relief from the State Board.

With the agreement of the parties, we have expedited consideration of Intervenor's application for emergent relief. However, after reviewing the arguments of counsel, we find that a

stay of the Commissioner's decision is not warranted in this case. Intervenor has not demonstrated that she is likely to succeed on the merits of her underlying appeal. Crowe v. De Gioia, 90 N.J. 226 (1982). Nor has she shown that compliance with that decision will cause her any irreparable harm or that the public interest calls for granting a stay in this instance. Id.; Yakus v. U.S., 321 U.S. 414 (1977).

In denying Intervenor's application, we also reject her request to supplement the record. The facts with which she seeks to supplement the record on appeal were not unadduced when the parties arrived at their stipulation of fact before the Administrative Law Judge. Nor are they material to the legal issues to be decided when we resolve the merits of her appeal.

We also find that oral argument is not necessary in order to make a fair determination with respect to Intervenor's application for emergent relief, and we therefore deny her request for oral argument. Finally, in the absence of authority to grant fees, we deny her request for counsel fees.

October 6, 1993

Date of mailing 08 OCT 1993

173-93

EDU #4003-93S
C # 173-93
SB # 43-93

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF OLD BRIDGE,	:	DECISION
MIDDLESEX COUNTY.	:	

Decided by the Commissioner of Education, July 27, 1993

Decision on motion by the Commissioner of Education, September 21, 1993

Decision on motion by the State Board of Education, October 6, 1993

For the Petitioner-Respondent, Brigiani, Gelzer, Cohen & Schneider (Elias L. Schneider, Esq., of Counsel)

For the Respondent, Wilentz, Goldman & Spitzer (Harold G. Smith, Esq., of Counsel)

For the Intervenor-Appellant, Anat Gordon, Esq.

Mitch Geier (hereinafter "petitioner"), an unsuccessful candidate for election to the Board of Education of the Township of Old Bridge (hereinafter "Board") in the annual school election held on April 20, 1993, challenged the election of Georgette Marinaccio (hereinafter "intervenor") to the Board. Petitioner argued that intervenor was not a registered voter in the district at the time she submitted her nominating petition or at the time of her election

MARCH 2, 1994

and, therefore, was not qualified for election to the Board pursuant to N.J.S.A. 18A:12-1.[1]

The record indicates that intervenor's name had been removed from the active voter list pursuant to N.J.S.A. 19:31-5 as a result of her failure to vote in a general election for the preceding four years. Intervenor's name was physically removed from the registration list on March 30, 1993 and she became aware of such removal on April 20 when she attempted to vote in the school election. She thereafter reregistered to vote on April 21. Her term of office on the Board commenced on April 27.

On June 30, 1993, an Administrative Law Judge ("ALJ"), finding that intervenor was not a lawfully registered voter at the time she filed her petition for candidacy or at the time of her election, concluded that she had not been qualified for election to the Board pursuant to N.J.S.A. 18A:12-1.

On July 27, 1993, the Acting Commissioner of Education adopted the findings and conclusions of the ALJ. She directed that intervenor be removed from the Board and that the County Superintendent appoint a replacement to fill the vacancy.

Intervenor filed the instant appeal to the State Board and also sought emergent relief from the Commissioner in the form of a

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1 N.J.S.A. 18A:12-1, "Qualifications of board members," provides:

> Each member of any board of education shall be a citizen and resident of the district, or of such constituent district of a consolidated or regional district as may be required by law, and shall have been such for at least one year immediately preceding his appointment or election, he shall be able to read and write, shall be registered to vote in the district, and, notwithstanding the provisions of N.J.S. 2C:51-1 or any other law to the contrary, he is not disqualified as a voter pursuant to R.S. 19:4-1.

stay of the decision of July 27. On September 21, the Commissioner denied intervenor's motion for a stay. Intervenor then sought such relief from the State Board. On October 6, we denied her application, finding that a stay was not warranted.

After a thorough review of the record, we affirm the decision of the Acting Commissioner to remove intervenor from her seat on the Board.

We reject intervenor's contention that she was a registered voter for purposes of satisfying the requirements of N.J.S.A. 18A:12-1 despite her removal from the county's voter registration rolls by operation of N.J.S.A. 19:31-5 for failure to vote in a general election for four years. The language of N.J.S.A. 18A:12-1 is clear and unambiguous that intervenor was required to be "registered to vote in the district, and...not disqualified as a voter pursuant to R.S. 19:4-1."[2] (Emphasis added.) While there is no dispute that intervenor was not "disqualified as a voter pursuant to R.S. 19:4-1," it is also clear that she was not "registered to vote in the district" by operation of N.J.S.A. 19:31-5, which requires that any individual who does not vote in any election under that Title for four consecutive years "shall be required to reregister before being allowed to vote at any

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2 R.S. 19:4-1, which is now codified as N.J.S.A. 19:4-1, provides, inter alia, that no person shall have the right of suffrage "[w]ho is an idiot or is insane; or ... [w]ho is serving a sentence or is on parole or probation as the result of a conviction of any indictable offense..."

subsequent election."[3] (Emphasis added.) The record indicates that intervenor did not reregister until after the election. We therefore concur with the Acting Commissioner that intervenor was not "registered to vote in the district" within the intendment of N.J.S.A. 18A:12-1 at the time of her candidacy for membership on the Board.

We also reject intervenor's contention that N.J.S.A. 18A:12-1 does not apply to candidates in school elections. The "qualifications" for board membership established by N.J.S.A. 18A:12-1 -- residency in the district for one year preceding the election, the ability to read and write, registered to vote in the district and not disqualified as a voter pursuant to N.J.S.A. 19:4-1 -- are threshold qualifications for election to a board. In order to ensure that the successful candidate in a school election possesses those qualifications, the education laws expressly require each candidate standing for election to a district board to certify in the nominating petition that he or she "is qualified to be elected to the office for which he is nominated, including a specific affirmation that he is not disqualified as a voter pursuant to R.S. 19:4-1." N.J.S.A. 18A:14-10 (emphasis added). As stated,

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[3] We note that individuals seeking to vote in school elections must be registered to vote in the election district included within the school district. N.J.S.A. 18A:14-44 In response to intervenor's exceptions to our Legal Committee's report, we also note that the lapse of her voting registration was effective by operation of N.J.S.A. 19:31-5 when she failed to vote in a primary, general, municipal or special election for four consecutive years, rather than upon the subsequent physical removal of her name from the registration rolls. Nor did it matter whether she had specific knowledge of such lapse or of the physical removal of her name from the voting registration list.

N.J.S.A. 18A:12-1, "Qualifications of board members," expressly provides those qualifications.[4]

Consequently, we affirm the decision of the Acting Commissioner to remove intervenor from her seat on the Board for failure to satisfy the qualifications set forth in N.J.S.A. 18A:12-1 for election thereto.

Attorney exceptions are noted.

March 2, 1994

Date of mailing MAR 4 1994

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[4] We note that, in contrast to N.J.S.A. 18A:12-1 at issue herein, N.J.S.A. 18A:12-2, "Inconsistent interests or office prohibited," does not establish qualifications for election to a board but, rather, precludes board members from having interests which are inconsistent with the duties required of such office. See Thomas v. Edwards, decided by the State Board of Education, November 3, 1993, appeal pending (App. Div.).

174-93

174-93

ARTHUR KRUPP,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE UNION COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, unsuccessful candidate for head coaching position, alleged violation of law in Board's decision to hire out-of-district candidate when petitioner was qualified for position.

ALJ concluded Board violated N.J.A.C. 6:29-3.3 when it failed to appoint petitioner to position of head coach of girls' basketball at Johnson Regional for 1990-91 season. Board was ordered to compensate petitioner in amount of $4,550 without interest (lost stipend). ALJ determined that in coaching assignments regulations require that a board must appoint from within district if there is a certified teacher who has applied for the coaching job and meets the district's written qualification standards.

Commissioner adopted findings and determination in initial decision, noting that nothing in law or regulation precludes a teacher who chooses not to apply for coaching job at one school from applying for, and asserting a claim to, a job in the same sport at another school in the district.

JULY 30, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

TRANSCRIPT
ORAL INITIAL DECISION
OAL DKT. NO. EDU 9182-91
AGENCY DKT. NO. 45-2/91

ARTHUR KRUPP,
Petitioner,
v.
BOARD OF EDUCATION OF UNION COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1, UNION COUNTY,
Respondent.

Thomas F. Dwyer, Esq., for petitioner
(Dwyer & Canellis, attorneys)

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

Record Closed: May 1, 1993 Decided: June 10, 1993

This is a transcript of the administrative law judge's oral initial decision rendered pursuant to *N.J.A.C.* 1:1-18.2.

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

This is a contested case which was transmitted to the Office of Administrative Law by the Department of Education on September 30, 1991, as the result of the filing of a verified petition of appeal by Arthur Krupp alleging that the Board's failure to appoint him to the position of head coach of girls' basketball at Arthur L.

Johnson Regional High School (hereinafter referred to Johnson or Johnson Regional) for the 1990-91 school year violated his rights as an in-district, certified, qualified teacher pursuant to the provisions of *N.J.A.C.* 6:29-3.3. According to the petition, the Board, rather than appointing him as it was obliged to do pursuant to that regulation, improperly appointed an individual who was not even employed in the school district. Accordingly, petitioner requested that he be named head coach of girls' basketball at Johnson Regional for the upcoming 1991-92 season and to be reimbursed in the amount of $4,450, the stipend he said he should have received had he properly been appointed as head coach of Johnson Regional for 1990-91. Since, of course, a hearing in this case was not conducted until March 1993, Krupp's demand for relief now has been modified to include a claim that he should be appointed to the Johnson Regional position for 1993-94 and to be paid an additional $900 representing the difference between the stipend he would have received if he had coached at Johnson Regional for 1991-92 and the stipend he actually received for coaching out-of-district. No monetary relief is sought for 1992-93 since Krupp coached in-district that season.

In its answer to the petition of appeal, the Board maintained that its determination to appoint an out-of-district individual and not Krupp to the position of head girls' basketball coach at Johnson Regional was the product of the reasonable exercise of its sound discretion in the particular circumstances since Krupp voluntarily had relinquished the opportunity to in all likelihood be reappointed to a similar position he held at Jonathan Dayton Regional High School, one of the district's other regional high schools where he had been the coach for many years.

A telephone prehearing conference was conducted on December 10, 1991, and at that time three separate issues were identified to be addressed at the hearing: (a) Was respondent's failure to appoint Krupp as head coach of girls' basketball at Johnson Regional a violation of *N.J.A.C.* 6:29-3.3 and, if so, to what relief is Krupp entitled; (b) Did Krupp's voluntary relinquishment of his head coaching position of girls' basketball at Jonathan Dayton Regional High School (which I'll hereinafter refer to as Dayton or Dayton Regional) constitute a waiver and/or an estoppel with respect to his right to monetary or other relief; and (c) Was the Board's decision not to appoint Krupp to the position of head coach of girls' basketball at Johnson

Regional sustainable on educational policy grounds independent of any State Board of Education regulation.

Hearings originally were scheduled for July 1992 but had to be adjourned as the result of witness unavailability and the matter was rescheduled. The plenary hearing was conducted on March 2, 1993, and a schedule for the submission of posthearing proposed findings of fact and conclusions of law was established. Various submissions now had been made and the following constitutes my oral initial decision which will be transcribed by the Office of Administrative Law and sent to the agency and the parties within 15 days pursuant to *N.J.A.C.* 1:1-18.2(b).

At the outset of the hearing the parties agreed to a joint stipulation of facts which was marked into evidence as Joint Exhibit 1. Those undisputed facts are as follows:

1. The Respondent, Board of Education of Union County Regional High School District No. 1 (hereafter "Board") serves the educational needs of students from the constituent districts of Berkeley Heights, Mountainside, Garwood, Kenilworth, Clark and Springfield for grades 9 through 12.

2. The Board maintains and operates four high schools: Jonathan Dayton in Springfield, Arthur L. Johnson in Clark, Governor Livingston in Berkeley Heights, and David Brearley in Kenilworth.

3. The Petitioner is a tenured teaching staff member of the Board assigned to teach at the Jonathan Dayton High School in Springfield.

4. Each year, the Board offers many extra curricular programs to its students at each high school facility. A girls basketball program is offered at Jonathan Dayton in Springfield and Arthur L. Johnson in Clark.

5. For many years prior to and including the 1989-90 season, the Petitioner served as the head coach for girls basketball at Jonathan Dayton High School.

6. On February 9, 1990, a vacancy announcement was posted for "Schedule E positions for 1990-91 at the four regional high schools," which included the position of Head Basketball Coach.

7. On February 13, 1990, Mr. Peter Falzarano, Athletic Director at Jonathan Dayton High School received the written resignation from Petitioner indicating that he did not want to be

considered for the Head Basketball Coach for girls basketball for the 1990-91 season.

8. In the evaluation report of the Petitioner for the sport of girls basketball for the school year 1989-90, it was noted as follows: "Mr. Krupp has stated that he will not be returning next year as the coach of the girls basketball team." This report was dated and signed by the Petitioner, May 7, 1990.

9. On September 16, 1990, the position of Head Basketball Coach (girls) was advertised in the Star Ledger.

10. Kathy Hodic, an out-of-district qualified certified teacher, who had served as assistant girls basketball coach at Jonathan Dayton High School during the 1989-90 season, applied for the head girls basketball coaching position at Jonathan Dayton High School for the 1990-91 season.

11. Walter Hennessy, an out-of-district qualified certified teacher, with prior coaching experience out-of-district, applied for the head girls basketball coaching position at Arthur L. Johnson for the 1990-91 season.

12. The Petitioner verbally expressed interest in the head girls basketball coaching position at Arthur L. Johnson High School for the 1990-91 season.

13. No other in-district candidates applied for the head girls basketball coaching positions at either Jonathan Dayton or Arthur L. Johnson for the 1990-91 season.

14. On October 16, 1990, upon recommendation of the Superintendent of Schools, the Board appointed Kathy Hodic to the head basketball coach of girls basketball at Jonathan Dayton for the 1990-91 season.

15. On November 7, 1990, upon the recommendation of the Superintendent of Schools, the Board appointed Walter Hennessy to the head basketball coach of girls basketball at Arthur L. Johnson for the 1990-91 season.

The following are additional findings of fact that I have determined following my review of the testimony.

16. Petitioner voluntarily had decided to relinquish his opportunity to be reappointed to the position as head coach of girls' basketball at Dayton Regional for a variety of reasons, including in particular his stating that he had become tired of coaching three different sports, which included girls'

soccer, girls' softball, and girls' basketball, and therefore determined at that time to give up the girls' basketball coaching position.

17. Nevertheless, in March 1990, petitioner changed his mind and to that end had determined to apply for the position of girls' basketball at Johnson Regional for, among other reasons, he considered that school to be his "alma mater" and that it was closer to his own home.

18. In March 1990 despite his original decision not to seek the head coaching position at Jonathan Dayton for the 1990-91 season, Krupp mentioned his interest in the girls' head coaching position at Johnson Regional to the then athletic director of that school, Louis Peragallo. Thereafter, through October 1990, Krupp pursued his interest in the Johnson Regional position with Peragallo who during that same period told Krupp that no appointment had yet been made.

19. As of late October 1990 Krupp believed he was to be appointed to the position at Johnson Regional since neither Peragallo nor anyone else informed him that by virtue of Board policy or for any other reason he would not or could not be appointed to that position.

20. By virtue of the fact that Krupp did not learn until late October 1990 that he would not be appointed to the Johnson Regional head coaching position, it was then too late for him to obtain a similar such position at any other school district for the 1990-91 season. The stipend he would have received as head coach of girls' basketball at Johnson Regional for 1991 had he been appointed and served in that position was $4,550.

21. For the 1991-92 school year petitioner served as head coach of girls' basketball in Sayreville and received a stipend which was $900 less than he would have received had he been coaching in the respondent school district for that same season.

22. During the 1992-93 season, Krupp again served as head coach of girls' basketball at Dayton Regional.

The forgoing represents my findings of fact as to the substantial portion of the testimony offered in this case. There were, of course, certain points of disagreement with respect to the precise substance of various conversations petitioner had with either the athletic director and or senior administrators during the period from February 1990 through October 1990 pertaining to his desire no longer to coach girls' basketball at Jonathan Dayton and the reasons therefore, followed by the circumstances surrounding his reconsideration with respect to coaching and his expressed desire to be appointed to that position at another school in the district, that is to say Johnson Regional rather than Dayton. For example, some Board witnesses claimed that Krupp expressed reluctance to coach at Dayton Regional claiming that its girls' basketball team was in a "down" cycle, whereas Johnson Regional was improving. Krupp, of course, categorically denied any such motivation. However, these and other points of difference in the testimony in my judgment are not critical to my determination in this case since for the reasons which follow I have concluded that the Board's failure to appoint Krupp to the position of head coach of girls' basketball at Johnson Regional for the 1990-91 school year and its appointment instead of Walter Hennessy, an out-of-district teacher, was a plain violation of the express provision of *N.J.A.C.* 6:29-3.3 and therefore was improper.

In order to establish a format for consideration of the issues identified in the prehearing order in this case, I believe it appropriate at the outset to set forth the specific language of the regulation in question--*N.J.A.C.* 6:29-3.3. At this point I'm not going to read the regulation. It will be typed into the transcript.

(a) Any person not certified as a teacher and not in the employ of a district board of education shall not be permitted to organize public school pupils during school time or during any recess in the school day for purposes of instruction, or coaching or for conducting games, events or contests in physical education or athletics.

(b) School districts shall be permitted to employ any holder of a New Jersey teaching certificate to work in the interscholastic athletic program provided that the position has been advertised.

(c) In the event there is no qualified and certified applicant, the holder of a county substitute certificate is authorized to serve as an athletic coach in the district in which he or she is employed for a designated sports season, provided that:

1. The district chief school administrator demonstrates to the county superintendent that:

   i. The vacant coaching position had been advertised; and

   ii. There was no qualified applicant based on the written standards of the district board of education;

2. The district chief school administrator will provide a letter to the county superintendent attesting to the prospective employee's knowledge and experience in the sport in which he or she will coach; and

3. Approval of the county superintendent shall be obtained prior to such employment by the district board of education. The 20-day limitation noted in *N.J.A.C.* 6:11-4.1(i) shall not apply to such coaching situations. [Emphasis added.]

In my view the provisions of this regulation leave practically no room for a board of education to hire an out-of-district applicant over a certified, qualified, in-district applicant regardless of the number of coaching positions available. The only possible "play" with respect to board discretion seems to me to relate to the promulgation of written qualifications where boards might establish certain criteria that may or may not have a bearing on in-district versus out-of-district personnel. *See, for example*, the decision in *Norcross v. Board of Education of North Hunterdon*, decided 92 *N.J.A.R.* 2d, 176. Except for that slight opening for the exercise of board discretion, I can find no authority for a board to appoint someone from outside the district where, as here, there is a fully certified, highly qualified, in-district candidate ready, willing, and able to take the job. I believe that result flows clearly from the regulation and from the cases which have dealt with the regulation. In that respect, see the decision in *Chambers v. Board of Education of Neptune*, 1985 *S.L.D.* 1379. Indeed, the fact that a board may determine that an out-of-district candidate is "more qualified" is not controlling so long as the in-district candidate meets threshold qualifications. *See, for example,* the decision in *Capraro v. Woodbridge Township Board of Education*, 91 *N.J.R.* 2d, p. 17. Of course, in this case Krupp had a demonstrated record of proficiency in coaching and achievement as a coach.

Both sides have agreed that an important underlying purpose of the regulation was to expand the pool of potential applicants where there is a coaching shortage caused by an insufficient number of qualified, in-district personnel, and thereby to allow boards under very specific circumstances to reach beyond their own district to

fill those coaching positions which are vacant. Another purpose, of course, is to limit a board discretion in order to avoid situations where professional athletes, for example, who are neither qualified to teach nor trained to foster student development in areas other than athletics are sought for such positions. In this respect, see the decision in *Barber v. Board of Education of Kearny,* 1975 *S.L.D.* p. 58.

In this case the Board argues that its decision to reject Krupp's candidacy for Johnson was consistent with a long-standing and sound practice of filling coaching positions at a particular school only with persons who teach in that same school. The problem I see with that position is at least threefold: (a) apparently there may have been exceptions; (b) that policy was never reduced to writing as required by the regulation; and (c) the regulation establishes superseding priorities which simply must be followed. This is not to say that had the Board's policy been reduced to writing and had the Board never deviated from it the Board's action necessarily would be sustained. However, in that event at least there would be a possibility that such a qualification, if duly promulgated and regularly and uniformly followed, could withstand the claim of arbitrary, capricious, or unreasonable action. However, that is not the case here.

Therefore, the Board's argument that it exercised sound educational judgment in disqualifying Krupp from obtaining the position of head coach of girls' basketball at Johnson Regional is flawed essentially because in the circumstances of this case it simply had no such discretion.

Nor is this to say that the Board's reasons for rejecting Krupp's candidacy are without intrinsic merit. Neither this administrative law judge nor the Commissioner for that matter are free to substitute their judgment for that of boards of education in matters which by law are committed to board discretion. Thus, had the coaching selection been open to consideration of such matters as on-site availability for dealing with student athlete problems, or to obviate student belief that they were being abandoned, such matters could have been taken into account. Of course, in this case Hennessy's appointment to the position at Johnson Regional questionably provided opportunity for him to be available to students during regular school hours since he did not teach in the school district even though he apparently had some flexible hours in the district where he did teach.

Nor was there any competent proof in the record to sustain the Board's assertion that any student, athlete or otherwise, actually felt abandoned or otherwise distressed by Krupp's decision to relinquish his position at Dayton. That was pure speculation. That is not to say that even if there was testimony to that effect it would have any substantial bearing on the proceeding. There simply was no competent evidence of that other than some of the Board's witnesses articulating that notion. In short, none of the concerns raised by the Board, however sincerely felt, addressed what I believe to be the critical overriding feature in this case--that the strictures imposed by the regulation to the effect that a Board must appoint from within the district if there is a qualified, certified teacher who has applied for the coaching job have to be honored.

Finally, the Board's argument that qualified teaching staff members should not be allowed to "pick and choose" their assignments, while again having some intrinsic merit from a managerial standpoint, nevertheless cannot override the thrust of the language of the regulation. Teachers, consistent with the regulation, can be denied coaching positions which they might desire. However, they cannot be required to coach where they do not wish to do so. Accordingly, unless the cited regulation is changed by the State Board to accommodate the concerns expressed here, or unless the Board can adopt written standards which can pass muster in the face of the language of the regulation, the fact is that qualified teaching in-district staff members can engage in such picking and choosing.

In reaching this conclusion, I am aware, of course, of the substantial volume of case law which commands deference to the board's prerogative in matters of board discretion. The decisions, of course, in *Ridgefield Park Education Association v. Ridgefield Park Board of Education*, 78 *N.J.* 144 (1978) and *Dunellen Board of Education v. Dunellen Education Association,* 64 *N.J.* p. 17 (1973), are just two of several decisions which articulate that proposition. The problem, however, with the Board's reliance on those cases in the particular circumstances of this matter is, as I have noted, that its determination not to appoint Krupp to the Johnson Regional girls' head basketball coaching position contravened the provisions of a State Board regulation which has the full force and effect of the law and acts as a limitation on the prerogative usually enjoyed by boards insofar as the exercise of their discretion or the determinations are concerned.

Nor do I believe that the Board's defense of waiver can be sustained. Krupp stated adequate reasons for deciding in February 1990 that he no longer wished to coach at Dayton for 1990-91. Whether or not he rapidly changed his mind about his decision or why he did so are not particularly relevant. As a certified, qualified, in-district teaching staff member who timely applied for the Johnson Regional position, he, not Hennessy, simply should have been selected as the coach at Johnson Regional for 1990-91 and he did not waive, relinquish, or otherwise give up that entitlement which the regulation provides to him simply because he no longer wished to coach at Dayton.

With respect to the question of damages, I believe that the $4,550 stipend for 1990-91 which Krupp would have received having been selected, as I believe he should have been, to be the head coach of girls' basketball at Johnson Regional should be awarded to him. While the Board argues that Krupp could have protected himself against the loss of that stipend by retaining conditionally the head coaching position at Dayton Regional, the fact is he was under no obligation to do so. Nor is there any competent evidence in the record to rebut his contention that by the time he finally learned in late October 1990 that he would not be appointed to the position at Johnson, to which as I indicated he was entitled, it essentially was too late for him to mitigate his loss by obtaining a similar available position in another school district.

During the 1991-92 school year, Krupp coached in Sayreville, as I indicated, and the difference in stipend there between what he received and what he would have received in the employ of the Board was $900. However, since Krupp did not apply for appointment at either Dayton or Johnson for 1991-92, I do not believe that any damages are due him for that year. While I can speculate that he did not apply for the Johnson position since he assumed he wouldn't get it, and that he did not want the Dayton position having relinquished it the year before, nevertheless, the record is devoid of a competent basis to award him that $900 for the reasons I have indicated.

Therefore, the total amount of petitioner's damages I **FIND** to be $4,550. Since the Board's determination in this case, although found by me to be in violation of the regulation, was made in good faith and not in deliberate violation of that regulation, no assessment of of prejudgment interest is recommended. In that

respect I would refer counsel to the provisions of *N.J.A.C.* 6:24-2.1, paragraph (c)(1), which deals with the question of interest assessment. Therefore, in light of the reasons I have just set forth, I have **CONCLUDED** that the respondent's action in failing to appoint petitioner to the position of head coach of girls' basketball at Johnson Regional for the 1990-91 season was in violation of the provisions of *N.J.A.C.* 6:29-3.3. Respondent therefore is liable to petitioner for compensatory damages in the amount of $4,550 without interest.

I will not in this case order the Board to appoint Krupp to the girls' head basketball coaching position at Johnson Regional for 1993-94. First, he must apply for the job and the Board given an opportunity to compare his qualifications against those of other applicants, if there are any, consistent with *N.J.A.C.* 6:29-3.3. On June 10, 1993, which is today's date, I will not prejudge or predetermine the outcome of that process. If it turns out that Mr. Krupp does apply and is the only candidate, then, of course, my determination, depending on what the Commissioner does, presumably will have some bearing on what is going to happen for the 1993-94 season.

I will file this initial decision with the Commissioner of Education for her consideration. This recommended decision may be adopted, modified or rejected by the **COMMISSIONER,** who by law is authorized to make a final decision in this matter. If the Commissioner does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 7th Floor, CN 500, Trenton, New Jersey 08625,** marking the outside of the envelope as "Attention: Exceptions." A copy of any exceptions so filed must be sent to the administrative law judge and to the other parties.

END OF TRANSCRIPT

I, Angela M. Robinson, certify that the foregoing is a true and accurate transcript, to the best of my ability, of Judge Weiss' oral initial decision rendered in the above matter on June 10, 1993.

June 11, 1993
Date

Angela M. Robinson
Angela M. Robinson

Receipt Acknowledged:

JUNE 15, 1993
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 18 1993
Date

Joyce LaVecchia
OFFICE OF ADMINISTRATIVE LAW

amr

WITNESS LIST

For Petitioner:

Arthur Krupp

Margaret Krupp

For Respondent:

Charles Bauman

David Carl

Peter Falzarano

EXHIBIT LIST

J-1 Joint stipulation of facts with attached Exhibits 1 through 6

P-1 Excerpt of minutes of Board meeting, February 20, 1990

P-2 Respondent Board's answers to the petitioner's initial interrogatories

ARTHUR KRUPP,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE UNION COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by both petitioner and the Board pursuant to N.J.A.C. 1:1-18.4, with each party submitting a reply to the other's exceptions.

In its exceptions, the Board takes issue both with certain findings of fact and with the ALJ's conclusions of law. With respect to facts, the Board seeks alternate findings that 1) by his own contention petitioner applied for the coaching job at Johnson on or about February 15, 1990, rather than in March 1990 as found by the ALJ (Petition of Appeal, paragraph 5); 2) well before October 1990, petitioner was aware, due to the district's widely acknowledged and ongoing practice of hiring coaches who are assigned as teachers to the school where the coaching is based, that he would not be given the job at Johnson (testimony of Falzarano, Carl, and Bauman; Interrogatory No. 5); 3) petitioner declined an offer to continue coaching at Dayton made during the summer of 1990

(testimony of Falzarano); and 4) petitioner was aware of the coaching vacancy at Johnson before resigning as coach at Dayton on February 13, 1990, as the Johnson coach resigned effective February 6, 1990 and his position was posted on February 9, 1990 (Exhibits P-1 and J-1, paragraph 6).

With respect to the ALJ's conclusions of law, the Board renews its arguments centering on a board's managerial right to assign staff and the district's policy of assigning teachers to their home schools only, the rationale for which is implicit in the job description for coaches (P-2 attachment). The Board stresses that it was willing to hire petitioner as a coach in the school where he was regularly assigned, but petitioner resigned from that position and refused an offer to stay there. Thus, the ALJ's decision permits a teacher's personal preference in assignment to override the Board's managerial prerogative in a critical area of school operations, fails to recognize that petitioner's resignation from one coaching position constituted a waiver of any claim to another position in the same sport, and awards monetary restitution to petitioner notwithstanding that petitioner could and should have mitigated any loss by conditionally retaining his position at Dayton while pursuing the position at Johnson.

In reply, petitioner initially objects to the Board's attempt to alter findings of fact by referencing testimony for which no transcript was provided. Petitioner contends that his own testimony established that 1) he did not apply for the position at Johnson until after February 20, 1990; 2) he did not know about the impending vacancy at Johnson when he resigned from Dayton; 3) he was not notified of the Board's decision to reject his application until

October 1990 and, in fact, had received and relied on assurances from the Athletic Director at Johnson that he would be coaching there; and 4) he was never offered his former position at Dayton after he was rejected for the position at Johnson. Even so, petitioner contends, the Board's proposed findings of fact would not alter the overriding principle, as properly construed by the ALJ, that a qualified in-district applicant must be given absolute preference over an out-of-district candidate.

Petitioner's primary exceptions in turn contest the ALJ's recommendations that petitioner is entitled to neither pre-judgment interest nor the salary differential ($900) between what he actually earned coaching out of district in 1991-92 and what he would have earned at Johnson. In the former instance, he avers, the Board acted with full knowledge of the law it was plainly violating, so that petitioner is entitled to interest under applicable regulatory criteria and, in the latter, the question of petitioner's coaching entitlement was in litigation and petitioner need not have made formal application at Johnson during 1991-92 to preserve his claim for that year. The Board in reply endorses the correctness of the ALJ's analyses and conclusions on these issues, noting that petitioner cites no precedent for his own positions thereon.

Upon careful review of this matter, the Commissioner adopts the recommendations of the ALJ for the reasons set forth in the initial decision as further explicated herein.

Initially, the Commissioner notes that without a transcript of the testimony given before the ALJ, it is not possible to reconcile the conflicting claims made by petitioner and the Board with regard to the findings of fact challenged above, nor does the

existing record provide any sufficient basis to alter the ALJ's determinations. Moreover, as noted by petitioner, acceptance of the Board's proposed findings arguendo would not alter the outcome of this matter, which hinges instead on controlling mandates of statute and regulation.

As properly found by the ALJ, in matters of hiring athletic coaches, the managerial discretion ordinarily afforded a board must give way to the clear directive of regulation providing that a board must first choose applicants from within its own district, resorting to out-of-district alternatives only when no in-district applicant meets the board's written qualification standards. In this instance, the Board cannot cast as "qualifications" for purposes of N.J.A.C. 6:29-3.3 unwritten assumptions which may underlie its job description for coaches, however sincerely the Board may believe in the validity of those assumptions. Neither can the Board rely on petitioner's decision not to reapply for his Dayton assignment* as a waiver of his right to apply for the job at Johnson, as nothing in law forecloses a teacher who chooses not to apply for a coaching job in one school from applying for a job in the same sport at another school in the district.

Finally, the Commissioner rejects both petitioner's and the Board's exceptions to the ALJ's recommendations regarding petitioner's entitlement to compensatory pay and interest and instead endorses the ALJ's analysis and conclusions in full.

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* It is (as frequently stated by the Board) here noted that petitioner did not resign from his coaching position; he merely made a decision not to reapply for an annual contract in that position for the subsequent year.

Accordingly, the initial decision of the Office of Administrative Law is affirmed for the reasons expressed therein as further explicated above,* and the Board is directed to pay petitioner forthwith the sum of $4,550 representing the lost stipend for the school year in which he was denied a coaching assignment contrary to the provisions of N.J.A.C. 6:29-3.3.**

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION***

JULY 30, 1993

DATE OF MAILING - JULY 30, 1993

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* For clarification purposes, the Commissioner notes that the ALJ's statement at p. 9 above, regarding boards not being able to require teachers to coach where they do not wish to do so, must be qualified by reference to law providing that school employees may be involuntarily assigned to extracurricular activities when no qualified applicant for a particular position can be found either within or without the district. N.J.S.A. 34:13A-23

**The Commissioner notes that this matter was transmitted to the Office of Administrative Law pursuant to the August 7, 1991 decision of the State Board of Education remanding the matter to the Commissioner, who had by letter decision of March 25, 1991 dismissed the appeal as untimely filed.

***Pursuant to her authority under N.J.S.A. 18A:4-34, the Commissioner has designated Assistant Commissioner Leo F. Klagholz to decide this matter in her stead.

174-98

EDU #9182-91
C # 174-93
SB # 47-93

ARTHUR KRUPP,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE UNION COUNTY REGIONAL HIGH SCHOOL DISTRICT #1, UNION COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, July 30, 1993

For the Petitioner-Respondent, Dwyer & Canellis
(Thomas F. Dwyer, Esq. of Counsel)

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

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

January 5, 1994

Date of mailing JAN 07 1994

174-93

SB # 21-91
EDU # 9182-91
C # 174-93
SB # 47-93
APP. DIV. #A-3212-93T1
SUP. CT. # C-680-94

ARTHUR KRUPP, :

PETITIONER-RESPONDENT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE UNION COUNTY REGIONAL HIGH SCHOOL DISTRICT #1, UNION COUNTY, : DECISION

RESPONDENT-APPELLANT. :

Remanded by the State Board of Education, August 7, 1991

Decided by the Commissioner of Education, July 30, 1993

Decided by the State Board of Education, January 5, 1994

Decided by the Appellate Division, December 6, 1994

Certification Denied by the Supreme Court, March 21, 1995

For the Petitioner-Respondent, Dwyer & Canellis (Thomas F. Dwyer, Esq., of Counsel)

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

June 7, 1995

This matter is before us pursuant to a remand by the Appellate Division.

The case arose from petitioner's claim that he should have been appointed girl's basketball coach at Johnson Regional High School for the 1990-91 school year. The State Board affirmed the Commissioner's decision, which adopted the Administrative Law Judge's determination that the district board had violated N.J.A.C. 6:29-3.3 when it had hired a certified teacher from outside the district rather than petitioner to fill this coaching assignment.

The Appellate Division reversed, holding that the regulation in effect during the relevant period could not be read to impose on district boards a preference for hiring candidates from within the district for coaching assignments. The Court found that the regulation merely required a district board to advertise such positions before accepting any applications from any certified teachers whether or not they were employed within the district.

The Appellate Division however remanded the matter for consideration of the district board's argument that it had exercised sound educational judgment in denying petitioner the coaching assignment at issue for the year in question. In doing so, the Court observed that the record failed to support the

board's conclusion that petitioner had not satisfied the standards for qualification for appointment to the assignment.

At the request of the parties, we deferred action with respect to the remand pending a determination by the New Jersey Supreme Court as to whether it would review the case. On March 21, 1995, the Court denied certification.

We now remand the matter to the Commissioner of Education pursuant to the Appellate Division's decision in order for him to consider in the first instance the Board's argument that it exercised sound educational judgment, to resolve whether petitioner satisfied the standards for appointment to the coaching position he sought, and for a decision on the merits of his claim consistent with the Appellate Division's construction of the regulation that he was entitled to the position. We do not retain jurisdiction.

June 7, 1995

Date of mailing JUN 09 1995

175-93

#175-93

RIDGEWOOD EDUCATIONAL ASSOCIATION, ELAINE HIGGINS AND ANN HOVAN,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Education Association and two members, tenured part-time supplemental teachers, challenged as arbitrary, capricious and unreasonable Board Policy Number 4123 that limits employment of supplemental teachers hired after February 24, 1992 (the date of the adoption of the amendment) not to exceed two consecutive years. Board argued that petitioners did not have standing to bring action and that petitioners failed to state claim upon which relief might be granted.

ALJ concluded that a prospective ruling on propriety of policy was not improper and might be challenged by any person having an interest in subject matter. ALJ, however, found both Association and individual petitioners lacked standing to challenge policy since no supplemental teacher was currently affected by policy and individual petitioners as taxpayers had no personal interest to claim standing in personnel cases. Petition was dismissed.

Commissioner adopted findings and determination in initial decision.

AUGUST 2, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4706-92
AGENCY DKT. NO. 222-5/92

RIDGEWOOD EDUCATION ASSOCIATION,
ELAINE HIGGINS, AND ANN HOVAN,
Petitioners,
v.
BOARD OF EDUCATION OF THE
VILLAGE OF RIDGEWOOD, BERGEN COUNTY,
Respondent.

Gregory T. Syrek, Esq., for petitioners (Bucceri and Pincus, attorneys)

Frank N. D'Ambra, Esq., for respondent (Sills Cummis Zuckerman Radin Tischman Epstein & Gross, attorneys)

Record Closed: May 10, 1993 Decided: June 16, 1993

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Petitioners, Ridgewood Education Association (Association), Elaine Higgins, and Ann Hovan, challenge as arbitrary, capricious, and unreasonable the policy adopted by respondent, the Board of Education of Ridgewood (Board), limiting employment of supplemental teachers not to exceed two consecutive years. Thus, petitioners request an order from the Commissioner of Education directing the Board to rescind the policy.

The Board denied that it acted arbitrarily, capriciously, or unreasonably but, rather, acted properly and in accordance with the requirements of *N.J.S.A.* 18A:6-9 and *N.J.A.C.* 6:24-2.1. Further, the Board argues that petitioners do not have standing to bring this action and that petitioners have failed to state a claim upon which relief may be granted. Also, it is asserted that because petitioners allege anticipated actions by the Board, the matter is not ripe for adjudication.

On June 25, 1992, the matter was transmitted to the Office of Administrative Law for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A prehearing conference was held on September 1, 1992, before Administrative Law Judge Joseph F. Martone. Thereafter, the matter was reassigned to the undersigned. By telephone conference, the parties had agreed to submit a stipulation of undisputed facts and stated that no testimonial evidence was necessary. Counsel was allowed to submit legal briefs on the issues established at the prehearing conference.

On January 26, 1993, the parties submitted a Stipulation of Facts, and the record closed on March 4, 1993, after receipt of reply briefs. On April 5, 1993, the record was reopened to allow counsel to brief issues that had not been addressed in initial and reply briefs. The record closed on May 10, 1993, after receipt of supplemental briefs.

ISSUES

1. Whether the policy adopted by respondent on February 24, 1992, limiting the term of service of nontenured supplemental teachers to two years, is arbitrary, capricious, or unreasonable.

2. If the policy is arbitrary, capricious, or unreasonable, what is the appropriate remedy?

3. Whether petitioners have standing in this matter.

4. Whether this matter presents an issue which anticipates future action and is accordingly not ripe for adjudication.

STIPULATION OF FACTS

The parties have stipulated to the following facts which are herein adopted as **FINDINGS OF FACT**:

1. The Association is the exclusive representative for collective negotiations purposes for, among others, teachers, including part-time "supplemental teachers" employed by respondent.

2. Petitioners Higgins and Hovan are part-time supplemental teachers employed by respondent. They have gained tenure pursuant to *N.J.S.A.* 18A:28-5. These petitioners are also residents and taxpayers of Ridgewood, New Jersey.

3. Prior to February 24, 1992, respondent's policy number 4123 stated the following:

   Certified Personnel
   Supplemental Teachers

   The supplemental instruction program shall be coordinated through the Department of Special Services. Compensation and benefits shall be as stipulated in the negotiated agreement between the Ridgewood Board of Education and the Ridgewood Education Association.

   This policy was adopted by respondent on December 19, 1988.

4. On February 24, 1992, respondent adopted an amended policy number 4123 (J-1). As amended, the policy states the following:

   Certified Personnel
   Supplemental Teachers

   The term "supplemental teachers" applies to the following professional personnel: Supplemental Instructors, Basic Skills Instructors, English-as-a-Second-Language/Bilingual Instructors, Home Instructors, and all other persons in part-time, hourly, instructional positions for which certification is required.

   The supplemental instruction program shall be coordinated through the Department of Special Services. Supplemental teachers shall be evaluated in accordance with administrative code, and compensation and benefits shall be as stipulated in the negotiated agreement between the Ridgewood Board of Education and the Ridgewood Education Association.

A condition of employment for supplemental teachers shall be that, regardless of quality of service, the term of service in any combination of part-time, hourly instructional positions shall not exceed two consecutive years. This condition of employment shall apply to those employees hired after February 24, 1992, the date of the adoption of this amendment.

5. Prior to the February 24, 1992 adoption of amended policy number 4123, the issues covered by the amendments had been discussed in the following forum:

(a) Principals' Council Meeting on October 31, 1991. The minutes of this meeting are attached hereto as Exhibit J-2.

(b) Principals' Council Meeting on December 4, 1991. The minutes of this meeting are attached hereto as Exhibit J-3. A copy of the proposal prepared by John Campion and George Neville and referred to in the minutes is attached hereto as Exhibit J-4.

(c) Principals' Council Meeting on December 18, 1991. The minutes of this meeting are attached hereto as Exhibit J-5.

6. The first reading of the proposed amendment to Board Policy 4123 occurred at the respondent's regular meeting on January 6, 1992. An excerpt from the minutes of this meeting is attached hereto as Exhibit J-6.

7. The proposed amendment to Board Policy 4123 was discussed at the regular meetings of respondent held on January 27 and February 10, 1992. Excerpts from the minutes of these meeting are attached hereto as Exhibits J-7 and J-8, respectively.

8. The amendment to Board Policy 4123 was adopted at the regular meeting of respondent held on February 24, 1992. An excerpt from the minutes of this meeting is attached hereto as Exhibit J-9.

9. During the discovery process in this case, petitioners propounded the following interrogatory:

15. Set forth in detail the complete factual basis relied upon by respondent in support of its reason for adopting or amending the policy supplied in answer to question 13, particularly as to any limitation on the length of employment.

Respondent's answer to this question states:

15) The Board of Education, so advised by its administrative staff, agrees and believes that the job of a supplemental part-time teacher, even though it is tenurable under the law, is not equal to the time commitment, the multiple job responsibilities, or the scope and sequence of the job of a contractual teacher. Supplemental teachers work with small groups of students, sometimes only one or two at a time; they are freed from the supervisory, homeroom, and other duties associated with the contractual teacher's role. They are not required to make up and grade tests and final examinations, they are not expected to evaluate a year's work of a classroom of students, they do not regularly work with classroom-size groups of students with all that implies in planning, effort and classroom management. They are not required to attend departmental and faculty meetings, they do not observe regular school day hours, they are not expected to be responsible for the child's learning in the same way that the classroom teacher is (supplemental teachers are assigned to work on specific tasks as directed by the classroom teacher), they are not required to attend Open Day Orientation nor to present themselves and their subjects at annual Back to School nights, *etc.*

Because of the important distinctions between the role of a supplemental teacher and that of the contractual teacher, the Board of Education feels that it is inappropriate to allow a supplemental teacher to attain tenure when that attainment would permit the supplemental teacher, in a seniority situation, to become a classroom teacher without ever having experienced a day of the regular classroom teacher's life.

DISCUSSION AND CONCLUSIONS OF LAW

Pursuant to *N.J.S.A.* 18A:6-9 and *N.J.A.C.* 6:24-2.1, petitioners challenge as arbitrary and capricious the Board's adoption of a policy limiting employment of supplemental teachers to not more than two consecutive years. Thus, petitioners seek an order from the Commissioner of Education directing the Board to rescind the policy. The Association is the exclusive representative for collective negotiations for part-time supplemental teachers employed by the Board. Higgins and Hovan are tenured part-time supplemental teachers employed by the Board and also are residents and taxpayers of Ridgewood, New Jersey. The record reflects that the adoption of Board Policy 4123

limiting the employment of supplemental teachers to two consecutive years applies to those employees hired after February 24, 1992, the date the policy was adopted. The record further reflects that there is no current employee or member of the Association whose employment status is currently affected by the implementation of the policy. Thus, it is appropriate to first address two pivotal questions: Whether the matter is ripe for adjudication and, if so, whether petitioners have the requisite standing to maintain this action.

Ripeness

The Board argues that there are no current employees who fall within the scope of the policy limiting employment to two consecutive years. Thus, the relief sought by petitioners is prospective because the policy has not yet been applied to deny a position to any supplemental teacher. Further, it is argued that "the court's [*sic*] do not give advisory opinions; a controversy must exist" (respondent's supplemental brief at 6). Therefore, it is submitted that the relief sought is prospective and not ripe for adjudication.

Petitioners contend that although they do not challenge the application of the policy to any particular part-time supplemental teacher, the adoption of the two-year employment limitation contained in the amendment is *ultra vires* and void. Therefore, it is appropriate to challenge the action at the outset rather than to wait until an individual is harmed.

DISCUSSION

The *New Jersey Administrative Code* explicitly grants the Commissioner of Education jurisdiction to render declaratory rulings. *N.J.A.C.* 6:24-2.1 provides in relevant part:

> Pursuant to *N.J.S.A.* 52:14B-8, any interested person(s) may petition the Commissioner for a declaratory ruling with respect to the applicability to any person, property, or state of facts of any statute or regulation enforced or administered by the Commissioner

Petitioners' failure to conform their petition to the format required for declaratory rulings, set forth at *N.J.A.C.* 6:24-2.2, has not been raised and should not be fatal to this petition.

> The rules herein contained shall be considered general rules of practice. . . . They may be relaxed or dispensed with by the Commissioner, in his or her discretion, in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice.
>
> [*N.J.A.C.* 6:24-5.15.]

The regulations governing the form of petitions for declaratory rulings and the permitted relaxation thereof is consistent with *New Jersey Court Rules* 4:5-2 and 4:5-7 which require an adequate pleading to contain a claim of relief, a statement of facts entitling the pleader of relief, and a demand for a judgment. *R.* 4:5.2. The pleadings shall be concise and direct but shall also be liberally construed. *R.* 5:5.7. Under the rule of liberal construction, a pleading is generally deemed adequate when it apprises an adverse party of the claims and issues to be raised at trial. *Dewey v. R.J. Reynolds Tobacco Co.*, 121 *N.J.* 69, 75-76 (1990); *Miltz v. Burroughs-Shelving*, 203 *N.J. Super.* 451, 458 (App. Div. 1985). Motions for dismissal for failure to state a claim should be granted only on the rarest occasions. *Printing Mart v. Sharp Electronics Corp.*, 116 *N.J.* 739, 772 (1989). If appropriate, petitioner should be permitted to amend an adequate petition. *See Muniz v. United Hosp. Med. Ctr.*, 153 *N.J. Super.* 79, 82-83 (App. Div. 1977). Moreover, an ALJ is empowered to permit a petitioner to amend a petition in cases in which such amendment would be in the interest of efficiency and expediency. *N.J.A.C.* 1:1-6.1. Here, an amendment is unnecessary. The Board implicitly acknowledges petitioners' request for a declaratory ruling where it argues that the judge should not render advisory opinions (respondent's supplemental brief at 6). *See also N.J.A.C.* 6:24-1.15, which provides for a relaxation of the rules by the Commissioner.

Based on the above, I **CONCLUDE** that petitioners seek a declaratory ruling concerning the adoption of the policy rather than its application to any particular person. Thus, I further **CONCLUDE** that a prospective ruling on the propriety of the Board's policy is not improper and may be challenged by any person having an interest in the subject matter. *Bergen Co. v. Port of New York Authority,* 32 *N.J.* 303, 307 (1960).

Accordingly, it is appropriate to address whether petitioners have sufficient interest in the subject matter and, thus, standing to maintain the action.

Standing

The Board asserts that the policy was deliberately worded to affect future employees rather than current employees. The Association arguably has a right to bring an action on behalf of those it represents. However, there is currently no individual represented by the Association "who could possible show some injury as a result of the Board policy" (respondent's supplemental brief at 3). With regard to Higgins and Hovan, it is asserted that they are tenured teachers and, thus, are not affected by the terms set forth in the policy.

Also, the Board asserts that standing to bring a cause of action requires petitioners to demonstrate injury or threat of injury by some governmental action about which they complain. Thus, since both individual petitioners are tenured employees, they lack standing to bring this action.

Petitioners assert that the Association has standing based on the possible impact that the policy may have on its members. Thus, the representative capacity of an organization representing the employee goes beyond the confines of the present dispute. Thus, it is submitted that the Association may represent the claims of individual teachers in educational law matters.

With regard to petitioners Higgins and Hovan, it is asserted that as residents and taxpayers of Ridgewood, they have standing to challenge the actions of the local board of education.

DISCUSSION

N.J.A.C. 6:24-2.1 provides, in part, that "any interested person(s) may petition the Commissioner for a declaratory ruling." An interested person is one "who will be substantially, specifically and directly affected by the outcome of a controversy before the Commissioner." *N.J.A.C.* 6:24-1.1. In *Crescent Park Tenants Ass'n v. Realty Equities Corp. of N.Y.*, 58 *N.J.* 98 (1971), the Supreme Court set forth the threshold requirements allowing a person to institute an action:

> [W]e will not render advisory opinions or function in the abstract [citation omitted] nor will we entertain proceedings by plaintiffs who are "mere intermeddlers" [citation omitted] or are merely interlopers or strangers to the dispute [citation omitted]. Without ever becoming enmeshed in the federal complexities and technicalities, we have appropriately confined litigation to those situations where the litigants concerned with the subject matter evidenced a sufficient stake and real adverseness.
>
> [*Id.* at 107.]

Thus, two requisites must be shown to sustain a finding of standing to bring an action: (1) Petitioner must demonstrate a sufficient stake in the outcome of the proceedings; and (2) his or her position must be truly adverse to that of respondent. The court's holding is consistent with the *Administrative Procedure Act* which defines who may be considered an interested person to initiate administrative proceedings before the Commissioner of Education. *N.J.A.C.* 6:24-1.1.

It is undisputed that teachers' associations have standing to challenge board actions when those actions intimately and directly affect the association's members. *Winston v. Bd. of Ed. of So. Plainfield*, 125 *N.J. Super.* 131, 142 (App. Div. 1973), *aff'd*, 64 *N.J.* 582 (1974); *Wyckoff Ed. Ass'n v. Wyckoff Bd. of Ed.*, OAL DKT. EDU 5174-80 (Aug. 21, 1981), *adopted*, Comm'r of Ed. (Oct. 5, 1981), *aff'd*, St. Bd. of Ed. (Sept. 5, 1982). Moreover, an association may have standing in its own right to seek judicial relief from injury to itself. *Warth v. Seldin*, 422 *U.S.* 490, 75 *S. Ct.* 2197, 45 *L. Ed.* 2d 343 (1975). In the absence of injury to itself, an association may have standing solely as representative of its members if it is alleged that its members or any one of them "are suffering immediate or threatened injury as a result of the challenge action of the sort that would make out a justiciable cause had the members themselves brought suit." *Id.* at 511, 75 *S. Ct.* at __, 45 *L. Ed.* 2d at 362.

Here, it is undisputed the Board's assertion that there is no current member of the Association to whom the policy applies. Consequently, the issue of standing of associations that has been routinely followed in *Winston* is not applicable here. Because there are no current Association members affected by the Board's policy, the Association cannot claim to be protecting the interests of its members. The Association would have to wait until a supplemental teacher to whom the policy would apply is affected before it could challenge the Board's action. Therefore, I **CONCLUDE** that the Association lacks standing to challenge the policy.

The individually-named petitioners, Higgins and Hovan, assert standing based on their status as residents and taxpayers of Ridgewood. Taxpayer status has been recognized as a basis for standing. In *Silverman v. Bd. of Ed. of the Tp. of Millburn*, 134 *N.J. Super.* 253 (Law Div. 1975), *aff'd,* 136 *N.J. Super.* 435 (App. Div. 1975), plaintiff taxpayers had standing to challenge a school closing. Plaintiffs represented not only the public interest but also their own private interests in preventing the school from closing. *Id.* at 258. Here, petitioners have not met the prerequisites of *Silverman*. Although slight additional private interest is sufficient to sustain a finding of standing where the case is of great public interest, *Salorio v. Glaser*, 82 *N.J.* 482, 491 (1980), the record does not reflect the impact, if any, of terminating teachers after two consecutive years of employment. Thus, in the absence of showing that the matter impacts the public interest, the courts will look to some measurable amount of detrimental impact on the complaining party's personal rights and will not permit a litigant standing to assert the rights of a third party. *Jersey City Med. Center v. Estate of Baum*, 84 *N.J.* 137, 144 (1980).

Petitioners' reliance on *Schinck v. Bd. of Ed. of Westwood Consol. School Dist.*, 60 *N.J. Super.* 448 (App. Div. 1960), does not support its position of standing. In *Schinck*, taxpayers challenged the adequacy of proof before the Commissioner on a school bond issued. The court in that case, however, was not called upon to decide the question of standing. Also, the issue of taxpayer standing was not addressed in *Consolidated Citizens Org., Inc., v. Bd. of Ed. of the Tp. of Neptune*, 1970 *S.L.D.* 123 or *Montclair Concerned Citizens Ass'n v. Bd. of Ed. of the Town of Montclair*, 1977 *S.L.D.* 1014, cited by petitioners.

Further, petitioners' reliance on *Elizabeth Federal Savings & Loan Ass'n v. Howell*, 24 *N.J.* 488 (1957), is completely removed from the issue of taxpayer's standing and therefore does not support petitioners' position. In *Elizabeth Federal*, the Commissioner of Banking and Insurance granted Roselle Park Savings and Loan permission to buy out an operation in Elizabeth and move that operation to another Elizabeth location. The competitors of the outside savings and loan, who were already established in Elizabeth, challenged the action. The court held that the competitors had sufficient interest to afford them standing in the action. *Id.* at 503. The court there merely stated that standing inheres to "all persons who are directly affected by and aggrieved as a result of the particular action sought to be brought before the courts for review." *Id.* at 500

(emphasis added). The court found that the petitioners had standing due to their status as competitor financial institutions, rather than taxpayer status.

Although taxpayer status has been recognized to confer standing upon plaintiffs in some cases, it has been routinely rejected by the Commissioner as a basis for standing in cases involving challenges to personnel decisions made by school boards. *See, e.g., Huetteman v. Bd. of Ed. of the Boro. of East Rutherford,* OAL DKT. EDU 4100-86 (July 25, 1986), *adopted*, Comm'r of Ed. (Sept. 3, 1986) (where taxpayers/parents held not to have standing because not "interested persons" under *N.J.A.C.* 6:24-1.1 for purpose of challenging transfer of principals); and *Kenwood v. Montclair Bd. of Ed.*, OAL DKT. EDU 8858-81 (April 23, 1982), *adopted*, Comm'r of Ed. (June 14, 1982) (where petitioner failed to demonstrate sufficient stake in outcome or substantial likelihood of harm). In cases involving substantial public interest, petitioner must have additional private interest, *i.e.*, some measurable detrimental impact. *Salorio* at 482, 491. *See also Ricciardelli v. Bd. of Ed. of the City of Newark*, OAL DKT. EDU 1894-79 (Sept. 26, 1979), *adopted,* Comm'r of Ed. (Nov. 16, 1979) (petitioner must be affected in a direct and meaningful way; taxpayer status insufficient to confer standing to challenge transfer of personnel).

Here, petitioners challenge a school board personnel policy which prohibits retaining supplemental teachers beyond two consecutive years of employment. Petitioners Higgins and Hovan allege no private interest beyond their status as taxpayers, as required under *Kenwood, supra*. On the other hand, cases relied on by petitioner, *Schinck, Silverman, Montclair, and Consolidated Citizens,* are distinguished from cases involving personnel matters. In those cases, a school closing, reorganization, and a bond issue entail a possible outlay of money or incurrence of debt by the school board. These issues would be of concern to Higgins and Hovan as taxpayers because increased costs of operating a school are often reflected in increased taxes. However, in personnel cases, taxpayers have no personal interest to claim standing. Therefore, I **CONCLUDE** that Higgins and Hovan lack standing to participate as petitioners in this action.

Based on the above, I **CONCLUDE** that petitioners' standing is a prerequisite to maintain this action before the Commissioner of Education. Having failed to establish requisite standing to bring this suit, the petition against the Board will be **DISMISSED** without actually reaching the merits of petitioners' allegations.

Accordingly, it is **ORDERED** that the petition of Ridgewood Education Association, Elaine Higgins, and Ann Hovan is hereby **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

June 16, 1993
DATE

MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

6/18/93
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 22 1993
DATE

OFFICE OF ADMINISTRATIVE LAW

md/e

APPENDIX

EXHIBITS

J-1	Board Policy 4123
J-2	Minutes, October 30, 1991
J-3	Minutes, December 4, 1991
J-4	Memorandum, Campion to Administrative Staff, October 9,1991
J-5	MInutes, December 18, 1991
J-6	Excerpt of Minutes, January 5, 1992
J-7	Excerpt of Minutes, January 27,1992
J-8	Excerpt of Minutes, February 19, 1992

OAL DKT. NO. EDU 4706-92

RIDGEWOOD EDUCATIONAL ASSOCIATION, ELAINE HIGGINS AND ANN HOVAN,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioners' exceptions and respondent's replies thereto were timely filed in accordance with N.J.A.C. 1:1-18.4.

Petitioners' exceptions raise one new argument with respect to their standing to bring the within petition. They allege that the ALJ made her decision to dismiss the petition based upon a fact not contained in the factual record of this case. Specifically, they aver that there is an absence in the record of sufficient, competent and credible evidence as to whether or not any part-time supplemental teachers have been hired subsequent to the Board's adoption of revised Policy Number 4123 on February 24, 1992. The Commissioner is urged to reverse the initial decision and remand this matter.

Petitioners' remaining exceptions with respect to the standing issue are a reiteration of arguments fully and fairly considered and addressed by the ALJ in her initial decision.*

The Board contends that the ALJ's reliance on the contention that there is no current member of the Association to whom the policy applies was justified. It points out that

> ***This statement was contained in respondent's initial brief. Despite the opportunity for a reply brief and a request by the Administrative Law Judge for supplemental legal briefs, petitioners failed to address respondent's assertion that no one individual represented by the Association could step forward and claim an inquiry seeking a remedy. Absent any such challenge or the presentation of evidence which would render the Board's representation invalid, the initial decision was based upon sufficient reason to support the conclusion that the association lacked standing.
> (Board's Reply Exceptions, at p. 1)

The Board urges that the initial decision be affirmed.

Upon a careful and independent review of the record of this matter, the Commissioner fully concurs with the analysis and conclusion of the ALJ that since there are no current Association members affected by the Board's policy, the Association cannot claim to be protecting the interest of its members, and, therefore, lacks standing to challenge the Board's policy at this time. In reaching her determination in this regard, the Commissioner was not persuaded by petitioners' objection that the absence of current members injured by the policy is a fact unsupported by the record. She

---

* It is noted that petitioners' exceptions IV through VIII are a restatement of their arguments going to the merits of the petition rather than the issue of standing and, therefore, are not exceptions to the initial decision and will not be considered herein.

particularly notes that in one of petitioners' own post-hearing submissions they stated

> ***The petitioners do not argue that the respondent's amendment to Policy Number 4123 is inappropriate as applied to any particular part-time Supplemental Teacher. The petitioners argue that the adoption of the two year employment limitation contained in the amendment is ultra vires and void.***
> (Supplemental Brief for Petitioners, dated April 30, 1993, at p. 9)

The Commissioner further notes that at no time subsequent to the Board's initial assertion of this statement did the petitioners in any of their submissions bring forth a challenge of any kind to this contention. Consequently, the Commissioner finds that in light of petitioners' statement and the fact that the Board's representation that there is no current member of the Association to whom the policy applies remained undisputed by petitioners, the ALJ's initial decision was based upon sufficient reason to support the conclusion that the Association did not have standing to bring the within petition.

Accordingly, for the reasons stated in the initial decision, the Commissioner accepts the recommendation of the ALJ dismissing the instant Petition of Appeal and adopts it as the final decision in this matter.

M L Fitzgerald
COMMISSIONER OF EDUCATION

AUGUST 2, 1993

DATE OF MAILING - AUGUST 2, 1993

175-93

EDU # 4706-92
C # 175-93
SB # 48-93

RIDGEWOOD EDUCATIONAL ASSOCIATION, ELAINE HIGGINS AND ANN HOVAN,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, August 2, 1993

For the Petitioners-Appellants, Bucceri & Pincus (Gregory T. Syrek, Esq., of Counsel)

For the Respondent-Respondent, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross (Frank N. D'Ambra, Esq., of Counsel)

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

December 1, 1993

Date of mailing 03 DEC 1993

175-93

EDU # 4706-92
C # 175-93
SB # 48-93
APP. DIV. #A-2458-93T1

RIDGEWOOD EDUCATIONAL ASSOCIATION, ELAINE HIGGINS AND ANN HOVAN,

PETITIONERS-APPELLANTS,

V.

BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, August 2, 1993

Decided by the State Board of Education, December 1, 1993

Decided by the Appellate Division, October 16, 1995

For the Petitioners-Appellants, Bucceri and Pincus (Gregory T. Syrek, Esq., of Counsel)

For the Respondent-Respondent, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross (Frank N. D'Ambra, Esq., of Counsel)

On December 1, 1993, the State Board of Education affirmed the decision of the Commissioner of Education that petitioners in this case did not have the standing to challenge a policy adopted by the Ridgewood Board of Education which limits the employment of supplemental teachers to two consecutive years.

DEC. 6, 1995

On October 16, 1995, the Appellate Division reversed our decision, finding that the petitioning association had an interest in protecting the employment status of prospective members sufficient to accord it representational standing to challenge the Board's policy. The Court also concluded that the professional status and involvement of the two individual teachers was sufficient to support their standing. Accordingly, the Court remanded the matter for proceedings on the merits.

We, in turn, remand this case to the Commissioner of Education for such additional proceedings as required to resolve the matter. We do not retain jurisdiction.

December 6, 1995

Date of mailing _____

176-93

DWAYNE CRESSINGER,

PETITIONER,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DWAYNE CRESSINGER,

PETITIONER/APPELLANT,

V.

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

RESPONDENT.

DECISION

AUGUST 2, 1993

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 5949-92

DWAYNE CRESSINGER,
Petitioner/Appellant,
v.
NEWARK BOARD OF EDUCATION,
Respondent.

OAL DKT. NO. EDU 7810-92
AGENCY DKT. NO. 249-6/92

DWAYNE CRESSINGER,
Petitioner/Appellant,
v.
BOARD OF EDUCATION
OF THE CITY OF NEWARK,
ESSEX COUNTY,
Respondent.

CONSOLIDATED

David B. Beckett, Esq., for petitioner/appellant (Szaferman, Lakind, Blumstein, Watter & Blader, attorneys)

Samuel M. Manigault, Associate Counsel, for respondent (Marvin L. Comick, General Counsel)

Record Closed: June 3, 1993 Decided: June 22, 1993

OAL DKT. NOS. CSV 5949-92 and EDU 7810-92

BEFORE **RALPH J. TOLOMEO,** ALJ:

The first matter of this consolidated proceeding, OAL DKT. NO. CSV 5949-92, was transmitted to the Office of Administrative Law for hearing on August 4, 1992. The matter involves Dwayne Cressinger's appeal of disciplinary action below which determined that charges of insubordination, neglect of duty and being absent without leave were sustained. The penalty imposed was that of removal, effective March 20, 1992.

This matter was assigned to Administrative Law Judge George Perselay and scheduled for hearing by him.

Thereafter, Dwayne Cressinger filed a Verified Petition with the Commissioner of the Department of Education of the State of New Jersey alleging that in addition to the protections Cressinger may have under the Civil Service Laws, that as a tenured custodian employed by the Newark Board of Education, petitioner/appellant could only be dismissed through the process required by the Tenured Employee's Hearing Law, *N.J.S.A.* 18A:6-9, *et seq.* The petition was filed with the Commissioner on June 2, 1992 and forwarded to the Office of Administrative Law as a contested case on October 7, 1992. The matter was assigned OAL DKT. NO. EDU 7810-92 and assigned to the undersigned. Thereafter, I scheduled this matter for hearing for June 24, 1993.

Shortly thereafter, I was apprised of the Civil Service Appeal (OAL DKT. NO. CSV 5949-92) by the attorneys for the parties who requested that these matters be consolidated. The request for consolidation was granted.

Prior to the scheduled hearing date of June 24, 1993, the parties advised that the issues in dispute were settled. They have submitted a Settlement Agreement which sets forth the terms of the settlement.

Among other things, specifically in paragraphs 6 and 7, the parties state:

> ... 6. The parties recognize that the provisions in this agreement are subject to approval by the Merit System Board and the New Jersey Department of Education and if said agreement is not approved by

both the Merit System Board and the New Jersey Department of Education, this action shall be reinstated within the Office of Administrative Law and the parties shall be entitled to demand the hearing on said matter. It is also expressly agreed that the question of whether the Merit System Board and/or New Jersey Department of Education has a predominant interest in this appeal has not been decided by this agreement and that unless both the Merit System (*sic.* Board) and the New Jersey Department of Education approve of said agreement, both appeals shall be reinstated. After such a reinstatement, the issue of predominant interest in this appeal will be addressed, but the issue need not be addressed at this time, it is expressly reserved.

7. Upon the final approval of said agreement by both the Merit System Board and the Department of Education, the agreement shall be deemed to be a withdrawal of Dwayne Cressinger's appeals to the Merit System Board and the New Jersey Department of Education and no cost shall be sought with respect to said appeals from either party.

From the foregoing, I have reviewed the record in this matter and the settlement terms and **FIND**:

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

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

I hereby **FILE** my initial decision with both the **MERIT SYSTEM BOARD** and the **DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **MERIT SYSTEM BOARD**, which by law is authorized to make a final decision in this matter. If the Merit System Board does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, APPELLATE PRACTICES AND LABOR RELATIONS, DEPARTMENT OF PERSONNEL, Three Station Plaza, 44 South Clinton Avenue, CN 312, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

ADDITIONALLY,

this recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 22, 1993
Date

Ralph J. Tolomeo
RALPH J. TOLOMEO, ALJ

Receipt Acknowledged:

Date

MERIT SYSTEM BOARD

6/24/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 28 1993
Date

Joyce LaVecchia
OFFICE OF ADMINISTRATIVE LAW

ro/e

RECEIVED
JAN 3 2 23 PM '93
STATE
OFFICE

SZAFERMAN, LAKIND, BLUMSTEIN,
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ATTORNEYS FOR PETITIONER

STATE OF NEW JERSEY
MERIT SYSTEM BOARD
OAL DOCKET NO: EDU7810-92
OAL DOCKET NO.: CSV05949-92

DWAYNE CRESSINGER, Petitioner V. BOARD OF EDUCATION OF THE CITY OF NEWARK, Respondent.	SETTLEMENT AGREEMENT

The parties having agreed that the above captioned matters should be fully and finally resolved and that all charges brought against Petitioner Dwayne Cressinger in the above referenced actions and as set forth in the Final Notice of Disciplinary Action issued by Respondent Board of Education of the City of Newark (hereinafter the "Board") on or about March 4, 1992 should be resolved and deemed settled as the parties agree that in the interest of resolving this matter without further delay, extensive effort and cost, and for the mutual consideration set forth this Agreement, the parties hereby settle this matter in accordance with the following terms and conditions:

1. The charges that are the subject of this appeal will

not be considered in any subsequent disciplinary matter for the purpose of "progressive discipline" or in the imposition of any penalty. It is expressly agreed that the Respondent Board shall not consider or not give affect to this Settlement Agreement herein or to said charges in its decision to seek discipline against Mr. Cressinger for any alleged infraction that occurs and/or is charged after the execution of this Agreement. It is also stipulated and agreed to that no disciplinary charges have been instituted, are being considered, or are presently pending against Dwayne Cressinger other than those set forth in the above referenced appeal and those described in paragraph 2 of this Agreement.

2. Notwithstanding the terms set forth in paragraph 1, the parties agree that the charges that are the subject of this appeal and the time that Mr. Cressinger serves as a leave of absence without pay as set forth in paragraph 5 of this Agreement shall be considered a suspension for the purposes of progressive discipline if and only if the Newark Board of Education is able to sustain the disciplinary charges and penalty that was imposed by the Board in the matter that has been captioned as Cressinger v. Newark Board of Eduction, OAL Docket No. CSV-9774-91. In the event the Board is not able to meet the above conditions, for whatever reason, the terms of paragraph 1 of this Agreement shall be followed.

3. Nothing in this Agreement shall be deemed or construed to be an admission of liability or wrongdoing by either party to this Agreement.

4. In consideration for settling this matter and for the payment of monies referred to in paragraph 5, Dwayne Cressinger agrees to accept a leave of absence without pay from March 4, 1992 until September 4, 1992. Said time shall be deemed to be a leave of absence without pay unless the City meets the conditions set forth in paragraph 2 of this Agreement.

5. The parties further agree that Dwayne Cressinger shall be paid a sum equal to back wages for the time period from September 4, 1992 through December 21, 1992 and that he shall be credited for all fringe benefits including but not limited to health insurance, pension credits and any other benefits to which he is entitled pursuant to his collective bargaining agreement and/or City Ordinance, Board policy and regulations, State Law, or Federal Law. Said payments shall include deductions that are normally taken from an employee's paycheck and shall be made within four weeks of approval of said agreement by the Merit System Board and New Jersey Department of Education.

6. The parties recognize that the provisions in this Agreement are subject to approval by the Merit System Board and the New Jersey Department of Education and if said Agreement is not approved by both the Merit System Board and the New Jersey Department of Education, this action shall be reinstated within the Office of Administrative Law and the parties shall be entitled to demand a hearing on said matter. It is also expressly agreed that the question of whether the Merit System Board and/or New Jersey Department of Education has a predominant interest in this appeal has not been decided by this Agreement

and that unless both the Merit System and New Jersey Department of Education approve of said Agreement, both appeals shall be reinstated. After such a reinstatement, the issue of predominant interest in this appeal will be addressed, but the issue need not be addressed at this time, it is expressly reserved.

7. Upon the final approval of said Agreement by both the Merit System Board and Department of Education, the Agreement shall be deemed to be a withdrawal of Dwayne Cressinger's appeals to the Merit System Board and New Jersey Department of Education and no cost shall be sought with respect to said appeals from either party.

8. The parties agree that this document represents a full understanding of what is agreed to between them, that they are satisfied with the services of respective counsel, and that no actions will be taken in response to or retaliation for said agreement or filing of the above-captioned appeals.

9. The Board through its representatives and counsel, represents and acknowledges that the individual(s) executing this Settlement Agreement on behalf of Respondent Board of Eduction of the City of Newark have the authority to enter into this Settlement Agreement and that they have obtained the approval of appropriate individuals and/or entities at the Board of Education of the City of Newark.

10. The parties agree and stipulate that they will not file any exceptions to this Agreement before the Merit System Board or New Jersey Department of Education and that if said Agreement is approved by both the Merit System Board and New Jersey Department

of Education, no appeal will be filed to the Appellate Division. Notwithstanding the above, the parties shall be permitted to file an appropriate action for the purposes of enforcing that party's right under this Agreement.

WITNESSETH AND ATTESTED TO:

DAVID B. BECKETT, ESQ.

DWAYNE CRESSINGER

SAMUEL MANIGAULT, ESQ.

BOARD OF EDUCATION OF THE CITY OF NEWARK

This Agreement is hereby consented to as to form and substance.

Hon. George Perselay, A.L.J.
(OAL Docket No.: CSV 05949-92)

Hon. Ralph J. Tolomeo, A.L.J.
(OAL Docket No.: EDU7810-92)

OAL DKT. NO. EDU 7810-92 (CSV 5949-92 Consolidated)

DWAYNE CRESSINGER,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,	:	
RESPONDENT.	:	COMMISSIONER OF EDUCATION
DWAYNE CRESSINGER,	:	DECISION
PETITIONER/APPELLANT,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,	:	
RESPONDENT.	:	

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

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

COMMISSIONER OF EDUCATION

AUGUST 2, 1993

DATE OF MAILING - AUGUST 3, 1993

177-93

G & G ELECTRIC CONTRACTORS, INC., AND REESE CONSTRUCTION CO.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY, AND ALLAN MARTINOVICH ELECTRICAL CONTRACTORS,	:	DECISION
RESPONDENTS.	:	

AUGUST 3, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
DECISION ON MOTION FOR EMERGENT RELIEF
OAL DKT. NO. EDU 5470-93
AGENCY NO. 199-6/93

G. & G. ELECTRICAL CONTRACTORS, INC. AND REESE CONSTRUCTION CO.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON AND ALLEN-MARTINOVICH ELECTRICAL CONTRACTORS,
Respondents.

Bruce R. Demeter, Esq., for petitioners (Simon & Demeter, attorneys)

Frederick W. Hardt, Esq., for respondent

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

The petitioners seek rejection of respondent Allen-Martinovich's bid for certain electrical work in the Pemberton Public Schools and award of the same to themselves. The petitioners allege Allen-Martinovich's bid exceeded its prequalification dollar amount; the respondent's Notice of Classification was improperly submitted; the respondent did not include the dollar amount of uncompleted contract work in its bid; the respondent did not identify Division of Building and Construction (DBC) classified subcontractors; the respondent failed to list three similar projects, and the respondent was late to a mandatory pre-bid meeting.

The respondent denies all allegations or, in the alternative, asserts that any irregularities were waivable.

The matter was opened before the Commissioner of Education by filing of a motion for emergency relief with a request for expedited hearing. The Department of Education transmitted the matter on June 10, 1993 to the Office of Administrative Law for determination pursuant to N.J.S.A. 52:14B-1 through - 15 and N.J.S.A. 52:14F-1 through - 13.

Oral argument on the motion was heard at the Office of Administrative Law facility in Mercerville on Thursday, June 17, 1993.

ARGUMENTS

Petitioners

The petitioners assert they observed errors in the Allen-Martinovich bid. Specifically, the total amount bid exceeded Allen-Martinovich's prequalification limits established by DBC. Bid documents are required to be within DBC limits. Under N.J.S.A. 18A:18A-26, a Board of Education shall accept bids only from persons qualified by DBC. Only qualified bidders can be recognized. Further, Allen-Martinovich's certification was not submitted in a separate envelope as required. This requirement is in place for an obvious reason. If a bidder is not qualified, there is no need to open and review her or his bid.

The contract is made of several parts. However, bids were solicited as one proposal. The respondent's exceeds its qualification limits. The Board issued separate contracts, each for amounts less than the respondent's qualifications limits. The matter should not have gone that far. The Board should not have accepted the bid in the first place. The statutes do not contemplate breaking up a contract. Rather, they are aimed at keeping bidding on level ground in the public interest.

Interpretations the Board received from DBC are off the point. The focus should be on the acceptance of the bid. The Board has disadvantaged other qualified bidders.

If the respondent was the low bidder on all ten subcontracts, it would have exceeded its DBC qualification. The bid process is of utmost importance and any

> Each facility shall be bid as separate projects with an overall construction bid. Each bidder shall be required to submit bid proposals on a minimum of three (3) facilities of their choice. Selected facilities have been scheduled to begin after asbestos abatement projects by others or shall be conducted in phases as indicated in the Project Manual.

The paragraph is quite clear and not reasonably susceptible of more than one meaning. Common sense, common experience and the clear wording all indicate no requirement that the entire electrical upgrade be bid. To the extent the petitioners read such a requirement into the language, they err.

Similarly, without more, there is no reason to apply the prequalification limit to the amounts bid. Common experience and common sense dictate that the total amount of bids awarded must be within the prequalification limit, when added to the amount of uncompleted contracts.

In deciding a motion of this type, it is necessary to consider immediacy of harm, irreparability of harm, likelihood of prevailing on the merits and to balance the relative harm worked by granting or denying the motion. Crowe v. DeGioia, 90 N.J. 126 (1982). It is also necessary to make all fair inferences in favor of the party not the maker of the motion.

In this case, harm, if any, might be immediate because contracts are soon to be let. I am not persuaded of irreparability because a money judgment could make petitioner whole. The question of prevailing on the merits, although by no means certain, seems on the basis of the arguments to tip slightly in the respondent's favor. As to relative harm, the Board has made much of its asbestos plans being contingent upon the electrical work that is the subject of this case. If the Board's procedures in this matter were patently wrong, no amount of pending work could overcome a decision against the Board. The relative harm worked upon the petitioners, as has already been determined, can be mitigated by a money judgment obtained in a proper forum.

Having considered and weighed carefully the arguments of counsel, I **DETERMINE** that the motion for emergent relief and stay of board action must be **DENIED.** It is so **ORDERED.**

Although the respondents successfully defend against the motion, the decision is no means one-sided. The respondent Allen-Martinovich made several mistakes.

Had any of them been material, the motion could have been granted. The Pemberton Board of Education, boards of education and all prospective bidders are reminded that the practice of competitive bidding for public contracts is rooted deep in sound principals of public policy. The purpose is to secure competition and the statutes directed toward the goal are for the benefit of the taxpayers and not the bidders. Hillside Tp. v. Sternin, 25 N.J. 317 (1957). No party should rely on a board's ability to waive certain requirements. Strict adherence to the bidding statutes and rules is the minimum conduct, not the maximum, expected of all involved in the bidding process.

It is further **ORDERED** that this matter proceed to plenary hearing unless earlier withdrawn.

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

21 JUNE 1993
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

OAL DKT. NO. EDU 5470-93

G & G ELECTRIC CONTRACTORS, INC., AND REESE CONSTRUCTION CO.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY, AND ALLAN MARTINOVICH ELECTRICAL CONTRACTORS,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law denying petitioners' Motion for Emergent Relief have been filed with the Commissioner for review and final decision pursuant to N.J.A.C. 1:1-12.6.

Subsequent to the filing of the initial decision, by letter received on July 8, 1993, petitioners advised the Commissioner that they no longer wished to pursue this matter and requested withdrawal of their petition.

Accordingly, the Initial Decision on Motion is deemed mooted by withdrawal of the Petition of Appeal, which is hereby dismissed with prejudice.

IT IS SO ORDERED.

AUGUST 3, 1993

DATE OF MAILING - AUGUST 3, 1993

COMMISSIONER OF EDUCATION

178-93

LIBRARY INTERIORS, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY AND GARDEN STATE OFFICE EQUIPMENT AND F.L. FELDMAN,	:	DECISION
RESPONDENTS.	:	
	:	

AUGUST 3, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON MOTION
OAL DKT. NO. EDU 5731-93
AGENCY DKT. NO. 215-6/93

STUART FIFE,
Petitioner,
v.
HUNTERDON CENTRAL REGIONAL BOARD OF EDUCATION,
Respondent.

Stuart Fife, petitioner, pro se

James P. Granello, Esq., Hunterdon Central Board of Education, for respondent

Roger W. Frost, for Intervenor, Garden State Office Systems and Equipment

BEFORE **DANIEL B. Mc KEOWN**, ALJ, t/a:

The Hunterdon Central Regional Board of Education (Board) solicited public bids for furniture, finishes and interior construction for its high school library. The specifications divided the entire project into five sections including library shelving, general furnishings, cabinetry, interior finishes and construction, and signage.. Petitioner Stuart Fife, who is the president of Library Interiors, Inc., submitted a bid for library shelving and for cabinetry. The Board also received bids for the library shelving from Garden State Office Equipment and for cabinetry from F.L. Feldman Associates. According to a schedule of bids received by the Board, Garden State Office Equipment was low bidder for the shelving and Feldman Associates was the low bidder for cabinetry. However, petitioner Fife on behalf of Library Interiors says that neither Garden State Office Systems nor Feldman Associates are prequalified pursuant to N.J.S.A. 18A:18A-26 to perform the work required. Petitioner Fife claims that because the lowest bids received by the Board

for the shelving and cabinetry exceeds $20,000, pre-qualification is a necessary condition for the Board to award the bids. Petitioner Fife who is pre-qualified seeks a stay of any action to be taken by the Board to award the bids for shelving and cabinetry to Garden State Office Equipment and Feldman Associates, respectively, until he can be heard on the entire matter.

Oral argument on petitioner's application for a stay was heard June 23, 1993, at the Office of Administrative Law (OAL), Mercerville. Petitioner Fife was heard at that time, as was counsel for the Board, and Roger W. Frost, on behalf of Garden State Office Systems and Equipment. No appearance was made on behalf of F.L. Feldman Associates. For the reasons that follow, petitioner's application for a stay of any action to be taken by the Board must be granted pending a complete and final disposition on the merits of the case.

FACTS

Certain background facts are not in dispute between the parties and they are as follow. The specifications (C-1) for this project were prepared for the Board by Globus Design Associates. While the Notice to the Bidders at the very beginning of the specifications state "***all rules and regulations set forth by the State of New Jersey regarding municipal and government bidding" must be followed, and various legal formalities are set forth within the bidding documents such as instructions to bidders, general conditions, noncollusion affidavit, affirmative action, and so on, no mention is made in the specifications in regard to pre-qualification. Nevertheless, petitioner Fife on behalf of Library Interiors submitted a bid (C-2) for the shelving and cabinetry components of the project. Petitioner included in his bid documents evidence of pre-qualification under N.J.S.A. 18A:18A-26 to submit bids in an aggregate amount of $400,000 in the classification of school furnishings as issued by the Department of the Treasury, Division of Building and Construction. Neither Garden State Office Systems and Equipment nor F.L. Feldman have been prequalified by the Department of the Treasury under N.J.S.A. 18A:18A-26.

It is noted that if the bid submitted for shelving by Garden State Office Systems and Equipment were invalidated for lack of pre-qualification, as well as the bid of Feldman Associates for the cabinetry for lack of pre-qualification, Library Interiors would have been the next lowest bidder in both categories.

It is represented through counsel for the Board that while the Board has determined to which bidders various awards will be made, it has elected not to make that information public until a ruling issues on petitioner's application for the stay.

ARGUMENTS

Petitioner Fife argues that he believes N.J.S.A. 18A:18A-27 et seq. requires bidders whose proposals are in excess of $20,000 must be prequalified and classified in accordance with law.

The Board contends that petitioner's application for a stay, or emergency relief must be denied for several reasons. 1. Petitioner failed to comply with N.J.A.C. 6:24-1.5 which requires a motion for a stay to be accompanied by a letter memorandum or brief which addresses the standards to be met for such relief under Crowe v. DeGioia 90 N.J. 126 (1982). Furthermore, the Board contends, petitioner fails to show irreparable harm, he fails to show all the material facts are uncontroverted, that the legal issues are settled as a matter of law, and, the Board says, petitioner fails to show a reasonable probability of prevailing on the merits of the case.

While the Board acknowledges N.J.S.A. 18A:18A-26 requires bidders to be prequalified for public work in excess of $20,000, it claims that "public work" is not to be defined in the whole of the Public Schools Contracts Law, N.J.S.A. 18A:18A-1.1 et seq. Furthermore, it also relies upon a certification filed by Susan Globus wherein she states that she believes pre-qualification is not necessary for this king of project.

The Board also claims that it would suffer undue hardship if the relief requested by petitioner were granted because it would have to start its improvement project anew.

ANALYSIS

In regard to the Board's argument that "public work" is nowhere defined, the Public Schools Contracts Law defines "contracts" at N.J.S.A. 18A:18A-2 as "contracts or agreements for the performance of work or the furnishing or hiring of services, materials, or supplies as distinguished from the contracts of employment." At paragraph K of the same statute, "work" is defined as "services

and any other activity of a tangible or intangible nature performed or assumed pursuant to a contract or agreement with a board of education."

N.J.S.A. 18A:18A-26 is mandatory when it says:

> E. Every board of education shall require that all persons proposing to bid on any contract requiring public advertisement for bids with the Board for public work, the entire cost whereof will exceed $20,000.00, shall first be classified ***as to the character and amount of public work on which they shall be qualified to submit bids. So long as such requirement is in effect, the board of education shall accept such bids only from persons qualified in accordance with such classification.

"Public work" is, for purposes of the Public Schools Contracts Law, the performance of work or the furnishing or hiring of services, materials or supplies. I CONCLUDE that this project is a public work which, by law, requires bidders to be prequalified. See Bil Jim Const. v. Bd. of Educ., 236 N.J. Super. 603 (Law Div. 1989).

In this case, the necessary facts for purposes of petitioner's application for a stay are not in dispute. The lowest bidders for shelving and cabinetry, respectively, are not prequalified. Should the Board award bids to these two lowest bidders, neither of whom are pre-qualified, irreparable harm would be suffered by petitioner Fife in that he is pre-qualified for the work solicited and the public at large would suffer irreparable harm because the Board would have awarded bids directly contrary to the Public Schools Contracts Law. These facts and the law show petitioner has a reasonable probability of prevailing on the ultimate merits of the case and while a stay of any action by the Board to presently award bids may create some hardship to it in terms of finishing the project, that hardship is insignificant to the larger issue of insuring that whichever bids are awarded by it are awarded consistent with law.

Therefore, petitioner's request for a temporary stay against the Hunterdon Central Regional Board of Education from awarding bids regarding the shelving and cabinetry portions of this project is hereby **GRANTED**. A plenary hearing shall be conducted as quickly as calendars permit.

It is so **ORDERED**.

This order on application for emergency relief may be adopted, modified or rejected by, **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

June 24, 1993
Date

Daniel B McKeown
DANIEL B. Mc KEOWN, ALJ, t/a

DOCUMENTS IN EVIDENCE

COURT EXHIBITS:

C-1	Specifications
C-2	Bid filed by petitioner
C-3	Schedule of bids received

LIBRARY INTERIORS, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY AND GARDEN STATE OFFICE EQUIPMENT AND F.L. FELDMAN,	:	DECISION
RESPONDENTS.	:	

The record and Initial Decision on Motion for Emergent Relief have been reviewed. The Board filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

Among the exceptions filed by the Board is a statement that:

> On June 28, 1993, the respondent Board of Education acted to reject all bids and rebid the project. See Notice to Bidders Attached. All previous bidders, including the petitioner, were advised of this action. See N.J.S.A. 18A:18A-22 and letter dated June 29, 1993 to petitioner attached.
>
> In light of the fact that the temporary stay would not take effect until 45 days from the date of the initial ruling and that the stay only prevented the Board of Education from awarding bids (see slip p. 4), it is respectfully submitted that this matter has become moot by reason of the rejection of all bids opened on May 21, 1993, which was the issue in dispute.
>
> Therefore, the Commissioner of Eduction should decline to enforce this stay. (emphasis in text)
>
> (Exceptions, at p. 3)

Having carefully considered the record including the exceptions, the documents submitted as attachments to such exceptions, and noting that no reply exceptions were filed disputing the exceptions recited above, the Commissioner finds and determines that the instant matter has been rendered moot by application of N.J.S.A. 18A:18A-22. Accordingly, the merits of the arguments raised by the parties in this matter are not considered in the disposition of this case, but rather, the matter is dismissed, with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 3, 1993
DATE OF MAILING - AUGUST 3, 1993

179-93

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF UPPER PITTSGROVE	:	DECISION
SCHOOL DISTRICT, SALEM COUNTY.	:	
	:	

AUGUST 4, 1993

OAL DKT. NO. EDU 3980-93

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF UPPER PITTSGROVE	:	DECISION
SCHOOL DISTRICT, SALEM COUNTY.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before her and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 4, 1993

DATE OF MAILING - AUGUST 4, 1993

180-93

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF UPPER PITTSGROVE	:	DECISION
SCHOOL DISTRICT, SALEM COUNTY.	:	
	:	

AUGUST 4, 1993

OAL DKT. NO. EDU 3981-93

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF UPPER PITTSGROVE	:	DECISION
SCHOOL DISTRICT, SALEM COUNTY.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before her and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 4, 1993

DATE OF MAILING - AUGUST 4, 1993

181-93

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
FRANKLIN TOWNSHIP SCHOOL	:	DECISION
DISTRICT, WARREN COUNTY.	:	
	:	

AUGUST 4, 1993

OAL DKT. NO. EDU 3999-93

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
FRANKLIN TOWNSHIP SCHOOL	:	DECISION
DISTRICT, WARREN COUNTY.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before her and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 4, 1993

DATE OF MAILING - AUGUST 4, 1993

182-93

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
KINGSWAY REGIONAL HIGH SCHOOL	:	DECISION
DISTRICT, GLOUCESTER COUNTY.	:	
_____	:	

AUGUST 4, 1993

OAL DKT. NO. EDU 4001-93

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
KINGSWAY REGIONAL HIGH SCHOOL	:	DECISION
DISTRICT, GLOUCESTER COUNTY.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before her and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 4, 1993

DATE OF MAILING - AUGUST 4, 1993

183-93

BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
OLD BRIDGE EDUCATION ASSOCIATION AND OLD BRIDGE CUSTODIAN SUPERVISORS ASSOCIATION,	:	
RESPONDENTS.	:	

SYNOPSIS

Petitioning Board sought declaratory judgment that contractual custodial tenure does not require adherence to Tenure Employees Hearing Act to effectuate dismissals and that Commissioner of Education therefore has no jurisdiction over custodians' terminations.

Citing Appellate Division decision in Wright, affirmed by Supreme Court, ALJ found that contractual tenure gave rise after three years to an indefinite appointment which in turn triggered operation of N.J.S.A. 18A:17-3. ALJ therefore concluded tenure provisions of the school laws applied to respondents.

Commissioner adopted findings and determination in initial decision.

AUGUST 4, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2395-93
AGENCY DKT. NO. 9-1/93

BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,
Petitioner,
v.
OLD BRIDGE EDUCATION ASSOCIATION AND OLD BRIDGE CUSTODIAN SUPERVISORS ASSOCIATION,
Respondents.

Francis X. Journick, Jr., Esq., and **Harold G. Smith**, Esq., on behalf of petitioner (Wilentz, Goldman & Spitzer, attorneys)

Randi Doner, Esq., on behalf of respondents (Balk, Oxfeld, Mandell & Cohen, attorneys)

Record Closed: May 10, 1993 Decided: June 22, 1993

BEFORE **SOLOMON A. METZGER**, ALJ:

This matter arises out of an appeal filed by petitioner with the Commissioner of Education seeking a declaratory judgment under the school laws. *N.J.S.A.* 18A:6-9 *et seq.* The matter was transmitted to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13. The facts are undisputed and the parties have filed cross-motions for summary decision pursuant to *N.J.A.C.* 1:1-12.5(b).

The question presented is whether respondents' members attain tenure under the school laws by virtue of a collective bargaining agreement between the parties granting tenure-like protections.

Petitioner employs custodians and custodian supervisors to maintain its buildings. These employees are hired for fixed one-year periods generally beginning with the start of the school year and ending with the completion of the school year. Respondents represent custodians and custodian supervisors in the district. The collective bargaining agreement which presently governs the parties provides in Article IV.C.:

> No [custodian or custodian supervisor] shall be disciplined, reprimanded, reduced in rank or compensation, or deprived of any professional advantage without just cause.

Article XXXIV.L.3. of the agreement provides:

> All custodial personnel shall receive tenure of position during good behavior and efficiency after the expiration of a period of employment of three consecutive years in the district.

N.J.S.A. 18A:17-3 provides:

> Every public school janitor of a school district shall, unless he is appointed for a fixed term, hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except as the result of the reduction of the number of janitors in the district made in accordance with the provisions of this title or except for neglect, misbehavior or other offense and only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title.

Petitioner argues that any job security or tenure-like rights which may accrue to the membership of respondents' associations derive from and are governed by their contract; these are outside the Commissioner's jurisdiction and the statutory tenure protections provided under the school laws. Respondents believe that the grant of tenure in their collective bargaining agreement brings their members within the ambit of the school laws.

The arguments turn on the decision of the New Jersey Supreme Court in *Wright v. Board of Educ. of East Orange*, 99 *N.J.* 112 (1985), and the Commissioner's decision in *Lang v. Holmdel Bd. of Educ.*, OAL Dkt. No. EDU 8453-82 (June 7, 1983), *adopted*, Comm'r of Educ. (July 22, 1983). In *Wright* the Court read *N.J.S.A.* 18A:17-3 to

provide a mechanism for immediate tenure and for the complete denial of tenure, depending upon whether the appointment was for an indefinite or fixed term. The Court held that the section did not preempt negotiated agreements between these poles and that the provision in question - tenure after three years of employment - fell within this spectrum. The opinion seeks primarily to make this point and to place the case into the context of public sector scope of negotiations cases. *See, In re IFPTE Local 195 v. State*, 88 *N.J.* 393 (1982); *State v. Supervisory Employees Ass'n*, 78 *N.J.* 54 (1978). Petitioner argues that the Court did not reach our question, and thus that we are governed by the Commissioner's prior decision in *Lang*. I do not agree. While petitioner points out correctly that the Court does not directly address whether the tenure obtained by Mr. Wright is protected by the school laws or by the terms of his contract, my reading of the opinion is that statutory tenure was assumed. This is more apparent from a review of the Appellate Division decision, which was not disturbed by the Supreme Court. Judge Joelson wrote:

> The manner in which a school district may grant tenure under the statute is by appointing a janitor for an indefinite term. Therefore, the provision in the contract that "[a]ll members of the bargaining unit shall receive tenure after three years of employment" obligated respondent to appoint Wright for an indefinite term after he had completed three years of employment.
>
> . . . We add that the negotiation of a tenure not specifically granted or forbidden by statute has been held valid. *Plumbers & Steamfitters v. Woodbridge Bd. of Ed.*, 159 *N.J. Super.* 83 (App. Div. 1978).
>
> [*Wright v. Board of Educ. of East Orange*, 194 *N.J. Super.* 181, 184-85 (App. Div. 1983)]

Thus, the Appellate Division held directly that contractual tenure gave rise after three years to an indefinite appointment, which in turn triggered the statute.

The decision in *Lang* precedes the Appellate Division's opinion in *Wright*. There a janitor employed under fixed annual contracts contended *inter alia* that he obtained statutory tenure after three years by virtue of a collective bargaining agreement, and as such, his termination without resort to the due process provided under the school laws was improper. The Commissioner, affirming an OAL opinion, held that tenure-like status achieved through collective bargaining was subject to the process and protections negotiated by the parties under the New Jersey Employer-Employee Relations Act, *N.J.S.A.* 34:13A-1 to -29, and was distinct from statutory tenure arising under the school laws. *Lang* cannot be harmonized with

Wright. Nowhere does the Appellate Division distinguish between tenure and tenure-like rights nor does it imply that tenure negotiated by contract must proceed exclusively under the process provided by the contract. The Supreme Court opinion says simply that the parties can negotiate tenure so long as it is not above the statutory maximum or below the statutory minimum and affirms the Appellant Division's holding "that the statute did not stand in the way of the valid negotiation of tenure" *Wright, supra*, 99 *N.J.* at 117. In failing to make the *Lang* distinction in a like case, it appears that the Supreme Court accepted the Appellate Division's premise that negotiated tenure was statutory tenure.

Based on the foregoing, it is my conclusion that the tenure provisions of the school laws apply to respondents.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 7th Floor, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

6/28/93
Date

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

6/25/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 29 1993
Date

OFFICE OF ADMINISTRATIVE LAW

/cae

BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
OLD BRIDGE EDUCATION ASSOCIATION AND OLD BRIDGE CUSTODIAN SUPERVISORS ASSOCIATION,	:	
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by the Board pursuant to the provisions of N.J.A.C. 1:1-18.4, as was a reply thereto by respondents.

In its exceptions, the Board reiterates its reliance on Lang, supra, and renews its argument that the Supreme Court in Wright, supra, did not directly address the question of whether the tenure obtained by a custodian through contract is protected by the school laws or by the terms of the contract, thus placing it outside the Commissioner's jurisdiction and the requirements of the Tenure Employees Hearing Act (N.J.S.A. 18A:6-10 et seq.). The interpretation espoused in the initial decision, the Board avers, incorrectly equates a contractual right with a statutory one and improperly permits a private agreement between a board and its employees to expand the scope of a statute (N.J.S.A. 18A:17-3) which on its face

clearly applies to only the two extremes mentioned within it, that is, to immediate tenure upon hiring or to no tenure at all.

Respondents in reply renew their argument that the Board has misconstrued Wright, supra, which was properly interpreted by the ALJ, and that Lang, supra, and other decisional law cited by the Board in support of its position predated Wright and was superseded by it.

Upon careful review of this matter, the Commissioner concurs with the ALJ that, notwithstanding that the Supreme Court did not directly address the question raised herein, the appellate ruling it affirmed plainly states that contractual provisions granting tenure after a certain period of employment obligate a board to thereafter appoint affected custodians for an indefinite term, as such appointment is the statutorily specified mechanism by which a school district may permissibly grant tenure. Wright, supra, at 184-85, cited in the Initial Decision, ante. This construction, in the Commissioner's view, clearly envisions any grant of janitorial tenure, including tenure of the "in-between" type at issue herein, as statutorily based, notwithstanding that it may be contractually effectuated. It then follows that proceedings to terminate are subject to the requirements of the Tenure Employees Hearing Act, and that disputes arising out of attempts to terminate tenured custodians are generally within the Commissioner's jurisdiction.

Accordingly, the initial decision of the Office of Administrative Law is affirmed for the reasons expressed therein and the provisions of N.J.S.A. 18A:17-3 and attendant tenure law are

deemed to apply to respondents, notwithstanding that their tenure was contractually granted.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 4, 1993

DATE OF MAILING - AUGUST 4, 1993

184-93

D.A.C. AND R.C.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BERGEN COUNTY VOCATIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

AUGUST 4, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 5282-93
AGENCY DKT. NO. 175-6/93

D. A. C. AND R. C.,
Petitioners,
v.
BOARD OF EDUCATION OF THE BERGEN COUNTY VOCATIONAL SCHOOL DISTRICT, BERGEN COUNTY,
Respondent.

David A. Stern, Esq., for petitioners
(Howard M. Davis, P.C., attorney)

Henry Amoroso, Esq., for respondent
(Nowell, Amoroso & Mattia, attorneys)

Record Closed: June 8, 1993 Decided: June 22, 1993

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

The Board of Education of Bergen County Technical High School suspended D. A. C., a student at the school, for ten days for allegedly committing an offense against property at the school on May 27, 1993. D. A. C. and his parent, R. C., filed a petition with the Commissioner of Education on June 3, 1993, seeking emergent relief of immediate reinstatement until plenary hearing, on the ground the student's procedural rights of due process under *Goss v. Lopez*, 419 *U.S.* 565, 95 *S.Ct.* 729 (1975), had been infringed. The Board of Education denied the assertion.

New Jersey is an Equal Opportunity Employer

The Commissioner transmitted the matter to the Office of Administrative Law as a contested case in accordance with *N.J.S.A.* 52:14F-1 *et seq*.

At hearing on short notice to the parties on June 8, 1993, the parties advised the administrative law judge the matter had been settled amicably, subject to approval of the administrative law judge and the Commissioner of Education.

I have reviewed the record and stipulation of settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures on the agreement;

2. The settlement fully disposes of all issues in controversy, is in the interest of parties and public and should be implemented forthwith.

3. The petition of appeal and motion for emergent relief are hereby **DISMISSED** in accordance with *N.J.A.C.* 1:1-19.1, subject to effectuation of terms of settlement.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 22, 1993
Date

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

6/24/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 28 1993
Date

OFFICE OF ADMINISTRATIVE LAW

amr

DAVID Cerrito, Infant
and Ralph Cerrito

V.

Bd. of Education of the
Vocational schools in the
County of Bergen AKA
Bergen County Technical schools;
EVAN R. DUPF, individually

EDU. 5282-93

upon Petition of DAVID Cerrito (D.C.) and Ralph Cerrito (R.C.) this matter has come before the OFFICE of ADMINISTRATIVE LAW, the Honorable James Osborn presiding, and Appearances of Counsel for Petitioner, DAVID STERN Esq., HOWARD M. DAVIS and Hoy T. Amoroso Esq. - Nowell, Amoroso & Martin, P.A.

And the court having heard Argument & counsel and reviewing documents marked R1- R8 respectfully the parties in the interest of settlement have consented the following;

Paragraph I. Petitioner will withdraw his Application with ~~prejudice~~ prejudice.

paragraph II. D.C. will be reinstated effective June 9, 1993 after a parent teacher student conference wherein petitioners counsel shall have the right to be present.

paragraph III. the Board will refer D.C. to a child study team of the district ~~which~~ which shall conduct an evaluation of D.C. pursuant

[redacted]

[redacted]

to New Jersey statute & Code governing such procedures. The outcome of the child study team evaluation will dictate the educative plan of D.C. with D.C. & R.C. as an authorized guardians having the right to challenge the child study team evaluation through the normal channels governing such procedures.

Paragraph 4, ... R.C. & D.C. shall execute a contract with the school District governing the rights & obligations of D.C. with regard to attendance and other educational policies.

The parties have read this Agreement and have had benefit of counsel in its explanation.

Further, this matter having been amicably settled & withdrawn with prejudice.

Daniel Stern, Esq.

Ralph Cerrito, Petitioner

David Cerrito, Petitioner

Henry Amoroso, Esq.

Anthony Miller, Respondent
Bergen County Technical School

Date June 5, 1993

The Honorable James Osborn J.A.

[redacted]

OAL DKT. NO. EDU 5283-93

D.A.C. AND R.C.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BERGEN COUNTY VOCATIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

AUGUST 4, 1993

DATE OF MAILING - AUGUST 4, 1993

185-93

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN CANARY, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP OF EAST	:	DECISION
BRUNSWICK, MIDDLESEX COUNTY.	:	
	:	

AUGUST 4, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT
OAL DKT. NO. EDU 7812-92
AGENCY DKT. NO. 421-9/92

BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,
Petitioner,
v.
JOHN CANARY,
Respondent.

Martin R. Pachman, Esq., for petitioner

Nancy I. Oxfeld, Esq., for respondent (Balk, Oxfeld, Mandell & Cohen, attorneys)

Record Closed: June 25, 1993 Decided: June 25, 1993

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter commenced on September 3, 1992 when, in accordance with the Tenure Employees' Hearing Law, N.J.S.A. 18A:6-10 to 18.1, the Board of Education of the Township of East Brunswick (hereinafter petitioner) certified to the Commissioner charges of incompetence against tenured teaching staff member John Canary (hereinafter respondent). An Answer on behalf of respondent was filed on September 9, 1992, and on October 7, 1992, the matter was transmitted to the Office of Administrative Law for a determination as a contested case pursuant to N.J.S.A. 52:14F-1 to -13.

A prehearing conference was conducted on November 5, 1992, at which time trial dates were set for March and April 1993. The first trial date, March 19, 1993,

was adjourned at the request of petitioner's attorney. On March 26, 1993, the parties appeared, and following discussion between them they advised that it was their intention to enter into a stipulation of settlement resolving this matter.

The signed stipulation of settlement, a copy of which is attached hereto and made a part hereof, as if set forth herein at length, was received on June 25, 1993, where upon the record closed.

I have reviewed the terms of the settlement and I **CONCLUDE** that the present case is one which is appropriate for settlement pursuant to the principles annunciated in Cardonic v. Board of Education of the Borough of Brooklawn, EDC 7093-81, 7094-81, decided April 6, 1983 by the State Board of Education. The charges herein reveal no allegation of affirmative wrong doing. Further, although the decision is exclusively one for the State Board of Examiners to make, the charges do not appear to be of the degree of seriousness such as to require action by the State Board of Examiners for revocation or suspension of respondent's certificate.

In addition, if the tenure charges were to be upheld following a hearing on the merits, pursuant to N.J.S.A. 18A:66-36 respondent would forfeit his rights to deferred retirement benefits based upon his many years of creditable service in the pension fund. Although the Legislature has provided for absolute forfeiture of pension rights for those members removed for cause before they are eligible to actually receive retirement benefits, a voluntary resignation prior to removal for cause will permit respondent to avoid the effect of the mandatory forfeiture provisions on his deferred retirement benefits. Widdis v. Retirement System, 238 N.J. Super. 70 (App. Div. 1990). Preservation of pension rights is a legitimate concern for the Commissioner when considering proceedings involving tenure charges. In re Fulcomer, 93 N.J. Super. 404, 421 (App. Div. 1967).

For all of these reasons, I **CONCLUDE** that the public interest does not require a plenary hearing to fully determine the issues in this case, and I therefore recommend to the Commissioner of Education the approval of this settlement as an appropriate voluntary resolution of this matter entirely consistent with the law and philosophy expressed in Cardonic v. Board of Education of the Borough of Brooklawn, supra.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

June 25, 1993
Date

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

6/29/93
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 1 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

cc

BALK, OXFELD, MANDELL & COHEN
50 Commerce Street
Newark, New Jersey 07102
(201) 642-0161
Attorneys for Respondent

BEFORE THE COMMISSIONER OF EDUCATION
OF THE STATE OF NEW JERSEY

OAL DKT. NO. EDU 7812-92
Agency Dkt. No. 402-12/90

IN THE MATTER OF THE TENURE HEARING OF JOHN CANARY, SCHOOL DISTRICT OF THE TOWN OF EAST BRUNSWICK, MIDDLESEX COUNTY	STIPULATION OF SETTLEMENT

The parties to the above matter have agreed to an amicable resolution of this litigation. The resolution is based upon agreement as to the following facts:

1. The Respondent, John Canary, is a tenured teacher of English employed by the Petitioner, School District of the Town of East Brunswick.

2. Commencing with the 1989-90 school year, a series of disagreements arose between the Respondent and his supervisors and administrators concerning an alleged failure to meet his individual improvement plan, inadequate and/or lack of planning, lack of organization as it relates to instructional management and ineffective and inconsistent classroom management. These allegations over a period of the school years 1989-90, 1990-91 an 1991-92 led to the filing of the within tenure charges against the

Respondent.

3. These charges arose from the fact that the Respondent had philosophical differences with his administrators and supervisors concerning classroom performance and the preparation of lesson plans which led the Respondent despite directives from his administrators and supervisors to act in the following manner which he believed was in the best interest of the students:

(a) The Board of Education required that English students be given a large number of varying types of compositions during the school year which were to be maintained in writing folders. The Respondent agreed with the Petitioner as to the necessity of assigning frequent and various types of writing assignments to his students, however he believed that the time spent in class maintaining the writing folders was time lost from instruction. Thus, the Respondent's students' writing folders did not contain the variety and assortment of materials that his supervisors required be maintained in those folders.

(b) The Respondent's supervisors required that the Respondent focus on certain aspects each day of the literature the students were studying. Respondent believed this to be an ineffective approach to teaching, and preferred to focus on an entire story, highlighting points of view and techniques as appeared appropriate during the course of the lesson.

(c) The Respondent's supervisors required that the Respondent's lesson plans be specifically written in a specific form for each class taught. The Respondent did not believe this

type of lesson plan was educationally useful; he preferred to writ plans which allowed him freedom to react in the classroom to the students and their reactions to any given lesson.

(d) The Respondent's supervisors required that the Respondent write the objectives of each days lesson on the blackboard for the students. The Respondent did not always do so as he believed this stifled the creativity and imagination of the students; as well as that his students were able to ask questions about what was going on if they did not understand.

4. The parties agree that the facts in this matter are not in dispute; as set forth above the Respondent's supervisors had certain requirements as to the planning and classroom performance of the Respondent; the Respondent chose to perform otherwise based on philosophical differences with his supervisors. The facts bein clear, there would be no public purpose served by requiring both parties to go through the time and expense of litigation.

5. Based on the scheduled hearing dates in this matter, which would continue through Thursday, April 22, 1993, the writing of briefs arguing the facts and the law on behalf of both parties, and the 45 days given to both the Administrative Law Judge and the Commissioner to issue decisions, it is clear that no matter what the result of this hearing, the Respondent would be paid his full salary and benefits less mitigation through the end of June, 1993.

Based upon the above factual agreement, the parties hereby agree to resolve this matter on the following basis:

1. John Canary will resign his position of employment as teacher with the East Brunswick Board of Education effective June 30, 1993;

2. The Board of Education will withdraw the tenure charges in this matter;

3. The Respondent will receive his current rate of pay through the date of his resignation less mitigation by alternate earnings. Upon his resignation, he will be compensated for unused accumulated sick leave days in accordance with the formula contained in the negotiated agreement between the East Brunswick Education Association and the East Brunswick Board of Education for 1992-1993.

4. The terms of this agreement are expressly conditioned upon the review and approval of the Commissioner of Education. In the event the approval of the agency head is not given, the terms of this agreement shall be void and have no force and effect whatsoever.

BALK, OXFELD, MANDELL & COHEN
Attorneys for Respondent
By:

NANCY I. OXFELD

MARTIN R. PACHMAN, P.C.
Attorneys for the Petitioner
By:

MARTIN R. PACHMAN, ESQ.

4A

EAST BRUNSWICK BOARD OF EDUCATION
Petitioner
By:

JOHN CANARY, Respondent

OAL DKT. NO. EDU 7812-92

IN THE MATTER OF THE TENURE HEARING OF JOHN CANARY, SCHOOL DISTRICT OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

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

The Commissioner approves the settlement terms as they comport with the Cardonick standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846) The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

AUGUST 4, 1993

DATE OF MAILING - AUGUST 4, 1993

186-93

IN THE MATTER OF THE TENURE :
HEARING OF MARY ROBERTS, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP : DECISION
OF CLINTON, HUNTERDON COUNTY. :
:

AUGUST 4, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9853-92
AGENCY DKT. NO. 472-10/92

SCHOOL DISTRICT OF THE TOWNSHIP OF CLINTON, HUNTERDON COUNTY,
Petitioner,
v.
MARY ROBERTS,
Respondent.

Joseph R. Morano, Esq., for petitioner (Rand, Algeier, Tosti & Woodruff, attorneys)

Steven E. Klausner, Esq., for respondent (Klausner, Hunter, Cige & Seid, attorneys)

Record Closed: June 9, 1993 Decided: June 17, 1993

BEFORE **M. KATHLEEN DUNCAN**, ALJ:

This matter was transmitted to the Office of Administrative Law on December 21, 1992, for determination as a contested case, pursuant to *N.J.S.A.* 52:14F-1 to 13. A prehearing conference was scheduled for April 19, 1993. At that time the attorneys for both parties advised that an action which Mary Roberts (hereinafter respondent) had filed against, *inter alia,* The School District of The Township of Clinton (hereinafter petitioner) in the United States District Court prior to the commencement of the within proceedings was about to be settled and that the Order which the federal district court judge was expected to sign concluding that case would order the withdrawal by petitioner of the within action.

By cover letter dated June 4, 1993, counsel for petitioner transmitted a copy of the consent order entered by Clarkson S. Fisher, United States District Court Judge, in *Mary Roberts v. Barbara Lentine, David Cahall, James O'Shea, Judith Ferguson, Nancy Simmonds, Kathleen Law, Carol Mikola, Frank Kennedy, Cynthia Williams, Charles Rebick, Joseph Trombetta, Ronald Twine, Robert Harrington and the Clinton Township Board of Education*, Civil Action #92-1734 (CSF). A copy of petitioner's June 4, 1993 letter withdrawing the tenure charges filed in this matter is attached hereto, together with a copy of the order entered in the federal court case.

For the foregoing reasons, it is hereby **ORDERED** that the within matter is **WITHDRAWN** and the Clerk of the Office of Administrative Law is hereby **ORDERED** to return the matter to the Commissioner of Education for appropriate disposition.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

June 17, 1993
Date

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

6/21/93
Date

Maureen R. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 23 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

am

RAND, ALGEIER, TOSTI & WOODRUFF
ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
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ROBERT M. TOSTI
ROBERT B. WOODRUFF
JOHN F. McDONNELL
ELLEN S. BASS

JOHN E. CROOT, JR.
KATHRYN J. KINGREE
JOSEPH R. MORANO
ROBERT A. KNEE
PHILIP E. STERN

RONALD M. PFLUG
OF COUNSEL

SUSSEX COUNTY OFFICE
42 BANK STREET
SUSSEX, NJ 07461
TELEPHONE:
(201) 875-3178
TELECOPIER:
(201) 875-9782

June 4, 1993

Honorable M. Kathleen Duncan
Office of Administrative Law
9 Quakerbridge Plaza, CN-049
Trenton, NJ 08625

RE: Roberts v. Clinton Board of Education
OAL Docket No. EDU 09853-92

Dear Judge Duncan:

Attached for your review is the parties' Stipulation of Settlement in the matter Mary Roberts v. Barbara Lentine, et al. Pursuant to this settlement, the Board hereby withdraws the tenure charges filed in this matter.

Very truly yours,

JOSEPH R. MORANO

JRM:mr
Enclosure

cc: Thomas F. Lowe, Clerk
Steven E. Klausner, Esq.

entered on THE DOCKET on 5-28-1993
WILLIAM T. WALSH, CLERK
By _____ (Deputy Clerk)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ORIGINAL FILED
MAY 27 1993
WILLIAM T. WALSH, CLERK

RAND, ALGEIER, TOSTI & WOODRUFF, P.C.
Courthouse Plaza
60 Washington Street
Morristown, New Jersey 07960
Attorneys for Defendants, (excluding R. Harrington)

MARY ROBERTS, :

Plaintiff, : CIVIL ACTION NO. 92-1734 (CSF)

v. :

BARBARA LENTINE, et al. : **STIPULATION OF SETTLEMENT**

:

Defendants. :

WHEREAS, the parties or their representatives appeared in open court on Monday, May 3, 1993, and in the presence of the Honorable John J. Hughes, United States Magistrate Judge at Trenton, New Jersey and at that time, Robert M. Tosti, as counsel to the Board and the individual defendants except Robert Harrington, outlined the terms of the settlement as contained in this Stipulation; and

WHEREAS, plaintiff, Mary Roberts, publicly declared her agreement with the terms contained herein as did her counsel. Stephen E. Klausner.

THEREFORE, this Stipulation is made this day of May, 1993, by and between plaintiff Mary Roberts and defendants Barbara Lentine, David Cahall, James O'Shea, Judith Ferguson, Nancy Simmonds, Kathleen Law, Carol Mikola, Frank Kennedy, Cynthia Williams, Charles Rebick, Joseph Trombetta, Ronald Twine, Robert Harrington and the Clinton Township Board of Education.

1. This Stipulation terminates this case.

2. Plaintiff will provide to the Defendants a formally executed and acknowledged release discharging forever any and all claims, direct and indirect, and rights for any injury and/or damage which plaintiff may have against the Defendants, specifically including, but not limited to, all claims asserted in the within action. Plaintiff will also release all claims against the individual defendants as well as the Clinton Township Board of Education, its agents, representatives, members and employees which were asserted or could have been asserted in the aforementioned action including all claims revealed or which may have been revealed through discovery, including, but not limited to, depositions, answers to interrogatories, medical reports, and throughout settlement negotiations. Plaintiff will also release all claims against all the defendants, their agents, members and employees which she may have for attorney's fees, expenses of litigation and/or cost of suit, whether based upon statute, court rule, or common law. Plaintiff will also release all claims and rights she may have with respect to tenure and its emoluments and all other claims and rights she may possess as a result of her employment in the Clinton Township School District, except as set forth in paragraph 8. The provisions of the release shall not limit or discharge any provision of the Stipulation of Settlement. In the even of any inconsistency between this Stipulation of Settlement and the Release, the provisions of this Stipulation of Settlement will prevail. Any provision of this Stipulation relating to the defendant Clinton Township Board of Education also inures to the benefit of the agents, representatives, members, employees and servants of the Clinton Township Board of Education, whether or not specifically so set forth.

3. By entering into this settlement, the individual defendants and Clinton Township Board of Education shall not be deemed to have admitted any liability with respect to the within action. The fact that these defendants have agreed to a settlement with the plaintiff shall not be construed as an admission that it or any of its present or former officials, servants, agents, representatives, or employees have engaged in any wrongful conduct, or that any of the facts alleged in the plaintiff's Complaint in the aforesaid civil action are true. This Stipulation shall not be admissible in evidence in any other proceeding in any jurisdiction, except in any action which may be taken to enforce the terms of this Stipulation.

4. The plaintiff and the defendants agree to cooperate fully in implementing the settlement and to execute any and all supplementary documents and to take all additional actions that may be necessary or appropriate to give full force and effect to the terms and intent of this Stipulation of Settlement.

5. This Stipulation has been executed by the plaintiff and defendants in good faith, to avoid further expenses and protracted litigation, and to provide for a full and final settlement of all claims, which were and are vigorously contested, denied and disputed as to validity and amount, and for no other purpose.

6. Plaintiff agrees to be bound by this Stipulation of Settlement. Anyone who succeeds to her rights and responsibilities, including but not limited to her heirs, assigns, executor/executrix, or administrator of her estate, is also bound.

7. The plaintiff relied on the advice of her attorney

in entering into this Stipulation of Settlement and further acknowledges that she has been accorded a full and complete opportunity to review and evaluate the terms and conditions of the settlement itself.

8. The parties hereby agree to the following terms of settlement:

(a) Retroactive to September 1991, Plaintiff shall assume the administrative position of Curriculum Coordinator at a salary of $55,000 for the 91-92 academic year; $60,000 for the 92-93 academic year and $65,000 for the academic year 93-94; the retroactive portions of these payments will be paid within 30 days of the receipt in good and proper order of her resignation and the release noted herein. Any dispute arising from the terms of employment will be referred to counsel for the Board and Mrs. Roberts for resolution with final resort to this court;

(b) plaintiff shall herewith submit a letter of resignation effective September 30, 1994 which the Board of Education will formally accept at a public meeting. Plaintiff understands that her resignation shall be irrevocable;

(c) plaintiff shall receive a lump sum payment of $25,000 within 30 days of the defendants' receipt in good and proper order of a formal release, as set forth above;

(d) plaintiff shall also receive a lump sum payment of $135,000 to be deposited for her in an annuity program of her choosing with a payment of interest monthly to her benefit. This sum shall be controlled by plaintiff, and defendants assume no responsibility for this sum after the money is transferred to such annuity program designated by plaintiff. It is expressly understood that the principal balance shall be paid to plaintiff's estate upon her death, or upon such other designate

as plaintiff may hereafter direct.

(e) The tenure charge case presently pending against plaintiff will be withdrawn by the Clinton Township Board of Education.

9. Plaintiff and Defendants understand and agree to the terms of this Stipulation of Settlement, and that as a result all claims against all parties are dismissed.

10. This Stipulation of Settlement shall be entered in the record of this case and shall have the same force and effect as if it were a Consent Order.

11. This Stipulation of Settlement sets forth the entire agreement between the parties to this action with respect to the settlement of this matter.

12. Any dispute relating to this Stipulation shall be governed by the law of the State of New Jersey.

FOR PLAINTIFF:

Mary Roberts

Stephen E. Klausner
Attorney for Mary Roberts

FOR DEFENDANTS:

Robert M. Tosti, Attorney
For Defendants Lentine, Cahall, O'Shea, Ferguson, Simmonds, Law, Mikola, Kennedy, Williams, Rebick, Trombetta, Twine and Clinton Township Board of Education

Stephen R. Knox
Attorney for Robert Harrington

IT IS SO ORDERED:

8/26/93

Clarkson S. Fisher,
United States District Court

OAL DKT. NO. EDU 9853-92

IN THE MATTER OF THE TENURE	:	
HEARING OF MARY ROBERTS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF CLINTON, HUNTERDON COUNTY.	:	
	:	

The record and initial decision in the form of an Order of Withdrawal have been reviewed. The Commissioner notes that the withdrawal of this tenure hearing follows from a settlement of another matter struck in federal district court between Roberts and named employees of the Board of Education herein, which settlement included as a condition, withdrawal of all pending legal matters between the parties.

Because the effect of this settlement in federal district court is to bring about respondent's resignation and termination of tenure proceedings prior to their conclusion and because the conduct charged in the tenure proceedings alleged conduct unbecoming a tenured teaching staff member, the Commissioner directs that the record of this matter be forwarded to the State Board of Examiners pursuant to N.J.A.C. 6:11-3.5 for further action as it deems appropriate.

IT IS SO ORDERED.

AUGUST 4, 1993

DATE OF MAILING - AUGUST 4, 1993

COMMISSIONER OF EDUCATION

187-93

IN THE MATTER OF THE CAP WAIVER	:	
APPEAL OF THE BOARD OF EDUCATION	:	COMMISSIONER OF EDUCATION
OF THE BOROUGH OF NETCONG, MORRIS	:	DECISION
COUNTY.	:	
	:	

AUGUST 11, 1993

IN THE MATTER OF THE CAP WAIVER :

APPEAL OF THE BOARD OF EDUCATION : COMMISSIONER OF EDUCATION

OF THE BOROUGH OF NETCONG, MORRIS : DECISION

COUNTY. :

_____:

For Petitioner, Philip E. Stern, Esq. (Rand, Algeier, Tosti and Woodruff)

For Respondent, John P. Jansen, Esq. (Mudge, Rose, Guthrie, Alexander & Ferdon)

This matter was opened before the Commissioner of Education on May 10, 1993 by way of the filing of a Petition of Appeal by the Board of Education of the Borough of Netcong (Board), wherein the Board sought to have included in the General Fund tax levy for the 1993-94 school year a cap waiver amount defeated by the voters at the annual school election.

On March 29, 1993, the Morris County Superintendent of Schools had notified the Board that its 1993-94 school budget was conditionally approved subject to passage by the voters of a cap waiver in the amount of $147,104 in current expense which was deemed necessary for provision of a thorough and efficient system of education in the district.

On April 20, 1993 the voters of the Borough of Netcong defeated both the proposed General Fund tax levy for the 1993-94 school year in the amount of $1,695,498 and the General Fund cap waiver request in the amount of $147,104. Upon review of the

defeated maximum permissible budget pursuant to N.J.S.A. 18A:22-37, the governing body of the Borough failed to certify the amount necessary for provision of a thorough and efficient education, so that pursuant to N.J.S.A. 18A:22-38, on May 28, 1993, the Commissioner determined that $1,695,498 in General Fund tax levy was necessary for the district to provide a thorough and efficient education and duly certified said amount to the Morris County Board of Taxation. Accordingly, no further Board action to appeal the voters' defeat of the base budget was necessary, and earlier filed appeal papers were duly withdrawn.

With respect to the defeated cap waiver, which remained as a pending matter before the Commissioner, on July 9, 1993, the Borough advised that it did not wish to participate in the appeal process, so that the matter proceeded thereafter on an uncontested basis.

The cap waiver requested by the Board includes the following line items specifically determined by the County Superintendent to be essential for provision of a thorough and efficient education and unable to be funded by reallocation within the maximum permissible budget:

Current Expense	Account No.	Amount
Grade 1-4 Teacher	11-120-100-101	$35,000
Salary/Benefits	11-XXX-290-290	5,000
Staff Salary/Benefits	11-110-100-101	35,000
4-year-old Kindergarten	11-XXX-290-290	5,000
Speech Services	11-218-100-101	10,000
Home Economics/Industrial Arts	11-130-100-101	10,310
Computers	11-130-100-101	6,661
ESL	11-3XX-100-101	6,000

Current Expense	Account No.	Amount
Co-curricular programs	11-402-100-100	4,133
Music Instruction, part-time	11-130-100-101	15,000
Library, part-time	11-000-222-100	15,000
	Total Cap Waiver Request:	$147,104

With regard to these line-item requests, in its initial filings and position statement the Board presents the following justifications:

Additional Teacher 1-4. Increases in district enrollment in these grades necessitate hiring of an additional teacher in order to avoid increasing class sizes to levels (c. 34 students) which are unacceptable given the nature of the student population served.

Early Kindergarten. The nature of the district's student body (District Factor "D") makes socialization and readiness development prior to Kindergarten essential for student success. Loss of cap monies will result in elimination of this vital, proven program.

Speech Services/ESL. Loss of cap wa r funding will eliminate services to approximately 48 speech students and at least 10 ESL students needing correctional attention in order to succeed in the district's educational program.

Home Economics/Industrial Arts. Cap monies are necessary to maintain these programs, which are the only two vocational options available in a district where many students are not academically inclined and which are already operating at bare-bones level.

Co-curricular Activities/Music. The district has only minimal offerings in these areas, which, in the absence of cap

monies, will be reduced beyond feasibility in a community where students do not have many opportunities for participation or exposure elsewhere.

Library/Computers. Loss of cap monies will result in reduction or elimination of already modest programs that are essential for developing the study skills, research ability and access to technology that district students need to succeed in the contemporary workplace.

Upon review of the record of this matter, including the documentation provided by the district in support of the necessity for the cap waiver funds, which is incorporated herein by reference, the Commissioner finds and determines that the requested relief shall be and is hereby granted as the Board has borne its burden of demonstrating that these funds are necessary for provision of a thorough and efficient education to the students of the Netcong School District. East Brunswick Township Board of Education v. East Brunswick Township Council, 48 N.J. 94 (1966); Board of Education of the Township of Deptford v. Mayor and Council of the Township of Deptford, 116 N.J. 305 (1989); Board of Education of the Borough of Rutherford v. Mayor and Council of the Borough of Rutherford, Bergen County, State Board of Education decision, July 7, 1993

Accordingly, the Morris County Board of Taxation is directed to adjust the General Fund tax levy of the Netcong School District for the 1993-94 school year to reflect an increase of $147,104 which results in a total General Fund tax levy of $1,842,602.

IT IS SO ORDERED.

AUGUST 11, 1993

COMMISSIONER OF EDUCATION

DATE OF MAILING - AUGUST 11, 1993

189-93

MARION MILLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTHERN REGIONAL HIGH SCHOOL DISTRICT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, nontenured school nurse whose contract was not renewed for 1991-92 school year, alleged she was entitled to health insurance coverage pursuant to N.J.S.A. 18A:16-18 when she filed for retirement effective July 1, 1991.

ALJ found since petitioner did not have tenure with respondent and she had not been offered a contract for the 1991-92 school year, she had no continuing relationship with respondent after June 30, 1991. Thus, when she retired on July 1, 1991, pursuant to provisions of N.J.S.A. 18A:66-43, she retired as a member of the Teachers' Pension and Annuity Fund, but she was not a retired employee of respondent's district. Therefore, petitioner was properly denied continuance of health coverage. Petition was dismissed.

Commissioner adopted findings and determination in initial decision.

AUGUST 11, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6209-92
AGENCY DKT. NO. 284-6/92

MARION MILLER,
Petitioner,
v.
SOUTHERN REGIONAL HIGH SCHOOL BOARD OF EDUCATION,
Respondent.

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

Robert D. Budesa, Esq., for respondent (Berry, Kagan & Sahradnik, attorneys)

Record Closed: May 19, 1993 Decided: July 1, 1993

BEFORE **M. KATHLEEN DUNCAN**, ALJ:

This matter commenced on June 23, 1992, with the filing of a petition of appeal by Marion Miller (hereinafter petitioner) seeking an order from the Commissioner of Education requiring the Southern Regional High School Board of Education (hereinafter respondent) to permit petitioner to continue health insurance benefits coverages pursuant to N.J.S.A. 18A:16-18.

An answer was filed on behalf of respondent on August 3, 1992, and on August 12, 1992, the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 to 13. A prehearing conference was conducted by telephone conference call on October 29, 1992, at which time the parties determined that they would file a joint stipulation of facts and cross-motions for summary decision. Petitioner's motion papers were received on January 21, 1993. Respondent's motion papers were received on January 28, 1993. A reply on behalf of petitioner, including additional documentation, was

received on February 9, 1993. No objection having been received from respondent, the documents, a copy of a letter from the Division of Pensions to petitioner, dated July 2, 1991, acknowledging receipt of her retirement application and a copy of a letter from the Division of Pensions to petitioner, dated November 14, 1991, advising that the Board of Trustees had approved her application for a service retirement, effective July 1, 1991, were marked as part of the record on February 23, 1993.

Thereafter, the undersigned wrote to both parties requesting to see a copy of the negotiated agreement which was in effect between respondent and its education association for the 1990-91 school year and also a copy of petitioner's last employment contract with respondent. By letter dated April 22, 1993, counsel for respondent provided the two documents. A letter dated May 6, 1993, from petitioner's counsel, objecting to additional documents which were included with the two which had been requested, was received on May 11, 1993. The undersigned having determined that all of the additional documents transmitted by respondent's counsel were relevant, notwithstanding that only two had been specifically requested, all of the additional documents were marked as part of the record on May 19, 1993, whereupon the record closed.

FINDINGS OF FACT

The facts relevant to a determination of the within matter are not in dispute, and I therefore find the following as uncontested facts.

Petitioner commenced employment with respondent as a school nurse on October 30, 1989. By letter dated March 28, 1991, respondent advised petitioner as follows:

> Due to new and stringent budgetary constraints imposed by the Quality Education Act, Southern Regional is forced to impose a reduction in force for the 1991-92 school year. Although you have made many contributions to Southern's students and staff, we will need to operate without your services next year. Therefore, at its April 18, 1991 meeting, the Board of Education will consider a recommendation to not renew your contract. If you would like to appear before the Board in either closed or open session, please notify Mr. Moran by April 17th.
>
> Your supervisor, principal, Dr. Daria and I will do all we can to assist you as you make plans for other professional opportunities during the next months.

Petitioner's contract of employment with respondent expired June 30, 1991, and it was not renewed. By letter dated July 2, 1991, the State of New Jersey Department of the Treasury, Division of Pensions, acknowledged receipt of petitioner's application for a service retirement and on November 14, 1991, the Board of Trustees of the Teachers' Pension and Annuity Fund advised petitioner that, at its regular meeting on November 14, 1991, it had approved her application for service retirement effective July 1, 1991. By letter dated February 22, 1992, petitioner wrote to her former employer as follows:

> Dear School Board Members,
>
> This letter is written to formally notify the Board that I have followed through with my July 1, 1991 application for retirement since I was not able to find a position that was commensurate to mine that was eliminated due to budgetary problems at Southern.
>
> In addition to not having my contract renewed, I was doubly disappointed to find that the Board opted not to participate in the Early Retirement Incentive Program. This would have benefited me greatly as I am left only one year short of the necessary twenty-five to be eligible for the State Health Benefits (paid by the State).
>
> Therefore, in accordance with Public Law 1987, I would like the Board to know that I plan to continue to participate in Southern's medical group insurance plan until I reach medicare age."
>
> Very truly yours,
>
> Marion Miller

Respondent replied by letter dated March 30, 1992, advising that petitioner was eligible only to receive the benefits of C.O.B.R.A., that is, the continuation of the health insurance coverages for an eighteen-month period of time, inasmuch as respondent viewed petitioner's employment status as having been terminated pursuant to a reduction in force and not as a result of a service retirement. The within matter followed.

APPLICABLE LAW AND DISCUSSION

N.J.S.A. 18A:16-18, the statute relevant to a determination of the within matter, provides:

> The continuance of coverage after retirement of any employee shall be provided at such rates and under the conditions as shall be prescribed in the contract subject, however, to the requirements set forth in section 8 of P.L.1979, c. 391 (C. 18A:16-19). The contribution required of any retired employee toward the cost of such coverage may be paid by the employee to the local board of education or in such other manner as the local board of education shall direct.

Paragraph 12:6 of the negotiated agreement between respondent and Southern Regional Education Association, effective July 1, 1989 through June 30, 1992 provides:

> Retirees may enroll in the current insurance programs at the group rates and at the individual's own expense. If, in the event a carrier will not permit such coverage for retirees, the coverage will cease, but the parties will meet to explore alternatives, making every attempt to find a carrier who will permit such coverage for retirees.

"Retirees" does not appear to be defined, and retirement is not discussed elsewhere in the provisions of the agreement. It is clear, nevertheless, that on June 30, 1991, petitioner ceased to be an employee of respondent. Since she did not have tenure with respondent and she had not been offered a contract for the 1991-92 school year, she had no continuing relationship with respondent after June 30, 1991. Accordingly, when she retired on July 1, 1991, pursuant to the provisions of N.J.S.A. 18A:66-43, she retired as a member of the Teachers' Pension and Annuity Fund, but she was not a retired employee of respondent's district.

When petitioner's employment with respondent ended on June 30, 1991, she had several options. Pursuant to the provisions of N.J.S.A.18A:66-8, she could have chosen to remain a member of the Teachers' Pension and Annuity Fund and returned to covered service within a period of ten years for continued membership in the Fund. Since she had reached sixty years of age, she could also file for a service retirement with the retirement system at any time; the fact that she chose July 1, 1991, as the effective date for her retirement does not make her a retired employee of respondent's district. Had she chosen August 1, or September 1, or October 1, 1991, the lack of an employment relationship would perhaps be clearer, but no different. In order to be a retired employee entitled to the benefits of N.J.S.A. 18A:16-18 petitioner would have had to select a retirement date prior to the

expiration of her employment. Since the facts in this matter are otherwise, petitioner is not entitled to the relief which she seeks.

For all of the foregoing reasons, respondent's determination denying petitioner continuance of coverage pursuant to N.J.S.A. 18A:16-18 is hereby **AFFIRMED** and the within matter is dismissed with prejudice.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

July 1, 1993
Date

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

7/6/93
Date

Maureen R. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 8 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

cc

DOCUMENTS IN EVIDENCE

P-1 Letter from Division of Pensions to petitioner, dated November 14, 1991

P-2 Letter from Division of Pensions to petitioner, dated July 2, 1991 (2 pages)

R-1 Letter from respondent to petitioner, dated March 30, 1992

R-2 Letter from respondent to petitioner, dated March 28, 1991

R-3 Letter from respondent to petitioner, dated June 5, 1991 (2 pages)

R-4 C.O.B.R.A. provisions, September 1990 (3 pages)

C-1 Employment contract between petitioner and respondent, dated May 1, 1990

C-2 Letter from petitioner to respondent, dated February 22, 1992

C-3 Excerpts of Board minutes, April 18, 1991 (2 pages)

C-4 Negotiated Agreement, July 1, 1989 - June 30, 1992 (54 pages)

MARION MILLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTHERN REGIONAL HIGH SCHOOL DISTRICT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions were timely filed in accordance with N.J.A.C. 1:1-18.4.

Petitioner's exceptions essentially reiterate her argument made before the ALJ, i.e., that because she began the process of applying for retirement, which was to be effective July 1, 1991, on June 3, 1991 while employed by the District, she was clearly eligible for the continuation of all health insurance coverage after retirement pursuant to N.J.S.A. 18A:16-18.

Upon careful and independent review of the record in this matter, the Commissioner finds the petitioner's argument unpersuasive and fully concurs with the findings and conclusion of the Administrative Law Judge that

> It is clear that on June 30, 1991, petitioner ceased to be an employee of respondent.***
>
> ***In order to be a retired employee entitled to the benefits of N.J.S.A. 18A:16-18 petitioner would have had to select a retirement date prior to the expiration of her employment.***
>
> (Initial Decision, at pp. 4-5)

Accordingly, the Commissioner affirms the decision of the Office of Administrative Law and adopts it as the final decision in this matter.

The Petition of Appeal is dismissed with prejudice.

COMMISSIONER OF EDUCATION

AUGUST 11, 1993

DATE OF MAILING - AUGUST 11, 1993

188-93

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE BOARD OF EDUCATION : COMMISSIONER OF EDUCATION
OF THE BOROUGH OF ALPINE, BERGEN : DECISION
COUNTY. :
:

AUGUST 11, 1993

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE BOARD OF EDUCATION : COMMISSIONER OF EDUCATION
OF THE BOROUGH OF ALPINE, BERGEN : DECISION
COUNTY. :
:

For Petitioner, J. Dennis Kohler, Esq.

For Respondent, James P. Logan, Esq. (Logan & Logan)

This matter was opened before the Commissioner of Education on May 12, 1993 by way of the filing of a Petition of Appeal by the Board of Education of the Borough of Alpine (Board), wherein the Board sought to have included in the General Fund tax levy for the 1993-94 school year a cap waiver amount defeated by the voters at the annual school election.

On March 23, 1993, the Bergen County Superintendent of Schools had notified the Board that its 1993-94 school budget was conditionally approved subject to passage by the voters of a cap waiver in the amount of $98,649 in current expense and $235,000 in capital outlay ($333,649 total) which was deemed necessary for provision of a thorough and efficient system of education in the district.

On April 20, 1993 the voters of the Borough of Alpine defeated both the proposed General Fund tax levy for the 1993-94 school year in the amount of $2,661,967 and the General Fund cap waiver request in the amount of $333,649. Upon review of the

defeated maximum permissible budget pursuant to N.J.S.A. 18A:22-37, the Mayor and Council of the Borough certified the General Fund tax levy in the amount of $2,645,967, a $16,000 reduction which both the Board and the County Superintendent determined could be sustained without jeopardizing provision of a thorough and efficient system of education in the district, thereby obviating the necessity for an appeal of the Borough's reduction to the maximum permissible budget.

With respect to the remaining issue of the defeated cap waiver, in an answer to the Board's petition filed on May 19, 1993, the Borough disputed the need for $52,000 of the proposed waiver, indicating that the district could still meet its thorough and efficient mandate with a $40,000 reduction in roof replacement costs (from $90,000 to $50,000) and a $12,000 reduction in architect fees (from $22,000 to $10,000).

On May 21, 1993 the Board submitted an amended petition setting forth that, upon consultation with the Borough, it agreed that the General Fund cap waiver request could be reduced by $52,000 as set forth above. Such reduction was agreed to by the County Superintendent. The Board, therefore, is now requesting approval of a cap waiver in the amount of $281,649, the need for which the Borough does not contest as indicated in the Answer filed to the original petition.

The cap waiver requested by the Board includes the following line items, all of which were determined by the County Superintendent to be essential for provision of a thorough and efficient education and unable to be funded by reallocation within the maximum permissible budget:

Current Expense	Account No.	Amount
Salary Librarian	11-000-222-100	$ 20,000
Regular Tuition	11-000-100-561	47,280
Benefits Teacher of Handicapped	11-000-290-290	9,000
Transportation for Additional Special Education Students	11-000-270-514	22,369
	Total Current Expenses	$ 98,649

Capital Outlay	Account No.	Amount
Classroom Equipment	12-110-100-730(K)	$ 5,000
Classroom Equipment	12-120-100-730(1-5)	12,500
Classroom Equipment	12-130-100-730(6-8)	12,500
Professional Services	12-000-400-390	10,000*
Construction Services	12-000-400-450	143,000*
	Total Capital Outlay	$183,000
	Total Cap Waiver Request	$281,649

*The County Superintendent had originally approved these line items in the amounts of $22,000 and $183,000 respectively; the amounts given here reflect the $12,000 and $40,000 reductions later agreed to by him as discussed above.

With regard to these line-item requests, the Board presents the following justifications, all substantiated by supporting documentation which is incorporated herein by reference:

Librarian. The district presently has limited library services. As part of an ongoing effort to improve such services, which are deemed essential to the educational program, the district seeks to hire a part-time librarian at a cost of $20,000.

Regular Tuition. Additional students have enrolled in the district who must be sent to Tenafly High School at a tuition cost of $47,280 over and above base budget allowances.

Special Education Costs. A number of pupils recently enrolling in the district have entailed costs falling outside the scope of the special education cap waiver granted by the Commissioner for the district's base budget. Four require transportation to out-of-district placements at a cost of $22,369

over and above base budget transportation allowances, and an additional Resource Room teacher is needed to provide mandatory in-district services, the cost of whose benefits ($9,000) is not covered in the base budget.

Capital Outlay/Equipment. The district's State-approved multi-year comprehensive facilities and maintenance plan developed pursuant to N.J.A.C. 6:8-4.9 requires upgrading of instructional technology (computers, projectors, video recorders, televisions, etc.) at a total initial expenditure of $30,000 for grades K-8.

Capital Outlay/Construction and Professional Services. Engineering reports undertaken to ensure student safety have identified the need for roof replacement (first-phase cost $50,000), correction of hot water storage capability ($2,000), installation of temperature controls ($10,000), boiler replacement ($50,000) and installation of a new electrical service ($20,000); to these costs must be added related advertising/printing expenses of $1,000, for a total of $133,000, and architect fees (professional services) of $10,000.

Upon review of the record of this matter, including the documentation provided by the district in support of its request for the cap waiver funds, the Commissioner finds and determines that the Board has demonstrated the necessity for each of the areas it seeks to fund through cap waiver monies.

However, the Commissioner finds that, notwithstanding County Superintendent approval of the full amount of the Board's line-item request, the projects and costs comprising the district's capital outlay construction services line item (Account No. 12-000-400-450 above) do not total $143,000 as reckoned by the

Board, but rather $133,000, leaving $10,000 unaccounted for in any manner. (This same error is found in the Board's original capital outlay cap waiver justification, which requests $235,000 but lists only $225,000 in expenditures.)

Therefore, the Commissioner finds and determines that $271,649 of the Board's requested relief shall be and is hereby granted as the Board has borne its burden of demonstrating that these funds are necessary for provision of a thorough and efficient education to the students of the Alpine School District; $10,000 of the Board's request, however, is denied for failure to meet this standard. East Brunswick Township Board of Education v. East Brunswick Township Council, 48 N.J. 94 (1966); Board of Education of the Township of Deptford v. Mayor and Council of the Township of Deptford, 116 N.J. 305 (1989); Board of Education of the Borough of Rutherford v. Mayor and Council of the Borough of Rutherford, Bergen County, State Board of Education decision, July 7, 1993

Accordingly, the Bergen County Board of Taxation is directed to adjust the General Fund tax levy of the Alpine School District for the 1993-94 school year to reflect an increase of $271,649 which results in a total General Fund tax levy of $2,917,616.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 11, 1993

DATE OF MAILING - AUGUST 11, 1993

189-93

EDU #6209-92
C # 189-93
SB # 50-93

MARION MILLER,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE SOUTHERN REGIONAL HIGH SCHOOL DISTRICT, OCEAN COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, August 11, 1993

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

For the Respondent-Respondent, Berry, Kagan & Sahradnik
(Robert D. Budesa, Esq., of Counsel)

Marion Miller (hereinafter "petitioner") commenced employment with the Board of Education of the Southern Regional High School District (hereinafter "Board") as a school nurse on October 30, 1989. In March 1991, petitioner was advised that as the result of a reduction in force ("RIF"), her contract would not be renewed for 1991-92. She subsequently submitted an application for a service retirement from the Teachers' Pension and Annuity Fund ("TPAF"), which was acknowledged by the State Division of Pensions on July 2, 1991. Petitioner's final day of employment in the district was June 30, 1991. Her retirement application was approved by TPAF on November 14, 1991, retroactive to July 1, 1991.

By letter dated February 22, 1992, petitioner notified the Board of the approval of her retirement and indicated that she

June 7, 1995

planned to continue to participate in the Board's group health insurance plan. See N.J.S.A. 18A:16-18.[1] The Board, however, denied petitioner's request, viewing her employment status as having been terminated pursuant to a reduction in force, rather than as the result of a service retirement. Petitioner filed a petition of appeal with the Commissioner of Education challenging such denial. The parties thereafter filed cross-motions for summary decision.

On July 1, 1993, an Administrative Law Judge ("ALJ") recommended dismissing the petition. The ALJ found it

> clear...that on June 30, 1991, petitioner ceased to be an employee of respondent. Since she did not have tenure with respondent and she had not been offered a contract for the 1991-92 school year, she had no continuing relationship with respondent after June 30, 1991. Accordingly, when she retired on July 1, 1991, pursuant to the provisions of N.J.S.A. 18A:66-43, she retired as a member of the Teachers' Pension and Annuity Fund, but she was not a retired employee of respondent's district.

Initial Decision, slip op. at 4.

The ALJ concluded that in order for petitioner to have been eligible for continuance of health coverage under N.J.S.A. 18A:16-18, she

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[1] N.J.S.A. 18A:16-18 provides, in part:

> The continuance of coverage after retirement of any employee shall be provided at such rates and under the conditions as shall be prescribed in the contract subject, however, to the requirements set forth in section 8 of P.L.1979, c. 391 (C. 18A:16-19)....

N.J.S.A. 18A:16-19 provides, in part:

> ...retired employees shall be required to pay for the entire cost of coverage for themselves and their dependents at rates which are deemed adequate to cover the benefits, as affected by Medicare, of such retired employees and their dependents on the basis of the utilization of services which may be reasonably expected of such older age classification....

would have had to have selected a retirement date which was prior to the expiration of her employment.

On August 11, 1993, the Commissioner adopted the ALJ's recommended findings and conclusions and dismissed the petition.

Petitioner filed the instant appeal to the State Board of Education.

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

This case presents the uncommon circumstance of a teacher who, by virtue of her age and years of service, was eligible for a service retirement from TPAF, but who had not yet achieved tenure in the district in which she was serving at the time of her retirement. The Commissioner rejected petitioner's bid to continue her medical insurance coverage after retirement pursuant to the terms of N.J.S.A. 18A:16-18 simply by virtue of her retirement being effective on July 1, 1991, the day after her final day of service in the district following the RIF. In so doing, the Commissioner would require non-tenured staff members eligible for service retirement by virtue of age and total years of service to retire prior to their final contractual day of employment after a RIF in order to be eligible for certain statutory benefits afforded retired employees. We conclude that such a determination exalts form over substance, and we find nothing in the school laws or implementing regulations that would impose such a requirement. Nor do we find such a result equitable.

N.J.S.A. 18A:16-18 expressly provides for "the continuance of coverage after retirement of any employee...." (Emphasis added.) There are no restrictions or qualifications placed on

"retirement." Nor is such benefit limited to tenured employees. In this instance, petitioner applied for and was granted a service retirement from TPAF effective July 1, 1991. It is evident that the effective date of retirement for a staff member employed through June 30 would be July 1. The fact that petitioner's decision to apply for a service retirement may have been precipitated by a reduction in force is of no moment under the terms of the statute. Nor do we find a legislative intent or any policy considerations in favor of penalizing a staff member who fulfills the terms of her contract rather than retiring before it expires, as the Commissioner's decision would require.

Consequently, we conclude that petitioner was eligible to continue her medical insurance coverage following her retirement on July 1, 1991 pursuant to the terms of N.J.S.A. 18A:16-18. We therefore reverse the decision of the Commissioner and grant petitioner's motion for summary decision.

June 7, 1995
Date of mailing JUN 09 1995

190-93

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE BOARD OF EDUCATION : COMMISSIONER OF EDUCATION
OF THE BOROUGH OF FREEHOLD, : DECISION
MONMOUTH COUNTY. :
:

AUGUST 13, 1993

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE BOARD OF EDUCATION : COMMISSIONER OF EDUCATION
OF THE BOROUGH OF FREEHOLD, : DECISION
MONMOUTH COUNTY. :
:

For Petitioner, Vincent C. DeMaio, Esq. (DeMaio and DeMaio)
For Respondent, Dolores Gibson, Borough Clerk

This matter was opened before the Commissioner of Education on May 27, 1993 by way of the filing of a Petition of Appeal by the Board of Education of the Borough of Freehold (Board), wherein the Board sought to have included in the General Fund tax levy for the 1993-94 school year a cap waiver amount defeated by the voters at the annual school election.

On March 24, 1993, the Monmouth County Superintendent of Schools had notified the Board that its 1993-94 school budget was conditionally approved subject to passage by the voters of a cap waiver in the amount of $444,306 in current expense which was deemed necessary for provision of a thorough and efficient system of education in the District.

On April 20, 1993 the voters of the Borough of Freehold approved the Board's maximum permissible General Fund tax levy for the 1993-94 school year, but defeated the General Fund cap waiver request. Accordingly, the Board filed the within appeal.

By letter dated July 20, 1993, the Mayor and Council of the Borough of Freehold advised that the Borough would not participate in appeal proceedings, so that this matter duly proceeded as uncontested.

The cap waiver requested by the Board includes the following line items, all of which were determined by the County Superintendent to be essential for provision of a thorough and efficient education and unable to be funded by reallocation within the maximum permissible budget:

Account Title	Account No.	Amount
Kindergarten Teacher Salaries	11-110-100-101	$225,800
Grades 1-5 Teacher Salaries	11-120-100-101	30,000
Grades 6-8 Teacher Salaries	11-130-100-101	15,000
Salaries/Kindergarten Aides	11-190-100-106	71,625
Salaries/Other Professional	11-000-218-104	32,500
Employee Benefits	11-000-290-290	52,881
General Supplies	11-190-100-610	16,500
	Total Cap Waiver	$444,306

In support of its cap waiver request, the Board argued that following a history of supporting school expenditures through appropriation of surplus funds which have been reduced to minimal levels, a cap waiver is needed in order to maintain programs at their current level. Without the cap waiver, 12.5 existing instructional positions (the entire staff of three essential programs) would be eliminated. Specifically, without cap monies to fund salaries, benefits and supplies, the District would be forced to eliminate its full-day kindergarten (five teachers and five assistants), its elementary gifted and talented program (1.5 teachers) and its guidance service (one counselor), all of which it deems to be integral components of the educational program necessary to meet State constitutional, statutory and regulatory mandates.

Upon review of the record, the Commissioner finds and determines that the Board's requested relief shall be and is hereby granted as the Board has borne its burden of demonstrating that funds over and above the maximum permissible General Fund budget are necessary for provision of a thorough and efficient education to the students of the Freehold School District. East Brunswick Township Board of Education v. East Brunswick Township Council, 48 N.J. 94 (1966); Board of Education of the Township of Deptford v. Mayor and Council of the Township of Deptford, 116 N.J. 305 (1989); Board of Education of the Borough of Rutherford v. Mayor and Council of the Borough of Rutherford, Bergen County, State Board of Education decision, July 7, 1993

Accordingly, the Monmouth County Board of Taxation is directed to adjust the General Fund tax levy of the Freehold School District for the 1993-94 school year to reflect an increase of $444,306 consistent with the Commissioner's findings above.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 13, 1993

DATE OF MAILING - AUGUST 16, 1993

191-93

ROBERT ROUNDS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ATLANTIC HIGHLANDS, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

AUGUST 16, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 791-93
AGENCY DKT. NO. 6-1/93

ROBERT ROUNDS,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF ATLANTIC HIGHLANDS, MONMOUTH COUNTY,
Respondent.

Thomas W. Cavanagh, Jr., Esq., on behalf of petitioner (Chamlin, Rosen, Cavanagh & Uliano, attorneys)

Nicholas Celso, III, Esq., on behalf of respondent (Schwartz, Simon & Edelstein, attorneys)

Record Closed: July 13, 1993 Decided: July 16, 1993

BEFORE **SOLOMON A. METZGER**, ALJ:

This matter arises out of an appeal filed with the Commissioner pursuant to the School Laws, *N.J.S.A.* 18A:6-9. The parties have now submitted a Stipulation of Settlement in the matter which is annexed. Having reviewed the terms of settlement and it appearing that it disposes of all issues in controversy and was entered into voluntarily, I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the terms of settlement and that these proceedings be and hereby are concluded.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Date

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

7/21/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 23 1993
Date

OFFICE OF ADMINISTRATIVE LAW

/cae

CHAMLIN, ROSEN, CAVANAGH & ULIANO
A Professional Corporation
268 Norwood Avenue
P.O. Box 38
West Long Branch, New Jersey 07764
(908) 229-3200
Attorneys for Petitioner,
Robert Rounds

ROBERT ROUNDS, Petitioner, vs. ATLANTIC HIGHLANDS BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY OAL DOCKET NO. EDU-00791-93S AGENCY REF. NO. 5-1/93 Civil Action STIPULATION OF SETTLEMENT AND DISMISSAL

WHEREAS, Petitioner, Robert Rounds filed a Verified Petition of Appeal on January 13, 1993 before the Commissioner of Education contesting the resolution of the Respondent dated November 10, 1992 to compel the Petitioner to submit to a psychological examination under N.J.S.A. 18A:16-2, while at the same time voting to withhold the Petitioner's adjustment and salary increment as well as other sanctions; and,

WHEREAS, the Respondent previously suspended the Petitioner with pay; and,

WHEREAS, an Answer was filed on behalf of the Respondent; and,

WHEREAS, on May 14, 1993 the Respondent voted to terminate the suspension with pay and to reinstate the Petitioner in his employment; and,

WHEREAS, on that same date the Respondent determined that there were insufficient reasons for the Petitioner to submit to a medical examination and, therefore, rescinded the prior resolution requiring same; and,

WHEREAS, the letter of reprimand and withholding of salary increments in the Resolution of November 10, 1992 were left in place by the Board, but same will be contested within the grievance/arbitration procedure of the Collective Bargaining Agreement in effect between the Respondent's and the Petitioner's Professional Associations and need not be resolved in this Administrative proceeding; and,

WHEREAS, the Petitioner has returned to his position without incident and is currently fulfilling his responsibilities in an acceptable fashion; and,

WHEREAS, both parties seek to withdraw the matter presently pending before the Office of Administrative Law and the Commissioner of Education under OAL Docket No. EDU-00791-93S, the attorneys for the parties have affixed their signatures and ask the Office of Administrative Law and the Commissioner of Education to effectuate a voluntary dismissal of the above action.

THOMAS W. CAVANAGH, JR., ESQ.
Attorney for Petitioner

NICHOLAS CELSO, III, ESQ.
Attorney for Respondent

Dated: June 24, 1993

OAL DKT. NO. EDU 791-93

ROBERT ROUNDS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ATLANTIC HIGHLANDS, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

COMMISSIONER OF EDUCATION

AUGUST 16, 1993

DATE OF MAILING - AUGUST 16, 1993

192-93

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE CITY : COMMISSIONER OF EDUCATION
OF EGG HARBOR, ATLANTIC COUNTY. : DECISION
:

SYNOPSIS

Petitioning citizens requested inquiry into annual school election challenging conduct of election with respect to school board referendum.

ALJ determined no sufficient evidence was advanced that will of people was suppressed. ALJ did find some minor irregularities -- voting machine inoperative for five minutes and election worker was five minutes late reporting for duty. ALJ, however, did not find that said situations rose to level of serious irregularities. In addition, both polling places were handicapped accessible. ALJ affirmed announced results of annual school election.

Citing In re Wene, Commissioner concurred with ALJ. Petition was dismissed.

AUGUST 16, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4004-93
AGENCY REF. NO. 85-4/93

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE CITY OF EGG HARBOR, ATLANTIC COUNTY

Anthony Padovani, Esquire, for petitioner, (Salhli and Padovani, attorneys)

Shirley Grasso, Esquire, for respondent, City of Egg Harbor Board of Education (Donio, Bertman, Grasso & Donio, attorneys)

Record Closed: June 4, 1993 Decided: July 8, 1993

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Complainant, Margaret J. Roesch, together with twelve signatures, requested an inquiry into the annual school election held on April 20, 1993, in the School District of the City of Egg Harbor, pursuant to N.J.S.A. 18A:14-63.12. The matter was transmitted from the Commissioner of Education (Commissioner) to the Office of Administrative Law (OAL) on April 30, 1993, pursuant to the provisions at N.J.S.A. 18A:14-63.12, N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. An inquiry was conducted by the undersigned on June 4, 1993, at the Atlantic City OAL, Atlantic Civil Courthouse, Atlantic City, New Jersey. The record was closed on June 4, 1993.

Complainants do not challenge the balloting for candidates for seats on the Board of Education of the City of Egg Harbor nor do they challenge the annual school budget, which was defeated. Rather, complainants challenge the conduct of

the election with respect to a school bond referendum the results of which are as follows:

Polling Place Number 1 (Fanny D. Rittenberg School)
For the proposal 110, Against 109.

Polling Place Number 2 (Charles L. Spragg School)
For the proposal 124, Against 124.

Military Service and Civilian Absentee Ballots For the proposal 5, Against 4.

Total: For the proposal 239
Against 237

In the complaint generated by Margaret J. Roesch, nine alleged irregularities are in issue. At the hearing, however, the parties stipulated that issues One through Five of the complaint were disposed of by the Board's document marked into evidence as R-1. Therefore, issues six through nine of the complaint are to be determined by this administrative tribunal. Those issues are as follows:

6. Specifically at Charles Spragg School:
   a. Clerk's not all there on time; time opened was less than minimum State law.
   b. Voting machine not operable;
   c. Not checking books of registered voters to see if persons truly had right to vote in this election;
   d. Not knowing beforehand, that, both city and regional voting booths were inside.
   e. Several persons, one handicapped, had to leave for work or due to physical disability, and could not cast their votes;

7. For all polls, long delays in order to cast votes with large turnouts and so short hours - made shorter by unreadiness and booth malfunction.

8. No register books signed, just a note pad and polling booth ticket. In at least one known case, a husband voted and signed wrong note pad. He went home to babysit and his wife came to vote. The Clerks had her sign her husband's name in the other pad.

9. Finally, NO RAMPS provided for handicapped as required by law. Handicapped denied their right to vote. (A ramp is available at Spragg School but voting machines in hall not accessible to ramp.)

FINDINGS OF FACT

Based upon the testimony and the documentary evidence adduced at the hearing, I **FIND** the following **FACTS** in this matter:

In November 1992, the Board of Education of Egg Harbor City changed from a Type I (with a Board of School estimate and appointed board members) to a Type II school district (with elected board members and the annual school budget determined by election process.) In or about January 12, 1993, a bond referendum issued by the Board was voted on by the electorate in the City of Egg Harbor. The Board's bond issue was defeated at the polls.

On April 20, 1993, at the annual school election held in the City of Egg Harbor, the Board's bond issue was again submitted to the electorate. The bond issue passed by two votes.

In the addition to the bond referendum, the Egg Harbor City electorate voted on the annual school budget for the Board of Education of Egg Harbor City. The budget was defeated. The electorate of Egg Harbor City also voted on the annual school budget for the Greater Egg Harbor Regional High School District., pursuant to N.J.S.A. 18A:13-17.

Complainant Margaret Roesch testified and asserted that she arrived at the Spragg School at 4:55 p.m. and was the 17th individual in line to vote. She contends that the polls opened one or two minutes after 5:00 p.m. and that all of the election workers were not in their places at 5:00 p.m. She asserted that one election worker arrived at 5:03 p.m. and another at 5:10 p.m.

Complainant Roesch asserted, among other things, that the first voter in line cast his/her vote 20 to 25 minutes after the opening of the polls. She asserted that she observed people leave the polling place without voting; and that there was a malfunction of one of the two voting machines. Complainant Roesch stated that at 5:10 p.m. the voters were advised that there were two elections on that day; i.e.,

the local annual school election for the City of Egg Harbor and the annual school election for the Greater Egg Harbor Regional School District.

Complainant Roesch further asserted that she did not observe any handicap access ramps at the Spragg School on April 20, 1993. She asserted that she also signed a composition tablet for the Egg Harbor City election, rather than the voter registration book.

On cross-examination, complainant Roesch admitted that she also signed a voting authority slip.

With regard to the handicapped voter who suffers from multiple sclerosis, complainant Roesch admitted that the individual's father brought the handicapped individual to the polling place and that the handicapped individual left the polling line because she became tired. Roesch also admitted she did not know there was a handicapped ramp at the rear of the building accessible to all handicapped individuals. It was also revealed that the handicapped individual was not in a wheelchair.

Ms. Roesch admitted, on the record, that she did not see the large signs attached to the voting machines. A blue sign indicated the Regional School District election and a white sign indicated the local board election.

Ms. Roesch also testified that she did not know of any handicapped individual unable to vote at the annual school election.

Carol Kienzle testified on behalf of complainant asserting, among other things, that she voted at the Rittenberg School. Ms. Kienzle could not recall whether she had voted in any other school elections in the past.

Ms. Kienzle testified that she arrived at the polling place between 5:30 p.m. and 5:45 p.m. She asserted that the voting machines were operating properly. Ms. Kienzle was directed to sign a composition tablet and a regional election book together with an authorization to vote slip. She asserted that only two individuals could vote at one time. She also asserted that she did not observed the signs "regional" or "local" on the voting machines.

Ms. Kienzle asserted that she had to wait between 15 and 20 minutes to vote. She asserted that she did not notice any paper ballots in a box under the table where the voters were to register.

John Baldi, testified on behalf of complainant, asserting that he did not vote at the April 20, 1993, annual school election. He asserted that he arrived at the Spragg School, however, he had to go to work at 5:00 p.m. Mr. Baldi works part-time in a bar called the Liberty Beer Garden. Mr. Baldi had advised his employer that he would be a little late because of the election. He contended that he waited in line 15 minutes and left the polling place without casting his ballot. Mr. Baldi testified further that he could not vote later in the evening because the polls were closed when he got off work.

Mr. Baldi asserted that he noticed a few people who had left the line. Mr. Bladi did not know, however, if those who left the line at the polling place returned at a later time to vote.

Ellen Strange Lenhart Johns, Egg Harbor City Board Secretary/Business Administrator, testified that she was responsible for conducting the Egg Harbor City Board's elections. She asserted, among other things, that all the election workers were duly certified by the Atlantic County Board of Elections. There were two sites for the annual school board election; the Spragg School and the Rittenberg School. She testified that the Regional Board of Education elections have been held at these two schools for the past 30 years and that all of the municipal elections have been held at the two schools for 30 years. She asserted that there were four election workers at each school which included one judge, one inspector and two clerks.

The annual school board election held on April 20, 1993, was held between the hours of 5:00 p.m. until 9:00 p.m. She asserted that the election began at the proper hour at both polling places.

Ms. Johns testified that there was a problem with the local voting machine at the Spragg School. `Ms. Johns left the Spragg School at 4:55 p.m. to go to the Rittenberg School and kept in touch with the Spragg School election workers by way of a walkie-talkie. Ms. Johns asserted that the problem with the malfunctioning voting machine at the Spragg School was solved at 5:05 p.m.

Ms. Johns testified that there were paper ballots available at both polling places. The paper ballots were secured in a box under the election registration table. The election workers were advised not to use the paper ballots unless there was an emergency. Ms. Johns asserted that there was no emergency on April 20, 1993. Ms. Johns admitted that there was one election worker who arrived late at the Spragg School. The election clerk arrived approximately five minutes after 5:00 p.m. The election clerk was to attend to the Regional voting machine. Another clerk covered for the late arriving clerk and there was no problem due to this lateness.

Ms. Johns testified, among other things, that there was a waiting period at both polling places due to the large voter turnout. The Egg Harbor City election involved the Board's annual school budget, the bond referendum, and two seats on the Egg Harbor City Board of Education with a number of write-in votes.

Ms. Johns asserted that one individual was denied the right to vote because the election workers could not find the individual's name in the voter registration book. The Atlantic County Board of Elections was called and because it could not find the individual's name, the voter was turned away.

The election workers maintained one poll list for the local election and three poll lists for the Regional election. Each voter was given an authorization slip to vote. The authorization slip must be signed by the voter and returned to the clerk before the voter enters the polling place. There were authorization slips for both the local and the Regional elections.

The voting machines were located at the front entrance of both schools. The evidence demonstrates that both polling places were handicapped accessible.

Having considered all the evidence before me, I **FIND** that:

1. A machine malfunctioned at the Spragg School polling place, however, the malfunction was corrected within five minutes of opening the polls.

2. An election worker was five minutes late reporting for duty on April 20, 1993.

DISCUSSION AND CONCLUSIONS

The complaints set forth herein are similar to those addressed by the Commissioner in In the Matter of the Annual School Election held in the School District in the City of Camden, Camden County, 1974 S.L.D. 618. At 624, the Commissioner stated the following:

> The Commissioner finds no grounds to void the school election because of the inoperative voting machine or the irregularities which did take place. Although the incident was unfortunate with its consequent delay for some voters and loss of opportunity to vote by others, it cannot be clearly shown that the inoperative voting machine or the other irregularities had a direct bearing on the ultimate result in the election. ...

The Commissioner, In the Matter of the Annual School Election held in the School District of the Borough of New Milford, Bergen County, 1975 S.L.D. 202, again determined that no sufficient evidence was advanced by the mechanical failure of the voting machines that "the will of the people was suppressed or thwarted." ... Id. at 205.

As for any delay in the casting of votes, the Law Division of the Superior Court of New Jersey determined that a 2½ hour delay in casting a vote was not sufficient to overturn an election. Magura v. Smith 131 N.J. Super. 359 (Law Div. 1974).

Having carefully reviewed all of the evidence before me, I **CONCLUDE** that the complainant has failed to carry its burden, by a preponderance of the credible evidence, that the will of the people was thwarted at the annual school election held on April 20, 1993.

I **CONCLUDE** that the results of the annual school election held on April 20, 1993, shall stand.

ORDER

Accordingly, it is hereby **ORDERED** that the announced results of the annual school election held on April 20, 1993, are **AFFIRMED.**

OAL DKT. NO. EDU 4004-93

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

8 July 1993
Date

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

7/9/93
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 9 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

FOR PETITIONER:
MARGARET ROESCH
CAROL KIENZLE
JOHN BALDI

FOR RESPONDENT:
ELLEN STRANGE LINDHART JOHNS

DOCUMENTS IN EVIDENCE

FOR PETITIONER:
P-1 NOTARIZED LETTER, 6/3/93 TO WHOM IT MAY CONCERN
SIGNED BY EDWARD J. ROESCH

FOR RESPONDENT:
R-1 LETTER, 6/3/93, TO THE COURT FROM SHIRLEY GRASSO, ESQUIRE
R-2 DIAGRAMS RITTENBERG SCHOOL & SPRAGG SCHOOL
R-3 LETTER, 4/1/87, TO L. DAVID RHINE FROM SAUL COOPERMAN, COMMISSIONER

OAL DKT. NO. EDU 4004-93

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE CITY : COMMISSIONER OF EDUCATION
OF EGG HARBOR, ATLANTIC COUNTY. : DECISION
:

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

Upon review, the Commissioner concurs with the findings and conclusions of the ALJ for the reasons well stated by him in the initial decision. It is clear that a voting machine which was inoperative for five minutes and a poll worker who was five minutes late in reporting for duty on the day of the election are not situations which rise to the level of serious irregularities and that no evidence was presented to support an allegation that these situations thwarted citizens' ability to vote or impacted the election within the meaning of that standard as applied to the grant of the extraordinary relief of ordering a new election. (See In re Wene, 26 N.J. Super. 363, (Law Div. 1953).)

Accordingly, the initial decision of the Office of Administrative Law affirming the results of the April 20, 1993 election held in the City of Egg Harbor is adopted and the instant Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

AUGUST 16, 1993

DATE OF MAILING - AUGUST 16, 1993

193-93

193-93

IN THE MATTER OF THE CAP WAIVER	:	
APPEAL OF THE BOARD OF EDUCATION	:	COMMISSIONER OF EDUCATION
OF THE TOWNSHIP OF OCEAN, OCEAN	:	DECISION
COUNTY.	:	
	:	

AUGUST 16, 1993

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE BOARD OF EDUCATION : COMMISSIONER OF EDUCATION
OF THE TOWNSHIP OF OCEAN, OCEAN : DECISION
COUNTY. :
:

For Petitioner, Paul J. Carr, Esq. (Masch, Visotcky, Cerefice & Carr)

For Respondent, Jerry J. Dasti, Esq. (Dasti, Murphy & Wellerson)

This matter was opened before the Commissioner of Education on June 14, 1993 by way of the filing of a Petition of Appeal by the Board of Education of the Township of Ocean (Board), wherein the Board sought to have included in the General Fund tax levy for the 1993-94 school year a cap waiver amount defeated by the voters at the annual school election.

On March 24, 1993, the Ocean County Superintendent of Schools had notified the Board that its 1993-94 school budget was conditionally approved subject to passage by the voters of a cap waiver in the amount of $1,092,411 in current expense which was deemed necessary for provision of a thorough and efficient system of education in the district.

On April 20, 1993 the voters of the Township of Ocean defeated both the proposed General Fund tax levy for the 1993-94 school year in the amount of $4,448,538 and the General Fund cap

waiver request in the amount of $1,092,411. Upon review of the defeated maximum permissible budget pursuant to N.J.S.A. 18A:22-37, the Township Committee of Ocean Township certified the General Fund tax levy in the amount of $3,992,829, a $455,709 reduction which both the Board and the County Superintendent determined could be sustained without jeopardizing provision of a thorough and efficient system of education in the district, thereby obviating the necessity for an appeal of the Borough's reduction to the maximum permissible budget.

With respect to the remaining issue of the defeated cap waiver, in a letter dated June 30, 1993, the Township Committee indicated that it would not object to the Board's cap waiver appeal in view of the acceptance of the Committee's reduction to the maximum permissible budget. Accordingly, this matter has duly proceeded as uncontested.

The cap waiver requested by the Board includes the following line items, all of which were determined by the County Superintendent to be essential for provision of a thorough and efficient education and unable to be funded by reallocation within the maximum permissible budget:

Current Expense	Account No.	Amount
Kindergarten Teacher Salaries	11-110-100-101	$ 100,596
Grades 1-5 Teacher Salaries	11-120-100-101	434,013
Grades 6-8 Teacher Salaries	11-130-100-101	50,473
Regular Programs - Supplies	11-190-100-610	75,339
Regular Programs - Textbooks	11-190-100-640	15,000
Special Ed/Resource Room Salaries	11-213-100-101	48,400
Special Ed/Speech Inst. Salaries	11-218-100-101	14,625
Tuition	11-000-100-562	60,875
Health Services Salaries	11-000-213-100	36,400
Other Support Services/Salaries	11-000-218-110	31,400
Educational Media/Library Salaries	11-000-222-100	30,490
Business/Other Support Services - Other Employee Benefits	11-000-290-290	194,800
	Total Current Expense	$1,092,411

With regard to these line-item requests, the Board presents the following justifications:

Kindergarten Salaries. Absent funding for two teachers and prorated portions of one teacher each in art, music, physical education and gifted and talented, the district will be unable to offer a kindergarten program, which is an essential component of its thorough and efficient educational plan.

Grades 1-5 Teacher Salaries. Eleven classroom teachers are needed to keep class sizes within the requirements of facilities regulations, and prorated portions of art, music, physical education and gifted and talented teachers are necessary to ensure a complete educational program.

Grades 6-8 Teacher Salaries. A computer teacher is needed to implement the district's technology program, for which a computer lab has been newly constructed and equipped. The line also includes prorated salaries for the art, music, physical education and gifted and talented teachers noted for grades K-5.

Regular Program - Supplies. Monies are needed to purchase workbooks, computer software, paper and other general supplies, particularly in view of the municipality's $25,000 reduction to this line item in the maximum permissible budget.

Regular Program - Textbooks. New textbooks are required for a recently implemented math and reading curricula, as well as to replace worn books and accommodate increased enrollments.

Special Education - Resource Room and Speech Teacher Salaries. One and one-half resource room positions and one-half a speech position are needed to accommodate increased numbers of students needing services and to conform with regulatory requirements for student/teacher ratios and evaluation conferences.

Tuition. Funds are needed to meet district's tuition obligation for special education students attending Southern Regional High School.

Health Services - Salaries. Without funds for one school nurse, 300 students will lack nursing services and the district will be unable to implement its K-3 Family Life program, for which the nurse serves as instructor.

Other Support Services - Salaries. One guidance counselor is needed for purposes of substance abuse education and student/family counseling in order to relieve overburdened building principals who could better focus their attentions on curriculum and instruction. The position is also needed to support Pupil Assistance Committee and pre-special education referral requirements.

Library Salaries. A part-time librarian and a clerical support person are needed to staff a newly built library essential for delivery of library services of one segment of the student population.

Employee Benefits. These funds are needed to meet contractual health benefit, dental and prescription drug obligations for 21 staff members.

Upon review of the record of this matter, including the documentation provided by the district, which is incorporated herein by reference, the Commissioner finds and determines that the Board has demonstrated the necessity for each of the line items it seeks to fund through cap waiver monies. Therefore, the Commissioner concludes that the Board's requested relief shall be and is hereby granted as the Board has borne its burden of demonstrating that these funds are necessary for provision of a thorough and efficient

education to the students of the Ocean Township School District. East Brunswick Township Board of Education v. East Brunswick Township Council, 48 N.J. 94 (1966); Board of Education of the Township of Deptford v. Mayor and Council of the Township of Deptford, 116 N.J. 305 (1989); Board of Education of the Borough of Rutherford v. Mayor and Council of the Borough of Rutherford, Bergen County, State Board of Education decision, July 7, 1993

Accordingly, the Ocean County Board of Taxation is directed to adjust the General Fund tax levy of the Ocean Township School District for the 1993-94 school year to reflect an increase of $1,092,411 which results in a total General Fund tax levy of $5,085,240.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 16, 1993

DATE OF MAILING - AUGUST 18, 1993

194-93

194-93

IN THE MATTER OF THE CAP WAIVER	:	
APPEAL OF THE BOARD OF EDUCATION	:	COMMISSIONER OF EDUCATION
OF THE BOROUGH OF SEASIDE	:	DECISION
HEIGHTS, OCEAN COUNTY.	:	
	:	

AUGUST 18, 1993

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE BOARD OF EDUCATION : COMMISSIONER OF EDUCATION
OF THE BOROUGH OF SEASIDE : DECISION
HEIGHTS, OCEAN COUNTY. :
:

For Petitioner, David M. Casadonte, Esq.

For Respondent, Annemarie Williams, Esq. (Gilmore & Monahan)

This matter was opened before the Commissioner of Education on May 10, 1993 by way of the filing of a Petition of Appeal by the Board of Education of the Borough of Seaside Heights (Board), wherein the Board sought to have included in the General Fund tax levy for the 1993-94 school year a cap waiver amount defeated by the voters at the annual school election.

On March 24, 1993, the Ocean County Superintendent of Schools had notified the Board that its 1993-94 school budget was conditionally approved subject to passage by the voters of a cap waiver in the amount of $308,050 in current expense which was deemed necessary for provision of a thorough and efficient system of education in the district.

On April 20, 1993 the voters of the Borough of Seaside Heights defeated both the proposed General Fund tax levy for the 1993-94 school year in the amount of $1,519,641 and the General Fund cap waiver request in the amount of $308,050. Upon review of the defeated maximum permissible budget pursuant to N.J.S.A. 18A:22-37,

the Mayor and Council of the Borough certified the General Fund tax levy in the amount of $1,277,641, a reduction of $242,000 which the County Superintendent deemed not to impair the Board's ability to provide a through and efficient education, thus obviating the need for appeal of the Borough's action.

With respect to the remaining issue of the defeated cap waiver, by letter dated June 18, 1993, the Borough advised that it would not object to the Board's Petition of Appeal, so that this matter proceeded thereafter as uncontested.

The cap waiver requested by the Board includes the following line items, all of which were determined by the County Superintendent to be essential for provision of a thorough and efficient education and unable to be funded by reallocation within the maximum permissible budget:

Current Expense	Account No.	Amount
Board Member Expenses		
NJSBA dues	000-230-890-01	$ 2,792
Child Study Team Salaries	000-219-104.00-01	110,500
Other Salaries/Occupational Therapy	000-221-109.00	20,000
Health Salaries/School Nurse	000-213-100.01-01	26,705
Other Health Serv./Physical Therapy	11-000-213-500	9,000
Tuition/Handicapped Students	000-100-566-00	31,000
Grades 1-5 Substitute Teachers	120-100-101.00-02	25,000
Transportation	000-270-511.01	40,000
Utilities - Heat	000-260-620.00	43,053
	Total Current Expenses	$308,050

With regard to these line-item requests, the Board presents the following justifications:

NJSBA Dues. This amount is necessary for membership dues in the State School Boards Association to which the district must belong by statutory mandate.

Child Study Team. This amount is needed to fund three team members for thirteen days per month in order to meet regulatory requirements for provision of special education services for an increasing number of qualifying students.

Occupational Therapist. An increase in the number of pre-school handicapped students to be served necessitates district employment of an occupational therapist to be contracted for an estimated cost of $60 to $75 per hour.

School Nurse. The district presently has only a half-time nurse, and the health and safety needs of present and upcoming student populations require that nursing services be available during the full time school is in session.

Physical Therapist. This item is necessitated by the IEP of a pre-school handicapped student who requires services over and above those experienced by the district in prior years.

Handicapped Tuition. These monies are needed to pay for three out-of-district placements during FY94, as well as for two unanticipated short-term placements arising from the needs of the district's transient population.

Substitute Teachers. Funds are needed to cover the cost ($50 per day per substitute) of substitutes for anticipated staff illness, personal leave, inservice, conference, curriculum development and other meeting requirements.

Transportation. This item is needed to pay for mandatory transportation for pre-school handicapped students and three out-of-district special education placements.

Utilities - Heat. Monies are needed to provide heating for an all-electric school building, as well as for the additional electrical costs associated with a currently planned building project.

Upon review of the record of this matter, including documentation provided by the district, which is incorporated herein by reference, the Commissioner finds and determines that the requested relief shall be and is hereby granted as the Board has borne its burden of demonstrating that these funds are necessary for provision of a thorough and efficient education to the students of the Seaside Heights School District. East Brunswick Township Board of Education v. East Brunswick Township Council, 48 N.J. 94 (1966); Board of Education of the Township of Deptford v. Mayor and Council of the Township of Deptford, 116 N.J. 305 (1989); Board of Education of the Borough of Rutherford v. Mayor and Council of the Borough of Rutherford, Bergen County, State Board of Education decision, July 7, 1993

Accordingly, the Ocean County Board of Taxation is directed to adjust the General Fund tax levy of the Seaside Heights School District for the 1993-94 school year to reflect an increase of $308,050 which results in a total General Fund tax levy of $1,585,691.

IT IS SO ORDERED.

M. L. Fitzgerald

AUGUST 18, 1993 COMMISSIONER OF EDUCATION

DATE OF MAILING - AUGUST 18, 1993

195-93

JOYCE BREITWIESER,

PETITIONER,

V.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner, elementary teacher, alleged she was dismissed with 60 days notice in violation of her tenure rights.

Initial decision determined that although petitioner's total service was continuous and in excess of three successive academic years within four successive academic years, she did not spend that time teaching a class for which she was or became fully certified. Petitioner held emergency certification when she was in position of teacher of handicapped. Petition was dismissed.

Commissioner adopted findings and determination in initial decision.

AUGUST 18, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1585-93
AGENCY DKT. NO. 5-1/93

JOYCE BREITWIESER,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,
Respondent.

Philip Feintuch, Esq., for petitioner
(Feintuch, Porwich & Feintuch, attorneys)

Charlotte Kitler, Esq., General Counsel, for respondent

Record Closed: June 21, 1993 Decided: July 19, 1993

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

PROCEDURAL HISTORY

The petitioner in this case, Joyce Breitwieser, filed a verified petition of appeal with the Commissioner of Education in early January 1993 alleging that although she had been employed continuously by the respondent in excess of three academic years as a regularly appointed teaching staff member, and was the holder during that entire time of proper and appropriate certificates, the respondent, contrary to her statutory entitlement to tenure, improperly terminated her employment in February 1993 following service upon her of a sixty-day notice.

The respondent's answer admitted that Breitwieser had been continuously employed by it between September 1989 and February 1993, a period of more than three consecutive academic years. However, it denied that she had obtained tenure. It pointed out that the first six months of petitioner's service, from September 1, 1989 to March 9, 1990, was performed as a teacher of preschool blind children under emergency certification as a "teacher of the handicapped." *See N.J.A.C.* 6:11-4.3(a). Since petitioner never qualified for a "teacher of the handicapped" endorsement, respondent maintains that such service under a substandard certificate cannot be "tacked" on to her subsequent service for approximately two and three-quarters academic years under a standard instructional certificate as an elementary school teacher, which she held during her entire time of employment. Thus, unless those first six months can be counted, tenure would not attach.

The issues having been joined, the file was transmitted by the Department of Education to the Office of Administrative Law as a contested case on February 25, 1993. Included with the file were cross-motions for summary decision previously filed with the agency and supporting memoranda. Oral argument was conducted on June 21, 1993, and the following is my initial decision.

STIPULATED FACTS

The essential underlying facts necessary for a determination in this case are not in dispute and are set forth in the certification of Judith N. Granick, state executive assistant in charge of the respondent's Department of Human Resources. That certification revealed the following. Petitioner was appointed as a full-time teacher of the handicapped by the respondent as of September 1, 1989, and assigned to the regional day school. Within days after she commenced her employment, petitioner obtained an emergency certificate as "teacher of the handicapped," valid from September 12, 1989 to June 1990. She also then held a regular instructional certificate, grades K-8, which had been issued in June 1989.

On March 9, 1990, petitioner was transferred, at her request, to a position as a Chapter I elementary school teacher at respondent's No. 3 school. Petitioner continued in employment in that position under contract as an elementary teacher for the remainder of the 1989-90 academic year, and for the entire 1990-91 and 1991-92 academic years. In September 1992, Breitwieser signed a new professional

employment contract agreeing to serve as a teacher for the 1992-93 academic year. That contract contained a provision whereby either of the parties could terminate by giving sixty days' notice in writing of that intention.

Breitwieser commenced teaching her class in September 1992. By letter dated December 14, 1992, Granick wrote to advise petitioner that in accordance with the provisions of *N.J.S.A.* 18A:27-10 *et seq.* and pursuant to the sixty-day termination clause, Breitwieser's service would not be required after January 4, 1993, although she would be paid at her current contract rate for the sixty-day period until February 12, 1993.

DISCUSSION

Since Breitwieser commenced her employment in September 1989 as a "teacher of the handicapped," but was not educationally qualified at that time other than as a regular elementary school teacher (she lacked eighteen credits), it became necessary for her to obtain emergency certification for that position, which she did. Can her service under that emergency certification be "tacked" to her subsequent two years and eight plus months of service under her regular certificate as an elementary school teacher to give her tenure? Respondent claims that such tacking cannot take place since the only circumstances under which emergency certification service has been tacked to other service and credited toward tenure are where the entire service under both the emergency and the regular certificate is in a position to which that emergency certification relates. In support of its contention, the Board cites the decisions in *Delli Santi v. Board of Ed. of Newark,* 1977 *S.L.D.* 1211, and *Kubas v. Board of Education of Linden,* 1980 *S.L.D.* 172. Petitioner, in opposition, relies upon the Commissioner's decisions in *K'Burg v. Board of Education of Lower Alloways Creek*, 1973 *S.L.D.* 636, and *Smith v. Board of Education of the Atlantic County Vocational-Technical School*, 1985 *S.L.D.* 704.

In *K'Burg,* the petitioner had been employed as a kindergarten teacher under an emergency certificate for almost five years, beginning in September 1968 and continuing into the 1972-73 school year. In March 1973, she was informed that her employment would not be renewed for the following school year. She continued in her duties until June 30, 1973. Although K'Burg held only an emergency certificate at the time she received the notice of nonreemployment in March 1973, she was

awarded a standard certificate as an elementary school teacher in April 1973. Thus, she claimed that, pursuant to *N.J.S.A.* 18A:28-5, she was tenured as of April 1973 since at that time she clearly was the holder of a proper certificate in full force and effect and had been employed for more than three consecutive academic years, together with employment at the beginning of the next succeeding academic year.

In finding in favor of K'Burg, the Commissioner observed that an emergency certificate is expressly recognized as valid both by the legislature and by the State Board of Education. *See also Smith v. Bd. of Educ. of Sayreville*, 1974 *S.L.D.* 1095, *aff'd*, State Board, 1975 *S.L.D.* 1160, *aff'd,* App. Div., 1976 *S.L.D.* 1120. The fact that it also is referred to as "substandard" does not detract, according to the Commissioner, from its validity. Thus, since K'Burg had been continuously employed as a kindergarten teacher for a substantial period of time beyond three years under both her emergency and her standard certificates, the Board had ample time to determine whether she met acceptable standards for continued employment. Indeed, its satisfaction with her performance was marked by the Board's annually seeking renewal of her emergency certification. Thus, when a standard certificate was issued to her in April 1973, during her fifth year of employment, all of the statutory conditions for permanent tenure were met.

The second case upon which Breitwieser relies is *Smith, supra*, 1985 *S.L.D.* at 704. There, petitioner taught for ten years under an emergency certificate and became eligible for standard certification in the same subject while still employed. Thus, in light of the *K'Burg* decision, the Commissioner found that Smith, too, had obtained tenure and that his service under the emergency certification was creditable for that purpose.

According to respondent, the decisions in the *Smith* and *K'Burg* cases, even assuming they still are viable, must be distinguished from the instant matter. Unlike those other cases, petitioner never obtained nor did she ever become eligible for an endorsement to teach the handicapped, the position to which her emergency certification related. Thus, the respondent points to the decision in *Delli Santi, supra*, where the Commissioner rejected a tenure claim by a person who attempted to tack service as a teacher of industrial arts under an emergency certificate to subsequent service as a teacher of English and social studies since no regular industrial arts certification was ever obtained. According to the Commissioner,

those circumstances made the case "clearly distinguishable" from *K'Burg*. In the *Kubas* case, too, the Commissioner rejected a tenure claim that relied upon a period of service under an emergency certificate because standard certification was not obtained until after termination of Kubas' employment. Thus, Kubas was never employed while regularly certified.

The issue, then, is whether in light of the circumstances in this case, the fact that Breitwieser's regular certificate contained no endorsement for "teacher of the handicapped," the category covered by her emergency certification, makes any difference. In my view, based upon my review and consideration of the facts and the decisional authorities, I believe that this circumstance is significant and fatal to her claim.

In the *K'Burg* case, the Commissioner cited the New Jersey Supreme Court's decision in *Zimmerman v. Board of Education of Newark*, 38 *N.J.* 65 (1962). Therein, the Court specifically observed that inherent in the tenure legislation is the policy not only that a board's duty to hire teachers demands that permanent appointments be made only if the teachers are found suitable for the positions after a qualifying trial period, but, in addition, that tenure attaches only where the precise statutory conditions have been met. That language is equally applicable here. Although the respondent in this case found petitioner's performance to be acceptable under her emergency certificate -- since it promptly moved her, at her request, into a regular teaching position in March 1990, continued her in that position for the balance of 1989-90, rehired her for 1990-91 and 1991-92, and then reemployed her under contract for 1992-93 -- the "precise conditions" required to be met before tenure attaches were not met.

The facts in *Kubas* support this result. There, even though petitioner taught cosmetology for more than three years, at all relevant times during the course of employment she held an emergency certificate only and did not obtain the standard certificate until after the end of her employment. Thus, no matter how long one teaches under an emergency certificate, one can never obtain tenure if that is the only type of certificate held during employment. Put another way, even though an emergency certificate may be "valid," it is not "proper and appropriate."

So, too, the facts in *Delli Santi* dictate a similar result. Therein, the Commissioner was concerned, of course, that much of the service was as a *per diem* substitute performing activities that regular teachers did not. In addition, the bulk of the time sought to be relied upon by Delli Santi for acquiring tenure was under an emergency certificate in the area of industrial arts, whereas the teacher's regular certificate was in a wholly different academic discipline. The instant matter is similar to *Delli Santi* since Breitwieser, although regularly certified as an elementary teacher in September 1989, served under an emergency certificate as a teacher of the handicapped, a position for which she did not have, nor did she ever obtain, suitable credentials. In fact, she served under that emergency certificate for fully twenty percent of her total service. Under these circumstances, to honor her tenure claim would fly in the face of the language in *Zimmerman* and constitute an unwholesome precedent.

Further support for the respondent's position may be found in the recent New Jersey Supreme Court decision in *Dennery v. Board of Education of the Passaic County Regional High School District No. 1*, 131 *N.J.* 626 (1993). Although the specific facts in *Dennery* are not squarely on point with the facts in this case, the Court's approach to the tenure issue and the language it used is most apropos. Thus, in *Dennery,* the Court first pointed out that in order to achieve tenure status, a teaching staff member must possess the "appropriate credentials and cannot acquire tenure unless he or she is the "holder of an appropriate certificate for the position." *See Dennery, supra*, at 632-33; *N.J.S.A.* 18A:28-4.

The *Dennery* Court went on to note that certain academic requirements must be met in order to enable a teaching staff member to be employed in certain positions and that completion of course work or the acquisition of a relevant higher degree are usually the factors involved. *See N.J.A.C.* 6:11-5.1 to -5.2. Critical to the *Dennery* rationale is that one must first have obtained tenure under a certificate before determining to what positions within that certificate such tenure can be transferred. Accordingly, the *Dennery* Court went on to note that tenure accrues to a teaching staff member under a certificate only if "he or she has also served in a position under that same certificate for a requisite period of time." *Dennery, supra,* at 638. Further, a teacher must "actually perform duties under the relevant certificate in order to obtain tenure under that certificate." *Dennery* at 639.

Breitwieser's service from September 1989 to March 1990 does not qualify since she never obtained her teacher of the handicapped credentials. Quoting its prior decision in *Spiewak v. Board of Education of Rutherford*, 90 *N.J.* 63 (1982), the Supreme Court in *Dennery* stressed that the clear and unambiguous language of the statute, *N.J.S.A.* 18A:28-5, requires that tenure accrues only where an employee has been employed under the appropriate certificate for the requisite period of time. In this case, I agree with the Board that Breitwieser does not meet those criteria since the holder of an emergency certificate as a teacher of the handicapped who never goes on to obtain regular certification with a teacher of the handicapped endorsement cannot obtain tenure by tacking on that period to other time that is short of the necessary three years plus service. Indeed, counsel for the respondent in colloquy with the undersigned during the course of oral argument indicated that in light of the *Dennery* case, it was arguable that if the facts in *K'Burg* presented themselves for decision again, the result in light of *Dennery* now might be different since in *K'Burg* (and in *Smith v. Board of Ed. of Sayreville* as well) the great bulk of time served was under an emergency certificate which, counsel maintains, can never be a "proper and appropriate" one under the language of *N.J.S.A.* 18A:28-5.

Be that as it may, the fact remains that although Breitwieser's total service was continuous and in excess of three successive academic years within four successive academic years, she did not spend that time teaching a class for which she was or became fully certified. While at first blush this result might appear to exalt form over substance and be characterized as "unfair," I believe it is the result that must obtain given the clear and unambiguous language of the tenure statute and the requirement that the "precise conditions" be met. An "emergency certificate," while valid, by definition is issued to persons who by virtue of their education and/or training are not yet qualified for regular certification in that particular area. Thus, as counsel for respondent points out, service under such a certificate which is not succeeded by service under a regular certificate in the same area must never be counted toward tenure since the employer would then be deprived of its full opportunity to review, analyze, evaluate, and make its critical decision. Indeed, in this case, although Breitwieser's performance is not in issue, her transfer in March 1990 from a position as a teacher of the handicapped to a regular Title 1 class was the product of her own belief that "I am not qualified to teach the ED students and I do not understand their violent tempers. . . . I can see now that it was a mistake to

take this position to begin with." (*See* letter of March 5, 1990, attachment five to Granick certification).

If it is "inequitable" or "unfair" to prevent one who has served only a minor portion of his or her time under an emergency certificate, and the balance under a regular certificate, from obtaining tenure, the solution lies either with the State Board by regulation and/or the Legislature in the tenure laws. It is not within the province of the undersigned administrative law judge to bend the statute and/or the regulations on the basis of my own view of what is "fair" or not. While I certainly appreciate the intrinsic merit to be found in Breitwieser's argument that her status as the holder of an emergency certificate should not be exalted so as to deprive her of tenure, I believe that this is the result that must obtain in light of the language of the statute and a proper interpretation of the applicable regulations that drew a clear line of demarcation between an emergency certificate and a standard certificate.

Accordingly, based upon the undisputed facts, I **CONCLUDE** that the Board's determination to terminate Breitwieser's employment, effective February 1993, was proper, and I **ORDER** that her verified petition be **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 19, 1993
Date

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

7/21/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 22 1993
Date

OFFICE OF ADMINISTRATIVE LAW

amr/e

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

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions were timely filed in accordance with N.J.A.C. 1:1-18.4.

Petitioner's exceptions aver, inter alia, that in reaching his conclusions in this matter the ALJ misconstrued and misapplied principles of prior Commissioner decisions. Petitioner sets forth her interpretation of the impact these prior decisions should have on the facts existing in the instant case.

Upon a careful and independent review of the record, the Commissioner finds petitioner's exceptions unpersuasive and adopts the findings and conclusions of the ALJ below that Ms. Breitweiser was not a tenured staff member and, consequently, the Board's determination to terminate her employment effective February 1993 was proper. In reaching this determination, however, the Commissioner notes that she passes no judgment on respondent's Dennery, supra, argument presented on page 7 of the initial decision as it has no material bearing on the resolution of the matter before her.

Accordingly, the Petition of Appeal is dismissed for the reasons set forth by the ALJ in the initial decision.

COMMISSIONER OF EDUCATION

AUGUST 18, 1993

DATE OF MAILING - AUGUST 18, 1993

195-93

EDU #1585-93
C # 195-93
SB # 49-93

JOYCE BREITWIESER,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, August 18, 1993

For the Petitioner-Appellant, Feintuch, Porwich & Feintuch (Philip Feintuch, Esq., of Counsel)

For the Respondent-Respondent, Charlotte Kitler, Esq.

The State Board of Education affirms the decision of the Commissioner of Education for the reasons expressed by the Administrative Law Judge.

June 1, 1994

Date of mailing JUN 03 1994

196-93

196-93

M. ELAINE WERNER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

AUGUST 18, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8624-91
AGENCY REF. NO. 309-8/91

M. ELAINE WERNER,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY.
Respondent.

Richard J. Kaplow, Esq., for petitioner
(Weinberg & Kaplow, attorneys)

Stephen J. Christiano, Esq., for respondent

Nancy I. Oxfeld, Esq., for intervenor, Barbara Wofsy
(Balk, Oxfeld Mandell & Cohen, attorneys)

Record Closed: July 20, 1993 Decided: July 23, 1993

BEFORE **MARYLOUISE LUCCHI-McCLOUD,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on September 11, 1991 for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and 52.14F-1 to -13

Prior to hearing the parties came to an amicable resolution of the matter and submitted a Stipulation of Settlement. Having reviewed the record and the settlement terms I **FIND:**

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

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is further **ORDERED** that the proceedings in this matter be concluded.

I hereby **FILE** my Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

7/23/93
Date

MARYLOUISE LUCCHI-McCLOUD, ALJ

Receipt Acknowledged:

7/26/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 29 1993
Date

OFFICE OF ADMINISTRATIVE LAW

am

JUL 20 [illegible] '93

WEINBERG AND KAPLOW, P. A.
A PROFESSIONAL CORPORATION
80 MORRIS AVENUE
SPRINGFIELD, NEW JERSEY 07081
(201) 379-5757
ATTORNEYS FOR Petitioner

BEFORE THE COMMISSIONER OF EDUCATION
OF THE STATE OF NEW JERSEY

M. ELAINE WERNER,

THE BOARD OF EDUCATION OF
WEST ORANGE

OAL [illegible]
EDU-~~10443-91~~
Agency Ref. No.
309-8/91

STIPULATION OF SETTLEMENT

The parties in the above captioned matter having reached an amicable settlement of the issues in dispute,

It is on this day of , 1993, stipulated and agreed as follows:

1. The Petitioner hereby withdraws the above referenced Petition of Appeal with Prejudice.

2. Respondent shall pay to the Petitioner the sum of $1,000.00 within 30 days of the issuance of a Final Decision by the Commissioner of Educationin this matter.

3. The Petitioner's seniority rights and position on the preferred eligibility list shall be unaffected by this agreement.

4. The parties hereto stipulate that this settlement agreement is without admission of liability or wrongdoing by any party.

5. This agreement is subjected to approval by the Board of Education, and will be presented to the Board for approval at the next scheduled Board meeting.

THE BOARD OF EDUCATION OF WEST ORANGE

By: _____
Vice President

ATTEST:

_____
Secretary

WEINBERG and KAPLOW, P.A.

By: _____
Richard S. Kaplow, Esq.
Attorney for Petitioner

By: _____
Stephen J. Christiano, Esq.
Attorney for Respondent

BALK, OXFELD, MANDELL & COHEN

By: _____
Nancy I. Oxfeld, Esq.
Attorney for Intervenor,
Barbara Wolfsy

OAL DKT. NO. EDU 8624-91

M. ELAINE WERNER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

AUGUST 18, 1993

COMMISSIONER OF EDUCATION

DATE OF MAILING - AUGUST 18, 1993

197-93

197-93

JOSEPH R. MULFORD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

AUGUST 18, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 3942-92
AGENCY DKT. NO. 187-4/92

JOSEPH R. MULFORD,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE, UNION COUNTY,
Respondent.

Sanford R. Oxfeld, Esq., for petitioner (Balk, Oxfeld, Mandell & Cohen, attorneys)

Neil M. Cohen, Esq., for respondent (Gill & Cohen, attorneys)

Record Closed: June 11, 1993 Decided: July 9, 1993

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appealed respondent's denial of his request for paid sick leave pursuant to N.J.S.A. 18A:30-2.1 for a work-related injury. The matter was transmitted to the Office of Administrative Law (OAL) on May 27, 1992 for a hearing as a contested case. The matter was assigned to the undersigned administrative law judge (ALJ) on June 25, 1992, and a telephone prehearing conference was scheduled for August 5, 1992.

An August 5, 1992 telephone prehearing conference was converted to a status conference at the request of the attorneys for the parties, and the terms of a

possible settlement were discussed. The attorneys were directed to advise the ALJ in two weeks as to the status of the matter.

By letter dated September 23, 1992 (Exhibit C-1), the ALJ requested the advice of the attorneys as to the status of this matter. By letter dated October 9, 1992 (Exhibit C-2), the ALJ was notified of the status of these discussions.

Since the matter was not settled, a telephone prehearing conference was rescheduled for November 10, 1992. On the date of the scheduled telephone prehearing conference, attorney for petitioner notified the ALJ that the matter had been settled and on that basis, the matter was adjourned. On November 13, 1992, a letter was received from attorney for petitioner (Exhibit C-3) confirming the settlement subject to approval by the board of education.

By letter dated December 7, 1992 (Exhibit C-4), the ALJ directed the attorneys to provide a copy of the settlement agreement pursuant to N.J.A.C. 1:1-19.1 or a written withdrawal from appellant or his attorney pursuant to N.J.A.C. 1:1-19.2 as soon as possible. When this direction was not complied with, the ALJ contacted the attorneys on January 13, 1993, at which time attorney for respondent indicated that he was awaiting the execution of a release by petitioner and requested that the matter be held for two additional weeks.

When no further contact with the ALJ was made by the attorneys for the parties, the ALJ directed a letter to the attorneys on March 24, 1993 (Exhibit C-5), directing them to provide a copy of the settlement agreement or a written withdrawal from the appellant or his attorney within ten days and further advising that the failure to comply would subject this matter to dismissal pursuant to N.J.A.C. 1:1-14.14(a)1.

When no response to the letter of March 24, 1993 was received, the ALJ directed his secretary to call the attorneys to advise that the ALJ had no choice but to dismiss the matter. No response was received as to this notification.

Based upon the foregoing I **FIND** that there has been an unreasonable failure to comply with the directives of the ALJ as well as the requirements of the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.12 to 21.6. Accordingly, I **CONCLUDE** that the appropriate sanction to be imposed in this matter is the dismissal of petitioner's petition as well as the suppression of respondent's defenses in this matter.

DECISION AND ORDER

Based upon the foregoing, it is hereby **ORDERED** pursuant to N.J.A.C. 1:1-14.14(a)1 and 2 that the petitioner's petition is hereby **DISMISSED** and respondent's defenses are hereby **SUPPRESSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 9, 1993
Date

JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

7/13/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 15 1993
Date

OFFICE OF ADMINISTRATIVE LAW

emd

EXHIBITS

Court's Exhibits:

C-1 ALJ letter dated September 23, 1992
C-2 Letter of Sanford R. Oxfeld, Exq., dated October 9, 1992
C-3 Letter of Sanford R. Oxfeld, Esq. , dated November 10, 1992
C-4 ALJ letter of December 7, 1992 with additional notations of January 13, 1993 thereon
C-5 ALJ letter dated March 24, 1993

OAL DKT. NO. EDU 3942-92

JOSEPH R. MULFORD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon review, the Commissioner concurs with the conclusion of the ALJ that due to the parties' unreasonable failure to comply with the directives of the ALJ, as well as the requirements of the Uniform Administrative Procedure Rules, the within petition must be dismissed and the Board's defenses thereto suppressed.

Accordingly, the initial decision of the Office of Administrative Law is affirmed and the instant Petition of Appeal dismissed.

AUGUST 18, 1993

DATE OF MAILING - AUGUST 18, 1993

Maryellen Fitzgerald

COMMISSIONER OF EDUCATION

198-93

198-93

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF NEWARK, ESSEX COUNTY.	:	
	:	

SYNOPSIS

Petitioner, defeated candidate for Board membership, sought recount and investigation into annual school election pursuant to N.J.S.A. 18A:63-12. Following recount, Commissioner affirmed announced results in separate decision. This matter was transmitted to OAL for purpose of conducting inquiry with respect to allegations of statutory violations that affected outcome of election (using Board employees as election workers, improper training of election workers, late mailing of sample ballots, comparison of signatures/non-genuine signatures of potential voters on poll lists and electioneering).

ALJ found that even though petitioner sufficiently established that some election irregularities occurred, she did not meet burden of proving that these irregularities affected outcome of election or thwarted will of the electorate. (In re Wene) Petition was dismissed.

Commissioner concurred with ALJ that petitioner did not meet burden of demonstrating that will of public had been thwarted by election irregularities. However, in light of disturbing record, Commissioner referred matter to Essex County Prosecutor for further appropriate action.

AUGUST 18, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3007-92
AGENCY DKT. NO. 109-4/92

IN THE MATTER OF THE ANNUAL NEWARK SCHOOL BOARD ELECTION, HELD IN THE SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY.

Vickie A. Donaldson, Esq., for petitioner, Maritza Torres-Falu

John M. Carbone, Esq., for respondent, School District of the City of Newark (Carbone & Fasse, attorneys)

Thomas McCormack, Esq., for intervenor Charles Bell (McCormack, Petrolle & Matthews, attorneys)

Francis Giantomasi, Esq., for intervenor John Mavilla

Record Closed: March 31, 1993 Decided: June 2, 1993

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On April 10, 1992, petitioner, Maritza Torres-Falu, filed a petition for recount and investigation pursuant to *N.J.S.A.* 18A:63-12. Petitioner sought a recount of the machines used in the East Ward of the City of Newark during the Board of Education election of April 7, 1992. Petitioner also sought a thorough investigation to

determine whether statutory violations occurred which affected the outcome of the election. More particularly, petitioner sought a comparison of all signatures of persons who voted in the East Ward; a determination as to whether the Board of Education (Board) complied with the statutory mandates regarding the use of sample ballots as prescribed by *N.J.S.A.* 18A:14-31; a determination as to whether the Board of Education employed Board of Education personnel as election officers in violation of *N.J.S.A.* 18A:14-6; a determination as to whether there was a lack of instruction given to election officers; and a determination as to the adverse effect that printed materials used and distributed during said election had on the outcome of the election.

On April 29, 1992, this matter was transmitted to the Office of Administrative Law (OAL) for the purpose of conducting an inquiry with respect to the allegations made by petitioner. On May 6, 1992, an amended petition was filed by the petitioner, *pro se,* with the OAL, in which the petitioner alleged statutory violations that, combined, allegedly affected the outcome of the election. Petitioner requested that a special election be ordered.

By decision dated May 14, 1992, the Commissioner of Education affirmed the report of his authorized representative who conducted a recount of the machine ballots cast in the East Ward, pursuant to petitioner's request dated April 10, 1992. The Commissioner determined that the tally for the East Ward was unchanged. Noting that no requests had been made for recounts of votes cast in other wards or in the district as a totality, the Commissioner determined that the results of the district election would stand as originally announced: Charles A. Bell, D. Kim Thompson Gaddy, and John Mavilla were elected to full terms of three years each on the Newark Board of Education. Petitioner finished in fourth place, behind John Mavilla.

On May 8, 1992, the undersigned judge was assigned to hear this matter, and a hearing was scheduled for June 2 and 3, 1992, at the OAL, 185 Washington Street, Newark, New Jersey 07102. On May 20, 1992, a conference call was held with the parties, and an in-person conference was scheduled for May 27, 1992, at the OAL. At that time, a status conference was held with counsel for all parties and, on June 2, 1992, an order was signed establishing the results of that conference. John Mavilla and Charles Bell, unnamed parties in the petition, were granted leave to intervene.

On June 3, 1992, respondent filed an answer to the amended petition essentially denying the allegations in the petition and demanding entry of judgment against petitioner.

The hearing commenced on June 2, 1992, at the OAL, Newark, New Jersey, and was continued on June 3, 4, 15, July 13, 14, 15, 16, August 24, 27, and October 5, 8, 9, 19, 20, and 28, 1992.

At the conclusion of the hearing, intervenor Bell, joined by intervenor Mavilla, moved for reconsideration of a prior motion to exclude evidence offered by petitioner and ruled admissible by the undersigned on October 8, 1992. The undersigned judge reserved on the motion and decided it by written opinion dated November 30, 1992. In sum, it was determined that the certified copies of the voter signature registers at issue, which were admitted into evidence, would remain in evidence. Posthearing briefs were required of all parties, and the record closed on March 31, 1993, when the undersigned judge became aware that petitioner would not be submitting a reply brief in this matter. The record closed on that date, and an extension of the time frame in which to file this initial decision was granted.

UNDISPUTED FACTS

Petitioner, Maritza Torres-Falu, was a candidate for election to the Newark Board of Education in the election held on April 7, 1992. She occupied ballot position A-3, seeking election to one of three seats subject to election. There were twelve declared and certified candidates running for these three open positions.

Charles I. Auffant, Esq., associate counsel to the Board, was appointed supervisor of the election, responsible for the organizing and oversight of said election in accordance with Title 18A. Consistent with Auffant's responsibilities as supervisor, a schedule of activities was developed which included, *inter alia*, the hiring of poll workers, the training of poll workers, and the mailing of sample ballots.

Virginia Haskins DeVane, executive director of Board affairs, assisted the supervisor of elections. Accordingly, she assisted with the training session, the

printer, the coordination of voting machines, and the employment of election day workers.

On March 26, 1992, a training session was held for the poll workers, who presumably had no prior election experience. Both Auffant and DeVane conducted the program, and a record of attendance was maintained.

Prior to the election, petitioner moved by order to show cause to compel Auffant to allow her to inspect the voting machines to be utilized in the election. Said order to show cause was returnable before the Honorable Judge Alvin Weiss, J.S.C., who granted petitioner's application. Pursuant to said order, petitioner was allowed to inspect the machines.

At the close of the election, petitioner received 4,673 votes, placing her fourth in vote totals behind Charles A. Bell (6,485), Kim Gaddy (5,204), and John Mavilla (5,140). The difference in vote totals between petitioner and John Mavilla was 467 votes.

Pursuant to *N.J.S.A.* 18A:14-15, petitioner fielded challengers in every election district in the city of Newark. These challengers were eligible to appear at every polling place, challenge voters, oversee the process of the election, and represent petitioner's interests. The record does not disclose any incident wherein Torres-Falu challengers objected to any "now alleged" illegal votes or complained of any failure to conduct signature comparisons at polling sites.

Petitioner reported one election law violation to Auffant on election day. This involved the alleged distribution of a palm card (P-24), which she asserted contained misleading information. Auffant, in his capacity as supervisor of elections, investigated this matter and found no basis that this occurred or affected the outcome of the election.

Petitioner alleges that during the course of the election and thereafter, she became aware of election irregularities. The instant action constituted an investigation to determine if statutory violations occurred during the April 7, 1992 school election and, in the event violations were found, whether they affected the outcome of the election such that the election should be invalidated.

DISCUSSION

I have considered the arguments presented by the parties and the following constitutes my determination as to each issue presented:

1. Burden of proof

As both parties acknowledge and the case law confirms, the burden is on the petitioner to show that the alleged irregularities occurred and, further, that they are sufficient to have changed the results of the election—*i.e.*, the will of the electorate was thwarted. *See, e.g., In re Willingboro Twp. School Election*, 92 *N.J.A.R.*2d (Vol. 4) 564, 566 (Dep't of Ed.) ("The burden of establishing, with a reasonable degree of certainty, that violations have altered the election outcome which otherwise would have resulted is upon petitioners," citing *In re Application of Moffat,* 142 *N.J. Super.* 217, 224 (App. Div. 1976), *certif. denied sub nom., Princeton Twp. v. Bleiman,* 71 *N.J.* 527 (1976)); *In re Annual School Election, Borough of Waldwick,* 92 *N.J.A.R.*2d (Vol. 4) 520, 523 (Dep't of Ed.).

2. Standard of proof

While the Board contends that the standard of proof to be used in this election challenge should be the "clear and convincing evidence" standard, recent school board election cases reveal that various ALJs have used the preponderance of the evidence standard without any sign of disapproval in the Commissioner's final decisions. *See, e.g., In re 1991 Annual School Election, Pennsauken Twp.,* 92 *N.J.A.R.*2d (Vol. 4A) 396, 397 (Dep't of Ed.); *In re Annual School Election, Borough of Waldwick, supra*; *In re Annual School Election, City of Passaic,* OAL DKT. EDU 2598-88 (May 17, 1988), adopted with modification on other grounds by Comm'r of Ed. (July 1, 1988). *See also In re Annual School Election, Borough of Wanaque,* 92 *N.J.A.R.*2d (Vol. 4A) 6, 9 (Dep't of Ed.) (noting that "[t]he substance of what must be proved and the corresponding burden of proof varies depending on whether it is alleged that the election was marred by 'malconduct,' whether election results were disturbed by the presence of illegal votes, or whether the election was disturbed when the legal votes were rejected at the polls;" noting also that "[a]lthough this

standard is a result of court decisions interpreting *N.J.S.A.* 19:29-1a and e, it applies to school elections").

In the instant matter, where petitioner alleges a number of election irregularities, including electioneering (in the form of distribution of "misleading" palm cards), the hiring of Board employees as election officials, the failure to properly train election workers, the failure to compare the signatures of voters on poll lists with those in the signature copy register, and the failure to timely mail sample ballots, petitioner's primary contention is that these irregularities resulted in illegal votes being cast. Given such allegations, the appropriate standard of proof is by a preponderance of the credible evidence, the usual standard for civil cases. Indeed, the *Passaic* matter, *supra*, involved similar charges of electioneering and poll list irregularities and the *Pennsauken* case, *supra*, involved similar allegations that illegal votes were cast. In both cases, the preponderance standard was employed.

Respondent's reliance on *In re Evans,* 227 *N.J. Super.* 339 (Law Div. 1988) to bolster its argument for the "clear and convincing" standard is misplaced. Clear and convincing proof was required in *Evans* because the claims against Evans invited criminal penalties and were viewed as "too serious to be proved by the lowest standard of evidence." *Id.* at 347. While election contests are certainly serious, this label coupled with the language in *Evans* does not carry the day for respondent on this matter. Furthermore, *In re Maplewood*, 255 *N.J. Super.* 690 (Law Div. 1992), supports this reading of *Evans.* "Judge Haines [in *Evans*], after analyzing the cases, found that since the relief sought was not merely the contest of an election, but removal of a person from office based on qualifications, he set a higher standard of proof." 225 *N.J. Super.* at 703.

The *Maplewood* court declared that the preponderance of the evidence standard is to be applied in election contests where there has been no wrongdoing by any of the candidates. *Id.* at 704. In the instant case, petitioner does not make any explicit assertion of wrongdoing on the part of any candidate; the gravamen of the complaint is illegal voting. Thus, under *Maplewood* and *Evans,* it seems appropriate to follow the preponderance of the evidence standard.

3. Employees as Election Officials

The appointment of election officials for school elections is provided for at *N.J.S.A.* 18A:14-6. The statute prohibits the hiring of employees of the board of education to act as election officials in its school election. Petitioner lists the names of twenty-two alleged "employees/election workers" and offers the testimony of Anthony Salters, executive director of Human Resource Services, whose responsibility includes the supervision of the district's personnel and payroll departments to back this claim. Respondent, however, admits to only six board members who may have worked as election officials, pointing out that some are of part-time or substitute status, out of the more than 600 election workers for this election. Respondent urges the *de minimis* nature of the alleged violation, contending that no impact on the election has been shown.

It seems clear that *N.J.S.A.* 18A:14-6 has been violated; the respondent merely quibbles over the degree to which it has been violated. The part-time or substitute status of the employees, even if accurately represented, has no bearing on whether the statute has been violated or the result of this violation. *See In re Annual School Election, Borough of Carteret*, 1972 *S.L.D.* 167, 170, where it was observed that "the statute bars the appointment of election officials who are 'employees' of the board, but lacks a differentiation between part-time itinerant, or sporadic employment." However, petitioner has not met her burden of proving that the hiring of these employees as officials (a relatively small number, even if twenty-two is the accepted number, out of the more than 600 election-wide workers) affected the outcome of the election. No such evidence has been provided. Hence, while this violation seems to have occurred, it does not rise to the level necessary for the extreme remedy of setting aside the results of the election. Nowhere is there any proof that the actions of these employees as election officials in any way influenced the results at the polls.

4. Training of Election Workers

Petitioner charges that the Newark Board of Education failed to properly train election workers as required by *N.J.S.A.* 18A:14-6.1 and that such failure resulted in the casting of votes by persons unqualified to vote. More particularly, petitioner asserts that the testimony of Pasquale Catena, Alicia Cruz, and Marianne Capriglioni was to the effect that they were never required to attend any training sessions

concerning the election and that they were not trained. They each testified that they were not issued any certificates by the Board or the County of Essex for prior service as election workers. Respondent asserts that it properly trained those election workers who were not exempt from training under the statute. Respondent provides an explanation for each of the four Board workers testifying on petitioner's behalf as to lack of training. Respondent explains that one had received prior training from the Board of Elections, one had received prior training as a member of the County Board of Elections, one previously worked elections and was familiar with the procedures, and one was an emergency appointment. Respondent admits that one election worker did not have the requisite training.

Exemptions from training are afforded by *N.J.S.A.* 18A:14-6.1 to election officers who have served in a polling district in which voting machines have been used for two consecutive school elections and who have received a certificate or who have received a similar certificate from the county board of elections pursuant to *R.S.* 19:50-1. In the present case, it appears that the challenged election workers may have some claim to prior experience, but it appears that, at the least, there were technical violations of the statute since there is no assertion that they possessed the required certificates. However, even finding such technical violations, it remains for petitioner to prove the connection between this election irregularity and the result of the election. *See In re Wene*, 26 *N.J. Super.* 363, 383 (Law Div. 1953), aff'd *sub nom. Wene v. Meyner*, 13 *N.J.* 185 (1953).

The court in *In re Wene*, *supra*, provided the standard, now routinely cited in school election cases, for checking on this connection:

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

Petitioner asserts that "the failure to train election workers resulted in such workers' failure to properly qualify voters such that they would be lawfully able to cast their votes." Petitioner's contention that there were resultant "illegal votes" in significant numbers to affect the outcome of the election appears to be wholly unsupported. No specifics as to these alleged illegal votes are provided to back this bald assertion: No names of illegal voters are provided, much less any indication of how the purported lack of training of a few election workers impacted on the results. In relation to this lack of training allegation, however, it is clear that petitioner, even if able to prove some minor violation of this statutory provision, has failed to sustain her burden of establishing its connection to the outcome of the election.

5. and 6. Comparison of Signatures/Non-Genuine Signatures

Petitioner charges that election workers failed to compare the signatures of potential voters on poll lists to those contained in the signature copy register, in contravention of *N.J.S.A.* 18A:14-50 and -51. Petitioner further maintains that such failure to compare signatures resulted in the casting of unlawful votes which provides a basis to set aside the election.

N.J.S.A. 18A:14-50 provides that voters shall sign the poll list before receiving an official ballot, while *N.J.S.A.* 18A:14-51 provides that one of the election officers shall compare the signature in the poll list with the signature made by the voter in the signature copy register. Only upon a determination that the signatures are sufficiently similar should the voter be eligible to receive a ballot.

To support her contention that this violation occurred, petitioner points to the testimony of four election officials (Pasquale Catena, Alicia Cruz, Beulah Holloway, and Mariann Capriglioni), who testified that they failed to make the required signature comparisons. Respondent, however, points out that "[i]n no district did [petitioner] bring forward and query all four election board members"; thus, highlighting the possibility that one of the other election officers may have made the signature comparisons at those sites. As long as one of the election officers did make the comparisons, there is compliance with the statute. That being so, there is

insufficient evidence in the record to allow petitioner to meet her burden of proving this violation.

Nevertheless, even if petitioner's proofs are sufficient to establish such violation of the statute, petitioner must still prove that the irregularities or violations were the producing cause of a result which otherwise would not have occurred. *In re Willingboro, supra*, 92 *N.J.A.R.*2d at 566. In the *Willingboro* case, even though election officials clearly "were derelict in performing their duties by failing to check the signatures from the poll list with the signature copy register, and by failing to fully enforce the prohibition on electioneering near the polling places," there was no evidence to establish that such conduct changed what otherwise would have been the election results. *Id.* at 566-67. The evidence in *Willingboro* established "isolated acts of negligence and omission by very busy election workers," which ALJ Duncan termed "reprehensible" but not sufficient to set aside the election. *Id.* at 567.

Both the Commissioner and ALJ Duncan noted the following guidance from *In re Wene, supra*:

> There is an important distinction between the binding effect of election laws upon officials entrusted with their administration in connection with their being subject to a punishment for a violation thereof, or the effect of such provisions if enforced as a challenge at the time of voting, on the one hand, and as to whether, on the other hand, an irregularity as to a particular provision due to no fault of the voter and not involving fraud or repression of the full and free expression of the popular will, should after the election have the effect of invalidating such votes.
>
> [*In re Wene, supra*, 26 *N.J. Super.* at 385.]

The Commissioner agreed that while irregularities and violations of school election law were shown to have occurred in the *Willingboro* matter, they did not rise to the level necessary for the extreme remedy of setting aside the results of the election.

It is the clear intent of the law that elections are to be given effect whenever possible. *Wene v. Meyner,* 13 *N.J.* 185 (1953). Irregularities, even when gross, when not amounting to fraud do not vitiate an election. *Stone v. Wyckoff,* 102 *N.J. Super.* 26 (App. Div. 1968). It is clear that irregularities and deviations from election laws by

election officials provide insufficient grounds for voiding an election if the will of the people has been fairly expressed and determined and has not been thwarted. *In re Clee*, 119 *N.J.L.* 310 (Sup. Ct. 1938); *In re Livingston,* 83 *N.J. Super.* 98 (App. Div. 1964). It is only when the irregularities are so gross as to produce illegal votes which would not have been cast or to defeat legal votes which would have been counted that an election will be set aside. *In re Wene, supra*, 26 *N.J. Super.* at 385.

Also, it should be noted that even if the signature comparison provision is viewed as mandatory, the violation of mandatory procedures by election officials does not automatically void an election. *In re Annual School Election, Borough of Wanaque, supra,* 91 *N.J.A.R.*2d at 8. A claimant must still show that the irregularity casts the results of the election in doubt. *Sharrock v. Keansburg,* 15 *N.J. Super.* 11, 19-20 (App. Div. 1951).

In the present matter, the irregularities (primarily the failure to compare signatures) have been linked by petitioner to the casting of illegal votes. Specifically, petitioner alleges that unregistered voters were allowed to cast votes, votes were cast in the names of persons who did not vote in the school election, and persons voted more than once.

The proof offered by petitioner to show that eleven unregistered voters voted in the election is a letter from Carmine Casciano, Commissioner of Registration and Superintendent of Elections for Essex County, which apparently lists eleven names of unregistered voters. Further, petitioner offered the testimony of certain individuals in conjunction with poll list signatures to establish that nine votes were cast in the names of voters registered to vote who it is asserted did not actually vote in this election. For example, Andrew Troublefield offered testimony. He is wheelchair bound and only able to vote by the aid of a friend who physically transports him to poll sites. Mr. Troublefield, unable to write his name, utilizes the mark of "X" to affix his signature. The "X" is contained in the signature copy register (P-36). As stated by petitioner, Mr. Troublefield, after identifying his "X," testified that he did not vote in the April 7, 1992 school election or in any election since "Gibson's loss," an obvious reference to the 1986 mayoral election for the City of Newark. He also testified that whenever he had voted, he was transported by George S. Williams.

This testimony was buttressed by Williams's testimony, which confirmed that Mr. Troublefield did not vote on April 7, 1992. Petitioner further points out that election official Beulah Holloway had previously testified that she witnessed Mr. Troublefield walk into the polling site, sign the poll list, and that she had compared his wholly written signature as placed on the poll list to the signature of Mr. Troublefield contained in the signature copy register. When confronted with the poll list signature and Mr. Troublefield's "X" in the signature copy register, she was at a loss to explain the obvious discrepancy. Petitioner notes that Mr. Troublefield has not been able to walk for many years and cannot stand fully upright, even with physical assistance.

Petitioner then lists forty-eight names of voters whose signatures allegedly appear on the poll lists as having voted twice. It seems from a review of the testimony and evidence that petitioner's proofs are indeed sufficient to establish that these sixty-eight, allegedly illegal, votes were cast and counted in the results of the election.

It must be remembered, however, that petitioner fell 467 votes short of gaining the third school board seat. Thus, even if it were found that the sixty-eight votes challenged above were illegal and that they were all cast for the third-place vote-getter (for which it appears there is no proof attempted by petitioner, a problem with her challenge which will be farther explored below), the election results cannot be set aside since it has not been proven that the outcome of the election was affected nor that the will of the electorate was thwarted.

This brings me to petitioner's assertion that, in accordance with the report and testimony of John Paul Osborn, petitioner's handwriting expert, 495 signatures on the poll list were not genuine. More particularly, the testimony of Osborn, who was qualified by the court as a forensic document examiner, indicated that he compared 726 signatures appearing on poll lists from the East Districts 4, 8-10, 9, 11, and 16. The signatures and addresses were compared to the signatures and addresses of voters listed in the signature copy register. Of the total number of comparisons made, the expert concluded in his report that 495 were to a highly probable or stronger degree non-genuine. Poll lists utilized by the expert for purposes of the comparisons were certified by Dr. Peter Carter, Essex County Superintendent of Schools, to be true copies of the poll lists utilized to obtain signatures of persons

presenting themselves to vote in the April 7, 1992 election. Dr. Carter also testified that certified copies provided to petitioner were true copies of signatures appearing in the signature copy register maintained by the County of Essex and under his statutory control. The parties stipulated that John Paul Osborn would testify that the information contained in List B (P-43 in evidence) contains all of the names of those signatures on the poll list where the conclusion of highly probable non-genuine or non-genuine was reached.

Respondent specifically rebuts this expert's conclusion with the testimony of five individuals who aver that their signatures are genuine. More fundamentally, however, respondent attacks the methodology used by petitioner's expert in comparing all of the signatures. More particularly, respondent presented the testimony of James M. Paladino, qualified as a handwriting expert and special document examiner, who questioned Osborn's methodology, the time frame utilized by him to make the comparisons, and his conclusions. He indicated that he knows of no examiner who does not use notes during the examination. He testified as to the difficulty in making a judgment from the use of photocopies. He opined that one could use a photocopy for a qualified opinion but that a final determination would require the use of original documents. He indicated that it would take about one and a half to two hours to compare a signature (a preliminary determination would take about one and a half hours time) and that the time utilized by Osborn of one and a half minutes per signature is "guesswork." He testified he would expect to see abnormal writings at the polling place. (An abnormal writing is done by the same person but has explainable differences.) Of import, he questioned Osborn's reliability and credibility, considering them faulty.

It is to be noted that Mr. Paladino offered no testimony at all as to the genuineness of the signatures petitioner's expert concluded were non-genuine. In fact, respondent's expert testified that he did not examine the documents utilized by petitioner's expert. He made no signature comparisons to determine the authenticity of same as alleged to be fraudulent by the petitioner.

I have considered the evidence presented and am of the view that petitioner's proofs seem sufficient to establish that there are in fact 495 non-genuine signatures. Those non-genuine signatures might lead to the inference that 495 illegal votes were cast. Nonetheless, even if it is assumed that 495 illegal votes were cast, it is

clear that petitioner's challenge must still fail since she has made no attempt to prove for whom these votes had been cast. Without knowing for whom the illegal votes were cast, it cannot be said that the outcome of the election was affected, nor that the will of the people was thwarted.

In a challenge based on illegal votes, the contestant has "not only the burden of showing that illegal votes were cast in number sufficient to change the result if they had in fact been cast for the contestee, but also the burden of showing, to the extent possible under the circumstances, for whom the illegal votes were cast." *Application of Murphy,* 101 *N.J. Super.* 163, 167 (App. Div. 1968), *certif. denied,* 52 *N.J.* 172 (1968). As acknowledged by ALJ Duncan in *Willingboro, supra*, the case *In re Mallon,* 232 *N.J. Super.* 249 (App. Div. 1989), makes it clear that petitioners are required to prove whether illegal votes cast in the election were cast for the opposing candidates. *In re Willingboro, supra*, 92 *N.J.A.R.*2d at 566.

The Appellate Division in *In re Mallon, supra*, notes that an exception has developed in the case law where the challenger cannot establish to the extent possible under the circumstances for whom the illegal vote was cast. 232 *N.J. Super.* at 269. The *Mallon* court interpreted that to mean that

> it must be shown that it is not possible to locate the person who cast the illegal vote or, if located, to compel the voter under *Evid. R.* 31 to disclose how he or she cast the illegal vote. For the exception to apply, however, the challenger must show the exercise of reasonable diligence in attempting to find the challenged voter and that, despite such diligence, he or she could not be found. The exception cannot mean merely that is is impossible to determine how the person voted or the language of the statute requiring that it be 'sufficient to change the result' (*N.J.S.A.* 19:29-1e) would have no meaning. The challenger has to carry both prongs of the burden established in *Murphy* and its progeny and, in addition, prove that despite diligent effort the illegal voter could not be found or refused to disclose his vote.
>
> [*Id.* at 269.]

Under this standard, it appears that petitioner here did not carry her burden of proof. She has, apparently, made no attempt to find the challenged voters and no attempt to subpoena those individuals connected to the alleged non-genuine signatures.

7. Sample Ballots

Petitioner also alleges an election irregularity in connection with the late mailing of sample ballots. The use and mailing of sample ballots is provided for in *N.J.S.A.* 18A:14-29 and 31. *N.J.S.A.* 18A:14-29 provides that

> [t]he secretary of each board of education of a type II special needs school district . . . located in a city of the first class having a population in excess of 300,000 according to the 1980 federal decennial census, shall prepare sample ballots for each school election and shall mail those sample ballots to the registered voters . . . .

In all other school districts, the board of education "*may*, by resolution, direct the secretary of the board to prepare sample ballots and mail those ballots to the voters" (emphasis added). The time frame for mailing the sample ballots is set out in *N.J.S.A.* 18A:14-31.

Petitioner correctly points out that the evidence substantiated the fact that the Board did not meet the statutory deadline by mailing all of the sample ballots within the proscribed time. As explained by petitioner, testimony was adduced as to why the mailing was late. Whether it was due to carelessness, negligence, or gross indifference to the statutory requirements, the evidence substantiated the fact that there was an effort to comply with the deadline of 12 noon on April 1, 1992, but that at that point only 31,624 sample ballots were mailed. Approximately 60,000 were not mailed. Eventually, the mailer delivered the remaining ballots to the Post Office for mailing. Further, petitioner points to the testimony of Samuel Delgado, an employee of McGraw-Hill Inc., the mailer utilized by the Board to perform the mailing. He testified that approximately 8,000 of the sample ballots which he posted for mailing were held at the Post Office and not mailed because the Board had not maintained sufficient funds to cover the mailing in an account utilized for that purpose. Petitioner alleged that 8,000 sample ballots returned to the Board as undelivered contained an overwhelming number of Spanish surname voters.

Petitioner asserts that the failure to mail or timely mail the sample ballots resulted in the loss of votes by persons uninformed about the election. Each

uninformed but potential voter represents the possibility of additional votes sufficient to change the outcome of the election.

Petitioner has failed to meet her burden of showing that the Board is in the type of school district and type of city in which the (usually) mandatory term "shall" section of the statute applies rather than the merely directory "may" section. Petitioner does not assert that the Board is in a type II school district or in a city of the first class. However, more to the point, even if it was found that a violation of the mandatory provision occurred, petitioner has failed to show a sufficient connection between this violation and the outcome of the election. Minor deviations from statutory requirements are not sufficient, in and of themselves, to void election results. *See, e.g., In re Annual School Bd. Election, Hamilton Twp., Atlantic County*, 92 *N.J.A.R.*2d (Vol. 4) 476, 478 (Dep't of Ed.). She has not produced any evidence that a voter failed to vote as a result of not receiving a sample ballot; even that would be insufficient, since it would not amount to a rejection of a legal voter.

8. Electioneering

Petitioner's electioneering claims center on the distribution, at certain polling sites, of a palm card that petitioner describes as misleading. More particularly, petitioner asserts that she was alerted by her campaign workers that campaign literature, a palm card (P-24 in evidence), was being distributed containing the names of lawful candidates and having affixed to each name certain ballot positions. The literature contained the names of Mary Darden, petitioner, and Kim Gaddy. However, where Mary Darden's name appeared, the ballot position of John Mavilla (A-14) had been affixed (P-24). Mary Darden's true ballot position was A-4.

The literature was distributed, according to petitioner, to polling sites where petitioner was likely to do well and where intervenor Mavilla was likely to do poorly. Petitioner claims that the juxtaposition of intervenor's ballot position on literature linking petitioner with her running mate was clear electioneering. Petitioner asserts that such conduct was intended to result in the thwarting of the electorate by causing voters thinking themselves to be voting for Darden to actually pull levers which registered votes for Mavilla.

Petitioner reported the activity to Auffant. Auffant not only acknowledged that he was made aware of the handout, but identified it (P-24) as an exact copy of the palm card presented to him on election day. By his testimony, it was proven that the ballot position on the palm card appearing next to Mary Darden's name belonged to John Mavilla. Auffant testified that upon learning of the alleged electioneering, he reported to the sites but could find no one distributing the literature at the time. He testified that he took no further steps to investigate the alleged electioneering.

Petitioner asserts that she had no greater duty than to report the situation and to request that proper officials investigate same. That the palm card existed and was delivered on election day showed, according to petitioner, that the will of the electorate was thwarted and that electioneering occurred.

Electioneering is prohibited under two statutes. *N.J.S.A.* 18A:14-72 states:

> If a person shall on any day fixed for any election tamper, deface or interfere with any polling booth or obstruct the entrance to any polling place, or obstruct or interfere with any voter, or loiter, or do any electioneering within any polling place or within 100 feet thereof, he shall be a disorderly person and shall be punished by a fine not exceeding $500.00 or by imprisonment not exceeding one year, or both.

N.J.S.A. 18A:14-81 states:

> If a person shall distribute or display any circular or printed matter or offer any suggestion or solicit any support for any candidate, party or public question, to be voted upon at any election, within the polling place or room or within a distance of 100 feet or the outside entrance to such polling place or room, he shall be a disorderly person.

See also In Re Chesilhurst School District Annual Election, 92 *N.J.A.R.*2d (Vol. 4A) 213 (Dep't of Ed.).

It is quite clear that the actions described by petitioner as electioneering, which apparently occurred, even if found to be electioneering, are not sufficient to set aside the election. Petitioner has not established a connection between this minor irregularity and the outcome of the election as required under the standard of *In re Wene*, *supra*. While it is often the case that where electioneering is found to have

occurred, the matter is referred to the prosecutor's office, it is not usually the case that the results of an election are voided for that reason alone. *See, e.g., In re Willingboro, supra*, 92 *N.J.A.R.*2d at 568. As stated in *In re Annual School Election, Mainland Regional School District, Somers Point and Linwood,* 92 *N.J.A.R.*2d (Vol. 4) 514, 515 (Dep't of Ed.), "[w]hile electioneering inside polling rooms is a violation of the statutes governing school board elections, it does not necessarily follow that the outcome of school elections is affected thereby." Here, there is no proof that the outcome of the election was affected by the distribution of palm cards.

9. Unclean Hands

The doctrine of unclean hands states that "he who comes into equity must come with clean hands." *City of Paterson v. Schneider*, 31 *N.J. Super.* 598, 605 (App. Div. 1954). This maxim is applied "to one who is guilty of fraud or unconscionable conduct with respect to the particular controversy in issue." *Id.* A court will deny equitable relief when the seeker "has been guilty of bad faith, fraud, or unconscionable acts in the transaction which forms the basis of the lawsuit." *Goodwin Motor Corp. v. Mercedes-Benz of North America, Inc.*, 172 *N.J. Super.* 263, 271 (App. Div. 1980). Simply put, a court should not grant relief to one who has been a wrongdoer with respect to the subject matter in suit. *Faustin v. Lewis,* 85 *N.J.* 507, 511 (1981).

Respondent, here, asserts that petitioner has unclean hands. Respondent, however, merely alludes to some relationship between petitioner and Auffant. There is no actual proof offered of any improper relationship. Thus, this claim must be dismissed as untenable.

CONCLUSION

Even though petitioner has sufficiently established that some election irregularities occurred, she has not met her burden of also proving that these irregularities affected the outcome of the election or in any way thwarted the will of the electorate. Mere speculation that results might have been different if conditions had been different will not suffice to meet the standard set out in *In re Wene, supra*. *See, e.g., In re Mainland Regional School District, supra*, 92 *N.J.A.R.*2d at 516.

ORDER

Therefore, it is **ORDERED** that petitioner's petition is **DISMISSED**. It is further **ORDERED** that the will of the electorate must be given full effect.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 7th Floor, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 2, 1993
Date

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

6/4/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 7 1993
Date

OFFICE OF ADMINISTRATIVE LAW

dgi/e

APPENDIX

LIST OF WITNESSES

For Petitioner:

Pasquale Catena
Alicia Mayra Cruz
Virginia Haskins DeVane
Charles I. Auffant
Anthony Wayne Salters
Samuel Andrew Delgado
Louis M. Conte
Lorraine Pizzano
Maryann Capriglione
James Leonardis
Ellen Graham
Beulah Holloway
John Paul Osborn
Peter E. Carter
Stephen Todd Powell
Joaquim Nascimento Prata
Valmira Maria Prata
Florencio Soto
Virginia Russo
Maria Elizabeth Soares
Ana Teisera Fernandes
Sylvia Fernandes (Translator)
Andrew Troublefield
George S. Williams
Maritza Torres-Falu

For respondent:

Luis Alvarado
Angelo DiFederico
Manuel P. Lopes
Denise DiFederico
Beverly Alfano
James M. Palladino
Carmine P. Casciano
Connie Albano

EXHIBITS IN EVIDENCE

R-1	Letter to election worker from Charles I. Auffant, dated March 12, 1992 (2 pages)
R-2	'92 Election worker information from Board of Education
R-3	Voting authority slips beginning No. 2201
R-4	Letter to election worker from Charles I. Auffant, dated March 12, 1992, without paragraph beginning "Please note." (2 pages)
R-5	Information to be presented to election workers at March 26, 1992 orientation meeting (4 pages)
R-6	Election schedule activity (4 pages)
R-7	Newark School Board Election April 7, 1992 blue form
R-8	Identification
R-9	Identification
R-10	1992 poll list (for voter signature) blank
R-11	Board of Education appointment of challengers and alternates (4 pages)
R-12	Letter to Ken McCasline from Charles I. Auffant, dated May 4, 1992
R-13	Letter to Stephen Goldstein from Charles I. Auffant, dated May 11, 1992
R-14	Identification
R-15	Letter to Carmine P. Casciano from Harry Ingram, dated July 10, 1992 (2 pages)
IB-1	Identification
IB-2	Identification

IB-3(a)	Checklist for challengers, April 7, 1992
IB-3(b)	Elections made easy
IB-3(c)	Official instructions district board of elections, Hudson County
IB-4	Letter to John Porter from Maritza Torres-Falu
IB-5	Letter to John M. Carbone from Vickie A. Donaldson, dated July 10, 1992
IB-6	Invoice for services rendered from John Paul Osborn, dated May 20, 1992 (2 pages)
IB-7	Letter to Maritza Torres-Falu from John Paul Osborn, dated May 20 1992 (2 pages)
IB-8	Identification
P-1	Identification
P-2	Identification
P-3	Identification
P-4	Identification
P-5	Identification
P-6	Certification by Virginia Haskins DeVane dated June 2, 1992 regarding resolution: Designation of election workers/officials, attached to board resolution (5 pages)
P-7	Certification of Charles I. Auffant dated April 21, 1992 (5 pages)
P-8	1992 Poll list (for voter signature) East Ward, District 9 (14 pages)
P-9	1992 Poll list (for voter signature) East Ward, District 8-10 (9 pages)
P-10	1992 Poll list (for voter signature) Central-East Ward, District 1-25 (6 pages)
P-11	1992 Poll list (for voter signature) East Ward, District Second (4 pages)
P-12	1992 Poll list (for voter signature) East Ward, District 4(5 pages)
P-13	1992 Poll list (for voter signature) East Ward, District 6, 7 (9 pages)
P-14	1992 Poll list (for voter signature) East Ward, District 11 (11 pages)
P-15	1992 Poll list (for voter signature) East Ward, District 15 (4 pages)
P-16	1992 Poll list (for voter signature) East Ward, District 18 (4 pages)
P-17	1992 Poll list (for voter signature) East Ward, District 19, 20, 21 (6 pages)
P-18	1992 Poll list (for voter signature) East Ward, District 22 (2 pages)
P-19	1992 Poll list (for voter signature) East Ward, District 29 (2 pages)
P-20	1992 Poll list (for voter signature) East Ward, District 30 (4 pages)
P-21	1992 Poll list (for voter signature) East Ward, District 32 (3 pages)
P-22	1992 Poll list (for voter signature) East Ward, District 33 (11 pages)

P-23 Letter to Maritza Torres-Falu from Carmine P. Casciano dated May 21, 1992 (2 pages)
P-24 Campaign palm card
P-25 Alleged Board of Education employees that worked as election officials for the April 7, 1992 (2 pages)
P-26 Identification
P-27 Identification
P-28 Identification
P-29 Identification
P-30 Identification
P-31 Identification
P-32 Identification
P-33 Identification
P-34 Identification
P-35 Identification
P-36 Duplicate C254154, voting record for Andrew Troublefield
P-37 1992 Poll list (for voter signature) East Ward, District 4 and 5, with certified copies of signature copy register for same district
P-37A Duplicate permanent registration, voting record for Maria Soto
P-37B Duplicate permanent voting record for Sal Hermo
P-37C Duplicate permanent voting record for Artur Moreira
P-37D Duplicate permanent voting record for Manuel Dias
P-37E Duplicate permanent registration voting record for James Dobek
P-37F Duplicate permanent registration voting record for Ann Witiuk
P-37G Duplicate permanent voting record for Francisco Colon
P-37H Duplicate permanent registration for Luis A. Alvarado
P-38 Certified copies of signature copy register for East Ward District 8 and 10
P-38A Duplicate permanent registration voting record for Stephen Powell
P-38B Duplicate permanent registration voting record for Virginia Russo
P-38C Duplicate permanent registration voting record for Beverly Alfano
P-38D Permanent registration, duplicate voting record for Jack R. Santos
P-39 Certified copies of signature copy register for East Ward, District 9
P-39A Duplicate permanent voting record for Joaquim Prata
P-39B Duplicate permanent voting record for Valmira Prata
P-39C Duplicate permanent registration voting record for Florencio Soto
P-39D Duplicate permanent voting record for Maria Soares

P-39E	Duplicate permanent voting record for Ana Fernandes
P-39F	Duplicate permanent voting record for Manuel Costa
P-40	Certified copies of signature copy register for East Ward, District 11
P-40A	Duplicate permanent registration voting record for Connie Albano
P-40B	Duplicate permanent voting record for Joseph R. Urso
P-41	1992 Poll list (for voter signature) East Ward, District 16 Nos. 1 and 2 with certified copies of signature copy register for District 16
P-41A	Duplicate permanent registration voting record for Angelo Di Federico
P-41B	Duplicate permanent voting record for Denise Di Federico
P-41C	Duplicate permanent voter registration form for Manuel Lopes
P-41D	Duplicate permanent voting record for Teofilo Rodrigues
P-41E	Permanent registration duplicate voting record for Louis Muniz
P-41F	Duplicate permanent registration voting record for Maria Herrera
P-41G	Duplicate permanent registration voting record for Dominick Romano, Sr.
P-42	List A, Index of questioned voters signatures examined by district and approximate order of appearance on poll lists
P-43	List B, Index of questioned voters signatures examined by district and approximate order of appearance on poll lists, opinion of non-genuine or highly probable non-genuine only (10 pages)
P-44	Identification
P-45	Identification
P-46	Identification
P-47	Identification
P-48	Identification
P-49	Identification
P-50	Letter to Maritza Torres-Falu from John Paul Osborn, dated May 26, 1992 with attachments, qualifications of John Paul Osborn, poll lists for East Ward District 8-10, East Ward District 11, East Ward District 4, East Ward District 9, East Ward District 16 (1), East Ward District 16 (Oliver Street)
P-51	Identification
P-52	Identification
P-53	Identification
P-54	Identification
P-55	Identification
P-56	Identification
P-57	Identification

P-58 Identification
P-59 Identification
P-60 Identification
P-61 Identification
P-62 Identification
P-63 Identification
P-64 Identification
P-65 Identification
P-66 Identification
P-67 Identification
P-68 Palm card, Falu, Gaddy, Darden
P-69 Letter to Maritza Torres-Falu from John Issac Porter dated July 17, 1992
P-70 Identification

C-1 Reconstruction of record dated August 27, 1992 (3 pages)

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF NEWARK, ESSEX COUNTY.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Both petitioner and the Board filed timely primary exceptions. The Board also filed timely reply exceptions.

Petitioner first excepts to the length of the hearing in this matter, which she avers was prejudicial to her because of the scheduling delays encountered in what she avers was an expedited hearing.

Further, petitioner excepts to the evidence in this case as the determination which recommended dismissal is against the weight of the findings and evidence; it fails to provide any remedies where statutory violations and fraud were found to exist; it was made without careful review of the evidence in the case or ignored or failed to properly credit the import of evidence; it was made without a presentation of the required overall analysis of findings of misconduct, fraud and illegality and the relationship of such findings to determine if the will of the electorate was thwarted or whether the outcome of the election was affected.

The Board's exceptions first posit that the standard of proof for this matter is that of clear and convincing evidence, not that of preponderance of the evidence. The Board submits, as it did at hearing below, that when fraud is alleged and the petitioner asks the Court to so conclude, the higher standard must be used. In so arguing, the Board relies on In re Evans, 227 N.J. Super. 339, 347 (Law. Div. 1988).

The Board further contends that the testimony of petitioner's handwriting expert and findings of the ALJ are based on an assumption not proven or stipulated, that is, that the sample for comparison was authentic. The Board reasserts its contention that petitioner had the burden of producing witnesses to verify or dispute the signatures at issue and that the testimony of her handwriting expert, at best, stands for the proposition that certain signatures are inconsistent. It claims that any perceived inconsistency between a signature on the poll list and the county books merely creates an issue or a question to be resolved or answered by the subject voter.

At Exception Three, the Board claims that petitioner's methodology, accepted by the ALJ, of not calling the voter to identify his or her signature but instead having an expert testify as to its authenticity, turns the process upside down. The Board submits petitioner's evidence was rebutted by showing multiple persons with the same name at the stated addresses yet the expert did not know which addresses he used. Yet, the Board claims, persons whose signatures the expert said were forgeries testified that they were their signatures. The Board avers that petitioner has not met her part of the burden by calling those voters forward

to ascertain if the conclusion of the expert witness was correct and how each person voted. It contends that the burden did not shift to the Board to bring in all the voters to contradict the findings of the expert. By random sampling, the Board submits that it established that the conclusions of petitioner's expert were incorrect. Consequently, the Board claims, petitioner failed to not only demonstrate the reliability of the methodology but also did not rebut the Board's challenge to the reliability and methodology she used.

The Commissioner will first consider the procedural issues raised in the parties' exceptions. As to petitioner's exception regarding the length of hearing, proceedings before the Office of Administrative Law are governed by N.J.A.C. 1:1-1 et seq. Concerns about the proceedings, including scheduling and conduct of cases before that tribunal, are challengeable before the Director of the Office of Administrative Law. N.J.A.C. 1:1-3.2(c) Accordingly, such exception is not properly lodged with the Commissioner of Education and is thus not considered in the disposition of this matter.

Further, the Commissioner is convinced that the ALJ properly concluded that the appropriate standard of review to be applied in this case is that of preponderance of the credible evidence not that of clear and convincing evidence. See Initial Decision at page 6. It is noted that this is not a court but a quasi-judicial forum in which the Commissioner is not empowered to adjudge criminal matters. In this regard, the State Board has spoken of the limitation of remedy available to the Commissioner in election matters in the decision captioned, In the Matter of the

Annual School Election Held in the Township of Old Bridge, Middlesex County, decided by the Commissioner of Education 1989 S.L.D. 1198, rev'd State Board 1208:

> ***[W]e conclude the circumstances presented here provided a sufficient basis upon which ALJ could properly conclude that a technical violation of the election law had occurred during the election campaign, and that the Commissioner could properly consider whether such violation affected the outcome of the election. However, N.J.S.A. 18A:14-63.12 does not entrust the Commissioner with the responsibility for or the authority to adjudicate the guilt of individuals who may be responsible for violations of N.J.S.A. 18A:14-97 occurring during an election subject to inquiry pursuant to that statute. Given his determination that the irregularities*** did not warrant a new election, we conclude that the Commissioner erred both in remanding the matter for adjudication of whether Mr. Hegarty was responsible for violation of N.J.S.A. 18A:14-97 and in adopting the ALJ's findings in that respect.
>
> ***We however, find nothing that would preclude the Commissioner from forwarding his decision to the County Prosecutor for his assessment of whether the matter should be pursued with respect to securing penalties pursuant to N.J.S.A. 18A:14-104. (at 1210)

Thus, where, as here, the Commissioner is convinced that the remedy of ordering a new election has not been demonstrated, the Commissioner's alternative is to direct the matter for the County Prosecutor's attention for determinations regarding criminal or misdemeanor offenses because this forum may make no findings nor assess penalties regarding a criminal matter. Accordingly, the Commissioner is without authority to heighten judicial scrutiny by tampering with the standard of review because the issues to be decided by the Commissioner are confined strictly to those involving education law. Hence, the appropriate standard of review remains that of demonstrating by a preponderance of the evidence that school

election law irregularities occurred and if they affected the outcome of the election. N.J.S.A. 18A:14-63.12 Therefore, for the reasons expressed in the initial decision as supplemented herein, the Commissioner dismisses as being without merit the Board's proposition that the heightened standard of clear and convincing evidence is the appropriate standard of review for this case.

In moving now to the exceptions posed by the parties concerning the factual conclusions drawn by the ALJ, it is noted that petitioner raises extensive exceptions regarding both the disputed and undisputed facts determined by the ALJ. However, the record before the Commissioner does not include a transcript of the hearing below. Challenges to the factual findings predicated upon credibility determinations made by an administrative law judge require the party to supply the agency head with the relevant and necessary portion of the transcript. See In re Morrison, 216 N.J. Super. 143 (App. Div. 1987). Thus, without pertinent transcript citations from which to draw her own conclusions, the Commissioner accepts those credibility determinations reached by the ALJ who was in a position to hear and adjudge the credibility of witnesses. See Parker v. Dornbierer, 140 N.J. Super. 185, 188 (App. Div. 1976). Consequently, petitioner's exceptions challenging the ALJ's credibility determinations and the factual findings predicated thereupon, both contested and uncontested, are hereby rejected as being without merit.

The record stands corrected, however, from petitioner's exception that no allegations are raised that Board members served as election officials, as stated at page 7 of the initial decision, to reflect the argument she raised that Board employees worked as

election officials. However, in correcting this apparent typographical error in the initial decision, that is not to say that the Commissioner accepts petitioner's contention that 22, not 6 Board employees, (as admitted by the Board's Supervisor of Elections, Mr. Auffant) were used in the Newark election as officials. Neither is the Commissioner persuaded that the higher number alleged by petitioner requires a new election be ordered because the violation of N.J.S.A. 18A:14-6 was so egregiously violated by the use of 22 Board employees. Further, the Commissioner draws such conclusion without regard to whether such employees were part-time, temporary or substitute employees. In claiming the number of employees serving as election officials was 22 not 6, petitioner relies on the testimony of Mr. Anthony Salters, Executive Director of Human Resource Services for the Newark Board of Education, as the basis for establishing this alternative allegation, which testimony cannot be scrutinized without the transcripts. Morrison, supra

Nevertheless, the record as established by the ALJ stands that N.J.S.A. 18A:14-6 was violated, because the Board admits 6 employees were used by the District as election officials, albeit without further distinctions drawn regarding the employees' status within the District, and hence without further investigation as to whether the suggestion of whether such employees were part-time or substitute agents of the Board should impact upon the penalty appropriate for violation of said election law. Regardless of the number or their employment status, the Board is hereby admonished to ensure, absolutely, that none of its employees, no matter in what capacity they serve the Board, are engaged as election officials in any future school board election, insofar as such action constitutes

a plain-faced violation of the law in New Jersey. As such, the Commissioner adopts as her own the discussion of the ALJ regarding the use of Board employees as election officials.

Similarly, the Commissioner will not disturb the credibility findings of the ALJ concerning the training of election workers without reference to pertinent transcript citations. Moreover, petitioner's objection to the ALJ's reliance on In re Wene, supra, for the standard of review, which petitioner would distinguish from this matter because this case alleges fraud, are dismissed as being without merit for the reason stated above. Consequently, the Commissioner concurs with the ALJ's assessment of the impact any such alleged irregularities in the training of the election officials had on the outcome of the election results for the reasons expressed on pages 8 and 9 of the initial decision.

The Commissioner also agrees with the Board that petitioner did not bring forward all four election officials present to demonstrate that no one at the site in question made signature comparisons, and thus that she is attempting to shift the burden of proving that such irregularities occurred from herself to the Board. The Commissioner concurs with the ALJ's exhaustive review of the law and the evidence, so much of it as is in the record before her, on the issue of signature comparisons as stated in the initial decision at pages 9-12. In so finding, however, it is noted that the Commissioner, like the Board, questions the methodology employed by petitioner's expert in drawing conclusions about genuine and non-genuine signatures. It is also observed that the ALJ only suggested that "petitioner's proofs seem sufficient to establish that there are in fact 495 non-genuine signatures," and that "***[t]hose non-genuine signatures might lead to the inference that

495 illegal votes were cast." (Initial Decision, at p. 13) (emphasis supplied). The Commissioner expressly rejects any conclusion that there were in fact 495 non-genuine signatures that count as illegal votes given the serious questions raised by the Board as to the methodology employed by petitioner's handwriting expert. Therefore, the Commissioner does not reach to any further conclusions regarding the alleged non-genuine signatures in this case.

Even with these limitations, the Commissioner is compelled to find, as did the ALJ in the Willingboro, supra, case, that such violations as were demonstrated in this record regarding illegal voting as established by signature comparisons, (see initial decision at pages 11-12) are nothing less than reprehensible, in fact, in the case of Mr. Troublefield, shocking. Nevertheless, the Commissioner finds that petitioner's exception averring that the ALJ failed to conclude that the number of signatures alleged to have been cast illegally, based upon her handwriting expert, exceeds the number of votes necessary to seat her, fails, first because she failed to demonstrate that the 495 signatures were non-genuine, but also because she failed to demonstrate for whom each of the 495 alleged illegal voters voted. Accordingly, petitioner cannot be found to have met her burden pursuant to Wene, supra; Mallon, supra; and Willingboro, supra. As such, the Commissioner once again adopts as her own the findings and conclusions of the ALJ regarding petitioner's allegations of non-genuine signatures, but finds sufficient evidence of illegal voting to refer the matter to the County Prosecutor due to the serious questions raised by the limited evidence established in this record.

As to petitioner's assertion, reiterated in exceptions, that the initial decision ignores the purpose for sample ballots in Newark, fails to provide any remedy for the acknowledged failure to mail approximately 8,000 such ballots pursuant to N.J.S.A. 18A:14-29, and fails to consider such violation in an analysis of election conduct and results, the Board reasserts its contention, adopted by the ALJ, that "Petitioner has failed to meet her burden of showing that the Board is in the type of school district and type of city in which the (usually) mandatory term 'shall' section of the statute applies rather than the merely directory 'may' section." (Initial Decision, at p. 16, quoting N.J.S.A. 18A:14-29) The Commissioner finds and determines that N.J.S.A. 18A:14-29 does in fact apply to the city of Newark, by taking official notice that Newark had a population of approximately 329,000 in 1980 as delineated in N.J.S.A. 18A:14-29. The Commissioner further takes official notice that Newark in fact is a type II district and is in fact a special needs district. So finding, the Commissioner need not address the Board's allegation that petitioner has failed to meet her burden of demonstrating these three conditions apply to Newark in establishing that it is required by N.J.S.A. 18A:14-29 to mail sample ballots to the constituents of the school district, that it is a special needs district and a type II district.

It is with such facts established that the Commissioner expresses her strongest disapproval of the Board's failure to mail 8,000 sample election ballots. That it failed to do so because of insufficient monies in the account earmarked for such costs is an inexcusable ministerial error which she directs not be repeated. The Board is charged by law to disseminate such information as a

means of informing the voters of the issues at play in the district. Even so, the record also compels the conclusion that notwithstanding this gross error, she must also conclude petitioner has not shown a sufficient connection between this violation and the outcome of the election to meet her burden of proof. See In the Matter of the Annual School Election Held in the School District of the Township of Pennsauken, Camden County, decided by the Commissioner June 12, 1992.

Finally, the Commissioner rejects petitioner's exceptions dealing with electioneering for the reasons expressed in the initial decision, that is, that she has failed to demonstrate that even if electioneering occurred as a result of the palm card distribution, she has not established a connection between such irregularity and the outcome of the election.

Taken as a whole, the review of this record is disturbing indeed. Although petitioner has not met her burden of demonstrating that the will of the public has been thwarted by the election irregularities found to have occurred in the school district, the irregularities proven, in the Commissioner's judgment, warrant the careful attention of the Essex County Prosecutor, due both to the number of allegations brought to the record and for consideration of whether any such irregularities constitute fraud. It is with grave concern that the Commissioner refers this matter to such office for further action as it deems appropriate.

AUGUST 18, 1993

DATE OF MAILING - AUGUST 19, 1993

Maryanne Fitzgerald

COMMISSIONER OF EDUCATION

199-93

199-93

BERNADETTE D. COSTANZO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF RAHWAY, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, nontenured teaching staff member, alleged she was discriminated against because of her age and physical condition in not being rehired for 1991-92 school year. Board contended petitioner's attendance was a factor in her nonrenewal.

Initial decision determined Board complied with all relevant aspects of regulations and statutes with exception of granting an informal appearance before Board but there is no specific penalty for such failure and there was no evidence that this failure was anything other than inadvertent or unintentional. ALJ concluded action of Board in choosing not to rehire petitioner was a lawful exercise of its discretion. ALJ further concluded that Board did not discriminate against petitioner in violation of Law Against Discrimination or violate her due process rights. Petition was dismissed.

Commissioner agreed with the ALJ's finding that although the Board erred in not complying with N.J.A.C. 6:3-1.20 [now 6:3-4.2], this violation of due process was remedied by the proceedings herein. Citing Dore, the Commissioner adopted findings and determination in initial decision.

AUGUST 23, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9155-91
AGENCY DKT. NO. 334-9/91

BERNADETTE D. COSTANZO,
Petitioner,
v.
THE BOARD OF EDUCATION OF THE CITY OF RAHWAY, UNION COUNTY,
Respondent.

John A. Smith, III, Esq., for petitioner

Alan J. Schnirman, Esq., for respondent
(Schnirman & Charney, attorneys)

Record Closed: April 20, 1993 Decided: July 19, 1993

BEFORE **MARYLOUISE LUCCHI-McCLOUD,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter arises out of a petition filed by Bernadette D. Costanzo alleging that she was improperly not offered a new contract of employment for the 1991-92 school year, while she was a nontenured teacher in the employ of the Rahway Board of Education. This petition was filed with the Commissioner of Education and thereafter transmitted to the Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52 14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13.

A prehearing conference was held in this matter on March 10, 1992 before Stephen G. Weiss, ALJ. At that time, the hearings were set down for October 20 and

October 21, 1992 before the undersigned. Those hearing dates were adjourned at the request of the parties, and the hearing in this matter began on December 4, 1992 before the undersigned at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey. Testimony was taken in this matter on seven nonconsecutive hearing days which included December 4, 1992, December 16, 1992, January 19 and 28, 1993, February 24 and 25, 1993 and March 9, 1993. At the conclusion of testimony in this matter, the hearing record was left open until April 12, 1993 in order to allow both sides to submit written memoranda of law regarding the case. That date was extended to April 20, 1993 at the request of the parties. On April 20, 1993, the record closed, and the forty-five day statutory time frame to render an initial decision would have expired on June 4, 1993. The undersigned requested an Order of Extension from the Department of Education, which was granted, and the time for filing an initial decision was extended until July 19, 1993.

STIPULATION OF FACTS

Prior to the commencement of the hearing, both sides entered into a written stipulation of facts (J-40), which is set forth as follows:

1. Petitioner was first employed as a teaching staff member with the respondent board of education in the annual contract in September 1988. Petitioner was reappointed under contract for the 1989-90 academic year. Petitioner was reappointed for a third teaching year in September 1990.

2. At the time of petitioner's notice of non-reappointment in April 1991, petitioner was forty-three years old.

3. At all times during which petitioner was teaching for the respondent board, there existed a contract between the board and the Rahway Teachers' Association permitting thirteen sick days per annum. The records reveal petitioner was out fifteen days in her first year; thirteen days in her second year; and thirteen days in her third year of teaching with the respondent.

4. Respondent board did not request petitioner to undergo medical evaluation by its own doctor at any time after petitioner's initial employment.

5. Petitioner's attendance was the basis for respondent Del Monaco's summative evaluation of March 30, 1991, whereon it is noted: "O = opportunity for improvement" under Category E: Work habits and obligations.

6. Petitioner requested an informal appearance from the board as permissible under *N.J.A.C.* 6:3-1.20.

7. Respondent did not give petitioner an opportunity to be heard pursuant to *N.J.A.C.* 6:3-1.20 as requested in her May 23, 1991 letter.

8. Petitioner, Bernadette Costanzo, was the only teacher completing her third year of employment who was excluded by respondent Del Monaco, from being recommended for reappointment in 1991.

9. (a) In addition to petitioner, twelve other teachers completed their third year of employment in June 1991.

   (b) All twelve teachers were offered reemployment and obtained tenure.

   (c) Petitioner was the only teacher completing her third year of employment who was not offered reemployment.

10. There was no written policy with regard to the number of days permitted absence due to illness for teaching staff members, but the teachers' contract stipulated thirteen days.

11. Petitioner was allowed to enroll in respondent's sick bank program.

As these facts were stipulated to by the parties, I **FIND** them to be operational facts of this case.

TESTIMONY

During the hearing, testimony was taken from a number of members of the respondent board of education.

Renee La Prete, who is the Assistant Principal of Rahway High School and had been for the preceding five years, testified. Part of her job involves evaluating teachers.

There was a 1991 summative evaluation of the petitioner which is based on yearly evaluations. Ms. La Prete is required to sign off on evaluations. Other participants in the evaluation process include Mr. Del Monaco, who is the Principal; Mr. Yergalonis, the Assistant Principal; and Mr. Stanley Friedman, who is a department chairman, as well as Ms. La Prete.

She acknowledged that she had never observed the petitioner's classroom performance, although she did have a close rapport with her. Ms. La Prete is also in charge of obtaining class coverage for teachers which included petitioner, if they are out for any reason.

Ms. La Prete indicated that she signed off on a March 30, 1991 evaluation (J-6), which reflected a marking of O, which stands for opportunity to improve under work habits and obligations. She testified this dealt with attendance. It was discussed at a committee meeting, as well as during the year. They specifically review attendance records of teachers.

Ms. La Prete said that she concluded that petitioner needed improvement in the area of attendance. She explained that the district prides themselves on their work ethic and attendance is paramount as their concern. She stated that she felt the amount of days that petitioner was absent was exorbitant. The board policy is that staff members have thirteen sick days available. According to her, they are not just "a given" and they should be used just when an employee is ill.

The witness testified that she has had to evaluate other teachers and feels that ten days sick time in a year may also be excessive. Anything from five to six days per

year would, in her words, be cause for alarm. There is no set number in the board policy. She confirmed that in reviewing the attendance, she does not look at the nature of the illness or absence.

When the decision is made not to rehire, it is based upon the total sick days used for the three-year period and does not look to the nature of the absences. She stated that she does not recall ever having recommended nonreappointment for any teacher in the last five years because of their attendance records.

Ms. La Prete spoke with petitioner after the signing of the report and the petitioner appeared very upset. They discussed her "excellent performance as an educator." It was her attendance which hurt her.

Ms. La Prete confirmed that the decision not to rehire her had nothing to do with Ms. Costanzo's performance as a teacher.

Ms. La Prete also acknowledged that there is no requirement for a doctor's note or certificate for each absence.

Ms. La Prete stated that when classroom evaluations are done during the year by the individuals responsible for them, there are also pre- and post-conference meetings. This is the standard operating procedure used by the board. There are a minimum of three observations for nontenured teachers, but they try to make five visits and observations. Those observations may be unannounced; however, she stated that she never did that. The witness tells the teacher that she is coming and stated that she believes Mr. Del Monaco and Mr. Yergalonis do the same.

The witness confirmed that the policy of the Rahway Public Schools was in effect at the time in question (P-1). She pointed out that under work habits and obligations on page nine of that exhibit, punctuality is listed although attendance is not specifically stated. That district evaluative procedure booklet has nothing regarding the number of absences which are considered appropriate or excessive.

Ms. La Prete did state that the nature of an individual's absence may have something to do with whether or not there is a recommendation to rehire. She

explained this by saying that if someone underwent surgery and it was one long illness, there might be a different effect on the recommendation. This was due to the fact that the district might be more able to have some form of continuity of education if they were aware that for a period of time an individual would be out rather than having to obtain substitute teachers at the last minute. She stated that there is no difference in her evaluation of tenured or nontenured teachers regarding their attendance.

Ms. La Prete was asked about a number of other summative evaluations and confirmed that the evaluation in 1989, which was Ms. Costanzo's second year (J-4), indicated that they were pleased with her performance but that her attendance needed improvement. Ms. Costanzo signed this and no response was submitted.

A summative evaluation from April of 1990, which was Ms. Costanzo's third year teaching (J-5), also addressed the need to improve her attendance and that she had been so informed. That evaluation stated that failure to improve attendance could result in termination. No response was submitted to this report and it was signed by the petitioner.

With respect to a summative evaluation of March 1991 (J-6), Ms. La Prete pointed out that it indicated that students have lost instructional time due to absences over the three-year period. As a result, Ms. Costanzo was not being recommended for reappointment. Ms. Costanzo also signed this last evaluation.

According to Ms. La Prete, attendance is paramount in making school function day in and day out. Although long-term illness is viewed differently, the impact of a long-term absence does not provide necessarily an inconsistency in instruction which the children are given. That would give the district the opportunity to plan to get a certified instructor in the same subject area. She stated that incidental absences provide the problem of no continuity of instructors, whether they are substitutes or other instructors.

Prior to the day of her testimony, Ms. La Prete indicated that she was unaware of the petitioner's age. She clearly stated that age had no part in the determination not to rehire the petitioner, and that she had never had any discussion regarding any possible handicap or illness which the petitioner might have had. These were never

considered nor was gender an issue. She was also not told or forced by anyone to make the recommendation that petitioner not be rehired.

Ms. La Prete stated that each year after a conference was held and the petitioner was encouraged to improve her attendance. It did, in fact, improve. Nonetheless, her attendance included fifteen absences in her first year, which was two over that provided by contract. It also included thirteen absences for her second year and thirteen absences for her third year.

Ms. La Prete stated that it was her feeling that the district would not want this problem to continue for the next twenty years by rehiring petitioner as a tenured teacher. She also described an incentive program which exists when there are funds available. Through this incentive program those individuals who have a perfect attendance record for a first year receive some form of reward. The rewards increase slightly from year to year as the individuals may accumulate other unblemished years.

Stanley Friedman also testified during the hearing. He was a supervisor and is certified for English K-8 and foreign language K-12. He acted as a supervisor of language and foreign language for grades 7 through 12 during the period of time from 1988 to June of 1991 and was the petitioner's supervisor. He participated in a number of evaluations of the petitioner, including the March 1991 evaluation (J-6). That evaluation indicated a need for improvement under the category of work habits and obligations. He stated that he felt attendance fit in here and there was no specific spot for attendance itself. He did speak with petitioner over the three-year period and told her that she needed to improve her attendance.

The March 1989 evaluation (J-4) also had a paragraph dealing with attendance. He did not recall if he specifically wrote it, but he did participate in the evaluation conference.

With respect to the April 1990 evaluation, he participated and it reflected thirteen absences. It also contained a paragraph regarding attendance.

The witness stated that he concurred in the decision not to rehire Ms. Costanzo after the third year. During the first two years, they wanted to give her every

opportunity to achieve tenure. At the end of the third year, it was necessary to make a decision.

He confirmed that there was never a punctuality problem with the petitioner.

He stated that at some time after the 1991 evaluation he was called into Mr. Del Monaco's office. He was then asked to give the petitioner the evaluation and called her into his office. He showed her the evaluation and she began to cry. He went in order to cover her homeroom until she was able to continue her duties.

The witness stated that he had spoken with her regarding her attendance. When absent, she did call him directly and either she or her husband would call and give him the lesson plans for the day.

The witness stated that when he made a determination to recommend that she not be rehired, it was not based upon any question or concern that she might not have been ill while using the sick time. According to him, the loss of instructional time was the only factor which was used. He stated that the board policy allowed thirteen days of sick leave per year.

In that particular year, he evaluated approximately fifteen individuals and Ms. Costanzo was the only one not recommended for reappointment.

The witness stated that the first comments regarding her attendance dated back to 1989. Classroom attendance was mentioned and she was urged to improve. She received that evaluation and signed it and did discuss the comment with the witness during a December 5, 1989 conference. He stated this was to put her on alert. Attendance immediately impacts on all the students she would be teaching. No response in writing was received as a result of this conference.

The classroom evaluation of February 8, 1990 (J-2) was made by this witness. On page three, the last paragraph also urged her to improve her attendance. She did not submit any written response to this evaluation.

The witness stated that the purpose of a conference is to discuss both the positive things which a teacher exhibits, as well as those negative aspects which may

exist. She was given a copy of the February 1990 report twenty-four hours prior to signing it.

The witness also participated in the summative evaluation of March 1989 (J-4). He stated that they were pleased with her performance. However, her attendance was less than satisfactory. The petitioner did sign it and did not submit a written response. This was the third writing that advised her of the possibility of a problem regarding attendance.

The 1990 summative evaluation (J-5) was prepared and signed and also noted the attendance problem. That particular evaluation informed Ms. Costanzo of the possibility that there would be a recommendation to terminate her employment if the attendance problem was not remediated. She received a copy and signed it, and no written response was submitted. He stated that this was the second year and they wished to make sure that she was aware of both the problem and the possibility of termination.

The witness stated that this is not an attendance pattern that he is pleased to see. She exhibited the same pattern in 1990-91.

He also participated in the summative evaluation of March 1991 (J-6). That evaluation made comment on page two that students had lost instructional time. By that time, he had already given her at least three warnings regarding attendance.

This last summative evaluation was the most important one because the decision to rehire or not to extend an offer of employment would mean whether or not the petitioner would receive tenure.

This witness conceded that Ms. Costanzo was an outstanding teacher in the classroom. The decision to deny her tenure was based solely upon inconsistencies in her attendance and the impact of lost instructional time on the students. He stated that if a teacher is absent, he or she must make sure that plans are given to the substitute and explain the program so that it can be carried out appropriately.

If there is a long-term absence, then a person with a certificate in that particular subject area could be obtained, and there would be less interruption of

services to the students and more continuity of education. Substitutes cannot effectively replace the teacher where incidental absences are at issue.

The witness stated that he weighed the favorable attributes of Mrs. Costanzo against her attendance record and felt that the attendance problem outweighed the positive aspects of her teaching abilities.

The witness indicated that the first time he found out the petitioner's age was the day of the hearing at which he testified. He did not consider age in making his decision nor did he at any time discuss any possible handicap or illness as these were not reasons for the decision not to rehire.

Ms. Costanzo never asked for any specific accommodation in order to help her deal with any possible or perceived handicap. The witness also confirmed that no one forced him to reach the conclusion which he did, and it was entirely voluntary on his report.

The witness recapped the reasons for not rehiring Ms. Costanzo as:

1. The number of absences.
2. The pattern of absences.
3. The adverse impact upon student instruction.

Anthony Rocco, Jr. also testified during the hearing. He is the Business Administrator and Board Secretary and has a business function as well as setting up meetings and taking minutes for the board of education. He is involved with staff members regarding pay but not with respect to professional evaluations. As of the time of the hearing, it was his fourteenth year as secretary to the Rahway Board of Education. On April 16, 1991, there was a board of education meeting, and the board was involved both in private caucus and in open public meeting.

With respect to public comment, he stated that the public is able to make comments about issues that come up. At the conclusion of that, the board goes into private session and no members of the public are permitted within. Members of the public did speak at the open session. The witness does not recall any questions being

posed by board members. He did state that there might have been a verbal discussion, but did not know precisely how long it took.

The decision of the board of education was to not rehire Ms. Costanzo. A memo, dated April 17,1991, from Frank D. Brunette to Ms. Costanzo, informed her that, as a result of the meeting held on April 16, 1991, she would not be offered a contract for the 1991-92 school year.

The petitioner, Bernadette Costanzo, also testified during the hearing. She was first employed as a French and Spanish teacher by the Rahway Board of Education in September of 1988. Prior to becoming employed, she was interviewed by Ms. La Prete and told that the position could possibly lead to tenure. Prior to that, she had worked for the Bayonne school system.

She submitted to a physical examination and filled out forms.

She stated that during the interview she was told that a teacher was permitted thirteen sick days per year. There was a specific phone number she had to call to indicate that she would be out absent. She then had to call her supervisor and give him details of the lesson plan. She stated that she called Mr. Friedman when she was ill or if her son was ill and told him so.

Petitioner agreed that the attendance records for her were correct indicating that in the 1988-89 school year she was out fifteen days, which involved eleven discreet periods of absence. In the 1989-90 school year, she was out thirteen days which involved ten discreet periods of absence, and in the 1990-91 school year she was out thirteen school days which involved four discreet periods of absence. She did not submit medical verification as to her absences because she was not required to do so.

In the 1988-89 summative evaluation, she indicated that she was present and acknowledged the evaluation. She stated that her attendance improved somewhat

after the evaluation and that she is more susceptible to colds and flu in the warmer months. In 1990-91, she experienced a great deal of pain and went to a doctor for tests. She stated that he determined she suffered from severe gastritis and she spoke to Mr. Brown as well as Mr. Friedman. She finally sought medical treatment after November of 1991.

The witness testified that she was rehired after the 1988-89 summative evaluation even though she had used the agreed upon number of sick days.

The witness testified that she requested a meeting with the superintendent after the summative evaluation (J-15). She also requested a meeting with the board in April. She did receive a meeting with the superintendent around Easter break and gave him copies of the evaluations from the Bayonne school system. She did not recall a conference with Mr. Brunette regarding nonreappointment. Subsequently, she received a memo that she was not going to be recommended for tenure. After receiving this memo, she asked for a hearing before the board and never received a response.

She did receive notification after the board's action. After concluding her work for the Rahway Board of Education, she began to work at St. Peter's Prep in Jersey City, teaching French and Spanish in grades nine through twelve. She has an annual contract with them, with her first year's salary amounting to $25,700 and her second year's salary amounting to $26,225. Had she remained with the Rahway Board of Education for the 1991-92 school year, her salary would have been approximately $31,000 with a Master's plus thirteen credits and in the 1992-93 school year, it would have been approximately $41,000 with her Master's plus thirty credits. She stated that she would have been allowed to take courses as long as she maintained a B average and that the Rahway Board of Education would have reimbursed her. As of June of 1991, she had only three credits; however, since that time, she has received six more credits but not been reimbursed for the courses that were taken. The total amount for the courses which she has taken but has not been reimbursed was $798.

The petitioner also testified that she had a dental plan at Rahway and had amassed a number of dental bills. She stated that the total unreimbursed amount was $1,140; however, she also had dental coverage under her husband's work and was unable to say whether or not the bills had been paid or covered through his

plan. She also was unable to describe the type of coverage that she had through her husband's employment or whether or not there was a deductible.

The petitioner testified that she feels that she was treated differently from other employees. She wrote letters requesting a hearing and did not receive one and feels that she was not allowed to speak on her own behalf. She indicated that she felt humiliated because she has never been let go from any position before and feels that this acts as a black mark on her record.

The petitioner testified at length regarding the days which she was out as to whether or not they were all due to her own illness or whether, on several occasions, they may have been due to the illness of a child.

Ms. Costanzo conceded that on her health status examination form, which was filled out prior to her employment with the Rahway Board of Education, she stated that she did not have any condition that would limit or restrict her ability to perform her job. No indication on that form was made that she suffered from any handicapping condition.

Ms. Costanzo conceded that the first time she was made aware that there was an attendance problem was in the first year. In the classroom observation report in 1989, there was a notation on the last page regarding her attendance in the 1988-89 school year. She did not submit a response to the evaluation because there was nothing in the evaluation that was not true. In the February 8, 1990 conference, as a result of her classroom evaluation, it also stated that she was urged to improve her attendance. She acknowledges that this was the second notice that she was given with respect to the problem.

The witness strenuously agrees that continuity of instruction is important for students.

The witness also acknowledges having signed and received a summative evaluation, dated March 23, 1989, which stated that Rahway was pleased with her performance but that her attendance was not satisfactory. She did recall discussing her attendance record with Mr. Brown, but did not recall if it was as a result of this evaluation. She also did not feel the need to write a written response to this one.

The April 1990 summative evaluation notified her that failure to improve could result in a recommendation to terminate her employment from Rahway. She stated that she was concerned when she was told this; however, she did not file a written response. Ms. Costanzo stated that she recognizes that she had been absent but felt that her other contributions were strong and positive and therefore outweighed any problems that her absences might have caused. She never felt that absence alone would be the factor relied upon in making a decision as to whether or not to rehire her.

The petitioner also acknowledged having seen the board of education attendance policy (J-9), which is in the manual given to the teachers. This discusses attendance and requires the presence of assigned personnel.

Ms. Costanzo stated that at no time did she request a leave of absence and therefore must concede that the board of education did not fail to grant her any leave of absence.

Ms. Costanzo did go to the April 16, 1991 board of education meeting. She was present for the entire meeting, although she was not in the private session. A number of people spoke on her behalf in public. However, she made no statement during the public session. She acknowledged that none of the administrators at Rahway told her that she could not speak at the meeting.

Ms. Costanzo acknowledges that she had received a number of cautions regarding her attendance. She did not indicate to the Rahway Board of Education that she suffered from any type of handicap nor did she ask for any leave of absence due to extended illness or disability. She also did not ask the board for any accommodation for any physical limitations from which she might suffer.

In rebuttal, the board of education called Nicholas Del Monaco, who is the Principal of Rahway High School. From January 1, 1991, he was the Acting Principal until April 1, 1991 when he became the fulltime Principal. He began his career with the Rahway Board of Education in 1963. He was certified as a chief school administrator in 1975. He listed his educational background during his testimony.

He testified that one of the things he learned in graduate school and has stressed is the importance of attendance for teachers. He stated that there is no substitute for the real teacher.

From 1978 to 1990, he was the Assistant Superintendent of Schools under Frank Brunette, which made him second in command for the entire district. Part of his job was interviewing new teachers, discussing the job as well as fringe benefits, district rules and regulations, the sick bank and expectations that the school district has for them. He would then set up an appointment with the individual and the superintendent. He also discussed attendance with them, as well as tuition reimbursement.

Mr. Del Monaco described an incidental absence as being less than five days while a long-term absence was five or more consecutive days. He stated that this was discussed at the orientation meeting for all teachers. Petitioner started in the 1988-89 school year and there was an orientation meeting prior to the start of school. Evaluative procedures were covered and that included attendance. There was also discussion of loss of instructional time and the adverse affect that it would have on students.

The witness stated that he first saw Ms. Costanzo's evaluation when she started to work. He got copies of the classroom observations and the summative evaluations. He stated that he was aware of Ms. Costanzo's attendance record. He did send a memo to Ms. Costanzo and met with her and discussed attendance.

He testified regarding the evaluations (J-1 through J-6) and indicated that the last two paragraphs not recommending that she be rehired in the summative evaluation of March 1991, while he was Acting Principal, were written by him. He stated that he weighed the attendance factor against her many positive aspects. Attendance is extremely important and this would have been her last year before getting tenure.

The witness testified that he never knew the petitioner's age until he found it out during the hearing nor was he aware of any handicap or medical condition that would have precluded the petitioner from being able to work or needing an accommodation. The witness also stated that Ms. Costanzo's gender was not an

issue in his decision and no one forced him or coerced him not to rehire her. He stated that he did so voluntarily based upon all factors weighed together.

The witness testified that this would have been the last year prior to Ms. Costanzo's receiving tenure. According to him, bad habits such as attendance problems, usually carry over so the district looks very carefully at them. They consider the three years leading up to that as a probationary period. While he agrees that academically Ms. Costanzo met the expectations of the board and the district, her attendance did not fit their expectations and was sufficiently weighed to result in her not being rehired.

Ronald Dolce was also called as a witness. He had been with the Rahway Board of Education for twenty-three years as a teacher. He is also president of the Rahway Education Association (REA). He represents certified staff and noncertified staff. He was the president of the organization in the 1990-91 school year. His function is to protect teachers' rights and maintain contract and support educational systems. He stated that he usually attends board of education meetings and is familiar with the format used.

The witness stated that he knows Ms. Costanzo as a teacher with the district. At the time of the hearing, he had not spoken to her since her termination. He stated that anyone in the audience during a board meeting has the right to speak during the public portion of the meeting. He denied having ever told anyone that they cannot speak at the public portion of the meeting. He stated that he did not tell Ms. Costanzo that she was not able to talk. He was present at the meeting when Ms. Costanzo's reappointment was voted on and was there for the entire meeting, with the exception of the private session. He stated that people spoke on her behalf and there were no negative comments.

Frank D. Brunette also testified. He was the Superintendent of the Rahway Board of Education from 1978 to 1992. He had been with Rahway for twenty years from 1959 to 1978 before he became Superintendent.

He stated that he had developed a philosophy essentially delineating that one who is employed should be present at the work site. To him, this is particularly important in education. There is a correlation between time on task and ability. He

stated that he carried out that philosophy while he was Superintendent in the district. According to him, there is a high correlation between teacher performance and their attendance and he asked the board of education to acknowledge good performance. The board of education policy (J-9) was implemented and it sets a course for the district which is "vital" to the success of the district. He stated that high absence rates would have a detrimental effect over a period of time.

The witness testified that he made a recommendation not to renew Ms. Costanzo's contract to the board of education and based it on the recommendation of the High School Principal, Mr. Del Monaco.

He also spoke with Mr. Brown before he left about Ms. Costanzo's attendance problems several times. He also spoke with employees about other nontenured teachers. He stated that when Mr. Brown recommended reappointing Ms. Costanzo after the first and second years, he accepted that recommendation. After the third year, however, the recommendation was to terminate, and he accepted that decision. He was aware of the problems through a series of meetings and when he met with Ms. Costanzo in April 1991, he had already had other meetings with her. He stated that he had reviewed the evaluations and the problems that had been documented in J-1 through J-6. He based his decision in reviewing these items and upon the strength of the recommendation by the principal.

The witness stated that he has recommended not rehiring other individuals for excessive absenteeism and that one person which he did not recommend rehiring was a man. He testified that this was not a gender-based issue and that he did not know Ms. Costanzo's age at the time the decision was made. He also testified that the decision was not based upon some form of handicap or disability. He does not know if she has any form of handicap or disability. He also stated that she never asked for a leave of absence.

Mr. Brunette agreed that Ms. Costanzo did meet the district's expectations with regard to her teaching performance. However, she did not meet their expectations regarding attendance.

The witness testified that he had personally reviewed Ms. Costanzo's attendance record after he received her summative evaluation and was aware there

were medical excuses for some, if not all, of the absences. He testified that the reasons for the absences were not in question. The only factor was the loss of instructional time to students. As a result, it was only the number of absences that were of concern to him.

FINDINGS OF FACT

Having heard the testimony of the witnesses and having assessed their credibility, as well as having reviewed the documentary evidence in this case, I **FIND** the following to be **FACT**:

1. Petitioner was employed by the respondent as a nontenured teacher in the Rahway High School for three school years, 1988-89; 1989-90; 1990-91.

2. Petitioner was advised through her summative evaluation of March, 1991, that she was not being recommended for reappointment. (J-6).

3. On March 22, 1991, petitioner requested a meeting with Superintendent, Frank D. Brunette, to have Superintendent Brunette reconsider her appointment (J-15).

4. On March 26, 1991, Superintendent Brunette wrote to petitioner asking her to call his office to arrange an appointment with her (J-14).

5. On April 8, 1991, the petitioner wrote to Superintendent Brunette thanking him for speaking with her (J-16).

6. On April 10, 1991, petitioner acknowledged receipt of the Superintendent's letter to her that she would not be recommended for renewal of a contract, and that the board would discuss and act on the recommendation at their regular meeting scheduled for April 16, 1991 (J-17).

7. On April 11, 1991, petitioner wrote to Superintendent Brunette enclosing a letter addressed to the board president asking the superintendent to

forward the letter to him ". . . requesting a possible meeting prior to the open board session of April 16."

8. On April 17, 1991, petitioner acknowledged receipt of the Superintendent's April 17, 1991 letter advising her that the school board of education would not offer a contract to her for the 1991-92 school year (J-19).

9. On May 1, 1991, the petitioner requested a statement of reasons for her not being offered a contract (J-20).

10. On May 15, 1991, Superintendent Brunette provided petitioner with the reasons for nonappointment (J-21).

13. On May 23, 1991, petitioner wrote to the board president requesting an informal appearance before the board at an open public meeting to persuade the board to reconsider its initial decision (J-34).

14. While this letter was received by the board, no response was made to the request to appear before the board and therefore the petitioner did not have the opportunity to do so.

15. The reason for not rehiring the petitioner after her third year of employment was due to a pattern of absences in the preceding three years. In the 1988-89 school year, she was absent fifteen days in a pattern of incidental absences. In the 1989-90 school year, she was absent thirteen days, again in a pattern of incidental absences. In the 1990-91 school year, she was absent a total of thirteen days, also in a pattern of incidental absences.

16. The petitioner's contract called for a maximum thirteen days of sick leave in a given year.

17. Other than the question of absences, Ms. Costanzo's performance was acceptable and indeed positive, and the decision not to rehire her was in

no way based upon performance-related aspects of her employment other than the question of absences.

18. Nothing exists in the record to suggest that any sick days taken by the petitioner were for any reason other than legitimate use upon her part.

19. The importance of attendance of teaching staff members was stressed with all teaching staff members, both prior to their beginning work as well as from year to year during incentive assemblies.

20. Clearly incidental absences cause interruption and interference with the day-to-day instructional program of students due to the fact that last-minute substitutes must be brought in. Incidental absences cause a greater interference than prolonged anticipated absences due to the fact that the individual, who may come in as a substitute, would not be able to provide the necessary continuity of program. In a prolonged absence, the district would be able to minimize the amount of interruption by providing for a concisely planned manner in which to deal with the situation.

21. The petitioner received a number of indications from her superiors in each of her three years of employment with the Rahway School District that her absences were excessive and a cause for concern. She was advised both orally, as well as specifically in writing, on at least seven separate occasions:

    (a) summative evaluation of March, 1989 (J-4)
    (b) classroom observation report of December 4, 1989 (J-1)
    (c) classroom observation report of February 15, 1990 (J-2)
    (d) Principal's memo to petitioner of February 20, 1990 (J-11)
    (e) summative evaluation of April, 1990 (J-5)
    (f) Principal's memo to petitioner of January 14, 1991 (J-12)
    (g) summative evaluation of March 30, 1991 (J-5)

22. The decision of the Rahway Board of Education not to rehire the petitioner who was a nontenured employee, was within the board's

discretion and was not unreasonable, arbitrary or capricious, but rather based upon a review of the information available and the recommendations of the evaluating personnel.

23. The petitioner requested that the Rahway School District provide a statement of reasons as to her not being rehired and was provided with such in a timely fashion.

24. The petitioner requested an informal appearance before the board of education. However, no such appearance was granted and the board failed to respond to the petitioner's request. There is no evidence in the record that suggests that the failure to respond was intentional.

25. The petitioner attended the board of education meeting on April 16, 1991, at which time action was to be taken by the board on the Superintendent's recommendation not to rehire her. At that time, she was present throughout the entire meeting and a number of individuals commented on that action and her job performance during the public portion of the meeting. While the petitioner claims that she was unaware that she could speak, I find that there is nothing in the record to support her contention that she felt she was someone not permitted to speak when the rest of the public was permitted to do so. She made no effort during that meeting to address the board of education.

26. The board, after hearing the information presented at the meeting, then voted not to extend a new contract to Ms. Costanzo.

LEGAL ARGUMENT

The petitioner initiated this action alleging violations of various school laws as well as allegations relative to discrimination under *N.J.S.A.* 10:5.1 *et seq.* The authority of the Commissioner to hear and determine issues of school law is statutory and is found in *N.J.S.A.* 18A:6-9.

While petitioner's complain includes allegations relative to questions under the Law Against Discrimination (LAD), jurisdiction to hear allegations alleging

discrimination other than under Title 18A, may come under the jurisdiction of the Department of Education to concurrently entertain the complaint and the jurisdiction of the Division of Civil Rights is not mandatory. *Hinfey v. Matawan Regional Board of Ed.*, 77 *N.J.* 514 (1978).

In this case, the petitioner alleges that the failure to rehire her and extend a contract to her violated the minimum standard of due process guaranteed under State education laws and elementary due process protection.

The respondent board of education has admitted that it did not comply with the provisions of *N.J.A.C.* 6:3-1.20, which provides the procedure for appearance of nontenured teaching staff members before a district board of education upon receipt of notice of non-reemployment.

There is no question that this portion was not complied with. The weight and effect to which this should be given will be discussed later in the discussion portion of this decision. The other alleged violations of due process found in the petitioner's posthearing submission at page 25 and 26, numbers one through eight, are not found to be substantiated within the course of the proceeding.

The petitioner contends that there was a denial of due process in the implementation of the summative evaluation where she alleges she first learned of Mr. Del Monaco's position regarding nonrenewal in J-6. This portion is completely unfounded. In prior evaluations, questions regarding her attendance were brought up and are clear in the exhibits which have been marked into evidence. While it was not until J-6 that there was a specific statement regarding the adverse impact her absences would have, resulting in the possibility of nonrenewal, it is clear that her attendance over the three-year period had been questioned and pointed out to her.

Petitioner argues that *N.J.A.C.* 6:3-1.19(d) requires the board to adopt a written policy regarding the supervision and provides the same to each teacher as well as requiring a written evaluation of the total performance. Petitioner seems to have added a requirement into that particular regulation which does not exist. *N.J.A.C.* 6:3-1.19(d) states that each policy for the supervision of instruction shall include, in addition to those observations and evaluations hereinbefore described, a written evaluation of the nontenured teaching staff members total performance as

an employee of the district board of education, including but not limited to certain enumerated areas. The evaluations discussed are defined in subsection (b) as meaning a written evaluation prepared by the administrative or supervisory staff member who visits the work station for the purpose of observing a teaching staff member's performance of the instructional process. Petitioner seems to have jumped from what is required in the evaluation process into adding a requirement that the board adopt a written policy regarding the supervision and give this to the teacher under that particular regulation. No such requirement exists pursuant to the regulation. The board of education and the district in this case complied with the provisions of *N.J.A.C.* 6:3-1.19 requiring their supervision of instruction as well as observation and evaluation of nontenured staff members.

Respondent also argues that the board of education acted arbitrarily and capriciously in not rehiring petitioner. In the three years the petitioner worked for the respondent, she exceeded the permissible amount of sick days by two in her first year. In the second and third years, she used the thirteen days each year that were available to her. High absenteeism has previously been deemed sufficient grounds for disciplinary action in tenure matters, even with the existence of legitimate medical excuses. *Montville Township Education Association v. Bd. of Education of the Township of Montville,* OAL Dkt. No. EDU 8247-83, Commissioner's decision at 10 (April 16, 1984); *Angelucci v. West Orange Board of Education*, 180 *S.L.D.* 1066; *In the Matter of the Tenure Hearing of Blanche Sheets*, 1980 *S.L.D.* 526, State Board rev'g 1979 *S.L.D.* 790. In this case, there are medical reasons for the absences. However, there is no question that Ms. Costanzo had been warned about her absences. Excessive absenteeism can interefere with the operation of schools. *Sheets, supra.* In the *Sheets* case, the court's holding was that even if the teacher was on approved medical leave or utilized only those sick days to which they were entitled, this would not prevent the argument that the absences were part of a record which justified a teacher's removal. *Id.* at 791. While that case dealt with a tenured teacher, the question of absenteeism is certainly equally as important when it comes to a nontenured teacher. Prior absences certainly can be used as a predictor of future patterns of absences which may come forward.

It is also equally imperative that the individual be given warnings that his or her superiors are dissatisfied with the pattern of absences which has come forward. In this case, Ms. Costanzo received a number of evaluations in which reference was

made to her absences. Notwithstanding the fact that she was apparently a fine teacher, it is compelling to any board of education for them to know that if they accept a teacher in a tenured position, that teacher will be able to fulfill the duties without interruption in services and a break in continuity of instruction to their students. The respondent's conduct was neither arbitrary, capricious or unreasonable, in that they weighed the mitigating factors regarding Ms. Costanzo's performance with the problems created by the pattern which she exhibited.

Petitioner also alleges violations of the LAD based upon age, sex or as regard to handicap or a perception of handicap. In this case, the testimony clearly and unequivocally established that the decisions made were in no way related to the age of the petitioner, her sex or any perception of handicap. In addition to this, petitioner admitted during her testimony that she does not suffer from any handicap. This, coupled with the fact that at no time did she request a leave of absence nor was one denied, clearly forecloses the argument that there has been a violation of the LAD.

Based upon all the considerations, it was clearly within the respondent's discretion to determine whether or not to reemploy Ms. Costanzo, a nontenured teacher, for a fourth year which would have granted her tenure. A nontenured teacher, while entitled to protection from arbitrary and capricious action, is not entitled to be treated in a nature in which a tenured teacher would, where there is a proposal of termination of employment. The question is whether or not the board acted reasonably in its decision and I **FIND** that, weighing the facts and circumstances, their decision was reasonable and not based upon improper considerations such as age, sex or handicap or perception of any handicap. The school board has discretion to determine whether or not to offer continued employment to its nontenured teachers. *Fousty v. South Plainfield Board of Ed.*, 1990 *S.L.D.* ____ (March 23, 1990).

The board of education complied with all relevant aspects of the regulations and the statutes with the exception of granting an informal appearance before the district board of education. There is no question that Ms. Costanzo requested that pursuant to *N.J.A.C.* 6:3-1.20. Neither *N.J.S.A.* 18A:27-3.2 nor *N.J.S.A.* 18A:27-10 nor their implementing regulation, *N.J.A.C.* 6:3-1.20, impose any specific penalty in the event that a local board fails to provide the prescribed procedures such as the

informal hearing before the board of education. A lack of strict compliance with the regulation should not necessarily be read to convey an immediate right to be rehired to the petitioner. There is no evidence that this failure was anything other than inadvertent or unintentional. Additionally, not unlike the situation in Civil Service cases, the proceeding before the Office of Administrative Law should serve to remedy the lack of appearance in an informal proceeding before the board of education. It is the hearing that took place at the OAL that, in essence, takes the place of the informal appearance as well as answering all other questions of fact and law which are presented. As a result, it is very much like a *de novo* proceeding which will cure any administrative defects below. *In re Darcy*, 454 *N.J. Super.* (App. Div. 1971).

CONCLUSION

Based upon the foregoing, I **CONCLUDE** that the action of the Rahway Board of Education in choosing to not rehire the petitioner, Bernadette D. Costanzo, for the 1991-92 school year, was a lawful exercise of its discretion. I further **CONCLUDE** that the Rahway Board of Education did not discriminate against the petitioner or violate the LAD nor did they violate any of her due process rights.

ORDER

Therefore, it is hereby **ORDERED** that the petition of Bernadette D. Costanzo be and hereby is **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

7/19/93
Date

MARYLOUISE LUCCH-McCLOUD, ALJ

Receipt Acknowledged:

7/21/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 22 1993
Date

OFFICE OF ADMINISTRATIVE LAW

APPENDIX

Witnesses

For Petitioner:

Bernadette Costanzo

For Respondent:

Rene LaPrete
Stanley Freedman
Anthony Rocco, Jr.
Nicholas Del Monaco
Ronald Dolce
Frank D. Brunette

Evidence

J-1	Classroom observation report, December 4, 1989
J-2	Classroom observation report, February 8, 1990
J-3	Classroom observation report, February 26, 1991
J-4	Summative evaluation, March 1989
J-5	Summative evaluation, April 1990
J-6	Summative evaluation and response thereto, March 30, 1990
J-7	Calendars-Number of accumulated days, 1988-89, 1989-90, 1990-91
J-8	Sick leave record, 1988-1991
J-9	Attendance patterns - Board Policy, September 6, 1988
J-10	Health status examination, November 22, 1988
J-11	Memo: Robert Brown to Bernadette Costanzo, February 20, 1990
J-12	Memo: Nicholas Del Monacoto Bernadette Costanzo, January 14, 1991
J-13	Memo: Nicholas Del Monacoto Bernadette Costanzo, January 18, 1991
J-14	Memo: Frank Brunette to Bernadette Costanzo, March 26, 1991
J-15	Letter: Bernadette Costanzo to Frank Brunette, March 22, 1991
J-16	Letter: Bernadette Costanzo to Frank Brunette, April 8, 1991

J-17 Memo: Frank Brunette to Bernadette Costanzo, April 10, 1991

J-18 Letter: Bernadette Costanzo to Frank Brunette, April 11, 1991

J-18a Attachment to Board (see 1B)

J-19 Memo: Frank Brunette to Bernadette Costanzo, April 17, 1991

J-20 Letter: Bernadette Costanzo to Frank Brunette, May 1, 1991

J-21 Letter: Frank D. Brunette to Bernadette Costanzo, May 15, 1991

J-22 Letter: Bernadette Costanzo to Frank Brunette, May 29, 1991

J-23 Plan for improvement of staff attendance, February 19, 1991

J-24 Letters of recommendation with regard to Bernadette Costanzo (7)

J-25 Medical: Harold Perkel, M.D., December 16, 1989

J-26 Medical: Allergy Consultants, P.A., October 17, 1988, January 9, 1989, February 6, 1989, February 15, 1989, March 13, 1989 and May 15, 1989

J-27 Minutes: Rahway Board of Education regular meeting, April 16, 1991

J-28 Employee attendance record, 1988-1989

J-29 Employee attendance record, 1989-1990

J-30 Employee attendance record, 1990-1991

J-31 Partial list of teachers

J-32 Minutes and agenda of closed session, April 16, 1991

J-33 Medical documentation

J-34 Letter: Requesting hearing from Bernadette Costanzo to President, Board, May 23, 1991

J-35 Teachers' Contract with sick bank policy, 1990 to 1993

J-36 Year-end evaluation addendum, June 16, 1989

J-37 Year-end evaluation addendum, June 12, 1990

J-38 Year-end evaluation addendum, June 13, 1991

J-39 Letter from Robert L. Brown, Principal, May 29, 1990

J-40 Stipulation of Facts, December 4, 1992

P-1 Rahway District Evaluative Procedures

P-2 Letter, dated April 14, 1992, from James Joyce

P-2a Salary voucher

P-3 Jersey City State College grade report ("91-SUM1")

P-3a Jersey City State College grade report (92-Spring) and copy of check, December 11, 1991

P-4 Copies of dental bills

P-5 Fax to Leo Kahn, May 30, 1991, two pages
(for identification)

R-1 Interrogatories, March 30, 1992
(for identification)

R-2 Rahway Board of Education agenda, April 16, 1992

R-3 Employment contract, June 14, 1990

OAL DKT. NO. EDU 9155-91

BERNADETTE D. COSTANZO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF RAHWAY, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions were untimely filed pursuant to the dictates of N.J.A.C. 1:1-18.4.

Upon a careful and independent review of the record of this matter, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge. As stated by the Court in Dore v. Bedminster Township Board of Education, 185 N.J. Super. 447 (App. Div. 1982):

> ***absent constitutional constraints or legislation affecting the tenure rights of teachers, local boards of education have an almost complete right to terminate the services of a teacher who has no tenure and is regarded as undersirable by the local board.*** (at 456)

The Commissioner is in agreement with the ALJ's finding that although the Board erred in not conplying with N.J.A.C. 6:3-1.20 [now 6:3-4.2], this violation of due process was remedied by the proceedings herein. Therefore, in the absence of any statutorily or constitutionally proscribed basis for the Board's

choosing not to rehire petitioner for the 1991-92 school year, such action was a lawful exercise of its discretion.

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

ACTING COMMISSIONER OF EDUCATION

AUGUST 23, 1993

DATE OF MAILING - AUGUST 23, 1993

199-93

EDU #9155-91
C # 199-93
SB # 53-93

BERNADETTE D. COSTANZO,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF RAHWAY, UNION COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, August 23, 1993

For the Petitioner-Appellant, John A. Smith, III, Esq.

For the Respondent-Respondent, Schnirman, Charney, Kahn & Howard (Alan Schnirman, Esq., of Counsel)

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

January 5, 1994

Date of mailing JAN 07 1994

199-93

EDU #9155-91
C # 199-93
SB # 53-93

BERNADETTE D. COSTANZO,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF RAHWAY, UNION COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, August 23, 1993

Decided by the State Board of Education, January 5, 1994

For the Petitioner-Appellant, John A. Smith, III, Esq.

For the Respondent-Respondent, Schnirman, Charney, Kahn & Howard (Alan Schnirman, Esq., of Counsel)

On January 5, 1994, the State Board of Education rendered its decision in this case, affirming the Commissioner's determination to dismiss the petition of a nontenured teacher who had alleged that the district board had not rehired her because of her age and physical condition.

On February 18, 1994, petitioner filed a motion for clarification/reconsideration of our January 2 decision. After considering the arguments of counsel, we deny that motion. Not only is the motion untimely, N.J.A.C. 6:2-2.7, but petitioner fails to provide any basis which would justify reconsidering our decision.

April 13, 1994

Date of mailing APR 15

200-93

200-93

CHRISTOPHER L. WAGNER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PASSIAC COUNTY TECHNICAL AND VOCATIONAL HIGH SCHOOL DISTRICT, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

AUGUST 23, 1993

OAL DKT. NO. EDU 5319-93

CHRISTOPHER L. WAGNER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PASSIAC COUNTY TECHNICAL AND VOCATIONAL HIGH SCHOOL DISTRICT, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before her and is dismissed with prejudice.

IT IS SO ORDERED.

Glen J. Gold

ACTING COMMISSIONER OF EDUCATION

AUGUST 23, 1993

DATE OF MAILING - AUGUST 23, 1993

201-93

EVELYN DI MARIA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MAINLAND REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

AUGUST 23, 1993

OAL DKT. NO. EDU 109-93

EVELYN DI MARIA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MAINLAND REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before her and is dismissed with prejudice.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

AUGUST 23, 1993

DATE OF MAILING - AUGUST 23, 1993

202-93

202-93

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF NEPTUNE TOWNSHIP, MONMOUTH COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

AUGUST 23, 1993

OAL DKT. NO. EDU 3996-93

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF NEPTUNE TOWNSHIP, MONMOUTH COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before her and is dismissed with prejudice.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

AUGUST 23, 1993

DATE OF MAILING - AUGUST 23, 1993

203-93

JENNIFER PARIENTE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF NEWTON, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

AUGUST 23, 1993

OAL DKT. NO. EDU 6155-93

JENNIFER PARIENTE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF NEWTON, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before her and is dismissed with prejudice.

IT IS SO ORDERED.

Ellen J. Sr

ACTING COMMISSIONER OF EDUCATION

AUGUST 23, 1993

DATE OF MAILING - AUGUST 23, 1993

204-93

204-93

ROBERT FINE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SCOTCH PLAINS-FANWOOD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

AUGUST 23, 1993

OAL DKT. NO. EDU 6005-92

ROBERT FINE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SCOTCH PLAINS-FANWOOD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before her and is dismissed with prejudice.

IT IS SO ORDERED.

Ellen J. Sroka

ACTING COMMISSIONER OF EDUCATION

AUGUST 23, 1993

DATE OF MAILING - AUGUST 23, 1993

205-93

205-93

JOHN GREEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MIDDLESEX COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

AUGUST 23, 1993

OAL DKT. NO. EDU 6148-93

JOHN GREEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MIDDLESEX COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before her and is dismissed with prejudice.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

AUGUST 23, 1993

DATE OF MAILING - AUGUST 23, 1993

206-93

IN THE MATTER OF THE CAP WAIVER	:	
	:	
APPEAL OF THE BOARD OF EDUCATION	:	COMMISSIONER OF EDUCATION
	:	
OF THE BOROUGH OF MOONACHIE,	:	DECISION
	:	
BERGEN COUNTY.	:	
	:	

AUGUST 24, 1993

IN THE MATTER OF THE CAP WAIVER	:	
APPEAL OF THE BOARD OF EDUCATION	:	COMMISSIONER OF EDUCATION
OF THE BOROUGH OF MOONACHIE,	:	DECISION
BERGEN COUNTY.	:	

For Petitioner, Christopher M. Hartwyk, Esq. (Hartwyk & Slowinski)

For Respondent, Frank L. Migliorino, Esq.

This matter was opened before the Commissioner of Education on June 15, 1993 by way of the filing of a Petition of Appeal by the Board of Education of the Borough of Moonachie (Board), wherein the Board sought to have included in the General Fund tax levy for the 1993-94 school year a cap waiver amount defeated by the voters at the annual school election.

On March 24, 1993, the Bergen County Superintendent of Schools had notified the Board that its 1993-94 school budget was conditionally approved subject to passage by the voters of a cap waiver in the amount of $377,189 in current expense which was deemed necessary for provision of a thorough and efficient system of education in the district.

On April 20, 1993 the voters of the Borough of Moonachie defeated both the proposed General Fund tax levy for the 1993-94 school year in the amount of $3,126,920 and the General Fund cap waiver request in the amount of $377,189. Upon review of the defeated maximum permissible budget pursuant to N.J.S.A. 18A:22-37,

the Mayor and Council of the Borough certified the General Fund tax levy in the amount of $2,566,500, a reduction of $560,420 which the Board appealed to the Commissioner on June 15, 1993. Subsequently, the parties and the County Superintendent engaged in mediation sessions which resulted in the Borough agreeing to restore $445,420 of its prior reduction, leaving a $115,000 reduction which the County Superintendent deemed not to impair the Board's ability to provide a thorough and efficient education. As a result of this determination, the Board's previously filed appeal of the Borough's reductions was withdrawn.

With respect to the remaining issue of the defeated cap waiver, an unanticipated delay in a planned building project and the consequent reduction in the district's staffing needs resulted in the Board's being able, with approval of the County Superintendent, to reduce its cap waiver request on appeal by $86,000. This reduction was effectuated by an amended petition filed on July 20, 1993 seeking a total of $291,189 as necessary for provision of a thorough and efficient education. By letter dated July 21, 1993, the Borough advised that it would not contest the Board's amended petition, and the record of this matter closed with the filing of the Board's position statement on August 24, 1993.

The cap waiver requested by the Board includes the following line items, all of which were determined by the County Superintendent to be essential for provision of a thorough and

efficient education and unable to be funded by reallocation within the maximum permissible budget:

Current Expense	Account No.	Amount
Preschool/Kindergarten Teacher Salaries	11-110-100-101	$ 76,522
Grades 1-5 Teacher Salaries	11-120-100-101	31,373
Grades 6-8 Teacher Salaries	11-130-100-101	108,965*
Energy (Heat/Electricity)	11-000-260-620	14,329
Other Employee Benefits	11-000-290-290	60,000*
	Total Current Expenses	$291,189

*The County Superintendent had originally approved these line items in the amounts of $141,965 and $80,000 respectively, and had also approved a line item for resource room staff in the amount of $33,000; the amounts given here reflect the $33,000 and $20,000 reductions in salary and benefit accounts and omission of the Resource Room account later agreed to by him as discussed above.

Preschool/Kindergarten Teacher Salaries. These funds are necessary to continue programs at the Robert L. Craig School, programs which are well-established and successful and are integral prerequisites to the district's first and second grade curriculum.

Teacher Salaries, Grades 1 - 5. These funds are needed for a third-grade teacher position, without which two third-grade sections will have to be consolidated into a class in excess of 32 students, a size that will impede the district's ability to carry out its educational program for that grade.

Teacher Salaries, Grades 6 - 8. These funds are necessary for teaching positions which collectively constitute the district's art, music and physical education programs, the loss of which would

have a particularly significant impact on Grades 6 - 8 due to the structure of the district's curriculum.

Energy (Heat and Electricity). These funds are needed to provide heat and electricity for the addition to the Robert L. Craig School, which must be serviced prior to occupancy so that construction may be completed and appropriate care and maintenance take place.

Other Employee Benefits. These funds are necessary to meet contractual benefit obligations to the teachers to be funded through the cap line items set forth above.

Upon review of the record of this matter, including the documentation provided by the district in support of the necessity for the cap waiver funds, which is incorporated herein by reference, the Commissioner finds and determines that the requested relief shall be and is hereby granted as the Board has borne its burden of demonstrating that these funds are necessary for provision of a thorough and efficient education to the students of the Moonachie School District. East Brunswick Township Board of Education v. East Brunswick Township Council, 48 N.J. 94 (1966); Board of Education of the Township of Deptford v. Mayor and Council of the Township of Deptford, 116 N.J. 305 (1989); Board of Education of the Borough of Rutherford v. Mayor and Council of the Borough of Rutherford, Bergen County, State Board of Education decision, July 7, 1993.

Accordingly, the Bergen County Board of Taxation is directed to adjust the General Fund tax levy of the Moonachie School District for the 1993-94 school year to reflect an increase of $736,609 ($445,420 in budget restorations agreed to by the municipality plus $291,189 in cap monies granted by the decision herein), which results in a total General Fund tax levy of $3,303,109.

IT IS SO ORDERED.

Ben J. Sol

ACTING COMMISSIONER OF EDUCATION

AUGUST 24, 1993

DATE OF MAILING - AUGUST 25, 1993

207-93

G. & G. ELECTRICAL CONTRACTORS, INC. AND REESE CONSTRUCTION CO.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY, AND ALLAN-MARTINOVICH ELECTRICAL CONTRACTORS,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

AUGUST 26, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
DECISION ON MOTION FOR EMERGENT RELIEF
OAL DKT. NO. EDU 5470-93
AGENCY NO. 199-6/93

G. & G. ELECTRICAL CONTRACTORS, INC. AND REESE CONSTRUCTION CO.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON AND ALLEN-MARTINOVICH ELECTRICAL CONTRACTORS,
Respondents.

Bruce R. Demeter, Esq., for petitioners (Simon & Demeter, attorneys)

Frederick W. Hardt, Esq., for respondent

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

The petitioners seek rejection of respondent Allen-Martinovich's bid for certain electrical work in the Pemberton Public Schools and award of the same to themselves. The petitioners allege Allen-Martinovich's bid exceeded its prequalification dollar amount; the respondent's Notice of Classification was improperly submitted; the respondent did not include the dollar amount of uncompleted contract work in its bid; the respondent did not identify Division of Building and Construction (DBC) classified subcontractors; the respondent failed to list three similar projects, and the respondent was late to a mandatory pre-bid meeting.

The respondent denies all allegations or, in the alternative, asserts that any irregularities were waivable.

The matter was opened before the Commissioner of Education by filing of a motion for emergency relief with a request for expedited hearing. The Department of Education transmitted the matter on June 10, 1993 to the Office of Administrative Law for determination pursuant to N.J.S.A. 52:14B-1 through - 15 and N.J.S.A. 52:14F-1 through - 13.

Oral argument on the motion was heard at the Office of Administrative Law facility in Mercerville on Thursday, June 17, 1993.

ARGUMENTS

Petitioners

The petitioners assert they observed errors in the Allen-Martinovich bid. Specifically, the total amount bid exceeded Allen-Martinovich's prequalification limits established by DBC. Bid documents are required to be within DBC limits. Under N.J.S.A. 18A:18A-26, a Board of Education shall accept bids only from persons qualified by DBC. Only qualified bidders can be recognized. Further, Allen-Martinovich's certification was not submitted in a separate envelope as required. This requirement is in place for an obvious reason. If a bidder is not qualified, there is no need to open and review her or his bid.

The contract is made of several parts. However, bids were solicited as one proposal. The respondent's exceeds its qualification limits. The Board issued separate contracts, each for amounts less than the respondent's qualifications limits. The matter should not have gone that far. The Board should not have accepted the bid in the first place. The statutes do not contemplate breaking up a contract. Rather, they are aimed at keeping bidding on level ground in the public interest.

Interpretations the Board received from DBC are off the point. The focus should be on the acceptance of the bid. The Board has disadvantaged other qualified bidders.

If the respondent was the low bidder on all ten subcontracts, it would have exceeded its DBC qualification. The bid process is of utmost importance and any

failure must lead to rejection of a bid - - unopened, unread, and unconsidered. The Board is trying to evade its responsibility by awarding parts of the total contract.

Allen-Martinovich did not list its subcontractors. If it uses subcontractors, it will disadvantage those who follow the rules. In addition, the respondent did not identify three similar projects. This requirement is clearly related to public protection: It shows that the bidder can do the job.

The respondent argues that only the amount of the projects of which the bidder is low bid shall be added to the amount of uncompleted contracts to determine if that bidder is under the prequalification limit established by DBC. This is true if and only if the projects are bid separately. In the present case, the bid documents call for one proposal. All other bidders acted accordingly.

The Board's action here invited later mischief. If a board can ask for a single bid and then break it up to reward certain favored contractors, the process is subverted.

Finally, on the issue of failure to identify subcontractors, the petitioners assert that some work awarded to Allen-Martinovich involves general contracting work and the bidder has failed to identify the general contractor it would use.

Respondents

The Board's first argument is procedural. In the request for interim restraint, the movant has to show it is entitled to relief. In the Board's opinion, it is not.

On the specific points raised, the Board points out that Allen-Martinovich has stated it needs no subcontractors in order to perform the subcontracts it was awarded (Exhibit 3). Allen-Martinovich did not list three similar projects. The Board waived submission, which it could properly do. This is not a major requirement. The Board reserved the right to reject any bidder who did not attend the required pre-bid meeting. Allen-Martinovich was late, but did attend the meeting. The Board considered this lateness and decided not to disqualify Allen-Martinovich on this basis. This does not somehow translate into a right to relief for the petitioner.

On the main issue, Allen-Martinovich has a DBC prequalification limit of $750,000.00. Its submitted bids totaling $627,000.00. With uncompleted work

contracts, this totals more than $750,000.00. However, Allen-Martinovich was awarded $423,000.00 in contracts. Combined with uncompleted work contract amounts, this comes to less than $750,000.00, its limit.

The bidding statutes and rules are not just to establish a level playing field but, mainly, to protect the public interest. Prequalification is designed to eliminate from the process those who do not meet a general minimum standard. All bidders have to show the right to bid. There is nothing in statute that says a bidder must be disqualified for submitting bids that exceed its qualification limits. The Board cannot disqualify automatically; it must look at all bids. Allen-Martinovich got a contract on low bid. There is an absence of case law or rules prohibiting the Board to do so.

Interim relief would be inappropriate in the present case. The movant must show that harm to him, on balance, would not be greater than on the respondent. If electrical contracts are not let immediately, work cannot be done before the opening of school in September and several asbestos removal projects will have to be terminated. It is public policy to eliminate asbestos from school buildings. The Board also would be exposed to damages by contractors who have been awarded legitimate contracts that must be rescinded because electrical contracts are not let.

The bid specifications clearly require that the work at each of the Board 's schools shall be bid as a separate item. The bidding law must be addressed to avoid undue advantage. That is not the same as torturing the bid process. If many unqualified bids are received, the DBC or the Legislature could provide that a board of education may not consider a bidder whose total bids exceed his qualification limit. This should not be so strictly interpreted where many contracts are being bid. In this case, the bidder was successful only on some parts of the work to be done at several schools. The bidder's prequalification limit was not exceeded.

DETERMINATION

Pre-bid Meeting

Allen-Martinovich's representative concededly was late attending the pre-bid meeting. The Board reserved the right to reject any bidder who did not attend the meeting. Why the representative was late may be considered by the Board. Generally, determining which conditions may be waived is based on the materiality

of the deviation, measured by the impact of the irregularity on the competitive bidding process. Terminal Const. Corp. v. Atlantic Cty. Sewerage Auth., 67 N.J. 403, 412 (1975). The purpose of bidding laws is to benefit taxpayers by securing competition and guarding against favoritism, improvidence, extravagance, and corruption. Trap Rock Industries v. Kohl, 59 N.J. 471, 479 (1971). While the statutory regulations of bidding are to be strictly observed, the application and construction of the statute should be such as to further, not frustrate, the legislative goals. Young v. West Orange Redev. Agency, 125 N.J. Super 440, 443 (App. Div. 1973). Inasmuch as this case found it appropriate, under the circumstances, to accept a bid late, mere lateness at a pre-bid meeting does not seem inappropriate where the late representative apparently satisfied all the other reasons for the pre-bid meeting.

Failure to Identify Subcontractors

The petitioners alleged that Allen-Martinovich did not submit a list of subcontractors with their bid proposal. This is true. However, Allen-Martinovich appears to have submitted a letter to the Board's architect indicating that all work would be conducted without the use of subcontractors. The architect submitted with Exhibit 3 three letters from Allen-Martinovich dated June 4, 1993. The third of these states

> In accordance with paragraph 1.8 of addendum 1, be advised that if awarded any of the contracts all work will be done by our forces except for final checkout of the sound clock and fire alarm systems which will be done under the supervision of the manufacturer's technician.
>
> No subcontractors will be used.

The statement clearly satisfies the requirement that subcontractors be identified.

Listing of Three Projects

The petitioners assert that Allen-Martinovich did not submit a list of similar projects performed by their company. The architect who drew the bids specifications acknowledges this defect. He requested that this information be forwarded to him within 24 hours of the bid opening. Allen-Martinovich did so. The architect recommended to the Board that the Board waive this as immaterial formality and being in their best interests.

Page 200-12 of the bid form at line 21 states

> List of a minimum of three (3) completed projects using specified system. Provide Owners' and Architect or Engineer's names, addresses, telephone numbers, Project name and year completed.

This requirement was created by the architect who drew the specifications. I am not cited to any authority in statute, rule or case law that requires such a list. This requirement apparently being of the Board's own making, and not required, the Board can waive it. This determination having been made, it is not necessary to address the propriety of 24-hour delay in submitting this information and I expressly refrain from doing so.

Separate Prequalification Statement

The bid form called for submission of each bidder's prequalification statement and amount of uncompleted projects in a separate envelope. It is conceded that Allen-Martinovich's prequalification statement and amount of uncompleted projects was not submitted in a separate envelope. It appears from the architect's certification that the material was submitted with Allen-Martinovich's bid packets, but the forms were current, were valid and were reviewed prior to reading any of Allen-Martinovich's bids. Again, the architect recommended that the Board waive this formality as immaterial and being in the Board's best interest.

Here again, there is a technical violation which appears to have worked no harm. The Board's waiver of this requirement appears to have been appropriate.

Prequalification Limits

Although Allen-Martinovich's bids, in the aggregate, together with unfinished contract work amounts, exceeded its prequalification limit, it was not the successful bidder on all phrases of the work. A DBC representative assured the architect that only the amount of the projects on which a bidder is low shall be added to the amount of uncompleted projects to determine if that bidder is under the prequalification limits established by DBC. Further, the fourth paragraph of the advertisement states

> Each facility shall be bid as separate projects with an overall construction bid. Each bidder shall be required to submit bid proposals on a minimum of three (3) facilities of their choice. Selected facilities have been scheduled to begin after asbestos abatement projects by others or shall be conducted in phases as indicated in the Project Manual.

The paragraph is quite clear and not reasonably susceptible of more than one meaning. Common sense, common experience and the clear wording all indicate no requirement that the entire electrical upgrade be bid. To the extent the petitioners read such a requirement into the language, they err.

Similarly, without more, there is no reason to apply the prequalification limit to the amounts bid. Common experience and common sense dictate that the total amount of bids awarded must be within the prequalification limit, when added to the amount of uncompleted contracts.

In deciding a motion of this type, it is necessary to consider immediacy of harm, irreparability of harm, likelihood of prevailing on the merits and to balance the relative harm worked by granting or denying the motion. Crowe v. DeGioia, 90 N.J. 126 (1982). It is also necessary to make all fair inferences in favor of the party not the maker of the motion.

In this case, harm, if any, might be immediate because contracts are soon to be let. I am not persuaded of irreparability because a money judgment could make petitioner whole. The question of prevailing on the merits, although by no means certain, seems on the basis of the arguments to tip slightly in the respondent's favor. As to relative harm, the Board has made much of its asbestos plans being contingent upon the electrical work that is the subject of this case. If the Board's procedures in this matter were patently wrong, no amount of pending work could overcome a decision against the Board. The relative harm worked upon the petitioners, as has already been determined, can be mitigated by a money judgment obtained in a proper forum.

Having considered and weighed carefully the arguments of counsel, I **DETERMINE** that the motion for emergent relief and stay of board action must be **DENIED.** It is so **ORDERED.**

Although the respondents successfully defend against the motion, the decision is no means one-sided. The respondent Allen-Martinovich made several mistakes.

Had any of them been material, the motion could have been granted. The Pemberton Board of Education, boards of education and all prospective bidders are reminded that the practice of competitive bidding for public contracts is rooted deep in sound principals of public policy. The purpose is to secure competition and the statutes directed toward the goal are for the benefit of the taxpayers and not the bidders. Hillside Tp. v. Sternin, 25 N.J. 317 (1957). No party should rely on a board's ability to waive certain requirements. Strict adherence to the bidding statutes and rules is the minimum conduct, not the maximum, expected of all involved in the bidding process.

It is further **ORDERED** that this matter proceed to plenary hearing unless earlier withdrawn.

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

21 JUNE 1993
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

OAL DKT. NO. EDU 5470-93

G. & G. ELECTRICAL CONTRACTORS, INC. AND REESE CONSTRUCTION CO.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY, AND ALLAN-MARTINOVICH ELECTRICAL CONTRACTORS,	:	DECISION
RESPONDENTS.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before her and is dismissed with prejudice.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

AUGUST 26, 1993

DATE OF MAILING - AUGUST 26, 1993

208-93

208-93

J.B., on behalf of her minor son, W.B., PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY, RESPONDENT.	:	DECISION

SYNOPSIS

Petitioning parent sought reversal of Board's denial to her son (W.B.) of his high school diploma. Petitioner contended Board unfairly gave W.B. a failing grade in physical education on the last day of school for cutting gym class.

Initial decision determined student wrongly cut class, but fair application of grading policy would have been to lower a mark for that marking period, not to lower it on an enhanced basis for perceived delinquencies or conduct in earlier marking periods despite policy language that seemed to allow such sanction. ALJ ordered Board to issue 1993 high school diploma to W.B.

Commissioner affirmed in part, reversed in part findings and determination in initial decision. Commissioner directed further clarification of W.B.'s fourth marking period grade in physical education to assess precise impact lowering W.B.'s unit grade had on his failing the fourth marking period. Commissioner found Board's physical education cut policy as compared to its district cut policy was in violation of the law. (V.J.H.) Therefore, Board was directed to terminate said cut policy. Commissioner directed Board to calculate W.B.'s fourth marking period physical education grade specifying numerically each component of the grade awarded W.B. and supplying justification for each numerical value. Thereafter Board is to recalculate W.B.'s grade excluding imposition of automatic grade reduction for cutting gym class. If W.B. achieves passing grade, a diploma is to be granted and record expunged.

AUGUST 26, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6374-93
AGENCY DKT. NO. 248-6/93

J. B., ON BEHALF OF W. B.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, PASSAIC COUNTY,
Respondent.

J. B., petitioner, *pro se*

Anthony P. Sciarrillo, Esq., for respondent

Record Closed: July 14, 1993 Decided: July 21, 1993

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

J. B., mother of W. B, a senior at Pequannock Township High School, Passaic County, filed a petition of appeal with the Commissioner of the Department of Education on June 29, 1993, asking action of the district board be reversed because of an unfair decision by which the student was given a failing grade on the last day of school and was thus refused his high school diploma. The Board's answer defending its action was filed with the Commissioner on July 6, 1993, challenging petitioner's standing to bring suit, asserting action was taken in accordance with grade policy, alleging the petition failed to state a claim upon which relief can be granted, and denying in general any action taken by teacher, administration or Board was arbitrary, without good cause or not in good faith. The Commissioner transmitted the matter to the Office of Administrative Law on July 6, 1993, asking expedited hearing because "summer school commences July 12, 1993."

On short notice to the parties, the matter came on for hearing in the Office of Administrative Law on July 12 and 14,1993. It was continued from the first day to a second in order to give time for Board counsel to reconfer with his client at a meeting on the evening of July 12, 1993. The Board refused to change its earlier position supporting administration and teacher. Hearing was concluded on July 14, 1993; the record closed then.

EVIDENCE AT HEARING

Most material facts were not in dispute. Friday, June 18, was the last day of school. The student's period five class was in physical education, which on that day consisted of watching a video movie entitled "Guess Who's Talking 2." The student attended the class, but after it began and apparently when the teacher was momentarily out of the room, he left without permission and was nailed in the cafeteria by an assistant principal/disciplinarian who sent him back to his classroom. For the offense, which student and mother did not deny was wrong, the student was given a cut for the class. Later the teacher telephoned the mother to say not to prepare a graduation party because impact of the cut meant the student would not graduate with his class. The mother said the teacher said there was nothing she could do because the assistant principal ordered the cut and the refiguring of the student's yearly grade. Stunned and bewildered, the mother began what can only be described as a Kafkaesque journey to seek explanation for the harshness of sanction. As if in a dream world between the real and the surreal, the mother spoke to the assistant principal, who told her the action taken was that of the teacher herself. The next one consulted, the principal, in reviewing the matter decided to support the teacher. On appeal to the superintendent, he supported administrator and teacher. A review by a Board subcommittee supported the superintendent. The county superintendent allowed there was nothing much that office could do. A judge of Superior Court in Morris County listened to petitioner's complaint for an order to show cause but said there was little she, the judge, could do because petitioner had not exhausted administrative remedies. Although by that time graduation had come and gone without the student, the present petition was filed on June 29, 1993. The student has begun summer school classes in physical education, 19 class days for two and one-half hours each day. Tuition is $125. Assuming his attendance is satisfactory, one trusts he will qualify as passed and be eligible for diploma. Prospects seem good; he got an 88 in volleyball for the Pequannock High School third marking period.

The present matter survives, however, on a parent's plea against injustice done.

What bewilders the mother besides harshness of sanction is how, as she put it, the student could be considered passing the class on the morning of June 18 and flunking the class for the year in the afternoon by application of what she felt is a confusing mix of the cut/marking policies. *See*, P-13, Pequannock Township Student Handbook. Her analysis is P-22, which gives the student a 63.2 (and passing) mark for marking period four before the offense and a 57.8 grade after the offense and after application of the effect of the student's first cut. Thus, she argues, final grade of 57.8 even with the cut should have been averaged with an 88 for the third marking period to reach a passing 72.9 final grade.

Interestingly, the teacher's analysis (P-21), dated June 24, 1993, fixed the student's grade for marking period four at 27.6 "due to times not dressed for class, disruptive behavior and one cut, when averaged with an 88 for the third marking period, equaling a failing 57.8 final grade for the year." [Emphasis added.] This analysis was explained at some length by the principal (in P-44, 45), who said:

> [The student] had not passed physical education for the year but rather was passing prior to the last day's evaluation being included as part of his final overall average. [*Id.* at 46.]

The student's inability to muster a passing 62.5 grade for the fourth marking period, therefore, was apparently a result of more than just the cut on the final day of class. (A cut is defined under school policy as including leaving class early. P-36, 37, 42.)

The student was medically excused from physical education for the first marking period of 1992-93. He passed health in the second marking period and received full credit. He passed the third marking period of physical education with an 88 average (for volleyball). A correct average for the year, it would seem, becomes either 72.9 as the mother would have it, or a 57.8 as teacher and principal would have it. The superintendent and the board of education, in their wisdom, supported teacher, assistant principal/disciplinarian and principal. There is no doubt they all possessed discretionary power to revise and mold grades in a compelling case.

DISCUSSION

Did the student's prior attitude and behavior drive the decision to lower his grade for the single cut on the last day of school to a level that kept him from receiving a diploma? If not, petitioner has no case. If so, there was violation of discretionary authority and bias, prejudice or bad faith. Petitioner here has no easy job.

In *Talarski v. Edison Township Board of Ed.*, 1977 *S.L.D.* 862, a teacher and his local education association brought suit against the board, its superintendent and principal, alleging that the principal of the high school improperly changed from failing to passing a final grade given by the teacher to a pupil and that the grade change was improperly supported by the superintendent and the board itself. For the school year the teacher had assigned a final failing grade of F on D, F, D, D; the principal revised the final grade of F to D and allowed the student to graduate with her class. On the evidence, the Commissioner affirmed the revision by the principal, superintendent and board, noting that by unwritten district policy there reposed discretion to do so. In passing, the Commissioner said that school law vests management of public schools in each district in local boards of education, and unless they violate the law, or act in bad faith, exercise of discretion in performance of duties imposed upon them is not subject to reversal. Otherwise, the independence of the district and the professional authority of teachers and administration would be improperly interfered with. There is a necessary caution, however, said the Commissioner:

> It is essential that local boards must retain such authority of review to prevent assignment of unreasonable or arbitrary grades. The acts of teachers may neither be insulated from administrative review of their supervisors and administrators nor from quasi judicial review by the Commissioner or judicial review by the courts. . . The Commissioner is further constrained to comment that petitioner's perception of [the student's] attitude as unsatisfactory as reason for the assigned F/failure borders dangerously close to the improper use of grades as deterrents. . . The use of marks and grades as deterrents or as punishment is likewise usually ineffective in producing the desired results and is educationally not defensible. Whatever system of marks and grades a school may devise will have serious inherent limitations at best, and it must not be further handicapped by attempting to serve disciplinary purposes too. . . It is further apparent that when an unsatisfactory attitude has already had its effect upon

> marking period grades, it should not again be applied to the average of those grades. . . [citations omitted] [*Id.* at 870].

CONCLUSION

I am satisfied from the evidence that though the student was wrong to cut his last physical education class, fair application of grading policy would have been to lower a mark for that marking period but not to lower it on an enhanced basis for perceived delinquencies or conduct in earlier marking periods, despite less than clear language in marking policy that would seem to allow such sanction to be imposed. To do otherwise, as I believe teacher, administrator, principal, superintendent and Board here did, is to visit upon the student an unfair double or enhanced punishment that had too drastic an effect. It becomes only sententious to repeat, as did the superintendent, platitudinous sentiments about Board and administrative reward for subordinate professionals, even-handed and strict enforcement of cut/marking policy so as to support the obedience of more perfect students, preservation of good order and discipline in the schools, and the like. I am impressed with petitioner's sincerity in this matter; she put the case for her son with candor, humility and no small measure of sincere thoughtfulness. Her efforts to be heard have been tortuous and fruitless. For the moment, at this level at least, those efforts have succeeded. The student's grade of 57.5 in physical education for the year is **REVISED** to 62.5, the lowest possible passing grade. The teacher's grading and Board support of it were arbitrary acts because the failing grade was punitive. The grade may not stand. The Board will issue the student a 1993 high school diploma. Judgment is **ENTERED** accordingly.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 21, 1993
Date

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

7/29/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 27 1993
Date

OFFICE OF ADMINISTRATIVE LAW

amr

LIST OF EXHIBITS

P-1	Letter of J. B. to superintendent, dated June 20, 1993
P-4	Letter of J. B. to board of education, dated June 23, 1993
P-6, 7, 8, 9, 9A	Physical Education Department of Education, method of evaluation and marking criteria
P-10	Letter of J. B. to Morris County Superintendent of Schools, dated June 24, 1993
P-13	Student handbook
P-17	Parent and student handbook, Middle School
P-20, 20A	Sample cut letter to parents
P-21	Cooperative Academic Improvement Report for W. B. by teacher, dated June 24, 1993
P-22	Final grade analysis, according to J. B.
P-23	Petition of appeal to Commissioner of Education, filed June 29, 1993
P-29	Board answer filed July 6, 1993
P-44	Certification of principal
P-48 to 51	Petition of appeal
P-52	Certification of high school principal
P-53	Newspaper photograph of Pequannock High School graduates
P-54	Notice to parent for student attendance at summer school to complete physical ed. requirements, dated June 24, 1993
P-55 to P-58	Counterstatement by petitioner on answer by board

OAL DKT. NO. EDU 6374-93

J.B., on behalf of her minor son, W.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Board filed timely exceptions pursuant to N.J.A.C. 1:1-18.4. The review of the matter is being conducted on request for expedition. It is noted that the Board filed a Motion for Dismissal due to mootness with the Bureau of Controversies and Disputes by faxed transmission on August 10, 1993. However, the Commissioner denies such motion insofar as the Board suggests therein that the subject matter of this case is now moot because W.B. has completed summer school and has received his high school diploma, leaving no other matters for adjudication. The record reveals that petitioner seeks expungement of the record of the incidents underlying this case in addition to her son's high school diploma. Thus, the Commissioner finds and determines that the matter is not moot, the motion must be denied and the matter decided on its merits.

The exceptions would reverse the initial decision for the reasons argued at the hearing, stressing that the physical education cut policy differs from, but is consonant with, the district policy as expressed in the student handbook, but noting also that all students were apprised of the physical education cut policy at the beginning of the school year.

The Board submits that the record illustrates that petitioner failed to meet her burden of demonstrating that the actions complained of were undertaken in an arbitrary manner. It claims instead that the Board's actions were consistently and impartially administered. It claims that petitioner seeks to shift the blame for the actions of her son to the administration and the Board. Instead, the Board avers, it was the student who was unprepared for class on three occasions, cut class on June 17, 1993 and failed physical education for the fourth marking period. Thus, the Board submits, W.B. failed the requirements for physical education for the 1992-93 school year, and was correctly assigned summer school as the means of acquiring the credits necessary to be eligible for his high school diploma.

Upon review of the record and the exceptions, the Commissioner directs further clarification of W.B.'s fourth marking period grade in physical education. Such clarification is necessary because it is nowhere set forth in the record upon what basis it is admitted by the principal in his certification that W.B. was passing physical education the morning of June 17, 1993, before he cut physical education. On the contrary, the record indicates that as of May 20, W.B. was failing physical education. See Exhibit 20A, which states that on that date, W.B.'s grade for the first half of the marking period was a failing 52. Without a precise statement of

the components making up W.B.'s fourth period grade and the numerical value assigned to each component of such grade, the Commissioner is unable to assess the precise impact lowering W.B.'s unit grade had on his failing the fourth marking period.

It is plain from the record that while the Board's policy regarding cutting falls within the bounds of law, the Board's physical education policy of failing a student who cuts physical education by automatically assessing him a letter grade of 62 for the unit is in violation of law. See V.J.H. v. Board of Education of the City of Orange Township and Woodrow Zaros, 1987 S.L.D. 1669. Therein it is stated:

> ***[T]he Commissioner has consistently refused to uphold policies which call for an automatic imposition of a grade penalty for unexcused absence or absences resulting from suspensions. (citation omitted)***
>
> Thus, while the Commissioner upheld a percentage reduction in a pupil's class participation grade, he struck down in Wetherell, supra, the portion of the Board's policy which incorporated an upward sliding scale of grades a student was required to receive in order to pass a course, i.e., a student absent 31-39 days for whatever reason had to attain a final average of 90 to receive course credit. (emphasis in text)
>
> (at 1679)

Thus, while the Board's policy of subtracting 10 points from the class participation component of the pupil's grade for lack of preparedness is hereby upheld as reasonable, the Commissioner cannot sustain a grading policy that automatically reduces a student's grade to a failing one for an entire instructional unit for cutting class. Consequently, while the Board might reduce W.B.'s class participation component by 30 points over the course of the marking period for being unprepared three times, it is not plain from the record that lack of participation was the sole basis for

W.B.'s failing the marking period insofar as the recalculated grade, as set forth in Exhibit 21, merely states: ["W.B.'s] marking Pd. 4 grade is 27.6. due to times not dressed for class, disruptive behavior, and 1 cut." Thus, a precise calculation of each component comprising his overall grade is required to determine whether W.B. would have passed for the marking period had the district not inappropriately reduced his unit grade to a failing 62 as a result of his cutting class on June 17.

Accordingly, the Board of Education is hereby directed to calculate W.B.'s fourth marking period physical education grade specifying numerically each component of the grade awarded W.B., and supplying the justification for each numerical value. Thereafter, W.B.'s grade is to be recalculated, excluding the imposition of the automatic grade reduction to a 62 for the second unit of the marking period, but providing for point reduction according to policy regarding unpreparedness stemming from the events of June 17. If, in so doing, W.B. achieves a grade sufficient to pass the course, a diploma is to be granted and the record expunged of this event.

Further, as in V.J.H., supra, the Board herein is directed to terminate forthwith its policy requiring that an automatic grade of 62 be given for "cutting". As in V.J.H., "***[i]t is emphasized [herein] that this decision does not serve to prohibit the Board from revising its policy to call for denial of credit or withdrawal from a course based on excessive absenteeism or truancy or other sanction not using grades as a disciplinary measure.***" (at 1680)

COMMISSIONER OF EDUCATION

AUGUST 26, 1993

DATE OF MAILING - AUGUST 27, 1993

208-93

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(208-93)

J.B., on behalf of her minor son, W.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, PASSAIC COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

SYNOPSIS

Petitioning parent sought reversal of Board's denial to her son (W.B.) of his high school diploma. Commissioner remanded matter for recalculation of W.B.'s physical education grade.

On remand, ALJ determined W.B. was qualified for a 1993 high school diploma. ALJ concluded Board complied with mandate of Commissioner to recalculate grade, issued his diploma, expunged and modified academic records. Matter was determined to be moot.

Commissioner adopted findings and determination in initial decision. Petition was dismissed.

FEBRUARY 17, 1994

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8322-93
(EDU 6374-93 ON REMAND)
AGENCY DKT. NO. 248-6/93

J. B., ON BEHALF OF W. B.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, PASSAIC COUNTY,
Respondent.

J. B., petitioner, *pro se*

Anthony P. Sciarrillo, Esq., for respondent

Record Closed: January 13, 1994 Decided: January 19, 1994

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

This matter is on remand by the Commissioner of the Department of Education under docket no. EDU 6374-93, an appeal by J. B., mother of W. B., a senior student at Pequannock Township High School, Passaic County, challenging W. B.'s final failing grade in physical education that disqualified him from graduation and a 1993 high school diploma. An administrative law judge ruled after hearing that the teacher's grading and administrative and Board support of it were arbitrary acts because the failing grade was punitive. In a decision of August 26, 1993, the

Commissioner affirmed in part and reversed in part. She remanded the matter to the Office of Administrative Law for further hearing and directed the Board:

> . . . to calculate W. B.'s fourth marking period physical education grade specifying numerically each component of the grade awarded W. B. and supplying the justification for each numerical value. Thereafter, W. B.'s grade is to be recalculated, excluding the imposition of the automatic grade reduction to a 62 for the second unit of the marking period, but providing for point reduction according to policy regarding unpreparedness stemming from the events of June 17, 1993. If, in so doing, W. B. achieves a grade sufficient to pass the course, a diploma is to be granted and the record expunged of this event. . . .

Remand was filed September 1, 1993. After further submission by the Board on action taken in response to remand, the record closed on January 13, 1994.

On October 8, 1993, its attorney advised the Board had recalculated W. B.'s fourth marking period grade for physical education and, after recalculation, W. B.'s final grade for the year was a passing 62.7. The Board, he advised, had issued a diploma to W. B. and would now expunge the academic record accordingly.

By letter orders of the administrative law judge on October 22, 1993 and December 15, 1993 the Board was ordered to file certifications by the chief school administrator and principal attesting to grade modification to petitioner's son's passing physical education for 1992-93 and qualification for and issuance of stigma-free 1993 diploma. A Board resolution so approving and containing a direction to expunge and modify mandated school records accords accordingly, pursuant to *N.J.A.C.* 6:3-6.3, 6.7(a)1, was to be annexed. Upon such filing, the matter would then be concluded as moot.

Certifications of the superintendent of schools and a high school principal dated December 10, 1993 were filed on December 14, 1993 attesting to administrative recalculation of grade and modification thereof, as well as W. B.'s qualification for 1993 stigma-free diploma. R-2, 3.

On January 10, 1993, the Board adopted the following resolution (R-4).

> **RESOLVED,** that the Board of Education of Pequannock Township approves the recalculation of the fourth marking

period grade of W. B. for physical education, thereby qualifying him for a 1993 high school diploma issued by the Board of Education of the Township of Pequannock; and be it further

RESOLVED, that the Board directs the superintendent of schools to expunge and modify the mandated school records accordingly.

CONCLUSION

From submissions above, I **CONCLUDE** the Board has complied with mandate of the Commissioner to recalculate grade, has issued W. B.'s 1993 diploma and has modified academic records accordingly. Board action is **APPROVED**. Issue now being moot, the matter is adjudged **CONCLUDED**. Jurisdiction is not retained.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 19, 1994
Date

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

1/21/94
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 24 1994
Date

OFFICE OF ADMINISTRATIVE LAW

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LIST OF EXHIBITS

R-1	Recalculation of W. B.'s physical education grade for marking period four, 1993, to show passing grade of 62.7 D-
R-2	Certification of superintendent of schools concerning recalculation of grade and expungement and modification of grades to indicate qualification for issuance of 1993 diploma, dated December 10, 1993
R-3	Certification of principal directing recalculation of final grade to exclude a grade reduction for cutting gym class, dated December 10, 1993
R-4	Resolution of Board of Education approving recalculation of fourth period marking grade of W. B. for physical education, thereby qualifying him for 1993 high school diploma and directing superintendent to expunge and modify mandated school records accordingly

OAL DKT. NO. EDU 8322-93 (EDU 6374-93) ON REMAND

J.B., on behalf of her minor son, W.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, PASSAIC COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record and initial decision on remand have been reviewed. No exceptions were filed by the parties. Upon careful and independent review of the record of this matter on remand, the Commissioner adopts as his own the findings and conclusion of the Office of Administrative Law that the instant matter is now moot. The Board of Education has recalculated W.B.'s physical education grade in compliance with the directives contained in the Commissioner's decision dated August 26, 1993, and as a result of such recalculation issued him a 1993 New Jersey High School diploma, modified his academic record accordingly, and expunged his record of the circumstances which led to the filing of the instant Petition of Appeal.

Accordingly, the instant matter is thus dismissed.

IT IS SO ORDERED.

FEBRUARY 17, 1994

DATE OF MAILING - FEBRUARY 17, 1994

COMMISSIONER OF EDUCATION

209-93

209-93

JAMES F. GUERRA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
HUDSON COUNTY AREA VOCATIONAL-TECHNICAL SCHOOLS, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, former apprenticeship coordinator whose position was abolished for reasons of economy in 1992, sought reinstatement with compensation.

In light of testimony and evidence, ALJ found respondent did not have an apprenticeship program for 1992-93 school year. Thus, petitioner's termination was proper. Petition was dismissed.

Commissioner adopted findings and determination in initial decision.

AUGUST 31, 1993

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7613-92
AGENCY DKT. NO. 396-8/92

JAMES F. GUERRA,
Petitioner,
v.
BOARD OF EDUCATION OF HUDSON COUNTY AREA VOCATIONAL TECHNICAL SCHOOLS,
Respondent.

Philip Feintuch, Esq., for petitioner
(Feintuch, Porwich & Feintuch, attorneys)

Alexander W. Booth, Jr., Esq., for respondent
(Brownstein, Booth & Barry, attorneys)

Record Closed: June 24, 1993 Decided: July 22, 1993

BEFORE **RICHARD McGILL,** ALJ:

This matter concerns a petition by James F. Guerra (petitioner) in which he alleges that he was improperly terminated from the position of Vocational-Technical Coordinator: Apprenticeship Programs with the Hudson County Area Vocational-Technical Schools. Petitioner seeks a determination that he has tenure in the position of Vocational-Technical Coordinator: Apprenticeship Programs and an Order directing the Board of Education of the Hudson County Area Vocational Technical Schools (respondent) to reinstate petitioner and awarding him all related entitlements and emoluments. In an amendment to the petition, petitioner seeks monies due from a prior dispute. Respondent filed an amended answer denying that petitioner was unlawfully

terminated and that petitioner is entitled to any relief. Respondent requests dismissal of the petition.

PROCEDURAL HISTORY

The petition was filed August 18, 1992 with the Department of Education, and the matter was transmitted to the Office of Administrative Law on October 1, 1992 for determination as a contested case. A hearing was conducted on April 7, 1993 at the Office of Administrative Law in Newark, New Jersey, and the record closed on June 24, 1993, after official notice was taken of decisions from a prior dispute between these parties.

BACKGROUND

The termination which is the subject of this proceeding occurred in 1992. The parties to this proceeding were involved in a similar dispute concerning actions of the Board of Education in 1988. An understanding of the prior proceeding is helpful for resolution of this dispute. The decisions from the prior dispute between the parties include an Initial Decision in *James Guerra v. Board of Education of Hudson County Area Vocational and Technical Schools*, OAL Dkt. No. EDU 1453-89, Agency Dkt. No. 345-11/88 (January 4, 1990), a Decision by the Commissioner of Education dated February 24, 1990 in the same matter, and an opinion of the Appellate Division of the Superior Court of New Jersey in *James Guerra v. Board of Education of Hudson County Area Vocational and Technical Schools*, No. A-6638-89T1 (App. Div. Nov. 8, 1991). The nature of the dispute and the facts in that proceeding were stated by the Appellate Division as follows:

> Petitioner James Guerra filed a petition with the Commissioner of Education, alleging that his tenure and seniority rights had been violated by respondent Board of Education of Hudson County Area Vocational and Technical Schools (respondent), when it abolished his apprentice coordinator position and transferred him to a position as an instructor of electronics.
>
> Petitioner served as a instructor of electronics in respondent's district and acquired tenure and seniority in that position. He then served as the Cooperative Industrial Education Coordinator for the district until 1983 when he was appointed to the position of apprentice coordinator. He served in that capacity until August 30, 1988. It is undisputed that petitioner achieved tenure status in that position. At its August 23, 1988

> meeting, respondent decided to abolish the training program position for cost-effectiveness purposes. It thereupon transferred petitioner to the position of instructor of electronics. On June 30, 1989, petitioner's position as electronics instructor was eliminated due to a reduction in force. The position of apprentice coordinator remained vacant until it was formally abolished by respondent on August 23, 1989. *Id.*, at 1-2.

The Appellate Division summarized the Commissioner's Decision as follows:

> The Commissioner [determined] that there was no statutory or regulatory impediment to respondent's abolishment of the apprentice training program. However, the Commissioner concluded that respondent did not act properly in transferring petitioner before it formally acted to abolish the apprentice coordinator position. As petitioner had tenure, he could not be removed from that position without his consent, or before the position was formally abolished pursuant to *N.J.S.A.* 18A:28-9, or before a tenure hearing was conducted under *N.J.S.A.* 18A:6-10. The Commissioner thereupon found that petitioner's transfer was *ultra vires*, and therefore awarded him the difference in salary and emoluments between the teacher and coordinator's position "until the date in August 1989 upon which respondent took formal action under that statute." The Commissioner also held that respondent did not act improperly in abolishing the petitioner's electronics instructor position which he held after his transfer. He thereupon ordered petitioner to be placed on the preferred eligibility list for each of the positions in which he held tenure. *See N.J.S.A.* 18A:28-12. The State Board affirmed the Commissioner's decision "for the reasons expressed therein." *Id.*, at 3-4.

The Appellate Division affirmed the determination of the State Board.

The position of apprentice coordinator was reinstated in January 1991, and petitioner was employed in that position until June 1992, when he was terminated and his position abolished for reasons of economy effective September 1992. Petitioner appeals from this termination.

ISSUES

The issues in this proceeding were stated in the prehearing order as follows: (1) whether respondent properly or improperly abolished the position of Vocational-

Technical Coordinator: Apprenticeship Programs, (2) whether the doctrine of *res judicata* applies based upon a decision by the Commissioner of Education dated February 24, 1990, and (3) if relief is warranted, whether petitioner should be restored to his position and granted back pay and other emoluments. In this proceeding, petitioner does not contend that respondent cannot abolish the apprenticeship program. Rather, petitioner maintains that respondent has continued to provide the apprenticeship program and that it is unlawful to do so without an apprenticeship coordinator. Petitioner argues that respondent cannot terminate him while the program remains in place. Respondent denies that it had an apprenticeship program during the 1992-1993 school year. Thus, the main factual issue is whether respondent continued to have an apprenticeship program subsequent to petitioner's termination effective September 1992. At the beginning of the hearing, respondent conceded that it owes petitioner approximately $11,000.00 as demanded in Count 2 of the petition and agreed to pay that amount to petitioner.

SUMMARY OF EVIDENCE

Petitioner gave the following testimony on his own behalf in this proceeding. Petitioner was last employed by respondent as an apprenticeship coordinator. Petitioner was advised by respondent on June 30, 1992 that his position was abolished for reasons of economy. Petitioner was the last apprenticeship coordinator, and subsequent to June 30, 1992, there was no apprenticeship coordinator.

The job description for the title "Apprenticeship Coordinator" states the job goal as follows:

> To direct and coordinate apprenticeship training Programs in accordance with the State and Federal policies and standards. The Apprentice Coordinator interprets and clarifies State and Federal policies governing apprenticeship training programs and provides information and assistance to labor, industry, and the apprentice in the following manner:

The job description then lists 24 responsibilities including the following:

> 1. Aids in all employers, employer organizations, joint labor and management committees, and labor organizations in formulating minimum standards for their apprentice programs. Also enlightens organizations, corporations,

and interested parties in the policies and educational facilities available for upgraded and continuing education of personnel.

2. Inspects and approves establishment for apprentice training under the New Jersey State Apprenticeship program and Federal Bureau of Apprenticeship - U.S. Department of Labor.

Petitioner states that an apprenticeship involves an agreement between the apprentice and the sponsor with approval by Federal and State representatives. The apprentice coordinator is the State representative. An apprentice receives on-the-job training from the employer and related classroom instruction from a school. An apprentice must have 140 hours per year of related instruction and a total of 576 hours. Petitioner set up a curriculum for the apprentice, monitored the hours of classrom instruction, checked on attendance and evaluated the course of study. It was the responsibility of the apprentice coordinator to certify to the United States Department of Labor and the New Jersey Department of Education that the apprentice had completed related classroom instruction and to execute various forms. Completion of the program by the apprentice leads to employment at a journeyman's wage. Petitioner signed a number of certifications during his employment with respondent. Petitioner acknowledged that courses related to an apprenticeship could be taken at other schools.

During the 1991-1992 school year, respondent had apprenticeship programs in electricity, electronics, masonry and carpentry at its facilities in Hudson County, and petitioner was the only certified apprentice coordinator. In the 1991-1992 school year, no other school in Hudson County had an apprenticeship program.

Petitioner presented a catalogue of courses offered by respondent for the 1992-1993 school year. At page 26, the catalogue includes a description of "Apprenticeship Diploma Programs." Petitioner acknowledged that page 26 was written years ago, and he stated that the catalogue was sent to the printer during the summer of 1992.

Petitioner acknowledged that he does not know who signed the various agreements and certifications during the 1992-1993 school year. Indeed, he did not know if anyone signed the agreements and certifications.

Petitioner presented a letter dated January 6, 1993 from Joseph Borgia, Apprentice Coordinator at the Mercer County Area Vocational Technical Schools, to Mr. Jim Dorin at Hudson County Vocational-Technical School. The letter refers to seven individuals attending respondent's schools in programs such as "carpenter" and requests transcripts. Petitioner interprets the letter to mean that individuals are participating in an apprenticeship program at respondent's schools. Petitioner acknowledges that requests for transcripts are not unusual.

Joseph Sirangelo testified as a witness for respondent. Mr. Sirangelo is employed by respondent as an Assistant Superintendent, a position which he has held for the last 10 of his 15 years of employment with respondent. Mr. Sirangelo knew petitioner during his employment with respondent and is familiar with the apprenticeship program. As the apprentice coordinator, petitioner worked with the employer as sponsor, and he developed a curriculum for the students who received related instruction at the schools.

The position of apprentice coordinator was abolished in June 1992 effective in September 1992 for financial reasons. Prior to the abolishment, Sirangelo discussed the situation with Ann Freeman, who was the State Apprenticeship Coordinator, and was told that there was no requirement to have an apprentice coordinator. Sirangelo had a similar discussion with the County Superintendent of Schools. While the Board's resolution abolishing the position of apprentice coordinator did not expressly address the apprentice program, Sirangelo stated that since petitioner was terminated, respondent has not had an apprentice program. Sirangelo was not aware of any plan related to the apprentice program that was ever submitted by respondent to the United States Department of Labor or the New Jersey Department of Education for approval. Respondent does not receive any Federal or State funds for apprentice training.

After petitioner was terminated, no one was hired to replace him as apprentice coordinator, and no one performs his duties. No one signs apprenticeship agreements since petitioner left, no one meets with employers or monitors the classes of apprentices, and no one certifies that apprentices have completed the related instruction.

Individuals interested in an apprenticeship program are referred to the Federal Bureau of Apprenticeship Training and to State Apprenticeship Coordinator Ann Freeman. Individuals in apprenticeship programs may take courses that could serve as

related instruction in respondent's school on the same basis as any other student. Respondent has not made any changes to its curriculum as a result of the abolishment of the position of apprentice coordinator, since courses offered by respondent are not specifically for apprentices. Apprentice documents could be signed by Ann Freeman or a coordinator from another county.

With respect to the catalogue for the 1992-1993 school year, Sirangelo stated that its purpose is the recruitment of students. It is prepared in the spring for the next school year. At the time that this particular catalogue was completed, the position of apprentice coordinator had not been abolished. A course in the catalogue may be cancelled in September.

LAW AND ANALYSIS

The first issue to be considered concerns respondent's argument that the doctrine of *res judicata* is applicable to this proceeding based upon the Commissioner's decision dated February 24, 1990. The term "*res judicata*" refers broadly to a common law doctrine which bars relitigation of claims or issues that have already been adjudicated. *Velasquez v. Franz*, 123 *N.J.* 498, 505 (1991). The doctrine of *res judicata* is applicable in appropriate cases to administrative proceedings. *City of Hackensack v. Winner*, 82 *N.J.* 1, 31-32 (1980). Identity of causes, of parties or their privies, and of issues is required in order to bar a claim. *Eatough v. Bd. of Medical Examiners*, 191 *N.J. Super.* 166, 173 (App. Div. 1983). This appeal concerns a termination in 1992, while the previous proceeding related to the abolishment of a position in 1988. Since the disputes related to two different causes of actions, the doctrine of *res judicata* does not bar this appeal.

Relitigation of an issue of fact or law previously decided may be precluded by the doctrine of collateral estoppel. *T.W. v. A.W.*, 224 *N.J. Super.* 675, 682 (App. Div. 1988). Consistent therewith, petitioner does not challenge in this proceeding the determination in the previous dispute between these parties that the authority of a board of education to abolish a position for reasons of economy pursuant to *N.J.S.A.* 18A:28-9 extends to the position of apprentice coordinator.

In this proceeding, petitioner maintains that if respondent offers an apprenticeship program, respondent must employ an apprentice coordinator. In support of the assertion that respondent had an apprenticeship program in the 1992-1993 school year, petitioner

asserts that respondent had an apprenticeship program in prior years, that no formal action was taken to abolish the apprenticeship program, that the catalogue for the 1992-1993 school year offered an apprenticeship program and that apprentices were taking courses in respondent's schools.

Respondent's witness, Joseph Sirangelo, was fully credible, and petitioner's testimony was also credible in regard to specific facts. However, I cannot accept petitioner's conclusion that respondent had an apprenticeship program during the 1992-1993 school year. While it is certainly true that respondent had an apprenticeship program in prior years, there is no support for petitioner's contention that formal action in addition to the resolution abolishing the position of apprentice coordinator is required to discontinue the apprenticeship program. Petitioner points to respondent's 1992-1993 catalogue which refers to an apprenticeship program and also to the fact that apprentices attend classes at respondent's schools. However, Sirangelo adequately explained that the catalogue was prepared in the spring prior to the determination to abolish the position of apprentice coordinator and that individuals in other apprenticeship programs may take courses at respondent's schools. Therefore, with the exception of petitioner's testimony to the effect that respondent had an apprenticeship program during the 1992-1993 school year, the above summary of testimony is **FOUND AS FACT,** and I specifically **FIND** that respondent did not have an apprenticeship program during the 1992-1993 school year.

In view of the above findings, petitioner's contention is without factual support. Under the circumstances, I **CONCLUDE** that that petitioner's argument is without merit and that respondent's termination of petitioner was proper. It follows that the petition should be dismissed.

Accordingly, it is **ORDERED** that the matter be dismissed.

I hereby **FILE** my Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Jul. 22, 1993
Date

RICHARD McGILL, ALJ

Receipt Acknowledged:

7/26/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 29 1993
Date

OFFICE OF ADMINISTRATIVE LAW

am

APPENDIX

WITNESS LIST

For petitioner:

James F. Guerra

For respondent:

Joseph Sirangelo

EXHIBIT LIST

P-1	Certificate as coordinator of apprentice programs	Evidence
P-2	Certification of Completion	Evidence
P-3	Catalogue of Hudson County Area Vocational-Technical Schools for 1992-1993	Evidence
P-4	Job description for Apprentice Coordinator	Evidence
P-5	Apprenticeship Agreement	Evidence
P-6	Letter dated January 6, 1993 from Joseph Borgia to Jim Dorin	Evidence

JAMES F. GUERRA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
HUDSON COUNTY AREA VOCATIONAL-TECHNICAL SCHOOLS, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and respondent's reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4.

Petitioner's exceptions essentially reargue his contention made before the ALJ and in his post-hearing submission that respondent, in actuality, has continued to provide the apprenticeship program and it is unlawful for it to do so without an apprenticeship coordinator and urge the Commissioner to reject the initial decision. Respondent avers that the ALJ's decision is clearly supported by the record.

Upon careful and independent review of the record in this matter and the exceptions advanced by petitioner, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge that petitioner's contention is without factual support and his termination by respondent was proper.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law and dismisses the within Petition of Appeal for the reasons expressed in the initial decision.

COMMISSIONER OF EDUCATION

AUGUST 31, 1993

DATE OF MAILING - AUGUST 31, 1993

209-93

EDU #7613-93
C # 209-93
SB # 52-93

JAMES F. GUERRA,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE HUDSON COUNTY AREA VOCATIONAL-TECHNICAL SCHOOLS, HUDSON COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, August 31, 1993

For the Petitioner-Appellant, Feintuch, Porwich & Feintuch
(Philip Feintuch, Esq., of Counsel)

For the Respondent-Respondent, Brownstein, Booth & Barry
(Alexander W. Booth, Jr., Esq., of Counsel)

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

April 13, 1994

Date of mailing APR 15 1994

210-93

210-93

FRANK GARGANO,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,,	:	
RESPONDENT.	:	

AUGUST 31, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8348-90
AGENCY DKT. NO. 306-8/90

FRANK GARGANO,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,
Respondent.

Arnold M. Mellk, Esq., for petitioner
(Wills, O'Neill & Mellk, attorneys)

Louis M. Flora, Esq., for respondent
(Levy, Lybeck, Bertele & Jaworski, attorneys)

Record Closed: June 25, 1993 Decided: July 23, 1993

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

This contested case was transmitted by the Department of Education to the Office of Administrative Law on October 11, 1990, following the filing of a verified petition of appeal by Frank Gargano alleging that as a tenured supervisor of mathematics employed by the respondent for over thirty years, his assignment by the Board in 1990-91 to teach three math classes daily, in addition to his supervisory responsibilities in two junior high schools, violated his seniority rights as a tenured supervisor and/or was arbitrary, capricious, and unreasonable.

A telephone prehearing conference was conducted by the undersigned administrative law judge on April 29, 1991. As the result of various adjournments, the hearing did not commence until May 10, 1993. At the conclusion of the hearing, a schedule for the filing of posthearing briefs was established. The record closed on June 25, 1993.

A. Joint Stipulation of Facts

Prior to commencement of the hearing, counsel executed a joint stipulation of facts which helped reduce the time needed for the trial (Exhibit C-1). Those stipulated facts may be summarized as follows. Petitioner was first employed by respondent in 1959 as a math teacher. The next year he became a department supervisor of mathematics and served as a supervisor/teacher until March 1988, when he was appointed to the position of "supervisor of mathematics, grades K-9." In that capacity, he became responsible for the first time for supervising math teachers in the district's two junior high schools, Burnet and Kawameeh. Prior to that time, he had been department supervisor for one school only.

During both the 1988-89 and 1989-90 school years, petitioner had no teaching assignments in addition to his supervisory duties. However, in early June 1990, he was informed that he would be assigned three daily teaching periods in addition to his supervisory duties for the 1990-91 school year (Exhibits P-1, P-2, P-3). Previously, during his career in Union, except for 1988-89 and 1989-90, Gargano did have one or two teaching periods in addition to his supervisory duties, but never three. For example, in the 1985-86 school year, while a supervisor, petitioner had two teaching periods and one nonteaching duty period (Exhibit R-3).

Both the job description for "supervisor" (Exhibit R-1), as well as the job description for "supervisor of mathematics, grades K through 9" (Exhibit R-2), provide that the person holding that position could be required to perform "any other duties which may be assigned by the superintendent of schools or other designated administrator with the approval of the superintendent." Petitioner retired from employment effective July 1, 1991.

B. Testimony For Petitioner

The sole witness for petitioner was Gargano himself. He noted that his appointment in March 1988 to the position of supervisor of math, grades K through nine, represented the first time during his entire employment in the district that he was relieved of all teaching duties while performing as a supervisor. At the time he was appointed in 1988, the only other math supervisor in the district was Rosalyn Zeid, who was supervisor of mathematics for grades ten through twelve at Union High School.

The three teaching periods assigned to Gargano for the 1990-91 school year consisted of two seventh grade and one ninth grade mathematics classes. That latter class, he said, contained five special education classified students who he described as difficult to handle.

Petitioner stressed that the first time he learned of the three teaching assignments for 1990-91 was on or about June 5, 1990, when notices were left in his mailbox advising him of the same (Exhibits P-1, P-2 and P-3). This notification process, in itself, was somewhat unusual since, normally, he was advised orally of any teaching assignments for the following school year. When Gargano realized that for the first time in his career in Union he was expected to teach three mathematics classes in addition to his supervisory duties in two schools, he promptly complained to Gary Malles, principal of Burnet Junior High School. In a memorandum he sent to Malles on that subject, Gargano demanded to know why the principal had "singled me out" for such a burdensome assignment and pointedly observed that having to prepare for and teach three class periods per day substantially reduced the amount of time he could devote to his supervisory activities (Exhibit P-4). Thus, he suggested alternatives that Malles and/or the senior administrative staff might consider to lessen his dual load. For example, he raised the possibility of reassigning other math teachers who had nonteaching duty periods during the three periods he was to teach, or assigning Zeid, who had less years of service as a supervisor, to teach the classes.

In mid-June 1990, Gargano met with Malles and Robert J. Bergen, the assistant superintendent of schools, in order to pursue his protest over the three-period

teaching assignment for the following school year. Bergen, he said, told him that the assignment was made because "I was the person for the job."

Petitioner taught the three math classes during 1990-91 and retired as of July 1, 1991. The relief he seeks is to be compensated retroactively for having to teach the three periods in question, a sum that he suggested should total $9,000. This amount is equal to three times the $3,000 stipend that teachers were paid for having to teach one extra period per day.

On cross-examination, Gargano agreed that he taught two periods in addition to his supervisory duties for a majority of the school years that he was employed in Union as a department chair or supervisor. Nevertheless, while he occasionally had a nonteaching duty period in addition to the two teaching periods, such as in 1985-86, he reiterated that at no time prior to 1990-91 did he ever have three teaching periods in addition to his supervisory duties, nor as far as he was aware did any other supervisor employed by the Board.

Finally, Gargano conceded that he knew that during the course of collective negotiations between the Board and the supervisors' unit, of which he was a member, proposals had been made that supervisors should be paid an additional stipend for having to undertake teaching duties as well. However, as far as he knew, the proposal was never included in any collective negotiations contract.

On redirect-examination, Gargano stressed that he could have been relieved of some, if not all, of the three teaching periods assigned to him in 1990-91, either by shifting those duties to other teachers (Exhibit P-6), or by assigning one or more of the classes to Zeid. Also, while he agreed that he had been told in April 1990 by the principal of Kawameeh Junior High School that some supervisors in the district would have to teach in 1990-91, he was not advised specifically that he would be one of them. Gargano maintained that he certainly was never forewarned that three teaching periods were to be assigned to him for the first time in his many years as a supervisor in the district.

C. Testimony for Respondent

The Board's sole witness was Bergen, who previously had filed a certification in connection with a motion for summary decision that was filed too late to be heard (Exhibit P-5). In that certification, Bergen explained that since in past school years petitioner regularly had been assigned to teach in addition to his supervisory duties, it was not unusual to reinstitute that format in 1990-91, particularly since a need to do so existed. Nor was any extra pay considered since this had never been done. In addition, although the supervisors' association had sought an additional stipend for those assignments both in collective negotiations and in an unfair practice filed with the Public Employment Relations Commission, neither effort was successful.

Bergen then set forth a variety of reasons for the decision to assign Gargano to teach three classes in the 1991 school year. Thus, he pointed out that Gargano, not Zeid, was the supervisor assigned to the two junior high schools, and he therefore would be expected to be most familiar with the math curriculum, which he helped develop. Bergen also pointed out that Zeid had no supervisory duties in either of the two junior high schools and was not located in either school. Also, she was in charge of the high school program and suffered from a physical disability that impaired her mobility. Moreover, since the number of junior high school mathematics teachers had been substantially reduced for the 1990-91 school year as the result of budget constraints, someone had to cover the three periods.

Bergen also noted that the practice of assigning supervisors to teach was consistent with the written job descriptions both for supervisors generally and for the K-9 mathematics supervisor in particular. Such assignments had been a longstanding practice in the district, particularly when, as in 1990-91, student enrollment and a reduced staff created a special need to do so. He reiterated that since Gargano always had one or two teaching periods and/or one duty period while a supervisor, except for 1988-89 and 1989-90, there was nothing extraordinary about his assignment for 1990-91, other than the fact that it consisted of three teaching periods rather than a combination of teaching and other duties.

With respect to Gargano's complaint that his ninth-grade mathematics class contained difficult special education students, Bergen pointed out that these

students, although classified, properly had been assigned there by the child study team for mainstreaming.

Finally, both during his direct- and his cross-examination, as well as in his certification, Bergen disputed that there was any reduction in force (RIF) with respect to Gargano's 1990-91 assignment since petitioner's employment continued without interruption, he suffered no loss of pay, and he received full seniority credit for that school year. He also denied that the 1990-91 assignment was designed to motivate Gargano to retire.

DISCUSSION

While there are some minor disagreements between the testimony of Gargano and Bergen, many of the essential facts necessary to a determination in this case are encompassed within the joint stipulation. Thus, I adopt those facts rather than having to restate them herein.

Whether the action taken with respect to Gargano for the 1990-91 school year constituted a RIF is easily resolved. Clearly, since he retained his employment for that school year at his full rate of pay, and he also received full seniority credit for that service, there was no RIF in the "classic "or any other sense. I take note, as well, that in a recent decision by the Commissioner involving a supervisor of English at Union High School, grades ten through twelve, the same argument was made and was rejected. *See Dallmeyer v. Board of Education of Union*, decided by the Commissioner December 29, 1992, 93 *N.J.A.R.* 2d (Vol. 4A) 125 (Dept. of Ed.), OAL DKT. NO. EDU 11372-91.*

So too, the claim by Gargano in this case, similar to that made in *Dallmeyer*, that the Board's determination to assign him to three teaching periods in addition to the supervisory duties was "unfair" and thereby can be characterized as arbitrary, capricious, or unreasonable also must fail. It is true that during his thirty-plus years

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* Dallmeyer, who had never had to teach during her ten-year service as a supervisor, was assigned to teach two English classes in 1991-92 and the number of teachers she supervised was increased from eleven to fifteen

of service as a supervisor, Gargano was never called upon to teach three classes in addition to his supervisory duties; indeed, neither was any other supervisor as far as the record reveals. This, however, does not make his 1990-91 assignment "unfair" in a legal, remedial sense. To the contrary, assignment of teaching staff members is a matter that is traditionally vested in the managerial discretion of boards of education, which must make those decisions in light of a variety of factors. *See, e.g., Ridgefield Park Ed. Assoc. v. Ridgefield Park Bd. of Ed.*, 78 *N.J.* 144 (1978).

Among those factors are the very reasons cited by Bergen both in his certification and during the course of his testimony, *i.e.*, that: (a) Gargano had helped develop the math curriculum, was particularly familiar with the junior high school math context, and was located physically at one of the schools; (b) Gargano had always taught one or two classes in addition to his supervisory duties, as had many other supervisors in the district; (c) a budget defeat with respect to the 1990-91 school budget had necessitated a reduction in staff and a need to spread teaching assignments among the remaining staff members; and (d) Zeid, the mathematics supervisor at the high school, was located at a physical distance from the two junior high schools and also suffered from a physical disability that impaired her mobility. In short, while one legitimately may take issue with the exercise of the managerial judgment made in Gargano's case, there were fundamentally sound educational reasons to support that decision. It was Gargano's burden, not that of respondent, to prove that the decision was arbitrary, capricious, or unreasonable, and he failed to do so.

CONCLUSION AND ORDER

Accordingly, in light of the fact that no RIF took place with respect to Gargano's employment during 1990-91 that implicated his seniority rights as a tenured supervisor and, further, in view of the fact that the Board's assignment of Gargano to teach three periods during that school year in addition to his supervisory duties was in good faith and within the sound exercise of its managerial discretion, I **CONCLUDE** that no cause of action exists. I therefore **ORDER** that the verified petition of appeal be **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 7th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 23, 1993
Date

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

7/26/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 29 1993
Date

OFFICE OF ADMINISTRATIVE LAW

amr/e

WITNESS LIST

For Petitioner:

Frank Gargano

For Respondent:

Robert J. Bergen

EXHIBIT LIST

J-1 Joint stipulation of facts

P-1 Memorandum to Gargano from Malles, June 1, 1990

P-2 1990-91 tentative schedule for Gargano

P-3 Memorandum to Gargano from principal of Kawameeh Junior High School re 1990-91 assignment

P-4 Memorandum from Gargano to Malles, June 7, 1990

P-5 Certification of Robert Bergen, with attachments

P-6 Mathematics teachers' schedules for 1990-91

R-1 Job description for supervisor

R-2 Job description for supervisor (math--grades K through 9)

R-3 Teaching period assignments for supervisors/coordinators for 1985-86

R-4 Teaching period assignments for supervisors for 1990-91 and 1991-92

OAL DKT. NO. EDU 8348-90

FRANK GARGANO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, tenured mathematics supervisor with over 30 years service, alleged Board violated his tenure and seniority rights when it assigned him to teach three math classes daily in addition to his supervisory duties. Petitioner claimed entitlement to full-time math supervisory position.

Initial decision determined that in light of fact that no RIF took place with respect to petitioner's employment during 1990-91 that implicated his seniority rights as a tenured supervisor and since Board's assignment of petitioner to teach and supervise was done in good faith and was within its managerial discretion, no cause of action existed. Petitioner did not prove that Board's action was improper. Petition was dismissed.

Commissioner adopted findings and determination in initial decision.

OAL DKT. NO. EDU 8348-90

FRANK GARGANO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon a careful and independent review of the record of this matter, the Commissioner agrees with the findings and conclusions of the Admnistrative Law Judge that in light of the fact that no RIF with respect to petitioner's employment took place during 1990-91 to implicate his seniority rights as a tenured supervisor, and he failed to meet his burden of proving that the Board's assignment of him to teach three periods in addition to his supervisory duties was arbitrary, capricious or unreasonable, no cause of action exists.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law and dismisses the within petition for the reasons expressed in the initial decision.

AUGUST 31, 1993

DATE OF MAILING - AUGUST 31, 1993

COMMISSIONER OF EDUCATION

211-93

BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning Board appealed Department of Education's assignment of student A.R. for tuition purposes pursuant to State Facilities Education Act, N.J.S.A. 18A:7B-1 to 13.

Citing Kaprow, initial decision dismissed the petition as time barred since Board filed well beyond 90 days following receipt of final notice from Finance.

Commissioner adopted findings and determination in initial decision. Petition was dismissed as untimely.

AUGUST 31, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 7797-92
AGENCY REF. NO. 383-8/92

BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,
Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,
Respondent.

Joseph M. Jacobs, Esquire, for petitioner
Marlene Zuberman, Deputy Attorney General, for respondent (Robert J. DelTufo, Attorney General of New Jersey, attorney)

Record Closed: June 22, 1993 Decided: July 14, 1993

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Board of Education of the City of Atlantic City (Board), disputes the Division of Finance (Finance) assignment of pupil A.R. as a resident pupil in the school district, pursuant to the State Facilities Education Act (Act), N.J.S.A. 18A:7B-1 to - 13.

This matter was transmitted to the Office of Administrative Law (OAL) on October 7, 1992, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A 52:14F-1 to -13. A prehearing conference was held on January 28, 1993, at which, among other things, the issue to be determined was agreed upon by the parties and the hearing date of July 8, 1993, was established. The prehearing order also granted leave for Finance to move for summary decision, pursuant to N.J.S.A. 1:1-12.5.

Finance exercised this grant. On June 1, 1993, this tribunal received its Notice of Motion to Dismiss and/or for Summary Decision with accompanying brief. On June 21, 1993, the Board submitted its memorandum of law in Opposition to respondent's Notice of Motion for Summary Judgment.

FINANCE'S STATEMENT OF FACTS

On August 5, 1992, the Board of Education filed a Petition of Appeal with the Commissioner of Education challenging the designation of Atlantic City as the district of residence of A.R. for school funding purposes. Approximately seven months earlier, on January 15, 1992, Finance had determined that Atlantic City was the school district responsible to pay the educational component of A.R.'s placement at the Lake Grove facility in the State of Connecticut.

A.R. was initially placed at Lake Grove by the Division of Youth and Family Services (DYFS) on November 14, 1990. At that time, his mother resided at 113A Florida Avenue in Atlantic City. On May 29, 1993, DYFS requested that Finance make a district of residence determination for A.R. At that time, A.R.'s mother was residing at 116 S. Bellevue Avenue in Atlantic City.

Finance notified the Board regarding its district of residence determination on June 21, 1991. Finance reiterated that finding by letter of December 10, 1991 and indicated that it had information that indicated the mother's address was 2681 Monterey Avenue, Atlantic City, as of October 15, 1991. The Board contested Finance's determination by letter to Assistant Commissioner Robert Swissler on January 2, 1992. On January 15, 1992, Finance issued its final determination, upholding Atlantic City as A.R.'s district of residence.

DYFS last checked A.R.'s mother's address on March 6, 1992. At that time, she was living with her husband at 2510 Fairmont Avenue in Atlantic City. That address was verified by the family's DYFS caseworker.

FINANCE'S LEGAL ARGUMENT

POINT I

THE PETITION OF APPEAL SHOULD BE DISMISSED BECAUSE IT WAS NOT FILED WITHIN THE TIME LIMIT SPECIFIED IN N.J.A.C. 6:24-1.2 (c).

Pursuant to N.J.A.C. 6:24-1.2 (c), any individual or entity who desires to bring an action before the Commissioner of Education must file a petition within 90 days of receiving notice of the action the petitioner is challenging. In this matter, the Board was notified of Finance's final determination regarding A.R.'s district of residence by letter dated January 15, 1992. Even allowing one week for mailing, the Board's petition would therefore have been due on April 21, 1992.

The Board did not file its petition until August 7, 1992, nearly four months after its petition was due and almost seven months after receiving Finance's final determination. Clearly, the Board did not comply with the provisions of N.J.A.C. 6:24-1.2 (c) and its petition in this matter should therefore be dismissed.

POINT II

PURSUANT TO N.J.S.A. 18A:7B-12, ATLANTIC CITY IS THE RESPONSIBLE SCHOOL DISTRICT FOR A.R.'S EDUCATIONAL COSTS WHETHER HIS MOTHER'S CURRENT ADDRESS OR ADDRESS AT THE TIME OF INITIAL PLACEMENT IS USED TO DETERMINE THE DISTRICT OF RESIDENCE.

Even if this tribunal denies respondent's Motion to Dismiss, Finance still prevails in this case as a matter of law. In determining a district of residence for school funding purposes, the Commissioner of Education looks to the provisions of N.J.S.A. 18A:7B-12. The statute provides, in relevant part, that the district of residence of a child who has been placed by a State agency in an out-of-State facility, "shall be the present district of residence of the parent or guardian with whom the child lived prior to his ...most recent placement by a State agency." Ibid. If that district

cannot be determined, then the district of residence is designated as the district in which the child resided prior to the placement.

When Finance was asked to determine A.R's district of residence in June 1991, his mother's then present address was 116 South Bellevue Avenue in Atlantic City. Even assuming that this address was invalid for some reason, application of the statutory criteria still results in a designation of Atlantic City as the district of residence. According to the information provided to Finance by Human Services, at the time he was placed in Lake Grove, A.R. was residing at 113A Florida Avenue in Atlantic City. Thus, the Board has no legal basis to deny that it is A.R.'s district of residence for school funding purposes.

Furthermore, when Finance again contacted the Board in December 1991 to reiterate its findings, it had information that A.R.'s mother was then residing at 2681 Monterey Avenue in Atlantic City. Moreover, by March 1992 she was residing with her husband in Atlantic City.

The inescapable conclusion one must reach when faced with this information, is that Atlantic City is A.R.'s district of residence and is therefore responsible for paying his education costs at Lake Grove. Indeed, the Board admitted as much in a letter to DYFS dated October 5, 1992. In view of the indisputable information provided as well as the Board's own admission, this tribunal should rule that Atlantic City is responsible for A.R.'s educational costs and grant Finance's Motion for Summary Decision.

THE BOARD'S LEGAL ARGUMENT

POINT I

THE TIME IS WHICH TO FILE AN APPEAL SHOULD BE WAIVED IN THIS MATTER

The petition of appeal should not be dismissed although it was not filed within the time specified in N.J.A.C. 6:24-1.2 (b). According to N.J.A.C. 6:24-1.2 (b), when a party intends to petition a final order of the Commissioner of Education he must do so within 90 days of receipt of the final order. This 90 day limitation period

may be waived or relaxed by the Commissioner under N.J.A.C. 6:24-1.17 when strict adherence may be inappropriate, unnecessary or may result in injustice.

The Board received a final notice from Finance on January 15, 1992. The notice informed the Board that the Atlantic City District would be responsible for paying the education expenses which were incurred as a result of A.R.'s placement at the Lake Grove facility in Connecticut. The notice also disclosed that the Commissioner had based its final determination on information that A.R.'s mother resided at 2681 Monterey Avenue in Atlantic City as of October 15, 1991.

Immediately after receiving final notice, the Board on February 4, 1992, sent one of its social workers, Sylvia Harris, to the 2681 Monterey Avenue address. Harris spoke with Mrs. Edna Leonzo who indicated that A.R.'s mother did not live at that address. Leonzo stated that A.R.'s mother only stayed at that address temporarily prior to having her baby and that A.R.'s mother never resided at 2681 Monterey Avenue on a permanent basis.

Although the Board did not file its petition of appeal challenging the designation of Atlantic City as the district of residence of A.R. until August 5, 1992, it acted promptly in investigating the accuracy of the information on which the Commissioner based its final determination. As a result of the information obtained by the Board from Leonzo, the Board can show that the information relied upon by the Commissioner was inaccurate and therefore unreliable. Thus, based on that information, it is apparent that A.R. did not reside in the Atlantic City School District as of 1991.

As mentioned above, pursuant to N.J.A.C. 6:24-1.17, the Commissioner has the authority to waive or relax the rules. In this instance, the rules should be relaxed and the appeal allowed because it would be an injustice to require the Board to bear the educational cost of A.R. when the Commissioner based its district of residence determination on information which was inaccurate.

POINT II

PLAINTIFF HAS FAILED TO MEET THE NECESSARY STANDARDS FOR THE GRANTING OF SUMMARY JUDGMENT

Pursuant to New Jersey Rule 4:6-2, summary judgment is to be granted when "the pleadings, depositions, answers to interrogatories and admissions of file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." N.J. Rule 4:6-2, see also Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 73-75 (1954); Adlers Quality Bakery, Inc. vs. Gasteria, 32 N.J. 55, 72 (1960); Warthen v. Toms River Community Memorial Hospital, 199 N.J. Super. 18, 22-23 (App. Div. 1985). The purpose of summary judgment procedure was set forth by the New Jersey Supreme Court in Monmouth Lumber Co. vs. Indemnity Insurance Company of North America, 21 N.J. 439 (1956) :

> It is fundamental that the purpose of summary judgment procedure is to grant relief in cases which procedural tactics are interposed to delay the trial and the inevitable result sought by the institution of the suit. It is designed to cut through sham and frivolity in an answer and lay the case before the trial court in its true light. If, when so viewed, there appears to be no genuine triable issues of fact, the relief should be granted. Id. at 448

It is a settled principle that where a party has demonstrated its prima facie right to summary judgment, the party opposing the motion for summary judgment is required to demonstrate by competent evidential material that a genuine issue of material fact exists or that the plaintiff is not entitle to summary judgment as a matter of law. Robbins v. Jersey City, 23 N.J. 229, 240-241 (1957; Heljon Management Corp. v. Dileo, 55 N.J. Super. 306, 312 (App. Div. 1959). The standards for the granting of summary judgment should be applied where the movant is entitled to that relief. See Judson, Supra., 17 N.J. at 74. Thus, the summary judgment procedure is intended to "avoid trials which would serve no useful purpose and to afford deserving litigants immediate relief." Warthen, Supra. 199 N.J. Super. AT 23; See also Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 65 (1980).

The summary judgment motion should not be granted because A.R.'s district of residence must be determined by the use of accurate information. As stated previously, Finance reached its decision that A.R.'s mother was a permanent resident of 2681 Monterey Avenue. There is evidence to show that A.R.'s mother resided at

this address on a temporary basis only. Thus this determination was based on inaccurate and therefore unreliable information. Additionally, the Board is in the process of reviewing all prior records regarding A.R.

As a consequence of Finance's faulty determination, a trial must be conducted so that the Board may question witnesses concerning whether A.R. did or did not reside in Atlantic City as of October 15, 1991. A.R. 's place of residence is a material issue which remains in dispute. Therefore, the petitioner is precluded from being granted a motion for summary judgment.

It is clear in the present case, that respondent has not and cannot demonstrate the necessary requirements for a summary judgment motion to be granted.

DISCUSSION AND CONCLUSIONS

Our Supreme Court has recently addressed the issue of the applicability of the 90-day rule, as embodied in N.J.A.C. 6:24-1.2 (c), in the matter of Kaprow v. Board of Education of Berkeley Township, 131 N.J. 572 (1993). Maurice Kaprow was a tenured assistant superintendent in the employ of the Berkeley Township Board of Education. Kaprow's employment was terminated effective June 31, 1981, as a consequence of a reduction in force (RIF) pursuant to N.J.S.A. 18A:28-9. The Berkeley Board failed to maintain Kaprow's name on a preferred eligibility list for reemployment as required by N.J.S.A 18A:28-12. Subsequent to Kaprow's termination, the Berkeley Board filled the position of assistant superintendent with someone other than Kaprow and without notice to him.

On February 23, 1988, Kaprow inquired of the Berkeley Board's secretary as to whether positions for which he retained tenure rights had been established by the Board subsequent to his termination. On February 23, 1988, the Board Secretary wrote Kaprow to advise him that on September 9, 1986, the Board appointed Robert Ciliento to the position of Assistant Superintendent of Administrative Services. The Board Secretary also advised Kaprow that on July 1, 1987, the Board had appointed Shelia McGuckin as District Supervisor of Elementary Schools.

In or about February 28, 1988, Kaprow addressed a letter to the Berkeley Board making claim to both the Assistant Superintendent and District Supervisor positions. Kaprow requested the Board to reinstate him retroactivity with full back pay and

benefits, pursuant to N.J.S.A. 18A:28-12. The Berkeley Board did not reply to Kaprow's letter of February 28, 1988.

On April 25, 1988, Kaprow sent a second letter to the Berkeley Board asserting he wished to amicably resolve the matter and requested a reply by May 16, 1988. On June 14, 1988, the Berkeley Board's attorney responded to Kaprow's April 25, 1988, letter and acknowledged that two positions had been created and filled. The Board's attorney asserted, among other things, that the duties of the two positions were substantially different from those performed by Kaprow and, therefore, his RIF rights did not attach and there was no basis for his reinstatement

On August 1, 1988, Kaprow filed a verified Petition of Appeal with the Commissioner of Education asserting his claim to the positions of Assistant Superintendent of Administrative Services and/or District Supervisor. Kaprow's case proceeded through the OAL, the Commissioner, the State Board of Education, the Appellate Division of Superior Court, to the New Jersey Supreme Court, which granted his petition for certification at 130 N.J. 16 (1992).

The Court in Kaprow found that the letter he received from the Berkeley Board's secretary on February 23, 1988, constituted adequate notice under N.J.A.C. 6:24-1.2 (c). Justice Garibaldi, writing for the Court, made the following observation:

> Adequate notice must be sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate. See Burns v. West Am. Corp., 137 N.J. Super. 442, 446, 349, A. 2d. 142 (Dist. Ct. 1975). Moreover, adequate notice under the regulation must be sufficient to further the purpose of the ninety-day limitations period. See Apex Roofing Supply Co. v. Howell, 59 N.J. Super. 462, 158, A. 2d. 49 (App. Div. 1960). A limitations period has two purposes. The first is to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims. Ochs v. Federal Ins. Co., 90 N.J. 108, 112, 447, A. 2d. 163 (1982). The second purpose is "'to penalize dilatoriness and serve as a measure of repose'" by giving security and stability to human affairs. Ibid. (quoting Farrell v. Votator Div., 62 N.J. 111, 115, 299, A.2d. 394 (1973)).
>
> When a plaintiff knows or has reason to know that he has a cause of action against an identifiable

> defendant and voluntary sleeps on his rights so long as to permit the customary period of limitations to expire, the pertinent considerations of individual justice as well as the broader considerations of repose, coincide to bar his action. [Farrell, supra. 62 N.J. at 115, 299, A.2d. 394]

> Adequate notice under N.J.A.C 6:24-1.2 should accommodate both purposes. That is, the notice requirement should effectuate concerns for individual justice by not triggering the limitations period until the tenured teachers have been alerted to the existence of facts that may equate in law with a post - RIF cause of action. See Burd v. New Jersey Tel. Co., 76 N.J. 284, 291, 386, A. 2d. 1310 (1978). At the same time, it should further considerations of repose by establishing an objective event to trigger the limitations period in order "to enable the proper and efficient administration of the affairs of government." Borough of Park Ridge v. Salimone, 21 N.J. 28, 48, 120 A. 2d. 721 (1956). Id. at 587

The Court held that the notice to Kaprow on February 23, 1988, albeit unofficial and informal, was sufficient to trigger the ninety-day limitations period. Kaprow's subsequent attempt to negotiate with the Board to resolve his claim was held to be irrelevant. The negotiations did not negate the fact that he received adequate notice on February 28, 1988, nor did it toll the running of the ninety-day limitations period.

In the instant matter, the Atlantic City Board readily admits it filed its petition out of time. The record clearly shows that the Board was in receipt of a final notice from Finance on January 15, 1992. The record also demonstrates that the Board did not file it's petition of appeal before the Commissioner until August 5, 1992, approximately seven months after receipt of the final notice. Ninety-days from January 15, 1992, fell on April 14, 1992. The petition of appeal was filed some four months subsequent to the ninety-day limitation period.

There are no facts in dispute with regard to the Board's receipt of Finance's final notice or the filing of the Board's petition of appeal. I **FIND and CONCLUDE**, therefore, there are no material facts in dispute and that the criteria for summary decision has been met with regard to the issue of timeliness. Judson, supra.

I **CONCLUDE** that under the provisions of N.J.A.C. 6:24-1.2 (c), the herein Board's claims are time barred. Kaprow, supra.

I **CONCLUDE**, therefore, there is no need to address the issue as to whether the Board is the responsible school district for A.R.'s educational costs under N.J.S.A. 18A:7B-12.

ORDER

Accordingly, it is hereby **ORDERED** that **SUMMARY DECISION** be and is hereby **ENTERED** on **BEHALF OF RESPONDENT.**

It is **FURTHER ORDERED** that the Board's Petition be **DISMISSED** on the grounds that it was **UNTIMELY FILED**, pursuant to N.J.A.C. 6:24-1.2 (c).

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

July 14, 1993
Date

Lillard E. Law, Jr.
LILLARD E. LAW, ALJ

Receipt Acknowledged:

7/21/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 23 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

lmh

DOCUMENTS IN EVIDENCE

NONE

OAL DKT. NO. EDU 7797-92

BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENT.	:	

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

Upon a careful and independent review of the record of this matter, the Commissioner agrees with the findings and conclusions of the Administrative Law Judge that under the provisions of N.J.A.C. 6:24-1.2(c), the within claims of the petitioner are time barred. Therefore, she agrees that it is unnecessary to address the issue as to whether the Board is the school district responsible for A.R.'s educational costs under N.J.S.A. 18A:7B-12.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law granting respondent's Motion for Summary Decision and dismisses the Petition of Appeal for the reasons expressed in the initial decision.

AUGUST 31, 1993

DATE OF MAILING - AUGUST 31, 1993

Maryanne Fitzgerald
COMMISSIONER OF EDUCATION

212-98

212-93

JANET GLYNOS AND LENORE JEANS, :

PETITIONERS, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF UNION COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1, UNION COUNTY, : DECISION

RESPONDENT. :

:

SYNOPSIS

Petitioning residents challenged regional Board's decision to close one of its four high schools (Brearley) and reassign students to the three remaining high schools. Petitioners contended Board's action was arbitrary, capricious and unreasonable and constituted bad faith and abuse of discretion.

ALJ concluded Board's decision to close Brearley High School due to declining enrollment and financial reasons was not made in an arbitrary, capricious or unreasonable manner. Moreover, Board did not reach its decision as a result of bad faith or abuse of discretion. ALJ found record reflected rational basis for closing and careful consideration of issues with information shared with public and lengthy discussions occurring throughout process. Public had reasonable opportunities for input through Ad Hoc Committee, Eagleton surveys, public hearings and public comment sessions at Board's regular meetings. One executive session and two retreats did not constitute bad faith. Petition was dismissed.

Commissioner affirmed findings and conclusions of initial decision, stressing that the Board's decision was a reasonably based, good faith exercise of its lawful discretion and that the Commissioner may therefore not substitute her judgment for that of the Board.

AUGUST 31, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 0908-93
AGENCY DKT. NO. 522-12/92

JANET GLYNOS AND LENORE JEANS,
Petitioners,
v.
BOARD OF EDUCATION OF UNION COUNTY, REGIONAL HIGH SCHOOL DISTRICT NO. 1,
Respondent.

Robert P. Glickman, Esq., for petitioners

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

Record Closed: June 11, 1993 Decided: July 23, 1993

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

STATEMENT OF THE CASE

Petitioners challenge the action of respondent, Board of Education of Union County, Regional High School District No. 1 (Board), closing one of its four high schools, the David Brearley High School (Brearley), effective September 1, 1993, and reassigning the students to the three remaining high schools. Petitioners allege that the Board's decision on November 17, 1992, to close Brearley was arbitrary, capricious, unreasonable, and constituted bad faith and an abuse of discretion.

Respondent denies the allegations and argues that its decision to close a school was proper and reasonable, reached with sufficient public input and participation and only after repeated efforts at other means of cost containment failed and began to adversely affect the educational program. Also, its choice of Brearley as the school to be closed was reasonable in all respects.

For the reasons discussed herein, I **CONCLUDE** that the Board's decision to close one of four regional high schools, specifically, David Brearley High School, was not arbitrary, capricious, unreasonable, or an abuse of discretion, nor was it done in bad faith.

PROCEDURAL HISTORY

The matter was opened before the Commissioner of Education on December 27, 1992, and was transmitted to the Office of Administrative Law (OAL) on February 3, 1993, for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The transmittal form requested that the matter be given priority scheduling because the outcome affected student assignments for September 1993.

On March 12, 1993, a prehearing conference was held at the OAL, and the issues were established. Hearing dates were scheduled for April 26, 27, 28, 29, May 3, 4, 5, and 6, 1993. The parties were ordered to prefile direct testimony of all expert witnesses prior to the hearing. A Prehearing Order was issued on March 23, 1993.

On March 26, 1993, the Board filed a Motion for Partial Summary Decision. The Board's motion was granted on April 26, 1993, and, consequently, several issues established at the prehearing conference were dismissed. Accordingly, on March 29, 1993, a second prehearing conference was held.

On April 22, 1993, the Board moved to adjourn the hearing dates for at least forty-five days. I denied the motion on April 23 and, thereafter, the Board filed an emergent interlocutory appeal from the denial before the Commissioner of Education. On April 26, the Commissioner granted a seven-day adjournment to May 3.

On April 27, 1993, petitioners appealed from the Commissioner's order to the State Board of Education for emergency relief; the State Board reversed the Commissioner's decision and granted petitioners' motion to reinstate the hearing schedule.

Thereafter, also on April 27, respondent filed an emergent interlocutory appeal before the Appellate Division, Superior Court of New Jersey; the Appellate Division denied the application to reverse the order of the State Board of Education. Accordingly, the

hearing commenced on April 28 and continued on April 29, May 3, 4, 5, 6, 7, 10, 12, and 13, 1993.

At the conclusion of the hearings, a briefing schedule was established: Initial briefs were due on June 1, and reply briefs were due on June 11, 1993, on which date the record was closed.

ISSUES

The remaining issues to be resolved in this matter are:

1. Whether, on November 17, 1992, the Board's vote to close one of the four high schools effective September 1993, and reassign the students to the remaining three high schools, was arbitrary, capricious, or unreasonable, constituted bad faith, or was an abuse of discretion.

    a) Whether the decision to close Brearley was arbitrary, capricious, or unreasonable, constituted bad faith, or was an abuse of discretion. (Petitioners allege that before voting to close Brearley, the Board failed to consider certain information or reports; *e.g.*, the school's age, structure, environmental and revenue-producing features, student enrollment projections, public response to the closing, and the effect on real estate values, racial balances, and functional capacity.)

Petitioners must carry the burden of proof by a preponderance of the evidence.

BACKGROUND

Based upon a review of the documentary and testimonial evidence, I **FIND** the following facts are undisputed and are therefore adopted as **FACT**.

The Union County Regional High School District No. 1 (District) was established in the 1930s to meet the instructional needs for high school students from six small farming communities: Berkeley Heights, Clark, Garwood, Kenilworth, Mountainside, and Springfield. Jonathan Dayton Regional High School (Dayton) in Springfield opened in 1937 and was the District's only high school until 1955. There are three other regional high

schools: Arthur L. Johnson (Johnson) in Clark opened in 1956; Governor Livingston (Livingston) in Berkeley Heights opened in 1960; and Brearley opened in Kenilworth in 1966. Students from Mountainside and Springfield attend Dayton; students from Clark attend Johnson; students from Berkeley Heights attend Livingston; and students from Garwood and Kenilworth attend Brearley.

District-wide demographic factors show that the original student enrollment of 817 increased to 5,722 in 1972, but then declined to 2,163 in 1992. During the period from 1970 to 1990, the combined District population decreased from 69,500 to 58,487 (R-26 at 5). "Each of the six communities is unique and differs from the other five. Some may be considered 'blue collar,' or labor intensive communities . . . while others such as Berkeley Heights and Mountainside consisting of relatively expensive single family houses . . . may be thought of as 'white collar,' with a managerial service orientation." *Id.* at iii. Common to all six communities are economically-sound manufacturing, office, research, and service facilities and a quality regional high school district.

The Regional Board of Education (Board) is comprised of nine members: Two members each representing Berkeley Heights, Clark, and Springfield and one member each representing Garwood, Mountainside, and Kenilworth.

Between 1972 and 1992, the District's student enrollment dropped 62%, from 5,722 to 2,162. The decline mirrors the general population trend in Union County and the six constituent communities between 1970 and 1990 (R-26 at 5-6; J-28 at 83-84). Only a slight fluctuation of student and general population is anticipated over the next decade (R-26 at ix; J-28 at 82-87).

Dayton, a three-story, 159,000 square-foot building, sits on a 12-acre site. Additionally, the District leases 17 acres of adjacent land from the Union County Park Commission. Student enrollment in 1972-73 was 1,399 and in 1992-93 was 581. The projected enrollment for 1993-94 is 588 students (R-26 at 42-56; R-23 at 19).

Johnson, a two-story, 200,000 square-foot building, sits on a 26-acre site; student enrollment in 1972-73 was 1,718 and in 1992-93 was 537. The projected enrollment for 1993-94 is 550 students. *Id.*

Livingston, a three-story, 168,200 square-foot building, sits on 39 acres. Student enrollment in 1972-73 was 1,625 and in 1992-93 was 622. The 1993-94 projected enrollment is 596 students. *Id.*

Brearley, a two-story, 140,000 square-foot building, sits on 21.5 acres. Student enrollment in 1972-73 was 1,056 and in 1992-93 was 423. The 1993-94 projected enrollment is 408 students. *Id.*

In addition to providing instructional needs for students, the schools sponsor educational and community events such as an adult education program, co-curricula student activities, and community athletic events. Thus, the high schools not only serve the students' academic needs, they also "serve a vital role in the life of each community . . . [and] . . . [t]hey genuinely enhance the quality of life and opportunities possible for residents within our six regional district communities" (R-26). However, the precipitous declining student enrollment over the past 20 years has impacted both the curriculum offered to students and cost of operating the schools. Consequently, the Board was compelled to consider whether it should continue to operate four regional high schools.

SUMMARY OF EVIDENCE

The parties entered into evidence 33 joint exhibits; petitioners entered 16 exhibits; and respondent entered 51 exhibits. Further, petitioner's eleven witnesses and respondent's nine witnesses testified about the District's four high schools, the past, current, and projected enrollment, public response to closing one of the schools, and the effect the closing of a school would have on real estate values, racial balances, the community, and the students. All held the common belief that the District is currently providing the students from the six communities a quality education; they differ, however, on the level of the quality education and whether it can be maintained under the present circumstances if four schools continue to operate. Furthermore, if a school should be closed, the parties disagree on which of the four should be closed. Much of the testimonial and documentary evidence, though relevant to the resolution of the issues, is repetitive and will therefore not be reiterated herein.

I

In 1985, the Board consulted Dr. Leonard Bornstein of Human Resource Consultants about the procedure for school closings. They discussed the process of information gathering, formulating committees, getting community input, and developing a plan for the students' use of the building.

In December 1990, the Board again hired Bornstein to conduct a study of the four regional high schools. As a result, Bornstein issued his Facility Study Based on Factors of Efficiency (J-28).

The study evaluated efficiency factors in each of the schools. It included an architectural description, building inspection, interviews with personnel, and a review of various District reports. Bornstein also discussed educational flexibility, rate of enrollment decline, recyclability, safety, socioeconomic, ethnic and/or racial considerations, and transportation (J-28 at 1-2).

Bornstein determined that improvements/repairs for each of the four buildings could reduce operating costs and improve operational efficiencies. For example, Dayton could replace the original wood, double-hung windows with insulated glass and aluminum windows; Johnson could replace boilers with high-efficiency equipment; Livingston could seal expansion joints on exterior walls; and Brearley could replace windows. Overall, the four buildings required a general proactive maintenance and repair program.

Bornstein estimated that repair costs ranged from $500,000 to $6 million dollars. Specifically, Brearley and Livingston were estimated at $500,000; Johnson at $750,000 to $1 million; and Dayton at $5 million to $6 million (J-28 at 61).

In contrast, Dr. Michael Disko, a civil engineer hired by the Board to review Bornstein's report, estimated repair costs for the schools as follows: Dayton -- $417,000; Johnson -- $734,000; Livingston -- $467,00; and Brearley -- $641,600.

Using 1989-90 actual expenses, Dr. Bornstein also estimated operating expenses for each school based on building size and student population. Dayton had the highest cost, followed by Brearley, Johnson, and Livingston (J-28 at 66-68). Bornstein then determined cost per square foot and per student. Similarly, Dayton had the highest cost per square

foot followed by Brearley, Johnson, and Livingston. However, Brearley had the highest per pupil cost and used only 38% of its total functional capacity. *Id.* at 69-72.

Dr. Merachnik, the District Superintendent, disputed Bornstein's figures and recalculated operating and per pupil costs based on an apportionment of actual costs per school. His revised costs showed that Brearley costs more to operate than Dayton, followed by Johnson and Livingston (R-18 at 8-9). However, he agreed with Bornstein that Brearley was the smallest school with the least functional capacity (R-23 at 19).

Bornstein noted that the District's declining enrollment has affected certain course offerings. Moreover, reduction in State aid will require adjustments to school expenditures. Anticipating that further encroachments on program and staff is likely to result, Bornstein stated that, at some point, "staff reduction and program elimination will 'impoverish' both the overall curriculum and its array of offerings" (J-28 at 80-81). Eventually, the Board will have to discuss the basic question of whether to close a school. Also, the Board must inform the six communities about enrollment decline and all its implications. Economic implications from enrollment decline and reduced State aid cannot be ignored in fulfilling this mission. "Accurate data needs to be constantly accumulated; goals established; existing educational policies developed; and criteria for various options determined" (J-28 at 86-87). Thereafter, the Board and communities should corroborate on long-term planning to maintain high academic standards and a strong curriculum in a weak economy.

Regarding environmental and construction factors, Bornstein found loose asbestos pipe installation in Dayton's attic (J-28 at 25). Moreover, a flow of air suction into the auditorium from the above attic was "filled with friable loose asbestos pipe installation." *Id.* at 25. He recommended immediate remediation of the asbestos in the these areas for health and safety reasons. Bornstein allocated a high percentage of Dayton's estimated $5 to $6 million repair cost to asbestos repair.

Bornstein also determined that the four school buildings are underutilized, and he therefore suggested that the Board lease part or all of the buildings to generate income. The most compatible tenants are educational organizations, such as technical and vocational schools, magnet schools, private special education programs, religious schools, colleges, and dance or martial arts studios. Other compatible lessees are day care and nursing care facilities. However, they would require extensive renovations for plumbing

and handicapped accessibility and, thus, would be less feasible than educational tenants. Dayton and Johnson could attract commercial enterprises because of its strategic location in the center of their municipalities (J-28 at 97-98). Bornstein concluded that revenues from leases would greatly alleviate operating costs, particularly expenses associated with maintaining basically unused spaces. On the other hand, leasing portions of the buildings to outside entities could depreciate the overall program of the schools "by introducing foreign groups into the school campuses, and by altering the balance of different programmatic spaces" (J-28 at 109).

Another income-producing use is to merge with other school districts. Tuition-paying students or an open tuition policy is a viable alternative to offset excessive taxing of local residents and continuing financial shortfalls from school aid decreases.

Bornstein performed a comparative study of the student body's socioeconomic, ethnic, and racial balance. Ethnicity among the six constituent communities was well balanced, "although the preponderate number of Jewish families seem to be located in four of the six communities" (J-28 at 116). He identified 210, or 9.9% minority students, and thus concluded that there was no problem with racial balances. Moreover, he concluded that the District's relatively low minority student population was not a significant issue (J-28 at 116). Moreover, he believed that "moving a dozen or so minority students from each of three schools and placing them in Johnson would enhance racial balance or benefit 'moved or move to' students." *Id.*

Of greater concern than racial or ethnic considerations was the question of socioeconomic groupings. Bornstein found significant differences in the per capita income among the six communities. Kenilworth and Garwood were on the bottom, falling below the State per capita average, while Clark followed at slightly above the average. Per capita earning power of Springfield, Berkeley Heights, and Mountainside residents was well above the State average. While pairing Kenilworth/Garwood student residents with Springfield/Mountainside student residents would create a "mix," belief patterns, goals, and expectations within socioeconomic groups tend to create invisible barriers and thus segregation within building walls (J-28 at 116-177). Thus, Bornstein concluded that socioeconomic groupings within the District was a major factor to consider in closing a school. Based on efficiency factors, Bornstein also concluded that Brearley was not the first school of choice to close. Instead, Dayton would be the most logical school of choice.

Bornstein's report was released to the Superintendent in March 1991. However, neither the Board nor the Superintendent ever questioned him about the study. It was not until November 1991 that Bornstein saw a newspaper article where the Superintendent had summarized and criticized his report. Bornstein testified that it is common practice for the consultant to meet with the Board after submitting the study. Thus, he found it unusual to have read about the Board's concern in the newspaper rather than hear it directly from the Board.

II

In March 1991, the Board commissioned the Eagleton Poll of Rutgers University to conduct a study assessing public support for implementing cost-containment measures in the schools. Specifically, the study was aimed to: (1) Measure the level of support for or against closing one or more schools; (2) identify which, if any, school(s) should be closed; (3) examine relative levels of support for a range of cost-containment measures; and (4) compare differences between demographic groups, *e.g.*, community, parental status, and age, supporting various cost-containment recommendations (J-29 at 3).

A scientific sample of 2,400 households distributed equally among the six communities was sent an eight-page questionnaire with input from the Superintendent, assistant superintendent, Board president, and six school district residents, selected at random. A 2.5% margin of error was calculated from 1,457, or 61% of the responses (J-29, Appendix A)

The residents assessed 23 cost-containment suggestions organized into three groups of projected major savings, moderate savings, and minor savings (J-29 at 12-17). A sample of suggestions included the following:

> Reduction of administrative positions by consolidating administrative duties.
>
> Closing down one of the four high school buildings and consolidating classes into the three remaining buildings.
>
> Reduction of teaching positions by increasing the number of students in classes.
>
> Sell the house owned by the school district on Clinton Avenue in Springfield that is currently used for office space.

Eliminate district summer school programs.

Eliminate freshman and junior varsity (JV) athletic teams.

Eliminate free use of school building and grounds by community groups by charging a fee to cover custodial and other expenses.

Eliminate minor athletic teams such as bowling, golf, gymnastics, swimming, tennis, and volleyball.

Eliminate cheerleading activities.

Eliminate student field trips.

Among seven major cost-containment suggestions, three recommendations supported by a majority of the residents were reducing administrative positions by consolidating administrative duties (93%), closing one of the four high schools (58%), and reducing support staff by eliminating clerical and/or custodial positions (56%).

A majority of residents in Mountainside, Garwood, and Berkeley Heights supported school closings as a means to cut costs. In comparison, less than half of the residents in Springfield, Clark, and Kenilworth supported school closings over other cost-containment measures.

On a relative assessment of which school should be closed, Brearley was selected by the highest percentage of the residents, followed by Dayton, Johnson, and Livingston. Rated independently, residents selected Brearley as the school that should be closed. Overall, Brearley was selected by more residents (47%) than any of the other schools; 38% of the residents chose Johnson and Dayton, while 28% chose Livingston.

To get input from all residents, the same questionnaire that was sent to the scientific sample was also sent to 23,000 residents in the District. Completed questionnaires were returned by 1,861 residents. The results of the newsletter survey, however, do not constitute a scientific survey where respondents are selected from a sample that is projectable to a defined population. Thus, responses from self-selected respondents such as newsletter surveys, 900 telephone polls, and other nonscientific polls do not project any known population group. They can easily become biased or imbalanced and, therefore, violate statistical principles on which research surveys are based. Notwithstanding the

potential for misuse of nonscientific polls, the main thrust of the findings from the scientific survey was supported by the newsletter survey.

The Board received the results of the scientific survey in September 1991 and on October 15, 1991, held a retreat meeting to review the findings. Thereafter, six meetings were held in each community for public response.

III

District Superintendent Merachnik sought an opinion on cost containment and the impact on curriculum from closing a school from Kenneth Mattfield, Supervisor of Curriculum. The report, Exhibit P-8, presented to the Ad Hoc Committee, also answered three questions: What constitutes a quality education?; Is the region providing it?; and, What would be the effects on the quality of education if one or two schools closed?

Mattfield first challenges two major assumptions: That quality education is directly related to the diversity of curriculum (the more choices, the better); and secondly, that quality education results from offering a wide range of advanced honors and challenging courses to the brightest and ablest students. Noting that a diverse and comprehensive program is expensive, Mattfield believes that quality education can be achieved through cost-containment measures for optimum use of small high schools.

Notwithstanding declining enrollment, the District was providing a quality education. Statistics revealed consistently good student performance on the High School Proficiency Test (HSPT), low drop-out rates, and a high percentage range of graduates entering two- and four-year colleges and other schools -- 78% at Brearley to 94% at Livingston (P-8 at 8). Thus, to maintain quality education, the Board will have to operate schools that are both cost efficient and small. Mattfield noted five reasons for retaining small high schools (P-8 at 14):

1. A sense of community can be more easily developed and maintained.
2. Shared values can more easily exist among students, parents, and teachers.
3. All students can be personally connected to learning.
4. Fewer resources can be devoted to controlling students; hence, more are available to teaching.
5. Students spend less time riding buses to get to more distant consolidated large schools.

Thus, in his report, Mattfield opposed closing any school because each is an appropriate size. Acknowledging that maintaining four high schools would be painful "because they cannot be 'large' high schools that happen to enroll 400 to 600 students," Mattfield proposed that each school respond to the needs of the student community, parents, and professionals (P-8 at 15). Rather than one curriculum for four schools, programs must be tailored to meet individual needs of the students. Choices will be limited by available resources with foreseeable cuts in programs and instructional and administrative staff cuts. *Id.*

Mattfield opposed consolidating the District with other small high schools in the area. Instead, he believed that a consolidation on a K-12 basis made more sense from a curricular standpoint. *Id.*

Also, he recommended the use of telecommunications for learning. Moving the high school curriculum beyond the school's four walls would also include course offerings at Union County Vocational/Technical School and Union County College.

Mattfield was candid about his bias for maintaining four small schools. Employed with the District since 1973, he initially taught English at Livingston. Recalling that period as the largest student enrollment, Mattfield was amazed by "the talent in its bright, sophisticated students" (P-8 at 16). It was a teacher's paradise compared to "the stark poverty of material resources" he had previously known. *Id.* Nevertheless, having taught in both large and small versions of the same school, Mattfield did not recommend any action that would "return to the good old days, or even take a step in that direction." *Id.* at 17.

Mattfield's testimony on May 3, 1993, presented a different conclusion than that stated in his report to the Ad Hoc Committee on February 26, 1992. Mattfield's report relied heavily on theoretical principles rather than on practical application. However, he believed that the concepts asserted in his report can be equally successful in three schools as well as four schools. Moreover, he testified that an enrollment of 700 to 750 students is considered a small high school. *See also* Exhibit J-25. Notwithstanding the conclusions made in his report, Mattfield agreed with the Board's vote on November 17, 1992, to close one of the high schools in the regional school district.

IV

Dr. Merachnik has been employed by the District since 1955. At the Board meeting on October 20, 1992, he presented a recommendation on whether the District should continue to maintain four high schools. If not, he recommended which school(s) should be closed, when the school(s) should be closed, and which students should be reassigned to which schools (R-23 at 2).

In forming his recommendation, Merachnik reviewed the minutes of the Ad Hoc Committee meetings, Bornstein's Factors of the Efficiency Study, Rutgers University's Eagleton Poll, and the District's Master Plan for Educational Facilities. Further, he met with the directors of pupil personnel services, guidance, computer operations, building and grounds, transportation, and of health, both physical and education. He also met with principals and assistant principals. Moreover, he established an administrative coordinating committee consisting of the assistant superintendent, the board secretary, the assistant board secretary, and a public relations person. Additionally, Merachnik reviewed an updated enrollment projection pattern.

Merachnik testified that the Board first considered the possibility of closing a school in 1985, when it developed a "what if" study on school closings and how small, quality schools operate. Notwithstanding declining enrollment, the Board decided to maintain and operate four schools rather than close a school because it cared about the adverse impact on the community if it lost a school. Also, the Board perceived the voters' approval of its budget as public approval to maintain four high schools.

In 1990, the Board again looked at the issue of a school closing. The 1989 State Board of Education's Report Card disclosed that the District had the highest per pupil cost in the State. Reactions from the general public, mayors, and municipal bodies compelled the Board to scrutinize and account for the reported cost. The Board, nevertheless, continued to operate four high schools, even when the budgets were voted down in 1990 and 1991. Within this context, the Board also took a careful look at the educational benefits. It noted that Scholastic Achievement Test (SAT) scores were declining and achievement tests were not reflective of the expectations for a district spending so much per pupil (R-23 at 50).

Consequently, the Board conducted several studies that focused and provided information on the total situation. The reports included a Factors of Efficiency Study (J-28),

which addressed the efficiency and cost of running each high school. Merachnik found numerous inaccuracies in Bornstein's report and wrote a summary critique. For example, he disagreed with several of Bornstein's conclusions, most particularly that Dayton's asbestos created an environmental hazard. Thus, he consulted an engineer for a second opinion.

Another concern with the Bornstein report was the functional capacity of the facilities. Bornstein determined functional capacity of the buildings on their square footage; Merachnik determined functional capacity on the curriculum offered and the academic programs. Specifically, Bornstein measured functional capacity based on the number of rooms available and the number of students per square foot who might fit into each room. He did not account for the curriculum and special arrangements required for certain classes mandating a small number of students, *e.g.*, special education, basic skills, computer science, resource room, etc. On the contrary, Merachnik believed that it was more appropriate to determine operating efficiency on room use incorporating the components of the curriculum rather than room use load and square footage (R-18 at 10).

Merachnik also questioned Bornstein's repair cost estimates for each school. Some of the recommended repairs had already been undertaken. Thus, he rejected Bornstein's repair estimates as unrealistic (R-18 at 7).

Merachnik also disagreed with Bornstein's method of determining operating costs. Bornstein measured cost efficiency by comparing the actual operating costs of each school with the square footage in each building and the number of enrolled students. Bornstein's assumptions were inaccurate because the 1989-90 actual expenditures for each school used were inaccurate.

The Board also had a survey performed by the Eagleton Poll of Rutgers University. The survey polled community attitudes, perceptions, and input concerning cost containment measures that could reduce school costs. The Board held six community meetings to discuss the results of the survey.

Merachnik considered carefully both the Bornstein report and the Eagleton Poll. Also, the Board held two retreat meetings to discuss their contents. On March 16, 1991, the Board had the retreat meeting at the Grand Summit Hotel in Summit, specifically to discuss

the Bornstein report. A second meeting was held at the hotel in October 1991 to discuss the Eagleton survey with a staff member from the institute.

Further, the Board established an Ad Hoc Committee (Committee) comprised of municipal council members, local board of education presidents, and regional district board members. The Committee conducted public meetings on February 5, February 26, March 18, and April 15, 1992.

At its last meeting on April 15, 1992, the Committee voted 7 to 4, with one abstention, to keep the four schools open. Although the Committee's recommendation was not binding on the Board, on April 28, 1992, the Board voted 5 to 4 to continue operating four high schools and to vigorously pursue cost-containment measures.

Also in April, the Board members and the Superintendent met with the Deputy Commission of Education and special assistant to the Commissioner of Education to discuss the issue of operating four high schools within the District. The Board gave data to the Department about the District, and the Department provided technical assistance and advice to the Board.

Subsequent to the Board's April 28 vote to continue operating four high schools, the following cost-containment measures were implemented:

1. A reduction from 16 department supervisors to 5 district supervisors.
2. A reduction from 4 guidance directors to 2 guidance directors.
3. Elimination of 4 attendance clerk positions with the assistant principals and their secretaries picking up this responsibility.
4. Adding two periods of teaching to the duties of directors of health, physical education, and athletics.
5. Eliminating the position of administrative assistant in the personnel office.
6. Reducing our sports program activities and coaching positions.
7. Eliminating night computer operators and replacing these people with automated equipment.
8. Renting of three rooms to another public school district, anticipated to commence on November 9.

In September 1992, the District teaching staff reported that some of the cost-containment measures were impacting educational services. Consequently, the Board had two major concerns: Whether declining enrollment seriously impaired the quality of opportunities and educational course offerings to students and whether cost-containment measures negatively impacted the services provided to students and parents. Simply stated, had the educational quality been diminished by the decisions to keep four schools open?

Merachnik also considered the functional capacity of each school. Based on the curriculum offered to students rather than the number of rooms or instructional spaces available, the four facilities can accommodate 4,674 students. With only 2,162 students enrolled, only 46% of capacity is used. Consequently, the four schools are underutilized. Theoretically, if one of the four schools were to close, 59% to 65% of capacity could be used. Also, because functional capacity changes annually with curriculum changes, the Board must consider how many schools are needed to accommodate future curriculum changes (R-23 at 8).

Merachnik also considered the impact of cost-containment measures on current services offered to students and parents. Administrative and supervisory staff reduction has effected school operations. Reducing full-time guidance directors to part-time positions in each school has impacted the department's ability to adequately coordinate its services. Moreover, student problems and parent concerns have not been timely handled, computer runs on class scheduling were impacted, and principals spent more time on guidance activities than they did when full-time guidance directors were available. Another cost-containment measure -- eliminating attendance clerks and reassigning this task to assistant principals -- has caused the assistant principals to spend a greater portion of time on clerical activities rather than on disciplinary matters.

Merachnik believed that regionalizing the seven school districts into one K-12 district is the best educational configuration for the District. It makes educational sense and "would be economically efficient because we would not need seven superintendents of schools, seven board secretaries/business administrators, four curriculum coordinators, seven directors of special services, *etc.*" (R-23 at 14). However, the Board does not have the authority, absent the consent of all local seven boards of education, to implement a K-12 district.

Consequently, Merachnik believed a high school enrollment of 750 to 800 students to be optimum size, and thus recommended the following to the Board:

1. Close one high school effective September 1993.

2. Reassignment of the students to the three remaining high schools in a manner that would permit those students from the same community to remain in the same school.

3. Plan a reassignment that would result in an approximate equal number of students in the three remaining high schools.

4. Reassignment of students from a particular community based on three preliminary factors: Use and adaptability of the facility, transportation safety, and time of transportation to and from school.

5. The school that is selected to be closed should not be sold but instead retained by the Board and leased in a long-term basis, *e.g.*, seven to ten years, to another public school district.

6. The regional district should maintain the school selected to be closed to enable the building and grounds to be utilized by the district and communities.

Merachnik also recommended expanding the school to an eight-period instructional day. Further, he recommended that the District should undertake several new educational initiatives.

Regarding the impact on District staff from closing a school, Merachnik recommended an early retirement program. The Board could then retain younger staff members whose positions might be in jeopardy. Also, he recommended staff training and development consistent with new programs to be implemented.

In selecting which school to close, Merachnik considered each school's functional capacity and its current and projected student enrollment. He concluded that "David Brearley is the school with the least functional capacity of any of our schools" (R-23 at 19). Moreover, each school's projected enrollment to the year 2000 envisions that Dayton would grow substantially more than the other three schools (from 588 students to 713 students). In contrast, projected enrollment at Brearley will rise from 392 students to 442 students in the next decade. *Id.* at 19-20. Merachnik also believed that constriction of curricular opportunities will be greatest in the school with the smallest enrollment.

Merachnik also considered and rejected closing Dayton, Johnson, or Livingston rather than Brearley. Comparably, Brearley did not have a sufficient number of specialty rooms or instructional space as did the other three schools. Johnson, Dayton, and Livingston have three biology laboratory rooms, but Brearley has two laboratory rooms; Johnson, Dayton, and Livingston have two chemistry laboratory rooms but Brearley has only one; each of the other schools has one physics laboratory, but there is none at Brearley. Brearley's media center is 4,124 square feet, while the media center at Dayton is 5,752 square feet, at Johnson is 7,472 square feet, and at Livingston is 7,560 square feet. It is anticipated that the science laboratory rooms will be needed to meet future curriculum changes requiring more hands-on experience (R-23 at 21).

Merachnik also maintained that all students from one community should be assigned to the same school. Consequently, reassigning students from the same communities now attending the three other schools to Brearley would cause enrollment to exceed Brearley's capacity of 983 students. However, Merachnik conceded that students from Mountainside attending Dayton could be reassigned to Brearley, which would result in projected enrollments of 585 in 1993-94; 592 in 1994-95; and 578 in 1995-96. However, by closing Dayton rather than Brearley, the District would be closing the school with more biology, chemistry, and physics labs. Also, Dayton is the school with the larger instructional media center, three gymnasiums, and the only facility for graphic arts instruction, millwork, and cabinet-making. Thus, Merachnik concluded that it would not "make good educational sense nor serve our program opportunities to make this decision to operate David Brearley in lieu of Jonathan Dayton" (R-23 at 22).

Based on variable factors and his assessment of all four schools, Merachnik concluded that

> the school with the smallest functional capacity, the school whose projected enrollment will not exceed 442 students any year in the next ten, thereby, leading to restricted curricular opportunities for students, the school with the fewest science labs and the smallest instructional media center and the school with an operating cost slightly higher than any other be the one selected to cease to operate. That school, as you all know by now, is David Brearley.
>
> [R-23 at 23.]

Merachnik's reassignment of the students from Brearley considered three major factors: Use of facilities or equitable distribution of students resulting in the three remaining schools being approximate in size; use and adaptability of facility; and transportation and safety. The reassignment recommended was as follows:

1. Clark and Garwood students to attend Johnson.
2. Kenilworth and Springfield to attend Dayton.
3. Berkeley Heights and Mountainside students to attend Livingston.

Merachnik urged the Board to consider his recommendations and render a decision in November.

Merachnik testified that the decision to close the school included significant input from the residents in the six communities. The Ad Hoc Committee meetings were attended by 200 to 300 residents. Although they were not permitted to speak, they were privy to the conversations of Committee members.

The Board also discussed expanding its District to include other school districts. Discussions were held with New Providence, Greenbrook, Roselle Park, and Westfield. None of these communities was interested in consolidating.

Merachnik conceded that his recommendation to close one of the four regional high schools and the selection of Brearley was determined in a one-step process. It was based, however, "upon much information and represents an educational plan; not a political one" (R-23 at 2).

V

The Ad Hoc Committee was formed to recommend to the Board whether the District should close a school. The Committee met on February 5, 26, March 18, and April 15, 1992.

At its February 5 meeting, Board Secretary Harold R. Burdge presented an overview of the appropriation of tax levy in each of the six communities. Merachnik presented an overview of the Eagleton Poll, the Bornstein report, and the enrollment projections. With regard to the Eagleton Poll, Janice Ballou was available to answer questions. With regard

to Bornstein's study, Merachnik prepared a summary report stating what he believed were inaccurate, invalid, or unnecessary recommendations (R-18).

The Committee was concerned about not having the opportunity to discuss the Bornstein report in the same in-depth manner in which they discussed the Eagleton survey. Merachnik conceded that this could have been done. However, based on the contents of the Bornstein report, the Board believed it was necessary to first get an in-depth evaluation by its own engineers and Superintendent before the report was made public (J-30 at 10-11). Another Board member questioned why Bornstein's firm was not available to answer questions regarding his report. Merachnik replied in part that:

> [T]he report is a year old, and a lot of repairs that were mentioned have already been cared for. . . . Dr. Bornstein is a consultant and used what I would consider subcontracted people. He does not have his own staff where we could just say, give us your staff. And I think . . . we've learned something from using a consultant of that kind.
>
> [J-30 at 12-13.]

At the February 26, 1992 Committee meeting, Mattfield presented his report (P-8). Mattfield believed that closing a high school to save money was "shortsighted economy" (J-31 at 10). Schools must be kept small if they are to meet the future successfully. This can be accomplished with cost-containment measures focused in the direction of a unified K-12 school district. *Id.* He also considered a magnet school system but believed its most common use was for desegregation, which was not an issue raised before the Board (J-31 at 25).

With regard to closing a school, Mattfield did not address the immediate impact of "taking a bunch of kids and uprooting and sending them off somewhere" because children are extremely resilient (J-21 at 29). His concern, however, was the impact on the community from large schools. Larger schools require resources to control larger groups of children. Thus, more resources are invested in control rather than teaching. *Id.* at 29.

The Committee's March 18, 1992 meeting focused on the impact of school closing on real estate values. The Committee received responses from several real estate agents associated with the six communities, each of whom believed that closing a school would severely impact the community, cause lower real estate values, lower the quality of life, or have a disastrous effect on market value (J-32 at 3).

Councilman Donald Ricca, a Committee member, testified about the diverse and broad-based membership of the Committee. They reviewed voluminous documents, including reports prepared by Bornstein, the Eagleton Institute, Mattfield, Burdge, and real estate brokers. Councilman Ricca, a fourth-generation resident of Kenilworth, candidly spoke about the importance of Brearley in his life and in the lives of his constituents -- Brearley is the "heart and soul" of the community.

The Committee also reviewed the 23 cost-containment proposals listed in the Eagleton survey (J-32 at 4). Burdge estimated a savings of $1,982,000 from the cost-containment measures, excluding closing one high school at an estimated savings of $4,000,000 (J-32 at 7). When asked whether the District should close a school, Burdge responded that, from a financial viewpoint, "We can no longer justify the cost of utilizing four buildings with such low enrollment. Financially, I believe there simply has to be a consolidation into fewer buildings" (J-32 at 29).

Merachnik and Burdge responded to questions about the $16,000 per pupil cost reported in the State's Report Card. Merachnik believed the figure was inflated because it was based on a 9-12 district rather than a K-12 district. Recalculating the same costs on a K-12 district resulted in a per pupil cost of $9,000 (J-32 at 23).

Mayor Kurno of Springfield recommended that the District should deregionalize, citing increased costs and declining enrollment as major factors (J-32 at 31-33). Indeed, the mayors of the six communities had several private meetings among themselves to discuss deregionalization (J-33 at 13).

On April 15, 1992, the Committee moved to close Brearley (J-33 at 29). The motion failed by vote of 7 to 4 and one abstention (J-33 at 31).[1]

[1]Discussions were had on an amendment to the motion to delete the name of a specific school to be closed. However, the record reflects that no official motion to amend was properly made. *See and compare*, Exhibit J-33 at 29-31, with Roberts' *Rules of Order*, rev'd, § 33).

VI

On September 1, 1992, the Board adopted the following cost-containment measures recommended by the Committee: Leasing three rooms at Brearley; reducing the District's athletic program; eliminating the night computer staff; reducing the pay rate for summer guidance counselors, child study members, school nurses and vocation coordinators; and charging rental to certain groups for use of school facilities (J-17 to J-22).

On September 8, 1992, the Board approved the reassignment of four assistant principals as attendance officers for their respective schools (J-18 at 2).

On September 15, 1992, at its public meeting, the Board met in executive session to discuss an item of possible litigation (J-19); it discussed and agreed to revisit the issue of closing a school (J-20).

On September 22, 1992, the Board voted to reexamine the issue of closing a school with the intent of making the District more educationally efficient. The Board also directed Merachnik to prepare a report with a recommendation "in light of the cost containment measures that have been considered to date" (J-21 at 5). Board members commented that educational input was needed from Merachnik and that some of the cost-containment measures and effects had resulted in problems that were detrimental to the District's program. Some Board members, who on April 28, 1992, voted to keep the four schools open, were concerned about the impact of cost-containment measures on the educational program. Other members, while agreeing with the sentiments expressed, believed that the cost-containment measures should be given more time to operate.

On October 5, 1992, members of the public asked whether the Board would vote to close the school after it decided to continue to operate four schools and instead implement cost-containment measures. In response, Zitomer conceded that perhaps the Board "made the wrong decision" when it voted in April to operate the four schools and implement cost-containment measures (J-22 at 31).

On October 20, 1992, Dr. Merachnik presented his recommendation to the Board (R-23). Kenilworth residents disagreed with his recommendation to close Brearley. They urged the Board to give cost-containment measures at least one year to work before

deciding to close the school. Additionally, many Brearley students pleaded with the Board not to close their school (J-23 at 32).

On November 4, 1992, approximately 1,300 people attended the Board's public meeting. Kenilworth Councilman Donald Rica delivered a written response prepared in conjunction with the Committee of Concerned Parents and other citizens of the community. Harvey Goldberg, a teacher at Brearley, expressed the sentiments of his colleagues at Brearley -- the faculty requested that the Board vote to reject the recommendation to close the school.

George Schlenker, a member of the Kenilworth Board of Education, read a prepared statement asking the Board to reject Merachnik's recommendation to close a school (J-24 at 46-49). Thereafter, at least 32 people, including students in the regional high schools, students in the junior high, Brearley graduates, teachers, and residents from the six communities, presented statements and asked questions. While a majority of the speakers opposed the closing of a high school, others asked the Board to continue to present a quality education. Students from Dayton and Johnson welcomed their regional classmates from Brearley into their schools (J-24 at 49-70). Also, several Board members asked questions concerning budgeted items embedded in cost containment measures. At the conclusion of the meeting, the Board voted that a public hearing would be held on November 17, 1992, concerning Merachnik's report and his recommendation on closing a school.

On November 17, 1992, 1,300 people attended the Board's meeting. They expressed their opinions and asked questions concerning the closing of Brearley. Brearley and Dayton students and Kenilworth parents pled with the Board to vote against closing Brearley. Also, residents from the other communities, students, and teachers asked the Board not to close the school (J-25 at 12).

Also, the Board answered questions about renting Brearley to handicapped students or another group. Burdge and Jean Melnyczenko of Disco Associates answered questions regarding renovations and conversion costs at Brearley (J-25 at 15-18). Mattfield answered questions regarding class size and the curriculum that he envisioned for next year and years to come.

Thereafter, the following resolution was placed before the Board members: "Effective September 1, 1993, the David Brearley High School shall become nonoperational within the regional school district system." *Id.* at 23. Prior to the vote, Board members expressed their views about closing Brearley (J-25 at 25-28). Some Board members believed cost containment was detrimental to the educational program and, if continued, would chisel the educational foundation by bits and pieces. Thus, cost containment was not the solution to the educational needs of the District, nor was it in the best educational interests of all the students. Instead, they were convinced that the educational program would be improved with only three high schools. They believed that each school would operate well with 700 to 800 students.

Other Board members responded to the emotional plea of Kenilworth parents and residents, many of whom were relatives and longtime friends of those casting the vote. Satisfied that they had done their "homework," they accepted Merachnik's recommendation and voted "yes" on the resolution.

One Board member, who voted "no" on the resolution, believed that unanswered questions remained. The other member who voted "no" resented the timing of the vote; he believed that it should occur after the first of the year. Additionally, it was felt that the Board was voting on Merachnik's recommendation without giving the Brearley staff, the Concerned Citizens of Kenilworth, or other Board members the opportunity to respond.

The resolution passed with a vote of 7 to 2.

After the vote, the Board adopted a resolution reassigning the students to the three remaining high schools. *Id.* at 29. The meeting was adjourned at 1:45 a.m. on November 18, 1992.

VII

Harold R. Burdge, Board Secretary, School Business Administrator, and Chief Financial Officer, has been employed with the District since 1961. He testified about the relationship between the District budgets and public support. The public supported the budget throughout the 1980s. However, the voters defeated the 1990-91 and 1991-92 budgets. The 1990-91 budget represented a zero increase over the prior year, and specific line item expenses were frozen at the 1989-90 level. The 1991-92 budget was 5.5% higher than the

1990-91 budget, and the Board again froze specific line item expenses. The budgeted amounts for both years were under the State-allowed cap.

Burdge believed that the voters were irate over high pupil costs. In 1990-91, the per-pupil cost ranged from $9,762.88 in Clark to $19,560.86 in Mountainside, with a District average of $12,881.74 (R-28). In 1991-92, the per-pupil cost ranged from $8,589.39 in Garwood to $20,118.57 in Mountainside, with a District average of $13,480.48. *Id.*

Burdge also believed that the budget defeats reflected public response to the School District Report Card (R-29). The report covered three major areas of the District's operations -- finances, staffing/student attendance, and student performance. Between 1988-89 to 1991-92, per-pupil cost increased from $10,898 to $16,376, an average annual rate of 14.5%. Also, it was reported that the District's tax rate is 21% above the average for other district budgets supporting the same grades within the region and 24% above the average for such districts across the State (R-29). Notably, the percentage of ninth graders passing the HSPT (reading, math, and writing) in 1990-91 showed an increase over tests given in 1985-86. Also, the District's class of 1991 averaged higher SAT scores compared with the State averages. *Id.*

The audited free balance for June 30, 1991, was $7,038,297. However, on July 1, 1991, the Board appropriated $2,150,000 from surplus to reduce the tax levy for the 1991-92 budget. Burdge testified that the Board determined to appropriate the money several months before the actual disbursement.

The audited free balance for June 30, 1992, was $8,783,453. On July 1, 1992, the Board appropriated $2,150,000 to reduce the tax levy and an additional appropriation of $2,950,000 on December 1 for nonrecurring expenses, *e.g.*, legal fees, teachers' salaries, and contracted services for grounds and buildings (P-1, R-32). Burdge concluded that the closing of Brearley would realize a cost savings of $3 million in 1993-94.

Petitioner Janet Glynos, a Kenilworth resident and parent of two elementary school children, is the founder of the Committee for Concerned Parents (CCP). Aware that the Board was considering whether it should close a school, the CCP was formed in September 1991 to persuade the Board not to close Brearley (R-2). It believed that Brearley had been targeted as the school that would be closed "based on a perceived inferior political 'clout' of Kenilworth and socioeconomic prejudice towards this town." *Id.*

Glynos is a graduate of Brearley and believes that the school plays a vital role in the community in an academic, athletic, and social posture. She also believes that all District schools have been treated fairly and equally. As a parent and a taxpayer, she supports the continued operation of four small high schools with fewer students.

Dr. Lawrence Kaplan, the Board's educational consultant, has known Bornstein for many years and chaired his doctoral dissertation. Kaplan is very familiar with the key-grid method of collecting information used in the process of school closings. Also, he reviewed Bornstein's study (J-28) and determined that it was not included in the report. Kaplan agreed that it would have been reasonable for the Board to question Bornstein about any concerns it had with his report or conclusions. Thus, he thought it was unusual that the Board did not discuss the report with Bornstein. However, Kaplan did not think it unusual to release the report to the public six months later rather then sooner.

Kaplan has been involved in the closing of three elementary schools. He testified that the average time it takes to close a school is three years. But for two of the schools, the time between the date when the Superintendent made a recommendation until the school closed was eighteen months. The third school took seven or eight years to close. Kaplan conceded that the time from the date the Superintendent recommended that Brearley be closed until the Board's vote was 28 days. However, based on his review of the data and the District's efforts over a period of years to deal with issues on cost containment and staff and administrative reduction, he concluded that the Board's process began much earlier than October 20, 1992.

FINDINGS OF FACT

1. Since 1972, the District's student enrollment declined from 5,798 to 2,163, or 62%.

2. During the mid-1980s, the Board considered and rejected the possibility of closing a school.

3. In the late 1980s, the Board began to implement cost containment measures.

4. In 1989-90, the District had the highest per pupil costs in the State.

5. Between 1990-91 and 1991-92, the District's tax rate was 21% above the average for other districts in the region and 24% above the average across the State.

6. Among the District's four high schools, Brearley is the smallest school with the least functional capacity.

7. In 1992-93, the District used 46% of its capacity for instruction.

8. In December 1990, a Factors of Efficiency Study was commissioned by the Board:

   a) The study was conducted by Dr. Bornstein and released to the Board in March 1991;

   b) On March 16, 1991, the Board went into executive session at a retreat meeting to discuss the report;

   c) The Board released the report to the public in November 1991.

9. In June 1991, The Board commissioned the Eagleton Poll of Rutgers University to conduct a scientific survey of residents in the six communities on their preferences to various cost-containment options:

   a) The results of the survey were released to the Board in September 1991;

   b) In October 1991, the Board held another retreat meeting at the Grand Summit Hotel to discuss the results of the survey;

   c) Six community meetings were held to discuss the survey.

10. A broad based Ad Hoc Committee reviewed relevant information and made a recommendation to the Board on cost containment measures, including closing a school:

a) The Committee reviewed the Master Plan, the Bornstein Report, the Eagleton Poll, Mattfield's curriculum report, a financial report, enrollment projects, real estate reports, and other voluminous data;

b) The Committee discussed the information at four meetings, well attended by the public;

c) On February 26, 1992, Kenneth Mattfield, the Supervisor of Curriculum, presented his report to the Ad Hoc Committee and recommended that the District maintain four small high schools;

d) On March 18, 1992, Harold Burdge presented his analysis of saving attributed to the 23 cost-containment proposals listed in the Eagleton Poll.

e) On April 15, 1991, the Committee voted 7 to 4, with one abstention, to recommend that the four schools remain open and that other cost-containment measures be implemented.

11. On April 28, 1992, the Board voted 5 to 4 not to close a school, but instead to pursue other cost-containment measures.

12. On September 15, 1992, the Board went into executive session to seek legal advice on revisiting the issue of closing a school.

13. On September 22, 1992, the Board voted to reexamine the issue of closing a school and directed the Superintendent to prepare a recommendation on the issue.

14. On October 20, 1992, Dr. Merachnik recommended to the Board that the District close one of the four high schools; he selected Brearley as the school to be closed.

15. On November 17, 1992, the Board voted to close Brearley in September 1993.

ARGUMENTS OF THE PARTIES

Petitioners' Position

Petitioners contend that the Board's decision on November 17, 1992, to close Brearley was arbitrary, capricious, unreasonable, in bad faith, and an abuse of discretion. Petitioners raise several events in the Board's deliberation process in support of their position.

It is contended that the decision to close Brearley was made in only 28 days -- from the date of the Superintendent's report on October 20 to the date of the Board's vote on November 17. Thus, there was insufficient time to adequately investigate, discuss, debate, and get public input on the issue of closing a school. Moreover, petitioners dispute the respondent's assertion that the process to close the school began before 1990. Therefore, it is submitted that prior general or philosophical discussions about cost containment and school closings, rather than a specific discussion on a specific identified school, is not part of the process that resulted in the November 17, 1992 vote.

Also, it is contended that the Superintendent's recommendation on the school closing should have been a two-step process: (1) Whether a school should close and, if so, (2) which school should be closed. Instead, the recommendation involved only one step. Further, the Board gave cost-containment measures only 15 days to work before it decided on September 15, 1992, to revisit the issue of school closing.

Petitioners contend that there was not a financial need to close a school. With regard to educational reasons, it is asserted that the Board had insufficient and conflicting information to reach a reasonable and nonarbitrary decision. It is further contended that that Board ignored recommendations made by committees, consultants, and its own supervisor of curriculum supporting the continued operation of four small high schools.

Petitioners assert that the Board's decision to release the Factors of Efficiency Study in November 1991, although it was received in March 1991, constituted bad faith.

It is further contended that the Board, in bad faith, conducted three private, secret meetings to discuss matters that should have been discussed in public: The Bornstein study, the Eagleton survey, and the issue of revisiting the school closing.

It is contended that prior to the November 17 vote, the Board had no plans on how reassigning Brearley students would impact and affect racial imbalances in the District. Moreover, it is suggested that the Board did not explore and aggressively discuss with the Roselle School District the probability of bringing Roselle into the District because of the that district's racial composition; the majority of Roselle students are black. Petitioners submit that merging the two districts would obviate the necessity of closing Brearley. Instead, the Board created a racial imbalance problem when it voted to close Brearley and reassign the students to the other three high schools.

Additionally, it is asserted that the Board acted in bad faith when it refused the legislators' suggestion to obtain an independent consultant to evaluate the situation before making a decision. Instead, it decided to close the newest school and the only school with handicapped accessibility and air conditioning.

Petitioners also assert that it is probable that Kenilworth real estate values will drop based on the closing of Brearley.

Petitioners submit that the Board's process to close Brearley was arbitrary, capricious, unreasonable, and done in bad faith. Thus, the presumption of correctness of the Board's action on November 17, 1992, has been rebutted. It is urged that the Board's action and vote on November 17, 1992, be set aside and vacated and that the Superintendent and administration be directed to reopen Brearley for the beginning of the 1993-94 school year.

Respondent's Position

The Board argues that its decision on November 17, 1992, to close a school was a reasonable response to a 20-year period of declining enrollment, a diminishing quality educational program, and increasing costs. Further, it appropriately chose to close Brearley after considering public input and only after repeated efforts at other means of cost containment had failed. Thus, it submitted that the decision to close the school was the cumulation of a 10-year, not a 28-day, decision.

Further, it is argued that the enrollment decline over the past 20 years has adversely affected the educational program. Underutilized buildings and dwindling curriculum were

inconsistent with providing a thorough and efficient educational program under *N.J.S.A.* 18A:7A-1 to -52. In essence, diminished pupil population had diminished the quality of education.

In contrast, the overall cost of operating four schools increased substantially. Per pupil costs increased 372%, from $3,100 per pupil to $14,700 per pupil. Nevertheless, the Board determined to keep four school open but to downsize operations. It developed its budget under cap, froze expenditures, reduced positions, and appropriated surplus in a fiscally responsible manner. When the school budget was defeated in 1990-91, the Board looked at other substantial cost containment measures, including closing a school. The Board sought information from experts on education, school curriculum, finance, and input from the six constituent communities. It is submitted that cost savings is an appropriate factor to consider in deciding whether to close a school.

Regarding Dr. Bornstein's Factors of Efficiency Study issued in March 1991, the Board was extremely concerned about the reported asbestos hazard at Dayton. Thus, it immediately hired an architectural and engineering firm to reinspect the facility's alleged asbestos problem. Further, in March 1991, the Board held a retreat "specifically to discuss the the alleged safety problem at . . . Dayton." The Bornstein report was discussed in executive session because the topic involved a potential student safety hazard.

Additionally, it is argued that the Bornstein report contained other inaccuracies and errors. For example, the report did not show that Brearley, the smallest school with fewer or insufficient speciality rooms, has the highest operational costs. Thus, to avoid public unrest over misinformation, the Superintendent revised the report before releasing it to the public in November 1991. Based on efficiency factors and the schools' physical features, the Board submits that Brearley was the most appropriate school to close.

Regarding the retreat meetings, it is asserted that they are encouraged by the New Jersey School Board's Association "to discuss issues in a more intense manner outside the time constraints and pressures of regular meetings." Thus, in October 1991, the Board had another retreat to discuss the Eagleton Poll results. Thereafter, it held six community meetings to discuss the results of the survey.

The Board argues that notwithstanding its vote in April 1992 to accept the Ad Hoc Committee's nonbinding recommendation to keep four schools open and instead to

pursue cost containment, the cost-saving efforts failed and adversely affected the educational program. Thus, "the Board members properly sought legal advice during their executive session meeting on September 15, 1992 concerning the procedure . . . to follow . . . to revisit the school closing issue." It is asserted that the executive session dealt only with an informal consensus on reopening the issue of whether to close a school, not a decision on whether to close a school.

The Board argues that petitioners' allegation that the decision to close Brearley failed to properly consider the student racial balance impact is without merit. The Board complied with its statutory duty when it submitted a request to close Brearley to the Department of Education, Bureau of Facility Planning Services. *N.J.A.C.* 6:22-3.2. In conjunction with the Office of Equal Educational Opportunity, the Bureau reviewed the District's situation and then approved the closing of Brearley, provided the District "undertake a student reassignment procedure to ensure racial balance" (R-8). Moreover, it is asserted that Dr. Bornstein correctly concluded in his study that no significant racial imbalance existed and, indeed, the State has never notified the Board of any problem before or after November 17, 1992. Thus, it is submitted that the Board's reassignment procedure complied fully with the plain language of *N.J.A.C.* 6:22-3.

Regarding the potential effect of Brearley's closing on Kenilworth property values, the Board conceded that the quality of the educational program and diversity of opportunities offered by a secondary school ultimately sell a potential buyer on a community. However, the Board's right to decide to close a school is inconsequential to property values affected by that decision. It is argued that the Board's primary responsibility is maintaining a quality education for the students, not maintaining property values for the homeowners. Thus, property values, although significant to homeowners, are not the focus of the Board's deliberations.

The Board argues that it considered the handicap accessibility of each of the buildings prior to the vote to close Brearley. An engineering firm provided detailed information about the needs of each facility to come into compliance with the Americans With Disabilities Act (ADA). 42 *U.S.C.* § 12101 to 12213. It is contended that the elevator at Brearley is not in compliance with ADA regulations nor the New Jersey Barrier Free Code. Moreover, ADA compliance in all four schools would cost approximately the same amount. The findings of the report were discussed at the November 17, 1992 meeting before the vote was taken.

The Board submits that having considered a broad range of information prior to its vote on November 17, 1992, its only reasonable alternative was to close a school. Additionally, its choice of Brearley as the school that should be closed involved community input and was supported by the recommendations of the Superintendent and the Business Administrator. Thus, its decision to close Brearley was consistent with the information before it. While its actions may not be perfect, they were reasonable and done in good faith.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

Pursuant to *N.J.S.A.* 18A:11-1, the board shall:

a. Adopt an official seal;
b. Enforce the rules of the state board;
c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees . . . ; and
d. Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district.

Accordingly, the Board has discretionary authority to close a school that is no longer necessary for the thorough and efficient education of the pupils in the district. *Boult v. Passaic Bd. of Ed.*, 136 *N.J.L.* 521 (E.&A. 1947). Moreover, the courts have held that the Commissioner of Education cannot substitute her opinion for that of the local board. *Silverman v. Millburn Tp. Bd. of Ed.*, 134 *N.J. Super.* 253 (Law Div. 1975).

Both the courts and the Commissioner of Education have repeatedly held that a board's decision to close a school is entitled to a presumption of correctness, and its decision will not be set aside unless there is a clear showing of abuse of discretion or error. *Thomas v. Morris Tp. Bd. of Ed.*, 89 *N.J. Super.* 327 (App. Div. 1965); *Kopera v. West Orange Bd. of Ed.*, 60 *N.J. Super.* 40 (App. Div. 1962); *Quinlan v. North Bergen Bd. of Ed.*, 73 *N.J. Super.* 40 (App. Div. 1962); *McMillan v. Board of Ed. of So. Orange-Maplewood*, 1977 *S.L.D.* 137; *Riccio v. Bloomfield Bd. of Ed.*, OAL DKT. EDU 8111-84 (May 16, 1985), *adopted*, Comm'r of Ed (July 8, 1985). Accordingly, the review of a local board of education's

discretionary action to close a school is not *de novo* and, thus, cannot determine whether the board did the "right thing." Instead, the scope of review is whether a preponderance of the evidence establishes that the board exercised its discretion unreasonably, arbitrarily, capriciously, or in bad faith.

I have considered petitioners' contention that the Board arbitrarily, capriciously, and unreasonably took only 28 days to close Brearley. Also, I have considered whether the decision was a two-step process; first, the decision to close a school, and second, which school to close. I have also considered petitioners' assertion that when the Board voted in April 1992 to continue four schools and pursue cost-containment measures, the issue regarding school closing was "dead" for least one year -- until June 1993.

Having considered carefully all the testimonial evidence, I agree that there were 28 days between the Superintendent's recommendation on October 20, 1992, and the vote on November 17, 1992. However, the decision to close Brearley was based, in large part, on information obtained and considered prior to October 1992. The Board began to look into the option of closing a school around 1985. Although none of the four schools may have been targeted, I reject petitioners' argument that general and philosophical discussions about cost-containment measures, including closing a school, is not part of the process resulting in the vote to close Brearley.

The record reflects a steady trend of declining student enrollment, increasing costs per pupil, and underutilization of the District's buildings. These were the type of events which caused the Board in the mid-1980s to begin an analysis of the District's configuration with the view of restoring efficient use of its schools. The Board's first step in the analysis was to establish a long-range planning committee to examine the enrollment decline. It then developed reports, the "what if" study, about the process of closing a school and its impact on the community. The curriculum director visited other small high schools to observe the effect of enrollment on educational quality and costs. Also, around 1985, the Board conferred with Bornstein about the process in closing a school.

The Public School Education Act provides that the maintenance and support of a thorough and efficient system of education for all children in the State is a legislative responsibility. *N.J.S.A.* 18A:7A-2. Accordingly, the courts have held that members of local school boards are responsible for the efficient operation of the school system. *Silverman* at 253, 261. Although no recommendation was made in 1985 to close a school, the Board's

foresight, consistent with legislative goals, was directed towards maintaining and supporting a thorough and efficient system of its high schools. Consequently, the closing issue remained a viable option. Merachnik credibly testified that notwithstanding declining enrollment over the past 20 years, the Board determined to maintain and operate four schools rather than close a school because it cared about the adverse impact on the community that would lose a school.

When the Board chose to use alternative cost-containment measures, it also continued to monitor the events that eventually led to the decision to close Brearley. Thus, prior to the November, 17, 1992 vote, the Board had cumulated and reviewed enough data to determine projected enrollment, the condition and future needs of the facilities, and curriculum. Much of the cumulated data was referenced by Merachnik to support his recommendation on October 20, 1992. "The superintendent, by virtue of his position as chief executive officer of the Board, is presumed to make significant educational recommendations to the Board based on fact, not flights of fancy." *Fullen, et al. v. Middleton Town Bd. of Ed.*, OAL DKT. EDU 2455-85 (Jan. 27, 1986) at 18, *adopted*, Comm'r of Ed (March 12, 1986). That his recommendation to the Board was a reversal of the Board's vote taken in April does not destroy such a presumption. The Board can and should change its mind whenever it determines with reasonably certainty that its prior action threatens the quality of education it is providing to its students and the efficient use of its schools. A board is obligated to make choices and has a duty to exercise its discretionary authority in good faith. Absent evidence to the contrary, its discretionary actions carry the presumption of correctness and are not subject to interference by the Commissioner. *Id.* at 19.

Thus, I **CONCLUDE** that the process that resulted in the decision to close Brearley was not done in 28 days, as petitioners claim. I further **CONCLUDE** that it was not unreasonable for the Board to decline the request by elected officials to hire another independent consultant before voting on November 17. Further, I **CONCLUDE** that the Board did not act in a vacuum without sufficient information before it voted to close a school. Rather, the Board engaged in a long-term plan to maintain the District's high academic quality, despite enrollment decline and increased costs over many years. Moreover, petitioners' contentions that the Board's decision to close Brearley did not consider the impact on Kenilworth property values or handicap accessibility are not supported by the evidence. Thus, I **CONCLUDE** that no discussion is necessary.

Additionally, I **CONCLUDE** that petitioners' contention that the Board's process to close a school was not a two-step process with ample time allowed for reasonable discussion, study, and debate is not supported by the evidence. The record does reflect that the Superintendent's recommendation to close a school and his selection of Brearley were issued simultaneously, as was the Board's vote. However, the evidence supports that each decision -- whether to close a school and, if so, which school -- remained separate but related components of the deliberation process. Consequently, I further **CONCLUDE** that the Board's process was not done in an arbitrary, capricious, or unreasonable manner.

Also, the record amply reflects public participation and input on the closing issue. The Ad Hoc Committee represented a broad-based membership from the six communities. It carefully scrutinized reports and information submitted by outside consultants and District administrators. Thereafter, the Committee made a nonbinding recommendation to the Board on the closing issue.

The Eagleton Poll collected 1,457 responses to 23 questions about alternative cost-containment measures. Specifically, the scientific survey measured the level of support by 2,400 District residents for closing one of the four schools and other cost reducing actions. Thereafter, six public meetings were held in each community, where all citizens had the opportunity to ask questions. Also, the Eagleton Poll conducted a nonscientific survey to allow all District residents the opportunity to provide input to the Board. Thus, the same questionnaire that was sent to the scientific sample was also sent to 23,000 District residents.

Also, the record reflects that the Board meetings, particularly on October 5, 20, November 4, and 17, were well attended by the public, elected officials, and others interested in the school closing issue. Although the public was given several opportunities to be heard on the issue, the Board purposely deviated from its routine when it held two of its meetings at the Summit Hotel to discuss the Bornstein study and the Eagleton survey. The reports were two major components of information provided by independent consultants and used by the Board in its deliberations on the closing issue. Notwithstanding its reasons for holding two "retreat" meetings, the wisdom of the Board's conduct is suspect. The Board was keenly aware of the residents' interest in its deliberations on the school closing. Moreover, it knew that the Kenilworth community was concerned that the school targeted by some was its own Brearley. Therefore, the decision to convert a regular meeting into a "retreat" meeting, positioned away from where the

meetings usually take place, invited a real or perceived cloak of secrecy around the meetings. Indeed, the Legislature had declared that

> it is essential that the conduct of members of the local boards of education and local school administrators hold the respect and confidence of the people. These board members and administrators must avoid conduct . . . which creates a justifiable impression among the public that such trust is being violated.
>
> [*N.J.S.A.* 18A:12-22(a).]

Moreover, the Legislature enacted the Open Public Meeting Act (OPMA) for the specific purpose of giving the public the right "to be present at all meetings of public bodies, and to witness in full detail all phases of the deliberation, policy, formation, and decision making of public bodies. . . . ." *N.J.S.A.* 10:4-7. Thus, all Board action on school closing is subject to interrogation by the public. Under these circumstances, it is of no import that some of the Board's discussion may be appropriately shielded from the public portion of the meeting and discussed in executive session. *See N.J.A.C.* 10:4-12(b). The Board's "retreat" meetings were nothing more than the group withdrawal to a place of seclusion. If the Board sought to discuss the impact of the reports on the issue of school closings outside the time constraints and pressures of regular meetings, it accomplished its purpose; no members of the public attended the meetings. "Courts cannot compel governing officials to act wisely, but it can and does compel them to act in good faith. And to say that governing officials must act in good faith is merely equivalent to saying that they must act honestly." *Peter's Garage, Inc. v. Burlington*, 121 *N.J.L.* 523, 527 (Sup. Ct. 1939).

Based on a careful review of the evidence, I **CONCLUDE** that the Board's decision to discuss the Bornstein study and the Eagleton Poll at two retreat meetings at a hotel in Summit effectively precluded the public from participating in its deliberation process and was therefore arbitrary. However, notwithstanding the Board's arbitrariness in holding two retreat meetings, rather than regular meetings, I **CONCLUDE** that its conduct does not vitiate its vote on November 17, 1992.

The Bornstein and Eagleton reports, as well as other relevant data about the closing issue cumulated by the Board, were provided to the public. While I agree with petitioners that the public and Ad Hoc Committee were not given the same in-depth opportunity to review and discuss all reports and data in a similar manner and, thus, the opportunity to

express their opinions on some information was of limited scope, such omission does not rise to the level of being arbitrary, capricious, or unreasonable. *See Committee to Save Baynard School v. Bd. of Ed. of New Brunswick*, 1978 *S.L.D.* 454, 461; *Majka v. Bd. of Ed. of Bloomfield*, OAL DKT. EDU 2240-79 (Sept. 17, 1979), *adopted*, Comm'r of Ed. (June 11, 1980).

The record reflects that information was shared with the public and that lengthy discussions were encouraged at regular Board meetings and six community meetings. Based upon available information, questions were answered to the best of everyone's ability. Also, study and debate was had among the diverse members of the Ad Hoc Committee. Thus, I am persuaded by the evidence that the Board was sensitive to the need of the public to participate and react to the question of a school closing before final action was taken. A checklist of points need not be established as a necessary prerequisite to school closings -- only a good faith effort to keep the public informed and provide it with reasonable opportunities to be heard on the issue. *Zimmerman v. Denville Bd. of Ed.*, 6 *N.J.A.R.* 66 (1982).

Regarding the executive session meeting on September 15, 1992, the Board's discussion about revisiting the issue of closing a school concerned a topic so sensitive and volatile that anything beyond the scope of possible litigation should have been immediately deferred until the public portion of the meeting. *Committee to Save Baynard School* at 460. Having carefully reviewed the documentary and testimonial evidence, I **CONCLUDE** that during the executive session, the Board members sought legal advice about the parameters of reopening the issue of closing a school. The record reflects that a consensus was taken that the Board would reopen the issue on whether to close a school, but no decision was made about closing a school. Final action on the decision to revisit the topic of closing a school was reserved until the public meeting on September 22, 1992. Thus, I **CONCLUDE** that the Board's action on September 15 did not constitute bad faith.

Based on the whole of the evidence, I **CONCLUDE** that the Board made good faith efforts to keep the public informed on the school closing issue. I further **CONCLUDE** that the public had reasonable opportunities through the Ad Hoc Committee, the Eagleton surveys, and the Board's regular meetings to be heard on the issue. Consequently, I also **CONCLUDE** that petitioners failed to establish by a preponderance of the evidence that the Board's executive session on September 15, 1992, and its two retreat meetings at the hotel in Summit constituted bad faith.

Regarding petitioners' assertion that there was no financial need to close a school, it is undisputed that student enrollment has declined 62% since 1970 and that costs per pupil have continued to increase. Moreover, the record amply reflects that the buildings were underutilized by students. Burdge's testimony about the Board's fiscal management in the light of recent budget defeats and his projected savings from cost-containment measures was straightforward and credible. The evidence also supports a conclusion that the Board reasonably determined that in order to make the best use of its physical assets, Brearley should be the school to close. I so **CONCLUDE**. A decision to close a school for financial reasons is a proper function of the Board. *Toriello v. Bd. of Ed. of W. Orange*, OAL DKT. EDU 3151-80 (Dec. 2, 1980).

Based on the whole of the evidence, I **CONCLUDE** that the Board reasonably determined that it could no longer afford to operate all four schools and, thus, it was in the best interest for the operation of the District to close one school. Further, it would be unreasonable and probably in derogation of its responsibility to taxpayers to allow the schools to remain partially used by a limited number of students if closing a school could result in a more efficient operation of the school system. *See, Silverman, supra*, at 261.

Petitioners' assertion that the Board failed to consider the impact of the student body racial imbalance prior to its vote on November 17, 1992, is without merit. Further, their assertion that the Board acted in bad faith concerning the Roselle School District is not supported by the record; that the Board may not have embraced the Roselle School District is not indicative of bad faith.

The record, however, does reflect a noticeable lack of minority students in the District (R-26 at 46-57, R-35). Notwithstanding the absence of a precise racial makeup of the six communities, it can reasonably be inferred that the population of the six communities reflects the nation's racial makeup. Thus, it is not unsettling that Bornstein found no significant racial imbalance within the District because minorities are often concentrated in segregated sections of large communities rather than small suburban and farm communities. Consequently, students from the six communities attending the regional high school will mirror the racial demography of their respective communities. Likewise, students from families of similar socioeconomic levels will be concentrated within corners of their communities and will maintain this boundary within academic walls. *See Miran v. Bd. of Ed. of Montclair*, 42 *N.J.* 237 (1964).

I am mindful that the District's obligation to maintain a thorough and efficient educational system includes more than providing quality instruction; it necessarily demands that economic, historical, social, and cultural considerations be included in the education delivered. *See Abbott v. Burke*, 119 *N.J.* 287 (1990). Also, when reassigning students to other schools, the Board could not subject them to the harmful consequences of practical segregation. In seeking to avoid this, the Board acted properly when it submitted its request to the Bureau of Facility Planning to close Brearley in compliance with *N.J.A.C.* 6:22-3.2, which provides:

> The reassignment of pupils to other schools in the district neither produces, sustains nor contributes to unlawful segregation, separation or isolation of student populations on the basis of race or national origin.

There is nothing in the record that would reasonably cause the Board to be concerned about racial imbalances in the District's student body before or after November 17, 1992. However, its prompt communication with the Bureau after the November vote is indicative of its good faith effort to assure that its reassignment of Brearley students is consistent with State regulations (R-8).

I have also considered carefully the testimony of the petitioning parents and residents on behalf of the Kenilworth students; closing a school is surely a loss that perhaps can only be known to those who are part of the institution. Thus, I am also mindful that the validity of their opinions are threatened by biases arising from social and emotional desirability, subjective judgments, and individual response tendencies.

On the other hand, whether to close a school is one of the most difficult decisions for a board of education. Here, the Board, over a significant period of time, gave careful study, thought, and consideration to all of those involved. It then considered and tried alternative solutions to the problem, arrived at a determination, and informed the community of its decision. Understandably, the entire Kenilworth community has been affected by that decision. However, closing the Brearley school is not a denial of education to Kenilworth and Garwood residents. The evidence clearly demonstrates that the Board's decision is reasonably intended to accomplish legitimate goals of providing a thorough and efficient educational program for all students enrolled in the regional District. It is also clear that where a board of education considers all of the factors and proceeds in its

determination to close a school in a deliberate, fair, and conscientious manner, with good reasons for its actions, it is entitled to a presumption of correctness which must control.

Based on an analysis of the facts and the applicable law, I **CONCLUDE** that respondent, the Board of Education of Union County Regional High School District No. 1, did not reach its decision to close a school, specifically David Brearley High School, as a result of bad faith or abuse of discretion; nor did it act arbitrarily, capriciously, or unreasonably.

Accordingly, it is **ORDERED** that petitioners' petition be and is hereby **DISMISSED**,

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 7th Floor, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 13, 1993
DATE

Mumtaz Bari-Brown
MUMTAZ BARI-BROWN, ALJ

OAL DKT. NO. EDU 0908-93

Receipt Acknowledged:

DATE 7/26/93

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 27 1993

DATE

OFFICE OF ADMINISTRATIVE LAW

md/e

APPENDIX

WITNESSES

For Petitioner:

Mrs. Lenore Jeans
Mrs. Janet Glynos
Councilman Donald J. Ricca
Dr. Leonard Bornstein
Mr. Kenneth Mattfield
Mr. Frederick J. Soos
Mr. Rudolph O. Cammarota
Assemblyman Monroe Jay Lustbader
Dr. George Schlenker
Dr. John J. Howarth
Mr. Glenn Fannick

For Respondent:

Mr. Edward W. Porter, Jr.
Dr. Michael Disko
Mrs. Nida E. Thomas
Mr. James Pasciti
Mr. Burton Zitomer
Mr. Harold R. Burdge
Dr. Lawrence Kaplan
Mr. Edwin J. Hicks III
Dr. Donald Merachnik

EXHIBITS

J-1	Board Minutes, January 7, 1992
J-2	Board Minutes, January 22, 1992
J-3	Board Minutes, February 18, 1992
J-4	Board Minutes, March 3, 1992
J-5	Board Minutes, March 17, 1992
J-6	Board Minutes, April 8, 1992
J-7	Board Minutes, April 21, 1992
J-8	Board Minutes, April 28, 1992
J-9	Board Minutes, May 5, 1992
J-10	Board Minutes, May 19, 1992
J-11	Board Minutes, June 2, 1992
J-12	Board Minutes, June 11, 1992
J-13	Board Minutes, June 16, 1992
J-14	Board Minutes, June 30, 1992

J-15 Board Minutes, July 7, 1992
J-16 Board Minutes, August 4, 1992
J-17 Board Minutes, September 1, 1992
J-18 Board Minutes, September 8, 1992
J-19 Board Minutes, September 15, 1992
J-20 Board Minutes (Executive Session), September 15, 1992
J-21 Board Minutes, September 22, 1992
J-22 Board Minutes, October 5, 1992
J-23 Board Minutes, October 20, 1992
J-24 Board Minutes, November 4, 1992
J-25 Board Minutes, November 17, 1992
J-26 Audit Report for July 1, 1990, to June 30, 1991
J-27 Audit Report for July 1, 1991 to June 30, 1992
J-28 Factors of Efficiency Study by Dr. Bornstein
J-29 Eagleton Poll, Rutgers University, November 1991
J-30 *Ad Hoc* Committee Minutes, February 5, 1992
J-31 *Ad Hoc* Committee Minutes, February 26, 1992
J-32 *Ad Hoc* Committee Minutes, March 18, 1992
J-33 *Ad Hoc* Committee Minutes, April 15, 1992

P-1 Board Secretary's Report No. 92-91, December 1, 1992
P-2 Chart - Diagram of Schools, Municipalities, and Board Representatives
P-3 Chart - Audit Surplus
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P-5 Not in Evidence
P-6 Not in Evidence
P-7 Not in Evidence
P-8 "Cost Containment and the Curriculum," by Kenneth Mattfield
P-9 Official School Enrollments as of October 15, 1992
P-10 Not in Evidence
P-11 Not in Evidence
P-12 Not in Evidence
P-13 Newspaper Article, "Roselle Considers Joining Regional District"
P-14 Prefiled Testimony of John Howarth
P-15 Resume of John Howarth

P-16 Prefiled Direct Testimony of George Schlenker
P-17 Letter re: Proposed Closing of Brearley, October 26, 1992
P-18 Prefiled Testimony of Rudolph Cammarota
P-19 Notice of Public Meeting, March 12,1991
P-20 Factors of Efficiency Questionnaire
P-21 Article, "The Best Public High Schools"
P-22 Letter to Mr. Kaulfers, January 13, 1993

R-1 Flyer by Committee of Concerned Parents
R-2 Letter to Senator Bradley, October 2, 1992
R-3 Not in Evidence
R-4 Not in Evidence
R-5 Letter to Bureau of Facility Planning Service, December 17, 1992
R-6 Not in Evidence
R-7 Letter to Bureau of Facility Planning Service, February 5, 1993
R-8 Letter to Dr. Merachnik, February 16, 1993
R-9 Letter to Mr. Granello, March 18, 1993
R-10 Letter to Committee of Concerned Parents, November 4, 1992
R-11 Memorandum re: Real Estate Broker Report, April 8, 1992
R-12 Vitae of Donald A. Merachnik
R-13 Chart - Total District Enrollments 1972/73 to 1992/93
R-14 Chart - District Average Cost per Pupil
R-15 Chart - Chronology of Events
R-16 Chart - Functional Capacity and Utilization
R-17 Chart - Support for Major Cost Containment Recommendation
R-18 Summary Report of the Factors of Efficiency Study
R-19 Chart - Operating Costs of School Buildings
R-20 Chart - Repair/Improvement Estimates
R-21 Letter, New Providence BOE to Zitomer, May 29,1 992
R-22 Letter, Roselle Park BOE to Zitomer, June 16, 1992
R-23 Recommendation of Dr. Merachnik
R-24 Memorandum from Dr. Merachnik, October 22, 1992
R-25 Chart - Which School(s) Should the Board Consider Closing
R-26 Master Plan for Educational Facilities
R-27 Resume of Harold R. Burdge

R-28	Report from Mr. Burdge
R-29	1992 School District Report
R-30	Finance Report to the *Ad Hoc* Committee, March 18, 1992
R-31	Memorandum from Dr. Merachnik, July 31, 1992
R-32	Chart - Surplus Appropriations
R-33	Not in Evidence
R-34	Prefiled Testimony of Edwin Hicks III
R-35	Prefiled Testimony of Nida E. Thomas
R-36	Prefiled Testimony of Michael Disko
R-37	Prefiled Testimony of Edward Porter, Jr.
R-38	Qualifications of Edward Porter, Jr., SRA
R-39	Report on Kenilworth Real Estate Values
R-40	Board Minutes, March 19, 1991
R-41	Prefiled Testimony of Lawrence Kaplan
R-42	Resume of Lawrence Kaplan
R-43	Comments by Faculty of Brearley
R-44	Comments by Staff of Livingston
R-45	Comments by Staff of Johnson
R-46	"How Has the Quality of Our Programs and Services Been Diminished by Implementing Cost Containment Measures"
R-47	"What Has the Change in Duties of the Directors of Health, Physical Education and Athletics Meant . . . "
R-48	"What Problems do the Guidance Directors . . . "
R-49	"Input from Administrative and Supervisory Staff . . . "
R-50	Enrollment Projections
R-51	Current Enrollment Data
R-52	Memorandum from Dr. Merachnik, March 24, 1993
R-53	District Projected Student Enrollments -Table 2
R-54	Regional High School District, Functional Capacity - Table 1
R-55	Board Minutes of November 1, 1991, pp. 10 to 12

OAL DKT. NO. EDU 0908-93

JANET GLYNOS AND LENORE JEANS,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF UNION COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Pursuant to the provisions of N.J.A.C. 1:1-18.4, petitioners and respondent each filed exceptions,* and respondent filed a reply to petitioners' exceptions. Petitioner Glynos also submitted a letter of exception, but this letter is not considered herein, as regulation makes no provision for filing of pro se exceptions where a party is represented by an attorney who has already filed exceptions on the party's behalf. N.J.A.C. 1:1-5.1 and 1:1-18.4.

Petitioners' exceptions consist of 77 points of contention with the initial decision, several of which are allegations that the ALJ failed to find as fact or properly emphasize items that favored

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* The Board's exceptions note, and OAL subsequently memorialized by memorandum, appearances on behalf of the Board by Nathanya G. Simon, Esq. and Nicholas Celso, III, Esq., whose names are duly entered in the record in addition to that of Mr. Schwartz but inadvertently missing from the initial decision. They also note a change in the name of the firm representing the Board to Schwartz, Simon, Edelstein, Celso and Kessler.

petitioners. These include the athletic record, newness and other physical advantages of the David Brearley High School (Petitioners' Exceptions, Nos. 1, 41); the expertise of Dr. Bornstein, his testimony regarding the correct methodology of determining school closings, and his opinion that Brearley would not be the logical school to close (Nos. 3 through 7); the finding of the Eagleton Poll that 93% of respondents favored cost containment through administrative reduction (No. 8); the fact that Curriculum Supervisor Mattfield was petitioners' witness (No. 10); the testimony of real estate experts on the impact of closing Brearley on property values in Kenilworth (No. 34); expert testimony regarding the Board's surplus level, which indicated that the district did not have financial difficulties as claimed (No. 39); the ALJ's Finding of Fact No. 10 inferring that the Ad Hoc Committee recommended closing a school, when in fact it voted 7-4 with one abstention to keep all four schools open (No. 44); the absence of plans for racial balance or accommodation of the disabled (Nos. 50, 63); the district's failure to undertake meaningful efforts to merge with neighboring district(s) such as Roselle (No. 50); the fact that most of the information before the Superintendent when he issued his October 1992 report and before the Board when it voted in November favored not closing a school (Nos. 56, 60); and the fact that prior to October 1992 no superintendent ever recommended closing a school (No. 57).

Petitioners also contend that nobody testified that the quality of education at Brearley was inferior and that, to the contrary, the district's curriculum supervisor testified that quality education could be maintained with four small high schools (Nos. 2, 11, 12 and 13, 52); that several reports and expert

opinions support small schools in general as the best purveyors of quality education (No. 14); that the closing of a school for 1993-94 was clearly a "dead issue" following the Board's vote in April 1992, as evidenced by the statements of the Board President himself (Nos. 15 through 19 and 27, 45), so that it was erroneous for the ALJ to find that the Board's November 1992 vote to close Brearley was the culmination of a long process and not an arbitrary, bad faith abandonment of the Board's stated commitment to cost containment measures (Nos. 20, 21, 22, 25, 26, 35, 40, 47, 49, 51, 54, 58, 59, 62); that the decision to close Brearley should have been a two-step process rather than a single decision (Nos. 33, 64) and that the Board refused legislative suggestions that an independent study be conducted prior to closing (No. 38), further showing arbitrariness and bad faith; and that the Board's failure to have a racial balance plan prior to closing Brearley was found by experts to be arbitrary and unreasonable and should have been more closely examined by the ALJ (Nos. 37, 76, 77).

With respect to the Open Public Meetings Act (OPMA), petitioners reiterate that the Board's discussion of the Eagleton Poll at a retreat meeting on October 15, 1991, which the Board attempts to justify with hearsay comments about the New Jersey School Boards Association's encouragement of retreats, was not only in violation of OPMA but also demonstrated bad faith and continued a pattern of excluding the public from discussion (Nos. 9, 24, 43, 53, 67, 68, 70, 75); that the Board's September 15, 1992 resolution to go into executive session was for the purely pretextual reason of possible litigation but was in fact to discuss and vote on school closings in violation of the public's right to witness such discussion and vote (Nos. 28, 29, 30, 31, 36, 42, 46, 55, 67, 73,

74, 75); and that the Board's contention of open public debate and significant public input is a sham in view of the short time frame between the Superintendent's recommendation to close Brearley and the actual vote to close, and in view of the public's inability to participate in earlier meetings regardless of their being held in the open (Nos. 32, 48, 65, 66, 71, 72).

In reply, the Board responds to each exception in turn, with the general thrust of its responses being that several of petitioners' "missing" findings are immaterial to the issues on which this matter ultimately turns or are in fact embedded within the initial decision; that petitioners take several statements, both of the ALJ and of witnesses, out of context or place upon them an import which they clearly do not possess given the legal standard controlling the present proceeding; and that the ALJ carefully weighed the evidence in favor of petitioners' and respondent's respective positions and properly found that respondents acted within their lawful authority and in good faith.* (Board's Reply Exceptions)

In its own exceptions, the Board initially points to an error in the quoting of Dr. Bornstein's report at page 8 of the initial decision, averring that his actual statement was that it would not be rational, productive or meaningful to believe that moving minority students to Johnson would enhance racial balance or

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* The Commissioner here notes the Board's threshold request to strike petitioners' exceptions in their entirety on grounds that they do not meet the requirements of N.J.A.C. 1:1-18.4 for specific citations to testimony, evidence or legal authority. The Commissioner declines to grant this request, both in the interest of justice and because the nature of this matter and the structure of the record permit adequate evaluation of, and response to, petitioners' submissions.

benefit affected students (J-28, at 116), thus supporting the Board's position that nothing in the record would have given the Board any cause for concern over the district's racial balance situation either before or after its November 1992 vote to close Brearley. (Board's Exceptions, at pp. 1-2)

The main thrust of the Board's exceptions, however, reaches to the ALJ's finding of arbitrariness regarding the retreat meetings of March and October 1991, at which the Bornstein study and Eagleton Poll, respectively, were discussed by the Board. With regard to the March 16, 1991 meeting, the Board argues that it believed, based on the immediate remediation directives and cost estimates of the Bornstein report, which was received by the district two days previously, that it was dealing with either a major health emergency or an erroneous study (based on its inconsistency with all prior assessments of district facilities) that could result in widespread and needless public panic, as well as taint of the upcoming poll the Board was planning to conduct, so that it sought to avoid such a situation by initially discussing and planning its response to the report in executive session. There was not, nor was there ever intended to be, any deliberation, policy formation or action taken from which the public was excluded, certainly none on the issue of school closings. Moreover, the Board's good faith in this matter is shown by the totality of its actions, which included immediately contracting for a verifying asbestos inspection and releasing the Bornstein report once it was certain that it had correct and reliable data on the district's asbestos situation. (Board's Exceptions, at pp. 2-5)

With regard to the October 1991 retreat, the Board argues that at a duly advertised meeting, the Board went into executive

session solely to receive a preliminary report on the Eagleton Poll and discuss the best way to disseminate its results. Again, no action of any kind was contemplated or taken, nor were there any discussions of school closings; moreover, the Board gave a full accounting of the retreat at a regular public meeting two weeks later. Thus, the Board avers, even assuming arguendo that the provisions of OPMA were violated (although they were not), within the overall context of events in this matter, any such violation was both de minimis and cured by subsequent public disclosure, deliberation and action. (Board's Exceptions, at pp. 5-7)

Upon careful and independent review of a voluminous record, including ten volumes of hearing transcripts,* extensive verbatim minutes of pertinent Board meetings, including public comments, and numerous reports, charts and other exhibits, the Commissioner finds, as did the ALJ, that the decision of the Union County Regional Board of Education to close David Brearley High School was neither arbitrary nor unreasonable, and that such action, being fully within the discretionary authority of the Board, is therefore not subject to upset by the Commissioner.

Preliminarily, the Commissioner observes that the initial decision in this matter represents a full and fair summation of pertinent testimony and evidence, and that the ALJ applied the proper legal standard both in weighing the record before her and in reaching her ultimate conclusions of fact and law.

The Commissioner further observes that petitioners' exceptions reiterate the same fundamental arguments raised before

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* Transcripts cover nine days of hearings, with the May 10, 1993 transcript (Vol. VIII) being in two parts.

the ALJ at hearing and in written post-hearing submissions, and that these arguments were thoroughly and correctly assessed in the initial decision above. However, based upon her own review of the record and of petitioners' specific exceptions, the Commissioner makes the following further comments.

Petitioners allege that the issue of a school closing was "dead" following the Board's vote in April 1992 and that, when the Board arbitrarily determined to revisit its decision in September 1992, there was insufficient time to adequately explore the matter and obtain public input, as only 28 days stood between the superintendent's recommendation to close Brearley and the Board's vote in November. Initially, the Commissioner notes that the Board minutes of April 28, 1992 (J-8) clearly demonstrate that, while the current round of debate about closing a school may have come to an end, several Board members fully recognized the stop-gap nature of the Board's decision and that the issue of school closing was bound to resurface because of the district's continuing declining enrollment/increasing budget situation. Also significant in this context is that several of those who voted to keep four schools open did so largely because they felt they had insufficient information and perspective to make so sensitive, far-reaching and unpopular a decision as closing a community's "home" school at that point in time. As to petitioners' claims of insufficient time for deliberation, the Superintendent's report of October 1992 was clearly a continuation of the preceding debate and was based to a significant degree on materials, opinions and information previously available, as well as on discussions that had occurred over a substantial period of time; indeed, the public comments in response

to this report center on many of the same arguments and objections to the notion of closing any school, and to the pros and cons of the various schools to be considered, made by the public and its Ad Hoc Committee representatives prior to the Board's vote in April (J-8, J-23 through 25, J-30 through 33). Moreover, the sentiments expressed by Board members at the time of the vote to revisit the school closing issue make it clear that the deliberations to come were a continuation of prior discussions and a reconsideration of a decision which the Board now had reason to believe may not have been the correct one (J-21). Thus, it cannot be said that the Board had not fully considered the issues raised in the report or opportunity taken to hear public concerns regarding them.

As to petitioners' contention that the decision to revisit the question of school closing in September 1992 was arbitrary and in bad faith, the Commissioner notes that, between the Board's vote in April and its inquiry into possible reopening, several Board members had experienced both misgivings about the adequacy of the cost-savings approach to the district's long-term budget problem and negative feedback from staff and community members on the impact of this approach on school operations and educational program, which in themselves are legitimate bases to question whether the Board had made the right decision in its prior vote (J-20, 21, 22). Further, the question of reopening debate was actually raised by a Board member (Garwood representative Toth) who had voted against closing a school and who ultimately continued in that conviction upon voting in November; it was, moreover, supported by a 7-1 majority including a mix of members with respect to April's vote, the sole opposition being from Kenilworth representative Soos (J-20, 21).

Petitioners further allege that the Board ignored the recommendations of committees, consultants and its own curriculum supervisor that four schools be maintained, and that the Board had insufficient and conflicting educational information before it when it acted to close Brearley. To the contrary, there is no evidence that the Board ignored these recommendations; rather, comments made by its individual members show it to have considered and rejected them in favor of differing but likewise legitimate assessments. In evaluating the Board's actions, the nature of these various recommendations must be considered: some are individual reports examining a single facet of the overall question, others make abstract recommendations based on an ideal construct where cost is no consideration (it is significant that Curriculum Supervisor Mattfield in J-25 characterized his own recommendation this way and subsequently supported the Board's decision to close Brearley), and still others are community-based opinions which, not unexpectedly, focus on immediate needs and perceptions and generally seek to protect particular interests. Placed against this in September was the Superintendent's report, precisely what the Board lacked in April and what it specifically stated it needed (J-21, 22) in order to finally resolve the question before it: a comprehensive, professional evaluation of the district's long-term situation that synthesized available information and opinions and made a firm recommendation for the district's future direction based on all relevant considerations. That the report's final recommendation may have been contrary to the findings of some of the specific reports and opinions considered in its development is indicative of neither arbitrariness nor bad faith, either on the part of the

Superintendent or the Board, when the basis for such contrariness is rational and clearly stated as it was herein and when reasonable efforts are made to respond to questions and concerns from opposing parties. In this context it is worth observing that, having considered the comprehensive report and ensuing debate, several Board members who had previously voted to keep all four schools open* now became persuaded that a closing was, unfortunately, indeed necessary, resulting in a final vote of 7-2 with the sole votes in opposition coming from the constituent representatives of Garwood and Kenilworth, the two towns whose students attended Brearley. (J-25)

The argument is also made that cost-containment alternatives were only given 15 days to work before being jettisoned in favor of closing a school, which financial necessity did not dictate, contrary to representations by the Board, and that the Board had no racial balance plan and failed to aggressively pursue merger with other districts because it did not welcome their minority populations, even though a merger could have kept Brearley open. As indicated above, in determining that cost-savings measures would not be sufficient to address its problems, the Board was clearly and properly taking a long-term view of the overall budget situation of the entire district (J-25), whereas petitioners' arguments are based on more immediate situations and perceptions, both with respect to tax impact and overall budget stability. Moreover, the record is plain that racial balance is not generally a

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* Newly appointed Board member LiCausi, of Springfield, who replaced a deceased Board member (Waldt) voting to keep all schools open, previously spoke (during a public comment session on April 28, 1992) in favor of keeping all schools open prior to becoming a Board member in June 1992 (J-8).

significant problem in the district (the Commissioner here notes that the Board's corrected quotation of Bornstein's report above is in fact accurate), so that the Board had no reason to proceed in any manner other than it did in this regard; neither is there evidence that racial discrimination or other improper motive played a role in any perceived lack of aggression in seeking to merge with other districts, a solution which the Board in any event would not be compelled to embrace as an alternative to closing a school.

Finally, petitioners contend that evidence of the Board's bad faith is found, in addition to the examples inherent in the allegations above, in its delaying the release of the Bornstein study, holding private and secret meetings, limiting public participation in the decision-making process and refusing to engage an independent consultant to study the question of school closing as suggested by local legislators. With respect to the Bornstein report, while hindsight may suggest that, under the circumstances, the Board might have appeared more forthright and objective had it released the report earlier, there is no impropriety in the course of action it did choose to follow, which had a good faith, rational basis and ultimately did not prevent public review and discussion of the report. With respect to limiting public participation, the record shows that, to the contrary, the Board went to great lengths to obtain public input, both directly through polls, comment sessions at Board meetings and public hearings, and indirectly through community-based representation on the Ad Hoc Committee; the law neither requires, nor does practicality dictate, that the public be permitted to speak at unlimited length or at every meeting dealing with a particular issue, however controversial. With

respect to the Board's unwillingness to hire an independent consultant, while such an action may have enhanced the Board's credibility in making an unpopular decision, there is nothing to have compelled the Board to undertake this step, particularly in view of the extensive work already done on the issue.

With respect to alleged "secret" meetings, however, the Commissioner finds that while the Board's two "retreat" meetings were duly advertised, otherwise properly conducted and appear to have been undertaken in good faith, the spirit of the Open Public Meetings Act is violated by any attempt to conduct public business in a manner that discourages, or appears designed to discourage, the public from attendance at meetings, Richard A. Voll and Sally Brandes v. Board of Education of the Village of Ridgewood, Bergen County, and Samuel Stewart, 1986 S.L.D. 883, even where the site selected is not "exceedingly remote" as in Voll. The Commissioner thus concurs with the ALJ that the Board erred in pursuing this course of action. Regarding the meeting of September 15, 1992, the Commissioner finds that the Board's reason for going into executive session was not pretextual, as claimed by petitioners, but that its discussion, while modest, did go beyond the bounds of the legal aspect of the question posed (J-19, 20). However, like the ALJ, the Commissioner finds that any violation arising from the Board's discussion and "consensus" on whether to revisit the question of closing a school was cured by the public discussion and vote (J-22) at the duly advertised meeting of September 22, 1992, and that such violation, like the "retreat" meetings discussed above, neither indicates bad faith nor rises to the level of invalidating any decision made by the Board or tainting its overall manner of proceeding.

Thus, taken as a whole, the record herein shows the Board to have been in the unenviable position of having to reconcile two sharply competing demands: the genuine need to address declining enrollment, spiraling budgets and a responsibility to operate the regional district in the most efficient and cost-effective manner possible, versus the needs and perceptions of constituent communities having a strong sense of identity and satisfaction with "their" neighborhood schools and a desire to maintain the status quo while finding some other way to reduce costs. It is equally clear that various alternatives available to the Board to deal with this situation were contemplated, and that there were arguments to recommend both for and against virtually any action the Board might have taken. That there may have been ways to reduce costs other than closing a school, or that there may have been some factors in favor of choosing a school other than Brearley, does not render the Board's decision arbitrary, nor does the fact that petitioners might have reached a different judgment under the circumstances. It is not necessary that the Board's choice have been the only possible one, or that there have been unanimity of opinion as to its rectitude -- be it community sentiment or expert assessment -- in order for the Board's ultimate decision to have been a rational exercise of discretion fairly reached. What is necessary, as recognized by the ALJ in her discussion and conclusions at pp. 33 ff., is that there have been a reasonable basis for the Board's choice and that its decision have been made in good faith. As indicated above, the Board actions herein adequately meet this test, so that neither petitioners nor the Commissioner may substitute their judgment for that of the Board, notwithstanding the sincerity

of petitioners' objections and the understandable persistence of their concerns as they relate to negative impact on the particular communities and students most directly affected by the closing at issue.

Accordingly, the initial decision of the Office of Administrative Law dismissing the Petition of Appeal and upholding the decision of the Union County Regional High School District No. 1 to close David Brearley High School is affirmed for the reasons expressed therein together with the additional reasons set forth above.

IT IS SO ORDERED.

Marylee Fitzgerald
COMMISSIONER OF EDUCATION

AUGUST 31, 1993

DATE OF MAILING - AUGUST 31, 1993

213-93

213-93

H.F.N. & J.N, on behalf of J.P.N. and J.N.N., minors, PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY, RESPONDENT.	:	DECISION

SYNOPSIS

Petitioners, parents of children attending elementary school in respondent's district, alleged their children were entitled to bus service in said district.

ALJ concluded since route for determining remoteness should be measured along available sidewalks and marked crosswalks if they exist, shortest route measured this way exceeded 2 miles. Thus, petitioners' children were eligible for transportation under N.J.S.A. 18A:39-1. (Dreifuss; Nelson)

Commissioner adopted findings and determination in initial decision and stressing the extreme narrowness of the holding of the facts in this particular matter.

SEPTMBER 3, 1993

213-93

#213-93
Initial Decision

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5580-92
AGENCY DKT. 282-6/92

HOWARD F. NICHOLS and
JULIA NICHOLS, parents, on
behalf of **JON-PAUL S. NICHOLS**
and **JESSICA N. NICHOLS,** minors,
Petitioners,
v.
WAYNE TOWNSHIP
BOARD OF EDUCATION,
Respondent.

Patricia Nichols, Esq. for petitioners

Ellen Marie Walsh, Esq. for respondent
(Fogarty & Hara, attorneys)

Record Closed: March 3, 1993 Decided: July 21, 1993

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

Statement of the Case

This is a suit on behalf of two elementary-school children seeking transportation to and from a public school pursuant to *N.J.S.A.* 18A:39-1. Local school districts must provide free transportation for remote students, including elementary students "who live more than two miles from their public school of attendance." *N.J.S.A.* 18A:39-1. Implementing regulations provide that the distance must be measured door-to-door "by the shortest route along public roadways or public walkways." *N.J.A.C.* 6:21-1.3. School districts, however, may voluntarily offer courtesy busing to resident students who do not qualify under the remoteness standard.

Essentially, the resolution of this dispute turns on the proper method for determining the shortest route. In particular, the parties disagree on whether or not the route must be measured along available paved sidewalks and existing marked crosswalks. The parents urge that young children walking to school must be taught to obey traffic safety rules and laws. But the district maintains that compliance with motor vehicle laws "cannot apply to a school district which is measuring remoteness." Rather, the district contends that its responsibility is to utilize the shortest possible route, without regard to pedestrian safety concerns. Alternatively, the district argues that its proposed route complies with any applicable motor vehicle laws and is safer than the route suggested by the parents.

Additionally, the parents challenge the correctness of the board's action on several other grounds, including the contention that it was improper to use the rear entrance to the school building in making the measurement; the contention that a particular pathway located on school-owned property does not constitute a public roadway or walkway; and the contention that the district adopted an arbitrary and unreasonable classification to select which elementary-school children living less than two miles from their school would receive courtesy busing. In light, however, of the recommended ruling that petitioners' children are entitled to transportation because the shortest route along available sidewalks and marked crosswalks exceeds the two-mile limit, it is unnecessary to reach petitioners' various other theories for relief.

Procedural History

Petitioners Howard and Julia Nichols filed their petition with the Commissioner of Education ("Commissioner") on June 22, 1992. Respondent Wayne Township Board of Education ("Board") filed its answer on July 7, 1992. Subsequently, on July 23, 1992, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case.

While the case was awaiting hearing, petitioners filed motion papers on September 3, 1993 seeking emergent relief. On September 8, 1992, the Board filed opposing papers. After oral argument on September 11, 1992, the OAL denied the motion. By order dated November 2, 1992, the Commissioner affirmed this denial.

Both sides concur that the material facts are not genuinely in dispute and that testimony by witnesses is unnecessary. Consequently, on February 17, 1993, the parties submitted a joint stipulation of facts, together with jointly-marked exhibits. Thereafter, on February 24, 1993, the parties each filed cross-motions for summary decision, accompanied by supporting briefs and additional exhibits. The OAL held oral argument on March 3, 1993.

Findings of Fact

All of the facts needed for summary disposition of this matter are either stipulated or undisputed. **I FIND:**

Mr. and Mrs. Nichols and their three children reside on Charlotte Terrace in the Township of Wayne, New Jersey. During the 1992-93 academic year, one child, age six, attended kindergarten at the Albert Payson Terhune Elementary School in the district. Next year, in September 1993, a second child, currently four years old, is expected to start kindergarten at the same school. An older child is presently in high school and is not involved in this litigation.

Until June 13, 1991, the district had provided courtesy busing throughout the district. On that date, however, the Board voted unanimously to eliminate courtesy busing in 1991-92. Later, the Board carved out two special exceptions to its general policy of no courtesy busing. On November 14, 1991, the Board adopted a resolution which reinstated courtesy busing for students enrolled in magnet programs who are assigned to schools other than their nearest neighborhood school. Similarly, on January 27, 1992, the Board restored courtesy busing for students who must cross or walk along State Highway 23. Neither of the two Nichols children fit within these special circumstances.

Although the parties propose slightly different routes for measuring the distance between home and school, there is no disagreement regarding physical measurements. Passaic County's Acting Superintendent of Schools made the actual measurements, and both parties stipulate the accuracy of these figures. Instead, the dispute focuses on the necessity of using sidewalks and crosswalks.

Originally, the Board's proposed route started at the entrance of the Nichols' home, wended its way north on the east side of Alps Road to its intersection with Hamburg Turnpike, continued north across the intersection and back over Alps Road within marked crosswalks, proceeded west on Hamburg Turnpike, and, ultimately, ended at the rear entrance of Terhune School. Door-to-door, the total distance is 10,513 feet or 1.99 miles. Alps Road on its east side has sidewalks for roughly half of the proposed route, from the intersection with Linden Road to the location of De Paul High School. The remainder of this route on the east side of Alps Road has no sidewalks. Photographs show that the path of travel, where the sidewalk normally would be, is overgrown with trees and other types of vegetation.

Petitioners' proposed route is identical to the Board's, except that it crosses over to the west side of Alps Road at a marked crosswalk directly in front of De Paul High School, continues north on available sidewalks on the west side of Alps Road, recrosses to the east side of Alps Road in the marked crosswalk at the intersection with Hamburg Turnpike, and eventually ends at the front rather than the rear

entrance of Terhune School. Measured in this manner, the total distance is 11,010 feet or 2.09 miles. If, however, the same route is followed to the rear door, the measurement is 10,622 feet or 2.01 miles.[1]

Subsequently, the Board proposed a third route which, like the parents' proposal, proceeds along the east side of Alps Road until the break in the sidewalk, crosses to the west side, and then continues along the sidewalk to the intersection with Hamburg Turnpike. At this point, the route crosses the Turnpike at the southwest corner of the intersection, where there is no marked crosswalk. By this route, the distance to the rear entrance of the school is 10, 488 feet or 1.99 miles. This third route cures any objection to the lack of sidewalks along the Board's original route. Nonetheless, it would require a child to cross the busy intersection at Hamburg Turnpike without the benefit of a marked crosswalk. One distinct advantage, however, is that the child would cross only one street to get to the other side of the intersection.

In contrast, the parents' proposed route does utilize marked crosswalks, but necessitates that a child cross the street three times at the intersection. Using the parents' route, the child must first cross Alps Road to get from the southwest to the southeast corner of the intersection, then cross Hamburg Turnpike to get to the northeast corner, and re-cross Alps Road to get to the northwest corner.[2]

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[1]For purposes of this decision, the Board's position that the route should terminate at the rear entrance to the school building will be presumed correct. *See Buonocore v. Hillsdale Bd. of Educ.*, 92 *N.J.A.R.* 2d (Vol. 4A) 655 (Comm'r). Regardless of whether measured to the rear or the front entrance, in either case the parents' route is more than two miles.

[2]The record is silent as to the reason for the peculiar layout of the marked crosswalks at this intersection. However, the photographs reveal that vehicular traffic traveling south on Alps Road encounters a "no left turn" sign for turns east onto Hamburg Turnpike. See Exhibit J-2(e). Thus, the marked crosswalks seem designed to channel pedestrians to the less heavily traveled portion of Hamburg Turnpike. Traffic engineers may well have concluded that it is less dangerous for pedestrians to cross Hamburg Turnpike where vehicular traffic is converging from three rather than four different directions.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the route should be measured along available sidewalks and existing marked crosswalks. Since the shortest route measured in this way exceeds two miles, petitioners' children are eligible for transportation under *N.J.S.A.* 18A:39-1.

Authority for free transportation to public schools derives from Art. VIII, § 4, para. 3 of the State Constitution of 1947, which confers on the Legislature the power to provide transportation for school-aged children to and from any school "within reasonable limitations as to distance." Courts have required local boards to provide transportation for children living "remote" from the school house. See *West Morris Reg. Bd. of Educ. v. Sills,* 58 *N.J.* 464, 474 (1971), *cert. den.* 404 *U.S.* 989, 92 *S. Ct.* 450, 30 *L.Ed.* 2d 370 (1971). *N.J.S.A.* 18A:39-1, as recently amended, requires a local public school district to provide free transportation to elementary school pupils "who live more than two miles from their public school of attendance." Such statutory language is consistent with Department of Education regulations, which define remoteness as "beyond two miles for elementary pupils." *N.J.A.C.* 6:21-1.3(a).

Regulations further prescribe that the measurement shall be made "by the shortest route along public roadways or public walkways" from the entrance of the pupil's residence to the nearest public entrance of the assigned school. *N.J.A.C.* 6:21-1.3(b). The regulations themselves do not expressly specify that the route must be drawn in compliance with applicable motor vehicle laws. But that meaning is inherent in the nature of a law-abiding society. Commissioner's decisions have recognized this implicit assumption. For example, in *Dreifuss v. Chatham Bd. of Educ.,* 1988 *S.L.D.* 952 (Comm'r May 25), the shortest routes to and from school were measured on opposite sides of the road because of the safety rule that pedestrians on roadways without sidewalks must walk facing oncoming traffic. When approving the measurement, the ALJ commented, "To decide differently is tantamount to requiring the child to violate the law when returning home from school." (1988 *S.L.D.* at 957). Upholding this approach, the Commissioner declared that the result was consonant with "the probable intent of the legislators" and with "the common

sense of the situation." (1988 S.L.D. at 960). Similarly, in *Tenzer v. Tenafly Bd. of Educ.*, OAL DKT. EDU 3357-84 (April 2, 1985), *adopted*, Comm'r (May 17, 1985), the Commissioner determined that the measurement along a semi-circular driveway of a private school was properly made against the flow of traffic to comport with general traffic laws.

Teaching elementary-school children to obey traffic rules has an educational as well as a safety aspect. Most importantly, it serves to protect them from avoidable risks on the way to school. But also, it conveys an important civics lesson on waiting one's turn, respecting the rights of others, and cooperating with social norms for the betterment of all. In our very own case, the Board distributed literature published by the National Association of Elementary School Principals urging parents to "[t]each your child . . . to use crosswalks when crossing streets" and also "to use designated sidewalks when walking to or from school or the school bus stop[.]" It is difficult to imagine telling a young child to stay always on the sidewalk, except when going to or coming from school.

As petitioners' counsel aptly observes, the Board appears to have "lost sight of the purpose of remoteness measurements." Case law instructs that "pedestrian distance and not vehicular distance is the measure." *Mangieri v. Cresskill Bd. of Educ.*, 1991 *S.L.D.* 58, 64 (Comm'r Jan 11). School routes are not some theoretical abstraction, but must be capable of being walked by real children. Indeed, the Board seems to have ignored the good advice of its own attorney, who in 1988 had issued a legal opinion: "Students must, of course, walk on sidewalks. If there is not a sidewalk, then the student must walk opposite the flow of traffic."

New Jersey motor vehicle law mandates that, "where there are no sidewalks or paths provided for pedestrian use, pedestrians shall, where practicable, walk only on the extreme left side of the roadway or its shoulder facing approaching traffic." *N.J.S.A.* 39:4-34. Accordingly, it would be illegal for children to continue walking on the east or right side of Alps Road once the sidewalk has abruptly ended. They must cross over to the west or left side of Alps Road, where not only will they be facing approaching traffic, but also they will be able to use the sidewalks available on that side of the road.

More problematic is the question of whether New Jersey motor vehicle law prohibits pedestrians from crossing a road outside of the marked crosswalks. *N.J.S.A.* 39:4-33 provides that at intersections like Alps Road and Hamburg Turnpike, where traffic is directed by a traffic signal, "no pedestrian shall enter upon or cross the highway at a point *other than a crosswalk*." (Emphasis added). Even where traffic is not directed by a police officer or traffic control device, pedestrians "shall cross the roadway within a crosswalk or, in the absence of a crosswalk, and where not otherwise prohibited, at right angles to the roadway."

Title 39, however, does not require that a "crosswalk" be marked on the road surface. As defined by statute, a crosswalk may either be distinctly marked on the surface of the road or be an unmarked crosswalk determined by connecting lateral lines extended from the sidewalks. *N.J.S.A.* 39:1-1. *State v. O'Connor*, 139 *N.J. Super.* 552, 554 (App. Div. 1976). *Accord, Cresse v. Parsekian*, 81 *N.J. Super.* 536, 545 (App. Div. 1963), *aff'd* 43 *N.J.* 326 (1964), explaining that, "[N]ot all crosswalks are 'marked upon the pavement.' A crosswalk is often bounded by invisible, imaginary lines[.]" *O'Connor* involved a motorist ticketed for failing to stop at a stop sign. The incident occurred at an intersection which had no markings on the road. Not surprisingly, the Appellate Division declared that the absence of road markings did not excuse the driver from failing to come to a complete stop "within five feet of the nearest crosswalk."

Our own case, on the other hand, involves an intersection which already has marked crosswalks. Presumably, the governmental authorities responsible for the roadway put those markings there for a purpose. Children of tender age do not possess the degree of sophistication needed to appreciate the subtlety of "imaginary" crosswalks. Most responsible parents in this situation would warn their children to stay on the sidewalks and to cross only within the marked lines. In the context of mapping out a route for school children to walk to school, the term "crosswalk" will be construed in its more commonly-understood sense of marked crosswalk rather than its technical legal sense. Certainly that is most in keeping with the Commissioner's reliance on "the common sense of the situation.". *Dreifuss*, 1988 *S.L.D.* at 957. *See also, Nelson v. McCaffery*, 1990 *S.L.D.* 532, 535 (St. Bd. Aug. 1), *aff'd 246 N.J. Super.* 467 (App. Div. 1991) ("[H]ypertechnical and legalistic argument must be rejected in favor of a common sense and practical approach.")

In closing, it is important to emphasize the extreme narrowness of the holding in this particular matter. It is not suggested that a local school district has any obligation whatsoever to enforce traffic laws or to provide sidewalks, traffic lights, crossing guards, police patrols, overpasses, etc. to meet the requirements of safe travel for school children. *See Schrenk v. Ridgewood Bd. of Educ.*, 1961 *S.L.D.* 185, 187 (Comm'r April 25). *See also, Yedwab v. Fair Lawn Bd. of Educ.*, OAL DKT. EDU 7765-80 (June 22, 1981), *adopted* (Comm'r Aug. 4, 1981); *Lo Rocco v. Hillsborough Bd. of Educ.*, OAL DKT. EDU 1579-80 (Aug. 20, 1980), *adopted* (Comm'r Oct. 4, 1980); *Trossman v. Highland Park Bd. of Educ.*, 1969 *S.L.D.* 61 (Comm'r May 1). Nor is it suggested that a school board has any affirmative duty to seek out the safest route or to avoid roadways without sidewalks and intersections without marked crosswalks. Nevertheless, if the route selected for measurement by school officials happens to have existing sidewalks and marked crosswalks, then the measurement must be based on the assumption that the children should use them.

Insofar as the requested relief is concerned, the record contains no evidence of any monetary loss. Therefore, petitioners' demand for reimbursement of travel costs allegedly incurred as a result of respondent's wrongful denial of transportation must fail for lack of proof. Similarly, petitioners' demand for counsel fees is denied. Absent explicit statutory authority to award attorneys' fees, the Commissioner lacks any power to do so. *Wagner v. Bridgewater-Raritan Reg. Sch. Dist.*, 1978 *S.L.D.* 827, 832 (Comm'r Nov. 3); *Watsula v. Plumstead Bd. of Educ.*, 1977 *S.L.D.* 692, 695 (Comm'r June 1).

Order

It is **ORDERED** that, starting with the 1993-94 academic year, the Board provide school transportation to petitioners' two children who attend elementary school in the district.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 21, 1993
Date

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

Date

OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Exhibits

No.		Description
J-1		Survey map of a portion of the Township of Wayne, dated September 28, 1992
J-2(a)-(k)		Series of photographs of the scene
J-3		Copy of letter to the New Jersey Department of Transportation from the United States Department of Transportation, dated January 21, 1992
J-4		Copy of letter to both counsel from the Passaic County Superintendent of Schools, dated January 6, 1993
J-5		Copy of minutes of a public works session of the Wayne Township Board of Education, dated June 13, 1991
J-6		Copy of minutes of a public works session of the Wayne Township Board of Education, dated November 14, 1991
J-7		Copy of minutes of a special meeting of the Wayne Township Board of Education, dated January 27, 1992
J-8	(a)	Copy of the Board's policy on pupil transportation, adopted July 28, 1992
	(b)	Copy of the Board's policy on student transportation services, adopted July 28, 1992
	(c)	Copy of the Board's procedures for formation, adoption and amendment of policy, dated April 1, 19982
	(d)	Copy of the Board's procedures on continuing review of Board policies, dated April 1, 1982
	(e)	Copy of the Board's procedures on formulation of administrative regulations, dated April 1, 1982
	(f)	Copy of the Board's procedures on suspension of policy, dated April 1, 1982
J-9	(a)	Copy of diagram of Terhune School
	(b)	Copy of diagram of Terhune School
J-10		Copy of report to parents from the National Association of Elementary School Principals, undated

J-11 Copy of letter to Howard F. Nichols from Gary Peatick, dated February 21, 1992

J-12 Copy of J-11, with handwritten notations

J-13 Copy of letter to Howard Nichols, Jr. from Gary Peatick, dated March 24, 1992

J-14 Copy of letter to Gary Peatick from Howard F. Nichols, Jr., dated March 13, 1992

J-15 Copy of letter to Gary Peatick from Howard F. Nichols, Jr., dated May 16, 1992

J-16 Copy of letter addressed to Parents/Guardian from Vincent R. Benfatti, dated August 1992

J-17 Copy of letter addressed to Parents/Guardin from Vincent R. Benfatti, dated September 1992

J-18 Copy of list of children bused to Terhune Elementary School during the 1991-92 school year

J-19 Copy of list of nonremote transported students, dated December 23, 1992

P-1 Copy of letter to Howard Nichols from James Palumbo, dated November 20, 1989

P-2 Copy of portion of exhibit J-1, with markings showing sidewalks

P-3 Photograph of parking area

P-4 Photograph of construction site

P-5 (a) Excerpt of transcript of a meeting of the Wayne Township Board of Education held on October 17, 1991

(b) Excerpt of transcript of a meeting of the Wayne Township Board of Education held on November 14, 1991

(c) Excerpt of transcript of a meeting of the Wayne Township Board of Education held on January 27, 1992

P-6 Copy of opinion letter to the Wayne Township Board of Education from Steven R. Fogarty, Esq., dated November 16, 1988

H.F.N. & J.N, on behalf of J.P.N. and J.N.N., minors,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Board filed timely exceptions pursuant to N.J.A.C. 1:1-18.4, but petitioners' exceptions were untimely. Consequently, the Commissioner considers only the Board's exceptions and petitioners' timely reply exceptions thereto in the disposition of this matter.

The Board reasserts the arguments proffered below, emphasizing its disagreement with the ALJ's findings, in particular that the Board must comply with New Jersey Motor Vehicle Laws when measuring remoteness, claiming that such conclusion is contrary to the case law which stands for the proposition that the dangerous conditions of a roadway do not prohibit a district from using the roadway as part of a remoteness measurement.

Upon careful and independent review of the record, the Commissioner agrees with the determination of the Office of Administrative Law that petitioners' children are eligible for transportation pursuant to N.J.S.A. 18A:39-1. In so finding,

however, the Commissioner first would correct the Board's reading of the initial decision. The ALJ expressly emphasizes the extreme narrowness of his recommended decision and unequivocally stresses the point at page 9 of said decision that "[i]t is not suggested that a local school district has any obligation whatsoever to enforce traffic laws or to provide sidewalks, traffic lights, crossing guards, police patrols, overpasses, etc. to meet the requirements of safe travel for school children." (emphasis supplied) The ALJ even goes so far as to state that "it [may not be] suggested that a school board has any affirmative duty to seek out the safest route or to avoid roadways without sidewalks and intersections without marked crosswalks." (Id.) Hence, the Board errs to argue the opposite proposition, that is, that the ALJ concluded that it "***must comply with the New Jersey Motor Vehicle laws when measuring remoteness." (Exceptions, at p. 3)

With such clarification made, the Commissioner concurs with the ALJ's conclusion that "the common sense of the situation" (Dreifuss v. Chatham, supra., at 960, accord, Nelson v. McCaffery, supra., at 535) dictates that if, as in this case, the route selected for measurement by school officials has existing sidewalks and marked crosswalks, the measurement shall be based on the assumption that the children should use them. See, e.g, J.O'D et al. v. Peapack-Gladstone Board of Education, 1989 S.L.D. 1303. The Commissioner finds and determines further that the conclusions drawn by the ALJ are consistent with the case law at issue in this matter, including those decisions rendered in the Township of Wayne concerning remoteness. See, e.g, Potter et al. v. Board of Education of the Twp. of Wayne, decided by the Commissioner

January 21, 1993. See also, Arlene Kraft v. Board of Education of the Township of Wayne, decided by the Commissioner January 2, 1992, aff'd State Board June 3, 1992.

Accordingly, the Commissioner adopts as her own the findings and conclusions embodied in the initial decision. IT IS therefore ORDERED that starting with the 1993-94 school year, the Board provide transportation to petitioners' two children who attend elementary school in its district.

COMMISSIONER OF EDUCATION

SEPTEMBER 3, 1993

DATE OF MAILING - SEPTEMBER 3, 1993

213-93

EDU #5580-92
C # 213-93
SB # 54-93

H.F.N. AND J.N., on behalf of J.P.N. and J.N.N.,

PETITIONERS-RESPONDENTS,

V.

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

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, September 3, 1993

For the Petitioners-Respondents, Patricia Nichols, Esq.

For the Respondent-Appellant, Fogarty & Hara
(Ellen Marie Walsh, Esq., of Counsel)

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

February 2, 1994

Date of mailing FEB 04 1994

214-93

214-93

JOHN BRODIE,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF SADDLE BROOK, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning citizen challenged proposed school closing alleging violations of regulatory requirements for school closing and violation of Open Public Meetings Act (OPMA). Board contended petition was premature because request to close the school is still under review by the Department of Education.

ALJ found that only after such approval to close the school is given can the school law dispute be "ripe" for adjudication. Moreover, ALJ found Board's technical noncompliance with reading of opening statement was de minimus violation of OPMA. Petition was dismissed in its entirety.

Commissioner adopted findings and determination in initial decision emphasizing issue was not ripe for adjudication.

SEPTEMBER 3, 1993

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING MOTION TO DISMISS
OAL DKT. NO. EDU 4509-93
AGENCY DKT. NO. 133-5/93

JOHN BRODIE,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF SADDLE BROOK,

Respondent.

John Brodie, petitioner, pro se

Anthony N. Gallina, Esq., for the respondent

Record Closed: July 14, 1993 Decided: July 27, 1993

BEFORE **JAYNEE LA VECCHIA**, CHIEF ALJ:

STATEMENT OF THE CASE

Petitioner, John Brodie*, a resident of the Saddle Brook School District, filed a Petition of Appeal with the Commissioner of Education, along with a request for emergent relief, alleging violations of the Open Public Meetings Act, violations of a conflict of interest by members of the board of education, and certain education law violations, all relating to the Saddle Brook Township Board of Education's (Board) decision to close the Washington Elementary School. The Board denies that any violations have occurred and contend that this action is premature because no final decision has been made by the State Department of Education approving the school closing. In fact, the school will not be closed for the 1993-94 school year due to the ongoing State review of the Board's request for approval.

*The petition of appeal as originally filed with the Commissioner of Education denoted the petitioner as "Citizens for Better Education." At a telephone prehearing conference conducted by the undersigned on June 16, 1993, Mr. Brodie, a nonattorney indicated that he would be appearing pro se on behalf of this unincorporated, nonlegal "entity" comprised of like-minded citizens within the

Argument on the request for emergent relief was held and the application denied by order dated May 24,1993. An expedited plenary hearing was scheduled for July 13, 14 and 15, 1993. At the conclusion of the presentation of petitioner's proofs on July 14, 1993, the Board moved to dismiss the petition. The third hearing day was adjourned pending a decision on the motion to dismiss. For the reasons which follow, the motion to dismiss is granted.

STANDARD OF REVIEW ON MOTION

The test for assessing a motion for involuntary dismissal at the close of petitioner's case in the administrative law setting is the same as that applied in the judiciary: whether all the evidence, together with the legitimate inferences to be drawn, can sustain a judgment in favor of the party opposing the motion. See *N.J. Ct. R.* 4:37-2(b); *Walsh v. Madison Park Properties, Ltd.*, 102 *N.J. Super.* 134 (App. Div. 1968). If reasonable minds can differ, the motion must be denied.

ANALYSIS

School Closing Issues:

Utilizing this standard, I turn first to the allegation in the petition that all requirements for the closing of a school have not been met. Petitioner cites *N.J.A.C.* 6:22-3.2, which concerns approval for a school closing, and *N.J.A.C.* 6:22-5.5, and -6.1, which relate to facility requirements generally.

N.J.A.C. 6:22-3.2 governs the approval for the closing of a school or schools. Subsection (b) of this regulation provides that a letter of approval from the Bureau of Facility Planning Services is required before a school or schools may be closed. Subsection (a) requires as follows:

Township of Saddle Brook. Respondent objected. The undersigned thereupon granted an oral application to amend the caption in this matter to reflect that he is the petitioner in this matter. Mr. Brodie was also granted a week to provide the undersigned and respondent with certifications, averring to the allegations of the petition, of any other individuals who wished to proceed in this matter as named parties. No additional individuals availed themselves of this opportunity. Accordingly, the caption was amended to reflect Mr. Brodie as the sole petitioner.

(a) The local district board of education shall provide the Department of Education, Bureau of Facility Planning Services with the following assurances that with the closing of a school or schools:

1. Sufficient school building capacity exists to house district students following such closing for each of the succeeding five years;

2. The use of substandard spaces in the remaining schools does not result or increase from an overall facilities shortage caused by school closings; and

3. The reassignment of pupils to other schools in the district neither produces, sustains nor contributes to unlawful segregation, separation or isolation of student populations on the basis of race or national origin.

Petitioner concedes that the State Department of Education, Bureau of Facility Planning Services has not completed its review of the district's request for approval to close the Washington School. Dr. Michael Macaluso of the Bureau testified that the Bureau has not made a decision to date on the request for State approval to close the Washington elementary school. Yet, petitioner argues that if the Bureau grants the request for approval, then a valid dispute exists as to whether the requirements for approval for a school closing have been met, which dispute should be decided. He claims that the "90 day "requirement for timely filing of a petition of appeal with the Commissioner forced him to file when he did. This reference is apparently to *N.J.A.C.* 6:24-1.2(c).

It would be premature for the undersigned to decide at this juncture whether the requirements for a school closing have been met. To do so, would be to usurp the authority of the Bureau of Facility Planning Services to perform its statutory duty under *N.J.A.C.* 6:22-3.2. Moreover, the record is undisputed that the District is in the process of addressing regulatory requirements pertaining to the specifics of its plan to close the Washington School as those requirements are being identified through the interactive review process utilized by the Bureau.

Criteria for determining the ripeness of a controversy for judicial determination were enunciated in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed. 2d 681 (1967). The reviewing court must assess "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." 387 U.S. at 149, 87 S.Ct. at 1515. In assessing fitness, the court must determine if a legal question suitable for judicial resolution has crystallized and

whether the ruling or action complained of is final. *Ibid.* See also *Haddon Twp. Bd. of Ed. v. New Jersey Department of Education*, 476 F. Supp. 681, 688 (D.N.J. 1979).

So, too, our State courts have refrained from rendering rulings that would be only advisory and from acting in the abstract. *N.J. Civil Service Ass'n. v. State of New Jersey*, 88 N.J. 605, 611 (1982). See also *Crescent Park Tenants Ass'n. v. Realty Eq. Corp. of N.Y.*, 58 N.J. 98, 107-108 (1971); *The Proprietary Ass'n v. Bd. of Pharmacy*, 16 N.J. 62, 72 (1954); *N.J. Turnpike Authority v. Parsons*, 3 N.J. 235, 240 (1949).

Petitioner's posture regarding the school closing treats the plan to close the Washington Elementary School as if it were frozen as of the time the Board approved certain basic concepts of the plan at its February 10, 1993 meeting. This is not a fair representation of the district's efforts to secure Bureau approval to close the Washington School, which have entailed reexamination of facility, personnel and other implementation detail associated with the plan. Petitioner concedes in the testimony he gave during the presentation of his case that this re-examination has been occurring. This fine tuning of the plan, in an effort to achieve state approval, underscores the need for judicial restraint at this juncture, for to rule on the appropriateness of the plan as presented to the Board on the evening of February 10 would be a wasteful exercise. The final detail of the plan remain to be decided through the Bureau's review of this matter.

I decline to address the requirements for school closing set forth in regulation and leave that assessment in the first instance to the State officials charged with that responsibility. The doctrine of ripeness of a controversy protects against deciding issues before they are necessary. Certainly in this instance, the Bureau's review may obviate the controversy, or sharpen any remaining issue by forcing the focus to be only on the plan approved for implementation, and not an evolving plan that has not finally addressed, for example, all substandard space issues and issues related to sufficient school capacity, both of which are the bailiwick of the Bureau to address initially. See P-22 in evidence; June 1, 1993 letter from Mr. Macaluso of the Bureau raising numerous substandard space issues relating to the Saddle Brook High School where pupils in grades 7 and 8 would be relocated pursuant to the closing of the Washington School and reallocation of pupils among the remaining schools. Accordingly, I dismiss paragraph 3 of the petition as premature.

Conflict of Interest Issues:

Petitioner raises two conflict of interest issues. The conflict issue raised in paragraph 7 of the petition was withdrawn at hearing. It is, therefore, dismissed. In paragraph 4 as amended, petitioner contends that two board members are members of the municipal governing body and, therefore, are in a position of a conflict of interest requiring their removal from the board, or abstention from any subsequent vote on the Washington School closing.

The facts presented by petitioner reveal that Mr. Joseph Carroll is the Deputy Chief of Police for Saddle Brook, having been appointed to that position through the civil service competitive examination process. Taking all inferences most favorably to petitioner, I assume that Mr. Carroll was appointed by the Mayor since this is how petitioner phrased his interrogatory on this issue, the answer to which provides a portion of the factual underpinning to petitioner's claim.

The facts also reveal that Ms. Susan Syme, who is no longer a current member of the Board since her term expired this past Spring, is a secretary in the Building Department of the Township. Again, Ms. Syme was appointed to this position through the civil service competitive examination process by the Mayor.

N.J.S.A. 18A:12-2 provides in pertinent part as follows:

> No member of any board of education shall. . . hold office a mayor or as a member of the governing body of a municipality. . . .

This prohibition is designed to prevent the holding of incompatible offices. The reference to "governing body of a municipality" is unambiguous. In determining who or what governs a municipal corporate entity, resort must be had to the laws of incorporation for a township, for there is no dispute that Saddle Brook is a township. See generally *N.J.S.A.* 40A:63-1 *et seq*. Specifically, the township committee is the legislative body of the municipality and has all executive responsibilities of the municipality not placed by law in the office of the mayor. *N.J.S.A.* 40A:63-6. The membership of the township committee is comprised of three to five members elected by a plurality of the votes. *N.J.S.A.* 40A:63-2. Petitioner's argument as to Ms. Syme and Mr. Carroll would have the term "municipal governing body" expanded to include employees of the township. This interpretation is contrary to the plain

language of *N.J.S.A.* 18A:12-2 and is inconsistent with the statutory provisions cited above which set forth the governance structure for a township such as Saddle Brook.

The Legislature is deemed familiar with its own enactments and not to have enacted conflicting laws. There is no apparent intent in *N.J.S.A.* 18A:12-2 to have broadened the concept of municipal governing body beyond the understanding of that concept in the laws setting forth governance of municipalities. I find petitioner's reading of *N.J.S.A* 18A:12-2 to be overly broad and contrary to a plain reading of its wording. Mr. Carroll's and Ms. Syme's employment with the Township of Saddle Brook does not make them members of the municipal governing body. Paragraph 4 of the petition is dismissed.

Open Public Meetings Act Issues:

Petitioner contends that the decision to close the Washington School was not made in accordance with the Open Public Meetings Act. Specifically, petitioner contends that no notice of the Board meetings conducted on November 16 and 19 1992, January 21, 1993 and February 3 and 10, 1993 was ever published in a newspaper. This was not denied by the Board. I find it as fact.

The Board has averred that a copy of the notice for each of these meetings was mailed to three newspapers, however, for reasons unbeknownst to it, the notices apparently were not published. (See R-2 and P-13).

N.J.S.A. 10:4-8 of the OPMA defines the "adequate notice" requirement, in pertinent part, as follows:

> d. "Adequate notice" means written advance notice of at least 48 hours, giving the time, date, location and, to the extent known, the agenda of any regular, special or rescheduled meeting, which notice shall accurately state whether formal action may or may not be taken and which shall be (1) prominently posted in at least one public place reserved for such or similar announcements, (2) mailed, telephoned, telegrammed, or hand delivered to at least two newspapers which newspapers shall be designated by the public body to receive such notices because they have the greatest likelihood of informing the public within the area of jurisdiction of the public body of such meetings, once of which shall be the official newspaper, where any such has been designated by the public body or if the public body has failed to so designate, where any has been designated by the governing body of the political subdivision whose geographic boundaries are coextensive with that of the public body....

This requirement has been held to mean that actual publication is not required, a public body may show compliance with the OPMA by demonstrating that the notice was mailed to appropriate newspapers in compliance with the 48 hour requirement. *Houman v. Pompton Lakes*, 155 *N.J. Super.* 129, 166-168 (Law Div. 1977). Pursuant to Evidence Rule 49, I accept the testimony of Mr. D'Achille, School Business Administrator for the Board and Dr. Edward Price, Superintendent of Schools, submitted in affidavit form (R-2) and in certified responses to interrogatories numbered 14 through 17 (P-13) respectively, admitted into this record by consent of the parties as proof of the fact that notice of these meetings were mailed in accordance with the regular routine for mailing.

The New Jersey Rules of Evidence permit the admission of evidence of custom to prove conformity therewith upon a particular occasion. *N.J.S.A.* 2A:84A, Rule 49. Furthermore, this rule does not require corroborating evidence before such evidence is admissible, reversing the common law rule. *Id. See also, Borgia v. Board of Review*, 21 *N.J. Super.* 462 (App. Div 1952) (requiring corroborating evidence before custom or habit is admissible). Case law has specifically applied the new rule to instances in which proof of mailing was at issue. *See, e.g., Bruce v. James P. McLean Firm*, 238 *N.J. Super.* 501 (App. Div. 1989) (holding that testimony need be from person charged with performance of the custom, but need not be specific as to incident in question); *Weinisch v. Sawyer*, 237 *N.J. Super.* 195 (App. Div. 1989) (evidence of habit or custom admissible regardless of corroboration).

These affidavits and certified answers serve as competent evidence that the notice of these meetings were properly posted. In accordance with the ruling in *Houman*, this evidence is sufficient to conclude that no violation of the OPMA occurred on any of these meeting dates even though publication apparently did not occur. Proof of posting is sufficient; a Board is not liable if the notice is not published in the newspaper or newspapers to which the notice is mailed.

Further, with regard to the OPMA violations alleged by petitioner, it is contended that at the meetings of the Board mentioned above (November 16, 19, 1992 January 21, February 3, 1993), the OPMA opening statement was not read and that the minutes of these meetings fail to contain a recording that this statement was read, contrary to *N.J.S.A.* 10:4-10. Petitioner so testified from his recollection as

to these meetings and the minutes of these meetings fail to reflect that this opening statement was read. For purposes of this motion, I accept this contention as true.

The Board counters this argument by contending that on June 9,1993, the Board took remedial action to rectify any previous OPMA violations which may have occurred during the previous school year. The minutes of the June 9, 1993 meeting were entered in evidence by consent and they reveal that by resolution the Board, acting de novo, readopted, confirmed and ratified its action taken at, among other meetings of the previous school year, the actions taken at the February 10, 1993 meeting (P-16). This remedial action was taken pursuant to *N.J.S.A.* 10:4-15.

This remedial procedure was analyzed in *Hauman, supra*. There the Court made the following observations about this procedure:

> The Open Public Meetings Act specifically provides a procedure by which a public body may subsequently rectify any action which would otherwise be voidable for failure to comply with the requirements of the act. *N.J.S.A.* 10:4-15(a) provides that
>
> > Any action taken by a public body at a meeting which does not conform with the provisions of this act shall be voidable in a proceeding in lieu of prerogative writ in the Superior Court, which proceeding may be brought by any person within 45 days after the action sought to be voided has been made public; provided, however, that a public body may take corrective or remedial action by acting de novo at a public meeting held in conformity with this Act and other applicable law regarding any action which may otherwise be voidable pursuant to this section. * * *
>
> The purpose of the act is to insure the public's right to observe all phases of the governmental decision-making process. However, this section evidences the Legislature's understanding that noncompliance with the act is not always purposefully designed to deny this right to the public, and that disruption of the orderly process of government would often follow a belated realization that a public body had, inadvertently, failed to act in compliance with the law. It should be noted that the predecessor Right to Know Law, *N.J.S.A.* 10:4-1 *et seq.*, did not contain a remedial provision. Therefore, it may be assumed that, in order to protect the equally important need of government to function effectively, the Legislature provide this remedial procedure whereby a public body may correct earlier statutory violations by subsequent action. The statement attached to *Assembly Bill* 1030 states that, "A public body may correct an action which does not comply with this Act by acting anew at any time at a public meeting that does comply with this Act." Thus, where the decision-making process is repeated in compliance with the act, the objective of public observance is fulfilled and, as long as the subsequent action is

retroactive in effect, governmental order is insured [155 N.J. Super. at 162-163].

I find that the Board's remedial action cures any OPMA violation which occurred at the February 10, 1993 meeting of the Board. However, this is not meaningful, since I have already found that the lack of newspaper publication for the February 10, 1993 meeting is not violative of the OPMA in view of proof of mailing of the notice, and there was an OPMA "opening statement" read at their meeting per petitioner's admission. Therefore, for purposes of this motion the February 10, 1993 meeting was technically in compliance with the OPMA.

To the extent that this remedial resolution does not name the other meetings where the minutes fail to reflect that the OPMA statement was read , these meetings were either work sessions (November 16 and 19, 1992 and January 21, 1993) or a public hearing of the Board on the proposed school closing plan (February 3, 1993). Accordingly, no formal action of the Board was taken on these occasions.

Based on the testimony and evidence produced by petitioner, augmented by the admissions entered into the record by the Board, it is apparent that petitioner has carried his burden of production as to Board compliance with *N.J.S.A.* 10:4-10 at the work sessions and public hearing conducted on November 16 and 19, 1992 and January 21 and February 3, 1993. In so concluding I note that I also have considered the time frames required for challenging actions under the OPMA.

Actions to challenge violations of the OPMA are to be filed within 45 days pursuant to *N.J.S.A.* 10:4-15. Actions challenging school law violations, to which an OPMA violation may be pendent, must be filed within 90 days of the challenged action. *See N.J.A.C.* 6:24-1.2 (c). See *Voll v. Bd. of Ed. of the Village of Ridgewood* 1986 S.L.D.at 912. But compare *McWilliams v. Bd. of Ed. of the Bridgewater-Raritan School District*, 1980 S.L.D. 1439, 1445 (December 24, 1980), aff'd. 1981 S.L.D. 1466 (May 6, 1981) (petitioner having failed to seek relief pursuant to the 45 day limitation period contained in section 15 of the OPMA is statutorily prohibited from seeking such relief). Even if the longer 90 day period were to be applied to these OPMA issues, this petition of appeal was filed with the Commissioner of Education on May 6, 1993. The last Board action, for which no remedial action was taken to cure OPMA violations, occurred on February 3, 1993.

This does not make petitioner's claim here out of time for the OPMA noncompliance which occurred at the Board's work sessions and public hearing do impact the otherwise valid action which occurred on February 10, 1992. Thus this action which was filed within 90 days of February 10, 1993 should be considered timely filed.

In *Polillo v. Deane*, 74 N.J. 562 (1977), the New Jersey Supreme Court considered circumstances similar to those presented here, namely public body meetings wherein deliberations occurred or public testimony taken but for which the certain requirements of the OPMA were not satisfied - followed by two meetings of the public body at which the OPMA requirements were met and at which formal action was taken. The court rejected the public body's argument in that matter that only the meeting at which formal action was taken (and therefore was subject to the "voiding" provision of the OPMA) need be examined. The Court stated:

> Acceptance of defendents' final contention that we need look only at the notice given before the last two meetings - when the Commission took formal action - would undermine the entire purpose of the Act. This would allow an agency to close its doors when conducting negotiations or hammering out policies, and then to put on an appearance of open government by allowing the public to witness the proceedings at which its action is formally adopted. Such an interpretation of the statute would conflict with *N.J.S.A.* 10:4-15(a) which provides that "a public body may take corrective or remedial action *by acting de novo* at a public meeting held in conformity with this act." [Emphasis added.] Surely it cannot be realistically contended that the September 2 and 3 meetings constituted a "*de novo*" reaffirmation of the activities which had transpired at the previous meetings. Consequently, even assuming the Commission did comply with the Act at these last two meetings, we do not believe that its actions were sufficient to correct the past violations which the trial judge found. [74 N.J. at 578].

See also *Voll, supra*, (Commissioner voided action taken at properly noticed public meeting of Board of Education because it was tainted by preceding Board meetings involving the same subject matter, which meetings had been held in violation of OPMA adequate notice requirements).

As in *Polillo*, I note that here the lack of compliance with OPMA requirements for the November 16, 19, 1992, January 21, and February 3, 1993 meetings of the Board did not work to preclude public participation. Petitioner conceded that he had notice of all of these meetings, and attended them as did

others. Moreover, it is noteworthy that the February 3 public hearing on the school closing was conducted in a place not normally used by the Board for its meetings - the high school auditorium - yet, it was attended by 200-250 persons as estimated by petitioner.

In *Polillo*, the Court was mindful of practical considerations which counseled against disregarding the considerable public involvement which had occurred despite the lack of OPMA compliance. Referencing the OPMA's remedial provisions, the Court stated:

> These remedial statutory sections contemplate maximum flexibility in rectifying governmental action which falls short of the standards of openness prescribed for the conduct of official business. Consistent with the breadth and elasticity of relief provided in the legislative scheme, it is entirely proper to consider the nature, quality and effect of the noncompliance of the particular offending governmental body in fashioning the corrective measures which must be taken to conform with the statute. Thus, in this context, the "substantial compliance" argument of defendants carries some weight on the question of remedy and relief. As pointed out, several commission meetings were held as to which there was public notice, albeit insufficient to satisfy the statute. Most meetings did involve the wide participation of the public. Many were held at various locations to enhance the access of the public and serve the convenience of the people. Most meetings did not involve any deliberative or executive action by the Commissioner but rather provided a forum for the presentation of the testimony and evidence of experts and other witnesses which have become part of a permanent and public record.
>
> We have observed that the spirit of the Open Public Meetings Law was not seriously undermined by a great deal of the work of this Commission.
>
> * * *
>
> Nevertheless, we must invalidate the final governmental action taken by the Commission, namely, its actual recommendation as to the form of government to be placed upon the ballot and the antecedent meetings at which the Commissioner deliberated and reached their conclusion. However, we do not find it necessary, in fashioning a remedial solution, to invalidate and repudiate all other public meetings, particularly those hearings at which testimony and evidence were received.
>
> Therefore, the Commission is directed to embark again upon its task of considering an appropriate form of government to be recommended by it for approval by the voters. In so doing, it may in its sound discretion utilize so much of the testimony and evidence which it acquired in the course of original effort as it deems

> necessary and appropriate. However, any decision in that regard must be arrived at in a manner in strict conformity with the Open Public Meetings Law so that the public may be fully apprised by adequate notice and a publicized agenda exactly what prior meetings and what aspects of the existing Commission record are sought to be so utilized. The Commission may hold additional meetings for the purpose of either supplanting or supplementing its prior efforts, again in strict compliance with the Open Public Meetings Law. Finally, any recommendation to be proposed by the Commission, after adopting the results of such prior meetings and developing evidence from any additional meetings as provided here, shall be adopted only at any concluding meeting or meetings which, to reiterate, satisfy the standards of the Act in every respect. [74 N.J. at 579-580].

Taking the *Polillo* Court's concern for practicality, I must here place into context the Board's technical noncompliance with the requirement that the OPMA opening statement be read at the outset of each meeting. All we have here, taking petitioner's proofs in the light most favorable to him, is the Board's failure to state at the beginning of the November 16 and 19, 1992 and January 21, 1993 Board work sessions, and at the February 3, 1993 public hearing, that the Board provided adequate notice of the particular meeting in compliance with the OPMA. The failure to make this statement does not mean that adequate notice was not provided. I have already found that the Board did provide adequate notice - the acting of mailing the notices for each of these meetings complied with the "adequate notice" defined in the OPMA. At most, we have a failure to tell the members of the public, who actually were at these meetings, that proper notice had been given. Surely there is no harm to these individuals, for they were at the meeting.

I decline to invalidate any action taken at the February 10, 1993 meeting as a result of this technical noncompliance which did not work any meaningful harm to public participation in the earlier held work sessions or public hearing. This is unlike the situation in *Polillo* where the public did not have adequate notice of the earlier meetings, thus compelling the Court to invalidate the action taken at the latter meetings. I emphasize that the failure to have made the OPMA opening statement does not mean adequate notice under the OPMA was not provided at these earlier meetings. It was provided. Accordingly, I find the technical noncompliance with the opening statement to be de minimus.

I note that petitioner does not seek any monetary penalty, having specifically waived any such penalty. The Commissioner has also held that she lacks jurisdiction to impose the OPMA's monetary penalty provisions. See *Rovello v. Hopewell Valley Regional Sch. Dist. Bd. of Ed.*, decided Comm. of Ed. (March 15, 1993) 134 *N.J.L.J.* 538; *Dougherty*, (Commissioner decision January 6, 1983) aff'd St. Bd. of Ed. (July 6, 1983). Taking this technical violation in context therefore, I find no basis for invalidating the action of the Board taken February 10, 1993 or for the Board to disregard its deliberations and public testimony received at the work sessions or public hearing.

Separately, petitioner contends that the notices of these meetings were not posted in a prominent place. *N.J.S.A.* 10:4-8d. sets forth the law's posting requirement as follows:

> . . .prominently posted in at least one public place reserved for such or similar announcements ....

Petitioner maintains that the posting of this notice on a bulletin board located in the hallway outside of the school district's administrative offices in the high school does not satisfy this requirement. Although petitioner concedes that this "area " is open to the public during business hours, he argues that this location is not prominent enough. This same argument is proffered as to a second bulletin board on which the notice is posted, namely a bulletin board that is physically located inside the meeting room used for school board meetings.

Petitioner's argument as to "prominence" applies this adjective to "place" instead of the posting location on the bulletin board. This emphasis sought by petitioner does not accord with the plain language of the statute, which describes the location requirement for the bulletin board to be merely a "public place". I cannot conclude that more is required. The bulletin board outside of the district's administrative offices is a public place open during business hours. I find that this posting place satisfies the literal language of the statute's requirements. There is no dispute that the posting did occur on this bulletin board. There is no evidence in this record to conclude that the notice was not prominent within the confines of this bulletin board. Accordingly, considering all of petitioner's proofs and his argument on this issue, I conclude that no violation of the posting requirement for the OPMA has occurred and dismiss allegations of paragraph 1 of the petition.

Petitioner also alleges that the Board violated the OPMA in denying a request from a member of the public to establish an ad hoc committee comprised of members of the public, which would participate in the study process regarding the closing of a school. Petitioner concedes that the Board is under no requirement of law to establish an ad hoc committee for this purpose. It is his testimony that he believes an OPMA violation occurred in *how* the request for such a committee was denied.

Specifically, petitioner testified that the request for the establishment of an ad hoc committee was made at an October 1992 meeting of the Board and at the December 1992 meeting, without discussion, the Board voted publicly to deny the request. Accepting these facts as true, I cannot find an OPMA violation here. Petitioner surmises that some private discussion must have occurred impermissibly between these two Board meetings. No proof to this effect was produced. Petitioner's theory of what may have taken place does not prove by a preponderance of the credible evidence that it did occur. Accordingly, absent any evidence to corroborate petitioner's allegations, I find that ths paragraph 2 of the petition of appeal must be dismissed.

Education Law Violations:

Paragraphs 5 and 6 of the petition allege as follows:

5. Failure of Board to report a description of the special education plan to the public and the possible financial impact on the budget for the prebudget year. (N.J.A.C. 6:28-1.2(b))

6. Failure of Board to read and note in the minutes the corrective action plan for the 1991-1992 Financial Audit. (18A:23-5)

Petitioner testified that the Board failed to conduct a public discussion at any Board meeting on the Special Education plan for the district, which he argues has a financial impact on the district and should have been considered in assessing alternatives to the school closing. Specifically, he argues that special education costs provide a basis for seeking a cap waiver and a cap waiver may have vitiated any financial rationale for closing the Washington elementary school.

The other 'facts' relating to paragraph 5 of the petition are contained in the Board's response to petitioner's interrogatory number 103 wherein it recounts the Board's efforts to comply with the requirement of *N.J.A.C.* 6: 28-1.2(b) for public input. The Board's response states:

> Q. The development of the special education plan shall provide reasonable opportunities for the participation of professional staff, parents, community members, disabled individuals and groups representing the disabled population. Set forth in detail how the Board of Education provided for this opportunity.
>
> A. Ms. Valerie Mosca is the Child Study Team Coordinator and prepared the Special Education Plan for the 1993-1994, 1994-1995 and 1995-1996 school years. In preparation of the plan approximately 375 people were surveyed including but not limited to: parents of Special Education students, Special Education high school, community parents, general education staff, special education staff, Administrators, The Disability & Business Technical Center Northeast Region and members of the Board.

I find this action by the Board to be in compliance with *N.J.A.C.* 6:28-1.2(b) which calls merely for public input without prescribing how that input is to be secured. Petitioner cites no legal basis for concluding that the Board was required to conduct this input through its own public sessions. I find no education law violation here. Paragraph 5 of the petition is dismissed.

As for the allegations of paragraph 6, petitioner provided no evidence of a violation for which a claim for relief could be recognized.

Per petitioner's testimony, the 1991-92 auditor's report was approved at the Board's November 11, 1992 meeting. Petitioner claims that there should have been discussion on this audit report at the December meeting, but the December 1992 minutes fail to reflect any such discussion.

Petitioner placed into evidence the minutes of the Board's meeting held on November 11, 1992 (P-20). These minutes reflect that the Board approved the Financial Audit and the corrective action plan for the 1991-92 Financial Audit recommended by the School Business Administrator. This action was performed, per the minutes, by motion and second. Following normal parliamentary procedure, the Board would have been required to receive discussion from among its member, on the motion before voting it. The fact that the minutes appear to indicate that there

was no discussion on the motion to approve the audit and corrective action plan does not work a violation of *N.J.S.A.* 18A:23-5, which provides only that:

> Within 30 days following the receipt of the report of the annual audit the board of education of the district shall, at a regularly scheduled public meeting, cause the recommendations of the auditor to be read and to be discussed and the discussion duly noted on the minutes of said board.

I find the Board's minutes of November 11, 1992 indicate Board compliance with the statute. Therefore, I find no school law violation to have occurred here. Paragraph 6 of the petition is dismissed.

Petitioner never plead that the Board's decision to close the Washington elementary school was arbitrary, capricious or unreasonable. But taking the allegations of paragraphs 5 and 6 to mean this, I find petitioner's argument here to be without merit - so much so that I believe reasonable minds could not differ and a motion to dismiss may properly be granted. No statutory violation has occurred here. Moreover, I do not find the Board has acted arbitrarily, capriciously or unreasonably in seeking to request State approval to close the Washington element school.

Petitioner seeks here to substitute his judgment, and those in the community of a like mind, for that of the Board. That is not the role for the adjudicatory process. I cannot say that the Board has acted arbitrarily, capriciously or in bad faith in having undertaken its study of the closing of the Washington elementary school and voting its approval to seek State approval for such a closing. The process is not complete. The plan is not complete - having changed already in response to State inquiries. Simply put, petitioner and his colleagues disagree with the judgment of the Board in determining a course of conduct toward the closing of the Washington elementary school. This does not give rise to a claim for relief from the Commissioner. Each time a public entity, or official, determines to pursue a course of conduct - as here to seek permission to close a school, does not immediatley give rise to a litigable issue.

Petitioner 's rights - at this juncture - when he disagrees with the Board's chosen course of conduct to seek State approval to close the school is to try and stop

that process by convincing the appropriate State official not to give the approval. Only after the approval has been given is a "school law dispute" ripe.

If that occurs here, then petitioner or any challenger would be subjected to the well established standard for assessing final action of a board of education acting within its discretionary authority.

As the Commissioner of Education stated in *McMillian*, a case which also involved a citizen disagreement with a board's determination to close one of its schools:

> The Board clearly had the discretionary authority to close one of its schools. *N.J.S.A.* 18A:11-1; *Boult and Harris v. Board of Education of Passaic*, 135 *N.J.L.* 329 (Sup. Ct. 1947), aff'd 136 *N.J.L.* 521 (E.&A. 1948); *Green Village Road School Association et al. v. Board of Education of the Borough of Madison, Morris County*, 1976 *S.L.D.* 700, aff'd State Board 716. In such matters it has been held by the Commissioner and the courts that, absent a clear abuse of discretion or proof of illegality, a board of education must answer, not to the Commissioner, but to its constituents for the wisdom of its actions. As was said by the Commissioner in the school closing dispute of *John J. Caffrey, Jr., et al. v. Board of Education of the township of Millburn, Essex County*, 1975 S.L.D. 630
>
> > * * *[I]t is axiomatic that the members of the local boards of education are responsible for the wisdom of their actions to the people who elect them and not to the Commissioner of Education. As the Commissioner recited the law as a frame of reference in *Cecelia Barnes et al. v. Board of Education of the City of Jersey City, Hudson County*, 1961-62 S.L.D. 122, 125, aff'd State Board of Education, 1963 S.L.D. 240:
> >
> > ***as long as***a board of education*** acts within the authority conferred on*** it by law the courts are without power to, or will not, interfere with, control, or review * * *its action and decisions in matters involving the exercise of discretion, in the absence of clear abuse thereof or error; nor is the wisdom or expediency of an act, or the motive with which it was done, open to judicial inquiry or consideration, where power to do it existed. 78 *C.J.S.* 920
> >
> > In absence of clear abuse of the discretionary power of the Board, the Commissioner will not interfere. It was held in *Boult v. Board of Education of Passaic*, 136 *N.J.L.* 521 (E. & A. 1948), concerning the authority of the Commissioner and State Board of Education under *R.S.* 18:3-14 and 15:
> >
> > > Neither of the quoted statutory provisions was intended to vest in the appellate officer or body the authority to exercise originally

> the discretionary power vested in the local board.
>
> The wisdom and effectiveness of a board of education's administrative decisions is a matter for the constitutent citizenry to determine. [1977 S.L.D. 139-140].

In closing, I note that in the course of this proceeding, since State approval was apparently not forthcoming in time to implement the school closing for the 1993-94 school year, the Board has commenced the reassignment of pupils - most notably the reassignment of seventh and eighth grade pupils to a portion of the high school facility. Petitioner has not challenged this action in this proceeding. Any challenge brought to Board action reassigning pupils within existing facilities would be subject to the same above stated test for discretionary action.

CONCLUSION

In summary, taking all of petitioner's proofs in the light most favorable to him, I must **CONCLUDE** that the motion to dismiss should be **GRANTED** for all the reasons stated herein. Accordingly, I **ORDER** the petition of appeal be dismissed in its entirety.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 27, 1993
Date

Jaynee LaVecchia
Jaynee LaVecchia, Chief ALJ

Receipt Acknowledged:

7/27/93
Date

Maureen K. Kelly
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 30 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

Exhibits

R-1	Affidavit of Dr. Edward Price
R-2	Affidavit of Anthony D'Achille
R-3	Exhibits to Affidavits (Board)
R-4	Minutes of February 8, 1993 caucus meting
P-1	Application for Emergent Relief
P-2	Minutes Board Meeting held on February 3, 1993
P-3	Minutes Special Work Session held on January 21, 1992
P-4	Minutes Special Work Session held on November 19, 1992
P-5	Minutes Special Work Session held on November 16, 1992
P-6	Board Policy (Current) - Public Participation - Board Meetings
P-7	(Current) Board Policy - Work Session, Caucus Meeting - Open to Public
P-8	D'Achille letter to Oliver, dated May 18, 1993, with attachments
P-9	Brodie letter to D'Achille, dated January 25, 1993
P-10	Brodie letter to Letter, dated April 28, 1993
P-11	Brodie letter to D'Achille, dated February 2, 1993
P-12	"News From Your Board" dated March 1993
P-13	Petitioner's Interrogatories - Responses (1-48)
P-14	Petitioner's Interrogatories - Responses (49-91)
P-15	Petitioner's Interrogatories - Responses (92-103)
P-16	Minutes of June 9, 1993 Board Meeting with certified resolution of notice re: Public Notice
P-17	Judy Mascellino, Legal Advertising Supervisor North Jersey Newspapers Company letter, dated May 26, 1993
P-20	Minutes of November 11, 1992 meeting
P-21	Audit Synopsis for 1991-92 school year
P-22	Macaluso letter to Price, dated June 1, 1993
P-23	Castilano letter to Price, dated February 1, 1993

OAL DKT. NO. EDU 4509-93

JOHN BRODIE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SADDLE BROOK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4.

Petitioner's lengthy exceptions essentially recast and reiterate his arguments raised before the ALJ at the hearing below. With respect to his allegation that the Board has not complied with all of the regulatory requirements for a school closing, he alleges that the Department of Education's Bureau of Facility Planning Services was not provided with full information regarding all aspects of the Board's proposal. He further objects to the ALJ's determination that this issue is not ripe for adjudication maintaining that

> ***to wait until a matter of this importance has crystallized to the point of no turning back would not be in the best interest of the district.*** (Petitioner's Exceptions, at p. 11)

It is noted that petitioner's exceptions contain extensive references to his own testimony and, to some extent, that of other individuals adduced at the hearing below which he avers support his exception assertions.

By way of reply to petitioner's exceptions which the Board addresses point by point, it essentially maintains that the petitioner has set forth conclusionary and speculative allegations of fact which are unsupported by the evidence. The Board urges that the initial decision be adopted by the Commissioner.

Upon a careful and independent review of the record, which, it is noted, does not include transcripts of the hearing below, the Commissioner is in full accord with the ALJ's well-reasoned analysis and conclusions and, therefore, affirms the initial decision for the reasons expressed therein.

The Commissioner finds that the ALJ fully and fairly disposed of the arguments advanced by the petitioner's exceptions in her initial decision. Moreover, because the transcript of the hearing below was not made available to the Commissioner by the parties, she will not address allegations proffered by the petitioner as to what was adduced from the testimony. Rather, in this regard, the Commissioner will rely on those findings and conclusions made by the ALJ who had an opportunity to weigh the testimony of the witnesses and to ascertain whether the petitioner's allegations were supported by sufficient credible evidence. Therefore, the Commissioner dismisses as being without merit those arguments raised by way of exception predicated on the petitioner's version of testimony taken below. See In re Morrison, 216 N.J.

Super. 143 (App. Div. 1987); see also Parker v. Dornbierer, 140 N.J. Super. 185 (App. Div. 1976).

Notwithstanding petitioner's belief to the contrary, the Commissioner is in full accord with the ALJ's determination that it is premature at this point in time to attempt to decide whether all of the regulatory requirements for closing a school have been met by the Board. The record clearly establishes that the Department of Education, Bureau of Facility Planning Services' review of the Board's request is currently in a state of fluidity. Regulatory requirements pertaining to the specifics of the plan will have to be addressed by the Board as these are identified through the interactive review process of the Bureau. Therefore, as this review process progresses it is entirely possible that the within controversy may be eliminated. In any event, as aptly stated by the ALJ:

> Petitioner seeks here to substitute his judgment, and those in the community of a like mind, for that of the Board. That is not the role for the adjudicatory process. I cannot say that the Board has acted arbitrarily, capriciously or in bad faith in having undertaken its study of the closing of the Washington elementary school and voting its approval to seek State approval for such a closing. The process is not complete. The plan is not complete - having changed already in response to State inquiries. Simply put, petitioner and his colleagues disagree with the judgment of the Board in determining a course of conduct toward the closing of the Washington elementary school. This does not give rise to a claim for relief from the Commissioner. Each time a public entity, or official, determines to pursue a course of conduct - as here to seek permission to close a school, does not immediately give rise to a litigable issue.
>
> Petitioner's rights - at this juncture - when he disagrees with the Board's chosen course of conduct to seek State approval to close the school is to try and stop that process by

> convincing the appropriate State official not to give the approval. Only after the approval has been given is a "school law dispute" ripe.
>
> If that occurs here, then petitioner or any other challenger would be subjected to the well established standard for assessing final action of a board of education acting within its discretionary authority.
>
> (Initial Decision, at pp. 16-17)

Accordingly, the recommended decision of the Office of Administrative Law is adopted for the reasons stated therein, and the instant Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

SEPTEMBER 3, 1993

DATE OF MAILING - SEPTEMBER 3, 1993

215-93

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JOHN SCHAEFER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, riffed Supervisor III, alleged Board employed nontenured staff in director position to which he was entitled. Petitioner possessed both a principal's and supervisor's endorsement.

ALJ concluded petitioner's former position was not substantially similar to director position, finding significant differences as to scope of program handled by director and significant differences as to to duties and responsibilities. ALJ concluded petitioner's tenure and seniority rights were not violated. (Dennery) Petition was dismissed.

Commissioner adopted findings and determination in initial decision emphasizing ALJ's conclusion that job duties were significantly different and that petitioner's tenure and seniority accrued as supervisor not as principal (separately tenurable titles pursuant to N.J.S.A. 18A:28-5).

SEPTEMBER 8, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4324-92
AGENCY DKT. NO. 235-5/92

JOHN SCHAEFER,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,
Respondent.

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

Richard K. Sacks, Esq., for the respondent

Record Closed: June 24, 1993 Decided: July 28, 1993

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

This matter concerns the allegation of the petitioner, John Schaefer, that he is entitled to the position of director of practical arts and the media which was given to a nontenured staff person by the respondent, the Board of Education of the Township of Lakewood, Ocean County (Board). The petitioner requested a hearing and the matter was transmitted to the Office of Administrative Law on June 11, 1992, for a hearing pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

There was a prehearing conference on August 26, 1992, before Administrative Law Judge M. Kathleen Duncan, and the parties agreed that the issue in this matter is whether the petitioner's tenure and seniority rights entitled him to the position of director of practical arts and the media. The hearing was scheduled for January 6, 1993. Prior to the hearing date, the matter was transferred to me for the purpose of conducting the hearing and rendering an initial decision. The hearing took place on

January 6, 1993, and after submission of briefs the record initially closed on February 23, 1993. At my request, the parties submitted additional briefs and the record closed on June 24, 1993.

FACTUAL FINDINGS

I **FIND** that the pertinent facts in this matter are not in dispute. Mr. Schaefer has been employed by the Board since 1961. He was initially a classroom teacher. In 1975, Mr. Schaefer became a department chairperson for business education. Sometime during the early 1980's, Mr. Schaefer's title was changed to supervisor of business education. Approximately in 1989, Mr. Schaefer's title was changed to supervisor III - industrial arts. The requirement for the supervisor III position is a supervisor or principal certificate or eligibility for the same (J-2). Mr. Schaefer has both a principal and a supervisor certificate (P-1, P-2).

As the supervisor of business education and as supervisor III - industrial arts, Mr. Schaefer worked ten months during the school year and he was responsible for the business education program in the high school, grades 9 to 12. Mr. Schaefer taught three or four courses and his immediate supervisor was the principal of the high school.

In 1992, the Board began consideration of a reorganization plan and the initial proposal retained the title of supervisor of business education. Edward W. Luick, the assistant superintendent of schools, testified that thereafter the superintendent of schools developed a reorganization plan which changed the building-based programs to district-wide programs with directors reporting to the superintendent of education rather than building principals (J-6). This plan eliminates a number of supervisor III positions and creates a number of director positions with district-wide responsibilities. These director positions are not among the enumerated position in the tenure statute, N.J.S.A. 18A:28-5. Staff persons in the director positions work eleven months during the school year, are responsible for district-wide programs, and have no classroom teaching responsibilities. The job description for the director position requires the person to hold a principal certificate (J-1).

According to Mr. Luick, this revised plan was adopted by the Board (J-3) in order to save money and also to achieve a better K to 12 grades curriculum. In the past, programs were developed in each school and there had not been enough cooperation between the various schools.

Pursuant to the adopted reorganization plan, the petitioner's position was eliminated and the responsibility for the business education program, grades K to 12, was given to the director of practical arts and the media.

Mr. Schaefer was interviewed for the position of director of practical arts and the media. He was not offered the position and the superintendent of schools, with the approval of the Board, hired Robert Kirschner for the position. Mr. Kirschner was initially hired by the Board in 1963 and worked as an industrial arts teacher (P-3). In 1969, Mr. Kirschner became a vocational placement counselor, and in 1972, he was given the position of vocational guidance counselor. After 1978, Mr. Kirschner's position was job placement and career counselor-guidance. As of September 1988, Mr. Kirschner again held the position of industrial arts teacher. In September 1990, Mr. Kirschner was given the position of supervisor III - industrial arts and he held this position at the time of his appointment to the director position.

At the time of the appointment of Mr. Kirschner to the position of director of practical arts and the media (J-5), Mr. Schaefer had tenure in the position of supervisor III - industrial arts and Mr. Kirschner had not acquired tenure in his supervisor III position.

Since the RIF, the respondent has held the position of business education teacher. Mr. Schaefer acknowledges that there are some differences between his former title of supervisor III and the director of practical arts and the media; however, he testified that the performance responsibilities and the job functions are the same. Mr. Schaefer stated that as the supervisor of business education, he guided, developed and implemented curriculum, assisted in the development of the budget for his subject area, helped recruit personnel, was responsible for conducting in-service programs, made recommendations for course alterations or modifications, reviewed test results, was the coordinator for any curriculum development in his area, and observed and evaluated all teachers within his subject area.

Mr. Luick testified that the director position contains new and expanded functions and responsibilities not assigned to the prior supervisory position. Mr. Luick stressed the fact that the director is responsible for the K to 12 grade program and reports to the superintendent of schools.

CONCLUSIONS OF LAW

Mr. Schwartz, on behalf of the petitioner, argued that Mr. Schaefer is entitled by his tenure and seniority rights to the position of director of practical arts and the media since Mr. Kirschner was nontenured at the time of his appointment. Mr. Schwartz recognized that if the petitioner's claim was based solely on seniority that he would not be entitled to the position based on the expanded grade responsibilities and expanded subject area responsibilities, citing Timko and Mikush v. Board of Education of Bridgewater-Raritan School District, 1991 S.L.D. _____ (June 19, 1991), affirmed in part and remanded by the State Board of Education (July 1, 1992). Mr. Schwartz argued that since Mr. Kirschner was not tenured at the time of the appointment, Mr. Schaefer's tenure rights gave him a superior claim to the position, citing Capodilupo v. West Orange Board of Education, 218 N.J. Super. 510 (App. Div. 1987); Bednar v. Westwood Board of Education, 221 N.J. Super. 239 (App. Div. 1987). Further, Mr. Schwartz argued that the duties of the director of practical arts and the media are very similar to the duties actually performed by Mr. Schwartz before the RIF, and therefore he is entitled to the director position, citing Boeshore v. North Bergen, 1974 S.L.D. 805; Smith v. Jersey City, 1988 S.L.D. ____ (Feb. 4, 1987), aff'd by State Board on November 4, 1987; Page v. Trenton Board of Education, 1980 S.L.D. 1193. According to Mr. Schwartz, the fact that Mr. Schaefer acquired tenure in the supervisor position does not effect his tenure entitlement to the new director position since the two positions are essentially the same.

On behalf of the Board, Mr. Sacks argued that the Board clearly had the right to eliminate staff positions as part of a reorganization, N.J.S.A. 18A:28-9. He argued that Mr. Schaefer is not entitled to the director of practical arts and the media position since the responsibilities are substantially different and the director position has additional duties and responsibilities. Mr. Sacks cited a number of cases in support of his position; specifically, Dennery v. Board of Education of the Passaic County Regional High School District #1, 131 N.J. 626 (1993). According to Mr. Sacks, the decision in the Dennery case is applicable in this matter and clearly establishes that the petitioner has no right to the position of director of practical arts and the media.

Mr. Schwartz argued that the Dennery case is distinguishable on the facts. In the Dennery case, the petitioner was claiming a supervisor position, which requires a supervisor certificate, even though she never held any positions requiring such a certificate. In this matter, Mr. Schaefer's former position required either a principal

or supervisor certificate and he holds both certificates. Mr. Schwartz argued that since Mr. Schaefer had tenure in his former position and since the director position requires a principal certificate, Mr. Schaefer has a superior right to the director position as compared to a staff member who never acquired tenure in the former supervisor position.

Although there are factual differences, I **CONCLUDE** that the rationale underlying the Supreme Court's decision in the Dennery case is equally applicable in this matter. In the case, the court stated:

> When the duties of the position in which a teaching-staff member has acquired tenure are substantially identical to those of the position that the person seeks a local school board may not sidestep an educator's tenure rights by simply renaming the position or tacking on additional meaningless requirements. The local board must extend the teaching-staff member's tenure rights to the newly-created position. See, e.g., Viemeister v. Board of Educ., 5 N.J. Super. 215, 218, 68 A.2d 768 (App. Div. 1949) (holding that tenured principal should be reinstated because his position had not in fact been abolished when local school board created the position of "teaching" principal); Vogel v. Board of Educ., (State Bd. of Educ. June 5, 1985), slip op. at 5-6. (explaining that a "[b]oard's decision to abolish a position is not sacrosanct and will be disturbed if it is found that the duties of the abolished position essentially have been transferred to another position so as to defeat the rights of the tenured employee to the abolished position"); Luppino v. Board of Educ., 1980 S.L.D. 1028, 1035-36 (ruling that duties of administrator of home instruction and principal of home instruction "were substantially the same" and change of title "did not involve the meaningful addition of extra duties").
>
> A mere overlap in duties, however, does not mean that two positions are equivalent for tenure purposes. If a newly-created position is similar to a tenure holder's abolished position but also requires additional duties or different responsibilities, then the newly-created position is not considered to be substantially similar to the former position. Santasiero v. Parsippany-Troy Hills Bd. of Educ., 1984 S.L.D. 854, 879; see also Sandri v. Board of Educ., 1986 S.L.D. 1501 (ruling that duties of abolished position of supervisor of guidance/shop were similar but of greater nature and scope than newly-created position of director of special needs and student services); Rufalo v. Board of Educ., 1986 S.L.D. 1699 (ruling that despite overlap of duties between post of vice-principal and newly-created supervisor position, positions were "substantially different").
> [Dennery at 639-40]

Based on the facts, I **CONCLUDE** that Mr. Schaefer's former position is not substantially similar to the position of director of practical arts and the media.

Although Mr. Schaefer's former responsibilities for the business education program in the high school are similar to the responsibilities contained in the job description for a director, there is a significant difference as to the scope of the program to be handled by the Director. The director is responsible for the K to 12 program. The two positions are not basically the same and I agree with Mr. Sacks' argument that there are significant differences as to the duties and responsibilities of the two positions. Therefore, I **CONCLUDE** that the respondent did not violate Mr. Schaefer's tenure and seniority rights by giving the director position to a nontenure staff member and I **ORDER** that Mr. Schaefer's appeal be **DISMISSED WITH PREJUDICE**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 28, 1993
Date

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

7/30/93
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 3 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

cad

EXHIBITS ADMITTED INTO EVIDENCE:

Joint Exhibits:

J-1 Job Description for the position of director
J-2 Job Description for the position of supervisor III
J-3 Minutes of the regular business meeting of the Lakewood Board of Education held on Monday, March 9, 1992
J-4 Part of the minutes of the regular business meeting of the Lakewood Board of Education held on April 13, 1992
J-5 Minutes of the regular business meeting of the Lakewood Board of Education held on May 11, 1992
J-6 Proposed administrative reorganization plan, dated February 28, 1992
J-7 A job description for the position of department chairperson, revised as of May 15, 1975; and the job description for the position of department chairperson (undated)

For the Petitioner:

P-1 Certificate issued by the State Board of Examiners to John Schaefer for the position of supervisor, dated October 1971
P-2 Certificate issued by the State Board of Examiners to John Schaefer for the position of principal
P-3 Employment record of Robert Kirschner

WITNESSES:

For the Petitioner:

John Schaefer

For the Respondent:

Edward W. Luick

JOHN SCHAEFER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Petitioner reasserts those arguments presented before the ALJ, stressing his tenure claim in addition to his seniority claim. Petitioner emphasizes that this is not a case where two tenured staff members are vying for the same title or position. Rather, he avers that he was tenured in the title of Supervisor for which he was required to hold an administrative certificate with either a principal's or supervisor's endorsement. The same certificate, he claims, with the same endorsement was required in the title of Director to which he now asserts tenure and seniority claims.

Petitioner avers the current holder of the title of Director also served in the title of Supervisor, but did not accrue tenure because he did not serve as a supervisor or in a position requiring an administrative certificate for the requisite period pursuant to N.J.S.A. 18A:28-5. Distinguishing Dennery, supra,

petitioner claims he is not laying claim to a title under which certificate he did not serve and did not accrue tenure. Rather, he submits he acquired tenure in a position requiring the same certificate required for the unrecognized title of Director. Hence, petitioner would reverse the decision of the ALJ and seeks reinstatement to the title of Director with all back pay and emoluments owed.

Upon careful and independent review of the record of this matter, the Commissioner affirms the conclusion of Office of Administrative Law dismissing the instant petition for the reasons expressed in the initial decision as augmented herein.

N.J.S.A. 18A:28-5, speaks to specific positions within school districts which are tenure eligible, including, the position of principal as separately tenurable from that of supervisor. Under the facts of this matter, petitioner held the position of Supervisor III under a job description calling for either a supervisor's or a principal's endorsement on an administrative certificate. This fact is uncontested, as is the fact that petitioner holds both endorsements. However, because the title of such position was, in fact, that of a supervisor, petitioner's tenure, as well as his seniority, accrued in a supervisor position, as compared to that of principal. Under the new position of Director, which has district-wide responsibilities (see Initial Decision, at pp. 3-6), the district called for a principal's endorsement. See N.J.A.C. 6:11-9.3.

Because petitioner's service as a Supervisor III accrued under his supervisor's endorsement, and without previous experience in a position requiring the use of his principal's endorsement, he

may lay no claim to a position as a director. This conclusion is compelled under the separately tenurable titles cited in N.J.S.A. 18A:28-5 and also for the reasons so well-stated by the ALJ relative to the differing job duties of a district-wide position. Dennery, supra See also Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982). To hold otherwise would result in anomalous circumstance of assistant principals having tenure rights to principal positions and principals having tenure rights to assistant superintendencies.

Accordingly, for the reasons expressed by the ALJ as augmented herein, the Commissioner adopts the initial decision as her own and the Petition of Appeal is dismissed, with prejudice.

COMMISSIONER OF EDUCATION

SEPTEMBER 8, 1993

DATE OF MAILING - SEPTEMBER 8, 1993

215-93

EDU #4324-92
C # 215-93
SB # 51-93

JOHN SCHAEFER,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, September 8, 1993

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

For the Respondent-Respondent, Richard K. Sacks, Esq.

John Schaefer (hereinafter "petitioner"), a tenured teaching staff member, was employed by the Board of Education of the Township of Lakewood (hereinafter "Board") in 1961 as a teacher of business education. In 1975, he was appointed department chairperson for business education, a position requiring certification as a supervisor. Such title was subsequently revised to "supervisor" of business education. In 1989, his position title was changed to Supervisor III-Industrial Arts. The job description adopted by the Board for Supervisor III required certification as either a supervisor or principal. Petitioner held both endorsements.

In 1992, as the result of a reorganization, the Board eliminated a number of Supervisor III positions, including the position held by petitioner. It also created several new director assignments with district-wide responsibilities. The job

Aug. 2, 1995

description adopted by the Board required certification as a principal in order to be qualified to serve as a director. Pursuant to the reorganization, the responsibility for the business education program, K-12, was assigned to the director of practical arts and the media, one of the new positions.

Petitioner filed a petition of appeal with the Commissioner of Education alleging that the Board had violated his tenure and seniority rights in appointing a non-tenured individual as the director of practical arts and the media.

On July 28, 1993, an Administrative Law Judge ("ALJ") recommended dismissing the petition. The ALJ, citing the Supreme Court's decision in Dennery v. Board of Educ., 131 N.J. 626 (1993), found that petitioner's abolished supervisory position was not substantially similar to the directorship of the practical arts and the media, stressing that there was a significant difference in the scope of the program to be handled by the director.

On September 8, 1993, the Commissioner adopted the findings and conclusions of the ALJ and dismissed the petition. She reasoned:

> N.J.S.A. 18A:28-5, speaks to specific positions within school districts which are tenure eligible, including, the position of principal as separately tenurable from that of supervisor. Under the facts of this matter, petitioner held the position of Supervisor III under a job description calling for either a supervisor's or a principal's endorsement on an administrative certificate. This fact is uncontested, as is the fact that petitioner holds both endorsements. However, because the title of such position was, in fact, that of a supervisor, petitioner's tenure, as well as his seniority, accrued in a supervisor position, as compared to that of principal. Under the new position of Director, which has district-wide responsibilities (see Initial Decision, at pp. 3-6), the district called for a principal's endorsement. See N.J.A.C. 6:11-9.3.

> Because petitioner's service as a Supervisor III accrued under his supervisor's endorsement, and without previous experience in a position requiring the use of his principal's endorsement, he may lay no claim to a position as a director. This conclusion is compelled under the separately tenurable titles cited in N.J.S.A. 18A:28-5 and also for the reasons so well-stated by the ALJ relative to the differing job duties of a district-wide position. Dennery, supra. See also Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982). To hold otherwise would result in anomalous circumstance of assistant principals having tenure rights to principal positions and principals having tenure rights to assistant superintendencies.

Commissioner's Decision, slip op. at 10-11.

After a thorough review of the record,[1] we affirm the ultimate determination of the Commissioner. However, our conclusion to do so is grounded in the analysis set forth herein.

Tenure is created by statute, N.J.S.A. 18A:28-1 et seq., which should be liberally construed to further its beneficial purpose of affording security to teaching staff who meet its standard of length of service. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 74 (1982). Under the statutory scheme, tenure is achieved in a particular "position." The "position" in which tenure is achieved is initially limited by the certificate that the teaching staff member must hold in order to fulfill the statutory prerequisite of qualification for employment. Capodilupo v. West Orange Bd. of Ed., decided by the State Board, 1986 S.L.D. 3010, 3013, aff'd, 218 N.J. Super. 510 (App. Div. 1987), certif. den., 109 N.J. 514 (1987). Further definition of the "position" in which tenure is achieved is provided by N.J.S.A. 18A:28-5, which, by

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[1] We note that the parties herein have not provided us with transcripts of the hearings held in this matter in the Office of Administrative Law.

specifying that service as a teacher, principal, assistant principal, vice principal, superintendent, assistant superintendent and school nurse shall be under tenure if other statutory prerequisites are met, defines, for individuals serving in these capacities, the scope of the "position" in which tenure is achieved and to which tenure protection attaches.[2] Id.

It is now well established that a tenured teaching staff member subject to a reduction in force pursuant to N.J.S.A. 18A:28-9 has entitlement by virtue of tenure to an assignment in such tenurable position within the scope of his or her certification as against non-tenured individuals. Bednar v. Westwood Bd. of Ed., 221 N.J. Super. 239 (App. Div. 1987), certif. den., 110 N.J. 512 (1988); Capodilupo, supra. Petitioner's abolished supervisory position did not require certification as a principal in order to be authorized by law to fulfill the duties and responsibilities thereof. Rather, the job description adopted by the Board called for certification as either a supervisor or principal. Nor does petitioner contend that the duties therein were of such nature as to require certification as a principal. As a result, petitioner's tenure accrued as a supervisor. See Capodilupo, supra.

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[2] N.J.S.A. 18A:28-5 provides, in pertinent part:

> The services of all teaching staff members including all teachers, principals, assistant principals, vice principals, superintendents, assistant supervisors, and all school nurses including school nurse supervisors, head school coordinators, and any other nurse performing school nursing services and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect, shall be under tenure during good behavior and efficiency....

In that petitioner claims entitlement by virtue of tenure to the directorship of practical arts and the media, it is necessary to determine whether the scope of his tenure achieved as the result of his employment as a supervisor encompassed that assignment. For the reasons that follow, we conclude that it did not.

The job description adopted by the Board for employment as a director required certification as a principal. There is, however, no indication in the record that such unrecognized title was submitted to the county superintendent for determination of the appropriate certification as required by N.J.A.C. 6:11-3.3(b).[3] The county superintendent is charged with responsibility in the first instance for determining the appropriate certification for service in an unrecognized position title based upon the specific duties required to be performed. It is the county superintendent's determination that establishes the certification required for such assignments, rather than the certification designated by the district board. Di Simoni v. Board of Education of the Passaic County Regional High School District #1, decided by the State Board, April 3, 1991. The State Board of Education has the ultimate administrative authority for determining the appropriate

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[3] N.J.A.C. 6:11-3.3(b) provides, in pertinent part:

> If a district board of education determines that the use of an unrecognized position title is desirable, or if a previously established unrecognized title exists, such district board of education shall submit a written request for permission to use the proposed title to the county superintendent of schools, prior to making such appointment. Such request shall include a detailed job description. The county superintendent shall exercise his or her discretion regarding approval of such request, and make a determination of the appropriate certification and title for the position....

certification. See South River Education Association v. Board of Education of the Borough of South River, decided by the State Board, November 4, 1987, aff'd, Docket #A-1695-87T8 (App. Div. 1990); Pezzullo v. Board of Education of the Township of Willingboro, decided by the State Board, March 1, 1989, appeal dismissed, Docket #A-4006-88T1 (App. Div. 1989).

As the ultimate fact-finder and administrative decision-maker for controversies and disputes arising under the school laws, Dore v. Bedminster Tp. Bd. of Ed., 185 N.J. Super. 447 (App. Div. 1982), we have reviewed the record before us, including the job description developed and adopted by the Board for directors. Based on our review, we find that a "director," as established by the Board in this particular instance has a qualitatively higher level of administrative responsibility than that entrusted to a supervisor.

As noted in the job description, directors report directly to the superintendent of schools. The goals of such assignments are to "provide instructional and content area leadership in the development, implementation, and coordination of the district's K-12 curriculum," and to "administer programs under his/her jurisdiction." Exhibit J-1, in evidence. Responsibilities include the development, implementation and evaluation of curriculum and instructional services; recommending the addition of new courses; primary responsibility for content area evaluation of faculty and staff at the secondary level; working with building principals in the improvement of individual staff competencies; observing and evaluating teachers; direct supervision of all teachers in the department; administering the programs and grants relevant to his or her curriculum area; assisting in the development, coordination and

implementation of the budget as it pertains to curriculum and instruction; assisting in the recruitment, screening, hiring, training and assigning of instructional personnel; and providing periodic reports to the Board and superintendent on curriculum needs. Id.

> Certification as a principal
>
> is required for any position that involves service as an administrative officer of a school or other comparable unit within a school or district. Such positions shall include assistant superintendent for curriculum and instruction, principal, assistant principal, vice-principal and director. Holders of this endorsement are authorized to direct the formulation of goals, plans, policies, budgets and personnel actions of the school or other comparable unit, to recommend them to the chief district administrator, and to direct their implementation in the school or other comparable unit. Holders of this endorsement also are authorized to direct and supervise all school operations and programs, to evaluate school staff, including teaching staff members pursuant to N.J.A.C. 6:3-1.19 and 1.21, and to direct the activities of school-level supervisors.

N.J.A.C. 6:11-9.3(b)

The fact that the job description includes some duties not requiring certification as a principal does not alter the fact that it includes responsibilities for which such certification is required. Thus, given the facts herein, we find certification as a principal appropriate for employment as a director in this particular instance. Consequently, tenure in such assignments accrues in the position of "principal." Since the tenure laws designate "principal" as a separately tenurable position, N.J.S.A. 18A:28-5, Capodilupo, supra, the scope of petitioner's tenure in a supervisory position would not extend to the director's assignment at issue herein.

Nor does Dennery, supra, confer such a right. The Court in Dennery settled that tenure rights achieved under one certificate may not be "transferred" to a position under a different certificate in which the staff member had not accrued any relevant work experience. Tenure is achieved in a particular position, Capodilupo, supra, and neither Dennery nor the line of cases cited therein provide for tenure status achieved under the administrative certificate to encompass every separately tenurable position thereunder for which the staff member holds the appropriate certification, regardless of work experience.[4] Cf. Kaprow v. Board of Educ. of Berkeley Tp., 131 N.J. 572 (1993) (in decision rendered on the same day as Dennery, the Supreme Court observed that staff member had achieved tenure in the position of assistant superintendent and that his right to a preference in reemployment following a RIF was predicated on his status as a tenured assistant superintendent). Thus, notwithstanding petitioner's possession of a principal certification and the fact that the principal and supervisor endorsements are both issued under the administrative certificate, the tenure laws, as noted, expressly designate "principal" as a separately tenurable position. Since petitioner had not achieved tenure status in the "position" of principal, he

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[4] We note that Capodilupo, supra, and Bednar, supra, dealt with tenure rights achieved as the result of employment under the instructional certificate. (N.J.S.A. 18A:28-5 specifies "teacher" as a separately tenurable position.) Ellicott v. Board of Educ., 251 N.J. Super. 342 (App. Div. 1991) involved the scope of tenure rights achieved by a staff member employed as a speech correctionist and learning disabilities teacher-consultant under the educational services certificate, in which only "school nurse" is specified by N.J.S.A. 18A:28-5 as a separately tenurable position.

had no entitlement by virtue of tenure to an assignment within that separately tenurable position.

While we conclude that petitioner had no entitlement to assignment as a director, we nonetheless find it necessary to clarify the Commissioner's assertion that awarding petitioner the controverted assignment "would result in anomalous circumstance of assistant principals having tenure rights to principal positions and principals having tenure rights to assistant superintendencies." Commissioner's Decision, slip op. at 11. No such rights can exist under the tenure laws. As previously noted, N.J.S.A. 18A:28-5, which provides definition of the "position" in which tenure is achieved, expressly designates "assistant principal," "principal" and "assistant superintendent" as separately tenurable positions. If we had found petitioner to be entitled to the director's assignment in this instance, such a finding would indicate only that the scope of the "position" in which he had achieved tenure encompassed the particular assignment at issue.

We therefore affirm the ultimate determination of the Commissioner to dismiss the petition, but do so for the reasons expressed herein.

Attorney exceptions are noted.

August 2, 1995

Date of mailing AUG 04 1995

216-93

LISETTE R. DELGADO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF UNION, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, nontenured teaching staff member, alleged Board reappointed her as teacher for 1992-93 school year and thus was entitled to her annual salary or, in the alternative, 60 days' pay effective September 1, 1992. Board contended no contract of employment existed.

ALJ concluded that a contract for employment had been formed and the Board's subsequent termination of petitioner technically constituted a breach but since petitioner would not have received her certification in English as a Second Language or Bilingual prior to the commencement of the school term on September 1, 1992, the Board had terminated her "for cause" and she was not entitled to 60 days' pay in lieu of notice.

Commissioner adopted initial decision with modification. Commissioner agreed with ALJ that a contract existed which the Board technically breached when it terminated petitioner. However, Commissioner found it unnecessary to reach a determination of whether Board's termination of petitioner was "for cause." Citing, N.J.E.A. v. Essex County Educational Services Commission, Commissioner found so long as notice of nonrenewal was provided by July 1 for contract containing 60 days' notice, there was no entitlement to 60 days' pay.

SEPTEMBER 9, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9748-92
AGENCY DKT. NO. 452-9/92

LISETTE R. DELGADO,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF UNION, HUDSON COUNTY, NEW JERSEY,
Respondent.

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

Louis C. Rosen, Esq., for respondent (Patino-Treat and Rosen, attorneys)

Record Closed: June 14, 1993 Decided: July 29, 1993

BEFORE **RALPH J. TOLOMEO**, ALJ:

STATEMENT OF THE CASE

Petitioner, Lisette R. Delgado claims that respondent, The Board of Education of the City of Union, reappointed her as a teacher for the 1992-93 school year and, therefore, is entitled to her annual salary for the same or, in the alternative, petitioner claims is entitled to 60 days pay effective September 1, 1992.

The respondent denies that any contract of employment exists and, further, denies any payment responsibility to petitioner.

As a result of events between the parties which transpired through the summer of 1992, petitioner, Lisette R. Delgado, filed a petition with the Commissioner of Education seeking compensation for her employment for the 1992-93 school year.

Respondent, Union City Board of Education (Board) answered denying any responsibility to petitioner.

The Department of Education forwarded the matter to the Office of Administrative Law as a contested case on December 15, 1992. A prehearing conference was conducted and the matter was scheduled for hearing for May 4, 1993 at the Newark office of the Office of Administrative Law. On that date, the parties and their representatives appeared and a hearing was conducted. At the conclusion of the hearing, the parties requested that they be permitted to file briefs. Such permission was granted, the last brief in this matter was received by the Office of Administrative Law on June 4, 1993 when the undersigned was on vacation. Upon the return of the undersigned on June 14, 1993, the record in this matter closed.

THE HEARING

At the hearing in this matter, petitioner testified on her own behalf. Respondent offered the testimony of Ms. Marilyn Impomeni, Ms. Barbara Beck and Superintendent Thomas Highton, all in the Board's employ.

Additionally, the parties offered documents which were received into evidence and marked Exhibits J-1 through J-21, R-1 through R-3 and P-1 and P-2.

From the testimony of the witnesses and a review of the documents, I **FIND** the following as **FACT**:

Lisette R. Delgado was initially employed by the Union City Board of Education (Board) for the 1990-91 school year. In August of 1990, petitioner was notified by letter that she had been hired by the Board and to notify the Board in the event that she chose not to accept employment. Two days later, the parties signed a written contract of employment.

During the 1990-91 school year, the petitioner was notified by the Board that she would not be rehired for the 1991-92 school year. However, in June of 1991, petitioner received a letter similar to the one received in 1990, indicating that she would be rehired unless she notified the school that she chose not to accept the position. Three weeks later, the parties signed a written contract.

In April of 1992, petitioner was informed that she would not be rehired for the 1992-93 school year. However, as in the previous two years, on June 4, 1992, petitioner received a letter informing her that she would be rehired unless she indicated that she did not wish to accept employment with the Board. This letter also advised petitioner of the time and date for reporting and the name of the individual to whom she should report on the first day of school. The letter also indicated that petitioner should make arrangements to complete all necessary paperwork and sign her contract. Petitioner never indicated that she was not interested in the position.

On June 19, 1992, the Board, by certified and regular mail addressed to the petitioner's post office box, notified petitioner that it was rescinding its offer and that the Board intended to take action in this regard at its meeting on June 25, 1992. On June 25, 1992, the Board terminated petitioner's employment, effective June 30, 1992. Petitioner testified that she never checked her post office box prior to June 25, 1992 and, as a result, was unaware of the Board's rescission notification. On June 25, 1992, petitioner went to the Board's office and attempted to sign her contract. The contract was never made available for her to sign.

When petitioner eventually learned of the Board's action, she requested from the Superintendent the reasons for her termination. The Board, through the Superintendent, explained that, among other things, petitioner was not properly certified. In contracts executed by the parties for the two prior school years, 1990-91 and 1991-92, petitioner agreed that she would obtain either a Bilingual or English as a Second Language Certificate within three years of her date of hire, subject to course availability (Exhibits J-2 and J-4). Superintendent Highton stated that he became aware that Ms. Delgado had not completed sufficient credits over the two year period to obtain such certification as required by the District. As such, if Ms. Delgado received a contract and commenced teaching on the first day of school, she would receive tenure without the requisite certification. Since the Union City School

District has a large Spanish population, the certification is mandatory. Both Superintendent Highton and Ms. Delgado agreed that an emergency certification was approved for that year, 1991-92. Without a waiver, which Superintendent Highton indicated he was not willing to request since there was no guarantee that she would complete the course work required for certification, Ms. Delgado would be unable to teach the class as scheduled.

Ms. Delgado stated that she has an Elementary Teaching Certificate for grades K through 8 but has not completed sufficient course work for either her Bilingual or English as a Second Language Certificate. She took an incomplete for one course when she became hospitalized and, thereafter, received a second incomplete. Ms. Delgado believes that she needs six credits each year for her Bilingual Certificate, a total of 12 but only has six credits at the present time, six credits were described as incomplete. Ms. Delgado stated that she was able to teach in the previous years because the Board applied for a waiver of a Bilingual Certification requirement.

As a result of the above, petitioner claims that the Board's resolution of May 28, 1992, approving her reappointment for the 1992-93 school year, created an agreement binding upon the Board which they could not rescind. The Board contends that its letter of June 4, 1992, informing the petitioner that she would be rehired, was merely an offer which the petitioner did not accept prior to the Board's rescission mailed to her on June 19, 1992.

ISSUES PRESENTED

From the foregoing, the issues presented through the **FACTS** as **FOUND** and the arguments of the parties are:

1. Whether a non-tenured teacher may be reappointed, thereby acquiring vested rights, solely by virtue of a Board resolution approving her rehiring.

2. Whether an enforceable contract for employment exists between a non-tenured teacher and the school Board where the Board made an offer of employment which the teacher properly accepted by silence, but where the teacher was not properly certified.

DISCUSSION AND ANALYSIS

I REAPPOINTMENT BY RESOLUTION

The mere act of approving, by Board resolution, the reappointment of a non-tenured teacher does not create a binding contract for employment. While no teaching staff member may be appointed without a majority vote of the Board, a separate contract for employment is also required.[1]

Since there is no indication in this record that the Union City Board of Education promulgated specific rules governing employment contracts, this discussion proceeds on the assumption that the statutory provision applies herein. Hence, teaching appointments require both a Board resolution and an employment contract. This conclusion is supported by cases cited by petitioner. *See Marshall v. Board of Ed. of North Arlington,* 177 *SLD* 1220; *Payne v. Board of Education of Verona,* 1976 *SLD* 543; *Moore v. Board of Ed. of Roselle,* 1973 *SLD* 526; *Hirsch v. Board of Education of Trenton,* 1961 *SLD* 189.

In some jurisdictions, a valid and enforceable contract of employment requires appointment or election in the manner specified by statute and the execution of a contract in accordance with the provisions of the statute; both elements are equally vital and essential, 78 *CJS Schools and School Districts* § 187A (1952). The focus in the cases cited therein is as much upon the contractual aspect of the employment arrangement as on the requirement that Boards approve hiring by resolution.

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[1] *N.J.S.A.* 18A:27-1 provides: no teaching staff member shall be appointed, except by a recorded roll call majority vote of the full membership of the Board of Education appointing him.

N.J.S.A. 18A:27-5 provides: every contract between the Board of Education which has not made rules governing such employment and any teaching staff member shall be in writing, in triplicate, signed by the President and Secretary of the Board of Education and by such person.

Except insofar as controlled by the constitutions or statutes, the making, requisites, and validity of a contract of employment of a teacher in the public schools are governed by the rules relating to contracts generally. As in the case of other contracts, there must be an offer and acceptance of employment. The vote of the school Board in favor of employing the certain person as a teacher usually amounts to an offer of employment when officially communicated to the teacher which the Board may revoke or cancel at any time before acceptance. Such vote does not constitute a contract of employment of such person, but, in the absence of a statute requiring further acts, a contract of employment comes into existence on the teacher's acceptance of the offer. *CJS, supra.*

The central issue in this matter is whether the petitioner accepted the Board's offer of employment. New Jersey does not have a controlling statute. The signed written contract requirement of *N.J.S.A.* 18A:27-5 would seem to obviate any discussion of general contract principles regarding offer and acceptance. Under the statute, the presence of these contractual elements can only be demonstrated by an express written agreement signed by the parties. However, decisions in this area demonstrate the Commissioner's willingness to extend contractual protection to teachers even the absence of the written agreement. For example, in *Marshall supra,* where a teaching staff member was notified by letter that the North Arlington Board of Education approved his employment and where the teacher accepted said employment, the Commissioner held that the Board's rescission was a breach of a firm contractual commitment. The Commissioner found that the Board's offer, by way of notification of the Board's approval of *Marshall's* rehiring, and *Marshall's* acceptance, albeit by silence, were sufficient to create an agreement binding upon the Board.

> "There was an acceptance to be found in the circumstances and in the understanding of the parties." *Marshall, supra,* at 1222.

In *Hirsch, supra,* where a teacher accepted employment immediately after notice of appointment, the Commissioner found that the Superintendent's subsequent letter of rescission was too late. *Hirsch, supra,* at 190-91. However, in *Lydon v. Board of Education of Hillsboro,* 1985 *SLD* 1439, it was held that a teacher's acceptance must be in writing. Additionally, where a written contract was signed by the teacher and the Board's Secretary but not the President, the Commissioner was

willing to grant the teacher full contractual rights under the partially executed document.[2]

In the instant case, under "the circumstances and understanding of the parties" petitioner's silence constitutes acceptance. Silence in the face of an offer is not an acceptance, unless there is a relationship between the parties or a previous course of dealing pursuant to which silence would be understood as acceptance. *John H. Jackson, Contract Law in Modern Society,* section 5.3 (1973).

Given the previous dealings of the parties, silence may reasonably be understood as acceptance. In two prior years, the Board notified petitioner of her rehiring and requested that she notify the Board only if she chose not to accept the position. Usually, sometime later, by arrangements made at the convenience of the parties, they would sign a contract.

In this matter, the Board asserts that it revoked or rescinded its offer prior to any attempt by petitioner to accept.

While a revocation is effective only upon receipt, "a written revocation is received when it is deposited in an authorized place." *Murray on Contracts, supra,* section 42B. "A person receives a notice or notification when . . . it is duly delivered at the place . . . held out by him as the place for receipt of such communications." *N.J.S.A.* 12A:1-201(26)(b). Presumably, petitioner's post office box is such a place.

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[2]There is an important distinction between the reasoning in these decisions and petitioner's claim that a contract arises immediately upon approval by the Board. In the cases cited, there is an understanding and expectation among the parties created by the Board's notification of approval of rehiring and some sort of assent manifested by the teacher. In these instances, the Commissioner has recognized contractual obligations before the full execution of a formal written agreement but after the Board's resolution to rehire, as long as there has been a manifestation of offer and acceptance. Essentially, these cases fall mid-point between the positions taken by the petitioner and the Board.

Petitioner is deemed to have received the revocation upon its delivery to her post office box.

However, because the Board, as the offeror, created the power of acceptance by silence, it is the petitioner who determines whether or not she intended to be bound by the contract prior to her receipt of the revocation. Ambiguity regarding the manner of acceptance should be resolved in favor of petitioner because, as the master of the offer, the Board created the predicament in which it now finds itself. *Seal Tite Corp. v. Ehret, Inc.,* 589 *Fed. Supp.* 701 (*DNJ* 1984).

It is clear not only from her testimony but from the record in this matter that petitioner intended her silence to indicate her acceptance of the Board's offer of employment. Therefore, I **CONCLUDE** that a contract for employment was formed and the Board's subsequent termination of petitioner technically constituted a breach.

II CERTIFICATION AND DAMAGES

Damages are usually awarded when there is a finding that the Board acted in an arbitrary or capricious manner and may include payment for the entire contract. *Marshall, supra; Payne, supra; Moore, supra* and *Hirsch, supra.* Damages pursuant to the 60 day termination clause may be awarded if the Board failed to notify a non-tenured teacher prior to April 30 that she will not be rehired for the following school year and the teacher then submits a written acceptance by June 1 which the Board fails to honor. *Armstrong v. Board of Ed. of East Brunswick,* 1975 *SLD 117; N.J.S.A.* 18A:27-10, 11 and 12.

However, as a general rule, a teacher who is improperly removed or dismissed may only recover damages if they "have in their possession, or on file with the proper Board or Officer, a license or certificate of his qualifications as prescribed by law . . ." *C.J.S., supra at section* 210a.

N.J.S.A. 18A:27-2 provides:

> Any contract or engagement of any teaching staff member, shall cease and determine whenever the employing Board of Education shall ascertain by written notice received from the

> County or City Superintendent of Schools, or in any other manner, that such person is not, or has ceased to be, the holder of an appropriate certificate required by this title for such employment, notwithstanding that the term of such employment shall not then have expired.

A contract for the employment of a teacher who is not properly certified as required by statute is void. In only one case has the Commissioner held that the Board should have waived its certification requirement and issued emergency certification to a teacher whose contract the Board rescinded for lack of certification. *Hirsch, supra.* However, the facts of that case are distinguishable from the instant matter in that *Hirsch* had never before been issued emergency certification and he was otherwise in possession of the appropriate "credentials," even though he had not yet obtained the actual certificate.

In this matter, the testimony of Superintendent Highton and petitioner clearly establishes that petitioner would not have received her certification in English as a Second Language or Bilingual prior to the commencement of the school term on September 1, 1992. I so **FIND**.

Although it is not absolutely clear whether the "contract" accepted by petitioner included a 60 day termination clause, from past contracts and the history of this matter, I **FIND** and **CONCLUDE** that petitioner was agreeing to the same terms and conditions of previous contracts, including the "60 day clause." *N.J.S A.* 18A:27-11. However, where the termination was for "good cause" and it was the petitioner who rendered her contract impossible of performance, the contractual claim to 60 days termination pay is forfeited. *Cheston v. Board of Education of Cherry Hill,* 1979 *SLD* 262.

CONCLUSION

From the foregoing, I **CONCLUDE** that the Board would have been bound by an enforceable contract whereby the petitioner would have been entitled to damages but for the fact that she was not properly certified. I **CONCLUDE** that any employment agreement with the petitioner, including the fully executed contract, is void by reason of her non-certification.

ORDER

It is hereby **ORDERED** that petitioner's claims as stated herein be and are hereby **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 29, 1993
DATE

Ralph J. Tolomeo
RALPH J. TOLOMEO, ALJ

Receipt Acknowledged:

8/3/93
DATE

Maureen S. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 4 1993
DATE

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

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OAL DKT. NO. EDU 9748-92

LISETTE R. DELGADO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF UNION, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions by both parties and petitioner's reply to respondent's exceptions were timely filed in accordance with N.J.A.C. 1:1-18.4.

Petitioner excepts, inter alia, to the ALJ's conclusion that she is not entitled to 60 days pay in lieu of proper notice of termination because the Board terminated her contract "for cause." She contends that this conclusion is not supported by the record in that the Board's resolution approving the termination of her contract provides no rationale of any kind for her termination. She further argues that the "cause" posited by the ALJ, i.e., that she would not have received permanent certification in English as a Second Language or Bilingual Education prior to the start of the 1992-93 school year, is incorrect since she was never under any obligation to receive such permanent certification by that time. Petitioner argues that the contracts she signed for the 1990-91 and

1991-92 school years specified that she had three years from the date of her initial hire, or until August 1993, to obtain this certification.

The Board's exceptions essentially reiterate its assertion that no contractual relationship existed between it and the petitioner.

Upon a full review of the record in this matter, with the exception of one modification discussed below, the Commissioner fully concurs with the ALJ's succinct and accurate discussion of the law and issues implicated herein.

The Commissioner agrees with the ALJ's finding that there was a contract between the Board and petitioner for the reasons clearly articulated by him on pages 5-8 of the initial decision. She likewise agrees that the Board technically breached this contract when it subsequently terminated petitioner. The Commissioner, however, finds it unnecessary to reach the issue of whether such termination by the Board was "for cause" as petitioner's claim of entitlement to 60 days' pay in lieu of notice is fully resolved by what the Commissioner determines is the controlling case in this matter, namely, New Jersey Education Association v. Essex County Educational Services Commission v. Board of Trustees, Teachers' Pension and Annuity Fund, 1984 S.L.D. 420, aff'd State Board 1985 S.L.D. 1976, aff'd New Jersey Superior Court, Appellate Division, April 30, 1986. That case ruled that so long as notice of nonrenewal is provided by July 1 for contracts containing 60 days' notice, there is no entitlement to 60 days' pay. (See also Jo Ann Holmes and Sharon Romanoski v. Board of Education of the Township of Springfield, 1991 S.L.D. 1369.) Thus, given that

petitioner in this matter was provided notice of termination on June 19, 1992, the relief she seeks must be denied irrespective of the reason(s) for her termination.

Accordingly, the Commissioner affirms the decision of the Office of Administrative Law, as modified herein, and dismisses the instant Petition of Appeal.

COMMISSIONER OF EDUCATION

SEPTEMBER 9, 1993

DATE OF MAILING - SEPTEMBER 9, 1993

217-93

217-93

IN THE MATTER OF THE TENURE :
HEARING OF RICHARD COX, STATE- : COMMISSIONER OF EDUCATION
OPERATED SCHOOL DISTRICT OF THE : DECISION
CITY OF PATERSON, PASSAIC COUNTY. :
:

SYNOPSIS

State-operated school district certified charges of neglect, misbehavior and insubordination against tenured chief school custodian based on respondent's failure to adequately perform cleaning tasks, secure building, submit work schedules and notify supervisors of absences and based on a pattern of absences on or after paydays.

ALJ found respondent guilty of misbehavior, neglect and insubordination related to his failure to properly discharge cleaning duties and certain charges related to absences. While ALJ found respondent should not continue as chief custodian, ALJ also found respondent should not be dismissed. Respondent was ordered suspended for six months and reduced in position to that of custodian.

Commissioner adopted findings and determination in initial decision with respect to charges, but modified penalty to be imposed. Commissioner concurred with ALJ's finding that respondent violated public trust by inadequately performing his duties as chief custodian. However, Commissioner disagreed with ALJ that respondent was not proven unfit to hold position of custodian. Commissioner ordered respondent dismissed from tenured employment in the district.

SEPTEMBER 9, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAK DKT. NO. EDU 1696-92
AGENCY DKT. NO. 39-2/92

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,
Petitioner,
v.
RICHARD COX,
Respondent.

Russell J. Schumacher, Esq., General Counsel, for petitioner

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

Record Closed: April 1, 1993 Decided: June 21, 1993

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter involves a hearing pursuant to the Tenure Employees Hearing Act charging respondent, a tenured chief custodian employed by the Paterson School District, with neglect, misbehavior and insubordination. The matter was transmitted to the Office of Administrative Law (OAL) on March 6, 1992 for hearing as a contested case. The matter was assigned to the undersigned administrative law judge (ALJ) on March 20, 1992, and a telephone prehearing conference was scheduled for April 21, 1992. The scheduled telephone prehearing conference was adjourned because of the unavailability of the attorney for respondent, and the matter was rescheduled for a telephone prehearing conference to be held on May 14, 1992. On that date, a telephone prehearing conference was concluded and a

Prehearing Order was entered settling the procedures to be followed. The matter was scheduled for hearing on November 19 and 20, 1992. When the matter could not be concluded after two days of hearings, the hearing was continued and rescheduled for January 25 and 26, 1993. The hearing was concluded on January 25, 1993. However, the attorneys requested that the record remain open to permit the submission of written closing arguments. Following the submission of written closing arguments and responses, the record closed on April 1, 1993.

STATEMENT OF CHARGES

The Statement of Charges against respondent in this matter are as follows:

First Charge

During the 1989-90, 1990-91, and 1991-92 school years, Mr. Cox has repeatedly failed to ensure that the school building is properly cleaned on a daily basis despite numerous follow-up requests by the building principal and other staff. His repeated failure to ensure that the cleaning is performed constitutes neglect and insubordination.

Second Charge

During the 1989-90, 1990-91, and 1991-92 school years, Mr. Cox has on numerous occasions failed to properly secure the building pursuant to the instructions of his supervisors, thereby endangering the safety and well-being of the children and staff in the school building. His conduct constitutes misbehavior, neglect and insubordination.

Third Charge

During the 1989-90, 1990-91, and 1991-92 school years, Mr. Cox has on numerous occasions displayed conduct constituting insubordination as he has failed to comply with valid and reasonable directives of the principal. This conduct is evidenced by Mr. Cox's leaving a door open in direct contravention of the orders of the building principal and Mr. Cox's failure to ensure the proper cleaning of the building in spite of numerous requests.

Fourth Charge

On numerous occasions Mr. Cox has demonstrated neglect of the duties of his office. This neglect is evidence by his failure to submit written evaluations in a timely manner, his pattern of absenteeism, and his failure to submit vacation schedules in a timely manner.

Fifth Charge

Mr. Cox has demonstrated conduct constituting misbehavior by informing the school building office that he would be out "sick" after his workday began and then proceeding to meet with another member of his association and preparing a grievance against the principal. This abuse of sick leave constitutes misbehavior.

Sixth Charge

Mr. Cox has left his job before his workday was scheduled to end without any notification of the administration. This conduct constituted misbehavior and neglect of his duties.

Seventh Charge

The Seventh Charge was withdrawn and dismissed by petitioner at the hearing.

STATEMENT OF ISSUES

Based upon the Statement of Charges in this matter, a summary of the issues to be resolved in this matter are:

1. Whether respondent repeatedly failed to properly clean a school building on a daily basis despite numerous follow-up requests by the school building and other staff?

2. Whether respondent failed to properly secure the school building pursuant to the instructions of his supervisors, thereby endangering the safety and well being of the children and staff in the school building?

3. Whether respondent displayed conduct constituting insubordination on numerous occasions by failing to comply with valid and reasonable directives of the school principal as evidenced by his leaving a door open in direct contravention of the orders of the building principal and by his failure to ensure the proper cleaning of the building in spite of numerous requests?

4. Whether respondent has demonstrated neglect of the duties of his office as evidenced by his failure to submit written evaluations in a timely manner, his pattern of absenteeism and his failure to submit vacation schedules in a timely manner?

5. Whether respondent has abused his sick leave, and as a result has demonstrated conduct constituting misbehavior by informing the school building office that he would be out sick after his workday began and then proceeding to meet with another member of his association and preparing a grievance against the principal?

6. Whether respondent left his job duties before his workday was scheduled to end without notification of the administration?

7. Whether the foregoing alleged conduct, if engaged in by respondent, constitutes neglect of duties, insubordination and/or misbehavior as alleged in the respective charges?

8. Whether the foregoing alleged conduct, if engaged in by respondent, is a sufficient basis for removal or other disciplinary action against respondent?

9. Whether these tenure charges are in retaliation for respondent's refusal to falsely and negatively evaluate another custodian at the demand of the building principal?

FACTUAL DISCUSSION

With respect to the Statement of Charges, petitioner produced the following witnesses.

Sandra Monteagudo, a first grade bilingual teacher, testified that in school year 1989-1990 she was assigned to one of the portable classrooms. She testified that this was a mobile home type classroom. Another teacher assigned to the other classroom in the portable was Mrs. Sanchez who taught kindergarten. The portable consisted of the two classrooms and two bathrooms. She observed the cleanliness of the classrooms and testified that while the garbage was always picked up, the floors were always dirty and were not mopped. In addition, she indicated that the bathrooms always had plumbing problems and they always smelled like urine.

Ms. Monteagudo testified that she never spoke to anyone about the condition of the bathrooms and classrooms. She testified that she brought her own supplies and cleaned the classroom each day using a bucket and Pine Sol. She also testified that her children would sweep the floors. She indicated that she took these steps because the children ate their lunch in the classrooms. She also indicated that she did not feel it was a teacher's responsibility to clean classrooms.

On cross-examination, Ms. Monteagudo testified that the custodians cleaned either before or after class but never during class. She indicated she never complained either to Mr. Cox or to anyone else about the dirty classroom. She never requested that someone mop the floors and the building principal never spoke to her about the cleanliness of the classroom.

On redirect, Ms. Monteagudo testified that she would clean the classroom upon her arrival in the morning and would sometimes ask the children to sweep the floor. She only recalls that the floors were wiped and spotless the week after Easter. However, the floors looked more dirty than ever by the end of the week. She also testified that she observed the floor being dirty 60 or 65 percent of the time or 2 or 3 days per week.

On recross-examination, Ms. Monteagudo testified that if the floor had been mopped, it was not mopped properly. She also indicated that the portable classroom unit was very old, the roof always leaked water when it rained and that there were plumbing problems. She also indicated that she sometimes observed dust, and that sometimes crayons and paper that had been dropped by children one day were still on the floor the next day.

Gloria Bennett testified that in 1990-1991 school year she was the first grade bilingual teacher in the portable classroom. She testified that she saw the respondent five or six times during the school year. Occasionally she saw him empty the garbage cans, mop the bathroom and also mop up when a child became sick. She testified that she saw respondent mop the bathroom three times but she never saw him dusting the classroom.

Ms. Bennett testified that she always paid attention to the cleanliness of the classroom and indicated that she could tell when the room had not been swept, because items that had been left on the floor the previous night remained there. Examples of this were paper cuttings. She indicated that at least two times per week she would observe the floors not having been swept and she would sweep up. She indicated that she observed the floor every day. The floors had been swept many times but many other times it had not been swept. She also indicated it was very easy to see if the floors had been mopped because the floors were white. She observed that they were mopped approximately two times per week.

Ms. Bennett testified that she spoke to the building principal concerning the cleanliness of the classroom and placed her concerns in a letter, dated January 5, 1990 (P-1).

Ms. Bennett testified that she was assigned to the portable classroom two full years for school years 1989-1990 and 1990-1991 and that her observations applied to both years. She indicated that when the problem of lack of cleanliness became too excessive it caused her to write the letter of January 5, 1990. After the letter she noticed some improvement and she had to sweep less often, and she saw respondent a couple of times per week. However, many times debris left on the floor remained there the next day. She also indicated that there were roaches in the bathroom and closet.

On cross-examination, Ms. Bennett testified that Ms. Monteagudo took over the portable first grade in school year 1991-1992. She indicated that the portable classroom looked very old and that she often observed water on the floor. She indicated that the classroom floor was not swept at least two times per week and sometimes more. She also indicated that many times the respondent cleaned the classroom while the children were still there. She made it clear that she was not saying that the room was never swept or mopped.

Margaret Turco testified that she was assigned to the portable classroom for school year 1991-1992. She indicated that she was aware that respondent was assigned to clean the portable classrooms because if she called because of a problem during the day respondent would be sent. She testified that she observed the cleanliness of the portable classroom on a daily basis. She also took steps to see that her students carried out certain responsibilities in the classrooms such as washing the blackboards and keeping the shelves neat. She indicated that she never had to clean the floor and never required her students to sweep the floor, unless something unusual were spilled. She indicated she never made any observations to determine whether the floor in the portable classroom had been mopped or swept.

Ms. Turco testified that in the 1990-1991 school year, she had occasion to go to the bathrooms on the second floor. She indicated that from 1985, when she was first assigned to the school, the boys' bathrooms smelled terribly with a foul odor.

Paula Santana, principal of school #11 testified that respondent was employed at the school as chief custodian and that he started at the same time as her, which was July, 1988.

Ms. Santana testified that respondent was responsible for opening the schools in the morning and locking them in the evening, making sure the heat was on and that the rooms were clean. He was also responsible for cleaning the snow in the playgrounds and was obligated to keep the school nice and clean. She indicated that respondent reported to her as the building administrator and that there were two additional custodians under respondent's supervision.

Ms. Santana testified that respondent had supervisory duties of the other custodians and was responsible for cleaning the portable classrooms and the second floor. As the supervisor of the other custodians he was to assure that the cleaning was done and was to check the cleaning of the school every single day. Ms. Santana testified that the list of custodial work distribution (P-2) was provided to her by Mr. Ruiz, who went over it with Mr. Cox.

Ms. Santana testified that she again discussed with respondent his responsibilities in November, 1990, and the discussion concerned that respondent was responsible for the portable classrooms, the second floor, the nurse's room and the second floor bathrooms. She indicated the discussion occurred because she kept

receiving complaints from Mrs. Turco and Mrs. Young about the cleanliness of the portable classrooms as well as from Ms. Monteagudo and Mrs. Sanchez. She indicated that Mrs. Sanchez said she was bringing her own utensils to clean. In addition, Ms. Bennett complained and Pamela Puglia a teachers aide for Ms. Sanchez made a written complaint (P-3).

Ms. Santana testified that she first discussed respondent's responsibilities with him in August, 1987 when she made an inspection of the school and found it was not ready to open in September. Respondent said to her that there was no problem and that he would take care of it. She indicated that when she came back to make sure everything was ready, she found it not ready. Garbage bags were around, and the rooms were not fairly clean. When she told respondent of this and indicated that if he was not aware of his responsibilities she would call Mr. Milone, his supervisor, respondent said to her "so what - call him." She then called Mr. Milone and he arranged to have someone meet with respondent. Mr. Erving Ruiz, assistant supervisor in the custodial department met with respondent and advised respondent of his duties.

Ms. Santana testified that when school opened in September, 1988, the custodial functions were not being performed, rooms were not fairly cleaned and garbage remained. She met with respondent and pointed out that the classrooms were still uncleaned and that the garbage was being placed in the corridor behind the smoke doors. After this, her requests were somewhat complied with but the rooms were not cleaned immediately. In addition, it took some time for respondent to take out the garbage.

Ms. Santana testified that she established her own routine. She would come in at 7 a.m., checked all portions of the school, the portables and the playgrounds. At the end of October and beginning of November, 1988, she found the portables to be dirty with the dirt visible on the tiles and the bathrooms, the bathrooms smelling and the bathroom mirrors not cleaned. She found the tiles in the portable bathrooms to be in deplorable condition. She discussed this with respondent and told him that he should do the cleaning correctly and that she needed the portables clean for the children. She indicated that in response, respondent shrugged his shoulders and said "yeah." Ms. Santana testified that she discussed the portable classrooms with respondent every time she inspected them or received a complaint from the staff. She indicated that there was an ongoing discussion about the portables.

Ms. Santana testified that she inspected the portable classrooms daily and found the floors dirty three or four days out of the five days in the week. She indicated that there was no evidence that the floors had been mopped. In addition, the floors had not been dusted and bits of papers dropped by the students remained there. She instructed respondent to dust and mop and he responded that he was doing so. However, there was no evidence that respondent was dusting or mopping these floors. She testified that for subsequent school years her observations did not differ.

As a result of respondent's failure to clean, she requested help from the central office. This help was provided by Benjamin Clanton and Erving Ruiz/

With regard to the nurse's office, Ms. Santana testified that she observed the garbage not being taken out, the bathroom not clean and the floor not clean. The nurse, Ms. Dorothy Hopko, told her that spots remained on the floor from bloody noses, etc. Ms. Santana testified that she visited the nurse's office as part of her daily routine and discussed the need to keep the nurse's office clean with respondent. Again the respondent shrugged his shoulders and said it was being done.

Ms. Santana testified that she continued her observations of the nurse's office for school years 1990-1991 and 1991-1992, and that they remained the same. The school nurse continued to complain and there was no change in her complaints.

Ms. Santana testified with respect to the second floor bathrooms. She indicated that she observed them on a daily basis. At the beginning of the school year 1988, the boys' bathroom was acceptable. However, by November and December, 1988, the smell from the boys' bathroom came out into the corridor. She instructed respondent to clean it thoroughly on a daily basis. In response respondent shrugged his shoulders and said it was being done. She observed that when respondent felt like cleaning he would do so. Ms. Santana testified that she still noticed the smell coming from the boys' bathroom on some days when the cleaning was not done. The observations she made in school year 1989-1990, continued for school year 1990-1991, and 1991-1992. She smelled the odor from the boys' bathroom three out of five days.

With respect to the girls' bathroom on the second floor, her observations in all three years were that the garbage cans were not emptied, the walls were not

cleaned, and paper was found on the floor. These observations were made in the morning. Ms. Santana testified that she met with respondent and told him that this bathroom was his responsibility and that he should clean it in the early morning or late afternoon before he left. However, she saw no change in the cleanliness of the bathroom.

Ms. Santana testified that her observations of the cafeteria during this entire period showed that the floors were not cleaned or that they had been mopped with dirty water. She indicated that unless it was brought to respondent's attention, he would not clean the cooking or serving areas. Despite her complaints to respondent, she saw no changes in the cleanliness of the cafeteria. Mrs. Tolliver, the cook-manager of the cafeteria told Ms. Santana that the cafeteria was not being cleaned and that if it was not the school would be fined by the health department. Ms. Santana indicated that on occasion the health department came to inspect the cafeteria and on these occasions she gave respondent directives to clean the cafeteria and it was done. As a result, on October 19, 1991, she was required to notify respondent of the necessity to clean the cafeteria as well as the library and the bathrooms on the second and third floors (P-5).

Ms. Santana testified with respect to the outside grounds. She explained that respondent and another custodian, Mr. Ortega, were required to clean the glass and other debris in the playground each morning. During school year 1988-1989, Ms. Santana testified that she observed the outside grounds on a daily basis. She testified that the smell was terrible and that it had been used as an outhouse by drug addicts. She indicated there was a great deal of broken glass on the playground as well as other debris including broken beer bottles and needles. She testified that the debris in the playground was somewhat picked up by the custodial staff, but if it was close to the fence it was ignored. She observed that glass was not picked up on a daily basis and that beer bottles were left in the playground three to four times per week until she specifically directed their removal. Her observations remained the same for school years 1990-1991, and 1991-1992. She indicated she gave the same instructions to respondent and that on occasion debris would be removed and other times it would not. Ms. Santana indicated that she discussed this situation with respondent three to four times each week. She explained that there is no gymnasium in the school and that the playground must be used as a gym. For safety purposes it needed to be clean, free of glass, needles and debris.

Ms. Santana testified that the custodian's room is located in the basement and contains a file cabinet, a desk for the chief custodian, a chair, and a rolling cart. The boiler room is adjacent. She testified that the custodian's room was not kept in an orderly manner, that it was not cleaned, that items were just thrown about and that there was no system for storage of items whatsoever. Ms. Santana testified that she discussed this with respondent and told him that it should be cleaned up because it gives a very bad impression. However, it was not.

With regard to the charge of insubordination, Ms. Santana testified that on October 28, 1991, she instructed respondent to clean and check the bathrooms three or four times each day. Ms. Santana testified that respondent responded to her that he had tried to clean the bathrooms and that if she wanted them clean she should clean them herself. As a result, Ms. Santana directed a memorandum addressed to respondent reporting this alleged insubordination (P-6).

Ms. Santana also reported that on May 8, 1991, a custodian, Mr. Ortega, who was responsible for cleaning the first floor rooms was absent. However, neither respondent nor the other custodian emptied the garbage or otherwise cleaned any of the classrooms assigned to Mr. Ortega. As a result a staff noncompliance letter, dated May 9, 1991, (P-4) was sent to respondent.

Ms. Santana testified that she contacted Mr. Lewis Milone and recommended that respondent either be transferred or terminated. As a result, Mr. Clanton was involved with respondent in school years 1990-1991, and 1991-1992 and held discussions with respondent around eight or twelve times to resolve this situation. Ms. Santana testified that she was present at five of these meetings and discussed the situation with Mr. Clanton. She indicated that Mr. Clanton stated that respondent was not cleaning the school properly and the deficiencies were pointed out to respondent by walking around the school with him.

Ms. Santana testified with respect to the failure of respondent to secure the doors to the school. She explained that School No. 11 is located at 350 Market Street at the corner of Summer Street and that it was a predominantly drug-infested area when she was first assigned to the school. She indicated that drug activities had been minimized in the meantime. The main entrance to School No. 11 is on Market Street. She explained that there is another door at Summer Street and another on Morton Street. The custodial door is on the Morton Street side and the garbage is taken out through the custodial door.

The policy of the school which was adopted for security purposes was that the Market Street entrance was the only entrance to be used to the school. She indicated that the chief custodian is responsible to open the school doors in the morning and to lock them in the evening. Ms. Santana testified that she gave respondent directives that she wanted the doors locked at all times and that she wanted no staff members entering or exiting the building other than through the Market Street entrance. Her assessment was that her directives were not being carried out by respondent. She indicated she announced the policy over the intercoms, placed it in writing and announced it at staff meetings. She also indicated that she told respondent herself at the time she became acting principal that she wanted no doors open other than the Market Street entrance. Despite this, Ms. Santana testified that she observed other door opened in October, 1988, of the year she was acting principal. She observed the custodial door as being opened and saw it opened during recesses. She then spoke to respondent and told him she did not want that door opened at any time because of her concern for the safety of the students, the staff and herself. However, she personally saw it opened again.

Ms. Santana testified that as a result of this, she sent a letter to Mr. Louis Milone, Supervisor of Maintenance, on May 25, 1990 (P-8), advising him of the failure of respondent to comply with this policy. She also sent a letter to Mr. Joseph Atallo, Acting Business Administrator of the school district on May 30, 1990 (P-9), advising him of the situation.

Ms. Santana testified that a meeting was held with Mr. Cox, Mr. Milone, Mr. Atallo, Mr. Kline and herself in June 1990. A general discussion occurred concerning respondent adhering to the directives from the building administrator and about keeping the custodial doors locked for the safety of everyone in the building. In response, respondent indicated that he would speak to the other custodians and that he would make sure that the door was not opened again.

Ms. Santana also testified that she directed respondent to lock and chain the security gates located at each entrance each evening and unlock them in the morning. However, she indicated respondent failed to fulfill his responsibilities with regard to the opening and closing of the gates. She testified that she found both gates locked in the morning. She indicated that the problem with this is that the doors are used in case of a fire as a means for exiting the building. Specifically, on May 16, 1991, she issued a staff noncompliance notice to respondent (P-12) indicating respondent's failure to unlock both gates to the school.

On another issue, Ms. Santana testified that respondent was responsible for coordinating the vacation schedules for the custodians. This required that respondent work out and give a vacation schedule to Mr. Milone and Ms. Santana in advance of the Christmas, Easter and summer vacations. With respect to the Christmas, 1989, vacation schedule, Ms. Santana indicated that on December 18, 1989, she told respondent that she would need to see the work schedule for the Christmas vacation for his staff. The schedule was placed in her mailbox by the secretary to the principal on December 20, 1989 (P-13). However, respondent failed to confer with her, failed to submit a copy to her for her approval and submitted it directly to Mr. Milone. She indicated that the schedule should have been submitted to her first and that respondent failed to comply with her requirements regarding submission of the vacation schedule. Ms. Santana explained that as the building administrator, one of her responsibilities is to know who is going to be in the building in case she needs to come inside or to know what is going on there. In addition, she needs to know who is carrying out the cleaning of the building. She also indicated that during vacations the custodians are required to clean the classrooms and touch-up what is needed to be done. She further testified that respondent failed to submit vacation schedules for Easter and the summer to her. Ms. Santana also identified a letter sent by her to Mr. Milone on July 2, 1990, indicating that she had not received the summer work schedules for the custodial staff as of that date (P-15).

Ms. Santana also testified that she advised respondent of a policy he was to follow when he was going to be out due to illness. She directed respondent to contact her at School No. 11 and advise her if he was going to be out for the day. If he knew in advance that he was taking a day off he was to let her know personally Respondent failed to comply with this policy. She specifically recalled instances when respondent would come to school and leave a note on her secretary's desk indicating that he was taking a sick day or would be out. She referred to a staff noncompliance notice dated November 1, 1991, on which date respondent called the School's main office at 8:10 a.m. that he was going to be out sick (P-18). On that occasion, respondent reported his absence to the secretary rather than to Ms. Santana. In addition, she also instructed respondent to call her between 7 and 7:30 a.m. since she was present by 7 a.m. Ms. Santana explained that she was advised she would be able to contact Mr. Milone at that hour in order to ensure that another employee would be sent to assist the other custodians and to have someone in the building with a boiler's license.

Ms. Santana testified as to respondent's absence on October 31, 1991. She testified that she subsequently learned that on that date, the respondent had gone to Mr. Mike Cortese in order to file a grievance against her. She learned that because respondent went to see Mr. Milone to obtain his paycheck and that Mr. Milone advised respondent that he had to get his check at the school. Mr. Milone was unaware that respondent was not working that day. Respondent then proceeded to see Mr. Mike Cortese, President of his Union. Ms. Santana identified a grievance submitted to Mr. Milone by respondent through Mr. Cortese, dated October 31, 1991 (P-7).

Ms. Santana testified that during the regular school year respondent was required to work from 6:30 a.m. to 3:30 p.m. with one hour for lunch. Summer hours were from 7 a.m. to 4 p.m. with one hour for lunch. Ms. Santana testified that she was aware on one day respondent did not work until the 4 p.m. summer hour. She saw another custodian, Mr. Azar at 1:30 or 2 p.m. and asked where respondent was. Mr. Azar said that respondent had left for the day. When she inquired of the school secretary as to whether respondent had reported his leaving, the secretary was unaware that respondent had left. As a result, Ms. Santana directed a letter to Mr. Milone, dated June 28, 1991 (P-19). Ms. Santana testified that on the next day she gave a copy to respondent and she inquired as to why he left early and whether he was aware of the procedure to call-in. She indicated that respondent merely shrugged.

Ms. Santana testified that she performed an evaluation of respondent on June 6, 1990. She indicated that if the other custodians under respondent's supervision did not wish to perform an assignment, respondent would simply ignore it. In addition, he failed to follow-through with repairs and failed to order supplies. She indicated that respondent did not comprehend his responsibilities or carry them out and that his attitude was "you can't tell me what to do". With respect to absenteeism, Ms. Santana indicated that every pay day respondent was out and that he would only come in to pick up his check.

On cross-examination, Ms. Santana indicated that she was not pleased with the performance of another custodian, Samir Azar. She requested that he be either transferred or terminated. She indicated that he is now serving as a chief custodian in another school.

Ms. Santana also testified that the assistant supervisor of respondent was Mr. Ruiz who appeared at the school to observe and direct respondent one to three times each week. However, Mr. Ruiz never submitted any documentation of his observations or directions to Ms.Santana.

When Ms. Santana was questioned concerning her evaluation of respondent of September 26, 1989 (R-1), she indicated that this evaluation was not too bad. She explained that at the time she was trying to work with respondent and she felt that he was trying to improve, so she gave him the benefit of the doubt. She indicated that she collaborated on this evaluation with Mr. Ruiz. Respondent was very cooperative with her during September, 1989, so she gave him a positive evaluation as an incentive and as motivation. They were both new to the building and she was trying to work with him. Even though she was not satisfied with the cleanliness at the beginning, she gave a satisfactory evaluation. She indicated that this evaluation was not entirely truthful but was given in order to work with respondent.

The evaluation of March 11, 1991, (R-2) was done by Mr. Milone with the typewritten portion of the evaluation being the comments of Ms. Santana. In this evaluation, Ms. Santana indicated that another custodian, Mr. Ortega, was doing all of the work because respondent and Mr. Azar could never be found. That was the purpose behind the second sentence in the comments. With respect to defying his directives, this referred to Mr. Azar regarding the unlocking of the custodian's door. She indicated that she did not feel that Mr. Milone inquired of her as to whether respondent was doing his job properly with respect to the specific matters evaluated by letter grades.

Ms. Santana indicated that the school district was taken over by the State so that she did no evaluations for 1991-1992 school year.

Ms. Santana indicated that she prepared the charges regarding respondent's attendance pattern. He was usually absent on pay day or the day after a pay day. This pattern of absences started in school year 1989-1990 and continued in school years 1990-1991 and 1991-1992.

Ms. Santana indicated that she wrote the letter of December 20, 1989, to Mr. Milone (P-13) because she wanted to review the vacation schedules with respondent in order to see when the custodians would be in the building.

Ms. Santana admitted that she differed with respondent concerning his evaluation of Mr. Azar. However, she denies telling respondent to negatively evaluate Mr. Azar. She admitted telling Mr. Azar that if he did not adhere to directives and properly clean the building that she would see that he was transferred or terminated.

Ms. Santana testified that respondent came in to the school building on October 31, 1991 to pick up his check. On redirect examination, Ms. Santana corrected her prior testimony by clarifying that she started at School No. 11 in 1989 (P-21) and that respondent was first under her supervision at the end of August, 1989.

Benjamin Clanton, Assistant Supervisor of Custodial Services, testified as to this matter. He indicated that as Assistant Supervisor he checks the various schools, assesses the work of the chief custodian, assigns workloads, checks time books and checks the cleanliness of school buildings. He is familiar with respondent and he indicated that he was sent in by Mr. Milone at the request of Ms. Santana to check respondent's work. He indicated that he was first sent in to check in either school year 1989-1990 or early in school year 1990-1991. Mr. Milone was getting complaints from Ms. Santana, and Mr. Milone requested that Mr. Clanton accompany Mr. Ruiz to School No. 11. He explained that Mr. Ruiz is no longer a supervisor and that he is presently the custodian in School No. 29.

On his first observation, he met with respondent, the custodial staff and Ms. Santana and took a walking tour of the school. He checked the staircases, bathrooms, cafeteria, halls and other areas and Ms. Santana pointed out areas that she was not satisfied with. He agreed with Ms. Santana that the areas were not cleaned the way they should be. The bathrooms on the second floor contained graffiti on the tiles and the sinks were not clean. Grafitti was found on the staircases. The cafeteria floor had been mopped but was not clean. With regard to the two bathrooms, the boys' rooms sinks and the bases of toilet bowls were not clean. The sinks and mirrors were not washed. He felt that not enough attention had been given to the cleaning of the toilet bowls and they had water rings. Overall, they were found not to be satisfactory. The baseboards were dirty and streaky. This indicated that they had been cleaned but this had not been done properly or had been done hastily.

Mr. Clanton testified that the cafeteria floors were not thoroughly mopped or had not been mopped properly. He touched the cafeteria floor and it seemed filmy. He indicated that he should not have gotten a filmy feeling.

On the outside of the school he found some glass and garbage in the playground areas.

He visited School No. 11 two or three weeks after this first visit. Usually his visits were because Ms. Santana had called complaining about respondent. On these visits and inspections he usually commented to respondent advising him that his cleaning was not satisfactory. Respondent did not agree but did not disagree. In addition, respondent did not deny that they were his areas that were found not to have been satisfactorily cleaned.

Mr. Clanton testified that he made four or five visits to School No. 11 related to complaints about respondent's cleaning. He also made other nightly visits. On these visits he would meet with Ms. Santana and respondent, check respondent's work areas and try to straighten out problems. For example, when he returned to the second floor boys' room, he felt that respondent did try and that they were better and cleaner than previously. In addition, the cafeteria floors had improved. However, the areas pointed out by Ms. Santana had not been cleaned properly. Whenever he checked areas at night they had always been done properly. Mr. Clanton testified as to the responsibilities of a chief custodian including the supervision of the other custodians and their training. Mr. Clanton felt that respondent was a little lax, that he was not forceful enough and that he was not interested enough in the cleanliness of the building. He would do something if he was told but Mr. Clanton felt that the chief custodian should do things without being told.

Mr. Clanton testified that he did not examine the portable classrooms and that Ms. Santana did not complain to him about the portables or about the other custodians. He also felt that respondent had the skills to perform but did not do so properly. He testified that Ms. Santana was not satisfied with Mr. Azar but there were no complaints from Ms. Santana about Mr. Ortega. He explained that respondent displayed a nonchalant attitude and that respondent felt he was cleaning properly. Mr. Clanton testified that respondent was never insubordinate to Ms. Santana in his presence.

With respect to the glass in the playground, Mr. Clanton felt that it was not safe but he was not sure when it got there. He also indicated that many times evaluations were not done because of the takeover of the school district by the State.

Lewis W. Milone, Supervisor of Custodial Services for petitioner testified that he familiar with respondent. When respondent was first considered as a chief custodian, he met with respondent and outlined the duties of the chief custodian. He gave respondent an outline of his responsibilities in September 1988. He indicated that the chief custodian is responsible to inspect the cleanliness of the building, the operation of the heating plant, the responsibility to clean the outside of the school building, to respond to the principal's requests, to meet the needs of the building and to direct his custodial staff as to their responsibilities.

Mr. Milone testified that about four to six months after respondent was named Chief Custodian at School No. 11, Paula Santana contacted him about having problems with respondent regarding his attitude and his lack of motivation. Mr. Milone indicated that he wrote a memo to respondent on January 4, 1990, because of a pattern of respondent taking off around pay day. In addition, his leadership quality was lacking. Mr. Milone indicated that he directed this memorandum to respondent on January 4, 1990, to which he attached the performance responsibilities of the chief custodian and the custodian (Exhibit P-25). In the memo Mr. Milone gave respondent three months to improve. Since the respondent was new, Mr. Milone testified that he sent Mr. Ruiz to assist him in getting on track. It was reported back to him through Ms. Santana and Mr. Ruiz that respondent was not performing his duties. He failed to develop work schedules, failed to submit multireports and quarterly reports or submitted them late. Mr. Ruiz gave Mr. Milone verbal reports as to some areas that need improved cleaning. In addition, vacation schedules for holiday periods were not provided to the principal but were sent directly to Mr. Milone by respondent. Mr. Milone indicated that Mr. Cox was given three months to correct his shortfalls in order to motivate him.

Mr. Milone testified that Mr. Santana spoke to him about her policy of keeping all but one of the entrance doors to the school locked, and Mr. Milone indicated he spoke to respondent about complying with this policy. In addition, he had another discussion with respondent after the incident of May 25, 1990 (Exhibit P-8). At that discussion, respondent said that he would go out of the custodian's door and go across the street for a smoke.

Mr. Milone testified that on October 31, 1991, he saw respondent at School No. 5 in the morning and that respondent had a meeting with the union representative. It was a pay day and the Chief Custodian usually came into pick up a package of checks for the schools. He later found that respondent reported in sick on that date and he then received a grievance from respondent (Exhibit P-7).

On cross-examination, Mr. Milone identified the evaluation of respondent of September, 1989 (Exhibit R-1). However, he indicated he is not sure if he actually reviewed this. It indicates that respondent's work was acceptable. He explained that he instituted a system of evaluating the custodians quarterly where he would evaluate them once each year and the assistant supervisors would evaluate them the other three times. He further explained that a single annual evaluation commenced in late 1991, but he does not recall if additional evaluations were done of respondent. Mr. Milone admitted that during the three-month period following the memo of January 4, 1990 (Exhibit P-25), respondent was performing satisfactorily.

In response to the foregoing charges, respondent testified and produced the testimony of Modesto Ortego and Samir Azar.

Respondent testified that he was transferred to School No. 11 in April 1989. Ms. Santana arrived in July, 1989, as the acting principal. He indicated that he holds a black seal license to operate a low pressure boiler at School No. 11. His subordinates were Mr. Ortega and Mr. Azar.

He testified that School No. 11 is a three-story building, with the first floor consisting of administrative offices. There are two portable classrooms in the playground. The basement consists of the custodian's room, a cafeteria, a library and storage area.

Respondent testified that he made up the custodial work description (Exhibit P-2). He testified that the standard routines were already in place and he adhered to the daily, weekly, monthly, bi-yearly and summer routines specified in the custodial work description.

With respect to the portable classrooms, he indicated that the floor covering consisted of tile, which was sinking down and tiles were working their way out. They were in bad shape and he cleaned them as best as he could. He called

maintenance to make repairs. In addition, there were holes in the ceilings of the portable. The respondent testified that he would sweep, take out the garbage and mop any spills. He indicated he mopped the bathrooms everyday because of the smell, but they were beyond hope. In addition, he sprayed them with a deodorizer.

Respondent testified that the smell in the second floor bathrooms in School Noll was the same and it could not be removed.

Respondent testified that the carpenters replaced part of the floor in the portable classrooms. He indicated this was the part of the floor between the bathrooms and had rotted out. In addition, the roof leaked but was never repaired and there was no response to his work order request. A few of the teachers complained to him about the bathrooms but none of the teachers in the portable classrooms ever complained to him about the cleaning of the classrooms.

Respondent testified that he cleaned the nurse's room each day and that the nurse never really complained to him about it.

With respect to the outside grounds, respondent testified that eacfh day he would go outside and pick up all the large material and most of the glass. He found broken bottles of wine and beer. He explained that all of the custodial staff cleaned the outside grounds. He also indicated that there was a small area which he referred to as a pit on the side of the school which was completely fenced in. He indicated that this was not used by the custodians but that people would throw trash in there.

With respect to the custodian's room, he indicated that he was obligated to keep it decent, but that no one ever complained to him that it was not kept clean.

Respondent testified that Mr. Clanton occasionally came to School No. 11 and on these occasions Mr. Clanton would speak to him about matters in general, and that any problems that he pointed out were corrected by respondent. He indicated that Mr. Clanton came to School No. 11 approximately three times. He indicated that Mr. Clanton never said to him that he was not doing his job properly. He also indicated that he never really had any separate meetings with Mr. Ruiz. He indicated that Ms. Santana would show him areas where there was a little dirt and that he would take care of it. In addition, Ms. Santana complained to him about Mr.

Azar. However, he felt that Mr. Azar was doing his job, but that he could not please Ms. Santana.

In January, 1990, respondent testified that Ms. Santana asked him to help her get rid of Mr. Azar. It was at this point that things started getting out of hand. Respondent testified that he responded to Ms. Santana that Mr. Azar was doing a fine job and he asked Ms. Santana to point out what Mr. Azar was doing wrong and it would be corrected.

Respondent testified that he never saw the letter from Ms. Bennett of January 5, 1990 (Exhibit P-1), or the letter of Ms. Puglia, dated January 5, 1990 (Exhibit P-3), before the tenure charges filed in this matter.

With respect to the locking of the doors to the school building, he would open certain doors in the morning and the other custodial staff would lock up at night. He explained that all of the four other entrances were to be unchained but to remain locked. Another door to the school that is near the custodian's room opens to the playground and he explained that the custodians used this door to carry out garbage which was bagged and put over the fence. On one occasion, Ms. Santana told him that that door was to be locked at all times. He kept the door locked except when taking out the garbage at lunch time. He indicated he never saw the memo of March 25, 1990, from Ms. Santana to Mr. Milone (Exhibit P-8) before the tenure charges and denies the facts set forth therein. He indicated that at no time did Ms. Santana ever tell him never to use the custodian door. He indicated that the Summer street door was unchained in the morning but remained locked. He indicated that with respect to Ms. Santana's memo of May 30, 1990, to Mr. Atallo that he does not believe he saw this before the tenure charges.

Respondent testified that he was not insubordinate. He indicated that every time Ms. Santana saw Mr. Azar, she was always looking for a problem. He indicated that he does not believe he saw Ms. Santana's letter of June 1, 1990 to Mr. Milone before the tenure charges and he feels that the four items in that letter were blown out of proportion. Respondent testified that Ms. Santana asked for his help prior to sending out the letter of June 1, 1990, and that the situation hit a boiling point between Ms. Santana and Mr. Azar in June, 1990.

Respondent testified that Ms. Santana gave him the evaluation of March 19, 1991 (exhibit R-2), as well as that of September 26, 1989 (Exhibit R-1). He

indicated that Ms. Santana did not complain to him in any way about his work. He also testified that he does not recall ever seeing the letter from Ms. Santana to Mr. Milone, dated December 20, 1989 (Exhibit P-13), relating to the Christmas vacation work schedule submission, prior to the tenure charges. Respondent recalls that he was required to prepare a work schedule and give Ms. Santana a copy, which he did by giving a copy to her secretary. He indicated that no one ever spoke to him about the work schedules being submitted late or in an improper manner.

Respondent testified that he recalls receiving the memo of January 4, 1990 (Exhibit P-25), from Mr. Milone with the attachments. He does not believe he spoke to Mr. Milone thereafter. In addition, Mr. Milone never spoke to him about anything he was doing wrong other than sending this memorandum.

With respect to the pattern of absences, respondent testified that he was never absent for reasons other than illness. In addition, neither Ms. Santana, Mr. Milone, Mr. Ruiz nor Mr. Clanton ever spoke to him about his absences, and no one ever questioned him about his absences, never asked him for medical verification and never sent him to a doctor to verify his illness.

Respondent recalls receiving a copy of a letter from Ms. Santana to Ms. Milone, dated July 2, 1990 (Exhibit P-15). He indicated that he remembers submitting the work schedules to Mr. Milone. He explained that the procedure is that the work schedules are submitted to Mr. Milone, who then approves them and send a copy of them to the principal. He indicated that in this case, Mr. Milone never sent the work schedules to Ms. Santana.

Respondent testified that his evaluations of his staff were submitted late on one occasion; however, he submitted these evaluations within the time period as extended by the memo of October 10, 1990 (Exhibit P-16).

With respect to the letter from Ms. Santana to Mr. Milone, dated June 28, 1991, respondent testified that whenever he left the building, he would either inform Ms. Santana's secretary or Mr. Azar. On this occasion, he informed Mr. Azar because Ms. Santana's secretary was not present, and that he left because he was not feeling well. He indicated that Mr. Milone never spoke to him about this particular incident.

Respondent indicated that he continuously complained to Mr. Milone about Ms. Santana's constant complaints. Mr. Milone advised him to "hang in there and do the best you can." Mr. Milone indicated to him on several occasions that Ms. Santana is his principal and to do the best that he could.

Respondent was questioned concerning the Staff Noncompliance Notice of May 9, 1991 (Exhibit P-4), where he was alleged to be remiss in failing to clean any of Mr. Ortega's classrooms in his absence. Respondent testified that he recalls receiving this Notice. He indicated that if a custodian is out, the other custodians help out by taking care of trash and large garbage for two days but that, a replacement is provided for absences of more than three days. The help consists of emptying baskets, keeping bathrooms clean and cleaning up the big stuff. Mr. Ortega was only absent one day.

Respondent also recalls receiving the memo of October 19, 1991 (Exhibit P-5), regarding the cafeteria, the library and the second and third floor bathrooms. He indicated that there was no discussion of the memo with Ms. Santana. He testified that the health department inspected the cafeteria every year and that it always passed. He also indicated that the library was the responsibility of Mr. Ortega.

With respect to the alleged insubordination on October 29, 1991, respondent testifies that he recalls receiving the memo of that date (Exhibit P-6). He indicated that on that occasion he explained to Ms. Santana the conditions of the bathroom, including rotting floors and the tiles coming up. He testified that he said to Ms. Santana "maybe you can do a better job yourself," but he denies saying that she should do it herself. Ms. Santana then told him that she would seek his termination.

Respondent admits preparing the grievance of October 31, 1991 (Exhibit P-7). He testified that on that date, he came in and opened the school but he was feeling very ill. He eventually had to leave and he went home. After he went home he stopped by to see Mr. Milone. However, no one ever asked him to submit a doctor's note or to verify his illness on that day.

Respondent testified that the Notice of Noncompliance of November 1, 1991 (Exhibit P-18) is incorrect. He indicated that on that date he called Mr. Milone first and then called the school. He testified that he called Mr. Milone before 7 a.m.

to make sure that the school would be opened. He does not know when he called the school.

In summary, respondent testified that he did a very good job in cleaning School No. 11. The building was always secured. He was never insubordinate, although he disagreed with Ms. Santana about Mr. Azar. Finally, he testified that he submitted written evaluations in a timely fashion and did the same with respect to vacation schedules.

On cross-examination, respondent indicated that he is familiar with the contents of the memo of January 4, 1990 (Exhibit P-25), and that he never questioned the accuracy of these records. On those dates, he always reported for work but left after lunch, after leaving a note to the principal. This occurred on October 31, 1989, November 16, 1989, November 30, 1989 and December 15, 1989. December 22 and 29, 1989 was bereavement leave. In addition, the respondent admitted that he was absent on February 16, 1990, pay day being February 15, on March 30, 1990, pay day being March 30 and on June 1, 1990, pay day being May 31, 1990. During the 1990-91 school year, respondent was absent on November 2, on December 14, which was a pay day, on March 15, which was a pay day and on April 30, which was a pay day. He indicated that he was always sick but that he never saw a doctor for any of these illnesses. On October 31, 1990, respondent testified that he became sick and left. However, he later felt better but did not return to work. He wanted to let the system calm down. He indicated that all of the turmoil was causing his illness and felt felt that his filing of a grievance on that date was an appropriate use of his time. He saw Mr. Cortese and he felt better but still not good enough to return to work.

With respect to the evaluations, respondent indicated that he disputed them but agreed that he would try to do better. He also indicated he never responded in writing.

Modesto Ortega, a Custodian in School No. 11, was also called to testify on behalf of respondent. He confirmed that respondent would check his work and that if he sometimes forgot something, respondent would either advise him or take of it. He would then come in the morning and clean the spots which he missed. Mr. Ortega also testified that the playground was to be cleaned everyday by himself and Mr. Cox and that this was done. He explained that on many occasions school children would bring food and throw bags or bottles in the playground or that

people would hang out there. As a result, they would sometimes have to clean this in the afternoon.

Mr. Ortega testified that respondent told him that the custodian's door had to be kept closed and that he never saw respondent leave the door open except when it was being used for deliveries or for garbage removal.

Mr. Samir Azar testified that he is now at School No. 14 as a custodian. He indicated that respondent checked his work almost daily. If he forgot to clean a bathroom or empty a garbage can, respondent would take care of it. He indicated that in the two hours after school he could not get two floors cleaned and that he would come in early at 8 a.m. each morning to finish up his work because he could not finish it the night before. However, Ms. Santana would come in early and catch him finishing up. He indicated that he was getting written up for things that were not his responsibility.

On cross-examination, Mr. Azar indicated that on one occasion he was on a break and was having an ice cream cone across the street. On that occasion, respondent had become sick and and had gone home.

Mr. Azar also indicated that he and respondent would take cigarette breaks. On one occasion, they did not close the door but placed a piece of wood in the door to keep it opened. They were then told not to leave the door open and they kept it closed after that.

LEGAL DISCUSSION AND ANALYSIS

As a member of the custodial staff, respondent is protected by the provisions of N.J.S.A. 18A:17-3, which provides that every public school janitor of a school district shall hold his office, position or employment under tenure during good behavior and efficiency. In Barnes v. Bd. of Jersey City, 85 N.J. Super. 42 (App. Div. 1964), certif. denied, 43 N.J. 450, it was held that the term janitor was used in a generic sense with the intention of including all janitorial and custodial employees of a school district.

Under the provisions of the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 to -18.1, it is provided that no person under tenure of office, position or employment shall be dismissed or reduced in compensation except for inefficiency,

incapacity, unbecoming conduct or other just cause. Additional procedural safeguards, including the right to a list of charges, a sworn statement of evidence and an impartial hearing are included in this law.

Tenure protects employees, including teachers, from arbitrary dismissal for unfounded, flimsy or political reasons. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 73 (1982). It is designed to aid in the establishment of a competent and efficient school system by affording to employees a measure of security in the ranks they hold after years of service. Viemeister v. Prospect Bd. of Ed., 5 N.J. Super. 215, 218 (App. Div. 1949). The burden of proof in such a proceeding is upon the charging party to establish the truth of the charges by a fair preponderance of the credible evidence. In re Polk, 90 N.J. 550 (1982). In order for testimony to be credible, it must not only proceed from the mouth of a credible witness but must be credible in itself and must be such as the common experience and observation of mankind can approve as probable in the circumstances. Spagnulo v. Bonnett, 16 N.J. 547, 554-555 (1954); In re Perrone's Estate, 5 N.J. 514, 521 (1950). A trier of fact may reject testimony because it is inherently incredible or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congelton v. Dura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

Discussion as to First Charge

The testimony of school principal Paula Santana was to the effect that respondent failed to properly clean two portable classrooms and bathroom facilities located in the portable unit and the second floor bathrooms. This testimony was corroborated by Sandra Montagudo, Gloria Bennett and Margaret Turco. Ms. Santana is the only one who testified as to the failure of respondent to properly clean the nurse's room. The testimony of Sandra Montagudo was entirely credible. She testified that in school year 1989-1990, her students would sweep the floors and that she used her own supplies to clean the classroom. She indicated that she took these steps because the children ate their lunch in the classroom. Gloria Bennett was also credible in testifying that in school years 1989-1990 and 1990-1991, she could tell when the portable classroom had not been swept because items that had been left on the floor the previous night remained there. She also observed that the floors were mopped approximately two times per week. Margaret Turco indicated she never made any observations to determine whether the portable classroom floor had been mopped or swept, but she corroborated that the second floor boy's bathrooms smelled terribly with a foul odor during school year 1990-1991.

Benjamin Clanton, Assistant Supervisor of Custodial Services also tended to corroborate the testimony of Ms. Santana. He indicated that on his first visit the second floor bathrooms were not clean and that the cafeteria floor had been mopped but was not clean and had not been mopped properly. He also indicated that he found some glass and garbage in the playground areas. However, he also testified that when he returned on subsequent visits that he felt that respondent was trying and that the second floor bathrooms were better and cleaner than previously. He also indicated that he felt respondent was a little lax and not forceful enough and he was not interested enough in the cleanliness of the building.

Based upon the foregoing testimony, I **FIND** that the testimony of Ms. Santana as corroborated by the testimony of Sandra Montagudo, Gloria Bennett, Margaret Turco and Benjamin Clanton was credible and preponderates over the testimony of respondent. I **FIND** that respondent, during school years 1989-90, 1990-91 and 1991-92, failed to properly clean the portable classrooms, the second floor boy's and girl's bathrooms, the cafeteria and the playgrounds and outside grounds of School No. 11. I **FIND** that this failure to properly clean these areas occurred on a continuous basis despite numerous follow-up requests by the school building principal and by respondent's supervisors.

Discussion as to Second Charge

The next issue involves whether respondent failed to properly secure the school building pursuant to the instructions of Ms. Santana and his supervisors, thereby endangering the safety and well-being of the children and staff of the school building. The testimony of Ms. Santana was undisputed concerning her policy adopted for security purposes that only the Market Street entrance of the school was to be used for access. Despite this, Ms. Santana found another door open in October 1988. In response to several meetings regarding these directives, respondent indicated that he would speak to the other custodians and that he would make sure other doors were not opened again. Respondent testified that he only opened the other door when taking out the garbage. With regard to this issue, the testimony of both Ms. Santana and respondent was credible. Certainly if doors were left opened on one or two occasions and there was subsequent remedial steps taken to make sure that the doors were closed, this should not be sufficient to support a charge of misbehavior, neglect and insubordination against the Chief Custodian. In summary, the testimony and evidence regarding the alleged failure of respondent to properly secure the school building, thus endangering the safety and well-being of the

students and staff does not preponderate either in favor of or against respondent. Accordingly, I **FIND** that petitioner has failed to establish the Second Charge that respondent failed to properly secure the school building pursuant to the instructions of the school principal and his supervisors, thereby endangering the safety and well-being of the children and staff in the school building.

Discussion as to Third Charge

The Third Charge deals with whether respondent was insubordinate on numerous occasions by failing to comply with the valid and reasonable directives of the school principal as evidenced by his leaving a door open in direct contravention of the orders of the building principal. Insubordination may be defined as the refusal to obey the direct lawful order of a superior as well as willful disobedience of the rules of the work place; this definition implies that a person knows what he or she is doing and requires proof of intent. 67 C.J.S., Officers, §133 at p. 512-513. In view of my prior finding, I **FIND** that the petitioner has failed to establish by a preponderance of the credible evidence that respondent was insubordinate in this regard. It certainly follows that if I did not find that respondent failed to comply with the directives of the school principal and his supervisors by failing to properly secure the school building, that the charge of insubordination on this basis is also not supported by a preponderance of the credible evidence.

The second portion of the Third Charge is whether respondent displayed conduct constituting insubordination on numerous occasions by his failure to insure the proper cleaning of the building in spite of numerous requests. In applying the above definition of insubordination to the actions of respondent, I **FIND** that the respondent was insubordinate in view of the numerous directives and requests made of him to clean his assigned areas in a proper manner. Under these circumstances, I **FIND** that respondent was guilty of conduct constituting insubordination by his failure to insure the proper cleaning of the areas specified in the Discussion as to the First Charge, set forth above, in spite of numerous requests.

Discussion as to Fourth Charge

The next issue to be decided is whether respondent has demonstrated neglect of the duties of his office as evidenced by his failure to submit written evaluations in a timely manner, his pattern of absenteeism, and his failure to submit vacation schedules in a timely manner. With respect to respondent's alleged failure

to submit written evaluations, I **FIND** that there is a lack of sufficient evidence to support this charge. On the one occasion when respondent admits to having been late, he also points to a memorandum which has the effect of giving him an extension to provide these evaluations. Accordingly, I **FIND** that respondent is not guilty of neglect of the duties of his position as evidenced by his failure to submit written evaluations in a timely manner.

As to whether respondent is guilty of neglect of the duties of his office by reason of his pattern of absenteeism, I **FIND** the proofs to be less than sufficient in this regard. No notifications were provided to respondent as to excessive absenteeism no efforts were made to remind respondent of his obligations to improve his record of absences, and there is no indication that petitioner considered the nature of respondent's illnesses. See, Smith v. Bd. of Ed., City of Trenton, OAL DKT. NO. EDU 5255-88 (March 6, 1989), adopted Comm'r of Educ. (April 18, 1989). Accordingly, I **FIND** that the charge against respondent that he is guilty of neglect of duty based on his alleged pattern of absenteeism has not been sustained by a preponderance of the credible evidence.

As to whether respondent is guilty of neglect of the duties of his office based on his failure to submit vacation schedules in a timely manner, the testimony of the parties as to this question was confusing. Ms. Santana indicated that it was the obligation of respondent to consult with her concerning the vacation schedules prior to his submitting them to Mr. Milone for approval. On the other hand, Mr. Milone indicated that these vacation schedules were to be submitted to him for approval and a copy would then be given to the school principal. The testimony of respondent seemed to agree with the testimony of Mr. Milone. Thus, there was clearly a lack of communication between the parties as to the obligation and responsibility of respondent with respect to the preparation and submission of vacation schedules. In addition, the testimony and evidence seem to establish only one occasion, involving the Christmas vacation of 1989, that the vacation schedule was not filed in a timely fashion but was filed several days late. Under these circumstances, I **FIND** that there is a lack of sufficient credible evidence to establish by a fair preponderance of the evidence that respondent is guilty of neglect of the duties of his office because of his alleged failure to submit vacation schedules in a timely manner.

Discussion as to Fifth Charge

Petitioner alleges in the Fifth Charge that respondent demonstrated conduct constituting misbehavior by informing the school building office that he would be out sick after his workday began and then proceeding to meet with another member of his association and preparing a grievance against the principal. The testimony as well as the supporting documentary evidence clearly establishes that this was the case. Respondent's explanation was that he felt very ill during the day, went home but then felt well enough to go to the administrative offices of the school district in order to attempt to pick up his paycheck as well as to meet the president of his association. This is clearly misbehavior, and respondent's testimony that he felt well enough to accomplish these additional matters but did not feel well enough to work is not credible. Accordingly, I **FIND** that respondent is guilty of conduct constituting misbehavior by his informing his school principal that he was be sick after his workday began on October 31, 1991, and by then proceeding to attempt to pick up his paycheck and by meeting the president of his association and preparing a grievance against the principal.

Discussion as to Sixth Charge

In the Sixth Charge respondent is charged with leaving his job duties before his workday was scheduled to end without notification of his school principal. This occurred on June 28, 1991, when Ms. Santana saw another custodian at approximately 1:30 or 2 p.m. and asked where respondent was. The custodian advised Ms. Santana that respondent had left for the day. She then inquired in the school office as to whether respondent had reported his leaving and there was no record of respondent having so reported. With respect to this charge, respondent testified that the school secretary was not present and that he advised a custodian, Mr. Azar, that he was feeling ill and was leaving for the day. However, it was respondent's responsibility to notify the school principal either directly or through her secretary or to otherwise advise his supervisor in the central office of his being sick and of the fact that he was leaving for the day. I **FIND** that respondent's failure to do so amounts to misbehavior and is clearly a violation of his obligation and responsibility as an employee of the school district.

Discussion as to the Issue of Retaliation

Respondent takes the position that these tenure charges were brought against him in retaliation for his refusal to falsely and negatively evaluate another custodian at the demand of the building principal. Respondent's testimony was to the effect that Ms. Santana requested respondent's assistance in seeking the termination or transfer of another custodian, Samir Azar. However, there is no indication that the actions or activities of Ms. Santana against respondent were not undertaken in good faith. There is no indication that Ms. Santana felt anything other than an honest belief that Mr. Azar, as well as respondent, were not properly fulfilling their respective positions. There is nothing in the record to establish that the within charges are in retaliation for anything or were undertaken for reasons other than Ms. Santana's honest belief and opinion that respondent was not performing his duties and responsibilities in a proper manner. Accordingly, I **FIND** that there is insufficient credible testimony and evidence to establish that the within tenure charges are in retaliation for respondent's refusal to falsely and negatively evaluate another custodian at the demand of the building principal.

Discussion as to Respondent's Affirmative Defenses

In Respondent's Brief submitted after the conclusion of the hearing in this matter, there were included two affirmative defenses. The first affirmative defense is that Ms. Santana, the school building principal, discriminated against respondent because he is a non-hispanic. The second affirmative defense is that petitioner should not be allowed to bring tenure charges against respondent because they failed to evaluate him.

The attorney for petitioner objects to respondent's presenting of these affirmative defenses and argues that fairness dictates that these affirmative defenses be given no consideration. He refers to N.J.A.C. 6:24-1.6, which provides that upon transmittal of a matter to the OAL, motions to amend a petition or answer shall be determined by the OAL. In addition, he relies on Rivera v. Gerner, 89 N.J. 526 (1982), wherein the New Jersey Supreme Court stated that the continuous thread running through decisions dealing with the injection of unpleaded or unargued issues into a case is a necessity to avoid prejudice or surprise. The attorney for petitioner argues that petitioner would be both surprised and prejudiced if these issues were considered.

I agree with the position of petitioner that respondent should not be permitted to raise these affirmative defenses at the present time. On the other hand, attorney for respondent's questioning of Ms. Santana on cross-examination in an effort to show her bias against respondent because he is a non-hispanic is relevant as to the question of Ms. Santana's motivation and the possibility of her bias against respondent. Likewise, the cross-examination of Ms. Santana and Mr. Milone concerning the failure to evaluate respondent was similarly relevant to show conduct on the part of petitioner which may not be consistent with the filing of charges against respondent. A witness' motivation, biase or interest in a case are always issues which are permitted to be inquired into during cross-examination. See Moiseyev v. New Jersey Racing Comm'n, 239 N.J. Super. 1, 9 (App. Div. 1989).

Based upon the above enunciated principles, I specifically reject any consideration of the two affirmative defenses raised by respondent in its briefs submitted after the conclusion of the hearing. With respect to the question whether Ms. Santana was biased against respondent because he is non-hispanic, I **FIND** based upon my observation of Ms. Santana, as well as her manner of responding to questions on both direct and cross-examination that bias against respondent because he is non-hispanic did, in fact, exist. It is for this very reason that my finding respondent guilty as to specific charges occurred only as to those charges where the testimony of Ms. Santana was corroborated by the testimony of others and/or by documentary evidence not offered by Ms. Santana.

Discussion of Penalty

Respondent has been found guilty of the following charges:

1. Misbehavior and neglect during school years 1989-90, 1990-91 and 1991-92, by continuously failing to clean properly the portable classrooms, the second floor bathrooms, the cafeteria, and the outside grounds of School No. 11 despite numerous follow-up requests by the school building principal and by respondent's supervisors.

2. Conduct constituting insubordination by his failure to insure the proper cleaning of the portable classrooms, the second floor bathrooms, the cafeteria and the outside grounds of School No. 11 in spite of numerous requests.

3. Misbehavior on October 31, 1991, by informing the school building office that he would be out sick after his workday began and then proceeding to meet with another member of his association and preparing a grievance against the principal.

4. Misbehavior and neglect of his duties by leaving his job on June 18, 1991 before his workday was scheduled to end without notifying the administration.

The next appropriate step, is to determine the remedy or penalty to be imposed.

The performance responsibilities of a Chief Custodian are numerous and varied. He is responsible for selecting assignments, scheduling and training of the custodial staff, the planning and overseeing of all maintenance and repair work, including safety, cleanliness and efficiency. He is obligated to maintain inventories of supplies, tools, equipment and fuel, to evaluate the performance of the custodial staff and to maintain the school and ground in good condition so that full educational use may be made of them (Exhibit P-25). The fact that the Legislature has seen fit to award tenure status to custodial employees, thus protecting them during their good behavior, clearly shows that school custodial staff members occupy a position of public trust. Any position which has among its duties and responsibilities the cleanliness of school buildings and classrooms for the purpose of protecting the health and welfare of the school children of our State, is clearly a position of public trust.

There was no testimony or documentary evidence submitted to show whether respondent was the subject of any prior disciplinary proceedings. Accordingly, it will be assumed that respondent's prior employment history with petitioner was satisfactory.

It is clear that respondent violated the public trust reposed in him to faithfully perform his duties as a chief school custodian. I **FIND** that based upon the findings of guilt of the charges set forth above that respondent should not continue to hold the position of chief school custodian. On the other hand, I **FIND** that there is no proof or evidence that respondent is unfit to hold the position of a custodian under the direct supervision of a responsible chief custodian. In addition, I **FIND** that some additional penalties should be imposed upon respondent to remind him of his

obligation and responsibility to the school children of this State, to perform such duties and obligations as are imposed upon him in a faithful and proper manner.

Accordingly, and after considering the nature of the findings of guilt and after considering the nature of the position, I **FIND** that respondent should be suspended for a period of six months. In addition, I **FIND** that respondent should suffer a reduction in his position to that of custodian.

DECISION AND ORDER

Based upon the foregoing, I hereby **FIND** respondent guilty of: (1) misbehavior and neglect during school years 1989-90, 1990-91 and 1991-92 by repeatedly and continuously failing to properly clean a school building on a daily basis despite numerous follow-up requests by the school building principal and his supervisors; (2) engaging in conduct constituting insubordination by his failure to insure the proper cleaning of the building in spite of numerous requests; (3) conduct constituting misbehavior by reporting out sick and by leaving his position before the end of the scheduled workday without notification on October 31, 1991; and (4) misbehavior and neglect of duties by leaving his job on June 28, 1991, before his workday was scheduled to end without notifying the administration. I **FIND** respondent not guilty of the charges of failing to properly secure the school building and of insubordination with respect to the failure to secure the school building door, and not guilty of neglect of duties of his position. It is hereby **ORDERED** that based upon the aforesaid findings of guilt, respondent shall be suspended for a period of six months, and shall be demoted to the position of custodian.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 7th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 21, 1993
Date

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

6/29/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 1 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

jz

LIST OF WITNESSES

For petitioner:

Sandra Montagudo
Gloria Bennett
Margaret Turco
Paula Santana
Benjamin Clanton
Louis W. Milone

For respondent:

Richard Cox
Modesto Ortego
Samir Azar

LIST OF EXHIBITS

P-1 Letter of G. Brown Bennett, dated January 5, 1990

P-2 Paterson Board of Education, Custodial Work Distribution, for respondent (undated)

P-3 Letter of Mrs. Puglia, dated January 5, 1990

P-4 Staff Non-Compliance Notice, dated May 9, 1991

P-5 Handwritten memo, dated October 19, 1991

P-6 Memo from Ms. Santana to respondent, dated October 29, 1991

P-7 Grievance addressed to Mr. Louis Milone from respondent, dated October 31, 1991

P-8 Letter to Mr. Louis Milone from Ms. Santana, dated May 25, 1990

P-9 Letter to Mr. Joseph Atallo, Ms. Santana, dated May 3, 1990

P-10 Letter to Mr. Louis Milone from Ms. Santana, dated June 1, 1990

P-12 Staff Non-Compliance Notice, dated May 16, 1991

P-13 Letter to Mr. Louis Milone from Ms. Santana, dated December 20, 1989

P-15 Letter to Mr. Louis Milone from Ms. Santana, dated July 2, 1990

P-16 Memo to respondent from Mr. Milone, dated October 10, 1990

P-18 Staff Non-Compliance Notice, dated November 1, 1991

P-19 Letter to Mr. Louis Milone from Mr. Santana, dated June 28, 1991

P-20 Evaluation, dated June 6, 1990

P-21 Letter of Appointment of Ms. Paula Santana, dated July 31, 1989

P-22 Resolution appointing Paul Santana as principal, effective July 1, 1991

P-23 1989-90 attendance record for respondent

P-24 Affidavit of Joan Constantime with payroll and attendance records of respondent attached

P-25 Memorandum to respondent, dated January 4, 1990, with two attachments

For the respondent:

R-1 Evaluation, dated September 26, 1989

R-2 Evaluation, dated March 19, 1991

OAL DKT. NO. EDU 1696-92

IN THE MATTER OF THE TENURE HEARING OF RICHARD COX, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. In accordance with an extension schedule granted by the Commissioner pursuant to N.J.A.C. 1:1-18.8, timely exceptions were respectively filed by respondent and the State-Operated District ("District"), as were replies thereto.

In his filings, respondent objects to the ALJ's having sustained Charge 1 (failure to properly clean premises and grounds), Charge 3a (insubordination related to such failure), Charge 5 (leaving work due to reported illness, then returning to pick up his paycheck and meet with union leadership regarding a grievance) and Charge 6 (leaving before end of workday without informing authorities), and further excepts to the penalties imposed as ultra vires (demotion) and unnecessarily severe (six-month suspension).

The District in turn objects to the ALJ's determination to dismiss Charge 2 (failure to properly secure school building), Charge 3b (insubordination related to such failure) and Charge 4 (failure to submit timely evaluations and vacation schedules;

unacceptable pattern of absenteeism), to the ALJ's finding of bias on the part of Principal Paula Santana, and to the imposition of a penalty less than full dismissal.

Specifically, with respect to Charge 1 (failure to properly clean premises and grounds, sustained by the ALJ), respondent argues that the only evidence in support of this charge came from Witness Santana, whose testimony the ALJ (properly) determined to reject wherever uncorroborated. Regarding school grounds, the testimony of Assistant Supervisor Clanton and Custodian Ortega established that the grounds were in fact cleaned each morning, but then fouled by people throwing garbage and debris into the area throughout the day. Regarding the cafeteria and second-floor bathrooms, the testimony of Clanton and Teacher Turco shows that respondent did clean these areas and therefore does not support Santana's contentions. With respect to the portable classrooms, placed against Santana's testimony are Clanton's admission that Santana never specifically complained to him about the portables, and several teachers' admissions that the rooms did show evidence of cleaning and that the condition of the facilities worked against their appearing clean, precluding judgment as to whether they had been cleaned or not. (Respondent's Exceptions, at pp. 1-5)

With respect to Charge 3b (insubordination in failing to carry out cleaning directives, sustained by the ALJ), respondent argues that, because the cleaning was in fact done as established under Charge 1, this contingent charge must necessarily fail. Moreover, there was considerable testimony to the effect that respondent did try to carry his job duties, even when the result might not have been as desired due to the condition of the

facilities and Ms. Santana's unrealistic expectations; nor did any witnesses other than Santana testify to having observed respondent being insubordinate. (Respondent's Exceptions, at pp. 6-7)

The District conversely argues for general acceptance of Santana's testimony as credible and unbiased, averring that there is no basis whatsoever, nor was any identified in the initial decision, for the ALJ's conclusion that Santana was not credible and had a racial bias against non-Hispanics. (District's Exceptions, at p. 3) Counter to this contention, respondent endorses the ALJ's determination, arguing that Santana's testimony showed her memory to be very poor, particularly with regard to dates, and further revealed her expectations to be unrealistic, her character vindictive, her truthfulness not always certain and her bias clearly in favor of Hispanics. (Respondent's Reply, at pp. 3-6)

With respect to Charge 2 and Charge 3a (failure to properly secure the school building and insubordination arising from such failure, both dismissed by the ALJ), the District points to Santana's testimony regarding her instructions in this area and to a memorialization (P-8) of how respondent failed to follow those instructions. (District's Exceptions, at pp. 1-2) Respondent in turn points to testimony establishing that he did in fact keep the building secure and frequently instructed his subordinates to do likewise, and notes the discrepancy between Santana's testimony to the effect that she herself saw the open door and the memorandum (P-8) demonstrating that she was merely told about it as yet another example of the inherent unrealiability of Santana's accounts. (Respondent's Reply, at pp. 1-2)

Regarding Charge 4 (pattern of absenteeism on/after payday, dismissed by the ALJ), the District argues that the January 4, 1990

memorandum (P-25) was sufficient warning about this problem, which continued for the remainder of 1990 and into 1990-91 as evidenced by respondent's undisputed attendance records. (District's Exceptions, at pp. 2-3) Respondent retorts that these records (P-24) show the problem to have improved significantly during 1990-91 and 1991-92, the incidence of absences on or after payday decreasing from eight instances in 1989-90 to three in 1990-91 to two and one-half in 1991-92; moreover, respondent was never asked to produce doctor's notes for any of his absences, nothing was offered to counter his testimony that his absences were due to illness, and he received no further indication of "pattern" attendance problems subsequent to the January 1990 memo. (Respondent's Reply, at pp. 2-3)

As to Charge 5 (leaving work and later preparing a grievance, sustained by the ALJ), respondent contends that the ALJ completely ignored testimony wherein he explained that on his way home after signing out sick, he merely stopped to pick up a previously prepared grievance and drop it off at appropriate administrative office before leaving school grounds for the day; moreover, this was a natural thing to do in that his illness largely stemmed from the emotional state brought on by his problems with Ms. Santana. The ALJ's account, respondent contends, wherein he went home, felt better and returned to school to prepare a grievance, is not based on any evidence presented at hearing. (Respondent's Exceptions, at pp. 8-9) The District counters that respondent himself testified that he went home prior to returning to filing the grievance, and that there was no testimony from anyone establishing that the grievance had been prepared previously. (District's Reply, at p. 1)

Regarding Charge 6, (leaving for day without notifying principal, sustained by the ALJ), respondent reiterates that he could not reasonably have been expected to inform persons who were not present of his leaving for the day, and it was entirely appropriate under the circumstances for him to have left word of his departure with a fellow custodian. (Respondent's Exceptions, at p. 10) The District in turn notes that respondent failed to notify any supervisor, which clearly constitutes misbehavior as properly found by the ALJ. (District's Reply, at pp. 1-2)

As to the penalty imposed, respondent argues that nowhere does the enabling statute (N.J.S.A. 18A:17-3) authorize the Commissioner to demote respondent; rather, under the terms of the law, he may only be "dismissed or suspended or reduced in compensation." (Respondent's Exceptions, at p. 11) Moreover, in the instant matter, the only potentially sustainable charges are Charges 5 and 6, which do not warrant so severe a penalty as a six-month suspension; however, in the event the suspension is sustained, respondent should be given credit for the period of his suspension without pay pursuant to N.J.S.A. 18A:6-14. (Respondent's Exceptions, at p. 12) The District counters that the law encompasses dismissal from a particular position as well as from tenured employment altogether, so that the demotion recommended by the ALJ is entirely within the scope of the Commissioner's authority (District's Reply, at p. 2); however, because respondent holds -- and would continue to hold under the ALJ's penalty -- a position of public trust for which the present proceedings have shown him unfit, the appropriate penalty in this matter is full dismissal rather than demotion and suspension. (District's Exceptions, at pp. 3-4)

Upon careful review of the record of this matter, including the transcript of hearings, the Commissioner affirms the ALJ's findings with respect to sustaining or dismissing the individual tenure charges, but modifies his determinations as to characterization of Principal Santana's testimony and the penalty to be imposed on respondent.

Initially, the Commissioner concurs with the ALJ and respondent that Principal Santana's testimony should be accepted in full only when corroborated by other sources. This concurrence is based on numerous instances where Santana's memory appears poor (e.g., confusion about dates), her recollections, however sincerely believed, are belied by other evidence (e.g., her perception that respondent's pattern of frequent absence on paydays persisted through 1992), and the personal tension between her and respondent, compounded by exacting standards and outspoken opinions, is manifestly evident. With regard to this latter point, without the opportunity to have observed witnesses directly, the Commissioner is unable to fairly adjudicate the questions of whether the root of such animus is necessarily bias against non-Hispanics as opined by the ALJ. Because the written record does not permit a firm conclusion in this regard, the Commissioner declines to impute such bias herein, instead qualifying the use of Santana's testimony for the reasons stated above.

Notwithstanding his reservations about Santana's testimony, however, the Commissioner finds, as did the ALJ, that corroborating evidence from other witnesses and documents is more than sufficient to sustain charges of neglect, insubordination and inappropriate behavior based on respondent's clear failure to adequately perform

his cleaning tasks or even recognize that he was so failing, and on his manifestly lax attitude toward his responsibilities. Respondent's exceptions pointing to witnesses who testified that he did do his assigned cleaning ignore documents and other testimony, sometimes from the same witness, establishing that although cleaning may have been done, it was done inadequately; nor would the condition of the District's facilities explain recurring problems such as unswept floors, carelessly wiped fixtures and tiles mopped with dirty water. Moreover, it is clear from respondent's own testimony that he believed -- indeed, still believes -- his work to have been fully acceptable, and that he re-cleaned or paid special attention to specified areas only in instances where they were explicitly brought to his attention on complaint or subsequent inspection by District supervisors. This same lack of comprehension and concern is evident in respondent's insistence that there was nothing inappropriate about his leaving work due to illness without notifying any supervisor, an oversight for which Santana's unavailability is no excuse, or about attending to the filing of a grievance on a day when he purported to be too ill to remain at work. (The Commissioner here notes that the Board's characterization of respondent's testimony on this latter issue, set forth ante, is borne out by the hearing transcript.)

In view of these findings, the Commissioner concurs with the ALJ that "respondent violated the public trust reposed in him to faithfully perform his duties as a chief school custodian" and that he did not perform his duties in a "faithful and proper manner." (Initial Decision, at pp. 33-34) The Commissioner disagrees, however, that respondent was not proven "unfit to hold the position

of a custodian under the direct supervision of a responsible chief custodian" and is thus deserving of a penalty less than dismissal. (Ibid.) While respondent appears willing to carry out specific directives to remedy deficiencies in his work on an instance-by-instance basis, it is equally clear that he would require virtually full-time oversight in order to ensure that his work was properly performed. There is no reason why a custodian found unfit to continue in his present position should be entitled to continued employment in the district when such employment would impose on his assigned supervisor the unwarranted burden of continually monitoring a subordinate demonstrated to be lax in both his assessment of what constitutes proper cleaning and in his actual carrying out of cleaning tasks.

Accordingly, the initial decision of the Office of Administrative Law is affirmed with modifications as set forth above, and respondent is dismissed from tenured employment in the State-Operated School District of the City of Paterson as of the date of this decision.*

IT IS SO ORDERED.

SEPTEMBER 9, 1993

DATE OF MAILING - SEPTEMBER 9, 1993

COMMISSIONER OF EDUCATION

* Having so ruled, the Commissioner does not reach to the parties' arguments on exception as to the Commissioner's authority to demote under N.J.S.A. 18A:17-3.

217-93

EDU #1696-92
C # 217-93
SB # 57-93

IN THE MATTER OF THE TENURE HEARING OF RICHARD COX, STATE-OPERATED SCHOOL DISTRICT OF THE OF THE CITY OF PATERSON, PASSAIC COUNTY.	:	STATE BOARD OF EDUCATION DECISION

Decided by the Commissioner of Education, September 9, 1993

For the Petitioner-Respondent, Russell J. Schumacher, Esq.

For the Respondent-Appellant, Bucceri & Pincus (Sheldon H. Pincus, Esq., of Counsel)

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

February 2, 1994

Date of mailing FEB 04 1994

218-93

218-93

MARYBETH DRISCOLL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
WEST ESSEX REGIONAL BOARD OF EDUCATION, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, riffed physical education teacher, claimed Board's action in employing nontenured individuals as permanent substitutes for 1992-93 school year violated her tenure rights.

ALJ concluded that based upon petitioner's tenure and appropriate certification, she was entitled to position of permanent substitute over two nontenured teachers. ALJ found as a result of RIF, petitioner was entitled to position for which she was qualified when vacancy occurred even though permanent substitute teacher position was not tenure eligible and was not specifically recognized as a seniority category pursuant to N.J.A.C. 6:3-1.10(1) (now 6:3-5.1(1)). Board was ordered to place petitioner in permanent substitute position with compensation for 1992-93 school year.

Commissioner adopted findings and determination in initial decision stressing the Appellate Division's reconsidered decision in Lammers.

SEPTEMBER 15, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6006-92
AGENCY DKT. NO. 285-6/92

MARYBETH DRISCOLL,
Petitioner,
v.
WEST ESSEX REGIONAL BOARD OF EDUCATION,
Respondent.

Randi Doner, Esq., for petitioner
(Balk, Oxfeld, Mandell & Cohen, attorneys)

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

Record Closed: June 18, 1993 Decided: August 2, 1993

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

PROCEDURAL HISTORY

On June 23, 1992, petitioner, Marybeth Driscoll, filed a petition of appeal with the Commissioner of Education requesting that respondent appoint her to the position of permanent substitute teacher for the 1992-93 school year and directing that respondent pay her all lost salary and benefits of employment. On July 29, 1992, respondent filed an answer requesting that the Commissioner dismiss the petition, alleging that the petition failed to state a claim upon which relief could be granted.

On August 4, 1992, this matter was transmitted by the Department of Education, Bureau of Controversies and Disputes, to the Office of Administrative Law for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The matter was assigned to the undersigned judge on August 26, 1992, and a telephone prehearing conference was scheduled for October 27, 1992. A prehearing conference was held on October 27, 1992. At that time, the issues were isolated, and a hearing was scheduled for April 16 and May 4, 1993. The parties filed a stipulation of facts and documents, which obviated the necessity for a hearing. As a result, the hearing was adjourned and the matter proceeded on motion for summary decision. The record closed on June 18, 1993, the date of the last submission in this matter.

STATEMENT OF THE CASE

At issue in the instant case is whether petitioner's tenure rights were violated. More particularly at issue is whether petitioner was entitled to be employed for the 1992-93 school year in the position of permanent substitute teacher and, if her tenure rights were violated, the relief to which she is entitled.

UNDISPUTED FACTS

As noted above, the parties filed a stipulation of facts on March 26, 1993. The stipulation of facts, with attached exhibits (J-1), are incorporated by reference and constitutes this tribunal's findings of fact. The undisputed facts are as follows:

Petitioner was a tenured teaching staff member of respondent, West Essex Regional Board of Education. She was employed by the Board from September 1, 1988 through June 30, 1992. Petitioner was employed by the Board in the area of physical education and held a regular certificate to serve as a teacher of health and physical education. At its meeting of May 26, 1992, the Board eliminated one teaching position in the area of physical education effective June 30, 1992. As the least-senior teaching staff member in the physical education department, Driscoll's position was eliminated, and she was placed on a preferred eligibility list for recall in her area of certification.

Harry Teaster Jr. was hired by the Board as a permanent substitute for the 1990-91 school year and was rehired for that position for the 1991-92 and 1992-93 school years. Michael Giampapa was hired by the Board as a permanent substitute for the 1988-89 school year and was rehired for that position for the 1989-90 and 1991-92 school years. Neither Giampapa nor Teaster is tenure eligible or a tenured employee of the Board because a permanent substitute teacher does not hold a position for which tenure can accrue. On May 26, 1992, the Board voted to appoint Giampapa and Teaster as permanent substitute teachers for the 1992-93 school year. This appointment was revised on June 22, 1992. On or about August 4, 1992, Giampapa resigned as a permanent substitute teacher. The Board did not employ a replacement, leaving one permanent substitute teacher for the 1992-93 school year.

The permanent substitute teacher reports each day and is the first individual utilized when any teacher is absent. His/her schedule varies on a daily or weekly basis dependent upon teacher absenteeism. In order to hold a full-time teaching position with the board, the individual must hold and maintain a regular teaching certificate with an appropriate subject matter endorsement. In order to serve as a permanent substitute teacher, the individual must hold and maintain a valid New Jersey teaching certificate or a substitute teaching certificate issued by the county superintendent (Policy No. 304). In order for a substitute to be assigned to teach more than twenty consecutive days in the same assignment, the individual must maintain a regular teacher certificate with appropriate subject matter endorsement. The individual is considered a long-term substitute in such an assignment.

Giampapa and Teaster both have valid teaching certificates in health and physical education.

ARGUMENTS OF COUNSEL

Petitioner argues that she was entitled to the position of permanent substitute teacher held by Teaster and/or Giampapa. She claims that by virtue of her tenure status and the fact that her instructional certificate met the minimum requirement for appointment to the position of permanent substitute teacher, she was entitled to that job. She points out that there were no other requirements listed as a prerequisite to the job. She notes that although the Board may claim that Teaster and Giampapa had greater rights to the position of permanent substitute as they

performed that position in the past, this point must be rejected because neither of these teachers was employed for a sufficient amount of time to acquire tenure.

Respondent argues that petitioner cannot assert a reemployment claim for a position that is not a seniority category under *N.J.A.C.* 6:3-1.10 nor an endorsement in any certificate issued by the State Board of Examiners, and that she cannot assert a claim to a position which itself is not a tenure eligible position. In the first allegation, respondent points out, more particularly, that petitioner has no claim or seniority rights to the assignment held by Giampapa or Teaster and that the Board was not obligated to employ her in such a capacity. Respondent asserts that the permanent substitute teaching position is not a category for which seniority can accrue, pursuant to *N.J.A.C.* 6:3-1.10. Because it is not included among the various endorsements detailed in *N.J.A.C.* 6:11-6.2, petitioner cannot claim entitlement to this assignment.

In regard to its second allegation, respondent asserts that petitioner attempts to utilize her tenure to qualify for a permanent substitute assignment. According to respondent, this claim has no legal basis. As a matter of statute, Board policy, and practice, the substitute assignment is nontenurable Consequently, petitioner's tenure status is irrelevant for the purposes of staffing the substitute job. Respondent has a managerial right, for purposes of efficiency, to utilize substitute services either by daily calls or one call of a year-long duration. In either situation, the nontenure status of the substitute assignment does not change.

Further, in response to petitioner's brief, respondent alleges that one may not assert a tenure claim to a position that itself is not tenure eligible. Respondent cites *Polo v. Board of Education of Bergen County Vocational Schools*, 92 *N.J.A.R.*2d (EDU) 459 in support of its position. Respondent notes that the permanent substitute teacher position is not tenure eligible; it does not require standard certification but, rather, is treated the same as a daily substitute. Respondent also alleges that if it is determined that petitioner was improperly denied the appointment at issue, she would be entitled to the salary she would have earned as a permanent substitute teacher, not that which she would have earned had she not been subjected to a reduction in force (RIF) and remained a physical education teacher.

DISCUSSION

The administration of New Jersey's school system is regulated by the Legislature and the Commissioner of Education. The law includes provisions concerning a teacher's acquisition of tenure and its effect on her employment relationship with the board of education.

More particularly, in regard to the acquisition of tenure, *N.J.S.A.* 18A:28-5 provides that

> The services of all teaching staff members including all teachers, principals other than administrative principals, assistant principals, vice principals, assistant superintendents and all school nurses including school nurse supervisors, head school nurses, chief school nurses, school nurse coordinators, and any other nurse performing school nursing services and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title [section 18A:6-9 *et seq.*], after employment in such district or by such board for:
>
> (a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
>
> (b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
>
> (c) the equivalent of more than three academic years within a period of any four consecutive academic years.

However, despite the tenure status of a teacher, the teacher may lose her position through a RIF. *N.J.S.A.* 18A:28-9 provides that:

> Nothing in this title or any other law relating to tenure of services shall be held to limit the right of any board of

> education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article.

Any such reduction in force must be made strictly on the basis of seniority in accordance with the standards established by the Commissioner with the approval of the State Board. *N.J.S.A.* 18A:28-10. Such seniority determinations are made by the local board of education. *N.J.S.A.* 18A:28-11.

In the event that a teacher is subject to a RIF, the teacher is placed on a preferred eligibility list in the order of seniority for reemployment. *N.J.S.A.* 18A:28-12. The applicable statute provides:

> If any teaching staff member shall be dismissed as a result of such reduction, such person shall be and remain upon a preferred eligibility list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal, if and when such vacancy occurs and in determining seniority, and in computing length of service for reemployment, full recognition shall be given to previous years of service, and the time of service by any such person in or with the military or naval forces of the United States or of this State, subsequent to September 1, 1940 shall be credited to him as though he had been regularly employed in such a position within the district during the time of such military or naval service, except that the period of that service shall not be credited toward more than four years of employment or seniority credit. [Emphasis added.]

Pursuant to *N.J.S.A.* 18A:28-13, the Commissioner of Education has established detailed proceedings and standards for the reemployment of persons placed on a preferred eligibility list. *See N.J.A.C.* 6:3-1.10.

Generally, an employee's seniority is determined according to the number of academic or calendar years of employment in the school district in specific categories. *N.J.A.C.* 6:3-1.10(b). In the event that an employee holds employment simultaneously in two or more categories, seniority will be counted in all categories in which he or she is employed. *N.J.A.C.* 6:3-1.10(f). An employee who moves from

or reverts to a category shall receive credit toward seniority in any or all categories in which she previously held employment. *N.J.A.C.* 6:3-1.10(h).

A teacher whose position has been abolished in a category will be given employment in the same category to which he or she is entitled by virtue of seniority. *N.J.A.C.* 6:3-1.10(i). If such employee lacks sufficient seniority for employment in the same category, she shall be placed on a preferred eligible list. *Id.* The employee may also revert to a category in which she was previously employed and remain on the preferred eligible list in the category from which she reverted. *Id.*

Similarly, in the event that the employee lacks sufficient seniority in the category to which she reverted, she shall revert in a like manner to the next preceding category in which she held employment. *N.J.A.C.* 6:3-1.10(j). The employee will also remain on the preferred eligibility list. *Id.*

Petitioner argues that the Board should have given her the job(s) that were offered to Giampapa and Teaster. Having considered the arguments presented, I am of the view that if petitioner can show that there are currently individuals who are serving in a position for which she is qualified, who have less seniority or who are nontenured, then she is entitled to that position. *See Bednar v. Westwood Board of Education,* 221 *N.J. Super.* 239 (App. Div. 1987) and *Capodilupo v. West Orange Twp. Bd. of Ed.,* 218 *N.J. Super.* 510 (App. Div. 1987), which stand for the proposition that tenure is the statutory threshold for the assertion of rights in a RIF and that teaching staff members with tenure have greater rights to a given position held by a nontenured individual, irrespective of seniority.

In *Bednar,* a tenured full-time elementary school teacher holding an institutional certificate with a comprehensive field endorsement in art was reduced to part-time. Petitioner claimed that based on his tenure as an art teacher, he was deserving of a nontenured secondary school job since he had experience in the specific category of secondary art. In deciding for petitioner, the court noted that the tenure statute "did not create or authorize the Commissioner to create competing rights for [nontenured] teachers" and that seniority of nontenured teachers should not "dilute" tenure rights. 221 *N.J. Super.* at 242-43.

Indeed, *Bednar* seems to illustrate that the "seniority" provisions of the tenure statute do not authorize retaining a nontenured teacher over a tenured teacher in a position within the certificate of a tenured teacher during a RIF based solely on the nontenured teacher's "seniority" or experience in the disputed position.

In *Capodilupo*, petitioner, a tenured teacher, was employed as a secondary school physical education teacher prior to his termination as a result of a RIF. The petitioner's teaching certificate was endorsed in both elementary and secondary physical education. In light of his tenure and seniority, he contended that he should have been offered one of two elementary physical education teaching positions that were held by two nontenured employees, despite the fact that he lacked any experience teaching at the elementary level.

In that case, the candidates whom the petitioner sought to replace were certified and experienced in teaching at the elementary level. However, neither of the teachers had acquired tenure. Petitioner claimed that he had seniority over the two candidates, thereby entitling him to one of their positions. Alternatively, he contended that his tenure entitled him to one of their positions. The court determined that petitioner did not possess any seniority rights to the elementary school position because the elementary physical education position and the secondary physical education are distinct and separate seniority categories. 218 *N.J. Super.* at 514 (citing *N.J.A.C.* 6:3-1.10(1)(15)(iii)).

However, the court agreed with the State Board in concluding that a tenured teacher seeking reinstatement is entitled to preference in a RIF as against a nontenured applicant with the same certification. 218 *N.J. Super.* at 515. In support of its decision, the court reiterated a comment made by the State Board: "Seniority provides a mechanism for ranking all tenured teaching staff members so that reductions among the tenured force can be effected in an equitable fashion and in accord with sound educational policies." *Id.* at 514. The tenure laws require that a tenured teacher should be retained over a nontenured teacher. *Id.* at 514-15. Consequently, in order to construe the tenure law to achieve its beneficial ends, the court concluded that a tenured teacher should receive preference in a RIF over a nontenured teacher with the same certification. *Id.* at 515.

In the instant matter, petitioner was tenured and certified for the position of physical health and education teacher. Giampapa and Teaster were hired as permanent substitute teachers, both being nontenured, as they do not hold positions for which tenure can accrue. Both Giampapa and Teaster held valid teaching certificates in health and physical education. Since petitioner held the minimum teaching certificate required for the two positions for which Giampapa and Teaster were hired, petitioner clearly would have been entitled to preference in a RIF as against both Giampapa and Teaster, as they were both nontenured applicants holding the same certification. *See Susan Data-Samtrak v. Bd. of Ed. of the Scotch Plains-Fanwood Regional School District, Union County*, Commissioner's Decision (January 27, 1988), *aff'd* State Board (June 1, 1988), wherein petitioner was RIFfed while two nontenured teachers were assigned to unrecognized titles of "in-school suspension." The qualifications for appointment to the unrecognized titles required a teaching certificate. Since petitioner held the appropriate certification, she was entitled as a result of a RIF and by virtue of her seniority to any assignment of that unrecognized title given to nontenured or less-senior teachers. *See also Camilli v. Bd. of Ed. of Northern Highlands Regional High School District,* Commissioner's Decision (Jan.3, 1988), *aff'd* State Board (May 1, 1985), in which it was determined that petitioner's seniority entitlement is not related merely to the subjects under which she has actually taught, but also to any assignment that the instructional endorsement qualifies her to fill.

Respondent argues that petitioner cannot assert a reemployment claim because the position of permanent substitute teacher is not a seniority category and, more to the point, is not tenure eligible. Respondent seeks to distinguish *Capodilupo* and *Bednar* on that basis. Moreover, respondent cites *Polo v. Bd. of Ed. of Bergen County Vocational Schools*, 92 *N.J.A.R.*2d (EDU) 459, in support of its argument that one may not assert a tenure claim to a position which is not tenure eligible. I am not in agreement with respondent's attempt to require tenure eligibility in the position sought as a prerequisite to that position. In *Polo,* the petitioner claimed entitlement to a preference over nontenured teachers for teaching assignments at the district adult evening school. The ALJ in *Polo* found, however, that since the teachers in the adult evening school were not required to possess certification, they were not eligible for tenure. Clearly, *Polo* is not akin to the instant matter. Certification is required for a position of permanent substitute teacher. Specifically, the position of permanent substitute teacher requires at a

minimum a county substitute certification and, after teaching twenty days in the same area, a valid New Jersey teaching certificate. Although both Giampapa and Teaster held valid teaching certifications in health and physical education, so too does petitioner.

In the instant matter, seniority is not an issue. Thus, the question of seniority categorization does not become a factor. Petitioner holds the required teaching certificate for the two positions for which Giampapa and Teaster were hired. More to the point, pursuant to *N.J.S.A.* 18A:28-12, "whenever a vacancy occurs in a position for which such person shall be qualified, then petitioner shall be reemployed when such vacancy occurs."

As petitioner correctly claims, irrespective of an employee's seniority, the tenured teacher has rights to certain positions because of tenure and the instructional certificate held. It is undisputed that Giampapa and Teaster were not tenured. The only requirement for employment as permanent substitute teachers was possession of a valid New Jersey teaching certificate or a substitute teaching certificate issued by the county superintendent. Petitioner holds a valid New Jersey teacher certificate. By virtue of her tenure status and by virtue of the fact that her instructional certificate met the minimum requirements for appointment to the position of permanent substitute teacher, she was entitled to that job.

Finally, respondent claims that if it is determined that petitioner was improperly denied the appointment at issue, her monetary damages should be computed in terms of what a permanent substitute teacher would have earned, not that which she would have earned had she not been subjected to a RIF and remained a physical education teacher. Respondent cites *Schwarzkopf v. Bd. of Educ. of Camden,* 1985 S.L.D. 130, 140-41 in support of its request.

Petitioner in *Schwarzkopf* argued that the salary reduction effectuated without advance notice was improper and violative of his rights to due process of law. Petitioner's position of chief psychologist was abolished in connection with a RIF. He was then transferred to the position of psychologist. The ALJ held that when an employee is transferred for proper reason to a position that has a lesser salary expectation, that employee is entitled only to the salary in the new position according to his/her appropriate step on the salary scale. The Commissioner agreed

and stated further that "when one is bumped into a lower position pursuant to a *bona fide* reduction in force, one has entitlement only to the salary of the new position. . . ." *Id.* at 141.

Therefore, in light of the applicability of *Schwarzkopf* to the instant matter, petitioner should be made whole for all lost salary that she would have received if she had been properly reemployed by the respondent as a permanent substitute teacher.

CONCLUSION

Petitioner is a tenured teacher holding a valid certificate to serve as a teacher of health and physical education. Both Giampapa and Teaster held identical certificates in health and physical education. Since the description of the permanent substitute teacher includes at a maximum a requirement of a teacher certificate and at a minimum a county substitute certification, petitioner was eligible for either of the two positions to which Giampapa and Teaster were appointed. I **CONCLUDE** that based upon petitioner's tenure and appropriate certification, she was entitled to the position of permanent substitute teacher. As a result of a RIF, whenever a vacancy occurs in a position for which such person shall be qualified, she shall be reemployed by the body causing dismissal, if and when such vacancy occurs. This is the case, despite the fact that a permanent substitute teacher position is not tenure eligible and is not specifically recognized as a seniority category pursuant to *N.J.A.C.* 6:3-1.10(l). To hold otherwise would constitute a violation of petitioner's tenure rights.

ORDER

It is hereby **ORDERED** that petitioner's appeal is granted. It is further **ORDERED** that she be reinstated to the position of permanent substitute teacher and, as such, receive the salary she would have earned for the 1992-93 school year in that position, including all benefits for that position.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 7th Floor, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 2, 1993
Date

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

8/4/93
Date

Maureen K. Kelly
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 5 1993
Date

Joyce LaVecchia
OFFICE OF ADMINISTRATIVE LAW

dgi/e

MARYBETH DRISCOLL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
WEST ESSEX REGIONAL BOARD OF EDUCATION, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Board filed timely exceptions pursuant to N.J.A.C. 1:1-18.4. Petitioner's reply exceptions, however, were untimely filed, following the denial of a request for an extension to file them.

The Board's exceptions object to the ALJ's conclusions. It charges that the ALJ improperly rejected the argument that the tenure eligibility of the permanent substitute position precludes the relief sought. The Board reiterates its reliance on Polo, supra, and also cites Salvati v. Board of Education of the Township of Montague, Sussex County, decided by the Commissioner April 15, 1982, as stating that a tenured clerical aide, terminated pursuant to a RIF, was not entitled, by virtue of tenure, to a nontenurable position of instructional teacher aide. Petitioner argues that in contrast to the tenure impediment in Polo, but in parity therewith, the instant matter implicates a statutory exception to tenure acquisition which prevents the position sought from being

tenure-eligible and, thus, subject to a tenure entitlement claim. Petitioner would distinguish the ALJ's reliance on such cases as Bednar, supra, Capodilupo, supra, and Data-Samtak, supra, because such cases involved claims to tenure-eligible positions, a characteristic absent in this matter.

Upon careful and independent review of this matter, the Commissioner adopts as her own the findings and conclusions of the ALJ. The Commissioner rejects petitioner's exceptions as being without merit for the reasons expressed in the initial decision and notes that the matter captioned Catherine Lammers v. Board of Education of the Borough of Point Pleasant, Appellate Division decision, A-5494-90T1, reconsidered by decision dated November 17, 1992 is dispositive of the entitlement of a properly certified riffed teaching staff member to lay claim to any vacant position such as a permanent substitute for which he or she is qualified. Accordingly, for the reasons expressed in the initial decision in this matter, and emphasizing the Appellate Division's reconsidered decision in Lammers, the Commissioner determines petitioner is entitled to a position as a permanent substitute for the 1992-93 school year in respondent's district with the emoluments and compensation of such a position.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 15, 1993

DATE OF MAILING - SEPTEMBER 15, 1993

218-93

EDU #6006-92
C # 218-93
SB # 56-93

MARYBETH DRISCOLL,

PETITIONER-RESPONDENT,

V.

BOARD OF EDUCATION OF THE WEST ESSEX REGIONAL SCHOOL DISTRICT, ESSEX COUNTY,

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, September 15, 1993

For the Petitioner-Respondent, Balk, Oxfeld, Mandell & Cohen (Randi Doner, Esq., of Counsel)

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

The facts of this matter are not in dispute. Petitioner Marybeth Driscoll (hereinafter "petitioner") is a tenured teaching staff member who was employed by the West Essex Regional Board of Education (hereinafter "Board") as a physical education teacher. By action taken on May 26, 1992, pursuant to N.J.S.A. 18A:28-9, the Board eliminated one teaching position in the area of physical education. As the least senior physical education teacher, petitioner was the staff member affected by this reduction in force (RIF), and, accordingly, she was placed on a preferred eligibility list for reemployment pursuant to N.J.S.A. 18A:28-12.

On the same date that the Board acted to reduce its physical education staff, it voted to issue contracts to two

AUGUST 3, 1994

individuals to be employed as "permanent substitute teachers" for the 1992-93 school year. On August 4, 1992, one of those two individuals resigned. The Board did not employ a replacement for that individual.

A "permanent substitute" in this school district reports daily and is the first individual used when any teacher is absent. His schedule varies on a daily or weekly basis, depending on teacher absenteeism. A county substitute's certificate or a teaching certificate is required for qualification.

On June 23, 1992, petitioner filed a Petition of Appeal with the Commissioner of Education, claiming that the Board had violated her tenure rights when it failed to appoint her to be a permanent substitute teacher for the 1992-93 school year.

Based on the facts stipulated by the parties, the Administrative Law Judge (ALJ) issued a summary decision on June 18, 1993, concluding that petitioner was entitled to a position as a permanent substitute. The ALJ reasoned that

> ...as a result of a RIF, whenever a vacancy occurs in a position for which such person shall be qualified, she shall be reemployed by the body causing dismissal, if and when such vacancy occurs. This is the case despite the fact that a permanent substitute position is not tenure eligible and is not specifically recognized as a seniority category pursuant to N.J.A.C. 6:3-1.10(c). To hold otherwise would constitute a violation of petitioner's tenure rights.

Relying on the Appellate Division's decision of November 17, 1992 in Lammers v. Board of Education of the Borough of Point Pleasant, Docket #A-5494-90T1 (App. Div. 1992), the Commissioner adopted the ALJ's decision as her own.

For the reasons that follow, we reverse.

The Commissioner's reliance on the Appellate Division's decision in Lammers is misplaced. Not only was that decision reversed by the New Jersey Supreme Court, Lammers v. Bd. of Educ., 134 N.J. 264 (1993), but the issues involved in that case have no bearing on the case now before us.

The central issue in Lammers was whether a teacher's one-year leave of absence from her position as a teaching staff member created a "vacancy" within the meaning of N.J.S.A. 18A:28-12 so as to require that the district board fill the position on the basis of seniority. There was no question that the "vacancy" at issue was in a position which would otherwise have been within the scope of N.J.S.A. 18A:28-12.

Petitioner here claimed that her status as a tenured teaching staff member entitled her to the "position" of permanent substitute teacher pursuant to N.J.S.A. 18A:28-12. In contrast to Lammers, this case turns on whether employment as a permanent substitute is employment in a "position" within the scope of N.J.S.A. 18A:28-12, not on whether there is a vacancy.

As follows, we find that employment as a permanent substitute is not within the scope of the entitlement conferred by N.J.S.A. 18A:28-12. Consequently, petitioner's claim must fail.

N.J.S.A. 18A:28-12 provides that whenever a teaching staff member is dismissed as the result of a reduction in staff,

> ...such person shall be and remain upon a preferred eligibility list for reemployment whenever a vacancy occurs in a position for which such person shall be qualified...

(emphasis added).

Reductions in staff are made under authority of N.J.S.A. 18A:28-9, which provides that

> ...nothing in this title...shall be held to limit the right of any board of education to reduce the number of teaching staff members employed in the district whenever, in the judgment of the board, it is advisable to abolish any such position.

(emphasis added).

The language of the statutes is not ambiguous. A "position" to which a tenured teaching staff may claim entitlement under N.J.S.A. 18A:28-12 upon abolition of the "position" she previously held pursuant to N.J.S.A. 18A:28-9 is one as a teaching staff member.

Teaching staff member is defined by N.J.S.A. 18A:1-1 as

> ...a member of the professional staff of any district or regional board of education,...holding office, position or employment of such character that the qualifications, for such office, position or employments, require him to hold a valid and effective standard, provisional or emergency certificate, appropriate to his office, position or employment, issued by the State Board of Examiners...

Again, the responsibilities attending employment as a permanent substitute teacher are not in dispute in this case. A permanent substitute reports and is assigned on a daily or weekly basis to substitute for absent teachers. A county substitute certificate is sufficient qualification for this employment and, accordingly, a permanent substitute teacher typically works in short-term assignments.

This employment is not of a character to require an individual so employed to hold a valid standard, provisional or emergency certificate appropriate to employment as a permanent substitute in order to be qualified. Rumson-Fair Haven Education Association and New Jersey Education Association v. Board of Education of the Rumson-Fair Haven Regional School District, decided by the State Board, August 5, 1987, slip op. at 7-11, aff'd, Docket

#A-291-87T8 (App. Div. 1988). Consequently, employment as a permanent substitute is not as a "teaching staff member." Id. Hence, a tenured teacher is not entitled by statute to be employed in that capacity following a reduction in staff pursuant to N.J.S.A. 18A:28-9 and placement on a preferred eligibility list for reemployment under N.J.S.A. 18A:28-12.

For the reasons expressed, we reverse the decision of the Commissioner in this case.

Attorney exceptions are noted.

August 3, 1994

Date of mailing AUG 04 1994

219-93

219-93

IN THE MATTER OF THE TENURE	:	
HEARING OF DAVID S. PLOTKIN,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF CHERRY HILL, CAMDEN COUNTY.	:	

SEPTEMBER 15, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3472-93
AGENCY DKT. NO. 26-2/93

IN THE MATTER OF THE TENURE HEARING OF DAVID S. PLOTKIN, SCHOOL DISTRICT OF THE TOWNSHIP OF CHERRY HILL.

William C. Davis Esq., for petitioner (Davis, Reberkenny & Abramowitz, attorneys)

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

Record Closed: July 19, 1993 Decided: August 2, 1993

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

The Cherry Hill Township Board of Education (petitioner or Board) filed tenure charges of insubordination against David S. Plotkin, respondent. The matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F-1 through -13, on April 16, 1993.

On July 7, 1993, I conducted a prehearing telephone conference. Among other things, it was represented that the substance of the charges is that the respondent failed timely to undergo a comprehensive medical examination ordered by the Board pursuant to *N.J.S.A.* 18A:16-2 and -3. It was also represented that the parties were seeking an amicable resolution of the matter.

On July 19, 1993 the parties advised the judge in writing that, with the assistance of his counsel, the respondent did in fact undergo medical evaluations. Counsel then entered into discussions concerning resolution of the matter. They negotiated an agreement and general release. A key element of this agreement is the use of accumulated sick leave days. The numbers reflected in the agreement represent application of accumulated sick leave days for the 1992-93 school year and a payment of the monies for the balance of the accumulated unused sick leave days in accordance with the labor agreement between the Board and the Cherry Hill Education Association.

Having reviewed *Tenure Hearing of Cardonick*, OAL DKT. EDU 7083-81 and 7094-81 (Feb. 17, 1982), rev'd Comm'r of Ed. (Apr. 7, 1982), aff'd St. Bd. of Ed. (Aug. 4, 1982) and having reviewed the record and the settlement terms, I **FIND:**

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

2. The settlement fully disposes of all issues in controversy and is consistent with the law, including the decisions in *Cardonick, above.*

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

I here **FILE** my Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

2 AUGUST 1993
Date

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

8/4/93
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 6 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

km

AGREEMENT AND GENERAL RELEASE

WHEREAS, MR. DAVID PLOTKIN (hereinafter "**PLOTKIN**") has been employed by the **BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY** (hereinafter "**BOARD**") as a tenured teaching staff member pursuant to N.J.S.A. 18A:28-5; and

WHEREAS, on February 8, 1993, the **BOARD** certified charges against **PLOTKIN** to the Commissioner of Education under the Tenure Employees Hearing Law alleging that **PLOTKIN** should be dismissed for insubordination and suspended him from his position; and

WHEREAS, PLOTKIN duly answered, denying the **BOARD'S** charges; and

WHEREAS, PLOTKIN and **BOARD** mutually desire to terminate amicably **PLOTKIN'S** employment and/or affiliation with **BOARD,** and to settle and terminate any and all disputes between them;

NOW, THEREFORE, in consideration of the mutual covenants and terms contained herein, **PLOTKIN** and **BOARD** agree as follows:

1. **PLOTKIN** and **BOARD** agree that **PLOTKIN** shall provide **BOARD** with a separate letter of resignation effective June 30, 1993, a copy of which is attached hereto and made a part hereof as **EXHIBIT "A"**, which shall be accepted by **BOARD** pursuant to N.J.S.A. 18A:28-8, and shall be placed in his personnel file as the sole and official basis for the severance of **PLOTKIN'S** employment with **BOARD.** The **BOARD** agrees that pursuant to his resignation, **PLOTKIN** shall be released from employment as of the close of the school day on Wednesday, June 30, 1993, and **PLOTKIN** agrees that his signature on this **AGREEMENT AND GENERAL RELEASE** constitutes an acknowledgement that he is relinquishing all rights to employment and/or reemployment with **BOARD.**

2. The **BOARD** further agrees and covenants that it will notify the Commissioner of Education that it wishes to withdraw with prejudice, the tenure charges pending "In the Matter of the Tenure Hearing of David Plotkin, AGENCY DKT. NO. 26-2/93", and further agrees to take all actions necessary on its part to secure the Commissioner's approval of this request.

4. **BOARD** further agrees that it shall revoke its suspension of **PLOTKIN** and place **PLOTKIN** on disability leave of absence effective February 9, 1993 and continuing through the date of his resignation on June 30, 1993. During this period the **BOARD** shall provide all salary ($28,772.61 less applicable state and federal withholding, social security and unemployment taxes), benefits and service credit to which **PLOTKIN** is entitled under the collectively negotiated agreement in force and effect in the Cherry Hill School District, Board Policy, and the laws of New Jersey. In addition, the **BOARD** shall:

(1) pay to Plotkin a lump sum sick leave buy-back of Three Thousand, One Hundred and Twenty Nine Dollars less state and federal withholding, social security, unemployment taxes;

(2) deduct $303.40 from the lump sum sick leave buy-back and pay said sums over to Washington National Insurance Company as an insurance premium payment for the period from February 8, 1993 through June 30, 1993; and

(3) reimburse to **PLOTKIN** the **BOARD'S** share of premiums which **PLOTKIN** incurred prior during the period of his suspension prior to the reinstatement of his health, dental and prescription plan coverages.

5. **PLOTKIN** and **BOARD** agree that all claims between them have been rendered moot by reason of **PLOTKIN'S** resignation from employment with **BOARD**, his reinstatement on disability leave and the **BOARD'S** pending withdrawal of the tenure charges.

(1) **PLOTKIN** therefore agrees and covenants that neither he, nor any person, organization nor other entity on his behalf, will file, charge, claim, sue or cause or permit to be filed, charged or claimed an new action for legal or equitable relief (including damages, injunctive, declaratory, monetary or other relief) against **BOARD** and/or its agents involving any matter occurring at any time in the past up to the date of this **AGREEMENT AND GENERAL RELEASE**. **PLOTKIN** certifies that as of the date of this **AGREEMENT AND GENERAL RELEASE**, there is no action pending on his behalf against **BOARD** or its agents.

(2) **BOARD** similarly agrees and covenants that neither it nor anyone on its behalf will file, charge, claim, sue or cause or permit to be filed, charged, or claimed any action for legal or equitable relief (including damages, injunctive, declaratory, monetary or other relief) against **PLOTKIN** involving any matter occurring at any time in the past up to the date of this **AGREEMENT AND GENERAL RELEASE**.

6. **PLOTKIN** further agrees, covenants and promises that he will not communicate or disclose the terms of this **AGREEMENT AND GENERAL RELEASE** herein to any persons other than his attorney,

accountant, union representative or members of his immediate family unless required to do so by law or court order.

7. **BOARD** agrees, covenants and promises that neither it, nor its officers, members, employees, agents, or its and their respective successors and assigns, heirs, executors and administrators will communicate or disclose the terms of this **AGREEMENT AND GENERAL RELEASE**, unless required to do so by law or court order.

8. **PLOTKIN** hereby certifies that he has read the terms of this **AGREEMENT AND GENERAL RELEASE**, that he has had an opportunity to discuss it with his attorney, and that he understands its terms and effects. **PLOTKIN** acknowledges further that he is executing this **AGREEMENT AND GENERAL RELEASE** of his own volition, with full understanding of its terms and effects, and with the intention of releasing all claims recited herein, for consideration which he acknowledges is adequate and satisfactory to him.

Intending to be legally bound hereby, **PLOTKIN** and **BOARD** execute the foregoing **AGREEMENT AND GENERAL RELEASE** this 21ST day of June, 1993.

WITNESS:

Carol A Sapakie

David Plotkin
DAVID PLOTKIN

WITNESS:

Thomas F. Redmond
BOARD SECRETARY

BOARD OF EDUCATION OF THE DISTRICT OF CHERRY HILL, CAMDEN COUNTY

David S. McAnally
BOARD PRESIDENT

OAL DKT. NO. EDU 3472-93

IN THE MATTER OF THE TENURE	:	
HEARING OF DAVID S. PLOTKIN,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF CHERRY HILL, CAMDEN COUNTY.	:	

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

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. It bears noting that paragraph 7 of the settlement, which states

> "[the] BOARD agrees, convenants and promises that neither it, nor its officers, members, employees, agents or its and their respective successors and assigns, heirs, executors and administrators will communicate or disclose the terms of this AGREEMENT AND GENERAL RELEASE, unless required to do so by law or court order"

is not binding on the Commissioner of Education insofar as the terms of the instant settlement are public information.

Moreover, it is noted that some of the terms of this settlement became effective June 30, 1993. The parties are advised that the terms of a settlement brought before the Commissioner are not final until approved by the Commissioner and thus should not presuppose her approval.

With such observations made, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

SEPTEMBER 15, 1993

DATE OF MAILING - SEPTEMBER 15, 1993

COMMISSIONER OF EDUCATION

220-93

220-93

STANLEY SIEGEL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF GARFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, nontenured teacher terminated by Board, alleged breach of the cancellation clause in his contract and sought payment for failure by Board to provide proper notice of termination. Original suit had been brought as a contract action in N.J. Superior Court Law Division. Appellate Division transferred matter for review under Commissioner's jurisdiction.

ALJ found petitioner was entitled to damages due to Board's premature cancellation of contract and due to contract language which plainly provided that "[I]n the absence of any provision herein for a definite number of days' notice, the contract shall run for the full term[.]" Board was ordered to pay petitioner salary and monetary benefits for period from December 18, 1991 to June 31, 1992 offset by $60 per day since petitioner declined work offered as substitute teacher.

Commissioner adopted findings and determination in initial decision and ordered payment to petitioner of mitigated compensation.

SEPTEMBER 15, 1993

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8225-92
AGENCY DKT. NO. 478-10/92

STANLEY SIEGEL,
Petitioner,
v.
BOARD OF EDUCATION
OF THE CITY OF GARFIELD,
Respondent.

David B. Wasserman, Esq., for petitioner
(Wasserman & Schachman, attorneys)

Toni Belford Damiano, Esq., for respondent
(Damiano & Cerruti, attorneys)

Record Closed: May 10, 1993 Decided: August 10, 1993

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

Statement of the Case

This is a claim by a nontenured teacher that a board of education terminated his employment in breach of the cancellation clause in his teaching contract. Originally, the suit had been brought as a contract action in the Superior Court of New Jersey, Law Division, Bergen County. Because the claim implicates the question of a teacher's rights in connection with a reduction in force under *N.J.S.A.* 18A:28-9, the Appellate Division transferred the case to the Commissioner of Education ("Commissioner") for exercise of her paramount jurisdiction over "all controversies and disputes arising under the school laws." *N.J.S.A.* 18A:6-9.

Essentially, two issues are presented for determination: First, whether respondent violated petitioner's rights when it terminated his employment in the midst of the 1991-92 academic year. Second, what payment is due to petitioner in connection with his termination as the result of a reduction in force. Petitioner contends that he is entitled to salary and benefits for the entire balance of his contract term. The school board maintains that he is only entitled to sixty-days pay, which he has already received.

Procedural History

In December, 1991, petitioner Stanley Siegel ("Siegel") filed a two-count complaint in the Law Division, the first count seeking compensatory damages for breach of contract and the second count seeking punitive damages.[1] Respondent Garfield Board of Education ("Board") promptly moved to dismiss the complaint for lack of jurisdiction. On February 21, 1992, the trial judge entered an order denying the motion. Thereafter, the Board filed its answer on February 27, 1992.

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[1]After the case was sent to the state administrative agency, petitioner voluntarily withdrew any claim for punitive damages

Meanwhile, the Appellate Division granted leave for interlocutory review. By a decision dated September 29, 1992, the Appellate Division reversed the trial court's ruling. Instead of dismissing the complaint, however, the Appellate Division transferred it to the Commissioner.[2] In so doing, the Appellate Division expressly "rejected plaintiff's claim that he has a legal, contractual remedy that may be adjudicated outside the parameters of the pertinent school laws applicable to reductions in force and the consequent impact upon affected teachers." *Siegel v. Garfield Bd. of Educ.*, No. A-3926-91T1, slip op. at 3 (N.J. App. Div. Sept. 29, 1992).

Subsequently, on October 22, 1993, the Commissioner transmitted the matter to the Office of Administrative Law "OAL") for hearing as a contested case. The OAL held a hearing on April 15, 1993. Witnesses and exhibits are listed in the appendix. Counsel submitted briefs by May 10, 1993, on which date the record closed.

Findings of Fact

All of the material facts are either stipulated or undisputed. **I FIND:**

On September 1, 1991 Siegel entered into a teacher's contract with the Board for the academic year to commence on September 1, 1991 and terminate on June 31,1992. Their agreement is set forth in a boilerplate "specimen contract" designed "to be modified in accordance with the terms of employment." Various spaces on the printed form were filled in by handwritten or typed notations. Salary for the entire ten-month term was $36,977.

The agreement contained a cancellation clause, reproduced here in full:

> It is hereby agreed by the parties hereto that this contract may at any time be terminated by either party giving to the other _____ days' notice in writing of intention to

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[2]Since Siegel instituted the court action within 90 days of receiving notice of the Board's adverse action, the filing with the Commissioner is timely. *See N.J.A.C.* 6:24-1.2(c). Where a case is transferred from the Court to the Commissioner, "the date of filing with the Commissioner relates back to the original date of filing with the Superior Court." *Driggins v. Newark Bd. of Educ.*, 93 *N.J.A.R.* 2d (Vol. 4A) 317, 318 (Comm'r of Ed.)

> terminate the same, but that in the absence of any provision herein for a definite number of days' notice, the contract shall run for the full term named above.

No definite number of days was specified in the written contract. The line reserved for that specific purpose was left blank.

Shortly after the start of the 1991-92 academic year, the Board notified Siegel by letter that it was "terminating [his] employment with the district effective 60 days from this date, due to a reduction in force[.]" Although that notice is dated September 30, 1991, Siegel's unrefuted testimony establishes that he did not actually receive the letter until October 15, 1991. His testimony is consistent with the acknowledged fact that the Board continued paying Siegel's salary through December 15, 1991, or sixty days from October 15, 1991.[3]

Since it was his very first year of employment in the district, Siegel did not have any tenure or seniority rights. Forced to look for a new job after school had already opened for 1991-92, Siegel was unable to find another teaching position. He scoured the greater New York-New Jersey metropolitan area unsuccessfully looking for vacancies in the educational fields which he is qualified to teach. Significantly, the Board introduced no evidence showing that suitable jobs were available. However, the Board did offer Siegel an opportunity to work as a substitute teacher in the Garfield school system at the rate of $60 per day. Siegel admits that he declined that offer because he wanted "a better position" and also because he would no longer be eligible for medical coverage and pension contributions.

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[3]In point of fact, Siegel testified that he actually was paid for two additional days, through December 17, 1991

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that Siegel is entitled to damages fixed by the cancellation clause in his contract of employment.

N.J.S.A. 18A:28-9 authorizes a local school district to reduce the number of teaching staff members "whenever, in the judgment of the board, it is advisable to abolish any such position for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause[.]" A decision by a school board to abolish a particular position is a managerial prerogative "[t]hat cannot be negotiated" away. *Old Bridge Twp. Bd. of Educ. v. Old Bridge Educ. Ass'n*, 98 *N.J.* 523, 531 (1985). Only tenured teachers are entitled to seniority protection. *Bednar v. Westwood Bd. of Educ.* 221 *N.J. Super.* 239, 242 (App. Div. 1987), *certif. den.* 110 *N.J.* 512 (1988). Nontenured teachers must be notified before April 30 whether or not they will be offered a contract for the succeeding academic year, but that statutory entitlement is inapplicable here because Siegel was not hired until the beginning of the 1991-92 year. *N.J.S.A.* 18A:27-10, -11.

Petitioner's argument that Board bears the ultimate burden of proving the justification for a reduction in force must be rejected. In the first place, Siegel never challenged the good faith of the Board's decision to terminate his position. Rather, petitioner framed the issues in terms of whether the Board's action violated the agreement between the parties. It is settled law that, without an affirmative showing of dishonesty, fraud, or abuse, the Commissioner is "not empowered to substitute his discretion for that of the local board." *Boult v. Passaic Bd. of Educ.*, 136 *N.J.L.* 521, 523 (E. & A. 1947). More pertinently, teaching contracts containing a standard termination provision "may be terminated in accordance with their terms, without the need to demonstrate "good" or "just" cause. *Mozier v. Cherry Hill Bd. of Educ.*, 450 *F. Supp.* 742, 448 (D.N.J. 1978). Thus, this analysis of Siegel's legal rights proceeds on the basic assumption that the Board acted within its authority when it notified him that his services in the district were no longer necessary.

Nonetheless, Siegel is entitled to some sort of relief for the Board's premature cancellation of his teaching contract The vexing question is how to accommodate the teacher's interest in fairness with the board's managerial prerogative to

terminate unnecessary employees. In *Old Bridge Twp. Bd. of Educ. v. Old Bridge Educ. Ass'n, supra,* a school board had originally notified a teacher in April that she would be rehired and, three months later, notified her in July that it was rescinding her employment for the upcoming school year. Balancing the interests of the parties, the New Jersey Supreme Court concluded that "awarding of a full year's pay (even with potential mitigation) would make a nullity of the Board's necessary power to reduce forces in the face of fiscal emergency." *Old Bridge*, 98 *N.J.* at 533. According to the Court, an award of a full year's salary "would eliminate the fiscal benefit of abolishing positions in times of economic crisis and would eviscerate the central propose of the statute." *Id.* Therefore, the Court devised its own remedy of measuring the extent of the damages by the number of days that the notice was late.

There are several crucial differences between the facts presented in *Old Bridge* and here. Unlike *Old Bridge* where the parties had "not actually negotiated a separate provision for notice of proposed fiscal layoffs," 98 *N.J.* at 534, Siegel's contract has an express cancellation clause dealing with termination of the relationship. *Old Bridge* also differs in that there was a definite cutoff date by which notice to the teacher was due (making it feasible to calculate damages in terms of lateness), whereas the Board's notice to Siegel was not similarly "late." Most important of all, the teacher in *Old Bridge* had the better part of the summer to find another job, whereas Siegel only learned of his termination in October when it is more difficult for unemployed teachers to find work.

Apart from such distinguishing features, a careful reading of *Old Bridge* provides support for Siegel's contractual remedy. Indeed, the Supreme Court itself acknowledged, "Had this been a non-tenured teacher, the Commissioner of Education would have looked to the standard contract of employment to find the correct resolution." 98 *N.J.* at 531. Relying on prior school law decisions, the Court elaborated:

> To determine the amount of the award the State Board has drawn upon the provisions in the standard contract of employment for non-tenured teachers requiring 60 days. *Armstrong v. East Brunswick Bd. of Educ.*, 1975 *SLD* 117, *aff'd* 1976 SLD 1104 (App. Div. 1976) (non-tenured teacher who did not receive notice of nonrenewal until two days after statutory deadline awarded 60 days salary). Had the reduction in force

> occurred in mid-term to a non-tenured teacher, the Commissioner would presumably draw upon the same provisions in teachers' contracts calling for 60 days notice of termination to value the claim. *Cf. Contaldi v. Board of Educ. of Jersey City* (Commissioner of Education, January 23, 1981) (non-tenured teacher awarded 60 days pay when he was not properly notified of his dismissal until the new school year had begun and he had already taught for one school day). 98 *N.J.* at 532

While 60-days notice of cancellation seems to have become the generally-recognized practice in the educational field, it is not enshrined in any statute or regulation. Review of the two administrative decisions cited by the Supreme Court reveals that in each instance the underlying contract or salary policy specified 60-days notice. *Armstrong*, 1975 *S.L.D.* at 1104. *Contaldi*, slip op. at 4. *Accord, Mozier*, 450 *F. Supp.* at 748 n.4, where it was said that the presence of an express 60-day notice provision in a teacher's contract"vitiates any expectancy of year long employment." *See also, Canfield v. Pine Hill Bd. of Educ.*, 97 *N.J. Super.* 483, 492 (App. Div. 1967) (Gaulkin, S.J.A.D. dissenting), *rev'd for reasons expressed in the dissent*, 51 *N.J.* 400 (1968), suggesting that, absent a cancellation clause, "the teacher would, at most, be entitled to his salary for the full term of the contract, but not to tenure."

Nothing however, prohibits the parties from negotiating a shorter or longer notice period, so long as the agreement does not pose a significant threat to the public employer's ability to make substantive policy decisions. *Old Bridge*, at 529. Such an approach is also consistent with the holding in *Rahway Educ. Ass'n v. Rahway Bd. of Educ.*, 1986 *S.L.D.* 1588, 1600 (Comm'r), wherein the Commissioner declared that "any agreement which extends salary benefits to nontenured teachers beyond the sixty-day termination provision *included in their employment contracts* is contrary to law." (Emphasis added).

If the Garfield Board had wanted to limit its exposure, it could have done so by putting the usual 60-day cancellation clause into its standard employment contract. Surely by September the Board ought to have had adequate knowledge of the district's financial condition and staffing needs for the immediate academic year. Consequently, the Board was in a much better position than the newly-hired teacher to anticipate the risk of future loss. If the employment contract had included the customary 60-day language, the Commissioner clearly would have enforced it.

Armstrong; Contaldi. Even if the cancellation clause were silent as to time, the Commissioner would be likely to impute 60 days as a "reasonable" time period. Ordinarily, if a contract contains no express terms as to its duration, it is terminable at will or after a reasonable time. *In re Miller's Estate*, 90 *N.J.* 210, 219 (1982); *West Caldwell v. Caldwell*, 26 *N.J.* 9, 27 (1958).

Here, however, the contractual language is not susceptible of such interpretation. Language chosen by the Board itself plainly provides that "[I]n the absence of any provision herein for a definite number of days' notice, the contract shall run for the full term[.]" Under these unique circumstances, where the Board could have easily limited its liability by using the appropriate language in its contract, it does not seriously interfere with managerial prerogatives to require the Board to honor the commitment that it voluntarily made.

Finally, consideration must be given to the question of whether Siegel made sufficient efforts to mitigate his damages. Since the terminated employee has available time which may be used profitably, the employer may reduce any damage award by showing that the employee could have secured other employment by reasonable efforts. Unreasonable refusals to accept other proffered employment will trigger mitigation principles. *Goodman v. London Metals Exchange, Inc.*, 86 *N.J.* 19, 34-35 (1981). Proofs establish that Siegel flatly rejected the Board's offer to hire him as a substitute teacher at $60 per day. Although it is understandable that Siegel would have preferred more lucrative and secure employment, it was unreasonable for him to turn down this temporary source of income. Especially this is true because the job offer was in Seigel's regular line of work as a teacher. While the record may be somewhat imprecise as to how many days of substitute work the district could have offered him, the reason for this lack is that Siegel declined to consider any substitute work whatsoever. Public employers should not be required to pay anyone for not working when there is work available to be done. Accordingly, the Board is entitled to a credit of $60 for each day that it must pay damages.

Order

It is **ORDERED** that the Board pay to Siegel his salary and other monetary benefits for the period from December 18, 1991 to June 31, 1992.

And it is further **ORDERED** that the Board is entitled to an offset of $60 per day for every school day during that period.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Aug. 10, 1993
Date

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

Aug. 13, 1993
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 18 1993
Date

OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

List of Witnesses

1. Stanley Siegel

List of Exhibits

No.	Description
J-1	Statement of stipulated facts
J-2	Copy of an employment contract between the Garfield Board of Education and Stanley Siegel, dated September 1, 1991
J-3	Copy of a letter to Stanley Siegel from the Garfield Board of Education, dated September 30, 1991

STANLEY SIEGEL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF GARFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions from both parties were timely filed in accordance with N.J.A.C. 1:1-18.4.

Upon a full and independent review of the record in this matter and the exceptions advanced by the parties, the Commissioner finds such exceptions to be without merit and fully concurs with the findings and conclusions of the ALJ in his initial decision that the Board is liable in damages to petitioner for salary and other monetary benefits for the period December 18, 1991 to June 31, 1992. As succinctly stated by the ALJ, the Board's own actions clearly compel the result in this matter.

> If the Garfield Board had wanted to limit its exposure, it could have done so by putting the usual 60-day cancellation clause into its standard employment contract. Surely by September the Board ought to have had adequate knowledge of the district's financial condition and staffing needs for the immediate academic year. Consequently, the Board was in a much better position than the newly-hired teacher to anticipate the risk of future loss. If the employment contract had included the customary 60-day language, the Commissioner clearly would

> have enforced it. Armstrong; Contaldi. Even if the cancellation clause were silent as to time, the Commissioner would be likely to impute 60 days as a "reasonable" time period. Ordinarily, if a contract contains no express terms as to its duration, it is terminable at will or after a reasonable time. In re Miller's Estate, 90 N.J. 210, 219 (1982); West Caldwell v. Caldwell, 26 N.J. 9, 27 (1958).
>
> Here, however, the contractual language is not susceptible of such interpretation. Language chosen by the Board itself plainly provides that "[I]n the absence of any provision herein for a definite number of days' notice, the contract shall run for the full term[.]" Under these unique circumstances, where the Board could have easily limited its liability by using the appropriate language in its contract, it does not seriously interfere with managerial prerogatives to require the Board to honor the commitment that it voluntarily made.
>
> (Initial Decision, at pp. 7-8)

The Commissioner further agrees that because petitioner rejected the Board's offer to hire him as a substitute teacher at $60 a day, he did not adequately mitigate his damages and, therefore, his monetary entitlement from the Board must be reduced by such $60 a day.

Accordingly, the Commissioner affirms the decision of the Office of Administrative Law. The Board of Education of the City of Garfield is hereby directed to pay petitioner his salary and other monetary benefits for the period December 18, 1991 to June 31, 1992, less an offset of $60 per day for every school day during that period.

SEPTEMBER 15, 1993

DATE OF MAILING - SEPTEMBER 15, 1993

COMMISSIONER OF EDUCATION

220-93

EDU #8225-92
C # 220-93
SB # 58-93

STANLEY SIEGEL,	:	
PETITIONER-CROSS/APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF GARFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, September 15, 1993

For the Petitioner-Cross/Appellant, Wasserman & Schachman
(David B. Wasserman, Esq., of Counsel)

For the Respondent-Appellant, Damiano & Cerruti
(Toni Belford Damiano, Esq., of Counsel)

Stanley Siegel (hereinafter "petitioner") was employed as a teacher by the Board of Education of the City of Garfield (hereinafter "Board") for the 1991-92 school year by a written contract dated September 1, 1991. That contract provided, in part:

> It is hereby agreed by the parties hereto that this contract may at any time be terminated by either party giving to the other _____ days' notice in writing of intention to terminate the same, but that in the absence of any provision herein for a definite number of days' notice, the contract shall run for the full term named above.

By letter dated September 30, 1991, the Board notified petitioner that as the result of a reduction in force, his employment was being terminated effective in 60 days.[1] Petitioner

[1] We note that the Board actually paid petitioner's salary through December 17, 1991.

APRIL 13, 1994

challenged such action, arguing that under the express terms of his contract, he was entitled to full compensation through the end of June 1992.[2]

On August 10, 1993, an Administrative Law Judge ("ALJ") concluded that petitioner was entitled to his salary and benefits for the period from December 18, 1991 to June 31 [sic], 1992 pursuant to the express terms of his contract. The ALJ also concluded that petitioner had failed to adequately mitigate his damages in that he had rejected the Board's offer of employment as a substitute teacher at a salary of $60 per day. The ALJ reasoned:

> Although it is understandable that Siegel would have preferred more lucrative and secure employment, it was unreasonable for him to turn down this temporary source of income. Especially this is true because the job offer was in Siegel's regular line of work as a teacher. While the record may be somewhat imprecise as to how many days of substitute work the district could have offered him, the reason for this lack is that Siegel declined to consider any substitute work whatsoever. Public employers should not be required to pay anyone for not working when there is work available to be done. Accordingly, the Board is entitled to a credit of $60 for each day that it must pay damages.

Initial Decision, slip op. at 8.

The ALJ acknowledged that petitioner had "scoured the greater New York-New Jersey metropolitan area unsuccessfully looking for vacancies in the educational fields in which he is qualified to teach" and that "the Board introduced no evidence showing that suitable jobs were available." Id. at 4.

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2 Petitioner originally filed his complaint in Superior Court, but the Appellate Division transferred this matter to the Commissioner of Education, rejecting petitioner's claim "that he has a legal, contractual remedy that may be adjudicated outside the parameters of the pertinent school laws applicable to reductions in force and the consequent impact upon affected teachers." Siegel v. Board of Education of the City of Garfield, Docket #A-3926-91T1 (App. Div. 1992).

On September 15, 1993, the Commissioner of Education adopted the findings and conclusions of the ALJ and directed the Board to pay petitioner his salary and other benefits as recommended by the ALJ, less $60 per day for every school day during that period.

The Board filed an appeal to the State Board, arguing that petitioner was entitled to no more than 60 days notice of termination. Petitioner filed a cross-appeal, contending that the Commissioner improperly offset his damage award by $60 per day due to his failure to accept employment with the Board as a substitute teacher.

After a thorough review of the record, we affirm the Commissioner's determination to award petitioner his salary and benefits for the period from December 18, 1991 through June 30, 1992[3] substantially for the reasons expressed by the ALJ and adopted by the Commissioner. However, because the Commissioner failed to apply the correct legal standard in assessing whether petitioner had adequately mitigated his damages, we reverse her determination that petitioner's award should be reduced by $60 per day.

What the Commissioner failed to recognize is that petitioner's duty to mitigate his damages did not require that he accept any offered teaching position without regard to the nature of the position or such factors as the attending salary and benefits. Rather, the duty imposed upon a wrongfully discharged employee by the mitigation doctrine is to seek similar employment in order to reduce the amount of his or her damages. Goodman v. London Metals

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[3] We correct the Commissioner's award of salary and benefits through June 31, 1992, a nonexistent date.

Exchange, Inc., 86 N.J. 19 (1981). "Similar employment refers to the nature of the activity, location and rate of compensation....Thus it may be unreasonable to apply mitigation principles when the available job would require the applicant to move his home or to accept a substantial reduction in pay." Goodman, supra at 36-37.[4]

In this case, it is evident from the record that the salary of the substitute teaching assignment offered by the Board was significantly less than that of the full-time employment from which petitioner was dismissed.[5] Thus, notwithstanding the fact that the employment offered to petitioner by the Board was in the teaching profession, his refusal of such offer may not have been unreasonable for mitigation purposes. As found by the ALJ and adopted by the Commissioner and undisputed by the Board, the petitioner "scoured" the New York and New Jersey areas for suitable employment. Had he abandoned such search and accepted the substitute teaching assignment, petitioner may have risked an even greater reduction from his damages by lowering his sights too soon. See Goodman, supra.

In that regard, we reject the ALJ's assertion adopted by the Commissioner that, in applying the mitigation doctrine,

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[4] We note that "the degree of comparability required is not static. With the passage of time circumstances may dictate that the claimant lower his sights and accept employment with lower pay, with different work, or at a more distant location..." Goodman, supra at 38. Moreover, a wrongfully discharged employee who lowers his or her sights too soon by accepting lower paying work risks a reduction from damages in an amount equivalent to that which he or she should have accepted. Id. at 40 n.3.

[5] As expressly indicated in petitioner's employment contract, exhibit J-2, in evidence, his annual salary for the 1991-92 school year was $36,977.

"[p]ublic employers should not be required to pay anyone for not working when there is work available to be done." Initial Decision, at 8. There is absolutely no support in law for such a conclusion in the context of an employee's duty to mitigate.

Moreover, even assuming arguendo that petitioner did fail to properly mitigate his damages by refusing the substitute position, there is no support in the record for the conclusion that petitioner's damages should be reduced by $60 for every school day between December 18, 1991 and June 30, 1992 when, as acknowledged by the ALJ, there is no indication as to how much work might have been available to him as a substitute. In applying mitigation principles, the appropriate deduction from damages is the greater of the claimant's actual earnings or the salary such individual should have been earning had he or she adequately mitigated. Goodman, supra at 43. Here, in the absence of evidence as to the number of days during the pertinent period in which substitute work was available, the amount petitioner could have earned had he accepted the substitute assignment cannot be determined. Nor is there any indication in the record before us, which does not include the transcripts from the hearing below, when he was offered the substitute assignment.

Consequently, we affirm the Commissioner's determination that petitioner was entitled to his salary and benefits for the period from December 18, 1991 through June 30, 1992, but reverse her decision to reduce petitioner's damages by $60 per day. In that the record before us does not permit us to determine whether petitioner did, in fact, properly mitigate, we remand to the Commissioner for the limited purpose of providing the Board with the opportunity to

demonstrate under the correct legal standard that petitioner failed to properly mitigate his damages by refusing the Board's offer of a substitute teaching position and, if so, how much he could have earned in such an assignment, and for a resultant computation of petitioner's damages. We emphasize that "[m]itigation, including the lower sights principle, is an affirmative defense and the burden of proving the appropriateness of its application rests on the wrongdoer," in this case the Board. Id. at 40.

April 13, 1994

Date of mailing APR 15 1994

220-93

103-95R
(220-93)

STANLEY SIEGEL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF GARFIELD, BERGEN COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

SYNOPSIS

In this matter Commissioner had adopted ALJ's findings that petitioner was entitled to damages due to Board's premature cancellation of contract and due to contract language. Commissioner had ordered Board to pay petitioner mitigated compensation.

State Board remanded matter for the limited purpose of providing the Board the opportunity to demonstrate under the correct legal standard that petitioner failed to properly mitigate his damages by refusing the Board's offer of a substitute teaching position and, if so, how much he could have earned in such an assignment, and for a resultant computation of petitioner's damages.

On remand, the ALJ concluded that the Board was not entitled to any mitigation of petitioner's damages. Citing the State Board's decision which relied on Goodman v. London Metals Exchange, Inc., ALJ found that petitioner was not required to lower his sights and accept employment with lower pay until he has exhausted reasonable efforts to find similar work at comparable pay. Thus, petitioner's damages should be based on his annual salary for the 1991-92 school year. Board was ordered to pay petitioner his lost salary in the gross amount of $22,958, less the usual deductions for taxes and social security contributions.

Commissioner concurred with the ALJ that the Board failed to meet its affirmative burden, as established in Goodman, of providing that the amount of potential earnings from substitute teaching should mitigate its obligation. Board failed to demonstrate that the lower sights principle should be applied in this circumstance. Board was ordered to pay damages to petitioner as directed.

MARCH 27, 1995

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO.EDU 4130-94
AGENCY DKT. NO. 478-10/92
(OAL DKT. NO. EDU 8225-92 - Remanded)
AGENCY DKT. NO. 478-10/92

STANLEY SIEGEL,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF GARFIELD,

Respondent.

David B. Wasserman, Esq., for petitioner
(Wasserman & Schachman, attorneys)

Toni Belford Damiano, Esq., for respondent

(Damiano & Cerruti, attorneys)

Record Closed: February 6, 1995 Decided: February 15, 1995

BEFORE: KEN R. SPRINGER, ALJ:

Statement of the Case

This is a remand by the State Board of Education for development of a more complete record on mitigation of damages.

Procedural History

Petitioner Stanley Siegel ("Siegel"), a non-tenured teacher, brought suit against respondent Garfield Board of Education ("Board"), alleging that the Board had terminated his employment in breach of the cancellation clause in his teaching contract. On August 10, 1993, the administrative law judge issued an initial decision recommending an award of damages to petitioner for violation of his contractual rights, but further concluding that the Board was entitled to an offset of $60 per day because of Siegel's failure to accept the school district's offer of substitute teaching work. *Siegel v. Garfield Bd. of Educ.,* 93 *N.J.A.R.* 2d (Vol. 4B) 766. Thereafter, on September 15, 1993, the Commissioner of Education adopted this recommendation. By decision dated April 13, 1994, the State Board "affirm[ed] the Commissioner's determination that petitioner was entitled to a salary and benefits for the period from December 18, 1991 though June 30, 1992, but reversed her decision to reduce petitioner's damages by $60 per day." In making that determination, the State Board noted the lack of proof in the existing record "as to how much work might have been available to him as a substitute" and "*when* he was offered the substitute assignment." *Siegel v. Garfield Bd. of Educ.*, 94 *N.J.A.R.* 2d (Vol. 4B) 319, 320. Consequently, the State Board remanded the matter to the Commissioner for,

> . . . the limited purpose of providing the Board with the opportunity to demonstrate under the correct legal standard that petitioner failed to properly mitigate his damages by refusing the Board's offer of a substitute teaching position and, if so, how much he could have earned in such an assignment, and for a resultant computation of petitioner's damages. 94 *N.J.A.R.* 2d at 320.

In turn, the Commissioner referred the matter to the OAL on April 29, 1994 for further proceedings in accordance with these instructions. The OAL held a hearing on February 6, 1995.

Findings of Fact

From the proofs adduced at the hearing, I **FIND** the following facts:

Garfield is a relatively large school district, comprised of seven lower schools and one high school. At all relevant times, Nick Pracilio was the Board employee responsible for notifying substitute teachers of the availability of daily employment. Typically, he would arrive at his desk in the high school at around 5:00 a.m. Principals from the various schools would telephone him with information about which teachers would be absent from work that particular day. Dr. Robert Van Zanten, superintendent of schools, had provided an approved list of names of substitute teachers. Using this list, Pracilio would telephone prospective substitute teachers and offer them a job for that day. Ordinarily, he would simply "go down the list" in order, without attempting to match a substitute's qualifications with a particular teaching assignment. According to Pracilio's testimony, however, Dr. Van Zanten had told him "to call Mr. Siegel first." Presumably, this preference was given because Siegel had lost his regular teaching job in the district as the result of a reduction in force.

In the two weeks immediately preceding the period in question, Siegel had accepted an offer of substitute work for ten out of ten work days. Specifically, he worked as a substitute for the district on Monday, December 2 through Friday, December 6, 1991 and on Monday, December 9 through Friday, December 13, 1991. Moreover, Pracilio telephoned Siegel on the morning of Monday, December 16, 1991 and offered him substitute work on that day as well. To the best of Pracilio's

recollection, Siegel told him that he "wasn't available," but would let him know "when he is available." After that conversation, Pracilio never telephoned Siegel again to offer him substitute work. Siegel never informed Pracilio that he was ready to accept future assignments.

Evidence establishes that there was substitute work available if Siegel had been willing to accept it. During direct examination, Pracilio testified that "there was never a day in Garfield that the district did not require a substitute" and that "every day at least one [teacher] was out." A notebook maintained by Pracilio in the ordinary course of business corroborates that substitute work was available at least through April 16, 1992.[1] Each page of the notebook, which starts on September 3, 1991 and continues to April 17, 1992, contains four columns identifying: the school building; the teacher who was absent; the reason for the absence; and the name of any substitute. For example, on Tuesday, December 17, 1991, there were fourteen absent teachers. Any one of these absences could have been covered by Siegel. Only ten substitute teachers were available, leaving four vacancies which the district was unable to fill. Similarly, on Wednesday, December 18, 1991 there were eighteen absent teachers and only eleven available substitutes.

As indicated, the notebook stops on April 17, 1992, on which date school was closed for the Good Friday holiday. Apart from Pracilio's general testimony, the Board failed to produce any evidence to substantiate that any substitute work was available for the remainder of the 1991-92 school year.[2] If Siegel had been willing to accept

[1] Claiming unfair surprise, petitioner's counsel objected strongly to the admission of these records because the Board had failed to produce them in discovery. This objection was overruled in the interest of creating a complete record. At the hearing, petitioner's counsel declined an offer to continue the hearing to give him sufficient time to respond to this newly-discovered evidence.

[2] While the witness made passing reference to the existence of a second notebook, the Board never offered such notebook into evidence at the hearing.

employment as a substitute teacher, there were seventy-three school days between December 16, 1991 and April 16, 1992 which he could have worked.[3] Therefore, at a rate of $60 per day, Siegel could have earned a total of $4,380.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the Board is not entitled to any mitigation of petitioner's damages.

Even if Siegel could have earned extra money by accepting the substitute-teaching offer, it does not follow that the Board is entitled to an offset. In its remand decision, the State Board expressly ruled that the agency below had misapplied the mitigation doctrine. Summarizing the law, the State Board commented:

> What the Commissioner failed to recognize is that petitioner's duty to mitigate his damages did not require that he accept any offered teaching position without regard to the nature of the position or such factors as the attending salary and benefits. Rather, the duty imposed upon a wrongfully discharged employee by the mitigation doctrine is to seek *similar* employment in order to reduce the amount of his or her damages. *Goodman v. London Metals Exchange, Inc.*, 86 *N.J.* 19 (1981). "Similar employment refers to the nature of the activity, location and rate of compensation . . . Thus it may be unreasonable to apply mitigation principles when the acceptable job would require the applicant to move his home or to accept a substantial reduction in pay." *Goodman, supra* at 36-37. 94 *N.J.A.R.* 2d at 319-320. [Emphasis in the original]

Here, as the State Board remarked, "it is evident from the record that the salary of the substitute teaching assignment offered by the Board was significantly less than that of the full-time employment from which petitioner was dismissed." *Ibid.* Moreover,

[3]This calculation excludes school holidays, winter vacation and dates that school was closed due to snow.

a claimant is not required to lower his sights and accept employment with lower pay until he has exhausted reasonable efforts to find similar work at comparable pay. None of the evidence offered by the Board indicates that Siegel was derelict in searching for comparable employment or that his unwillingness to accept an immediate drastic reduction in pay was unreasonable. Under the law, as outlined by the State Board in its decision, the Board has not met its affirmative burden of proving that the amount of potential earnings from substitute teaching, should be considered in mitigation.

Computation of the amount of Siegel's damages should be based on his total annual salary of $36,977 and 182 days in the 1991-92 academic year, or a per diem rate of $203.17. Both parties stipulated that there were 113 school days from December 18, 1991 to June 30, 1992. Accordingly the amount of lost salary is 113 x $203.17 = $22,958. No pre-judgment interest will be allowed against a public governmental entity in the absence of "a showing of overriding and compelling equitable reasons. . . to justify the award." *Newark Bd. of Ed. v. Levitt*, 197 *N.J. Super.* 239, 244 (App. Div. 1984).

Order

It is **ORDERED** that the Board pay to Siegel his lost salary in the gross amount of $22,958, less the usual deductions for taxes and social ecurity contributions.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and

unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

Feb. 15, 1995
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Feb. 17, 1995
DATE

Receipt Acknowledged:
Hope R. Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

FEB 17 1995
DATE

OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

List of Witnesses

1. Nick Pracilio, stock clerk, Garfield school district

List of Exhibits

No.		Description
P-1		Copy of letter to Toni Belford Damiano, Esq. from David B. Wasserman, Esq., dated May 19, 1994
R-1	Id.	Copy of handwritten notes prepared by Nick Pracilio
R-2		Original notebook of the assignment of substitute teachers for the period September 3, 1991 to April 16, 1992
R-3		Copy of revised notebook entry for Monday, December 16, 1991

STANLEY SIEGEL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF GARFIELD, BERGEN COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

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

Upon careful and independent review of the record of this matter on remand, the Commissioner finds that OAL properly applied the standard set forth in Goodman v. London Metals, supra, in determining that the Board is obligated to pay petitioner for his lost salary from December 18, 1991 through June 30, 1992, less usual deductions for taxes and social security contributions. The Commissioner concurs that the Board herein has failed to meet its affirmative burden, as established in Goodman, of providing that the amount of potential earnings from substitute teaching should mitigate its obligation. Here, no evidence is offered showing that petitioner was derelict in his search for comparable employment (Initial decision, at p. 6), nor was petitioner obligated to accept what would have amounted to a substantial reduction in pay (Goodman, at 37). Moreover, the lower sights principle is not to be applied

automatically, but rather with caution and in consideration of the circumstances peculiar to the individual involved. (Goodman, at 40) The Board has failed to demonstrate that the lower sights principle should be applied in this circumstance.

Accordingly, the Commissioner adopts as his own the findings and conclusions of law by the Administrative Law Judge in the initial decision for the reasons expressed therein. The Board is ordered to pay damages to petitioner as therein specified.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 27, 1995

DATE OF MAILING MARCH 27, 1995

220-93

APP DIV. #L-16189-91
EDU # 8225-92
C # 220-93
SB # 58-93
EDU # 4130-94
C # 103-94R
SB # 53-95

STANLEY SIEGEL, :

PETITIONER-RESPONDENT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF GARFIELD, BERGEN COUNTY, : DECISION

RESPONDENT-APPELLANT. :

Transferred by the Appellate Division, September 29, 1992

Decided by the Commissioner of Education, September 15, 1993

Remanded by the State Board of Education, April 13, 1994

Remanded by the Commissioner of Education, April 29, 1994

Decision on remand by the Commissioner of Education, March 27, 1995

For the Petitioner-Respondent, Wasserman & Schachman (David B. Wasserman, Esq., of Counsel)

For the Respondent-Appellant, Toni Belford Damiano, Esq.

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

July 5, 1995

Date of mailing JUL 07 1995

221-93

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GAIL TRACY STINE,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SEPTEMBER 20, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL FOR MOOTNESS
OAL DKT. NO. EDU 6993-91
AGENCY DKT. NO. 173-6/91

GAIL TRACY STINE,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN,
Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Zazzali, **Fagella & Nowak**, attorneys)

Peter P. Kalac, Esq., for respondent (Kalac, Newman, **Lavender & Campbell**, attorneys)

Record Closed: August 13, 1993 Decided: August 13, 1993

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

Gail Tracy Stine, petitioner, having appealed to the Commissioner of Education a determination of the Middletown Township Board of Education, respondent, that the petitioner was in a retired status; and

The matter having been answered and transmitted to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F-1 through -13; and

It appearing that the Board of Trustees of the Teachers Pension and Annuity Fund has approved the petitioner's application for ordinary disability retirement, now

Therefore, I **FIND** and **CONCLUDE** that there no longer is a justiciable issue before me. Accordingly, the matter is **DISMISSED** as moot. It is so **ORDERED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

13 AUGUST 1993
Date

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

8/17/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 19 1993
Date

OFFICE OF ADMINISTRATIVE LAW

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GAIL TRACY STINE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon such review, the Commissioner concurs with the ALJ that this matter has been mooted by subsequent events and no longer constitutes a justiciable controversy before the Commissioner.

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

IT IS SO ORDERED.

SEPTEMBER 20, 1993

COMMISSIONER OF EDUCATION

DATE OF MAILING - SEPTEMBER 20, 1993

222-93

IN THE MATTER OF THE SCHOOL :
ELECTION HELD IN THE SCHOOL : COMMISSIONER OF EDUCATION
DISTRICT OF THE BOROUGH OF : DECISION
DEAL, MONMOUTH COUNTY. :
:

SYNOPSIS

Petitioner, unsuccessful candidate for Board membership, sought inquiry into alleged violations and irregularities in school election proceedings in regard to validity of nominating petition, electioneering and actions of challengers.

ALJ concluded (1) nominating petition challenged was valid pursuant to N.J.S.A. 18A:14-9 to 12; (2) there was insufficient evidence that candidate engaged in electioneering; (3) there were irregularities involving challengers that should be referred to County Prosecutor for further action; and (4) petitioner's claim for invalidation of the election results as defective and untimely was dismissed. ALJ ordered Board election officials to comply with school election laws in the future.

Commissioner adopted findings and determination in initial decision with modification. Commissioner set aside ALJ's dismissal of petitioner's claim for invalidation of election results noting that request contained in petition submitted met required statutory and regulatory requirements. Commissioner concurred with remaining findings and conclusions of ALJ, and concluded that petitioner had not met his burden of proof that any of the irregularities occurring in the Deal election thwarted the will of the people thereby justifying the ordering of a new election. Commissioner directed transmittal of copy of decision to County Prosecutor for any action he/she deems necessary under law.

SEPTEMBER 20, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4002-93
AGENCY DKT. NO. 97-4/93

IN THE MATTER OF THE
DEAL SCHOOL ELECTION

Bernard Boglioli, Sr., Esq., for petitioner Kolodjeski (Boglioli, O'Mara, Reynolds & Mirra, attorneys)

Honora M. O'Brien, Esq., for Board of Education (Shebell & Schibell, attorneys)

Record Closed: July 21, 1993 Decided: July 23, 1993

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

Stanley Kolodjeski, an unsuccessful candidate in the April 20, 1993 election for a seat on the Borough of Deal Board of Education ("Board"), charges that, relative to that election, there were violations of the school election laws and he has requested an inquiry into the election. See N.J.S.A. 18A:14-1 to -104 and N.J.A.C. 6:24-6.1(b).

More particularly (in a letter requesting the inquiry) relative to successful candidates Richard Menahem and Robin Gavin, Mr. Kolodjeski alleges the following: (1) Mr. Menahem's nominating "petition for election was altered after it was notarized. The original signature attesting to the voters' signatures was snowpacked out and a different signature written." (2) Mr. Menahem's and Ms. Gavin's "[c]ampaign literature was mailed without a statement of who paid for it." (3) "Hand written sheets of paper were given by Mr. Menahem to unknown persons in the gym" (when and where voting was occurring).

Relative to the election officials, Mr. Kolodjeski alleges the following: (1) Challengers did not have name tags. (2) Voters who were asked for their names and addresses but who refused to give same were permitted to sign in the registration book.

Relative to Mr. Menahem's "challenger" Morton Hirschman, Mr. Kolodjeski alleges the following: (1) During the voting hours, in the lobby adjacent to the gym where voting took place, Mr. Hirschman passed out campaign circulars, discussed the election with voters and told voters what "lines" to vote and levers to pull. (2) At the above time, in the gym, Mr. Hirschman also had "discussions" with voters. (3) When his (Kolodjeski's) challenger approached the "judge of elections about [Mr. Hirschman's] conduct, he [Mr. Hirschman] was verbally rude to her" by asking what she was "bitching about." (4) After the "judge of elections" ordered Mr. Hirschman to "be quiet, sit down or go home," he complied for only a short time before resuming the above-noted conduct. (5) After the voting had ended, Mr. Hirschman "forced himself inside the machine curtain, attempting to read the results before the election committee,"and only after repeatedly being commanded to do so, did he leave.

PROCEDURAL HISTORY

By letter dated April 23, 1993, Mr. Kolodjeski made the above allegations and requested that the Monmouth County Commissioner of Elections conduct "an inquiry" into the election be conducted. By letter dated April 26, 1993, the Monmouth County Superintendent of Schools transmitted Mr. Kolodjeski's letter to the New Jersey Commissioner of Education who, by letter dated April 30, 1993, transmitted it to the Office of Administrative Law where it was filed as a contested case. See N.J.S.A. 18A:6-9, N.J.S.A. 52:14B-2(b) and -9 and N.J.A.C. 1:1-3.1. By letter dated May 25, 1993, Mr. Kolodjeski's attorney entered his appearance and, by letter dated June 2, 1993, the Board's attorney entered her appearance. On June 8, 1993, during a telephone conversation with Mr. Hirschman, I confirmed that he knew that Mr. Kolodjeski had made allegations against him and complaints against him could follow; he had notice of the time, place and purpose of the hearing; he would be afforded an opportunity to be heard; he should consult with an attorney; and he had a right to testify or to refuse to testify relative to Mr. Kolodjeski's allegations.

A hearing was held on June 9, 1993, in the Borough of Deal Municipal Building. In his opening statement, Mr. Kolodjeski's attorney contended that, in his letter, Mr.

Kolodjeski set forth not only a request for an "inquiry into alleged violations" of relevant election statutes, but also a request or claim that Mr. Menahem's nominating petition, candidacy and election should be voided and that Mr. Kolodjeski, who received the next highest number of votes, should be deemed elected to the Board. Compare N.J.A.C. 6:24-6.1(a) to N.J.A.C. 6:24-6.1(b) and (c). In the alternative, Mr. Kolodjeski's attorney moved to amend the letter to add those claims. See N.J.A.C. 1:1-6.2. Mr. Kolodjeski's contention and motion were opposed and objected to by the Board's attorney, and are resolved below. Mr. Kolodjeski's attorney also submits that the evidence supports the voiding of Mr. Menahem's nominating petition, etc., and the Board's attorney denies that such evidence was presented. At the attorneys' request, the record remained open to allow them to obtain a transcript of the hearing and to file closing memoranda.

FINDINGS OF FACT

I **FIND** the following **FACTS**:

Board secretary, Anthony F. Moro, Jr., Ed. D., provided blank "Nominating Petition[s] for Annual School Election" to potential candidates for the April 20, 1993 election to the Deal Board of Education. The petitions had parts to be completed to assure compliance with relevant school elections statutes.

By February 9, 1993, a "Nominating Petition" was completed for Mr. Menahem's candidacy in the April 20, 1993 election: Part "A," the "Nominating Statement," identified Mr. Menahem as a candidate for membership on the Board in the April 20, 1993 election. Part "B," the "Signatories," included the signatures of ten Deal residents. See N.J.S.A. 18A:14-9. Part "C," the "Verification," included a statement to be "verified by the oath of [a signatory], taken and subscribed before a person qualified under the laws of this state to administer an oath," that the signatories were qualified voters, etc.; however Mr. Menahem, who, as a candidate could not also be a "signatory," incorrectly signed the "Verification." See N.J.S.A. 18A:14-11 (emphasis added). Part "D," the "Candidate's Acceptance," on February 9, 1993, was also signed by Mr. Menahem and notarized by the New York State notary. See N.J.S.A. 18A:14-10 and BOE-1a.

On or about February 10, 1993, Mr. Menahem presented his nominating petition to Dr. Moro for filing.

After Mr. Menahem's petition was filed, Dr. Moro reviewed it and noticed that, instead of one of the signatories, as required by statute, Mr. Menahem had signed the "Verification." Dr. Moro then (correctly) instructed Mr. Menahem that one of the "Signatories" must sign the "Verification." Therefore, Dr. Moro "whited-out" Mr. Menahem's signature (but he inadvertently failed to white-out the hand-printed name "Richard Menahem" in the beginning of the "Verification"). Mr. Menahem and Germaine Menahem, his wife, who was a "signatory," then brought the petition to Sandra H. Carasia, a New Jersey notary; and on February 19, 1993, Mrs. Menahem signed the "Verification" and Mrs. Carasia notarized that signature. Mr. Menahem then again presented his nominating petition to Dr. Moro, who accepted it for filing. (Dr. Moro did not date- stamp nominating petitions and kept no records as to dates of filing.) See N.J.S.A. 18:14-12 and BOE-1a.

In making the above findings, I have accepted Mr. Menahem's testimony and rejected Mrs. Carasia's testimony that she notarized Mr. Menahem's signature on the "Verification" for reasons including the following: Dr. Moro credibly testified that he instructed Mr. Menahem that a "Signatory" and not the candidate must sign the "Verification," and Dr. Moro whited-out Mr. Menahem's signature so a "Signatory" could sign it. Mr. Menahem credibly testified that he and his wife went to Mrs. Carasia for the sole purpose of having his wife sign the "Verification" and having Mrs. Carasia notarize that signature. After Dr. Moro's instruction, Mr. Menahem would not have repeated the mistake of signing the "Verification." Also, Mrs. Carasia volunteered that, when she norarized the "Verification," Mr. Menahem had "many papers" and she "[could] not say [that the nominating petition] was the only paper," i.e., evidencing uncertainty as to what she notarized. Mr. Menahem's nominating petition's "Verification" shows (over the white-out) the signature "Germaine Menahem" and the notarization by Mrs. Carasia.

Also, on February 19, 1993, Mr. Menahem signed and later filed with Dr. Moro an "Appointment of Challengers and Alternates," naming Morton Hirschman as his challenger. See N.J.S.A. 18A:14-15 and BOE-2.

On February 23, 1993, Ms. Gavin's nominating petition for election to the Board in the April 20, 1993 election was properly completed and notarized and it was timely filed with Dr. Moro. See BOE-3.

On February 24, 1993, Mr. Kolodjeski's nominating petition for election to the Board in the April 20, 1993, election was properly completed and notarized and it

was timely filed with Dr. Moro. See BOE-4. On February 24, 1993, Mr. Kolodjeski's "Appointment of Challenger and Alternates," naming Dolores Kolodjeski as his challenger, was properly filed with Dr. Moro. See BOE-5.

Mr. Kolodjeski also asked Frances Fronapfel if she would act as one of his challengers and she said she wished to do so. However, after Mrs. Fronapfel contacted Dr. Moro and asked him about this and to be furnished with identification, Dr. Moro stated, since "[Everyone knew] one another. It [wasn't] necessary." See N.J.S.A. 18A:14-17.

Thereafter, after speaking with the office of the Monmouth County Superintendent of Schools, Dr. Moro telephoned Mr. Menahem and advised him to have his wife's "Verification" notarized "again" (although Dr. Moro was not clear about why it was "necessary") and, on March 3, 1993, Howard Londa, a notary public of the state of New York, so notarized Germaine Menahem's signature. See BOE-6.

During the election campaign, Ms. Gavin paid for the printing of about a hundred circulars urging "support" for herself and Mr. Menahem, which circular did not include a statement identifying who had paid for it, and it was distributed by Ms. Gavin and Mr. Menahem. See N.J.S.A. 18A:14-97, K-1 and K-1a. Also during the campaign, Mr. Menahem paid for the printing of two to three hundred handbills urging people to "vote for" himself and Ms. Gavin, which handbill did not include a statement identifying who had paid for it, and it was distributed by Mr. Menahem. See N.J.S.A. 18A:14-97 and K-2.

On April 20, 1993, from 4:00 p.m. to 9:00 p.m., in the Deal School gym, where two voting machines were located, the election took place with the following persons present during most of the voting: Brendan W. Kelly, as judge of the elections; Dolores Buck, as an election clerk; Josephine Cassaro, as an election clerk; Norma Furlong, as an election clerk; Mr. Hirschman, as Mr. Menahem's challenger; Mrs. Kolodjeski, as Mr. Kolodjeski's challenger; and Mrs. Fronapfel, as Mr. Kolodjeski's "challenger." See N.J.S.A. 18A:14-46. (The judge of elections and "election clerks" had previously served in such positions and Dr. Moro submitted their names to the Board, which approved their appointments. However, Dr. Moro did not know whether they had received certificates memorializing instruction in the use of voting machines or other duties. See N.J.S.A. 18A:14-6.1.) Challengers were not provided with and did not wear "mark[s] of identification." See N.J.S.A. 18A:14-17.

During the voting, challengers had no designated place to sit or stand, although desks and chairs were available, and Mr. Hirschman was "floating around" and "greeting" voters (it could not be determined how many) who entered the gym. In the gym, Mr. Hirschman introduced the reverend William Carton, a local pastor and voter, to Mr. Menahem. Mr. Hirschman also handed one of Mr. Menahem's handbills to James Carasia, another voter. Mr. Hirschman also helped Frances Kadre, an elderly voter, into the gym and several times told her and her sister, who accompanied her, to "Vote line two," i.e., for Mr. Menahem. Mr. Hirschman also approached Marilyn Tomaino, after she had voted, gave her a paper and said to her, "Take this list and go call people."

Mrs. Kolodjeski did not formally "challenge" any voter. However, she did ask the election officials to "call out" several persons' names and her requests were not always honored.

After the voting had ended, i.e., a few minutes after 9:00 p.m., Mr. Kelly and Mrs. Buck went to the voting machines to open them and count the votes. At that time, Mr. Hirschman entered a voting machine to see the vote totals; Mrs. Buck told Mr. Hirschman, whom she believed to be familiar with voting practice, "You know better! Get out! Out! Out!" Mr. Hirschman then withdrew. The votes for membership to the Board were then announced: 139 for Ms. Gavin, 97 for Mr. Menahem and 79 for Mr. Kolodjeski. See N.J.S.A. 18A:14-45 to -56, BOE-7 and BOE-8. (The school budget was also approved by the voters.)

On May 3, 1993, Ms. Gavin and Mr. Menahem were seated as members of the Board. See BOE-12.

LEGAL CONCLUSIONS

Laws governing school elections are found at N.J.S.A. 18A:14-1 to -104, N.J.S.A. 19:1-1 et seq. and N.J.A.C. 6:24-6.1 to -6.4.

Statement and Timeliness of Mr. Kolodjeski's Claim that Mr. Menahem's Election Should be Voided and that He (Mr. Kolodjeski) Should be Deemed Elected

Pleadings in administrative cases need not be formally prepared, but, consistent with notions of notice, due process and fundamental fairness, must state a party's claims or one's defenses sufficiently to fairly apprise an adverse party of the

claims and issues involved. See N.J.A.C. 1:1-2.1 "Pleadings," N.J.A.C. 1:1-6.1 and N.J.A.C. 6:24-6.1. Compare R. 4:5-1, -2, -3, -4.

N.J.A.C. 6:24-6.1(a) requires that the request for "investigation" relative to a school election be written and "set forth with particularity the grounds on which the election results are contested." (Emphasis added.) Also, N.J.S.A. 18A:14-63.12 provides the following:

> Upon written request within 5 days of the announcement of the result of an election by a defeated candidate, . . . the Commissioner of Education or his authorized representative shall inquire into the alleged violations of statutorily prescribed procedures for school elections, to determine if such violations occurred and if they affected the outcome of the election.
>
> [Emphasis added.]

By contrast, N.J.A.C. 6:24-6.1(b) refers to a "Request for inquiry into alleged violations of statutorily prescribed election procedures", i.e., with no requirement of "particularity."

It is apparent that a claim affecting "the outcome of [an] election," e.g., requesting the commissioner to invalidate and void the election of a board of education member, is subject to more stringent requirements relative to form (written), basis and timeliness than a "request" for "inquiry" into possible violations, which might be referred to and later prosecuted in court as, e.g., a disorderly persons offense or crime.

Mr. Kolodjeski's letter does allege facts upon which violations of statutorily prescribed election procedures could be determined, however not until well more than five days after announcement of the election results, during his attorney's oral opening statement, was there a claim stated for invalidation of the election results and the seating of Mr. Kolodjeski as a member of the Board. By that time, Mr. Menahem had been seated as a member of the Board and, consistent with N.J.S.A. 18A:14-63.12 and the usual statute of limitations' public policy favoring finality and repose, I **CONCLUDE** that the oral claim for invalidation of Mr. Menahem's candidacy, election and seating is defective, out-of-time and must be **DISMISSED WITH PREJUDICE**.

Mr. Menahem's Nominating Petition

Assuming arguendo that Mr. Kolodjeski's claim for invalidation of Mr. Menahem's candidacy, election, etc., was properly made, the following should be considered:

N.J.S.A. 18A:14-9 provides:

> Each candidate to be voted upon at a school election shall be nominated directly by petition, signed by at least 10 persons, none of whom shall be the candidate himself, and filed with the secretary of the board of education of the district on or before four p.m. of the 54th day preceding the date of the election. The signatures need not all appear upon a single petition and any number of petitions may be filed on behalf of any candidate but no petition shall contain the endorsement of more than one candidate.

N.J.S.A. 18A:14-10 provides:

> Each nominating petition shall be addressed to the secretary of the board of education of the district and therein shall be set forth:
>
> a. A statement that the signers of the petition are all qualified voters of the school district or, in the case of a regional school district, qualified voters of the constituent district which the candidate shall represent on the board of education of the regional district;
>
> b. The name, residence and post office address of the person endorsed and the office for which he is endorsed;
>
> c. That the signers of the petition endorse the candidate named in the petition for said office and request that his name be printed upon the official ballot to be used at the ensuing election; and
>
> d. That the person so endorsed is legally qualified to be elected to the office.
>
> Accompanying the nominating petition and to be filed therewith, there shall be a certificate signed by the person endorsed in the petition, stating that:
>
> a. He is qualified to be elected to the office for which he is nominated, including a specific affirmation that he is not disqualified as a voter pursuant to R.S. 19:4-1;
>
> b. He consents to stand as a candidate for election; and

c. If elected, he agrees to accept and qualify into said office.

[Emphasis added.]

N.J.S.A. 18A:14-11 provides:

> Each nominating petition shall be verified by the oath of one or more of the signers thereof, taken and subscribed before a person qualified under the laws of this state to administer an oath to the effect that:
>
> a. The petition is signed in their own proper handwriting by each of the signers thereof;
>
> b. The signers are to the best knowledge and belief of the affiants legally qualified to vote at the election at which the candidate shall be voted for; and
>
> c. The petition is prepared and filed in good faith for the sole purpose of nominating the candidate therein named in order to secure his election as a member of the board.
>
> [Emphasis added.]

N.J.S.A. 18A:14-12 provides:

> If, on or before the 49th day preceding the date of the election, the secretary of the board finds a nominating petition to be defective excepting as to the number of signatures, the secretary of the board shall forthwith notify the candidate of the defect and of the candidate's right to remedy the defect not later than the 49th day preceding the date of the election, and the candidate indorsing the petition may amend the same in form or substance, but not to add signatures, so as to remedy the defect at any time prior to said date. A nominating petition not so found to be defective shall be, as of the 48th day preceding the election, conclusively valid for the purposes of this chapter.
>
> [Emphasis added.]

Mr. Kolodjeski submits that Mr. Menahem's nominating petition is fatally defective because, in Part "D," the "Candidate's Acceptance," Mr. Menahem's signature was not notarized by a New Jersey notary. However, the statute does not require notarization of the "Candidate's Acceptance" and, if the requirement of notarization could be inferred, unlike N.J.S.A. 18A:14-11, N.J.S.A. 18A:14-10 does not require that it be by "a person qualified under the laws of this state" (emphasis added). Mr. Menahem signed his nominating petition, certifying that he was qualified to be elected, etc., and, although the statute does not require it, his signature was notarized. I **CONCLUDE** that the fact that his certification was

notarized by a New York notary does not make it invalid; statutory requirements and intent were satisfied by Mr. Menahem.

Mr. Kolodjeski also submits that, because Mr. Menahem's printed name remained and Mrs. Menahem's was not printed in the "Verification" Section, the "Verification" and petition were defective. However, Mr. Menahem's nominating petition included the statutorily required ten "signatories" and, by February 19, 1993, i.e., not later than the 49th day preceding the date of the election, it was lawfully verified and notarized by a New Jersey notary and filed. The fact that Mr. Menahem's printed name inadvertently remained in part "C" does not invalidate Mrs. Menahem's otherwise lawful verification. Therefore, I **CONCLUDE** that the nominating petition must be deemed valid by operation of N.J.S.A. 18A:14-9, -10, -11 and -12.

The Circular Urging the Election of Ms. Gavin and Mr. Menahem

N.J.S.A. 18A:14-97 provides:

> No person shall print, copy, publish, exhibit, distribute or pay for printing, copying, publishing, exhibiting or distribution or cause to be distributed in any manner or by any means, any circular, handbill, card, pamphlet, statement, advertisement or other printed matter having reference to any election or to any candidate or to the adoption or rejection of any public question at any annual or special school election unless such circular, handbill, card, pamphlet, statement, advertisement or other printed matter shall bear upon its face a statement of the name and address of the person or persons causing the same to be printed, copied or published or of the name and address of the person or persons by whom the cost of the printing, copying, or publishing thereof has been or is to be defrayed and of the name and address of the person or persons by whom the same is printed, copied or published.
>
> [Emphasis added.]

Everyone is conclusively presumed to know the law, statutory or otherwise, and, in the absence of statutory or constitutional requirements (which are not present here), actual notice of the law is not required for a duty of compliance or liability for a violation. Graham v. N.J. Real Estate Comm'n, 217 N.J. Super. 130, 138 (App. Div. 1987), and In re Krah, 130 N.J. Super. 366 (App. Div. 1974).

Ms. Gavin and Mr. Menahem appear to have violated N.J.S.A. 18A:14-97, a disorderly persons offense. On the other hand, there is no evidence that the

violation was willful or in bad faith and, because they paid for and distributed circulars and handbills for their own election, the intent of N.J.S.A. 18A:14-97, i.e., to ensure public disclosure of financial and other supporters, was not thwarted. Finally, service on a board of education is usually an altruistic, but often a thankless, task and I **CONCLUDE** that this matter should not be referred to the Monmouth County Prosecutor or New Jersey Attorney General. N.J.A.C. 6:24-6.5.

Mr. Menahem's Passing "Sheets of Paper" at or Near the Polling Place

N.J.S.A. 18A:14-72 provides:

> If a person shall on any day fixed for any election tamper, deface or interfere with any polling booth or obstruct the entrance to any polling place, or obstruct or interfere with any voter, or loiter, or do any electioneering within any polling place or within 100 feet thereof, he shall be a disorderly person and shall be punished by a fine not exceeding $500.00 or by imprisonment not exceeding one year, or both.
>
> [Emphasis added.]

N.J.S.A. 18A:14-73 provides:

> No person shall within the polling room mark his ballot in a place other than in the polling booth or show his ballot, nor shall anyone request such person to show his ballot during the preparation thereof, nor shall any other person inspect such ballot during the preparation thereof or after it is prepared for voting in such a way as to reveal the contents, nor shall any person within the polling place or within 100 feet thereof, loiter, electioneer, or solicit any voter or prompt a voter in answering any questions required to be answered by such voter in connection with any election.
>
> Any person violating any provisions of this section shall be a disorderly person and shall be punished by a fine not exceeding $500.00, or imprisonment not exceeding one year, or both.
>
> [Emphasis added.]

N.J.S.A. 18A:14-81 provides:

> If a person shall distribute or display any circular or printed matter or offer any suggestion or solicit any support for any candidate, party or public question, to be voted upon at any election, within the polling place or room or within a distance

> of 100 feet of the outside entrance to such polling place or room, he shall be a disorderly person.
>
> [Emphasis added.]

N.J.S.A. 18A:14-101 provides:

> No person shall by abduction, duress or any forcible or fraudulent device or contrivance whatever, impede, prevent or otherwise interfere with the free exercise of the elective franchise by any voter at any election; or compel, induce or prevail upon any voter either to vote or refrain from voting at any election, or to vote or refrain from voting for any particular person or persons at any election.
>
> [Emphasis added.]

I **FIND** and **CONCLUDE** that there is insufficient evidence that Mr. Menahem engaged in electioneering or committed any violations of the above statutes.

Challengers' Name Tags

N.J.S.A. 18A:14-17 provides:

> Each challenger shall wear a mark of identification as a challenger which shall be furnished to him by the secretary of the board.

Dr. Moro failed to provide challengers with identification and Mr. Kelly failed to ensure that challengers wore identification as required by N.J.S.A. 18A:14-17.

Overall, Dr. Moro and Mr. Kelly demonstrated either a lack of familiarity with school election laws or a lack of interest in compliance with them.

"Challenged" Voters Who Were Permitted to Sign In and Vote

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

> Each challenger may in the polling district for which he is appointed:
>
> a. Challenge the right of any person to vote in such district at any time after the person claims such right and before his ballot is deposited in the ballot box, or before the screen, hood or curtain of the voting machine is closed, and ask all necessary questions to determine this right; and
>
> b. Be present while the votes are being counted, in such position that he can observe the marking on the ballots

> but not to interfere with the orderly counting of the votes, and challenge the counting or rejection of any ballot or part thereof.

N.J.S.A. 18A:14-50 provides:

> The voter shall, previous to the receipt of an official ballot, sign his name without assistance and state his address in an appropriate column of the poll list and the election officer in charge of the poll list shall record therein opposite the voter's name, the number of the official ballot furnished to the voter for voting.

N.J.S.A. 18A:14-51.2 provides:

> Upon any question or challenge of a voter duly registered, it shall be the duty of the election board and the privilege of all of its members to put such questions as are proper to determine the right of the voter to vote.
>
> [Emphasis added.]

N.J.S.A. 18A:14-51.3 provides:

> In event that the right of any voter to vote shall be challenged, his right to vote shall be determined in accordance with the provisions of [N.J.S.A. 19:1-1 et seq.].

N.J.S.A. 18A:14-67 provides:

> Any officer or employee of any board of education or any person designated as an election officer to hold any election who shall willfully fail to perform or enforce any provision of this title, or shall willfully destroy any record directed to be kept thereby, or any person who shall willfully or fraudulently register to vote in any election or elections more than once, or register under any but his true name, or attempts to vote in any election by impersonating another, who is registered, or, being registered in an election district in which he is not a resident at the time of registering, votes or attempts to vote in any election, shall be guilty of a misdemeanor.
>
> [Emphasis added.]

Mrs. Kolodjeski candidly admitted that she did not formally give notice of a "challenge" of any voter. However, she did request the election officials to "call out" the names of several voters and her requests were not always honored. While I cannot conclude that a violation of the above statutes occurred, I do **CONCLUDE** that a warning should be issued to Mr. Kelly that, if, in the future, he acts as a judge of the election, it is his duty to ensure that procedures are followed and order is

maintained, so that a challenger may exercise her right to challenge (including learning the identity of) any person attempting to vote.

Mr. Hirschman's Distribution of the Election Handbill, Etc., and Suggestion and Solicitation of Support for Mr. Menahem in and About the Polling Place and His Resumption of Misconduct in Violation of the Order of the Judge of Elections

On the record made in this investigation, it appears probable that Mr. Hirschman electioneered, solicited votes, offered suggestions and/or solicited support for his candidate and distributed a printed campaign handbill, all within the polling place or within 100 feet thereof and in violation of N.J.S.A. 18A:14-72, -73 and -81. Further, Mr. Hirschman's misconduct continued after the judge of elections directed him to end it. Therefore, I **CONCLUDE** that this matter should be referred to the Monmouth County Prosecutor and/or the New Jersey Attorney General, who may decide to prosecute Mr. Hirschman.

Mr. Hirschman's "Forcing Himself into the Voting Machine"

N.J.S.A. 18A:14-84 provides :

> A person who shall willfully obstruct or interfere with any election officer, while performing any duty prescribed by this title, shall be a disorderly person and shall be punished by a fine not exceeding $500.00, or by imprisonment at hard labor for a term not exceeding one year, or both.

On the record made in this investigation it appears probable that, as election officials were about to read and tally the votes, Mr. Hirschman forced himself into a voting machine, thereby interfering with the election officers in violation of N.J.S.A. 18A:14-84. Therefore, I **CONCLUDE** that this matter should be referred to the Monmouth County Prosecutor and/or the New Jersey Attorney General.

ORDERS

While the record does not support the finding that Mr. Hirschman's actions affected a sufficient number of votes to have changed the result of the election, the conduct of the Borough of Deal's April 20, 1993 school election involved a number of irregularities which, in the future, must be eliminated as follows:

(1) Dr. Moro, relative to future school elections, is ordered to (a) advise candidates to study statutes governing school elections (see N.J.S.A. 18A:14-1 to -104, N.J.S.A. 19:1-1 et seq. and N.J.A.C. 6:24-6.1 to -6.4.); (b) mark or stamp nominating petitions to show their dates of filing; (c) confirm that persons proposed to serve as election officials will have had instruction, certification, etc., relative to operation of voting machines (see N.J.S.A. 18A:14-6.1); and (d) comply with statutory requirements for written appointment of challengers and furnish a mark of identification to each challenger (see N.J.S.A. 18A:14-17).

(2) Mr. Kelly, should he serve as judge of a future school election, is ordered to (a) complete instruction in the operation of a voting machine and keep a certificate establishing the same (see N.J.S.A. 18A:14-6.1), (b) study statutes governing school elections (see above), (c) confirm that a challenger wears a mark of identification (d) maintain order and prevent electioneering in the polling place.

The Monmouth County Prosecutor or New Jersey Attorney General are requested to consider investigation and appropriate action relative to Mr. Hirschman's probable violation of the above-noted school election laws.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 23, 1993
Date

John R. Tassini
JOHN R. TASSINI, ALJ

Receipt Acknowledged:

7/27/93
Date

Maureen R. Kibbe
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 30 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

jz

EXHIBITS

Submitted by Stanley Kolodjeski:

K-1 Robin Gavin and Richard Menahem election campaign circular (copy).

K-1a Original of Robin Gavin and Richard Menahem election campaign circular (yellow)

K-2 Original of Robin Gavin and Richard Menahem handbill (pink)

Submitted by the Deal Board of Education (all are copies except where noted):

BOE-1 "Nominating Petition for Annual School Election" of Richard Menahem

BOE-1a Original of "Nominating Petition for Annual School Election" of Richard Menahem

BOE-2 "Appointment of Challengers and Alternates," Challenger: Morton Hirschman, dated February 19, 1993

BOE-3 "Nominating Petition for Annual School Election" of Robin Gavin, notarized February 23, 1993

BOE-4 "Nominating Petition for Annual School Election" of Stanley Kolodjeski, notarized February 24, 1993

BOE-5 "Appointment of Challengers and Alternates," Challenger: Dolores Kolodjeski, dated February 24, 1993

BOE-6 New York notarization, relative to Germaine Menahem, dated March 3, 1993

BOE-6a Original New York notarization, relative to Germaine Menahem, dated March 3, 1993

BOE-7 Report of votes for April 20, 1993 election of Board candidates

BOE-8 "A33 Regular/Combined Statement of Result of School Election" of April 20, 1993

BOE-9 "Certificate and Report of School Taxes (1993-94 School Year)" by Moro, dated April 22, 1993

BOE-10 Letter from Board of Education, Deal School District (Moro), dated April 23, 1993

BOE-11 Letter from Board of Education, Deal School District (Moro), dated May 4, 1993

BOE-12 "Form A-12," report of election results, etc., dated May 3, 1993

BOE-13 "Fax Transmission Election Memo"

BOE-14 Letter of Norma Furlong, dated May 17, 1993

BOE-15 Letter of Josephine Cassaro, dated May 21, 1993

BOE-16 Letter of Brendan W. Kelly (judge of the Deal Board of Education election), dated May 24, 1994 (sic)

BOE-17 Letter of Dolores L. Buck, dated May 31, 1993

WITNESSES

For Mr. Kolodjeski:

Sandra Carasia
Dolores Kolodjeski
Frances Fronapfel
Josephine Cassaro
Dolores Buck
Stanley Kolodjeski

For the Board:

Richard Menahem
Anthony F. Moro, Jr., Ed. D.

IN THE MATTER OF THE SCHOOL	:	
ELECTION HELD IN THE SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE BOROUGH OF	:	DECISION
DEAL, MONMOUTH COUNTY.	:	
	:	

The record and initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4 and are presented in pertinent part below.

Petitioner excepts to the ALJ's analysis and conclusion with respect to the timeliness and legal sufficiency of his claim for invalidation of the election results. Petitioner avers

> ***that his letter addressed to Michael Maddaluna, Monmouth County [Superintendent of Schools], dated April 23, 1993, requested "an inquiry into the Deal Board of Education election held on Tuesday, April 20, at the Deal elementary school gym." The letter recites a number of irregularities in violation of the election law in support for Petitioner's conclusion that "the above warrants an investigation into the validity of Mr. Menahem's election." [Emphasis supplied] N.J.S.A. 18A:14-63.12 provides for an investigation into alleged violations of statutorily prescribed procedures for school elections "upon written request within five days of the announcement of the result of an election by a defeated candidate...." Petitioner's letter of April 23, 1993 satisfies the requirements of the statute.***
> (Petitioner's Exceptions, at p. 8)

Petitioner further argues that N.J.A.C. 6:24-6.1(a)

> ***simply demands compliance with N.J.S.A. 18A:14-63.1 et seq. with respect to requests for recounts of the ballots cast or "for an investigation of the procedures at a school election" which "shall be in letter form addressed to the Commissioner and shall set forth with particularity the grounds on which the election results are contested." The Court's Initial Decision acknowledges that "Mr. Kolodjeski's letter does allege facts upon which violations of statutorily prescribed election procedures could be determined...." Neither the statute nor the applicable Administrative Code provisions require more than a request "in letter form" stating the requester's reasons for challenging the election.
> (Petitioner's Exceptions, at p. 9)

Petitioner, therefore, concludes that the request for invalidation of the election results made in his initial petition satisfied the statutory and regulatory requirements for same and should not have been dismissed.

Petitioner next excepts to the ALJ's findings of fact and conclusions of law with respect to Richard Menahem's nominating petition. He argues, inter alia, that the Court's finding that Mrs. Carasia, in fact, notarized Germaine Menahem's signature on February 19, 1993 is contrary to her own testimony, without foundation in evidence, and makes no sense in light of the surrounding established circumstances. Petitioner avers that if the "finding" that Mrs. Carasia notarized Germaine Menahem's signature on February 19 is accepted as true, it would follow that Richard Menahem's petition, insofar as the verification, would have been valid on that date. Why then would Dr. Moro subsequently advise Menahem to have the petition notarized a third time? Petitioner alleges that the only rational answer is that Dr. Moro realized that the petition submitted to him for the second time was still

defective in that Germaine Menahem's signature was written over Richard Menahem's "whited-out" signature and never properly notarized.

Petitioner next alleges that Richard Menahem's nominating petition was invalid for failure to adhere to statutory time requirements. Specifically, he asserts that N.J.S.A. 18A:14-12 provides that a candidate has the right to remedy a defective petition not later than the forty-ninth day preceding the date of the election, and a nominating petition not so found to be defective shall be presumed to be conclusively valid as of the forty-eighth day preceding the election. He argues that Dr. Moro found the Menahem petition to be defective on or before March 2 and on March 3 Mr. Menahem had the petition with him in New York for notarization; consequently, such petition was not in the possession of the Board Secretary on the forty-eighth day preceding the election (March 3, 1993). He maintains that Richard Menahem, therefore, failed to file a petition within the time specified by law and such petition must be found invalid.

Lastly, petitioner contends that the cumulative effect of the numerous incidents of electioneering noted by the Court justifies setting aside the election, particularly since the contest was a close one.

The Board in its response supports the decision rendered by the ALJ claiming that it is aptly supported by testimony elicited at the hearing, portions of which the Board reviews in its exceptions. It additionally points out that the record is totally void of any evidence that the election results would have been different had

there not been any "electioneering" and, consequently, the election results should stand.

Upon a careful and independent review of the record, including the transcript of the hearing below, the Commissioner accepts the findings, conclusions and recommendations of the Office of Administrative Law with one exception which is fully detailed below.

With respect to petitioner's claim for invalidation of the election results, the Commissioner does not agree with the ALJ's conclusion that such request was first raised by petitioner's attorney at the hearing and, thus, must be dismissed as untimely. A review of the Request for Inquiry dated April 23, 1993 supports petitioner's exception argument that this request concluded with the words

> "I feel the above warrents [sic] an investigation into the validity of Mr. Menahem's election."

The Commissioner finds that, although further elaboration may have served to elucidate petitioner's prayer for relief, the language utilized was sufficiently clear to conclude that he was contesting "the outcome of the election," and that his submission met the statutory and regulatory requirements for advancing such request. Therefore, the conclusion of the ALJ dismissing petitioner's claim for invalidation of the election results as defective and untimely is reversed. The Commissioner is compelled to note, however, that were the petitioner to bear his burden of proof that Mr. Menahem was not properly elected to a seat on the Board of Education, petitioner is not entitled to be adjudged the successful candidate by virtue of such disqualification. In this

event, the relief which would be accorded by the Commissioner is the ordering of a new election. (See In the Matter of the School Election of the Hopatcong School District, Sussex County, 1973 S.L.D. 115.)

With respect to the nominating petition of Mr. Menahem, the Commissioner is in full accord with the findings and conclusions reached by the ALJ. Although Mrs. Carasia, the Notary Public, testified that she witnessed the signature of Mr. Menaham on February 19, 1993, a thorough review of the entire record belies such contention and corroborates the determination of the ALJ in this regard.

> ***I have accepted Mr. Menahem's testimony and rejected Mrs. Carasia's testimony that she notarized Mr. Menahem's signature on the "Verification" for reasons including the following: Dr. Moro credibly testified that he instructed Mr. Menahem that a "Signatory" and not the candidate must sign the "Verification," and Dr. Moro whited-out Mr. Menahem's signature so a "Signatory" could sign it. Mr. Menahem credibly testified that he and his wife went to Mrs. Carasia for the sole purpose of having his wife sign the "Verification" and having Mrs. Carasia notarize that signature. After Dr. Moro's instruction, Mr. Menahem would not have repeated the mistake of signing the "Verification." Also, Mrs. Carasia volunteered that, when she notarized the "Verification," Mr. Menahem had "many papers" and she "[could] not say [that the nominating petition] was the only paper," i.e., evidencing uncertainty as to what she notarized. Mr. Menahem's nominating petition's "Verification" shows (over the white-out) the signature of "Germaine Menahem" and the notarization by Mrs. Carasia.
>
> (Initial Decision, at p. 4)

In reaching her determination, the Commissioner rejects petitioner's exception contention that to accept that Mrs. Carasia notarized Mrs. Menahem's signature leaves unexplained Dr. Moro's subsequent request to have the petition notarized a third time. The

Commissioner finds that the reasoning of the ALJ in this regard is fully supported by the transcript of testimony, specifically that of Dr. Moro.

> ***I contacted Bruce Quinn and told him what the mistake had been and I told him that it had been notarized and Bruce indicated to me that the notarization verified the twelve people in Section B and I told him what I did.
>
> I said I whited-out Mr. Menahem's name and asked him to get one of the others and he said that is fine. He said it is not a big mistake but if you want to get it renotarized, do so.
>
> ***
>
> And at that point, Mr. Menahem again picked up his petition and got it renotarized but Mr. Quinn did, in fact, tell me that it was not an illegal petition at that particular point.
>
> (Tr. 187, 188)

The Commissioner further finds no basis within the record to question the ALJ's assessment of credibility or weighing of evidence in this regard.

Consequently, the Commissioner determines that when Mr. Menahem presented his nominating petition to Mr. Moro after this February 19 notarization and it was accepted for filing, his petition was fully valid by operation of N.J.S.A. 18A:14-9, 10, 11, and 12. As such, any subsequent action of Dr. Moro, i.e., requesting an additional notarization of Mrs. Menahem's signature - just to be on the safe side - was unnecessary, irrelevant and immaterial.

With regard to each of the specific allegations of election irregularities, the Commissioner adopts as her own the findings and conclusions set forth in the initial decision for the reasons expressed therein.

Although the record reflects the existence of irregularities and deviations from statutory requirements pertaining to the conduct of school elections, the Commissioner finds that petitioner has failed to sustain his burden of proving that such election irregularities in Deal on April 20, 1993 require invalidation of said election results. Giving credit to the allegations set forth by petitioner and his proofs, the Commissioner cannot conclude that the will of the people was thwarted in connection with the election. (See In the Matter of the Annual School Election Held in the Township of Pittsgrove, Salem County, 1976 S.L.D. 585.)

In arriving at the above determination, however, the Commissioner cannot ignore those findings in the initial decision which clearly reveal that that Board, through its Secretary and the school election workers, must assume a large part of the responsibility for the violations of school election procedures which did, in fact, occur. The Deal Board of Education is hereby reminded of its obligation to have appropriate, overall election procedures established and followed and the need for adequate and proper instruction of its election workers, particularly with respect to familiarity with statutes governing school elections, maintaining order and preventing electioneering in the polling place.

Given that certain of the statutorily proscribed irregularities occurring in Deal involving the conduct of a person identified in the initial decision were sufficiently flagrant, the Commissioner is compelled to transmit a copy of this decision to the Office of the Monmouth County Prosecutor for the purpose of taking any further action deemed appropriate and consistent with law.

In all other respects, the instant Petition of Appeal is dismissed and the Board is hereby ordered to comply with all of those directives set forth in the initial decision, ante.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 20, 1993

DATE OF MAILING - SEPTEMBER 20, 1993

223-93

223-93

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE BOARD OF EDUCATION : COMMISSIONER OF EDUCATION
OF THE BOROUGH OF ROOSEVELT, : DECISION
MONMOUTH COUNTY. :
:

SEPTEMBER 21, 1993

IN THE MATTER OF THE CAP WAIVER	:	
APPEAL OF THE BOARD OF EDUCATION	:	COMMISSIONER OF EDUCATION
OF THE BOROUGH OF ROOSEVELT,	:	DECISION
MONMOUTH COUNTY.	:	
	:	

For Petitioner, David B. Rubin, Esq. (Rubin, Rubin, Malgran, Kaplan and Kuhn)

For Respondent, John J. Ross, Esq.

This matter was opened before the Commissioner of Education on May 19, 1993 by way of the filing of a Petition of Appeal by the Board of Education of the Borough of Roosevelt (Board), wherein the Board sought to have included in the General Fund tax levy for the 1993-94 school year a cap waiver amount defeated by the voters at the annual school election.

On March 24, 1993, the Monmouth County Superintendent of Schools had notified the Board that its 1993-94 school budget was conditionally approved subject to passage by the voters of a cap waiver in the amount of $130,231 in current expense which was deemed necessary for provision of a thorough and efficient system of education in the district.

On April 20, 1993 the voters of the Borough of Roosevelt defeated both the proposed General Fund tax levy for the 1993-94 school year and the General Fund cap waiver request. Upon review of the defeated maximum permissible budget pursuant to N.J.S.A.

18A:22-37, the governing body of the Borough determined not to make any reductions to the amounts proposed by the Board as necessary for provision of a thorough and efficient education, so that no further Board action to appeal the voters' defeat of the base budget was necessary.

With respect to the defeated cap waiver, on August 23, 1993, the Borough advised that it did not wish to contest the Board's appeal or participate in the appeal process. Therefore, upon receipt of the Board's position statement on September 13, 1993, the record of this matter was deemed closed.

The cap waiver requested by the Board includes the following line items specifically determined by the County Superintendent to be essential for provision of a thorough and efficient education and unable to be funded by reallocation within the maximum permissible budget:

Current Expense	Account No.	Amount
Tuition to LEA's/Regular	11-000-100-561	$90,083
Tuition to Private Schools/Handicapped	11-000-100-566	33,721
Contracted Transportation/Spec. Ed.	11-000-270-514	6,427
	Total Cap Waiver Request:	$130,231

With regard to these line-item requests, in its initial filings and position statement the Board presents the following justifications:

Regular Tuition. This amount is necessary due to a significant (approximately 32%) increase in the tuition rate payable to East Windsor Regional High School District, to which Roosevelt sends students in grades 7 - 12.

Handicapped Tuition. Identification and classification of two special needs students has resulted in a tuition increase of 170% over 1992-93 adjusted tuition, for which an amount over and above that in the base budget is necessary.

Special Education Transportation. These monies are necessitated by the transportation requirements of the two newly identified special needs students noted above.

Upon review of the record of this matter, including the documentation provided by the district in support of the necessity for the cap waiver funds, which is incorporated herein by reference, the Commissioner finds and determines that the requested relief shall be and is hereby granted as the Board has borne its burden of demonstrating that these funds are necessary for provision of a thorough and efficient education to the students of the Roosevelt School District. East Brunswick Township Board of Education v. East Brunswick Township Council, 48 N.J. 94 (1966); Board of Education of the Township of Deptford v. Mayor and Council of the Township of Deptford, 116 N.J. 305 (1989); Board of Education of the Borough of Rutherford v. Mayor and Council of the Borough of Rutherford, Bergen County, State Board of Education decision, July 7, 1993

Accordingly, the Monmouth County Board of Taxation is directed to adjust the General Fund tax levy of the Roosevelt School District for the 1993-94 school year to reflect an increase of $130,231 pursuant to the determination above.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 21, 1993

DATE OF MAILING - SEPTEMBER 22, 1993

224-93

224-93

BOARD OF EDUCATION OF THE RIVER DELL REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BRENDA CANAL ET AL.	:	DECISION ON REMAND
RESPONDENTS.	:	

SYNOPSIS

Petitioning Board sought declaratory judgment regarding whether its determination that certain contractual conditions were not met constituted "good cause" for withholding of increments under N.J.S.A. 18A:29-14. Matter was on remand from State Board decision of July 1, 1992 for resolution of question of whether the Commissioner had jurisdiction to entertain this matter.

ALJ found that Board's unilateral determination that contractual conditions had not been met did not constitute "good cause" within the meaning of N.J.S.A. 18A:29-14 for the withholding of respondents' salary increments. He further found that case did not present overriding issue of statutory interpretation or educational policy requiring the Commissioner of Education's intervention. ALJ determined outcome was to be determined by general contract principles of past practice, course of negotiations and meeting of the minds. Petition for declaratory relief was dismissed.

Commissioner adopted findings and determination in initial decision and deferred to the dispute mechanism set forth in the parties' negotiated agreement.

SEPTEMBER 24, 1993

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5343-92

AGENCY DKT. 15-92

RIVER DELL REGIONAL BOARD OF EDUCATION

Petitioner,

v.

BRENDA CANAL, MARK CONNOLLY, WILLIAM KEITH, RICHARD LOORAM, JOAN MUZENI, JOSE ORTIZ, DAVID SCHOENFELD, LOUIS SIRIGNANO, GEORGE STEINMETZ, MARGARET TALBOT, CRISTINE VAN DER VELDE, MARIANNE COFFEY, JAN MILLER, MARY MORAN, and RIVER DELL EDUCATION ASSOCIATION,

Respondents.

Marc Joseph, Esq. for petitioner
(Joseph & Feldman, attorneys)

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

Record Closed: April 1, 1993 Decided: August 16, 1993

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

Statement of the Case

This is a petition for a declaratory ruling concerning the applicability to a particular set of facts of the statutes and rules administered by the Commissioner of Education ("Commissioner"). *N.J.S.A.* 52:14B-8 and *N.J.A.C.* 6:24-2.1 confers discretionary authority on the Commissioner to entertain such petitions for declaratory relief and to issue rulings which are binding on the parties.

Petitioner River Dell Board of Education ("River Dell" or "Board") seeks a declaration that its withholding of the salary increments of various teaching staff members pursuant to *N.J.S.A.* 18A:29-14 was a valid exercise of its inherent managerial prerogative and was necessary to implement controlling State educational policy. River Dell took the action allegedly to freeze the salaries of these teachers so they would not receive any salary advancement for graduate-course credits which were obtained through an unapproved out-of-state university and which did not meet higher New Jersey standards. Respondents maintain that the issue is essentially one of contractual interpretation which does not require the special expertise of the Commissioner.

For the reasons which follow, this matter does not implicate genuine questions of school law or educational policy and, consequently, it is not an appropriate subject for the exercise of the Commissioner's acknowledged jurisdiction to issue declaratory rulings. Instead, the matter is best handled by the grievance mechanism which the parties themselves have established for resolving disputes about the meaning of their contract.

Procedural History

Initially, on December 3, 1991, River Dell filed its verified petition with the Commissioner. On or about December 10, 1991, respondents filed their answer, raising lack of jurisdiction as one of several affirmative defenses. On February 18, 1992, the Commissioner issued a letter ruling, dismissing the petition as presenting issues "outside my jurisdiction." River Dell took an immediate appeal to the State Board of Education ("State Board").

Thereafter, on July 6, 1992, the State Board reversed and remanded the matter to the Commissioner for consideration of "whether a determination [by River Dell] that contractual conditions have not been met constitutes 'good cause' for it to withhold salary increments under *N.J.S.A.* 18A:29-14." In so doing, the State Board emphasized that its ruling is "limited to the question of whether the Commissioner has the jurisdiction to entertain this matter," and does not address "any other questions that may affect the justiciability of the case." (slip op. at 2-3).

Subsequently, on July 16, 1992, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing. Both parties submitted cross-motions for summary decision, together with supporting certifications and briefs, on February 26, 1993. They filed reply briefs by March 18, 1993. The OAL held oral argument on April 1, 1993. Because the facts necessary to determine the "good cause" issue are undisputed, the case may be decided on the papers.

Findings of Fact

All of the material facts are undisputed. I **FIND:**

At the time that this dispute arose, the Board and the River Dell Education Association, the majority representative for the teachers in the district, were engaged in protracted negotiations concerning the collective agreement for 1991-1994. These negotiations continued past the expiration date of the old contract on June 30, 1991, so that the teachers kept on working without a new contract. Under the terms of the old contract, an academic "credit" for purposes of placement on the salary guide was defined to mean "one full semester credit." (Paragraph 3.6). In addition, teachers could obtain "equivalence credit" for participation in certain "workshops," provided that the superintendent of schools gave her written approval before the teacher began the workshop. (Paragraph 3.5A).

The Board and the Education Association entered into a new contract on November 25, 1991, covering the period July 1, 1991 through June 30, 1994. During the first year of the new contract, until June 30, 1992, the definition of "credit" for placement on the salary guide remained unchanged. Starting in the second year however, the word was redefined to mean "one full semester course as commonly

accepted for graduate credit given at a New Jersey State Institution approved by the State Department of Education." (Paragraph 3.6) Teachers could still earn "equivalency credits" for workshops approved in advance by the superintendent. (Paragraph 3.5A).

On November 25, 1991, the same day that the new contract was signed, the Board also adopted a resolution freezing respondents' salaries by withholding the negotiated salary increments of twelve teachers and denying horizontal movement along the guide to two others.[1] Significantly, the Board did not express any dissatisfaction with the job performance of these particular teachers. Rather, the Board acted solely because these teachers had received advancement on the salary guide for completion of credit-bearing courses, offered by the University of Bridgeport, which were later determined to be in violation of New Jersey standards for award of college credit. Consequently, the Board sought to freeze respondents' salaries until such salaries would have reached the same level without benefit of the disputed credits.

Each of the respondents had taken courses given in New Jersey by an outfit known as The Innovative Group and received credits awarded by the University of Bridgeport in Connecticut. Respondents concede that the courses offered by Bridgeport University through The Innovative Group do not count for degree credit in New Jersey. As the record clearly shows, on March 11, 1991 the New Jersey Higher Education Department wrote to the University of Bridgeport that its operations in this State violated New Jersey regulations by offering college credits without obtaining prior approval of the New Jersey Board of Higher Education and also by awarding more than one credit hour "for an experience compressed into one week's time or less." The University had been awarding three credits for a course lasting only four days. New Jersey officials gave the University of Bridgeport the option of either complying with the regulations or ceasing operation in this State

[1]The salary guide consists of horizontal rows based on years of employment and vertical columns based on educational qualifications. Jan Miller and Mary Moran had not yet received any recognition on the salary guide for the disputed credits.

immediately. By letter dated March 22, 1991, the University of Bridgeport replied that it was "stopping such activity immediately" and had informed The Innovative Group "that it may not offer, advertise or otherwise engage itself in credits from the University of Bridgeport."

Later, on May 1, 1991, the Commissioner of Education and the Chancellor or Higher Education jointly sent out a memorandum on the subject of college credit to all public school superintendents and principals in New Jersey. Summarizing the regulations governing the award of college credit, the memorandum discusses the "risks" for teachers who enroll in courses which do not satisfy the standards:

> First, if such a course comes to the attention of the Department of Higher Education, the organization offering the course will be sent a cease and desist order, which has the legal authority of the state of New Jersey through the office of the Attorney General. Therefore, teachers and others may find the course canceled, perhaps while it is in progress. Second, credit courses taken in New Jersey which do not meet the above standards will not meet the Department of Education standards for certification.

None of the respondents, however, are seeking to use the credits from the University of Bridgeport to gain a college degree or to obtain certification. Although the Board accuses respondents of attempting to deceive it into giving salary credits for "sham" courses, the record indicates that both sides only recently became aware of the deficiencies in the University of Bridgeport's authority to award credits for courses offered in New Jersey. Indeed, the River Dell superintendent of schools had previously given approval to the taking of these courses by her teaching staff.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that River Dell's unilateral determination that contractual conditions have not been met does not constitute "good cause" within the meaning of *N.J.S.A.* 18A:29-14 for the withholding of respondents' salary increments.

N.J.S.A. 18A:29-14 authorizes a local board of education to withhold the salary increments of any teaching staff member "for inefficiency or other good cause."

Annual salary increments are "in the nature of a reward for meritorious service to the school district" and should not be regarded as an automatic entitlement. *Probst v. Haddonfield Bd. of Educ.*, 127 *N.J.* 518, 527 (1992); *North Plainfield Educ. Ass'n v. Plainfield Bd. of Educ.*, 96 *N.J.* 587, 593 (1984). "Evaluation of that service is a management prerogative essential to the discharge of the duties of a school board." *See Clifton Teachers v. Clifton Bd. of Educ.*, 136 *N.J. Super.* 336, 339 (App. Div. 1975).[2] In determining whether to withhold a salary increment, a local board is making a judgment concerning the quality of the educational system. *Bernards Twp. Bd. of Educ. v. Bernards Twp. Educ. Ass'n,* 79 *N.J.* 311, 321 (1979). Ordinarily, the burden is on the teacher to prove that a school board's denial of her increment because of unsatisfactory job performance was "patently arbitrary, without rational basis, or induced by improper motives." *Kopera v. West Orange Bd. of Ed.*, 60 *N.J. Super.* 288, 294 (App. Div. 1960).

In this case, however, River Dell did not withhold respondents' increments because of any dissatisfaction with their job performance or concern about their professional qualifications. Instead, River Dell took its action to vindicate a supposed State policy on teachers' salaries. River Dell misconstrues the regulations found at *N.J.A.C.* 9:1-1.1 to 4.8, which deal specifically with licensure of institutions of higher education and not with the setting of teachers' salaries by local school boards. *See generally, N.J.S.A.* 18A:68-1 to 11, relating to licensing of colleges to confer degrees. Out-of-state institutions wishing to offer credit-bearing courses or degree programs in New Jersey must petition the Board of Higher Education for authorization. *N.J.A.C.* 9:1-6.2(a). Rules of the State Board require teacher candidates to present college study completed at accredited or approved institutions. *N.J.A.C.* 6:11-3.16(a). A teacher who earns credits at a nonapproved institution operating illegally in New Jersey will be unable to use those credits for

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[2]As the result of legislation effective January 4, 1990, an increment withholding "for predominately disciplinary reasons" is subject to grievance procedures. *N.J.S.A.* 34:13A-26. The withholding of a teaching staff member's increment based on the actual teaching performance is still appealable to the Commissioner of Education. *Assembly Labor Committee Statement* to Assembly Bill No. 4706 (1989). Undeniably, River Dell's withholding action was not performance-based. It is unnecessary for the Commissioner to decide whether Riverdale acted "for predominately disciplinary reasons."

obtaining teacher certification in this State. But the present statutes and regulations are silent on whether such credits may be counted for salary purposes.

Apart from the Teachers Quality Employment Act, *N.J.S.A.* 18A:29-5 to -5.12, which fixes minimum starting salaries for full-time teachers at $18,000, there is no current State policy governing teachers' salaries in New Jersey. Basically, the determination of salary levels in local school districts is left to the bargaining table. Working hours and compensation are the quintessential "terms and conditions of employment" within the contemplation of the Employer-Employee Relations Act. *Englewood Bd. of Educ. v. Englewood Teachers Ass'n*, 64 *N.J.* 1, 6 (1973). While the State has a clear interest in the quality of education being delivered and the overall costs of school funding, *see Abbot v. Burke*, 19 *N.J.* 287 (1990), it has no stake in where a local district places a particular teacher on the salary guide. As recognized in *N.J.S.A.* 18A:29-9, placement on the salary guide is not a managerial prerogative but, rather, is subject to agreement. *Belleville Educ. Ass'n v. Belleville Bd. of Educ.*, 209 *N.J. Super.* 93, 98 (App. Div. 1986). Many disputes over contractual language may be resolved by binding arbitration if the agreement so provides, without resort to the Commissioner. *South Orange-Maplewood Educ. Ass'n v. South Orange-Maplewood Bd. of Educ.*, 146 *N.J. Super.* 457 (App. Div. 1977)

It is in such context that one should interpret the Supreme Court's ruling that a school board's decision to withhold an increment is "a matter of essential managerial prerogative" which "cannot be bargained away." *Bernards Twp.*, 79 *N.J.* 311, 321 (1979). In the *Bernards Twp.* case, the increment withholding was "dependent upon an evaluation of the quality of the services which the teacher has rendered." *Id.* River Dell, on the other hand, did not evaluate the quality of respondents' services or utilize the increment withholding as an incentive for needed improvement. *See, Probst*, 127 *N.J.* at 130. Rather, River Dell withheld respondents' increments in order to to impose its own views in an ongoing labor dispute over the meaning of disputed term in the contract. Use of the Board's legitimate management powers as a device to circumvent established mechanisms for resolving contractual disagreements does not constitute "good cause" for the withholding of an increment.

Cases on which River Dell relies are readily distinguishable. *Baha v. Hoboken Bd. of Educ.*, 1980 *S.L.D.* 299 (Comm'r), *Cafarelli v. Long Beach Island Bd. of Educ.*,

1976 *S.L.D.* 989 (Comm'r) and *Brick Twp. Educ. Ass'n v. Brick Twp. Bd. of Educ.*, 1975 *S.L.D.* 521 (Comm'r), *aff'd* 1975 *S.L.D.* 524 (Comm'r), were all situations in which teachers sought the Commissioner's assistance in determining whether they held the appropriate doctoral degree or graduate credits for advancement on the salary guide. Since none of these cases involved withholding of salary increments, they do not provide any guidance on what constitutes "good cause" for such action. Moreover, the statutory scheme then in existence incorporated a minimum salary schedule which boards were obligated to follow, *N.J.S.A.* 18A:29-7, and mandated that any doctoral degree must be "acceptable to the state board of education for certification purposes." *N.J.S.A.* 18A:29-6. When the Teacher Quality Employment Act was passed in 1985, these statutory provisions were repealed and replaced by the present system which gives greater flexibility for negotiations. *L.* 1985, *c.* 321, §16. Nor is the present case analogous to *Honaker v. Hillsdale Bd. of Educ.*, 1980 *S.L.D.* 906 (Comm'r), where the a board of education did not withhold a salary increment, but merely acted to correct a clerical error.

Here River Dell and the Association contemplated at least some occasions in which advancement on the salary guide could be granted for completion of non-credit bearing courses or seminars, as illustrated by the fact that the district was willing to recognize certain approved "workshops." Whether this generosity extended to credits earned at an unapproved out-of-state university accredited in its home state is a question of the parties' intent. While it seems improbable that any board of education would knowingly trade extra money for academic credits of doubtful value, the salary issue turns on what the actual understanding happened to be.

In short, this case does not present overriding issues of statutory interpretation or educational policy requiring intervention by the Commissioner. Its outcome will be determined by the more mundane contract principles of past practice, course of negotiations, and meeting of the minds. Even though the Commissioner has jurisdiction to issue declaratory relief, she should defer to the specialized forum

which is better suited to develop those topics.[3] See *Hackensack v. Winner*, 82 *N.J.* 1, 34-35 (1980) (notwithstanding concurrent jurisdiction, the Public Employment Relations Commission should have voluntarily "abstained" from hearing a matter more appropriately before the Civil Service Commission). The result reached here is fully consistent with the remand order of the State Board, which refrained from expressing any opinion on other issues affecting "the justiciability of the case."

Order

It is **ORDERED** that summary decision is granted in favor of respondents, dismissing River Dell's petition for declaratory relief and deferring to the dispute-resolution machinery set forth in the negotiated agreement.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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[3]The River Dell Education Association has separately instituted an arbitration proceeding on behalf of respondents. However, the Appellate Division has temporarily stayed the arbitration proceeding pending appeal of a lower court order denying the Board's application for a restraining order. *River Dell Reg. Bd. of Educ. v. River Dell Educ. Ass'n*, No. A-5156-91T5 (N.J. App. Div. Oct. 6, 1992) (order granting stay).

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 16, 1993
Date

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

8/19/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 24 1993
Date

OFFICE OF ADMINISTRATIVE LAW

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BOARD OF EDUCATION OF THE RIVER DELL REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BRENDA CANAL ET AL.	:	DECISION ON REMAND
RESPONDENTS.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions in accordance with N.J.A.C. 1:1-18.4.

Petitioner's exceptions essentially recast and reargue contentions presented in summary judgment submissions in this matter. The Commissioner determines that such contentions were fully and fairly considered by the ALJ in his initial decision.

Upon a careful and independent review of the record in this matter, the Commissioner concurs with the findings and conclusions of the Office of Administrative Law aptly expressed in the initial decision. She is in full agreement that this matter does not present overriding issues of statutory interpretation or educational policy requiring her intervention. Rather, the resolution of this matter will be determined by general contract principles of past practice, course of negotiations and meeting of the minds.

Accordingly, the Commissioner adopts the recommendation of the Office of Administrative Law as the final decision in this

matter and hereby grants summary decision to respondents, dismisses River Dell's petition for declaratory relief, and defers to the dispute resolution mechanism set forth in the parties' negotiated agreement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 24, 1993

DATE OF MAILING - SEPTEMBER 24, 1993

224-93

SB # 15-92
EDU #5343-92
C # 224-93
SB # 60-93

BOARD OF EDUCATION OF THE RIVER DELL REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BRENDA CANAL, ET AL.,	:	DECISION
RESPONDENTS-RESPONDENTS.	:	

Decided by the Commissioner of Education, February 18, 1992

Remanded by the State Board of Education, July 1, 1992

Decision on remand by the Commissioner of Education, September 24, 1993

For the Petitioner-Appellant, Kalac, Newman, Lavendar & Campbell (Francis J. Campbell, Esq., of Counsel)

For the Respondents-Respondents, Bucceri & Pincus (Louis P. Bucceri, Esq., of Counsel)

This case was initiated by the Board of Education of the River Dell Regional School District (hereinafter "Board"), which sought by Petition of Appeal filed with the Commissioner of Education pursuant to N.J.A.C. 6:24-1.2 a ruling that its action in withholding increments based on its unilateral determination that certain contractual conditions had not been met was for "good cause" under N.J.S.A. 18A:29-14. The Commissioner dismissed the Board's petition prior to transmitting the matter to the Office of Administrative Law (OAL) on the grounds that the Commissioner of Education did not have jurisdiction over the subject matter of the dispute.

On appeal, the State Board found that whether a determination by the Board that contractual conditions had not been

May 4, 1994

met constituted "good cause" for it to withhold salary increments under N.J.S.A. 18A:29-14 raised a question under the education laws. However, in remanding the matter to the Commissioner, we emphasized that our ruling was limited to the question of whether the Commissioner had the jurisdiction to entertain the matter, and we observed that the question appeared to be more properly the subject of a declaratory judgment under N.J.A.C. 6:24-2.1 than a contested case.

On remand, the Commissioner transmitted the matter to the Office of Administrative Law (OAL). The Administrative Law Judge (ALJ) considered the petition as one for a declaratory ruling. He found that the matter did not involve a subject that was an appropriate one over which the Commissioner should exercise her discretionary authority to issue declaratory rulings. However, in arriving at this determination, the ALJ reached the legal conclusion that, based on the undisputed facts in this matter and the applicable law, the Board's unilateral determination that contractual conditions had not been met did not constitute "good cause" within the meaning of N.J.S.A. 18A:29-14 for the withholding of the salary increments involved. It was on this basis that the ALJ found that the matter did not implicate any genuine questions of education law. He therefore recommended dismissing the petition.

The Commissioner adopted the ALJ's determination. In so doing, she found that "the resolution of this matter will be determined by general contract principles of past practice, course of negotiation and meeting of the minds."

The Board appealed. It contends that the Commissioner must issue a declaratory judgment in this matter because "the

Commissioner is the appropriate authority to determine whether the Board's action taken to withhold the salary increments of teachers who obtained, or attempted to obtain, advancement on the salary guide by submission of education 'credits of doubtful value' was statutorily defensible under the 'good cause' language of N.J.S.A. 18A:29-14." Board's brief, at 1. For the reasons that follow, we disagree and therefore affirm the Commissioner's determination not to issue a declaratory judgment.

Initially, we emphasize that this matter does not involve a challenge by a teaching staff member to the Board's action in withholding an increment. Rather, it is the district board which, after acting under authority of N.J.S.A. 18A:29-14 to withhold the increments of certain of its staff members, is seeking a declaration that its action was proper under the education laws. Accordingly, the sole question before us in this appeal is whether it was appropriate for the Commissioner to decline to issue a declaratory judgment.

N.J.A.C. 6:24-2.1 provides in pertinent part that

> ...any interested person(s) may petition the Commissioner for a declaratory ruling with respect to the applicability to any person, property or state of facts of any statute or regulation enforced or administered by the Commissioner. The determination to entertain such petitions for declaratory judgments shall be within the sole discretion of the Commissioner. A declaratory judgment shall be binding upon the Commissioner and all parties to the proceedings on the specific statement of facts set forth therein.

We recognize that administrative adjudication such as the proceedings herein are quasi-judicial rather than judicial. City of Hackensack v. Winner 82 N.J. 1, 29 (1980). Nonetheless, it is evident to us that the question of whether the Commissioner should

grant declaratory relief under N.J.A.C. 6:24-2.1 should be judged with reference to the judicial standards governing the granting of such relief. Id. at 30-33.

As is the case under N.J.A.C. 6:24-2.1, judicial power to grant or deny declaratory relief is discretionary. E.g., New Jersey Ass'n for Retarded Citizens, Inc. v. New Jersey Department of Human Services, 89 N.J. 234 (1982); Hildebrandt v. Gaily, 65 N.J. Super. 274 (App. Div. 1961). The purpose of such proceedings is to provide a means by which rights, obligations and status may be adjudicated in cases involving a controversy that has not yet reached the stage at which either party may seek a coercive remedy. E.g., Hammond v. Doan, 127 N.J. Super. 67 (Law Div. 1974). While a declaratory judgment should not be denied lightly, Union County Bd. of Chosen Freeholders v. Union County Park Commission, 77 N.J. Super. 425, 432-33 (Law Div. 1962), rev'd, 41 N.J. 333 (1964), it is not appropriate to grant declaratory relief where to do so will not terminate the uncertainty or end the controversy giving rise to the proceeding. E.g., Unsatisfied Claim and Judgment Fund Bd. v. Concord Ins. Co., 110 N.J. Super. 191 (Law Div. 1970). Furthermore, declaratory relief is not available to preempt or to anticipate a decision to be made in another pending action, e.g., Hartman v. Maplewood School Transp. Co., 109 N.J. Super. 497 (App. Div. 1969), or where the request for a declaratory ruling is, in effect, an attempt to have the validity of a possible defense in an expected future suit adjudicated in advance. E.g., Donadio v. Cunningham, 58 N.J. 309 (1971).

In light of these principles, it is apparent that the Commissioner acted properly in denying declaratory relief in this

instance. In this respect, we can not ignore that the validity of the Board's action is also the subject of a challenge through the arbitration process. Although those proceedings have been stayed, that stay was granted so as to permit judicial resolution of an appeal by the Board from a lower court decision denying its application for restraint of the arbitration. River Dell Reg. Bd. of Educ. v. River Dell Educ. Ass'n, Docket #A-5156-91T5 (App. Div. 1992). Given these circumstances, it is unlikely that a declaratory judgment involving the same subject issued by the Commissioner of Education would end the controversy. To the contrary, it is evident that any declaration on our part would serve only to complicate the situation.

For these reasons alone, we concur with the ALJ and the Commissioner that this petition for declaratory relief should be denied.[1] Hence, as modified herein, we affirm the Commissioner's determination to dismiss the Board's petition in this matter.

May 4, 1994

Date of mailing MAY 06 1994

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[1] As set forth above, in deciding this appeal we are affirming the Commissioner's determination to exercise her discretionary authority so as to refrain from issuing a declaratory judgment and, hence, we are not deciding whether or not the underlying dispute is arbitrable. In this respect, we note that the primary jurisdiction to make those determinations lies with the Public Employment Relations Commission (PERC). N.J.S.A. 34:13A-5.4. See Board of Ed. of Vocational School in Camden County v. CAM/VOC Teachers Ass'n, 183 N.J. Super. 206 (App. Div. 1982). See also N.J.S.A. 34:13A-26 and 27 (if there is a dispute as to whether withholding of an increment of a teaching staff member is disciplinary so as to be subject to the grievance process, it is PERC which shall resolve that dispute).

225-93

225-93

MICHAEL TOVINO,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SEPTEMBER 24, 1993

OAL DKT. NO. EDU 4123-93

MICHAEL TOVINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before her and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 24, 1993

DATE OF MAILING - SEPTEMBER 24, 1993

226-93

DIONE BARNES AND HER PARENTS ALLAN AND DONNA WENTT,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE GREATER EGG HARBOR REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

SEPTEMBER 24, 1993

OAL DKT. NO. EDU 5462-93

DIONE BARNES AND HER PARENTS ALLAN AND DONNA WENTT,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE GREATER EGG HARBOR REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before her and is dismissed with prejudice.

IT IS SO ORDERED.

Marlene Fitzgerald
COMMISSIONER OF EDUCATION

SEPTEMBER 24, 1993

DATE OF MAILING - SEPTEMBER 24, 1993

227-93

227-93

KADELL, INC., T/A RELIABLE ROOFING COMPANY,

PETITIONER,

V.

BOARD OF EDUCATION OF THE PASCACK VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY.

COMMISSIONER OF EDUCATION

DECISION

SEPTEMBER 24, 1993

OAL DKT. NO. EDU 3892-93

KADELL, INC., T/A RELIABLE ROOFING COMPANY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PASCACK VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY.	:	DECISION
	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before her and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 24, 1993

DATE OF MAILING - SEPTEMBER 24, 1993

228-93

228-93

ESPERANZA ANASTASIO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF TEACHER CERTIFICATION ET AL.,	:	DECISION
RESPONDENT.	:	
	:	

SEPTEMBER 29, 1993

OAL DKT. NO. EDU 3622-92

ESPERANZA ANASTASIO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF TEACHER CERTIFICATION ET AL.,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before her and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 29, 1993

DATE OF MAILING - SEPTEMBER 29, 1993

229-93

229-93

MARY ANN RUSSELL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DOWNE, CUMBERLAND COUNTY,	:	DECISION
RESPONDENT.	:	

OCTOBER 4, 1993

OAL DKT. NO. EDU 1053-93

MARY ANN RUSSELL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DOWNE, CUMBERLAND COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before her and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 4, 1993

DATE OF MAILING - OCTOBER 4, 1993

230-93

230-93

FRANKLYN W. EDWARDS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WANAQUE, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

OCTOBER 4, 1993

OAL DKT. NO. EDU 7792-92

FRANKLYN W. EDWARDS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WANAQUE, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before her and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 4, 1993

DATE OF MAILING - OCTOBER 4, 1993

231-93

231-93

S.R., by his guardian ad litem, J.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MORRIS REGIONAL HIGH SCHOOL DISTRICT, MORRIS COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

OCTOBER 4, 1993

OAL DKT. NO. EDU 6216-92 (EDU 2890-92 ON REMAND)

S.R., by his guardian ad litem, J.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MORRIS REGIONAL HIGH SCHOOL DISTRICT, MORRIS COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before her and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 4, 1993

DATE OF MAILING - OCTOBER 4, 1993

232-93

232-93

BONNIE BROWN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NORTH PLAINFIELD, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

OCTOBER 4, 1993

OAL DKT. NO. EDU 5578-92

BONNIE BROWN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NORTH PLAINFIELD, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before her and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 4, 1993

DATE OF MAILING - OCTOBER 4, 1993

233-93

233-93

LYNNE MARTOCCIO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WASHINGTON, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	

OCTOBER 4, 1993

OAL DKT. NO. EDU 5273-92

LYNNE MARTOCCIO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WASHINGTON, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. In so doing, however, the Commissioner notes that the "Stipulation of Settlement" appears to be merely a joint stipulation of facts signed by the parties with the title simply changed to reflect a stipulation of settlement. As such, the Commissioner emphasizes for the record that in approving the settlement in this matter, she makes no judgment whatsoever as to any conclusions to be drawn from these facts regarding the tenure and seniority claims set forth in the Petition of Appeal.

According, the matter is hereby dismissed.

COMMISSIONER OF EDUCATION

OCTOBER 4, 1993

DATE OF MAILING - OCTOBER 4, 1993

234-93

234-93

B.B., on behalf of her minor child, C.B.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

OCTOBER 4, 1993

OAL DKT. NO. EDU 1586-92

B.B., on behalf of her minor child, C.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of dismissal for failure to appear transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-14.4 have been reviewed. The Commissioner approves the dismissal. Consequently, the matter is no longer deemed to be a dispute before her and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 4, 1993

DATE OF MAILING - OCTOBER 4, 1993

235-93

235-93

JOHN V. ORFINI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	

OCTOBER 4, 1993

OAL DKT. NO. EDU 6168-93

JOHN V. ORFINI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before her and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 4, 1993

DATE OF MAILING- OCTOBER 4, 1993

236-93

236-93

NANCY APGAR AND PENNY F. PILLER, PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY, RESPONDENT.	:	DECISION

SYNOPSIS

Petitioning bus drivers appealed Board's refusal to reimburse them for legal fees for dismissed speeding tickets.

ALJ concluded petitioners were entitled to be reimbursed for costs which they incurred defending against the motor vehicle violations herein under N.J.S.A. 18A:16-6.1 in light of the Commissioner's decision in Drabich. ALJ denied, however, petitioners' request for reimbursement for legal fees incurred in pursuing the proceeding.

Citing recent State Board decision in Drabich wherein it was held that provisions of N.J.S.A. 18A:16-6.1 do not extend to indemnification in motor vehicle offenses, Commissioner reversed. Commissioner affirmed ALJ's denial of petitioners' claim for reimbursement for legal fees incurred in commencing the proceeding herein. (Whalen) Petition was dismissed.

OCTOBER 7, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8923-92 and
EDU 8924-92
AGENCY DKT. NO. 469-10/92 and
468-10/92

NANCY APGAR and PENNY F. PILLER,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY,
Respondent.

Henry F. Collins, III, Esq., for petitioners (Collins & Berman, attorneys)

Robert J. Merryman, Esq., for respondent (Carroll & Weiss, attorneys)

Record Closed: July 16, 1993 Decided: August 27, 1993

BEFORE **JOSEPH F. MARTONE,** ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners, who are school bus drivers employed by respondent, appealed respondent's refusal to reimburse their legal fees for dismissed speeding tickets. Both matters were transmitted to the Office of Administrative Law (OAL) on November 16, 1992, for hearing as a contested case. The matter was assigned to the undersigned Administrative Law Judge (ALJ) on December 18, 1992.

On December 22, 1992, the ALJ conferred with the attorneys for the respective parties, at which time the attorneys agreed that consolidation of these matters would be appropriate. Accordingly an Order for Consolidation was entered on December 22, 1992, in which these two matters were consolidated into a single proceeding.

The matter was scheduled for hearing on April 26, 1993. Prior to the commencement of the hearing, the parties submitted a motion and cross motion for summary decision. Accordingly, the hearing scheduled for April 26, 1993, was adjourned. After the submission of additional memoranda of law on July 16, 1993, the record was closed.

FACTUAL DISCUSSION

As indicated by the fact that the attorneys have filed cross motions for summary decision, the essential facts in this matter are not disputed.

On December 20, 1991, both petitioners were employed by respondent and were engaged in the operation of school buses pursuant to their employment. Each of the petitioners was operating a separate school bus occupied by students of the school district. Each of the petitioners received a traffic summons alleging that at approximately 2:34 p.m. on December 20, 1991 they had been traveling at approximately 70 miles per hour in a 50 mile per hour zone while operating the school buses.

On May 12, 1992, the matters were tried jointly in the Jackson Township Municipal Court. The charges against both petitioners were dismissed after the completion of the State's case.

Each of the petitioners paid to their attorney $400.00 in legal fees for this representation. Thereafter, petitioners requested reimbursement for the aforesaid legal fees pursuant to N.J.S.A. 18A:16-6.1 but their applications were denied by respondent on July 9, 1992.

Specifically, the certification of Georgia Elms, Supervisor of Personnel, indicates that petitioners' request for legal fees was initially pursued as a grievance (Exhibit C-7). Petitioners' grievances were denied and the petitioners never sought arbitration of the grievances but brought this petition requesting reimbursement for their legal fees.

Petitioners assert that respondent has reimbursed employees for legal fees in similar situations. Respondent denies this and also argues that even if it has

reimbursed employees for legal fees in similar situations in the past, this would not be determinative of the Board's duty under the statute.

LEGAL DISCUSSION AND ANALYSIS

N.J.S.A. 18A:16-6.1 refers back to N.J.S.A. 18A:16-6, thus making it clear that the two statutes should be read together. In that light and after close scrutiny of these provisions, the requirements for reimbursement may be set forth as follows:

1. Reimbursement is available only to persons holding any office, position or employment under the jurisdiction of a board of education;
2. Reimbursement is available for any act or omission arising out of and in the course of the performance of the duties of such office, position or employment;
3. In matters involving civil actions, the board is required to defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom;
4. In matters involving criminal actions, reimbursement is required only if the proceeding is dismissed or results in a final disposition in favor of such person;
5. In matters involving criminal actions, the board is required to reimburse the employee for the cost of defending such proceeding, including reasonable counsel fees and expenses of the original hearing or trial and all appeals.

Respondent takes the position that a prosecution for a motor vehicle violation is not a criminal action. Respondent relies on State v. Roth, 154 N.J. Super. 363 (App. Div. 1977). In that case, the issue before the court was the scope of discovery in a municipal court prosecution for drunken driving. The court held that a motor vehicle violation was not a criminal action and, therefore, the defendant was not entitled to the requested discovery. Respondent also relies on State v. Walsh, 236 N.J. Super. 151 (Law Div. 1989). In that case, the court addressed the issue whether the aggravating and mitigating factors which must be considered in sentencing under the Criminal Code must also be considered in sentencing for a motor vehicle offense. In that case, the court specifically held that motor vehicle offenses are not crimes and, therefore, are not covered by the Code.

Respondent also relies on State v. Hammond, 118 N.J. 306 (1990). In that case, the New Jersey Supreme Court addressed the nature of motor vehicle violation and noted that such offenses are not treated under the Code of Criminal Justice. The court concluded that the legislative history of both the Code of Criminal Justice and the Motor Vehicle Act indicate that the Code provisions were not intended to apply to motor vehicle offenses. Finally, respondent points out that under N.J.S.A. 2C:1-14(k) the term "offense" does not include a motor vehicle violation.

Petitioners rely on Cilento v. Hillside Bd of Ed., 1985 S.L.D. 1513. In that case the ALJ discussed N.J.S.A. 18A:16-6 and -6.1. N.J.S.A. 18A:16-6.1 was enacted in 1965, and it was noted that in an introductory statement that the bill was intended to provide legal help under limited circumstances in the event of a criminal action against an employee. It was reasoned that it is important for teaching staff members to be given financial protection whenever they are subject to legal action, civil or criminal, provided the costs are reasonable and the conduct arose out of and in the course of the performance of their duties. Accordingly, it was concluded that disorderly person charges were intended to be included in the legislation's protections. However, respondent argues that Cilento is distinguishable because a disorderly persons offense is covered by the Code of Criminal Justice.

A motor vehicle violation has many of the same attributes and protections as a criminal offense, and the State has the burden of establishing all elements of the offense beyond a reasonable doubt. State v. Wenzel, 113 N.J. Super. 215, 217 (App. Div. 1971). While defenses such as entrapment and constitutional rights such as the right to a jury trial and the right to receive Miranda warnings are not applicable to motor vehicle violations, other protections, such as the prohibition against double jeopardy are applicable. State v. Fogarty, 128 N.J. 59 (1992.

In State v. Dively, 92 N.J.. 573 (1983), the New Jersey Supreme Court held that a conviction for a motor vehicle 'offense' precluded a subsequent criminal prosecution arising out of the same incident based on the double jeopardy clauses of the State and Federal Constitutions. In its analysis, the Court stated at 585:

> Motor vehicle violations have not been considered to be crimes, but only petty offenses. State v. Tropea, 78 N.J. at 314; State v. Macuk, 57 N.J. 1, 9-10 (1970). This tradition has been continued under the New Jersey Code of Criminal Justice, effective September 1, 1979. A motor vehicle violation is presently not a crime under the Code. N.J.S.A. 2C:1-4.* * * . However, the proceedings involving motor vehicle violations in the municipal courts are quasi-criminal in

> nature. State v. DiCarlo, 67 N.J. 321, 327 (1975). The offenses must be proved beyond a reasonable doubt. State v. Emery, 27 N.J.348, 353 (1958). Punishments may include imprisonment for periods of up to six months, . . . [citations omitted],and fines of as much as $2,000. . . [citations omitted].

In its broadest sense the term "criminal action" may be said to encompass all proceedings for the punishment of a public offense and includes all actions for the enforcement of penal laws. See, 1A C.J.S., Actions, Sec. 68(a) (1993).

In Drabich v. Hillsborough Tp. Bd. of Ed., 93 N.J.A.R. 2d (EDU) 173, the Commissioner rejected the decision of the ALJ that motor vehicle offenses are not criminal matters within the contemplation of N.J.S.A.18A:16-6.1. The Commissioner reasoned that this and its companion provision, taken together, clearly intend to provide a "safety net' for school employees who have legal actions brought against them as a result of performing the duties of their positions. The Commissioner felt that the Legislature could not have intended to exclude motor vehicle offenses when such offenses specifically arose out of the performance of the duties of an employee merely because they "fall between the cracks" of statutory language as being neither "civil" nor "criminal" within the precise technical meaning of those terms. As a result, the Commissioner held that proceedings arising from motor vehicle offenses are "criminal actions" eligible for indemnification under N.J.S.A. 18A:16-6.1. It was also indicated that such a result is consistent with considerations of equity since the violation in that matter arose from a school bus driver's performance of her duties; denying relief would ignore the fact that, but for those duties, she would not have received the summons and would not have been faced with defending herself against a charge which ultimately proved unwarranted

Based upon the foregoing discussion, it is clear that N.J.S.A. 18A:16-6.1 is intended to reimburse a school district employee where a "criminal action" in its broadest sense, is instituted against and successfully defended by the employee. Such "criminal actions" include disorderly persons offenses and motor vehicle violations, if they arise out of and in the course of the employee's duties as an employee of the school district.

In the present matter, both petitioners were operating school buses pursuant to their employment when they each received traffic summons alleging that they were speeding. At the trial, the charges against both petitioners were dismissed after the completion of the State's case. Respondent argues that the charges against

petitioner did not arise out of and in the course of their duties, citing Powers v. Union City Bd. aff'd., 124 N.J.Super 590 (Law Div. 1973), aff'd o.b. 127N.J. Super 294 (App. Div. 1974), cert. den. 65 N.J. 575 (1974).

However, it is clear, and I **FIND**,that the charges against petitioners arose out of and in the course of their employment as school bus drivers. As in the Drabich case, if petitioners were not engaged in their duties as school bus drivers, they would not each have received the summons and would not have been faced with defending themselves against charges which were ultimately found to be unwarranted. Accordingly I **CONCLUDE** that petitioners are entitled to be reimbursed for the costs which they incurred defending against the motor vehicle violations in this matter.

Petitioners also seek to be reimbursed for legal fees which they incurred in commencing this proceeding for reimbursement. However, unlike N.J.S.A. 18A:16-6, N.J.S.A. 18A:16-6.1 specifies only that the employee shall be reimbursed,

> "for the cost of defending such proceeding, including reasonable counsel fees and expenses of the original hearing or trial and all appeals."

In Cilento, supra at 1521 it was concluded that reimbursement of counsel fees incurred by one forced to litigate his right to enforce a statutory claim will not be allowed, absent a showing of bad faith, citing Van Horn v. City of Trenton, 80 N.J. 528, 538 (1979). This holding is consistent with the approach taken by the courts that "sound judicial administration will best be advanced by having each litigant bear his own counsel fees except in those few situations specially designated . . ." Gerhardt v. Continental Ins. Cos., 48 N.J. 291 (1966): Coleman v. Fiore Bros. Inc., 113 N.J. 594 (1989); R 4:42-9.

Based on the foregoing, I **FIND** and **CONCLUDE** that petitioners are not entitled to reimbursement for legal fees incurred in pursuing this present proceeding.

DECISION AND ORDER

It is hereby **ORDERED** that respondent shall reimburse petitioners for the reasonable costs incurred by them defending the motor vehicle summons including counsel fees and expenses. It is further **ORDERED** that petitioners' request for

reimbursement of the legal fees incurred in pursuing this proceeding are hereby **DENIED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 27, 1993
Date

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

8/31/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 03 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

emd

APPENDIX

LIST OF EXHIBITS

C-1	Petitioners' Notice of Motion
C-2	Affidavit of Henry F. Collins, Esq.
C-3	Petitioners' Letter Memorandum of Law
C-4	Petitioners' supplemental Letter Memorandum of Law
C-5	Respondent's Notice of Cross Motion with attachments
C-6	Respondent's Brief
C-7	Certification of Georgia Elms with Exhibits attached
C-8	Respondent's supplemental Letter Brief

NANCY APGAR AND PENNY F. PILLER, PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY, RESPONDENT.	:	DECISION

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

Upon review of the record, the Commissioner finds that the August 4, 1993 State Board decision in Rose Drabich v. Board of Education of the Township of Hillsborough, Somerset County, holding that the provisions of N.J.S.A. 18A:16-6.1 do not extend to indemnification in motor vehicle offenses, requires the reversal of the ALJ's determination in this matter.

However, the Commissioner fully concurs with the ALJ's findings and conclusions with respect to denial of petitioners' claim for reimbursement for legal fees incurred in commencing the instant proceeding. It is well established that the Commissioner does not have plenary authority to award counsel fees in determining controversies and disputes presented to her under Education Law, N.J.S.A. 18A:6-9. (See Whalen v. Sayreville Board of Education, 192 N.J. Super. 453 (App. Div. 1983).)

Accordingly, the initial decision of the Office of Administrative Law is reversed in part and affirmed in part and the within Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

OCTOBER 7, 1993

DATE OF MAILING - OCTOBER 7, 1993

237-93

237-93

Millstone Township Teachers Association v. Board of Education of the Township of Millstone, Monmouth County and Medford Lakes Education Association v. Board of Education of the Borough of Medford Lakes, Burlington County and Eastampton Township Education Association v. Board of Education of the Township of Eastampton, Burlington County and Rumson Education Association v. Board of Education of the Borough of Rumson, Monmouth County and Cranbury Education Association v. Board of Education of the Township of Cranbury, Middlesex County and South Amboy Education Association v. Board of Education of the City of South Amboy, Middlesex County

SYNOPSIS

Petitioning Associations sought declaratory judgment that Boards' participation in the Grinspec Trust for providing health insurance coverage for Boards' employees was void and ultra vires.

ALJ found N.J.S.A. 18A:16-13 does not authorize, either directly or by fair implication, local boards to provide health benefits via the kind of trust intermediary represented by Grinspec herein. ALJ concluded respondents' execution of trust participation agreement was ultra vires. Respondent boards and all other local school boards participating as trustees in Grinspec Trust were ordered to give notice of their intention to withdraw from participation.

Commissioner adopted findings and determination in initial decision and ordered withdrawal of boards from participation in Grinspec Trust by the end of 1993-94 school year.

OCTOBER 12, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

MILLSTONE TOWNSHIP TEACHERS ASSOCIATION,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MILLSTONE, MONMOUTH COUNTY,
Respondent.

}OAL DKT. NO. EDU 4175-92
}AGENCY DKT. NO. 194-5/92

and

MEDFORD LAKES EDUCATION ASSOCIATION,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF MEDFORD LAKES, BURLINGTON COUNTY,
Respondent.

}OAL DKT. NO. EDU 4707-92
}AGENCY DKT. NO. 230-5/92

and

EASTAMPTON TOWNSHIP EDUCATION ASSOCIATION,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF EASTAMPTON, BURLINGTON COUNTY,
Respondent.

}OAL DKT. NO. EDU 5670-92
}AGENCY DKT. NO. 289-6/92

and

RUMSON EDUCATION ASSOCIATION,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF RUMSON, MONMOUTH COUNTY,
Respondent.

}OAL DKT. NO. EDU 6001-92
}AGENCY DKT. NO. 195-5/92

and

CRANBURY EDUCATION ASSOCIATION,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF CRANBURY, MIDDLESEX COUNTY,

}OAL DKT. NO. EDU 6002-92
}AGENCY DKT. NO. 258-6/92

and

SOUTH AMBOY EDUCATION ASSOCIATION,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF SOUTH AMBOY, MIDDLESEX COUNTY,
Respondent.

}OAL DKT. NO. EDU 9656-92
}AGENCY DKT. NO. 499-11/92

(CONSOLIDATED)

William R. Mayer, Esq., on behalf of Millstone Township Board of Education (Cohen, Shapiro, Polisher, Shiekman & Cohen, attorneys)

Stephen J. Mushinski, Esq., on behalf of Borough of Medford Lakes Board of Education

John T. Barbour, Esq., on behalf of Eastampton Township Board of Education (Barbour & Costa, attorneys)

B. John Pendleton, Jr., Esq., on behalf the Borough of Rumson Board of Education (McCarter & English, attorneys)

Philip H. Shore, Esq., on behalf of the Township of Cranbury Board of Education (Shore & Zahn, attorneys)

Clark W. Convery, Esq., on behalf the City of South Amboy Board of Education (Convery, Convery & Shihar, attorneys)

Richard Friedman, Esq., on behalf of Teachers' Association (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Michael R. Cole, Esq., on behalf of intervenor, Connecticut General Life Insurance Company (Riker, Danzig, Scherer, Hyland & Perretti, attorneys)

Stephen B. Hunter, Esq., on behalf of intervenor, New Jersey Education Association (Klausner, Hunter, Cige & Seid, attorneys)

Kim Chapman-Belin, Esq., on behalf of intervenor, New Jersey School Boards Association

Record Closed: April 30, 1993 Decided: July 22, 1993

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

Each of the Teachers Associations, named above filed a petition against its Board of Education alleging that the board, after withdrawing from the State Health Benefits Plan, contracted to provide health insurance coverage through a plan called the Grinspec Trust (the Trust) rather than through a direct contract with an insurance company, in the manner authorized by *N.J.S.A.* 18A:16-13. Petitioners claim the Grinspec Trust plan is not authorized by law and is prohibited. They seek to have respondents ordered to provide health benefit coverage in the manner authorized by statute. Connecticut General Life Insurance Company (CG), which actually provides the health benefits through the Grinspec Trust, and the New Jersey School Boards Association, intervened in support of respondents. The New Jersey Education Association intervened in support of petitioners. After prehearings, the parties filed a stipulation of facts and exhibits. The stipulation and several policy pages designated C-1 constitute the record in these dockets. The record closed on April 30, 1993, after receipt of responsive briefs, but the time for decision was extended to July 29, 1993.

Factual Background

The Trust currently includes forty eight public and private sector employers who use this facility to provide employee health benefits guaranteed to be at least equal to the dollar level of benefits which would be paid by the State Health Benefits Plan (SHBP). The Trustees, which include each school board (participating trustee) and one bank trustee, together are the policy holder on a group insurance policy issued by CG, an authorized New Jersey carrier, on a group policy form filed with the New Jersey Department of Insurance (DOI). A school board applicant must be approved by the bank trustee, who is appointed by the settlor (Grinspec, Inc., an insurance licensee) and must satisfy eligibility requirements. The bank trustee alone shall have and exercise all rights and obligations with respect to the policy or the Trust (Exhibit BO. 4.01, 4.03, 7.01; Exhibits F page 3(l)). The employer boards pay premiums to the bank trustee (or its designee) who holds the trust fund. CG is the

designee and Boards have been sending premiums directly to CG. The bank trustee appoints an administrator with the approval of Grinspec, Inc. Grinspec and CG are administrators.

The fixed premium is based on the pooled claims experience of all the employers in the trust. Any retired employee who qualified for coverage through the SHBP due to retirement after 25 years of government service or to disability retirement, is not covered by the Trust. "Non-qualified" retired employees can participate as Trust beneficiaries. All "qualified" retirees remain in the SHBP and their benefits are paid by the Teachers' Pension and Annuity Fund (TPAF). As petitioners point out:

> Finally, the Stipulations make plain that Grinspec, Inc. and its insurance carrier, Connecticut General, "market" their Trust by comparing the rates and benefits of their Trust to those of the State Health Benefits Plan (Stipulation 17). Connecticut General prepared a list which directly compares just two "plans": the State Health Benefits Plan and Connecticut General's under the Trust (Stipulation 17 and Exhibit D). Interestingly, and significantly, Connecticut General did not compare its benefits to the benefit plan of any of the carriers for those local boards who contract with other carriers. That is, the Trust was comparing itself solely to the SHBP, and it did so for "marketing purposes." (Stipulation 17). Similarly, the Trust compares its rates only to those of the SHBP. One could surmise from this marketing approach that the targets of the Trust's market are, in fact, certain local boards who are current participants in the SHBP. [PB. page 4]

CG avers that each school board has a direct contract of insurance with CG because the Trust agreement demonstrates that is the intention of the parties. If the parties wanted a direct contract, however, they would have made one, and there would be no need for the trust arrangement they devised. Similarly, although the boards are currently paying premium to CG as designee of the bank trustee, the trust agreement provides that, at any time, they may be required to pay into a trust fund which can cover more than premium expense alone. Currently, CG pays all trust administrative costs, broker fees and promotion expense and includes these costs in the premium. The trust fund, at the discretion of the bank trustee, may be used to "promote" the plan and to pay tax assessed on the trust fund. Thus what is occurring now may not be what will occur in the future. The real question is why the parties to this agreement find it so attractive.

Insofar as these particular school boards are concerned, the simple answer is that the Grinspec cost for coverage is ten percent less than that of the SHBP

(stipulation 17) even though CG includes brokers fees in its premium and SHBP pays no broker fee. Since the premium is fixed, the Board is not faced with unanticipated fluctuations which can occur in small experience rated groups. The Trust reserves the right to deny membership based on underwriting guidelines. This means that the Trust need not solicit or accept school districts with poor claims experience. Such experience can occur because of a high incidence of claims per subscriber or high costs per incidence. It has been officially recognized in this State that medical providers charge less in some areas than in others. The Health Department denominated ten labor market areas in calculating hospital rate equalization factors. (*N.J.A.C.* 8:31A - Appendix C). Generally speaking, the highest costs areas are in large cities and heavily populated areas, both because labor costs in metropolitan areas are higher and also because this is where the teaching hospitals are located (CMDNJ is located in Newark). Teaching hospitals are always higher cost, and that factor has always been recognized in hospital rate regulation.

By aiming at small school districts (200 or fewer employees), in the southern half of the state, CG is marketing to groups likely to have lower claim costs. SHBP must take all governmental employers regardless of risk factors, however: thus smaller, low claim cost groups are pooled with the larger, higher claim cost groups. In insurance terminology, the activity of CG through the Trust is considered "cream skimming,"[1] and will result in migration of low claims cost boards out of the SHBP, and consequent higher cost per beneficiary within that plan. The effect of barring older retirees and disabled pensioners from Trust eligibility is, of course, to eliminate the highest risk individuals. They and their expenses remain with SHBP.

If each respondent Board individually purchased a group policy directly from an insurance carrier or from a nonprofit hospital or medical service corporation (the Blues), the rate would have to be based on the claims experience of its own group of employees. Thus the rate might not be stable. The claims experience of less than a group of 200 lives is never fully credible, in the actuarial sense. Generally one needs 500 lives and several years of claims for credibility).[2] By pooling the claims experience of these small governmental groups, Grinspec can obtain credible claims experience and avoid the rate fluctuations variations in incidence could create

1 The more modern term is "cherry picking."

2 The ALJ draws upon insurance agency expertise commonly known in the insurance industry for some general background, having been a Department of Insurance hearing officer and Assistant to the Commissioner.

from year-to-year for a small experience rated group. SHBP achieves a similar result but it cannot refuse a governmental group with poor claims experience, nor can it refuse retirees with 25 years of service or those retired due to disability. CG says that it would not insure small groups (under 200 lives) without the Grinspec Trust facility.

Although respondents may not consider a background discussion of health insurance industry concepts germane to the issues in this case, I believe it illuminates some reasons why the petitioners are so concerned with what may appear to the uninitiated as a legal technicality. It may also shed light on the intentions of the Legislature in enacting or not enacting specific provisions of law which are at issue here. Respondents' concerns are obvious and their intentions are good: they seek to lower their costs and stabilize them. Petitioners are especially concerned about costs of coverage for SHBP beneficiaries in non-Grinspec school districts and the effect that rising SHBP expense will have on these districts, TPAF and the State, which pays the employers' share of TPAF costs for qualified retirees. (*N.J.S.A.* 52:14-17.32 as amended by L. 1987 c. 384). SHBP benefits are statutory, but are subject to modification in a collective bargaining agreement made on behalf of the State. *N.J.S.A.* 52:14-17.28a. Thus pressure for a reduction of benefits or for holding down compensation may occur if the expenses of the SHBP rise too precipitously. There is little doubt that skimming the cream off a group (*i.e.*, removing retirees and the disabled), and skimming off the best groups (accepting only groups tending to have younger employees or to be in geographically lower medical cost areas) would adversely effect SHBP costs. This thesis may prove irrelevant to the legal issue, which must be decided on its own merits. Nevertheless, the practical effects should be known, even if they are of no consequence in determining the legal issues. I adopt the stipulations as **Findings of Fact** and **FIND** the stipulated exhibits and pages of the policy (C-1) to be authentic documents. In my discussion below, I will refer to portions of the documents which have legal significance on the issues.

Legal Discussion and Conclusions

Respondents and CG state that "the very simple issue involved here is whether *N.J.S.A.* 18A:16-13 authorizes a Board to contract for medical insurance "with" CG, an authorized New Jersey carrier. *N.J.S.A.* 18A:16-13 provides:

> Any local board of education may enter into contracts of group life, accidental death and dismemberment, hospitalization, medical, surgical, major medical expense, or health and accident insurance with any insurance company or companies authorized to do business in this State, or may

> contract with a nonprofit hospital service or medical service corporation with respect to the benefits which they are authorized to provide respectively. Such contract or contracts shall provide any one or more of such coverages for the employees of the local board of education and may include their dependents. A local board of education amy enter into a contract or contractors to provide drug prescription and other health care benefits as may be required to implement a duly executed collective negotiations agreement, or as may be required to implement a determination by a local board of education to provide such benefit or benefits to employees not included in collective negotiations units. Nothing herein contained shall be deemed to authorize coverage of dependents of an employee under a group life insurance policy or to allow the issuance of a group life insurance policy under which the entire premium is to be derived from funds contributed by the insured employee.
> [emphasis added]

The statutes relating to group insurance for local boards of education, *N.J.S.A.* 18A:16-12 through 22 do not otherwise describe the authorized contracts, except that *N.J.S.A.* 18A:16-22 speaks of them as "contracts executed between a local board of education and an authorized insurer." This language supports an interpretation that the contract referred to is a two party contract.

CG argues that a direct contract of insurance exists between each board and CG because the Trust Agreement says that a participating trustee is an eligible group which agrees to the trust agreement, agrees to enter into one or more contracts of group insurance with an insurance company authorized to do business in New Jersey and agrees to be bound by the terms of the group policy "which the participating trustee has entered into with the insurance company" (Exhibit B, 1.01) This artful language is intended to define the trust agreement as a direct contract between a local board and an insurance company. CG cites five other indicia of a direct contract:

1. Monthly premium charges calculated separability for each school board.
2. School boards currently pay their monthly premium directly to CG.[3]
3. School boards can select types, limits, and deductibles applicable.
4. Claims are submitted to and paid by CG .
5. The Trustees are policy holders.

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[3] The trust provides that premiums go into a Trust Fund, but the controlling entities have directed that the monies go to CG, recognizing that the Trust Fund feature raises regulatory concerns.

Petitioners respond that:

> . . . the Stipulation of Facts and the Trust Participation Agreement both state that the insurance policy here is issued by Connecticut General to the Trust, not to each board. The participating employers obtain insurance coverage for their employees from the "Trust Fund." (See Exhibit F, section 1). The Trust Agreement itself states that the participating employers gain coverage because and when they become a Participating Employer. (Exhibit B, section 4.02.) It is the Trust, not each individual employer, which has the insurance policy, and the individual participating employers gain coverage by virtue of participating in the Trust. If there were direct contracts between each participating employer and the insurance carrier, then surely they would have been supplied . . . they do not exist.
>
> . . . The Trust Agreement purposefully establishes that actual control of the Trust vests in the Bank Trustee, the Settlor, and the Insurance Carrier. In fact, the earmark of the Trust arrangement is that the Participating Trustees surrender all rights, duties and obligations to those three entities. Repeated throughout the Trust Agreement and the Participating Trust Agreements are provisions and clauses which state, explicitly, that the Bank Trustee has all of the rights and duties of control of the Trust and the Policy. Just by way of example, and in addition to the examples provided in the Petitioners' brief in chief, Section 4.01 of the Trust Agreement states: "All rights and obligations with respect to the Policy shall be vested solely in the Bank Trustee." (Exhibit B). In Section 6, the Bank Trustee alone is authorized to "enter into any agreements with the Insurance Company or any agent thereof which it may deem to be in the best interests of, and in furtherance of the purposes of, this Trust."
>
> . . . the Grinspec Trust is run and controlled by the Bank Trustee, the settlor (i.e., Grinspec, Inc.), and the Insurance Carrier.
>
> Control over the Trust is not the only matter which the school boards have surrendered under this arrangement. Despite assertions that each district pays its own premiums directly to Connecticut General based upon coverages which each district selects, the vital fact remains that the school districts surrender their own experience rating. . . . there is a pooling of risks of the employees of all participating employers . . . the policy issued by the carrier is based upon the premiums determined by the risk experience of all employees, "not on the experience of each school board." (Stipulation 32.) . . .
>
> Thus Section 3(G) of Exhibit F declares:
>
> > An adjustment in the premium rate applicable to the policy will be based upon the claim experience of all organizations participation [sic] in the Trust. No separate experience records will be maintained with respect to any Participating Trustee.

> . . . Hence the premiums paid by each board will depend on the claims experience of numerous employees of other employers, not on its own employees. Clearly this may result in some boards paying higher premiums than their own workforce's claims experience warrants. . . . the boards will never know this because the Trust forbids maintaining experience records for each participating employer. [RB, pages 3 to 6]

Although I respect the drafters' artful verbalizations in the Trust Agreement, paint cannot turn a horse into a zebra. The Trust Agreement is an agreement between Grinspec, Inc., (the settlor) and the Trustees (Exhibit B, Initial paragraph). The policy holder is the Trustees (C-1, page 1). The bank trustee alone has the power to execute group insurance applications (Article 4.01, Exhibit B). Premiums are held by the bank trustee in an unsegregated trust fund (Exhibit B, 3.01). The fact that Grinspec is having respondents pay premiums directly to CG at this time which assures insurance regulation of the funds does not change the nature of the instrument. I **CONCLUDE** that the trust agreement is not a contract executed between a local board of education and an authorized insurer, *i.e.*, a direct policy of insurance between two parties as intended by *N.J.S.A.* 18A:16-13 and described in *N.J.S.A.* 18A:16-22. This interpretation of the statute is bolstered by the case law and the legislative scheme for group health coverage of local school board employees discussed in subsequent sections of this decision. Since I have concluded that the Trust mechanism is not a contract authorized under the statute, it follows that the Trust method of providing health benefits is not expressly authorized.

The issue then becomes whether or not a school board is permitted to or is authorized by fair implication to enter into a trust agreement of this kind with an intermediary for the provision of health benefits to employees. After all, the arrangement is beneficial to the boards financially and the employees have been guaranteed the same benefit level through the Trust as that offered by SHBP.

It is true that aged and disabled ("qualified") pensioners are relegated to the SHBP, but their benefits are not diminished.[4] CG pays premium taxes to the State

[4] I reviewed the policy, trust agreement and trust participation agreements carefully seeking a definition or provision defining the benefits of qualified versus non-qualified retirees as stated in the stipulation. With permission of petitioners' counsel, I spoke by telephone with CG counsel, requesting that he point out a policy or trust agreement provision distinguishing qualified and non-qualified retirees and their rights and benefits, because I could find none. None exists. CG pointed to an interpretation of the policy, (C-1, page 43) in conjunction with *N.J.S.A.* 52:14-17.32f. It is most unusual for a policy not to define all subclasses of eligible beneficiaries, such as retirees, when one subclass ("non-qualified") is covered and another subclass ("qualified") is not.

and, as an authorized insurer, the Guaranty Act (*N.J.S.A.* 17B:32A-3) covers its beneficiaries in the event of an insolvency.

Respondents and CG argue that the Legislature did not intend *N.J.S.A.* 18A:16-13 to limit lawful insurance mechanisms and that delegated power to provide benefits through a trust agreement with a policy of an authorized carrier can be found by fair implication in the statute. Petitioners argue that the Legislature knew exactly what it wished to prevent by specifying the kind of contract authorized by the statute, because it has specified when joint venture agreements are allowed and when boards can join together in a pool for specific types of coverage, such as tort claims, damages and workers' compensation. Health benefits are conspicuously missing from enablements for joint ventures and insurance pooling, other than through the SHBP.

CG cites an unpublished 1984 Appellate Division opinion in support of its argument: *Irvington Education Assoc. v. Bd. of Ed. of Township of Irvington*, (Dkt. A-4805-82T5). CG's thesis is that the Appellate Division held that the Legislature only intended to prohibit self insurance. The court described its determination as a "narrow question," that being, whether a local board of education may act as self insurer for health insurance. The court states, "It is . . . not the mere incurring of an open-ended liability that defeats defendant's proposed plan, but rather the lack of specific authority to accept [it] in the area of health benefits." Although other portions of this opinion are *dicta*, the court references significant factors for consideration. In concluding that self insurance was barred, "although the law governing a local board's power in this instance is far from clear, "the court weighed the factors of lack of express authority, availability of viable substitutes, absence of a uniform scheme of statutory protection for such funds and legislative history in analogous situations. The court found a lack of specific authority to accept such responsibility in the area of health benefits when the Legislature expressly authorized joint self insurance for other specified coverages in *N.J.S.A.* 18A:18B-1 *et seq.*

A careful reading of the joint self insurance statutes for school boards (*N.J.S.A.* 18A:18B-1 *et seq.*) demonstrates that there are many parallels of the Grinspec Trust form with the joint self insurance vehicle provided by statute. There is a board of trustees, a majority of which shall be members or employees of boards of education but no trustee shall enter into any contract with the group or receive monies (except for actual expenses and $200 a day for a meeting), for services performed for or on

behalf of the group. The school board insurance group contributes to a joint fund for insurance and related services. The stated legislative intention is to attain for smaller districts the benefits of providing "protection from risks on a group basis - in a pool." (Senate Ed. Comm. Statement on Assembly, No. 1372-L. 1983 c. 108). The group may jointly purchase under a master policy or contract of insurance for participating members. *N.J.S.A.* 18A:18B-3(a). (I note the Legislature appears to be well aware of insurance terminology). A highly significant provision is that any board of education may join the group: there is no insurer or insurer controlled trustee who can bar a board from membership on grounds of "underwriting guidelines" although compliance with risk management programs is required. *N.J.S.A.* 18A:18B-3(b). These statutes were the ones which the Appellate Division reviewed in the *Irvington* decision of 1984.

CG interprets the *Irvington* holding as a ruling that *N.J.S.A.* 18A:16-13 provides only some examples of permissible insurance arrangements and does not preclude the use of others so long as they are not self insurance. The *Irvington* court says:

> Were the issue before us merely whether the school board, if it wished to provide health care benefits to its employees would be limited to either a private insurance program under ***N.J.S.A.*** 18A:16-13 or to participate in the State program under ***N.J.S.A.*** 52:14-17.34, the Teamsters Local 331 decision would have set the question to rest. It is clear that a board of education may both provide health benefits and seek a method of doing so other than by the methods expressly authorized by the two cited statutes.

The *Teamsters Local 331* holding (191 *N.J. Super.* 404 (Ch. Div. 1981), aff'd o.b. 191 *N.J. Super.* 394 (App. Div. 1983), was based on a municipality's right to provide compensation to its employees who, in turn, had the right to collectively negotiate to contribute their payments to a union health and welfare fund. This method is a non-statutory alternative. The *Teamsters* case and the self insurance group statute adopted shortly prior to the appellate holding clearly showed that private insurance under *N.J.S.A.* 18A:16-13 and the SHBP were not the exclusive means of obtaining coverage. The holding did not, however, decide whether a trust agreement intermediary method is the same as the private insurance which the Legislature authorized and intended under *N.J.S.A.* 18A:16-13. The *Irvington* court noted, that even though the board carried excess insurance, the retention of $900,000 in self-insurance "as opposed to a statutorily authorized insurance program exceeds the authority of the board." I **CONCLUDE** that the issues before me were not determined in the *Irvington* case.

In addition to the lack of express authority, the *Irvington* court considered the availability of viable substitutes. Those substitutes, as to respondents here, in addition to the SHBP include both facilitations expressly authorized under *N.J.S.A.* 18A:16-13, namely contracts with insurers or the Blues. Respondents have not suggested there is a shortage of health coverages offered by the Blues and directly by insurance carriers. The absence of a uniform scheme of statutory protections for (self) insurance funds is not a substantially analogous factor here so long as the authorized carrier alone receives premiums, but the trust agreement provides that the bank trustee may do so and need not segregate the funds. The Insurance Commissioner does not have regulatory powers over the bank trustee and trust fund, as he or she has over authorized carriers and over self insurance funds under *N.J.S.A.* 18A:18B-7. I **CONCLUDE** this circumstance is a significant adverse indicator to finding implied power to use a trust vehicle as an intermediary.

The most significant factor in the balance mentioned by the *Irvington* court is the legislative history in analogous situations. By 1984, the Legislature had clearly opted not to allow local boards to join a pool for self insurance of health coverage, although it could easily have done so. CG argues that none of the analagous post 1984 legislative enablements expressly authorized trust, joint or pooled health insurance facilitations for local school boards because the Legislature was aware that all permissible private insurance modalities had been expressly authorized by *N.J.S.A.* 18A:16-13. Since the *Irvington* decision was unpublished and the narrow issue decided concerned self-insurance, I find no merit in this argument. In fact, when the Legislature expressly authorized local school districts to enter into contracts for group legal insurance in 1986, the Senate Education Committee Statement (S 1180, L. 1986 c. 73) urged passage because in the absence of specific statutory authority, questions may arise as to the authority of school boards to provide the benefits available under *N.J.S.A.* 17:46C-1 *et seq.* The manner in which this shall be done is clearly set forth in these statutes, *N.J.S.A.* 18A:18A-3.2, 3.3 and 3.4.

In 1990, the Legislature authorized local government units to obtain group health and life insurance coverage from an insurance carrier or the Blues through joint insurance funds. (*N.J.S.A.* 40A:10-36a, b(2)). The Assembly Insurance Committee Statement accompanying the bill (S 197, L. 1990 c. 120) reported that it "permits two or more local units to combine for the purpose of securing insurance coverage and allowing local units to achieve insurance cost savings made possible through risk pooling." The Legislature could readily have authorized school boards

to join for the purchase of insurance group policies or Blues service contracts, but it did not. It did not adopt the group policy risk pooling savings mechanism for school boards. The SHBP remained the only statutorily authorized risk pooling mechanism for providing health coverage to local board employees.

The legislative intent and scheme for local board provision of health benefits was dispositively illuminated by passage of L.1992 c. 51. Although local boards were then authorized to join with the municipalities served by their schools to obtain the benefits of risk pooling for other forms of coverage, and the joined local unit could also pool with other local units under *N.J.S.A.* 40A:10-36; *N.J.S.A.* 40A:10-36.1 provided:

> **40A:10-36.1. Local unit to include boards of education; boards of education prohibited from joint agreements for group health or term life insurance**
>
> For the purpose of P.L. 1983, c. 372 (C. 40A:10-36 et seq.), "local unit" shall be deemed to include boards of education which join together with municipalities pursuant to P.L. 1992, c. 51 (C. 40A:10-52 et al.), except that boards of education, other than boards of education of county vocational school districts, shall not join together with other local units as provided in section 1 of P.L. 1983, c. 372 (C. 40A:10-36) for the purpose of providing contributory or non-contributory group health insurance or group term life insurance, or both, to employees or their dependents or both, as otherwise permitted therein.
> [emphasis added]

The session law in L. 1992 c 51 is replete with exclusions barring a board of education from participating in a pool for group life and health coverage. A county vocational district can do so, presumably because the county may pool for other employees. Note also that none of the pooling statutes cited herein allows an entity other than a governmental one to be admissible to the group pool. I **CONCLUDE** that the omission of health insurance from the joint and pooling statutory enablements for local school boards was intentional. It is fundamental that what the Legislature omits, the courts will not supply *Remedial Educ. & Diag. Serv. v. Essex County Educ. Serv.*, 191 *N.J. Super.* 524, 527 (App. Div. 1983).

I interpret *N.J.S.A.* 40A:10-36.1 to bar local boards from risk pooling group insurance mechanisms for the provision of health benefits as contrary to the statutory scheme. That scheme is inextricably bound up with SHBP provisions.

The Rest of the Legislative Scheme: Titles 52 and 17B

Local boards may only exercise those powers granted by the Legislature. *Fairlawn Ed. Asso. v. Fairlawn Bd. of Ed.*, 79 *N.J.* 574, 583 (1979). Our Supreme Court therein considered a board's authorization to offer early retirement plans, found no express authorization and concluded it could not be implied because of an overriding concern for the fiscal health of TPAF and preemption by the Legislature. Although health benefits are not subject to the long term actuarial fiscal concerns of pensions, there are some analogies. In 1964, *N.J.S.A.* 52:14-17.34 was amended to permit local government units including school districts to participate in SHBP as "the logical way to provide the greatest benefits to public employees in New Jersey at the lowest cost to both employers and employees" (Senate Bill No. 6 Statement). The claims experience for state and local employees may be separated into subgroups. *N.J.S.A.* 52:14-17.29(c). Local employer experience is considered separately. *N.J.A.C.* 17:9-5.1. The SHB Commission is given the authority to particularize subgroups and determine rates to equitably reflect cost of benefits based on sound actuarial principles. Participation of local groups is voluntary, but, as we have seen, the means by which they may otherwise provide benefits is limited to a contract directly between an insurance carrier or the Blues and a single school district, not a pooling arrangement.

In 1988, the Legislature gave TPAF qualified retirees a right to participate in SHBP even if their former employer opted out of SHBP participation and provided that TPAF, not local boards, would pay for these benefits. *N.J.A.C.* 52:14-17.32f. Current law was not fully effective until 1992 (L. 1992 c. 126§2). Local government employees were not given this right. The Legislature financially assisted local boards served by SHBP by directing that TPAF pay SHBP benefits for qualified retirees and permitted all such retirees to elect to stay with the SHBP. The Legislature nowhere mandated that all qualified retirees must participate in SHBP rather than in a local board's group insurance plan. There can hardly be any question that if an instrument such as the Grinspec Trust can bar qualified retirees from benefits in a local group plan, to the financial benefit of the local district, all qualified retirees (the worst risk group) will be forced to migrate to the SHBP and the costs in that plan for all retirees (including those who must contribute for their own benefits) must inevitably rise. The cost to TPAF and its participants will rise. The rates will rise due to forced migration of older retirees and the disabled into SHBP at TPAF expense and election against the SHBP by out- migrating groups like Grinspec participants with underwriting guidelines which allow rejection of groups with poor claims

experience. The effect of these occurrances will be to unbalance the careful legislative scheme where in SHBP and TPAF are protected from adverse selection by the prohibition against risk pooling by competing plans and the interaction of Title 17B mandatory provisions applicable to all group health insurance policies.

CG argues that the Legislature favored competition in the insurance field and did not intend to bar any permissible insurance facilitation. I have already concluded that the Legislature did not intend health coverage risk pooling for local boards, thus limiting rate competition. The competition favored is competition between private insurers and the Blues and among insurers on a circumscribed playing field. All competing carriers must comply with the statutes standarizing product. (I do not refer to whether or not carriers are providing the basic SHBP level of benefits: it is stipulated that they do). The contracts authorized by *N.J.S.A.* 18A:16-13 must conform with *N.J.S.A.* 18A:16-16 through 16-21, however. The statutory contract requirements are essential components of the Legislative scheme, having been adopted at the same time. Compliance of the insurance contract with the statutes can be readily ascertained if the direct insurance contract is the only effectuating instrument. What if, however, an intermediary trust agreement affects the terms and conditions? Does the local board of education file only a copy of the trustees' insurance contract and its own certificate (part of the policy), with the SHBC under *N.J.S.A.* 18A:16-21? Does it file both the trust agreement and policy as the complete contract? What the boards filed with SHBC is not of record.

N.J.S.A. 18A:16-14(a) and *N.J.S.A.* 40A:10-18a mandate that the contract shall exclude from eligibility active or retired employees who are eligible by age for Medicare, but are not covered by the complete Medicare program and those eligible under another group contract. Private employers' plans are not subject to these statutes. The CG policy (C-1, page 37) provides that CG will "assume the amount payable under " Part B of Medicare for a person who is entitled to be enrolled in that Part, but is not, to be the amount he would receive if he were enrolled." SHBP requires all persons who are Medicare eligible to be enrolled in Medicare, *N.J.A.C.* 17:9-6.3(d). If not enrolled in Medicare, they are excluded. (Not all qualified retirees are Medicare eligible, however.) *N.J.S.A.* 18A:16-14(a) intends that insurer group contracts have similar provisions to SHBP. The CG policy appears to provide that a Medicare eligible who does not enroll is still covered to the extent major medical coverage would wrap around Medicare payments.

N.J.S.A. 18A:16-19(b) provides that if a qualified retired employee "elects at time of retirement" to take SHBP coverage, he is not eligible for employer-paid coverage. The word "elect" clearly means "to select, or choose." Prior to *N.J.S.A.* 52:14-17.32f and f1 (L. 1992 c. 126), a qualified TPAF retiree could not remain in the SHBP if his former employer was not an SHBP participant. *N.J.A.C.* 52:14-17.32f provides that a qualified TPAF retiree who retired prior to the adoption of that law (1988 or 1992, depending upon class of retiree) may participate in the SHBP if the retiree applies within one year after the effective date. These statutes clearly give the employee the option to elect a benefit plan and tell him when he must apply. The Senate Committee Statement concerning L. 1987 c. 384, A 4363 corroborates this conclusion. The stated intention therein for a mandate that TPAF, rather than the local board pay for qualified retiree benefits in SHBP is to give local boards incentives to offer retiree coverage when they have not done so previously. There is no implication that a local board is to have the unilateral right to shift all qualified retirees to SHBP. All the cited law in this paragraph leads to a conclusion that the Legislature has given the retired or retiring employee the right to choose and a time frame within which this must be done.

CG's policy (C-2, page 43) says: "If your active service ends because you retire, your insurance may be continued upon your election at time of retirement in accordance with State law." The stipulation says at paragraph 45 that all retirees are eligible for coverage under the group insurance policy. This fact and the policy section cited above, *prima facie* would appear to comply with the statutes. But in stipulations 46, 47 and 48, I find that CG and respondents interpret the cited policy provision to mean that the policy does not cover all retirees, but covers only "non-qualified" employees and that qualified employees who wish to continue coverage must switch to the SHBP. They interpret "elect" in *N.J.S.A.* 18A:16-19 by way of the page 43 policy provision to mean any qualified employee who "elects" to continue coverage. This interpretation is inconsistent with the clear meaning of the statutes that a local board employee has the option to elect the SHBP. An "election in accordance with State law" is an election to stay in the local board's plan or to apply to SHBP. I so **CONCLUDE**.

A final part of the picture in determining whether the Legislature intended to authorize local boards to use trust agreement intermediaries, such as this, is the application of the recently enacted L. 1993 c. 8, which directly relates to the funding of TPAF qualified retirees' benefits. The insurance company with a policy covering local board employees must pay, each year, a surcharge which is a percentage of the

claims (not the premiums) paid attributable to the coverage of these employees and their dependents. The Grinspec Trust participation agreement (Exhibit F, 3, G) expressly provides that the premium rate applicable to the policy will be based on the claim experience of all organizations participating in the Trust and "no separate experience records will be maintained "for any participant. This new statute reinforces the conclusion that the legislative scheme does not contemplate authorization for pooling under a trust agreement, but only a direct contract of insurance between a local board and the carrier under *N.J.S.A.* 18A:16-13.

The surcharge section of L. 1993 c. 8 includes a more explicit description of the insurance company from which school boards may obtain a policy. *N.J.S.A.* 18A:16-13, described such an insurance company as one authorized to do business in New Jersey. L. 1993 c. 8 describes the carrier as one "writing insurance pursuant to Title 17B of the New Jersey Statutes." The new description is more explicit in that it would be possible to have an out-of-state (non-domestic) insurance company authorized to do business in New Jersey for some lines of business, but not for group health coverage, which it did write in other states. Such a carrier could sell a policy to an out-of-state "trust" group established for insurance marketing purposes which would purchase the policy from the carrier in that state. The carrier could then claim as to the trust "members" in New Jersey, it was not selling a New Jersey group policy delivered or issued for delivery in New Jersey (*N.J.S.A.* 17B:27-26) and was therefore not subject to Title 17B requirements. By further describing the policy which local boards have with an authorized carrier as a company "writing insurance pursuant to Title 17B," the Legislature has made it clear that the manner in which the carrier contracts for the policy must be that of Title 17B.

The cited provision of c. 8 of L. 1993 imports into the description of the authorized contract that it must in all respects be written pursuant to Title 17B, which mandates certain benefits must be offered in group health policies (*N.J.S.A.* 17B:27-46.1 *et seq.*). For example, if an employee is terminated due to total disability, the group health policy must provide for continuation of all coverage in the group policy, even if the person is eligible for or covered by Medicare, for a payment no more than the group rate. *N.J.S.A.* 17B:27-51.12. The employee may "elect continuation" of his group coverage. The statutory mandate would be inconsistent with any interpretation that an employer can force a disabled individual into another choice. The language "electing continuation" in this statute allows definitive interpretation of that term in a group health policy context. It illuminates the meaning of the CG policy term used at page 43 of C-1, which speaks to active

service which ends due to injury or sickness or retirement. Page 43 of the policy form was filed March 4, 1982, which was just after *N.J.S.A.* 17B:27-51.11 *et seq.* was approved (January 9, 1981), and before it was to become effective (90 days after enactment, *i.*e., about April 1, 1982). The policy also follows that statute in that it tells the beneficiary that the continuation plan may not "preclude individual selection." *N.J.S.A.* 17B:27-31 does not require that a group health policy must include retirees, but if it does include retirees, *N.J.S.A.* 17B:27-51.12 at (3)a, b and c (mandating continuation of all coverages for the disabled under any new group policy contracted for by the employer) requires that they cannot be dropped from any group plan continued by the employer. CG would have difficulty complying with this provision if it marketed to local boards carrying private insurer or Blues group health coverage, because it claims the Trust policy only covers "non-qualified" retirees. It could readily pick-up SHBP employers, however, because qualified retirees can continue in SHBP.

All of the above discussion illuminates the meaning of the policy. The policy form does not and was never intended to mean that qualified retirees (which include the disabled) may elect "in accordance with State law" to continue only in the SHBP and may be forced out of the employer's plan. "In accordance with State Law" refers to the provision of *N.J.S.A.* 17B:27-51.11 *et seq.* not *N.J.S.A.* 52:14-17.32f, as CG contends. No provision in the policy or trust agreement defines the classes of qualified and non-qualified retirees as these classes are described by CG and no provision clearly states that such qualified retirees are not eligible for coverage. In fact, the policy must cover qualified retirees of non-school public employees because SHBP will not. If a group plan such as the trust agreement as applied is inconsistent with Title 17B, it is not a contract of insurance written pursuant to Title 17B within the meaning of L. 1993 C. 8 and *N.J.S.A.* 18A:16-13, even if the insurer is authorized to do business in New Jersey, the policy form has been filed and the risk is not pooled. *N.J.S.A.* 17B:27-27 and 29 permit risk pooling through multiple employer trust funds. As the discussions here demonstrate, however, after 1982, it became more difficult for a group insurance plan to comply with both Title 17B and 18A.

CG contends that the speed with which *L.* 1993 c. 8 was passed due to intense lobbying of NJEA vitiates the existence of any legislative intent. "Legislative intent" as used in statutory construction is a legal term of art, not a description of the state of mind existing in a legislator at the time a vote is cast. Thus, the record of lobbying and of passage of the bill offered by CG in rebuttal to petitioners' argument is

irrelevant. If it were relevant, it would logically support petitioners' argument, not that of CG: it can be seen as support of the NJEA position and an attempt at speedy correction of private insurers' implementation of pooled claim experience for local boards. The legislative intention behind *L.* 1993 c. 8 as found in its accompanying statement bolsters my conclusion concerning the entire legislative scheme, for *L.* 1993 c. 8 even provides a way back to the SHBP for local boards which currently have contracts with private insurers when these contracts terminate, but subjects those which contract with private insurers thereafter to the usual waiting period.

Taking into consideration the analogous factors alluded to in case law for a determination of whether or not the Grinspec Trust is a method authorized to provide health benefits and whether express authorization is needed, including the legislative history and statutory scheme related to the issue, I **CONCLUDE** that *N.J.S.A.* 18A:16-13 does not authorize local boards to provide health benefits via the kind of trust intermediary found here, and that authorization would have to be express and cannot be found by fair implication because the Grinspec arrangement is inconsistent with and detrimental to implementation of the legislature scheme for provision of such benefits by local school boards in the State as a whole. I **CONCLUDE** that respondents' execution of the trust participation agreement is *ultra vires*.

It is therefore **ORDERED** that the respondent boards and all other local school boards participating as trustees in the Grinspec Trust give notice of their intention to withdraw from participation upon a final order in this docket;

that intervenor CG retrieve past claims experience for the period beginning January 1, 1993, and commence forthwith to record claims experience for each participating board separately consistent with the statutory requirement expressed in L. 1993 c. 8; and

that participating boards take whatever steps are necessary to assure continuation of employee benefits in accordance with law in the event a final order in this docket requires withdrawal from Trust participation.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 29, 1993
Date

Naomi Dower LaBastille
NAOMI DOWER-LABASTILLE, ALJ

Receipt Acknowledged:

7/29/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 29 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

/cae

List of Exhibits

J-1 Stipulation and Stipulated Exhibits of the Parties

C-1 First three pages of CG policy and pages 37 and 43 of Certificate incorporated therein

OAL DKT NOS. EDU 4175-92, 4707-92, 5670-92, 6001-92, 6002-92 AND 9656-92 (CONSOLIDATED)

MILLSTONE TOWNSHIP TEACHERS ASSOCIATION,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF MILLSTONE, MONMOUTH COUNTY,	:	
RESPONDENT.	:	
AND	:	
MEDFORD LAKES EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MEDFORD LAKES, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
AND	:	
EASTAMPTON TOWNSHIP EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF EASTAMPTON, BURLINGTON COUNTY,	:	
RESPONDENT.	:	
AND	:	

RUMSON EDUCATION ASSOCIATION,

PETITIONER,

V.

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

RESPONDENT.

AND

CRANBURY EDUCATION ASSOCIATION,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF CRANBURY, MIDDLESEX COUNTY,

RESPONDENT.

AND

SOUTH AMBOY EDUCATION ASSOCIATION,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF SOUTH AMBOY, MIDDLESEX COUNTY,

RESPONDENT.

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Intervenor Connecticut General Life Insurance Company (hereinafter CG) filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. Petitioning Associations filed a timely concurrence with the ALJ's decision. Five respondents filed untimely requests to

join in CG's exceptions. Intervenor NJEA, as well as petitioning Associations, filed timely replies.

Upon careful and independent review of the record of this matter, including the exceptions filed by CG, the Commissioner affirms the findings and conclusions of the Office of Administrative Law, which established that N.J.S.A. 18A:16-13 does not authorize local boards of education to provide health benefits through trust intermediary funds such as Grinspec. Like the ALJ, the Commissioner finds that authorization for such trusts is not expressly provided for in statute, nor can it be found to exist by fair implication.

The matter at bar concerns the legality of a trust arrangement devised by a group of private and public sector employers who have joined together for the purpose of providing health insurance to their employees. For a public board of education to provide insurance coverage, statutory authority must exist. Local boards of education have only that authority to act delegated to them by the Legislature. See Fair Lawn Ed. Assoc. v. Fair Lawn Bd. of Ed., 79 N.J. 574, 583 (1979). See also Scatuorchio v. Jersey City Incinerator Authority, 14 N.J. 72, 85 (1953). Accord, In re Jamesburg High School Closing, 83 N.J. 540, 549 (1980) (Where there exists reasonable doubt as to a school board's power to act in a certain manner or area, "the power is denied.") N.J.S.A 18A:16-13 plainly states that contracts for health insurance made by a board of education must be with an insurance company or with a nonprofit hospital service or medical service corporation. It is equally plain from a reading of the statutes that the only way public schools can join together to provide insurance of any kind is

through a Joint Insurance Fund (JIF) pursuant to N.J.S.A. 18A:18B-2 and 3. Said statutes provide:

> 18A:18B-2. Insurance authorized
>
> Any board of education is authorized to insure, contract or provide for any insurable interests of the district or board in the manner authorized by section 3 of this act [Section 18A:18B-3], for the following:
>
> a. Any loss or damage to its property, real or personnal, motor vehicles, equipment or apparatus;
>
> b. Any loss or damage from liability resulting from the use or operation of motor vehicles, equipment of apparatus owned or controlled by it;
>
> c. Any loss or damage from liability for its own acts or omissions and for acts or omissions of it officers, employees or servants arising out of and in the course of the performance of their duties, including, but not limited to, any liability established by the "New Jersey Tort Claims Act," N.J.S. 59:1-1 et seq., or by any federal or other law;
>
> d. Loss or damage from liability as established by Chapter 15 of Title 34 of the Revised Statutes, Labor and Workmen's Compensation (R.S. 34:15-1 et seq.);
>
> e. Expenses of defending any claim against the board, district, officer, employee or servant arising out of and in the course of the performance of their duties, whether or not liability exists on the claim.
>
> 18A:18B-3. School board insurance group
>
> a. Any two or more boards of education may form and become members of a school board insurance group. A board of education may take this action by resolution of the board. Through membership in a school board insurance group, a board of education may participate in any joint self-insurance fund or funds, risk management programs or related services offered or provided by the group. The group shall have the power to establish a fund or funds for coverages authorized in section 2 of this act [Section 18A:18B-2] and to jointly purchase insurance or coverages under a master policy or contract of

> insurance for participating members. The group shall have the power to take other actions necessary to developing, administering, and providing risk management programs, joint self-insurance funds, joint insurance purchases, and related services.
>
> b. The bylaws of the school board insurance group shall provide that any board of education may join the group, provided it agrees to comply with the standards for membership, including risk management programs, which shall be established by the group, and may be a member as long as it complies with the standards for membership.
>
> c. A school board insurance group may sue or be sued and shall appoint a natural person residing in this State or a corporation authorized to do business in this State as its agent for service of process. The group shall notify the commissioner of the appointment.
>
> d. A school board insurance group is not an insurance company or an insurer under the laws of this State and the development, administration or provision by a group of joint self-insurance fund or funds, risk management programs and related services does not constitute the transaction of insurance nor doing an insurance business. A group shall not be subject to the provisions of Title 17, Subtitle 3, Insurance, of the Revised Statutes.

Health insurance is conspicuously absent from the types of insurance envisioned by the Legislature that public schools may provide. A review of the legislative history of N.J.S.A. 18A:18A-1 et seq., reveals that repeated efforts have been made to add health insurance to the list of insurances for which boards may join together to provide; however, the Legislature has repeatedly rejected such attempts. See initial decision at pp. 9-19.

Were public boards of education permitted to join Grinspec Trust, then it would become a JIF. Grinspec would then become subject to regulation by the Department of Insurance and, concomitantly, become subject to statutory restriction as to what

kinds of insurance would be permissible pursuant to N.J.S.A. 18A:18B-2, and 3. As noted above, said statutes exclude health insurance coverage. Hence, because boards are without inherent power to join together for purposes other than those specifically provided for by statute (Scatuorchio, supra), Grinspec is outside the allowable parameters of law .

In arriving at this determination, the Commissioner notes that while she adopts the findings and conclusions of the Office of Administrative Law in this case, she does so without specifically endorsing the ALJ's comments based upon the ALJ's individual experience as a former hearing officer and Assistant Commissioner for the Department of Insurance, such as that observation made at pp. 9-10 of the initial decision regarding the Guaranty Act. While the ALJ's reading of N.J.S.A. 17B:32A-3 may be true generally, because said statute specifically excludes JIFs, it may have no application to this case. Similarly, the Commissioner makes no comment on, nor draws any conclusions from, the ALJ's language on page 11 of the initial decision, which could be read to suggest that school board JIFs must accept all applicants.

Yet, to find such intermediary trusts such as Grinspec permissible, with the understanding that the Trust admits that it provides coverage by being selective as to its participants based upon exclusion of certain categories of clients such as retirees ("cherrypicking"), is to suggest that the State Health Benefits Plan (SHBP) would eventually becomes analogous to the now defunct Joint Underwriters Association (JUA), a collective of high risk individuals for which some public entity would have to shoulder the costs of providing health insurance. Such arrangements would exist in contravention to the best interests of the State.

It is further observed that among those instances whereby the Legislature has provided for pooling in purchasing insurance, only public employers are mentioned. None of the statutes considered herein envisions pooling by public sector entities with private sector employers. Yet, Grinspec does permit both public and private sector employers to participate in the Trust. As noted by petitioners in their post-hearing brief, "[t]he differences in the laws and rules regarding health benefits between private and public sector employers [are] enormous and diverse." (Petitioners' Trial Brief, at p. 11) The Commissioner finds such diversity in entities speaks against a finding of validity under public education law.

Accordingly, for the reasons expressed in the initial decision, as augmented herein, the Commissioner finds and determines that N.J.S.A. 18A:16-13 does not authorize local boards of education to provide health benefits through the kind of intermediary such as Grinspec Trust. The Commissioner finds, accordingly, that respondents' execution of the trust participation agreement herein is ultra vires. The Commissioner therefore directs that the respondent boards and all other local school boards participating as trustees in the Grinspec Trust give, as of the date of this decision, notice of their intention to withdraw from participation by the end of the 1993-94 school year. Moreover, no boards of education whose participation in the Trust may be pending shall be permitted to do so.

IT IS SO ORDERED.

OCTOBER 12, 1993

DATE OF MAILING - OCTOBER 13, 1993

COMMISSIONER OF EDUCATION

237-93

8M-94
(237-93)

MILLSTONE TOWNSHIP TEACHERS ASSOCIATION,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF MILLSTONE, MONMOUTH COUNTY,

RESPONDENT.

AND

MEDFORD LAKES EDUCATION ASSOCIATION,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF MEDFORD LAKES, BURLINGTON COUNTY,

RESPONDENT.

AND

EASTAMPTON TOWNSHIP EDUCATION ASSOCIATION,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF EASTAMPTON, BURLINGTON COUNTY,

RESPONDENT.

AND

COMMISSIONER OF EDUCATION

DECISION ON MOTION

JANUARY 14, 1994

RUMSON EDUCATION ASSOCIATION, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE BOROUGH OF RUMSON, MONMOUTH COUNTY, :

RESPONDENT. :

AND :

CRANBURY EDUCATION ASSOCIATION, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP OF CRANBURY, MIDDLESEX COUNTY, :

RESPONDENT. :

AND :

SOUTH AMBOY EDUCATION ASSOCIATION, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP OF CRANBURY, MIDDLESEX COUNTY, :

RESPONDENT. :

OAL DKT. NOS. EDU 4175-92, 4707-92, 5670-92, 6001-92, 6002-92 AND 9656-92 (CONSOLIDATED)

MILLSTONE TOWNSHIP TEACHERS ASSOCIATION,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF MILLSTONE, MONMOUTH COUNTY,	:	
RESPONDENT.	:	
AND	:	
MEDFORD LAKES EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MEDFORD LAKES, BURLINGTON COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
AND	:	
EASTAMPTON TOWNSHIP EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF EASTAMPTON, BURLINGTON COUNTY,	:	
RESPONDENT.	:	
AND	:	

RUMSON EDUCATION ASSOCIATION, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE BOROUGH OF RUMSON, MONMOUTH COUNTY, :

RESPONDENT. :

AND :

CRANBURY EDUCATION ASSOCIATION, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP OF CRANBURY, MIDDLESEX COUNTY, :

RESPONDENT. :

AND :

SOUTH AMBOY EDUCATION ASSOCIATION, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP OF CRANBURY, MIDDLESEX COUNTY, :

RESPONDENT. :

For Intervenor Connecticut General, Riker, Danzig, Scherer, Hyland & Perretti (Michael R. Cole, Esq., of Counsel)

For the Board of Education of the City of South Amboy, Convery, Convery & Shihar (Clark W. Convery, Esq., of Counsel)

For the Board of Education of the Township of Millstone, Cohen, Shapiro, Polisher, Shiekman and Cohen (William R. Mayer, Esq., of Counsel)

For the Board of Education of the Borough of Medford Lakes, Stephen J. Mushinski, Esq.

For the Board of Education of the Borough of Rumson, McCarter and English (B. John Pendleton, Jr., Esq., of Counsel)

For the Millstone Township Teachers Association et al., Zazzali, Zazzali, Fagella & Nowak (Richard A. Friedman, Esq., of Counsel)

For Intervenor/Petitioner New Jersey Education Association, Klausner, Hunter, Cige & Seid (Laurence Van Wess, Esq., of Counsel)

This matter has come before the Commissioner on November 12, 1993 by way of Notice of Motion with accompanying certification and brief filed by Intervenor Connecticut General Life Insurance Company (CG), seeking a stay of the Commissioner's decision rendered in the above-captioned matter on October 12, 1993. Relying on Zon. Bd. of Adj. v. Service Elec. Cable T.V., 198 N.J. Super. 370 (App. Div. 1985) and Humble Oil & Refining Co. v. Wojtycha, 48 N.J. 562, 566 (1967), CG claims a stay should issue pending review of this case before the State Board of Education because it is likely to succeed on the merits of its case, it will suffer irreparable harm if the stay is not granted, there are substantial legal issues raised and the order sought to be stayed will enjoin ongoing operations of a public body. Millstone Township Board of Education, South Amboy Board of Education, Rumson Borough Board of Education, and Medford Lakes Borough Board of Education joined in the Motion for Stay, relying on the submissions of CG for their position.

On November 19, 1993, Millstone Township Teachers Association on behalf of petitioners filed an Affidavit in Opposition to CG's Application for Stay. Intervenor/Petitioner New Jersey Education Association joined in the Opposition filed by

Millstone Education Association and adopted the submissions filed by Millstone Education Association in so doing.

CG first argues that it will likely succeed on the merits because under Irvington Education Association v. Board of Education of the Township of Irvington, Dkt. No. A-4805-82T5, (App. Div. 1984), the existing relationship between it and the Boards of Education named as respondents in this matter in the form of the Grinspec Trust is valid. CG also relies on N.J.S.A. 17B:27-27 for its contention that as an insurance trust made up of employers it is a permissible vehicle to deliver health insurance under N.J.S.A. 18A:16-13. CG also claims that the respondent Boards and it freely entered into a contractual relationship which defines that a contract of insurance exists between it and those Boards.

Second, CG claims it will suffer immediate and irreparable harm if a stay is not granted because the effect of the Commissioner's decision is to prevent it from using the Grinspec Trust policy to deliver insurance coverage to the respondent Boards. If the Commissioner's decision is not stayed, CG avers, it may forfeit part of this business even if CG's position and the Trust are subsequently vindicated.

Third, CG submits that the balancing of harms weighs in its favor and, also, that a stay is in the public interest because the Trust provides health benefits at a cost that is ten percent less than the cost from the State Health Benefits Program (SHBP). It argues that if the final decision is enforced, the Boards will be forced to either undo their arrangement with CG to enter into another less advantageous arrangement or to enroll in the SHBP. CG

suggests there is no reason why the Boards should be forced to make this election before the conclusion of all appeals.

Further, CG contends there is no harm to the Associations if the stay is granted in that the record shows that the benefits and the administration of the health benefits coverage is not deficient or inadequate in any way, and, in fact, is equal to or better than the SHBP benefits. CG thus contends that the Associations will not suffer harm if the stay is entered and the Boards' choice delayed until the conclusion of this litigation. It claims it makes no sense to direct a public employer to use its scarce resources to search out different insurance arrangements for its employees when a final judicial determination on a question of law has not been made.

The Affidavit in Opposition to the Motion for Stay submitted by Millstone Township Teachers Association's counsel contends preliminarily that the stay should be denied because the Commissioner did not order immediate action, but rather permitted ample time for the Boards to discontinue their participation in, and use of, Grinspec Trust. Further, the Associations contend the requisite criteria for a stay have not been satisfied by CG and those Boards joining in CG's application for stay.

The Commissioner has delegated her authority to hear and decide this matter to Win L. Tillery, Assistant Commissioner, pursuant to N.J.S.A. 18A:4-34.

Upon careful review of the papers submitted by the parties, and under the legal standards that apply to an assessment of whether a stay of the Commissioner's decision should be issued, the Assistant Commissioner denies CG's and the Boards' motion. See

Crowe v. DeGioia, 90 N.J. 126 (1982). In denying this motion, the Assistant Commissioner finds that CG has failed to make any showing that it will prevail on the merits of the appeal before the State Board or that it will suffer any irreparable harm from complying with the Commissioner's decision in this matter, which fully addressed the arguments raised by CG in its request for stay.

In so deciding, the Assistant Commissioner stresses that the Commissioner's decision represents the final determination in this matter, unless and until reversed upon appeal. (N.J.S.A. 18A:6-25) Consequently, CG and those Boards seeking the instant stay are, by operation of law through the denial of their request for stay, bound by the Commissioner's directive that they cease to be a part of Grinspec Trust or any other similar arrangement as Grinspec Trust by June 1994. The Commissioner's decision found that such date affords the Boards ample time to comply with the law regarding the provision of health insurance for their employees and agents.

Accordingly, the instant Petition with Motion for Stay is denied.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JANUARY 14, 1994

DATE OF MAILING - JANUARY 18, 1994

237-93

EDU #4712-92, 4707-92, 5670-92, 6001-92, 6002-92, 9656-92 (consolidated)
C # 237-93
SB # 62-93

MILLSTONE TOWNSHIP TEACHERS ASSOCIATION, PETITIONER-RESPONDENT, V. BOARD OF EDUCATION OF THE TOWNSHIP OF MILLSTONE, MONMOUTH COUNTY, RESPONDENT-APPELLANT, AND MEDFORD LAKES EDUCATION ASSOCIATION, PETITIONER-RESPONDENT, V. BOARD OF EDUCATION OF THE BOROUGH OF MEDFORD LAKES, BURLINGTON COUNTY, RESPONDENT-APPELLANT, AND EASTAMPTON TOWNSHIP EDUCATION ASSOCIATION, PETITIONER-RESPONDENT, V. BOARD OF EDUCATION OF THE TOWNSHIP OF EASTAMPTON, BURLINGTON COUNTY, RESPONDENT-APPELLANT,	:	STATE BOARD OF EDUCATION DECISION ON MOTION

May 4, 1994

AND

RUMSON EDUCATION ASSOCIATION,

PETITIONER-RESPONDENT,

V.

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

RESPONDENT-APPELLANT,

AND

CRANBURY EDUCATION ASSOCIATION,

PETITIONER-RESPONDENT,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF CRANBURY, MIDDLESEX COUNTY,

RESPONDENT-APPELLANT,

AND

SOUTH AMBOY EDUCATION ASSOCIATION,

PETITIONER-RESPONDENT,

V.

BOARD OF EDUCATION OF THE CITY OF SOUTH AMBOY, MIDDLESEX COUNTY,

RESPONDENT-APPELLANT.

Decided by the Commissioner of Education, October 13, 1993

For the Petitioners-Respondents, Zazzali, Zazzali, Fagella & Nowak (Richard Friedman, Esq., of Counsel)

For the Respondent-Appellant Board of Education of the Township of Millstone, Cohen, Shapiro, Polisher, Shiekman & Cohen (William R. Mayer, Esq., of Counsel)

For the Respondent-Appellant Board of Education of the Township of Medford Lakes, Stephen J. Mushinski, Esq.

For the Respondent-Appellant Board of Education of the Township of Eastampton, Barbour & Costa (John T. Barbour, Esq., of Counsel)

For the Respondent-Appellant Board of Education of the Borough of Rumson, McCarter & English (B. John Pendleton, Jr., Esq., of Counsel)

For the Respondent-Appellant Board of Education of the Township of Cranbury, Shore & Zahn (Phillip H. Shore, Esq., of Counsel)

For the Respondent-Appellant Board of Education of the City of South Amboy, Convery, Convery & Shihar (Clark W. Convery, Esq., of Counsel)

For the Intervenor-Appellant Connecticut General Insurance Company, Riker, Danzig, Scherer, Hyland & Perretti (Michael R. Cole, Esq., of Counsel)

For the Intervenor New Jersey Education Association, Klausner, Hunter, Cige & Seid (Stephen B. Hunter, Esq., of Counsel)

For the Intervenor New Jersey School Boards Association, Kim Chapman-Belin, Esq.

The State Board of Education stays the operation of the decision of the Commissioner of Education pending our decision on the merits of this appeal. Crowe v. De Gioia, 90 N.J. 126 (1982); Yakus v. United States, 321 U.S. 414, 440 (1944). Cf. Irvington Education Association v. Board of Education of the Township of Irvington, Docket No. A-4805-82T5, slip. op. at 9 (App. Div. 1984).

Pursuant to N.J.A.C. 6:2-1.9, we direct sua sponte that the parties supplement the record in this case within ten days of this decision with an executed copy of the entire master medical policy issued by intervenor Connecticut General Life Insurance Company ("CG") to the trustees of the Grinspec Group Medical Trust, along with any additional policies or policy documents covering the individual respondent boards of education herein. We further direct

supplementation with any and all additional instruments executed between CG and the individual respondent boards which are not part of the record in this matter.

May 4, 1994

Date of mailing MAY 06 1994

237-93

EDU #4175-92, #4707-92, #5670-92, #6001-92, #6002-92 and #9656-92
(consolidated)
C # 237-93
SB # 62-93

MILLSTONE TOWNSHIP TEACHERS ASSOCIATION,

PETITIONER-RESPONDENT,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF MILLSTONE, MONMOUTH COUNTY,

RESPONDENT-APPELLANT,

AND

MEDFORD LAKES EDUCATION ASSOCIATION,

PETITIONER-RESPONDENT,

V.

BOARD OF EDUCATION OF THE BOROUGH OF MEDFORD LAKES, BURLINGTON COUNTY,

RESPONDENT-APPELLANT,

AND

EASTAMPTON TOWNSHIP EDUCATION ASSOCIATION,

PETITIONER-RESPONDENT,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF EASTAMPTON, BURLINGTON COUNTY,

RESPONDENT,

STATE BOARD OF EDUCATION

DECISION

June 7, 1995

AND :

RUMSON EDUCATION ASSOCIATION, :

PETITIONER-RESPONDENT, :

V. :

BOARD OF EDUCATION OF THE BOROUGH OF RUMSON, MONMOUTH COUNTY, :

RESPONDENT-APPELLANT, :

AND :

CRANBURY EDUCATION ASSOCIATION, :

PETITIONER-APPELLANT, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP OF CRANBURY, MIDDLESEX COUNTY, :

RESPONDENT-APPELLANT, :

AND :

SOUTH AMBOY EDUCATION ASSOCIATION, :

PETITIONER-RESPONDENT. :

Decided by the Commissioner of Education, October 13, 1993

Decision on motion by the Commissioner of Education, January 14, 1994

Decision on motion by the State Board of Education, May 4, 1994

For the Petitioners-Respondents, Zazzali, Zazzali, Fagella & Nowak (Richard Friedman, Esq., of Counsel)

For the Respondent-Appellant Board of Education of the Township of Millstone, DeCotiis, Fitzpatrick & Gluck (William R. Mayer, Esq., of Counsel)

For the Respondent-Appellant Board of Education of the Borough of Medford Lakes, Stephen J. Mushinski, Esq.

For the Respondent Board of Education of the Township of Eastampton, Barbour & Costa (John T. Barbour, Esq., of Counsel)

For the Respondent-Appellant Board of Education of the Borough of Rumson, McCarter & English (B. John Pendleton, Jr., Esq., of Counsel)

For the Respondent-Appellant Board of Education of the Township of Cranbury, Shore & Zahn (Philip H. Shore, Esq., of Counsel)

For the Intervenor-Appellant Connecticut General Insurance Company, Riker, Danzig, Scherer, Hyland and Perretti (Michael R. Cole, Esq., of Counsel)

For the Intervenor New Jersey Education Association, Klausner, Hunter & Cige (Stephen B. Hunter, Esq., of Counsel)

For the Intervenor New Jersey School Boards Association, Kim Chapman-Belin, Esq.

This case was initiated by separate Petitions of Appeal to the Commissioner of Education filed by six education associations against the district boards of education which employed the individuals represented by each association. The impetus for the action was that each of the district boards had withdrawn from the New Jersey State Health Benefits Plan and had contracted to provide health insurance coverage to its employees by an arrangement with Connecticut General Life Insurance Company

known as the Grinspec Trust. Petitioners claimed that this arrangement was not authorized by law and was prohibited.

Connecticut General and the New Jersey School Boards Association intervened on behalf of the respondent district boards, and the New Jersey Education Association intervened in support of petitioners.

On October 13, 1993, the Commissioner adopted the findings and conclusions of the Administrative Law Judge and held that N.J.S.A. 18A:16-13 as then in effect did not authorize district boards of education to provide health benefits through arrangements such as the Grinspec Trust and that such authorization could not be implied from the statutes. She directed that all district boards participating in the Grinspec Trust give notice of their intention to withdraw from it by the end of the 1993-94 school year.

Connecticut General appealed the Commissioner's decision to the State Board contending that the Grinspec Trust was a permissible method for providing health insurance benefits under New Jersey Law as then in effect.

On May 4, 1994, the State Board of Education stayed the Commissioner's decision pending our decision on the merits.

On January 19, 1995, P.L. 1995 c. 74 was signed into law. This legislation amended N.J.S.A. 18A:16-13 so as to authorize district boards to provide group health insurance

benefits to their employees and dependents through joint insurance fund arrangements subject to certain conditions specified in the statute.

By letter of April 20, 1995, the parties were advised that the State Board would take notice of P.L. 1995 c. 74 in relation to this matter and that the parties were being afforded the opportunity to address the impact of the legislation.

It is Connecticut General's position that the new legislation expressly and unambiguously permits district boards to make use of arrangements such as the one involved here. It further argues that examination of the terms of the amendment bolsters the position it took when it appealed the Commissioner's decision, i.e., that the arrangement involved was permissible even under the prior law.

The Associations contend that P.L. 1995 c. 74 does not cure the legal defect in the Grinspec Trust because the Grinspec Trust uses group experience to establish rates rather than using individual rating and that the terms of the legislation do not authorize establishing rates through group experience.

Connecticut General counters that the new legislation does not in any way qualify the grant of express authority for district boards to enter trust arrangements and that by allowing boards to insure their employees jointly, it permits group rating.

We conclude that by expressly authorizing joint insurance, P.L. 1995 c. 74 renders moot any question of whether arrangements such as the Grinspec Trust were permissible under prior law, and, hence, we need not decide such questions in order to dispose of the instant appeal.

Upon review of the current law, we agree with Connecticut General that the law now provides the express authority for joint insurance plans like the arrangement involved here and does not prohibit group rating. On this basis, we dismiss the appeal in this matter. In doing so, we stress that P.L. 1995 c. 74 requires compliance with certain conditions, including approvals by the Commissioner of Education. We therefore extend our stay of the Commissioner's directive that all district boards withdraw from the Grinspec Trust to the extent necessary to insure that the district boards involved can comply with the current law without any interruption of coverage.

June 7, 1995

Date of mailing JUN 09 1995

237-98

EDU #4175-92, #4707-92, #5670-92, #6001-92, #6002-92 and #9656-92 (consolidated)
C # 237-93
SB # 62-93

MILLSTONE TOWNSHIP TEACHERS ASSOCIATION,

PETITIONER-RESPONDENT,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF MILLSTONE, MONMOUTH COUNTY,

RESPONDENT-APPELLANT,

AND

MEDFORD LAKES EDUCATION ASSOCIATION,

PETITIONER-RESPONDENT,

V.

BOARD OF EDUCATION OF THE BOROUGH OF MEDFORD LAKES, BURLINGTON COUNTY,

RESPONDENT-APPELLANT,

AND

EASTAMPTON TOWNSHIP EDUCATION ASSOCIATION,

PETITIONER-RESPONDENT,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF EASTAMPTON, BURLINGTON COUNTY,

RESPONDENT,

STATE BOARD OF EDUCATION

DECISION ON MOTION

SEPT. 6, 1995

AND :

RUMSON EDUCATION ASSOCIATION, :

PETITIONER-RESPONDENT, :

V. :

BOARD OF EDUCATION OF THE BOROUGH OF RUMSON, MONMOUTH COUNTY, :

RESPONDENT-APPELLANT, :

AND :

CRANBURY EDUCATION ASSOCIATION, :

PETITIONER-APPELLANT, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP OF CRANBURY, MIDDLESEX COUNTY, :

RESPONDENT-APPELLANT, :

AND :

SOUTH AMBOY EDUCATION ASSOCIATION, :

PETITIONER-RESPONDENT. :

Decided by the Commissioner of Education, October 13, 1993

Decision on motion by the Commissioner of Education, January 14, 1994

Decision on motion by the State Board of Education, May 4, 1994

Decided by the State Board of Education, June 7, 1995

For the Petitioners-Respondents, Zazzali, Zazzali, Fagella & Nowak (Richard Friedman, Esq., of Counsel)

For the Respondent-Appellant Board of Education of the Township of Millstone, DeCotiis, Fitzpatrick & Gluck (William R. Mayer, Esq., of Counsel)

For the Respondent-Appellant Board of Education of the Borough of Medford Lakes, Stephen J. Mushinski, Esq.

For the Respondent Board of Education of the Township of Eastampton, Barbour & Costa (John T. Barbour, Esq., of Counsel)

For the Respondent-Appellant Board of Education of the Borough of Rumson, McCarter & English (B. John Pendleton, Jr., Esq., of Counsel)

For the Respondent-Appellant Board of Education of the Township of Cranbury, Shore & Zahn (Philip H. Shore, Esq., of Counsel)

For the Intervenor-Appellant Connecticut General Insurance Company, Riker, Danzig, Scherer, Hyland and Perretti (Michael R. Cole, Esq., of Counsel)

For the Intervenor New Jersey Education Association, Klausner, Hunter & Cige (Stephen B. Hunter, Esq., of Counsel)

For the Intervenor New Jersey School Boards Association, Kim Chapman-Belin, Esq.

By decision of June 7, 1995, we acted on a motion filed by Connecticut General Life Insurance Company (Connecticut General) and dismissed its appeal in this matter as moot given the enactment of P.L. 1995 c.74.

The case had been initiated by the filing of petitions of appeal to the Commissioner of Education when six districts withdrew from the New Jersey State Health Benefits Plan and contracted to provide health insurance coverage to its employees by an arrangement with Connecticut General known as the Grinspec Trust. The petitioning education associations had claimed that this arrangement was not authorized by law and was prohibited.

In her decision, Commissioner Fitzgerald had adopted the findings of the Administrative Law Judge, and the Commissioner concluded that, were district boards of education permitted to join it, the Grispec Trust would be a joint insurance fund (JIF) subject to regulation by the Department of Insurance. She also held that N.J.S.A. 18A:16-13 as then in effect did not authorize district boards of education to provide health benefits through arrangements such as the Grinspec Trust and that such authorization could not be implied from the statutes. She directed that all district boards participating in the Grinspec Trust give notice of their intention to withdraw from it by the end of the 1993-94 school year.

In dismissing this appeal, we rejected the education associations' arguments that P.L. 1995 c. 74 did not cure the legal defect in the Grinspec Trust because the Grinspec Trust uses group experience to establish rates. Rather, we agreed with the position taken by Connecticut General that the new legislation did not in any way qualify its grant of authority for district boards to enter trust arrangements and that by allowing boards to insure their employees jointly, it permitted group rating. On that basis, we dismissed the appeal. We however extended our stay of the Commissioner's directive so as to permit the district boards involved to take such steps as required to comply with the new law without any interruption of coverage.

Connecticut General has now moved for clarification and reconsideration of our decision granting its motion to dismiss its appeal. It requests that we modify the decision to include a finding that it is specifically Section 4 of the new legislation which rendered the controversy moot. That section expanded the authorization granted district boards to contract for health insurance so as to expressly authorize them to do so through trusts.

Initially, we clarify that we made no determination as to whether or not the Grinspec Trust was also a joint insurance fund arrangement when we dismissed the appeal in this matter. Rather, we merely agreed with Connecticut General that there is no question that district boards are now expressly authorized to contract for health insurance by trust arrangements regardless of whether or not a specific trust arrangement is also a joint insurance fund. Consequently, we perceived no need to pass upon the Commissioner's finding in this case that the Grinspec Trust was a joint insurance fund in order to dismiss the appeal.

Our dismissal of the appeal neither imposed on nor excused the district boards involved in the Grinspec Trust from complying with any provisions of the new legislation which would otherwise be applicable to them. The reference to the Commissioner of Education in our decision was a typographical error. We recognize that the legislation places responsibility for any required approvals on the Commissioner of Insurance.

September 6, 1995

Date of mailing SEP 08 1995

238-93

238-93

BOARD OF EDUCATION OF THE TOWNSHIP OF BERKELEY,

PETITIONER,

V.

MAYOR AND TOWNSHIP COUNCIL OF THE TOWNSHIP OF BERKELEY, OCEAN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

OCTOBER 13, 1993

BOARD OF EDUCATION OF THE TOWNSHIP OF BERKELEY,

PETITIONER,

V.

MAYOR AND TOWNSHIP COUNCIL OF THE TOWNSHIP OF BERKELEY, OCEAN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of $200,000 made by governing body following voter rejection of proposed budget on April 20, 1993.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore the $200,000 reduction made to the surplus given the additional state aid received by the district as a result of a population composed of 45% plus senior citizens.

BOARD OF EDUCATION OF THE TOWNSHIP OF BERKELEY,

PETITIONER,

V.

MAYOR AND TOWNSHIP COUNCIL OF THE TOWNSHIP OF BERKELEY, OCEAN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

Thomas E. Monahan, Esq. (Gilmore & Monahan), for Petitioner

Edmund Glasner, Esq. (Glasner & Sheehan), for Respondent

This matter was opened before the Commissioner of Education by way of a Petition of Appeal submitted by the Berkeley Township Board of Education (Board) on June 9, 1993 seeking restoration of a $200,000 reduction in the 1993-94 General Fund tax levy imposed by the Mayor and Council of the Township of Berkeley (Township Council) after defeat of the district's budget by the voters of the district at the annual school election held on April 20, 1993. As a result of the aforesaid reduction imposed by the Township Council, the amounts in dispute before the Commissioner are summarized below:

Proposed Tax Levy Adopted by Board	Amount of Tax Levy Certified by Governing Body
$9,697,778	$9,497,778
Amount of Reduction By Governing Body	**Amount of Reduction in Dispute Before Commissioner**
$ 200,000	$ 200,000

On June 29, 1993 the Township Council filed its Answer to the Petition of Appeal pursuant to the provisions of N.J.A.C. 6:24-7.6 and 7.7. On July 19 the Board filed its Position Statement in support of its appeal and the Township Council filed a response on August 9, 1993. The Township Council filed its Position Statement on July 29, 1993. A response to the Township's Position Statement and a subsequent final summation were filed by the Board, respectively, on August 9 and August 17, 1993. No further papers were filed thus closing the official record.

STANDARD OF REVIEW

In rendering judgment relative to budget appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

BOARD'S POSITION

It is the Board's position that the action of the Township Council in reducing the General Fund tax levy by $200,000 was arbitrary and capricious in that it failed to participate in meaningful consultation as required by N.J.S.A. 18A:22-37. The Board argues that the only meeting held between the parties occurred on May 6, 1993 and was of approximately one hour's duration. At said meeting, the Board presented the Township Council with a list of items totaling $203,189 which, according to the Board, had been inadvertently omitted from the budget. The items submitted by the Board as excerpted from the affidavit of Pellegrino W. Goione, Acting Superintendent, were as follows:

> (1) In the Account: Operation and Maintenance of Plant Services, there had been the omission of a contractual obligation for garbage removal, the cost of which was $30,500.00.
>
> (2) In the Account: Instruction, provision had to be made for the reinstatement of a substance awareness coordinator position at a cost of $50,000.00.
>
> (3) In the Account: Attendance, there had been an omission for the costs associated with occupational therapists and physical therapists, resulting in a shortage of monies needed to pay for occupational therapy and physical therapy for the students in the amount of $32,389.00.
>
> (4) In the Account: Tuition, it was anticipated that the cost would be $95,000.00. There were actually five placements at a total cost of $121,900.00 resulting in a shortage of $26,900.00.
>
> (5) In the Account: Tuition, $56,000.00 was budgeted but there were placements requiring the expenditure of $91,400.00 resulting in a shortage of $35,400.00.
>
> (6) In the Account: Instruction, $219,900.00 was budgeted for Kindergarten staff. As a result of Kindergarten registration, it was necessary to project one additional teacher because of the additional Kindergarten students resulting in a shortage of $28,000.00. (Affidavit, at pp. 2, 3)

After said presentation, it is the Board's contention that the Township Council terminated the meeting without consideration of the items presented and distributed a pretyped copy of a letter setting forth its intent to reduce the tax levy by $200,000. The contents of said letter which contains the Township's reasons for the reduction are set forth below:

> Berkeley Township School Board May 6, 1993
> Negotiating Team
>
> Subject: Return of Surplus Monies to the Taxpayers of Berkeley Township without impacting on the quality education of the Children of Berkeley Township.
>
> 1. Last year's Negotiating Team played hard ball with the Township Council and finally after many, many, meetings and threatening to spend Legal Fees in appeals to the State, gave us an $80,000 cut to Berkeley Township taxpayers.
>
> As a result, the School System had a $960,000.00 surplus this year. The Cap this year was 6.75% higher than last year's budget and you are spending $750,000.00 over last year's budget.
>
> $360,000.00 of this year's surplus is being used to get to Cap.
>
> 2. Current surplus is over $500,000.00 and normally $700,000.00 to $900,000.00 dollars in surplus is generated every year. If you only generate $500,000.00 surplus this year, you will experience a surplus of over a Million dollars.
>
> 4. Therefore, under the above conditions, the following are standing firm and requesting $220,000.00 to be returned, from surplus monies, to the Taxpayers of Berkeley Township. (Beekman Affidavit, Exhibit A)

In the Board's view the failure to discuss the items brought to the Township Council's attention by the Board's representatives, as well as the distribution of a previously

prepared position statement, supports a determination that the Township Council's actions were arbitrary and capricious and not based upon educational considerations. The Board further contends that the arbitrary nature of the Township Council's actions are further buttressed by the unwillingness to meet again unless a particular Board member who had voted against the budget was present, a demand rejected by the Board as being an intrusion on its prerogative of determining the composition of its representatives.

The Board further iterates that the Township Council made no finding of fact nor did it identify specific areas of reduction or file a statement of reasons at the time such reductions were made.

Finally, the Board argues that its surplus at the time of budget preparation was $507,770 for a budget in the amount of $12,315,739, well within the permissible limit to be maintained for emergencies and catastrophies as presented by the Commissioner. The Board points out that the $203,000 in inadvertent omissions from the budget will further reduce the availability of surplus to meet unforeseen contingencies.

TOWNSHIP'S POSITION

The Township Council for its part denies that it failed to participate in meaningful consultation. It contends that it met with Board representatives on three occasions and that it submitted the pre-typed May 6 letter to the Board only after it became convinced that the Board was unwilling to negotiate.

The Township Council further contends that the alleged omission of over $200,000 from the budget is a subterfuge. It is the Township Council's position that the $200,000 reduction in the tax levy will not jeopardize educational goals and that the letter

of May 6, 1993 sets forth its reason for such reduction. It further points out that the reference to tax consequences to the taxpayers of Berkeley is a legitimate concern that may be considered so long as the budgetary amount provided is sufficient to provide a thorough and efficient system of education. East Brunswick, supra

Finally, the Township Council contends that the Board will have over $360,000 in funds available to it in surplus as well as an additional amount of state school aid of $383,240.

COMMISSIONER'S DECISION

In assessing the arguments raised by the Board in regard to the reductions imposed by the Township Council on the Board's surplus, the Commissioner finds as meritless the Board's argument that the Township failed to meet the requirements of the administrative rules and East Brunswick, supra, and Deptford, supra, insofar as the statement of reasons is concerned. She further determines that the Township Council was in substantial compliance with N.J.S.A. 18A:22-37 as set forth in Board of Education of the Township of Branchburg v. Township Committee of the Township of Branchburg, 187 N.J. Super. 540 (App. Div. 1983).

The record amply supports the fact that the Township Council's letter of May 6, 1993 which was submitted to the Board members in attendance at the meeting of that date clearly indicates that the Township Council viewed the Board's surplus as being excessive and thus constituted a reason for reducing the General Fund tax levy by $200,000. As to whether the said surplus can be reduced as contemplated by the Township Council will be considered by the Commissioner below.

It is further clear that a municipal governing body has the right to consider the total budget including the availability of

surplus in making its determination as to what figure need be arrived at in order to ensure a thorough and efficient system of education. Subsequently, the Commissioner has further determined that such determinations by a governing body need not specifically identify line item reductions in arriving at a determination relative to a reduction in surplus, provided the governing body has given due consideration to its obligation to ensure a sufficient levy to meet the constitutional mandate for a thorough and efficient system of education. Board of Education of the Borough of Oakland v. Mayor and Borough Council of the Borough of Oakland, Bergen County, 91 N.J.A.R. 2d (EDU) 21, 1991 S.L.D. 1657

In weighing the need of the Board for the surplus allocation in the instant matter, the Commissioner is mindful of the fact that it is well established that a Board is empowered to maintain a reasonable surplus to meet unforeseen contingencies. Fair Lawn Board of Education v. Mayor and Council of Fair Lawn, 143 N.J. Super. 259 (Law Div. 1976) Further, the Commissioner has consistently held that a 3% surplus for unforeseen contingencies is reasonable. Board of Education of the City of Perth Amboy v. Council of the City of Perth Amboy, Middlesex County, 1987 S.L.D. 2262

A review of the record in the instant matter indicates that the estimated free balance as of June 30, 1993 was $507,770 in a budget of $12,315,739 which amounted to approximately a 4% surplus. A further reduction of such surplus by the $200,000 reduction contemplated by the governing body would have reduced the available surplus to approximately 2.5%, a figure decidedly below the 3% normally considered as necessary by the Commissioner to meet

emergencies which may occur during a school year. The equation in this matter, however, has been drastically altered by notification from the New Jersey State Department of Education that the Board would be receiving an additional amount of $383,240 in state aid as a result of a population composed of 45% plus senior citizens. (See letter to Melvin Wyns as part of Board's Response Statement.) Under such circumstances, the Commissioner finds and determines that the Board may sustain a $200,000 reduction in its surplus without doing harm to its ability to provide a thorough and efficient system of education. The Commissioner notes that the Board objects to the introduction by the Township Council of this notification of the additional amount of state aid since this windfall was unknown to it at the time of the preparation of its budget. Notwithstanding the Board's contention, however, the Commissioner's determination must be based upon the information available to her at the time she renders her decision just as the Commissioner would have considered an argument from the Board had its audited free balance proven to be drastically below its estimate.

In conclusion, therefore, the Commissioner finds that the Board has failed in its burden of demonstrating that it cannot sustain a thorough and efficient system of education without the amount by which the Township Council reduced its General Fund tax levy. The reduction of $200,000 is sustained and the amount of tax levy certified for the 1993-94 school year will remain at $9,497,778.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 13, 1993

DATE OF MAILING - OCTOBER 13, 1993

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BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE,

PETITIONER,

V.

TOWNSHIP COMMITTEE OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

OCTOBER 13, 1993

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE,

PETITIONER,

V.

TOWNSHIP COMMITTEE OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of $11,200,000 made by governing body following voter rejection of proposed budget on April 20, 1993.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore $1,137,670 for a total General Fund tax levy of $19,394,591 for 1993-94 school purposes.

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE,

PETITIONER,

V.

TOWNSHIP COMMITTEE OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

James T. Hundley, Esq. (Hillman, Hundley, Parry & Fallon, P.C.), for Petitioner

Donald L. Beekman, Esq. (Beekman & Missett, P.C.), for Respondent

This matter was opened before the Commissioner on May 27, 1993 through the filing of a Petition of Appeal by the Board of Education of The Township of Neptune (Board) seeking restoration, on the grounds of necessity for a thorough and efficient system of education, of reductions by the Mayor and Township Committee of the Township of Neptune (Committee) in the General Fund tax levy for the 1993-94 school year. These reductions were made pursuant to N.J.S.A. 18A:22-37 and N.J.A.C. 6:24-7.2(b)2 following voter rejection of the Board's proposed budget on April 20, 1993 and after consultation with the Board as required by law.

The total proposed and certified budgets, as well as the amounts in dispute in this matter, are set forth below:

Proposed Tax Levy Adopted by Board		Amount of Tax Levy Certified by Governing Body	
General Fund	$19,456,921	General Fund	$18,256,921

Amount of Reduction By Governing Body	Amount of Reduction in Dispute Before Commissioner
General Fund $1,200,000	General Fund $ 1,200,000

On June 14, 1993 the Committee filed its answer to the Petition of Appeal pursuant to the provisions of N.J.A.C. 6:24-7.6. On June 28, 1993, the Committee submitted a letter stating that it would rely on the reasons for reduction as originally submitted and that the School District surplus, the main thrust of the Committee reduction, should be verified prior to a decision on the appeal. On July 6, 1993, the Board filed its Position Statement. On August 13, 1993, the Director of the Bureau of Controversies and Disputes of the State Department of Education sent a letter to the Committee advising that the regulatory period for the creation of a record in this appeal had expired and that it was being provided a period of five (5) working days from the receipt of that letter to augment its position regarding verification of the surplus figures at issue in this matter. The Committee was further advised that the Board would be provided five (5) working days from the receipt of the Committee's submission to issue a rebuttal to any objections to the surplus calculations. On August 23, 1993, the Committee filed its response that it preferred the surplus funds to be verified by audit but that it believed the unaudited figure of $648,032.92 as surplus after the Committee reduction as identified by the Board is sufficient. It must be noted that the calculations attached to that letter had two errors: 1) The Balance Appropriated as of July 1, 1993 was listed as $1,500,000.00 when the correct amount as per the budget and all other documents is $1,200,000.00; and 2) the Committee reduction is listed as $833.00, although it was subtracted correctly as $833,000.00. On September 1, 1993, the Board responded

that the Committee's reduction would result in a surplus of less than 2% and that anticipation of any additional surplus funds prior to audit from the 1992-93 year for the 1993-94 budget is not sound business or budgeting practice. It must be noted that this letter contained two figures for the surplus after the Committee reduction, one of $336,748 and one of $648,032.92. On September 7, 1993, the Committee submitted another letter disputing the Board's position on the percentage of surplus to be maintained. Upon receipt of all papers from both parties, the record of this matter was closed on September 10, 1993. The reductions to the General Fund tax levy and reasons for reductions as determined by the Committee are as follows:

Account Number	Title	Reduction
11-303	Fund Balance	$833,000
	Allows district to maintain 2% in surplus versus current expenses.	
11-000-230-20-339-1	Accountant Fees	5,000
	Percentage increase disproportionate to usual and customary fees for this area.	
11-000-230-20-331	Legal Fees	10,000
	Percentage increase disproportionate to usual and customary fees for this area.	
11-000-230-20-339	Architect Fees	5,000
	Percentage increase disproportionate to usual and customary fees for this area.	
11-000-230-9-340	Substitute Caller	1,000
	Exceeds customary salary increases	
11-000-230-20-339-2	Field/Landscape Architect Fees	10,000
	Cost can be included in referendum	
11-000-230-20-339-3	Engineer Services	7,500
	Cost can be included in referendum	

Account Number	Title	Reduction
11-000-230-20-890-2	Board of Education Dues/Travel/ Meeting/Conf.	3,900
	No additional travel over last year	
11-000-230-20-610-2	Board Computer Supplies	2,000
	No increase needed over last year	
11-000-230-20-890-1	Board Member Other Expense	5,860
	No increase needed over last year.	
11-000-230-20-590	Election Expenses	7,000
	Hold elections during regular election dates	
11-000-230-9-890	Supt. Dues/Travel/Meeting/Conf.	2,500
	Limit travel to 1991-92 levels	
11-000-230-9-610-4	Supt. Office Supplies	8,000
	Percentage increase disproportionate	
11-000-230-9-610-5	Supt. Copier Supplies	4,000
	Percentage increase disproportionate	
11-000-230-9-610-7	Supt. Other Expenses	1,000
	Percentage increase disproportionate	
11-000-230-9-610-8	Supt. Machine Paper	500
	No increase needed over last year	
11-000-290-9-590	Printing/Publishing	5,000
	Percentage increase disproportionate	
11-000-221-9-102-1	Supv./Coord. Salaries	35,180
	Allowance for negotiated contractual salaries	
11-130-100-2-101-1	Grades 6-8 Teachers Salaries	177,615
	Allowance for negotiated contractual salaries	
11-000-260-1-620-20	High School Heat/Gas	7,300
	Reflects actual spent over last year	

Account Number	Title	Reduction
11-000-260-2-620-20	Middle School Heat/Gas	4,500
	Reflects actual spent over last year	
11-000-260-3-620-20	Ridge Avenue School Heat/Gas	1,450
	Reflects actual spent over last year	
11-000-260-4-620-20	Gables School Heat/Gas	600
	Reflects actual spent over last year	
11-000-260-5-620-20	Green Grove School Heat/Gas	2,100
	Reflects actual spent over last year	
11-000-260-7-620-20	SRH School Heat/Gas	3,800
	Reflects actual spent over last year	
11-000-260-8-620-20	Summerfield School Heat/Gas	2,400
	Reflects actual spent over last year	
11-000-260-9-620-20	Central Heat/Gas	1,140
	Reflects actual spent over last year	
11-000-260-30-620-20	Maint. Garage Heat/Gas	225
	Reflects actual spent over last year	
11-000-260-5-490-23	Green Grove Water and Sewer	1,390
	Reflects actual spent over last year	
11-000-260-1-620-21	High School Electric	7,300
	Reflects actual spent over last year	
11-000-260-2-620-21	Middle School Electric	8,050
	Reflects actual spent over last year	
11-000-260-3-620-21	Ridge School Electric	2,350
	Reflects actual spent over last year	
11-000-260-4-620-21	Gables School Electric	1,650
	Reflects actual spent over last year	
11-000-260-5-620-21	Green Grove School Electric	2,500
	Reflects actual spent over last year	

Account Number	Title	Reduction
11-000-260-6-620	O G Electric	700
	Reflects actual spent over last year	
11-000-260-7-620-21	SRH School Electric	1,785
	Reflects actual spent over last year	
11-000-260-8-620-21	Summerfield School Electric	3,345
	Reflects actual spent over last year	
11-000-260-9-620-21	Central Electric	1,950
	Reflects actual spent over last year	
11-000-230-1-530	High School Telephone	2,000
	Percentage increase disproportionate	
11-000-230-2-530	Middle School Telephone	850
	Percentage increase disproportionate	
11-000-230-3-530	Ridge School Telephone	700
	Percentage increase disproportionate	
11-000-230-4-530	Gables School Telephone	1,400
	Percentage increase disproportionate	
11-000-230-5-530	Green Grove School Telephone	1,500
	Percentage increase disproportionate	
11-000-230-7-530	SRH School Telephone	1,000
	Percentage increase disproportionate	
11-000-230-9-530	Superintendent Telephone	1,000
	Percentage increase disproportionate	
11-000-260-1-610	High School Custodial Supply	900
	Reflects actual spent over last year	
11-000-260-2-610	Middle School Custodial Supply	1,000
	Reflects actual spent over last year	
11-000-260-3-610	Ridge School Custodial Supply	1,810
	Reflects actual spent over last year	

Account Number	Title	Reduction
11-000-260-4-610	Gables School Custodial Supply	200
	Reflects actual spent over last year	
11-000-260-5-610	Green Grove School Custodial Supply	2,300
	Reflects actual spent over last year	
11-000-260-7-610	SRH School Custodial Supply	4,400
	Reflects actual spent over last year	
11-000-260-8-610	Summerfield School Custodial Supply	2,350
	Reflects actual spent over last year	
	Total	$1,200,000

NOTE: Account numbers are listed as used by Board and Committee. These numbers include correct G.A.A.P. budget codes plus internal identification numbers added by the district.

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

Mindful, then, of the balance to be applied in this standard of review, the Commissioner makes the following determination with respect to the reduction in the General Fund tax levy effectuated by the Committee.

Account		Reduction
11-303	Fund Balance	$833,000

A major issue in this matter was the amount of surplus funds available to the Board at end of the 1992-93 school year. The many documents submitted by both parties listed many different figures as possible free balance. It was also determined that the Board had submitted contradictory information on the surplus funds available. The Position Statement indicated a possible 1992-93 surplus (Funds Available as of June 30, 1993) of $479,642, but the Budget Summary for 1992-93 as of June 30, 1993, submitted by the Board as Exhibit 6, listed the Funds Available as of June 30, 1993 as a negative $479,642. On September 1, 1993, the Director of the Bureau of Controversies and Disputes sent a letter to the Board requesting clarification of the surplus funds issue. A copy of that letter was sent to the Committee. A response was received from the Board on September 10, 1993 acknowledging that the $479,642 listed as the 1992-93 surplus was in error and that the negative $479,642 in Budget Summary was due to Reserve and Clearing Accounts which do not impact the regular budget.

The Board presented an updated calculation of the Fund Balance as of August 31, 1993, beginning with the Audited Fund Balance for Current Expense as of July 1, 1992 of $3,444,748.92. From this amount it deducted $1,200,000 appropriated by the Board for 1993-94, $350,000 appropriated for matching funds for the EDA Grant, and $114,077.15 expected to be the amount of expenditures exceeding revenues in 1992-93. These deductions leave an Unaudited Fund Balance of $1,780,671.77, which would be reduced with the Committee reduction of $833,000 to $947,671.77. In its calculations, the Board neglected to subtract the 1992-93 appropriation of $725,000 from the Audited Fund Balance of July 1, 1992. This reduces the anticipated balance, prior to the Committee reduction, to $1,055,671.77, which is less than 3% of the 1993-94 Current Expense budget.

It has been determined that a surplus fund balance of 3% is reasonable for protection against unforeseen circumstances and/or emergencies. Board of Education of the Township of Branchburg v. Township Committee of the Township of Branchburg, 187 N.J. Super. 540 (App. Div. 1983); Board of Education of the City of Perth Amboy v. Council of the City of Perth Amboy, Middlesex County, 1987 S.L.D. 2262. The Commissioner therefore orders the restoration of the $833,000 reduction.

It must be noted, however, that there is concern about the anticipated deficit spending in 1992-93. If the official 1992-93 audit confirms the over expenditure, the Board will be advised at a later date of any penalty that may be applied because of the deficit.

Account		Reduction
11-000-230-20-339-1	Accountant Fees	$5,000

The Committee's position was that the percentage of increase was disproportionate to usual and customary fees for this area. However, the adjusted amount of $17,000 certified by the Committee is less than the $20,900 spent in 1992-93 for these services according to the June 30, 1993 budget status report submitted by the Board. Also, the Board states that it will be requiring additional services from the accountant in 1993-94 because of the bond referendum scheduled for September 28, 1993. Based on the Board's 1992-93 expenditures and anticipated additional fees for 1993-94, the Commissioner determines that the $5,000 reduction to this account is restored.

Account		Reduction
11-000-230-20-331	Legal Fees	$10,000

The Committee's position was that the percentage of increase was disproportionate to usual and customary fees for this area. However, the adjusted amount of $53,000 certified by the Committee is less than the $53,700 spent in 1992-93 for these services according to the June 30, 1993 budget status report submitted by the Board. The Board also argues that costs for legal services will increase in 1993-94 because of several legal issues - two pending contested matters, one tenure matter awaiting trial, and an Unfair Labor Practice scheduled for trial in August and September, 1993. Based on these facts, the Commissioner determines that the $10,000 reduction is restored.

11-000-230-20-339	Architect Fees	$5,000

The Committee's position is that the percentage of increase is disproportionate to usual and customary fees for this area. The amount of $30,000 budgeted by the Board, however, is significantly

less than the $80,216 spent in 1992-93 according to the June 30, 1993 budget status report submitted by the Board. The Board also states that it will require the services of an architect for roof and building projects approved for 1993-94 and for the referendum scheduled for the 1993-94 school year. Since the provision of safe and healthy school buildings that comply with code requirements is essential to a thorough and efficient educational system, the Commissioner orders the restoration of the $5,000 reduction to this account.

Account		Reduction
11-000-230-9-340	Substitute Caller	$1,000

The Committee states that the amount budgeted exceeds customary salary increases. The Board submits with its Position Statement Exhibit 11, a contract for these services in the amount of $12,000, which is greater than the $12,000 certified by the Committee. The Board also states that additional funds were budgeted for maintenance of the equipment for this service. The Commissioner orders that the reduction of $1,000 is restored.

11-000-230-20-339-2	Field/Landscape Architect Fees	$10,000

The Committee states that the costs for these services can be included in the referendum. The Board states that it has embarked on a district-wide site improvement project for 1993-94 and that these items are not included in the referendum. The June 30, 1993 budget status report submitted by the Board lists expenditures in 1992-93 of $20,903 for these services. Since there has been extensive work completed in 1992-93 and some site work will also be part of the referendum, the Commissioner sustains the reduction of $10,000.

Account		Reduction
11-000-230-20-339-3	Engineer Services	$7,500

The Committee states that these costs can be included in the referendum. The Board states that it plans to have a district-wide assessment of the district's plumbing, heating, and ventilation systems and that this work is not included in the referendum. The June 30, 1993 budget status report submitted by the Board lists expenditures of $7,500 for these services in 1992-93. Based on this fact, the Commissioner determines that work has already been done in this area and that the Board did not substantiate the need for funds for this service in 1993-94. The Commissioner sustains the reduction of $7,500.

11-000-230-20-890-2	BOE Dues/Travel/Meetings/Conf.	$3,900

The Committee's position is that there should be no additional travel in 1993-94 over the past year. The Board states that it plans to expand the development program for individual Board members in 1993-94. It is noted that board member knowledge and information are essential for effective services to the school district. Also, the amount certified by the Committee is less than the amount expended in 1992-93. Accordingly, the Commissioner orders the restoration of the $3,900 reduction.

11-000-230-20-610-2	Board Computer Supplies	$2,000

The Committee states that no increase is needed for this item over 1992-93. The Board states that it plans to expand the district's new computer system to all individual school sites to assist in site-based management. The Board also states that its expenditures for 1992-93 total $3,784. The amount of $7,000 certified by the Committee is almost double the amount spent in

1992-93. Accordingly, the Commissioner sustains the reduction of $2,000.

Account		Reduction
11-000-230-20-890-1	Board Member Other Expenses	$5,860

The Board accepts the reduction of $5,860 and the Commissioner sustains this reduction.

11-000-230-20-590	Election Expenses	$7,000

The Committee states that the Board should hold elections during regular election dates. The Board is planning to hold a separate bond referendum during 1993-94. A special separate election is sometimes advisable and is provided for in statute. Based on the 1992-93 election costs of $5,965 as submitted by the Board and the plan for a special election in 1993-94, the Commissioner orders the restoration of the $7,000 reduction in this account.

11-000-230-9-890	Supt. Dues/Travel/Meetings/Conf.	$2,500

The Committee states that travel should be limited to the 1991-92 level. The Board states that the amount expended in 1992-93 was $10,006. The budgeted figure for 1993-94 was $10,000. Restricting expenditures to a level of two years prior does not seem reasonable and the Board has demonstrated fiscal constraint with no increase in this account over the prior year. The Commissioner therefore orders the restoration of the $2,500 reduction.

11-000-230-9-610-4	Superintendent Office Supplies	$8,000

The Committee states that the percentage of increase is disproportionate. The Board responds that the 1992-93 expenditure for this item was $12,401. The Board also states that it plans in 1993-94 to expand the computer support activities for the district.

However, the amount certified by the Committee is an increase of more than 20% over the prior year expenditures. The Commissioner therefore sustains this reduction of $8,000.

Account		Reduction
11-000-230-9-610-5	Superintendent Copier Supplies	$4,000

The Board accepts the reduction of $4,000 and the Commissioner sustains this reduction.

11-000-230-9-610-7	Superintendent Other Expenses	$1,000

The Board accepts the reduction of $1,000 and the Commissioner sustains this reduction.

11-000-230-9-610-8	Superintendent Machine Paper	$ 500

The Board accepts the reduction of $500 and the Commissioner sustains this reduction.

11-000-290-9-590	Printing/Publishing	$5,000

The Committee states that the percentage increase is disproportionate. The Board states that the expenditure for this account in 1992-93 was $39,119 and that it plans to increase the number of newsletters to be published from five to seven. The Committee's position that the percentage increase is disproportionate is inappropriate since there is no increase in this line item over the 1992-93 budgeted amount or expenditure. The Commissioner accordingly orders the restoration of the $5,000 reduction.

11-000-221-9-102-1	Supervisor/Coordinator Salaries	$ 35,180

The Committee states that it provided an allowance for negotiated contractual salaries for this item. The Board states that it is responding to a specific recommendation by the Department of Education External Review Team on supervisory personnel. The

Board also submitted the names of the supervisors and 1993-94 salaries which total the $176,000 budgeted. Based on this confirmation of need, the Commissioner orders the restoration of the $35,180 reduction.

Account		Reduction
11-130-100-2-101-1	Grades 6-8 Teachers Salaries	$177,615

The Committee again states that it provided an allowance for negotiated contractual salaries for this item. The Board responds that additional pupils are anticipated at the Middle School in 1993-94. The Board submitted the names and 1993-94 salaries for the teachers assigned to the Middle School for 1993-94. These salaries total $2,730,700, which is significantly more than the amount certified by the Committee and is only $4,876 less than the amount budgeted. Based on this confirmation of need, the Commissioner orders the restoration of the $177,615 reduction.

11-000-260-1-620-20	High School Heat/Gas	$ 7,300

The Committee states that the amount provided reflects the actual amount spent over last year. The Board responds with three positions: 1) 1992-93 was a year with a mild heating season with only one snow day school closing; 2) Board plans for increased community use of school buildings on evenings and weekends in 1993-94 in response to the External Review Team recommendation for Community Linkages, as noted in Exhibit 14; and 3) a rate increase petition filed by the Board's gas utility, New Jersey National Gas. The Board states that the total expenditures for this line item in 1992-93 was $89,999. The amount of $90,400 certified by the Committee provides an increase of only $400 over that amount. Since appropriate heat in a building is mandated by code during school

hours and is essential for the health and welfare of occupants at all times, the Commissioner determines that the positions presented by Board are valid. The Commissioner orders the restoration of the $7,300 reduction.

Account		Reduction
11-000-260-2-620-20	Middle School Heat/Gas	$4,500

Positions presented by the Committee and the Board are the same for this item as for High School Heat/Gas as above. The Commissioner again determines that the Board's positions validate the need for a budgeted increase for this item. However, the amount of $56,000 certified by the Committee provides an increase of almost 10% over the amount of $50,999 spent in 1992-93. The Commissioner therefore sustains the reduction of $4,500.

11-000-260-3-620-20	Ridge Avenue School Heat/Gas	$1,450

Positions presented by the Committee and the Board are the same for this item as for High School Heat/Gas as above. The Commissioner again determines that the Board's positions validate the need for a budgeted increase for this item. However, the amount budgeted by the Board is almost 16% over the amount spent in 1992-93, whereas the amount certified by the Committee provides a more reasonable increase of approximately 7 1/2%. The Commissioner therefore sustains the reduction of $1,450.

11-000-260-4-620-20	Gables School Heat/Gas	$600

Positions presented are again the same as noted above, and it is determined that the Board's positions are valid. The amount certified by the Committee for this item is less than the amount expended in 1992-93. The Commissioner therefore orders the restoration of the $600 reduction.

Account		Reduction
11-000-260-5-620-20	Green Grove School Heat/Gas	$2,100

Positions presented are again the same as noted above, and it is determined that the Board's positions validate the need for an increase. However, the amount certified by the Committee provides an increase of almost 45% over 1992-93 expenditures. The Commissioner sustains the reduction of $2,100.

11-000-260-7-620-20	SRH School Heat/Gas	$3,800

Positions presented are again the same as noted above, and it is determined that the Board's positions are valid. The amount certified by the Committee is less than the amount expended for this item in 1992-93. The Commissioner therefore orders the restoration of the $3,800 reduction.

11-000-260-8-620-20	Summerfield School Heat/Gas	$2,400

Positions presented are again the same as noted above, and it is determined that the Board's positions are valid. The amount certified by the Committee is again less than the amount expended for this item in 1992-93. The Commissioner therefore orders the restoration of the $2,400 reduction. It should be noted that there was a typographical error in the Board's Position Statement for the original amount budgeted for this item. The amount restored when added to the adjusted amount certified by the Committee equals an original amount of $32,300, which agrees with the Board's last sentence for that item in the Position Statement.

11-000-260-9-620-20	Central Heat/Gas	$1,140

Positions presented are again the same as noted above, and it is determined that the Board's positions are valid. The amount certified by the Committee is the amount expended for this item in

1992-93 and thus provides no increase. The Commissioner therefore orders the restoration of the $1,140 reduction.

Account		Reduction
11-000-260-30-620-20	Maint. Garage Heat/Gas	$225

The Board accepts this reduction and the Commissioner sustains the reduction of $225.

11-000-260-5-490-23	Green Grove School Water/Sewer	$1,390

The Committee states that the amount of $2,860 certified reflects the actual spent over last year. However, the Board states that the amount spent was $4,156, and this is supported by the Budget Summary as of June 30, 1993 submitted by the Board as documentation. The Commissioner orders the restoration of the $1,390 reduction.

11-000-260-1-620-21	High School Electric	$7,300

The Committee states that the amount certified reflects the actual spent over last year. The Board presents two positions: 1) Board plans for increased community use of school buildings on evenings and weekends in response to the External Review Team recommendation for Community Linkages, as noted in Exhibit 14; and 2) the projection of a rate increase by the Board's electric utility, Jersey Central Power & Light. Since appropriate lighting is mandated by code during school hours and is essential for the health and welfare of occupants at all times, the Commissioner determines that the positions presented by the Board are valid to justify the need for a reasonable increase. The amount of $91,800 certified by the Committee provides only a slight increase over the amount of $89,537 spent for this item in 1992-93. The Commissioner therefore orders the restoration of the $7,300 reduction.

Account		Reduction
11-000-260-2-620-21	Middle School Electric	$8,050

Positions presented by the Committee and the Board are the same for this as for High School electric cited above. The Commissioner again determines that the Board's positions validate the need for a budgeted increase for this item. However, the amount of $100,750 certified by the Committee provides an increase in excess of 13% over the amount of $88,999 spent in 1992-93. The Commissioner therefore sustains the reduction of $8,050.

11-000-260-3-620-21	Ridge Avenue School Electric	$2,350

Positions presented by the Committee and the Board are the same for this item as for High School electric as above. The Commissioner again determines that the Board's positions validate the need for a budgeted increase for this item. The amount certified by the Committee is less than the amount expended for this item in 1992-93. The Commissioner orders the restoration of the $2,350 reduction.

11-000-260-4-620-21	Gables School Electric	$1,650

Positions presented by the Committee and the Board are the same for this item as for High School electric as above. The Commissioner again determines that the Board's positions validate the need for a budgeted increase for this item. However, the amount of $16,500 certified by the Committee provides a significant increase over the amount of $11,961 expended in 1992-93. The Commissioner therefore sustains the reduction of $1,650.

11-000-260-5-620-21	Green Grove School Electric	$2,500

Positions presented by the Committee and the Board are the same for this item as for High School electric as above. The

Commissioner again determines that the Board's positions validate the need for a budgeted increase for this item. The amount of $31,250 certified by the Committee provides a minimal increase of over the amount of $30,499 spent in 1992-93. The Commissioner orders the restoration of the $2,500 reduction.

Account		Reduction
11-000-260-6-620	Ocean Grove Electric	$700

The position presented by the Committee is the same for this as for High School electric as above. The Board cites the projected rate increase by the Board's electric utility, Jersey Central Power & Light. The Board also states it is in the process of installing new exterior security lights at this closed school site. The amount of $500 certified by the Committee is less than the $811 spent for this line item in 1992-93. The Commissioner orders the restoration of the $700 reduction.

11-000-260-7-620-21	SRH School Electric	$1,785

The positions presented by the Committee and the Board are the same for this item as for High School electric as above. The Commissioner again determines that the Board's positions validate the need for a budgeted increase for this item. The amount of $17,850 certified by the Committee is a minimal increase over the $16,999 spent in 1992-93 for this item. The Commissioner orders the restoration of the $1,785 reduction.

11-000-260-8-620-21	Summerfield School Electric	$3,345

The positions presented by the Committee and the Board are the same for this item as for High School electric as above. The Commissioner again determines that the Board's positions validate the need for a budgeted increase for this item. However, the amount

of $33,450 certified by the Committee provides an increase of approximately 8% over the expenditures of $30,999 in 1992-93. The Commissioner sustains the reduction of $3,345.

Account		Reduction
11-000-260-9-620-21	Central Electric	$1,950

The Board accepts the reduction of $1,950 and the Commissioner sustains this reduction.

11-000-230-1-530	High School Telephone	$2,000

The Committee states that the percentage of increase is disproportionate. The Board states that it is planning the installation of a new automatic calling system for pupil attendance/tardies and increased use of telephone lines for FAX transmissions between school and central office replacing the former employee messenger service. The Committee's position is confusing and weak since it refers to a percentage of increase and certifies less than the 1992-93 expenditures. The Commissioner orders the restoration of the $2,000 reduction.

11-000-230-2-530	Middle School Telephone	$850

The positions presented by the Committee and the Board are the same as for High School telephone as above. The amount certified by the Committee provides no increase over the amount expended in 1992-93. The Commissioner orders the restoration of the $850 reduction.

11-000-230-3-530	Ridge Avenue School Telephone	$700

The positions presented by the Committee and the Board are the same as for High School telephone as above. Again, the Committee's position is confusing and weak with reference to a percentage of increase since it certified an amount less than the

1992-93 expenditures. The Commissioner orders the restoration of the $700 reduction.

Account		Reduction
11-000-230-4-530	Gables School Telephone	$1,400

The positions presented by the Committee and the Board are the same as for High School telephone as above. Again, the Committee certified an amount less than the amount expended in 1992-93. The Commissioner orders the restoration of the $1,400 reduction.

11-000-230-5-530	Green Grove School Telephone	$1,500

The positions presented by the Committee and the Board are the same as for High School telephone as above. Again, the Committee certified an amount less than the amount expended in 1992-93. The Commissioner orders the restoration of the $1,500 reduction.

11-000-230-7-530	SRH School Telephone	$1,000

The positions presented by the Committee and the Board are the same as for High School telephone as above. Again, the Committee certified an amount less than the amount expended in 1992-93. The Commissioner orders the restoration of the $1,000 reduction.

11-000-230-9-530	Superintendent Telephone	$1,000

The positions presented by the Committee and the Board are the same as for High School telephone as above. Again, the Committee certified an amount less than the amount expended in 1992-93. The Commissioner orders the restoration of the $1,000 reduction.

Account		Reduction
11-000-260-1-610	High School Custodial Supply	$900

The Committee states that the amount certified reflects the actual amount spent over last year. The Board responds that the amount expended in 1992-93 was $14,995, which is more than the $12,100 certified by the Committee and more than $13,000 budgeted by the Board. The Board also notes the anticipation of equal or increased use of the schools by staff, pupils and community and the possible increase in the cost of custodial supplies. Based on the amount spent in 1992-93 the Committee's position is not valid. The Commissioner orders the restoration of the $900 reduction.

11-000-260-2-610	Middle School Custodial Supply	$1,000

The positions presented by the Committee and the Board are the same as for High School custodial supply as above. Once more, the amount certified by the Committee is less than the amount expended in 1992-93. The Commissioner orders the restoration of the $1,000 reduction. It should be noted that the Board's Position Statement incorrectly lists the Difference (Reduction) as $900. The correct figure is $1,000.

11-000-260-3-610	Ridge Ave. School Custodial Supply	$1,810

The positions presented by the Committee and the Board are the same as for High School custodial supply as above. Again, the amount certified by the Committee is less than the amount expended in 1992-93. The Commissioner orders the restoration of the $1,810 reduction.

11-000-260-4-610	Gables School Custodial Supply	$200

The positions presented by the Committee and the Board are the same as for High School custodial supply as above. The amount

of $4,450 certified by the Committee provides an increase of more than 14% over the $3,898 expended in 1992-93. The reduction of $200 is therefore sustained.

Account		Reduction
11-000-260-5-610	Green Grove School Custodial Supply	$2,300

The positions presented by the Committee and the Board are the same as for High School custodial supply as above. The amount certified by the Committee is less than the amount expended in 1992-93. The Commissioner orders the restoration of the $2,300 reduction.

11-000-260-7-610	SRH Custodial Supply	$4,400

The positions presented by the Committee and the Board are the same as for High School custodial supply as above. The amount certified by the Committee is less than the amount expended in 1992-93. The Commissioner orders the restoration of the $4,400 reduction.

11-000-260-8-610	Summerfield Custodial Supply	$2,350

It should be noted that the Board's Position Statement incorrectly identifies this line item as SRH custodial supply. The account number and dollar figures clearly verify this line item as Summerfield Custodial Supply. The positions presented by the Committee and the Board are the same as for High School custodial supply as above. The amount certified by the Committee is less than the amount expended in 1992-93. The Commissioner orders the restoration of the $2,350 reduction.

SUMMARY

For the reasons set forth above, the Commissioner determines to restore $1,137,670 and sustains $62,330 of the $1,200,000 General Fund reduction appealed herein, as summarized by the chart below:

General Fund	Amount of Reduction	Restored	Sustained
Fund Balance	$ 833,000	$ 833,000	
Accountant Fees	5,000	5,000	
Legal Fees	10,000	10,000	
Architect Fees	5,000	5,000	
Substitute Caller	1,000	1,000	
Field/Landscape Architect Fees	10,000		$10,000
Engineer Services	7,500		7,500
BOE Dues/Travel/Mtg./Conf.	3,900	3,900	
Board Computer Supplies	2,000		2,000
Board Member Other Expenses	5,860		5,860
Election Expenses	7,000	7,000	
Supt. Dues/Travel/Meeting/Conf.	2,500	2,500	
Supt. Office Supplies	8,000		8,000
Supt. Copier Supplies	4,000		4,000
Supt. Other Expenses	1,000		1,000
Supt. Machine Paper	500		500
Printing/Publishing	5,000	5,000	
Sup'v/Coord. Salaries	35,180	35,180	
Grades 6-8 Teachers Salaries	177,615	177,615	
High School Heat/Gas	7,300	7,300	
Middle School Heat/Gas	4,500		4,500
Ridge Ave. School Heat/Gas	1,450		1,450
Gables School Heat/Gas	600	600	
Green Grove School Heat/Gas	2,100		2,100
SRH School Heat/Gas	3,800	3,800	
Summerfield School Heat/Gas	2,400	2,400	
Central Heat/Gas	1,140	1,140	
Maint. Garage Heat/Gas	225		225
Green Grove School Water/Sewer	1,390	1,390	
High School Electric	7,300	7,300	
Middle School Electric	8,050		8,050
Ridge Ave. School Electric	2,350	2,350	
Gables School Electric	1,650		1,650
Green Grove School Electric	2,500	2,500	
Ocean Grove Electric	700	700	
SRH School Electric	1,785	1,785	
Summerfield School Electric	3,345		3,345
Central Electric	1,950		1,950
High School Telephone	2,000	2,000	
Middle School Telephone	850	850	
Ridge Ave. School Telephone	700	700	

General Fund	Amount of Reduction	Restored	Sustained
Gables School Telephone	1,400	1,400	
Green Grove School Telephone	1,500	1,500	
SRH School Telephone	1,000	1,000	
Supt. Telephone	1,000	1,000	
High School Custodial Supply	900	900	
Middle School Custodial Supply	1,000	1,000	
Ridge Ave. Sch. Custodial Supply	1,810	1,810	
Gables School Custodial Supply	200		200
Green Grove Sch. Custodial Supply	2,300	2,300	
SRH School Custodial Supply	4,400	4,400	
Summ. School Custodial Supply	2,350	2,350	
TOTAL	$1,200,000	$1,137,670	$62,330

Accordingly, the Monmouth County Board of Taxation is directed to make the necessary adjustment as set forth below to reflect a total of $19,394,591 to be raised in tax levy for the General Fund for the Neptune Township Board of Education:

	General Fund
Original Tax Levy	$19,456,921
Reduction	$ 1,200,000
Tax Levy After Reduction	$18,256,921
Restoration	$ 1,137,670
Tax Levy After Restoration	$19,394,591

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 13, 1993

DATE OF MAILING - OCTOBER 13, 1993

239-93

C #239-93
SB # 61-93

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
TOWNSHIP COMMITTEE OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY, RESPONDENT-APPELLANT.	:	DECISION

Decided by the Commissioner of Education, October 13, 1993

For the Petitioner-Respondent, Beekman & Missett (Donald L. Beekman, Esq., of Counsel)

For the Respondent-Appellant, Hillman, Hundley, Parry & Fallon (James T. Hundley, Esq., of Counsel)

The State Board of Education approves the settlement proposed by the parties to this case contingent on the review of said settlement by the Monmouth County Superintendent and his assurance to us that the resulting amount will be adequate to provide a thorough and efficient education to the District's students.

May 4, 1994

Date of mailing MAY 06 1994

240-93

240-93

BOARD OF EDUCATION OF THE TOWNSHIP OF MANSFIELD, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MANSFIELD, WARREN COUNTY, RESPONDENT.	:	DECISION

OCTOBER 13, 1993

BOARD OF EDUCATION OF THE TOWNSHIP OF MANSFIELD,

PETITIONER,

V.

TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MANSFIELD, WARREN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of $53,559 made by governing body following voter rejection of proposed budget on April 20, 1993.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore $51,059 for a total General Fund tax levy of $2,043,211 for 1993-94 school purposes.

BOARD OF EDUCATION OF THE TOWNSHIP OF MANSFIELD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MANSFIELD, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

David A. Wallace, Esq. (Stiles & Wallace), for Petitioner

Joseph R. Valentino, Esq. (Valentino, Dunne & Stein), for Respondent

This matter was opened before the Commissioner of Education by the filing of a Petition of Appeal on the part of the Board of Education of the Township of Mansfield (Board) on June 8, 1993 appealing the reduction in the 1993-94 budget imposed by the Township Committee of the Township of Mansfield (Township Committee) pursuant to N.J.S.A. 18A:22-37 after the defeat of the budget by the electorate of the Township at the annual school election held on April 20, 1993. The aforesaid reduction in the amount of $53,559 in the 1993-94 General Fund tax levy was certified by way of a resolution of the Township Committee dated May 3, 1993. That resolution sets forth the following reductions and the rationale for same as follows:

Account 214 - Salaries Other Instructional Staff:

From: $229,202.00 To: $214,643.00

RATIONALE: ACCOUNT 214: With the student population as it exists and the projected enrollment as anticipated, the Township Committee contends that the current part-time Guidance Counselor can adequately support the school sufficiently.

Account 240 - Teaching Supplies:

From: $53,000.00 To: $20,000.00

RATIONALE: ACCOUNT 240: Based on the 1991-92 audited figure and the actual expenses for the 1992-93 year, the Township Committee sees no need for the additional $33,000.00 in that line item.

Account 250 - Other Expenses for Instruction:

From: $38,940.00 To: $34,940.00

RATIONALE: ACCOUNT 250: The Township Committee maintains that the expenditures for supplies which are not consumed in the actual teaching/learning process are adequate at an annual 8% increase.

Account 630 - Heat for Building:

From: $27,500.00 To: $25,500.00

RATIONALE: ACCOUNT 630: Based on the history of the school's fuel oil consumption, the Township Committee maintains that an 11% increase in the price of fuel to be sufficient to cover costs.

TOTAL REDUCTION OF: $53,559.00

As a result of these reductions, the amounts in dispute before the Commissioner are summarized below:

Proposed Tax Levy Adopted by Board	Amount of Tax Levy Certified by Governing Body
$2,045,711	$1,992,152
Amount of Reduction in the Budget by Governing Body	**Amount of Reduction in Dispute before Commissioner**
$53,559	$53,559

On June 21, 1993 the Township Committee filed its Answer to the Petition of Appeal pursuant to the provisions of N.J.A.C. 6:24-7.6 and 7.7. On July 12, 1993 the Board submitted its Position Statement in support of the Petition of Appeal and the Township Committee filed its Position Statement on July 13, 1993. A rebuttal statement and a final summation were filed by the Board on July 28 and August 17 respectively. No further papers were filed by the Township Committee and the record was closed.

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

BOARD'S POSITION

Account 214	Reduction
11-000-219-104 - Salaries Other Instructional Staff	$14,559

The Board contends that the Township Committee failed to understand the reason given by the Board for its decision to create the position of a full-time guidance counselor. The Board points out that it does not presently have a part-time counselor, as perceived by the Township Committee, but employs a full-time social worker and a part-time social worker (2 days per week). It is the function of the social worker to work with and counsel classified students but this person is not appropriately certified to counsel regular education students. The full-time social worker does assist in crisis intervention involving non-classified students. The Board asserts that the part-time social worker does social case histories for the child study team referrals and re-evaluations.

It is the intention of the Board to eliminate the part-time social worker position and create a position of full-time guidance counselor in order to serve the needs of non-classified students while turning the full task of social case history development and case management over to its full-time social worker.

It is the Board's contention that increasing enrollment and increases in single parent families and families in crisis within that expanding student population makes it important to have a full-time guidance counselor to provide support for at-risk children.

The Board points out that the $14,559 reduction targeted in this account represents the salary of the part-time social worker and was not intended to represent the funding necessary to extend a part-time position to a full-time one.

Account 240	Reduction
11-190-100-616 - Teaching Supplies	$33,000

The Board contends that the rationale provided by the Township Committee in its resolution cutting the expenditures for teaching supplies is predicated upon the assumption that the Board can cover that reduction by utilizing surplus in the 1992-93 accounts to purchase supplies for 1993-94, as it did in 1991-92. The Board, however, explains that the action which it took in 1991-92, namely to expend approximately $19,000 in teaching supplies over and above what was budgeted for that year, was to enable it to expend its unappropriated free balance to bring that figure to a level that would avoid a withholding of state aid for any amount over 7.5% of the budget.

Although the amount expended as of December 2, 1992 was only $11,795 with further expenditures of $7,200 required for the balance of 1992-93, it is the Board's contention that the appropriated $34,000 surplus in the 1992-93 account cannot be used to purchase 1993-94 supplies since that surplus has been appropriated into the 1993-94 budget as free balance. (See Exhibit B, Board's Position Statement.)

It is therefore the Board's contention that reducing the teaching supplies account would prevent it from meeting its obligation to provide a thorough and efficient system of education.

Account 250	Reduction
11-000-218-600 - Other Expenses/Instruction	$4,000

The Board points out that there has been no increase in this account between 1992-93 and 1993-94 despite the Township Committee's contention in its rationale that an 8% increase is adequate.

The Board argues that in-service and workshops are necessary for teacher development and that the Visiting Author Program enhances the reading and language arts program. The Teacher Recognition Program expenditure, the Board argues, bolsters staff morale while the Walk, Jog and Run Program is closely tied to the Physical Education and Health Program.

Account 630	Reduction
11-000-260-620 - Heat for Building	$2,000

The Board argues that the 2% increase recommended by the Township Committee is unrealistic given the unpredictability of both weather and oil prices.

TOWNSHIP COMMITTEE'S POSITION

Initially, the Township Committee argues that a pattern of overbudgeting has predominated in the district citing a growing free balance over the years up to June 30, 1992 as well as increasing General Fund revenues. It points out that the amount derived from taxation in the district has increased by $200,000 since 1990 despite the fact that appropriations from free balance increased to an anticipated $334,646 for the 1993-94 year.

In reviewing the Township Committee's position, the Commissioner notes that its statement outlines nine areas about which it had initial concern. However, since the actual reductions and certification cite only four items, the Commissioner's review will be limited to those items actually reduced by the Township Committee.

Account 214	Reduction
11-000-219-104 - Salaries Other Instructional Staff	$14,559

The Township Committee initially contends that its review of existing staffing fails to reveal any part-time guidance counselor position despite the Board's announced intention to create a full-time position by increasing the part-time position to full time.

Despite the increase in enrollment which the Township Committee only accepts arguendo, it points out that the Board's own projections demonstrate that the majority of increases will take place in grades K-3. Based upon the age and grade level of the majority of the increases, the Township Committee does not find any need for guidance counseling services, particularly since the district already employs a school psychologist, a social worker, a full-time child study team director, a LDTC and a part-time guidance counselor.

Account 240	Reduction
11-190-100-616 - Teaching Supplies	$33,000

The Township Committee argues that the Board has in recent years been purchasing the upcoming year's teaching supplies out of surpluses from the previous fiscal year citing the Board's actions for the 1992-93 school year when it purchased supplies for that year out of surpluses from the 1991-92 school year. Since the Board budgeted $53,000 for supplies in 1992-93 and only expended approximately $19,000 in 1992-93, the Township Committee saw no need for an additional appropriation of $53,000 in teaching supplies for 1993-94. It therefore reduced the appropriation for 1993-94 by the

$33,000 not expended in 1992-93 recommending that the Board continue its practice of purchasing the succeeding year's supplies out of the current year surpluses.

Account 250	Reduction
11-000-218-600 - Other Expenses/Instruction	$4,000

In light of the defeat of the budget by the voters, the Township Committee concluded that certain expenditures which it believed to be unnecessary could be eliminated or reduced in this account as follows:

	From	To
(1) In-service training	$2,000	$1,000
(2) Visiting Author Program	$1,000	0
(3) Class trips	$1,000	$ 500
(4) Teacher Recognition Program	$ 650	$ 150
(5) Professional Workshops	$2,600	$2,100
(6) Class trip (separate line item for 6th grade trip)	$ 500	$ 0

Account 630	Reduction
11-000-260-620 - Heat for Building	$2,000

The Township Committee argues that the increase in appropriation for fuel oil in 1993-94 to $27,500 cannot be justified based both upon previous year's actual expenditures and the history of overbudgeting in this area in the past. It points out that actual expenditures have been as follows:

1989-90	$24,327
1990-91	20,939
1991-92	23,070

Appropriations for the above-cited years were:

1989-90	$5,673 over
1990-91	6,061 over
1991-92	5,730 over

In light of the foregoing, it effectuated the reduction of $2,000 in this account.

In summation, the Township Committee points out that it originally considered some $84,559 in reductions but scaled its amount down to the $53,559 contained in its resolution which constitutes approximately 2 1/2% of the overall budget.

COMMISSIONER'S DETERMINATION

The Commissioner has carefully reviewed the arguments as presented by the parties in this matter. Based upon her review and applying the standard prescribed by law and Constitution, the Commissioner renders the following determinations in the accounts indicated below:

Account 214	Reduction
11-000-219-104 Salaries Other Instructional Staff	$14,559

The Commissioner finds that the rationale for reduction in this account is entirely without merit. The necessity for guidance services cannot be argued away by merely citing the fact that the students to whom said guidance services are to be provided are too young to require them. In fact, it can be clearly stated without fear of contradiction that early intervention has a more beneficial effect upon children's ability to cope with their problems than attempting to do so when problems have been allowed to fester and grow to the point where they result in "acting out" behavior. Further, the Commissioner would note that the role of child study team members cannot be effectively carried out while bearing the additional burden of assuming the role of providing routine guidance services to the non-classified population.

Finally, it should be pointed out that N.J.S.A. 18A:7A-5(e) requires as one of its elements for the provision of thorough and efficient educational system "Programs and supportive services for

all pupils especially those who are educationally disadvantaged or who have special educational needs." (Emphasis supplied)

In light of the foregoing, the Commissioner directs the restoration of the $14,559 by which this account was reduced by the Township Committee.

Account 240	Reduction
11-190-100-616 - Teaching Supplies	$33,000

After examining the Board's rationale and its pattern of actual expenditures over the past years with the exception of 1992-93, the Commissioner determines that the Board has met its obligation of demonstrating the necessity for the restoration of the $33,000 by which this account was reduced. The Township Committee has failed to demonstrate that a continuing practice exists for the purchase of the succeeding year's supplies out of current year surplus except for the single year 1992-93. In so determining the Commissioner notes the Board's contention that the $33,000 by which the 1992-93 account for teaching supplies was overbudgeted was used to increase the free balance appropriation for 1993-94. Under said circumstances limiting the Board's actual amount available for teaching supplies in 1993-94 to $20,000 would seriously inhibit the Board's ability to provide a thorough and efficient system of education.

Account 250	Reduction
11-000-218-600 - Other Expenses/Instruction	$ 4,000

In reviewing the Township Committee's argument that the specific items in this account were non-essential, the Commissioner cannot agree with such a conclusion in all instances cited.

Staff development through in-service training is an essential part of a district's role in ensuring that its staff has the necessary tools to provide a thorough and efficient education. Likewise, programs such as the Visiting Author Program and class trips enhance and enrich the learning experience of children and must be considered as necessary to a thorough and efficient education.

The Board's decision to utilize its own funds to uphold the spirit of N.J.S.A. 18A:29A-2 by providing a $500 grant to the district's "teacher of the year" is indeed praiseworthy and should be continued if possible. However, since the State bears ultimate responsibility for ensuring a thorough and efficient system of education and it has seen fit due to fiscal restraints to eliminate any monetary award as part of its teacher recognition program, the Commissioner must conclude that such an expenditure cannot be considered as necessary for the provision of a thorough and efficient system of education.

The class trip funds being mandated by law (N.J.S.A. 18A:36-21) to provide funds for students unable to afford such trips are deemed essential by the Commissioner.

In light of the foregoing, the Commissioner determines that $3,500 of the amount by which this account was reduced be restored: in-service $1,000, workshops $500, Visiting Author Program $1,000, Class trips $1,000).

The Commissioner likewise determines that the $500 reduction in the teacher recognition program be sustained.

Account 630	Reduction
11-000-260-620 - Heat for Building	$2,000

The Commissioner finds that the Board has failed to meet its burden of demonstrating that the $2,000 by which this account was reduced would impede its ability to heat the building. The figures presented by the Township Committee indicating past years' expenditures would indicate the Board's ability to live within the parameters established by the Township Committee. The $2,000 reduction is therefore sustained.

SUMMARY

Account	Reduction	Sustained	Restored
214 - Salaries/Other Instruct.	$14,559	-0-	$14,559
240 - Teaching Supplies	$33,000	-0-	$33,000
250 - Other Expenses/Instruct.	$ 4,000	$ 500	$ 3,500
630 - Heat	$ 2,000	$2,000	-0-
Total	$53,559	$2,500	$51,059

The Commissioner directs the Warren County Board of Taxation to strike an additional tax levy of $51,059 in its General Fund so as to afford the Board of Education of Mansfield Township a total General Fund account of $2,043,211 for the operation of its schools for the 1993-94 school year.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 13, 1993

DATE OF MAILING - OCTOBER 13, 1993

241-93

241-93

BOARD OF EDUCATION OF THE HENRY HUDSON REGIONAL SCHOOL DISTRICT,

PETITIONER,

V.

MAYOR AND BOROUGH COUNCIL OF THE BOROUGH OF ATLANTIC HIGHLANDS AND MAYOR AND BOROUGH COUNCIL OF THE BOROUGH OF HIGHLANDS, MONMOUTH COUNTY,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

OCTOBER 13, 1993

BOARD OF EDUCATION OF THE HENRY HUDSON REGIONAL SCHOOL DISTRICT PETITIONER, V. MAYOR AND BOROUGH COUNCIL OF THE BOROUGH OF ATLANTIC HIGHLANDS AND MAYOR AND COUNCIL OF THE BOROUGH OF HIGHLANDS, MONMOUTH COUNTY, RESPONDENTS.	:	COMMISSIONER OF EDUCATION DECISION

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of $89,718 made by governing body following voter rejection of proposed budget on April 20, 1993.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore $79,718 for a total General Fund tax levy of $3,827,881 for 1993-94 school purposes.

BOARD OF EDUCATION OF THE HENRY HUDSON REGIONAL SCHOOL DISTRICT,

PETITIONER,

V.

MAYOR AND BOROUGH COUNCIL OF THE BOROUGH OF ATLANTIC HIGHLANDS AND MAYOR AND BOROUGH COUNCIL OF THE BOROUGH OF HIGHLANDS, MONMOUTH COUNTY,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

Frank M. McDonough, Esq. (Kenney, Gross & McDonough), for Petitioner

John G. Colannino, Esq., for Borough of Atlantic Highlands, Respondent

Gregory S. Baxter, Esq. (Caruso & Baxter, P.A.), for Borough of Highlands, Respondent

This matter was opened before the Commissioner on June 2, 1993 through the filing of a Petition of Appeal by the Board of Education of the Henry Hudson Regional School District (Board) seeking restoration, on the grounds of necessity for a thorough and efficient education, of reductions by the Mayor and Borough Council of the Borough of Atlantic Highlands (Atlantic Highlands) and the Mayor and Borough Council of the Borough of Highlands (Highlands) in the General Fund tax levy for the 1993-94 school year. These reductions were made pursuant to N.J.S.A. 18A:22-37 and N.J.A.C. 6:24-7.2(b)2 following voter rejection of the Board's proposed budget on April 20, 1993 and after consultation with the Board as required by law.

The total proposed and certified budgets, as well as the amounts in dispute in this matter, are set forth below:

Proposed Tax Levy Adopted By Board of Education		Amount of Tax Levy Certified by Governing Bodies	
General Fund	$3,837,881	General Fund	$3,748,163
Amount of Reduction By Governing Bodies		**Amount of Reduction in Dispute**	
General Fund	$89,718	General Fund	$89,718

On June 23, 1993, Atlantic Highlands filed its Answer to the Petition of Appeal, and on June 25, 1993 Highlands filed its Answer to the Petition of Appeal, both pursuant to the provisions of N.J.A.C. 6:24-7.6. On July 13, 1993, the Board filed its Position Statement. On July 29, 1993, Atlantic Highlands filed its Position Statement. On August 16, 1993, Highlands filed its Position Statement. However, due to the fact that it was received more than three weeks past due it was deemed untimely filed and any replies generated from it were not considered. The Board filed its Response to the Atlantic Highlands Position Statement on August 6, 1993. No other responses or summations were received, and the record was closed on August 21, 1993.

The reductions to the General Fund tax levy and reasons for reductions as determined by Highlands are as follows:

Description		Reduction
1.	Wage freeze on all non-teaching positions (line #'s 230-100, 240-103, and 290-100)	$ 32,718
2.	Reduce employee benefits cost of $500 per employee by exiting the state [plan]	$ 25,000
3.	Consolidate clerical positions Administration, Telephone and Telegraph and fixed charges - Administration (100 series)	$ 22,000
4.	Remove from surplus	10,000
	Total	$ 89,718

The resolution submitted by Atlantic Highlands lists only the total reduction of $89,718 and does not specify line item or rationale. Attached to that resolution is a memo from the Finance Committee of the Atlantic Highlands Council to the Mayor and Council. That memo lists the following reductions:

Description	Reduction
* Eliminate and roll back Administrative raises (acct 100) $654,364 @ 5% = $32,718	$32,718
* Consolidate secretary position (acct 100)	22,000
* Insurance savings anticipated (acct 100) (new carrier)	25,000
* Additional surplus (current balance approx $220,000)	10,000
Total	$89,718

Concerns expressed in that letter regarding current financial constraints of taxpayers, while important, are not relevant in the determination of sufficient funds as required by statute to provide a thorough and efficient education. (See Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966).)

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary

reductions imposed by local governing bodies. (See also East Brunswick, supra, and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

It is noted that respondents' failure to file documents within the time period established by code and the failure of one respondent to include the required rationale for reduction in the Council's resolution are critical errors in procedure. However, this does not relieve the Board of its obligation to demonstrate that the restorations it seeks are necessary for a thorough and efficient education.

Mindful, then, of the balance to be applied in this standard of review, the Commissioner makes the following determination with respect to the reduction in the General Fund tax levy effectuated by the Councils of Atlantic Highlands and Highlands.

	Reduction
Wage Freeze/Reduction of raises for all non-teaching/administrators	$32,718

It is not possible to identify specifically the positions to which the Councils were referring for this reduction. The line numbers cited by Highlands do not provide the detail to determine how the reduction was calculated. The memo attached to the Atlantic Highlands resolution provides a method of calculation, $654,364 @ 5% = $32,718, but it does not specify the source of the $654,364 figure. Again, the account listing, account 100, does not provide necessary detail for identification of positions.

The Board, in its Position Statement, cites the lack of specificity noted above and states that the positions included in the listed line items encompass employees whose terms and conditions of employment are secured by negotiated contracts. Additionally, Atlantic Highlands in its Position Statement lists reductions to equal the total tax levy reduction of $89,718, but these items and dollar amounts do not agree with the memo attached to its resolution. There is also no item or combination of items that equals the $32,718 listed as the reduction for administrative or non-teaching positions. The Statement lists the elimination of the Substance Abuse Specialist, the reduction to ten months for the Substance Abuse Coordinator, and hiring one aide rather than two. Atlantic Highlands states that the student population of the district does not support the need for these positions and that grant monies received for substance abuse services could be used for the one counselor and other programs. The Position Statement submitted by Highlands also does not agree with the reductions listed in its resolution, and, in fact, only proposes in the area of personnel the hiring of only one new aide for a reduction of $7,372.

Based on the Board's statement regarding contractual positions and the lack of specificity and consistency in submissions from Atlantic Highlands and Highlands, the Commissioner orders the restoration of the $32,718 reduction.

	Reduction
Reduce Employee Benefits Cost/ Insurance Savings Anticipated	$25,000

Atlantic Highlands, in the memo attached to its resolution, and Highlands, in its resolution, both list this $25,000 reduction

as an insurance cost savings. Again, however, the Position Statements from the two respondents did not agree with the initial resolutions. In its Position Statement, Atlantic Highlands proposes a $10,000 reduction from savings in benefits. Highlands totally eliminates this reduction from its Position Statement.

The Board does agree that it negotiated for a change in medical insurance carriers and will achieve a savings in costs of $27,000 over the amount budgeted in 1993-94. The Board argues that these monies are needed to maintain and operate an aging fleet of school buses and that it has the authority to transfer funds from one account to another as needed.

The Board is correct that during the school year it has the right to transfer funds from one line item to another, but it is not a valid defense against a reduction to argue that the monies are not needed where reduced but are needed in another budget area. This issue is strongly impacted, however, by the inconsistency of Atlantic Highlands and the apparent total reversal in position by Highlands on this reduction.

Based on these facts, the Commissioner orders the restoration of the $25,000 reduction.

	Reduction
Consolidate clerical/secretary positions	$22,000

Again, the Position Statements submitted by Atlantic Highlands and Highlands do not agree with the initial resolutions/ memo. Atlantic Highlands in its Position Statement does not refer to any secretarial or clerical positions but rather recommends the elimination of the bookkeeper at a savings of $18,275. It argues that the business administrator is responsible for the books. In

its Position Statement, Highlands does not include any secretarial or clerical reductions. The Board argues that there is a need for all secretarial positions and that some are already shared between offices.

Based on the material submitted, the Commissioner orders the restoration of the $22,000 reduction.

	Reduction
Surplus	$10,000

The Position Statements from both Atlantic Highlands and Highlands do not agree with the initial resolutions/memo submitted by the two governing bodies. Atlantic Highlands in its Position Statement increased the amount of reduction from surplus to $15,903. Highlands increased the amount of surplus reduction in its Position Statement to $34,000. The Board states in its Petition of Appeal that the district budget surplus is 4.1% and is necessary to ensure the district can address emergency situations. In the Board's Position Statement, it cites the surplus funds as only 2%. In the Board's Response, it again refers to the surplus as below 3%. It refers to a surplus figure of $84,164, but the basis for the calculation is incorrect. For that figure, it used the audited July 1, 1991 balance of $575,032. It should have used the audited June 30, 1992 figure of $546,679. Deducting from that amount the Balance Appropriated of $241,690 for 1992-93 and the proposed Balance Appropriated of $101,066 for 1993-94, the estimated surplus for Current Expense would be $203,923, or just over 4.2%. The calculation for the General Fund, including both Current Expense and Capital Outlay, results in an estimated surplus of $262,115, or just over 5.4%. It has been determined that a reasonable surplus is a necessary item for protection against unforeseen circumstances and

emergencies. It has also been determined that a surplus of 3% is reasonable. Board of Education of the Township of Branchburg v. Township Committee of the Township of Branchburg, 187 N.J. Super. 540 (App. Div. 1983); Board of Education of the City of Perth Amboy v. Council of the City of Perth Amboy, Middlesex County, 1987 S.L.D. 2262. The Board's surplus is within that range. The Commissioner, therefore, sustains the $10,000 reduction.

Thus, for the reasons set forth above, the Commissioner determines to restore $79,718 of the $89,718 reduction appealed herein, as summarized below:

Item	Restoration
1. Wage freeze/reduction of raises for all non-teaching/administrators	$ 32,718
2. Reduce Employee Benefits/Insurance Savings Anticipated	25,000
3. Consolidate clerical/secretary positions	22,000
Total	$ 79,718

Accordingly, the Monmouth County Board of Taxation is directed to make the necessary adjustment as set forth below to reflect a total of $3,827,881 to be raised in tax levy for the General Fund for the Henry Hudson Regional School District for the 1993-94 school year:

	General Fund
Original Tax Levy	$3,837,881
Reduction	89,718
Tax Levy After Reduction	3,748,163
Restoration	79,718
Tax Levy After Restoration	$3,827,881

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 13, 1993

DATE OF MAILING- OCTOBER 13, 1993

242-93

242-93

BOARD OF EDUCATION OF THE BOROUGH OF LINDENWOLD,

PETITIONER,

V.

BOROUGH COUNCIL OF THE BOROUGH OF LINDENWOLD, CAMDEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

OCTOBER 13, 1993

BOARD OF EDUCATION OF THE BOROUGH OF LINDENWOLD,

PETITIONER,

V.

BOROUGH COUNCIL OF THE BOROUGH OF LINDENWOLD, CAMDEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of $314,628 made by governing body following voter rejection of proposed budget on April 20, 1993.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore $191,390 for a total General Fund tax levy of $4,440,990 for 1993-94 school purposes.

BOARD OF EDUCATION OF THE BOROUGH OF LINDENWOLD,

PETITIONER,

V.

BOROUGH COUNCIL OF THE BOROUGH OF LINDENWOLD, CAMDEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

Barbara E. Riefberg, Esq. (Jeffrey I. Baron, P.A.), for Petitioner

Robert L. Messick, Esq., for Respondent

This matter was opened before the Commissioner of Education by way of a Petition of Appeal filed on May 27, 1993 by the Board of Education of the Borough of Lindenwold (Board) seeking restoration to its General Fund tax levy of $314,628 which was cut from its proposed 1993-94 school year budget by the Borough Council of Lindenwold (Council) upon defeat of same by the voters at the annual school election held on April 20, 1993. The aforesaid reduction was imposed by the Council after conferring with the Board in accordance with the provisions of N.J.S.A. 18A:22-37. As a result of the reductions the amounts in dispute before the Commissioner are summarized below:

Proposed General Fund tax levy adopted by the district board of education	Amount of General Fund tax levy certified by governing body
Current Expense $4,564,228.00	Current Expense $4,249,600.00

Amount of reduction in the budget by governing body

Current Expense $314,628.00

Amount of reduction in dispute before the Commissioner

Current Expense $314,628.00

The aforesaid General Fund tax levy was established by the Council by imposing the following line item reductions:

LINE ITEM		AMOUNT REDUCED
463.	Salaries, Principals/Asst. Principals	$78,960.00
Reason:	Two (2) new Assistant Principals are not needed, existing Principals at schools #4 and #5 can perform duties as they have been.	
155, 156 & 157.	Salaries of Teachers	$85,491.00
Reason:	The following new positions are not needed: Two (2) full time teachers, one-half time computer teacher, one one-half time art teacher and one one-fifth time phys ed teacher. The present staff is adequate.	
465.	Salaries, Secretarial and Clerical Assistants	$ 6,480.00
Reason:	Two (2) new positions not needed, present staff adequate.	
515.	Salaries, Food Service	$ 6,480.00
Reason:	Two (2) new positions not needed, present staff adequate.	
472.	Salaries, Operation of Plant Services	$18,568.00
Reason:	New position not needed, present staff adequate.	
427.	Total Special Ed.	$34,649.00
Reason:	The plan for a new psychologist not needed. Present person handling present needs. (Specific special education line item cannot be identified)	
506.	Other Employee Benefits	$34,000.00
Reason:	Reduction of benefits required due to the elimination of the above positions.	

LINE ITEM		AMOUNT REDUCED
405.	Total Tuition - Undistributed Expenditures	$ 50,000.00

Reason: Number of pupils requiring outside tuition has decreased.

On June 11, 1993 the Council filed its Answer to the Petition of Appeal. Position Statements of the parties were filed on June 28 and July 21, respectively, by the Board and the Council. No further filings were submitted and the record was formally closed.

STANDARD OF REVIEW

In rendering judgment relative to budget appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

BOARD'S POSITION

Initially, the Board contends that the Statement of Reasons provided by the Council is inadequate in that it contains conclusional statements without analysis of educational factors. The Board offers the following responses to the Council's reductions:

Line Item	Reduction
463. Salaries Principals/Asst. Principals	$78,960

The Board argues that it requires two new assistant principals in schools #4 and #5, its two largest schools. Factors making such increase necessary include increasing enrollment and attendant disciplinary, supervisory, scheduling and transportation problems.

In addition to increased enrollment, the Board argues that increased staff has imposed great difficulty upon the principals of these two schools to meet their mandated evaluation requirements. It is the Board's intention to use the assistant principals to handle all problems of discipline, safety, transportation, attendance, scheduling and supervision of the lunch program in order to free the principals to carry out the primary task of staff evaluation and supervision. The Board points out in its Growth and Capacity Study that both of the schools involved have student enrollments of over 600 and are projected to increase in size. (See Exhibit C, Board's Position Statement.)

Line Item	Reduction
155, 156 & 157. Salaries of Teachers	$85,491

The reductions in these line items represent the salaries of 2 full-time classroom teachers, one half-time computer teacher,

one half-time art teacher and a one-fifth time adaptive physical education teacher.

The Board points out that it will have at least 90 second graders at its School #4. With three second grade teachers at that school and without an additional teacher the Board projects second grade classes with 30 pupils or more should new pupils register. Since many of the pupils in these classes will be mainstreamed handicapped pupils requiring extra attention, the Board urges the restoration of this position.

The half-time computer teacher is required due to increasing enrollment and the need to conduct additional computer classes. The Board argues that its current computer teacher also coordinates the program and is thus unable to commence classes below the fourth grade. The Board contends that the addition of a half-time computer teacher will enable it to extend computer instruction to lower grades and to train other teachers in how to utilize computers for instruction.

The one-fifth adaptive physical education teacher is needed to lighten the load of the existing teacher who must provide services to 38 preschool handicapped students during one fifth of that person's time. The Board contends that the increase of one day of adaptive physical education time will save money currently spent on occupational therapy.

The Board argues that an additional Basic Skills teacher is needed due to increased enrollment and the special needs of students in kindergarten and pre-first grade. It is the Board's contention that its current staff cannot provide the time necessary to assist these pupils in the math, reading and developmental skills necessary to permit them to function in larger class settings.

Finally, the Board seeks an additional part-time art teacher position which was eliminated three years ago, based on increased enrollment and the fact that pupils receive art instruction from a certified art teacher only once every two weeks.

Line Item	Reduction
465. Salaries, Secretarial & Clerical Assistants	$ 6,480

The Board contends that two floating secretarial aides are necessitated at School #4 due to increased enrollment and the very high transient rate of pupils. The Board contends that the increased enrollment, staffing and rate of transciency create paperwork which cannot be presently handled by existing staff.

Line Item	Reduction
515. Salaries, Food Service	$ 6,480

The Board contends one new cafeteria aide position is needed at School #4 and School #5 due to increased enrollment and to provide supervision both in the cafeteria and the playground during 5 different lunch periods.

Line Item	Reduction
472. Salaries, Operation of Plant Services	$18,568

The Board argues that an additional person is needed to carry out repairs in a timely fashion. It also contends that the additional person will save money presently expended for outside contractors.

Line Item	Reduction
427. Total Special Education	$34,649

The Board avers that its present psychologist primarily counsels handicapped pupils and does not have time for providing counseling services to regular students. It is the Board's

contention that there is a current waiting list of students to receive counseling services. At the time of the preparation of the 1993-94 budget, the Board offered the following statistics in support of its need for additional counseling and psychological services:

On-going Counseling - 46
Monitoring - 17
Waiting List - 15

Line Item	Reduction
506. Other Employee Benefits	$34,000

This reflects the amount by which employee benefits would be reduced if the staffing reductions imposed by the Council were approved. The Board having argued for the maintenance of the positions contends this amount must be restored.

Line Item	Reduction
405. Total Tuition-Undistributed Expenditures	$50,000

This line item involves monies budgeted for outside tuition. The Board argues that the amount budgeted for 1993-94 is necessary based upon the current number of students placed outside the district, the number being currently evaluated and the potential for student transfers into the district requiring special placement. The Board projects 47 pupils to be variously placed at a total cost of $824,047. (See Exhibit K, Board's Position Statement.) It contends that the reduction imposed by the Council would be devastating since it would leave the district with only $772,749 to meet the above projected cost.

COUNCIL'S POSITION

Line Item	Reduction
463. Salaries, Principals/Asst. Principals	$78,960

The Council argues that the Board's projected enrollment increase represents a 2.5% growth while the addition of two new vice principals boosts the non-teaching administrative staff from 6 to 8, a 25% increase.

The Council argues that no matter how busy the school day of its principals are, the nature of our times with layoffs and retrenchments requires concessions and longer hours on the part of these persons employed.

Line Item	Reduction
155, 156 & 157. Salaries of Teachers	$85,491

As in its argument related to the vice principals, the Council argues that the slight increase in enrollment does not justify an $85,491 increase in new teachers' salaries.

At present, the Board employs 97 teachers to serve 1,426 students, a ratio of 1 to 14.7. The 40-pupil increase projected by the Board, argues the Council, raises that ratio to 15.1 students per teacher. The Council argues that the increase can be absorbed without increasing class size more than one child per class or by restructuring existing classes.

Line Item	Reduction
465. Salaries, Secretarial and Clerical Assistants	$ 6,480

The Council claims its elimination of the two clerical aide positions is based upon a lack of evidence that the present workload justifies the new positions.

Line Item	Reduction
515. Salaries, Food Services	$ 6,480

As in the above account, the Council argues that the "modest" projected increase in enrollment does not justify the increased number of food service workers.

Line Item	Reduction
472. Salaries, Operation of Plant Services	$18,568

The Council argues that there has been no increase in the number of buildings or size of the plant which had been previously serviced with 13 staff members. The Council contends that the 2.5% increase in enrollment cannot justify the increase in custodial staff.

Line Item	Reduction
427. Total Special Education	$34,649

The Council simply contends that the present staffing in the psychologist area is sufficient and that an additional person is not needed.

Line Item	Reduction
506. Other Employee Benefits	$34,000

The elimination of new positions imposed by the Council make this amount for employee benefits unnecessary.

Line Item	Reduction
405. Total Tuition-Undistributed Expenditures	$50,000

The Council contends that this reduction is justified since the Board advised that the number of pupils for which tuition payment is required has decreased by the above amount.

COMMISSIONER'S DECISION

The following represents the Commissioner's determination line item by line item:

Line Item	Reduction
463. Salaries, Principals/Asst. Principals	$78,960

The Board has insufficiently documented its case for additional administrative assistance at the two schools in question. While the Commissioner is sympathetic to the importance of the principal's role in evaluation of staff and the manner in which other required tasks detract from that most important function, the Board has not sufficiently met its burden of proof of demonstrating the necessity of these two new positions to the detriment of being able to provide a thorough and efficient system of education. The reduction of $78,960 is sustained.

Line Items	Reduction
155, 156 & 157. Salaries of Teachers	$85,491

The Commissioner has carefully considered the arguments of the parties as they relate to this area. Based upon that review, the Commissioner determines that the Board has demonstrated the necessity for the additional teacher staffing requested. In so doing, the Commissioner notes that the arguments put forth by the Council lack an understanding of the educational implications of an increase of 40 pupils in enrollment. One cannot merely look at the overall ratio of pupils to teachers and obtain a true understanding of the impact since many persons classified as teachers do not instruct what might be classified as a full complement of pupils. Further, it should be clear that an increase in 40 pupils cannot necessarily be accommodated by assigning one to each classroom.

The Commissioner therefore finds and determines that the Board has met its burden of demonstrating the need for the additional personnel requested under the above-cited line items and directs that the $85,491 reduction in this area be restored.

Line Item	Reduction
465. Salaries, Secretarial and Clerical Assistants	$ 6,480

The Board has failed to demonstrate that the absence of the two secretarial aides are necessary for a thorough and efficient system of education. The Commissioner finds that no convincing justification is provided other than the mere fact that enrollment has increased and therefore directs that the $6,480 reduction be sustained.

Line Item	Reduction
515. Salaries, Food Service	$ 6,480

As in the line item above, the Commissioner finds insufficient basis upon which to determine that the two cafeteria aide positions are necessary for a thorough and efficient system of education. While the Board argues the desperation of its need, it provides no data as to why it cannot continue under its 1992-93, staffing, other than the fact that the two schools have enrollments of 600 students with 5 lunch periods. It offers no data as to the number of aides presently employed, whether it has an open or closed lunch program, nor the number of pupils per lunch period.

The reduction of $6,480 in this line item is sustained.

Line Item	Reduction
472. Salaries, Operation of Plant Services	$18,568

The Commissioner finds and determines that the Board has failed to present compelling evidence that would justify the

restoration of funds in this line item. While it argues for this new position on the basis of presumed savings on contractors' services, it offers no evidence of such savings nor does it provide information as to why the existing staff is insufficient to meet its needs in providing a safe and healthful environment for its students. The reduction of $18,568 is sustained.

Line Item	Reduction
427. Total Special Education	$34,649

The Board has demonstrated its need for additional psychological counseling. The case load projected both for those receiving counseling and those being monitored, as well as the existence of a waiting list, are sufficient to demonstrate the need in this area. Therefore, the Commissioner directs the restoration of $34,649 in this line item.

Line Item	Reduction
506. Other Employee Benefits	$34,000

The Commissioner finds it difficult to estimate the amount of benefits which must be restored in this area based upon those employee salary reductions sustained and restored. However, assuming that only the full-time and half-time employees are eligible for such benefits, the Commissioner has calculated that 8 new positions would have been eligible for such benefits. Therefore, since the Commissioner restored 2 full-time teachers, one half-time computer teacher, one half-time art teacher and a school psychologist, the benefits line item must be increased by 5 positions. Based upon 8 positions eligible for benefits requested by the Board, the Commissioner has calculated the benefits for each

position to be $4,250 per position. Thus, the Commissioner directs that $21,250 be restored and that $12,750 in reductions be sustained.

Line Item	Reduction
405. Total Tuition-Undistributed Expenditures	$50,000

While the Council contends that it has been informed that the number of pupils requiring tuition payments has decreased, the Board's projections presented as Exhibit K of its Position Statement indicate a need for tuition payments actually greater than the amount for which it originally budgeted. The Council, for its part, does not provide any basis for projecting a reduction of $50,000 in this line item. Therefore, in recognition of the great uncertainties which are part of the budgetary projections in the area of tuition requirements, the Commissioner directs the restoration of the $50,000 by which the Council reduced this line item.

SUMMARY

Line Item	Amount of Reduction Sustained	Amount Restored
463. Salaries, Prins./Asst. Prins.	$ 78,960	$ -0-
155, 156 & 157. Salaries, Teachers	-0-	$ 85,491
465. Salaries, Secretarial	6,480	-0-
515. Salaries, Food Service	6,480	-0-
472. Salaries, Operation of Plant	18,568	-0-
427. Special Education	-0-	34,649
506. Other Employee Benefits	12,750	21,250
405. Total Tuition-Undistributed	-0-	50,000
Totals	$123,238	$191,390

In view of the foregoing, the Commissioner directs that the Camden County Board of Taxation strike an additional tax levy of $191,390 for the Lindenwold Public Schools to be used for school purposes in the 1993-94 school year so that the total tax levy for such purposes shall be $4,440,990.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 13, 1993

DATE OF MAILING - OCTOBER 13, 1993

243-93

243-93

BOARD OF EDUCATION OF THE BOROUGH OF LODI,

PETITIONER,

V.

MAYOR AND COUNCIL OF THE BOROUGH OF LODI, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

OCTOBER 13, 1993

BOARD OF EDUCATION OF THE BOROUGH OF LODI,

PETITIONER,

V.

MAYOR AND COUNCIL OF THE BOROUGH OF LODI, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of $884,977 made by governing body following voter rejection of proposed budget on April 20, 1993.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore $794,977 for a total General Fund tax levy of $15,736,828 for 1993-94 school purposes.

BOARD OF EDUCATION OF THE BOROUGH OF LODI,

PETITIONER,

V.

MAYOR AND COUNCIL OF THE BOROUGH OF LODI, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

William R. Nunno, Esq., for Petitioner

Paul S. Barbire, Esq., for Respondent

This matter was opened before the Commissioner by way of a Petition of Appeal filed on June 1, 1993 by the Board of Education of the Borough of Lodi (Board) seeking restoration, on the grounds of necessity for a thorough and efficient system of education, of the reduction imposed by the Mayor and Council of the Borough of Lodi (Borough) after defeat of the 1993-94 budget by the citizens of Lodi at the annual school election held in April 20, 1993. These reductions were made pursuant to N.J.S.A. 18A:22-37 and N.J.A.C. 6:24-7.2(b)2. The total proposed General Fund tax levy as well as the amount by which it was reduced and the amount in dispute are set forth below:

Proposed Tax Levy Adopted by Board	Amount of Tax Levy Certified by Governing Body
$15,826,828	$14,941,851
Amount of Reduction in the Tax Levy by Governing Body	**Amount of Reduction in Dispute before Commissioner**
$884,977	$884,977

On June 11, 1993 the Borough filed its Answer pursuant to the provisions of N.J.A.C. 6:24-7.6 and 7.7. The Board filed its Position Statement in support of its Petition of Appeal on June 29, 1993 and on July 13, 1993 the Borough filed its written submission in support of its enacted reductions. The Board filed a combined Final Summation and Reply Position on July 23, 1993 at which point the record was closed.

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

The documentation submitted by the parties identifies the line item reductions as follows:

Account	Account Number	1993-94 Board Appropriation	Proposed Cut
Regular Programs			
Kinder., Tchrs. Sals.	110-100-101	$ 224,568.00	$ 8,349.00
Gr. 1-5, Tchrs. Sals.	120-100-101	2,652,306.00	125,655.00
Gr. 6-8, Tchrs Sals.	130-100-101	1,633,124.00	60,196.00
Gr. 9-12, Tchrs. Sals.	140-100-101	2,361,982.00	87,879.00
General Supplies	190-100-610	120,093.00	5,000.00
TOTAL			$287,079.00
Neuro Impaired			
Salaries of Teachers	204-100-101	$ 574,503.00	$ 21,794.00
SUBTOTAL			$ 21,794.00
Resource Room			
Salaries of Teachers	213-100-101	$ 511,348.00	$ 80,351.00
SUBTOTAL			$ 80,351.00
Speech Instruction			
Salaries of Teachers	218-100-101	$ 160,669.00	$ 6,058.00
SUBTOTAL			$ 6,058.00
TOTAL SPECIAL EDUCATION			$108,203.00
Basic Skills			
Salaries of Teachers	230-100-101	$ 218,475.00	$ 50,695.00
Other Salaries-Inst.	230-100-106	19,000.00	721.00
TOTAL			$ 51,416.00
Bilingual Education-Instruction			
Salaries of Teachers	240-100-101	$ 223,276.00	$ 8,587.00
Other Salaries-Inst.	240-100-106	19,000.00	721.00
TOTAL			$ 9,308.00
School Cocurricular Activities			
Salaries	401-100-100	$ 44,645.00	$ 6,075.00
TOTAL			$ 6,075.00

Account	Account Number	1993-94 Board Appropriation	Proposed Cut
School Athletics - Instruction			
Salaries	402-100-100	$ 122,475.00	$ 14,790.00
Trans. to Cover Deficit (Agency)	402-100-930	18,000.00	13,000.00
TOTAL			$ 27,790.00
Undistributed Expenditures - Instruction			
Tuition Private Schls. (Handicap)	000-100-566	$1,036,529.00	$ 40,000.00
TOTAL			$ 40,000.00
Undistributed Expenditures - Health Services			
Salaries	000-213-100	$ 186,062.00	$ 6,700.00
TOTAL			$ 6,700.00
Undistributed Expenditures - Other Support Servs.			
Salaries Other Prof. Staff	000-218-104	$ 429,772.00	$ 16,198.00
Salaries Clerical/ Secretarial	000-218-105	38,417.00	1,104.00
TOTAL			$ 17,302.00
Undistributed Expenditures - Other Support Services			
Salaries Prof. Staff	000-219-104	$ 324,782.00	$ 14,695.00
Undistributed Expenditures - Impvt. of Instruction Services			
Salaries - Supervisors of Instruction	000-221-102	$ 37,999.00	$ 1,443.00
TOTAL			$ 1,443.00
Undistributed Expenditures - Educational Media Servs.			
Salaries	000-222-100	$ 208,101.00	$ 7,966.00
TOTAL			$ 7,966.00

Account	Account Number	1993-94 Board Appropriation	Proposed Cut
Undistributed Expenditures - General Administration			
Other Purchased Services	000-230-339	$ 40,250.00	$ 5,000.00
Purchased Technical Services	000-230-340	23,100.00	5,000.00
Supplies and Materials	000-230-600	14,847.00	4,000.00
TOTAL			$ 14,000.00
Undistributed Expenditures/ Operation and Maint.			
Salaries	000-260-100	$ 896,125.00	$ 21,000.00
Cleaning, Repair, Maintenance	000-260-420	139,012.00	55,000.00
Other Purchased Services	000-260-490	31,645.00	12,000.00
Heat and Electricity	000-260-620	348,104.00	10,000.00
TOTAL			$ 98,000.00
Undistributed Expenditures - Business/Other Support			
Other Employee Benefits	000-290-290	$2,204,874.00	$180,000.00
TOTAL			$180,000.00
Undistributed Expenditures - Food Services			
Transfers to Cover Deficit	000-310-930	$ 15,000.00	$ 15,000.00
TOTAL			$ 15,000.00
TOTAL UNDISTRIBUTED			$395,106.00
GRAND TOTAL GENERAL FUND			$884,977.00

In addition to the specific line item delineations presented by the Borough, the resolution reducing the Board's General Fund tax levy also provided the following rationale:

JUSTIFICATION FOR CUTS	PROPOSED CUT
	$365,724.00

#1. Teachers received over 30% in salary increases during the last 3 years. Average county increases over that period were between 7 and 8 percent. This freeze on teacher salary raises would provide an average increase to teachers of approximately 8+ percent per year for the 4 year period ending in the 1993-94 school year. Additionally, 42% of all Lodi teachers will still receive their step and stipend increment this year.

$ 30,000.00

#2. Based on prior years expenditure trend the Borough believes that the budget presented is overstated in the appropriations for degree changes and teacher sick leave.

$ 5,000.00

#3. Based on prior years expenditure trend the Borough believes that the budget presented is overstated in the appropriations for general supplies.

$103,388.00

#4. The Borough in its review of the proposed 7 new teachers believes that 4 new teachers would be more appropriate. This approach will not affect any programs existing in the district. Additionally, the Borough feels that these 4 new teachers should be utilized to enhance the music, media and gym programs.

$ 60,000.00

#5. The Borough in its review believes that estimates in these appropriations should be reduced and the Board should allow the taxpayers to vote specifically on these capital improvements. Additionally architectural fees should be made part of that funded capital improvement.

$ 5,000.00

#6. The Borough in its review believes that estimates in these appropriations should be reduced and right to know should be handled by the Board's maintenance staff.

$ 28,000.00

#7. The Borough finds no basis to accept these anticipated deficit appropriations in cafeteria and athletics. Operating at a deficit does not comply with Department of Education regulation.

$ 40,000.00

#8. Based on prior years expenditure trend the Borough believes that the budget presented is overstated in the sub appropriation for the possibility of placement of additional classified students.

$ 4,000.00

#9. Based on prior years expenditure trend the Borough believes that the budget presented is overstated in the appropriation for expenses for superintendent's office.

$ 21,000.00

#10. The Borough in its review has determined that the sub appropriation for overtime and substitute custodians requires a cost saving plan to be developed by the Board.

$ 22,000.00

#11. Based on prior years expenditure trend the Borough believes that the budget presented is overstated in the appropriations for landscaper, water and heat.

$180,000.00

#12. In its review the Borough researched average Blue Cross increases in the market place and has determined that the more appropriate estimate for hospitalization is 18% and not 25% as presented by the Board.

$ 20,865.00

#13. The Borough in its review has determined that teacher salary increases for extra curricular and athletics are not appropriate in this economic time. Appropriations have been brought to last year's levels.

TOTAL CUTS $884,977.00

BOARD'S POSITION

Initially, the Board objects to the failure of the Mayor and Council to meet with the Board for purposes of consultation in conformity with the provisions N.J.S.A. 18A:22-37. The Board points out that the Mayor and Council changed the meeting time for such conference from 7:30 p.m. May 3, 1993 to 4:00 p.m. May 3, 1993. When informed that Board members could not meet at 4:00 p.m., the Mayor and Council met without the required conference and adopted the tax levy which is the subject of the contested matter herein.

As a result of the foregoing, the Board contends the Borough's action in reducing the tax levy by $884,977 was arbitrary and capricious and prevents it from carrying out its obligations to provide a thorough and efficient system of education.

The Board contends that the arbitrary nature of the Borough's actions are further illustrated by the fact that the proposed reductions were prepared prior to the meeting by the chief financial officer of the Borough and presented to the members for vote without any members of the Board or district administration being present to explain the rationale behind specific expenditures.

The Board further points out that virtually no discussion transpired of why individual reductions were made at the meeting

conducted by the Borough. In support of its position the Board offers as Exhibit B to its Position Statement a transcript of the Borough's meeting of May 3, 1993.

Further, by way of affidavits from two members of the Council presented as Exhibit A of its position statement, the Board seeks to demonstrate that no consultation took place between the Board and the Borough as required by N.J.S.A. 18A:22-37 and that Council members were presented with the proposed cuts at the meeting of May 3, 1993 without opportunity to review or consider them individually as required by law. As a result of the above-cited alleged deficiencies, the Board points out that Councilman Masopust voted "no" on the resolution to reduce the tax levy and Councilman Paparozzi abstained.

The Board's position relative to the individual categories and line item reductions are set forth below:

Account	Reduction
Salaries - Teachers	$365,724

The Borough's recommended reductions in this area cover 17 separate line accounts as follows:

11-110-100-101	11-240-100-101
11-120-100-101	11-240-100-106
11-130-100-101	11-000-213-100
11-140-100-101	11-000-218-104
11-204-100-101	11-000-218-105
11-213-100-101	11-000-219-104
11-218-100-101	11-000-221-102
11-230-100-101	11-000-222-100
11-230-100-106	

The amount of reduction indicated above constitutes the 4% salary increase for teachers negotiated by the Board with the teacher bargaining unit and which the Board contends was set forth in a Memorandum of Agreement signed by representatives of the

teachers and the Board to be presented to the full membership of both bodies for ratification. (See Exhibit D, Board's Position Statement.)

The Board points out that the decision on the part of the Borough to reduce the entire 4 1/2% set aside to implement the negotiated agreement contained in the memorandum of agreement prevents it from bargaining in good faith as required by N.J.S.A. 34:13A-5.4a(5) and (6) and further prevents it from implementing its plan to increase the length of the school day which had been recommended by an ad hoc committee of the community to bring instructional time in the Lodi school district closer to the average of instructional time of other districts in Bergen County. The Board points out that its unilateral attempt to implement such a change at the high school was overturned by the Public Employment Relations Commission for failure to negotiate compensation for increases in instructional time in the matter of Lodi Board of Education, P.E.R.C. No. 92-120, 18 NJPER 9123151 (1992). (Position Statement, at p. 14)

The Board points out that the reduction imposed by the Borough in this account prevents it from ratifying the memorandum of agreement with the teachers and thus from implementing the increase in instructional time provided for in that agreement.

Account	Reduction
11-120-100-101 Degree Changes/Sick Leave	$30,000

This account funds increases in salary for teachers who move across the salary guide by virtue of courses taken toward advanced degrees which is part of the Board's negotiated agreement with the teachers bargaining unit. It further provides funds to replace teachers who are on extended sick leave.

The Board contends that its normal experience is that two to four teachers per year take extended sick leave and four to six teachers achieve degree changes. In 1992-93 three teachers took sick leave and were replaced at a cost of $71,851.15. Additionally four teachers achieved degree changes for a total cost of $5,755. Thus actual expenditures for 1992-93 were $77,606.15 thereby justifying the appropriation of $74,999 proposed by the Board.

Account	Reduction
11-190-100-610 General Supplies	$ 5,000

The Board contends it increased its spending in this account for 1993-94 in order to fund the purchase of calculators for students which use is mandated by the State Department of Education in statewide testing. The Board contends that the type of calculator required to be used by all middle and high school students must be purchased at a cost of $17,250. It therefore points out that despite the $10,000 requested increase in this account, it has already cut the account by $7,250.

11-213-100-101 Resource Room - Salaries 11-230-100-101 - Basic Skills - Salaries	$103,388

The reduction in these accounts represent the Borough's determination relative to new teaching positions in the area of resource rooms (213) and basic skills (230). The aforesaid reduction represents salaries of one basic skills teacher and two resource room teachers.

The Board argues that the new basic skills teacher is necessary in order to meet the needs of an increasing number of students requiring remediation in order to pass the HSPT high school graduation requirement mandated by the State. The Board contends that the combination of 90 new students transferred into Lodi High

School and the greater difficulty of the 11th grade HSPT account for the increased number of students requiring remediation.

The Borough's reductions eliminate 2 of 3 new special education teachers. The Board contends that one is needed to replace a special education teacher in the elementary area who was moved to a position as an LDTC and the other two are necessary to meet an increase in the number of special education students at the high school from 86 to 100. Further, the Board points out that the current resource room concept must change to a resource center pursuant to N.J.A.C. 6:28-4.3 which alters the number of pupils permitted in each section and which permits students to attend the center up to four periods per day as opposed to the previous two periods per day. Finally, the Board argues that Bergen Tech has tightened its acceptance policies for attendance at its special education satellite program and the Board anticipates that 30 to 40% of the Lodi students attending these programs will be discharged to the district to provide services.

Account	Reduction
11-000-230-339 Other Purchased Services	$ 5,000
11-000-260-420 Cleaning, Repair and Maintenance	55,000

The Board delineates that the amounts reduced were earmarked for repair of the roof of Lincoln School ($40,000), architectural fees for the repair ($5,000) and for unforeseen repairs which may occur during the school year ($15,000).

The Board declares that its expenditures in 1992-93 for unforeseen repairs was $58,492.57 thus demonstrating the clear need for the minimal $15,000 set aside for such repairs in 1993-94.

Account	Reduction
11-000-230-340 Purchased Teacher Services	$ 5,000

The money appropriated above is for the purchase of technical services pursuant to the New Jersey Right to Know Law. The Board argues that the district's maintenance personnel lack the technical training and knowledge to carry out the tasks necessary for compliance with the above statute.

11-000-310-930 Food Services Deficit $15,000

This appropriation is set aside to cover deficits which may arise in its food services program. The Board points out that it has a contract with the Canteen Corporation which administers the food services program to subsidize that program in the amount of $12,000 should expenses exceed revenues. (See Exhibit H, at pp. 12 and 13, Board's Position Statement.) Additionally, the Board is obligated to subsidize the value of government donated commodities estimated at $3,000.

11-402-100-930 Athletic Deficit $13,000

The Board argues that actual expenditures for the purpose of covering athletic deficits in previous years has been as follows:

1989-90	-	$17,824.05
1990-91	-	$18,038.95
1991-92	-	$16,303.50

Since gate receipts for athletic events vary from year to year, the Board contends an appropriation of $18,000 as contemplated in this account for 1993-94 is entirely reasonable.

11-000-100-566 Tuition to Private School for the Handicapped $40,000

The Board points out that its sub-appropriation in this line item for 1992-93 was $75,000 but expenditures were actually $132,426. In lieu of the above circumstances and the uncertainty

which exists relative to how many students might need to be placed in private schools for the handicapped, the Board contends that its $100,000 estimated sub-appropriation is reasonable.

The Board contends that the Commissioner's granting of a cap waiver in the amount of $134,395 due to increased special education costs implicitly deemed the appropriation in this line item necessary.

Account	Reduction
11-000-230-600 Supplies and Materials	$ 4,000

The Board contends that the amount by which the appropriation in this account was increased over the previous year is due to $5,050.00 in new expenditures as follows:

Policy Book for Parents	-	$1,500
Report Cards (Revised)	-	$1,200
Newsletter	-	$1,600
Community Survey	-	$ 500
Senior Citizen Program	-	$ 250

11-000-260-100 Salaries-Custodians	$21,000

This sub-account involves monies appropriated for overtime pay and substitute custodians. The Board points out that each custodian is entitled to 3 personal days, 15 sick days and an average of 15 vacation days per year. When custodians are not present at work for the above reasons, they must be replaced by substitutes or through overtime on the part of those present. The Board contends that it has undertaken many steps over the years to reduce costs in the area, such as hiring substitutes at $8.00 per hour instead of paying $24.00 per hour for overtime work. Notwithstanding these efforts, the Board points out that its actual expenditures in this area have been $66,862.71 in 1990-91, $57,149.39 in 1991-92 and $43,947.66 as of May 31, 1993. In light

of the foregoing the Board contends that its $45,000 proposed appropriation for 1993-94 is reasonable and necessary to provide for its needs in this area.

11-000-260-490 Purchased Property Services $12,000

The money appropriated in this account is for landscaping and maintenance of athletic fields. The need for this service is necessitated by the Board's action in reducing its custodial staff by one person whose responsibility was groundskeeping and landscaping. Since this individual's salary was $37,265 the Board contends its action resulted in a saving of $27,265.

Account	Reduction
11-000-260-620 Utilities	$10,000

The Board's original proposed appropriation for water was $13,000. The reduction of $2,000 in this area imposed by the Borough would bring the amount available for such utility to $11,000 when actual expenditures for water in 1992-93 were $12,918.13.

The Board points out its expenditures for heat during previous years were as follows:

1990-91	-	$ 96,963
1991-92	-	$126,445
1992093	-	$120,149

In light of past expenditures, the Board argues that its proposed appropriation of $130,000 for 1993-94 represents a reasonable increase in an area where actual costs cannot be predicted because of the vicissitudes of weather and possible price increases.

11-000-290-290 Other Employee Benefits $180,000

The Board argues that prudence dictates that it budget for a 25% increase in health coverage costs since it has been informed

by Blue Cross/Blue Shield that its health coverage will increase between 15 and 25%. Such a prudent approach, the Board contends, is necessary since the Board's surplus at the end of 1992-93 was only $116,192.34, less than 1% of the total proposed budget.

Account	Reduction
11-401-100-100 Salaries - Cocurricular 11-402-100-100 Salaries - Athletics	$20,865

The salaries involved in these accounts were negotiated between the Board and the teachers bargaining unit and were part of the Memorandum of Understanding between the Board and the teacher's union which has not been ratified due to the reductions imposed by the Borough.

BOROUGH'S POSITION

It is the Borough's contention that it did confer with the Board in conformity with the provisions of N.J.S.A. 18A:22-37. The Borough points out that the Mayor consulted with the Board, its Board Secretary as well as other school officials prior to the May 3, 1993 Council Resolution, as well as meeting with the Superintendent, Board President and Board Secretary on May 10, 1993 at the Lodi Board offices. It is the Borough's contention that during the course of these meetings it examined each applicable line item in order to determine the amount necessary for providing a thorough and efficient system of education.

The Borough points out that its action in reducing the budget by $884,997 resulted in shielding the teachers, administrators and other personnel from any reductions in force as well as to preserve existing programs.

The Borough's Position Statement repeats the reductions which it set forth in its Resolution of May 3, 1993 along with the

rationale contained therein. Further it sets forth the following facts for the Commissioner's consideration:

> In addition to the justifications for the specific cuts presented the Borough maintains that the Board has not attempted to reduce costs to taxpayers. The Borough submits the following facts to demonstrate this position:
>
> i) Average income - Borough of Lodi - $29,887.00; Per capita income - Borough of Lodi - $13,415.
>
> ii) There are approximately 181 teachers in the Lodi School System - 58% of said Teachers have salaries over $51,000.00 per year.
>
> iii) The Lodi Teaching staff received a 31% increase in their contract for the prior three (3) year period; The average County increase over the same three (3) years was 24%.
>
> iv) Average length of teaching day County wide [is] seven (7) hours; Lodi teaching day is approximately 6.5 hours.
>
> v) Attached hereto is the Contract struck between the Board and the teaching staff. (See Exhibit "A1")
>
> vi) Additionally, the Board has commenced and/or proposed certain capital improvements which could have been funded by Public School Loans. No Applications appear to have ever been filed. (See supporting Bergen Record article dated May 18, 1993, as Exhibit "A2".)
>
> vii) During the Budget Process for the 1993-1994 school year, repairs to the Lincoln School roof were anticipated. In June the Board approved funding for repairs to the Lincoln School and an additional school roof. Those funds came from surplus in the insurance appropriation line item account.
>
> viii) Finally the Board continues to estimate Fund balances which severely inflates their Tax Levy. An analysis is hereinbelow provided:

Year Ended	School Tax Levy	Estimated Budget Fund Balance	Fund Balance per Audit Report
1988	$10,340,231	$161,382.14	$896,428.61
1989	$11,206,541	$185,783.23	$359,730.18
1990	$12,608,841	$257,070.61	$574,090.54
1991	$14,044,968	$384,145.18	$633,509.66
1992	$14,892,031	$109,090.54	$541,054.59
1993	$14,840,650	$191,892.00	?

School taxes have increased 43+% since 1988. As noted hereinabove the Board had the ability to apply fund balances for tax stabilization but has failed to do so.

(Borough's Position Statement, Exhibit A)

In conclusion, the Borough cites the Appellate Division decision in Board of Education of the Township of East Brunswick v. Township Council of the Township of East Brunswick, 91 N.J. Super. 20 (App. Div. 1966) for the proposition that "[t]he Commissioner is theoretically bound to respect its [Mayor and Council] exercise of judgment and discretion in that regard***. He may not supplant the council's budget merely because of any concept by him that the board's budget rather than the council's better serves the constitutional mandate for 'a thorough and efficient system of free public schools.' [cite omitted] Nor may he abrogate the council's budget for the mere reason alone that he would have fixed a larger one had the council failed to promulgate a budget within the ten-day period and the responsibility to do so had then fallen to the Commissioner under the statute.***" (at 26)

COMMISSIONER'S DECISION

Initially the Commissioner finds and determines that the actions of the Mayor and Council in adopting its tax levy resolution of May 3, 1993 without having formally met with the Board of Education did not comport with the requirements of N.J.S.A. 18A:22-37 for consultation. Notwithstanding the protestations of

the Borough's Municipal Manager Charles S. Cuccia in his certification as part of the Position Statement of the Borough, the informal meetings which he contends were held with school officials before the May 3 resolution and a subsequent meeting held after the passage of the resolution on May 10, 1993 with "pertinent members of the School Board family," such alleged meetings do not constitute compliance with the clear mandate of N.J.S.A. 18A:22-37 that is contemplated by that statute. Consultation as conceived under the statute requires participation and discussion between both bodies. Branchburg Bd. of Ed. v. Branchburg, 187 N.J. Super. 540 (App. Div. 1983)

Further, the transcript of the May 3, 1993 meeting of the Borough Council at which the budget cutting resolution was adopted and which was provided to the Commissioner as part of the Board's Position Statement raises serious questions as to the degree to which there was a conscientious review designed to determine an amount necessary for a thorough and efficient education. Such doubt arises from the fact that Mr. Cuccia by his own admission in his certification, as confirmed by the transcript, did not provide the Council members with copies of his recommended cuts until the time of the meeting. While, as Mr. Cuccia points out in his certification, it may not be inappropriate for a fiscal expert such as himself to review the Board's budget and to make recommendations to the Council for its consultation, such recommendations should provide adequate time and opportunity to be carefully considered by the Council, given the constitutional responsibility of the municipal governing body to provide sufficient funds to ensure the provision of thorough and efficient system of education. No matter how expert in fiscal affairs the Municipal Manager may be and no

matter what the procedures of the municipality may be, when reviewing a school budget for determining sufficiency, the ultimate responsibility is that of the governing body itself and to satisfy the requirements of N.J.S.A. 18A:22-37 there must be active consultation with the board of education and careful item by item review by the members of the municipal governing body.

Finally, the Commissioner must consider the contention of the Board that the Borough violated the Open Public Meeting Act (N.J.S.A. 10:4-6) in that the meeting announcement advertised by the Borough misstated the agenda of said meeting in that the notice as published indicated that the determination of the amount of tax levy appropriation would be adopted at a special meeting to be scheduled. (See Exhibit C, Board's Position Statement.)

As to the OPMA allegations advanced by the Board, the Commissioner finds and determines that she does not have jurisdiction over allegations of violation of the OPMA levied against a municipal governing body. What authority she does have would rest solely in terms of a board of education's actions and even under such matters, her authority is limited. See Michael Rovello et al. v. Michael Boyel et al., decided by the Commissioner March 15, 1993.

Further, even if the Commissioner had jurisdiction she would decline to consider this issue when raised as it is within the context of the Position Statement rather than as part of the Board's Petition of Appeal. Notwithstanding the above, the Commissioner finds Mr. Cuccia's attitude rather cavalier in dismissing the Board's OPMA contentions by virtue of his defense of "substantial compliance."

Notwithstanding whatever deficiencies may have existed relative to appropriate consultation and careful consideration, pursuant to Deptford, supra, the Commissioner is obliged to conduct an item-by-item review of the proposed reductions in order to bring her expertise to bear on whether such reductions can be sustained without doing injury to the responsibility to assure a thorough and efficient system of education. Consequently, the Commissioner shall set forth her findings in each area of reduction but as set forth by the court in Deptford and discussed by the State Board in Board of Education of the Township of Rochelle Park v. Mayor and Council of Rochelle Park, 92 N.J.A.R. 2d (EDU) 425. As such, there shall be invoked a heavy presumption against the educational validity of the Borough's proposed budget cuts.

Account	Reduction
11-110-100-101/ 11-000-222-100 Salaries - Teachers	$365,724

Since the reason advanced for reduction in the teacher salary accounts was the same and the reduction in each account was the same 4 1/2% set aside for salary increases, the Commissioner's determination relative to these reductions will be dealt with collectively.

After examining the positions presented by the parties, the Commissioner determines that the Borough has acted in an arbitrary manner in removing all funds for a possible salary increase for teachers. While the Borough seeks to justify its actions by virtue of the fact that salary increases in the previous three years of the contract totalled 34% and were above the county average for that three year period, it failed to consider the fact that Lodi has one of the lowest salary schedules in Bergen County and that the above

average increases were designed to remedy that situation. Further, the Borough, perhaps due to its failure to consult with the Board, did not consider that the reduction in the salary accounts would make it impossible for the Board to implement its Memorandum of Agreement and its plan to increase the length of the school day to conform to the average school day of the other schools in Bergen County and which bears directly upon the ability of the Board to maintain a thorough and efficient system of education.

Ultimately it would appear from a study of the transcript of the Borough's May 3 meeting that its primary concern as it related to the issue of salary increases was the tax rate and not the impact which its decision would have on the educational process.

In light of the foregoing, the Commissioner directs that the $365,724 reduction in the salary accounts be restored.

Account	Reduction
11-120-100-101 Degree Changes/Sick Leave	$30,000

The Board has clearly demonstrated that its actual appropriations in 1992-93 for salary guide movement and replacement of teachers on sick leave ($77,606.15) justify its appropriation of $74,999 in this account for 1993-94. Consequently, the Commissioner directs that $30,000 be restored to this account.

11-190-100-610 General Supplies	$ 5,000

While the Board offers a reasonable explanation for the need to expend the $5,000 by which the Borough reduced this account, it fails to meet its burden of proof to demonstrate that the remaining $115,093 would not be sufficient to meet the needs described by the Board through a re-ordering of priorities. The $5,000 reduction in this account is sustained.

Account	Reduction
11-213-100-101 - Resource Room - Salaries 11-230-100-101 - Basic Skills Salaries	$103,388

The Borough's determination that the district could get along with 4 new teachers rather than the 7 requested by the Board in its proposed appropriations in this account is arbitrary in that it offers no explanation as to what factors underlie its determination. Further, the Borough far oversteps its authority, responsibility and expertise in recommending in what disciplines the new teachers should be hired.

The Board on its part does provide a reasonable explanation for why the three additional positions should be restored. While the approval by the Commissioner of the cap waiver for the district did not explicitly identify the areas within special education where such additional funds should be allocated, it does acknowledge the fact that increased enrollment in special education was confirmed.

In light of the foregoing, the Commissioner directs that the $103,388 reduction in this account be restored.

11-000-230-339 Other Purchased Services	$ 5,000
11-000-260-420 Cleaning, Repair and Maintenance	$55,000

The Borough's position that the capital improvements contemplated in these accounts should be voted on separately is entirely without merit. By way of statute the Legislature has directed that there no longer be separate votes on Current Expense and Capital Outlay but that a single vote on the General Fund tax levy replace the former practice.

While the creation of a single General Fund tax levy does not preclude the governing body from reviewing and reducing capital projects on their merits, it must provide substantial reasons why

such should not be undertaken while the Board bears the burden of proof for demonstrating that the project is necessary to ensure a thorough and efficient education.

In the instant matter, the Board has met both its burden of demonstrating the need for roof repairs in the amount of $40,000 and rebutting the Borough's contention that such project be voted on separately. However, the Board has failed to meet its burden of demonstrating why the architectural fee of $5,000 and the $15,000 for unforeseen repairs cannot be accommodated within the approximately $35,000 remaining in account 11-000-230-339 (Other Purchased Services) and the $84,012 remaining in 11-000-260-420 after utilization of the $40,000 for the roof repair.

Consequently, the Commissioner directs that the reduction of $5,000 in account 11-000-230-339 be sustained. The Commissioner further directs that the $15,000 reduction in account 11-000-260-420 be sustained while $40,000 in that account for roof repair be restored.

Account	Reduction
11-000-230-340 Purchased Teacher Services	$5,000

While the Commissioner agrees that the district's own personnel, as recommended by the Borough, lacks the expertise to carry out the requirements of the Right to Know Law, she does not believe that the Board has demonstrated that the funds remaining in this account could not be utilized to offset the $5,000 reduction imposed by the Borough. The $5,000 reduction in this account is sustained.

Account	Reduction
11-000-310-930 Food Services Deficit	$15,000

The Board has amply identified its need for the funds necessary to offset a deficit in its Food Services account by virtue of its contract with the private catering service. The argument of the Borough that deficits are not permitted by New Jersey Law is correct; however, the circumstances described herein do not constitute a year-end deficit but are in fact designed to appropriate funds so that a deficit does not occur. The $15,000 reduction in this account is restored.

11-402-100-930 Athletic Deficit	$13,000

While the Board has justified the fact that a deficit may occur between athletic program costs and gate receipts, it has not demonstrated that it would be unable to absorb that deficit by way of reductions in supplies or materials for athletics. Consequently, the Commissioner sustains the reduction of $13,000 in this account.

11-000-100-566 Tuition to Private Schools for the Handicapped	$40,000

Meeting the needs and requirements of educationally handicapped pupils is statutorily mandated as an essential element of a thorough and efficient system of education. Because students may be enrolled in such programs at any time during the school year at tuition rates that are not only extremely high but cannot accurately be predicted, districts must provide for contingencies in this regard. Given the precarious state of this district's unappropriated free balance, there is very little margin for error. Consequently, the Commissioner directs that the $40,000 reduction in this account's sub-appropriation be restored.

Account	Reduction
11-000-230-600 Supplies and Materials	$ 4,000

The Board, while demonstrating the need for the items to be purchased from the $4,000 reduction in this account, has failed to meet its burden of demonstrating that it cannot accommodate its need through re-ordering priorities within the $10,847 remaining in this account. The $4,000 reduction is sustained.

11-000-260-100 Salaries - Custodians $21,000

Once again, while the Board has succeeded in demonstrating its prior expenditures in the sub-account for substitutes and overtime pay, it has failed to provide sufficient data to demonstrate why the approximately $875,000 in the total salary account is insufficient to accommodate the needs for substitutes and overtime. The reduction of $21,000 is sustained.

11-000-260-490 Purchased Property Services $12,000

The Board has failed to meet its burden of demonstrating that the services provided by the landscaper cannot be performed by its existing staff or that these services are essential for the provision of a thorough and efficient system of education. The $12,000 reduction imposed by the Borough is sustained.

11-000-260-620 Utilities $10,000

The Board has failed to meet its burden of demonstrating that a $10,000 reduction in the total area of Utilities would prevent it from providing a comfortable and secure physical environment with the $338,000 remaining in this account. The $10,000 reduction in this account is sustained.

Account	Reduction
11-000-290-290 Other Employee Benefits	$180,000

In reaching a conclusion relative to this account, the Commissioner notes that the increase projected to the Board in health benefits by Blue Cross/Blue Shield covered a range between 15% and 25%. While the Board argues from the perspective of budgeting for the maximum in that range, the Borough strikes a much more conservative estimate of 18%.

Notwithstanding whether the appropriate percentage of increase for which to budget, the Board correctly points out that the difference between an 18% increase and a 25% increase is $93,397.68, not the $180,000 by which the Borough reduced this account. (See calculations provided by the Board as Exhibit J in its Statement of Position.) Given the precariously low surplus available to the Board the Commissioner orders restoration of the $180,000 for health insurance to assure adequate monies should the costs be at the higher range of the percentage increase Blue Cross projected.

11-401-100-100 Salaries - Cocurricular 11-402-100-100 Salaries - Athletics	$20,865

The Commissioner directs the restoration of the $20,865 in salaries which represent the amounts negotiated between the Lodi Board of Education and the Lodi Education Association for the reasons found earlier in this decision.

SUMMARY

Accounts	Reduction	Sustained	Restored
11-110-100-101 to 11-000-222-100 Teachers Salaries	$365,724	$ 0	$365,724
11-120-100-101 Degree Changes & Sick Leave	30,000	0	30,000
11-190-100-610 General Supplies	5,000	5,000	0
11-213-100-101 11-230-100-101 Salaries/New Teachers	103,388	0	103,388
11-000-230-339 Other Purchased Services	5,000	5,000	0
11-000-260-420 Repair and Maintenance	55,000	15,000	40,000
11-000-230-340 Purchased Tech. Services	5,000	5,000	0
11-000-310-930 Food Services	15,000	0	15,000
11-402-100-930 Athletics Deficit	13,000	13,000	0
11-000-100-566 Tuition for Sch. for Handi.	40,000	0	40,000
11-000-230-600 Supplies and Material	4,000	4,000	0
11-000-260-100 Salaries/Custodians	21,000	21,000	0
11-000-260-490 Purchased Property & Servs.	12,000	12,000	0
11-000-260-620 Utilities	10,000	10,000	0
11-000-290-290 Other Employee Benefits	180,000	0	180,000
11-401-100-100 Salaries Extra	20,865	0	20,865
11-402-100-100 Curriculum and Athletics			
TOTALS	$884,977	$ 90,000	$794,977

In light of the foregoing the Commissioner directs that the Bergen County Board of Taxation strike an additional General Fund tax levy of $794,977 for the Board of Education of the Borough of Lodi to be used for school purposes during the 1993-94 school year so that the total General Fund tax levy for such purposes shall be $15,736,828 as shown below:

Amount certified by Borough	$14,941,851
Amount restored by Commissioner	794,977
Total General Fund tax levy	$15,736,828

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 13, 1993

DATE OF MAILING - OCTOBER 13, 1993

244-93

244-93

BOARD OF EDUCATION OF THE BOROUGH OF JAMESBURG, PETITIONER, V. MAYOR AND BOROUGH COUNCIL OF THE BOROUGH OF JAMESBURG, MIDDLESEX COUNTY, RESPONDENT.	COMMISSIONER OF EDUCATION DECISION

OCTOBER 15, 1993

BOARD OF EDUCATION OF THE BOROUGH OF JAMESBURG, PETITIONER, V. MAYOR AND BOROUGH COUNCIL OF THE BOROUGH OF JAMESBURG, MIDDLESEX COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

For Petitioner, Nathanya G. Simon, Esq. (Schwartz, Simon, Edelstein, Celso & Kessler)

For Respondent, Christopher D. Rafano, Esq. (Rafano and Wood)

The Board of Education of Jamesburg (Board) appeals to the Commissioner of Education from an action taken by the Mayor and Council of the Borough of Jamesburg (Council) pursuant to N.J.S.A. 18A:22-37 certifying to the Middlesex County Board of Taxation a lesser amount for General Fund costs for the 1993-94 school year than the amount proposed by the Board in its budget which was rejected by the voters.

At the annual school election held on April 20, 1993, the Board submitted to the electorate a proposal to raise $3,292,604 by local taxation for General Fund costs of the school district. After the voters' rejection of the proposal, the Board submitted its budget to Council for its determination of the amount necessary for the operation of a thorough and efficient school system in the

BOARD OF EDUCATION OF THE BOROUGH OF JAMESBURG,

PETITIONER,

V.

MAYOR AND BOROUGH COUNCIL OF THE BOROUGH OF JAMESBURG, MIDDLESEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of $231,509 made by governing body following voter rejection of proposed budget on April 20, 1993.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore $199,509 for a total General Fund tax levy of $3,260,604 for 1993-94 school purposes.

Borough of Jamesburg for the 1993-94 school year pursuant to the mandatory obligation imposed on Council by N.J.S.A. 18A:22-37.

After consultation with the Board, Council made its determination and adopted a resolution on May 11, 1993 certifying to the Middlesex County Board of Taxation an amount of $3,061,095 for General Fund costs. The amounts in dispute are summarized below:

Proposed Tax Levy Adopted by Board	Amount of Tax Levy Certified by Governing Body
$3,292,604	$3,061,095
Amount of Reduction by Governing Body	**Amount of Reduction in Dispute before Commissioner**
$231,509	$231,509

On July 6, 1993 Council filed its Answer. The Board filed its Position Statement on July 30, 1993 and a Final Summation on August 17, 1993. No further papers were filed by Council and the record was closed.

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East

Brunswick, 48 N.J. 94 (1966) and Board of Education of the Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

Mindful, then, of the balance to be applied in this standard of review, the Commissioner makes the following determination with respect to the reduction in the General Fund effectuated by the Council.

Council's resolution of May 11, 1993 set forth the following proposed line item reductions and the reasons for such reductions:

LINE ITEM REDUCTIONS

	Program Code	Function Code	Object Code	Reduction Amount
General Administration				
Other Purchased Prof. Services	000	230	339	$ 5,000

The Mayor and Borough Council has been informed that the Monroe Township Board of Education has publicly stated that regionalization is no longer under consideration.

Supplies and Materials	000	230	600	$ 1,500

The budget line item detail contains no specific item purchases or expense requests, or service required.

Undistributed Expends. - Business and Other Support Services				
Other Employee Benefits	000	290	290	$18,000

This reflects the savings of personnel eliminations and reductions, as computed, for the various positions detailed under the appropriate budget line item.

	Program Code	Function Code	Object Code	Reduction Amount
Purchased Prof. Services	000	290	330	$ 10,000

The Mayor and Borough Council has determined an excess amount of $10,000 budgeted for professional services in consideration of what appears to be required and in comparison of prior years.

Supplies and Materials	000	290	600	$ 2,450

The reduction eliminates the following specific Board of Education expenses as budgeted:

Board Members Travel	$ 450
Board Members Seminars, Lectures, etc.	900
Entertainment Fees of Other Boards	300
Travel and Subsistence Sec'y/Bookkeeper	800
	$ 2,450

Misc. Expenditures	000	290	890	$ 1,000

The reduction represents what the Mayor and Borough Council deems to be in excess or reasonable for certain board membership.

Instruction - Regular Programs

Regular Programs - Instr. Pre-School/Kind. - Salaries of Teacher	110	100	101	$35,000

The reduction is the elimination of a teaching position, thereby maintaining two teaching positions in the budget. This reduction requires two Kindergarten sections for the school year 1993/94, as compared to the original three as budgeted. The Kindergarten sections would be comprised of 15 students per class as opposed to the original 10 student/teacher ratio.

	Program Code	Function Code	Object Code	Reduction Amount
Grades 1-5 - Salaries of Teachers	120	100	101	$31,600

The reduction is the elimination of a Guidance Counselor position. The Guidance Counselor individual, as eliminated, is transferred to a gym teacher position. This allows for the reduction of one gym teacher.

Regular Programs - Undistrib.Instr. Oth. Sals. for Instr.	190	100	106	$14,400

The elimination of the proposed 1993/94 new positions, namely 3 half time aides in the JFK School, and the substitute positions for the aforementioned.

General Supplies	190	100	610	$ 9,150

The budget contains supply accounts for each individual school. This reduction eliminates the appropriation for "District wide supply account general supplies" in the amount of $9,150, as the Mayor and Borough Council maintain this to be duplication.

Textbooks	190	100	640	$ 5,500

This reduction postpones the acquisition of New District wide K-4 Health Program Textbooks for one year, and allows for the remaining items requested.

Other Objects	190	100	800	$10,000

The Mayor and Borough Council, due to the lack of adequate formal detail of this budget appropriation, have deemed it necessary to reduce such appropriation as the amount is considered in excess of what is required.

	Program Code	Function Code	Object Code	Reduction Amount
Undistrib. Expends. - Other Support Services - Students - Regular Supplies and Materials	000	218	600	$ 904

The Guidance Office supplies and materials as budgeted are no longer required pursuant to actions previously taken regarding the position.

Other Objects	000	218	800	$ 2,109

The Mayor and Borough Council eliminated or reduced this entire budget line item because the detail supporting documentation contained no specific item purchases, expense requests or services required.

Undistrib. Expends. - Other Support Services - Students - Special Other Objects	000	219	800	$ 3,923

The Mayor and Borough Council eliminated or reduced this entire budget line item because the detail supporting documentation contained no specific item purchases, expense requests or services required.

Undistrib. Expends. - Educa. Media Services/School Library Other Objects	000	222	800	$ 588

The Mayor and Borough Council eliminated or reduced this entire budget line item because the detail supporting documentation contained no specific item purchases, expense requests or services required.

	Program Code	Function Code	Object Code	Reduction Amount
Attendance and Health				
Undistrib. Expends. - Health Services Other Objects	000	213	800	$ 1,500

The Mayor and Borough Council eliminated or reduced this entire budget line item because the detail supporting documentation contained no specific item purchases, expense requests or services required.

Undistrib. Expends. - Operation and Maintenance of Plant Services Salaries	000	260	100	$35,650

The reduction eliminates two budgeted positions, including a new 6 hour per day custodian at JFK School.

General Supplies	000	260	610	$ 5,000

The Mayor and Borough Council reduced this budget line item by $5,000 determining the appropriation to be excessive for such items listed.

Cleaning, Repair and Maint. Serv.	000	260	420	$18,000

The Mayor and Borough Council eliminate, reduce or delay the following items inasmuch as no capital project budget plan was submitted.

Eliminate Venetian Blind/Shade Replacement (All Purpose Room and Relocatables)	$ 2,000
Reduce Anticipated Glass Repairs	1,500
Eliminate Repairs of Blacktop of JFK	8,000
Eliminate Carpeting of JFK	1,500
Other Managed Savings	5,000
	$18,000

	Program Code	Function Code	Object Code	Reduction Amount
Food Services				
Undistrib. Expends. - Food Services Salaries	000	310	100	$ 6,935

The number of positions, specifically, Lunch Room Aides/ Monitors are reduced by five, thereby maintaining the prior year level.

Student Body Activ. and Spec. Proj.

School Sponsored Cocurricular Activ. Salaries	401	100	100	$ 2,500

This appropriation reduction basically limits the amount that the Mayor and Borough Council believes is necessary and required, and not duplicated elsewhere.

Capital Outlay (1200 Series) and Other Capital Items (Fund 12)				
Equipment				
Regular Programs - Instr.				
Grades 1-5	120	100	730	$ 2,000
Grades 6-8	130	100	730	1,000
Undistrib. Expend. - School Admin.	000	240	730	300
Undistrib. Expend. - Operation and Maintenance of Plant Services	000	260	730	7,500
				$ 10,800

The above listed Capital Outlay appropriations have been cut in the amounts as shown above. The Mayor and Borough Council have reviewed the specific budget requests and have reduced the appropriations by eliminating, delaying or reducing certain acquisitions for the school year 1993-94.

TOTAL $231,509

Regarding these reductions, the Board argues that the Resolution by Council reducing the school district budget by $231,509.00 is arbitrary, unreasonable and capricious, without consideration of the needs of the school system, based upon inaccurate interpretation of data and improper standards and fails to provide sufficient monies to the school district to meet the constitutional and statutory mandate to provide a thorough and efficient system of education to the students in Jamesburg for the 1993-94 school year.

Notwithstanding the Board's allegations above, Council's reasons and the Board's responses are set forth below in regard to the reduction in each line item.

GENERAL CURRENT EXPENSE
(FUND II)

1. Administration, Telephone and Telegraph and Fixed Charges. Undistributed Expenditures - Support Services, General Administration, Other Purchased Professional Services.

Program Code	Function Code	Object Code	Reduction Amount
000	230	339	$ 5,000

Council states that it has been informed that the Monroe Township Board of Education has publicly stated that regionalization (evidently with Jamesburg) is no longer under consideration. The Board does not deny that the regionalization study has been rejected at this time; however, it asserts that it had determined to commence planning for a building program at the John F. Kennedy School if the regionalization study was abandoned. This planning has become critical because of an increase in enrollment over the past three years with the resultant overcrowding in the school district. Additionally, the relocatable buildings utilized by the district are

approximately 30 years old and in need of replacement. The funds designated in this line item would be used to employ an architect to commence preliminary planning for a building program.

Based on the above, the Board has adequately shown that it must begin planning to relieve the overcrowding in the district. However, the Commissioner is not convinced that the full budgeted amount is necessary for the preliminary planning being considered. Accordingly, a $2,500 reduction will be allowed and $2,500 will be restored to the budget.

	Program Code	Function Code	Object Code	Reduction Amount
2. Supplies and Materials				
	000	230	600	$ 1,500

Council states that this line item contains no specific item purchases, expense requests, or services required. The Board did not respond to Council's reasons; rather, it argued for restoration of monies for the superintendent's membership in professional associations and set forth requirements for dues and attendance fees for various workshops which are part of his contractual obligation to the Board.

Based on the above, Council's reasons are sustained and $1,500 will be reduced from the budget.

3. Undistributed Expenditures - Business and Other Support Services				
	000	290	290	$18,000

Council gave its reason as follows: "This reflects the savings of personnel eliminations and reductions, as computed, for the various positions detailed under the appropriate budget line item." The Board's response identified the line items referred to by Council, even though the governing body failed to show where the

specific cuts were made. The cuts represent the elimination of health benefits for the employees Council eliminated later in this budget. Further, the Board asserts, without contradiction, that if the personnel eliminations were made, unemployment insurance benefits would accrue to at least three of these individuals in the next budget year, resulting in a financial liability to the Board of approximately $19,500. The Board concludes that the elimination of these positions would drastically affect the education provided to the children in the district.

Although the Board's reasoning is sound, a decision on restoration of this account must await the examination of items 7, 8, 9, and 18 below. It is here that Council recommends the elimination of the several positions mentioned above.

	Program Code	Function Code	Object Code	Reduction Amount
4. Purchased Professional Services				
	000	290	330	$10,000

The governing body suggests that an excess amount of $10,000 has been budgeted in this account in comparison to the amounts budgeted in prior years. The Board argues that the amount is necessary for continuing litigation, including lawyers and negotiators' fees. It justifies the increase in this line item stating that transfers into this account have been necessary in prior years because appropriations were insufficient.

Although some increase has been adequately justified, a $5,000 increase should be sufficient. Therefore, $5,000 will be reduced and $5,000 is restored to the budget.

5. Undistributed Expenditures -- Business and Other Support Services: Board Members Travel; Board Members Lectures, etc.; Entertainment Fees of Other Boards; Travel and Subsistence, Secretary/Bookkeeper.

Program Code	Function Code	Object Code	Reduction Amount
000	290	600	$2,450

Council eliminated $2,450 from the above-mentioned line items finding the amounts excessive or unreasonable for certain Board membership. However the Board asserts that the sum represents Board members' business expenses, contractual obligations to the Board Secretary, and other training expenses for the Board Secretary related to the GAAP system. Expenditures for travel and education of Board members relating to Board business are reimbursable. A nominal $300 is utilized for food service costs associated with meetings held with Monroe Township or other communities, when Jamesburg is the host district. The specific reduction of $800 for travel and subsistence for the Board Secretary contains $500 which is a contractual obligation to the Board Secretary.

The Commissioner has held in earlier decisions that reasonable business expenses are necessary when related to individual and group betterment. These expenses appear to be reasonable and necessary for the delivery of thorough and efficient educational services in the district. Accordingly, the $2,450 reduction will be restored to the budget.

Program Code	Function Code	Object Code	Reduction Amount
6. Miscellaneous Expenses			
000	290	890	$1,000

Council argues again that the amount reduced represents what it deems to be in excess for certain Board membership. The

Board asserts that this $1,000 reduction represents money necessary to cover dues for four organizations in which the Board or its Business Manager hold memberships. In one case the membership is statutorily mandated, and in another, the dues represent a contractual obligation to the Board Secretary.

The Commissioner does not find the amount budgeted for this account to be unreasonable. The conduct of ordinary business requires these necessary expenses so that the Board officials may participate in county-wide and state organizations. Therefore, the $1,000 reduction will be restored to the budget.

	Program Code	Function Code	Object Code	Reduction Amount
7. Preschool/Kindergarten Salaries of Teachers.				
	110	100	101	$35,000
8. Grades 1-5 - Salaries of Teachers.				
	120	100	101	$31,600

Items 7 and 8 will be considered together because they both represent recommendations by Council to eliminate positions that have been established by the Board.

Regarding item 7, Council states that its reduction requires the elimination of a teaching position. This reduction will allow two kindergarten sections for the school year 1993-94, rather than the three budgeted by the Board. Council also discusses a student/teacher ratio which it believes is not justifiable. Item 8 calls for the elimination of a guidance counselor position.

Both of these recommendations attack the organizational structure of the educational staff in the district. While Council certainly has the right to suggest changes in the educational structure, the Board alone has the responsibility to staff its

schools in the manner it believes will provide the thorough and efficient education it must deliver. The Board has established an all day kindergarten program. A reduction of a teacher here would terminate this program and force the Board to go back to the half-day programs previously offered. The reduction of a guidance counselor as recommended in item 8 would also terminate a program the Board deems necessary for the delivery of essential pupil services. The Board points out that this position will also address other educational responsibilities including development of career education curriculum, coordination of district testing, development of discipline process and handling parent/teacher conferences related to children's discipline. These are worthy educational goals which should not be interrupted. Council's reasons indicate only the saving of money without regard to the effect its reductions would have on the delivery of more efficient services to the district's children. On the other hand, the Board has adequately defended its need for the positions it has established; consequently, the $35,000 and $31,600 salaries will be restored to the budget.

Program Code	Function Code	Object Code	Reduction Amount
9. Regular Education Grades 1-5; Undistributed Instruction; Other Salaries for Instruction.			
190	100	106	$14,400

In this account, Council recommends the elimination of "3 half time aides in the JFK School, and the substitute positions for the aforementioned." The Board argues that the elimination of these positions will have a negative impact on a thorough and efficient education in the district. Enrollment has increased in grades 2 and

4 so that the district has classes with no less than 27 pupils. To reduce pupil/teacher ratio without hiring additional teachers, the Board determined to hire classroom aides. In this instance the Board has made a wise and conservative decision in its determination to lessen the pupil/teacher ratio without hiring additional staff, thus saving money while achieving its objective. Therefore, the $14,400 reduction will be restored to the budget.

	Program Code	Function Code	Object Code	Reduction Amount
10.	General Supplies			
	190	100	610	$ 9,150

Council contends that the Board's budget contains supply accounts for each individual school. Its reduction eliminates the appropriation for "District wide supply account general supplies" in the amount of $9,150. Council maintains that this is a duplication. The Board asserts that this account is necessary to provide sufficient funds for consumable teaching supplies. Included are such items as computer software, duplicating paper for the instructional programs, workbooks, supplies for a new reading program and consumable general supplies (paper, pencils, crayons, etc.). In the Commissioner's judgment, such supplies must be made available to ensure proper programming for the district's pupils. The Board has adequately shown a need for these supplies; however, there is no showing that they are not needed because of an alleged duplication. Accordingly, the $9,150 reduction will be restored.

11.	Textbooks			
	190	100	640	$ 5,500

The reduction in this account postpones the acquisition of new district-wide K-4 health program textbooks for one year. The

Board maintains that these funds have been deferred for the past few years. The district's health curriculum has been updated to meet state mandates, which require the inclusion of information on sexually transmitted diseases and anabolic steroids. According to the Board, these required subjects, and other important topics, are not included in the current textbooks. Based on this rationale, the $5,500 reduction will be restored to the budget.

	Program Code	Function Code	Object Code	Reduction Amount
12. Other Expenses	190	100	800	$10,000

Because of the lack of formal detail of this budget item appropriation, Council deemed it excessive and reduced it by $10,000. According to the Board, the account includes a number of expenses for items such as graduation expenses, pupil awards, and projected raises for teachers. In the Commissioner's judgment, Council is correct. The Board's rationale does not contain the specific information that would show that it is a necessary expenditure required for a thorough and efficient education. Accordingly, the $10,000 reduction will stand.

13. Undistributed Expenditures; Other Support Services; Students - Regular Instruction - Supplies and Materials	000	218	600	$ 904
14. Undistributed Expenditures; Other Support Services; Students - Other Instructional Staff	000	218	800	$ 2,109

Items 13 and 14 will be considered together.

Council reduced item 13 which contains guidance office supplies, and item 14 because it had earlier eliminated the position

of guidance counselor. The record above shows that the guidance counselor position was restored; therefore, there is the obvious need for guidance office supplies and the projected salary increase for the guidance counselor. Accordingly, the amounts of $904 and $2,109 will be restored to the budget.

	Program Code	Function Code	Object Code	Reduction Amount
15. Undistributed Expenditures; Other Support Services; Special; Other Objects				
	000	219	800	$ 3,923
16. Undistributed Expenditures; Educational Media Services/School Library - Other Objects				
	000	222	800	$ 588
17. Undistributed Expenditures; Health Services; Other Objects				
	000	213	800	$ 1,500

Items 15, 16, and 17 will be considered together because each concerns the reduction of monies by Council for projected salary increases expected by the Board in its on-going contract negotiations with its teachers union. Item 15 for special education teachers was reduced $3,923. Item 16 for the media center specialist was reduced $588. Item 17 for two school nurses was reduced $1,500. These sums are reasonable estimates by the Board, which obviously expects the teachers union to negotiate a raise for its members. The Board asserts, without contradiction, that it is negotiating in good faith. When the negotiations are completed, the new agreement must be funded; therefore, the amounts proposed by the Board are reasonable and necessary and $3,923, $588 and $1,500 will be restored to the budget.

Program Code	Function Code	Object Code	Reduction Amount
18. Operation: Net of Telephone and Telegraph, Maintenance - Net of Equipment, Fixed Charges, and Transportation; Land and Buildings Rental. Undistributed Expenditures - Operation and Maintenance of Plant Services Salaries			
000	260	100	$35,650

Council proposes the elimination of two custodian positions. One is a new six hour per day position and the other is the Head Custodian/Maintenance Worker position. No reason was given. The Board asserts that it has carefully considered the complaints of parents and teachers for over a year concerning the maintenance and cleanliness of the school buildings. It claims that the Head Custodian/Maintenance Worker is the only maintenance individual employed by the school district. This individual is the only district employee who holds a Black Seal License and is, therefore, able to operate the boilers for the heating of each of the schools. Without this employee, school could not open in the winter. If the Head Custodian/Maintenance Worker position were eliminated, the cost to the District to employ outside contractors for daily maintenance responsibilities would exceed the salary of this one individual.

Based on the rationale given by the Board, I am convinced that the two custodial positions are necessary for the maintenance and cleanliness of the district's school buildings; therefore, the $35,650 reduction will be restored to the budget.

Remaining is the disposition of item 3 which was held in abeyance until items 7, 8, 9 and 18 were decided. Item 3 budgeted $18,000 for health insurance for the employees eliminated by Council in items 7, 8, 9, and 18. Since all of these employee positions

have been restored, there is need to restore the monies budgeted for health insurance for those individuals. Accordingly, $18,000 is restored to the budget for item 3.

Program Code	Function Code	Object Code	Reduction Amount
19. Undistributed Expenditures - General Supplies			
000	260	610	$5,000

Council reduced this line item by $5,000 determining that the appropriation is excessive. The Board argues that the funds are necessary for cleaning and custodial supplies and that any reduction will have a significant impact on the cleanliness of the facilities. Finding no evidence that the budgeted amount is excessive, the $5,000 reduction will be restored to the budget.

Program Code	Function Code	Object Code	Reduction Amount
20. Undistributed Expenditures - Cleaning, Repair, and Maintenance Services			
000	260	420	$18,000

Council recommends the following reductions in this line item:

Eliminate venetian blind/shade replacement (All purpose room and relocatables)	$ 2,000
Reduce anticipated glass repairs	1,500
Eliminate repairs to blacktop at JFK	8,000
Eliminate carpeting of JFK	1,500
Other managed savings	5,000
Total	$18,000

The Board asserts that this money is necessary for essential services; however, it appears that the specific items set forth by Council may be deferred without impeding the Board's ability to provide a thorough and efficient education to its pupils. The item labeled "Other managed savings" lacks specificity; therefore, $5,000 will be restored to the budget. A reduction of $13,000 will be sustained.

21. Undistributed Expenditures - Food Service Salaries

000	310	100	$ 6,935

Council reasons that the "Lunch Room Aides/Monitors are reduced by five, thereby maintaining the prior year level." The Board states that the prior budget year did not provide for Breakfast Aides who are necessary for implementation of the district's new Breakfast Program. Additional expenditures are anticipated for Lunchroom Aides and Monitors to provide for supervision of pupils during lunch and recess periods.

Based on this rationale and finding no substantiation for the cut by Council, the $6,935 reduction will be restored to the budget.

Program Code	Function Code	Object Code	Reduction Amount

22. School Sponsored Co-Curricular Activities.

401	100	100	$ 2,500

Council states that this appropriation reduction limits the amount that it believes is necessary and required, and not duplicated elsewhere. The Board contends that the funds are necessary as they support summer curriculum writing and revision. The district revises curriculum each year in order to provide necessary instructional and curricular improvement.

The Commissioner concurs with the Board's statement that a comprehensive and updated curriculum is essential to a thorough and efficient system of schools in the district. Consequently, the $2,500 reduction will be restored to the budget.

CAPITAL OUTLAY
(FUND 12)

	Program Code	Function Code	Object Code	Reduction Amount
23. Equipment; Regular Programs - Instruction; Grades 1-5	120	100	730	$2,000

	Program Code	Function Code	Object Code	Reduction Amount
24. Equipment; Regular Programs - Instruction; Grades 6-8	130	100	730	$1,000
25. Equipment; Undistributed Expenditures; School Administration	000	240	730	$ 300
26. Equipment; Undistributed Expenditures; Operation and Maintenance of Plant Services	000	260	730	$7,500

The line items enumerated in 23, 24, 25, and 26 will be considered together as they were by Council when it made its reductions as follows:

Equipment	
Regular Programs - Instruction	
Grades 1-5	$ 2,000
Grades 6-8	1,000
Undistributed Expenditures - School Administration	300
Undistributed Expenditures - Operation and Maintenance of Plant Services	7,500
Total	$10,800

Council states that it has reviewed the specific budget requests and reduced the appropriations by eliminating, delaying or reducing certain acquisitions for the school year 1993-94.

Regarding item 23, the Board states that a portion of these funds will be utilized to purchase equipment such as desks and chairs, library tables and chairs, and reading tables which will be used by pupils in grades 1-5. The purchase of this equipment has

been necessitated by the enrollment increases during the last two years. The only money received in this area has been provided by the PTA through a fundraising project.

Regarding item 24, similar expenditures will be made for pupils in grades 6-8. Additionally, computer equipment must be purchased to replace the computers in the middle school computer lab which are obsolete and barely operational.

The $300 allocated for item 25 is for the replacement of office chairs. The old furniture must be replaced as it is damaged and barely usable.

In item 26, Council cut $7,500. This appropriation covers the replacement of lunchroom tables at the elementary school. The current tables are damaged and causing splinters. A three-year plan for replacement commenced last year. Additionally, the funds are necessary to purchase a high speed waxer/buffer and a steam rug cleaner to assist the custodial and maintenance staff in their efforts to clean and maintain the buildings. The current buffing machines are barely operational.

Upon review of the Board's rationale in the four items reviewed above, it is concluded that the items discussed are necessary for the safe and efficient operation of the district's schools. There are no supporting reasons for the reductions made by Council; consequently, the $10,800 reduction will be restored to the budget.

SUMMARY

Object Code	Item	Amount Restored	Amount Not Restored
339	Admin. Other Purch. Prof. Ser.	$ 2,500	$ 2,500
600	Supplies and Materials	-0-	1,500
290	Business & Other Support Ser.	18,000	-0-

Object Code	Item	Amount Restored	Amount Not Restored
330	Purchased Prof. Services	5,000	5,000
600	Business and Other Support Ser.	2,450	-0-
890	Misc. Expense	1,000	-0-
101	Salaries, Teachers	35,000	-0-
101	Salaries, Teachers	31,600	-0-
106	Salaries, Instruction	14,400	-0-
610	General Supplies	9,150	-0-
640	Textbooks	5,500	-0-
800	Other Expenses	-0-	10,000
600	Supplies and Materials	904	-0-
800	Other Objects	2,109	-0-
800	Other Objects	3,923	-0-
800	Other Objects	588	-0-
800	Other Objects	1,500	-0-
100	Salaries Maintenance	35,650	-0-
610	Salaries Maintenance	5,000	-0-
420	Maintenance Services	5,000	13,000
100	Food Service Salaries	6,935	-0-
100	Co-Curr. Activity	2,500	-0-
730	Equipment Grades 1-5	2,000	-0-
730	Equipment Grades 6-8	1,000	-0-
730	Equipment School Administration	300	-0-
730	Equipment Maint. Plant Ser.	7,500	-0-
	TOTAL	$199,509	$32,000

Based on the above, the reductions sustained total $32,000, and $199,509 has been restored to the budget.

Accordingly, the Middlesex County Board of Taxation is directed to add to the local tax levy for the Borough of Jamesburg $199,509 for the General Fund of the school district for the 1993-94 school year as set forth below:

General Fund Tax Levy Certified by Council	$3,061,095
General Funds Restored by the Commissioner	199,509
Total Tax Levy after Restoration	$3,260,604

IT IS SO ORDERED.

OCTOBER 15, 1993

COMMISSIONER OF EDUCATION

DATE OF MAILING - OCTOBER 15, 1993

245-93

245-93

BOARD OF EDUCATION OF THE BOROUGH OF RIVERDALE, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MAYOR AND COUNCIL OF THE BOROUGH OF RIVERDALE, MORRIS COUNTY, RESPONDENT.	:	DECISION

OCTOBER 15, 1993

BOARD OF EDUCATION OF THE BOROUGH OF RIVERDALE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MAYOR AND COUNCIL OF THE BOROUGH OF RIVERDALE, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of $76,305 made by governing body following voter rejection of proposed budget on April 20, 1993.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore $51,930 for a total General Fund tax levy of $2,509,588 for 1993-94 school purposes.

BOARD OF EDUCATION OF THE BOROUGH OF RIVERDALE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MAYOR AND COUNCIL OF THE BOROUGH OF RIVERDALE, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

Robert H. Greenwood, Esq., for Petitioner

Richard Clemack, Esq. (Angelo & Clemack), for Respondent

This matter was opened before the Commissioner of Education on June 14, 1993 by way of the filing of a Petition of Appeal by the Board of Education of the Borough of Riverdale (Board), appealing the reduction in the 1993-94 budget imposed by the Mayor and Council of the Borough of Riverdale (Council) after the budget was defeated by the voters of the district in the annual school election held on April 20, 1993. Upon such defeat, the Board met and conferred with the Mayor and Council as required by N.J.S.A. 18A:22-37 whereupon the Council adopted a resolution on May 12, 1993 imposing a $40,505 reduction in current expense items and $35,800 in capital outlay resulting in a total General Fund tax levy reduction of $76,305. The total proposed tax levy and certified tax levy as well as the amounts in dispute are set forth below:

Proposed tax levy adopted by the Riverdale Board of Education:		Amount of tax levy certified by governing body:	
Current expense:	$2,424,463	Current expense:	$2,383,958
Capital outlay:	109,500	Capital outlay:	73,700
Total General Fund Tax Levy	$2,533,963	Total General Fund Tax Levy Certified	$2,457,658

Amount of reduction in the budget by governing body:

Current expense:	$40,505
Capital outlay:	35,800
Total General Fund Tax Levy Reduction	$76,305

Amount of reduction in dispute before the Commissioner:

Current expense:	$40,505
Capital outlay:	35,800
Total General Fund Tax Levy in Dispute	$76,305

At the time of its resolution setting forth the above cited $2,457,658 General Fund tax levy which included the $76,305 reduction, the Council identified the following accounts and the amount of reductions in each account:

GAAP Acct. #		Amount
11-190-100-580	Travel Expense-Regular Programs (conventions)	$ 550.00
11-401-100-600	Co-curricular Activities - Supplies & Materials	400.00
11-402-100-610	Athletics & Supplies	450.00
11-000-100-561	Contingency - Tuition Regular	10,290.00
11-000-100-562	1 Special Ed. Contingency (Pompton Lakes)	2,940.00
11-000-100-562	1 Special Ed. Contingency	14,000.00
11-000-222-600	Materials, Supplies & Equipment	1,625.00
11-000-230-590-01	Board Expenses-Support Services	3,850.00
11-000-230-590-02	General Administration Exp. (convent.)	1,100.00
11-000-230-590-06	Superintendents Office (convention)	1,200.00
11-000-240-590	Sch. Admin.-Support Servs. (misc.)	2,100.00
11-000-270-511	Contingency	2,000.00
TOTAL CURRENT EXPENSES ----------		$40,505.00
12-000-230-730	Capital Outlay-General Admin. Equip.	$1,000.00
12-000-400-450	Capital Outlay-Remodeling	28,100.00
12-000-400-710	Capital Outlay-Sites & Site Additions	6,700.00
TOTAL CAPITAL OUTLAY ----------		$35,800.00
GRAND TOTAL OF ALL EXPENSE CUTS ----------		$76,305.00

It is to be noted that the above-cited resolution contained no rationale for the reductions imposed. On June 28, 1993 the Commissioner received the Council's Answer to the Petition of Appeal which set forth the following rationale for the reductions imposed in the Council's adopted certification resolution of May 12, 1993:

LINE ITEMS REDUCED; SUPPORTIVE REASONS

1. 11-190-100-[580]. Travel expense-Regular Programs (Convention) $2,100 reduce by [$550]. Costs of workshops should be borne by taxpayers, but not hotel rooms, food and travel. Personal costs should be borne by attendees.

2. 11-401-100-600. Co-curricular activities - Supplies and Materials. $825 reduced by $400. Deleted costs of shirts for pupils participating in Olympics Day. Shirts not necessary.

3. 11-402-100-610. Athletics and Supplies. $1,450 reduced by $450. Delete provision for hats for 28 pupils. Hats not necessary.

4. 11-000-100-561. Contingency-Tuition Regular $450,625 reduce by $10,290. Eliminate contingency for students. New students and departing students balance out.

[11-000-100-562. 1 Special Ed. Contingency (Pompton Lakes) reduced by $2,940.]

5. 11-000-100-562. Tuition Special Ed. (Pompton Lakes) 117,816 reduced by $14,000. Cut one contingency student.

6. 11-000-222-600. Education Media Service. $5,725 reduce by 1,625. Need only 1/2 of AV this year.

7. 11-[000]-230-590-01. Board Expenses. Supp. Services. $5,000 reduced by $3,850. Cut hotel, food and travel expenses. Personal costs should be borne by attendees.

8. 11-[000]-230-590-02. General Administration Expenses. $1,800 reduce by $1,100. Cut hotel, food and travel. Personal costs should be borne by attendees.

9. 11-000-230-590-06. Superintendents Office Misc. Expenses. $7,406 by $1,200. Cut hotel, food and travel. Personal costs should be borne by attendees.

10. 11-000-240-590. Support Services School Administration Misc. $3,000 reduce by [$2,100]. Cut dinner for graduates and caps and gowns.

11. 11-000-270-511. Student Trans. $108,233 reduced by $2,000. Contingency for ill student never used.

12-000-230-730. Capital Outlay - General Admin. Equipment. $2,500 reduce by $1,000. For Fax machine not needed.

12-000-400-450. Capital Outlay - Remodeling. $50,000 reduce by $28,100. Board received bid of $21,900 to do job.

12-000-400-710. Capital Outlay - Site and Site Addition. $50,000 reduce by $6,700. Bid of $43,400 already received.

On July 19, 1993 the Board filed its Statement of Position and the Borough filed its Statement of Position on July 27, 1993. The Board filed a rebuttal on August 3, 1993. On August 4, 1993 the Board submitted a Motion and Brief in Support of Request for Summary Judgment which was not considered because there exists no provision for same in the regulations regarding budget appeals. On August 18, 1993, the Board resubmitted the same brief as a final summation pursuant to N.J.A.C. 6:24-7.8, which has been reviewed and considered in this case. The record was closed on August 18, 1993.

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

BOARD'S POSITION

Initially, the Board argues that the Council in failing to provide reasons for its reductions at the time the reductions were made acted in an arbitrary and capricious manner and therefore the amounts by which the various accounts cited above have been reduced should be restored. In support of its argument, the Board cites East Brunswick, supra, for the proposition that reasons must be given for all reductions imposed and further cites Deptford, supra,

for the proposition that such reasons must accompany the reductions in order to assure that the municipality has considered the educational factors implicit in such reductions. Further, the Board points out that in Deptford the Supreme Court concluded that "***the Commissioner*** is entitled to invoke a heavy presumption against the educational validity of the proposed budget cuts***" (at 320) if the reasons for such cuts are not provided at the time the reductions are made and the greater the length of the delay, the stronger the presumption of lack of validity of such cuts.

The Board argues that the reasons supplied by the Council at the time of the filing of its Answer are not adequate reasons and it further urges the Commissioner to apply the heavier burden of proof mandated by Deptford, supra, in such cases where the filing of reasons are late.

Finally, the Board points out that its projected surplus at the end of the 1992-93 school of $40,000 is inadequate to meet contingencies which may occur during the 1993-94 school year which is precisely the area of the budget which the Borough has seen fit to reduce.

The Board's item-by-item justification for restoration is set forth below:

Account		Reduction
11-000-100-562	Tuition Special Education	$14,000
11-000-100-562		2,940

There are two separate amounts which were originally set for contingency purposes. One contingency amount was $28,000 for purposes of providing tuition for two handicapped students who might enter the district by the start of the 1993-94 school year from

which the Council cut $14,000. The other contingency amount consisted of $2,940 set aside for the possible necessity of classifying a Riverdale student at Pompton Lakes High School who was not classified as handicapped at the time of entry into the receiving district.

It is the Board's contention that the two special education students no longer remain a contingency but have actually enrolled in the district and must be provided for from the funds set aside for such purpose.

The Board points out that the $2,940 set aside for one contingency special education student entering or presently enrolled at Pompton Lakes High School is still a contingency amount but represents a small and reasonable amount to be set aside for that purpose.

Account		Reduction
11-000-100-561	Tuition Regular	$10,290

The amount reduced in this account represents tuition set aside for 3.5 students not enrolled at the time of budget preparation but who might be enrolled at the opening of school and need to have tuition of $2,940 per student to Pompton Lakes. It is the Board's contention that three such students have in fact enrolled and that the remaining amount is necessary to guard against the possibility of a student enrolling after the start of the school year. In fact, the Board points out, should such a student be a senior, the tuition rate at Kinnelon High School where Riverdale seniors still attend would be $11,000.

Account		Reduction
11-000-270-511	Student Transportation Services	$ 2,000

This money is for unexpected transportation expenses such as the need to temporarily transport an injured student or students who cannot attend school without such services. The Board Secretary/Business Administrator certifies that in 1990-91 $838 was spent for such services for two different students on crutches while in 1991-92 $4,785 was expended for a single student in a wheelchair and crutches. She further certified the 1992-93 costs for such services were $3,878.

Account	Reduction
11-190-100-580	$ 550
11-000-230-590-01	3,850
11-000-230-590-02	1,100
11-000-230-590-06	1,200
Total	$6,700

All of the reductions in the above-cited accounts represent monies budgeted for attendance at conferences, conventions and workshops for Board members and professional personnel. The Board argues that it is essential that both Board members and administrators keep abreast of the latest developments within the areas of their responsibilities.

The Board points out that expenses for food, travel and hotel for such attendance on the part of administrators is a contractual benefit which would have to be met by taking money from other accounts for such purposes. As for Board member expenses for such matters, the Board cites a November 17, 1983 decision of the Commissioner in support of its position, Barnegat Township Board of Education v. Township of Barnegat. In that decision both the Administrative Law Judge (ALJ) and the Commissioner agreed as to the importance of restoring such funds although in the final analysis in the case the amounts were directed to be taken out of the Board's extensive surplus.

Account		Reduction
11-000-240-590	School Admin./Support Services	$2,100

The monies eliminated in this account are for caps and gowns for students ($600) and an awards dinner ($1,500). The Board argues that caps and gowns have been a traditional part of graduation exercises and to have parents pay for them would result in some being able to do so and some being unable to do so.

It further pointed out that having parents pay for themselves at the awards dinner would only save $500 to $750.

Account		Reduction
11-401-100-600	Student Body Co-Curricular Activit.	$400

The amount cut here represents shirts for pupils participating in Olympics Day. The Board argues for its retention because of the self-esteem and school pride engendered by this small expenditure.

Account		Reduction
11-402-100-610	Student Body Athletic Supplies	$450

The amount reduced in this account represents expenditures for caps worn by the boys and girls softball teams. The Board contends that the hats are a necessary and sanitary protection. It further argues that it had promised to maintain the same level of amenities that seventh and eighth graders enjoyed when they attended Kinnelon Public Schools on a sending-receiving relationship.

Account		Reduction
11-000-222-600	Educational Media Services	$1,625

The reduction in this account represents 1/2 of the amount budgeted for new AV materials and computer software. The Board

asserts that such a reduction makes little sense since the district is purchasing 19 new computers for its computer classes.

Account		Reduction
12-000-230-730	Capital Outlay - Gen. Admin. Equipment	$1,000

The amount reduced in this account represents $1,000 for a new fax machine. The Board's Business Administrator in her certification points out that material from the current fax machine comes out on curled, thin fax paper and must be recopied thus wasting time of employees and incurring additional expense in supplies. She contends that the load of faxes received is heavy and that a newer, more efficient machine would save both time and money.

Account		Reduction
12-000-400-450	Capital Outlay - Remodeling	$28,100

The Board originally allocated $50,000 for the removal of underground storage tanks along with repaving of the affected area. While the Board acknowledges that bids came in at a lesser cost than anticipated, the Council's determination to cut the account to the amount of the lowest bid, argues the Board, ignores attendant costs and the possible need to clean up any contamination discovered. The Board does acknowledge the possibility of a reduction of $2,321. (See Certification of Joan Marotta, Exhibit #1, at p. 7, of Board's Position Statement.)

Account		Reduction
12-000-400-710	Capital Outlay - Sites and Additions	$6,700

The Board budgeted $50,000 to convert from oil to gas heat. Since the bids came in lower than anticipated, the Board agrees that, except for $1,000 of expenses overlooked by the Council this account can be reduced by $5,700.

In summation, the Board argues that the Council acted arbitrarily in reducing the budget by deliberately targeting contingency funds based upon what it believed other districts were doing and because it contended that the Council would bail the Board out if the contingencies actually arose and by ignoring the facts presented to it that many of the contingencies were actualities by the time the budget was defeated.

By taking the approach that it did, the Board contends the Council acted from a tax cutting perspective rather than an educational one as required by East Brunswick, supra, and Deptford, supra.

COUNCIL'S POSITION

Account		Reduction
12-000-400-450	Capital Outlay - Remodeling	$28,100

The Council argues that the actual amount of the bid for removal of the oil tanks was $17,679, even less than the Council had allotted ($21,900). The Council argues that it had been told by the contractor that no contamination had been found, therefore it contends that $31,311 should be cut.

Account		Reduction
12-000-400-710	Capital Outlay - Sites and Additions	$6,700

In this account the Council agrees to accept the Board's acknowledgment that a $5,700 cut is sufficient.

Account		Reduction
11-402-100-610	Athletic Supplies	$450

The Council contends that the Little League buys hats at $5 per hat rather than the $16 per hat estimated by the Board, thus justifying its $450 reduction.

Account		Reduction
11-401-100-600	Co-Curricular Supplies	$400

The Council rebuts the Board's position by contending that good teaching, not T-shirts, produces self-esteem.

Account		Reduction
11-190-100-580	Travel Expenses	$ 550
11-000-230-590-01	Board Expenses	3,850
11-000-230-590-02	Admin. Expenses	1,100
11-000-230-590-06	Super. Off. Expenses	1,200

The Council contends that Board members go to Atlantic City taking their wives which in the Council's view constitutes a vacation. It argues that professionals should pay for their own professional training.

Account	Reduction
11-000-100-562	$14,000
	2,940

The Council contends the contingency no longer existed since three pre-school handicapped had already entered the school system.

Account		Reduction
11-000-100-561	Tuition Regular Contingency	$10,290

The Council contends that there is no new student entering the system who would go to Kinnelon.

Account		Reduction
11-000-222-600	Educational Media Services	$1,625

The Council does not quarrel with the purchase of 19 new computers but contends that existing soft-ware is sufficient.

Account		Reduction
12-000-230-730	Capital Outlay - Gen. Admin. Equipment	$1,000

The Council argues that most fax machines do not provide flat copies and the Board's interest is only in getting a "fancier" machine.

The Council summarizes its position as follows:

> Our cuts did not go after [core] issues of teaching. We want to cut disguised vacations (Atlantic City conventions); emphasize bargain shopping (hats) and eliminate non-essential costs such as graduation dinners and caps and gowns.
>
> Our position on capital cuts, are clearly borne out by the facts. Again, there is no soil contamination from the oil tank, and both the oil tank and heating bids came in much lower than projected. (Certification of John McKeown)

COMMISSIONER'S DECISION

Initially, the Commissioner notes that the Board quite accurately points out the standard that may be applied pursuant to Deptford, supra, when the governing body fails to provide its reasons for its recommended reductions simultaneously with the reductions themselves, as set forth on pages 5-6 herein. Further, she finds that excerpts from the transcripts of the Council debate provided by the Board offer strong evidence of that body's bent toward arbitrariness in determining to cut all contingencies based upon what it perceived to be a practice in other districts. Nonetheless, this flaw does not automatically result in full restoration of the budget reductions so as to eliminate the necessity for reviewing the reasons advanced by both parties on an account-by-account basis and making individual determinations pursuant to the standard of review which prevails in budget determinations as set forth in Deptford, supra, East Brunswick, supra, and State Board decision on July 1, 1992 in Board of Education of the Township of Rochelle Park v. Mayor and Council of

Rochelle Park, Bergen County, 92 N.J.A.R. 2d (EDU) 425. The effect of the flaw is that the Commissioner can invoke a heavy presumption against the educational validity of the reductions.

Account		Reduction
11-190-100-580	Travel	$ 550
11-000-230-590-01	Board Expenses	3,850
11-000-230-590-02	General Admin. Expenses	1,100
11-000-230-590-06	Superintendent's Office	1,200

Initially the Commissioner notes that expenses for travel, room and registration fees at conventions and workshops for administrators are matters of contractual obligation for the Board and must be honored. Therefore $550 for travel and $2,300 for administrative convention expenses are restored. Further, the Commissioner finds in conformity with Barnegat, supra, that attendance by Board members at conventions are a vital means of providing the necessary training requisite for effective Board membership. She therefore likewise directs the restoration of the $3,850 in Board member expenses for in-service development and training. In short, the Commissioner believes that board members who devote so much of their personal time and energy in performing a public service at no compensation and who have no other means of obtaining the knowledge and skills required to perform effectively in an increasingly complex environment need the opportunity to obtain the latest information and interact with their peers in order to provide effective policy leadership directed toward the provision of a thorough and efficient system of education.

Account		Reduction
11-000-100-562	Tuition Special Education	$14,000
11-000-100-562	Tuition Special Education	2,940
11-000-100-561	Tuition Regular	$10,290

The Commissioner has carefully considered the arguments presented by the parties in regard to the above-cited amounts for contingencies which were budgeted by the Board and reduced by the Council. Based upon that review the Commissioner finds that the Board's estimates for contingency purposes were both conservative and prudent. Given the very small anticipated surplus of $40,000, to do less would be irresponsible. In reaching this conclusion the Commissioner notes that the contingency of $14,000 which the Board provided for in special education is no longer a contingency amount but a real need, a matter which it is noted the Council misinterprets to mean that the money is no longer needed.

Therefore, in light of the Board's convincing arguments and the Council's inability to demonstrate anything other than its willingness to allow the Board to take a risk with the nebulous promise of "bailing them out," the Commissioner directs the restoration of $16,940 in account 11-000-100-562 and $10,290 in account 11-000-100-561.

Account		Reduction
11-000-270-511	Student Transportation Services	$2,000

Upon examination of the past experiences in this area and the inherent unpredictability, the Commissioner finds that the Board has met its burden of demonstrating that a $2,000 contingency fund for transporting students who require special services due to injury is both prudent and necessary. The Commissioner directs the restoration of $2,000 in this account.

Account		Reduction
11-000-240-590	Admin./Support Services	$2,100

Regretfully, the Commissioner determines that neither caps and gowns for elementary school graduation nor an awards dinner are factors necessary for the provision of a thorough and efficient system of education. Therefore the $2,100 reduction in this account is sustained.

Account		Reduction
11-401-100-600	Co-Curricular Supplies	$400
11-402-100-610	Athletics and Supplies	$450

The Commissioner finds that the Board has failed to meet its burden of demonstrating that T-shirts, prizes and softball hats are a necessary component of a thorough and efficient system of education. Therefore, the $850 reduction in these two accounts are sustained.

Account		Reduction
11-401-222-600	Education Media Services	$1,625

The Commissioner finds the reasons advanced by the Council, namely a determination that the district needs only 1/2 the AV materials it budgeted for, to be arbitrary; she also notes that the Board's only argument in support of its appropriation is the fact that it has ordered 19 new computers for instructional purposes. It provides no information as to what percentage of its old software remains useful while acknowledging that some of it does remain so. Further, the Board offers no explanation of what its current state of AV materials is and what new materials are required.

In light of the scarcity of detail and the burden which must be borne by the Board, the Commissioner sustains the $1,625 reduction in this account.

Account		Reduction
12-000-230-730	General Admin. Equipment	$1,000

The Board has not demonstrated that the new fax machine which it seeks is necessary in order to provide a thorough and efficient system of education. The reduction of $1,000 is sustained.

Account		Reduction
12-000-400-450	Remodeling	$28,100

It is clear from the arguments and figures provided by the parties that the actual bids received for removal of the oil tanks was $17,679 and that the amount budgeted for such purpose was $50,000. While the Board argues that clean-up of possible contamination makes its estimate viable, the Council insists no contamination exists. Assessing the validity of the Council's contention is impossible since it offers no proof nor any indication of what expertise for making such a decision exists in the contractor to whom its members spoke.

The Business Administrator's Certification attached to the Position Statement contains a letter from David Gurgel, an engineer employed by the tank removal company. That letter estimates the cost for clean-up of contamination from $2,000 to $15,000 with a recommendation to provide for $30,000 in the district's budget.

In light of the foregoing and given the fact that the Board in question had suffered a budget defeat, it would seem excessive to continue to budget $30,000 for a possible clean-up when preliminary indications as admitted are that no contamination exists. Therefore, the Commissioner concludes that it would be prudent for the Board to estimate a potential clean-up of $15,000 which added to the $17,679 for the removal totals $32,679. Consequently, the

Commissioner directs a restoration of $15,000 in this account and sustains a reduction of $13,100.

Account		Reduction
12-000-400-710	Sites and Site Additions	$6,700

The parties agree that a $5,700 reduction can be sustained in this account resulting in a restoration of $1,000 to the Board.

SUMMARY

Account	Sustained	Restored
11-190-100-580	$ -0-	$ 550
11-000-230-590-01	-0-	3,850
11-000-230-590-02	-0-	1,100
11-000-230-590-06	-0-	1,200
11-000-100-561	-0-	14,000
11-000-100-562	-0-	2,940
11-000-100-561	-0-	10,290
11-000-270-511	-0-	2,000
11-000-240-590	2,100	-0-
11-401-100-600	400	-0-
11-402-100-610	450	-0-
11-000-222-600	1,625	-0-
12-000-230-730	1,000	-0-
12-000-400-450	13,100	15,000
12-000-400-710	5,700	1,000
Totals	$24,375	$51,930

In light of the foregoing the Commissioner directs the Morris County Board of Taxation to strike an additional General Fund tax levy for school purposes for the Riverdale Public Schools of $51,930 for the 1993-94 school year which when added to the $2,457,658 previously certified shall result in a total General Fund tax levy for said district of $2,509,588.

OCTOBER 15, 1993

COMMISSIONER OF EDUCATION

DATE OF MAILING - OCTOBER 15, 1993

246-93

246-93

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

OCTOBER 15, 1993

BOARD OF EDUCATION OF THE TOWNSHIP OF MAHWAH,

PETITIONER,

V.

THE MAYOR AND TOWNSHIP COUNCIL OF THE TOWNSHIP OF MAHWAH, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of $395,000 made by governing body following voter rejection of proposed budget on April 20, 1993.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore $395,000 for a total General Fund tax levy of $18,871,914 for 1993-94 school purposes.

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

Mark G. Sullivan, Esq. (Sullivan & Sullivan), for Petitioner

John J. D'Anton, Esq. (D'Anton & Hummel), for Respondent

This matter was opened before the Commissioner on June 3, 1993 through the filing of a Petition of Appeal by the Board of Education of the Township of Mahwah (Board) seeking restoration, on the grounds of necessity for a thorough and efficient education, of reductions by the Mayor and Township Council of the Township of Mahwah (Council) in the General Fund tax levy for the 1993-94 school year. These reductions were made pursuant to N.J.S.A. 18A:22-37 and N.J.A.C. 6:24-7.2(b)2 following voter rejection of the Board's proposed budget on April 20, 1993 and after consultation with the Board as required by law.

The total proposed and certified budgets, as well as the amounts in dispute in this matter, are set forth below:

Proposed Tax Levy Adopted by Board	Amount of Tax Levy Certified by Governing Body
General Fund $18,871,914	General Fund $18,476,914
Amount of Reduction By Governing Body	**Amount of Reduction In Dispute**
General Fund $395,000	General Fund $395,000

On June 18, 1993, Council filed its Answer to the Petition of Appeal. A Position Statement was filed by the Board on July 13, 1993 and by Council on July 16, 1993. Responses were filed by the Board on July 26, 1993 and by Council on July 27, 1993. The Board filed a Summary Statement on August 2, 1993. No other documents were received, and the record was closed on August 2, 1993.

The reductions to the General Fund tax levy and reasons for reductions as determined by Council are as follows:

Line No./Account No.	Account Title	Reduction
085-11-000-230 086-11-000-240	Support Servs. - General Adm. Support Servs. - School Adm.	Combined Reduction $295,000
095-12-000-73X	Capital Outlay - Equipment	100,000
	Total	$395,000

It should be noted that the Council's resolution had three errors in the list of reductions, listing internal program numbers as account numbers, recording a "17" in place of the "12" in the Capital Outlay account number, and including the Curriculum Director as one of the reductions although that position is not included in the designated account codes. It must also be noted that the Board in its Position Statement notes that the Council did not designate a line item for the equipment reductions. The Council, however, does have a line item/account code listed for equipment in its resolution, but with one number in error as noted above.

The rationale presented for the reduction in Support Services, General Administration and School Administration is that the positions of Assistant Superintendent, two Assistant Principals, the Curriculum Director, and other support staff can be eliminated since there is adequate other administrative personnel to provide a thorough and efficient education. The reduction of equipment is based on the reason that there is no justification for the expenditure.

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of Statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

Mindful, then, of the balance to be applied in the standard of review, the Commissioner makes the following determination with respect to the reduction in the General Fund tax levy effectuated by Council.

Item	Reduction
Support Services - General Administration Support Services - School Administration	$295,000

The Board disputes Council's statement that the positions of Assistant Superintendent, two Assistant Principals, the Curriculum Director and other support staff can be eliminated without a negative effect on the educational program. In its Position Statement, the Board presents arguments citing the necessity for each position and the individual job description listing duties and responsibilities. The Board states in defense of all positions listed above that the district enrollment and enrollment in the two buildings with the Assistant Principals have been increasing each year since 1987-88. The Board states that the Assistant Superintendent has, among other duties, responsibility for personnel and records management, negotiations and administration of labor agreements, and federally funded programs. The Assistant Principal at Ramapo Ridge School teaches two classes a day, assists with observation of staff and extra curricular activities, and is responsible for discipline, attendance, and scheduling. The Assistant Principal at Joyce Kilmer School serves fifty percent (50%) of the time in a guidance capacity, is responsible for discipline and attendance, and assists in the observation of staff and extra curricular activities. The Director of Instruction supervises the regular instructional program and curriculum of the district and also coordinates, evaluates, develops and implements new programs.

The Board states that the Council's reduction of secretarial staff is unclear, but it would affect the secretary to the Assistant Superintendent. The Board argues that this administrative position is essential and requires the position of secretary.

Council states in its Response to the Board's Position Statement that the reductions will not have any impact on the actual instruction provided to the students.

The Commissioner has carefully reviewed the arguments of both parties in this critical area of the budget appeal. After such review, the Commissioner finds that Council's arguments that such reductions would have no negative impact on the educational process are without merit. A thorough and efficient educational program requires the completion of a multitude of tasks outside of the classroom. These tasks are critically relevant to the effectiveness of the educational program. It is determined that the Board has clearly justified the necessity for these positions. The Commissioner therefore orders the restoration of the $295,000 reduction.

Item	Reduction
Equipment	$100,000

Council's reduction in this area was a general one without specifics as to which pieces of equipment it felt were unnecessary. In its Position Statement, Council agrees that the reduction applies to unspecified equipment. It states that the information provided to it does not document any specific items included in this account. In its Response to the Board's Position Statement, Council states that the reduction allowed the Board to reprioritize its

equipment needs. Council also states that the Board in its Appeal must do more than simply assert that each item is necessary for a thorough and efficient education.

The Board in its Position Statement argues that it cannot address the reduction in equipment since no specific items were identified. It also states that the equipment was thoughtfully considered prior to its inclusion in the proposed budget and it disputes Council's claim of not having a list of specific equipment items. The Board states that an itemized list of Capital Outlay equipment items was submitted to Council. Indeed, Council's Answer to the Board's Petition did include as an attachment the itemized list of Capital Outlay equipment items.

In reviewing the information presented, the Commissioner determines that Council's reduction in equipment was not based on a review of the items and determination that specific pieces were unnecessary to a thorough and efficient education. The Commissioner finds, therefore, that this reduction was arbitrary and orders the restoration of the $100,000.

Thus, for the reasons set forth above, the Commissioner determines to restore $395,000 of the General Fund tax levy reduction appealed herein as summarized below:

Line No./ Account No.	Account Title	Reduction	Restored
085-11-000-230 086-11-000-240	Support Servs. - Gen. Admin. Support Servs. - School Admin.	$295,000	$295,000
095-12-000-73X	Capital Outlay - Equipment	100,000	100,000
	TOTAL	$395,000	$395,000

Accordingly, the Bergen County Board of Taxation is directed to make the necessary adjustment as set forth below to reflect a total of $18,871,914 to be raised in tax levy for the General Fund by the Township of Mahwah for the 1993-94 school year:

	General Fund
Original Tax Levy	$18,871,914
Reduction	395,000
Tax Levy After Reduction	18,476,914
Restoration	395,000
Tax Levy After Restoration	$18,871,914

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 15, 1993

DATE OF MAILING - OCTOBER 15, 1993

247-93

247-93

BOARD OF EDUCATION OF THE TOWNSHIP OF BRANCHBURG,

PETITIONER,

V.

TOWNSHIP COMMITTEE OF THE TOWNSHIP OF BRANCHBURG, SOMERSET COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of $245,184 made by governing body following voter rejection of proposed budget on April 20, 1993.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore $245,184 for a total General Fund tax levy of $14,562,151 for 1993-94 school purposes.

OCTOBER 15, 1993

BOARD OF EDUCATION OF THE TOWNSHIP OF BRANCHBURG, PETITIONER, V. TOWNSHIP COMMITTEE OF THE TOWNSHIP OF BRANCHBURG, SOMERSET COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

David W. Carroll, Esq. (Carroll & Weiss), for Petitioner

Mark S. Anderson, Esq. (Woolson, Sutphen, Anderson & Nergaard), for Respondent

This matter was opened before the Commissioner on June 4, 1993 through the filing of a Petition of Appeal by the Board of Education of the Township Branchburg (Board) seeking restoration, on the grounds of necessity for a thorough and efficient education, of reductions by the Township Committee of the Township of Branchburg (Committee) in the General Fund tax levy for the 1993-94 school year. These reductions were made pursuant to N.J.S.A. 18A:22-37 and N.J.A.C. 6:24-7.2(b)2 following voter rejection of the Board's proposed budget on April 20, 1993 and after consultation with the Board as required by law.

The total proposed and certified budgets, as well as the amounts in dispute in this matter, are set forth below:

Proposed Tax Levy Adopted by Board	Amount of Tax Levy Certified by Governing Body
General Fund $14,581,767	General Fund $14,316,967
Amount of Reduction by Governing Body	**Amount of Reduction in Dispute**
General Fund $264,800	*General Fund $245,184

* It should be noted that there was some confusion about the figures in the chart above due to mathematical errors, but final documents from both parties indicate agreement on these corrected numbers.

On July 9, 1993, the Committee filed its Answer to the Petition of Appeal. This Answer did not comply with N.J.A.C. 6:24-7.6 for timeliness of filing or with N.J.A.C. 6:24-7.7 for submission of specific documentation with the Answer. The Board filed a Position Statement on July 29, 1993 and the Committee filed a combined Position Statement and Response to the Board's Position on August 2, 1993. The Board filed a Response to the Committee's Position Statement on August 12, 1993. No further documents were received and the record on this matter was closed on August 17, 1993.

The reductions to the General Fund tax levy and reasons for reductions as determined by Committee are as follows:

Account No.	Title	Reduction	Rationale
11-000-222-105-01-255	Library Clerk Salary	$ 22,900	Position can be eliminated without detriment to quality of education
11-000-240-103-01-333	Asst. Principal Salary	39,000	Position can be eliminated without detriment to quality of education
11-000-240-103-01-334	Supervisor Basic Skills Salary	39,000	Position can be eliminated without detriment to quality of education

Account No.	Title	Reduction	Rationale
11-000-290-340-01-582	Printing/ Publishing Expense	10,000	Reduction in numb of times the Boar newsletter is published
11-000-290-290-01-552	Employee Medical Insurance	36,900	Reduction in personnel
11-000-290-290-01-555	Employee Dental Insurance	9,360	Reduction in personnel
11-000-290-290-01-558	Employee Prescrip. Insurance	2,160	Reduction in personnel
11-000-290-290-01-561	Employee Vision Care Reimbursement	780	Reduction in personnel
11-000-290-220-01-543	Social Security Other	7,490	Reduction in personnel
11-000-290-241-01-547	Pension Payments - PERS	6,210	Reduction in personnel
11-000-290-105-01-531	Board Office Clerical Sals.	50,000	Excess personnel
11-000-240-105-01-336	Secretary Salary - Central	25,000	Excess personnel
12-000-270-733-07-621	School Buses - Regular Trans.	16,000	Latest bid indicates a price for two buses is $16,000 less than budgeted
	TOTAL	$264,800	

The account codes listed above comply with the requirements of the Department of Education, but the last five numbers in each account number were added by the Board for internal accounting.

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and

efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

Mindful, then, of the balance to be applied in the standard of review, the Commissioner makes the following determination with respect to the reduction in the General Fund tax levy effectuated by Committee.

Account	Reduction
11-000-222-105-01-255 - Library Clerk Salary	$22,900

In its resolution, the Committee states that this position can be eliminated without detriment to the quality of education. The Committee adds in its Position Statement that all the recommended reductions in staff are not teaching positions and, although not suggesting that these staff members perform no useful service for the schools, the Committee set its educational sights slightly lower and placed a slightly higher priority on the costs of these services. The Committee continues that they do not agree with

the Board that budget issues must be determined solely by educational considerations and not in reaction to the voters' rejection of the school budget because this would make the submission of the school budget to the voters a vain and cynical act.

The Committee's concern with economic issues is certainly understandable but reflects a misunderstanding of the purpose of procedures following a budget rejected by the voters. These procedures provide the voters with the assurance of a detailed review of the proposed budget by the governing body. The requirements for that review, in fact the primary intent of all parties must be to ensure the provision of a thorough and efficient education, as specified in N.J.A.C. 6:24-7.2. As set for by the New Jersey Supreme Court in East Brunswick, supra, a governing body, as well as the Commissioner, must have as the sole standard of review, the necessity of funds for the provision of thorough and efficient education. Of this the court stated:

> "The governing body may, of course, seek to effect savings which will not impair the educational process. But its determination must be independent ones properly related to educational considerations rather than voter reactions. In every step, it must act conscientiously, reasonably and with full regard for the State's educational standards and its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community."
> (emphasis supplied, at 105-106).

The Board in its Position Statement notes that the library-media specialist in each school also functions as an instructor with a regular teaching schedule in the library. They also have periods set aside for individual needs work. Based on these schedules, the

board states that a library-media clerk is essential in each school to carry out the extensive clerical and equipment responsibilities involved in running a library-media center. The Board submits a job description for the library-media clerk to verify the many and varied duties.

Based on the justification for this position submitted by the Board, the Commissioner orders the restoration of the $22,900 reduction.

Account	Reduction
11-000-240-103-01-333 - Assistant Principal Salary	$39,000

The Committee's position is the same for this reduction as noted above. The Board in its Position Statement lists the duties of the Assistant Principal at the Central School, a middle school serving grades 6-8. The Board states that the Assistant Principal is responsible for discipline and behavior problems, scheduling, use of school facilities, substitutes for the entire district, facilities maintenance, and supervision/evaluation of staff with 15 formal teaching observations, conferences, and written reports each year.

Based on the information submitted, the Commissioner determines that the duties performed by the Assistant Principal are essential and could not be reasonably assumed as additional responsibilities by the Principal. The Commissioner orders the restoration of the $39,000 reduction.

11-000-240-103-01-334 - Supervisor of Basic Skills Salary	$39,000

The Committee's position is again the same for this reduction as noted above. The Board in its Position Statement notes that this position was created in 1992-93 as a consolidation of two

previous part-time Assistant Principal positions. The job description for the Supervisor of Basic Skills as submitted by the Board lists a number of specific duties, including testing, pupil assessment and grouping, and placement decisions.

Since all the duties involved in an effective basic skills program are critically essential to the provision of a thorough and efficient education, the Commissioner orders the restoration of the $39,000 reduction.

Account	Reduction
11-000-290-340-01-582 - Printing/Publishing	$10,000

The Board accepts this reduction and thus it is not part of the appeal.

11-000-290-105-01-531 - Board Office Clerical Salaries	$50,000

The Committee's rationale for this reduction is the same as noted above. The Board in its Position Statement lists the Board Office/Central Office clerical staffing as follows: One secretary for the Superintendent, one secretary for the Business Administrator/ Board Secretary, a full-time accounts payable/accounts receivable secretary who also serves as receptionist, and a part-time payroll secretary. The Board also notes that two positions, a second secretary for the Superintendent and a bookkeeper, have been eliminated in the past six years.

The Commissioner finds impossible to determine how the Committee believed this clerical staff of three full-time and one part-time positions could be significantly reduced and still ensure the efficient completion of the many clerical tasks involved in the responsible operation of a school district of this size. The Commissioner orders the restoration of the $50,000 reduction.

Account	Reduction
11-000-240-105-01-336 - Secretary Salary - Central	$25,000

Again, the Committee's rationale for this reduction is the same as noted above. The Board in its Position Statement lists an extensive number of tasks completed by the three secretaries who serve the Principal, Assistant Principal, and Guidance Counselor. The duties include typing of a multitude of letters, reports, memos, certificates, requisitions, newsletters, and specific notices and forms, maintaining and monitoring various miscellaneous accounts and records within the school, and serving the main office reception area for students, teachers, parents and visitors.

The Commissioner determines that the Board has verified the need for these positions for the efficient operation of the school and orders the restoration of the $25,000 reduction.

11-000-290-290-01-552	Medical Insurance	$36,900
11-000-290-290-01-555	Dental Insurance	9,360
11-000-290-290-01-558	Prescription Insurance	2,160
11-000-290-290-01-561	Vision Care Reimbursement	780
11-000-290-220-01-543	Social Security - Other	7,490
11-000-290-241-01-547	Pension Payments - PERS	6,210

The Committee reduced all the benefit areas listed above on the basis of the reductions in personnel that it had identified. Since it has been determined that these personnel positions are to be restored, the Commissioner orders the restoration of these reductions - $36,900, $9,360, $2,160, $780, $7,490, and $6,210.

12-000-270-733-07-621 - Reduced Cost of Two School Buses	$16,000

Both parties agree that the low bid for two new school buses is less than the amount in the proposed budget. The Committee in its Position Statement asserts that the reduction of $16,000 was agreed to by the Board. The Board, however, in its Position

Statement cites a bid price which is $9,616 less than the budgeted amount and seeks restoration, as listed in the Petition of Appeal, of $6,384.

It is not possible to determine why the two parties have differing positions on the amount of possible reduction in this area. However, the Board has submitted an affidavit from the Board Secretary/ Business Administrator certifying the low bid for the two school buses as $96,384, which is $9,616 less than the budgeted amount of $106,000. Therefore, of the $16,000 reduction, the Commissioner orders the restoration of $6,384.

Thus, for the reasons set forth above, the Commissioner determines to restore $245,184 of the $245,184 in General Fund reductions appealed herein as summarized by the chart below:

Account No.	Title	Reduction	Restored	Sustained	Unappealed
11-000-222-105-01-255	Library Clerk Salary	$ 22,900	$ 22,900	0	
11-000-240-103-01-333	Asst. Principal Salary	39,000	39,000	0	
11-000-240-103-01-334	Supervisor of Basic Skills Salary	39,000	39,000	0	
11-000-290-340-01-582	Printing/ Publishing Expense	10,000			$10,000
11-000-290-290-01-552	Employee Medical Insurance	36,900	36,900	0	
11-000-290-290-01-555	Employee Dental Insurance	9,360	9,360	0	

Account No.	Title	Reduction	Restored	Sustained	Unappealed
11-000-290-290-01-558	Employee Prescription Ins.	2,160	2,160	0	
11-000-290-290-01-561	Employee Vision Care Reimbursement	780	780	0	
11-000-290-220-01-543	Social Security - Other	7,490	7,490	0	
11-000-290-241-01-547	Pension Payments - PERS	6,210	6,210	0	
11-000-290-105-01-531	Board Office Clerical Salaries	50,000	50,000	0	
11-000-240-105-01-336	Secretary Salary - Central	25,000	25,000	0	
12-000-270-733-07-621	School Buses - Regular Transportation	16,000	6,384	0	9,616
	TOTAL	$264,800	$245,184	0	$19,616

Accordingly, the Somerset County Board of Taxation is directed to make the necessary adjustment as set forth below to reflect a total of $14,562,151 to be raised in General Funds tax levy by the Township of Branchburg for the 1993-94 school year:

	General Fund
Original Tax Levy	$14,581,767
Reduction	$ 264,800
Tax Levy After Reduction	$14,316,967
Restoration	$ 245,184
Tax Levy After Restoration	$14,562,151

IT IS SO ORDERED.

OCTOBER 15, 1993

DATE OF MAILING - OCTOBER 15, 1993

COMMISSIONER OF EDUCATION

248-93

248-93

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

OCTOBER 15, 1993

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON,

PETITIONER,

V.

MAYOR AND COUNCIL OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of $250,000 made by governing body following voter rejection of proposed budget on April 20, 1993.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore $250,000 for a total General Fund tax levy of $53,700,799 for 1993-94 school purposes.

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

Michael R. Paglione, Esq. (Paglione & Massi), for Petitioner

Raymond A. Ash III, Esq., for Respondent

This matter was opened before the Commissioner of Education by way of a Petition of Appeal filed by the Board of Education of Hamilton Township School District (Board) on June 8, 1993 seeking restoration, on the grounds of necessity for a thorough and efficient education of the reduction of $250,000 in its General Current Expense tax levy proposal imposed by the Mayor and Township Council of Hamilton Township (Council) for the 1993-94 school year. This reduction was made pursuant to N.J.S.A. 18A:22-37 and the applicable provisions of N.J.A.C. 6:24-7.2(b)2 following voter rejection of the Board's proposed General Current Expense budget on April 20, 1993, and after consultation with the Board as required by law. The total proposed and certified budgets as well as the amount in dispute in the instant matter are set forth below:

Proposed Tax Levy Adopted by Board		Amount of Tax Levy Certified by Council	
Current Expense	$52,340,448	Current Expense	$52,090,448
Capital Outlay	1,360,351	Capital Outlay	1,360,351
Total General Fund	$53,700,799	Total General Fund	$53,450,799

Amount of Reduction in Board's Budget by Council		Amount of Reduction in Dispute before Commissioner	
General Fund	$ 250,000	General Fund	$ 250,000

(Board's Petition, Exhibit A)

The reduction at issue which was imposed by Council at its meeting of May 10, 1993 reads in pertinent part as follows:

> BE IT FURTHER RESOLVED by the Council of the Township of Hamilton that reductions of the Hamilton Township Board of Education 1993 - 1994 budget are recommended in the area specified hereafter, which expenditure is not essential to the provision of a thorough and efficient system of schools in the Hamilton Township School District, for the stated reason:
>
> > $250,000 IN FREE APPROPRIATIONS BALANCE/SURPLUS TO APPROPRIATIONS
> >
> > The Council of the Township of Hamilton finds that it is just and reasonable to utilize Free Appropriations Balance/Surplus to offset the level of General Current Expenses, Capital Outlay and Special Schools to be funded through the collection of local taxes. (Board's Petition, Exhibit B)

Initially the Commissioner observes from the foregoing recitation of facts that it is evident that Council's tax levy reduction of $250,000 was effectuated in the current expense portion of the Board's budget submission to the voters. It is further observed that Council did not specify those current expense line items or give its supporting reasons for such reduction of $250,000 to which this anticipated surplus revenue was to be applied. Council filed its Answer on June 23, 1993 which confirmed the amount in dispute listed above. Both parties submitted their respective

written statements of position on July 23, 1993. Thereafter the record of this matter was closed.

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

Mindful, then, of the balance to be applied in this standard of review, the Commissioner makes the following determination with respect to the reduction in the tax levy effectuated by Council.

Revenue Surplus Balance (Anticipated) from 1991-92 School Year

It is Council's position that the Board has historically underestimated its actual amounts of surplus balances on an annual

basis which has resulted in such surplus balances being well in excess of those previously reported by the Board in the prior school year.

The Board contends that its surplus balance for the 1991-92 school year was originally anticipated at $450,127 and the reduction of $250,000 would bring the balance to $200,127 or approximately .2% of its total $98,766,844 budget for the 1993-94 school year. The Board maintains that the Commissioner has routinely permitted an appropriations balance/surplus of 3% of a total school budget as being reasonable and necessary to provide a thorough and efficient system of education.

The Board further maintains that since the time it reported its original anticipated surplus balance, unanticipated expenses have already arisen prior to the commencement of the 1993-94 academic school year:

> ***Such unanticipated expenses have already arisen. Over the course of the past eight weeks, $45,000 had to be appropriated to replace portions of the roof at the Yardville School, $45,000 was appropriated on an emergency basis to remove an underground fuel oil tank at Hamilton High School West and it was necessary to undertake emergency asbestos removal at the Sayen School, at a cost of $9,300, and at the Klockner School at a cost of $1,800. The total cost of these emergency repairs totalled $101,100 and such a cost already exceeds one-half of the available $200,127 remaining in surplus after Council's reduction.
>
> It is foreseeable that in a school district the size of Hamilton Township with 26 school buildings further emergency repairs will be necessary during the 1993/94 school year. It is essential, in order to provide a thorough and efficient education, that these repairs be made as soon as the emergency arises. Even without the $250,000 reduction by Council, the School District's budget surplus is still below a "comfortable" surplus amount and far below the

[ideal] surplus amount required to address future emergency repairs to the school facilities.***
(Board's Position Statement, at pp. 3-4)

Council rejects the Board's arguments in support of the restoration of the $250,000 reduction imposed on its General Current Expense tax levy request by the application of an equal amount of the Board's unanticipated surplus funds. It takes the position that the Commissioner has never approved any fixed parameters with respect to the amount or percentage of an unappropriated free balance to be maintained by a local board of education. To the contrary Council maintains that the Commissioner has expressed caution against the maintenance of a balance to fund all possible contingencies. Council relies on Board of Education of Lakewood v. Township Committee of the Township of Lakewood, Ocean County, 1976 S.L.D. 27 which holds that a determination of unappropriated free balances should be reasonable and the judgment to be employed must be objective, rather than subjective. In this regard Council contends that the Board lost its objectivity in merely attaching an arbitrary percentage of 2% of its total budget appropriations for the incorporation of a free surplus balance into its 1993-94 budget request.

The Commissioner has reviewed the respective written positions of the parties pertaining to the tax levy reduction of $250,000 controverted herein.

The Commissioner finds that the original unappropriated free balance of $450,127 reserved by the Board in its 1993-94 current expense budget request has been eroded by $101,100 prior to the commencement of the 1993-94 school year due to unforeseen unanticipated expenditures. The question which is now before the Commissioner to determine is whether or not Council's reduction of

$250,000 in the General Current Expense tax levy would negatively impact upon the Board's ability to maintain a reasonable free balance for unforeseen expenditures which could possibly be incurred during the remaining months of the academic school year. In taking these unanticipated expenditures of $101,100 and Council's tax levy reduction of $250,000 into consideration, the Commissioner finds and determines that an amount of $99,027 which remains in free balance for the 1993-94 school year is insufficient for the Board to meet any further unanticipated contingencies for the remainder of the school year. This is especially true in view of the size and complexity of operations in the Hamilton Township school District which has projected a total budget of $98,766,844 for the 1993-94 school year. Thus for the reasons set forth above the Commissioner determines that Council's tax levy reduction of $250,000 in the Board's General Current Expense appropriations for the 1993-94 school year cannot be sustained and the $250,000 reduction is set aside.

Accordingly, the Commissioner hereby directs the Mercer County Board of Taxation to increase the General Fund tax levy for school purposes in the School District of Hamilton Township by $250,000 for the 1993-94 school year. This amount when added to the $53,450,799 previously certified in the General Fund tax levy will result in a total amount of $53,700,799.

Amount previously certified by Council	$53,450,799
Amount restored by Commissioner	250,000
Total General Fund Tax Levy	$53,700,799

IT IS SO ORDERED.

OCTOBER 15, 1993

DATE OF MAILING - OCTOBER 15, 1993

COMMISSIONER OF EDUCATION

250-93

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SB # 66-93

BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, PETITIONER-RESPONDENT, V. MAYOR AND COUNCIL OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY, RESPONDENT-APPELLANT.	STATE BOARD OF EDUCATION DECISION

Decided by the Commissioner of Education, October 15, 1993

For the Petitioner-Respondent, Gaccione, Pomaco & Beck (Frank Pomaco, Esq., of Counsel)

For the Respondent-Appellant, Robert J. Giordano, Esq.

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. We, however, set aside the Commissioner's finding that

> ...she does not have jurisdiction over allegations of violation of the OPMA [Open Public Meetings Act] levied against a municipal governing body.

Commissioner's decision, at 4.

To the contrary, as a general matter, it is well settled that where the Commissioner of Education has jurisdiction over a dispute under the education laws, he also has incidental jurisdiction to determine issues arising under the Open Public Meetings Act as they relate to such controversy. E.g., Sukin v. Northfield Bd. of Ed., 171 N.J. Super. 184 (App. Div. 1979)

March 2, 1994

(subsequent history omitted). However, in view of our determination of this appeal, we need not decide the OPMA claims made by the district board in the proceedings below.

March 2, 1994

Date of mailing MAR 04 1994

249-93

249-93

BOARD OF EDUCATION OF THE TOWNSHIP OF LOWER ALLOWAYS CREEK,

PETITIONER,

V.

MAYOR AND TOWNSHIP COMMITTEE OF LOWER ALLOWAYS CREEK, SALEM COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

OCTOBER 15, 1993

BOARD OF EDUCATION OF THE TOWNSHIP OF LOWER ALLOWAYS CREEK, PETITIONER, V. MAYOR AND TOWNSHIP COMMITTEE OF LOWER ALLOWAYS CREEK, SALEM COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of $99,999 made by governing body following voter rejection of proposed budget on April 20, 1993.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore $99,999 for a total General Fund tax levy of $1,875,230 for 1993-94 school purposes.

BOARD OF EDUCATION OF THE TOWNSHIP OF LOWER ALLOWAYS CREEK, PETITIONER, V. MAYOR AND TOWNSHIP COMMITTEE OF LOWER ALLOWAYS CREEK, SALEM COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

A. Paul Kienzle, Jr., Esq. (Casarow, Casarow, & Kienzle), for Petitioner

Ross Levitsky, Esq., for Respondent

This matter was opened before the Commissioner on June 4, 1993 through the filing of a Petition of Appeal by the Board of Education of the Township of Lower Alloways Creek (Board) seeking restoration, on the grounds of necessity for a thorough and efficient education, of reductions by the Mayor and Township Committee of the Township of Lower Alloways Creek (Committee) in the General Fund tax levy for the 1993-94 school year. These reductions were made pursuant to N.J.S.A. 18A:22-37 and N.J.A.C. 6:24-7.2(b)2 following voter rejection of the Board's proposed budget on April 20, 1993 and after consultation with the Board as required by law.

The total proposed and certified budgets, as well as the amounts in dispute in this matter, are set forth below:

Proposed Tax Levy Adopted by Board	Amount of Tax Levy Certified by Governing Body
General Fund $1,875,230	General Fund $1,775,231
Amount of Reduction By Governing Body	**Amount of Reduction In Dispute**
General Fund $99,999	General Fund $99,999

On June 17, 1993, the Committee filed its Answer to the Petition of Appeal. A Position Statement was filed by the Board on June 28, 1993. A Position Statement was filed by the Committee on July 14, 1993. The Board filed a Final Summation on July 30, 1993, and Committee submitted a Summary on August 6, 1993. No further documents were received and the record was closed on August 6, 1993.

The reductions to the General Fund tax levy and reasons for reductions as determined by the Committee are as follows:

Line Item	Description	Reduction	Rationale
11-1XX-100-XXX	Regular Programs Instruction	$30,114	Eliminate second physical education teacher position
11-1XX-100-XXX	Regular Programs Instruction	$ 6,201	Eliminate teacher salary portion of Assistant Principal position
11-000-100-XXX	Instruction	$10,000	Reduce tuition for possible placement students.
11-000-290-XXX	Business and Other Support Services	$14,000	Reduction in fringe benefits from elimination of two positions
11-000-290-XXX	Business and Other Support Services	$ 5,785	Anticipated savings from policy renewals
11-000-240-XXX	Support Services - School Admini.	$33,899	Elimination of Assistant Principal position
	Total	$99,999	

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

Mindful, then, of the balance to be applied in the standard of review, the Commissioner makes the following determination with respect to the reduction in the General Fund tax levy effectuated by the Committee.

Item	Reduction
Regular Programs - Instruction Physical Education Teacher	$30,114

The Committee states that a second physical education teacher in a K-8 school is a duplication and is not required for the

thorough and efficient education for an elementary school of 266 students. The Board states that the physical education teachers have training in and responsibilities for instruction in Family Life Education, Drug and Alcohol Prevention Education, and HIV/AIDS Education, all mandated programs, in addition to the regular physical education program. The Board also states that the physical education teachers provide supervision while students are in the locker rooms and organization and supervision of lunchtime recess activities. It further states that the reduction would result in the termination of employment of a black, male teacher, who is the only minority teacher and one of only two males in the regular educational program. The Committee states in its Position Statement that, although this argument is certainly important to the district in terms of enriching the students' educational experience, it is irrelevant to the situation herein. The arguments regarding staff reductions involve only the positions, not the individuals in the positions. The Committee in its Position Statement cites a comparison of physical education staffing in nine other districts and noted that only two had two physical education teachers. The Committee also stated that classroom teachers and the school nurse could fill any gap caused by the reduction in physical education staffing. It further states that supervision in the locker room is unnecessary. The Committee in its comparison of physical education staffing in other districts did not include consideration of the total available staff in the other districts or how the mandated programs were being provided. Also, the suggestion that classroom teachers and the school nurse could handle additional duties presumes that this would be possible with their present schedules and contractual duties.

It is determined that the Board has defended the need for two physical education teachers to provide mandated programs to the students. The Commissioner orders the restoration of the $30,114 reduction.

Item	Reduction
Regular Programs - Instruction - Teacher Salary Portion of Assistant Principal Position	$ 6,201

The Board in its Position Statement argues that the elimination of the Assistant Principal's instructional duties would negatively impact the students in the reading program. The Committee in its Position Statement asserts that the reading class taught by the Assistant Principal is a separate issue and does not detract from the fact that this administrative post is not needed in the district. The Committee does not state that this instructional program should be eliminated.

It is determined, therefore, that this reduction is an arbitrary action by the Committee. The Commissioner orders the restoration of the $6,201 reduction.

Instruction - Reduction of Tuition	$10,000

The Board in its Position Statement notes that throughout the year additional tuition students are placed in educational programs, and that the Board already anticipates placements with two possible situations that currently exist. The Committee in its Position Statement maintains that these placements are not yet made and, if they do occur later, can be funded by monies within the budget or surplus. Planning ahead to budget responsibly is a serious and challenging task for every school district. The Commissioner is aware of the difficulties involved in precisely determining special educational needs since evaluations and

placements are ongoing throughout any school year. In this matter, the Board has identified two very specific possible placements that may occur in 1993-94.

Therefore, based on the information presented, the Commissioner orders the restoration of the $10,000 reduction.

Item	Reduction
Business and Other Support Services - Savings from Policy Renewals	$ 5,785

The Committee asserts in its Position Statement that the reduction was based on annual rebates received by the Board on its renewal of insurance contracts and the surplus at the end of each year in the insurance accounts. The Board states that the Committee has not identified what policies are referred to or what insurance premiums are being reduced.

In reviewing the documents submitted, the Commissioner agrees that the Committee does not provide any specifics on how the savings can be accomplished or document what it claims to be prior savings. The Commissioner orders the restoration of the $5,785 reduction.

Support Services - School Administration Assistant Principal	$33,899

The Committee in its resolution states that the position of Assistant Principal can be eliminated in a district of this size without affecting the thorough and efficient education of the students. The Committee adds that the duties of the Assistant Principal can be assumed by the Chief School Administrator. The Board in its Position Statement lists the duties and responsibilities of the Assistant Principal, which include observations and evaluations of one-half of the certified, tenured

teaching staff, observations and evaluations of one-third of the certified non-tenured teaching staff, completion of Annual Performance Reports and Professional Improvement Plans for one-half of the certified, tenured teaching staff, completion of the annual evaluation/observation forms for twenty-one support staff employees, and assistance with staff supervision, educational objectives and requirements, reporting necessities, preparation and work on curricula, and work on monitoring programs. The Committee acknowledges in its Position Statement that the Assistant Principal appears to carry a full work load, but claims that these duties can be reasonably delegated to other positions without impacting on the thorough and efficient educational program.

The Commissioner has carefully reviewed the arguments of both parties on this issue. A thorough and efficient educational program requires the completion of a multitude of tasks outside of the classroom. These tasks are critically relevant to the effectiveness of the educational program. In this matter, it does not seem reasonable that the Chief School Administrator can complete the duties already assigned to that position and mandated by statute and code and also effectively assume the administrative responsibilities now completed by the Assistant Principal. The Commissioner orders the restoration of the $33,899 reduction.

Item	Reduction
Business and Other Support Services - Fringe Benefits	$14,000

The Committee based this reduction in fringe benefits on the elimination of the Assistant Principal and one physical education teacher positions. Since the Commissioner has ordered the restoration of funds for those two positions, the restoration of this $14,000 reduction is also ordered.

Thus, for the reasons set forth above the Commissioner determines to restore $99,999 of the General Fund tax levy reduction appealed herein as summarized below:

Line Item	Description	Reduction	Restored	Sustained
11-1XX-100-XXX	Regular Programs Instruction - Physical Education Teacher	$30,114	$30,114	-0-
11-1XX-100-XXX	Regular Programs Instruction - Assistant Principal Teaching Salary	$ 6,201	$ 6,201	-0-
11-000-100-XXX	Instruction - Tuition	$10,000	$10,000	-0-
11-000-290-XXX	Business and Other Support Services - Fringe Benefits	$14,000	$14,000	-0-
11-000-290-XXX	Business and Other Support Services - Policy Renewals	$ 5,785	$ 5,785	-0-
11-000-240-XXX	Support Services - School Administration Assistant Principal	$33,899	$33,899	-0-
	Totals	$99,999	$99,999	-0-

Accordingly, the Salem County Board of Taxation is directed to make the necessary adjustment as set forth below to reflect a total of $1,875,230 to be raised in tax levy for the General Fund by the Township of Lower Alloways Creek for the 1993-94 school year:

	General Fund
Original Tax Levy	$1,875,230
Reduction	99,999
Tax Levy After Reduction	1,775,231
Restoration	99,999
Tax Levy After Restoration	$1,875,230

IT IS SO ORDERED.

OCTOBER 15, 1993

DATE OF MAILING - OCTOBER 15, 1993

COMMISSIONER OF EDUCATION

250-93

250-93

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

OCTOBER 15, 1993

BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE,

PETITIONER,

V.

MAYOR AND COUNCIL OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of $865,600 made by governing body following voter rejection of proposed budget on April 20, 1993.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore $639,835 for a total General Fund tax levy of $21,076,171 for 1993-94 school purposes.

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

For Petitioner, Frank Pomaco, Esq. (Gaccione, Pomaco & Beck)

For Respondent, Robert J. Giordano, Esq.

The Board of Education of the Township of Belleville, (Board) appeals to the Commissioner of Education from an action taken by the Mayor and Council of the Township of Belleville (Council) pursuant to N.J.S.A. 18A:22-37 certifying to the Essex County Board of Taxation a lesser amount for General Fund costs for the 1993-94 school year than the amount proposed by the Board in its budget which was rejected by the voters.

At the annual school election held on April 20, 1993, the Board submitted to the electorate a proposal to raise $21,301,936 by local taxation for General Fund costs of the school district. Following voter rejection of the proposal, the Board submitted its budget to Council for its determination of the amount necessary for the operation of a thorough and efficient school system in the

Township of Belleville for the 1993-94 school year pursuant to the mandatory obligation imposed on Council by N.J.S.A. 18A:22-37.

After consultation with the Board, Council made its determination and certified to the Essex County Board of Taxation an amount of $20,436,336 for General Fund costs.

GENERAL FUND

Board's Proposal	$21,301,936
Council's Certification	20,436,336
Amount Reduced	$ 865,600

Council filed its Answer on June 24, 1993. The Board filed its Position Statement on July 26, 1993; Council also filed its written position on July 26, 1993. Council filed a response to the Board's statement on August 6, 1993 and the Board filed a Final Summation on August 23, 1993. Thereafter the record was closed.

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

Mindful, then, of the balance to be applied in this standard of review, the Commissioner makes the following determination with respect to the reduction in the General Fund tax levy effectuated by Council.

COUNCIL'S REDUCTIONS

Account	Account Title	Amount
11-000-230-520	Insurance	$ 22,600
11-000-230-531	Telephone	5,000
11-000-230-[580]	Travel	5,500
11-[000]-290-220	Social Security Contributions	80,000
11-[000]-290-241	Other Retirement Contributions	23,000
11-[000]-290-290	Other Employee Benefits	100,000
11-[000]-290-340	Technical Services	2,500
11-[000]-290-500	General Supplies	8,000
11-[000]-290-890	Miscellaneous Expenditures	4,000
11-XXX-100-101	Salaries of Teachers	150,000
11-190-100-640	Textbooks	50,000
11-[000]-240-800	General Supplies	45,000
11-[000]-240-105	Secretary Salaries	15,000
11-[000]-270-890	Supplies and Materials	5,000
11-[000]-260-[100]	Ground and Maintenance Salaries	10,000
11-[000]-260-610	General Supplies	30,000
11-[000]-260-620	Energy	30,000
11-402-100-101	Salaries-Athletic Trainer	30,000
11-303	General Fund Free Appropriations Balance	250,000
	Total Reduction	$865,600

OPEN PUBLIC MEETINGS ACT

Before discussing any of the line item reductions, it is necessary to examine the Board's allegation that Council violated the provisions of the Open Public Meetings Act, N.J.S.A. 10:4-8 and 10:4-9, by failing to give proper notice of its meeting on May 13, 1993, when it certified the tax levy. The Board seeks restoration of its full budget because of the alleged OPMA violation.

The record shows that Council gave proper notice of its meeting of May 13, 1993; however, when it realized that it would be unable to have a quorum for that meeting, after discussion the meeting was changed to a time six hours earlier than originally scheduled.

Council concedes that it was unable to give proper notice of this change in time; however, it asserts that the change of meeting time was necessary because of the urgency of adopting the resolution (certifying the tax levy) on time.

As to the OPMA allegations advanced by the Board, the Commissioner finds and determines that she does not have jurisdiction over allegations of violation of the OPMA levied against a municipal governing body. What authority she does have would rest solely in terms of a board of education's actions and even under such matters, her authority is limited. See Michael Rovello et al. v. Michael Boyel et al., decided by the Commissioner March 15, 1993.

BUDGET LINE ITEM ANALYSIS

Account	Reduction
11-000-230-520 - Insurance	$22,600

Council's reduction in this account is $22,600. It based its reduction on its contention that the account was overbudgeted last year to the degree that the Board transferred $30,000 to another account. Further, it asserts that the Board does not need an umbrella policy and that it did not have one last year.

The Board has budgeted $194,500 for property and liability insurance for the 1993-94 school year. Included in this amount is the premium for the umbrella insurance policy. The record shows

that $170,316 in premiums was expended in the 1992-93 school year. The Commissioner finds Council's reduction of $14,500 for the umbrella policy is valid and it will be sustained. Even with this reduction, the Board will experience a modest increase in its insurance account. Therefore, $8,100 will be restored to the budget.

Account	Reduction
11-000-230-531 - Telephone	$5,000

The Board budgeted $55,000 for this line item. Council states that the Board merely restated the budgeted amount for the 1992-93 school year rather than calculating its expenditures on current telephone usage. Council asserts that an increase of $2,000 over the $48,000 spent last year is sufficient; therefore, $50,000 is adequate for this line item.

The Board Secretary's affidavit shows an expenditure in this account of $49,095 for the 1992-93 school year. The Board states that a $50,000 budget might be adequate for this item if usage remained the same; however, Council did not consider the Board's anticipated move to the high school building which would require additional telephone installations and hookups in the new facility.

Based on the Board's anticipated move, it seems reasonable that an increase in this fund is necessary; however, it appears that an increase of $2,500 would be sufficient at this time until the Board develops a record of expenditures in this account. Accordingly, a reduction of $2,500 will be allowed.

Account	Reduction
11-000-230-580 - Travel	$5,500

Council recognizes that Board and administrative attendance at professional conferences are both important elements in maintaining a thorough and efficient system of education; however, it deems the appropriation of $16,500 in travel and conference expenses excessive.

The Board has calculated that the cost to attend all conferences by Board members and the administration would be $30,700. Therefore, it reasons that it has already trimmed its budget by $14,200. The Board maintains that conferences are learning experiences and are integral to professional growth. It encourages its members to take advantage of the benefits they offer.

The Commissioner finds that Council's reduction in this account is excessive; however, it appears that the Board will still be able to achieve its objective with a reduction of $2,000. Sufficient funds will remain so that some of the Board members and the administration may attend all of the scheduled conferences and meetings. Therefore, the amount of $3,500 is restored.

11-000-290-220 - Social Security Contributions	$80,000

Council's analysis for social security contributions took into account all salaries for those employees not covered by the Teachers Pension and Annuity Fund. Council calculated the amount that would be necessary to fund this line item and determined that the Board exceeded this reasonable calculation by the amount reduced.

The Board produced an affidavit by its Board Secretary which shows that the amounts of $246,249 and $261,025 were expended

for this line item in the 1991-92 and 1992-93 school years. It budgeted $270,000 for this account and concludes that the $190,000 allowed by Council is insufficient.

Based on the above, the record shows that the Board's budget in this account is reasonable considering its past expenses; therefore, the $80,000 reduction will be restored.

Account	Reduction
11-000-290-241 - Other Retirement Contributions	$ 23,000

Council maintains that its reduction allows for a ten percent increase over the amount budgeted last year and that the Board has failed to substantiate a need for more than $89,000 in this account.

The Board argues that the Public Employees Retirement System cost $60,000 in 1992-93 and that the invoice for 1993-94 is $78,577. The Essex County Pension Fund cost $20,361 in 1992-93; therefore, it needs a minimum of $100,000 to fund these two line items.

The record supports the Board's position. Consequently, the Commissioner determines that a reduction of $12,000 will be allowed and $11,000 will be restored to the budget.

11-000-290-290 - Other Employee Benefits	$100,000

This account is budgeted at $3,424,980. Council researched the percentage increase being charged in this account by other boards as compared to the increases requested by the Belleville Board and found the projections used for 1993-94 to be "slightly excessive." By contrast, the Board set forth a detailed listing of its expected costs in this account. Its last projection, as

documented in its Position Statement, shows an expenditure in this account of $3,348,158. The Board budgeted $26,635 or .8% more than its projection.

Based on the foregoing, the Commissioner finds that the Board has demonstrated a need for the monies budgeted in this account, except its .8% increase; therefore, a reduction of $26,635 will be allowed, and $73,365 will be restored to the budget.

Account	Reduction
11-000-290-340 - Technical Services	$ 2,500

Council suggests that the travel budget, analyzed earlier, is sufficient for all administrative travel expenses of the Board. It contends that this account can be eliminated without affecting the thoroughness and efficiency of education within the district.

The Board argues that it cannot eliminate its contractual obligation to the business administrator for travel expenses. This money is not provided for elsewhere in the budget. Council failed to identify it properly and give any reason for a reduction in this account.

The Board has shown with sufficient explanation its need for the monies in this account. Conversely, Council did not supply any valid reason for a reduction. The Commissioner determines that $2,500 will be restored to the budget.

11-000-209-500 - General Supplies	$ 8,000

Council asserts that it was unable to make a direct comparison of prior year's expenditures. However, it has determined that the appropriations of $96,100 for the 1992-93 school year have been increased to $119,900 for 1993-94. Council's review of other accounts indicates that office supplies were provided for by way of

an appropriation of $7,500 in Account 11-000-230-061 for the Board, School Election and Superintendent. Additionally, $12,000 was requested for office supplies, computer supplies and reference materials. This additional amount of approximately $20,000 for office supplies is considered excessive.

The Board argues that it budgeted $17,000 in this line item and that Council's reduction covers two line items, General Administration and Business Services. Council has failed to identify the sources of its numbers for its reduction based on problems in understanding the new accounting system.

It appears that Council has not properly identified the account from which its reduction was made, or it has combined two or more accounts in its review. Consequently, the reasons for its reduction do not comport with the facts concerning this line item; therefore, the $8,000 reduction will be restored.

Account	Reduction
11-000-290-890 - Miscellaneous Expenditures	$ 4,000

Council avers that overhead expenditures are up significantly over 1992-93, and it believes that sufficient funds exist elsewhere in the budget to cover the two expenditures within this account. In addition, Council does not agree that the provision for a Right-to-Know expenditure will be as much as the Board indicates.

The Board asserts that the breakdown of expenditures shown in its position statement demonstrate its necessary expenditures. These miscellaneous dues and assessments are not accounted for elsewhere in the budget.

The record shows that this account contains funds for professional association dues for the business administrator and computer services director as well as State of New Jersey assessments for Right-to-Know and fire registration fees. There is no showing that these expenditures are provided for elsewhere in the budget; therefore, the Commissioner determines that the $4,000 reduction will be restored.

Account	Reduction
11-1xx-100-101 - Teachers Salaries	$150,000

Council asserts that its does not seek to reduce the number of teachers within the district, but the appropriations of the Board for 1993-94 do not clearly indicate a recommendation for any additional personnel over the present level. Council's review of the audit reports for prior years shows savings averaging approximately $300,000 in each year because of teacher retirements. The overall salary level is reduced as a result of replacement teachers at the entry level. Based on the historical analysis of this account, Council recommends a reduction of $150,000. Since this does not reflect a reduction in teacher-staff levels, there should be no adverse impact on the Board's ability to provide a thorough and efficient system of education.

The Board asserts that it budgeted 2.8% for negotiation of teachers' salaries based on present personnel. According to the New Jersey School Boards Association, the average increase after negotiations is 6.11% in Essex County and 6.8% state-wide. This exceeds the provision made in the Belleville budget. Presently, all teaching staff members are anticipated to return. The budget does not provide for emergency positions in the event that increased

enrollment necessitates the creation of additional classes. Recent enrollments show the need for an additional bilingual teacher for 1993-94. This position was not included in the 1993-94 budget.

Council's reduction based on attrition is reasoned, but speculative. There are too many unknowns to allow for its full reduction. However, the Board's projection, although well-reasoned, is also somewhat speculative, considering its changing enrollment and still to be resolved negotiations agreement with its teachers. Viewed as a whole, however, it appears that a $50,000 reduction can be sustained. Therefore, the Commissioner will restore $100,000 to the budget.

Account	Reduction
11-190-100-640 - Textbooks	$50,000

Council states that it is very sensitive to the budget reductions that directly impact on pupils, and textbooks is certainly one of these accounts. However, this account is nearly double the 1992-93 spending level. Council asserts that old textbooks are replaced every year with a new series, and the trend in textbook spending has been remarkably consistent. Moreover, there will be a material increase over current spending patterns irrespective of its reduction.

The Board acknowledges that its budget in this line item is nearly double that of the 1992-93 school year due to an allotment of $85,000 for a major replacement of a reading series, grades K-6. This new series is more aligned with the state tests and its acquisition should help increase pupil testing results.

Although the Board's goal is meritorious, the governing body was not persuaded to allow for the purchase of a completely new

reading series in grades K-6. Further, the Board does not contend that it is unable to provide a thorough and efficient system of education for its pupils without the complete new series. There is still an increase in this budget item after Council's reduction; therefore, the Board will be able to begin the purchase of the texts it desires.

The Commissioner will sustain Council's reduction of $50,000.

Account	Reduction
11-000-240-600 - General Supplies	$45,000

Council argues again that the change in accounting principles applied makes the direct comparison of prior years very difficult. Nevertheless, a review of the figures provided leads Council to the conclusion that the appropriation for 1993-94 ($96,512) more than doubles the expenditure for 1992-93. Council recommends spreading this reduction over the several supply accounts it alleges are throughout the Board's budget. The resultant reductions would then be discretionary with the Board.

The Board contends that Council has combined several supply accounts to arrive at its budget figure of $96,512. Utilizing these same accounts,the Board made a comparison and demonstrated that the increase over the amount budgeted in 1992-93 is $13,130. To make the matter more confusing, the school district budget statement shows that $57,725 has been budgeted in this account.

Neither Council nor the Board was able to clarify the proposed budgeted expenditure. And assuming that the budget statement correctly expressed $57,725 as the budgeted amount, a $45,000 reduction in this account would be ludicrous. Therefore,

Council's suggested reductions will be considered through the several accounts it identified (Guidance, Child Study, Library, and Principal's Office). Accordingly, the budget will be held at the same level projected for 1992-93.

The Commissioner determines that a reduction of $13,130 will be sustained and $31,870 will be restored to the budget.

Account	Reduction
11-000-240-105 - Secretaries' Substitutes' Salaries	$15,000

Council believes that a provision for secretarial substitutes is unnecessary. When secretaries are absent from work, others should cover their positions without the need to bring in substitutes. This is common practice within the Council and should be the policy of the Board. Careful planning and redistribution of work can eliminate the need for secretarial substitutes.

The Board argues that Council's practices should not dictate those of the Board. The Board's layout precludes distribution of work, unless it can be done from remote locations. Certainly telephone and reception duties cannot be redistributed to remote locations. When there is only one secretary in a building, there must be a substitute. The district employs twenty-one secretaries and they are divided among its nine schools in nine different locations. There are seven elementary schools; each has one secretary. The middle school has two secretaries and the high school has twelve. Their duties generally preclude their being reassigned in the event of an absence and, in the case of the elementary schools, an absence would leave the building unstaffed. The 1992-93 expenditure for substitute secretaries was $16,518.

An examination of the positions of the parties demonstrates that the Board has adequately supported its need for substitute secretaries. The record shows that its budget is less than its expenditure last year for the same item. Further, Council's practice regarding its secretarial absences is not transferable to the Board. Therefore, the $15,000 reduction will be restored to the budget.

Account	Reduction
11-000-270-600 - Supplies and Materials	$5,000

Council argues that there should be consistency within budget accounts such as transportation. It claims that the Board achieved savings in this account by revising its transportation policy. Accordingly, Council's reduction will be sufficient to cover 1993-94 spending.

The Board notes that only four in-town runs have been eliminated for the 1993-94 school year. This will result in savings equal to or less than any inflationary increases for gas or equipment. The 1992-93 expenditures totaled $32,113, according to its attached affidavit. While the district expects some savings associated with its revised transportation policy, it must allow for inflationary increases in gasoline, as well as maintenance for an aging fleet.

An examination of this line item shows that the Board budgeted $33,000, approximately the same amount it expended last year. It is reasonable to conclude that any savings from its revised transportation policy will be practically off-set by normal inflationary increases. The Board's budget in this line item is reasonable and $5,000 will be restored to the budget.

Account	Reduction
11-000-260-100 - Grounds and Maintenance Salaries	$10,000

Council asserts that the Board bases its 1993-94 budget request of $15,000 on the 1992-93 budget of $14,000, even though only $2,774 was expended and $4,000 transferred out in the sub-account for substitutes. Further, the Board budgeted for substitutes in the event of a long-term absence without noting that such an absence will likely result in savings in the regular salary account. The Board also added a provision for work/study students even though no such usage resulted in 1992-93.

The Board budgeted $15,000 for this program. $9,000 is set aside for the employment of three high school students enrolled in the work/study program, and $6,000 is allotted for the employment of substitutes in the event of a long-term absence of any of the maintenance personnel. The Board defends its budget by pointing out that it has twelve persons in the maintenance/grounds area and that they all accumulate sick leave. As of July 1, 1993, these individuals have amassed a total of 574 sick days which may be used during the school year. On average, an employee would have to be absent in excess of 47 days prior to the Board accruing any savings in the regular salary account.

It appears that the Board is unable to adequately justify its request for the substitute maintenance personnel in this account. According to Council, only $2,774 was expended in 1993 and no students were employed. The Board asserts that this in an aberration and that it will certainly attempt to employ students this year. In any event, the Board has failed to show that this expenditure is necessary for the maintenance of thorough and

efficient school district. Therefore, the $10,000 reduction will be sustained by the Commissioner.

Account	Reduction
11-000-260-610 - General Supplies	$30,000

Council states that the Board provided figures which it was unable to trace to past audit reports or the 1992-93 budget reports. Nevertheless, Council made a five-year comparison of spending and an analysis of the details behind the 1992-93 spending which shows that a $30,000 reduction would not affect the quality of education in the district.

The Board submitted its figures of the five-year comparison addressed by Council and its comparison does not agree with Council's assessment. In fact, the amount budgeted this year is $10,000 less than the amount budgeted last year. Further a five-year comparison is not a valid reason, without other support, to reduce a budget item. Accordingly, the $30,000 reduction will be restored to the budget.

	Reduction
11-000-260-620 - Energy	$30,000

In Council's judgment, its analysis of this line item discloses that its reduction will still leave sufficient funds in the account for energy expenses even if this winter is more severe than the last.

A review of the Board's data discloses that its expenditure for 1991-92 was $427,589, and $419,125 for the 1992-93 school year. The average for the past two years is $422,842. A reduction of $15,000 will leave a balance in this account of $425,000 for the 1993-94 school year, which is slightly more than the average

expenditure for the past two years; therefore, the Commissioner determines that $15,000 will be restored to the budget.

Account	Reduction
11-402-100-101 - Athletic Trainer	$30,000

Council asserts that the Board wants to add this position to its staff. While such a position may be desirable by the Board, Council questions whether such a position is necessary for a thorough and efficient system of education in the district.

The Board set forth a strong argument for establishing this new position; however, the Commissioner finds that the new position is desirable but not necessary for the establishment of a thorough and efficient system of schools. Accordingly, the $30,000 reduction by Council will be sustained.

11-303 - General Fund Unappropriated Balance	$250,000

Council provided an analysis of the Board's surplus using estimated or excess revenues, cancelable accounts payable and unexpended budget funds. Council believes that the true surplus will be in excess of 2.1% and states that additional revenues can be generated by pointing to the Board's own surplus maintenance strategies of recent years.

The Board states that its General Fund Unappropriated Balance as of June 30, 1993 is $766,433, and that $150,000 of this balance has already been earmarked for use in the 1993-94 budget. The remaining $616,433 is equivalent to 2.1% of the proposed general fund balance. The Board asserts that Council's reduction of an already modest surplus, given the negotiations considerations inherent in the budget, demonstrates Council's indifference to the district's continued fiscal integrity. Council has arbitrarily

established $500,000 as a proper Fund Balance for the district without taking into account other financial considerations and the potential for unanticipated expenditures associated with increasing district enrollment.

The Commissioner has reviewed the documents submitted and has considered the arguments of the parties. The Commissioner has stated on many occasions that a reasonable surplus is a necessary item in the budget.

In Board of Education of the Township of Madison v. Mayor and Council of the Township of Madison, 1968 S.L.D. 139, the board of education faced substantial reductions by its governing body. The Commissioner determined that the Madison Board's "***problem is one of total revenues available to meet the demands of a school system***." (at 142) This conclusion is applicable to this Belleville budget dispute.

In Board of Education of Fair Lawn v. Mayor and Council of Fair Lawn, 143 N.J. Super. 259 (Law Div. 1976), aff'd 153 N.J. Super. 480 (App. Div. 1977), the Court held that "***the board has the right, subject to ultimate review by the Commissioner of Education, to maintain a reasonable surplus in order to meet unforeseen contingencies.***" (at 273) See also: Board of Education of the Town of Dover v. Mayor and the Board of Aldermen of the Town of Dover, Morris County, 1991 S.L.D. 1330 wherein the Commissioner concluded that a surplus of 1.9% of the current expense budget was "insufficient to sustain the Board against unforeseen contingencies." (at 1343)

Both in prior case law and in regulation, the Commissioner has held 3% as the amount of surplus to be generally regarded as reasonable and necessary. N.J.A.C. 6:20-2.13

In Board of Education of Delaware Valley Regional High School District v. Township of Alexandria et al., 1989 S.L.D. 62, aff'd in part/rev'd in part by the State Board 81, the State Board of Education determined a free balance of approximately 4% of the current expense budget to be a slender reserve. See also: Board of Education of the Township of West Orange v. Township Council of West Orange, Essex County, 1991 S.L.D. 84.

In the instant matter, the Board has a General Fund Free Appropriations Balance of approximately 2.1%. Based on regulation and case law as set forth above, the Commissioner finds this surplus is insufficient. Accordingly, the $250,000 reduction will be restored to the budget.

A revised table of the reductions showing the amounts restored and sustained is set forth below:

RESTORATIONS

Account	Description	Reduction	Amount Restored	Amount Not Restored
11-000-230-520	Insurance	$ 22,600	$ 8,100	$ 14,500
11-000-230-531	Telephone	5,000	2,500	2,500
11-000-230-580	Travel	5,500	3,500	2,000
11-000-299-220	Soc. Sec. Contri.	80,000	80,000	-0-
11-000-290-241	Oth. Retire.Contri.	23,000	11,000	12,000
11-000-290-290	Oth. Employ. Ben.	100,000	73,365	26,635
11-000-290-340	Technical Services	2,500	2,500	-0-
11-000-290-500	General Supplies	8,000	8,000	-0-
11-000-290-890	Miscellaneous Exp.	4,000	4,000	-0-
11-XXX-100-101	Salaries Teachers	150,000	100,000	50,000
11-190-100-640	Textbooks	50,000	-0-	50,000
11-000-240-800	General Supplies	45,000	31,870	13,130
11-000-240-105	Secretary Salaries	15,000	15,000	-0-
11-000-270-890	Supplies & Mater.	5,000	5,000	-0-

Account	Description	Reduction	Amount Restored	Amount Not Restored
11-000-260-100	Sals., Grnds. & Maintenance	10,000	-0-	10,000
11-000-260-610	General Supplies	30,000	30,000	-0-
11-000-260-620	Energy	30,000	15,000	15,000
11-402-100-101	Sal.-Athletic Trainer	30,000	-0-	30,000
11-303	General Fund-Surplus	250,000	250,000	-0-
	TOTAL	$865,600	$639,835	$225,765

This tabulation shows that $639,835 must be restored to the budget. Accordingly, the Essex County Board of Taxation is directed to add to the local tax levy for the Township of Belleville School District $639,835 for General Fund current expense purposes for the 1993-94 school year which when added to the amount of $20,436,336 previously certified by the governing body will result in a total General Fund current expense tax levy of $21,076,171.

Amount of Tax Levy Certified by the Governing Body	$20,436,336
Amount Restored by the Commissioner	639,835
Total General Fund Curr. Exp. Tax Levy	$21,076,171

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 15, 1993

DATE OF MAILING - OCTOBER 15, 1993

251-93

251-93

BOARD OF EDUCATION OF THE BOROUGH OF BRADLEY BEACH, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MAYOR AND BOROUGH COUNCIL OF THE BOROUGH OF BRADLEY BEACH, MONMOUTH COUNTY, RESPONDENT.	:	DECISION

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of $444,800 made by governing body following voter rejection of proposed budget on April 20, 1993.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore $436,800 for a total General Fund tax levy of $3,698,352 for 1993-94 school purposes.

OCTOBER 15, 1993

BOARD OF EDUCATION OF THE BOROUGH OF BRADLEY BEACH, PETITIONER, V. MAYOR AND BOROUGH COUNCIL OF THE BOROUGH OF BRADLEY BEACH, MONMOUTH COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

Peter P. Kalac, Esq. (Kalac, Newman, Lavender, & Campbell), for Petitioner

Joseph P. Quinn, Esq. (Pringle & Quinn), for Respondent

This matter was opened before the Commissioner of Education on June 10, 1993 through the filing of a Petition of Appeal by the Board of Education of the Borough of Bradley Beach (Board) seeking restoration, on the grounds of necessity for a thorough and efficient education, of reductions by the Mayor and Borough Council of the Borough of Bradley Beach (Council) in the General Fund tax levy for the 1993-94 school year. These reductions were made pursuant to N.J.S.A. 18A:22-37 and N.J.A.C. 6:24-7.2(b)2 following voter rejection of the Board's proposed budget on April 20, 1993 and after consultation with the Board as required by law.

The total proposed and certified budgets, as well as the amounts in dispute in this matter, are set forth below:

Amount of Tax Levy Proposed By Board of Education		Amount of Tax Levy Certified by Council	
General Fund	$3,706,352	General Fund	$3,261,552
Amount of Reduction By Council		Amount of Reduction In Dispute	
General Fund	$444,800	General Fund	$444,800

On July 2, 1993 the Council filed its Answer to the Petition of Appeal. Position Statements were filed by the Board on July 16, 1993 and by Council on August 2, 1993. A Response was filed by the Board of August 5, 1993, and a Summation was filed by the Board on August 19, 1993. No further documents were received and the record on this matter was closed on August 19, 1993.

The reduction to the General Fund tax levy and reasons for reductions as determined by Council are as follows:

Description	Reason	Reduction
Teachers' Salaries	Eliminate 4.5% salary increase	$ 76,400
Group Insurance		41,300
Legal Services		8,000
Misc. Other Expenses		22,800
Teachers' Salaries	Modify by 15% decrease with possible layoffs	296,300
	Total	$444,800

The Council resolution of May 11, 1993 was not filed with its Answer, which had no attached certification or documentation, but was filed with its Position Statement. The resolution included 40 itemized reductions which were then summarized into the five broad categories listed above. It must be noted that Council presented no rationale for some of the reductions in its resolution. The list of 40 itemized reductions had no rationale and was preceded in the resolution by two statements regarding the fact that the Mayor and Council felt and recognized that the voters

wanted a reduction in the school budget and, further, felt that the taxpayers could not absorb a 13.9 cent increase to their taxes. After the list of reductions, the resolution combined the items into the five categories and listed the percentage reductions noted above as the rationale for the two salary items. No rationale was given for the other three items.

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

Before reviewing the instant matter line item by line item, the Commissioner must point out for the record that the New Jersey

Supreme Court in East Brunswick, supra has addressed the proper standard of review by a governing body after defeat of a budget by the voters. In reads in pertinent part:

> "But its determinations must be independent ones properly related to educational considerations rather than voter reactions. In every step it must act conscientiously, reasonably and with full regard for the State's educational standards and its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community." [at pp. 105-106]

Moreover, it is clear that the New Jersey Supreme Court in Deptford, supra has unequivocably ruled that the statement of reasons for each reduction effectuated by a governing body must be done at the time the municipality make its certification of the reduced budget to the county board of taxation and that if there is a failure to do so there can be a heavy presumption against the educational validity of the proposed cuts. It determined that

> "The board of education should be furnished with reasons in order to respond quickly and intelligently and to act constructively in preserving educational interests. The advantages of such a process would be dissipated if the reasons were not available until an appeal has been filed. Hence, we conclude that these regulations do not exempt the municipality from a duty to file a statement of reasons in a timely fashion in conjunction with any proposed budget cuts, which, we now determine, must be done at the time the municipality makes it (sic) certification of the reduced budget to the county board of taxation.
>
> ***We now hold that statements must be provided for any line-item reductions. This will not be unduly inconvenient or burdensome***
>
> Further, a uniform rule that calls for the submission of explanatory reasons for all budget cuts will encourage municipalities to be specific and conscientious in their consideration of educational concerns, and will serve to make such considerations an integral part of their decisionmaking process." [at pp. 315-317]

and

> "...we want to stress that if the municipality fails to submit reasons contemporaneously with its certification of budget cuts, the Commissioner of Education in the course of an ensuing appeal is entitled to invoke a heavy presumption against the educational validity of the proposed budget cuts. Hence, the greater the dalay in the submission of detailed reasons in support of such cuts, the stronger will be the presumption against their validity and the heavier will be the municipality's burden on appeal to establish the validity of the reduced budget. In that posture, the Commissioner will be entitled initially to presume that such cuts have been made purely for extra-educational reasons or for political expediency without specific cognizance taken of their educational effects." [at pp. 320-321]

Mindful, then, of the balance to be applied in the standard of review, the Commissioner makes the following determination with respect to the reductions in the General Fund tax levy effectuated by Council.

Item	Reduction
Teachers' Salaries - Eliminate 4.5% Salary Increases	$76,400

In its Position Statement, the Board notes that it is presently in salary negotiations, now at the mediation stage, with its teachers and that it had budgeted $76,400, an average increase of 4.5%, to meet the obligation. The Board states that the 4.5% is well below the average salary increases for teachers in the State for 1993-94. The Council in its Position Statement asserts that no salary increases for teachers are warranted because the current salaries are adequate and far exceed the income level of most residents.

In reviewing the data presented, it is determined that the Board must adequately prepare for negotiated increases in teachers'

salaries and that Council's position to provide no increases is unreasonable. The Commissioner orders the restoration of the $76,400 reduction.

Item	Reduction
Legal Services	$ 8,000

The Council provided no rationale for this reduction in its resolution but asserts in its Position Statement that a $2,000 reduction in legal fees, a $2,000 reduction in general administrative professional fees, and a $4,000 reduction in architectural fees can be achieved without substantial detriment to the educational system and will not jeopardize a thorough and efficient education. The Board notes in its Position Statement that the amounts budgeted for these services are based on past experience. The Board adds in the Board Secretary's affidavit attached to the Position Statement that this reduction is approximately one-third of the amount budgeted for these services.

This was a difficult issue to address since neither party presented specific reasons for the need or lack of need for these funds. However, a critical factor in this review is the need for the Commissioner to conclude that the amount reduced is necessary for the provision of a thorough and efficient system of education. It is determined that the Board did not provide sufficient documentation, to lead to this conclusion and therefore the Commissioner sustains this reduction of $8,000.

Miscellaneous Other Expenses	$ 22,800

Again, the Council provided no rationale for this reduction in its resolution but claims in its Position Statement that the eight items included in this area can be reduced without any

substantial impact on the operation of the school or on the thorough and efficient education. The Board in its Position Statement contends that the supplies and services included in the itemized list are essential to maintaining a thorough and efficient system of schools. The Board notes that the amounts budgeted were based on prior years' experience and that the reductions range from 9% of teaching supplies to 33.3% of maintenance supplies.

The Commissioner determines that the supplies and services included in this area are essential to the thorough and efficient operation of the schools and therefore orders the restoration of the $22,800 reduction.

Teachers' Salaries -
Modify by 15% decreases with possible layoffs $296,300

The Council in its resolution lists a lengthy number of salary reductions and states that these could be possible teacher layoffs. The list includes reductions not only for teachers but also for the Superintendent, Board Secretary/Business Manager, Treasurer of School Monies, various secretarial positions, custodians, and specialists, such as librarian, social worker, psychologist, learning disabilities teacher-consultant and speech teacher, and food service workers. In its Position Statement, the Council justifies the reductions to bring spending under control and in light of the salary cuts and staff reductions the Council is experiencing. Council agrees that there will be an effect from these reductions, but it claims the effect will not result in a failure to provide a thorough and efficient education.

The Board is its Position Statement argues that some reductions cannot be achieved because of contractual obligations, such as for the Superintendent and Board Secretary/Business Manager

and because of statutorily mandated services. The Board points out that reductions of some specialized teachers would eliminate programs such as art, music, industrial arts, and gifted and talented/computer programs. The Board adds that reductions in the elementary teaching staff at the grade levels with the lowest enrollment would result in class sizes of 34, 35, 36, which it believes is neither thorough nor efficient.

In reviewing the data submitted on this reduction, the Commissioner finds that the Council's position, while admitting a possible effect from this reduction, blatantly ignores the extensive impact of the reduction, particularly in a district with increasing enrollment. It is determined that the Council's reduction is arbitrary, capricious and unreasonable. The Commissioner orders the restoration of the $296,300 reduction.

Item	Reduction
Group Insurance	$41,300

The Council provided no rationale for this reduction in its resolution, but asserts in its Position Statement that savings can be achieved by the Board by getting lower premiums in the open market, by anticipated staff reductions, and by elimination of benefits for part-time employees. The Board claims in its Position Statement that these funds are necessary to pay the premiums for the health and dental insurance policies which are contractual commitments under the collective bargaining agreement. The Board also states that savings by reductions in staff would result in a less than thorough and efficient education.

Based on the data presented and the decision to restore the reductions for salaries, the Commissioner orders the restoration of the $41,300 reduction.

Thus, for the reasons set forth above, the Commissioner determines to restore $436,800 and sustain $8,000 of the $444,800 in General Fund reductions appealed herein as summarized by the chart below:

Description	Reduction	Restored	Sustained
Teachers' Salaries (eliminate increase)	$ 76,400	$ 76,400	$ -0-
Group Insurance	41,300	41,300	-0-
Legal Services	8,000	-0-	8,000
Misc. Other Exps.	22,800	22,800	-0-
Teachers' Salaries (15% decrease)	296,300	296,300	-0-
Totals	$444,800	$436,800	$8,000

Accordingly, the Monmouth County Board of Taxation is directed to make the necessary adjustments as set forth below to reflect a total of $3,698,352 to be raised in General Fund tax levy by the Borough of Bradley Beach for the 1993-94 school year:

	General Fund
Original Tax Levy	$3,706,352
Reduction	444,800
Tax Levy After Reduction	3,261,552
Restoration	436,800
Tax Levy After Restoration	$3,698,352

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 15, 1993

DATE OF MAILING - OCTOBER 15, 1993

252-93

252-93

THOMAS J. KIRSCHLING, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY, RESPONDENT.	:	DECISION

SYNOPSIS

Petitioner, tenured Director of Personnel, alleged Board violated his rights by refusing to compensate him for unused vacation days and holidays subsequent to his resignation.

ALJ concluded under Board's existing employee benefits policy, vacation pay is deferred compensation and, once earned and not used, payment could not be denied. Therefore, Board was ordered to compensate petitioner for thirty-two and one-half unused vacation days at his per diem rate at the time of his resignation on January 2, 1991. It was also obligated to pay petitioner his per diem rate for the legal holiday January 1, 1991. Moreover, having reviewed record, ALJ dismissed Board's claim that petition was untimely filed.

Commissioner adopted findings and determination in initial decision and ordered payment for unused vacation days and one holiday. Pursuant to N.J.A.C. 6:24-1.16(c)1, Commissioner rejected petitioner's claim for pre-judgment interest.

OCTOBER 18, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 355-92
AGENCY DKT. NO. 399-11/91

THOMAS J. KIRSCHLING,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY,
Respondent.

Margaret C. Murphy, Esq., New Jersey Association of School Administrators, for petitioner

Frederick W. Hardt, Esq., for respondent

Record Closed: June 18, 1993 Decided: August 30, 1993

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Thomas J. Kirschling, alleges that the Board of Education of the Township of Pemberton (Board) violated his tenure rights when it failed and refused to compensate him for unused vacation days and holidays subsequent to his resignation from the Board's employ, contrary to and in violation of N.J.S.A. 18A:28-5, and the Board's own policy with regard to payment for unused vacation days. The Board asserts that absent an employment contract provision for payment of accrued vacation leave, or provision for salary in lieu of vacation leave, or statutory authority for such payment, an employee has no claim for such payment.

This matter commenced with the filing of a Petition of Appeal by petitioner on or about November 8, 1991. The Board filed its Answer on or about November 18, 1991. The matter was transmitted to the Office of Administrative Law (OAL) on January 13, 1992, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A prehearing conference was held on April 16, 1992, at which, among other things, the jurisdiction of the Commissioner of Education (Commissioner) was placed in issue.

Thereafter, the Board propounded a Motion for Summary Decision, pursuant to N.J.A.C. 1:1-12.5, requesting that this tribunal find and determine that jurisdiction of the instant matter lies with the Public Employment Relations Commission (PERC) rather than with the Commissioner. Petitioner opposed the motion. On July 10, 1992, the undersigned issued an Order Granting Partial Summary Decision in favor of petitioner, concluding that the Commissioner had jurisdiction to hear and determine the matter. On August 14, 1992, the Commissioner concurred and ordered that the matter proceed to a determination on the merits.

The hearing was held on January 26, 1993, at the OAL, Mercerville, New Jersey. The parties requested, and were granted, leave to submit posthearing briefs and memoranda. Subsequent to the submission of the last memorandum, the Board requested to reopen the record for the admission of a document inadvertently omitted at the hearing. The Board's request was granted, the record was reopened and the document was accepted. Petitioner objected by way of letter dated June 17, 1993, (received June 18, 1993) and the record was considered closed on June 18, 1993. An extension for the issuance of the initial decision was requested and granted.

UNCONTESTED FACTS

The following facts are neither disputed nor contested. Therefore, I adopt the following as my **FINDINGS of FACT** in this matter:

Petitioner was employed by the Board from November 6, 1987, until January 2, 1991, as its director of personnel. Petitioner, therefore, had acquired a tenure status with the Board.

Petitioner was, by the nature of his employment position, a "confidential" employee. Therefore, he was exempt from and not a member of a collective bargaining unit for contractual purposes. N.J.S.A. 34:13A-3 (g).

On May 9, 1989, the Board adopted a policy of benefits for its confidential employees, which included the assistant superintendent, business administrator/board secretary and director of personnel, among others (P-4). The adopted policy provided for, among other thing, Item 5, which states in part:

> Emergency leave at the discretion of the Superintendent
>
> Vacation Days - 22 per year - Prorated on the basis of 1.8 per month; Unused vacation days shall be compensated at the per diem rate.
>
> [P-3]

It was the practice that the employee would earn vacation time over a period of a year. The employee was then free to take the vacation time in the year subsequent to the year in which it was earned.

On May 15, 1989, the assistant superintendent addressed a memorandum to the Board's business administrator/board secretary, which stated:

> In accordance with the unanimous Board approval of Superintendent's Recommendation VII, #6, Employee Benefits - Assistant Superintendent, on May 9, 1989, please process payment for seven (7) unused vacation days, earned during the 1987-88 school year and to have been used 1988-89. Please also process payment for 22 vacation days earned during 1988-89 school year and which will not be able to be used due to resignation from district.
>
> Total vacation days to be paid at per diem rate equals 29 days.
>
> [R-5]

The assistant superintendent was paid a total of $9,236.64 by the Board for twenty-nine unused vacation days (P-6).

On August 14, 1990, the Board passed a resolution which stated as follows:

Be it resolved that the following administrators be authorized to use their unused vacation days for the 1989-90 school year:

Name	#of Unused Days
Robert Moore	9 days
Mark Cowell	10½ days
Thomas Kirschling	14 days
John Harrington	1 day

[P-9]

Petitioner earned the fourteen days in the 1988-89 school year. He used the vacation days prior to his resignation from the Board's employ effective January 2, 1991.

Petitioner claims he earned twenty-two vacation days in the 1989-90 school year which became available to him on July 1, 1990. In addition, during the period from July 1, 1990, to January 2, 1991, petitioner claims he earned an additional eleven vacation days, at the rate of 1.8 per month. He had used one-half day between July 1, 1989, and January 2, 1991. He further claims pay for the holiday, January 1, 1991. Thus, petitioner claims his unused vacation and holiday time amounts to thirty-two and one-half days.

SUMMARY OF THE TESTIMONIAL EVIDENCE

Ronald Chiste, former assistant superintendent of the Pemberton School District, testified on behalf of petitioner. He testified that the Board adopted a policy which incorporated "the leadership team" concept within the central office of school administrators, under the direction of the Board's superintendent of schools (P-1). The Board policy entitled The Leadership Team (P-1) was adopted by the Board on February 10, 1987, and provided for the superintendent to institute a leadership team management system for submitting recommendations to the Board on issues of educational policy, and to address the economic concerns and working conditions of the leadership team members, among other things. The central office staff (leadership team) of confidential employees did not directly address nor negotiate with the Board with respect to salaries, fringe benefits or other economic concerns. Rather, the superintendent presented their proposals to the Board.

Mr. Chiste testified that the Board adopted a policy on February 10, 1987, which provided for leaves for administrators not covered by negotiated agreements. The policy states as follows:

> Professional staff administrators whose terms of employment are not covered by a negotiated agreement or personal contract shall be entitled to the same leave benefits provided to members of the Professional Administrators Association.
>
> [P-2]

Specifically, with respect to vacation benefits for confidential employees, Mr. Chiste testified that it was the practice that the employee earned vacation time over a period of a year. Subsequent to having earned the time, the employee could then use it for vacation. However, in the event the confidential employee left the employ of the Board and had not used the accrued vacation time to which she/he was entitled, the employee was reimbursed for those days of vacation time not used. Mr. Chiste applied the Board's policy (P-3) to his advantage where he was reimbursed for twenty-nine unused vacation days upon his resignation from the Board's employ, effective June 30, 1989 (P-5, P-6).

Petitioner testified on his own behalf, asserting, among other things, that he commenced his employment with the Board on November 9, 1987, in the position of director of personnel. Petitioner, thereafter, acquired early tenure with the Board in that position.

Petitioner testified that the personnel functions of the position required him to perform his duties in the summer months rather than take vacation time. There was a high priority to fill vacant teaching and non-teaching positions, particularly during the summer months. During the 1989-90 school year there was the threat of a strike by the school district employees. Consequently, petitioner devoted the months of June, July and August to securing replacement teachers in the event the teachers did strike. Consequently, petitioner was unable to use his full twenthy-two days of vacation time. Instead, petitioner was able to use eight of the vacation days earned, leaving him with fourteen accrued vacation days.

Pursuant to past practice, petitioner requested reimbursement for the fourteen unused vacation days. On the Board's agenda for its July 3, 1990, executive session, Superintendent Robert Moore sought authorization to pay central office administrators for unused vacation time for the 1989-90 school year (P-8). The Board

rejected the superintendent's recommendation. At its regular monthly meeting held on August 14, 1990, the Board adopted a resolution authorizing petitioner and three other administrators to use their unused vacation days for the 1989-90 school year (P-9). Petitioner complied with the Board's resolution and used the fourteen vacation days prior to January 2, 1991.

On December 12, 1990, petitioner submitted his resignation to Superintendent Moore, effective January 2, 1991, "pursuant to all legal, contractual and past practices" (P-11). On December 21, 1990, Superintendent Moore advised petitioner that the Board accepted his resignation at its regular monthly meeting held on December 20, 1990 (P-12). On January 4, 1991, petitioner submitted a voucher for reimbursement of thirty-two and one-half unused vacation days (P-13). He broke that number down into twenty-two vacation days earned during the 1989-90 school year, to be used after July 1990, and eleven days' vacation earned from July 1990 through December 31, 1990, plus New Year's Day, a paid holiday. Petitioner's voucher to the Board was for a total amount of $7,765.50, which he claimed was due and owing to him.

On cross-examination, petitioner admitted it was his duty as director of personnel to attend all Board meetings. He further admitted he attended the July 3, 1990, Board meeting where it discussed payment for unused vacation time. It was petitioner's understanding that the Board would not pay him for the fourteen vacation days he had earned and accumulated for the 1989-90 school year. Petitioner testified that the Board's past practice was to pay for the accumulated vacation time not used the previous year after July 1, with the commencement of the new school year.

Petitioner testified there was no question in his mind in May 1990 that the Board was considering continuing the then existing policy concerning entitlement to accumulated unused vacation time. He based this belief upon the fact that the Board had just paid Mr. Chiste for unused vacation leave. As of August 14, 1990, the date of the Board's action (P-9), petitioner understood that the Board would not reimburse him for fourteen vacation days. He further understood that he either had to use the fourteen vacation days within the time prescribed by the Board, or lose them. Petitioner also understood that he had accumulated an additional twenty-two days of vacation, commencing July 1, 1990.

Petitioner recalled that his resignation from the Board's employ was effective January 2, 1991. January 1, 1991, was a legal holiday, for which he was not paid and other administrators were paid.

Petitioner testified that he was aware of the so called "ninety-day rule." N.J.A.C. 6:24-1.2(c). He contended that his former attorney was communicating with representatives of the Board concerning its failure to pay petitioner for his thirty-two and one-half vacation days. Philip E. Stern, petitioner's former attorney, wrote a letter dated February 26, 1991, to Superintendent Moore which said, in part:

> As you are aware, I represent the legal interests of Dr. Thomas Kirschling concerning his employment with the Pemberton Township Board of Education.
>
> My client informs me that, upon his resignation from your district, he had earned 32½ (thirty-two and one-half) vacation days. Dr. Kirschling further informs me that the Board has yet to pay him for his accrued vacation days.
>
> Kindly inform me, at your earliest convenience, when Dr. Kirschling can expect payment of 32½ vacation days.
>
> Thank you in advance for your anticipated cooperation in this matter.
>
> [R-5]

Petitioner testified that by the end of the 1990-91 school year, June 30, 1991, his attorney had not received a response to his February 25, 1991, letter. Petitioner did not know whether attorney Stern had discussed the issue with Superintendent Moore. Petitioner was aware that Mr. Stern had sent a letter to Mr. Hardt, the Board's attorney, dated September 12, 1991. Mr. Stern's letter to Mr. Hardt stated, in part, as follows:

> As you will recall, I represent the interests of Dr. Thomas J. Kirschling as they relate to his former employment as Director of Personnel for the Pemberton Township Board of Education.
>
> As we previously discussed, upon resignation from his position in Pemberton, Dr. Kirschling accrued 32½ (thirty-two and one-half) vacation days. My client informs me that Board policy dictates that he should have been paid the per diem amount of the 32 ½ days based upon his final annual salary. To date, Dr. Kirschling has not been paid for his vacation days.

> I have spoken with both the Pemberton Superintendent of Schools and yourself concerning payment of Dr. Kirschling's vacation days. Since there appears to be no impediment barring payment of said days, kindly inform me at your earliest convenience when Dr. Kirschling can expect payment for his accrued vacation days.
>
> Thank you again for your continued courtesies and cooperation in this matter.
>
> [P-15]

Petitioner asserted that following his submission of the voucher for payment of his vacation days on January 4, 1991 (P-13), he heard nothing from the superintendent or the Board. He asserted he was never told he would not be paid for the earned vacation days and, therefore, assumed he would be paid. When petitioner heard nothing from the Board, he contacted the attorney to bring the matter to a final resolution.

On September 20, 1991, the Board advised petitioner it would not pay him the value of his accrued vacation days. Attorney Stern filed petitioner's Verified Petition of Appeal before the Commissioner on or about November 12, 1991.

Robert J. Moore testified on behalf of the Board, asserting, among other things, that he retired from the Board's employ on June 30, 1992. He had been associated with the Board for thirty-two years and was appointed as its superintendent in 1984.

Mr. Moore testified about the Board's policy concerning the payment for vacation days, saying:

> The only consistent policy that was followed was that when a person retired, let's say June 30th, then they would be paid that vacation that accumulated during the course of the previous year.
>
> [Transcript at 110]

Other than upon retirement, Mr. Moore asserted that payment for accrued vacation time was on a case-by-case basis or a Board-to-Board basis.

Mr. Moore testified that under the Board's policy found in Exhibit P-2 in evidence, the central office staff was afforded benefits identical to those negotiated between the Board and the Pemberton Township Administration Association

(Association). Mr. Moore did not have a copy of the negotiated agreement between the Board and the Association when he testified. However, he asserted that during the period of time relevant to this proceeding, the agreement did not contain a firm policy by which administrators were paid for unused vacation days. He further asserted that neither Board policies P-1 nor P-2 mandated that employees be paid for unused vacation days.

Mr. Moore prepared the Board agenda items for its session held on July 3, 1990 (P-8). He recommended that the Board authorize payment for unused vacation time for the 1989-90 school year to its central office administrators. After the Board discussed the Superintendent's recommendation, it was tabled and the Board retired into caucus or executive session to discuss the matter further under the employment exception of the Open Public Meetings Act (OPMA), N.J.S.A. 10:4-12b(8). Subsequent to the caucus session, Mr. Moore withdrew the recommendation for lack of majority vote of the Board to approve it.

Mr. Moore asserted that the Board simply did not want to pay its central office administrators for the vacation days. As a compromise, the Board and Superintendent agreed that the vacation days would be used during that current school year; the employee would either use the vacation days or lose them.

On August 14, 1990, the Board adopted the resolution to authorize petitioner and three other employees to use their vacation days for the 1989-90 school year (P-9). Mr. Moore testified that by this action, the Board adopted a policy different from that which was in existence in 1989 and which provided for compensation at a per diem rate for unused vacation days (P-3). He explained that under the new policy, the employee either used the vacation days or lost the days; there was no compensation for unused vacation days.

Mr. Moore testified that he met with petitioner and two other administrators to explain that the Board required them to use their twenty-two vacation days during the course of the year. None of the administrators were please with the Board's decision.

On August 15, 1990, following the August 14, 1990, Board meeting, Mr. Moore addressed a memorandum to Mr. J. Harrington, petitioner and Mr. Cowell concerning vacations. Mr. Moore's memorandum stated, in part, as follows:

> The Board of Education made two decisions at the August 14 meeting concerning vacation days.
>
> Central Office Administrators receive 22 days per year.
>
> 1. Unused vacation days - these days must be used during the 1990-91 school year.
>
> 2. Vacation - 1990-91 - The Board has adopted a resolution requiring the use of the all vacation days during the current school year.
>
> Please submit a schedule of dates you plan to use these days.
>
> [R-6]

Mr. Moore testified that he learned from petitioner that petitioner would be leaving the Board's employ to accept a position with the Evesham Township Board of Education. Mr. Moore and petitioner discussed petitioner's termination date, however Moore was not certain of the date until he received petitioner's letter of resignation, dated December 12, 1990. There, petitioner established January 2, 1991, as the effective date of his resignation. Mr. Moore asserted that petitioner could have used his accumulated vacation days prior to the effective date of his resignation.

Subsequent to petitioner's termination, Mr. Moore received a telephone call from petitioner's then attorney, Philip Stern, concerning petitioner's accumulated vacation time. Mr. Moore advised Mr. Stern that Moore was not authorized to make any payment for petitioner's unused vacation days.

On cross-examination, Mr. Moore admitted that, in addition to Mr. Chiste, other school administrators had left the Board's employ and received pay for unused vacation days. Mr. Joseph Poedubicky, a school principal, left the school district in February 1990 to take another position and was paid for his unused vacation days. Mr. Moore also testified that Ms. Ronnie Storch resigned from the Board's employ effective July 1988, and was paid for her unused vacation days. Mr. Moore could not testify as to how many vacation days each of the two administrators were reimbursed for because he did not have their records.

On examination by this tribunal, Mr. Moore testified that between August 14, 1990, and July 1992, the effective date of his retirement, four administrators resigned or retired from the Board's employ. Dr. DiNunzio, principal, retired effective July 1, 1992, and was paid for his twenty-two accumulated vacation days.

Mr. Edward Moore, principal, likewise retired effective July 1, 1992, and was paid for his accumulated vacation days. Mr. Robert Page, a central office administrator, was paid for his accumulated twenty-two days, effective upon his retirement, July 1, 1992. Similarly, George Young, principal, was paid for his twenty-two days of accumulated vacation.

Mr. Moore asserted, among other things, that these four individuals had accumulated their twenty-two vacation days as of July 1, 1992. The employees were not in the service of the Board thereafter and they had not been able to use their accumulated vacation days prior to July 1, 1992. Consequently, the Board paid the four administrators for their accumulated vacation days upon their retirements.

Mark Cowell, assistant superintendent for business/board secretary testified that he was affected by the Board's action of August 14, 1990, and lost twenty-two vacation days over the course of the last couple of years. He explained that the nature of his job prevented him from taking extended vacations, i.e., he is required to attend the Board's two monthly meetings, must certify the payroll, approve all bills to be paid, sign all purchase orders and vouchers, attend Board committee meetings, e.g., budget, negotiations, etc.

Assistant Superintendent Cowell testified that Mr. Poedubicky's last working day in the Board's employ was January 26, 1990. Mr. Poedubicky was paid for fifteen and one-half vacation days upon his leaving the school district. Twelve of the fifteen and one-half vacation days had accrued from July 1989 to January 1990. Therefore, three and one-half unused vacation days were carried forward from before July 1989.

Mr. Cowell testified that Ms. Ronnie Storch left the Board's employ on June 30, 1989, and was paid for twenty-two unused vacation days when she left. Ms. Storch had earned the vacation days during the 1987-88 school year.

Mr. Cowell said that it was true that when Mr. Chiste resigned he was paid for twenty-nine unused vacation days, seven of which were brought forward from the previous year.

Mr. Cowell testified that there was no doubt in his mind that the Board's action taken on August 14, 1990, altered its policy concerning payment to its administrators for unused vacation days. Cowell was certain that the policy was explained to him,

as well as to petitioner, by the Board and then Superintendent Moore. Based upon his knowledge of the Board's policies, he contended that petitioner was not entitled to the number of days he was claiming. Cowell opined that petitioner may be entitled to a claim for per diem accumulation of unused vacation days from July 1, 1990, to January 1991, but not for days accumulated prior to July 1, 1990.

SUMMARY OF LEGAL ARGUMENTS

PETITIONER'S POSITION

At POINT I.A. of his brief, petitioner argues that the August 14, 1990, Board resolution did not nullify its obligation to pay him for earned vacation time. On its face, the August 14, 1990, action (P-9) affected only the days earned in the 1988-89 school year that had not been used in the 1989-90 school year. The language of the resolution is clear and unambiguous and New Jersey courts have long held that the function of the courts is to ascertain the intent of the lawmaker from the plain meaning of the statute (in this case, the resolution). In addition, when a statute is clear and unambiguous, it is not open to construction or interpretation and the court may not indulge in any interpretation other than what is called for by its express language. DeHart v. Bambrick, 177 N.J. Super. 541, 549 (App. Div. 1981).

The Board resolution of August 14, 1990, is clear and direct. Upon a request for payment for the vacation days earned in 1988-89, the Board authorized, instead of payment, that these employees could use the days earned in 1988-89. The resolution did not refer to vacation time earned in any other year. Indeed the resolution did not refer to this Board's benefits policy for confidential administrators (P-7) at all and did not express an intent to completely and permanently amend same (T-137, 138).

Further, the Board had an opportunity to revise the language prior to its adoption of the minutes of the August 14, 1990, meeting, had the Board believed that the language did not fully encompass its intent (T-168, 169). As it did not amend its resolution upon further review, the Board cannot now claim it intended far more than it expressed in the plain meaning of the resolution itself. As there is no ambiguity on the face of the resolution and its meaning is clear and direct, the words and phrases of the resolution must be given their ordinary meaning.

B. Petitioner used the fourteen days noted in the Board's resolution and, therefore, he conformed to the Board's requirement. The testimony showed that he was unable to take the vacation time available to him during the 1989-90 school year because of a number of problems in the district - notably an anticipated teachers' strike (T-36, 37). By its resolution of August 14, 1990, the parties agreed that the Board refused to pay for the fourteen unused days earned in 1988-89, as it would have under its previous policy (T-170, 142, 153, 137). Thus the Board was informing these administrators that it would not meet its obligations, pursuant to its prior practice as confirmed in its policy of May 9, 1989, to compensate them for vacation time they were unable to use in the previous school year. Rather, the Board directed these administrators to use this accumulated time.

The testimony shows that petitioner, in fact, used the fourteen days referred to in the resolution, prior to the effective date of his resignation, January 2, 1991 (T-170, 171). Thus, he conformed to the Board's refusal to pay (though there was, and is, a question as to whether this Board could decide to ignore its own policy and pass a resolution affecting the rights of these employees retroactively. See, Schlenker v. Board of Education of the School District of Morris, 1991 S.L.D. 1026, 1032 and 1042). The Board is now attempting to use its resolution of August 14, 1990, (which clearly affected only the days earned in 1988-89 and not used in 1989-90 for which employees were requesting payment while still employed) in a greatly expanded manner. It wishes to apply this very narrow resolution to vacation earned in 1989-90 and in 1990-91 and avoid paying an employee for earned vacation upon his resignation.

C. Petitioner contends that vacation pay is deferred compensation and, once earned, payment for it cannot be denied. Petitioner observes that the parties do not dispute that the Board policy provided that petitioner earned vacation at the rate of 1.8 days per month. Nor do they dispute that petitioner had accumulated 32.5 vacation days at the time of his resignation (T-140). Further, Mr. Moore (T-162, 163), Mr. Cowell (T-145 to 148) and Mr. Chiste (T-15, 16) all testified that every employee who had left the district had been paid for earned vacation time, with the exception of petitioner. Thus, payment for vacation upon resignation was a clearly established policy in the district.

Having taken the fourteen days earned in 1989-89, petitioner had accumulated, by the effective date of his resignation, twenty-two days earned in 1989-90 which became available to him on July 1, 1990. Further, between July 1,

1990, and January 2, 1991, he earned an additional eleven days. Thus, on the date of his resignation he had accumulated:

	22	days earned in 1989-90
	+ 11	days earned from July 1, 1990, to January 2, 1991
	- .5	days taken from July 1, 1990, to January 2, 1991
Total:	32.5	days earned at the time of resignation

The Supreme Court of New Jersey held that vacation pay is, in effect, additional wages. Once the employee furnishes the consideration under the contract by having worked the requisite time, the employer cannot deprive him of the benefits due. Owens v. Press Publishing Co., 20 N.J. 537, 547 (1956). In addition, the court in Botany Mills, Inc. v. Textile Workers Union, 50 N.J. Super. 18, 30 (App. Div. 1958), stated:

> Vacation pay . . . has often been said to be in the nature of deferred compensation, in lieu of wages, earned in part each week the employee works, and payable at some later time.

Since petitioner worked the requisite time, earning 1.8 days vacation per month, the Board may not unilaterally refuse to pay him for vacation time not used.

N.J.S.A. 18A:28-5 states that a tenured employee may not be reduced in compensation, except for just cause. In refusing to pay for this vacation time the Board has not alleged any cause, just or otherwise. Thus, as vacation has been defined by New Jersey courts as additional wages and deferred compensation, and as the Board has admitted that petitioner had earned thirty-two and one-half vacation days at the time of his resignation (T-140), the Board may not refuse to pay for same without running afoul of the tenure statute noted above. Thus, both on the basis of elemental contract law and on the basis of the tenure statute, this Board is precluded from denying petitioner payment for his earned vacation time.

At POINT II of his argument, petitioner asserts that the Board is obligated by its policy and past practice to pay him for January 1, 1991.

The parties do not dispute that petitioner's resignation was effective January 2, 1991, and that the superintendent recommended that the Board accept his resignation as of that date (T-123 and P-12). Petitioner testified that he was not paid for the legal holiday, January 1, 1991 (T-96). In addition, he testified that he had

always been paid for that day in the past and that all confidential employees had always been paid for that day (T-60). The Board presented no evidence to the contrary and no explanation as to why petitioner was not paid. Petitioner was a salaried professional employee, who was paid at an annual rate; he was not an hourly employee, paid only for the actual hours worked. There is no dispute that all of the other confidential administrators were paid for the day in question or that the Board practice was to pay salaried employees for legal holidays. Therefore, the Board was obliged to pay petitioner for January 1, 1991.

Indeed N.J.S.A. 18A:25-3 requires boards of education to pay salaried teaching staff members for legal holidays. This statute requires that teaching staff members be paid even if school is in session and the staff member chooses not to work. January 1, 1991, was a legal holiday on which the Pemberton schools were closed and petitioner was not required to report to work. As he was a salaried teaching staff member, the Board is obliged to pay him for the day.

Petitioner argues, at POINT III of his brief, that his Petition of Appeal was filed in a timely manner because the Board failed to give him a specific and definitive answer to his request for payment until September 20, 1991. Petitioner testified that it was his understanding that he would be paid for his accrued vacation and holidays upon his resignation and in his letter of resignation he said that his resignation was "pursuant to all legal, contractual and past practices that shall be due me" (P-11). The superintendent advised petitioner by letter dated December 21, 1990, that the Board accepted petitioner's resignation effective January 2, 1991 (P-12).

Thereafter, petitioner submitted his claim for payment of his vacation by way of voucher dated January 4, 1991. Petitioner heard nothing from the Board. Petitioner testified that he believed he would be paid and that the approval process would take some time.

Subsequently, petitioner contacted Mr. Stern, who commenced discussions with Superintendent Moore and later, with the Board's attorney regarding payment. There was no answer from the Board until September 20, 1991, when the Board informed petitioner it would not pay him for his accrued vacation time.

At the hearing, the Board did not provide any evidence that it had, in fact, provided petitioner with specific and definite notice that it would not pay him. See,

Parisi v. Board of Education of the City of Asbury Park, State Board of Education (October 24, 1984) at 3, which holds that:

> N.J.A.C. 6:24-1.2 provides that petitions to the Commissioner . . . shall be filed within 90 days after receipt of notice of the school board's actual ruling.

The State Board went on to say that the notice, to be effective, must be specific and definite. Ibid. Similarly, in Meyer v. Board of Education of the Township of Wayne, 1986 S.L.D. 3094, at 3098, the State Board held:

> . . . the notice provided by the board of its action must be specific and definite so that a petitioner is informed both of the action taken by the board and the fact that he was affected by that action.

In the instant matter, the Board, through its attorney, continued to discuss the matter with petitioner's attorney, but provided no final answer until its September 20, 1991, letter noted above. It cannot now benefit from this behavior of stringing petitioner along by belatedly invoking the ninety-day rule. Upon receipt of the September 20, 1991, letter, petitioner then filed his Petition of Appeal on November 12, 1991, well within the ninety days required by N.J.A.C. 6:24-1.2 (c).

As noted above, at the hearing, the Board presented no minutes of a meeting at which the Board made a decision to refuse the petitioner's demand for vacation pay and no evidence that petitioner's voucher or demand was even presented to the Board for action. In fact, Mr. Cowell stated that he never presented petitioner's voucher for payment to the Board (T-165). He stated that whenever there was a question regarding a voucher, he would bring it to the attention of the superintendent and, if necessary, the board attorney (T-155). In this case, he brought the voucher to the attention of the superintendent.

The superintendent testified that he spoke with petitioner's attorney and, allegedly, told Mr. Stern that he "was not authorized" to pay petitioner. This artfully phrased testimony is equivocal and ambiguous and could not be considered a specific and definitive refusal by the Board to pay. Note that he did not say that the Board **refused** to pay or that he had even sought authorization. Indeed, the Board presented no evidence that the superintendent had sought authorization from the Board or had even presented petitioner's voucher to the Board for payment. That Mr. Moore's alleged statement to Mr. Stern was not a specific and definitive refusal to pay is bolstered by:

- The Board's admission that there were several conversations between petitioner's representative and the Board's representatives between the time of petitioner's resignation and his September 12, 1991, demand letter and that it was on September 20, 1991, that the Board informed petitioner it would not pay him the value of his vacation days. See, Petition Count One, Paragraphs 5 and 6, and Answer to Count One, Paragraph 1.

- Mr. Stern's letter to Mr. Hardt (P-15) states that petitioner expected to be paid pursuant to Board policy; reiterates that Mr. Stern had had conversations with both the superintendent and the board attorney, and states further:

> Since there appears to be no impediment barring payment of said days, kindly inform me . . . when Dr. Kirschling can expect payment.

  This language on its face indicates that as of September 12, 1991, petitioner fully expected to be paid and had been given no specific, definitive statement from the Board that the Board had reviewed his claim and refused to pay him. See also petitioner's testimony at T-97, 98.

- The testimony of the business administrator, Mr. Cowell, that there was a question as to whether petitioner was to be paid and that he had brought the question to the attention of the superintendent, not the Board.

Thus, the only credible evidence on the record as to when a specific, definitive answer was provided petitioner was the September 20, 1991, letter from Mr. Hardt, in which the Board, through its attorney, unequivocally stated that it refused to pay. See, Board's Answer to Count One, Paragraph 5, of the Petition. In German v. Board of Education of Cape May Vocational-Technical Center, 1989 S.L.D. 3002, the State Board reversed the Commissioner's decision as to the application of the ninety-day rule. There, as here, the Board did not respond to the petitioner's request for payment and attempted to avoid its obligations by inaction and silence. The State Board found that the claim was not barred by the statute of limitations and, further, held that under like circumstances, relaxation of the rule was warranted in the interest of justice. German, 1989 S.L.D. 3006.

Petitioner does not appeal from the Board's action in passing its resolution of August 14, 1990, (as respondent states in its memorandum provided at the hearing in this matter). It is petitioner's position that he met the terms of that resolution and used the fourteen days referred to between July 1, 1990, and January 2, 1991. He sought payment for his thirty-two and one-half vacation days accrued in 1989-90 and 1990-91. Thus, the Board cannot rely upon the August 14, 1990, date as the time from which the statute of limitations must run. His request was for payment upon his resignation pursuant to the Board's policy of May 9, 1989, (authorizing payment for unused vacation) and its unwavering past practice of paying employees for accrued vacation upon resignation. Mr. Moore and Mr. Cowell both testified that every employee who had left the district had been paid for accrued vacation with the exception of petitioner (T-162, 163 and T-145 to 148). Note Mr. Moore's response regarding Dr. DiNunzio when asked by the administrative law judge (ALJ) what caused the Board to pay Dr. DiNunzio for vacation accrued in the previous year upon his resignation:

> Well, that had been the practice and the --- a longstanding practice, not just for these four gentlemen but for --- . . . . That's been the practice because they had actually earned those vacation days, so the Board paid them.
>
> [T-147]

Petitioner further argues that the Board must be found to have waived the statute of limitations defense. He contends that in its Answer to his Petition, the Board admitted that:

> 5. On September 12, 1991, following several verbal inquiries, petitioner wrote to respondent, requesting payment of his accrued vacation days.
>
> **and**
>
> 6. On September 20, 1991, respondent informed petitioner that it would not pay petitioner the value of his accrued vacation.
>
> [Petition Count One at Paragraphs 5 and 6]

Thus, it does not appear on the face of the Petition that the action pleaded is barred by the statute of limitations (Rappeport, infra). On the contrary, by its Answer respondent admits petitioner's allegations relative to when the significant events at issue occurred and, thus, from what date the statute of limitations began to run.

In addition, the issue of timeliness was not specifically raised as an affirmative defense, nor was it raised in the prehearing order dated April 21, 1992, as an issue to be addressed by the parties and the ALJ, or in the Board's motion for summary judgment (on ~~the~~ other threshold issue of jurisdiction) of May 15, 1992. At the hearing, the Board relied upon its first affirmative defense - failure to state a claim upon which relief may be granted - as encompassing a statute of limitations defense. This prejudiced petitioner as he was unable to arrange for the necessary witnesses and prepare an appropriate defense on the issue of timeliness.

At the hearing, the Board argued that, having raised the affirmative defense of "failure to state a claim upon which relief can be granted," it was allowed to raise the "statute of limitations" defense "by motion or under the general rules" (T-64). However, R. 4:5-4 requires that the "statute of limitations" defense be specifically and separately pleaded.

Rappeport v. Flitcroft, 90 N.J. Super. 578, 580 (App. Div. 1966), held that,

> . . . **where it affirmatively appears on the face of a complaint** that the action pleaded is barred by the statute of limitations, the defense can be raised by motion to dismiss [cite omitted] for failure to *state* a claim upon which relief can be granted. [Emphasis added]

As noted above, in the instant matter it cannot be said that it is clear on the face of the petition that the action is barred by the statute of limitations. On the contrary, the Board's admission to paragraphs 5 and 6 of the Petition is evidence that the ninety-day rule was not an issue in this matter.

Even if the Board were permitted to preserve the "statute of limitations" defense within the "failure to state a claim" defense, R. 4:6-2 and R. 4:6-3 state that the threshold defenses listed there, including "(e) failure to state a claim upon which relief can be granted," must be made in pleadings or by motion **before** the trial, unless the court **for cause** orders that the hearing and determination thereof be deferred until the trial. Since the statute of limitations issue did not come before the ALJ until the day of the hearing, the ALJ did not have the opportunity to make the necessary "for cause" determination that would have permitted deferral until the hearing date. Thus, the Board, having failed to raise the specific "statute of limitations" defense in its pleadings, or at the prehearing conference or in its motion for summary judgment, should be deemed to have waived the defense.

The case law shows that the Board may not now rely on the defense, having failed to raise the issue before the hearing. See, Fees v. Trow, 105 N.J. 330, 335 (1987), in which the Court states that, though there was an obvious statute of limitations defense,

> . . . because that affirmative defense was neither pleaded in defendant's answer nor raised in defendant's motion for summary judgment, and because it has not been adverted to by either party at any stage of these proceedings, we treat it as having been waived. See R. 4:6-7 Rappeport v. Flitcroft, 90 N.J. Super. 578, 581 (App. Div. 1966).

In addition, O'Connor v. Abraham Altus, 67 N.J. 107, 116 (1975), stated unequivocally that the defense of statute of limitations is preserved under the defense of "failure to state a claim upon which relief can be granted" only for the purposes of a motion **before** trial. There the Court stated that the reason for the rule is notice to the plaintiff. It permitted the defendant in O'Connor to initially raise the issue at trial only because another defendant had raised the defense in his pleadings and in the pretrial order. Thus, "plaintiffs were aware that the issue of the statute was in the case." O'Connor, supra, 67 N.J. at 116. In the instant matter, petitioner did not receive notice that the statute of limitations was an issue in the case, as it was not raised in the pleadings, nor in the pretrial order, nor in respondent's motion for summary judgment on the threshold issue of jurisdiction. As a result of the lack of notice, petitioner was prejudiced at the hearing as he was unable to properly prepare a defense and have witnesses available to testify with respect to the issue of timeliness. Thus, in the instant matter, the issue was not preserved for the hearing and respondent must be found to have waived that defense.

Judge Pressler states, in her commentary with respect to R. 4:6-7, Waiver or Preservation of Defenses, that a statute of limitations defense may be preserved in the defense of "failure to state a claim upon which relief can be granted" only where the bar of the statute of limitations appears on the face of the complaint. In addition, she notes that the Supreme Court in Fees, supra, 105 N.J. 330, treats a statute of limitations bar as a waivable affirmative defense. She further notes that ordinarily affirmative defenses required to be pleaded by R. 4:5-4 (including the statute of limitations defense) which are not timely raised are waived. Pressler, Current N.J. Court Rules, comment on R. 4:6-7 (1993).

The statutory scheme provided by these rules must be applied here, as their purpose is to avoid "trial by ambush." Otherwise, a respondent could, as here, avoid disclosing prior to the hearing date its "statute of limitations" defense by incorporating it under the catchall defense of "failure to state a claim upon which relief can be granted." Petitioner cannot then be prepared to rebut that defense. Petitioner respectfully asserts that he was prejudiced by permitting testimony to be taken on the issue of timeliness. The Rules of the Court and the cases interpreting these are based in the fundamental notion that the right to due process encompasses the right to know, prior to a hearing, the nature of respondent's defenses.

THE BOARD'S POSITION

At POINT I of its brief, the Board asserts that by its resolution adopted on August 14, 1990, it adopted a use-or-lose policy for accrued vacation time. It argues, among other things, that the stated intent of the Board resolution on August 14, 1990, was to adopt a new policy as to accrued vacation time for administrative personnel.

It is undisputed that on May 9, 1989, the Board adopted a policy dealing with benefits of certain administrative personnel, including petitioner (P-3). Item 6 of that policy states:

> Vacation Days - 22 per year - Prorated on the basis of 1.8 per month; Unused vacation days shall be compensated at the per diem rate.

Unused vacation payments pursuant to this policy were made by the Board. On July 3, 1990, the superintendent presented a recommendation for similar payments. The recommendation was withdrawn when discussion during executive session revealed that there would not be enough votes to approve that agenda item (T-119). On August 14, 1990, the Board passed a resolution affecting vacation benefits for certain administrators (P-9). In the written minutes of August 14, 1990, the resolution states:

> 26. Be it resolved that the following administrators be authorized to use their unused vacation days for the 1988-90 school year:

Name	# of Unused Days
Robert Moore	9 days
Mark Cowell	10½ days
Thomas Kirschling	14 days
John Harrington	1 day

This action appears to have been in part a compromise for payment for the unused days of the 1988-89 school year (T-119).

As petitioner's brief argues (at 4), on its face the August 14, 1990, written minutes list only those unused vacation days for the 1989-90 school year. Admittedly, the Board has not amended those minutes. However, the portion of the minutes containing the resolution (P-9) is not a full transcript. It is just the resolution, who made the motion, who seconded it and whether it was approved or disapproved (T-165). The testimony revealed that discussions were held both during the course of and subsequent to approval of that resolution which would clearly reveal the Board's intent to adopt a use-or-lose policy as to accrued vacation days (T-80, 89-91).

Petitioner was present at the July 13, 1990, Board meeting during which the superintendent's recommendation as to payment for unused vacation days was withdrawn (T-65, 78). Petitioner was present at the August 14, 1990, meeting. He was present during discussion concerning the motion regarding unused vacation days (T-79, 80). He had conversations with the superintendent either before or after the motion was adopted concerning its content and implications (T-80, 83, 120, 121-22). He discussed the motion and what it meant with the business administrator (T-80).

The superintendent testified that he spoke with other administrators affected to convey to them that by the Board's resolution of August 14, 1990, the Board had adopted a different policy as to unused vacation days from the policy which had existed in 1989 (T-120, 138). The business administrator testified that he understood the Board's action to be an alteration of policy and that it appeared that the other affected administrators understood the same (T-164 to 166).

The superintendent's memorandum dated August 15, 1990, reflects an understanding that the Board had adopted a use-or-lose policy as to unused vacation days. Despite the above-noted conversations and the memorandum, petitioner maintains that he was firmly under the assumption that the Board action

of August 14, 1990, affected only the fourteen days of vacation earned during the 1988-89 school year and that he would be paid for his accrued vacation days submitted at the time of his resignation (T-57, 75, 105-06). He claims he did not known what the Board meant (T-81).

It was possible that the Board could make a change in policy (T-26). Petitioner acknowledged in his testimony that the Board would have changed policies by adopting a policy at a public Board meeting (T-85). This was just what the Board did at its August 14, 1990, meeting. Therefore, when petitioner separated from service, there was no policy in the district to pay for unused accumulated vacation time from the prior school year (T-141, 158). That policy has been followed consistently as to those employees covered by it (T-160). Board policy did permit payment for unused vacation time which had accrued during the year of retirement (T-110, 145 et seq.).[1] The individuals paid had worked an entire year, but could not have put in for their vacation time because they were retiring on July 1st of that year. Unused vacation time which had accrued for any previous year was not paid for. These payments are consistent with the Board's policy with regard to using or losing accrued vacation time (T-149, 150).

In contrast, petitioner submitted a resignation to be effective January 2, 1991. Contrary to petitioner's characterization, his resignation does not state that his tender of resignation would be contingent upon receiving payment for his vacation time (P-11; petitioner's brief at 10). According to the superintendent's testimony, he and petitioner discussed when he would be leaving. However, the determination as to the date of effective termination was made by petitioner (T-122 to 124). Moreover, petitioner could have submitted a vacation plan and could have had his resignation become effective after he had used his vacation (T-123).

At POINT II of its brief, the Board argues that petitioner failed to file a timely petition to challenge its adoption of a new policy concerning accrued vacation time.

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[1] It is pursuant to this policy that petitioner may be entitled to a claim for the per diem accumulation which occurred from July 1, 1990, to January 1, 1991, an accumulation which he could not have used because it would have vested in July of 1991.

On August 14, 1990, the Board decided that unused vacation days must be used during the 1990-91 school year. To this end and with the intent that a policy be adopted requiring the use of all vacation days during the current school year, the Board adopted resolution #26 on August 14, 1990.[2] Petitioner did not bring any petition challenging that Board action within the ninety-day time frame mandated by N.J.A.C. 6:24-1.2(c). He testified that he has brought no challenge other than the one which is before this tribunal at this time (T-77). Having failed to file a timely petition challenging the Board's new policy, he should be precluded now from such action.

Petitioner asserts that he is not appealing "from the Board's action in passing its resolution of August 14, 1989 [sic]." He claims that he met the terms of the August 14, 1990, resolution by using the fourteen days referred to. He claims that his request for payment upon resignation was pursuant to the Board's policy of May 9, 1989, and "its unwavering past practice of paying employees for accrued vacation upon resignation" (Petitioner's brief at 14). However, as noted above, the Board's policy as of August 14, 1990, has been followed consistently subsequent to its adoption. Petitioner states that the Board cannot rely upon the August 14, 1990, date as the time from which the statute of limitations must run, but it is that very date which established the Board policy pursuant to which the Board must deny petitioner's request for payment.

The Board further contends it has not waived its statute of limitations defense. It asserts that at the hearing it was permitted by the ALJ to pursue questioning as to the time of filing of Dr. Kirschling's petition. Having raised the affirmative defense of "failure to state a claim upon which relief can be granted," it was allowed to raise a "statute of limitations" defense (T-64). "[W]here the bar of the statute of limitations appears on the face of the complaint, it may be asserted as a 'failure to state a claim upon which relief can be granted.' " Rappeport v. Flitcroft, supra, 90 N.J. Super. at 581. It may not be clear on the face of the petition that the action is barred by the statute of limitations. The Board does not dispute, as admitted in its Answer, that on September 12, 1991, petitioner wrote to it requesting payment for

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[2] The Board does not contend that a **second** resolution concerning vacation days was adopted by the Board on August 14, 1990. Rather that by virtue of the resolution that was adopted, the Board intended to adopt a new policy requiring the use or loss of accrued vacation time. Other affected administrators have testified that they understood this to be the implication of the Board's resolution.

accrued vacation days or that on September 20, 1991, the Board informed petitioner that it would not pay the value of the accrued vacation claimed. However, by these admissions, the Board cannot be said to have admitted that these are the only significant events in the suit at hand. On the contrary, the date of the Board's adoption of its August 14, 1990, resolution is of great significance as it is upon the basis of this policy that payment for petitioner's claimed accrued vacation has been denied. Petitioner cannot be said to be unaware of the importance of the Board's action on that date. The fact that no one challenged the Board's decision was stated in both the "Factual Statement" of its motion for summary judgment (on the issue of jurisdiction) of May 15, 1992 and in its "Answers to Interrogatories" of January 1993.

Cases which petitioner cites for the proposition that the Board may not now rely on the statute of limitations defense, having failed to raise the issue before the hearing, may be differentiated from the case at bar. In Fees v. Trow, supra, 105 N.J. 330, the Court "note[d] in passing" that, though there was an obvious statute of limitations defense, that defense would be treated as having been waived as it was neither pleaded in the defendant's answer, raised in its motion for summary judgment or adverted to by either party. It does not appear in Fees that the defendant had asserted a "failure to state a claim" defense by virtue of which she could raise a "statute of limitations" defense. Moreover, unlike Fees, where the defense was not adverted to at any state of the proceedings, the Board here has specifically raised such issue, at least as of the time of hearing.

Petitioner's characterization of O'Connor v. Abraham Altus, supra, 67 N.J. 107, is similarly erroneous. The Court in that case observed:

> Plaintiffs recognize, however, the rule of Rappeport v. Flitcroft, 90 N.J. Super. 578 (App. Div. 1966), which preserves the defense of statute of limitations, at least for purposes of a motion before the trial, where the answering pleading recites the complaint's "failure to state a claim upon which relief can be granted," 90 N.J. Super. 580; see R. 4:6-2.
>
> [O'Connor, supra, 67 N.J. at 116]

The Court did not state "unequivocally that the defense of the statute of limitations is preserved under the defense of 'failure to state claim upon which relief can be granted' only for the purposes of a motion **before** trial" (Petitioner's brief at p. 17). In fact, while Rappeport dealt with a motion for judgment on the pleadings, R. 4:12-8 (precursor of present R. 4:6-7), upon which the Court's decision was based, stated, in part, that *"the defense of failure to state a claim upon which relief can be granted*

*** may also be made by a later pleading, if one is permitted, or by *motion for judgment on the pleadings* or **at the trial on the merits** ***." Rappeport, supra, 90 N.J. Super. at 580; bold face added. While in the instant matter there is no other defendant who had raised the defense in its pleadings as in O'Connor, petitioner can still be said to have been under notice that the statute of limitations would be an issue in the case given that the Board's refusal to pay was based upon its policy adopted in August 1990.

DISCUSSION AND CONCLUSIONS

With regard to the Board's authority to adopt a vacation policy for its administrators, it is observed that N.J.S.A. 18A:11-1(c) requires boards of education to:

> c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees. . . .

And, pursuant to N.J.S.A. 18A:30-7, boards of education are granted authority to:

> fix either by rule or by individual consideration, the payment of salary in cases of absence not constituting sick leave. . . .

Thus, the legislative authority for the Board to incorporate policies "for its own government" and "for the . . . regulation of conduct . . . of its employees" and for "the payment of salary in cases of absence not constituting sick leave," and, in this instance, policies concerning vacation time, are embodied within the corpus of school law.

Here, within the scope of its authority, the Board adopted a series of policies which regulated the conduct of its central office administrators. Two such policies were adopted by the Board on February 10, 1987, namely The Leadership Team (P-1) and Leaves for Administrators Not Covered by Negotiated Agreement (P-2). Inasmuch as petitioner and other central office administrators (The Leadership Team) were considered confidential employees, pursuant to N.J.S.A. 34:13A-3 (g), the Board provided them with the identical leave benefits provided to members of

the district's Professional Administrators Association, which was able to negotiate with it (P-2). In addition, the Board promulgated an employee benefits policy for its assistant superintendent, business administrator/board secretary and petitioner, who was the Board's director of personnel (P-3). The adopted policy provided petitioner and the others with twenty-two vacation days per year. In the event petitioner, or the others, were unable to use the vacation days, the Board's policy provided that petitioner would be compensated at a per diem rate for every vacation day not taken (P-3).

The Board contends that by its action on August 14, 1990, it intended to adopt a new policy as to accrued vacation time for its administrative personnel. The Board's resolution, however, does not reflect its intention. Rather, it is specific in its terms of requiring the four named administrators to use their unused vacation days from the 1989-90 school year. The resolution adopted on August 14, 1990, says nothing about repealing P-2 and/or P-3.

The Commissioner has discussed the guidelines to interpretation of board of education policies. In Romeo, Jr., v. Board of Education of the Township of Madison, 1973 S.L.D. 102, it was said, at 106, that:

> In ascertaining the meaning of a policy, just as of a statute, the intention is to be found within the four corners of the document itself. The language employed by the adoption should be given its ordinary and common significance. Lane v. Holderman, 23 N.J. 304 (1957). Where the wording is clear and explicit on its face, the policy must speak for itself and be construed according to its own terms. Duke Power Company, Inc. v. Edward J. Patten, Secretary of State, et al., 20 N.J. 42, 49 (1955); Zietko v. New Jersey Manufacturers Casualty Ins. Co., 132 N.J.L. 206, 211 (E. & A. 1944); Bass v. Allen Home Development Co., 8 N.J. 219, 226 (1951); Sperry and Hutchinson Co. v. Margetts,15 N.J. 203, 209 (1954); 2 Sutherland, Statutes and Statutory Construction, (3rd. ed. 1943), section 4502.

The Board contends that it was its intent to repeal the employee benefits policy (P-3) by its action on August 14, 1990. Yet, the language adopted by its resolution only refers to the use of vacation time for the 1989-90 school year. The "four corners of the document" express the Board's intention which, when "given its ordinary meaning," only speaks to a limited period of time and not to its adopted employee benefits policy.

Had the Board intended to repeal the employee benefits (P-3) policy which it afforded its central office administrators, it could have done so, pursuant to N.J.S.A. 18A:11-1. As the Court held in Newark Publishers' Association v. Newark Typographical Union, 22 N.J. 419, 427 (1956):

> We are not at liberty to introduce and effectuate some supposed unrevealed intention. The actual intent of the parties is ineffective unless made known in some way in the writing. It is not the real intent but the intent expressed or apparent in the writing that controls. [emphasis supplied]

Thus, the writing of the adopted resolution of August 14, 1990, expresses the Board's intent to limit petitioner's use of fourteen days of vacation time from 1989-90 during the 1990-91 school year. Petitioner complied with the Board's resolution and used the fourteen days as intended.

I **CONCLUDE**, therefore, that by its action on August 14, 1990, the Board modified its employee benefits policy for the unused vacation days during the 1989-90 school year, under its statutory authority. N.J.S.A. 18A:11-1.

I **CONCLUDE** that the Board did not, however, repeal its employee benefits policy which provided payment for unused vacation days other than those unused in the 1989-90 school year.

I **FIND** that petitioner earned twenty-two vacation days during the 1989-90 school year which were available to him after July 1, 1990. I **FIND** that between July 1, 1990, and January 2, 1991, petitioner earned an additional eleven vacation days at 1.8 days per month. I **FIND** that petitioner used one-half vacation day between July 1, 1990, and January 2, 1991, leaving a total of thirty-two and one-half unused vacation days.

I **CONCLUDE** that under the Board's existing employee benefits policy, vacation pay is deferred compensation and, once earned and not used, payment for it cannot be denied. Botany Mills, Inc., supra, 50 N.J. Super. at 30.

I **CONCLUDE**, therefore, that pursuant to the Board's existing employee benefits policy, the Board must compensate petitioner for thirty-two and one-half unused vacation days at his per diem rate at the time of his resignation on January 2, 1991.

N.J.S.A. 18A:25-3 provides as follows:

> No teaching staff member shall be required to perform his duties on any day declared by law to be a public holiday and no deduction shall be made from such member's salary by reason of the fact that such a public holiday happens to be a school day and any term of any contract made with any such member which is in violation of this section shall be void.

Petitioner submitted his resignation effective January 2, 1991. January 1, 1991, known as New Year's Day, is a legal holiday pursuant to N.J.S.A. 36:1-1. The Board pays its salaried employees for legal holidays. In the matter of Moldovan v. Board of Education of the Township of Hamilton, Mercer County, 1971 S.L.D. 246, the Commissioner said, at 253, that:

> The clear intent of this long standing statute, N.J.S.A. 18A:25-3, supra, is that teaching staff members shall not be required to perform duties on any public holiday, that no salary deduction shall be made for absence because a public holiday happens to be a school day, and that no contract term may violate this statute. It is evident that this statute does not prohibit school sessions on public holidays, but instead protects the right of teaching staff members to be absent on public holidays without suffering financial loss. In the instant matter, petitioners' absence from the school session held on October 12, 1970, was within the rights bestowed upon teaching staff members by N.J.S.A. 18A:25-3, supra; therefore, their salaries were not subject to a deduction because of such absence.

In the instant matter, the Board accepted petitioner's resignation, effective January 2, 1991. Having done so, it is obligated to pay petitioner for the holiday which fell on January 1, 1991. N.J.S.A. 36:1-1; N.J.S.A. 18A:25-3; Moldovan, supra, 1971 S.L.D. 246.

I **CONCLUDE**, therefore, that the Board, by accepting petitioner's resignation effective January 2, 1991, is obligated to pay petitioner his per diem rate for the legal holiday, January 1, 1991.

As for the Board's argument that petitioner's Petition of Appeal was untimely filed, pursuant to N.J.A.C. 6:24-1.2 (c), there is nothing in the record to demonstrate that the Board gave petitioner notice, by way of a "final order, ruling or other action," before September 20, 1991, that it would not reimburse him for his accrued vacation days. While there may have been some discussions between petitioner's

attorney and agents of the Board, there is nothing in the record to show that the Board complied with the provisions of N.J.A.C. 6:24:1.2(c) to advise and alert petitioner of its action prior to September 20, 1991.

I **FIND and CONCLUDE**, therefore, that the Board's argument that petitioner's Petition of Appeal was untimely filed under the so-called ninety-day rule is without merit and must be dismissed.

ORDER

Accordingly, it is **ORDERED** that the Board of Education of the Township of Pemberton reimburse Dr. Thomas J. Kirschling his per diem rate of pay for thirty-two and one-half unused vacation days and one holiday.

It is **FURTHER ORDERED** that the Board's claim that petitioner's Petition of Appeal is barred by virtue of the ninety-day rule (N.J.A.C. 6:24-1.2 (c)) is **DISMISSED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

30 August 1993
Date

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

9/1/93
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 07 1993
Date

Joyce LaVecchia
OFFICE OF ADMINISTRATIVE LAW

lmh/e

WITNESSES

FOR PETITIONER:

THOMAS KIRSCHLING
RONALD CHISTE

FOR RESPONDENT:

ROBERT MOORE
MARK COWELL

DOCUMENTS IN EVIDENCE

FOR PETITIONER:

P-1	POLICY
P-2	POLICY
P-3	EMPLOYEE BENEFITS
P-4	PAGE FROM MINUTES
P-5	MEMO DATED 5/15/90
P-6	VOUCHER
P-7A	EVALUATION 6/8/90
P-7B	EVALUATION 3/14/90
P-7C	EVALUATION 12/21/88
P-7D	EVALUATION 5/3/88
P-7E	EVALUATION 1/25/89
P-8	PAGE OF AGENDA
P-9	PAGE OF MINUTES
P-10A	COMPUTER PRINTOUT
P-10B	COMPUTER PRINTOUT
P-11	LETTER OF RESIGNATION
P-12	LETTER DATED 12/21/90
P-13	VOUCHER
P-14	CHART
P-15	LETTER DATED 9/12/91

FOR RESPONDENT:

R-1	DOCUMENT
R-2	FORM 11/12/91
R-3	DOCUMENT
R-4	EMPLOYMENT CONTRACT
R-5	LETTER 9/26/91

OAL DKT. NO. EDU 355-92

THOMAS J. KIRSCHLING,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision of the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions in accordance with N.J.A.C. 1:1-18.4.

Petitioner excepts to the initial decision only to the extent that the ALJ failed to award him pre-judgment interest. He avers that he is entitled to such interest since there was no basis in law, Board policy or Board practice which justified the Board's failure to pay him for his earned vacation and the New Year's Day holiday in a timely manner.

Upon review of the record, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge and adopts the initial decision as the final decision in the matter for the reasons well stated therein.

The Commissioner specifically rejects petitioner's claim of entitlement to pre-judgment interest in this matter as she determines that the record does not support the existence of the criteria necessary for her awarding of such interest under N.J.A.C. 6:24-1.16(c)1.

Accordingly, the Commissioner hereby orders the Board of Education of the Township of Pemberton to reimburse Thomas J. Kirschling his per diem rate of pay for thirty-two and one-half unused vacation days and one holiday, and dismisses the Board's claim that the within Petition of Appeal is barred by virtue of the ninety-day rule (N.J.A.C. 6:24-1.2(c)).

COMMISSIONER OF EDUCATION

OCTOBER 18, 1993

DATE OF MAILING - OCTOBER 18, 1993

253-93

253-93

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF EAST AMWELL	:	DECISION
TOWNSHIP, HUNTERDON COUNTY.	:	
	:	

SYNOPSIS

Petitioner, unsuccessful candidate for membership on the Board, sought inquiry into alleged violations/irregularities in school election proceedings (improper instruction by election workers and overall ambiguity and confusion accompanying the execution of write-in votes).

Following review of record and evaluation of credibility of witnesses, ALJ upheld original election results. Although ALJ found some mistake on the part of eight workers, the record did not prove error in the process and there was no cause to invalidate the election.

Commissioner adopted findings and determination in initial decision.

OCTOBER 18, 1993

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4000-93

AGENCY DKT. NO. 102-4/93

IN THE MATTER OF THE SCHOOL ELECTION HELD IN THE TOWNSHIP OF EAST AMWELL, HUNTERDON COUNTY

Gary P. Hall, Esq., for petitioner (Fogarty & Hara, attorneys)

Ed Pagan, Jr., Esq., for respondents

Record Closed: June 16, 1993 Decided: July 16, 1993

BEFORE **JOSEPH LAVERY**, ALJ:

STATEMENT OF THE CASE

Petitioner, James M. Hall, is an unsuccessful write-in candidate for a one-year term on the **East Amwell Board of Education (Board)**. After the election, petitioner brought a petition before the Commissioner of Education. He asked that certain write-in votes, declared invalid in the election, now be counted, and that he be declared the winner.

Named as respondents in the petition are the successful candidate for the one-year term, **Claude Case**, as well as the **Board secretary, Dorothy Biggs.**[1]

PROCEDURAL HISTORY

This matter was declared a contested case by the Commissioner of Education pursuant to N.J.S.A. 52:14B-9 and -10. The Commissioner directed that there be an inquiry into alleged violations of statutorily prescribed procedures, pursuant to N.J.S.A. 18A:14-63.12. She filed the dispute in the Office of Administrative Law (OAL) on April 30, 1993.

The Director and Chief Administrative Law Judge thereafter assigned the case for hearing. After adjournment for cause, the hearing convened on June 16, 1993. On that date, the record closed.

ANALYSIS

Background:

Much of the material background is undisputed:

On April 20, 1993, an election was held for members of the School Board in the East Amwell School District. For three of the Board seats, eight candidates competed to obtain three-year terms. The candidates were listed vertically at Columns 1, 2 and 3. For the remaining seat, located at Column 5, the term was only one year. Five candidates, including respondent Case and petitioner (a write-in contestant), stood for that elective office (Exh. P-13). It is this one-year-term seat which is the subject of appeal.

The balloting went forward in East Amwell. The process was shared, in the same building, with the simultaneous balloting for election to the board of the Hunterdon County Regional High School

[1] The appropriate respondent in this contested case is the East Amwell Board of Education. Significantly, it is that body which has undertaken the defense.

District. At hearing, the parties agreed that a hand-drawn document, Exh. P-12, reflects the relative location of the voter registration table, the "sign-in" table, and three voting machines (two for East Amwell [one of which was on-line for less than the full voting day], and one for the Hunterdon County contest). The drawing also represents the paths taken by the voters.

Witnesses uniformly testified that first, they went to the voter registration table to verify their status. They proceeded next to the sign-in table, where they received a "voucher" or authorization slip which a worker took at each of the two East Amwell voting machines. The witness voters then went in the curtained voting booth, and cast a vote. The vote was recorded in one of two ways: (1) by the turn of a switch next to the names of declared candidates, printed in Columns 1, 2, 3, or 5, or, (2) if voting for a "write-in" candidate, by pencilling the name in a "slot" on the machine. The write-in slot was supposed to be located at the top of the relevant column, on a diagonal or slant. A write-in vote accommodated votes for persons whose names were not printed on the ballot, for one reason or another.

In this inquiry, the write-in slot for the one-year term in East Amwell is the focus. That slot was placed, on a diagonal, at the top of the framed ballot on the machine. It was near or above (the exact location is controverted) Column 5. The slot was separated from the column by an intervening band, which was the "question row" (Exh. R-1). The name of respondent Claude Case alone was printed below it, in Column 5. Only the turn of a switch next to Mr. Case's name was needed to vote in his favor.

On the other hand, a voter determined to elect petitioner, Jim Hall (or any other write-in candidate), had to reach beyond the top of Column 5, lift up the write-in-slot cover above the question row, and write in his name (Exh. R-1). If that voter had turned any voting switch next to a candidate whose name was printed below in the column, the cover could not be lifted. Conversely, lifting the cover locked the switches next to the declared candidates' names printed below the question band, in the column.

This design prevented votes for more than one candidate. Voters were held to this same write-in procedure above Columns 1, 2, and 3, as well. By way of instruction, Exh. R-1, entitled "How You Can Write In A Vote On An Automatic Voting Machine," was placed on the registration table for voters to see. It contained a picture of the machine, and a short narrative direction. No "mock-up" of the machine, or of the ballot sheet itself, was available.

Within this arrangement, the election ended with the following announced results for the one-year term here in issue:

CANDIDATES - 1-YEAR TERM	AT POLLS	ABSENTEE	TOTAL
Claude Case	177	5	182
Jim Hall	178	0	178
Darlys Maksymovich	3	0	3
Ilona English	1	0	1
Hill	1	0	1

[Exh P-13]

Once the results were in, the present controversy ignited. Candidate Jim Hall challenged the election. In his moving papers, which triggered this appeal before the Commissioner, petitioner argued that, in fact, he had received 231 votes. This was 53 more votes than the official tally. He maintained that the write-in slots over Columns 4, 6 and 7 contained these hand-penciled votes, in the following order:

Column 4	-	4 votes
Column 6	-	33 votes
Column 7	-	16 votes
Total	-	53 votes

In contrast, in a recount conducted by a representative of the Commissioner of the Department of Education, only 36 write-in votes were tabulated outside Column 5 (Exh. P-13).[2] Nevertheless, the new total, combining 36 votes with the unchallenged number of 178 votes, still brought petitioner Hall's total to 214. This exceeded the number of votes, 182, credited to the declared winner for the one-year-term seat: Claude Case.

Against this background, hearing went forward in the OAL.

Arguments of the Parties:

Petitioner Hall's Argument:

Petitioner Hall argues that the will of the people was thwarted in this election. The cause, he asserts, is twofold. This unlawful result arose from (1) improper instruction by the election workers, and (2) overall ambiguity and confusion accompanying the execution of write-in votes.

To create a factual record, petitioner offered the testimony of eight voters, in supplement to their affidavits (Exhs. P-1, P-2, P-4, P-5, P-6, P-7, P-9, and P-11). **Frank DiGiandomenico** testified that he intended to write in above the one-year-term candidates, and used slot six, though it was hard to gauge whether it was in line with the one-year-term column. **Jean Earle** used slot four, because, she stated, petitioner's name was written in plastic directly in line with that slot. **Colleen Litwin** testified that she used slot 6, despite having heard instructions to others by an election worker to use slot 5 for the one-year-term vote. She recalled that the slide for slot 5 wouldn't move, while slot 6

[2] The hearsay observations of the Commissioner's representative concerning the appearance of the voting machines cannot be accepted here. They are barred by the "residuum rule," N.J.A.C. 1:1-15.5(b). This rule demands that some competent evidence support all ultimate findings of fact. The representative was not subject to cross-examination through testimony at the instant hearing, and was not present during the election. Consequently, the ALJ cannot find facts from a review of Exh. P-13, the recount report.

opened. Convinced then that this was the correct location, she wrote in slot 6. She recalled it was hard to line up either slot 5 or slot 6 with the candidate's name printed below. **Judith DiGiandomenico** thought that the candidate declared for the one-year term lined up with slot 6. When it opened, she too wrote petitioner's name there. Though she had seen Exh. R-1, she saw no other written instructions.

Candace L. Higgins likewise thought slot 6 was aligned with the Case name, and wrote in petitioner's name there. She had been instructed by a worker to identify the proper slot by lining the two up. **Richard G. Malsbury** recalled that he had difficulty from the outset. Once in the booth, he was forced to lean out through the curtain, and ask an election worker for instruction. He was told to "Count over six, and go up six." He took this to mean write in at slot 6. Despite all, he continued to be confused, and was uncertain what slot he ultimately chose to write in his vote for petitioner.

Stephen M. Bielawski testified that he too was told by a worker, Carol Roth, to count from the left, perhaps five or six spaces, to the position to be voted on, then move upward to the write-in slot. Mr. Bielawski determined that to be slot 5. When he could not open it, he tried several others, then chose the nearest one. He stated that he was confused while in the booth. **Jeannette F. Petrus** conceded that she was so confused that she voted in a panic. She knew the slot she chose was incorrect. When she had previously asked for help, the worker only told her to write in her candidate's name, which would not appear on the ballot.

Not all of the witnesses could recall seeing write-in instructions at the voting site, and it was stipulated that none were at the machines themselves. Several remembered receiving Exh. R-1 in the mail, with election materials sent by petitioner.

Several other affidavits, without adoptive testimony, were admitted in evidence (Exhs. P-3, P-8, and P-10).[3]

In the face of these proven irregularities, petitioner argues, the outcome of the election was fatally influenced, and a new election should be promptly held, as a cure.

East Amwell Board of Education's Argument:

In response, the Board contends that the write-in votes misplaced in slots other than slot 5 were not mere technical irregularities or errors. Because the votes were inappropriately placed, they should not be counted. There is no precedent, the Board argues, for a contrary decision. In any event, even if the alleged process flaws could be so described, technical deficiencies per se would not justify invalidating an election, and thwarting the electorate.

The Board's witnesses, election workers at the site, differed somewhat from petitioners' witnesses in their recollection of the voting on April 20. **Mildred Hall**, trained in write-in voting for both general and school district elections, recalled a few questions on write-ins. No one specified what term-seat was involved. She was unaware of any misalignment of Column 5 with the corresponding write-in slot. However, she disclosed, she had served virtually all of her time at the Hunterdon Regional High School District machine.

Adele A. Purcell, who worked all evening at the first table, remembered that at least half the voters asked for write-in instructions. She answered by showing them Exh. R-1, with its pictured directions. As a further help, she told them to count from the left over to the right column, being careful, because the slot above was on a slant. Ms. Purcell recalled directing them to move up to the slot only from Columns 1, 2, 3, and 5, which contained

[3] As with Exh. P-13, these exhibits cannot justify findings of fact, N.J.A.C. 1:1-15.5(b).

the printed names. The voters were told to raise the lip, write the name, and open the curtain; the paper would then move and the slot cover would return by sliding down.

Margaret Case Bixby, daughter of the declared candidate, recalled working all night at the sign-in table. She too gave detailed instructions and cautions, similar to the other workers, in aid to about twenty-five questioners. No one asked specifically about petitioner, or the one-year-term slot. She heard from two Board members that two people had complained about write-in voting.

Carol Johnson had worked at both tables, as well as at both East Amwell voting machines (Exh. P-12). She recalled that the explanatory exhibit, Exh. R-1, had been placed at the entry/registration table. While she was working at that table, no one had asked how to write in a vote. One voter had inquired about it at the sign-in table, and asked Ms. Johnson whom she should vote for. In contrast, while working at the machines Ms. Johnson was asked frequently for assistance. She gave the same instructions as the other workers testifying, adding that write-ins at blank slots would be invalid votes. Ms. Johnson was certain that she never identified slot 6 as appropriate, and that she was not queried by anyone about petitioner specifically. She did recall some plastic curving upward in one machine, which did not block the slot.

Caroline Roth remembered between 50 and 75 percent of voters asking for assistance on write-in votes. No particular candidate was mentioned. She too directed voters to move from the left to the column for the seat involved, then go directly upward to the proper slot, raising the cover to write in the slot. Slot 6 was not mentioned, to her recollection. Though she heard complaints, they did not pertain to columns being out-of-line with the write-in slots.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact:

Although most of the facts are not disputed, some critical few are controverted. To resolve them, **I FIND:**

1. No election worker instructed a voter to write in his or her ballot at a particular slot, especially slot 6.

2. All workers directed questioners to locate, and move upward, from the column for a particular term-seat, and to then open the slot corresponding, where they could write in their votes.

3. The votes cast by those witnesses testifying at hearing were placed in slots other than slot 5 because of confusion, mistake, or, in one instance, panic.

4. Slot 5 was adequately aligned with the one-year-term column, Column 5, for a voter to perceive a direct connection between the two.

5. Assistance concerning the write-in procedure was available to those voters seeking it. It took the form of guidance from election workers on duty, and from pictorial and written directions in Exh. R-1.

Conclusions of Law:

Burden of proof:

Petitioner must prove his case by a preponderance of the credible evidence, which is the standard in administrative proceedings, Atkinson v. Parsekian, 37 N.J. 143 (1962). Precisely what is needed to satisfy the standard must be decided on a case-by-case basis. The evidence must be such as to lead a reasonably cautious mind to a given conclusion, Bornstein v. Metropolitan

Bottling Co., 26 N.J. 263 (1958). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power, State v. Lewis, 67 N.J. 47 (1975). Credibility, or more specifically, credible testimony, in turn, must not only proceed from the mouth of a credible witness, but it must be credible in itself, as well, Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954).

The controlling law:

The enabling act and its implementing rule:

The statutory section under which this appeal is brought, N.J.S.A. 18A:14-63.12, bears repeating:

> Upon written request within 5 days of the announcement of the result of an election by any defeated candidate, or, in the case of a question, proposition or referendum, upon petition of 10 qualified voters at any school election, the Commissioner of Education or his authorized representative shall inquire into alleged violations of statutorily prescribed procedures for school elections, to determine if such violations occurred and if they affected the outcome of the election.

Implementation of that section is through the Commissioner of Education's rules, promulgated in the New Jersey Administrative Code, at N.J.A.C. 6:24-6.1 through N.J.A.C. 6:24-6.5. The latter rule interprets the legislative intent of N.J.S.A. 18A:14-63.12:

> Where the Commissioner finds as a result of a recount or an inquiry that an error has occurred which alters the result of the election or that irregularities have occurred sufficient to influence the outcome, he or she shall order such relief as is appropriate.

The undisputed background, weighed with the findings which resolve controverted facts, does betoken confusion in a portion of the electorate over write-in voting. Notwithstanding, they do not

support a conclusion: (a) that this amounts to an "error" "which alters the result of the election," or (b) that "irregularities have occurred sufficient to influence the outcome."

Petitioner's comparative case law:

Petitioner's reliance on In The Matter of School Board Election, Hamilton Tp., Atlantic Co., 92 N.J.A.R. 2d (Vol. 4A) 476 (Education), does not alter this conclusion. In that case, a massive influx of voters in a two-district election caused a two-hour wait, in close-packed, slow-moving lines. It was found that at least one poll worker eventually directed voters to stop casting write-in votes, complaining that this held up the extraordinarily delayed line. Unlike here (only one Board seat is in issue), three Board seats were open in Hamilton, and three write-in candidates involved. The voting machines allowed votes for any combination of written and declared candidates. Election workers gave voters ambiguous or erroneous answers when questioned about multiple write-in votes. The machines' location and inspection also were challenged as statutorily improper.

Assessing that record, the ALJ characterized the confusion as "substantial." The Commissioner called it "massive." Both found the voters to have been actively misinformed by the election workers. The Commissioner observed that "widespread error and omission were proven in the area of instructing voters on casting of multiple write-in votes...." Hamilton, supra, 92 N.J.A.R. 2d (Vol. 4A) at 480). Emphasizing petitioner's four-vote margin of loss, the Commissioner understandably decided that the facts warranted a call for a new election.

Distinguishing the instant facts:

In contrast, the persuasive facts here under consideration are not parallel to those in Hamilton, supra, 92 N.J.A.R. 2d (Vol. 4A) 476. They disclose that 178 East Amwell voters managed to identify slot 5 as the appropriate write-in location for petitioner Hall's name. All cast their votes, and petitioner was duly credited. The

election workers, trained and experienced, gave similar instructions, understandable to a reasonably attentive listener. These directions were not in error; neither were they candidate-specific, except from one worker, who used column candidates' names only as illustrative examples. A picture with a short, plain write-in explanation (Exh. R-1) had been mailed by petitioner, pre-election, to the electorate. It was clearly visible on the first table at the voting site.

Moreover, despite a large turnout, both the two East Amwell and one Hunterdon lines moved freely. No worker actively discouraged or forbade write-in votes to offset sluggish movement. None of the workers, all of whom were credible, saw misalignment between slot 5 and Column 5. Voters were cautioned that the write-in slot was on a slant, the reasonable purpose of which, one worker testified, was to ease the task of writing while standing.

Summary:

In sum, the hearing record does not prove error in the process; it does prove mistake on the part of eight voters. Nevertheless, unintentioned votes, per se, when judged by the legislative intent of the Act or its implementing rule, cannot be held a cause to invalidate this election. The cases cited by the Board support this view: In the Matter of School Election, Shamong Tp., Burlington Co., 1986 S.L.D. ___; In the Matter of School Election, Bordentown Tp., Burlington Co., 1991 S.L.D. 1226.

ORDER

Therefore, after review of the entire record, evaluation of the credibility of witnesses, and assessment of briefed legal argument:

I ORDER that the results from votes cast in the election to fill the one-year-term seat on the Board of Education, East Amwell School District, be **UPHELD.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

July 16, 1993
DATE

Joseph Lavery ALJ
JOSEPH LAVERY, ALJ

Receipt Acknowledged:

7/20/93
DATE

Maureen R. Kushner
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 22 1993
DATE

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

ml/E

DOCUMENTS IN EVIDENCE

For petitioner:

P-1	Affidavit of Frank J. DiGiandomenico
P-2	Affidavit of Jean Earle
P-3	Affidavit of James Walker
P-4	Affidavit of Colleen Litwin
P-5	Affidavit of Judith A. DiGiandomenico
P-6	Affidavit of Richard Guy Malsbury
P-7	Affidavit of Stephen M. Bielawski
P-8	Affidavit of Cheryl Pate
P-9	Affidavit of Jeannette F. Petrus
P-10	Affidavit of Lorraine S. Moore
P-11	Affidavit of Candace L. Higgins
P-12	Hand-drawn map
P-13	Final Decision of Commissioner of Education, dated May 14, 1993

For respondent:

R-1	"How You Can Write In A Vote On An Automatic Voting Machine"

WITNESSES

For petitioner:

Frank J. DiGiandomenico
Jean Earle
Colleen Litwin
Judith DiGiandomenico
Candace Higgins
Richard G. Malsbury
Stephen Bielawski
Jeannette F. Petrus

For respondent:

Mildred Hall
Adele A. Purcell
Margaret Case Bixby
Carol Johnson
Caroline W. Roth

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF EAST AMWELL	:	DECISION
TOWNSHIP, HUNTERDON COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by petitioner pursuant to the provisions of N.J.A.C. 1:1-18.4, as were replies thereto by the Board of Education. At petitioner's request, an extension of time was granted by the Commissioner in order to give petitioner an opportunity to procure transcripts in support of his exceptions. However, no transcripts were forthcoming by the stipulated date or subsequently, so that the Commissioner has decided this matter on the basis of the existing record.

In his exceptions, petitioner objects to the ALJ's findings of fact, averring that they are based on summations of witness testimony that are incomplete, inaccurate or both. In particular, he takes issue with the ALJ's characterization of election worker Carolyn W. Roth's testimony, claiming that such testimony actually supported witnesses who reported problems with alignment of columns for write-ins. Petitioner further excepts to the ALJ's use of the residuum rule to discount the report of the Commissioner's representative who conducted the recount of results in this

election, stating that this report, which supports petitioner's position regarding alignment of write-in slots, should be acccorded weight in that it consists of observations made and recorded in the course of the representative's performance of his official duties.

In reply, the Board contests petitioner's claims of mischaracterized testimony based on its own recollection of such testimony, as well as on the absence of a transcript. The Board further contests petitioner's claims regarding the report of the Commissioner's representative on recount, both because petitioner, who bears the burden of proof in this matter, elected not to call the representative as a witness and because the observations at issue were beyond the scope of the representative's duty in conducting a recount pursuant to N.J.S.A. 18A:14-63.5, as opposed to an inquiry pursuant to N.J.S.A. 18A:14-63.12. Notwithstanding this, the Board contends that even if petitioner's claims were given every favorable inference, the result would still not meet the necessary standard for ordering a new election.

Upon review of this matter, the Commissioner affirms the initial decision of the ALJ for the reasons set forth below.

Initially, the Commissioner cannot, in the absence of a transcript of the hearing, assess the parties' arguments regarding the ALJ's characterization of witness testimony, nor can she find any basis in the existing record not to defer, as is customary, to the representations and weighing of testimony of the direct trier of fact. Moreover, the Commissioner concurs that the observations of her representative in the report submitted in conjunction with petitioner's separate request for recount have no official weight and effectively constitute hearsay for purposes of the within

inquiry, as they were inappropriately made in the context of a recount, where the role of the Commissioner's representative is merely to retabulate or recheck vote tallies. See the Commissioner's May 14, 1993 final decision on recount (Exhibit P-13).

The Commissioner further finds that the ALJ applied the proper standard of law in this matter in her analysis at pp. 9-12 above, so that, given her acceptance of the ALJ's findings of fact, the Commissioner must fully concur with the ALJ's determination that a new election is not warranted under the circumstances presented herein.

Accordingly, the initial decision of the Office of Administrative Law, upholding the results of the April 20, 1993 annual school election in East Amwell Township, is affirmed for the reasons expressed therein together with the further explication set forth above.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 18, 1993

DATE OF MAILING - OCTOBER 18, 1993

254-93

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

SYNOPSIS

Petitioner, tenured elementary teacher, contested Board's withholding of his 1992-93 employment and adjustment increments due to unsatisfactory performance.

In light of testimony, ALJ found Board's withholding was well justified and petitioner had ample notice of alleged deficiencies. ALJ determined petitioner did not carry his burden of proof. Petition was dismissed.

Commissioner adopted findings and determination in initial decision.

OCTOBER 18, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7620-92
AGENCY DKT. NO. 261-6/92

MARTIN A. BROWN,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY,
Respondent.

Philip Feintuch, Esq., for petitioner
(Feintuch, Porwich & Feintuch, attorneys)

David F. Corrigan, Esq., for respondent
(Murray, Murray & Corrigan, attorneys)

Record Closed: August 13, 1993 Decided: August 30, 1993

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

PROCEDURAL HISTORY

This contested matter was transmitted by the Department of Education to the Office of Administrative Law on October 1, 1992, as the result of the filing by Martin A. Brown of a petition of appeal challenging the withholding of his 1992-93 salary and adjustment increments A telephone prehearing conference was conducted on December 15, 1992, and the following issues were identified: (1) was the withholding of the increments arbitrary, capricious or unreasonable; and (2) was the petition filed in timely fashion Although the second issue subsequently was

abandoned by respondent, a new issue arose at the hearing when Brown challenged the process used by respondent to withhold his increments. Briefs were filed in accordance with an agreed schedule and the record closed on August 13, 1993.

TESTIMONY

A. Stipulation of Facts

Prior to commencement of the testimony, counsel submitted a joint stipulation of facts to which pertinent documents were attached (Exhibit C-1). Those stipulated facts are as follows:

1. The petitioner, Martin A. Brown, is a tenured teaching staff member who was appointed on September 1, 1969.

2. The petitioner has been assigned to the 5th grade for the last three (3) school years.

3. During the 1991-1992 school year the petitioner's placement on the salary guide properly reflected his years of service in the Jersey City School District.

4. On March 31, 1992, the petitioner received a notice from Ms. Judi Granick, State Executive Assistant of the respondent, informing him that his salary increment would be withheld for the 1992-1993 school year because of unsatisfactory ratings.

5. The increment withheld from the petitioner for the 1992-1993 school year consisted of an employment increment and adjustment increment.

6. On December 11, 1991, the petitioner was observed and evaluated by Mary Ann Wallace. In the Instructional Observation Report [of her December 11, 1991 visit], Ms. Wallace stated that the petitioner performed unsatisfactorily in the performance area of "Employs effective organization and planning '

7. On February 19, 1992, the petitioner was observed and evaluated by Dr. Joan Kegelman. In the Instructional Observation Report dated February 19, 1992, Dr. Kegelman stated that the petitioner performed unsatisfactorily in the performance area of "Employs effective organization and planning."

8. On March 4, 1992, the petitioner was observed and evaluated by Ruth Vega. In the Instructional Observation Report dated March 4, 1992, Ms. Vega stated that the petitioner performed unsatisfactorily in the performance area of "Employs effective organization and planning."

9. In the Instructional Annual Written Performance Report dated May 15, 1991, the petitioner was informed that he needed improvement in the performance area of planning and employing effective organization.

10. In the Instructional Annual Written Performance Report dated May 16, 1990, the petitioner was informed that the needed improvement in the performance area of planning and time-on-task.

11. In the Instructional Observation/Evaluation Report dated March 30, 1990, the petitioner was informed that he needed improvement in planning performance area.

B. Testimony for Respondent

Although the burden of proof rests upon the petitioner to establish his case by a preponderance of the evidence, for purposes of convenience the respondent presented its proofs first. *See, N.J.A.C.* 1:1-14.6(l).

The first witness for the State-operated school district, Maryanne Wallace, is principal of the Conwell School which houses grades pre-K to 8. Prior to becoming principal, Wallace had been the assistant principal there for more than four years. Petitioner was a fifth grade teacher at Conwell during this period and it was Wallace's responsibility to evaluate him

On May 16, 1990, Wallace gave petitioner the annual instructional written performance report (PIP) required by *N.J.A.C.* 6:3-1.21 (Exhibit J-7). That document identified two particular areas in need of improvement for the upcoming 1990-91 school year--"planning" and "time-on-task." Although petitioner had demonstrated deficiencies in those areas in 1989-1990, Wallace determined not to recommend that his increment be withheld in 1990-91 since the former Conwell School principal had not, according to Wallace, effectively conducted evaluations and Wallace felt it would be unfair to Brown to withhold any increment under those circumstances. Nevertheless, she considered the May 1990 performance report to constitute "a serious warning" calculated to put petitioner on notice that real improvement was expected. Nevertheless, in Brown's annual evaluation of May 1991, continuing deficiencies in planning again were noted (Exhibit J-6).

Thus on December 11, 1991, Wallace visited Brown's classroom to conduct a formal observation of his performance. She explained that she waited three months before making that visit for petitioner's benefit; *i.e.*, she wanted to give him ample time to deal effectively with the criticisms of his performance set forth in the 1990 and 1991 reports. Indeed, on December 10, 1991, the day before her visit, Wallace had a pre-observation conference with Brown at which time she told him that she would observe his class on the following day. However, when she asked to see his plan book for the next day's lesson, he was unable to produce it. Accordingly, he had to prepare a separate lesson plan which he indicated he would follow on the next day when she made the observation.

Wallace entered Brown's classroom on December 11, 1991, at approximately 8:45 a.m. expecting to observe a math lesson. Although his lesson plan anticipated instruction that day in multiplication, he did not even address that subject until the 45 minutes allocated to the entire period had expired. Wallace explained that the first 15 minutes of class time had been taken up by the teacher's review of homework and his using "flash cards." The next half-hour involved various other matters, including having to stop what he was doing on occasion in order to tell the pupils to be quiet. As Wallace put it, "he never taught the [planned] lesson." The following day, Wallace taught the class in order personally to demonstrate to Brown what he should have been doing and to offer him support in that regard.

Wallace prepared a formal report following her classroom observation in which she rated Brown as "unsatisfactory" with respect to his ability to employ effective organization planning. She wrote that he, "lacks evidence of good lesson preparation and use of materials," that his plan book was not available and that the subject matter of the proposed lesson for that day, an introduction to multiplication, should have been covered well before mid-December.

On January 22, 1992, Wallace and Brown had a post-observation conference during which she stressed that his class lagged substantially behind the timetable set forth in the established curriculum and expressed her serious concern that his students were not prepared for the mid-term examination. As it turned out, every one of his students failed that exam and Wallace later learned that all of Brown's students failed the final exam as well.

Wallace went on to relate that Brown displayed a variety of other deficiencies during her December 11, 1991 observation. For example, since he had a heterogeneous group of students in his fifth grade class, she was disappointed that he did not take steps to adjust his pedagogic technique to accommodate those intellectual differences. Moreover, Wallace observed that some pupils actually demonstrated hostility toward petitioner which she ascribed, in part, to the absence of meaningful instruction to keep both their attention and their respect.

As a result of the unsatisfactory nature of Brown's performance on December 11, 1991, Wallace, consistent with school district policy, asked a mathematics supervisor to make a second observation. To that end, on February 19, 1992, Dr. Joan Kegelman observed a math class taught by Brown. Later, a third administrator, assistant principal Ruth Vega, also was asked by Wallace to make an observation, which she did. Kegelman and Vega both testified at the hearing and their observation reports are attached to the joint stipulation of facts as well (Exhibits J-4 and J-5).

Wallace, Kegelman and Vega all rated Brown's performance to be unsatisfactory during 1991-92. Thus, Wallace recommended that his increments for 1992-93 be withheld. In fact, according to the principal, between December 1991 and the end of the school year in June 1992, to her regret Brown's performance became worse rather than better.

In connection with her recommendation that petitioner's 1992-93 increments be withheld, Wallace prepared a summary memorandum in which she noted that three separate observations and evaluations of Brown had been made during 1991-92 and on each occasion petitioner displayed an unsatisfactory level of performance in the area of organization and planning (Exhibit J-1). Although she believed that petitioner has the potential to be a good teacher, Wallace felt that he failed to make the necessary commitment to be successful, and did not adequately offer his students an opportunity to master their grade level material. Significantly, in that memorandum Wallace stated that some students who came to Mr. Brown's fifth grade class with achievement levels at or above grade level, "failed to make any progress and frequently regress. . . ."

On cross-examination, Wallace agreed that her visit on December 11, 1991 was the only "formal" observation she made of Brown during the 1991-92 school year. With respect to petitioner's alleged misuse of mathematics terms during that observation, Wallace explained that he should have been referring to "factors" rather than to "multiplicand" and "multiplier," and the students seemed confused by the terms he was using. More importantly however, Wallace stressed that during the entire time she was there the children were never even taught what the lesson plan called for Brown to teach--the meaning of "least common multiple." Much of the period was taken up by homework review and dealing with pupils who did not do their homework. Wallace reiterated that Brown not only was behind the necessary pace for preparing his class for the mid-term exam, but he was also behind with respect to the final exam as well.

The district's next witness, Dr. Joan Kegelman, has been a mathematics supervisor since 1990. In February 1992 at Wallace's request, she also observed Brown teach a math class and she prepared a written report of the same (Exhibit J-4). Kegelman, too, rated petitioner to be "unsatisfactory" in his use of effective organization and planning. In particular, she found he had a major problem in "pacing" since he was not keeping up with the time requirements of the core curriculum. Indeed, when she visited his class on February 19, 1992, Brown was working with the class on two-digit division, a subject which he should have covered in November 1991. She also testified that although Brown appeared to know his

subject matter, he "tells students the information and does not give them a chance to discover it for themselves."

On cross-examination, the witness stressed that her post-observation conference with Brown on February 25, 1992, primarily was designed to focus attention on the fact that his students were expected to cover various subjects before the end of the school year. Her observation the previous week revealed that he was not proceeding at the expected rate called for in the curriculum. Moreover, Brown's method of presentation was not one which she believed was particularly designed to capture the interest of the students.

The third witness for respondent, Ruth Vega, is the assistant principal at Conwell and at the request of Wallace she observed Brown's class on March 4, 1992. Her report similarly rated him to be "unsatisfactory" in the area of effective organization and planning (Exhibit J-5). Vega had observed Brown teach a class in social studies and in her report she, too, criticized him for failing to control his class and to hold its attention. She noted as well that he failed to maintain appropriate pacing and to keep up with the time allotted in the curriculum guide. Although Brown was teaching "unit 2," by March he should have been up to "unit 4" and it appeared clear to Vega that petitioner would not have enough time to finish the curriculum by the end of the school year. Also, although the lesson should have been covered in 45 minutes, Vega said it took about one hour.

C. Testimony for Petitioner

Brown testified on his own behalf. He has been employed in the Jersey City school district for about 24 years and has always taught at the elementary level. He maintained that it was not until his post-observation conference with Wallace on January 22, 1992, that he was first told that he was not "on pace" with the curriculum. He explained that this was probably due to the fact that his students were having difficulty with the material. He also maintained that at no time did Wallace or anyone else ever tell him that his lesson plans were not following the pacing required.

Brown further noted that the first time he became aware that his increments for 1992-93 would be withheld was when he received a notification, dated March 31,

1992, from the executive assistant Ms. Granick (Exhibit J-2). At no time prior to his receipt of that notice did any administrator discuss this possibility with him nor did he ever have any opportunity to challenge the proposal to withhold his increments at the local level before the withholding was implemented.*

On cross-examination Brown repeated that it was not until January 22, 1992, when he met with Wallace that he was made aware that he was not keeping pace and again explained that if this was so, the primary cause was the inability of his students to go any faster. He agreed that he discussed pacing with Kegelman during the post-observation conference he had with her on February 25, 1992, and that they came up with a plan which he then followed. With respect to the social studies curriculum mentioned by Vega, he could not recall whether he completed all of the units by the end of the 1991-92 school year.

DISCUSSION

The first issue to be addressed is the procedural claim raised at the hearing by petitioner. In particular, he maintains that although *N.J.S.A.* 18:7A-35(d) and (e) appear to provide broad ranging authority in the state district superintendent to step into the role of the board in connection with increment withholdings in state-operated school districts, there is nothing either expressly or impliedly contained in those provisions which would provide a basis for usurpation of the longstanding procedure for withholding set forth in *N.J.S.A.* 18A:29-14. As counsel for petitioner sets forth in his brief, to permit the superintendent unilaterally to deny the increment without first submitting reasons for that action to the board for its consideration would effectively remove the protective entitlements contained in the withholding of increment statute and make the superintendent of schools, "the accuser, judge and jury." Since the Jersey City Board of Education was not abolished by the takeover legislation, and since the Legislature did not specifically provide that the provisions of *N.J.S.A.* 18A:29-14 were superseded, petitioner maintains that the increment withholding authority continued to reside, at least in part, in the local board and there is no authority for the superintendent effectively to "rule by fiat."

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*It was this testimony which gave rise to the procedural issue to be discussed *infra*.

Counsel for the respondent, in opposition to the procedural claim, points to the provisions of *N.J.S.A.* 18A:7A-35 to support the proposition that the language and thrust of the takeover legislation clearly was and is designed to provide superintendents in state-operated school districts with the essential authority previously possessed by the local school board. Thus, counsel notes that the authority to certify tenure charges against a teacher employed by the state-operated School District of Jersey City has specifically been found to reside in the superintendent. *See, In the Matter of the Tenure Hearing of Pellagatti*, 93 *N.J.A.R.* 2d (Vol. 4A) 121 (Dept. of Education); *In the Matter of the Tenure Hearing of Mantone*, 93 *N.J.A.R.* 2d (Vol. 4A) 322 (Dept. of Education).

I believe that the position taken by the respondent is correct. The takeover legislation clearly was designed to repose substantial authority in the superintendent to implement the laws and the rules of the State Board which normally would be the province of the local board of education. As the Commissioner noted in the *Mantone* case, it is "without question that [*N.J.S.A.* 18A:7A-35(e)] empowers the Superintendent to engage in all necessary activities to allow the district to be fully functional. . . ." *Id.* at 326. I agree with counsel that the broad grant of powers to the superintendent in the school takeover legislation necessarily included the authority exercised here; namely, to act on a recommendation to withhold an increment. To hold that the withholding of increment function was retained by the local board would fly in the face not only of the statutory provisions relating to the powers of the state district superintendent, but would also vest much greater authority in the board of education itself than the takeover legislation ever anticipated. *See, e.g., N.J.S.A.* 18A:7A-47 and 7A-48. In short, the procedural issue raised by petitioner must be rejected.*

Having rejected the procedural claim raised by petitioner, the remaining issue is whether the action by the respondent in withholding Brown's 1992-93 salary and

*Petitioner also raised in his brief a claim that the withholding action ran afoul of the provisions of the Open Public Meetings Act, *N.J.S.A.* 10:4-6 *et seq*. Since that issue was not raised in the pleadings nor was it ever mentioned prior to the filing of the posthearing brief, it will not be considered by me.

adjustment increments was arbitrary, capricious or unreasonable. In that respect, based upon the joint stipulation of facts and the testimony of all the witnesses, it is clear that in respect to that claim Brown palpably has failed to sustain the burden of proof placed upon him to demonstrate by a preponderance of the credible evidence that such action was so tainted. To the contrary, the testimony profferred by Wallace, Kegelman and Vega painted, in my judgment, a picture of a teacher whose performance was woefully inadequate. It is distressing, if not appalling, that every one of Brown's fifth grade students failed not only the mid-term math examination, but the final examination as well. There can be no excuse for such a result, and indeed, none was seriously offered. Brown's lame explanation that his students somehow were not up to the task is disturbing, to say the least. Each of the three evaluators observed that he was far behind the pace set forth in the curriculum and each brought that concern specifically to his attention in post-conference interviews. Since the performance evaluations for the previous two school years alerted Brown to this same problem, he clearly had ample advance notice of his alleged deficiencies and cannot possibly claim that the withholding came as any surprise. *See, e.g., Sturn v. South Plainfield Board of Education*, 92 *N.J.A.R.* 2d (Vol. 4A) 661 (Dept. of Education).

It is, of course, well settled that the burden of proving that an increment withholding was arbitrary, capricious or unreasonable rests upon the person challenging the withholding. *Kopera v. West Orange Board of Ed.*, 60 *N.J. Super.* 288 (App. Div. 1960); *see also, Board of Ed. of Bernards Township v. Bernards Township Education Association,* 79 *N.J.* 311 (1979). Given the overwhelming nature of the testimony profferred by the respondent, it is plain that the determination to withhold Brown's 1992-93 salary and adjustment increments was well justified and petitioner has not even come close to carrying the burden of proof placed upon him. Accordingly, his petition of appeal should be **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 30, 1993
Date

Stephen G. Weiss
STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

9/1/93
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 02 1993
Date

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

amr/e

WITNESS LIST

Maryanne Wallace

Joan Kegelman

Ruth Vega

Martin A. Brown

EXHIBIT LIST

C-1 Joint stipulation of facts with attached Exhibits J-1 through J-8

P-1 (For identification) Instructional Staff Evaluation Form

P-2 (For identification) Handwritten lesson plan

P-3 Lesson plan book

R-1 (For identification) Written performance evaluation, June 1992

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

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

Upon review of the record, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge and adopts the initial decision as the final decision in this matter for the reasons well stated therein.

Accordingly, the Petition of Appeal is hereby dismissed.

M L Fitzgerald

COMMISSIONER OF EDUCATION

OCTOBER 18, 1993

DATE OF MAILING - OCTOBER 18, 1993

255-93

255-93

BOARD OF EDUCATION OF THE PASCACK VALLEY REGIONAL HIGH SCHOOL DISTRICT,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
CHOON H. KWON,	:	
RESPONDENT.	:	
	:	

OCTOBER 20, 1993

BOARD OF EDUCATION OF THE PASCACK VALLEY REGIONAL HIGH SCHOOL DISTRICT,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
CHOON H. KWON,	:	
RESPONDENT.	:	

For the Board, Fogarty and Hara (Rodney T. Hara, Esq., of Counsel)

This matter having come before the Commissioner by way of Petition of Appeal date June 24, 1993 seeking tuition pursuant to N.J.S.A. 18A:38-1(b) from respondent for the attendance of two pupils, S.Y.J. and J.Y.J., in petitioner's district; and

Whereas said petition was followed by a motion and affidavit filed on August 11, 1993 by counsel for the Board seeking an order authorizing the immediate removal of S.Y.J. and J.Y.J. as students enrolled in petitioner's school district; and

Whereas said submissions averred that the students in question are not properly domiciled in the district and further challenged the affidavits submitted by that individual alleged to be keeping such children gratis for greater than the school year in question; and

Whereas no Answer or other submission has been filed by respondent in the matter, despite three notices to do so, the most recent of which was mailed on August 13, 1993 by certified mail, return receipt requested; and

Whereas said certified letter was return with a post office stamp stating "Attempted-Not known;" and

Whereas, the Commissioner has carefully reviewed the arguments of the Board in the matter; and

Whereas in the absence of any response by respondent, the Commissioner hereby deems the facts as pled by the Board as true pursuant to N.J.A.C. 6:24-1.4(e); now therefore

The Commissioner finds and directs that the Board's prayer for tuition for S.Y.J. and J.Y.J. as students enrolled in petitioner's district is hereby granted for the 1992-93 school year through the date of this decision in the 1993-94 school year; and

The Commissioner further finds and determines that based upon the facts admitted as pled, S.Y.J. and J.Y.J. are not properly domiciled in petitioner's district, and thus may be excluded from receiving a free public education in said district; and

The Commissioner further finds and determines that having directed the assessment of tuition based upon facts admitted as pled, including that the children are not properly domiciled in the district as affidavit students, the motion brought for the removal of the students during the pendency of this appeal is hereby rendered moot.

Finally, the Commissioner rejects petitioner's prayer for attorney fees in this matter, there being no provision for the grant

of attorney fees or costs within the Commissioner's authority. See Balsley v. North Hunterdon Board of Education, 117 N.J. 434 (1990).

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 20, 1993

DATE OF MAILING - OCTOBER 20, 1993

256-93

256-93

STANLEY HALPERN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DELRAN, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, part-time school psychologist who had served as Coordinator of Child Study Team prior to abolishment of that position, alleged he had greater entitlement to position of Director of Curriculum and Pupil Personnel Services than nontenured teacher and sought appointment to said position.

In light of Supreme Court decision in Dennery, ALJ concluded petitioner was not entitled to relief sought. At time of rif, he possessed neither a principal's endorsement nor a school administrator's endorsement necessary for director position. Moreover, although position of Director of Curriculum and Pupil Personnel Services included all of petitioner's former job duties, it also included numerous curriculum-related responsibilities and responsibility for staff evaluations making the two positions substantially dissimilar. Petition was dismissed.

Commissioner adopted findings and determination in initial decision with clarification that even if petitioner held principal's endorsement, he could not bump into position of director due to duties being separably tenurable citing N.J.S.A. 18A:28-5, Schaefer, and Dennery.

OCTOBER 20, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 1426-92
AGENCY DKT. NO. 15-1/92

STANLEY HALPERN,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF DELRAN, BURLINGTON COUNTY,
Respondent.

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

John T. Barbour, Esq., for respondent

Record Closed: July 28, 1993 Decided: September 13, 1993

BEFORE **M. KATHLEEN DUNCAN**, ALJ:

This matter was commenced on January 21, 1992, when Stanley Halpern (hereinafter petitioner) filed a petition of appeal with the Commissioner of Education asserting that he had greater entitlement to be appointed to the position of Director of Curriculum and Pupil Personnel Services as against a non-tenured teaching staff member and seeking appointment to said position. An answer was filed on behalf of the Board of Education of the Township of Delran (hereinafter respondent) on February 19, 1992, and on February 25, 1992, the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 to 13.

A prehearing conference was conducted by telephone conference call on May 21, 1992, at which time it was determined that the matter would be decided on cross-motions for summary decision. The parties agreed to file a joint stipulation of facts on or before June 8, 1992; briefs in support of the cross-motions were to be

filed on or before July 8, 1992, and replies, if any, by July 20, 1992. A number of extensions of time were requested and granted. A brief in support of petitioner was filed on September 21, 1992, and thereafter on September 23, 1992, counsel for petitioner forwarded a proposed stipulation of facts, which had not been signed by the parties. Thereafter, the parties continued for a protracted period of time to attempt to agree on a stipulation of facts. By letter dated February 24, 1993, the undersigned advised the parties that the matter had been scheduled for preemptory hearing on May 7, 1993, and only if completed motion papers were filed before that date would the hearing be adjourned. On April 30, 1993, respondent filed a motion for a decision on the pleadings with supporting papers. By letter dated May 4, 1993, petitioner replied, acknowledging that for the most part the facts relevant to a determination of this matter are not in dispute but asserting that Director of Curriculum and Pupil Personnel Services was an unrecognized position title requiring approval by the county superintendent, pursuant to N.J.A.C. 6:11-3.3(b). Petitioner asserted that the procedure set forth in this regulation had not been followed and suggested that testimony was required with respect to the manner in which respondent concluded that a principal's endorsement was required for the position. Following a telephone conference call on May 5, 1993, it was determined that petitioner would file a motion for leave to amend the petition to include the assertions with respect to N.J.A.C. 6:11-3.3(b) and would file a cross-motion for summary decision. On May 19, 1993, petitioner filed a motion for leave to amend the petition of appeal. Respondent replied by letter memorandum dated June 2, 1993. Oral argument on the motions was conducted by telephone conference call on July 20, 1993, following which the undersigned requested that copies of the job descriptions for the position titles Director of Curriculum and Pupil Personnel Services and also for Coordinator of Child Study Team be provided. One job description was received on July 23, 1993; the other job description was received on July 28, 1993, whereupon the record closed.

FINDINGS OF FACT

The facts relevant to a determination of these motions are not in dispute, and I therefore find the following as uncontested facts.

Petitioner is a tenured teaching staff member employed by respondent. For approximately twenty years he served in the position Coordinator of Child Study Team. The qualifications for this position required petitioner to hold an educational services certificate with a school psychologist endorsement and an administrative

certificate with a supervisor's endorsement. In addition to performing the duties of Coordinator of the Child Study Team, petitioner also functioned as the school psychologist.

On or about October 21, 1991, respondent voted to abolish the position of Coordinator of the Child Study Team and to create the position of Director of Curriculum and Pupil Personnel Services. Petitioner challenged respondent's October 21, 1991, actions as a violation of the Open Public Meetings Act, N.J.S.A. 10:4-12(b)(8). On December 9, 1991, respondent again voted to abolish the position of Coordinator of Child Study Team thereby reducing petitioner to a part-time school psychologist. Again petitioner challenged respondent's actions as a violation of his Open Public Meetings Act rights and the challenge was successful. On or about May 18, 1992, respondent for the third time abolished petitioner's position of Coordinator of the Child Study Team. It also once again approved petitioner's appointment as a part-time psychologist retroactive to March 23, 1992. The current holder of the position of Director of Curriculum and Pupil Personnel Services, who was appointed effective March 23, 1992, is a non-tenured teaching staff member who holds an administrative certificate with endorsements of principal, supervisor, and school administrator. Although petitioner has been working toward obtaining a principal endorsement, he has not yet completed the requirements for receiving that endorsement. The job description for Director of Curriculum and Pupil Personnel Services approved by respondent on November 18, 1991, lists, under qualifications, "New Jersey Principal's Certification, School Administrator preferred." The responsibilities and duties include those of the former position Coordinator of the Child Study Team but also include numerous additional duties related to development of curriculum for kindergarten through grade twelve and evaluation of results of district-wide testing programs. The Director of Curriculum and Pupil Personnel Services is also responsible for evaluating child study team personnel.

Petitioner contends that Director of Curriculum and Pupil Personnel Services is an unrecognized position title, that respondent was required to submit the title to the County Superintendent of Schools for approval and determination of the appropriate endorsement, pursuant to N.J.A.C. 6:11-3.3(b), and that notwithstanding the fact that he does not possess a principal or school administrator endorsement he has greater entitlement to the position Director of Curriculum and Pupil Personnel Services than the non-tenured teaching staff member who holds the position.

Respondent contends that the position title "Director" is recognized at N.J.A.C. 6:11-9.3, which indicates that the holder of that position must possess either a school administrator or principal endorsement and that no action was therefore required by the county superintendent of schools, although respondent acknowledges that the county superintendent was consulted about this subject by telephone on September 16, 1991, and September 19, 1991. Respondent also asserts that petitioner is barred from raising the unrecognized position title issue by the provisions of N.J.A.C. 6:24-1.2(c), which requires that petitions of appeal be filed no later than the ninetieth day from the date of the receipt of notice by petitioner of the subject of requested review.

APPLICABLE LAW AND DISCUSSION

MOTION FOR LEAVE TO AMEND THE PETITION

N.J.A.C. 6:24-1.2(c), the regulation which sets forth the limitations period for filing complaints with the Commissioner of Education, provides:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.

No challenge is made to the timeliness of the original petition of appeal in this matter which was filed on or about February 3, 1992. Unquestionably absent from that petition, however, is any allegation that the title "Director of Curriculum and Pupil Personnel Services" is an unrecognized position title requiring approval of the county superintendent of schools. N.J.A.C. 6:11-3.3 subsection b (which prior to October 1990, was N.J.A.C. 6:11-3.6) requires a district board of education to submit a written request for permission to use an unrecognized position title to the county superintendent of schools prior to making any appointment. The county superintendent is then required to either approve or disapprove use of the title and if the title approved, the superintendent makes the determination of the appropriate certification and title for the position. Commencing with respondent's first attempt in October 1991 to abolish petitioner's position and to establish the position Director of Curriculum and Pupil Personnel Services, petitioner was aware of the proposed position title. The job description for the position was approved and posted in November 1991. Petitioner is also charged with knowledge of the regulatory provisions properly adopted and published in the administrative code.

Accordingly, his attempted amendment of his petition to raise these claims in 1993, is time-barred. The fact that petitioner's attorney and respondent's attorney commenced having discussions about the county superintendent's role in determining the appropriate certification for the position of Director of Curriculum and Pupil Personnel Services in or about May 1992, does not alter this determination since an attempted amendment, asserting additional claims, in May 1992 would also have been time-barred.

Furthermore, although the general rule is certainly that motions for leave to amend are required to be liberally granted without consideration of the ultimate merits of the amendment, where, as here, a motion for summary decision addresses the merits of the claim, the motion to amend may be properly denied because on the merits it is clear that the claim alleged in the proposed amendment must fail. City Check Cashing v. Nat. St. Bk., 244 N.J. Super. 304, 308-309 (App. Div. 1990). To permit amendment of the petition to allow the claim that Director of Curriculum and Pupil Personnel Services is an unrecognized position title would be a frivolous act, since it is clear from the provisions of N.J.A.C. 6:11-9.3(a) and (b) "Director" is a recognized position title. See infra.

MOTION FOR A DECISION ON THE PLEADINGS AND/OR FOR SUMMARY DECISION

Neither party challenges any facts material to a determination of these motions and both assert entitlement to a decision as a matter of law; accordingly, this case is ripe for summary decision. N.J.A.C. 1:1-12.5; R. 4:46-2; Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 73-75 (1954).

On April 8, 1993, our Supreme Court issued its opinion in Dennery v. Board of Educ., 131 N.J. 626 (1993), reversing the Appellate Division opinion which petitioner cited in his petition of appeal as authority for the relief he seeks. The Supreme Court held that an educator with tenure in any endorsement that he or she possesses can, in effect, extend or transfer that tenure to other endorsements that are subsumed under the same certificate, but cannot "transfer" tenure earned under one certificate to a position under a different certificate which he or she has acquired but under which she/he has not accrued any relevant work experience. Id. at 634-635. Even under the Appellate Division's opinion in Dennery, however, petitioner would not be entitled to the relief which he seeks because, by his own admission in the petition, at the time of the RIF he did not possess a principal endorsement or a school administrator endorsement, and as acknowledged during oral argument on the

motions, he still does not possess either of these endorsements nor is he currently qualified to obtain either of them or to obtain the Director of Student Personnel Services endorsement on his educational services certificate. The Supreme Court opinion in Dennery reaffirmed the holding in Ellicott v. Board of Educ., 251 N.J. Super. 342 (App. Div. 1991) that "tenure under any one endorsement entitles an educator to tenure under all endorsements obtained under his or her certificate. (emphasis added)"* Thus, if, at the time of the RIF, petitioner had held the principal endorsement or the school administrator endorsement which very clearly entitle the holder to serve in the position "Director" (see N.J.A.C. 6:11-9.3(a) and (b), pursuant to Ellicott and Dennery he would have been entitled to extend his tenure rights obtained under his supervisor's endorsement on his administrative certificate to the newly created position Director of Curriculum and Pupil Personnel Services. It is very clear, however, that tenure extends only to State Board created positions for which the educator holds an appropriate endorsement. This is explicitly explained (and highlighted in footnote 6) in the State Board's opinion which the Appellate Division affirmed in Ellicott:

> Similarly, principal, assistant principal, vice principal, superintendent and assistant superintendent, although all within the purview of the administrative and supervisory certificate, are separately tenurable positions by virtue of the express language of N.J.S.A. 18A:28-5.[5] Capodilupo, supra. See, e.g., Schienholz v. Board of Education of the Township of Ewing, decided by the State Board of Education, February 7, 1990, appeal pending (App. Div.). In Schienholz, we reiterated that tenure was achieved in the position of "principal," rather than in the specific assignments of elementary or high school principal, stressing that "principal" was a separately tenurable position under N.J.S.A. 18A:28-5. Since petitioners therein were authorized by virtue of their principal endorsements to serve at all grade levels, they were entitled to tenure protection in all assignments within that tenurable position for which that certification qualified them.

---

5 We note that such status as separately tenurable positions is not based upon the various endorsements on the administrative certificate. An endorsement as principal, for example, authorizes service in both the separately tenurable positions of principal and vice principal. N.J.A.C. 6:11-10.4(b). Thus, while the Commissioner stresses, as an analogy to the

* Except positions specifically tenurable under N.J.A.C. 18A:28-5. See Ellicott, 251 N.J. Super. 342, 345 fn. 1.

> With the exception of school nurse assignments within the purview of the educational services certificate are not enumerated in N.J.S.A. 18A:28-5 as separately tenurable positions. Under regulations promulgated by the State Board, moreover, teaching staff members holding an educational services certificate are authorized and qualified for service in any assignment under that certificate for which they possess the appropriate endorsement. N.J.A.C. 6:11-12.1 et seq. Consequently, we conclude that, with the exception of school nurses, who are separately tenured by statute, staff members serving under educational services certificates achieve tenure in "educational services" and are entitled to tenure protection in all assignments within that tenurable position for which the endorsements on their certificates qualify them.[6]

> instant case, the irrationality of a tenured vice principal displacing a non-tenured principal following a RIF, under regulations promulgated by the State Board, an individual serving as a vice principal is required to possess an endorsement as principal, and would, therefore, be authorized and qualified for service as a principal. Id. However, by virtue of the fact that principal and vice principal are, pursuant to N.J.S.A. 18A:28-5, separately tenurable positions, a tenured vice principal who has no tenure as a principal would have no statutory entitlement by virtue of tenure to assignment as a principal following a RIF.

6 We emphasize that, by virtue of the fact that the scope of the position to which tenure protection attaches is limited by the scope of the staff member's certification, individuals tenured in educational services would have no entitlement by virtue of tenure to assignments under that certificate for which they do not possess the appropriate endorsement. (1990 S.L.D. 1717-1718)

The proper endorsement for the position Director of Curriculum and Pupil Personnel Services is not an issue for the county superintendent because it is a title recognized at N.J.A.C. 6:11-9.3(a) and (b) in the administrative code. See N.J.A.C. 6:3-1.10(g), a seniority regulation which provides, "whenever the title of any employment shall not be found in the certification rules or in these rules, the holder of the employment shall be classified as nearly as may be according to the duties performed, pursuant to the provisions of N.J.A.C. 6:11-3.6. (now N.J.A.C. 6:11-3.3(b)).

Furthermore, the following language from the Supreme Court's opinion in Dennery resolves any other possible remaining doubts that petitioner might be entitled to the newly created Director position:

> "When the duties of the position in which a teaching-staff member has acquired tenure are substantially identical to those of the position that the person seeks, a local school board may not sidestep an educator's tenure rights by simply renaming the position or tacking on additional meaningless requirements. The local board must extend the teaching-staff member's tenure rights to the newly-created position. . . .
>
> A mere overlap in duties, however, does not mean that two positions are equivalent for tenure purposes. If a newly-created position is similar to a tenure holder's abolished position but also requires additional duties or different responsibilities, then the newly-created position is not considered to be substantially similar to the former position. . . (Dennery, 131 N.J. at 639-640).

Although the position Director of Curriculum and Pupil Personnel Services includes all of petitioner's former job duties as Coordinator of the Child Study Team, it also includes numerous curriculum related responsibilies and responsibility for staff evaluations which were not part of petitioner's previous position. Therefore, the two positions are not so substantially similar as to require extension of tenure rights.

For all the foregoing reasons, I **CONCLUDE** that petitioner is not entitled to the relief which he seeks. It is hereby **ORDERED** that petitioner's motion for summary decision is denied; respondent's motions for decision on the pleadings and for summary decision are hereby granted, and the within matter is dismissed with prejudice.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

September 13, 1993
Date

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

Sept. 13, 1993
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 16 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

cc

STANLEY HALPERN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DELRAN, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon careful and independent review of the record of this matter, the Commissioner affirms the initial decision for the reasons expressed therein with the following qualification. It is observed that at page six of the initial decision the ALJ states in reviewing the New Jersey Supreme Court holding in Dennery, supra, that:

> ***if, at the time of the RIF, petitioner had held the principal endorsement or the school administrator endorsement which very clearly entitle the holder to serve in the position "Director" (see N.J.A.C. 6:11-9.3(a) and (b)), pursuant to Ellicott and Dennery he would have been entitled to extend his tenure rights obtained under his supervisor's endorsement on his administrative certificate to the newly created position of Director of Curriculum and Pupil Personnel Services.***

While the Commissioner is in accord with the ALJ's disposition of the facts of this case, it bears noting, as a general

matter, that the Supreme Court holding in Dennery, supra, has not displaced the concept of separably tenurable positions. See, for example, John Schaefer v. Board of Education of the Township of Lakewood, Ocean County, decided by the Commissioner September 8, 1993. Under the facts of this case, even if petitioner held a principal's endorsement at the time of the RIF, he would not have been able to claim a position as director because one who is tenured based upon service as a supervisor may not "bump" into a position requiring a principal's endorsement due to the duties being separably tenurable pursuant to N.J.S.A. 18A:28-5. Hence, service in a position which requires only a supervisor's endorsement precludes bumping rights based on tenure into a position requiring a principal's endorsement. Schaefer, supra

With this clarification made, the Commissioner otherwise concurs with the ALJ's dispositions of petitioner's claims, including those reiterated in his exceptions.

Accordingly, for the reasons expressed by the Office of Administrative Law, as limited herein, the Commissioner adopts the initial decision's findings of fact and conclusions of law which result in the dismissal of the instant Petition of Appeal.

COMMISSIONER OF EDUCATION

OCTOBER 20, 1993

DATE OF MAILING - OCTOBER 20, 1993

257-93

257-93

BOARD OF EDUCATION OF THE TOWNSHIP OF MAURICE RIVER, CUMBERLAND COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF WILDWOOD, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning District sought payment of tuition and transportation costs for homeless child (A.P.) who last resided in respondent District. Respondent denied child was homeless and claimed district of residency could not be determined.

ALJ dismissed petition and cross-petition finding student was not homeless and neither Board had claim under laws governing education for homeless students. Merely living with friends or relatives even out of necessity does not render a person homeless especially when the child lives with the mother.

Commissioner adopted findings and determination in initial decision.

OCTOBER 20, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7805-92
AGENCY REF. NO. 418-9/92

BOARD OF EDUCATION OF THE TOWNSHIP OF MAURICE RIVER, CUMBERLAND COUNTY,
Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF WILDWOOD, CAPE MAY COUNTY,
Respondent.

Frank DiDomenico, Esq., for petitioner, (Milstead, Gruccio & DiDomenico, attorneys)

Bruce M. Gorman, Esq., for respondent

Record Closed: July 30, 1993 Decided: September 10, 1993

BEFORE **EDGAR R. HOLMES, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law on October 7, 1992, for determination as a contested case pursuant to the Administrative Procedures Act, *N.J.S.A.* 52:14B-1 to -15; and the act creating the OAL, *N.J.S.A.* 52:14-1 to -13.

The petitioner Maurice River Township Board of Education seeks reimbursement from the Wildwood Board of Education for the educational expense of A.P. Wildwood Board of Education has cross-claimed for A.P.'s tuition from Maurice River Township Board of Education. Both Boards assert that A.P.was a "homeless child" during some period of the school year 1991/92. They seek reimbursement pursuant to *N.J.A.C.* 6:3-7.4 which designates the district of residence as the responsible party for a homeless child's education.

FACTUAL AND LEGAL DISCUSSION

The parties stipulate the following facts:

> B.P. the mother of A.P., resided with her mother in Maurice River Township until the time of her marriage to W.P. in early 1989. At that time, she moved to his place of residence, first in Wildwood Crest and then into Wildwood. They resided together as husband and wife until May of 1991, at which time a marital dispute arose, and B.P. left her husband in Wildwood and returned to her mother's home in Maurice River Township, taking with her, her three minor children, including A.P., subject of the within dispute.
>
> B.P. and A.P. continued to reside with her mother in Maurice River Township until approximately November 1, 1991. In August of 1991, she registered A.P. in the Pre First Program in the Wildwood Elementary School. She registered him there because she hoped she and her husband might effect a reconciliation. When school began in September of 1991, she transported A.P. to Wildwood and home again to Maurice River Township after the school day. The reconciliation B.P. hoped for never occurred, and she continued to reside in Maurice River Township.
>
> On October 18, 1991, B.P. withdrew A.P. from the Wildwood School system. On October 22, 1991, she

registered A.P. for school in the Maurice River Township School system. At that time, she executed a typed registration form which contained the following language:

Confidential Date of Enrollment
Name of Parent/Guardian
Present Address
Last Permanent Address
Last School District
Date at Last Permanent Address
Date at Last School District

Must check ***one*** of the categories below:

____1. We are a migrant family lacking adequate housing.
____2. We are out of necessity living with relatives or friends.
____3. We are living in a private place not designed for or ordinarily used as a regular sleeping accommodation for human beings.
____4. None of the above apply.

An "x" was typed next to the line reading as follows:

2. We are out of necessity living with relatives or friends.

This form reproduces some of the language from *N.J.A.C.* 6:3-7.3, which was designed to assist Board of Educations in determining when a child is homeless.

Petitioner Maurice River Township Board of Education then demanded payment of tuition from respondent, Wildwood Board of Education. Respondent denied that tuition was due.

> In the interim, on or about November 1, 1991, B.P. moved to a duplex on High Street in Maurice River Township. For the next year, the Cumberland County Welfare Agency paid a portion of her rent. Since November 1992, she has received no rental subsidy.

The Maurice River Township Board of Education based its decision that A.P. was homeless on two things. It had information from employees of the Cumberland County Welfare Board that B.P. was "homeless" and it had B.P.'s signature on a form provided by the Maurice River Township Board of Education indicating that she was "out of necessity living with relatives and friends." The complete sentence from which that phrase is taken is as follows:

> 5. the child of a homeless family who is out of necessity living with relatives or friends; or ...

Merely living with relatives or friends, even out of necessity does not render a person homeless. This paragraph covers a typical situation in which a family, already homeless, places one or more of its children with relations or friends. It is not intended to make all children who reside with relations and friends out of necessity, homeless. Especially when they are living with their mother.

The fact that B.P. received temporary rental assistance also does not indicate that she was homeless. Temporary rental assistance is often useful in preventing homelessness. The language of the regulation approving temporary rental assistance includes "imminent homelessness" as well as "actual homelessness." *N.J.A.C.* 10:82-5.10 (d). B.P. furnished the Cumberland County Welfare Agency with a letter from her mother saying she could not live there any longer. The Welfare Board reacted properly, because the letter was an indication that B.P. was in danger of becoming homeless. However, it was a mischaracterization by Welfare employees to describe A.P. as actually "homeless." In addition, A.P.'s father continued to reside in Wildwood to whom the child may have returned.

FINDINGS AND CONCLUSIONS

There is no indication that A.P. suffered a loss of shelter so that he lacked "a fixed, regular and adequate residence." *N.J.A.C.* 6:3-7.2.

I **FIND** that A.P. was not a homeless child during the 1991/92 school year.

I therefore **CONCLUDE** that neither the Maurice River Township Board of Education or the Wildwood Board of Education has a claim pursuant to *N.J.A.C.* 6:3-7.4.

I **DISMISS** the complaints and cross complaints filed herein.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

9/10/93
Date

EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

9/15/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 20 1993
Date

OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

FOR PETITIONER:

B.P.
LARRY PRETLOW
ROSEMARIE NEUMAN

FOR RESPONDENT:

NONE

DOCUMENTS IN EVIDENCE

JOINT EXHIBITS

J-1	CHRONOLOGY AND SUPPORTING DOCUMENTS
J-2	PRE FIRST REGISTRATION
J-3	SOCIAL HISTORY

OAL DKT. NO. EDU 7805-92

BOARD OF EDUCATION OF THE TOWNSHIP OF MAURICE RIVER, CUMBERLAND COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF WILDWOOD, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner concurs with the ALJ that the pupil at issue in this matter is not homeless, so that neither the petitioner nor the respondent Board of Education has a claim under the laws governing assignment of educational costs for homeless students.

Accordingly, the initial decision of the Office of Administrative Law dismissing both the Petition of Appeal and respondent's cross-petition is affirmed for the reasons expressed therein.

IT IS SO ORDERED.

OCTOBER 20, 1993

DATE OF MAILING - OCTOBER 20, 1993

COMMISSIONER OF EDUCATION

257-93

EDU #7805-92
C # 257-93
SB # 67-93

BOARD OF EDUCATION OF THE TOWNSHIP OF MAURICE RIVER, CUMBERLAND COUNTY,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF WILDWOOD, CAPE MAY COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, October 22, 1993

For the Petitioner-Appellant, Milstead, Gruccio & DiDomenico
(Frank DiDomenico, Esq., of Counsel)

For the Respondent-Respondent, Bruce M. Gorman, Esq.

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

March 2, 1994

Date of mailing MAR 04 1994

258-93

258-93

IN THE MATTER OF THE TENURE	:	
HEARING OF ARTHUR DRUMMOND,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
ATLANTIC CITY, ATLANTIC COUNTY.	:	
	:	

OCTOBER 20, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8109-92
AGENCY DKT. NO. 456-9/92

IN THE MATTER OF THE TENURE HEARING OF ARTHUR DRUMMOND, SCHOOL DISTRICT OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY

Joseph M. Jacobs, Esq., for petitioner, Board of Education of the City of Atlantic City

Allen S. Zeller, Esq., for respondent, (Freeman, Zeller & Bryant, attorneys)

Record Closed: August 26, 1993 Decided: September 3, 1993

BEFORE **EDGAR R. HOLMES**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on October 19, 1992, to be heard as a contested case pursuant to the Administrative Procedures Act, N.J.S.A. 52:14B-1 to -15 and the act creating the OAL, N.J.S.A. 52:14F-1 to -13.

In this matter the Board sought to remove the respondent because he is alleged to have made sexual advances, both physically and verbally, to a female student summer worker in his capacity as a custodian.

The female student summer worker has failed to cooperate with the Board during the investigation and the Board can no longer locate her in order to compel her attendance at a plenary hearing.

The Board asserts that it has no evidence upon which to proceed which can satisfy the residuum rule, N.J.A.C. 1:1-15.5.

Nevertheless, the respondent, who denies the allegation, will consent to a settlement which provides for his return to work on or about August 2, 1993, after a four month suspension without pay.

The parties have agreed to a settlement and have prepared a stipulation indicating the terms thereof, which is attached and fully incorporated herein.

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

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

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

9/3/93
Date

EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

9/9/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 14 1993
Date

OFFICE OF ADMINISTRATIVE LAW

lmh

FILED

Aug 26 11 00 PM '93

STATE OF NEW JERSEY
OFFICE OF
ADMINISTRATIVE LAW

JOSEPH M. JACOBS, ESQ.
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Atlantic City, New Jersey 08401
(609) 345-5000

Attorney for Petitioner

BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY,	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW
PETITIONER,	DOCKET NO: EDU 8109-92
v.	OAL NO: 456/9-92
ARTHUR DRUMMOND,	
RESPONDENT.	**STIPULATION OF SETTLEMENT**

This action having been commenced by Joseph M. Jacobs, Esq., attorney for the Petitioner, The Atlantic City Board of Education, and Allen S. Zeller, Esq., of Freeman, Zeller & Bryant, attorney for the respondent, having filed an answer to the petition and the dispute between the parties having been amicably adjusted by and between the parties and the parties desiring to enter into Stipulation of Settlement o the basis and terms as set forth herein:

IT IS hereby stipulated by and between the petitioner and the respondent that the within matter be and hereby is settled in the following terms:

1. That respondent, Arthur Drummond, shall return to work as a janitor in the Atlantic City School district on August 2, 1993; and

2. He shall receive a four (4) month suspension without pay, which suspension has already been completely served.

Dated: 8-17-93

Joseph M. Jacobs, Esq.
Attorney for Petitioner

Dated: 8-14-93

Allen S. Zeller, Esq.
Attorney for Respondent

OAL DKT. NO. EDU 8109-92

IN THE MATTER OF THE TENURE	:	
HEARING OF ARTHUR DRUMMOND,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
ATLANTIC CITY, ATLANTIC COUNTY.	:	
	:	

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

The Commissioner approves the settlement terms as they comport with the Cardonick standard for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846) The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

OCTOBER 20, 1993

DATE OF MAILING - OCTOBER 20, 1993

259-93

259-93

LAWRENCE CHAMMINGS, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ROCKAWAY, MORRIS COUNTY, RESPONDENT,	:	DECISION
AND	:	
EDWIN JOHNSTON, JR., INTERVENOR.	:	

SYNOPSIS

Petitioner, former assistant principal, alleged violation of his seniority rights and improper calculation of military service credits in district appointment of another candidate (intervenor) to acting assistant principal position.

ALJ concluded both petitioner and intervenor were equal in terms of seniority. Moreover, ALJ found absent a policy for selection in case of a tie, de facto recognition must be given to Board's choice of intervenor over petitioner in 1991. Board, however, was ordered to adopt a written policy to be applied in the future and was directed to use said policy to decide between petitioner or intervenor for middle school position no later than February 1, 1994, provided each remained eligible for said appointment. Otherwise, petition was dismissed.

Commissioner concurred with ALJ's analysis and conclusion and directed adoption of Board's policy and application to petitioner and intervenor by February 1994.

OCTOBER 20, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10825-91
AGENCY DKT. NO. 391-11/91

LAWRENCE CHAMMINGS,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF ROCKAWAY, MORRIS COUNTY,
Respondent,
and
EDWIN JOHNSTON, JR.,
Respondent-Intervenor.

Sanford R. Oxfeld, Esq., for petitioner
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Paul H. Green, Esq., for respondent
(Green & Dzwilewski, attorneys)

Wayne J. Oppito, Esq., for respondent-intervenor

Record Closed: August 6, 1993 Decided: September 15, 1993

BEFORE **STEPHEN G. WEISS,** ALJ

PROCEDURAL HISTORY

This contested case was transmitted to the Office of Administrative Law by the Department of Education following the filing of a verified petition of appeal by

Lawrence Chammings alleging that in August 1991 the position of "acting assistant principal" at respondent's Copeland Middle School was improperly awarded to Edwin Johnston, Jr., rather than to petitioner. In addition, Chammings claimed that a preferred eligibility list prepared for the position of "assistant principal-elementary school" improperly listed Johnston ahead of petitioner. Following the filing of the Board's answer and transmittal to the Office of Administrative Law, I signed a consent order permitting Johnston to intervene as a respondent.

A telephone prehearing conference conducted by the undersigned identified the following issues:

(1) Was petitioner entitled by virtue of seniority, including military service credit, to appointment as acting assistant principal at the Middle School; and

(2) Is the petition barred by virtue of the application of *N.J.A.C.* 6:24-1.2 (the 90-day rule), laches and/or estoppel.

Although a plenary hearing was scheduled, all counsel subsequently agreed that the matter could be submitted on a joint stipulation of facts and cross-motions for summary decision pursuant to *N.J.A.C.* 1:1-12.5. Those items were filed and the record closed on August 6, 1993.

JOINT STIPULATION OF FACTS

The joint stipulation of facts, marked "Court Exhibit 1," sets forth in detail the background circumstances which form the basis for the cross-motions for summary decision. Those stipulated facts are as follows:

1. The Rockaway Township School District is a K-8, Type II District having five elementary schools for instruction in grades kindergarten through five, and one middle school, named the Copeland Middle School, for grades six, seven and eight.

2. At its December 17, 1985 meeting, respondent adopted a resolution classifying grades seven and eight in the district as junior high school

level, pursuant to what was then *N.J.A.C.* 6:27-1.2(b). A copy of the pertinent portion of the Board minutes of December 17, 1985, is submitted herewith as Exhibit J-1. At all times relevant herein, grades seven and eight in the district have been organized on a departmental basis.

3. Until the 1990-91 school year, all grade six classes were housed in the district's elementary schools. Effective September 1, 1990, all District grade six classes were relocated to the Copeland Middle School.

4. Petitioner, Lawrence Chammings, has been employed by the respondent as follows:

September 1966 - June 1971:	Elementary School Teacher
September 1971 - June 1972:	Helping Teacher
July 1972 - June 1975:	Assistant to the Principal
July 1975 - June 1982:	Assistant Principal
July 1982 - June 1987:	Assistant Principal/Supervisor (Social Studies, Language/Arts, and Kindergarten)
July 1987 - June 1988:	Supervisor of Language Arts
July 1988 - August 1988:	Summer program supervisor, Reading/Language Arts
September 1988 - June 1990:	Teacher, grades 5 (1988-89) and 6 (1989-90), K.D. Malone Elementary School
September 1990 - Present:	Teacher, grade 6, Copeland Middle School

5. Lawrence Chammings has been issued the following certificates by the New Jersey Department of Education:

Elementary School Teacher - issued July 1968[1]

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[1]Chammings' service in Rockaway prior to July 1968 was under a provisional certificate.

Principal/Supervisor - issued May 1975

6. Petitioner Chammings has attained tenure in the respondent School District as a teacher and as an assistant principal.

7. The intervenor, Edwin Johnston, Jr., has been employed by the respondent as follows:

September 1963 - June 1971:	Elementary School Teacher
September 1971 - June 1972:	Helping Teacher
July 1972 - June 1975:	Assistant to the Principal
July 1975 - June 1982:	Assistant Principal
July 1982 - June 1987:	Assistant Principal/Supervisor (Science, Research (Microcomputer), Music, Art, Physical Education, Library)
September 1987 - June 1989:	Head Teacher, Copeland Middle School
September 1989 - June 1990:	Acting Assistant Principal, O'Brien Elementary School
September 1990 - June 1991:	Head Teacher, Copeland Middle School
August 21, 1991 - Present:	Acting Assistant Principal, Copeland Middle School

8. Edwin Johnston also served as the Director of the district's summer school for the 1988-89 school year. A copy of the pertinent portion of respondent's March 23, 1988 meeting, at which Johnston was appointed to such position, is annexed hereto as Exhibit J-2.

9. Edwin Johnston has been issued the following certificates by the New Jersey Department of Education:

Elementary school teacher - issued December 1965[2]
Principal/Supervisor - issued June 1975

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[2]Johnston's service in Rockaway prior to December 1965 was under a provisional certificate.

10. Intervenor Edwin Johnston, Jr., has attained tenured in the respondent school district as a teacher and as an assistant principal.

11. At a special meeting held on June 10, 1987, respondent voted to approve an administrative reorganization plan and to abolish, effective June 30, 1987, five Assistant Principal/Supervisor positions, including the positions of Lawrence Chammings and Edwin Johnston. A copy of the pertinent portion of the minutes of respondent's June 10, 1987 meeting is submitted herewith as Exhibit J-3. Except for Chammings and Johnston, no employees affected by the 1987 reduction in force ("RIF") remain in the district's employ or have any preferred eligibility recall rights.

12. As a result of the RIF the respondent Board, at a special meeting held on August 10, 1987, voted to appoint Lawrence Chammings to the position of Supervisor Reading/Language Arts and Edwin Johnston to the position of Copeland Middle School Head Teacher, an extra stipend position. A copy of the pertinent portion of the minutes of respondent's August 10, 1987 meeting is submitted herewith as Exhibit J-4.

13. The position of Assistant Principal at the Copeland Middle School was not eliminated in the administrative reorganization. Felicia Jamison was appointed to that position effective July 1, 1987, pursuant to an order of the Director of the Division on Civil Rights, who had determined that the respondent violated New Jersey's Law Against Discrimination in denying Dr. Jamison a promotion to assistant principal in 1978.

14. By letter from Anthony Vinciguerra dated November 4, 1987, Mr. Johnston was notified that the Board had approved the stipend for his appointment as head teacher. A copy of that letter is annexed hereto as Exhibit J-5.

15. Use of the nonstandard title of middle school head teacher was approved by the Morris County Superintendent of Schools by letter dated November 4, 1988. A copy of that letter is submitted herewith as Exhibit J-6.

16. At its April 27, 1988 regular meeting, respondent voted to abolish the position of Supervisor of Reading/Language Arts effective June 30, 1988. A copy of the pertinent portion of the minutes of the Board's April 27, 1988 meeting is annexed hereto as Exhibit J-7. As a result of this RIF, Lawrence Chammings was assigned to the position of elementary school teacher for the 1988-89 school year and thereafter.

17. By letter dated April 28, 1988, from Assistant Superintendent Anthony Vinciguerra, petitioner Chammings was formally notified of the Board's action to abolish his supervisor position. The letter also raised the possibility of summer employment and a stipend position during the school year to mitigate Lawrence Chammings' salary loss. A copy of that letter is submitted herewith as Exhibit J-8.

18. By letter dated May 13, 1988, petitioner Chammings replied to Mr. Vinciguerra's April 28 letter. Mr. Chammings requested a vacant fifth grade teacher position at the K. D. Malone School, accepted an offer of summer employment, and declined a stipend position during the 1988-89 school year. A copy of petitioner Chammings' May 13, 1988 letter is submitted herewith as Exhibit J-9. Mr. Chammings served as a supervisor of language arts/reading in the district's summer program for the months of July and August, 1988.

19. In September, 1988, Lawrence Chammings filed a petition with the Commissioner of Education (OAL DKT. No. EDU 7364-88, Agency DKT. No. 287-9/88), asserting entitlement by virtue of his tenure status to the Copeland School Assistant Principal position held by Felicia Jamison, who was then nontenured in the position. Edwin Johnston, Jr., thereafter filed a similar petition (OAL DKT. No. EDU 9366-88, Agency DKT. No. 361-11/88). In a decision dated August 22, 1989, affirmed by the State Board of Education January 3, 1990, the Commissioner dismissed both petitions for failure to file within the ninety-day time limitation of *N.J.A.C.* 6:24-1.2(b).

20. The principal of the district's Dwyer Elementary School was absent due to personal illness for the entire 1989-90 school year. In order to provide administrative coverage of the school, the Board directed the principal of the O'Brien Elementary School to also serve as acting principal of the Dwyer School, and transferred Edwin Johnston, Jr., to the position of Acting Assistant Principal at the Dwyer Elementary School. A copy of the pertinent portion of the minutes of the Board's September 27, 1989 meeting, approving Mr. Johnston's stipend for the acting assistant principal position, is annexed hereto as Exhibit J-10. Edwin Johnston served full-time at the Dwyer School as acting assistant principal for the period August, 1989 through June 30, 1990. For the 1991-92 school year, he returned to the position of head teacher at the Copeland Middle School.

21. Effective August 8, 1991, Felicia Jamison was promoted to the position of Assistant Superintendent for Curriculum and Instruction, creating a vacancy in the position of Copeland Middle School Assistant Principal. On August 21, 1991, respondent voted to appoint Edwin Johnston, Jr. to the position of Acting Assistant Principal of the Copeland Middle School. A copy of the pertinent portion of that meeting's minutes is annexed hereto as Exhibit J-11. Mr. Johnston continues to serve in the position of Acting Assistant Principal of the Copeland School at the present time.

22. Lawrence Chammings served in the United States Navy from September 16, 1953 until his honorable discharge on or about September 6, 1957, thus rendering him eligible for four years' military service seniority credit pursuant to *N.J.S.A.* 18A:29-11. Edwin Johnston, Jr. did not serve in the military.

23. At the time Lawrence Chammings attained tenure as an elementary school teacher, he received four years' military service credit towards his seniority in said category. A copy of the pertinent portion of the most recent seniority list available for the position of elementary school teacher, prepared in 1987, is annexed hereto as Exhibit J-12.

24. The same four years of military service was also credited to Mr. Chammings' seniority in the category of elementary school assistant principal, at the time Mr. Chammings attained tenure in that position. A seniority list for the category of assistant principal - elementary school dated June 30, 1981, is annexed hereto as Exhibit J-13. (This is the seniority list referred to in Paragraphs 11 and 12 of the First Count of the Petition in the within controversy.)

25. The district has prepared at least three preferred eligibility lists covering administrative positions formerly held by Lawrence Chammings and Edwin Johnston, Jr. A copy of a preferred eligibility list prepared for the position of assistant principal - elementary school, dated June 30, 1987, is annexed hereto as Exhibit J-14.[3] (This is the "seniority list" referred to in Paragraphs 2 and 3 of the Second Count of the Petition in the within matter.) Another list, covering all relevant positions and specifying respective seniority for the 1987-88 and 1988-89 school years, is annexed hereto as Exhibit J-15. This list was prepared in connection with the litigation brought against the District by Mr. Chammings and Mr. Johnston in 1988 and was submitted as a Joint Exhibit in that controversy pursuant to a Stipulation of Facts. A third preferred eligibility list prepared thereafter for the elementary school assistant principal category is submitted herewith as Exhibit J-16. (This is the preferred eligibility list referred to in Paragraph 4 of the Second Count of the Petition in the instant controversy.)

26. The reason for the discrepancy in Mr. Chammings' seniority as listed in Exhibits J-13 and J-14 (aside from the intervening years of service) is that in preparing Exhibit J-14 and subsequent preferred eligibility lists, the District did not include four years of military service credit in calculating Mr. Chammings' seniority in the category of assistant principal - elementary school. The district performed the seniority calculation in this

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[3]Of the individuals listed in this document, Angelo Curcio, Irwin Fidel and Eleanor Halak have since retired. John Terranova and Sylvia Ziegler are currently employed in the District as elementary school principals.

manner as a result of the decision of the State Board of Education in *Meyer v. Bd. of Educ. of Tp. of Wayne* decided State Board (March 6, 1986), Docket Nos. 129-83 and 1-85), *aff'd,* [per curiam] No. A-3175-85T-6, (App. Div. Sept. 24, 1987), cert. den. 110 *N.J.* 162 (1988). The District continues to apply Mr. Chammings' military service credit towards his seniority in the category elementary school teacher.

27. Board Policy No. 3112 (R) specifies the standards to be applied when a determination must be made as to who among two or more tenured staff members with the same seniority status shall be dismissed in a RIF. A copy of this policy is annexed hereto as Exhibit J-17.

DISCUSSION

A. The "90-Day Rule" Claim (*N.J.A.C.* 6:24-1.2)

The first issue which I should address is the separate defense raised by the Board and supported by intervenor claiming that Chammings' petition must be dismissed for his failure to comply with *N.J.A.C.* 6:24-1.2, the "90-day rule." According to both the Board and Johnston, since the essence of Chammings' claim relates to the middle school position in which Johnston has been serving since 1987, the critical date is in late April 1988 when petitioner formally learned that his supervisory position as Supervisor of Language Arts was to be eliminated and that he, not Johnston, would be reassigned to an elementary school teaching position. Thus, Johnston's appointment more than three years later as acting assistant principal at the Copeland Middle School did not, according to Johnston and the Board, give Chammings a "new" cause of action. Rather, it essentially was tantamount to a "transfer" from one administrative position to another.

Disposition of the "90-day rule" issue is relatively easy.* As petitioner accurately observes in his supplemental brief, the joint stipulation of facts establishes that Johnston was appointed to the acting assistant principal position at

*Both laches and estoppel defenses also were raised, but were not advanced in the briefs. Thus, I will consider them withdrawn.

Copeland Middle School on August 21, 1991, said appointment to be effective as of September 1, 1991. During 1990-91 he was "Head Teacher" at the same school. Chammings' petition of appeal was filed on November 4, 1991, well within 90 days of August 21, 1991, no less September 1, 1991. Whether or not Chammings was informed in late April 1988 that his supervisory position was to be eliminated and he was to be reassigned to an elementary teaching position is not, in my view, relevant to the gravamen of the instant petition which plainly targets Johnston's August 1991 appointment. Clearly, that was the critical event which triggered Chammings' instant cause of action and the matter may therefore proceed on the merits.

B. The Seniority Claim

For the following reasons, I believe that application of the relevant statutes and regulations to the stipulated facts lead to the conclusion that Chammings and Johnston are and have been equal to one another in terms of their seniority. Thus, the Board erred in 1991 when it determined to appoint Johnston to the middle school position without also considering Chammings' equal entitlement to it. While the Board argues that in the event of a tie it was appropriate for it to resort to its Policy No. 3112(R), and petitioner has the burden of proving that the process it used was arbitrary, capricious or unreasonable, as far as this record reveals Johnston's appointment was made without reference to the contents of that policy. Further, it is highly doubtful that the particular policy is even applicable to the instant facts.

The argument profferred by petitioner that his seniority is greater than that of Johnston is based upon his having received his principal/supervisor certificate in May 1975, whereas Johnston received his certificate in June 1975, one month later. Thus, Chammings claims he has been certified for one month longer and therefore he should always have been placed ahead of Johnston on any preferred eligibility list. I reject this assertion since I agree with the Board that seniority, which is earned within a specific category, is dependent upon actual service in that category. It is the date one commences his or her duties, not the date one receives certification which constitutes the critical point. *See, e.g., Compton v. Board of Education of Hanover*, 1972 *S.L.D.* 274.

On the other hand, I reject the Board's claim that the school law decision relied upon by Chammings to count his time served as an elementary teacher, *Choplick v.*

Board of Ed. of Piscataway, adopted by the Commissioner of Education, (October 11, 1990), affirmed by the State Board, 1991 *S.L.D.* 2530, should be disregarded. While it is true that administrative law judge in *Choplick* apparently was "troubled" by the conclusion he reached, the result of Judge Campbell's initial decision was then adopted by silence under *N.J.S.A.* 52:14B-10(e) without written comment by the Commissioner. Since Judge Campbell's decision thereafter was affirmed by the State Board of Education it clearly has precedential effect and its holding will be applied here. *Choplick* held, of course, that the provisions of *N.J.A.C.* 6:3-1.10(h) protect persons who move from or revert to a category, whether upward or downward in the hierarchy. Thus, in that case an intervenor prevailed over *Choplick* since she continued to accrue seniority in a vice principal category even during that school year when she had reverted to an elementary teacher category. Thus, Chammings, too, continued to accrue seniority while an elementary teacher.

Although the parties also discussed Chammings' military service and the crediting of such service toward his seniority, it appears there is no issue to be resolved on that subject, as petitioner accurately points out, the Board has properly credited him with his military service.

Johnston argues that he has greater seniority than petitioner since his service as head teacher at the Copeland Middle School for three years gives rise to seniority credit either as an elementary assistant principal or in a junior high school category. *See, N.J.A.C.* 6:3-1.10(l)16 and 17. No case authority is provided to support this proposition. Moreover, a review of the stipulated facts reveals that both petitioner and Johnston have a total time in service, for seniority purposes, of 19 years as of the end of the 1990-91 school year. All of that time is to be credited to the category of assistant principal, the position petitioner held when he was riffed in 1987 and the position which Johnston now holds.

Thus, Chammings and Johnston have equal seniority in the assistant principal category and the determination now boils down to the question of how the Board should have chosen between Chammings and Johnston in 1991 given their equal status. As noted, both the Board and Johnston rely on the provisions of the Board Policy No. 3112 (R) which prescribes the procedure to be followed in determining who between two or more tenured teaching staff members with the same seniority status shall be dismissed in a reduction in force. In that case preference is given to

that teaching staff member, "who has demonstrated the greater degree of teaching competence and promise of success in the district." The Board contends that if I determine that the seniority calculation in this case results in a tie, although the policy does not literally cover the instant situation; nevertheless, it may be "inferred" that the Board may look to the same factors when choosing which of two or more staff members with equal seniority will be recalled to fill a vacancy. Thus, the Board also maintains that petitioner had the burden of demonstrating that its decision was arbitrary, capricious or unreasonable and since petitioner failed even to raise that issue, no less pursue it on the merits, his petition must fail.

As I indicated earlier, I reject the Board's argument that its decision to prefer Johnston over Chammings finds support in any policy. First, by its very terms Policy No. 3112 (R) does not apply to the particular circumstances since it deals with a reduction in force and a determination of which teaching staff member shall retain a position. It has no application to the context of this case. Second, there is no indication that the Board considered the criteria set forth in the policy when it appointed Johnston rather than Chammings in 1991. The only stipulated fact *vis-a-vis* that appointment is the bare reference to it in the Board minutes (Joint Exhibit 11). If pursuant to section (D)(3) of that policy the Board did, in fact, compare qualifications, there is no proof in the record to that effect.

Thus, Chammings and Johnston are now and in August 1991 were equal in terms of their seniority. Since only one of them was entitled to the assistant principal position at the Copeland Middle School the selection should have been made pursuant to a duly promulgated process articulated in written Board policy. Unfortunately, at the time of Johnston's appointment in 1991 there was no such policy. The question, then, is what remedy now is appropriate in light of the absence of any policy and the fact that Johnston actually has served in the contested position for two years.

I believe that under the particular circumstances, absent a policy for selection in case of a tie, *de facto* recognition must be given to the Board's choice of Johnston rather than Chammings in 1991. While it was not appropriate for the Board to have given preference to Johnston in light of the tie, it would have been equally improper if preference was given to Chammings. I believe the parties, therefore, should be left where they find themselves as of this point. Even though under a properly

adopted policy Chammings might have prevailed over Johnston, the absence of such a policy means that Chammings has no superior claim and the practicalities of the situation dictate that *de facto* recognition be given to Johnston. *Cf., Adams v. Goldner*, 79 *N.J.* 78 (1979); *Monsees v. Bd. of Educ. of Bloomingdale*, 1982 *S.L.D.* 1409.

However, in view of the tie, the status quo should not continue indefinitely. Although Johnston may remain in the assistant principal position, it is incumbent upon the Board to promptly consider and promulgate a policy designed to deal with this type of situation. In light of the requirements of due process, public notice and the like, a reasonable period of time should be given to the Board to accomplish this result. To that end I will order that no later than November 15, 1993, the Board must adopt a written policy to be applied to situations of this sort, consider the qualifications of eligible candidates and make an appointment to be effective no later than February 1, 1994.

CONCLUSION AND ORDER

Accordingly, for the reasons set forth above, I **CONCLUDE** that the verified petition of appeal should be **DISMISSED**. However, I further **ORDER** that unless modified by the Commissioner, no later than November 15, 1993, the Board must duly promulgate and formally adopt a specific written policy designed to deal with situations wherein a vacancy must be filled from a pool of two or more persons whose seniority entitlement to that position is equal to each other. I further **ORDER** that no later than February 1, 1994, the Board must appoint either Chammings or Johnston to the Copeland Middle School position, assuming each remains eligible for said appointment and no other person presents superior credentials in terms of seniority.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 15, 1993
Date

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

9/17/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 20 1993
Date

OFFICE OF ADMINISTRATIVE LAW

amr

EXHIBIT LIST

Court Exhibit 1 - Joint Stipulation of Facts with attachments

LAWRENCE CHAMMINGS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ROCKAWAY, MORRIS COUNTY,	:	DECISION
RESPONDENT,	:	
AND	:	
EDWIN JOHNSTON, JR.,	:	
INTERVENOR.	:	

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

Upon review, the Commissioner concurs with both the ALJ's analysis of the parties' respective seniority entitlements and his conclusion regarding the absence of any specific identifiable procedure for having chosen intervenor over petitioner for the position at issue. The Commissioner further concurs, in view of the parties' equal entitlement to this position, with the ALJ's recommended directives regarding adoption of a Board policy to be applied in such matters and application by February 1994 of that policy to petitioner and intervenor so as to choose between them provided that they both remain eligible and no more senior person claims the position at issue.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 20, 1993

DATE OF MAILING - OCTOBER 20, 1993

260-93

260-93

BOARD OF EDUCATION OF THE BOROUGH OF WOODBINE,

PETITIONER,

V.

MAYOR AND COUNCIL OF THE BOROUGH OF WOODBINE, CAPE MAY COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of $15,891 made by governing body following voter rejection of proposed budget on April 20, 1993.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore $10,831 for a total General Fund tax levy of $593,164 for 1993-94 school purposes.

OCTOBER 15, 1993

BOARD OF EDUCATION OF THE BOROUGH OF WOODBINE,

PETITIONER,

V.

MAYOR AND COUNCIL OF THE BOROUGH OF WOODBINE, CAPE MAY COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

For Petitioner, Richard T. Goodkin, Esq.

For Respondent, Michael E. Benson, Esq. (Buonadonna, Benson & Parenti, P.C.)

The Board of Education of the Borough of Woodbine (Board) appeals to the Commissioner of Education from an action taken by the Mayor and Council of the Borough of Woodbine (Council) pursuant to N.J.S.A. 18A:22-37, certifying to the Cape May County Board of Taxation a lesser amount for General Fund costs for the 1993-94 school year than the amount proposed by the Board in its budget which was rejected by the voters. This appeal was filed on June 10, 1993.

At the annual election held on April 20, 1993, the Board submitted to the electorate a proposal to raise $598,224 by local taxation for General Fund costs of the school district. After the voters' rejection of the proposal, the Board submitted its budget to Council for its determination of the amount necessary for the operation of a thorough and efficient school system in the Borough

of Woodbine for the 1993-94 school year pursuant to the mandatory obligation imposed on Council by N.J.S.A. 18A:22-37.

After consultation with the Board, Council made its determination and certified to the Cape May County Board of Taxation an amount of $582,333 for General fund costs.

Amount of Tax Levy Proposed by Board	Amount of Tax Levy Certified by Council
General Fund $598,224	General Fund $582,333
Amount of Reduction By Council	Amount of Reduction In Dispute
$15,891	$15,891

On June 18, 1993 Council filed its Answer. The Board filed its Position Statement on July 30, 1993 and Council filed two Certifications on July 7 and August 18, 1993. Thereafter the case record was closed.

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford

Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

Mindful, then, of the balance to be applied in this standard of review, the Commissioner makes the following determination with respect to the reduction in the General Fund tax levy effectuated by the Council.

Line Items	Description	Reduction
163	Teaching Supplies	$ 2,000
453	Principal & Payroll Clerk	2,892
463	Vice Principal Salary	1,833
480	Heat	2,560
498	School Board Administrator	4,106
500	Social Security, Other	2,500
	Total	$15,891

The Board asserts that Council's cuts are arbitrary, unreasonable, and if not restored will deprive the Board of the ability to provide a thorough and efficient education to the pupils in its district. Council asserts that its reductions are not arbitrary nor unreasonable, and that most of its cuts were agreed to by the Board.

The Board avers that its auditor is also the auditor for the Borough of Woodbine. Prior to its meeting with Council, the auditor was asked to review the budget and advise Council where excess funds might be located. According to the Board, the auditor advised Council that it was a "bare bones" budget and that there

were no excess funds. Acting as a negotiator between the Board and Council, the auditor suggested that if the Board could make a "modest" reduction in the budget, he was certain an agreement could be reached with Council. Based on this representation, the School Board Administrator authored a letter dated May 10, 1993, in which he proposed cuts in three line items totalling $7,060. This correspondence with the proposed reduction was offered in the spirit of compromise, based on the auditor's representation that the dispute might be amicably settled without costly litigation.

This is the scenario that leads to Council's assertion that the Board had "agreed" to certain reductions. The Commissioner does not find that the Board agreed to any of the proposed reductions. Since Council refused to accept the Board's offer as a compromise settlement, the budget will be examined in its entirety as if there were no efforts to settle the matter. The line items will be decided based on the relative arguments applicable to each.

Line Item	Reduction
163 - Teaching Supplies	$2,000

Council states that its budget reduction is a modest one and that no facts have been related by the Board to show that its reduction would prevent the Board from providing a thorough and efficient education for its pupils. Based on the history of the Board's expenditures, Council's allocation for this line item is $16,000, the amount acknowledged by the Board in its certification. Consequently, there is no showing of need for further expenditures in this account.

The Board disagrees asserting that it budgeted only $18,000 for this line item when the expenditure for the 1992-93 school year

was $19,204. The account was under-budgeted for 1993-94. So far, this account shows actual invoices and expenditures for teaching supplies and workbooks for the 1993-94 school year of $16,556.56, exclusive of all other office supplies required for the entire school year.

In the Commissioner's judgment, the Board has detailed its requirements for expenditures in this line item with sufficient itemization. Council's reliance on the historical perspective of expenditures in this line item is not persuasive. On the other hand, the Board's educational criteria supports its position. Accordingly, the $2,000 reduction will be restored to the budget.

Line Item	Reduction
453 - Principal and Payroll Clerk	$2,892
463 - Vice Principal Salary	$1,833
498 - School Board Administrator	$4,106

The three accounts listed above will be discussed together because each involves a reduction in a negotiated contract.

Council asserts that the Board has arbitrarily increased administrative salaries to track the percentage increases provided to the teaching staff through their union contract. Council's reduction in these line items is an effort to keep administrative salary increases within a realistic and responsible framework. Council contends that the Board cannot lock in these salaries by contract and then say that the governing body is powerless to make any adjustment. Acceptance of this position could result in salary increases of up to 30% in the future.

The Board defends the salary increases it negotiated with each of the persons designated in the above line items. Regarding the Chief School Administrator (principal), the Board introduced a

document showing that its principal has 27 years in education with 21 of those years in administration and he is the lowest paid administrator in Cape May County. Both the principal and the payroll clerk have been tendered contracts. The same situation exists for the Vice Principal and the School Business Administrator. The School Business Administrator is also one of the lowest paid individuals in that position in the county. The Board asserts that any reduction in this line item will impair its ability to honor a legally existing contract.

The Commissioner has reviewed these line items and the arguments of the parties. Council's assertion that the Board's position is identical to its position on the reduction of staff salaries during its 1991 budget appeal when the Commissioner upheld the reductions by Council is not supported by the record. In the 1991 budget appeal, the Board admittedly budgeted a set percentage over its current expenditures for salaries, anticipating a 9% increase for staff and a 7% increase for administrators as a result of ongoing negotiations. In that instance, the Commissioner held that a sufficient pool of funds remained in several other accounts to collectively allow for raises the Board anticipated as a result of the negotiations process. Consequently, the Commissioner upheld the reductions made by council. (See 1991 S.L.D. 2324.)

The matter at hand is different. Each of the persons discussed has been awarded a legally binding contract and according to the certification of the Board president, which has not been refuted, each contract appears to be reasonable and consistent with the salaries paid in the area. The Board clearly has the discretionary authority to do all things consistent with state law

in carrying out its obligatory function to operate a thorough and efficient school system. There is no evidence that the Board has abused its discretion. The only reason suggested by Council for its reductions appears to be its determination that the salaries tendered are too high. Having found the salaries reasonable and consistent with those in the county, the Commissioner restores the reductions in line items 453, 463, and 498 to the budget.

Line Item	Reduction
480 - Heat	$2,560

Council asserts that this reduction is clearly justified by virtue of the Board's expenditure history and that its cut will not impair the Board's ability to provide a thorough and efficient education for its pupils.

The Board does not dispute its actual past expenditures as set forth by Council; however, it maintains that the past two winters have been very mild and that a cold winter and an increase in utility rates and/or an increase in oil rates would exhaust this line item.

In this line item, Council has given a valid reason for its reduction, whereas the Board's position is merely speculative. Consequently, Council's reduction of $2,560 will be sustained.

500 - Social Security, Other	$2,500

Council asserts that the Board overstated the amount necessary for funding the Board's share in paying Social Security taxes and that its reduction will not impair the Board's ability to provide a thorough and efficient system of education for its pupils.

The Board did not respond to Council's reduction in this line item and there is no finding that this reduction will affect

the thorough and efficient operation of the district. Therefore, the Commissioner determines that Council's cut will be sustained.

The following table shows the amounts restored and not restored to the budget.

Line Item	Description	Amount Restored	Amount Not Restored
163	Teaching Supplies	$ 2,000	
453	Principal & Payroll Clerk	2,892	
463	Vice Principal Salary	1,833	
480	Heat	-0-	$2,560
498	School Board Administrator	4,106	
500	Social Security, Other	-0-	2,500
	TOTAL	$10,831	$5,060

This tabulation shows that $10,831 must be restored to the budget. Accordingly, the Cape May County Board of Taxation is directed to add to the local tax levy for the Borough of Woodbine School District $10,831 for General Fund expense purposes for the 1993-94 school year which when added to the amount of $582,333 previously certified by the governing body will result in a total General Fund tax levy of $593,164.

Amount of Tax Levy Certified by the Governing Body	$582,333
Amount Restored by the Commissioner	10,831
Total Tax Levy After Restoration	$593,164

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 15, 1993

DATE OF MAILING - OCTOBER 15, 1993

261-93

261-93

DOMINICK DE CESARE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF NORTH BERGEN, HUDSON COUNTY, LINDA RUCCI, LEO C. GATTONI, JR., AND JOHN DOES 1 THROUGH 26,	:	DECISION
RESPONDENTS.	:	

OCTOBER 26, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION - SETTLEMENT
OAL DKT. NO. EDU 8529-92
AGENCY DKT. NO. 465-10/92

DOMINICK DeCESARE
Petitioner,
v.
NORTH BERGEN BOARD OF EDUCATION, HUDSON COUNTY; LINDA RUCCI; LEO C. GATTONI, JR. and JOHN DOES 1 THROUGH 26,
Respondents.

Edward D. Bortz, Esq., for petitioner

Robert A. Silber, Esq., for respondents
(Giblin & Giblin, attorneys)

Record Closed: September 17, 1993 Decided: September 22, 1993

BEFORE **ARNOLD SAMUELS,** ALJ:

On October 5, 1992, the petitioner filed a verified petition with the Commissioner of Education seeking a determination that he had not resigned his position, that he was still a tenured teacher, and that he was entitled to back pay and punitive damages for retaliatory action allegedly taken against him by respondents.

On October 30, 1992, the matter was transmitted to the Office of Administrative Law (OAL) for hearing and determination as a contested case

pursuant to *N.J.S.A.* 52:14F-1 to -13. A prehearing conference was held by the OAL on April 5, 1993, and a prehearing order was entered, defining and limiting the issues to be decided, fixing hearing dates, providing for discovery and regulating other procedural aspects of the forthcoming hearing.

A settlement was reached by the parties prior to the hearing, and a written settlement agreement was subsequently drafted and executed by the petitioner and by representatives of the parties' respondent. A copy of the agreement, which was filed in the OAL on September 17, 1993, is attached hereto and made a part hereof.

Having reviewed and considered the issues involved in this dispute, it is **CONCLUDED** that the parties have voluntarily and knowingly agreed to the settlement, as set forth in the attached document. It is further **CONCLUDED** that the settlement is fair and fully dispositive of all issues in controversy between the parties.

It is therefore **ORDERED** that the settlement be approved and this matter dismissed.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

September 22, 1993
Date

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

9/23/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 30 1993
Date

OFFICE OF ADMINISTRATIVE LAW

ms

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

SEP 17 12 01 PM '93

DOMINICK DECESARE,

Petitioner,

v.

NORTH BERGEN BOARD OF EDUCATION, LINDA RUCCI, LEO C. GATTONI, JR., and JOHN DOES 1 THROUGH 26, ET ALS

Respondents.

SETTLEMENT
OAL DKT NO. EDU 08529-92 N
AGENCY REF. NO. 465-10/92

The Petitioner, Dominick Decesare, and the Respondent, North Bergen Board of Education, et als, have voluntarily resolved all disputed matters and enter into the following settlement which fully disposes of all issues in controversy between the Petitioner and Respondent.

1. The Petitioner withdraws the Petition for Declaratory Judgment action filed on or about October 2, 1992.

2. The Respondent shall void and permanently remove from Petitioner's file, the letter the Respondent purports to be the retirement of the Petitioner dated February 11, 1992.

3. The Petitioner shall continue in his tenured staff position with the Respondent. The Petitioner's academic accreditation for salary purposes will reflect Masters + 60 credits.

4. The Respondents' Resolution (a copy of which is attached hereto) dated February 12, 1992, relating to

Petitioner is null and void and is deemed rescinded by Respondent.

5. The Respondents' resolution (a copy of which is attached hereto) dated June 17, 1992, relating to Petitioner is null and void and is deemed rescinded by the Respondent.

6. Respondent represents that there are no Board Resolutions other than those dated February 12, 1992, and June 17, 1992, which are attached hereto, naming Petitioner in regard to any matters.

7. The Parties agree to be bound by and perform all duties and obligations set out in the Agreement between the North Bergen Council of Administrators and Supervisors and the North Bergen Board of Education and said Agreement is incorporated by reference into this settlement.

8. The Petitioner's accrued sick leave as of September, 1992, shall reflect 57.5 days.

9. Petitioner acknowledges and agrees $551.15 is the amount due Petitioner from Respondents for back salary for the school year 1989-1990 and that his accrued sick leave is correct as of September, 1992. Parties agree that if Petitioner has not been paid the $551.15 that said payment will be made to Petitioner forthwith.

10. The Respondent and its employees are hereby authorized to execute and effectuate the terms of this Agreement.

11. All notices and other communications hereunder

shall be effective upon receipt, shall be in writing and shall be delivered (by first-class, registered or certified mail, postage prepaid) addressed as follows (or addressed to such other address as any of such parties may hereafter designate for such purpose);

(a) If to Petitioner, to him at:
Mr. Dominick Decesare
One Rochelle Street
City Island, New York 10464

with a copy to:

Edward D. Bortz, Esq.
626 East Palisade Avenue
Englewood Cliffs, New Jersey 07632

(b) If to Respondent, to it at:
7317 Kennedy Boulevard
North Bergen, New Jersey 07047

with a copy to:

Giblin & Giblin, Esqs.
Two Forest Avenue, Suite 200
Oradell, New Jersey 07649

12. The Petitioner agrees that, in consideration of the foregoing settlement, he knowingly and voluntarily waives and releases forever whatever claims he may have against the North Bergen Board of Education, the Township of North Bergen and each of their respective Board members, officers and employees, based upon any matter, cause or thing relating to his employment by the North Bergen Board of Education. Specifically excluded from this Release is Petitioner's pending Worker's Compensation claim against Respondent.

This release and waiver includes, but is not limited to any rights or claims under Federal, State or local law,

statutory or decisional, for wrongful or abusive discharge, for breach of any contract, or for discrimination based upon race, color, ethnicity, sexual orientation, age, national origin, religion, disability, or any other unlawful criterion or circumstance, including rights or claims under the Age Discrimination in Employment Act of 1967 ("ADEA") that may have accrued up to the signing of the settlement. The Petitioner's signature to this Agreement also constitutes confirmation that he has had the opportunity to consider this Agreement and its consequences, and that he has been advised prior to signing this Agreement to consult with an attorney, or any personal or financial advisor of his choosing. The parties further acknowledge that this release and waiver does not in any way or at any time ever release the Respondent from defending and indemnifying Petitioner should Petitioner be made a Defendant in an action based upon any matter, cause or thing relating to his employment by the North Bergen Board of Education.

13. The Respondent, its members, officers and employees, agree that, in consideration of the foregoing settlement, it knowingly and voluntarily waives and releases forever whatever claims that may have accrued against Petitioner prior to executing this Agreement based upon any matter, cause or thing relating to his employment by the North Bergen Board of Education or to the above litigation.

14. Neither this Agreement, nor any provision

hereof, may be modified, altered or amended, nor may any provision hereof or right hereunder be waived, except by an instrument in writing signed by the party against which such modification, alteration, amendment or waiver is sought to be enforced.

15. The failure of either party to insist in any one or more instances upon a strict performance of any of the provisions of this Agreement shall not be construed as a waiver or relinquishment for the future of said provision and the same shall continue and remain in full force and effect.

16. This Agreement will become effective when it is approved by the Office of Administrative Law and the Commissioner of Education. Any disapproval shall not interfere with the rights of the Petitioner or Respondents to pursue this matter further.

DATED: 9/8/93

DOMINICK DECESARE

Edward Bortz, Esq., as to
Dominick DeCesare

DATED: 9-10-93

NORTH BERGEN BOARD OF EDUCATION

Jack Duffy, as to North
Bergen Board of Education

MAURENA LUZZI, President 9-2-93

OAL DKT. NO. EDU 8529-92

DOMINICK DE CESARE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF NORTH BERGEN, HUDSON COUNTY, LINDA RUCCI, LEO C. GATTONI, JR., AND JOHN DOES 1 THROUGH 26,	:	DECISION
RESPONDENTS.	:	

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

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

COMMISSIONER OF EDUCATION

OCTOBER 26, 1993

DATE OF MAILING - OCTOBER 26, 1993

262-93

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HENRY PRUITT, WILLIAM CHALEFF AND RICHARD SEGALL,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

DECEMBER 16, 1993

OAL DKT. NO. EDU 7793-92

HENRY PRUITT, WILLIAM CHALEFF AND RICHARD SEGALL,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

Robert M. Schwartz, Esq. (Lake and Schwartz) for Petitioners

Allan S. Gutfleish, Esq. (Gutfleish and Davis) for Respondent

Whereas, this matter was opened before the Commissioner of Education by the Englewood Board of Education on December 1, 1993 through the filing of a Notice of Motion for a stay of the Commissioner's decision of October 25, 1993 in the above-referenced matter which is currently pending on appeal before the State Board of Education; and

Whereas, the Board seeks a stay of the Commissioner's decision which ordered the reinstatement of the increments of Petitioners Pruitt and Segall for the 1992-93 school year and directing the Board to remit salary differentials to petitioners for this period of time; and

Whereas, the Board avers that it meets the requirements necessary for such relief because:

1. The issue involved in this matter, i.e., the deadline for board action with respect to the withholding of an increment of a 12-month administrator, is an issue of first impression. As such, the State Board of Education, as the ultimate determiner of controversies under school law, is the appropriate tribunal to resolve it;

2. Petitioners would incur no irreparable harm if the stay were granted since if they were to prevail, the Board could readily pay salary differentials owed. On the other hand, if the stay is not granted and the Board is ultimately successful, it would have to seek reimbursement of approximately $6,000 paid to each of the petitioners which might require legal action if either or both were no longer employed by the Board.

   Status quo pending the outcome of appeal would not harm either party, while immediate payment of the increments would harm the Board;

3. The Board's appeal asserts both legal and equitable grounds for not establishing June 30 as the deadline for withholding a 12-month employee's increment. Since an administrator's responsibilities are not completed until June 30 or after, this deadline does not permit a board of education to properly carry out its responsibilities under N.J.S.A. 18A:29-14; and

Whereas, petitioners oppose the granting of a stay on the grounds that:

1. Board merely reiterates arguments made to the Commissioner with respect to the matter being one of first impression and presents no compelling argument that it is likely to prevail on the merits of this matter;

2. There are clear and unmistakable legal remedies available to restore the status quo, if necessary, should the Board ultimately prevail in this matter. Therefore, the Board has not demonstrated that it would incur irreparable harm necessary to justify the extraordinary relief requested;

3. Public interest would be harmed if the stay is granted. The Board is effectively arguing that it should not be bound to existing timelines in evaluating the performance of the 12-month employees. Public interest requires that employees be subject to ongoing evaluations which are sufficiently definite in the criteria used and the conclusions reached in sufficient time so that reward or penalty action can be taken before the beginning of the next school year. The Board is apparently advocating that allowances be made for its own inefficiency; and

Whereas, the Commissioner has reviewed the positions of the parties and finds no basis for granting a stay because the Board has not met the standards for granting injunctive relief set forth by the New Jersey Supreme Court in Crowe v. DeGioia, 90 N.J. 126 (1982) since it has failed to demonstrate that:

1. It would suffer irreparable harm if the stay were denied;

2. It has a likelihood of prevailing on the merits of its appeal to the State Board;

3. Greater harm would inure to it than petitioners if the stay were denied; and

4. The public interest compels the grant of a stay; now therefore

IT IS ORDERED that the Board reinstate the increments of Petitioners Pruitt and Segall for the 1992-93 school year and remit to them the difference between the salaries they should have received and the salaries they actually received during this period as directed in the Commissioner's October 25, 1993 decision.

COMMISSIONER OF EDUCATION

HENRY PRUITT, WILLIAM CHALEFF AND RICHARD SEGALL,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

OAL DKT. NO. EDU 7793-92

HENRY PRUITT, WILLIAM CHALEFF AND RICHARD SEGALL,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

Robert M. Schwartz, Esq. (Lake and Schwartz) for Petitioners

Allan S. Gutfleish, Esq. (Gutfleish and Davis) for Respondent

Whereas, this matter was opened before the Commissioner of Education by the Englewood Board of Education on December 1, 1993 through the filing of a Notice of Motion for a stay of the Commissioner's decision of October 25, 1993 in the above-referenced matter which is currently pending on appeal before the State Board of Education; and

Whereas, the Board seeks a stay of the Commissioner's decision which ordered the reinstatement of the increments of Petitioners Pruitt and Segall for the 1992-93 school year and directing the Board to remit salary differentials to petitioners for this period of time; and

Whereas, the Board avers that it meets the requirements necessary for such relief because:

1. The issue involved in this matter, i.e., the deadline for board action with respect to the withholding of an increment of a 12-month administrator, is an issue of first impression. As such, the State Board of Education, as the ultimate determiner of controversies under school law, is the appropriate tribunal to resolve it;

2. Petitioners would incur no irreparable harm if the stay were granted since if they were to prevail, the Board could readily pay salary differentials owed. On the other hand, if the stay is not granted and the Board is ultimately successful, it would have to seek reimbursement of approximately $6,000 paid to each of the petitioners which might require legal action if either or both were no longer employed by the Board.

   Status quo pending the outcome of appeal would not harm either party, while immediate payment of the increments would harm the Board;

3. The Board's appeal asserts both legal and equitable grounds for not establishing June 30 as the deadline for withholding a 12-month employee's increment. Since an administrator's responsibilities are not completed until June 30 or after, this deadline does not permit a board of education to properly carry out its responsibilities under N.J.S.A. 18A:29-14; and

Whereas, petitioners oppose the granting of a stay on the grounds that:

1. Board merely reiterates arguments made to the Commissioner with respect to the matter being one of first impression and presents no compelling argument that it is likely to prevail on the merits of this matter;

2. There are clear and unmistakable legal remedies available to restore the status quo, if necessary, should the Board ultimately prevail in this matter. Therefore, the Board has not demonstrated that it would incur irreparable harm necessary to justify the extraordinary relief requested;

3. Public interest would be harmed if the stay is granted. The Board is effectively arguing that it should not be bound to existing timelines in evaluating the performance of the 12-month employees. Public interest requires that employees be subject to ongoing evaluations which are sufficiently definite in the criteria used and the conclusions reached in sufficient time so that reward or penalty action can be taken before the beginning of the next school year. The Board is apparently advocating that allowances be made for its own inefficiency; and

Whereas, the Commissioner has reviewed the positions of the parties and finds no basis for granting a stay because the Board has not met the standards for granting injunctive relief set forth by the New Jersey Supreme Court in Crowe v. DeGioia, 90 N.J. 126 (1982) since it has failed to demonstrate that:

1. It would suffer irreparable harm if the stay were denied;

2. It has a likelihood of prevailing on the merits of its appeal to the State Board;

3. Greater harm would inure to it than petitioners if the stay were denied; and

4. The public interest compels the grant of a stay; now therefore

IT IS ORDERED that the Board reinstate the increments of Petitioners Pruitt and Segall for the 1992-93 school year and remit to them the difference between the salaries they should have received and the salaries they actually received during this period as directed in the Commissioner's October 25, 1993 decision.

COMMISSIONER OF EDUCATION

DECEMBER 16, 1993

DATE OF MAILING - DECEMBER 16, 1993

262-93

EDU #7793-92
C # 262-93
SB # 67-93

HENRY PRUITT, WILLIAM CHALEFF AND RICHARD SEGALL,

PETITIONERS-RESPONDENTS,

V.

BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, October 25, 1993

For the Petitioners-Respondents, Lake & Schwartz
(Robert M. Schwartz, Esq., of Counsel)

For the Respondent-Appellant, Gutfleish & Davis
(Allan S. Gutfleish, Esq., of Counsel)

On July 9, 1992, the Board of Education of the City of Englewood (hereinafter "Board") voted to withhold the salary increments of Henry Pruitt, William Chaleff and Richard Segall (hereinafter "petitioners"), tenured teaching staff members, for the 1992-93 school year, pursuant to N.J.S.A. 18A:29-14.[1] The petitioners were 12-month employees with contractual terms commencing on

[1] N.J.S.A. 18A:29-14 provides, in pertinent part:
> Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned....

August 2, 1995

July 1. As a result of such action, petitioners filed a petition of appeal with the Commissioner of Education, contending that the Board had violated their tenure rights in withholding their increments and that such withholding was arbitrary, capricious and unreasonable.[2]

Petitioners subsequently filed a motion for summary decision, alleging that the Board had failed to act in a timely manner in withholding their increments. They maintained that such action was taken after commencement of the 1992-93 school year, thereby effectively causing them to suffer an unlawful reduction in their salaries in violation of their tenure rights. An Administrative Law Judge ("ALJ") recommended denying petitioners' motion, concluding that the performance of such employees could not be fully evaluated for purposes of withholding their increments until after completion of their duties on June 30.[3]

The Board thereupon filed a motion for summary decision, contending that petitioners' deficiencies as demonstrated in the record constituted a sufficient basis for the withholdings. Petitioners did not contest the substantive basis for the Board's action, but preserved their contention that such action had been untimely. The ALJ recommended granting the Board's motion for summary decision and dismissing the petition.

On October 25, 1993, the Commissioner rejected the ALJ's recommendation to deny petitioners' motion for summary decision.

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[2] We note that petitioner Chaleff withdrew from this matter during the proceedings in the Office of Administrative Law and is not a party to the instant appeal.

[3] Petitioners' request to the Commissioner for interlocutory review of such determination was rejected as untimely pursuant to N.J.A.C. 1:1-14.10(b).

The Commissioner stressed that a district board was required to take action to withhold salary increments prior to the beginning of the school year involved. Citing Newark Teachers' Union, Local 481, AFT/AFL-CIO, and Edna Smith v. Board of Education of the City of Newark, decided by the Commissioner, 1984 S.L.D. 1045, the Commissioner noted that the "beginning of the school year" for purposes of withholding the increments of 10-month employees had been defined as September 1, which, while not necessarily the date of commencement of actual service, was the date on which such employees' salary entitlements commenced. Accordingly, the Commissioner concluded that July 1 was the date the yearly period of service and concomitant salary entitlement began for the petitioners herein, 12-month employees under contract from July 1 to June 30, and that the Board could not have acted to withhold their increments for 1992-93 after June 30, 1992.

In so doing, the Commissioner rejected the Board's argument that a June 30 cutoff unfairly compromised its ability to evaluate employees, pointing out that staff evaluation was an activity which, of necessity, extended over a number of months. She found it entirely reasonable to expect that all required evaluations could be concluded in sufficient time to permit a district board to take any necessary action by June 30. Consequently, the Commissioner concluded that the Board's action on July 9, 1992 withholding petitioners' increments was untimely and, as a result, constituted a reduction in their compensation in violation of N.J.S.A. 18A:28-5. In light of such determination, the Commissioner found it unnecessary to address the Board's motion for summary decision regarding the substantive basis for the withholdings.

The Board filed the instant appeal to the State Board of Education, alleging that there was no legal basis for the Commissioner's determination to impose a June 30 deadline for withholding the salary increments of 12-month employees and that such a cutoff did not constitute sound educational policy.

On March 15, 1995, the Legal Committee issued a Report in this matter in which it found no basis for concluding that N.J.S.A. 18A:29-14 imposed different time frames for withholding the increments of 10- and 12-month employees. Petitioners filed exceptions to that Report, in which they indicated that July 1 was the commencement of the fiscal year and that, contractually, any increments to which 12-month employees were entitled took effect at that time.

We have carefully reviewed the record, including the stipulation of facts submitted by the parties, and, after further consideration in light of petitioner's exceptions, we affirm the decision of the Commissioner, as clarified herein. It is undisputed that petitioners Pruitt and Segall[4] were employed under the terms of a collective bargaining agreement between the Board and the Englewood Public School Administrators. The parties further stipulated that "[a]s of July 1, 1992, all three Petitioners were twelve-month employees with their contractual term commencing on July 1 of the school year." Stipulation of Facts, at 3 (emphasis added). It is also undisputed that there was a salary schedule in effect in the district on July 1, 1992 which provided for increases in salary for the petitioners' positions. Id.

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[4] See, supra, n.2.

N.J.S.A. 18A:28-5 prohibits a district board from reducing a tenured teaching staff member in compensation, except for inefficiency, incapacity, unbecoming conduct or other just cause, and then only in the manner prescribed in the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq. While a district board may withhold a staff member's salary increments, N.J.S.A. 18A:29-14, we find, under the particular facts in the record before us, that the action taken by the Board in this case to withhold the increments of petitioners Pruitt and Segall subsequent to the commencement of their 12-month terms at compensation fixed by the district's salary guide constituted an improper reduction in their compensation in violation of N.J.S.A. 18A:28-5.

We therefore affirm the decision of the Commissioner with regard to petitioners Pruitt and Segall on the appeal before us, as clarified herein.

Attorney exceptions are noted.

August 2, 1995

Date of mailing AUG 04 1995

262-93

262-93

HENRY PRUITT, WILLIAM CHALEFF AND RICHARD SEGALL,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioners, three tenured 12-month teaching staff members, alleged procedural and substantive challenges to Board's withholding of their increments. Petitioner Chaleff withdrew from matter. Prior to hearing, ALJ denied petitioners' motion for summary decision on procedural issue of timeliness of Board's withholding action.

Initial decision granted Board's motion for summary decision on substantive reasons for increment withholdings, finding Board was entitled to prevail as a matter of law based on deficiencies in petitioners' performance. ALJ dismissed petitioners' petition but allowed them to reserve right to file a challenge of her Decision on Motion on procedural issue.

Commissioner reversed ALJ's motion decision regarding procedural issue of timeliness of the Board's action in denying petitioners' increments and granted summary decision to petitioners finding it unnecessary to reach to remainder of initial decision dealing with substantive reasons for denial of increments. Commissioner noted that the law is clear that a local board must pass its resolution to withhold prior to beginning of school year in which increment withholding is to take effect (which in the case of these 12-month employees was July 1, 1992). Northern Highlands Regional v. Martin; Smith v. Hamilton Township; Newark Teachers' Union; and Charles Gersie. Commissioner found Board's action untimely and ultra vires and ordered reinstatement of increments for Petitioners Pruitt and Segall for 1992-93 school year with compensation.

OCTOBER 25, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 7793-92
AGENCY DKT. NO. 424-9/92

HENRY PRUITT, WILLIAM CHALEFF AND RICHARD SEGALL,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,
Respondent.

Robert M. Schwartz, Esq., for petitioners
(Lake & Schwartz, attorneys)

Allan S. Gutfleish, Esq., for respondent
(Gutfleish & Davis, attorneys)

Record Closed: August 13, 1993 Decided: September 8, 1993

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

On September 8, 1992, petitioners, Henry Pruitt, William Chaleff and Richard Segall, filed a petition of appeal with the Commissioner of Education alleging that by reducing petitioners' compensation for the 1992-93 school year (withholding their increments), the Englewood Board of Education (board or respondent) had violated their tenure rights. Respondent filed an answer on September 14, 1992,

alleging that it had acted in a proper and reasonable manner. On October 7, 1992, the matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The matter was assigned to the undersigned judge on October 30, 1992, and a telephone prehearing conference scheduled for December 1, 1992. On that date, the issues were isolated and it was determined that petitioners could move to amend the petition to include substantive issues at to the reasons for the withholding of petitioners' salary and employment increments. In addition, dates were established to allow petitioners to move for summary decision.

On or about December 16, 1992, petitioners moved to amend the petition to include substantive issues as to the reasons for the withholding of the increments. Petitioners sought to add a second count alleging that the withholding of their increments by the board was arbitrary, capricious, unreasonable and in violation of *N.J.S.A.* 18A:29-14. On or about December 24, 1992, respondent filed an answer to petitioners' amended petition of appeal alleging that it acted reasonably and in accordance with *N.J.S.A.* 18A:29-14 in withholding petitioners' increments. The amended petition and answer were deemed filed. On or about January 15, 1993, the parties filed a stipulation of facts in this matter.

On February 3, 1993, petitioners moved for summary decision alleging that respondent did not act in a timely manner in withholding petitioners' employment and adjustment increments. On February 22, 1993, respondent filed a brief in support of summary judgment on behalf of respondent alleging that the issue before the Commissioner of Education is a determination of the cutoff date of the withholding of a twelve-month employee's increment.

On or about March 8, 1993, petitioners moved for an order permitting the petition of appeal to be amended to include another petitioner, Harold Jones, an employee of the Englewood Board of Education. On or about March 19, 1993, respondent filed a brief and certification in opposition to the motion. Oral argument on both motions was scheduled for April 15, 1993 at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey 07102.

On April 15, 1993, oral argument was held in regard to the motions and an oral decision was rendered. Petitioners' request to amend the petition of appeal to

include Harold Jones as a party petitioner in this action was denied. Petitioners' motion for summary decision was also denied. The orders were signed on April 27, 1993, incorporating these determinations. On May 10, 1993, petitioners requested interlocutory review of the undersigned's April 15, 1993 oral decision incorporated in the order signed April 27, 1993. On May 13, 1993, the Commissioner of Education advised petitioners that their request for interlocutory review was untimely pursuant to *N.J.A.C.* 1:1-14.10(b) and would not be entertained. A hearing in this matter was scheduled for October 19, 20 and 21, 1993.

On June 25, 1993, respondent filed a motion for summary decision as to each petitioner alleging that there is no genuine issue as to any material fact challenged and that the board is entitled to prevail as a matter of law. Essentially, the board contended, based on three certifications of superintendent of schools, Dr. Henry Oliver, that the deficiencies of petitioners constitute a sufficient basis for the withholdings and that petitioners, Henry Pruitt and Richard Segall, admitted deficiencies in their performance. The board opined that its decision to withhold the increments should be upheld unless petitioners can prove that the board's actions were arbitrary or without reasonable basis. The board contended that summary decision is appropriate based on the deficiencies, the admissions of deficiencies and the legal principle governing increment withholding.

By letter dated August 2, 1993, counsel for petitioners indicated that petitioners, Pruitt and Segall, without necessarily admitting to the allegations raised by respondent, had decided not to contest the substantive basis of the increment withholding, scheduled to be heard on October 19, 20 and 21, 1993. By letter dated August 12, 1993, counsel for petitioners indicated that Pruitt and Segall did not wish to contest the merits of the increment withholding action taken on or about July 9, 1992, and that he would not be filing any papers in opposition to the motion for summary judgment as to Pruitt or Segall. He indicated, however, that Pruitt and Segall wished to preserve their contention that the action of July 9, 1992, violated their tenure rights as it was taken after the commencement of the 1992-93 school year effectively causing both of them to suffer a salary reduction. (He noted he would do so by filing exceptions to the undersigned's Initial Decision). He further indicated that petitioner Chaleff wished to withdraw entirely from this matter; he did not wish to contest the increment withholding either on its merits or on a procedural basis.

Based upon the above, I **CONCLUDE** that respondent's motion for summary decision as to the substantive basis of the increment withholding is granted as to petitioners, Pruitt and Segall. Chaleff's appeal is withdrawn. I Further **CONCLUDE** that petitioners may file exceptions to my April 27, 1993 order incorporating the April 15, 1993 bench decision on the issue as to whether the board's action to withhold the increment was timely.

Based on the above, it is hereby **ORDERED** that respondent's request for summary decision is granted and petitioners' appeal is **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 8, 1993
Date

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

9/9/93
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 10 1993
Date

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

dgi/e

HENRY PRUITT, WILLIAM CHALEFF AND RICHARD SEGALL,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4.

Petitioners' exceptions relate solely to the ALJ's denial, during the course of these proceedings, of their summary decision motion.[1] Such motion contended that the Board's July 9, 1992 vote to withhold their increments was procedurally defective and, therefore, void because the effective date for their salaries pursuant to their collective bargaining agreement was the beginning of the school year, July 1, and consequently they had a contractual entitlement to salary on that date. Therefore, any Board action

[1] Subsequent to the ALJ's April 15, 1993 decision and order signed April 27, 1993 in this regard, petitioners on May 10, 1993 requested interlocutory review of such decision by the Commissioner. The Commissioner declined to entertain petitioners' request at that time as it was untimely pursuant to N.J.A.C. 1:1-14.10(b).

taken after July 1 constituted an impermissible reduction in salary in contravention of their tenure rights.

Petitioners except to a rationale for the rejection of their motion posited by the ALJ in her decision, i.e., that the petitioners were not "entitled" to a salary increase. They maintain that they do not assert that an entitlement exists as to increments, fully recognizing that such must be earned. Further, they assert that they do not contest the right of a Board to withhold increments pursuant to N.J.S.A. 18A:29-14. Petitioners do, however, contend that the tenure protection accorded them under N.J.S.A. 18A:28-5 et seq. and N.J.S.A. 18A:6-10 precludes the Board from unilaterally reducing their salary which they aver has occurred in this case.

Petitioners assert that case law is consistent on the proposition that once teaching staff members receive a salary increase, they have an entitlement not to have it decreased except for the reasons and under the procedures set forth in law and cite the Commissioner's decisions in Charles Gersie v. Board of Education of the City of Clifton, 1972 S.L.D. 462; Anson et al. v. Bridgeton Board of Education, 1972 S.L.D. 638; Stockton v. Trenton City Board of Education, 210 N.J. Super. 150 (App. Div. 1986); Newark Teachers' Union Local 481 AFT/AFL-CIO and Edna Smith v. Board of Education of the City of Newark, 1984 S.L.D. 1045; and Magliozzi v. East Brunswick Township Board of Education, 1989 S.L.D. 2854, as support for their contention and assert that the only exception to this principle is in cases of mutual mistake with respect to salary which they aver is not a factor in the instant matter. Petitioners next contend

> ***it is undisputed that the Petitioners' salary was controlled by an agreement between the

> Englewood Board of Education and the Englewood Public School Administrators. (Exhibit J-14). The Agreement contained a salary guide. Under the salary guide Petitioner Pruitt, who was paid $78,192 for the 1991-92 school term, received the salary of $84,159 effective July 1, 1992. Petitioner Segall, who was paid $81,166 for the 1991-92 school term received a salary of $87,360 for the 1992-93 school term, also effective July 1, 1992. As a result of the action taken by the Englewood Board of Education on July 9, 1992 both Petitioners had their 1992-93 salaries reduced to the salaries which they received in 1991-92. Petitioner Pruitt was reduced from a salary of $84,159 to $78,192. Petitioner Segall was reduced from a salary of $87,360 to $81,166. (emphasis in text)
>
> (Petitioners' Exceptions, at p. 3)

Lastly, petitioners object to the Board's attempt to distinguish the facts in this matter from Newark Teachers Union Local 481 et al., supra, by asserting that a cut-off date of July 1 is incongruous because for 12-month employees a board needs additional time after July 1 to determine whether increment withholding is appropriate. Petitioners assert that there is no basis for such additional time in either statute or case law.

Petitioners urge that the Commissioner reverse the ALJ's decision with respect to the timeliness of the Board's action and reinstate their increments for the 1992-93 school term.

The Board contests petitioners' assertion that the appropriate cut-off date for its withholding of their increments was June 30, 1992, contending that there were numerous reasons justifying the ALJ's finding that this date was inappropriate under the circumstances existing in this matter. These are summarized below:

1) Initially, the Board argues that petitioners received notice on June 29, 1992 that the Board intended to discuss the withholding of their increments at its July 9, 1992 meeting and,

thus, were aware at that time that there was a real possibility that their increments would be withheld during the school year.

2) The Board additionally contends that petitioners' were also advised at this time that their salaries would remain at the status quo until after this meeting. It argues that, therefore, petitioners had neither received nor had a realistic expectation of receiving any salary increment prior to the Board's action on July 9, 1992 and, consequently, did not suffer any salary reduction in violation of N.J.S.A. 18A:28-5.

3) The Board further asserts that the ALJ recognized the strong public policy rationale for not utilizing June 30 as a cut-off date for withholding the increment of a 12-month administrative employee.

> ***Logic and educational soundness require that the Board be afforded an opportunity to react to an employee's egregious or negligent actions during the last week in June. Since an essential aspect of a principal and assistant principal's job duties include the timely end of year evaluations of tenured and non-tenured staff, the failure in this case to complete evaluations in a timely and satisfactory manner could not be ascertained by the Superintendent and acted upon by the Board by June 30th. Thus, the Administrative Law Judge is correct in her finding that a June 30th deadline for withholding Petitioners' increments would not permit a Board of Education to properly carry out its responsibilities under N.J.S.A. 18A:29-14. (Board's Objection to Interlocutory Review, dated May 13, 1993, at p. 2)

4) Finally, the Board asserts that the cases cited by petitioners are irrelevant and of no precedential value in this matter as the issue here, i.e., the determination of a cut-off date for the withholding of a 12-month employee's increment is a matter of first impression. The Board urges that a cut-off date of August 1 be established for Board action with respect to 12-month

administrative employees, arguing that such would provide sufficient time for a superintendent to evaluate end-of-year performance and for a board to act without prejudicing the employees' rights.

The Board requests that the ALJ's decision granting it summary decision be affirmed and that the Commissioner dismiss the within petition and find the Board's July 9, 1992 action proper and not in violation of petitioners' rights.

Upon a careful and independent review of this matter, which included a review of the tape of the ALJ's decision on the summary decision motion at issue herein, the Commissioner reverses the ALJ's motion decision regarding the timeliness of the Board's action in denying petitioners' increments and hereby grants summary decision to petitioners on this issue. She, therefore, finds it unnecessary to reach the remaining portion of the initial decision which grants summary decision to the Board with respect to the substantive basis for the increment withholdings.

In reaching her determination in this regard the Commissioner, although recognizing the merit of the Board's contention that the establishment of a cut-off date for board action in this particular instance is a matter of first impression, disagrees with its assertion that previous education law decisions have no precedential value in this matter. The Commissioner is compelled to initially note that the law is clear that a local school board must pass its resolution to withhold an employee's increment prior to the beginning of the school year in which it is to take effect. (See Northern Highlands Regional School District Board of Education v. Martin, App. Div., 1979 S.L.D. 852; Smith v. Hamilton Township Board of Education, 1988 S.L.D. 740; Newark Teachers' Union, supra; and Charles Gersie, supra.)

She further notes that definition of "the beginning of the school year" for the purpose of increment withholding of 10-month teaching staff members who are employed September to June, resulting in a date-certain for board action, was accomplished by the Commissioner in Newark Teachers' Union et al., supra.

> ***It is the belief of the Commissioner that as a matter of fundamental fairness, board action to withhold an increment must be prior to the date the ten-month period of service commences. Therefore, this would require board action prior to September 1 of the school year involved. Although actual service may not commence until the first day of school, September 1, nonetheless, is the date upon which a staff member's salary entitlement commences for the ten-month period of service September to June.*** (at 1056)

With this established law firmly in mind, and after fully considering the implications of the matter herein at issue, the Commissioner concludes that July 1, 1992 is the date the yearly period of service and concomitant salary entitlement began for the instant 12-month teaching staff members employed July 1 to June 30. Consequently, she finds that unless the Board acted to withhold the increments prior to June 30 where, as here, a binding salary schedule was to take effect on July 1, it could not after July 1 take such action. The Commissioner believes that the establishment of a cut-off date other than June 30 for Board action to withhold the increments of these individuals would be inconsistent with existing law in this area, as well as in violation of fundamental principles of fairness and equity.

In so concluding, the Commissioner was unpersuaded by the Board's argument that utilizing June 30 as a cut-off date unfairly compromises a board's ability to sufficiently evaluate employee completion of year-end duties such as evaluation of staff. Evaluation of teaching staff is an activity which, of necessity,

extends over a number of months (Note: the majority of nontenured staff evaluations must be completed by May 15 in order to meet the notice requirements of N.J.S.A. 18A:27-10) and she finds it entirely reasonable to expect that all required evaluations can be concluded in sufficient time to permit a board to take all necessary action by June 30. Therefore, a board which allows this activity to extend to the last week of June does so at its own peril.

In the matter at hand, even though the Board determined that petitioners' performance was not satisfactory and informed them of the possibility of action which could affect their increments, lack of timely official action by the Board permitted petitioners' salary for 1992-93 to become established as specified in their collective bargaining agreement.

The Commissioner finds and determines that when the Board of Education of the City of Englewood acted on July 9, 1992 to deny the increments of the petitioners in this matter, its action took place after petitioners had undertaken performance of their contract for the school year in question and, therefore, such action constituted a reduction in petitioners' compensation in contravention of N.J.S.A. 18A:28-5. Consequently, she determines that such Board action was untimely and ultra vires and must be set aside.

Accordingly, the Commissioner orders reinstatement of the increments of Petitioners Pruitt and Segall for the 1992-93 school year and directs the Board to remit to the petitioners the difference between the salaries they should have received and the salaries actually received during the period in dispute.

IT IS SO ORDERED.

OCTOBER 25, 1993

COMMISSIONER OF EDUCATION

DATE OF MAILING - OCTOBER 26, 1993

263-93

N.A.C., on behalf of her minor child, T.C.

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF CEDAR GROVE, ESSEX COUNTY, AND THE SUPERINTENDENT OF SCHOOLS OF CEDAR GROVE,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parent, whose child (T.C.) was refused admission to kindergarten for 1993-94 school year, alleged Board arbitrarily changed kindergarten cut-off date to November 30. Petitioner contended she had been assured that cut-off date was December 1.

ALJ found the Board's Registration Policy, which required a child entering kindergarten to be five years old before December 1, had been in effect since 1981. Thus, the Board, which consistently applied the policy and did not make any exceptions to it, properly exercised its discretion in refusing to permit T.C., whose birth date was December 1, to register for 1993-94 school year.

Commissioner adopted findings and determination in initial decision.

OCTOBER 27, 1993

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6510-93
AGENCY DKT. NO. 236-6/93

N.A.C., on behalf of T.C.,
Petitioner,
v.
CEDAR GROVE BOARD OF EDUCATION AND SUPERINTENDENT OF SCHOOLS OF CEDAR GROVE,
Respondents.

N.A.C., on behalf of T.C., petitioner, *pro se*

Rodney T. Hara, Esq., for respondents (Fogarty & Hara, attorneys)

Record Closed: September 3, 1993 Decided: September 17, 1993

BEFORE **MARIE P. SIMONELLI,** ALJ:

STATEMENT OF THE CASE

Petitioner N.A.C., on behalf of her son, T.C., appeals respondents' denial of her request to register T.C. for kindergarten for the 1993-94 school year.

PROCEDURAL HISTORY

N.A.C. filed a Petition on about June 9, 1993. On July 9, 1993, this matter was transmitted to the Office of Administrative Law for a hearing. The hearing was held on September 3, 1993. N.A.C. and N.C., T.C.'s parents, testified on T.C.'s behalf. Sam Peshkopia (Mr. Peshkopia), the principal of South End School, Maria Krause (Ms. Krause) and Roberta Dow (Ms. Dow), secretaries in the Superintendent's Office, Elaine Lucas (Ms. Lucas), a secretary at North End School, Barbara Hadaway (Ms. Hadaway), a secretary at South End School and John DeCesare (Mr. DeCesare), the Superintendent, testified on respondents' behalf.

FACTS

Having heard the witnesses and reviewed the Exhibits, I **FIND** the following **FACTS:**

In January 1993, N.A.C. telephoned Mr. DeCesare's office to obtain documents to register T.C. for kindergarten for the 1993-94 school year. N.A.C. spoke to Ms. Dow and gave Ms. Dow certain information, including T.C.'s birthdate of December 1, 1988. Ms. Dow placed that information into a file.

Two weeks later, Ms. Krause reviewed that information and determined that T.C. was not eligible to register for kindergarten because he did not meet the registration requirements set forth in the Policy Registration Requirements (the Registration Policy) of respondent Cedar Grove Board of Education (the Board).

The Registration Policy requires a child entering kindergarten to be five years old before December 1 (P-4: Registration Policy). This requirement has been in effect since at least March 24, 1981 (See: P-5). The Registration Policy has no provision for determining exceptions to this requirement.

Ms. Dow telephoned N.A.C. and advised her that she could not register T.C. for kindergarten because he was not born before December 1. N.C. then called Mr. DeCesare's office and requested to meet with Mr. DeCesare. Mr. DeCesare advised N.C. to attend a meeting of the Board on February 9, 1993. Mr. DeCesare also

advised N.C. that the Registration Policy could only be waived for T.C. by a majority vote of the Board.

N.A.C. and N.C. attended the February 9, 1993 meeting and requested that they be permitted to register T.C. for kindergarten for the 1993-94 school year. N.A.C. and N.C. alleged that Mr. Peshkopia, Ms. Lucas and Ms. Hadaway had advised them that T.C. could register for kindergarten because the cut-off date was December 1. Despite this allegation, the Board determined that T.C. was not eligible to register for kindergarten because he was not born before December 1.

There was some discussion at the February 9, 1993 meeting about having T.C. tested by a Child Study Team (CST) to determine his fitness to enter kindergarten. T.C. was never evaluated.

N.A.C. and N.C. again appeared before the Board on April 6, 1993 and again presented their case. The Board determined, by consensus, that it would not waive the Registration Policy for T.C. (R-1 Minutes of Closed Conference Meeting of April 6, 1993).

N.A.C. and N.C. attended a third meeting of the Board on August 31, 1993. Although a presentation was made on T.C.'s behalf, the Board would not change its position.

CONCLUSIONS OF LAW

Pursuant to *N.J.S.A.* 18A:10-1 and *N.J.S.A.* 18A:11-1, the Board has the discretionary authority to govern and manage the schools in Cedar Grove. *N.J.S.A.* 18A:10-1 provides, in pertinent part:

> The schools of each school district shall be conducted, by and under the supervision of a board of education . . .

N.J.S.A. 18A:11-1 provides, in pertinent part:

> The board shall

> c. Make, amend and repeal rules, . . . for its own government and the transaction of its business and for the government and management of the public schools . . .
>
> d. Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district.

In addition, under *N.J.S.A.* 18A:38-5, the Board is not required to admit a child under five years of age into kindergarten. *N.J.S.A.* 18A:38-5 provides, in pertinent part:

> No child under the age of five years shall be admitted to any public school, except such as may be provided pursuant to law for children of his age.

N.J.S.A. 18A:44-2 gives the Board the discretionary authority to admit a child under the age of five into kindergarten.

With respect to the establishment of a cut-off date for admission into kindergarten, *N.J.S.A.* 18A:38-6 gives the Board the discretionary authority, by a majority vote of all members of the Board, to establish a date other than October 1.

In order to determine whether or not the Board abused its discretionary authority under the above-mentioned statutes, it must be shown that the Board's refusal to waive the Registration Policy for T.C. was arbitrary, capricious, unreasonable or unlawful. N.A.C. claims that the Board's action was arbitrary, capricious and unreasonable because:

1.) The Board had made an exception in 1973 and permitted a child born on December 1 to register for kindergarten;

2.) The Board refused to have had T.C. tested by a CST to determine his fitness to enter kindergarten; and

3.) Mr. Peshkopia, Ms. Lucas, Ms. Hadaway and some teachers misinformed N.A.C. that the cut-off date was December 1.

In this case, the Board exercised its statutory discretionary authority and adopted a kindergarten registration policy consistent with *N.J.S.A.* 18A:38-6. The Registration Policy, which was in effect since at least March 24, 1981, provides clearly that a child entering kindergarten must be five years old before December 1.

Mr. DeCesare testified that, during his eight years as Superintendent, the Board consistently applied the Registration Policy and did not make any exceptions to it. Although N.A.C. alleged that the Board had made an exception in 1973, this was hearsay evidence. There also was no evidence of what the cut-off date was in 1973.

In addition, despite the discussion about having T.C. tested by a CST, the Board is not required to provide such testing. *Shenkler v. Board of Education of the Borough of Hohokus,* 1974 *S.L.D.* 772, 777-778.

Finally, there was conflicting testimony as to whether or not N.A.C. had been misinformed by Mr. Peshkopia, Ms. Hadaway, Ms. Lucas and some teachers that the cut-off date was December 1. Even if N.A.C. and N.C. did receive such misinformation, the Registration Policy, not the beliefs or opinions of staff members and teachers, governs the admission of children into kindergarten in Cedar Grove.

Although the Board had the discretionary authority to waive the Registration Policy for T.C. (who unfortunately was born a few hours too late), it choose not to do so. The Board's action, albeit obdurate, was not arbitrary, capricious, unreasonable or unlawful and it was supported by statutory authority.

Based upon the foregoing, I **CONCLUDE** that the Board properly exercised its discretion in refusing to permit T.C. to register for kindergarten for the 1993-94 school year.

ORDER

I, therefore, **ORDER** that N.A.C.'s Petition be and hereby is **DISMISSED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Sept. 17, 1993
DATE

MARIE P. SIMONELLI, ALJ

Receipt Acknowledged:

9/20/93
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 21 1993
DATE

OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

Witnesses

For petitioner:

N.A.C., mother of T.C.
N.C., father of T.C.

For respondents:

John DeCesare, Superintendent of Schools of Cedar Grove
Roberta Dow, Secretary, Superintendent's Office
Barbara Hadaway, Secretary, South End School
Maria Krause, Secretary, Superintendent's Office
Elaine Lucas, Secretary, North End School
Sam Peshkopia, Principal, South End School

Exhibits

J-1	Petition, dated June 9, 1993
J-2	Answer and Proof of Mailing
P-1	Video of Board of Education Meetings on February 9, 1993 and August 31, 1993
P-2	Letter, dated February 9, 1993, from Annette Lupo to the Board
P-3	Letter, dated May 17, 1993, from N.A.C. to Mr. DeCesare
P-4	Cedar Grove Board of Education Policy Registration Requirements, dated 8/25/92
P-5	Cedar Grove Board of Education Policy Registration Requirements, dated 3/24/81
P-6	Cedar Grove Board of Education Policy Registration Requirements, dated 8/24/82
P-7	Cedar Grove Board of Education Registration Requirements, dated 3/30/93

P-8	Letter, dated June 3, 1993, from Mr. DeCesare to N.C.
P-9	Letter, dated June 4, 1993, from N.A.C. to Mr. DeCesare
P-10	Letter, dated June 9, 1993, from Mr. DeCesare to N.A.C.
P-11	Letter, dated July 22, 1993, from Anthony E. Recchia, Jr.
P-12	Letter, dated August 6, 1993, from N.A.C. to Rodney T. Hara, Esq.
P-13	Letter, dated August 25, 1993, from Rodney T. Hara, Esq. to N.A.C.
P-14	Letter, dated 8/23/93, from Leonard M. Goodman, Esq. to N.C.
R-1	Minutes of Closed Conference Meeting on April 6, 1993

N.A.C., on behalf of her minor child, T.C.	
PETITIONER,	
V.	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CEDAR GROVE, ESSEX COUNTY, AND THE SUPERINTENDENT OF SCHOOLS OF CEDAR GROVE,	DECISION
RESPONDENTS.	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by petitioner pursuant to the provisions of N.J.A.C. 1:1-18.4, as were replies thereto by the Board.

In her exceptions, petitioner objects to the ALJ's rejection as hearsay of Exhibit P-14, a parent letter confirming that a child born on December 1, 1968 had been admitted to school in 1973, since she had been apprised at hearing that hearsay would be admissible. She further objects to the ALJ's having expected her to demonstrate what the Board's policy was at that time in view of the fact that the Board destroys prior policies upon their being superseded by new or revised policies. Finally, she urges that review of the videotape of pertinent Board meetings will show the superintendent to have stated that the district's December 1 cut-off date extends back to the early part of the century.

In reply, the Board notes that while hearsay may be admissible, it must be supported by some legally competent evidence

pursuant to N.J.A.C. 1:1-15.5, so that the ALJ was correct to assign P-14 no significant weight. Moreover, the Board contends, even if P-14 were to be accepted arguendo, the fact that a prior exception may once have been made is not in itself sufficient to demonstrate that the Board acted arbitrarily in exercising the discretion granted it by law and thus was entitled to a presumption of correctness. Finally, the Board objects to the ALJ's characterization of its action as "obdurate," because such a characterization is both unwarranted and legally irrelevant, and asks the Commissioner to affirm the ALJ without accepting this characterization.

Upon review, the Commissioner concurs with the ALJ that the Board's decision in this matter was fully within its discretionary authority and not arbitrary, unreasonable or otherwise improper so as to render it susceptible to overturning by the Commissioner.

As noted by the ALJ, it is a board's prerogative not to grant exceptions to the district's cut-off date for entry into kindergarten; indeed, many boards elect not to do so for the very reasons given by the Board herein. Nor was petitioner's son subjected to disparate treatment; the superintendent testified that no exceptions to the relevant district policy had been made within his memory, and the only evidence proffered of any possible prior exception was Exhibit P-14, which, even taken arguendo at full weight, demonstrates only that one child, who was born on December 1, 1968 and therefore did not meet the cut-off date, attended school in 1973, not that he did so with the Board's specific knowledge or consent. Finally, while it is unfortunate that verbal identification of the district's cut-off date as

"December 1" did not convey to petitioner the actual effect of the relevant policy on her child, the fact remains that the formal written policy, which must control herein, clearly states that to enter kindergarten a child must be five years old before December 1.

Accordingly, the initial decision of the Office of Administrative Law dismissing the Petition of Appeal is affirmed for the reasons expressed therein as further explicated above.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 27, 1993

DATE OF MAILING - OCTOBER 27, 1993

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* In response to the Board's reply exceptions, the Commissioner notes that, to the extent that the ALJ's characterization of the Board's position as "obdurate" infers anything more than maintenance of its considered determination not to deviate from policy in the face of continuing challenges by petitioner and her supporters, that characterization appears unwarranted by the record herein.

264-93

264-93

LUCILLE NUBER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, cafeteria manager whose position as director of food services was abolished, challenged said abolition and her demotion as arbitrary, capricious and unreasonable.

In light of the record and testimony of witnesses, ALJ found petitioner failed to carry her burden of proof. ALJ found District had properly reviewed performance of noninstructional staff members such as petitioner and made reasoned judgments as to reorganization of central supervisory and administrative staff. Petition was dismissed.

Commissioner adopted findings and determination in initial decision.

OCTOBER 26, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6154-90
AGENCY DKT. NO. 227-7/90

LUCILLE NUBER,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY,
Respondent

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

Patricia A. Taylor, Assistant General Counsel, for respondent
(Charlotte Kitler, General Counsel)

Record Closed: August 30, 1993 Decided: September 13, 1993

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

PROCEDURAL HISTORY

This contested matter was transmitted by the Department of Education to the Office of Administrative Law in August 1990 following the filing of a verified petition of appeal by Lucille Nuber alleging that the respondent State-operated School District of Jersey City had acted in an arbitrary and capricious manner in May

1990 when it abolished her position as the director of food service and appointed her to a cafeteria manager position at a substantially reduced salary.*

Following the transmittal of the case file, I conducted a telephone prehearing conference at which counsel agreed that the following issue was to be resolved: "Was the respondent's decision not to hire petitioner for the reorganized central administrative and supervisory staff arbitrary, capricious and unreasonable and, if so, what shall the remedy be?" A hearing originally scheduled for May 1991 was twice adjourned as the result either of illness or the unavailability of witnesses. The case ultimately was heard on June 14, 1993, posthearing briefs were filed and the record was closed on August 30, 1993.

TESTIMONY

A. Stipulation of Facts

At the outset of the hearing, counsel entered into a joint stipulation of facts to which three separate documents were attached (Exhibit J-1). These stipulated facts are as follows:

1. Petitioner was initially hired by the Jersey City Board of Education on January 5, 1966, when she was appointed to the position of food service worker on a provisional basis, pending examination by Civil Service.

2. Petitioner was appointed to the position of food service worker as a permanent appointment, following certification by Civil Service, on August 1, 1969.

3. Thereafter, petitioner received permanent appointment to the position of senior food service worker on October 16, 1971, followed by

*Petitioner's annual salary as a cafeteria manager was $19,240, plus $1,200 for longevity. This was prorated for June and July 1990. Her annual salary as Director had been $44,020, plus $1,200 for longevity. She retired from employment on August 1, 1990.

permanent appointment to the position of cafeteria manager on November 1, 1977.

4. Petitioner was appointed on a permanent Civil Service basis to the position of director of food service on February 18, 1980. This position was abolished by the Jersey City Board of Education on August 27, 1981, and petitioner was placed, through demotional rights to her previous permanent position of cafeteria manager as of October 11, 1981.

5. On September 1, 1985, the Jersey City Board of Education again appointed petitioner on a permanent Civil Service basis to the position of director of food service.

6. On October 4, 1989, the Jersey City Board of Education was removed and a State-operated school district was established by Administrative Order issued by the New Jersey State Board of Education. The State Board's Decision and Order are published at 13 *N.J.A.R.* 1, 89 (1989).

7. By memorandum dated December 13, 1989, the State District Superintendent of Schools notified the noninstructional supervisory and administrative staff in the central office that their positions would be abolished pursuant to statute upon the reorganization of central office and that evaluation of their performance would be conducted over the next few months. A copy of the memorandum is appended as Exhibit "A."

8. The evaluation of petitioner was issued on March 27, 1990. A copy of the evaluation is appended as Exhibit "B."

9. Petitioner was advised, in the cover letter of March 27, 1990 transmitting her evaluation, that she could submit written comments and could also contact the office of Victor Demming, State Business Administrator, for an appointment to discuss the evaluation. No written comments were submitted.

10. By letter dated April 4, 1990, petitioner was advised that her current position was abolished by operation of *N.J.S.A.* 18A:7A-44. The letter further advised petitioner that she was entitled to claim the position of cafeteria manager. Petitioner was appointed to the position of cafeteria manager, effective June 4, 1990.

11. The New Jersey Department of Personnel has advised, by letter dated June 7, 1990, that petitioner's appointment as cafeteria manager is a permanent appointment with no loss in Civil Service status or tenure. A copy of the letter of June 7, 1990 is appended as Exhibit "C."

12. Petitioner retired from employment on August 1, 1990.

B. Testimony for Petitioner

Pursuant to the prehearing order Nuber has the burden of proof and proceeded first. She testified to her employment history in the school district and related the activities that she carried out as director of food service under the supervision of Jay Roggenstein, the administrative assistant/business operations. Nuber's primary duties included preparation of menus and review of applications for either free or reduced priced meals. She was also involved in interviewing and hiring cafeteria workers and was responsible for shifting cafeteria workers between schools to assure that all sites were covered adequately on a daily basis.

Nuber then identified a written performance evaluation which had been prepared by Dr. Emery J. Konick, Jr., a State consultant, in connection with an evaluation of noninstructional central staff which he conducted in 1989-90 pursuant to *N.J.S.A.* 18A:7A-44 (Exhibit B to Exhibit J-1). Although Nuber agreed with Konick's observation in the "leadership" section of that evaluation that she spent a good deal of time in her office rather than at the various school cafeteria sites, she observed that in Roggenstein's evaluation of her performance for the 1988-89 school year, her superior concluded that she was a "satisfactory" employee and in none of the several evaluation areas was she rated as "needing improvement" (Exhibit P-1).

On cross-examination, Nuber agreed that menus she prepared were "faxed" on a regular basis to Trenton for State approval. However, she denied this procedure was necessitated by any concern about lack of nutrition in the menus developed by her or under her supervision.

C. Testimony for Respondent

The respondent's sole witness, Dr. Konick, holds a master's degree from Seton Hall and a doctorate from Rutgers University and for several years was the assistant superintendent for business for the Woodbridge Township Board of Education. He was hired by the Department of Education in 1989 to review the job performance of persons employed in Jersey City's food service department, including Nuber (Exhibit A to Exhibit J-1).* To that end he reviewed various documents, conducted several interviews and authored the March 1990 evaluation report which, in part, criticized Nuber and concluded that her performance in the area of management and supervision was unsatisfactory (Exhibit B to Exhibit J-1).

As part of his evaluation Konick took into account a portion of the "Level III Report" of the Jersey City School District issued by the Department of Education preparatory to the State takeover. An excerpt from that Report contained generally negative comments regarding the operation of the food service department and commented that the program lacked direction and was fragmented (Exhibit R-1) According to the Report, the school district, "did not understand that the duties of the position [of director of food service] were not the focus of the concern, but rather that [Nuber's] qualifications to handle the responsibilities of a large, multi-site child nutrition program were in question."

Konick went on to note in his own evaluation report that Nuber did not maintain proper contact with her managers since she did not go to the cafeterias often enough to "sit on top of" various situations there. Konick observed that even

*The background circumstances leading up to the takeover and the dire need for such remedial action is described in detail by Judge Springer in his initial decision in *McCarroll v. Bd.of Ed. of Jersey City,* decided July 26, 1989, aff'd by the Assistant Commissioner of Educ., August 31, 1989, aff'd State Board of Educ., October 4, 1989, 13 *N.J.A.R.* 1 (1989).

though Roggenstein had no prior food service experience, it had become necessary to appoint him to oversee Nuber's activities. This appointment, according to Konick, should not have been needed had Nuber properly exercised the leadership role expected of her as director. Konick also was disturbed by the information that menus had to be faxed to Trenton for approval. He considered the need for this procedure to be unusual and a further indication of a problem in supervision.

Konick made reference in his evaluation to the fact that only recently cafeteria workers had begun to communicate directly with their managers rather than continue to take their problems to the union shop steward. According to Konick, this new development, which was encouraging, was in contrast to what had been going on previously. His clear implication was that Nuber had let a poor situation develop, and only recently was it undergoing a change for the better.

The witness also concluded from his review, including speaking with Nuber, that she did not have sufficient involvement with the delivery of food services at the elementary schools. Even though Nuber's job description required her to do so, she apparently did not prepare the elementary school menus, leaving that task to outside vendors from whom the food was purchased (Exhibit R-2). Accordingly, based upon his overall review, Konick found Nuber's performance as director of food service to be unsatisfactory and he recommended that the department be reorganized. As a result, Nuber's position was abolished and effectively she was "demoted" to the position of cafeteria manager (Exhibit C to Exhibit J-1).

On cross-examination, Konick readily agreed that his interview with Nuber was amicable and he did not express any of his criticisms to her directly. He also agreed that various comments in the Level III Report had to do with activities that took place when Nuber was not in charge of the food services area. In particular, on direct examination Konick made reference to an audit which found an overclaim of more than $700,000. This, however, occurred at a time when Nuber was not in any responsible position. Konick also conceded that although the food service department's budget was often in deficit, he could not say whether the deficit had increased or decreased during Nuber's tenure or in comparison to previous years.

Finally, with respect to his criticism that in one of the high schools for which Nuber had responsibility the number of lunches sold was remarkably low (50 to 100

in a school with 1,200 pupils), Konick conceded he did not know how many students were receiving free meals. However, he insisted that substantially more "marketing" activities could have taken place in order to interest students and/or their families in purchasing lunch, such as meeting with PTA groups, establishing a salad bar and/or sending flyers home.

DISCUSSION

Based upon my review and consideration of the stipulated facts and the testimony, I believe that petitioner has failed to satisfy her burden to prove by a preponderance of the credible evidence that the abolition of her position as director of food service and her consequent demotion to cafeteria manager was arbitrary, capricious, unreasonable or otherwise unfair. To the contrary, *N.J.S.A.* 18A:7A-44(c) vested broad discretion in the State to review the performance of noninstructional staff members such as Nuber and to make reasoned judgments concerning that performance as part of an overall evaluation of the staffing needs of the reorganized district. It is not within my province to substitute my own judgment for that of the State even where I might disagree, provided the determination, as here, was free of any taint.

A review of the evaluation report submitted by Konick, as supplemented by his testimony, contains ample support for his conclusion that the food service department should be reorganized which led, of course, to petitioner's demotion. Nuber, as director, was the person responsible for the overall performance and she therefore must bear responsibility for the major problems found by Konick. While one might disagree with Konick's perceptions linking Nuber to the several problems he found, I cannot say that his ultimate conclusion in light of the situation was so arbitrary, capricious or unreasonable as to justify recommending that it be rejected. As noted above, it was Nuber's burden to demonstrate by a preponderance of the credible evidence that the decision not to offer her a position on the reorganized central supervisory and administrative staff was arbitrary, capricious and/or unreasonable. She failed to carry that burden and her verified petition of appeal must therefore be **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 13, 1993
Date

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

9/15/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 16 1993
Date

OFFICE OF ADMINISTRATIVE LAW

amr/e

WITNESS LIST

Lucille Nuber
Emery J. Konick, Jr.

EXHIBIT LIST

J-1 Joint stipulation of facts with attached exhibits A, B and C

P-1 Evaluation of non-instructional management personnel (Lucille Nuber), June 1989

R-1 Level III Report of the Jersey City School District, pp. 187-191, May 1988
R-2 Job description, director of food service, August 28, 1985

OAL DKT. NO. EDU 6154-90

LUCILLE NUBER,

PETITIONER,

V.

STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

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

Upon review, the Commissioner concurs with the ALJ that the District's decision not to offer petitioner a position on the reorganized central supervisory and administrative staff was neither arbitrary nor unreasonable.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUC

OCTOBER 26, 1993

DATE OF MAILING - OCTOBER 26, 1993

265-93

BOARD OF EDUCATION OF THE BOROUGH OF BUTLER, MORRIS COUNTY :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

MAYOR AND COUNCIL OF THE BOROUGH OF BUTLER, MORRIS COUNTY : DECISION

RESPONDENT. :

:

OCTOBER 29, 1993

BOARD OF EDUCATION OF THE BOROUGH OF BUTLER, BERGEN COUNTY,

PETITIONER,

V.

MAYOR AND COUNCIL OF THE BOROUGH OF BUTLER, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of $200,000 made by governing body following voter rejection of proposed budget on April 20, 1993.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore $153,500 for a total General Fund tax levy of $6,925,794 for 1993-94 school purposes.

BOARD OF EDUCATION OF THE BOROUGH OF BUTLER, BERGEN COUNTY,

PETITIONER,

V.

MAYOR AND COUNCIL OF THE BOROUGH OF BUTLER, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

This matter was opened before the Commissioner by the filing of a Petition of Appeal on June 15, 1993 from the Board of Education of the Borough of Butler (Board) appealing the reduction in the 1993-94 budget imposed by the Mayor and Council of the Borough of Butler (Borough) pursuant to the provisions of N.J.S.A. 18A:22-37. The aforesaid reduction consisted of a $200,000 reduction in the General Fund tax levy. As a result of such reduction, the amount in dispute before the Commissioner is summarized below:

Proposed Tax Levy Adopted By Board of Education		Amount of Tax Levy Certified by Governing Bodies	
General Fund	$6,972,294	General Fund	$6,772,294
Amount of Reduction By Governing Bodies		Amount of Reduction in Dispute	
General Fund	$200,000	General Fund	$200,000

On July 1, 1993 the Borough filed its Answer to the Petition of Appeal pursuant to the provisions of N.J.A.C. 6:24-7.6 and 7.7. On July 23, 1993 the Board filed its written submission in

support of the Petition of Appeal and the Borough filed its Position Statement on July 27, 1993. The Board filed a Response on August 6, 1993 and no other pages were filed thus closing the official record.

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

In the instant matter, the Borough, upon defeat of the 1993-94 school budget by the voters of the district, did confer with the Board as required by N.J.S.A. 18A:22-37 and established a tax levy to be used for school purposes. The aforesaid tax levy was

established by the passage of Resolution R93-47 on May 12, 1993 setting forth the following reductions:

$ 14,000	Difference on salary for Aaron Decker Principal
14,500	Agreed upon by Dr. Stranzl
64,000	Science and Language Teachers' Salaries
32,000	Guidance Counselor
32,000	Psychological Personnel
9,500	Social Security for New Personnel
34,000	Health Benefits for New Personnel
$200,000	

Subsequently, on July 13, 1993, the Borough, by way of Resolution 1993-67, amended the resolution of May 12, 1993 to include the following statement of reasons to accompany the reductions imposed by its earlier resolution:

> 1. $14,000.00 reduction in salary of principal of Aaron Decker School. The principal of the Aaron Decker School will retire on September 1, 1993. This is only three months into the new budget year. During the budget hearings Dr. Stranzl, upon questioning by the council, testified that approximately $14,000.00 could be reduced as a result of the salary decrease which would be paid to a new incoming principal with less seniority.
>
> 2. $14,500.00. During the budget hearings, Dr. Stranzl testified that an amount of $14,500.00 could be reduced from the budget in various places not including the various reductions otherwise made by the Mayor and Council.
>
> 3. $64,000.00 for new science and language teachers' salaries. School Board budget included an additional science teacher and an additional foreign language teacher. Testimony at the budget hearings established that there is no anticipated increase in the overall student body at the Butler High School. Since there is no anticipated increase in the overall student body, additional needs for science and foreign language classes should be offset by decreased demand in other subject areas. During the hearing the Mayor and Council requested statistics on predicted class sizes in these various areas. They were informed that these figures were not available. Additional demands in these subject areas should be met through a restructuring of existing positions.

4. $34,000.00 reduction due to health benefits for the eliminated positions. Testimony given during the budget hearings established that $34,000.00 in health benefits would be saved by eliminating the new positions. It is believed that an additional $9,500.00 will be saved by the elimination of the need to pay Social Security Tax for these positions.

5. $22,855.00 reduction by continuing to have the middle school guidance counselor serve in a part-time capacity. The budget adopted by the Board of Education provided for increasing the Guidance position in the middle school from a part-time position to a full time position. The Council resolution incorrectly reduced the budget by $32,000.00, but it was the intent to reduce it by $22,855.00. It was noted that the middle school has an unusually high number of special education teachers which should be able to handle special needs of children without an increase in guidance counseling staff.

6. $40,000 reduction by elimination of a full-time psychologist position for the child study team. The budget adopted by the Butler Board of Education provided for $40,000.00 for the additional of a full time psychologist for the child study team. The resolution adopted by the Mayor and Council stated a $32,000.00 reduction for this budgeted item, this item should have been reduced by $40,000.00. Testimony given during the budget hearing was that this position was necessary because it had become more cost effective to hire a full time psychologist than it had been to use consulting psychologists. Were this the case there should have been a corresponding reduction in the amount budgeted for professional services. This was apparently not the case. Testimony during the budget hearing was that there would be the need for approximately ten additional reports from the number of reports required in the previous budget year. It was also stated that consulting reports cost between $300.00 and $500.00. If, in fact, it was more cost effective to hire a full time psychologist for the child study team, there should have been a reduction in the professional services area of the budget.

Positions of the Parties

In setting forth the respective positions of the parties, it should be noted that neither the Borough nor the Board identify

the reductions by specific line item number but only by the position or general category from which the reduction is to come.

Initially, it is to be noted that the Board argues that the entire amount of reduction should be restored in that it alleges that the Borough has failed to meet the requirements of N.J.A.C. 6:24-7.2(b)(4) and the findings of the New Jersey Supreme Court in Deptford, supra, to set forth its reasons for the reductions imposed at the time such reductions are made. The Board contends that by virtue of such failure the Borough demonstrated that its actions were not consistent with the legal responsibility to review the defeated budget for its sufficiency in providing a thorough and efficient system of education but were, in fact, arbitrary and capricious. The Board points out as proof of its contention that the original resolution of the Borough merely identified areas of reduction without written reasons and only added such written reasons with its amended resolution.

In response to the Board's general contention of arbitrary action, the Borough indicates that the specific reasons for the reductions were clearly articulated by its members at the three hearings between the two bodies and that its July 13, 1993 amending resolution provided the written statement of reasons required by law. It contends that the written reasons are merely a memorialization of the verbal reasons provided at the meetings between the bodies.

Account	Reduction
Principal's Salary	$14,000

It is the Board's contention that the Principal's Salary account identified by the Borough cannot be reduced even though one

of its principals was retiring and would be replaced at a lower salary. The Board contends that the saving of $13,793 on the new principal's annual salary will be offset by the fact that the retiring principal will still be paid for July and August due to a September retirement and that the contractual obligation to pay $6,879.16 in unused vacation days and unused sick time will more than offset any possible savings in the difference between the salary of the new and old principals.

The Borough offers no reason for its reduction in this area other than its perception that savings can be realized by virtue of the difference in salary of the new principal as opposed to the retiring principal.

Account	Reduction
Unspecified	$14,500

The Board by way of affidavit of its superintendent, Dr. Frank J. Stranzl, points out that the $14,500 figure to which the Borough includes in its reduction is an overall amount offered by him as a possible compromise by which the Board could possibly reduce its overall budget in order to reach a compromise settlement. Dr. Stranzl alleges that said offer was never an agreement between the parties.

Teachers' Salaries	$64,000

The amount of reduction here represents two new positions, one in science and one in foreign language. These two positions are justified by the Board by virtue of the fact that there is increased interest in both foreign language and science. The Board argues that 102 additional students have requested foreign language in

their schedules for 1993-94 and that it intends to introduce foreign language study in grades 7 and 8 so that it may offer a fifth year of foreign language in the future.

Further, the Board argues the necessity for the additional science, teacher due to state mandated additional requirements in science, as well as increased interest on the part of parents and students in advanced science programs.

The Borough contends that the two new positions are unjustified due to the absence of increased enrollment. It further concluded, based upon its review of the 1992-93 school year schedule attached to its Position Statement as Exhibit D, that the district's business education and industrial arts classes were under utilized and therefore it recommended that the Board reconfigure its staff to accommodate the changes in student interest.

Account	Reduction
Health Benefits New Personnel	$34,000

The Board argues that it has no idea as to how the Borough arrived at its figure of $34,000 in health benefits. It points out that it pays a maximum of $9,000 per year for current personnel. Assuming that the figure cited by the Borough includes both requested new science teachers and a proposed increase in guidance, such amount would only be $27,000, not the $34,000 reduction by the Borough.

The Borough rests its position based upon a determination that four new positions would be eliminated by its reduction and each such position would require $8,400 per employee.

Account	Reduction
Guidance Counselor	$32,000

This amount represents increasing the guidance position at the district's middle school from part time to full time. The Board argues that it has no idea how the Borough arrived at its $32,000 figure since the additional cost represents only an increase of $22,855.

It is the Board's contention that the need for guidance services has increased tremendously over the years and that its middle school is the only one in the area which does not have a full-time guidance counselor. The Board contends that 34% of its students are transient and often arrive without necessary records and test scores which have to be upgraded and are beyond the capacity of a part-time counselor. Further, the Board argues that its policy of bringing back special needs students to the district for mainstreaming and the increasing number of dysfunctional families have placed a further strain on guidance services.

The Borough argues that the additional burden of mainstreaming can be handled by the 2.5 social workers currently employed by the Board. It further seeks to buttress its position in this regard by citing an alleged Department of Education figure indicating a state-wide average of 1 social worker for every 1,046 students, thus indicating that Butler has more than twice the number of the state-wide average.

Psychological Position	$32,000

The amount of reduction here represents an additional psychologist's position requested by the Board. The Board agrues that 20% of its pupils are classified and that it is justified in increasing its child study team by this position.

It is the Board's contention that in the past the additional burdens placed upon its psychological services have been met through the hiring of consultants and thus it is more cost effective to increase its psychological services through an additional position.

In addition, the Board contends that a county-wide survey indicates the need for the additional position in order to permit the implementation of a corrective action plan for handicapped pupils which includes psychological counseling.

The Borough agrues that statistics of the Department of Education indicates that the 20% classification rate of Butler pupils is the highest of any district in its district factor group, with the average being 11.7%. The Borough points out that this disparity may indicate over utilization of classification. Even conceding the necessity for so many classified pupils, the Borough contends that current staffing of the district's special education staffing already exceeds the state-wide averages for staffing without the new position.

Further, the Borough points out that although the district argues for this position as a means of reducing consultant services, it is unable to point out any savings that have been achieved through the creation of this position.

Account	Reduction
Social Security for New Personnel	$9,500

The Board points out and the Borough concedes that no Social Security payments are made by the Board since said costs are assumed by the State.

COMMISSIONER'S DECISION

Initially, the Commissioner concludes that the Board has raised a strong argument relative to the deficiencies in the Borough's failure to provide a written statement of reasons at the time the reductions were originally made and its subsequent attempt to rectify said deficiency by adoption of an amendatory resolution two months later. Unquestionably such actions, in addition to the Borough's seemingly haphazard delineation of reasons without identifying specific line items, arriving at incorrect figures and recommending reductions in such areas as social security benefits when such benefits are not the responsibility of the Board, permit the Commissioner pursuant to Deptford, supra, to invoke a heavy presumption against the educational validity of the Borough's actions. The Commissioner's determinations in that regard are set forth below:

Account	Reduction
Principal's Salary	$14,000

The Board has met its burden of demonstrating that its obligations under its contract with its administrators to pay for unused vacation and sick days more than offset the savings to be realized by hiring a new principal at a lower salary than the retiring principal. Therefore, the Commissioner directs that $14,000 be restored.

Teacher's Salaries	$64,000

The need for the two new positions requested by the Board, one each in science and foreign language, has been demonstrated to the Commissioner's satisfaction. While the Borough concedes the need for these positions, its recommended solution that the new positions be financed by virtue of the elimination of positions in

the area of industrial arts and business education is not, as the Board points out, automatically feasible in a comprehensive high school which requires the meeting of the needs of a diverse student body. The Board, however, should be reviewing the totality of its program for purposes of eliminating programs and courses no longer serving student needs. In light of the foregoing, the Commissioner directs the restoration of $64,000 to finance additional teachers in science and foreign language.

Account	Reduction
Guidance Counselor	$32,000

Initially, it should be pointed out that the Borough concedes that the amount of reduction in this item should be $22,855 since the increase requested by the Board was for an increase in guidance services at its middle school from part time to full time.

After carefully weighing the arguments presented by both parties in this matter, the Commissioner concludes that the presence of full-time guidance services in a middle school are a necessary concomitant of a thorough and efficient system of education. This conclusion is buttressed by the arguments presented by the Board as to the increasing need in our society to provide early assistance to children coming from dysfunctional families. The $32,000 reduced by the Borough is restored.

Psychologist's Position	$32,000

The Commissioner has carefully considered the arguments presented by the Board particularly those which set forth a contention of providing services at a lesser cost through the establishment of this position and thus the reduction of the need for as much in the way of consultant services.

Based upon such consideration, the Commissioner finds merit in the Borough's argument that the Board has failed to demonstrate the savings which its contends this position would afford and likewise finds little merit in the Board's argument that these savings are reflected in the fact that the appropriation for consultant services has not risen based upon the 1992-93 figure. Even allowing for a natural increase for inflation, the creation of a $40,000 position should have been reflected in some reduction in the consultant services account.

In light of the foregoing, the Commissioner sustains the reduction of $32,000 for the position of an additional psychologist with the caveat that the Board should be able to fund such a position with the difference of the $8,000 remaining in this account and the effectuation of true savings in the area of consultant services.

Account	Reduction
Health Benefits	$34,000

The $34,000 reduction for health benefits imposed by the Borough are directed to be restored. The Commissioner reaches such determination based upon the restoration of the two additional teachers, the increase in the middle school guidance counselor from part time to full time and the right of the Board to fund the psychologist's position by other means.

Social Security Benefits	$9,500

Since the Board correctly points out that it does not pay social security for the new personnel and the Borough acknowledges its error, the $9,500 reduction is restored.

Account	Reduction
Unspecified	$14,500

While Dr. Stranzl points out that no agreement was reached on his proposed compromise settlement with the Borough, the Commissioner is obligated to take into consideration the interests of the taxpayers of the district once she has become assured of the sufficiency of funds to provide a thorough and efficient system of education. It must be presumed, therefore, given the equal responsibility of the superintendent and the Board to likewise assure a sufficient amount to provide a thorough and efficient education that the offer of a $14,500 across-the-board reduction could be absorbed without injury to the constitutional mandate.

In light of the foregoing, the Commissioner directs that the $14,500 across-the-board reduction as tentatively offered by the superintendent be sustained.

SUMMARY

Account	Sustained	Restored
Principal's Salary	$ 0	$ 14,000
Unspecified	14,500	0
Teachers Salaries	0	64,000
Guidance Counselor	0	32,000
Psychologist	32,000	0
Health Benefits	0	34,000
Social Security	0	$ 9,500
TOTALS	$46,500	$153,500

In light of the foregoing, the Commissioner directs the Morris County Board of Taxation to strike an additional General Fund tax levy of $153,500 for the Butler Public Schools to be used for school purposes in the 1993-94 school year so that the total 1993-94 General Fund tax levy shall be $6,925,794.

COMMISSIONER OF EDUCATION

OCTOBER 29, 1993

DATE OF MAILING - NOVEMBER 1, 1993

266-93

266-93

BOARD OF EDUCATION OF THE TOWNSHIP OF STAFFORD, OCEAN COUNTY, PETITIONER, V. STAFFORD TOWNSHIP COUNCIL, OCEAN COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

OCTOBER 29, 1993

BOARD OF EDUCATION OF THE TOWNSHIP OF STAFFORD, OCEAN COUNTY,

PETITIONER,

V.

STAFFORD TOWNSHIP COUNCIL, OCEAN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of $183,832 made by governing body following voter rejection of proposed budget on April 20, 1993.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore $183,832 for a total General Fund tax levy of $7,026,436 for 1993-94 school purposes.

BOARD OF EDUCATION OF THE TOWNSHIP OF STAFFORD, OCEAN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STAFFORD TOWNSHIP COUNCIL, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

For Petitioner, Howard Butensky, Esq. (Kelly, Butensky, Pepe and Van Keuren)

For Respondent, Annemarie Williams, Esq. (Gilmore & Monahan)

This matter was opened before the Commissioner of Education on May 26, 1993 when the Board of Education of Stafford Township (Board) filed a Petition of Appeal against the Mayor and Council of Stafford Township (Council) seeking restoration of $183,832 reduced from the 1993-94 general fund tax levy appropriation on the grounds of necessity for a thorough and efficient education. Council filed its Answer on July 12, 1993. Council filed its written position statement on August 3, 1993 and the Board's written position and reply were filed on August 5 and August 18, 1993 respectively. Thereafter the record of this matter was closed on August 25, 1993 after expiration of the time for submission of summations. The

relevant facts not deemed to be in dispute are as follows:

- The Board adopted a school budget for the 1993-94 school year to be raised by local taxation including $7,026,436 in current expense and $99,528 in capital outlay.

- The voters rejected the total budget at the annual school election held on April 20, 1993.

- On May 3, 1993 Board and Council met to determine what reduction, if any, in the school budget.

- At the commencement of the meeting, the Superintendent of Schools caused the following memorandum to be distributed to the Council and the Board members present:

> The purpose of this meeting tonight is to discuss the Stafford Township School District budget which was defeated by the electorate on April 20, 1993 by 28 votes, 575 to 547. Although the budget presented to the public reflected a $200,000 decrease from the previous school year's budget it did reflect a 3¢ tax increase from 69¢ to 72¢.
>
> As a matter of review, I would like to point out the following:

Budget	Board of Education Appropriation	Tax Rate
1990 - $10.4 million	$ 420,000	56¢
1991 - $12.1 million	$ 993,000	61¢
1992 - $11.9 million	$ 670,000	69¢
1993 - $11.7 million	-	72¢
Total	$2,083,000	

> Over the past three years the Board of Education has used more than $2 million from surplus to help relieve the burden on the taxpayer and that money is no longer there due to the QEA laws which prohibit school districts from having more than 3% surplus (that figure has recently changed

to 7.5%.) Our defeated budget reflected a figure that equaled our newly established state budget cap. Every budget that is submitted under the QEA cap will lose some of the state aid next year; for every dollar we reduce, the state will cut $1.43 in state aid next year.

In order to arrive at $11.7 million budget figure the Stafford Township Board of Education recommended the following reductions:

- Four less teachers (speech, auditorily handicapped, 3rd grade at Oxycoccus, and 1st grade at McKinley.)

- Four less district-wide custodial positions.

- The elimination of summer school and summer curriculum work for teachers.

The Mayor and I had a preliminary meeting last week to review the defeated budget and discuss modifications. The School Board has been requested to cut an additional $180,000.00 which will make the tax rate 70¢ or an increase of one cent.

As the educational leader of this community, I must make very difficult recommendations to the Board of Education which will reduce the budget by $180,000.00 but in turn will not devastate the educational programs that we have worked so hard and so long to maintain. Irrespective of the cuts mentioned a short while ago I can only say that I, along with Mr. Mento and the members of the Board of Education, have studied this budget from top to bottom, line item by line item, and we now must focus our attention on some of the areas that are unique to our school system which will decrease additional personnel and increase class size. Areas of potential cuts include:

Transportation - Revise the bus routes for 1993-94 adding more time between current runs and eliminate some existing bus runs which will decrease personnel and also the need to purchase one or two new buses which was budgeted at $123,000. In order to accommodate this, the current starting and ending times of all schools will be affected.

Personnel - The Board of Education will be prepared to discuss the need of a district-wide nurse's assistant, a district-wide science teacher, and an adaptive physical education teacher.

Class Size - It will be recommended that the sixth grade and fifth grade reduce the number of sections by one, thus increasing size in the fifth grade from 20.7 to 24.1 per and in sixth grade from 22.8 to 26.6 per.

These additional cuts may affect four teachers and three support staff members.

- At the same meeting, Council adopted a resolution reducing the Board's current expense appropriation from $7,026,436 to $6,842,604 which resulted in a general fund local tax levy reduction of $183,832 for the 1993-94 school year.

- The reduced tax levy was certified by Council to the Ocean County Board of Taxation on May 4, 1993.

- Attached to Council's Answer and made part of its tax levy certification as revised Schedule "A," are the following recommended current expense line item reductions:

Line Item	From	To	Amount of Reduction
156 Grade 1-5 Teachers	$2,227,723	$2,139,723	$ 88,000
506 Other Employee Benefits	$1,819,240	$1,806,240	13,000
560 School Buses - Regional	$ 123,000	$ 40,168	82,832
		Total Reduction	$183,832

The Commissioner observes that Council has presented no statement of specific reasons for each of the recommended current expense line item economies listed above, but rather, as indicated in its written position statement of August 3, 1993, Council adopted as its own statements made in the Superintendent's memorandum of May 3, 1993, ante, as its reasons for making such reductions.

The Board in its response to Council's position statement rejects Council's effort to incorporate such statements made by the Superintendent as being valid or in compliance with the provisions

of N.J.A.C. 6:24-7.2(b)4 and N.J.A.C. 6:24-7.7(a)2. More specifically, the Board in its reply argues that:

> ***The reason for the omission is clear, the governing body had no supporting reasons as it merely established a number and left it to the Board of Education to implement the reduction. Such a procedure is contrary to the statutory scheme for a defeated budget in a Type II District. the fact that Dr. Buyarski attempted, on behalf of the Petitioner, to determine whether the budget could absorb the predetermined reduction is nothing more than a good faith effort to resolve the budget dilemma and can certainly not be adopted by the municipality as its position.*** (Board's Reply, at p. 2)

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

Mindful, then, of the balance to be applied in her standard of review, the Commissioner makes the following determination with respect to the reduction in the current expense tax levy effectuated by the Council.

Initially, the Commissioner will review those respective positions of the parties regarding whether or not the Council may rely on the Superintendent's memorandum of May 3, 1993 as satisfying the mandatory requirements of N.J.A.C. 6:24-7.2(b)4 and N.J.A.C. 6:24-7.7(a)2. In this regard, the Commissioner finds the language laid down by the Court in East Brunswick, supra, as being dispositive wherein the Court stated in pertinent part:

> The governing body may, of course, seek to effect savings which will not impair the educational process. But its determinations must be independent ones properly related to educational considerations rather than voter reactions. In every step, it must act conscientiously, reasonably and with full regard for the State's educational standards and its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community. [East Brunswick, at 105-106.]

The Commissioner, upon review of the Superintendent's memorandum of May 3, 1993, supra, cannot agree that such statements contained therein, which, as a matter of fact, were never formally adopted by the Board, can, by any stretch of imagination, be construed as being appropriate to be considered as independent reasons upon which Council arrived in making its current expense tax levy reduction of $183,832. The Commissioner so holds.

Council's failure to independently arrive at specific reasons for its line reductions, however, does not automatically result in a full restoration of the current expense line item reductions controverted herein. Such remedy is too extreme and

shall not prevent the Commissioner from complying with the constitutional and statutory responsibilities of her office as laid down by the Court in Board of Education of the Township of Deptford v. Mayor and Council of the Township of Deptford, 116 N.J. 305 (1989)

In addressing this issue the Court held in pertinent part

> ***if the municipality fails to submit reasons contemporaneously with its certification of budget cuts, the Commissioner of Education in the course of an ensuing appeal is entitled to invoke a heavy presumption against the educational validity of the proposed budget cuts. Hence, the greater the delay in the submission of detailed reasons in support of such cuts, the stronger will be the presumption against their validity and the heavier will be the municipality's burden on appeal to establish the validity of the reduced budget. In that posture, the Commissioner will be entitled initially to presume that such cuts have been made purely for extra-educational reasons or for political expediency without specific cognizance taken of their educational effects.***
>
> (Deptford, at 320-21)

Line Items	Reduction
156 - Teachers (Grades 1-5)	$88,000
506 - Other Employee Benefits	$13,000

The Board argues that the recommended reductions imposed by Council in the above-referenced line items would further exacerbate those reductions in teaching staff and custodial personnel it had previously made prior to the adoption of its 1993-94 budget request. At that time, the Board budgeted for three less teachers and eliminated four custodial positions. The Board maintains that Council's reductions herein would require the abolishment of three more teaching positions which could not be accomplished without compromising its mandate to provide a thorough and efficient program of education for its pupils. Similarly, the Board points out that the employee benefits which attach to these positions are mandated

by law and cannot be eliminated. (See Superintendent's Memorandum of May 3, 1992, supra, and Board's Position Statement, at pp. 2-3)

The Commissioner finds and determines that the $88,000 budgeted for teachers' salaries (#156) and the $13,000 for other employee benefits (#506) must be restored to the current expense tax levy in order to provide stability in its education program for the 1993-94 school year and further curtailment of its educational programs. Therefore, the respective reductions of $88,000 and $13,000 made by Council in line items #156 and #506 are directed to be restored.

Line Item	Reduction
560 - School Buses	$82,832

The Board argues that three of its school buses were scheduled to go off line by virtue of age for the 1993-94 school year. These buses were to be replaced by three new school buses. The line item reduction of $82,832 will be necessary for the replacement of one of the three school buses in question. Without restoration of this amount the Board maintains that it will be unable to provide the minimum number of school buses required to transport its pupils to and from school. The Board points out that it provides busing for more than 95% of its pupils for safety reasons because of a lack of sidewalks within the geographical area of the three public schools it operates in Stafford Township. Moreover, the need for pupil transportation had been required by Board policy by virtue of the fact that all three schools are in close proximity to the heavily traveled highways of Routes #9 and #72 in Ocean Township.

The Commissioner finds and determines that the Board has met its burden of proof with regard to the restoration of $82,832 for the replacement of one of its school buses during the 1993-94 school year. It is therefore directed that Council's reduction in this line item be set aside.

Thus, for the reasons set forth above, the Commissioner finds and determines that Council's reduction of $183,832 in the general fund tax levy for the 1993-94 school year be set aside.

The general fund tax levy of $6,842,604 originally certified by Council to the Ocean County Board of Taxation for the 1993-94 school year will be increased by $183,832.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 29, 1993

DATE OF MAILING - OCTOBER 29, 1993

267-93

BOARD OF EDUCATION OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY,

RESPONDENT,

V.

TOWNSHIP COUNCIL OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

OCTOBER 29, 1993

BOARD OF EDUCATION OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY,

RESPONDENT,

V.

TOWNSHIP COUNCIL OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of $1,275,439 made by governing body following voter rejection of proposed budget on April 20, 1993.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore $576,671 for a total General Fund tax levy of $15,069,350 for 1993-94 school purposes.

BOARD OF EDUCATION OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY, RESPONDENT,	:	
V.	:	COMMISSIONER OF EDUCATION
TOWNSHIP COUNCIL OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY, RESPONDENT.	:	DECISION

This matter was opened before the Commissioner by way of a Petition of Appeal on June 3, 1993 from the Board of Education of the Township of Jefferson (Board) appealing the reduction in the 1993-94 budget imposed by the Council of the Township of Jefferson (Township) pursuant to the provisions of N.J.S.A. 18A:22-37. The aforesaid constituted a $1,275,439 reduction in the General Fund tax levy for the 1993-94 school year. As a result of this reduction, the amount in dispute before the Commissioner is set forth below as required pursuant to N.J.A.C. 6:24-5.3(c):

Proposed Tax Levy Adopted by the Board		Amount of Tax Levy Set by Governing Body
Current Expense:	$15,118,132	$13,842,693
Capital Outlay:	$ 649,986	$ 649,986
Amount of Reduction in the Budget of Governing Body		**Amount of Reduction in Dispute Before the Commissioner**
Current Expense:	$1,275,439	$1,275,439
Capital Outlay:	-0-	-0-

On June 10, 1993 the Township filed its Answer to the Petition of Appeal which included within such Answer the list of specific line item reductions along with the reasons for their

imposition contained in the Township's original resolution establishing the reductions and setting forth the General Fund Tax Levy.

In August the Board filed its Statement of Position in the form of affidavits from Richard D. Reilly, Business Administrator/ Board Secretary and Sheldon F. Rubin, Superintendent of Schools. By way of a letter of August 3, 1993, the Township waived its Position Statement relying upon its summary of line item reductions and the reasons therefore as submitted in its Answer. On August 6, 1993 by way of a letter of that date, the Board waived its response to the Township's Position Statement relying upon the affidavits of Mr. Reilly and Mr. Cohen as representing its response to the Township's position. The Township filed a response by way of letter brief dated August 16, 1993 and the Board filed a Summary Statement on September 1, 1993 whereupon the record was officially closed.

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East

Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

In the instant matter, the Township, upon defeat of the 1993-94 budget by the electorate, did confer with the Board as required by N.J.S.A. 18A:22-37 and established a tax levy to be used for school purposes. The aforesaid tax levy was established by imposing the following line item reductions:

Summary of line item reductions to the 1993-94 Jefferson Township Board of Education budget:*

Account Number		Amount
120b	- Legal Fees	$ 15,000
130a	- Board Member Expenses	3,600
130m	- Printing	2,300
213	- Instructional Salaries	150,000
240	- Teaching Supplies	45,000
420c	- Miscellaneous Health Expenses	2,500
545	- Curricular Activities	7,000
550	- Other Transportation Expenses	55,000
630	- Heat	60,000
650a	- Custodial Supplies	10,000
660d	- Miscellaneous Operating Expenses	7,000
720	- Contracted Services	60,000
810a	- State and County Retirement Fund	68,266
810c	- Social Security Other	101,573
820a	- Property Insurance	5,700
820b	- Employee Insurance	230,000

* The reasons for the above-cited reductions were also contained in the Township's resolution imposing the reductions but will be considered at the Township's request as its official statement of Position.

Account Number		Amount
820c	- Liability Insurance	2,500
870	- Tuition	100,000
660	- Budgeted Fund Balance	350,000
Total		$1,275,439

TOWNSHIP'S POSITION

Initially, the Commissioner notes that the Township sets forth a long list of items and information which it alleges it requested from the Board and which it contends it never received. The specifics of such allegations are set forth in detail as Exhibit A attached to its resolution setting forth the reduced tax levy, which is the subject of the controversy herein. The following represents the Township's reductions and its reasons for said reductions:

Account	Reduction
120b - Legal Fees	$15,000

The Township contends that prior to 1992-93 the Board's expenditures for legal fees amounted to $18,901, $22,289 and $20,089 for the years 1989-90 to 1991-92. The amount budgeted for 1992-93 was $25,000. For 1993-94, the Board budgeted $50,000 which represents a 100% increase which the Township believes is unjustified. The Township argues that even with the reduction imposed the Board is permitted a $10,000 increase over the 1992-93 appropriation.

130a - Board Member Expenses $ 3,600

The Township argues that the Board should hold the line on expenses in this area due to the existing economic climate. The above reduction of $3,600 would maintain expenditures for Board attendance at conferences and seminars at the $24,000 appropriated for 1992-93.

Account	Reduction
130m - Printing	$ 2,300

The Township argues that the amount budgeted in 1992-93 was $7,282 from which monies were transferred out leaving an amount of $4,672, most of which was expended. The Township argues that the 1993-94 budgeted amount should not be compared to the 1992-93 budgeted amount but to the 1992-93 actual expenditure. The Township therefore argues that this account should be frozen at its current spending level, thus the $2,300 recommended reduction which still lowers the increase for 1993-94 at 7% above 1992-93 expenditures.

213 - Instructional Salaries $150,000

The Township points out that every year the Board projects its salary needs based upon the salaries of current staff; however, each year teachers at the top of the salary schedule retire and are replaced by teachers at the lower end resulting in significant savings each year. In 1992, the Township contends this difference amounted to $245,930. The Township contemplates similar savings for the 1993-94 school year and thus believes itself justified in reducing this account by $150,000.

240 - Teaching Supplies $45,000

The Township, while contending a sensitivity to reductions in accounts directly impacting on students, nevertheless argues for consistency over the years when student enrollment and staffing remain relatively constant. The Township contends that as of the filing of its position, expenditures in this account represented $109,956 for 1992-93 with two months to go and that the annual average audited expenditure over a four-year period including 1992-93 is $164,350. It therefore questions the need for a 50%

increase in this account over 1992-93 to a proposed expenditure level of $242,882 without any increase in enrollment or teaching positions. It argues that even with the $45,000 reduction in this account there is a sufficient built-in increase to account for inflation.

Account	Reduction
420c - Miscellaneous Health Expenses	$2,500

The Township argues that a 40% increase in this account is unwarranted.

545 - Curricular Activities $7,000

Normal expenditures in this account between 1989-90 and 1991-92 have ranged from $19,294 to $24,366 with $10,911 expended so far in 1992-93. While the Board budgeted $39,549 in 1992-93, it transferred $19,549 from this account during the year. The Township therefore argues that a budgeted amount of $30,355 for 1993-94 is unwarranted.

550 - Other Transportation Expenses $55,000

The Township contends that the Board's decision to contract out certain bus routes should have produced reductions in expenditures for gasoline, oil and tires, however, proposed spending for 1993-94 exceed current spending levels in each of the areas indicated above. (See Township's Statement of Reasons for exact figures.)

630 - Heat $60,000

The Township argues that the Board's projections of expenditures in this area have historically been poor yet actual expenditures has been consistent, i.e., expenditures of $139,906, $146,908 and $142,156 over the past three years with $123,400

expended for 1992-93 with three spring months remaining. The Township also points out that the Board has routinely transferred money from this account, i.e., $48,538 in 1991-92 and $60,000 in 1992-93, yet it has budgeted the same amount for 1993-94 as the 1992-93 year.

Account	Reduction
650a - Custodial Supplies	$10,000

As in the previous account, the Township argues for consistency in expenditures for custodial supplies. It points out that a proposed expenditure for 1993-94 of $55,551 is nearly 50% higher than the average of the actual expenditures of $39,555 and $35,984 over the previous two years.

660d - Miscellaneous Operating Expenses	$ 7,000

The Township argues that the Board budgeted $11,000 in this account for 1992-93 but reduced it to $5,000 during the year and expended only $887.50 as of the filing of this appeal. In 1991-92 actual expenditures in this account amounted to $2,269. Given the expenditures in this area in the past, the Township argues that no rationale exists for budgeting $10,000 in this account for 1993-94.

720 - Contracted Services	$60,000

The Township contends that the Board has historically overbudgeted in this account pointing out that $85,258 was transferred out in 1990-91, $106,500 in 1991-92 and $104,000 in the current year leaving a budgeted amount of $315,953. Given this history, the Township argues that a budget of $315,703 for 1993-94 is unwarranted.

Account	Reduction
810a - State and County Retirement Fund	$ 68,266

The Township argues that this account is overbudgeted. It contends that the 1991-92 bills amounted to $88,820. The 1992-93 budget was overbudgeted by $50,000 as that amount was transferred out. The 1993-94 budgeted amount of $165,968 is the same as the allegedly overbudgeted 1992-93 budget. The $68,266 reduction in this account, the Township contends, still allows for a 10% increase over the previous year's expenditures.

810c - Social Security Other	$101,573

This represents social security payments for persons not covered by the State. In this account, the Township contends that the amount budgeted for 1993-94 was based upon the 1992-93 budgeted amount of $384,973. The Council contends that actual spending in this area will amount to $260,000 for 1992-93. While acknowledging an increase for 1993-94, the Township contends that a 9% increase over 1992-93 actual spending is sufficient to meet Board needs which would permit the $101,573 amount by which this account was reduced.

820a - Property Insurance	$ 5,700

The Township finds that 17.3% increase in insurance in this account to be excessive compared to what it believes to be a reasonable increase of 7.2% budgeted for between 1991-92 and 1992-93. Even with the reduction provided for in this account, the Township argues that the Board will still have a sufficient amount to provide for a 10% increase in premiums.

820b - Employee Insurance	$230,000

The Township acknowledges that insurance expenditures, especially for health benefits are difficult to predict, however, by

the time of this filing more concrete figures are available to the Board. The Township recognizes that State Health Benefits are increasing over 1992-93 but for less than the 27% budgeted by the Board. It contends the same is true for dental and workers compensation insurances. The Township therefore argues that the $230,000 reduction in this account still leaves a 17.5% increase over 1992-93, an amount which it deems adequate based upon its analysis of the insurance market.

Account	Reduction
820c - Liability Insurance	$ 2,500

The Township questions the Board's decision to budget a 19% increase factor despite the fact that the 1992-93 premium cost only 84% of the amount budgeted for that year. With the reduction imposed here, the Township contends a 10% increase factor is left in the amount budgeted.

870 - Tuition	$100,000

The Township acknowledges the difficulty faced by the Board in budgeting for tuition costs due to the uncertainty of how many students may be classified during the school year. Notwithstanding such recognition, the Township argues that there is a 46% increase between 1992-93 and 1993-94 based upon a $798,233 budget in 1992-93 and a proposed amount of $1,163,900 in 1993-94. The Township argues that past experience in this area in no way justifies the increase requested by the Board. It contends that even with the reduction imposed herein, it still permits a 20% increase over 1992-93 expenditures.

Account	Reduction
660 - Budgeted Fund Balance	$350,000

The Township believes that the Board should utilize additional surplus in 1993-94 to reduce the tax burden. The Township argues that the Board has finished the school year with the following surplus balance over the last three years:

1990	$ 600,828
1991	$ 127,460
1992	$ 604,184
1993	$1,500,000 (Township estimate)

The Township contends that the Board has a history of finishing each year with a surplus. It argues that it wishes to provide the Board with more than a 2.5% budget surplus. The Township contends that its proposed reduction of $350,000 in surplus will still leave the Board with more than $1,008,650.

BOARD'S POSITION

The Board generally argues that the actions of the Township in reducing the budget were arbitrary and capricious. It further contends that the Township used budget years out of context to create a distorted picture and invalid comparisons. The Board's line item justifications are set forth below:

Account	Reduction
120b - Legal Fees	$15,000

The Board disputes the arguments of the Township that the $50,000 1993-94 budget represents a doubling of the $25,000 expenditure in the 1992-93 budget. The Board points out that its actual expenditures for 1992-93 was approximately $150,000 and that its budget of $50,000 for 1993-94 represents less than half its actual expenditure in 1992-93. The Board points out that the Township in averaging expenditure based upon past years ignored the

$105,000 spent in 1992-93 which would have yielded an average of $49,333 almost exactly the amount budgeted for 1993-94.

Account	Reduction
130 - Board Members Expenses	$ 3,600

The Board contests the idea that 1993-94 expenditures be held at 1992-93 levels. Of the $27,600 budgeted for 1993-94, $23,400 is required by law (N.J.S.A. 18A:6-50) to be paid as dues to the New Jersey School Boards Association leaving only $2,300 to cover expenses to conferences and new Board members' orientations.

130m - Printing	$2,300

The Board points out that printing of the calendar at $3,500, the budget newsletter at $1,800 and postage of $2,000 to distribute them consumes the entire printing budget.

213 - Instructional Salaries	$150,000

The Board disputes the Township's assumption that retirements of high salaried people and hiring of new teachers at lower salary levels will reduce this account sufficiently to permit the $150,000 reduction imposed. The Board contends that it anticipates only one retirement with a replacement of that $50,000 salary by a $28,609 salary, a saving of only $21,651. Despite this saving, the Board argues that the Township did not consider into its calculations the factor of teacher movement on the guide due to changed educational status which it alleges could amount to $50,000.

240 - Teaching Supplies	$ 45,000

The Board challenges the Township's tactic of using prior year spending averages to arrive at its reduction. The Board contends that its budgeting in this area is based on set figures per student which have not changed over the years of $60.50 per

elementary student, $64.13 per middle school student and $65.34 per high school student. Further, the Board points out that its per pupil expenditures in this area ranks 27th out of 29 districts in Morris and Sussex Counties.

Finally, the Board contends that the Township uses inaccurate figures for 1992-93 based upon April expenditures of $109,956 when total 1992-93 expenditures were $208,000 out of a budgeted amount for that year of $210,285, which was itself a reduction from $221,992 in 1991-92. Thus, the Board contends that the reduction imposed by the Township would result in an amount less than $200,000 for instructional supplies when actual expenditures for the past three years were in excess of $200,000.

Account	Reduction
420c - Miscellaneous Health Expenses	$2,500

This account contains funds for independent evaluations of handicapped children by outside professionals and not supplies as indicated by the Township. In 1992-93 the Board contends it budgeted $9,000 and expended $11,200. The Board contends that prudence dictates increasing this account by a small amount to $12,400.

545 - Curricular Activities	$7,000

The Board argues that while the Township makes much of the fact that $19,549 was transferred from this account in 1992-93, it fails to consider the fact that this account interacts with the 520c account utilized when outside buses are required. Taken together, these two accounts are consistent in their spending patterns.

The Board further points out that much of the spending in this account occurs during the spring and that actual expenditures as of May 20, 1993 were $21,000.

Since this account is influenced by playoffs in sports, it argues that a $30,355 budget in this area is appropriate and a reduction of $7,000 cannot be sustained.

Account	Reduction
550 - Other Transportation Expenses	$55,000

The Board agrees that it can sustain a cut of $33,500 in this budgetary item.

630 - Heat	$60,000

The Board concedes that it could sustain a reduction of $45,000 in this account.

650a - Custodial Supplies	$10,000

The Board concedes this reduction.

660d - Miscellaneous Operating Expenses	$ 7,000

The Board concedes the reduction in this area.

720a - Contracted Services	$60,000

The Board contends that there has been a history of deferred maintenance in the district where monies have been transferred from this account to fund other emergencies. The Board cites a $45,000 parking lot repair cancelled to provide for increased legal fees, as well as other circumstances.

810a - State and County Retirement Fund	$68,266

The Board points out that its statement of accounts from PERS amounted to $118,000 out of $165,968 budgeted leaving a potential excess in this account of $47,968. With a contingency of $5,000, the Board accedes to a reduction of $42,968.

Account	Reduction
810c - Social Security Other	$101,573

The Board budgeted $384,973 and it anticipates expenditures of $320,000. The Board contends that prudent budgeting requires it consider that new hires may increase this amount in addition to possible tax increases. Using the Council's own figure of an allowable 9% increase, the Board argues that this account should be held at $350,000, permitting the Board to agree to a $34,973 reduction.

820a - Property Insurance $ 5,700

The Board contends that it has been informed of significant property insurance increases due to classroom expansion projects and therefore argues that it cannot agree to reduction of the $92,310 it budgeted in 1993-94.

820c - Liability Insurance $ 2,500

The Board agrees that it can absorb the above reduction.

820b - Employee Insurance $230,000

The Board sets forth the following figures as actual amounts for 1993-94:

Medical Insurance	$2,422,073
Dental Insurance	241,083
Workers Compensation	247,143
	$2,910,299

Based upon an amount budgeted of $3,002,504, this leaves a cushion of $92,205.* The Board argues that its remaining cushion is

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* The Commissioner notes that the Board due to arithmetical error cites this figure as $62,504.

reasonable in that each additional family coverage costs the district $10,000 and that it anticipates further increases in workers compensation rates due to a pending case.

Account	Reduction
870 - Out of District Tuition	$100,000

The Board argues that its known expenditures in this account also include payments based on extended school year and tuition adjustments from a prior year. The Board indicates that it requested a 10% increase for special education tuition over the $925,000 expended in 1992-93 yielding a preliminary amount of $1,017,500. Two new students added an additional $50,000 bringing the total to $1,067,500. When Vo-Tech tuition is added, the total amount equaled the budgeted amount of $1,163,900.

660- Budgeted Fund Surplus	$350,000

The Board offers no argument other than to contend that the State recommends a 3-5% surplus to meet emergency needs. The Board, it is noted offers no figures to its anticipated surplus of June 30, 1993.

COMMISSIONER'S DETERMINATION

Initially, in addressing the Township's contention that the Board failed to provide all the information requested of it, the Commissioner notes the detailed response provided by the Board in its final summation. Based upon that response and upon the consideration by the Commissioner of what requirement is imposed on a board of education by law, she cannot conclude that the Board failed in its legal responsibilities. Therefore the item-by-item

determination of the Commissioner is set forth below:

Account

120b - Legal Fees

The Township concedes that the $15,000 reduction should be restored based upon the Board's explanation.

113a - Board Member Expenses

The Township concedes that the $3,600 reduction in this account should be restored.

130m - Printing

The Commissioner finds and determines that the Board has failed to justify why the amount expended in 1992-93 would be insufficient to meet its printing needs in 1993-94. The $2,300 reduction is sustained.

213 - Instructional Salaries

The Commissioner finds the Board's figures as they relate to the savings to be realized from retirements at the top of the salary guide to be persuasive. Under the circumstances, however, an amount of $21,651 to be held in reserve for guide movement would appear to be unnecessary. The Commissioner finds persuasive the Township's argument that such amount should have been projected in the original budget figures. Therefore, the Commissioner directs that a $22,000 reduction be sustained and that $128,000 be restored.

240 - Teaching Supplies

Based upon the Board's own figures as to student enrollment and the per pupil amount budgeted at the three levels, the Commissioner notes that even utilizing the budget figure per pupil at the high school level ($65.34) for all approximately 3,000 students, the amount to be expended would be $196,020, thus permitting the absorption by the Board of the $45,000 reduction

imposed by the Township. While extremely sensitive to reductions in teaching supplies, the Board's total reliance upon per pupil expenditure levels without explanation of further factors leads the Commissioner to sustain the $45,000 reduction imposed by the Township.

Account

420c - Miscellaneous Health Expenses

The Commissioner finds that the Board has met its burden in demonstrating that $11,200 has been expended in this account as of June 30, 1993. She finds no merit in the Township's argument that the Commissioner rely solely upon expenditures encumbered as of the date of the appeal. Consultation services may occur at any time during a school year and thus a slight cushion over 1992-93 expenditures is justified. The Commissioner directs the restoration of $2,500 in this account.

545 - Curricular Activities

The Commissioner finds that the Board has failed to provide sufficient specific dates to demonstrate its inability to sustain a reduction in this account. The $7,000 reduction is sustained.

550 - Other Transportation Expenses

The Commissioner notes that the Board agrees to a $35,000 reduction in this account. She also notes that the Township argues that the Board fails to provide specific figures as to why only a $3,500 reduction should be imposed rather than the $55,000 reduction recommended by the Township. The Commissioner finds merit in the Township's position since the burden rests clearly with the Board. Consequently, the Commissioner sustains the $55,000 reduction imposed by the Township.

Account

630 - Heat

Once again, the Board concedes its willingness to absorb a reduction of $45,000, some $15,000 less than that imposed by the Township. The Township, however, argues that the Board has failed to defend its position with specific data. The Commissioner agrees. The $60,000 reduction is sustained.

650a - Custodial Supplies

The Board accepts the $10,000 reduction in this account.

660d - Miscellaneous Operating Expenses

The Board accepts the $7,000 reduction in this account.

720 - Contracted Services

While the Board argues that the transfers from this account in past years here resulted in unmet repair needs, it does not provide a list of such needs which would justify its budgeted amount in 1993-94. Since the burden of demonstrating need rests with the Board, the Commissioner finds that the reduction of $60,000 be sustained.

810a - State and County Retirement Fund

The Board agrees that a reduction of $42,968 can be accepted and the Commissioner agrees that a $5,000 cushion above actual costs is defensible. Therefore a $42,968 reduction is sustained and $25,298 is restored.

810c - Social Security Other

Based upon the figures provided by the Board in its sworn affidavit of Mr. Reilly, the Commissioner determines that a $35,000 reduction be sustained and that $66,573 be restored.

Account

820a - Property Insurance

The Township agrees with the restoration of $5,700 in this account based upon information provided by the Board.

820b - Employee Insurance

Based upon the 1993-94 figures provided by the Board for Health and Dental Benefits and Workers Compensation, the Commissioner determines that the entire amount of $230,000 by which the Township reduced this account be restored. The Commissioner finds merit in the Board's argument of maintaining a cushion of approximately $62,000 when each new person added to district employment costs $10,000.

820c - Liability Insurance

The Board agrees that it can absorb the $2,500 reduction in this account.

870 - Tuition

Based upon the information provided by the Board and the Township's acquiescence in a $57,500 restoration, the Commissioner determines that the Board has met its burden of demonstrating its need for the full amount of $1,163,900 as provided in its original budget, particularly in light of the unpredictability of ultimate costs in this account. Therefore, the Commissioner directs that the $100,000 reduction be restored.

660 - Budgeted Fund Balance

The Commissioner notes that the Board's audited surplus as of June 30, 1992 was $604,183.73. Such a surplus figure applied against the $15,768,118 of the Board's projected budget for 1993-94 yields a 3.8% surplus. The Commissioner notes that the Council

projects a June 30, 1993 surplus significantly greater than the audited figure for 1992 and that the Board offers no argument in refutation of that figure. In light of the burden imposed by the courts in East Brunswick, supra, and Deptford, supra, the Commissioner finds that the Board has failed to demonstrate that it cannot absorb the $350,000 reduction in surplus directed by the Township. The reduction of $350,000 is sustained.

The following represents a summary of all accounts restored and sustained.

Account	Sustained	Restored
120b	$ 0	$ 15,000
113a	0	3,600
130m	2,300	0
213	22,000	128,000
240	45,000	0
420c	0	2,500
545	7,000	0
550	55,000	0
630	60,000	0
650a	10,000	0
660d	7,000	0
720	60,000	0
810a	42,968	25,298
810c	35,000	66,573
820a	0	5,700
820b	0	230,000
820c	2,500	0
870	0	100,000
660	350,000	0
TOTAL	$698,768	$576,671

In light of the foregoing, the Commissioner directs the Morris County Board of Taxation to strike an additional tax levy for school purposes of $576,671 for the Board of Education of the Township of Jefferson so that the total General Fund tax levy for the 1993-94 school year shall be $15,069,350.

COMMISSIONER OF EDUCATION

OCTOBER 29, 1993

DATE OF MAILING - NOVEMBER 1, 1993

268-93

UNION CITY EDUCATION ASSOCIATION AND ROBERT DORSETT, PETITIONERS,	:	
V. BOARD OF EDUCATION OF THE CITY OF UNION CITY, HUDSON COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

SYNOPSIS

Petitioner, unsuccessful candidate for various coaching positions, alleged violation of law in Board's selection of other individuals for positions for which he qualified.

ALJ determined Board's decision to hire other individuals including three county certified substitutes rather than petitioner to coaching positions was not arbitrary and capricious. Moreover, ALJ found there was no automatic preference under N.J.A.C. 6:29-3.3 for full-time employees over part-time employees in the same district. N.J.A.C. 6:29-3.3(c) was inapplicable to this case since no out-of-district personnel holding county certificates were involved. Petition was dismissed.

Commissioner affirmed dismissal of petition but rejected ALJ's conclusions of law. Pursuant to N.J.A.C. 6:29-3.3, a preference exists for coaches who hold standard certification and who are teaching staff members in the district. (Norcross; Chambers) Further, when two board employees with standard teaching certificates apply, since no general entitlement to any coaching position exists, Board's failure to appoint petitioner over another standard-certified teacher who applied later was not arbitrary. Moreover, because Board felt petitioner's class play advisorship duties would conflict with coaching duties, neither was petitioner entitled to position offered substitutes, although absent his appointment as class play advisor, he would otherwise have been entitled to those coaching positions offered to county-certified substitutes, under the prescriptions of N.J.A.C. 6:29-3.3.

NOVEMBER 1, 1993

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10441-91
AGENCY DKT. NO. 350-9/91

UNION CITY EDUCATION ASSOCIATION and ROBERT DORSETT,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF UNION, HUDSON COUNTY,
Respondent.

Paul L. Kleinbaum, Esq., for petitioner
(Zazzali, Zazzali, Fagella & Nowak, attorneys)

Louis C. Rosen, Esq., for respondent
(Patino-Treat & Rosen, attorneys)

Record Closed: June 16, 1993 Decided: September 14, 1993

BEFORE **MARYLOUISE LUCCHI-McCLOUD,** ALJ:

This matter arises out of a petition filed on behalf of the petitioner alleging that the respondent Board of Education improperly failed to appoint him to several coaching positions in the school district.

The petition was filed on September 24, 1991 and an answer was filled in this case on November 4, 1991. The matter was then transmitted to the Office of Administrative Law (OAL) on November 13, 1991 for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to -13.

This case was set down for a hearing on July 16, 1992 however that date was adjourned at the request of respondent's attorney. The matter was then rescheduled for December 30, 1992 which date was adjourned at the request of petitioners' attorney. It was then given a date of April 26, 1993 and a hearing was held on that date as well as on May 11, 1993. The hearing record was left open until June 6, 1993 for posthearing submissions by the parties. The time for them to file those documents was extended until June 16, 1993 at the request of respondents' attorney with the consent of his adversary. Upon receipt of those submissions on June 16, 1993, the record closed. The time in which to render an initial decision would ordinarily have expired on July 31, 1993 however, an Order of Extension was signed granting an extension until September 14, 1993 in which to file the initial decision.

The original caption and filing was on behalf of the Union City Education Association and Robert Dorsett. At the time of the hearing it was agreed that the Union County Education Association is not a party to this matter and that Robert Dorsett is in fact the party in interest.

STIPULATED FACTS

At the time of the hearing, both sides entered into a written stipulation of facts which are uncontroverted:

1. Petitioner is a full-time, tenured teacher in the employ of the Board who has held numerous appointments as a coach.

2. Petitioner applied to be head coach for cross country and indoor and outdoor head coach track at Emerson High School pursuant to a posting of April 8, 1991.

3. Petitioner did not respond to a posting on or about April 8, 1991 for the position of head coach for indoor and outdoor track at Union Hills School.

4. The only applicant for the positions of head coach for indoor and outdoor track at Union Hills High School, Michael McGinley, a certified substitute

teacher in the employ of the Board, was appointed to the two positions on June 6, 1991, and petitioner was appointed to the head coach cross country position at Emerson High School on the same date.

5. On June 11, 1991, the Board posted head coaching positions for indoor and outdoor track at Union Hills and Emerson High Schools. Petitioner applied for the positions at Union Hills High School and reapplied for the positions at Emerson High School.

6. Petitioner also applied for assistant basketball coaching positions at both high schools.

7. On June 25 and 27, Alvaro Tirado, a full time certified teacher, applied for the head coaching positions at both high schools for indoor and outdoor track, respectively.

8. On July 25, 1991, petitioner was appointed to the position of head coach for cross country track at Emerson High School. McGinley's appointment as head coach for indoor and outdoor track at Union Hills High School was affirmed as well.

9. On July 25, 1991, the Board appointed three certified substitute teachers then in its employ and one full-time teacher to assistant basketball coaching positions.

10. On August 29, 1991, the Board appointed Tirado to the head coaching position for indoor and outdoor track at Emerson High School.

11. The Board could not have appointed petitioner to a coaching position for indoor track and basketball, as the seasons for those two sports overlap.

12. Respondent Board has not adopted written guidelines or policies regarding qualifications for athletic coaching positions. The Board's stipulation to this fact may not be construed as an implied admission of relevance to any legal issue

13. Respondent Board submitted applications for approval to hire substitute teachers to the County Superintendent for Michael McGinley, Joseph Blake and Dale Brooks dated September 16, 1991, August 29, 1991 and September 17, 1991, respectively. The applications were subsequently approved by the County Superintendent. The Board's stipulation to this fact may not be construed as an implied admission of relevance to any legal issue.

As these facts have been stipulated to by the parties, I **FIND** them to be operational facts in this case.

TESTIMONY

Testimony was taken from Robert Dorsett during the hearing. He had been employed by Union City for 18 years as a physical education teacher at Edison and was certified for K through 12 in health and physical education. He also holds a certification in administration and supervision. In the past he had held head cross country coaching positions for 17 years, held indoor track coach positions for 17 years, and head outdoor track coach position for 17 years. Mr. Dorsett is also the president of the Union City Education Association and it is that association that has the contract with Union City Board of Education.

Mr. Dorsett explained during his testimony the positions that he applied for which included head track coach for boys at Union Hills and Emerson, track coach for indoor and outdoor track boys at Union Hills and Emerson as well as assistant coach for basketbill at Union Hills and Emerson. He stated that he may have applied for other positions. He was not appointed as assistant basketball coach. He did state that he was willing to perform in any of these coaching positions, but did confirm that indoor track and basketball overlapped. He stated however, that there was no conflict between outdoor track and basketball.

Mr. Dorsett described that he had previously held track coaching positions at Emerson but had not held basketball coaching positions at either Union Hills or Emerson.

The petitioner conceded that on January 7, 1991 the Board of Education appointed Michael McGinley as head indoor and outdoor track coach at Union Hills. At that time he did not complain to anyone about the appointment. He reapplied for head coach indoor and outdoor track at Emerson because that position had not been filled. He also applied for indoor and outdoor track coach at Union Hills even though he knew that position had already been filled. He was not aware of any action by the Board rescinding that appointment.

The petitioner was appointed cross country coach on June 6, 1991.

He has been coaching in Union City for 17 years and he described the seasonal nature of coaching. It begins in the fall with cross country and then moves on to indoor track and then later to outdoor track. Some students overlap from each activity into the next. He stated that sometimes individuals get indoor and outdoor coaching positions together but sometimes they did not. According to petitioner normally both were given to the same individual. Indoor track was from after Thanksgiving until approximately the end of February, outdoor track would follow that.

The petitioner stated that one does not prepare before the season other than perhaps making phone calls regarding whether or not students have had physicals.

Outdoor track begins approximately March 8 each year, although it varies slightly from year to year. He stated that there is a small gap between the indoor and outdoor track season which could be up to as much as three weeks. Outdoor track usually ends in early June.

The petitioner stated that he had been appointed as class play advisor during the 1991-92 school year. This is an activity in which the class puts a show on once a year. He stated this has minimal time demands. He generated a form regarding a lip synching show. The students came to sign up briefly and met three or four times to practice in the late afternoon. The show was on a Friday evening in April or May. He was awarded this position in August 1991. At that time he had already received the cross country position for September to November. Practice for cross country met after school for the students to run approximately one hour each day, three or four days per week. The petitioner stated that during this particular coaching season he

could have but did not organize the school play. He stated that the play is usually done during the school day, and when it occurs during the school year is up to the discretion of the advisor. He stated that if he had gotten indoor or outdoor coach he could still have been the class play advisor since they only met three or four times. According to him he would have been able to do coaching in the afternoon and then follow it with a meeting for the class play or have had meetings on rainy days. He stated that indoor and outdoor coaching and class play did not conflict even though they overlap by season. He did state that basketball possibly might overlap although he saw no conflict in this.

The petitioner stated that he feels he should be given the salary for indoor and outdoor track or outdoor track and basketball. he did confirm that indoor track and basketball overlay and also do conflict. During the 1991-92 school year the extracurricular activities in which he was involved were cross country and school play advisor. He stated that he should have been awarded either positions at Union Hills or Emerson. He stated that he had coached at Emerson at the high school level in indoor and outdoor track as well as cross country. He had not coached at Union Hills. He stated that he has also coached basketball below the high school level in Union City.

The petitioner stated that he did not apply for any extracurricular activities outside of the school district. He felt that he had sufficient time to devote to indoor and outdoor track coach. He stated that he was never told that his appointment as school play advisor would bar him from indoor and outdoor track coach.

Joseph R. Marini also testified during the hearing. He is employed by the Union City Board of Education and has been assistant superintendent of schools since September 1980. He posts positions in the spring for the next year's extracurricular spots. Along with the help of the secretary he prepares the lists and distributes them to the schools and to the union as well as board members pursuant to the contract. After the board of education has taken action they post the selectee list. He stated that extracurricular positions include coaching, advisors, cheerleaders, majorettes and debating team as well as several others. There are 30 to 40 positions in extracurricular spots in each high school.

The witness stated that with respect to coaching positions he was aware that Mr. Dorsett had positions in prior years including indoor and outdoor track and cross country. In previous years he had been appointed simultaneously to these positions. He also had been appointed to indoor and outdoor track at the same time. The policy has been to try and give these to one individual because they know the children and what those children are capable of in the particular sport.

During the 1991-92 school year the petitioner applied for indoor and outdoor track coach for both Emerson and Union Hills as well as cross country coach at Emerson. He was appointed as head coach for cross country in Emerson. He was also appointed school play advisor.

In Union Mr. McGinley was originally appointed as indoor and outdoor head track coach. There were no other applicants. After he had been appointed the position was posted again erroneously.

The witness stated that he felt there would be a conflict with class play advisor and indoor and outdoor track coach in either school. He stated that there are time requirements of the school play advisor. Rehearsals were necessary one or two times per month over a six to eight month period. This would make approximately 15 or 20 rehearsals over the year. As a result he felt there would be a conflict with the seasons and the time with indoor and outdoor track coach at Emerson or Union Hills.

In July or August, Alvaro Tirado applied to Union Hills. He is a math teacher with the Board. The witness did not know if he had coaching experience.

The petitioner had applied for the position at Emerson and was not selected. He also applied in Emerson for assistant basketball coach. This would have created a conflict.

The witness stated that when Mr. McGinley was appointed as head track coach indoor and outdoor at Union Hills he was the only applicant. It was only by error that the matter was reposted and once again Mr. McGinley was appointed.

The witness acknowledged that there is no written policy to prohibit the teacher from holding more than one extracurricular position. There have been

teachers who had been selected for more than one such position in the past. The witness stated that he did not supervise the petitioner regarding his work as school play advisor. He did not know specifically how many times the petitioner had held rehearsals. The witness also acknowledged that he never told Mr. Dorsett that acting as school play advisor precluded him from any coaching positions.

FINDINGS OF FACTS

Having heard the testimony of the witnesses and having assessed their credibility, as well as having reviewed the evidence in this case, in addition to those fact stipulated to by the parties, I **FIND** the following to be fact:

1. Coaching is seasonal in nature and the sports run as follows:

   a. cross country beginning in the fall;

   b. indoor track which concludes in the latter part of February; and

   c. outdoor track coach which begins approximately March 8 each year and runs to about June.

2. The positions of indoor track coach and basketball coach overlap and conflict making it impossible for an individual to hold both positions.

3. The Union Hills indoor and outdoor track coach position was originally given to the only applicant, Michael McGinley. After this appointment the Board erroneously reposted the position. That position was once again given to Michael McGinley.

4. The time required of a school play advisor would be one to two meetings per month for a six to eight month period, making a total of 8 to 16 meetings not taking into account the actual show.

5. Those substitute teachers hired by the board of education as coaches were certified to teach and were also in the employ of this board of education as teachers prior to their applications for coaching positions.

LEGAL DISCUSSION

The question presented in this case is whether or not petitioner, who was a full time teacher employed by the respondent board of education should have been appointed to any of the coaching positions discussed rather than those individuals who were substitute teachers already in the employ of the board of education and who received the position.

With respect to the indoor and outdoor head coaching positions at Union Hills High School for the 1991-92 school year the original posting netted only one applicant, Michael McGinley. A subsequent erroneous posting occurred and it was after that posting that the petitioner applied. Subsequent to this Michael McGinley once again received that position. There was no rescission of the original appointment and as a result the subsequent applicants to the erroneous posting should not affect Mr. McGinley's appointment to those positions.

Under *N.J.S.A.* 6:29-3.3 the critera for hiring athletics personnel is listed. It reads as follows:

> (a) Any person not certified as a teacher and not in the employ of a district board of education shall not be permitted to organize public school pupils during school time or during any recess in the school day for purposes of instruction or coaching or for conducting games, events or contests in physical education or athletics.
>
> (b) School districts shall be permitted to employ any holder of a New Jersey teaching certificate to work in the interscholastic athletic program provided that the position has been advertised.
>
> (c) In the event there is no qualified and certified applicant, the holder of a county substitute certificate is authorized to serve as an athletic coach in the district in which he or she is employed for a designated sports season, provided that:
>
> 1. The district chief school administrator demonstrates to the county superintendent that:
>
> i. The vacant coaching position has been advertised; and

ii. There was no qualified applicant based on the written standards of the district board of education;

In this case the individuals who received the coaching positions were certified as teachers and were also in the employ of this particular district board of education. The question presented in this case is whether or not reference to subsection (c) is appropriate. That provision deals with out-of-district holders of a county substitute certificate and indicates that they may act as a coach under certain conditions. This provision seems intended to prevent school districts from bringing individuals with substitute certificates from outside primarily for the purpose of coaching certain sports. In this case all applicants were within the district.

Petitioner cites *Norcross v. Board of Education of the North Hunterdon Regional High School District*, 92 *N.J.A.R.* 2d (EDU) 176, aff'd App. Div. (Docket No. A-3533-91T1, March 30, 1993) for the proposition that a full time teaching staff member within the district is given a preference over a part-time teacher from within the same district. That decision ndicates that absent written policy regarding qualifications for the positions the additional requirement of a preference for a full time over part-time certified teachers within the district occurred.

It is clear that tenure does not attach to the posting positions and that the employment of coaches and staff in a school district is a board prerogative. The question that we are faced with is whether or not that added provision which is not specifically stated in *N.J.S.A.* 6:29-3.3 establishing a preference for full time over part-time certified teachers employed by a particular board of education exists.

In *John Chambers, Jr. v. Board of Education of the Township of Neptune*, 1985 S.L.D. 1379 there is a discussion of the amendments to the rule requiring in-district personnel be hired over out-of-district personnel. Now, boards of education may initially advertise coaching vacancies as far and as wide as it deems reasonable. Such advertising, however, does not change the basic principle that coaches must be first sought from the board's own teaching staff. *Id.* at 1374. The basic requirements of *N.J.S.A.* 6:29-3.3 are that the individual must be a certified teacher and must be employed by the district board of education. The petitioner as well as those individuals who received the coaching positions fit this description. To add a

provision to the regulation requiring a preference for full time over part-time employees of the same district is to take on a legislative role rather than merely interpreting the regulations as they exist.

In this case the district board of education has shown sufficient reasons for the choice of the part-time employees of that district to the coaching position, so that it cannot be found that their actions were arbitrary and/or capricious. The idea that an added preference exists for full time teachers without taking into account any other factors that would require adding a provision to *N.J.S.A.* 6:29-3.3. That provision does not presently exist and as a result, *Norcross* is specifically disagreed with in this decision.

If the purpose of this regulation is to prevent district boards of education from bringing in athletics personnel from the outside in order to "bulk up" athletic programs then this policy is not in any way advanced by crafting an additional clause which does not appear in the regulations to make full time employees automatically chosen over part-time employees of that board.

CONCLUSION

Based upon the foregoing, I **CONCLUDE** that the decision of the Board of Education of the City of Union in hiring other individuals rather than the petitioner to the coaching positions discussed above, was not arbitrary and capricious. I further **CONCLUDE** that the no automatic preference exists under *N.J.S.A.* 6:29-3.3 for full time employees over part-time employees in the same district. I further **CONCLUDE** that because no out-of-district personnel holding county certificates are involved *N.J.A.C.* 6:29-3.3(c) is inapplicable in this case.

ORDER

It is hereby **ORDERED** that the decision of Union City Board of Education be and hereby is **AFFIRMED**. It is hereby **ORDERED** that the petition filed by the Union City Education Association and Robert Dorsett by and hereby is **DISMISSED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

9/14/93
Date

MARYLOUISE LUCCH-McCLOUD, ALJ

Receipt Acknowledged:

9/15/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 16 1993
Date

OFFICE OF ADMINISTRATIVE LAW

am

APPENDIX

Witnesses

For petitioner:

Robert Dorsett

For respondent:

Joseph R. Marini

Evidence

J-1	Application of Dale Brooks
J-2	Application of Joseph Blake
J-3	Application of Michael McGinley
P-1	Agreement - Union City Board of Education and Union City Education Association
P-2	Applicant list
P-3	June 7, 1991 selectee list
P-4	June 11, 1991 job opening list
P-5	Minutes of June 6, 1991 meeting of the Union City Board of Education
P-6	Job opening dated June 11, 1991
P-7	Applicant list dated July 2, 1991
P-8	Selectee list July 25, 1991
P-9	Minutes of Board meeting, July 25, 1991
P-10	June 11, 1991 posting
P-11	Letter dated June 18, 1991 - Marini to Dorsett
P-12	Packet with July 27, 1990 selectee list as first page - 6 pages
P-13	Packet regarding extra compensation/co curricular activities - 1991-1992 (7 pages)

UNION CITY EDUCATION ASSOCIATION AND ROBERT DORSETT,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF UNION CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

It is petitioners' contention that Dorsett was the only qualified applicant for the position of Indoor and Outdoor Head Track Coach for Boys at Union Hill and Emerson High Schools, and he should have been appointed to the positions at one of the schools. Petitioners argue that although Mr. Tirado was appointed to said positions at Emerson, that appointment was made after the Board passed over Dorsett, who was the only applicant as a result of the April posting. Further, petitioners claim the ALJ erred in finding that the Board could appoint Mr. McGinley to the track positions at Union Hill since he was the only applicant, because if that were so, then the ALJ failed to address why the Board did not appoint Dorsett to the track positions at Emerson High, as he was the only applicant in April 1991. Alternatively, petitioners argue that the Board

should have appointed Dorsett to one of the assistant basketball coaching positions in place of the substitutes who were appointed.

More specifically, petitioners argue that the Commissioner should reject the initial decision since Dorsett was the only qualified applicant pursuant to N.J.A.C. 6:29-3.3 because the Board did not follow proper procedures for hiring substitutes, and because the ALJ's findings of fact are incomplete. Petitioners aver the issue in this case is whether a full-time certified teacher employed by a board must be given preference over the holder of a county substitute certificate. Thus, they believe the ALJ erred in casting the issue of this matter as being "***whether or not reference to subsection (c) [of N.J.A.C. 6:29-3.3] is appropriate. That provision deals with out-of-district holders of county substitute certificates and indicates that they may act as a coach under certain conditions.***" (Initial decision, at p. 10) Petitioners believe this is a misstatement of the issue herein because nothing in N.J.A.C. 6:29-3.3(c) concerns out-of-district holders of county substitute certificates. Instead, petitioners claim that the section at issue herein concerns under what circumstances a holder of a county substitute certificate can serve as a coach, whether the individual is from within the district or from outside the district. Thus, they submit, the ALJ erred to the extent that she interpreted the regulation to apply only to holders of county substitute certificates from out of the district.

In this regard, petitioners aver they did not argue before the ALJ that anything in Norcross, supra, or any other decision, concerned the preference of full-time teachers over part-time teachers. They further submit that Dorsett could not be rejected

for the positions in question in favor of a substitute, even one who was previously employed by the district.

Petitioners summarize their position by stating that this matter is virtually indistinguishable from Chambers, supra, and Norcross, supra. Petitioners aver the ALJ erred in reaching a conclusion different from that of Norcross, which they say held invalid a local board's selection of a county superintendent certificate substitute because the petitioner met the qualification of N.J.A.C. 6:29-3.3 in the absence of written qualification standards.

Upon careful and independent review of the record of this matter, the Commissioner affirms the dismissal of the Petition of Appeal in this matter but for reasons different from those expressed by the ALJ.

At the outset of this discussion, the Commissioner would emphasize that overarching statement of law established by the ALJ in this case at page 10:

> It is clear that tenure does not attach to the [coaching] positions and that the employment of coaches and staff in a school district is a board prerogative.

Regarding the position of Head Coach, Indoor and Outdoor Track, Emerson High School, inquiry stops before reaching section (c) of N.J.A.C. 6:29-3.3, which provides:

> In the event there is no qualified and certified applicant, the holder of a county substitute certificate is authorized to serve as an athletic coach in the district in which he or she is employed for a designated sports season, provided that:
>
> 1. The district chief school administrator demonstrates to the county superintendent that:

i. The vacant coaching position has been advertised; and

ii. There was no qualified applicant based on the written standards of the district board of education.***

The record establishes that Petitioner Dorsett was the only applicant in April 1991 for the position as Indoor and Outdoor Head Track Coach at Emerson High School. It is also undisputed that upon reposting the position in June 1991, Alvaro Tirado, applied for said coaching slot. Regardless of the timing of the applications, no obligation existed for the Board to select Dorsett for any coaching position at any time. Its only obligation was to select a candidate based upon the prescriptions of N.J.A.C. 6:29-3.3.

It is undisputed that Mr. Tirado holds a standard teaching certificate and is a teaching staff member in the Board's employ who responded to the reposting of said positions at Emerson. See Stipulation of Facts Nos. 7 and 10. These two characteristics are the sole provisions envisioned by N.J.A.C. 6:29-3.3. See Chambers, supra, and Norcross, supra, unless the Board, through its own discretion, enhances such requirements by adopting policy regarding qualifications for employment as a coach in a given sport. In the absence of prescribed qualifications for the kind of coaching position in question as described in Chambers and Norcross, Mr. Tirado's appointment conformed with N.J.A.C. 6:29-3.3(a) and (b) and therefore cannot be deemed a patent abuse of the Board's discretion. Thus, petitioners' argument that Dorsett was entitled to such position merely because he was passed over in favor of a later applicant fails. The Commissioner so finds.

On the other hand, review of the coaching positions of 1991 granted Messrs. McGinley, Blake and Brooks does involve

consideration of N.J.A.C. 6:29-3.3(c) insofar as their appointments could not be accomplished without exhaustion of candidates within the district who were holders of standard certification as teaching staff members and who were employees within the district. N.J.A.C. 6:29-3.3(c); Chambers, supra; and Norcross, supra The record indicates that these three employees held only substandard county superintendent's substitute certificates, applied for belatedly in mid-September, approximately two months after appointing them to coaching positions. This action clearly falls outside the prescriptions of regulation and case law as described above.

In this regard, while the ALJ correctly recites the holding of Chambers, supra, as standing for the proposition that coaches must be first sought from the Board's own teaching staff and that the individual must be a certified teacher (see Initial Decision, at p. 10), the Commissioner specifically rejects her reading of Norcross, supra, for the principle that "an added preference exists for full time teachers without taking into account any other factors that would require adding a provision to N.J.S.A. 6:29-3.3." (Initial Decision, at p. 11) Rather, Norcross reinforces the principles articulated in Chambers, including the proposition that a preference exists for coaches who hold standard certification and who are teaching staff members in the district. In Norcross, as in this case, a board of education may not select for a coach an individual who holds only a substandard county substitute's certificate over a teaching staff member from within the district who holds standard certification. For a discussion of what constitutes a teaching staff member, see, for example, Rumson-Fair Haven Education Association and Brad Wilbur v. Board of Education of

the Rumson-Fair Haven Regional School District, 1986 S.L.D. 2284, rev'd State Board, 1987 S.L.D. 2682, Super.Ct. aff'd June 24, 1988.

However, the facts of this case make review of such argument unnecessary because the Board offered a reasonable explanation for failing to hire Dorsett for the other head coaching position in indoor and outdoor track at Union Hills, that is, that appointment to such position would conflict with Petitioner Dorsett's appointment as class play advisor. While petitioners may dispute the extent to which such appointment would conflict with the duties of a head coaching position, nothing in the record before the Commissioner suggests patent arbitrariness in the Board's determination to direct petitioner's services to the class play advisorship instead of as an indoor and outdoor track coach as a result of time conflicts established by the ALJ in being a play advisor.

Moreover, of his own admission, indoor tract and basketball, the assistant's position for which Petitioner Dorsett also sought compensation, conflict. Hence, it may not be argued that such failure to assign him to either of these extracurricular positions constitutes arbitrary action by the Board. Similarly, the Commissioner finds without merit petitioners' claim that Petitioner Dorsett was owed notice that his appointment as school play advisor would bar him from indoor and outdoor track coaching positions, for the reason stated at the outset of this discussion, that is, no entitlement to any coaching position exists, as a general proposition.

Accordingly, for the reasons stated herein and having specifically rejected the ALJ's conclusions of law, the instant Petition of Appeal is dismissed, with prejudice.

COMMISSIONER OF EDUCATION

NOVEMBER 1, 1993

DATE OF MAILING - NOVEMBER 1, 1993

268-93

EDU #10441-91
C # 268-93
SB # 70-93

UNION CITY EDUCATION ASSOCIATION AND ROBERT DORSETT,	:	
PETITIONERS-APPELLANTS,	:	STATE BOARD OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF UNION CITY, HUDSON COUNTY,	:	
RESPONDENT-CROSS/APPELLANT.	:	

Decided by the Commissioner of Education, November 1, 1993

For the Petitioner-Appellant, Zazzali, Zazzali, Fagella and Nowak (Paul L. Kleinbaum, Esq., of Counsel)

For the Respondent-Cross/Appellant, Patino-Treat & Rosen (Louis C. Rosen, Esq., of Counsel)

Robert Dorsett (hereinafter "petitioner"), a tenured teacher in the employ of the Board of Education of the City of Union (hereinafter "Board"), filed a petition with the Commissioner of Education alleging that the Board had improperly denied him appointment to several coaching assignments in the district for the 1991-92 school year. Petitioner alleged that a number of those assignments for which he had applied had been given to individuals holding only county substitute certificates, in violation of N.J.A.C. 6:29-3.3.

On September 14, 1993, an Administrative Law Judge ("ALJ") recommended dismissing the petition, concluding that the Board's actions had not been arbitrary or capricious. The ALJ found that all of the individuals assigned to the controverted coaching positions, including those holding only county substitute certificates, were certified as teachers and were in the employ of

June 1, 1994

the Board, as required by N.J.A.C. 6:29-3.3. The ALJ asserted that no preference existed under N.J.A.C. 6:29-3.3 for full-time employees over part-time employees in the same district.

On November 1, 1993, the Commissioner adopted the recommendation of the ALJ to dismiss the petition, but for reasons different than those expressed by the ALJ. The Commissioner, citing Norcross v. Board of Education of the North Hunterdon Regional High School District, decided by the Commissioner of Education, August 8, 1991, aff'd by the State Board of Education, February 5, 1992, aff'd, Docket #A-3533-91T1 (App. Div. 1993) and Chambers v. Board of Education of the Township of Neptune, decided by the Commissioner of Education, 1985 S.L.D. 1379, stressed that "a preference exists for coaches who hold standard certification and who are teaching staff members in the district....[A] board of education may not select for a coach an individual who holds only a substandard county substitute's certificate over a teaching staff member from within the district who holds standard certification." Commissioner's Decision, slip op. at 18. The Commissioner concluded that the appointments of the three individuals holding only substandard county substitute certificates "could not be accomplished without exhaustion of candidates within the district who were holders of standard certification as teaching staff members and who were employed within the district. N.J.A.C. 6:29-3.3(c)." Id.[1]

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[1] We note that, contrary to the Commissioner's assertion that the three substitute teachers who were employed by the Board as coaches did not apply for their county substitute certificates until several months after they had been appointed to the coaching assignments, the record indicates that Joseph Blake and Michael McGinley held county substitute certificates at the time of their coaching appointments on July 25, 1991 and that Dale Brooks' certificate, which had been issued in January 1988, expired on July 1, 1991 and was renewed for an additional three-year period in September 1991.

The Commissioner, however, found that the Board had offered a reasonable explanation for failing to hire petitioner for the head coaching position in indoor and outdoor track at Union Hills High School--such appointment would conflict with his appointment as class play advisor. The Commissioner further found that since indoor track and basketball conflicted, "it may not be argued that such failure to assign him to either of these extracurricular positions constitutes arbitrary action by the Board." Id. at 19. Similarly, the Commissioner found no merit to petitioner's claim that he was owed notice that his appointment as school play advisor would bar him from indoor and outdoor track coaching positions.

The Commissioner also determined that the Board's failure to appoint petitioner as indoor and outdoor track coach at Emerson High School was not improper in that the Board had appointed another applicant who held a standard teaching certificate and was a teaching staff member in the Board's employ.

The petitioner filed the instant appeal to the State Board, limited to the argument that he had been improperly denied the indoor and outdoor track coaching assignments at Union Hills High School. Petitioner requested that he be compensated for the coaching stipends he would have received in those two assignments in 1991-92.

The Board has filed a cross-appeal from the decision of the Commissioner. While the Board agrees with the Commissioner's determination to dismiss the petition, it disagrees with the reasoning of that decision. The Board argues that the Commissioner erred in construing N.J.A.C. 6:29-3.3 as giving a preference to coaching applicants who were "teaching staff members." The Board

contends that since the substitutes who were appointed by the Board held valid county substitute certificates and had been actively employed as substitutes by the Board, they were qualified and certificated applicants who met the requirements of the above regulation for appointment to the controverted coaching assignments.

After a thorough review of the record, we reverse the decision of the Commissioner rejecting petitioner's claim to the indoor and outdoor track coaching assignments at Union Hills High School in 1991-92.

N.J.A.C. 6:29-3.3 provides:

> (a) Any person not certified as a teacher and not in the employ of a district board of education shall not be permitted to organize public school pupils during school time or during any recess in the school day for purposes of instruction, or coaching or for conducting games, events or contests in physical education or athletics.
>
> (b) School districts shall be permitted to employ any holder of a New Jersey teaching certificate to work in the interscholastic athletic program provided that the position has been advertised.
>
> (c) In the event there is no qualified and certified applicant, the holder of a county substitute certificate is authorized to serve as an athletic coach in the district in which he or she is employed for a designated sports season, provided that:
>
> 1. The district chief school administrator demonstrates to the county superintendent that:
>
> i. The vacant coaching position had been advertised; and
>
> ii. There was no qualified applicant based on the written standards of the district board of education;
>
> 2. The district chief school administrator will provide a letter to the county superintendent

attesting to the prospective employee's knowledge and experience in the sport in which he or she will coach; and

3. Approval of the county superintendent shall be obtained prior to such employment by the district board of education. The 20-day limitation noted in N.J.A.C. 6:11-4.4(i) shall not apply to such coaching situations.

Following the Board's reposting of the indoor and outdoor track coaching assignments at Union Hills High School, the only applicants therefor were petitioner and Michael McGinley, who held a substandard county substitute certificate.[2] Such certificate is issued to individuals "who do not hold a standard instructional certificate" and is granted only when the supply of "properly certificated teachers" is inadequate. N.J.A.C. 6:11-4.5. The holder of a county substitute certificate is authorized to serve as an athletic coach only in the event "there is no qualified and certified applicant." N.J.A.C. 6:29-3.3(c). Petitioner, on the other hand, was employed by the district and "certified as a teacher," N.J.A.C. 6:29-3.3(a), and there is no contention that he was not "qualified" for the assignments at issue based on written standards of the district.[3] N.J.A.C. 6:29-3.3(c)(1)(ii).

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2 The Board contends in its exceptions to our Legal Committee's report that the reposting of these assignments on June 11, 1991 "could have no effect on the valid, previous appointment of McGinley" on June 6 when he had been the sole applicant. We note that, notwithstanding the Board's earlier action to appoint McGinley, and regardless of whether the reposting was in error, the Board took formal action at its meeting of July 25, 1991 to make appointments to the coaching assignments at issue. In so doing, the Board appointed McGinley, despite the fact that petitioner had also applied. It is this action which forms the basis for the instant petition.

3 We note that the parties stipulated that the Board "has not adopted written guidelines or policies regarding qualifications for athletic coaching positions." Stipulation of Facts, at 2.

While there is no right to employment as a coach, Koslick v. Board of Education of the Township of Edison, decided by the State Board of Education, April 1, 1987, aff'd, Docket #4358-86T1 (App. Div. 1987), a district board must adhere to the prescriptions of N.J.A.C. 6:29-3.3 in selecting coaches. Consequently, we conclude that the Board abused its discretion in failing to appoint petitioner, the only qualified and certified applicant, to the indoor and outdoor track coaching assignments at Union Hills High School while appointing instead the holder of a substandard county substitute certificate.[4] See Norcross, supra.

The appointment of petitioner as class play advisor does not alter our determination. Inasmuch as petitioner met the criteria of N.J.A.C. 6:29-3.3, the Board could not circumvent the provisions thereof so as to employ a substitute as coach simply by appointing petitioner to a concurrent extracurricular assignment outside the realm of that regulation. Moreover, contrary to the Commissioner's finding, we cannot conclude on this record that the Board's failure to appoint petitioner to the indoor and outdoor track coaching assignments at Union Hills High was due to a conflict with his assignment as class play advisor, which appointment occurred at the same Board meeting in which McGinley was appointed to the controverted coaching assignments. P-9, in evidence. Nor is it evident on this record that there was in fact a conflict such as to preclude petitioner from effectively fulfilling the

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[4] Despite the fact that petitioner had applied for the indoor and outdoor track coaching assignments at Union Hills High School, we note that the request from the District Superintendent to the County Superintendent for approval to employ a coach holding a county substitute certificate related that the district "has not received applications from any certified teachers." Exhibit J-3, in evidence.

responsibilities of those assignments.

We also correct the Commissioner's reading of N.J.A.C. 6:29-3.3 as providing a preference to coaching applicants who are teaching staff members in the district. A "teaching staff member" is defined by N.J.S.A. 18A:1-1 as a member of the professional staff of a district board "holding office, position or employment of such character that the qualifications, for such office, position or employment, require him to hold a valid and effective standard, provisional or emergency certificate, appropriate to his office, position or employment...." N.J.A.C. 6:29-3.3(a), however, includes no such requirement, expressly providing only that "any person not certified as a teacher and not in the employ of a district board" may not serve in a coaching capacity. (Emphasis added.) That regulation does not impose upon such certified applicants the requirement that their employment in the district be as a "teaching staff member" as defined by N.J.S.A. 18A:1-1, and we have never determined that regulation to include such a condition. Pursuant to the express language of N.J.A.C. 6:29-3.3(a), it is sufficient that the applicant is "in the employ of a district board" and is "certified as a teacher."

Finally, we find puzzling the Commissioner's statement that since the indoor track and basketball coaching assignments sought by petitioner conflicted, "it may not be argued that such failure to assign him to either of these extracurricular positions constitutes arbitrary action by the Board." Commissioner's Decision, slip op. at 19 (emphasis added). While failure by a district board to appoint an eligible applicant to both of two concurrent coaching assignments may not constitute arbitrary action, it is certainly

arguable that a district board's failure to appoint such applicant to either of those two assignments purely on the basis of a conflict between them is arbitrary and capricious.

Thus, for the reasons stated herein, we reverse the decision of the Commissioner on the point of appeal before us and direct the Board to pay petitioner the stipends he would have received as indoor and outdoor track coach at Union Hills High School during the 1991-92 school year.

Attorney exceptions are noted.

June 1, 1994

Date of mailing JUN 03 1994

269-93

BOARD OF EDUCATION OF THE BOROUGH OF CARTERET, MIDDLESEX COUNTY,

PETITIONER,

V.

MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, MIDDLESEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

NOVEMBER 4, 1993

BOARD OF EDUCATION OF THE BOROUGH OF CARTERET, MIDDLESEX COUNTY,

PETITIONER,

V.

MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, MIDDLESEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Board appealed General Fund tax levy reduction in the amount of $300,000 made by governing body following voter rejection of proposed budget on April 20, 1993.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of reduction was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore $300,000 for a total General Fund tax levy of $13,869,630 for 1993-94 school purposes.

BOARD OF EDUCATION OF THE BOROUGH OF CARTERET, MIDDLESEX COUNTY,

PETITIONER,

V.

MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, MIDDLESEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

Laura J. Bogaards, Esq. (Wilentz, Goldman & Spitzer), for Petitioner

Joseph J. Triarsi, Esq. (Pisano & Triarsi), for Respondent

This matter was opened before the Commissioner of Education by way of a Petition of Appeal filed by the Board of Education of the Borough of Carteret (Board) on June 18, 1993, seeking restoration of a $300,000 cut to the 1993-94 General Fund tax levy made by the Mayor and Council (Borough) pursuant to N.J.S.A. 18A:22-37 following voter defeat of the Board's proposed budget at the annual school election held on April 20, 1993. The amounts underlying the instant dispute are summarized as follows:

Proposed Tax Levy Adopted by Board	Amount of Tax Levy Certified by Governing Body
$13,869,630	$13,569,630
Amount of Reduction By Governing Body	**Amount of Reduction in Dispute Before the Commissioner**
$ 300,000	$ 300,000

On July 27, 1993 the Borough filed an Answer to the petition, and pursuant to N.J.A.C. 6:24-7.8, position statements were filed by the Board on August 12, 1993 and the Borough on August 6, 1993. Due to a delay in service of the Borough's position statement, the Board's timely response was filed on September 12, 1993. No other papers were filed by the parties, and upon expiration of pertinent regulatory submission times, the record of this matter was duly closed.

STANDARD OF REVIEW

In rendering judgment relative to budget appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has in turn delegated the responsibility for providing such system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies upon voter defeat of proposed school budgets. See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).

In reviewing such appeals, the Commissioner must determine whether a board of education has demonstrated that the amount by which a specific line item has been reduced by the governing body is necessary for provision of a thorough and efficient system of education in the district.

BOARD'S POSITION

The Board states that the only reduction at issue in this matter is an across-the-board cut of $300,000 to the 1993-94 school budget, with a recommendation that the Board offset such reduction by utilizing free balance (surplus). The Board contends that the Borough's action was arbitrary, capricious, erroneous and contrary to the requirements of prior decisional law.

As a matter of law, the Board likens the situation at issue herein to that considered by the Commissioner in Board of Education of the Borough of Ramsey v. Mayor and Council of the Borough of Ramsey, Bergen County, 1991 S.L.D. 2125. Therein, the governing body cut $250,000 from the current expense tax levy for 1991-92 and recommended that the Board compensate for this reduction by utilization of the same amount in surplus. The Commissioner held, however, that over and above the necessity to demonstrate that the budgeted amount of surplus was in fact excessive, a governing body may direct utilization of surplus to offset current expenses only if specific line item reductions were concomitantly identified for offset based on valid educational reasons. Accordingly, the entire amount of the governing body's reduction was restored in that no such identification had been made and the only reason given for reduction was municipal tax relief.

With respect to the actual calculations made by the Borough, the Board argues that these were based on incorrect figures and erroneous assumptions, due at least in part to the Borough's insistence on conducting its review of Board records on the one day when neither the Board Secretary/Business Administrator nor the Board Accountant would be available for consultation. In support of

its position, the Board submits letters from its auditing firm dated August 10, 1993 and September 9, 1993, the latter verifying that upon completion of field work for the district's annual audit, subject only to standard office review procedures before issuance of a final report, the district's General Fund free balance as of June 30, 1993 is $450,912, from which $300,000 has been budgeted as anticipated revenue for 1993-94, leaving an actual surplus of $150,912. Thus, even if the Borough meant to argue that the Board's surplus was excessive--although in fact it failed to express such position in explicit terms--that argument cannot stand in light of the figures set forth above, which represent a surplus well below the 3% consistently found to be reasonable by the Commissioner.

BOROUGH'S POSITION

The Borough argues that its action was neither arbitrary nor unreasonable, and indeed, that it was undertaken carefully and methodically with due regard for educational and fiscal considerations, requiring the Board to anticipate and apply additional surplus rather than reducing any line items in the Board's proposed budget. The Borough relates that the Board had advertised its estimated available fund balance as of June 30, 1993 as $636,121 in current expense and $30,029 in capital outlay, anticipating that $0.00 would remain from 1992-93 unencumbered appropriations on that date. Upon defeat of the budget by the voters, Borough representatives visited Board offices and reviewed the Board's available appropriations report (as of April 1993) so as to project 10-month actual expenditures into 12-month figures and determine if any line items could be expected to be unexpended or unencumbered on June 30, 1993. This review identified 15 such line

items in current expense yielding a total of $198,900 and one in capital outlay yielding $75,000, whereupon the Borough concluded that the Board could reasonably anticipate an addition to its advertised fund balance in the amount of about $275,000 so as to be able to apply an additional $300,000 to its 1993-94 budget and reduce the tax levy by this same amount.

COMMISSIONER'S DETERMINATION

Initially, the Commissioner notes that the case relied upon by the Board for its primary legal argument, Ramsey, supra, is inconsistent with other cases wherein the Commissioner ruled, notwithstanding the holding of Ramsey, that a governing body need not specifically identify line item reductions in arriving at a determination relative to a reduction in surplus provided that due consideration has been given to the obligation to ensure a thorough and efficient education. Board of Education of the Borough of Oakland v. Mayor and Borough Council of the Borough of Oakland, Bergen County, 1991 S.L.D. 1657; Board of Education of the Township of Berkeley v. Mayor and Township Council of the Township of Berkeley, Ocean County, decided October 13, 1993. Thus, to the extent that Ramsey, supra, stands for a proposition contrary to the principle stated in Oakland and Berkeley, that decision is held herein to have been erroneously decided and not controlling in the present matter.

This holding, however, does not end the inquiry with regard to the within dispute. It is well established that a municipal governing body has the right to consider the total budget, including surplus, in making its determination as to what figure need be arrived at in order to ensure a thorough and efficient system of

education in the district. Branchburg Board of Education v. Branchburg Township Committee, 187 N.J. Super. 540 (1983) It is equally certain that a board of education is empowered to maintain a reasonable surplus to meet unforeseen contingencies. Fair Lawn Board of Education v. Mayor and Council of Fair Lawn, 143 N.J. Super. 259 (Law Div. 1976) Further, the Commissioner has consistently held that a 3% surplus is reasonable. Board of Education of the City of Perth Amboy v. Council of the City of Perth Amboy, Middlesex County, 1987 S.L.D. 2262

In the present matter, the record is clear that the methodology employed by the Borough was reasonable on its face, but that the outcome was nonetheless flawed because it was based on figures and assumptions that the Board has proven through the results of an annual audit to have been premature, incomplete or erroneous. The Board did, indeed, as claimed by the Borough, advertise estimated free balances totaling $666,150, and the Borough identified yet another $273,900 in "surplus" through unexpended and/or unencumbered accounts as it purportedly found them in the papers it reviewed, leaving, in the Borough's reckoning, a surplus of $940,050 from which to make appropriations to current expense. (It is unclear whether the Borough realized that the Board had also advertised from this amount an appropriation to current expense of $300,000. If so, by the Borough's own reckoning a further reduction of $300,000 would have left the Board with a surplus of $340,050, or less than 2%; if not, the remaining balance after the Borough's directed appropriation would have been $640,050 or about 3% of the total General Fund budget of about $21 million.)

However, the fact remains that the annual audit--the Board's representation of which, the Commissioner notes, was neither disputed nor replied to by the Borough--revealed instead that the actual surplus available after review of all accounts was $450,912, even less than the amount anticipated by the Board in its advertised budget. From this, as had been advertised, $300,000 was applied to current expense, leaving the district with an actual audited free balance of $150,912, or less than 1% of its General Fund budget. Under these circumstances, the Commissioner cannot find, notwithstanding the Borough's attempt to carefully and systematically identify funds with which to offset tax levies, that what in reality would amount to a reduction of $300,000 in the district's General Fund budget can be sustained. To the contrary, the Commissioner notes that even the amount of surplus following restoration herein, a total of $450,912, is just over 2% of the district's budget.

Accordingly, the Commissioner finds that the amount in dispute in this matter is in fact necessary for provision of a thorough and efficient education and therefore directs the Middlesex County Board of Taxation to adjust the General Fund tax levy of the Borough of Carteret for the 1993-94 school year to reflect an increase of $300,000, for a total levy of $13,869,630.

IT IS SO ORDERED.

NOVEMBER 4, 1993

DATE OF MAILING - NOVEMBER 4, 1993

COMMISSIONER OF EDUCATION

270-93

270-93

BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, PETITIONER, V. TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY, RESPONDENT. AND IN THE MATTER OF THE CAP WAIVER APPEAL OF THE MIDDLETOWN TOWNSHIP SCHOOL DISTRICT, MONMOUTH COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

NOVEMBER 4, 1993

BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, PETITIONER, V. TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY, RESPONDENT. AND IN THE MATTER OF THE CAP WAIVER APPEAL OF THE MIDDLETOWN TOWNSHIP SCHOOL DISTRICT, MONMOUTH COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of $1,467,652 and reduction in cap waiver in the amount of $687,890 made by governing body following voter rejection of proposed budget on April 20, 1993.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore reductions for a total General Fund tax levy of $59,713,145 for 1993-94 school purposes.

BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
AND	:	
IN THE MATTER OF THE CAP WAIVER APPEAL OF THE MIDDLETOWN TOWNSHIP SCHOOL DISTRICT, MONMOUTH COUNTY.	:	

For Petitioner, Peter P. Kalac, Esq. (Kalac, Newman, Lavender & Campbell)

For Respondent, William F. Dowd, Esq. (Dowd & Reilly)

This consolidated matter was opened before the Commissioner on June 1, 1993 through the filing of a Petition of Appeal of a defeated budget by the Middletown Township Board of Education (Board) pursuant to the provisions of N.J.A.C. 6:24-7.1 et seq. The Board also filed on June 1, 1993 a Petition of Appeal of its defeated cap waiver. The Board sought restoration, on the grounds of necessity for a thorough and efficient education, of reductions by the Township Committee (Township) following voter rejection on April 20, 1993 of the Board's proposed budget and cap waiver. Subsequent to the defeat, the Board and Township, pursuant to

N.J.S.A. 18A:22-37 and N.J.A.C. 6:24-7.2(b)2, consulted on the defeated budget and the Township reduced the General Fund tax levy by $1,467,652. The Township also reduced the cap waiver tax levy by $687,890. The cap waiver had been approved by the Monmouth County Superintendent of Schools as necessary for a thorough and efficient education of the students of Middletown Township, and the district's 1993-94 budget had consequently been granted only a conditional approval. Consequently, the monies in contention in this consolidated matter are as set forth below:

Proposed Tax Levy Adopted by Board of Education		Amount of Amended Tax Levy Certified by Governing Body	
General Fund	$57,090,945	General Fund	$55,623,293
Cap Waiver	$2,622,200	Cap Waiver	$ 1,934,310
Amount of Reduction by Governing Body		**Amount of Reduction in Dispute Before the Commissioner**	
General Fund	$ 1,467,652	General Fund	$ 1,467,652
Cap Waiver	$ 687,890	Cap Waiver	$ 687,890

On June 21, 1993, the Township submitted its Answer to both Petitions. Because the original Township resolution had a mathematical error in the calculation of the tax levy certified by the Township, an amended resolution was submitted on June 30, 1993. Amended petitions were filed by the Board on both issues on July 6, 1993. Answers to the amended petitions were submitted by the Township on July 21, 1993. Position Statements covering both matters were filed by the Township on August 12, 1993 and by the Board on August 16, 1993. The Board filed a Response to the Township's Position Statement on August 19, 1993. An affidavit was filed by the Monmouth County Superintendent of Schools and Monmouth County School Business Administrator on September 13, 1993 certifying the decision process employed during the budget and cap waiver review to provide sufficient funds for a thorough and efficien'

educational system. On September 22, 1993, letters were submitted by both parties advising that they would not file any further replies. Upon receipt of these statements, the record of this consolidated matter was closed on September 22, 1993.

It must be noted that there were some errors in the documents submitted by both parties, including an incorrect total tax figure in the amended Answer submitted by the Township, incorrect Current Expense reduction figures in the Township Position Statement, and an error in identifying the Debt Service tax levy as a Capital Outlay tax levy in the charts in the Board's Petitions. These erros did not, however, effect the identification of the disputed reductions which were correctly specified in the resolutions submitted by both parties.

The specific reductions under appeal in the Current Expense tax levy are as follows:

Account		Reduction
J-110	Salaries - Administration	$ 7,850
J-120	Purchased Prof./Technical Services	25,000
J-213	Salaries - Teachers	267,867
J-215	Salaries - Clerical	11,400
J-710	Salaries - Maintenance of Plant	300,000
J-640	Utilities	65,815
J-650	Supplies for Operating of Plant	14,420
J-740	Other Expenses for Repair of Buildings	25,300
	Additional Surplus Appropriation	750,000
	Total	$1,467,652

The proposed amounts and specific reductions in the T&E cap waiver are as follows:

Account	Proposed	Reduction
Capital Lease - Interest	$ 428,723	$221,613
Capital Lease - Principal	671,277	71,277
Employee Medical Insurance	195,000	195,000
Prof. Service Equipment Contracts	400,000	200,000
Resource Ctr. - Mandated Programs	477,200	- 0 -
K-12 Math/Science Initiative	450,000	- 0 -
Total	$2,622,200	$687,890

I. Defeated Budget

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

Mindful, then, of the balance to be applied in the standard of review, the Commissioner makes the following determination with respect to the reductions in the General Fund tax levy effectuated by the Township.

J-110 Salaries - Administration $7,850

The Township states that a retiring Records Specialist can be replaced at a lower salary to generate a savings of $7,850. The Board argues that, since 1993-94 negotiations are not yet completed,

they estimated the salary needs based on average settlements of approximately 6% in Monmouth County. The Board states that this percentage would result in a first step salary guide figure of $21,200, which is greater than the amount certified by the Township. Provision of a thorough and efficient educational system requires a variety of related clerical tasks, definitely including the compilation of records. It is determined that districts must reasonably and realistically estimate to budget for salaries when negotiations are incomplete. The Commissioner, therefore, orders the restoration of the $7,850 reduction.

J-120 Purchased Professional/Technical Services $25,000

The Township states that the 1992-93 school budget analysis contains an unencumbered balance of $44,964.50 as of March 31, 1993. The Township adds that legal fees should be reduced in the 1993-94 budget since most negotiations have been completed. The Board states that the Township's rationale is incorrect because the negotiations services provided by the attorney are included in an annual retainer and that services outside of the retainer have for several years been under-budgeted. The Board states that the average expenditure for the past three years on legal fees has been $161,138, which is $61,138 more than the amount certified by the Township. Since legal services are very often essential to the operation of a school district, and since the Township's reduction appears to be based on an erroneous assumption, the Commissioner orders the restoration of the $25,000 reduction.

J-213 Salaries - Teachers $267,867

The Township's reduction is again based on savings it estimates can be achieved by replacing nine retiring staff members

with teachers at a lower salary. The Board asserts in its Position Statement that the total figure used by the Township for the salaries of the retirees is incorrect and too high. The Board submits a list of the retiring teachers and salaries to verify this position. The Board also states that 1993-94 negotiations are not yet completed and that it is estimating the salary needs based on average settlements of approximately 6% in Monmouth County. The Board adds that, when replacement teachers for retirees are hired, the Board attempts to obtain the services of teachers with some experience. The Board also states that funds in this account are required for recurring expenses for long-term substitutes and the possibility of increased class size requiring the splitting of one class into two. The Board notes that it currently has 16 elementary classes of 27 or more students and that an unexpected increase of only a few students in any one of those classes may require splitting the class and hiring another teacher. There is no question that provision for sufficient qualified teachers is an essential component of a thorough and efficient educational system. The Commissioner cannot permit the Township to effectively restrict the Board to selecting only inexperienced candidates upon retirement of senior teachers. These must be a reasonable balance in this area in the recruitment and employment of teachers. The Commissioner orders the restoration of the $267,867 reduction.

J-215 Salaries - Clerical $11,400

The position of the Township is, as in the salary issues above, that a retiring secretary can be replaced at a lower salary. The Board argues as it did above that the budget includes estimated dollars based on average settlements since negotiations are not yet

completed. The Board also states that the amount certified by the Township would be less than the estimated first step salary guide figure. It is determined, as stated above, that sufficient clerical staff members are necessary for the efficient operation of the school district and that reasonable and realistic dollars must be estimated for budgetary purposes. The Commissioner orders the restoration of the $11,400 reduction.

J-710 Salaries - Maintenance of Plant $300,000

The Township states that the staff of custodians and groundskeepers can be reduced by 10 positions since additional supervisors are included in the 1993-94 budget. The Board states that the Township's rationale is incorrect. The Board notes that the four supervisors hired for 1993-94 are replacements for positions which were terminated in the spring of 1992 when an outside maintenance management firm was hired. The contracted firm was not satisfactory to the Board, and the Board is returning to an in-house operation. The Board further maintains that the number of custodians and groundskeepers employed by the District may be too few, based on the size of the District which includes 18 major buildings and 395 acres of land. Since the maintenance of school buildings and grounds is required by code and is essential to the operation of the school district, it is determined that the Board has justified the proposed staffing of custodians and groundskeepers. The Commissioner orders the restoration of the $300,00 reduction.

J-640 Utilities $65,815

The Township states that the Board's increase of 4.98% for utilities is without justification. The Township further states

that the Board should consider a "green light program" to generate electrical savings. The Township set the appropriation in this area at the 1992-93 level. The Board argues that a "green light program" would require a capital investment which has not been budgeted in 1993-94. The Board also submits a letter from Jersey Central Power & Light Company which recommends a budgeted increase of 8-9% for 1993-94 based on the rate increase approved for the company in February 1993. Based on the data presented, the Commissioner orders the restoration of the $65,815 reduction.

J-650 Supplies for Operating of Plant $14,420

The Township reduced this line item to provide a 10% increase. The Board argues that the Township has erred in its calculations. The Board states that the amount of $85,000 certified by the Township is less than the $91,567 spent in 1991-92. Again, the efficient operation of the plant is an essential component of a thorough and efficient educational system. Based on the data submitted, the Commissioner orders the restoration of the $14,420 reduction.

J-740 Other Expenses for Repair of Buildings $25,300

The Township also reduced this line item to provide a 10% increase. The Board again states that the Township's rationale is erroneous. The Board states that the amount of $377,950 budgeted for the item in 1992-94 is less than the $415,000 spent in 1992-93. Again, it is determined that the proper maintenance and repair of buildings is a critical requirement in the operation of a school district. The Commissioner determines that the data submitted verifies the necessity for these funds and orders the restoration of the $25,300 reduction.

Additional Surplus Appropriation $750,000

The Township states that an additional appropriation of $750,000 from surplus is reasonable and would provide an anticipated free balance of $884,245 as of June 30, 1994. The Board states that this amount would represent only 1.3% of the budget, and it asserts this would be irresponsible financial management. The Board also states that the free balance including the $750,000 would represent 2.3% of the budget. It notes that this is less than the 3 - 7.5% free balance allowances cited in statute and code. The Board further states that because of overexpenditures in 1988-89, its use of surplus funds is being monitored by the County Superintendent of Schools. It is definitely fiscally necessary and responsible for a board to maintain a reasonable free balance for financial protection in the event of unexpected and/or emergency situations. As the Board states, N.J.S.A. 18A:7D-28 allows a free balance of 3% of the general fund budget when a cap waiver is requested, and N.J.S.A. 18A:7D-4 and N.J.A.C. 6:20-5.8(a) allow a free balance up to 7.5% of the net budget without penalty. Based on the data presented and statutory provisions, it is determined that the free balance which would result from the Township's action could jeopardize the financial security of the Board and thus potentially effect the thorough and efficient educational program in the District. The Commissioner orders the restoration of the $750,000 reduction.

Thus, for the reasons set forth above, the Commissioner determines to restore the entire $1,467,652 in the Current Expense

tax levy reduction appealed herein, as summarized by the chart below:

Account		Restored
J-110	Salaries - Administration	$ 7,850
J-120	Purchased Professional/Technical Services	25,000
J-213	Salaries - Teachers	267,867
J-215	Salaries - Clerical	11,400
J-710	Salaries - Maintenance of Plant	300,000
J-640	Utilities	65,815
J-650	Supplies for Operating of Plant	14,420
J-740	Other Expenses for Repair of Buildings	25,300
	Additional Surplus Appropriation	750,000
	Total	$1,467,652

II. Cap Waiver

The Township reviewed the cap waiver appropriations and certified taxes for $1,934,310 as essential for a thorough and efficient education of the $2,622,200 requested in the waiver by the Board. There is a question as to the Township's legal authority to review this area. In any event, however, its review does not eliminate the Board's responsibility to substantiate and verify the need for funds to provide a thorough and efficient educational system.

This issue of cap waiver funds for the District and the verification of their necessity for the educational program is a complex one. The Board initially submitted a request for a cap waiver significantly greater than the amount proposed to the voters. After an intense review by the Commissioner's staff, this initial request was approved as essential to a thorough and efficient educational system. The approved amount was subsequently reduced two times by the Board in an effort to reduce the tax levy from the 1993-94 budget. These actions resulted in a letter of

reprimand to the Board from Assistant Commissioner Elena Scambio advising that the Board would be monitored by the County Superintendent regarding how all items in the initial cap waiver request would be addressed. The cap waiver of $2,622,200 as submitted for voter approval was approved by the County Superintendent of Schools as essential for a thorough and efficient education and thus only conditional approval was given for the proposed 1993-94 budget.

The Board states that the District has budgeted below cap for four years and did not appeal Township reductions after defeated budgets. The Board asserts that this history has resulted in the need for the cap waiver items to provide a thorough and efficient educational system. In the documents submitted, the Board addressed the need for the items included in the cap waiver proposal.

K-12 Math/Science Initiative $450,000

The Board states that these funds are for textbooks, supplies and materials for the grades K-12 math/science initiative. The Board also states that these funds, to a large extent, are the same as those budgeted for 1992-93. Textbooks, supplies and materials are unquestionably essential to the provision of each specific curriculum area in a thorough and efficient educational system. The Commissioner grants the waiver request of $450,000.

Professional Service Equipment Contracts $400,000

The Board states that these monies are for contracts to service educational equipment. The Board adds that the Township's reduction was based on an incorrect assumption that these funds were for an outside maintenance firm contract which had been terminated. The Board states that no funds were budgeted for a maintenance

service contract and that the $400,000 included in the cap waiver was for professional servicing for educational equipment. The Commissioner finds that appropriate servicing of educational equipment is an obviously necessary expenditure for a thorough and efficient educational system. It is also apparent that the Township's proposed reduction in this area was based on an erroneous position. The Commissioner grants the cap waiver request of $400,000.

Employee Medical Insurance $195,000

The Board states that the funds for employee medical insurance/workers' compensation insurance were budgeted in line with the notification of a 14% increase from the insurance carriers. The Board also states that the Township's reduction in this area was again in error with its claim that the Board has a self-insured medical insurance plan. The Commissioner determines that sufficient funds must be budgeted to provide statutory and contractual employee benefits and grants the cap waiver of $195,000.

Resource Centers - Mandated Programs $477,200

The Board states that the monies in this request are for resource centers to meet the requirements for newly mandated special education programs. The Board states that it has employed in 1993-94 seven new teachers of the handicapped and seven new aides in order to provide the resource centers programs. The Board also states that it will continue to maintain its existing special education classes for over 1400 in-district students with various disabilities. Both federal and state statutes require comprehensive educational services and programs to special education students to

ensure the provision of a complete and appropriate education for each child. The Commissioner grants the cap waiver of $477,200.

	Interest $428,723
Capital Lease Program	Principal $671,277

The Board states that it utilized a capital lease program to provide the equipment necessary for a thorough and efficient educational system. The Board states that the monies budgeted for principal and interest on this lease are obligatory under the lease agreement and must be paid. The Board adds that the lease program was selected to purchase the equipment because the Board could not budget $3,200,000 in a single year to purchase all the equipment needed. The Board contends that the Township's reduction of $750,000 in leased equipment to achieve its proposed reduction in the 1993-94 cap waiver would negatively affect the provision of a thorough and efficient educational system. The Board adds that the purchase of educational equipment and supplies have been significantly impacted by underspending the District budget caps for a prolonged period of time. The Commissioner finds that the Board has developed a legitimate and reasonable fiscal plan to provide the equipment necessary for a thorough and efficient educational system. The cap waiver of $428,723 for capital lease program interest and $671,277 for capital lease program principal is granted.

In summary, upon review of the Board's position and supporting documentation, the Commissioner finds and determines that the $2,622,200 in General Fund cap waiver monies sought by the Board are necessary for mandated services and contractual obligations which are essential to the provision of a thorough and efficient educational program and that reallocation within the maximum

permissible budget is not possible. Board of Education of the Borough of Rutherford v. Mayor and Council of the Borough of Rutherford, Bergen County, decided by the State Board of Education July 7, 1993.

Accordingly, the Monmouth County Board of Taxation is directed to make the necessary adjustment as set forth below to reflect a total of $59,713,145 to be raised in tax levy for General Fund purposes by the Township of Middletown for the 1993-94 school year.

	General Fund Budget	Cap Waiver
Original Tax Levy	$57,090,945	$2,622,200
Reduction	1,467,652	687,890
Tax Levy After Reduction	55,623,293	1,934,310
Restoration	1,467,652	687,890
Tax Levy After Restoration	57,090,945	2,622,200

Total General Fund $59,713,145

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 4, 1993

DATE OF MAILING - NOVEMBER 4, 1993

270-93

C #270-93
SB # 65-93

BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, PETITIONER-RESPONDENT, V. TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY, RESPONDENT-APPELLANT, AND IN THE MATTER OF THE CAP WAIVER APPEAL OF THE MIDDLETOWN TOWNSHIP SCHOOL DISTRICT, MONMOUTH COUNTY.	:	STATE BOARD OF EDUCATION DECISION

Decided by the Commissioner of Education, November 4, 1993

For the Petitioner-Respondent, Kalac, Newman, Lavender & Campbell (Peter P. Kalac, Esq., of Counsel)

For the Respondent-Appellant, Dowd & Reilly (William F. Dowd, Esq., of Counsel)

The Board of Education of the Township of Middletown (hereinafter "Board") sought restoration of reductions made by the Township Committee of the Township of Middletown (hereinafter "Township"), pursuant to N.J.S.A. 18A:22-37, following voter rejection of the Board's proposed 1993-94 budget and cap waiver. The Township had reduced the Board's proposed General Fund tax levy by $1,467,652 and its proposed cap waiver by $687,890. On November 4, 1993, the Commissioner of Education directed restoration of all such amounts reduced by the Township.

MARCH 2, 1994

The Township thereupon filed the instant appeal to the State Board. The Township has also filed a motion to supplement the record pursuant to N.J.A.C. 6:2-1.9 with a portion of the final audit report of the Board for the 1992-93 school year, the payment schedule for debt service and interest owed by the Board to the Monmouth County Improvement Authority, and the Board's salary audit for 1993-94. The Board opposes such motion as involving materials and information not yet in existence during the proceedings before the Commissioner. The Board maintains that, if the Township's motion is granted, then it should be permitted to supplement the record on appeal with an affidavit of the Superintendent of Schools relating that subsequent events revealed that the district had underbudgeted for transportation costs in 1993-94.

The nature of the budget process is such as to require that a determination on disputed school budgets be made on the basis of information which was available for review by the Commissioner, rather than predicated on continually evolving financial circumstances which were not known to or considered by the governing body at the time it acted to reduce the budget which is the subject of the appeal. Bd. of Ed., E. Brunswick Tp. v Tp. Council, E. Brunswick, 48 N.J. 94, 105-106 (1966). In this instance, the exhibits proposed by the Township and Board and the information contained therein were not considered by the Township in effectuating the reductions at issue herein or available for review by the Commissioner. Consequently, we conclude that the record before us should not be supplemented with such materials, and we deny the parties' motions.

We recognize our limitations in reviewing Commissioner's decisions with respect to budgets established by municipal governing bodies pursuant to N.J.S.A. 18A:22-37. Bd. of Ed., E. Brunswick Tp. v. Tp. Council, supra. See N.J.A.C. 6:24-7.5 through N.J.A.C. 6:24-7.8. However, we can not ignore our obligation to assure that the education budget is sufficient to enable the Board to provide a thorough and efficient education to the district's students. Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989); Bd. of Ed., E. Brunswick Tp. v. Tp. Council, supra. Accordingly, in this context, we affirm the decision of the Commissioner to restore the reductions made to the budget and cap waiver. In so doing, we reiterate that the appeal by the Township in this case is based in large part on those documents forming the basis of its motion to supplement, which we have denied.[1] Disregarding those materials, which are not part of the record in this matter, see N.J.A.C. 6:2-1.14, we find that the Township has proffered no valid reason for disturbing the Commissioner's decision.

March 2, 1994

Date of mailing MAR 04 1994

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[1] We note that the Township improperly included those documents and references thereto in an appendix to its appeal brief prior to a determination on its motion to supplement. See N.J.A.C. 6:2-1.14(b).

270-93

C #270-93
SB # 65-93

BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN,

PETITIONER-RESPONDENT,

V.

TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,

RESPONDENT-APPELLANT,

AND

IN THE MATTER OF THE CAP WAIVER APPEAL OF THE MIDDLETOWN TOWNSHIP SCHOOL DISTRICT, MONMOUTH COUNTY.

STATE BOARD OF EDUCATION

DECISION ON MOTION

Decided by the Commissioner of Education, November 4, 1993

Decided by the State Board of Education, March 2, 1994

For the Petitioner-Respondent, Kalac, Newman, Lavender & Campbell (Peter P. Kalac, Esq., of Counsel)

For the Respondent-Appellant, Dowd & Reilly (William F. Dowd, Esq., of Counsel)

Inasmuch as we find that the Township Committee's application fails to meet the standards that would entitle it to relief under Crowe v. De Gioia, 90 N.J. 126 (1982), we deny its motion for a stay of our decision of March 2, 1994.

August 3, 1994

Date of mailing AUG 04 1994

271-93

BOARD OF EDUCATION OF THE TOWNSHIP OF FLORENCE, PETITIONER, V. TOWNSHIP COUNCIL OF THE TOWNSHIP OF FLORENCE, BURLINGTON COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

NOVEMBER 4, 1993

BOARD OF EDUCATION OF THE TOWNSHIP OF FLORENCE,

PETITIONER,

V.

TOWNSHIP COUNCIL OF THE TOWNSHIP OF FLORENCE, BURLINGTON COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of $224,600 made by governing body following voter rejection of proposed budget on April 20, 1993.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore $183,500 for a total General Fund tax levy of $5,062,526 for 1993-94 school purposes.

BOARD OF EDUCATION OF THE TOWNSHIP OF FLORENCE, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
TOWNSHIP COUNCIL OF THE TOWNSHIP OF FLORENCE, BURLINGTON COUNTY, RESPONDENT.	:	DECISION

For Petitioner, Stephen J. Mushinski, Esq.

For Respondent, William T. Wilkins, Esq. (Wilkins & Vallone)

The Board of Education of the Township of Florence (Board) appeals to the Commissioner of Education from an action taken by Township Council of the Township of Florence (Council) pursuant to N.J.S.A. 18A:22-37, certifying to the Burlington County Board of Taxation a lesser amount for General Fund costs for the 1993-94 school year than the amount proposed by the Board in its budget which was rejected by the voters.

At the annual school election held on April 20, 1993, the Board submitted to the electorate a proposal to raise $5,103,626 by local taxation for General Fund costs of the school district. After the voters' rejection of the proposal, the Board submitted its budget to Council for its determination of the amount necessary for the operation of a thorough and efficient school system in Florence Township for the 1993-94 school year pursuant to the mandatory obligation imposed on Council by N.J.S.A. 18A:22-37.

After consultation with the Board, Council made its determination and certified to the Burlington County Board of Taxation an amount of $4,879,026 for General Fund costs.

GENERAL FUND

Board's Proposal	$5,103,626
Council's Proposal	$4,879,026
Amount Reduced	$ 224,600

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

Mindful, then, of the balance to be applied in this standard of review, the Commissioner makes the following

determination with respect to the reduction in the General Fund tax levy effectuated by the Council.

GENERAL FUND LINE
ITEM REDUCTIONS

Line Item	Description	Reduction
11-140-100-610-000-176-H	Instrumental Music	$ 5,000
11-110-100-101-000-00-A	Sals. Tchr's Presch-K	12,500
11-120-100-101-000-00-A	Sals. Tchr's 1-5	12,500
11-130-100-101-000-00-A	Sals. Tchr's 6-8	12,500
11-140-100-101-000-00-A	Sals. Tchr's 9-12	12,500
11-000-260-100-CUS-A	Maint. Servs.	20,000
11-230-89-SBA-000-A	Board Office Exp.	2,000
11-000-230-890-000-00-A	Board Member's. Exp.	5,500
11-00-230-890-SUP-00-A	Supt's Office Exp.	1,000
11-000-260-620-ELE-000-A	Electricity	10,000
11-000-260-620-HTG-000-A	Heat (Natural Gas)	5,000
11-401-100-100-000-00-A	Sals. Extracurr.	4,000
11-402-100-100-000-000-A	Sals. Athletic	13,600
11-000-260-610-000	Maint. Bldgs & Grnds	1,000
11-000-270-600-GAS-000	Gasoline, Oil	1,500
11-402-100-600-FHS-000-S	Supplies Athletic/Exp.	6,000
	Total	$124,600

Further, Council directed the Board to add to its budget an additional $100,000 from the General Fund Free Appropriations Balance, for a total reduction of $224,600.

The Board contends that the budget reductions by Council are without proper foundation; therefore, they are arbitrary, capricious and unreasonable. Further, the amount certified by Council will not provide sufficient funds to the Board to conduct a thorough and efficient system of schools. Council denies that its determinations are arbitrary, capricious or unreasonable, and asserts that the school budget it adopted meets the criteria established by N.J.S.A. 18A:22-37.

In the Commissioner's judgment, Council has supplied reasons for its ultimate determination regarding each of the line items reduced; therefore, the budget will be considered according to Council's specific reductions.

Line Item	Reduction
11-140-100-610-000-176-H, Instrumental Music	$5,000

Council avers that the Board should maintain the status quo in this item by utilizing the instruments that were in its inventory during the prior school year. Council also recommends the practice it noticed in other school districts of requiring pupils, who participate in the musical instrument program and do not own an instrument, to lease the specific instrument which they utilize at a relatively minimal cost.

The Board asserts that its philosophy is that every pupil should have the right to participate in any aspect of this extracurricular program which includes the opportunity to learn to play a musical instrument and to participate in the band program. In order to facilitate this philosophy, the Board has approximately 22 wind instruments for its music program for grades four through twelve, and at present there are approximately 150 pupils participating. The proposed budget reduction would severely limit the number of instruments the music program could purchase, even through the most frugal leasing programs currently available. Further, the reduction would necessitate that only children whose parents have the financial ability to supply instruments would be able to participate in the instrumental music program.

The Commissioner notes with approval the Board's effort to improve and build its music program. Extracurricular activities are important to a child's schooling just as other components in the educational process are. With the ability to procure more instruments, a larger percentage of pupils will be able to participate. As the Board points out, its program would go from

being inclusive to exclusive and severely limited in scope if participation is limited to pupils who have the financial ability, rather than otherwise talented pupils whose families are without the financial ability to support their participation in the instrumental music program. The Board's position is reasonable, justified, and its rationale is adequately supported. Accordingly, the $5,000 reduction will be restored to the budget.

Line Item		Reduction
Teachers' Salaries		
11-110-100-101-000-00-A	Preschool-K	$12,500
11-120-100-101-000-00-A	Grades 1-5	each
11-130-100-101-000-00-A	Grades 6-8	($50,000)
11-140-100-101-000-00-A	Grades 9-12	

Council simply states that each of the above areas is "Overstaffed." Using tables showing class sizes and the current staff, the Board argued at great length that any reduction in staff would cause severe overcrowding at every grade level in every school in the district. A review of those tables supports the Board's argument; however, Council does not seek to reduce a staff member for every class at every grade level in the district. Rather, Council merely suggests that $12,500 can be cut from each of the four accounts listed above with the resultant reduction of no more than one or two teachers.

In the Commissioner's judgment, it is not enough to say that a school or a grade level is overstaffed without showing specifically where. Although the organization and staffing of schools is the province of the Board, the single word "Overstaffed," without more, suggests an arbitrary reduction. Further, this is a money reduction, not a staff reduction, indicating that Council did not know how its reduction could affect staff or class size at any

level. Although it appears to Council that a $50,000 overall reduction in these salary accounts would not prevent the Board from operating a thorough and efficient system of education, its suggestion lacks the specificity required for affirmation of its determination. Accordingly, the $50,000 reduction will be restored to the budget.

Line Item	Reduction
11-000-260-100-CUS-A, Maintenance Services	$20,000

Council eliminated two additional custodians included in the Board's budget suggesting that they are not needed. Council states that the new middle school, scheduled for completion in February 1994, will eliminate the need for custodians at the six trailers now housing the middle school pupils. Those trailers will no longer need custodial services.

The Board argues that its new middle school will add more than 45,000 square feet which must be cleaned and maintained. Also, there will be additional areas which will be opened for special school events and other extracurricular activities. Those events must be monitored by a custodian. Further, if these positions are eliminated, the Board asserts that it will have an insufficient number of custodians to clean and maintain its schools. The result might be the curtailing of some events and some extracurricular activities; therefore, the pupils' school life and learning experiences will suffer and the Board will be unable to provide its state-mandated thorough and efficient education.

The Commissioner has reviewed the positions of the litigants and considers the additional 45,000 square feet that will need to be cleaned and maintained a major factor in the Board's

budget for more custodial help upon the completion of the new middle school. It appears that the elimination of the six trailers will not negate the need for additional custodians because there will be greater areas of responsibility with the new building. The Board's position in this regard is reasonable; therefore, the $20,000 reduction of the two custodial positions will be restored to the budget.

Line Item	Reduction
11-000-260-610-000, Maintenance, Building and Grounds	$1,000

The Board states that the $1,000 eliminated by Council was to be used for reimbursement to the buildings and grounds supervisor, as well as the support staff, for licensing fees and tuition reimbursement. Specifically, the buildings and grounds supervisor is required to take courses within the New Jersey Public School Facility Supervisors Program at Rutgers University for recertification of pesticide applicator licenses, as well as the boiler license. Additionally, the support staff is required to complete and pass the black seal boiler school for which they are to receive a reimbursement of the cost of attending, as well as a reimbursement for the fee of obtaining their black seal boiler license.

Council rejects the Board's justification for this line item and maintains that the line item is overbudgeted. Council asserts that as a cost-saving measure, the Board should hire personnel who have already obtained the necessary licenses to operate the various machinary and equipment involved.

The Board states that the support staff cannot personally afford to pay for the licensing fees which are required by the

district under the present negotiating contract. Further, if this money is not restored, it may be necessary to retain outside contractors to perform this work at a greater cost than the $1,000 it seeks to be restored to its budget.

Having considered the positions of both parties, the Commissioner does not find any support for the proposition that the line item is overbudgeted. The Commissioner does find, however, that the Board's statement is reasonable, rational and compelling. Consequently, the $1,000 reduction will be restored to the budget.

Line Item	Reduction
Expenses 11-230-89-SBA-000-A, Board Office Expenses; 11-000-230-890-000-00-A, Board Member Expenses; 11-00-230-890-SUP-00-A, Superintendent's Office	$8,500

These line items were reduced by Council in the aggregate sum of $8,500 based on its determination that in each of the three line items, there are sums appropriated to reimburse expenses incurred at the annual School Board Convention held in Atlantic City. The line item designated "Board Office Expenses" appropriated the sum of $8,525 for supplies for the Board office, other valid office expenses, and convention expenses, dues and subscriptions. Council reduced this line item by $2,000, eliminating convention expenses, dues and subscriptions.

The line item designated "Board Member Expenses" provides for convention expenses of $3,500. All other expenses are $2,000 for a total line item expense of $5,500. Council suggests that the Board should pay only registration fees and that its members should pay for their own food and lodging.

Under "Superintendent's Office Expenses" Council deducted $1,000 for convention expenses, dues and subscriptions from the

original budget of $3,860. The balance of the account includes all the supplies and materials needed to run the Superintendent's office. Council states that these three reductions will not detrimentally affect the quality of education in the school district.

The Board defends these line items in great detail and explains the benefits its members derive from attending the annual School Board Convention. During the convention, Board members attend meetings, co-mingle with Board members from all over the state and learn vital information provided in workshops presented by the New Jersey School Boards Association.

The Commissioner considers the annual School Board Convention in Atlantic City to be a worthwhile and beneficial experience for Board members. The convention has the reputation of providing a great deal of information which can be useful to Board members. Further, the ideas Board members share with others is immeasurable. However, the Commissioner finds and determines that the Board has failed to demonstrate that its obligation to educate itself necessitates the full Board's attendance at inservice events, including the annual workshop. See Board of Education of the Borough of Bergenfield v. Mayor and Council of Bergenfield, Bergen County, 1991 S.L.D. 2225. Nor has the Board demonstrated that greater economics cannot be exercised in attendant discretionary expenditures without impairing the provision of a thorough and efficient education. Therefore, the following reductions will be sustained: Board Office Expenses - $2,000; Board Member Expenses - $3,500 ($2,000 for all other expenses will be restored to the budget); Superintendent's Office Expenses - $1,000, for an aggregate reduction in these accounts of $6,500 with $2,000 restored to the budget.

Line Item	Reduction
11-000-260-620-ELE-000-A, Electricity	$10,000

Council avers that the Board increased this line item by 30% over its prior year's budget based on the opening of the new middle school during the first part of next year. And although Council concedes that there will be a necessary increase for electricity, it states that the Board did not consider that there will be no further need to provide electricity to the temporary class rooms located in trailers which currently house the middle school which will be eliminated.

The Board argues that its electricity costs have gone up an average of 5% for each of the past three years. Considering these increases and an estimate of the cost of electricity for the new building which was provided by Public Service Gas and Electric, it placed an additional $21,000 in the item to cover the cost of electricity for the middle school after it is opened.

In the Commissioner's judgment, Council has allowed for an increase in this account, and it is noted that the Board did not comment about an estimated savings generated by the elimination of the middle school trailers. Council has made a reasonable determination; therefore, the $10,000 reduction will be sustained.

11-000-260-620-HTG-000-A, Heat (Gas)	$5,000

The arguments of the litigants for and against this line item are identical to those set forth in the Electricity account above. Here, the Board increased this line item by $24,000 which Council considers to be overestimated; therefore, it was cut by $5,000. The Board, arguing as it did above, considers its protection reasonable based on past years' increases and an estimate by Public Service.

Having considered the arguments, the Commissioner finds Council's position to be reasonable. It has made a modest reduction while providing for an increase in this account; therefore, the $5,000 reduction will be sustained.

Line Item	Reduction
11-401-100-100-000-00-A, Extracurricular Salaries	$4,000

The Board asserts that the amount appropriated for the 1993-94 school year represents nearly a $2,000 reduction from the amount which was appropriated in the 1992-93 school year for this line item. Further, a decrease in the extracurricular salaries will result in the elimination of a particular extracurricular activity. The Board believes that these activities are necessary for a well-rounded education for its pupils and seeks restoration of the full reduction.

Council believes that the extracurricular activities can be maintained, despite its reduction, without detrimentally affecting the programs that are offered. Council does not intend to eliminate any extracurricular activities; however, it states that it "was solely motivated in an effort to effect cost savings, given today's poor economic conditions."

In the Commissioner's judgment, Council's reasoning is deficient. Guidelines have been established for municipal governing bodies considering reductions in a budget proposed by a local board of education when that budget has been rejected by the voters. In that regard, the Court stated in part as follows:

> ***The governing body may, of course, seek to effect savings which will not impair the educational process. But its determinations must be independent ones properly related to educational considerations rather than voter reactions.

***Board of Education of East Brunswick Township v. Township Council, East Brunswick, 48 N.J. 105 (1966)

In the present matter, Council failed to make any educational considerations concerning this reduction; whereas, the Board adequately set forth its rationale detailing the need for these monies. Consequently, the $4,000 reduction will be restored to the budget.

Line Item	Reduction
11-402-100-100-000-000-A, Athletic Salaries	$13,600

Council reduced this line item by 10% to effect a cost savings by reducing athletic programs that will not affect the school district's ability to provide a thorough and efficient education, while maintaining an adequate sports program.

The Board contends that this cut will force the school district to discontinue all middle school and freshman sports. The Board explains in great detail the educational and social values pupils experience in athletic programs and states that its pupils will be denied these benefits if it is forced to eliminate certain athletic programs.

In the Commissioner's judgment, 10% cut in this budgeted item should not cause the elimination of all middle school and freshman sports. There are other options including an across-the-board reduction of the entire athletic program. Further, it has not been shown that the Board will be unable to provide a thorough and efficient educational program irrespective of this reduction by Council; therefore, the $13,600 reduction will be sustained.

Line Item	Reduction
11-000-270-600-GAS-000, Gasoline, Oil	$1,500

Council states that this account has increased over the amount appropriated by the Board in its prior school year budget. Council determined that its reduction was attainable without detrimentally affecting the transportation operations of the school district.

The Board argues that it has increased its transportation responsibilities because of an increase in the number of its special education pupils and the changing of its attendance areas because of classroom availability. This has resulted in the need to purchase two additional buses.

Under these circumstances, the Commissioner finds it entirely reasonable to budget this modest increase for fuel and oil. Accordingly, the $1,500 reduction will be restored to the budget.

11-402-100-600-FHS-000-S, Athletic Supplies	$6,000

Council considers this line item overbudgeted and too large an expenditure for athletic supplies. While concerned for the safety of school pupils, Council believes that this savings can be attained by postponing replacement of supplies and equipment where they are still serviceable and can be utilized without placing in jeopardy the safety and well-being of the school pupils.

The Board states that the amount budgeted does not represent any increase over the amount appropriated and actually expended in 1992-93. The Board maintains that the proposed cut would eliminate many items which are essential to the care and

maintenance of the current athletic equipment, as well as eliminate supplies designed for the protection of the student athletes.

In the Commissioner's judgment, such an expenditure is desirable but not necessary for the maintenance of a thorough and efficient educational program. The record shows that sufficient funds remain in this account despite Council's reduction; therefore, the $6,000 reduction in this line item will be sustained.

Line Item	Reduction
Free Balance	$100,000

The General Fund Free Appropriations Balance was reduced by Council in the amount of $100,000. Council states that the remaining balance of $308,043 is more than adequate to protect the school district from any emergency contingencies.

The Board argues that its current free balance represents approximately 3.7% of its proposed 1993-94 budget and that it has outstanding a number of issues which could seriously deplete its free balance. Specifically, there is the matter of a potential residential placement of a pupil at a cost of over $80,000. Another matter concerns a possible back pay judgment against the Board in excess of $100,000. And the school district is in the midst of an $11,000,000 renovation/construction project which could demand further funding from its free balance.

In the Commissioner's judgment, the Board's free balance is marginal considering the contingencies outstanding for which the Board could become liable.

In Board of Education of Fair Lawn v. Mayor and Council of Fair Lawn, 143 N.J. Super. 259 (Law Div. 1976), aff'd 153 N.J.

Super. 480 (App. Div. 1977), the court held that "***the board has the right, subject to ultimate review by the Commissioner of Education, to maintain a reasonable surplus in order to meet unforeseen contingencies.***" (at 273) See also: Board of Education of the Town of Dover v. Mayor and Aldermen of the Town of Dover, Morris County, 1991 S.L.D. 1330 wherein the Commissioner concluded that a surplus of 1.9% of the current expense budget was "insufficient to sustain the Board against unforeseen contingencies." (at 1343) Both in prior case law and in regulation, the Commissioner has held 3% as the amount of surplus to be generally regarded as reasonable and necessary. (N.J.A.C. 6:20-2.13)

In Board of Education of Delaware Valley Regional High School District v. Township of Alexandria et al., decided by the Commissioner, February 6, 1989, aff'd in part/rev'd in part by the State Board, August 2, 1989, the State Board of Education determined a free balance of approximately 4% of the current expense budget to be a slender reserve. See Board of Education of the Township of West Orange v. Township Council of West Orange, Essex County, decided by the Commissioner January 28, 1991.

In the present matter, the Board's free balance is insufficient when measured against the above guidelines. Based on the rationale articulated in the several decisions above, the $100,000 reduction in the General Fund free balance will be restored to the budget.

A revised table of the reductions showing the amounts restored and sustained is set forth below:

Description	Restored	Not Restored
Instrumental Music	$ 5,000	$ -0-
Sals. Tchr's Presch-K	12,500	-0-
Sals. Tchr's 1-5	12,500	-0-
Sals. Tchr's 6-8	12,500	-0-
Sals. Tchr's 9-12	12,500	-0-
Maint. Servs.	20,000	-0-
Board Office Exp.	-0-	2,000
Board Member's. Exp.	2,000	3,500
Supt's Office Exp.	-0-	1,000
Electricity	-0-	10,000
Heat (Natural Gas)	-0-	5,000
Sals. Extracurricular	4,000	-0-
Sals. Athletic	-0-	13,600
Maint. Bldgs & Grnds	1,000	-0-
Gasoline, Oil	1,500	-0-
Supplies, Athletic/Exp.	-0-	6,000
TOTALS	$ 83,500	41,100
General Fund Free Appropriations Balance	100,000	-0-
GRAND TOTAL	$183,500	$41,100

This tabulation shows that $183,500 must be restored to the budget. Accordingly, the Burlington County Board of Taxation is directed to add to the local tax levy for the Township of Florence School District $183,500 for General Fund current expense purposes for the 1993-94 school year which when added to the amount of $4,879,026 previously certified by the governing body will result in a total General Fund current expense tax levy of $5,062,526.

Amount of Tax Levy Certified by Council	$4,879,026
Amount Restored by the Commissioner	183,500
Total Tax Levy after Restoration	$5,062,526

IT IS SO ORDERED.

NOVEMBER 4, 1993

DATE OF MAILING - NOVEMBER 4, 1993

COMMISSIONER OF EDUCATION

272-93

TERRI IVORY ON BEHALF OF A.I.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parent sought determination that Board had wrongfully dismissed her daughter (A.I.) from summer school, thus causing A.I. to be ineligible for eleventh grade due to lack of ten credits.

Initial decision found that summer school participants had received memo stating: "DISORDERLY STUDENTS WILL IMMEDIATELY BE DROPPED FROM ALL COURSES WITH NO TUITION REFUND." ALJ found A.I.'s due process rights were not violated. Since summer school is a privilege, not a right, A.I.'s misbehavior in getting involved in fighting incident gave Board rational basis to dismiss her from program. Petition was dismissed.

Commissioner adopted findings and determination in initial decision.

NOVEMBER 5, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8493-93
AGENCY DKT. NO. 305-8/93

TERRI IVORY ON BEHALF OF A.I.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN, MONMOUTH COUNTY,
Respondent.

Terri Ivory, petitioner, pro se

Peter Shebell, Jr., Esq., for respondent (Shebell & Schibell, attorneys)

Record Closed: October 6, 1993 Decided: October 21, 1993

BEFORE **M. KATHLEEN DUNCAN**, ALJ:

This matter was commenced on August 20, 1993, when Terri Ivory on behalf of her daughter A.I. (hereinafter petitioner) filed an Amended Petition of Appeal with the Commissioner of Education seeking a determination that the Board of Education of the Township of Ocean (hereinafter respondent) had wrongfully dismissed her daughter from the summer school program and requesting an order requiring respondent to permit A.I. to make up two weeks of summer school work and take the exams in order to receive the ten credits necessary to move to eleventh grade. Petitioner's request for emergent relief was denied by the Commissioner of Education, and on September 13, 1993 the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 to -13. A prehearing conference was conducted on September 21, 1993, at which time the issues for determination at hearing were identified as follows:

1. Was A.I. improperly expelled from summer school?

2. If the answer to the previous question is yes, what are the appropriate remedies?

The plenary hearing was scheduled pursuant to the procedures for accelerated proceedings under N.J.A.C. 1:1-9.4 for October 6, and 12, 1993, at the Trenton Office of the Office of Administrative Law. The hearing commenced as scheduled on October 6, 1993 and concluded on the same date whereupon the record closed.

FINDINGS OF FACT

Most of the facts relevant to a determination of this matter are not in dispute and I therefore find the following as uncontested facts.

A.I., a student enrolled at Neptune High School for 1992-93 school year, failed to satisfactorily complete the course requirements for Applied Biology and English II and accordingly determined to take the courses in summer school to obtain the ten credits necessary to commence the 1993-94 school year as a junior. She spoke with the Guidance Department in Neptune High School and was advised that Ocean Township High School offered both courses and was the least expensive summer school option. On June 30, 1993, A.I. registered for both courses and paid the required $150 per course fee. The registration materials which were provided to A.I. at this time included a brochure describing the five-week (July 2 through August 6, 1993) summer school session. That brochure provided in pertinent part:

> DISCIPLINE - An atmosphere conducive to learning is essential for a successful summer school. Students are expected to exercise self-control, act respectfully, and arrive daily ready to learn. Misbehavior will result in dismissal with no tuition refund. Proper attire must be worn at all time (shirts & shoes). Smoking is not allowed at any time in the building or on the grounds. Food and beverages are not allowed in the classrooms. Students who are enrolled in both sessions are not permitted to assemble in the parking lot or leave the school grounds between classes. (R-1 in evidence)

A.I.'s signature and the signature of her father on the June 30, 1993 application for admission appear directly below the statement, "I agree to meet all requirements and abide by all the rules and regulations of Ocean Township Summer School 1993." (R-2 in evidence) A separate memorandum distributed to all summer

school participants reiterates, "DISORDERLY STUDENTS WILL IMMEDIATELY BE DROPPED FROM ALL COURSES WITH NO TUITION REFUND." (R-5 in evidence).

A.I. attended classes between July 2, and July 20, 1993, without incident. On July 20, 1993, however, a series of incidents occurred which resulted in a determination by Annette Caccamise, Director of the Summer School, that A.I. would not be permitted to return to the summer school thereafter and would not receive a refund of her tuition monies.

The series of events which resulted in A.I.'s dismissal from summer school commenced at approximately 12:15 p.m. on Tuesday, July 20, 1993, while A.I. was attending her English II course. At that time the door to the classroom opened and some female teenagers announced that they were there to fight with D.F. When Ms. Caccamise noticed these girls in the hallway shortly thereafter, they advised her that they were waiting for their cousin; Ms. Caccamise advised them that they could not wait inside the building and asked them to leave. She escorted them to the door. As she was returning to her office, Mr. Costa, A.I.'s English teacher, approached her and informed her that he had been advised by A.I. that those girls were there to fight D.F., her "sister." Ms. Caccamise returned to the building doorway where she observed the girls sitting on a wall outside of the school. She approached them and asked them whether they were there to fight D.F. While she was talking with the girls, D.F. walked out the front door of the school and passed them on her way to her mother's car. Ms. Caccamise then approached D.F., and her mother. Ms. F. provided Ms. Caccamise with the history of the longstanding conflict between the girls and D.F., following which Ms. Caccamise advised D. F. and her mother to leave immediately. When D. protested that she had to go back into the school to get her keys and her books, Ms. Caccamise instructed her to go promptly to lock herself in her mother's car, and Ms. F. walked backed into the building with Ms. Caccamise to retrieve the books and keys. On the way Ms. F. and Ms. Caccamise stopped to talk with the girls who were still sitting on the wall outside the front door. Ms. Caccamise advised them that the school had a social worker and asked whether they would be interested in having him mediate this dispute. When they seemed interested, she advised them she would contact Dr. McGroogan, the social worker, and she asked them to leave.

By the time Ms. Caccamise and Ms. F. had returned to the classroom, it was 12:25 p.m. and summer school had been dismissed. A.I. was still in the classroom, however, and she spoke to Ms. Caccamise, saying words to the effect, "If they fight

my sister I'm going to fight them. If anybody messes with my sister, I will fight them." As Ms. Caccamise, Ms. F. and A.I. walked toward the front door, Ms. Caccamise advised A.I. that she should refrain from becoming involved in any altercation because it was cause for immediate dismissal. A.I. repeated her intention to fight if the girls were fighting with D., at which point, as the three approached the doorway Ms. Caccamise noticed students standing on the wall looking toward the parking area. She went right back into the building and told her secretary to call the police.

Outside the building D.F., instead of locking herself in her own car as instructed, had crossed the parking lot to the driveway where petitioner had parked her car and was waiting for her daughter. D.F. said, "Mom," (which is how she addressed petitioner because A.I. and she were good friends, "those girls are here to beat me up." Pursuant to petitioner's instructions, D.F. got into the back seat of petitioner's car and locked the door. Almost immediately the girls who had been sitting on the wall outside the school building front door came over to petitioner's car and began pounding on the car and shouting words to the effect, "Bitch, we going to beat your ass today." Petitioner, who was in her car behind the driver's wheel, shouted to the girls to get away from her car and to stop pounding it. When they did not listen, petitioner got out of the car and was attempting to move them away from it when one of the girls reached inside the open door, unlocked the back door and dragged D.F. out. D.F. and one of the girls, J. O., began fighting. Petitioner intervened between the two of them and was attempting to break up the fight and in the process she herself was hit on the side of the head either by J. or by D. Petitioner then heard her daughter A.I. shouting loudly several times, "You hit my mother. You bitch, you hit my mother." By the time Ms. Caccamise, Ms. F. and A.I. arrived on the scene of the fight, the fight had been broken up by some other teachers who were in the area. A.I., however, kept shouting, "You hit my mother", to which petitioner responded, "No, get in the car." A.I., however, did not follow her mother's instructions and kept yelling. At this point one of the other girls, S.H., yelled at A.I., "I did not," and ran over and began hitting A.I. Petitioner intervened between S.H. and her daughter and attempted to push her daughter into the car. In the process she was again hit on the side of her head, this time by S.H. The police arrived and the fight was stopped. Petitioner and A.I. went to the police station and filed charges against the girls who had been involved in the fight.

Later that same day, after petitioner had reported to her nursing job at Monmouth Medical Center, she received a telephone call from Ms. Caccamise who

advised her that she was glad that charges had been filed against the girls and that she was sorry about what had happened, but that A.I. could not come back to summer school. The next morning petitioner went to school and spoke with Ms. Caccamise about what had happened. Ms. Caccamise advised petitioner that A.I. had been involved in a fight because she had not been quiet and had not gotten into the car immediately as she had been instructed to do. Petitioner advised Ms. Caccamise that A.I. had not been fighting because she, petitioner, had prevented it. Ms. Caccamise advised petitioner of her determination to dismiss all of the girls who were involved from summer school, as it was her judgment that they were all engaged in misbehavior warranting dismissal. Petitioner then contacted the Guidance Department at Neptune High School to ascertain whether there was any way she could arrange for A.I. to obtain the credits necessary for her to move to eleventh grade. The Guidance Department advised her that there was not. She then contacted the Commissioner's office, Division of Controversies and Disputes, and spoke with Mrs. Kim about filing a petition of appeal with the Commissioner for emergency relief. Unfortunately, by the time petitioner received the materials sent to her by the Commissioner's office concerning how to file a petition of appeal, summer school was over. Petitioner's original petition was prepared on August 13, 1993; an amended petition seeking emergent relief was filed on August 20, 1993. Mrs. Kim advised petitioner that the request for emergent relief was denied, but the matter would be transmitted to the Office of Administrative Law and processed on an accelerated basis.

The few areas of factual dispute in this matter are not truly relevant to a determination of the matter, nor do they reflect adversely upon the credibility of any of the witnesses. Ms. Caccamise testified that she did not see petitioner being hit by any of the girls prior to the altercation between S.H. and A.I.; upon examination by the undersigned, however, she acknowledged that she did not know what had happened before she arrived upon the scene and that A.I. had been a few steps ahead of her in arriving at the scene. Ms. Caccamise also testified that she heard A.I. shout only the word "mother" before S.H. attacked her. Then she further testified that she had yelled at A.I. repeatedly, "Shut-up and get in the car". Petitioner testified that she did not hear Ms. Caccamise yelling at A.I. at that time, but with all the excitement and confusion of the fight, however, this is not surprising. Finally, petitioner testified that Ms. Caccamise had advised her the day after the incident that A.I. had been doing all right in both of her courses and would probably have gotten the ten credits. Ms. Caccamise testified that at the time A.I. was dismissed from summer school she was passing the English course but failing the

Biology course. A.I. acknowledged that she had not been passing the Biology course, and accordingly, petitioner's recollection was simply inaccurate. The outcome of this matter is not dependent upon the resolution of any factual disputes; it requires, rather, a legal determination concerning whether A.I.'s due process rights were violated by respondent's failure to provide her a hearing prior to dismissal and whether respondent's determination to terminate A.I.'s summer school enrollment was arbitrary, capricious and unreasonable.

APPLICABLE LAW AND DISCUSSION

The rule is well settled that actions of local boards of education which lie within the area of their discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives. Kopera v. West Orange Bd. of Education, 60 N.J. Super. 288 (App. Div. 1960). Which courses of study to offer and when to offer them have been held to be discretionary decisions left to local boards of education. Parsippany-Troy Hills Ed. Ass'n v. Bd. of Ed., 188 N.J. Super. 161 (App. Div. 1983). School districts are not required to conduct summer schools; whether to do so and what rules and regulations to impose for participants therein are areas for the board's discretionary judgment. R-1 in evidence, the brochure prepared by the Ocean Township High School Summer School Director setting forth rules and regulations for the operation of the summer program, emphasizes in plain language that "(s)tudents are expected to exercise self-control, act respectfully and arrive daily ready to learn." "Misbehavior will result in dismissal with no tuition refund,"the brochure states.

Petitioner argues that A.I.'s conduct on July 20, 1992, wherein she disregarded the instructions of Ms. Caccamise, the Summer School Director and her mother to remain silent and to get in the car to avoid any altercation, was not unreasonable under the circumstances. It is petitioner's position that A.I. was not involved in fighting because she, petitioner, prevented it by physically restraining her daughter. The underlying facts, which are not in dispute, reveal, however, that at the time A.I. repeatedly shouted, "You hit my mother. You hit my mother", all fighting had temporarily ceased. No one was hitting petitioner at that time. It was only after A.I. continued to shout that S.H. began attacking her, hitting petitioner in the process. While it is certainly understandable that A.I. would be upset when she witnessed her mother being hit during attempts to break up the original fight between D.F. and J.O., by the time A.I. actually reached the scene that fighting had been stopped by teachers in the area. If A.I. had exercised the self-control specifically required by the

summer school rules and had obeyed her mother and Ms. Caccamise, the additional fight involving S.H. would not have occurred.

Certainly there were various degrees of culpability for the several teenage girls involved in this incident. For respondent to conclude, based upon all the facts, that A.I.'s lack of self-control constituted "misbehavior" within the rules requiring dismissal with no tuition refund was not an arbitrary, capricious and unreasonable decision, however.

The remaining issue relates to how respondent's decision was made. Petitioner asserts that A.I.'s due process rights were violated because respondent did not conduct a plenary hearing prior to issuing its determination to dismiss A.I. Petitioner points to P-1 in evidence, respondent's board policy concerning expulsion from school of students in the district. P-1 defines "expulsion" to mean the permanent exclusion of a student from the schools of the district. Respondent argues that the policy articulated in P-1 does not apply to summer session, the offering of which is optional with the school district and enrollment in which is optional for the student. Respondent argues that attendance at summer school is a privilege, not a right, and because the course offerings are five weeks of intensified study for material which would otherwise take a full year to cover, that no misbehavior of any kind can be tolerated. The full-blown plenary hearing provided for in P-1 in evidence is clearly appropriate when the proposed action is the termination of a student's right to attend the public schools in his/her district. For the termination of such a significant right, the principles of due process would require no less than such a full-blown hearing. Due process is flexible and calls for such procedural protections as the particular situation demands, however. Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action. New Jersey Parole Bd. v. Byrne, 93 N.J. 192 (1983). Since the summer school program is of such limited duration, a full plenary hearing before the Board of Education would not be a practical way for making determinations concerning misbehavior, nor does termination of a privilege require such an elaborate procedure. Fundamental fairness in a situation such as this requires notice and an opportunity to be heard. Under the facts of the present matter, the decision maker, Ms. Caccamise, observed first-hand most of the actions involved. On July 21, 1993, the day after the incident, petitioner did have an opportunity to discuss and explain and argue her cause with Ms. Caccamise. Under

all of the circumstances present in this matter, I **CONCLUDE** that petitioner's and A.I.'s due process rights were not violated by the manner in which the determination was made.

Accordingly, for all of the foregoing reasons, the determination of the Ocean Township Board of Education dismissing A.I. from the 1993 summer session is **HEREBY AFFIRMED** and the within matter is dismissed with prejudice.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. Pursuant to N.J.A.C. 1:1-9.4(c)8 and the agreement of the parties and the **DEPARTMENT OF EDUCATION, THE COMMISSIONER** shall issue a final decision within fifteen (15) days.

Within six (6) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Oct 21, 1993
Date

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

Oct. 21, 1993
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 26 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

cc

DOCUMENTS IN EVIDENCE

For petitioner:

P-1 Expulsion policy (2 pages)

For respondent:

R-1 Summer School 1993 brochure
R-2 Application for admission, signed 6/30/93
R-3 Neptune High School Guidance Department list of 1993 Accredited Summer High School Programs
R-4 Permission from Neptune High Principal for A.I. to attend summer school courses
R-5 Notice to Summer School Students
R-6 Red Bank Regional Summer School Enrollment Form
R-7 Shore Regional High School Summer School Information Sheet
R-8 Red Bank Catholic Summer School Application (3 pages)

WITNESSES

For petitioner:

Terri Ivory
A.I.

For respondent:

Annette Caccamise
Robert J. Mahon

OAL DKT. NO. EDU 8493-93

TERRI IVORY ON BEHALF OF A.I.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review of the record, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge and adopts the initial decision as the final decision in the matter for the reasons well stated therein.

Accordingly, the Petitioner of Appeal is dismissed with prejudice.

COMMISSIONER OF EDUCATION

NOVEMBER 5, 1993

DATE OF MAILING - NOVEMBER 8, 1993

273-93

273-93

JUDY L. GRAEF,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

NOVEMBER 8, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6562-92
AGENCY DKT. NO. 378-7/92

JUDY L. GRAEF,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,
Respondent.

Wayne J. Oppito, Esq., for petitioner
(New Jersey Principals and Supervisors Association)

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

Record Closed: September 30, 1993 Decided: September 30, 1993

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

This matter was transmitted to the Office of Administrative Law by the Department of Education on August 27, 1992, as a contested case as the result of the filing of a petition of appeal by Judy L. Graef wherein she challenged the Board's failure to reassign her for 1992-93 as the result of a rif to positions to which she believed she was entitled, including director of personnel. A prehearing conference was conducted by the undersigned administrative law judge by telephone on December 9, 1992, and hearings were scheduled for May 1993.

In the interim, a petition was filed by another Bloomfield Board employee, Frank James White, wherein he challenged the Board's failure to appoint him to one of the positions to which Graef claimed entitlement. That matter, OAL Dkt. No. EDU 8236-92, thereafter was consolidated with the instant matter.

As a result of the consolidation, the hearing dates were adjourned, and the matter was scheduled to commence before me on September 30, 1993.

On the date scheduled for hearings in the consolidated matters I was advised that a settlement had been reached between petitioner Judy L. Graef and the Board in connection with her case. To that end a release and settlement agreement was submitted to me, signed by petitioner and by the superintendent of schools on behalf of the Board. That document sets forth the terms and conditions of an agreement reached by the parties with respect to salary payments, vacation entitlements and other matters.

I have reviewed the file and the terms of the settlement, and I **FIND** as follows:

1. The parties voluntarily have agreed to the settlement as evidenced by the signatures appearing on the settlement agreement; and

2. The settlement fully disposes of all issues in controversy and is consistent with law.

I therefore **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and, accordingly, I approve the settlement and order that the parties comply with its terms and that these proceedings be **CONCLUDED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 30, 1993
Date

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

10/4/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 08 1993
Date

OFFICE OF ADMINISTRATIVE LAW

amr

RELEASE AND SETTLEMENT AGREEMENT

This Release and Settlement Agreement is executed by and between the **Bloomfield Board of Education** (hereafter referred to as "Board") and **Judy Graef** (hereafter referred to as "Graef");

WHEREAS, personnel actions taken by the Board at meetings held on April 13, 1992, May 4, 1992 and July 20, 1992 were pursued through the Office of Administrative Law/Commissioner of Education in a matter entitled Graef vs. Bloomfield Board of Education, OAL Docket No. EDU-06562-92N; and

WHEREAS, the Board recognizes Graef's claim to the position of Administrative Assistant to the Superintendent, and without prejudice to her claims to the other positions named in the Petition of Appeal; and

WHEREAS, in the interest of the parties desiring to fully and finally resolve and settle all claims between them arising out of the Board's actions;

NOW, T H E R E F O R E, in consideration of the mutual promises and covenants contained herein, the parties do hereby agree as follows:

1. The Board agrees to pay to Graef the annual salary of $75,906.00 for the 1993-94 school year which shall constitute Graef's full salary retroactive to July 1, 1993 and prospective through June 30, 1994 in the current position as Director of Personnel.
2. The Board shall grant to Graef twenty-two (22) vacation

days effective July 1, 1993 for the 1993-94 school year to be earned in accordance with Board policy. Graef shall also receive eleven (11) additional vacation days, of which 7 1/2 shall be charged, and the remainder of these 11 days (3 1/2) are to be utilized prior to June 30, 1994.

3. Effective July 1, 1994 and each year thereafter, Graef shall be eligible for salary increases in accordance with the same Board policy and practices as other central office administrators employed by the Board.

4. The terms and agreement reached in this Settlement Agreement shall be contained in an Initial Decision to be issued by Administrative Law Judge Stephen Weiss, which then is subject to approval by the Commissioner of Education. the Board shall comply with all terms of this Agreement within 30 days of receipt of the Commissioner's decisio

5. Graef does hereby release and discharge the Board from any and all claims, rights and causes of action of any nature whatsoever arising from or in any way connected with her employment with the Board as addressed by the issues raised in the instant litigation and the employment actions taken by the Board aforementioned. This Release expressly terminates the proceedings between the parties and includes any and all claims for damages, salary, fringe benefits, fees and other expenses incurred by Graef to date.

6. This Release and Settlement Agreement contains the entire

agreement and understanding between the parties and constitutes full and final settlement to all claims. This Release and Settlement Agreement shall be governed by the laws of the State of New Jersey. Each party hereto has had ample opportunity to consult with competent

representation concerning the terms and conditions of this settlement and each party knows and understands the contents herein and enters into this settlement of their own free will and without any inducement not contained herein.

IN WITNESS WHEREOF, the parties hereunder do execute this Agreement on this 30th day of September, 1993.

WITNESS:

Wayne J. Oppito

Judy Graef
JUDY GRAEF

WITNESS:

BLOOMFIELD BOARD OF EDUCATION

By: Edward Glickman
EDWARD GLICKMAN,
Superintendent

OAL DKT. NO. EDU 6562-92

JUDY L. GRAEF,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

NOVEMBER 8, 1993

DATE OF MAILING - NOVEMBER 8, 1993

274-93

KRANTZ & LIST ELECTRIC, INC., PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY, RESPONDENT.	:	DECISION

SYNOPSIS

Petitioner, unsuccessful bidder on electrical contract, challenged award to lowest bidder claiming the bid was improperly based on hourly rate for journeymen which was below prevailing wage rate for Union County and in violation of N.J.S.A. 34:11-56.25 et seq.

ALJ found Board properly awarded contract to "lowest responsible bidder." Even if hourly rate was below prevailing wage rate, remedy for that situation would involve the contractor and the Department of Labor. Petition was dismissed.

Commissioner adopted findings and determination in initial decision.

NOVEMBER 8, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 5857-93
AGENCY DKT. NO. 131-5/93

KRANTZ & LIST ELECTRIC, INC.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,
Respondent.

Robin List, President, Krantz & List Electric, Inc., appearing pursuant to *N.J.A.C.* 1:1-5.4(a)5

Vito A. Gagliardi, Jr., Esq., for respondent
(Riker, Danzig, Scherer, Hyland & Perretti, attorneys)

Record Closed: September 20, 1993 Decided: September 21, 1993

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

PROCEDURAL HISTORY

Pending before me in this matter is a motion for summary decision filed by respondent, Board of Education of the City of Elizabeth, pursuant to *N.J.S.A.* 1:1-12.5. In support of that motion, the certification of Angelo Paternoster, purchasing agent for respondent, has been submitted, together with a memorandum of law.

The Board's moving papers were filed at the Office of Administrative Law on August 27, 1993 and counsel certified that a copy had been sent by certified mail, return receipt requested, to petitioner. On August 30, 1993, during a telephone conference call with respect to the motion, I advised Ms. List of the time requirements contained in OAL's summary decision rule. I also indicated to her that the prehearing conference would be adjourned pending disposition of the motion. No response has been filed by petitioner to the Board's motion, nor has any extension of time for filing a response been requested. Accordingly, the matter is ready for determination. *See, N.J.S.A.* 1:1-12.2(a), 1:1-12.5(c).

The file in this matter was transmitted to the Office of Administrative Law on June 17, 1993, and concerns a petition by Krantz & List Electric, Inc. protesting the Board's award of a contract for electrical installation and maintenance services to another bidder, Electrical Applications, Inc. According to Krantz & List, the bid by Electrical Applications, although ostensibly the lowest, was based on an hourly rate for journeymen which was below the prevailing wage rate for Union County and therefore in violation of *N.J.S.A.* 34:11-56.25 *et seq.* Thus, petitioner sought rescission of the award to Electrical Applications and the award, instead, to petitioner. The Board filed an answer denying the allegations of the petition and set forth certain separate defenses. Although a telephone prehearing conference was scheduled to be conducted by me on August 30, 1993, in light of the pending motion for summary decision that prehearing conference was adjourned.

FACTS

The Paternoster certification, which is not opposed, contains the following facts. In March 1993 respondent advertised for the receipt of bids for an electrical installation and maintenance services contract for the 1993-94 school year. In response to the advertisement a bid was received from Electrical Applications, Inc., which was the lowest bid submitted. In its submission Electrical Applications set forth that the hourly rate to be paid by it to a journeyman electrician would be $34.27. According to Paternoster, the president of Electrical Applications informed him that the company had determined to assume the cost of paying employee benefits directly, rather than passing on that additional cost to the Board. Since, with that understanding, its bid was the lowest one, the Board determined to award the contract to Electrical Applications. Thus, on April 15, 1993 a contract to furnish

labor and necessary equipment for the furnishing of electrical and maintenance services to the Board for the 1993-94 school year was duly awarded to Electrical Applications in the amount of $34.27 per hour for an electrician journeyman, and $21.13 per hour for an electrician apprentice. The Krantz & List bid set forth that the amount to be paid to a journeyman would be $37.79 per hour and $16.38 to an apprentice. The New Jersey Department of Labor prevailing wage rate determination for Union County with respect to electricians requires that the hourly rate to be paid to a journeyman electrician should be $27.20, plus an additional $4.06 per hour to electricians engaged in the performance of certain applicable contracts.

DISCUSSION

For the reasons which follow, the motion for summary decision will be granted. As the Board memorandum in support of the motion notes, the school law statutes require that where bids are solicited for public expenditures in connection with services, materials or supplies exceeding $10,700, the contract must be awarded to the "lowest responsible bidder." *N.J.S.A.* 18A:18A-18, -37. In this case there is no dispute that the lowest bid submitted was that of Electrical Applications. Nor is there any dispute that Electrical Applications is a "responsible bidder," other than the implication from the petition that since the winning bid allegedly sets forth an hourly rate for a journeyman electrician below the prevailing wage rate for Union County, there is a lack of "responsibility."

As Board counsel points out in his memorandum, the prevailing wage schedule requires payment to journeyman electricians in Union County for regular work to be $31.26 per hour where, as here, applicable contracts are being performed. The bid by Electrical Applications did not set forth, nor was it required to set forth, that the cost of employee benefits would not be passed on to the Board. Thus, in the first instance, the bid, on its face, was in compliance with the prevailing wage act since the hourly rate proposed to be paid ($34.27) is in excess of the prevailing wage rate established for Union County.

Furthermore, even if the hourly rate quoted by Electrical Applications was below the prevailing wage rate, the remedy for that situation arguably would involve the contractor and the Department of Labor. Once a violation is reported

and proved, payments are imposed on the contractor itself and the public body is not directly involved.

Finally, as Board counsel further observes, there is a serious question whether petitioner even has standing to challenge an alleged violation of the Prevailing Wage Act. See, *Ruehl Co. v. Board of Trustees*, 85 *N.J. Super.* 4, 10 (Law Div. 1964). In any event, it is clear that in an action of this sort an unsuccessful bidder certainly cannot compel the award to itself even if the award is set aside. In that case, the Board would have to readvertise.

Accordingly, for all of the reasons set forth herein, there being no genuine issue of material fact in dispute, the Board's motion for summary decision will be granted and the petition of appeal dismissed.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 21, 1993
Date

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

9/23/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 29 1993
Date

OFFICE OF ADMINISTRATIVE LAW

amr

OAL DKT. NO. EDU 5857-93

KRANTZ & LIST ELECTRIC, INC., PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY, RESPONDENT.	:	DECISION

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

Upon review of the record, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge and adopts the initial decision as the final decison in the matter for the reasons well stated therein.

Accordingly, summary decision is granted to the Board and the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

NOVEMBER 8, 1993

DATE OF MAILING - NOVEMBER 8, 1993

275-93

WILLIAM DUSENBERRY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HUDSON COUNTY AREA VOCATIONAL-TECHNICAL SCHOOLS; BOARD MEMBERS, INDIVIDUALLY; AND FRANK J. GARGIULO, SUPERINTENDENT,	:	DECISION
RESPONDENTS.	:	
	:	

NOVEMBER 8, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7619-92
AGENCY DKT. NO. 399-8/92

DR. WILLIAM DUSENBERRY,
Petitioner,
v.
BOARD OF EDUCATION OF THE HUDSON COUNTY AREA VOCATIONAL-TECHNICAL SCHOOLS; BOARD MEMBERS, INDIVIDUALLY; and, FRANK J. GARGIULO, SUPERINTENDENT,
Respondents.

Margaret C. Murphy, Esq., for petitioner

Alexander W. Booth, Jr., Esq., for respondents
(Brownstein, Booth & Barry, attorney)

Record Closed: September 24, 1993 Decided: September 24, 1993

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

This matter was transmitted to the Office of Administrative Law on October 1, 1992 for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -13 and *N.J.S.A.*. 52:14F-1 to -15.

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

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

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

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Sept. 24, 1993
Date

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

9/27/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 30 1993
Date

OFFICE OF ADMINISTRATIVE LAW

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AUG 11 11 20 AM '93

STIPULATION OF SETTLEMENT
OAL DKT. NO. EDU 7619-92
AGENCY DKT. NO. 399-8/92

DR. WILLIAM DUSENBERRY,
Petitioner,
v.
BOARD OF EDUCATION OF THE HUDSON COUNTY AREA VOCATIONAL-TECHNICAL SCHOOLS; BOARD MEMBERS, INDIVIDUALLY; and, FRANK J. GARGIULO, SUPERINTENDENT,
Respondents.

Petitioner and respondents have reached a voluntary agreement in this matter. The terms of settlement are as follows:

1. Petitioner, Dr. William Dusenberry, agrees to dismiss this matter with prejudice and to release respondents, Hudson County Area Vocational and Technical School Board of Education ("HCAVTS Board "), the Board members individually, and Frank J. Gargiulo, superintendent, from any and all claims raised in this matter, including but not limited to contract damage claims, tuition reimbursement claims and the right to reemployment.

2. HCAVTS Board will pay Dr. Dusenberry $6,000 in one lump-sum payment no later than October 15, 1993 or within ten days after approval of this settlement by the Commissioner of Education, whichever is later.

3. This agreement is subject to the formal approval of the HCAVTS Board at its next regularly scheduled meeting in September 1993 and to approval by the Commissioner of Education.

DATED: August 11, 1993

William Dusenberry, PhD

Margaret C. Murphy, Esq.,
for petitioner

Alexander W. Booth, Jr., Esq.,
for respondents
(Brownstein, Booth & Barry, attorneys)

OAL DKT. NO. EDU 7619-92

WILLIAM DUSENBERRY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HUDSON COUNTY AREA VOCATIONAL-TECHNICAL SCHOOLS; BOARD MEMBERS, INDIVIDUALLY; AND FRANK J. GARGIULO, SUPERINTENDENT,	:	DECISION
RESPONDENTS.	:	

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

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

NOVEMBER 8, 1993

COMMISSIONER OF EDUCATION

DATE OF MAILING - NOVEMBER 8, 1993

276-93

LISBETH JOHNSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WARREN, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

NOVEMBER 8, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7617-92
AGENCY DKT. NO. 392-8/92

LISBETH JOHNSON,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WARREN, SOMERSET COUNTY,
Respondent.

Kenneth I. Nowak, Esq., on behalf of petitioner (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Nathanya G. Simon, Esq. on behalf of respondent (Sxhwartz, Simon & Edelstein, attorneys)

Record Closed: September 24, 1993 Decided: September 27, 1993

BEFORE **SOLOMON A. METZGER**, ALJ:

This matter arises out of a petition filed with the Commissioner of Education pursuant to the School Law, *N.J.S.A.* 18A:6-9. The matter was transmitted to the Office of Administrative Law as a contested case, pursuant to *N.J.S.A.* 52:14F-1to -13. The parties have now submitted a settlement agreement in the matter which is annexed. Having reviewed the terms of the settlement and it appearing that it fully disposes of all issues in controversy and was entered into voluntarily, I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the terms of settlement and that these proceedings be and hereby are **CONCLUDED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

9/27/93
Date

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

9/29/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 04 1993
Date

OFFICE OF ADMINISTRATIVE LAW

/cae

RELEASE AND SETTLEMENT AGREEMENT

SEP [illegible] 3 [illegible] '93

This Release and Settlement Agreement is executed by and between LISBETH JOHNSON (hereafter referred to as "Johnson") and THE WARREN TOWNSHIP BOARD OF EDUCATION (hereafter referred to as "Board");

WHEREAS, at a duly constituted public meeting of the Board held on March 23, 1992, a Resolution was adopted by the Board approving the release of all non-tenured personnel effective June 30, 1992, as listed on an attachment which list included the petitioner Johnson; and

WHEREAS, petitioner Johnson contested the nonrenewal of her employment alleging improper notice and filed a Petition of Appeal with the Commissioner of Education (Agency Reference No. 392-8/92) which was transmitted to the Office of Administrative Law and assigned to Administrative Law Judge Solomon A. Metzger (Docket No. EDU07617-92S); and

WHEREAS, Johnson and the Board desire to fully and finally resolve and settle all claims between them arising out of Johnson's employment with the Board and all other action and claims arising from any employment actions taken by the Board concerning Johnson;

N O W, T H E R E F O R E, in consideration of the mutual promises, covenants and terms contained herein, the parties do hereby agree as follows:

1. Johnson agrees to withdraw her petition of appeal from

further processing at the Office of Administrative Law and Commissioner of Education.

2. The Board agrees to pay Johnson the sum of $7,500.00, without deductions, within thirty days after receipt of the Final Decision by the Commissioner of Education.

3. Johnson does hereby release and discharge the Board from any and all claims, rights and causes of action of any nature whatsoever arising from or in any way connected with her employment with the Board, together with the facts and circumstances surrounding the action taken by the Board on March 23, 1992. This Release expressly terminates all proceedings which Johnson now has or may later have, and includes any and all claims for damages, reinstatement, salary, fringe benefits, and any other expenses incurred by Johnson in any way relating or arising from or in any way connected with her employment with the Board.

4. This Agreement is subject to ratification by the Board, which is anticipated at the Board Meeting of August 23, 1993.

5. This Release and Settlement Agreement contains the entire agreement and understandings between the parties, and constitutes full and final settlement to all claims. This Release and Settlement Agreement shall be governed by the laws of the State of New Jersey. Each party hereto has had ample opportunity to consult with competent representation concerning the terms and conditions of the settlement, and each party knows and understands the

contents herein, and enters into this settlement of their own free will and without any inducement not contained herein.

IN WITNESS WHEREOF, the parties hereunto set their hands and seals as of the dates indicated.

Dated: 8/24/93

Lisbeth Johnson
LISBETH JOHNSON

WITNESSED BY:

Susan Suchocki

Dated: 9/13/93

WARREN TOWNSHIP BOARD OF EDUCATION

By: Kenneth Teitel

WITNESSED BY:

Murray A Peyton
MURRAY PEYTON
Board Secretary

OAL DKT. NO. EDU 7617-92

LISBETH JOHNSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WARREN, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

NOVEMBER 8, 1993

DATE OF MAILING - NOVEMBER 8, 1993

277-93

BOARD OF EDUCATION OF THE BOROUGH OF GARWOOD, UNION COUNTY,

PETITIONER,

V.

MAYOR AND COUNCIL OF THE BOROUGH OF GARWOOD, UNION COUNTY,

RESPONDENT,

AND

IN THE MATTER OF THE CAP WAIVER APPEAL OF THE BOROUGH OF GARWOOD SCHOOL DISTRICT, UNION COUNTY.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of $54,000 made by governing body following voter rejection of proposed budget on April 20, 1993.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore $54,000.

Board also appealed General Fund cap waiver in the amount of $58,727 rejected by voters.

Upon review of the record, Commissioner determined to order the increase of $58,727 in cap waiver monies for a total General Fund tax levy of $2,656,682 for 1993-94 school year.

NOVEMBER 9, 1993

BOARD OF EDUCATION OF THE BOROUGH OF GARWOOD, UNION COUNTY,

PETITIONER,

V.

MAYOR AND COUNCIL OF THE BOROUGH OF GARWOOD, UNION COUNTY,

RESPONDENT,

AND

IN THE MATTER OF THE CAP WAIVER APPEAL OF THE BOROUGH OF GARWOOD SCHOOL DISTRICT, UNION COUNTY.

COMMISSIONER OF EDUCATION

DECISION

William S. Jeremiah, Esq. (Buttermore, Mullen, Jeremiah and Phillips) for Petitioner

Robert F. Renaud, Esq. (Palumbo & Renaud) for Respondent

This consolidated matter was opened before the Commissioner on June 11, 1993 through the filing of a Petition of Appeal of a defeated budget by the Borough of Garwood Board of Education (Board) pursuant to the provisions of N.J.A.C. 6:24-7.4. The Board also filed on June 11, 1993 a Petition of Appeal of its defeated cap waiver. The Board sought restoration, on the grounds of necessity for a thorough and efficient education, of reductions by the Borough of Garwood Mayor and Council (Council) following voter rejection on April 20, 1993 of the Board's proposed budget and cap waiver. Subsequent to the defeat, pursuant to N.J.S.A. 18A:22-37 and N.J.A.C. 6:24-7.2(b)2, the Board and Council consulted on the

defeated budget and the Council reduced the General Fund tax levy by $54,000. Consequently, the monies in contention in this consolidated matter are as set forth below.

Proposed Tax Levy Adopted by Board of Education	Amount of Tax Levy Certified by Governing Body
General Fund $2,597,955	General Fund $2,543,955
Cap Waiver $ 58,727	
Amount of Reduction By Governing Body	**Amount of Reduction In Dispute Before the Commissioner**
General Fund $54,000	General Fund $54,000
Cap Waiver $58,727	Cap Waiver $58,727

On June 24, 1993, the Council submitted its Answers to both Petitions. In its Answer, the Council stated that there had been a transposition of numbers in the tax levy listed in its resolution and certified the corrections of that tax levy to $2,543,955 as listed above. The Council filed Position Statements on both matters on July 2, 1993. The Board filed Position Statements on both matters on July 9, 1993.

As a result of the State Board of Education's July 7, 1993 decision in Board of Education of the Borough of Rutherford v. Mayor and Council of Rutherford wherein the State Board ruled that decisions in defeated voter cap waiver appeals must determine whether or not reallocation within the district's maximum permissible budget is possible and whether and to what extent the specific programs at issue are essential in order to enable the Board to meet its constitutional obligation to provide a thorough and efficient system of education, a letter was sent to the parties by the Director of the Bureau of Controversies and Disputes informing them of the need to supplement the record to document the reallocation and cap waiver review conducted by the county

superintendent pursuant to N.J.S.A. 18A:7D-27. The county superintendent was accorded thirty (30) days from receipt of the letter to submit a sworn affidavit setting forth an explanation and documentation of that review, including the bases for concluding that (1) reallocation within the district's maximum permissible budget for the 1993-1994 school year was not possible and (2) the specific programs at issue were essential for the Board to provide a thorough and efficient system of education to its students.

The governing body and Board were provided twenty (20) days from receipt of the county superintendent's submission to file a response thereto.

The county superintendent's affidavit and supportive documentation were received on September 17, 1993.

No additional documents were filed by either party and the record of this consolidated matter was closed on October 7, 1993.

The specific reductions in the General Fund tax levy are as follows:

Account	Title	Rationale	Reduction
11-000-290-XXX	Business & Other Support Services	Reduction in cost of insurance	$20,000
11-000-100-XXX	Tuition	Reduction in tuition for out-of-district placement	18,000
11-102-100-XXX	Athletics/ Instructional	Reduction in purchase of new playground equipment	6,000
11-000-270-XXX	Transportation	Reduction in out-of-district transportation costs	4,000
11-000-260-XXX	Operation/Maintenance of Plant Services	Reduction in custodial staff	6,000
		Total	$54,000

The cap waiver amounts under appeal are as follows:

Kindergarten teacher for new class	$35,460
Kindergarten aide for new class	11,592
Benefits for teacher and aide	11,675
Total	$58,727

I. Defeated Budget

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

Mindful, then, of the balance to be applied in the standard of review, the Commissioner makes the following determination with respect to the reduction in the General Fund tax levy effectuated by Council.

Line Item	Reduction
11-000-100-XXX - Tuition	$18,000

The Council states that this reduction in tuition is based on its understanding that a student currently in an out-of- district placement would be returned to and mainstreamed in the local district schools. The Board agrees that the Council's understanding regarding one student's placement is correct. The Board states that the one change does not mean that there will not still be eight or more out-of-district placements in 1993-94. The Board notes that it has historically had an average of eight special education pupils placed in out-of-district schools each year. It states that it had nine such placements in 1991-92 and eight in 1992-93. The Board continues that it anticipates and budgeted for eight placements in 1993-94. The Board also notes that the projected enrollment for 1993-94 will be 9% higher than in 1992-93.

In weighing the arguments presented by the parties on this issue, the Commissioner is mindful of the difficulties involved in precisely determining special educational needs since evaluations and placements are ongoing throughout any given school year. The responsibility is this area can certainly be impacted by increasing enrollment. The Commissioner therefore determines that the Board's budgetary proposal for these mandated services is reasonable and realistic and orders the restoration of the $18,000 reduction.

11-102-100-XXX - Athletics/Instructional	$6,000

The Council states that these funds are not necessary to purchase playground equipment since the funds for this purpose were donated. It also states that the funds are not necessary to the installation of the equipment since this work could be completed by

the school custodial staff. The Board states that the funds are for the removal of the old equipment, installation of the new equipment, and the replacement of the existing surface in the playground areas with a new and safe material. The Board asserts that the custodial staff has been reduced in recent years and that the current limited staff is required to maintain the buildings. The Board adds that the custodial staff does not have the equipment, skill or time to do this work. The provision of properly installed equipment is unquestionably essential to ensure safety. Similarly, playground services must consist of safe materials to avoid injury to pupils. The Board has stated that the existing playground areas are unsafe. The proposed expenditure is therefore determined justified and the Commissioner orders the restoration of the $6,000 reduction.

Line Item	Reduction
11-000-270-XXX - Transportation	$4,000

The Council states that this reduction represents the cost of transportation for the one student to be returned to the district as noted above. The Board again states that the Council has failed to acknowledge the needs of the district for out-of-district placements and the transportation needs associated with them. As determined above on the question of special education tuition, it is difficult to precisely determine the needs that will occur throughout an entire school year. The Board's budgetary proposal in this area is deemed reasonable to meet thorough and efficient educational requirements. The Commissioner orders the restoration of the $4,000 reduction.

Line Item	Reduction
11-000-260-XXX - Operation/Maintenance of Plant Services	$6,000

The Council states that this reduction is possible because it believes the district has at least ten part-time custodial employees plus a full-time maintenance supervisor who should be performing custodial work. It also states that, although there are three Borough schools, two are at the same location and are joined. The Board states that it has one full-time and six part-time employees to maintain the three buildings. The Board states that the Council incorrectly cited ten part-time custodial employees. It explains that four college students are hired in the summer to do painting and other miscellaneous maintenance work. The Board also states that the position of Supervisor of Buildings and Grounds has always existed in the district and is critical to the proper supervision of the maintenance and cleaning of the school property. The Board again notes the reduction of the custodial staff in 1990-91 and 1991-92. The proper maintenance of facilities, mandated by code, is an essential component of a thorough and efficient educational system. The Commissioner determines that the Board has supported the necessity for the existing custodial staff and orders the restoration of the $6,000 reduction.

11-000-290-XXX - Business and Other Support Services	$20,000

The Council determined that this reduction in medical/ health insurance and workers' compensation insurance was possible with the reduction it had recommended of custodial staff, as discussed above, and a teacher and aide. The Board argues that, as noted above, it cannot provide the required maintenance and custodial services without the current staffing level. The Board

also states that a reduction of a teacher and an aide would not be possible because of projected enrollment increase. The custodial issue has already been addressed in this decision. It has been determined that the enrollment in the district did increase from 1991 to 1992 and is projected to increase again in 1993. It is indisputable that sufficient teaching staff is required for a thorough and efficient system. The Commissioner orders the restoration of the $20,000 reduction.

Thus, for the reasons set forth above, the Commissioner determines to restore the entire $54,000 in the General Fund reduction appealed herein, as summarized by the chart below:

Account	Title	Reduction	Restored
11-000-100-XXX	Tuition	$18,000	$18,000
11-102-100-XXX	Athletics/Instructional	6,000	6,000
11-000-270-XXX	Transportation	4,000	4,000
11-000-260-XXX	Operation/Maintenance of Plant Services	6,000	6,000
11-000-290-XXX	Business and Other Support Services	20,000	20,000
	Total	$54,000	$54,000

II. Cap Waiver

The Board had presented to the voters a cap waiver in the amount of $58,727 to provide staffing for an additional full-day kindergarten class. The Board has operated a full-day kindergarten program for many years and had two classes for 55 students in 1992-93. The Board states that the kindergarten population for 1993-94 is 59 students and that, therefore, a third class is required. The cap waiver amount includes $35,460 for a new teacher, $11,592 for a new aide, and $11,675 for benefits for the teacher and

aide. In his letter of March 23, 1993, the county superintendent informed the Board that, as a result of the budget review, the 1993-94 budget received only conditional approval subject to the cap waiver proposal of $58,727, and that, if the cap waiver is rejected by the voters, the Board must file an appeal. The Council in its Position Statement on the cap waiver notes that it does not oppose the granting of the cap waiver if a third kindergarten class is created.

In summary, upon review of the documentation submitted on this matter, the Commissioner finds and determines that the record amply establishes that the $58,727 in cap waiver monies sought by the Board are necessary for the district to provide sufficient classes for the increasing kindergarten enrollment and are thus essential for a thorough and efficient educational system. The Commissioner also finds and determines, based on documentation submitted, that reallocation of funds within the district's maximum permissible budget is not possible. Rutherford, supra

Accordingly, the Union County Board of Taxation is directed to make the necessary adjustment as set forth below to reflect a total of $2,656,682 to be raised in tax levy for General Fund purposes by the Borough of Garwood for the 1993-94 school year.

	General Fund
Tax Levy Certified by Council	$2,543,955
Restored by Commissioner (Defeated Budget)	54,000
Cap Waiver Order of the Commissioner	58,727
Total	$2,656,682

IT IS SO ORDERED.

NOVEMBER 9, 1993

COMMISSIONER OF EDUCATION

DATE OF MAILING - NOVEMBER 9, 1993

278-93

BOARD OF EDUCATION OF THE CITY OF BURLINGTON, PETITIONER, V. COMMON COUNCIL OF THE CITY OF BURLINGTON, BURLINGTON COUNTY, RESPONDENT. - - - - - - - - - - - - - - - - - - IN THE MATTER OF THE CAP WAIVER APPEAL OF THE CITY OF BURLINGTON, BURLINGTON COUNTY.	COMMISSIONER OF EDUCATION DECISION

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of $173,000 made by governing body following voter rejection of proposed budget on April 20, 1993.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore $144,000.

Board also appealed General Fund cap waiver in the amount of $184,572 rejected by voters.

Upon review of the record, Commissioner determined to order the increase of $184,572 in cap waiver monies for a total General Fund tax levy of $6,039,405 for 1993-94 school year.

NOVEMBER 12, 1993

BOARD OF EDUCATION OF THE CITY OF BURLINGTON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
COMMON COUNCIL OF THE CITY OF BURLINGTON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
- - - - - - - - - - - - - - - - - -	:	
IN THE MATTER OF THE CAP WAIVER APPEAL OF THE CITY OF BURLINGTON, BURLINGTON COUNTY.	:	
	:	

For the Petitioner, Thomas A. Scattergood, Esq.

For the Respondent, David M. Serlin, Esq.

This is a consolidated matter submitted on June 14, 1993 for decision by the Commissioner of Education. The Board of Education of the City of Burlington (Board) appeals to the Commissioner from an action taken by the Common Council of the City of Burlington (Council) pursuant to N.J.S.A. 18A:22-37, certifying to the Burlington County Board of Taxation a lesser amount for General Fund costs for the 1993-94 school year than the amount proposed by the Board in its budget which was rejected by the voters.

On March 23, 1993, the Board's request for a cap waiver was given conditional approval by the Burlington County Superintendent of Schools and was thereafter placed on the ballot seeking approval by the electorate.

At the annual school election held on April 20, 1993, the Board submitted to the electorate a proposal to raise $5,883,833 by local taxation for General Fund costs of the school district in addition to the approval of a cap waiver in the amount of $184,572. After voter rejection of both matters, the Board submitted its proposals to Council for its determination of the amounts it deemed necessary for the operation of a thorough and efficient system of schools in the City of Burlington in the 1993-94 school year pursuant to the mandatory obligation imposed on Council by N.J.S.A. 18A:22-37.

	Proposed Tax Levy Adopted by Board	Amount of Tax Levy Certified by Council
General Fund	$5,883,833	$5,710,833
Cap Waiver	184,572	-0-
TOTAL	$6,068,405	$5,710,833

	Amount of Reduction	Amount in Dispute Before the Commissioner
General Fund	$173,000	$173,000
Cap waiver	$184,572	$184,572

Council's Answer was filed on June 24, 1993. The Board's Position Statement was filed on July 16, 1993 and a supplement to the Statement on August 9, 1993. Council's Position Statement on the budget appeal was filed September 8, 1993 and the Board's response was filed on October 6, 1993. An affidavit and supportive documentation to supplement the record in the cap waiver appeal was filed by the county superintendent on September 14, 1993. No replies to this document were received from the parties and the record was closed on October 20, 1993 upon receipt of a complete line item budget from the district.

BUDGET DISPUTE

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

Mindful, then, of the balance to be applied in this standard of review, the Commissioner makes the following determination with respect to the reduction in the General Fund tax levy effectuated by the Council.

The Commissioner has read the respective position statements filed by the parties which are incorporated herein by

reference unless specifically relied upon for the purpose of further clarification of any particular item as examined in the body of this decision.

In the instant matter, Council established the aforesaid tax levy by imposing the following line item reductions:

Account	Description	Reduction
33 (various)	Salary Accounts	$ 64,000
12-000-400-450	Construction Services	95,000
11-000-290-290	Other Employee Benefits	14,000
	TOTAL	$173,000

The Board concedes that a reduction of $15,000 from the 12-000-400-450 account is acceptable. Additionally, the Board accepts $14,000 of the proposed reduction in the 11-000-290-290 account. Accordingly, the actual amount in the budget dispute before the Commissioner is $144,000.

Reduction No. 1

Account Description	Account Number	Amount
General Administration	11-000-230-100	$ 1,240.00
Business & Support Services	11-000-290-100	1,720.00
Principals	11-000-240-103	3,060.00
Supervisor of Instruction	11-000-221-102	2,160.00
Preschool/Kindergarten	11-110-100-101	1,900.00
Grades 1-5	11-120-100-101	11,950.00
Grades 6-8	11-130-100-101	6,800.00
Grades 9-12	11-140-100-101	13,560.00
Other Support Student-Regular	11-000-218-104	1,920.00
Other Support Student-Special	11-000-218-105	540.00
Educational Media/Library	11-000-222-100	1,000.00
Other Support Student-Regular	11-000-219-104	1,270.00
Other Support Student-Special	11-000-219-105	370.00
Improv. Instruction Services	11-000-221-105	520.00
School Administration	11-000-240-105	1,750.00
Other Salaries for Instruction	11-190-100-106	180.00
Attendance	11-000-211-100	270.00
Health	11-000-213-100	1,050.00
Special	11-000-270-108	260.00
Other than between home & school	11-000-270-109	110.00
Operations	11-000-260-100	5,310.00
Cocurricular Activities	11-401-100-100	410.00
Athletics	11-402-100-100	1,260.00
Perceptionally Impaired Salaries	11-205-100-101	2,410.00

Account Description	Account Number	Amount
Multiply Handicapped Salaries	11-212-100-101	210.00
Basic Skills/Remedial - Teacher	11-230-100-101	1,630.00
Basic Skills/Remedial - Other	11-230-100-106	850.00
Bilingual Education	11-240-100-101	90.00
Supplementary Instruction	11-217-100-101	5.00
Speech Instruction	11-218-100-101	70.00
Home Instruction	11-219-100-101	5.00
Summer School Instruction	13-422-100-101	100.00
Adult Education	13-602-100-101	20.00
		$64,000.00

As shown in the schedule above, Council's reductions total $64,000. Council suggested that a 6% increase in spending is reasonable in today's economic climate. Council suggests that given the declining enrollment in the district and the economic circumstances facing residents of New Jersey, even this increase is difficult, if not impossible, to justify. Council maintains that the reductions which were made could have been greater without impacting the educational process.

The Board states that it is in negotiations with the teachers union for the 1993-94 school year. Further, contract negotiations will also begin for the 1993-94 school year for both the custodial/maintenance force and the cafeteria staff. Additionally, the Board asserts that it has not yet begun negotiations with its administrative association for 1993-94.

The Board states that it budgeted 6% increases in its salary accounts when preparing the 1993-94 budget. Council examined the district's contractual obligations in all of its salary accounts as of April 1993 and compared those numbers with the budgeted amounts for 1993-94. The difference calculated by the Council was 6.77%. Based on that difference, Council determined that 6% was adequate to settle all upcoming negotiations; therefore, $64,000 (or

.77%) should be cut across the board. Council then applied this .77% reduction to all of the General Fund-Current Expense Fund 11 accounts. The Board asserts that these calculations are flawed for the following reasons:

1. The Board recently concluded negotiations with its administrators association for the 1992-93 school year. Therefore those increased dollars could not be included in Council's calculation. The Board is obligated for an additional commitment of $24,180.

2. The Board approved a basic skills summer program on May 24, 1993 that will require a commitment of an additional $16,322 in salaries not included in Council's calculation.

3. The guidance department has been recommended to work an additional week at the conclusion of the regular school calendar, as they have done in the past. Accordingly, an additional commitment and expenditure of $5,290 was made for this purpose.

4. The Board's child study team has requested additional evaluations be made in an on-going attempt to address the needs of urban youngsters. An additional salary commitment of $16,000 will be made to address these evaluations. Total commitment for these items is $61,792.

The Board further argues:

> The result of these additional commitments to the City's original calculation would have the net effect of changing the total reduction of $64,000.00 to one of $0.00. The specific calculation is as follows:
>
> Original Calculation by Governing Body
>
> Contractual Obligations as of 4/30/93, Salaries $8,332,493.00

Budgeted Salaries-City of Burlington BOE 93/94	$8,896,181.00
Percent Increase	6.76%
Actual Dollar amount represented by .76%	$ 64,000.00

Revised Calculation Reflecting Additional Commitments

Contractual Obligations as of 4/30/93, Salaries	$8,332,493.00
Total additional Salary obligations	$ 61,792.00
Budgeted Salaries-City of Burlington BOE 93/94	$8,896,181.00
Percent Increase	6.0%
Actual Dollar amount represented by % above 6%	$ 0.00

> The City of Burlington Board of Education rejects the premise that the Common Council can, by the cut imposed on the salary accounts, limit the Board's ability to negotiate with all of its bargaining units. It further contends that an across the board cut does not present evidence specific to any one account, that would indicate any justification for a cut. Nonetheless, the Board of Education made a determination during the budget preparation process that a 6% increase gave them the latitude to successfully conclude negotiations with the various bargaining units, which is a legitimate response to the position of the Common Council. Our position is that all $64,000.00 in cuts proposed by the governing body must be restored for these valid reasons.
> (Board's Position Statement, at p. 8)

In carefully weighing the position of the parties in this matter, the Commissioner finds reasonable the approach taken by the governing body in arriving at its reduction, notwithstanding the fact that numerous prior budget decisions support the Board's position that (1) a governing body cannot dictate the negotiated increase for salaries as that authority rightfully rests with the Board and (2) that across-the-board percentage reductions are not

permissible. However, what has been heavily weighed and is deemed the deciding factor in reaching a determination concerning this reduction is the fact that the Board herein has demonstrated that it is using the monies budgeted in excess of a 6% negotiated increase to provide to its students the additional educational programs and services set forth above which in the Commissioner's judgment are particularly important to a special needs school district such as Burlington City. Therefore, it is determined that the $64,000 reduction shall be restored.

Reduction No. 2

Construction Services - 12-000-400-450 $95,000

Council contends that this roof repair can be delayed for another year, stating that the Board has not supplied to Council any engineering documentation as to the necessity of the roof replacement at this time, nor has it submitted any specifications. Further, it would be unusual to commence a roof replacement project while school is in session. Without providing engineering information to support the need for immediate roof replacement, the Board has failed to fulfill its responsibility to Council.

The Board argues that it has been more than proactive in supplying sufficient and thorough information to Council long before any specifics were actually requested. It asserts it supplied a memo on April 21, 1993, with attached documents, concerning the gym roof project. (See: Facilities Study, attached to Board's Response to Council's Position Statement.) The Board also provided a detailed statement setting forth its determination and supporting reasons for the replacement of the gym roof, which followed the recommendations of its engineer. The engineering study was

conducted and served as the basis for the Five-Year Facility Plan and for this budgeted item. This allocation for the roof repair for the 1993-94 school year is a continuation of the Board's commitment to insure that it maintains its facilities and does not permit them to deteriorate.

The Board concludes that the need for the gymnasium roof replacement is not only in compliance with a long-term engineering plan and recommendations but also necessary to maintain facilities so that a thorough and efficient education can be provided to the pupils of the district.

Based on the record and the documentary evidence submitted, the Commissioner concurs with the Board. There is adequate representation by the Board that this replacement should not be delayed. A leaking roof will demand immediate emergency patchwork to prevent further damage to the structure as a whole. Here, the evidence supports replacement of the roof so that emergency repairs will not be necessary; therefore, the Commissioner determines that $80,000 will be restored to the budget. It is noted that the Board previously agreed to a reduction of $15,000 because of a favorable bid on the project.

Reduction No. 3

Employee Benefits - 11-000-290-290 $14,000

Council made a judgment that 1% of the Board's budgeted increase could be cut without inhibiting its ability to meet its contractual obligations. The Board conceded this reduction after joining an insurance pool which enabled it to realize a savings of $14,000. The county superintendent of schools agreed to the reduction in this account by letter to the Commissioner dated

June 17, 1993; consequently, there being no disagreement concerning this line item, the $14,000 reduction will be sustained.

CAP WAIVER

The defeated cap waiver request of $184,572 included the continuation of important educational programs, including one-half day kindergarten 4 and full-time kindergarten 5. This amount reflects the salaries of five teachers, other salaries for two educational assistants and other employee benefits.

As a result of the State Board of Education's July 7, 1993 decision in Board of Education of the Borough of Rutherford v. Mayor and Council of Rutherford wherein the State Board ruled that decisions in defeated voter cap waiver appeals must determine whether or not reallocation within the district's maximum permissible budget is possible and whether and to what extent the specific programs at issue are essential in order to enable the Board to meet its constitutional obligation to provide a thorough and efficient system of education, on August 10, 1993 a letter was sent to the parties by the Director of Bureau of Controversies and Disputes informing them of the need to supplement the record to document the reallocation and cap waiver review conducted by the county superintendent pursuant to N.J.S.A. 18A:7D-27. The county superintendent was accorded thirty (30) days from receipt of the letter to submit a sworn affidavit setting forth an explanation and documentation of that review, including the bases for concluding that (1) reallocation within the district's maximum permissible budget for the 1993-94 school year was not possible and (2) the specific programs at issue were essential for the Board to provide a thorough and efficient system of education to its students.

The governing body and the Board were then provided twenty (20) days from receipt of the county superintendent's submission to file a response thereto.

The county superintendent's affidavit and supportive documentation were received on September 14, 1993. There were no replies from the litigants. The record closed on October 20, 1993 upon receipt of a complete line item budget from the district.

By letter dated March 23, 1993, the Burlington County Superintendent of Schools conditionally approved the 1993-94 school district budget subject to the advertisement of the budget cap waiver proposal in the amount of $184,572. As a special needs district, the Board's budget request required a joint review by, and approval from, the Assistant Commissioners for the Division of Urban and Field Services and the Division of Financial Services. The Assistant Commissioners gave the authorization for the conditionally approved cap waiver. The line items requested are set forth below.

CAP WAIVER REQUEST

ACCOUNT TITLE	ACCOUNT NUMBER	AMOUNT
K/4 Kindergarten Salaries of Teachers	11-110-100-101	$ 60,000
K/5 Kindergarten Salaries of Teachers	11-110-100-101	90,000
Other Salaries for Educational Assistants	11-230-100-106	13,610
Other Employee Benefits	11-000-290-290	20,962
	TOTAL	$184,572

The Board and the community are firmly committed to preschool and full-day kindergarten for their pupils. The Board, the administrators, teachers and parents in the district consider the programs developed for K/4 and full-day K/5 as necessary and

essential to a thorough and efficient education in the City of Burlington.

The Commissioner has reviewed the cap waiver request and the conditionally approved budget which was submitted to the voters. It is also noted that the Burlington County Superintendent of Schools filed an affidavit with the Director of the Bureau of Controversies and Disputes and with the litigants. No replies to the affidavit were filed.

In the Commissioner's judgment, the record is sufficiently developed to establish, through the review conducted by the Burlington County Superintendent of Schools and those Department of Education officials who participated in the review and conditional approval of the Board's budget and cap waiver request, that the reallocation of funds within the permissible budget could not be accomplished without a cap waiver approval.

Based on the above, the record is convincing that approval of the cap waiver must be granted so that the Board will be able to conduct a thorough and efficient system of schools in the City of Burlington. Accordingly, the cap waiver in the requested amount of $184,572 is granted.

Account Number	Description	Reduction	Restored	Not Restored
33 (Various)	Salary Accounts	$ 64,000	$ 64,000	$ -0-
12-000-400-450	Construction Services	95,000	80,000	15,000
11-000-290-290	Other Emp. Benefits	14,000	-0-	14,000
	TOTAL	$173,000	$144,000	$29,000
	Cap Waiver	184,572	184,572	-0-
	GRAND TOTAL	$357,572	$328,572	$29,000

Having reached this determination, the Commissioner directs the Burlington County Board of Taxation to increase the 1993-94

General Fund current expense tax levy for the City of Burlington to reflect a restoration of $144,000 from the reductions effectuated by Council and an additional $184,572 in cap waiver appropriations which sums reflect a total General Fund current expense tax levy increase of $328,572.

Accordingly, the total 1993-94 General Fund current expense tax levy for the City of Burlington School District shall be $6,039,405.

Amounted Certified by Council		$5,710,833
Restored by Commissioner (Defeated Budget)		144,000
Cap Waiver Ordered by Commissioner		184,572
	TOTAL	$6,039,405

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 12, 1993

DATE OF MAILING - NOVEMBER 12, 1993

279-93

ROBERT T. WINSTON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, school psychologist terminated pursuant to the terms of his employment contract, claimed to have acquired tenure and sought summary decision. Respondent also sought summary decision, agreeing that there was no genuine issue as to any material fact but denying that petitioner acquired tenure. In order to have acquired tenure, petitioner's employment must be deemed to have continued through the 60-day period subsequent to his termination.

Citing Canfield Supreme Court decision, ALJ determined petitioner had not acquired tenure. Petitioner's employment ended as of date of his dismissal and the accumulation of time to achieve tenure also stopped running at that point. Petitioner's motion for summary decision was denied. Respondent's motion for summary decision was granted and petition was dismissed.

Commissioner adopted findings and determination in initial decision, noting that to the extent a prior ruling (Buff, decided March 1981) appeared to reject Canfield, that ruling was set aside.

NOVEMBER 15, 1993

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 9660-92
AGENCY DKT. NO. 96-4/92

ROBERT T. WINSTON,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY,
Respondent.

Philip Feintuch, Esq., for petitioner
(Feintuch, Porwich & Feintuch, attorneys)

Regina Waynes Joseph, Esq., for respondent
(Murray, Murray & Corrigan, attorneys)

Record Closed: August 19, 1993 Decided: October 1, 1993

BEFORE **RICHARD McGILL,** ALJ:

Robert T. Winston (petitioner) seeks by way of motion for summary decision a determination that he had tenure in the position of school psychologist with the State-Operated School District of the City of Jersey City (respondent) and that his termination effective January 13, 1992 violated his tenure rights. Respondent denies that petitioner received tenure in the position of school psychologist and, like petitioner, moves for summary decision.

PROCEDURAL HISTORY

Petitioner filed his petition with the Commissioner of Education on April 10, 1992, pursuant to the Commissioner's authority to hear and determine controversies concerning the school laws under *N.J.S.A.* 18A:6-9. Respondent filed an answer on December 1, 1992, and the matter was transmitted to the Office of Administrative Law on December 10, 1992 for determination as a contested case.

On July 28, 1993, respondent filed a motion for summary decision. On August 16, 1993, respondent filed a letter brief in opposition to petitioner's motion along with a cross-motion for summary decision.

MOTIONS FOR SUMMARY DECISION

A motion for summary decision should be granted where there is no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law. *N.J.A.C.* 1:1-12.5(b). The same standard is applied in the courts of this State pursuant to *R.* 4:46-2. Summary judgment "is designed to provide a prompt, businesslike and inexpensive method" to dispose of actions which do not present any genuine issue of material fact. *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 *N.J.* 67, 74 (1954). The movant must show that there is no genuine issue of material fact, and all inferences of doubt are drawn against the movant. *Id.* at 74-75. However, excessive caution which would undercut the purposes of a motion for summary judgment should be avoided. *Pierce v. Ortho Pharmaceutical Corp., 84 N.J.* 58, 65 (1980). Thus, if the opposing party offers only facts which are immaterial or insubstantial in nature, this circumstance should not defeat a motion for summary judgment. *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 *N.J.* at 75. Although the pleadings may raise a factual issue, summary judgment procedure pierces the allegations in the pleadings, where the other papers show the absence of any genuine issue of material fact. *Ibid.*

a. Facts

In this proceeding, there is no genuine issue of material fact. Petitioner was hired by respondent as a school psychologist effective February 27, 1989. Petitioner and respondent entered into an employment contract for the period from February 27, 1989 to August 31, 1989, and thereafter, petitioner and respondent entered into employment

contracts for the periods from September 1, 1989 to August 31, 1990 and from September 1, 1990 to August 31, 1991. Respondent again hired petitioner with a contract as a school psychologist for the 1991-1992 school year.

The contractual agreements between petitioner and respondent state that the ". . . contract may at any time be terminated by either party giving to the other sixty days notice in writing of intention to terminate the same . . . ." By letter dated January 10, 1992 from respondent's Executive Director of Human Resources, Robert Y. Schaefer, petitioner was advised of the decision of the State District Superintendent to terminate his employment effective at the conclusion of January 13, 1992. Petitioner received sixty days termination pay. Within the sixty-day period following the notification that he was to be terminated effective January 13, 1992, petitioner would have gained tenure.

In his motion for summary decision, petitioner states that he knows of no action taken by the district at a public meeting or even at a private meeting, and based thereon, petitioner asserts that respondent did not comply with the Open Public Meetings Act, *N.J.S.A.* 10:4-6 to 21. In response, respondent submitted an affidavit of Judi Granick, who is the Executive Assistant to the State District Superintendent for the State-Operated School District for the City of Jersey City. The affidavit contains the following statement:

> The action of the State District Superintendent terminating Mr. Winston's employment with the School District was made known to the Jersey [City] Board of Education at its meeting of February 20, 1992 which meeting complied with the provisions of the Open Public Meetings Act.

Petitioner did not respond to this statement, while his motion indicates a general lack of knowledge whether respondent complied with the Open Public Meetings Act. Under the circumstances, I accept respondent's assertion as true.

b. Law and Analysis

In accordance with *N.J.S.A.* 18A:28-5, teaching staff members gain tenure after employment with any school district or under any board of education for:

> (a) Three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or

> (b) Three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
> (c) The equivalent of more than three academic years within a period of any four consecutive academic years.

Here, petitioner would have gained tenure pursuant to *N.J.S.A.* 18A:28-5(c), if his employment continued through the sixty-day period subsequent to his termination.

Respondent maintains that petitioner did not achieve tenure because by notifying petitioner by letter dated January 10, 1992 that his employment would be terminated effective January 13, 1992, respondent immediately stopped the running of the time for tenure. In support of its position, respondent cites *Canfield v. Board of Ed. of Pine Hill Borough*, 51 *N.J.* 400 (1968), rev'g on dissent 97 *N.J. Super.* 483 (App. Div. 1967), wherein teacher Gladys Canfield was originally employed by the Board of Education on November 19, 1962. Her contract was renewed annually for three ensuing school years from September 1, 1963 to June 30, 1964, from September 1, 1964 to June 30, 1965, and from September 1, 1965 to June 30, 1966. Her contract of employment provided that it could be terminated by either party upon giving sixty days notice in writing of intention to terminate. By November 19, 1965, Canfield would have actually served three full academic years, which would have satisfied the requirements of the statute, N.J.S.A. 18:13-16, in effect at the time, allowing for tenure "after employment, within a period of any four consecutive academic years, for the equivalent of more than three academic years." The Board of Education notified Canfield on November 15, 1965, that it was terminating her teaching contract to take effect immediately and giving her two months pay. Canfield contended that because the sixty days pay was to run beyond the date when she would otherwise have achieved tenure, she is entitled to tenure.

The majority in the Appellate Division determined that the Board of Education had the power to prevent Canfield from continuing to render services even if doing so breached the contract, but that without sixty days notice the action did not terminate Canfield's employment. The majority concluded that Canfield's employment continues for the sixty-day notice period and that therefore Canfield achieved tenure.

The New Jersey Supreme Court reversed for reasons expressed in the dissenting opinion of Judge Gaulkin, who stated in part as follows:

> It seems to me that tenure and contract are two different concepts; tenure is statutory and arises only by passage of the time fixed by the statute, and the discharge of an employee before the passage of the required time bars tenure, even if the discharge is in breach of an employment contract which, if not breached, would have extended to a date which would have given tenure.
>
> * * *
>
> I find nothing in the contract which justifies the conclusion reached by my Brothers that the dismissal was not effective on the date the notice of dismissal was given. If this was a dispute arising out of the breach of the contract itself in which the question of the date of termination of the contract became important, it might be held that the termination was not effective until 60 days after the notice of dismissal was given . . . But here we are concerned not with the contract or its breach, but with the status of the plaintiff -- *i.e.*, tenure. It seems to me that the dismissal immediately stopped the running of the time to tenure. The burden of proving the right of tenure is upon plaintiff and ordinarily that right must be clearly proved. I do not think a municipality should be trapped into tenure by the construction of words which neither party expected to have that meaning. *Canfield v. Bd. Edu. of Pine Hill*, 97 *N.J. Super.* at 490-493.

Thus, even where a contract requires the employee to be retained beyond the tenure date, a timely prior notice of dismissal precludes tenure.

Petitioner relies upon *Doris V. Buff v. Board of Education of North Bergen, Hudson County*, 81 *S.L.D.* 340 (1981). The facts in *Buff* are similar to *Canfield* in that Buff was employed as a teacher pursuant to a contract which provided for termination by either party on sixty days notice. The Board of Education terminated Buff without giving sixty days notice but paid her salary for two months. Absent the termination, Buff would have gained tenure within the sixty-day period.

The Commissioner of Education adopted an Initial Decision in which the administrative law judge did not follow *Canfield*, based upon the view that that decision cannot be considered viable precedent in light of subsequent opinions of the United States Supreme Court in *Board of Regents v. Roth*, 408 *U.S.* 564, 92 *S. Ct.* 2701, 33 *L.Ed.* 2d 548 (1972) and *Perry v. Sindermann*, 408 *U.S.* 593, 92 *S. Ct.* 2694, 33 *L.Ed.* 570 (1972). Both *Roth* and *Sindermann* concerned situations where college professors had employment contracts for fixed one-year terms and were not rehired for the next

academic year. Roth was hired for one academic year and was not rehired for the subsequent academic year. The United States Supreme Court held that Roth did not have a constitutional right to a statement of reasons or a hearing in regard to the decision not to rehire him for another year. The Supreme Court observed that the requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. Where these protected interests are implicated, there is a right to some kind of prior hearing. However, before due process requirements apply, a determination must be made that the interest is within the Fourteenth Amendment's protection of liberty and property. Thus, the issue in the case was whether Roth was deprived of liberty or property. The Court determined that the decision not to rehire Roth did not deprive him of liberty and that he did not have a property interest in being rehired.

In *Sindermann*, a professor was employed as a college teacher in a state college system for ten years at three different institutions. He was employed at the last institution for four successive year under a series of one-year contracts. After becoming involved in a dispute with the college administration, Sindermann's one-year contract terminated, and the Board of Regents voted not to offer him a new contract for the next academic year. The college did not have a formal tenure system, but Sindermann alleged that the college had a de facto tenure system based upon a provision that had been in the college's Faculty Guide for many years and that he had relied thereon. After discussing the meaning of "property," the Court concluded that Sindermann had more than a mere subjective expectancy of re-employment and that he should be given a hearing to prove the legitimacy of his claim.

The point of this discusson is that the issues in *Roth* and *Sindermann* were whether college professors whose one-year contracts had run their course had a property interest in continued employment protected by the Fourteenth Amendment. As is readily apparent, the facts and issues in *Roth* and *Sindermann* were dissimilar from *Buff*, where the teacher was employed pursuant to a contract at the time that she was terminated. Thus, it is not at all clear that *Roth* and *Sindermann* would change the result in *Canfield*.

This is not to say that Buff's interest in continued employent did not constitute property protected by the Fourteenth Amendment's requirement of due process. Rather, the point was well established prior to *Roth* and *Sindermann*. In *Connell v. Higginbotham*, 403 *U.S.* 207, 91 *S. Ct.* 1772, 29 *L.Ed.* 2d 418 (1971), the Supreme Court

specifically stated that a teacher, who evidently did not have a contract or tenure, could not be summarily dismissed from public employment without hearing or inquiry required by due process. The Court cited *Slochower v. Board of Education*, 350 *U.S.* 551, 76 *S.Ct.* 637, 100 *L.Ed.* 692 (1956), wherein the summary dismissal of a college teacher for invoking the privilege against self-incrimination to avoid answering a question in regard to his official conduct violates due process of law. Thus, it was established well prior to *Canfield* that public employment is an interest protected by the Fourteenth Amendment's prohibition against deprivation of property without due process of law. These circumstances further indicate that *Roth* and *Sindermann* had no impact on *Canfield*.

The most pertinent portion of *Sindermann* is the concurring opinion of Chief Justice Burger, who underscored a point made in the Court's opinion to the effect that the relationship between a state institution and one of its teachers is essentially a matter of state law. *Perry v. Sindermann*, 408 *U.S.* at 603, 33 *L.Ed.* 2d at 581. Chief Justice Burger quoted from *Board of Regents v. Roth*, 408 *U.S.* at 577, 33 *L.Ed.* at 561, as follows: "Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." If state law is unclear, the federal court should abstain, and the teacher should be left to resort to state courts on questions arising under state law. *Perry v. Sindermann*, 408 *U.S.* at 604, 33 *L.Ed.* 2d at 581.

Thus, *Roth* and *Sindermann* do not change state law as to property interests but rather look to state law as a source thereof. *Canfield* is an interpretation of a state statute in regard to tenure and is unaffected by *Roth* and *Sindermann*. Under the circumstances, it is not accurate to say that *Canfield* does not survive as a viable precedent. Any lingering doubt is removed by the fact that *Canfield* was recently cited as law in an opinion of the Appellate Division of Superior Court in *Kletzkin v. Board of Educ.*, 261 *N.J.Super.* 549, 552 (App. Div. 1993).

Under *Canfield*, the teacher's employment ended as of the date of her dismissal, and the accumulation of time to achieve tenure also stops running. Since Canfield had not accumulated sufficient time, she did not receive tenure, irrespective of the fact that she would have received tenure within the sixty-day period provided in her contract for notice of termination.

Similarly here, petitioner was dismissed effective January 13, 1992, and as of that date, he had not accumulated sufficient time to gain tenure. The fact that he would have accumulated sufficient time to receive tenure during the sixty-day period for notice of termination under the contract is immaterial in view of *Canfield.* Under the circumstances, I **CONCLUDE** that petitioner did not achieve tenure in the position of school psychologist.

Petitioner's claim that respondent violated the Open Public Meetings Act was not raised in the petition and was mentioned for the first time in the motion for summary decision. As noted above, petitioner's claim is without factual support. Therefore, I **CONCLUDE** that this claim is without merit.

Accordingly, it is **ORDERED** that:

1. Petitioner's motion for summary decision is denied.

2. Respondent's motion for summary decision is granted.

3. The petition in this matter be dismissed.

I hereby **FILE** my Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Oct. 1, 1993
Date

RICHARD McGILL, ALJ

Receipt Acknowledged:

10/5/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 12 1993
Date

OFFICE OF ADMINISTRATIVE LAW

am

ROBERT T. WINSTON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by petitioner pursuant to the provisions of N.J.A.C. 1:1-18.4, as were replies thereto by respondent State-Operated School District ("District").

In his exceptions, petitioner first contends that, notwithstanding his own motion for summary judgment, the ALJ erred in granting summary judgment to the District. This is so, petitioner avers, because a fact which was not material to the argument of his own motion, i.e., his claim of return to duty at the District's behest on March 1, 1992, is material to the District's stance and is clearly in dispute between the parties; thus, the District is not in a position to be granted summary judgment. (Petitioner's Exception No. 1)

Petitioner next argues that the ALJ erred in accepting the affidavit of the District's Executive Assistant stating that petitioner's termination was covered at a February 20, 1992 meeting

which was in compliance with the Open Public Meetings Act (OPMA), as petitioner knows of no such occurrence and the Executive Assistant's statement represents an unsupported conclusion of law which she is not competent to make. (Petitioner's Exception No. 2)

Finally, petitioner contends that in rejecting the Commissioner's decision in Buff, supra, on grounds that it wrongly applied Roth, supra, and Sindermann, supra, the ALJ is in effect acting as an appellate tribunal with the authority to overrule the clear prior holding of the Commissioner. As the ALJ was both in error in his analysis of these cases and without authority to overturn the Commissioner in any event, his decision herein must be reversed. (Petitioner's Exception No. 3)

In reply, the District argues that, in moving for summary judgment, petitioner cannot have it both ways. In his moving papers, petitioner claimed there were no material issues of fact and that he was terminated on January 13, 1992; he cannot now claim that he was returned to duty on March 1, 1992. To the contrary, petitioner, having been neither reemployed nor newly contracted, was never an employee of the District subsequent to January 13, 1992. (Reply Exceptions, at pp. 2-3) The District further notes that the ALJ was correct in finding that petitioner first raised OPMA allegations in his motion for summary judgment without having previously raised these in his petition and that petitioner chose not to respond to the Executive Assistant's affidavit although there was opportunity for such response; the District moreover asserts that petitioner's purported lack of knowledge of an event does not constitute a dispute that the event occurred, merely a statement that he was unaware of it. (Reply Exceptions, at pp. 4-5) Finally,

the District urges the Commissioner to accept as correct and well-founded the ALJ's application of Roth and Sindermann, as well as his concomitant conclusion that Canfield remains valid law in matters, such as the present one, which specifically hinge on interpretation of State statutes. (Reply Exceptions, at pp. 6-7)

Upon careful and independent review of the record, the Commissioner concurs with both the ALJ's determination to render decision on a summary basis and his finding that petitioner did not acquire tenure in the district.

With respect to petitioner's claim that a dispute of material fact precludes summary decision in this matter, it is noted that petitioner himself moved for summary judgment, specifically arguing that:

> In the matter sub judice there are no material issues of fact. Within the period between his notification that he was to be terminated, January 13, 1992 and the date that he received his final pay, 60 days following January 13, 1992, Dr. Winston would have gained tenure.
>
> That is the only meaningful issue in this matter. (Letter Brief in Support of Motion for Summary Judgment, at pp. 1-2)

It is further noted that petitioner made no reference to his purported March 1, 1992 return to work in his moving papers, and, more significantly in view of his arguments on exception, that he filed neither response nor objection to the District's Cross-Motion for Summary Decision, which included a recitation of facts that made no mention of such return and expressly claimed that this recitation represented the undisputed facts of the case. (Letter Brief in Opposition to Petitioner's Motion and in Support of District's Cross-Motion for Summary Judgment, at pp. 1-2) Thus, notwithstanding that a purported return to work was alleged in

petitioner's initial pleading and denied by the District in its Answer (Paragraph Nos. 9 and 10), petitioner abandoned any argument based thereon by his conduct before the ALJ and cannot now be heard to claim that there exists a factual dispute which must act as a bar to summary decision.

Similarly, as petitioner made no allegations of OPMA violations in his initial petition, nor did he respond or object to the affidavit of the Executive Assistant presented with the District's Cross-Motion as was his obligation under N.J.A.C. 1:1-12.5(b) had he believed facts related to OPMA issues were in dispute, the ALJ was correct to assume for purposes of decision herein that the District Board was in fact advised of petitioner's termination at a meeting duly conducted in accordance with OPMA requirements.

Finally, the Commissioner concurs with the ALJ's analysis and application of Roth, supra, and Sindermann, supra, and herein holds that, to the extent that it stands for the proposition that the New Jersey Supreme Court's 1968 decision in Canfield, supra, is no longer valid law, Buff, supra, is rejected as erroneously decided.

Accordingly, the initial decision of the Office of Administrative Law dismissing the Petition of Appeal is affirmed for the reasons expressed therein together with the additional explication set forth above.

IT IS SO ORDERED.

M. L. Fitzgerald

NOVEMBER 15, 1993 COMMISSIONER OF EDUCATION

DATE OF MAILING- NOVEMBER 15, 1993

279-93

EDU #9660-92
C # 279-93
SB # 71-93

ROBERT T. WINSTON,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, November 15, 1993

For the Petitioner-Appellant, Feintuch, Porwich & Feintuch
(Philip Feintuch, Esq., of Counsel)

For the Respondent-Respondent, Murray, Murray & Corrigan
(Regina Waynes Joseph, Esq., of Counsel)

On December 1, 1993, counsel for the appellant Robert T. Winston filed a notice of appeal to the State Board of Education from a decision of the Commissioner of Education dated November 15, 1993. The Commissioner had rejected the claim of appellant, a school psychologist, that his tenure rights had been violated when he had been dismissed from such employment in the district, finding that appellant had been dismissed prior to his acquisition of tenure. The Commissioner granted the State-operated School District's motion for summary decision and dismissed the petition. Along with his notice of appeal to the State Board, appellant's counsel requested that the briefing schedule be held in abeyance pending his receipt of the transcripts in this matter.

April 13, 1994

By letter dated December 22, 1993, appellant's counsel was notified of his failure to file a brief in support of this appeal. In a telephone call to the Counsel to the State Board on December 27, appellant's counsel reiterated that he had requested holding the briefing schedule in abeyance. He also, however, advised that he had subsequently learned that there were no transcripts in this matter and that he was, therefore, dropping such request. Under the circumstances, he was given until January 18, 1994 to file his brief. In a letter dated December 27, appellant's counsel expressly confirmed the new filing deadline of January 18.

No appeal brief, however, was filed by that date. Nor did counsel for appellant request further extension for such filing. By letter dated January 24, 1994, appellant's counsel was notified of his failure to file a brief in support of the appeal. Counsel was advised that this matter was being referred to the Legal Committee of the State Board for consideration of his failure to perfect the appeal, pursuant to N.J.A.C. 6:2-1.12, which authorizes dismissal of an appeal on motion of the State Board for failure to meet the filing deadline for an appeal brief.

On March 10, 1994, more than seven weeks after the extended due date for the brief and 6-1/2 weeks after he was notified of his failure to file, appellant's counsel filed a brief in support of this appeal. Counsel provided no explanation for the late filing or at any time requested a further extension for filing.

Pursuant to N.J.A.C. 6:2-1.11(a), a brief in support of an appeal must be filed "within 20 days after the appeal has been filed." In this case, appellant was granted an extension until January 18, 1994 to file his brief, a fact expressly acknowledged by

counsel for the appellant in his letter of December 27, 1993. As noted, no appeal brief was filed by that date and counsel for the appellant did not request a further extension for such filing. He finally filed an appeal brief on March 10.

Under the circumstances, we dismiss the appeal in this matter for failure to perfect. N.J.A.C. 6:2-1.12(a). While N.J.A.C. 6:2-1.19 allows the State Board to relax its rules in its discretion to avoid injustice, we find relaxation in this case unwarranted.

A review of Appellate Division decisions on the subject is informative. As pointed out by the Court:

> The rules relating to briefs and appendices on appeal have as their prime purpose the orderly and considered presentation of the matter on appeal so that the court may have before it such parts of the record and such legal authorities as will be of help in arriving at a proper determination.

Abel v. Elizabeth Bd. of Works, 63 N.J. Super. 500, 509 (App. Div. 1960).

Asserting that violation of the rules dealing with appellate briefs "cannot and will not be tolerated," Still v. Ohio Cas. Ins. Co., 189 N.J. Super. 231, 236 (App. Div. 1983), the Court has stressed that an appeal is ordinarily subject to dismissal when an appeal brief is filed out of time, without an application having been made for an extension. Elmora Savings and Loan Association v. D'Augustino, 103 N.J. Super. 301, 304 (App. Div. 1968); Abel, supra at 509. Accordingly, the Court has dismissed appeals for late filings and other violations of the rules regarding appeal briefs and appendices. See, e.g., Cherry Hill Dodge, Inc. v. Chrysler Credit Corp., 194 N.J. Super. 282 (App. Div. 1984) (appeal dismissed

where appeal brief and appendix were "replete with procedural deficiencies"); Mestice v. Bd. of Adjustment of Neptune City, 35 N.J. Super. 313 (App. Div. 1955) (appeal dismissed where appeal brief was due, following an extension, on January 17, but was not placed on the opposing attorney's desk until 9:00 p.m. on January 18).

The Court has, however, been willing to relax its general rule when asked to decide a matter of public importance, see, e.g. Abel, supra (Court proceeded to a determination on the merits, despite service on July 20 of appeal brief due on June 25, in case involving challenge to validity of amendment to municipal zoning ordinance. The Court stressed that but for the fact that the case involved a matter of public importance to the City of Elizabeth and its residents, it would "not hesitate" to dismiss the appeal); and in cases presenting substantive issues of transcendent importance. See, e.g., In the Matter of the Tenure Hearing of M. William Cowan, 224 N.J. Super. 737 (App. Div. 1988) (Court proceeded to the merits in tenure proceeding against teacher charged with verbal and physical abuse of students, despite overlength appeal brief that "blatantly violates the Rules of Court." The Court noted that the appeal would have been dismissed "were it not for the transcendent importance of the substantive issues raised in the appeal."); Elmora Savings and Loan Association, supra (Court proceeded to the merits, despite out-of-time filing of appeal brief, "in view of the defense raised" where appellant, wife of career serviceman, claimed benefit of the Soldiers' and Sailors' Relief Act of 1940 in a mortgage foreclosure action in which her husband did not wish to oppose the action).

In Wilson v. New Jersey State Department of Education, Docket #A-536-89T5 (App. Div. 1990), the Appellate Division reversed the State Board's decision to dismiss an appeal in which the brief in support of the appeal had been "filed either twelve days late or four days late, depending on what the Board considers as the filing date of the notice of appeal." Id., slip op. at 3. Appellant's counsel therein alleged disparate treatment in that he had not received a notice from the State Board advising him of his failure to file. The Court found that the record disclosed "inconsistent treatment of overdue briefs by the State Board. Some tardy litigants receive written notice advising them that their appeal brief has not been filed and that unless the brief is received the appeal will be dismissed. Others receive no such notice." Id. Under the circumstances, the Court directed that the appeal brief be accepted as filed.

Thereafter, however, in Paszamant v. Highland Park Board of Education, decided by the State Board of Education, April 1, 1992, aff'd, Docket #A-4812-91-3 (App. Div. 1993), the Appellate Division affirmed a determination by the State Board to dismiss an appeal for failure to perfect where the brief in support of the appeal had been filed one month late and counsel for the appellant therein had received written notification from the State Board of his failure to file. The Court concluded:

> Even accepting the certification of petitioners' counsel that the failure to file the brief was due to clerical inadvertence within his office, we cannot close our eyes to the fact that on February 19, 1992, one day after the brief was due, the State Board informed petitioners' counsel that no brief had been filed. The response of petitioners' counsel to that notice was silence. He neither communicated with the Board nor with his adversary to explain his apparent dilemma or to request an extension.

> An entity such as the State Board of Education has to be free to enforce its own procedural rules, providing that it does not do so in a manner which is arbitrary, capricious or unreasonable. We are satisfied that its actions in this matter cannot be so classified and we thus affirm.

Paszamant, supra, slip op. at 2-3.

In this case, appellant's brief was due by January 18, 1994 and he was notified of his failure to file on January 24. Yet his brief was not filed until March 10, more than seven weeks after the filing deadline and 6-1/2 weeks after he was notified of his failure to so file. Appellant's counsel did not request further extension for filing. Nor has he offered an explanation for the late filing. Ultimately, it was his obligation and responsibility to assure compliance with the regulations, and we find no basis for relaxation of the rules in this instance.

Our regulations concerning the time for filing of appeal briefs are clear and unambiguous, and the great majority of the members of the Bar act in full compliance therewith. It is highly unusual for a situation to arise which we find to be sufficiently flagrant to warrant dismissal of an appeal for failure to file an appeal brief within the time limit imposed by regulation. However, our rules are not to be taken lightly, and disregard of or indifference thereto cannot and will not be tolerated.

Inasmuch as we find that this case does not present us with a matter of public importance or substantive issues of transcendent importance warranting a determination on the merits, we dismiss the appeal pursuant to N.J.A.C. 6:2-1.12(a) for failure to perfect.

April 13, 1994

Date of mailing APR 15 1994

280-93

JOSEPH DI FALCO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF KINNELON, MORRIS COUNTY,	:	DECISION ON MOTION
AND	:	
ROBERT SCHOTT,	:	
INTERVENOR.	:	

NOVEMBER 15, 1993

JOSEPH DI FALCO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF KINNELON, MORRIS COUNTY,	:	DECISION ON MOTION
AND	:	
ROBERT SCHOTT,	:	
INTERVENOR.	:	

SYNOPSIS

On Motion for Interlocutory Review of ALJ's Order vacating his earlier Order on Motion for Emergent Relief, Commissioner denied emergent relief finding that Petitioner, a taxpayer in Kinnelon, failed to meet the standards set forth in Crowe v. DeGioia, 90 N.J. 126 (1982) for such an extraordinary remedy. Petitioner's Motion for Emergent Relief sought to establish an escrow account for $112,000 purportedly required to be disbursed on or about October 1, 1993 by the Board to Intervenor, a tenured principal in the district, whom the Board sought to remove by a buy-out agreement. The agreement's validity is the basis of the appeal before the Commissioner.

Decision on Motion also discussed Department of Education regulation, N.J.A.C. 6:24-1.5 and OAL's regulation, N.J.A.C. 1:1-12.6. Commissioner determined that a Motion for Emergent Relief must be filed before the Agency Head, not OAl, as Petitioner had done. Commissioner recognized also, that while a drafting error in N.J.A.C. 6:24-1.5 would seem to require that once a Motion for Emergent Relief is filed before her, if the matter in toto is already before OAL, it must be determined by the ALJ, she has the authority to decide the matter on Motion for Emergent Relief or to transmit it to OAL for determination.

JOSEPH DI FALCO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF KINNELON, MORRIS COUNTY,	:	DECISION ON MOTION
AND	:	
ROBERT SCHOTT,	:	
INTERVENOR.	:	

For the Petitioner, Joseph DiFalco, Pro Se

For the Board, Philip E. Stern, Esq. (Rand, Algeier, Tosti & Woodruff)

For the Intervenor, Robert M. Schwartz, Esq. (Lake and Schwartz)

This matter has come before the Commissioner of Education by way of a request for interlocutory review pursuant to N.J.A.C. 1:1-14-10 filed on October 25, 1993 by Petitioner in the above-captioned matter. Petitioner seeks a determination reversing the order of the Office of Administrative Law (OAL) of October 22, 1993, which vacated its September 29, 1993 Order on Emergent Relief directing an escrow account be set up should respondent Board make any payments to Intervenor pursuant to a Separation Agreement (hereinafter the buy-out agreement) that is the basis of the instant Petition of Appeal.

By correspondence dated October 27, 1993, the Commissioner advised the parties that she would entertain the Motion for

Interlocutory Review. Pursuant to N.J.A.C. 1:1-14.10(d), the Board and Intervenor were also directed to submit, within three days of receipt of such correspondence, arguments in favor of the order or ruling of October 22, 1993. In the same letter, the Board and Respondent were invited to address arguments in response to Petitioner's request for interim relief pursuant to N.J.A.C 1:1-12.6. On October 29, 1993 Intervenor submitted a timely reply letter, which was followed by a similar submission by the Board which was also timely received.

Petitioner's current motion argues that N.J.A.C. 6:24-1.5(d) states that the Commissioner may decide applications for emergent relief prior to any transmittal of the matter to OAL for hearing and that, after transmittal to the OAL, any motion for emergent relief shall be determined by the OAL. (Petitioner's Motion, filed October 25, 1993 at p. 1) (Emphasis in original) Petitioner contends that such regulation places the sole responsibility for hearing this matter before OAL. In the alternative, Petitioner submits that if it is found that the Motion for Emergent Relief must be made before the agency head, then he renews his argument that an escrow account be established for all funds paid to Intervenor pursuant to the controverted buy-out agreement during the pendency of the appeal challenging its legality.

In support of the latter contention, Petitioner claims that according to the buy-out agreement, as of October 1, 1993, the position of the parties changed, because the agreement states that the Board may make payments of the separation monies after that date. Because it has not yet been determined if the buy-out is legal, Petitioner avers, it would be "precipitous and imprudent"

(Petitioner's Request for Emergent Relief filed October 25, 1993, at p. 1) to create a situation where large sums of taxpayer monies were to be disbursed to Intervenor who may be required to surrender those funds in the future, assuming the buy-out agreement is found to be contrary to law. Citing "the Westfield case", (Id.) [no citation provided -- ed.], for the proposition that the funds to be repaid in that matter were unrecoverable because the individual has dissipated all of the money, Petitioner contends the taxpayers of Kinnelon should not be burdened with the loss in this case, stating the "'loss of the many [versus] the benefit of an individual'"(Id.) is at stake in this matter. Petitioner argues that Intervenor has nothing to lose by having the funds escrowed pending the outcome of this case because if the agreement is deemed to be legal, all of the funds due him will be made available with interest. On the other hand, Petitioner submits, if the accord is found to be unenforceable, another term of the accord, at paragraph 6 page 6, will take effect, that which requires Intervenor to be returned to his employment in accordance with his tenure and seniority, and to repay all monies paid out to him. Petitioner adds that the agreement sets forth no Board obligation to pay any money to Mr. Schott until June 30, 1993, thus arguing further against harm to Intervenor were an escrow account established.

Citing N.J.A.C. 6:24-1.15 which allows that rules may be relaxed or dispensed with by the Commissioner in his or her discretion in any case where strict adherence thereto would result in injustice, Petitioner submits that if the taxpayers were to lose the unprecedented sums of money contemplated in the matter at issue, it would be a grave injustice. On the other hand, Petitioner

suggests that no burden is borne by anyone by creation of the escrow account. Petitioner thus avers he has met the standards for the grant of pendente lite restraints as set forth in Crowe v. DeGioia, 90 N.J. 126 (1982).

In response thereto, Intervenor notes that the ALJ's October 22, 1993 disposition of the motion for reconsideration agreed with Intervenor that OAL does not have jurisdiction over the motion for emergent relief Petitioner herein filed there. In response to Petitioner's allegation that the motion for emergent relief filed before the Commissioner should be heard by the Office of Administrative Law, Intervenor submits that the only logical conclusion to be drawn from comparing N.J.A.C. 1:1-12.6 with N.J.A.C. 6:24-1.5 is that the Commissioner may transmit an emergent relief application to OAL after it is filed with the Commissioner. Any other interpretation, Intervenor contends, would put the drafters of Title 6 at odds with the more general and overriding procedural rules governing administrative agencies such as the Department of Education and the Office of Administrative Law.

Regarding the substantive aspects of Petitioner's application for emergent relief, Intervenor notes that OAL still has before it the Board's motion for summary judgment to dismiss Petitioner's appeal. Intervenor contends Petitioner has not only not shown that he is likely to prevail on the merits of this case, but the procedural history shows that OAL is, at the very least, having difficulty allowing it to even proceed to a hearing based on the arguments advanced by the Board. Consequently, Intervenor argues, it would appear that Petitioner's application for interim relief must be denied because he has not met the first test in the

Crowe standard by which the application must be decided, that is, that he can demonstrate a likelihood of prevailing on the merits of his claim. The Board's reply brief joins Intervenor in this argument.

In response to Petitioner's assertion that the relief Petitioner now seeks would not alter the agreement which is at the center of this dispute as the agreement does not require the Respondent to pay any monies to Intervenor before June 30, 1994, Intervenor submits this is not the case. He claims instead that the agreement does obligate the Board to make payments under certain restrictions, that is, when Intervenor requests payments. Hence, Intervenor contends, requiring that payments be held in escrow by the Board until June 30, 1994 or until the merits of this case are resolved abrogates the agreement as it was negotiated, written and understood.

Intervenor further asserts that Petitioner has not demonstrated evidence of irreparable harm that would result if interim relief were not granted. Intervenor claims there are clear legal remedies available to restore the status quo should monies paid by the Board to him be ordered repaid, specifically, through a court-directed enforcement order. The Board joins in Intervenor's contention in this regard as well.

As for the public interest factor, Intervenor contends that the public interest would only be harmed if the Commissioner rules against the Board and the status quo could not be restored. Intervenor reiterates that there are legal remedies available to the Board in the event that Petitioner is successful. Moreover, he claims, the agreement itself provides that if a court should render

as void the monetary obligation contained within it, Intervenor would be required to return any monies paid after October 1, 1993 before the Board may return him to its employ. Thus, no basis exists to claim the public interest compels emergent relief, Intervenor submits.

Hence, Intervenor seeks denial of Petitioner's request for interim relief.

Having carefully considered the arguments of the parties in this matter on interlocutory appeal, including the Order of the Office of Administrative Law dated September 29, 1993, vacated by Order dated October 22, 1993, the Commissioner adopts as her own the Order of the Office of Administrative Law dated October 22, 1993, vacating the earlier Recommended Order of September 29, 1993. The Commissioner affirms that she, not the OAL must receive, in the first instance, all requests for emergent relief pursuant to N.J.A.C. 6:24-1.5. However, while Petitioner erred in seeking reversal of the ALJ's October 22, 1993 Order before OAL, because N.J.A.C. 6:24-1.5 and N.J.A.C. 1:1-12.6 compel filing of any Request for Emergent Relief before the Agency Head, there is merit in suggesting that N.J.A.C. 6:24-1.5(d) by its wording would appear to require that once a motion for emergent relief has been filed with the Commissioner it must be determined by OAL, if the case in toto has already been transmitted to OAL. This, however, is deemed a technical flaw in the drafting of the regulation since the Commissioner clearly has the option to determine an emergent relief motion herself if she so chooses.

Having thus decided that the Request for Emergent Relief need be filed with the Agency Head, the Commissioner now moves to

disposition of such request because judicial economy dictates her consideration of Petitioner's Request for Emergent Relief rather than yet again having the ALJ rule. This determination is reached given that she has the benefit of the ALJ's Recommendation regarding the motion dated September 29, 1993 and she has had the opportunity to review the audio tape of the October 12, 1993 hearing.

Upon careful review of the arguments of the parties, Petitioner's motion is denied for failure to meet the standards for such extraordinary relief as articulated in Crowe v. DeGioia, supra. Hence, the motion for emergent relief is denied.

Initially, the Commissioner finds Petitioner has made no showing of irreparable harm because "monetary damage does not, in itself, constitute irreparable harm." See, Harmon Jeff Garvin v. State Operated School District of the City of Paterson, Passaic County, decided by the Commissioner July 23, 1993, aff'd State Board October 2, 1993. Moreover, no clause of the controverted buy-out agreement alters the conclusion that no irreparable harm exists in this matter insofar as the Commissioner has the authority to reject any or all of the terms of such accord upon her consideration of the underlying merits of Petitioner's claim and order repayment of any monies paid out already by the Board to Intervenor, should it be determined that the matter lies within her purview pursuant to N.J.S.A. 18A:6-9. Further, although Petitioner claims that an escrow account would save harmless all parties to this action, claiming that the Board of Education is not bound by the buy-out agreement to make payments to Intervenor until June of 1994, the clause in question actually states:

3. Between the period October 1, 1993, and June 30, 1996, Mr. Schott shall be entitled to receive the sum of $337,848.00 ("Settlement Amount") in further settlement of all claims and obligations which he may have or hold against the Board. Such Settlement Amount shall be paid by the Board to Mr. Schott as he may request subject to the following restrictions:

(a) Between October 1, 1993 and June 30, 1994, the Board shall not be obligated to pay more than $112,616.00 of the Settlement Amount;

(b) Between July 1, 1994, and June 30, 1995, the Board shall not be obligated to pay more than one-half (1/2) of the balance of the Settlement Amount remaining as of June 30, 1994;

(c) Between July 1, 1995, and June 30, 1996, the Board shall pay, upon the request of Mr. Schott the remaining balance of the Settlement Amount. (Agreement, para. 3)
(Emphasis Supplied)

In this regard the Commissioner cannot accept the ALJ's finding in his September 29, 1993 recommended order stating "Significantly, the terms of the settlement [buy-out] agreement do not obligate respondent to pay any money to Mr. Schott until June 30, 1994" (at p. 2), insofar as Paragraph three states that Board payments during that period shall be made upon Intervenor's request.

Neither has Petitioner advanced a likelihood of succeeding on the merits of his claim insofar as the law in this matter is unsettled. The Commissioner so finds by observing that it is not clear that she has jurisdiction over the underlying claim at issue herein. See, Dr. Columbus Salley v. Board of Education of the City of Newark, et al., 1984 S.L.D. 1714.

Next, in reviewing the third prong of the Crowe, supra, standards, that is balancing the equities, the Commissioner deems the positions of the parties in this regard to be in equipoise

insofar as neither the Board, Petitioner nor Intervenor has presented compelling arguments as to why the harm to it or him outweighs the interests of the opposing parties.

Finally, in considering the public interest, the Commissioner quite clearly understands and shares the concerns expressed by the ALJ at hearing on October 12, 1993 regarding the issue of recoupment, should Petitioner ultimately prevail in challenging the buy-out agreement, given the large amount of money (approximately $112,000) that could be paid out by June 30, 1994 if requested by Intervenor. Nonetheless, the Commissioner cannot grant the extraordinary relief requested herein because taken as a whole the record simply does not present a strong enough showing under the four prongs of Crowe, supra, to warrant disturbing the status quo.

Accordingly, the order of the Office of Administrative Law entered October 22, 1993 vacating its earlier Order of September 29, 1993 finding the Office of Administrative Law lacks jurisdiction to decide the emergent relief matter because the motion was improperly filed before it instead of the Commissioner is affirmed. Further, upon review of the instant Motion for Emergent Relief filed before the Commissioner on October 25, 1993, the extraordinary relief sought therein is hereby DENIED.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 15, 1993

DATE OF MAILING - NOVEMBER 15, 1993

280-93

C # 280-93
SB # 69-93

JOSEPH DI FALCO,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF KINNELON, MORRIS COUNTY,	:	DECISION ON MOTION
RESPONDENT-RESPONDENT,	:	
AND	:	
ROBERT SCHOTT,	:	
INTERVENOR.	:	

Decision on motion by the Commissioner of Education, November 15, 1993

For the Petitioner-Appellant, Joseph DiFalco, pro se

For the Respondent-Respondent, Rand, Algeier, Tosti & Woodruff (Philip E. Stern, Esq., of Counsel)

For the Intervenor, Lake & Schwartz (Robert M. Schwartz, Esq., of Counsel)

On September 24, 1992, Joseph DiFalco (hereinafter "petitioner") filed a petition with the Commissioner of Education challenging a Separation of Employment Agreement between the Board of Education of the Township of Kinnelon (hereinafter "Board") and Robert Schott (hereinafter "intervenor"), the principal of Kinnelon High School. That agreement, dated August 24, 1992, provides, inter alia, that intervenor would resign from his employment with the Board effective October 1, 1993 and that the Board would pay intervenor the sum of $337,848 as he may request between October 1,

FEB. 2, 1994

1996, subject to certain restrictions on the 1993 and June could be paid during the first two years. The amounts transmitted the matter to the Office of Administrative Com") for hearing.

On September 20, 1993, the petitioner filed a letter with the Administrative Law Judge ("ALJ") hearing the case, advising that the effective date of intervenor's resignation was approaching and requesting that the ALJ preserve the status quo by establishing an escrow account pending determination of this matter. On September 29, the ALJ entered an order on petitioner's "application for emergency relief" in which he directed the Board to place the sums becoming due to intervenor under the separation agreement into an interest-bearing escrow account. However, on October 22, the ALJ vacated that order on motion of the intervenor, concluding that he did not have the jurisdiction to issue the order. Petitioner thereupon filed an application for interlocutory review and a request for interim relief with the Commissioner, seeking reversal of the ALJ's order of October 22.

On November 15, 1993, the Commissioner adopted the ALJ's October 22 order. The Commissioner agreed that the ALJ lacked the jurisdiction to order the requested interim relief, stressing that it was the Commissioner, and not the Office of Administrative Law, who, in the first instance, must receive all requests for emergent relief under N.J.A.C. 6:24-1.5. The Commissioner added, however, that:

> there is merit in suggesting that N.J.A.C. 6:24-1.5(d) by its wording would appear to require that once a motion for emergent relief has been filed with the Commissioner it must be determined by OAL, if the case in toto has already been transmitted to OAL. This, however, is deemed a technical flaw in the drafting of the

> regulation since the Commissioner clearly has the option to determine an emergent relief motion herself if she so chooses.

Commissioner's Decision on Motion, slip op. at 6.

Finding that, in this case, judicial economy dictated that she consider petitioner's request for emergent relief, rather than transmit it to OAL, the Commissioner denied that request for failure to meet the standards articulated in Crowe v. De Gioia, 90 N.J. 126 (1982). In so doing, the Commissioner found that petitioner had failed to demonstrate irreparable harm, stressing that monetary damage did not, in itself, constitute such harm, that petitioner had failed to show the likelihood of succeeding on the merits of his claim, and that he had not shown the harm alleged to outweigh the interests of the opposing parties. While acknowledging petitioner's concerns regarding the difficulties the Board might have in recouping any moneys it paid to intervenor if petitioner ultimately prevailed on the merits, the Commissioner concluded that she could not grant the extraordinary relief sought since the record as a whole did not present a strong enough showing under the standards enunciated in Crowe to warrant disturbing the status quo.

On November 24, 1993, the petitioner filed a notice of appeal to the State Board from the Commissioner's decision on motion. By letter dated December 1, the petitioner was notified that since he was seeking to appeal an interlocutory decision, his appeal was governed by the requirements of N.J.A.C. 6:2-2.3, which requires the filing of a motion for leave to appeal in such instances. Petitioner was afforded the opportunity to amend his appeal so as to conform with the regulatory requirements. In compliance therewith, the petitioner filed a motion for leave to appeal, along with supporting documents.

We grant petitioner's motion for leave to appeal an interlocutory decision. However, after a thorough review of the record, we deny his request for emergent relief. Substantially for the reasons expressed by the Commissioner, we find that petitioner has failed to satisfy the requirements for such relief delineated in Crowe, supra.

Furthermore, we concur that petitioner was required to file his request for emergent relief with the Commissioner. Although petitioner's request to the ALJ was not formally expressed as a motion or application for emergent relief, the relief sought, establishment of an escrow account in order to maintain the status quo pending final determination, was emergent in nature and required compliance with the applicable regulations. As acknowledged by the petitioner, he sought the ALJ to "exercis[e] a temporary judicial injunction." Letter brief in support of motion for leave to appeal, at 1. Consequently, as determined by the ALJ in his October 22 decision, he did not have the jurisdiction in this instance to direct the relief sought.

For the reasons that follow, however, we reject the Commissioner's view that N.J.A.C. 6:24-1.5 is "technically flawed," and, as a result, we are compelled to correct her analysis of the regulations governing determination of motions for emergent relief.

N.J.A.C. 6:24-1.5(c) provides that the Commissioner of Education, upon receipt of an application for interim relief, may either act upon the application or transmit it to OAL for immediate hearing. Section (d) provides that the Commissioner:

> may decide such application prior to any transmittal of the matter to the OAL for hearing. After transmittal to OAL, any motion for emergent relief shall be determined by the OAL. (See N.J.A.C. 1:1-12.6.)

N.J.A.C. 1:1-12.6(b), in turn, providing for emergency relief pending a final decision on the whole contested case, requires that "[a]pplications for emergency relief shall be made directly to the agency head and may not be made to the Office of Administrative Law." N.J.A.C. 1:1-12.6(c) permits the agency head to either hear the application or transmit it to OAL for hearing. Once the application is transmitted, the regulation provides for determination by OAL.

It is evident from the language of our regulation that, contrary to the Commissioner's assertion, N.J.A.C. 6:24-1.5(d) does not require transmittal of an emergent relief matter to the Office of Administrative Law, even if the case in toto has already been transmitted. To the contrary, N.J.A.C. 6:24-1.5 expressly gives the Commissioner the option of deciding the motion himself. Once, however, the motion has been transmitted to OAL for hearing, it must then be decided initially by that agency.

Therefore, as modified herein, we affirm the Commissioner's decision denying petitioner's request for emergent relief.[1]

February 2, 1994

Date of mailing FEB 04 1994

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[1] We emphasize that our decision herein is limited to petitioner's request for emergent relief pending final determination, and we do not in any way determine the merits of petitioner's challenge to the separation agreement, which is currently proceeding before OAL.

281-93

DOUGLAS BOWER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning wrestling coach sought reversal of NJSIAA decision that he violated Article IX of bylaws requiring coaches to conduct themselves in a sportsmanlike manner. Association contended coach unilaterally terminated an interscholastic contest (Sectional Semi-Final Wrestling Team Championship) making a "travesty of the forfeiture procedures." Petitioner claimed his decision to cancel the match was based on the team physician's failure to examine three of his key varsity players and the unavailability of his alternate wrestlers due to the questionable status of his wrestlers and alternate wrestlers due to injury, inexperience, or failure to practice.

Following review of testimony and record, Commissioner was convinced that petitioner was provided due process by hearings of NJSIAA Controversies Committee and the Executive Committee. Commissioner concluded petitioner failed to prove that Association's determination was arbitrary, capricious or unreasonable. Commissioner affirmed decision of NJSIAA and the penalties levied by Association. Petition was dismissed.

NOVEMBER 16, 1993

DOUGLAS BOWER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	

For the Petitioner, Stephen B. Hunter, Esq. (Klausner, Hunter, Cige and Seid)

For the Respondent, Michael J. Herbert, Esq. (Picco, Mack, Herbert, Kennedy, Jaffe & Yoskin)

This matter has come before the Commissioner by way of a Petition of Appeal filed on December 4, 1992 by counsel for Douglas Bower seeking a reversal of the decision of the New Jersey State Interscholastic Athletic Association (NJSIAA) Executive Committee dated September 23, 1992, which affirmed the determination of the Controversies Committee dated June 2, 1992 holding that the conduct of Coach Douglas Bower, a wrestling coach at Howell High School, Freehold Regional High School District, in forfeiting the February 19, 1992 Sectional Semi-Final Wrestling Championship to Manalapan High School constituted a violation of Article IX of the NJSIAA Bylaws requiring coaches to conduct themselves in a sportsmanlike manner and specifying that they had no unilateral right to terminate an interscholastic contest, and that Coach Bower's conduct constituted an egregious violation of the wrestling

regulations by making a "travesty of the forfeiture procedures." Petitioner seeks reversal of such decision as being arbitrary, capricious and unreasonable and further seeks a prohibition against the NJSIAA's assessing him a fine in the amount of $500, as well as reversal of the Committee's placing him on a two-year probation during which time the member school employing his services will be required to submit monitoring forms to the NJSIAA for each match during the wrestling season with each official being asked to submit evaluation forms after each match, and his ineligibility during this two-year probation to serve the NJSIAA as a tournament representative or to serve on any of the Association's Committees.

On December 11, 1992 Respondent NJSIAA filed its Answer to the Petition of Appeal along with a copy of the record below including transcripts of the two hearings, as well as the written decisions of the two Committees.

By letter dated January 29, 1993, the Director of the Bureau of Controversies and Disputes directed petitioner to submit a brief on the merits of his claim and provided a ten-day period after this submission for the NJSIAA to file a reply brief. The briefs were filed by the parties on March 11, 1993 and March 25. 1993, respectively.

It is noted that in making its determination in this matter, the Controversies Committee made the following Findings of Fact:

> 1. In November, 1991, Howell High School received wrestling regulations for the 1992 Team Championship, which was scheduled to begin on Wednesday, February 19, 1992, with Sectional Semi-Finals, followed up by Sectional Finals on Thursday, February 20, and State Team Championships on February 22, 1992.

2. In addition to the Team Championships, the NJSIAA scheduled Individual District Championships, to start on February 28, 199[2], the week after the conclusion of the Team Championships.

3. The regulations for the Team Championships specifically warned that once entered and scheduled, schools should not withdraw or make a "TRAVESTY OF THE FORFEITURE PROCEDURES," or run the risk of suffering punitive action by the NJSIAA Controversies Committee.

4. Pursuant to the regulations, Howell Wrestling Coach Douglas Bower completed the requisite NJSIAA weigh-in forms on Monday, February 17, 1992,[1] listing Varsity wrestlers for each one of the thirteen weight classes, with thirteen separate alternates from the Junior Varsity squad.

5. Three of the Varsity wrestlers were diagnosed as having contagious skin diseases (the 135, 145 and 189 [lb.] wrestlers). Each one of these wrestlers received a clearance from [his] personal doctor[s], but did not receive clearance from the school physician, Dr. Joseph Schauer.

6. On the evening of February 19, 1992, the Manalapan team arrived at the Howell gym to participate in the 7:00 p.m. Sectional Semi-Final Team Championship against Howell. In addition, security and staff personnel were retained, along with Wrestling Official Ron Guarnieri.

7. At approximately by 5:00 p.m. or shortly before the arrival of the Manalapan Team and the Official, Coach Bower ascertained that the 135, 135 and 189 lb. wrestlers could not wrestle, because they had not received an approval from Dr. Schauer. He immediately went to Dr. Schauer's office, and the school physician would not approve the participation of the wrestlers, because of the contagious nature of their skin condition.

8. Coach Bower contended that six of his Varsity wrestlers (125, 130, 152, 160, 171 and Heavy Weight) had a variety of injuries preventing their participation. This assertion

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[1] The record indicates that the forms were actualy completed on Wednesday, February 19.

is contradicted by the Official trainer records, and the testimony of Dr. Herman and Athletic Director Frank Petrulla, that only the 130 lb. wrestler was, in fact, incapable of participating, because of an injury. In addition, Coach Bower admitted that several of the "injured" wrestlers would have competed had there been a chance to win the contest. He acknowledged that these "marginal" wrestlers were not placed on the mat after he determined that the three wrestlers with skin diseases (135, 145 and 189 [lb.]) could not wrestle on that evening. Finally, several of the "injured" wrestlers did participate in the Individual District Championships a week later, and practiced throughout this entire period of time.

9. When Coach Bower completed the official weigh-in form on February 17, stating that there were 26 wrestlers available (thirteen Varsity and thirteen alternates), the NJSIAA must assume that the document was accurate. The completed form meant that on the evening of February 19, 1992, there were 26 qualified and physically able wrestlers available to participate in the tournament.

10. Even assuming that several of the wrestlers were not physically able to participate on February 19, provisions should have been made to wrestle one or more of the thirteen JV wrestlers identified on the weigh-in form.

11. The Committee finds as a fact that, when a school lists wrestlers as alternates, that those individuals will be utilized, if the Varsity or first listed wrestlers in each weight class are not available for any reason. In this case, all of the alternates were members of an outstanding JV team, who were fully capable of participating on the evening of February 19.

12. The Committee finds the excuse given by Coach Bower that many of the JV wrestlers could not participate because they stopped practicing, to be unavailing. As Athletic Director Petrulla accurately noted he could have made sure that these students continued to practice and were available. Many of the injuries recounted by the Coach occurred months earlier, and when the Coach listed these JV members on the weigh-in form, he should have made provisions for the students to practice in anticipation of the Sectional Semi-Final Team Championships.

> 13. The Committee finds as a fact that when Coach Bower could not wrestle three of his top Varsity athletes, because of the lack of medical clearances, he determined that he would have difficulty winning the Sectional Semi-Final Team contest against Manalapan High School. Instead of utilizing Varsity wrestlers who had some lingering ailments, or JV alternatives, he, instead, chose to forfeit the match to save both he and his team from an "embarrassment."
>
> 14. The conduct of Coach Bower deprived many of his own wrestlers [of] the opportunity to participate in the Sectional Semi-Final Team contest, and required Howell, Manalapan and the NJSIAA to incur considerable expense. The expense, disruption and unfairness to students, fans and athletes at both schools [were] caused only because this Coach wanted to avoid some type of strategic setback.
> (Controversies Committee Decision, Exhibit B, at pp. 12-15)

Petitioner contends that the blame for the decision to forfeit the February 19 match cannot be placed solely on his shoulders. He avers that the 11th hour decision of the Howell Township school physician not to examine the three wrestlers to clear them for participation heavily influenced his decision to cancel the match. Likewise, he avers that Mr. Petrulla, who should have been the ultimate decision maker in the matter, was absent that evening, which necessitated several telephone calls to him attempting to get his input on the problems petitioner was facing and resulted in no viable solutions being offered. Petitioner maintains that

> The decision was made with the wrestlers' health and safety as the primary concerns. Coach Bower asserts that to penalize him, without penalizing Mr. Petrulla for his participation, or lack thereof, in the decision to forfeit the match, is completely unjustifiable under the circumstances. It is the Site Manager who has the ultimate decision on such matters and absent any clear decision by the Site Manager, Coach Bower was compelled to make the decision.
> (Brief in Support of Petitioner's Petition of Appeal, at p. 14)

Petitioner asserts that in making its determination the Controversies Committee misinterpreted or ignored evidence and testimony he presented while giving substantial credence to Mr. Petrulla's testimony even though such testimony conflicted with earlier statements or evidence. Specifically, petitioner avers that the Committee accepted Mr. Petrulla's assertion that wrestlers who petitioner claimed were injured did not appear in the Trainer's Log in the week prior to the February 19 match. Petitioner asserts that the Trainer's Log, which was in evidence, lists eight wrestlers who received treatment one day prior to the match. He contends that of these eight, one wrestler is listed as not being able to practice at all and the others were strictly limited in their practice participation.

Petitioner next avers that the Committee ignored his explanations that the weigh-in form should not be regarded as an accurate representation of the wrestlers available for the February 19 match, but rather covered the entire four-day tournament schedule. Petitioner contends that when he filled out this form, he did so to provide the maximum flexibility over the entire period. As such, this form should have been viewed as a roster of wrestlers who, although not necessarily available or eligible for the February 19 match, could become available at some point during the tournament. Petitioner avers that this was a strategy that nearly every coach in the tournament was probably using.

Petitioner further contends that it would not have been prudent to send the inexperienced Junior Varsity alternates who were available on February 19 to the mat against the agressive, highly skilled Manalapan team. He avers that exposing these inexperienced

young wrestlers to clear overmatches would have invited not only the prospect of humiliation for them but, more importantly, a great possibility that these inexperienced wrestlers would have sustained serious physical injury.

Lastly, petitioner contends that the penalty assessed against him in this matter is excessive. He avers that two other teams, Brick Memorial and Rancocas Valley, also withdrew from this same tournament without an investigation being conducted or penalties being assessed. He further contends that the Committee has imposed less severe penalties on others who have committed more flagrant violations of NJSIAA regulations. He cites as examples nine Controversies Committee decisions over the past five years which involved team withdrawals from interscholastic events where he avers that none of the penalties assessed for the same violation approach the severity of the penalty imposed on him. In particular, petitioner points to a case involving the Belleville wrestling team where the coach pulled his team off the mat while the match was in progress because he felt the referee had made calls favoring his opponent. Petitioner contends that in this regard the Committee only assessed the coach a $300 fine and a one-year probation which did not include ineligibility to serve as a tournament representative or on any of the Association's Committees, clearly, he avers, a less severe penalty for a more egregious violation of the same regulation he is charged with violating.

Respondent NJSIAA contends that the decision of its Controversies Committee and its Executive Committee was not arbitrary but rather based upon substantial credible evidence in the record following a hearing before the former Committee which

provided the petitioner, who was represented by counsel, with the opportunity to present evidence, examine and cross examine witnesses and to argue his case. Further, it maintains that the hearing was transcribed and a seventeen-page decision rendered. NJSIAA states that petitioner was thus able to present his arguments before two deliberative bodies of the NJSIAA, both of which fully considered the case and the applicable NJSIAA rules, thereby affording him complete and appropriate due process.

Respondent argues that in cases where the NJSIAA has afforded a petitioner due process, the Commissioner will not overturn the decision of the Association unless that decision was arbitrary or capricious, even when she would judge otherwise in a de novo review. It states that Article IX of the NJSIAA Bylaws requires interscholastic coaches to conduct themselves in a sportsmanlike manner. It avers that the evidence adduced below clearly shows that the coach's actions were contrary to Article IX in that no coach has a unilateral right to terminate an interscholastic contest. NJSIAA maintains that Coach Bower's conduct deprived many of his own team and his opponents of the opportunity to participate in the Semi-Final Championship.

NJSIAA further argues that petitioner does not here contend that his due process rights were violated, nor does he challenge Section 1 of the Tournament Regulations which condemns the misuse of forfeiture procedures. Likewise, he does not dispute that this particular tournament provision is consistent with assuring good sportsmanship based on Article IX of the NJSIAA Bylaws.

It maintains that petitioner, instead, focuses his entire argument on the contention that the two NJSIAA Committees should

have believed his version of the events of February 1992 rather than the version related by the wrestling official, the Howell principal and Howell's athletic director.

NJSIAA asserts that petitioner's attempt to place blame for the improper termination of the match on the school physician for his failure to examine three of the wrestlers on February 19 is ludicrous. It contends that even assuming that the physician should have re-examined the wrestlers, the fact that he did not, cannot be the basis for a coach unilaterally deciding to forfeit a match, notwithstanding the availability of replacements. NJSIAA avers that the coach knew of the questionable status of the three Varsity players days before the match and should have made adequate preparation to substitute the three Junior Varsity wrestlers listed on the weigh-in form if it became necessary. It argues that this is precisely why the NJSIAA requires a listing of alternative wrestlers to be a part of the tournament regulations.

NJSIAA next disputes petitioner's contention that it would have been irresponsible of him to jeopardize the health and safety of the eight wrestlers who received treatment for injuries the day before the match by allowing them to wrestle. It asserts that testimony of Mr. Petrulla, which the Committee found to be entirely credible, stated that of these eight players, only one was listed as being unable to practice. Of the remaining wrestlers,

> ***nowhere did the trainer state those youngsters were not capable of taking the mat for practice or for wrestling.*** We all get bumps and bruises. I don't know any wrestling team that progresses on February 19th without having their share of nicks and cuts. (Exhibit C, 96:2 to 23).
> (Reply Brief of Respondent, at p. 20)

Additionally, NJSIAA avers that that the coach, himself, testified that he would have wrestled all of the Varsity wrestlers in the Trainer's Log if he could have been assured that the three Varsity players were cleared by the school physician. (Exhibit C, 112)

Respondent NJSIAA additionally alleges that petitioner's contention that his primary concern in forfeiting the match was the health and safety of the wrestlers is further belied in the brief he submitted to the Commissioner where it is obvious that his main concern was winning:

> There was, however, some advantage to be gained by individual wrestlers on the Howell Team. The forfeit afforded certain wrestlers additional time to heal their injuries before beginning the District Championships the following week. The loss to Manalapan on February 19, 1992 marked the end of Howell's dual meet, team vs. team, competition. The following week would begin the post-season tournament schedule, which shifts the focus to individuals, rather than teams. The ultimate purpose of the post-season tournaments, beginning with the District Championship, is to crown a State Champion in each weight class. Coach Bower's decision was motivated by his desire to protect the health and safety of his team. There was nothing to be gained on February 19, 1992 by wrestling six matches, facing certain defeat and risking injury to his wrestlers.
>
> The Committee's assertion that he was "making a travesty of forfeiture procedures" is without support. Coach Bower was handed a set of difficult circumstances only hours before the February [19], 1992 wrestling match. Dr. Schauer's inexplicable behavior greatly reduced Howell's chances of winning that evening, in fact, made it next to impossible*** (Pb 19). (emphasis in text)
>
> (Reply Brief of Respondent, at p. 21)

With respect to the penalties imposed by the NJSIAA in this matter, respondent argues that such penalties are not excessive under the circumstances. It states that there are significant

differences between this matter and the situation involving the Belleville coach cited by the petitioner. It avers:

> ***[T]he Belleville coach withdrew his team toward the end of a meet, after there had been fights occurring in the spectators' stands. Second, in that case, the Committees found that the coach acted improperly, but impulsively. In this case, the Petitioner deliberately manipulated the forfeiture procedures to prevent a contest from occurring in the first place. The Belleville Coach assumed responsibility. In contrast, the Petitioner blamed first the school physician, and then the school Athletic Director, accusing the latter of making "misleading and false statements" (Pb 13). More importantly, he completed a "Weigh-in Form," stating that 13 Junior Varsity wrestlers were available to participate in a tournament at the very time that, according to him, virtually none of these alternates could wrestle because of a self-imposed "team rule." The School Principal properly found that conduct to be deceptive, and a clear violation of the procedures of the NJSIAA. This is a coach who asserted that he had six injured wrestlers who could not wrestle, but then acknowledged that they could have wrestled after all, if there was a chance to win. In contrast with the impulsive conduct of the Belleville coach, the Petitioner intentionally deceived the Wrestling Officials and the NJSIAA. His conduct was grossly unsportsmanlike.***
>
> (Respondent's Reply Brief, at pp. 23-24)

With respect to petitioner's argument regarding two other schools who withdrew from this same tournament without penalty, the NJSIAA submits an affidavit of the Associate Director of the NJSIAA which explains that the withdrawal of these two teams was permitted as a result of their providing fully documented medical proof that an outbreak of herpes or impetigo had clearly created a medical risk for their players.

Upon a careful and independent review of this matter, the Commissioner is convinced that the hearings of the NJSIAA Controversies Committee and the Executive Committee fully provided petitioner with the due process to which he is entitled. As

correctly noted by the NJSIAA, the standard of review in this matter prevents the Commissioner from substituting her judgment for that of the Association's absent a showing by petitioner that such body acted in an arbitrary, capricious, or unreasonable manner. After a thorough consideration of the record, which includes the transcripts of the two hearings below, as well as the written decisions of these bodies, the Commissioner concludes that petitioner has failed to meet this burden, and the NJSIAA's decision is, therefore, affirmed as are the penalties levied by said Association against petitioner.

In making her determination in this regard, the Commissioner was not unmindful that the record certainly conveys that petitioner has had a long and significant record as a coach in interscholastic sports. This does not, however, serve to nullify the reasonableness of and rational basis for the Committee's determination. Rather, the Commissioner finds it inconceivable that a coach with his extensive experience when faced, two days before a major tournament, with even a remote possibility that three of his key varsity wrestlers might not be able to compete in the match, did not recognize the importance of assuring that alternates were practiced and available just in case his worst fears were realized.

Accordingly, the Commissioner adopts as her own the findings and conclusions of the Controversies Committee and the Executive Committee in this matter and hereby dismisses the Petition of Appeal with prejudice.

NOVEMBER 16, 1993

COMMISSIONER OF EDUCATION

DATE OF MAILING - NOVEMBER 16, 1993

282-93

THOMAS JABOUR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE DELAWARE VALLEY REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, tenured teaching staff member riffed in May 1991, claimed Board violated his tenure and seniority rights when it abolished his 10-month position of Teacher of Industrial Technology but retained less senior teacher. Petitioner sought reinstatement with compensation.

Initial decision determined petitioner failed to timely submit supporting documentation of his military service that would have shown him to have more seniority than person retained. In light of such proof, ALJ determined petitioner would have been retained for 1991-92 but such proof of military service rested with petitioner. (Nealy) Thus, petition was dismissed.

Commissioner adopted findings and determination in initial decision.

NOVEMBER 18, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7975-91
AGENCY DKT. NO. 258-7/91

THOMAS JABOUR,
Petitioner,
v.
BOARD OF EDUCATION OF THE DELAWARE VALLEY REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,
Respondent.

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

David W. Carroll, Esq., for respondent
(Carroll & Weiss, attorneys)

Record Closed: August 26, 1993 Decided: October 5, 1993

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

PROCEDURAL HISTORY

This contested matter was transmitted by the Department of Education to the Office of Administrative Law on August 19, 1991, following the filing of a petition by Thomas Jabour alleging that in June 1991 the respondent violated his tenure and seniority rights when it abolished his 10-month position as teacher of industrial technology, but retained another teacher whose seniority actually was less than his

own. Petitioner demanded reinstatement to his teaching position and reimbursement for salary he claims he lost during the 1991-92 school year when he was forced to find employment by another school district in a 12-month position for less remuneration.

Following a series of adjournments, a plenary hearing was held on May 14, 1993, and the record closed on August 26, 1993 when petitioner's reply brief was received. The following constitutes my initial decision.

TESTIMONY

A. Stipulation of Facts

At the outset of the hearing, counsel agreed to a joint stipulation of facts (Exhibit C-1) which set forth the following:

1. The Delaware Valley Regional High School Board of Education is the governing body for a regional district serving grades 9 through 12. The Board operates one school - Delaware Valley Regional High School (hereinafter "DVRHS").

2. During the 1990-91 school year, respondent employed four full-time (six duty periods) certified teachers of industrial technology--petitioner, Vincent C. Specht, William Petty and Boyden D. Stretch. In addition, the Board employed Louis J. DiLullo as assistant principal. In addition to his administrative duties, DiLullo also taught two periods of industrial technology. Attached hereto as Exhibit J-1 is the job description for the assistant principal position held by DiLullo. DiLullo is certified as a teacher and principal.

3. Specht and DiLullo began their employment with DVRHS the same day as petitioner, September 1, 1970. Stretch began his employment in 1959. Petty began in 1964. Petitioner had two years' prior teaching experience in another New Jersey public school district. Specht had six years prior teaching experience in a New Jersey public school district.

4. Specht, Petty, Stretch and petitioner taught industrial arts/technology course, and only industrial arts courses, throughout their tenure at DVRHS. DiLullo taught industrial arts/technology exclusively through the 1988-89 school year. Beginning 1989-90, he has served as assistant principal, albeit with some teaching responsibilities as described above.

5. As a result of declining enrollments, it became apparent to administration and the Board during the 1990-91 school year that one full-time industrial technology position would have to be abolished as of the 1991-92 school year.

6. The Board at its May 28, 1991 meeting abolished one industrial technology position, effective for the 1991-92 school year, and further voted not to offer employment to petitioner for the 1991-92 school year. Attached hereto as Exhibit J-4 is a true copy of relevant excerpts from the official minutes of that meeting.

7. By letter dated May 29, 1991 (attached hereto as Exhibit J-5) petitioner was notified of the Board's action and of his right to be reemployed in the first available position for which he was certified.

8. (a) Attached hereto as Exhibit J-6 is a true copy of petitioner's employment application.

   (b) Attached hereto as Exhibit J-7 is a true copy of Specht's employment application.

   (c) Attached hereto as Exhibit J-8 is a true copy of DiLullo's employment application.

9. Petitioner also has a total of five plus years in the National Guard and Naval Reserves, official documentation of which has also been provided to the Board subsequent to the commencement of this litigation. The parties stipulation that National Guard and Reserve duty is not creditable towards seniority under *N.J.S.A.* 18A:28-11.1.

10. The ISS aide position was established with the written approval of the county superintendent in August 1979. Attached hereto as Exhibit J-11 [is the] cover letter and original application and signed approval form dated August 21, 1979.

11. The ISS aide position has continued in existence every year since. Attached hereto as Exhibit J-12 is the district's 1990-91 Annual Report of Persons employed on School Aide Positions. No form was printed or required by the Department of Education for 1991-92.

12. The ISS aide position is a covered position with the bargaining unit represented by the Delaware Valley Education Association. Attached hereto as Exhibit J-12 is "Appendix D"--the negotiated salary guide for school aides for school years 1989-90 and 1990-91. Pending negotiations on a new contract for 1991-92 and 1992-93, the salary guide for ISS aides during those years has remained the same. Although not required by job description, the Board has always hired persons with either a substitute's certificate or a regular teaching certificate for the ISS aide position.

13. Boyden Stretch, the most senior of all the industrial technology teachers, retired from the district effective June 30, 1992. The Board offered, and petitioner accepted full-time reemployment as an industrial technology teacher for the 1992-93 school year.

14. Petitioner's salary, had he been employed at DVRHS during 1991-92 would have been $51,234.

15. Petitioner's certifications and the date each was acquired, are as follows:

Certification	Date Acquired
Teacher of Industrial Arts	6-8-66
Supervisor	7-75
Principal	5-76

During the 1991-92 school year Jabour was employed as the supervisor in charge of the physical plant and facilities by the Somerville Board of Education, a 12-month position, at a salary of $42,000. It was stipulated that had petitioner been retained in his 10-month teaching position at DVRHS that school year he would have earned $51,234, a dollar differential of $9,234. Beyond that, Jabour's 12-month position in Somerville also required him to work an extra one hour per day, thereby effectively reducing his salary by another one-seventh. Thus, petitioner calculated that the total differential between what he was paid by Somerville in 1991-92 and what he would have received had he been retained in his employment by respondent was approximately $21,000, taking into account: (1) a 20 percent differential for working 12 months instead of 10 months; and (2) an additional differential of one seventh, or 14%, for the extra one hour per day.

Finally, Jabour identified a certificate which confirmed that he was honorably discharged as a member of the Army National Guard on January 28, 1972 (Exhibit P-7).

On cross-examination, Jabour agreed that at no time prior to being rehired at DVRHS in September 1992 did he provide Matula or the Board with official documentation corroborating his military service. He insisted, however, that when he first applied for the position in 1970 he did produce his DD-214 form for Phillips. He also explained that the credit given to him for active duty military service from July 1969 to December 1969 was appropriate even though that time period partly overlapped his employment in Bridgewater. He pointed out that he was in the "technical employ" of the Bridgewater Board during all of 1969-70, except that he was on military leave from July 1969 to December 1969.

Finally, Jabour conceded that when he appeared before Matula and the personnel committee in May 1991 and read his statement, no reference was made in it to his military service. Nor did he contend at that meeting that he should receive credit for military service in order to avoid being "riffed." Thus, after reading his statement, the discussion which ensued had to do only with other positions in the district which might be available to him.

C. Testimony for Respondent

The Board's first witness, William F. Muhs, has been a board member for about three years and was a member of the three-person committee with whom petitioner met in 1991. Muhs recalled that Jabour requested the meeting in order to discuss his future employment since petitioner knew he was the teacher who would be "riffed." Prior to meeting with petitioner the Board members were told by Matula that even though Jabour had been asked for proof of his military service, none was provided. According to Muhs, Jabour was asked that day for proof of prior military service, and his response was "evasive." Thus, the discussion centered on other possible positions in the district and no further attention was paid to the military service issue.

On cross-examination, Muhs conceded that he did not personally review Jabour's file, but believed Matula might have mentioned that the file did reflect a claim of military service. Muhs specifically recalled that Matula told the committee that Jabour was advised of the consequences if no documentary proof of military service was provided.

The second Board witness was Matula. He explained that during the 1990-91 school year the Board determined that a position in the industrial arts department would have to be abolished because of a general decline in enrollment. In December 1990 Matula began to review the seniority status of the potentially affected employees and in late March or early April 1991 he mentioned to Jabour that there was some question regarding petitioner's military service. Specifically, Matula expressed concern that the time period Jabour said he was on active duty (July 1969 to December 1969) overlapped the time (September 1969 through December 1969) that he said he was employed by Bridgewater. When Matula asked Jabour to provide verification that could be resorted to if needed, Jabour replied that he was not sure he could find any documentation but would look for it.

Sometime during April 1991, Matula again spoke to Jabour, at which time petitioner told the superintendent he could not find any documentation. Thus, in light of the fact that there continued to be, in Matula's mind, some inconsistency regarding Jabour's claimed military service from July to December 1969 and his employment that same year in Bridgewater, Matula concluded that Jabour perhaps

had misinterpreted or misconstrued the nature and/or time of his active duty service and it was up to him to clear up that confusion. When no such verification was produced, Matula and the Board members concluded that Jabour could not be given credit for military service in respect to seniority. Therefore, Specht was retained.

Matula also recalled that the meeting among Jabour, the personnel committee and the superintendent took place at the request of petitioner and when the meeting started Jabour read a prepared statement and the parties then discussed other possible positions for 1991-92. Matula, like Jabour, had no recollection of any discussion of petitioner's military service. Matula also explained that unlike the Board's expectation of documentary proof to support a military service claim, no independent verification of Jabour's claim of prior out-of-district teaching service was sought because he assumed this had been done at the commencement of petitioner's employment. Matula agreed that had Jabour timely documented his military service he, rather than Specht, would have been retained for 1991-92.

DISCUSSION

Respondent conceded that based upon the documentation it finally received from Jabour in September 1992, there is no doubt that petitioner did have the prior military service he alleges he had, and if such official documentation had been provided by Jabour during the decision-making process from March to May 1991, Specht, not Jabour, would have been "riffed." Thus, the issue for determination is whether the consequences of Jabour's failure to timely submit supporting documentation should fall on him (salary differential for 1991-92 and loss of one-year's seniority), or whether the Board, in light of the information it already had at its disposal *vis-a-vis* his military service, *i.e.*, the military service information set forth on Jabour's employment application, that he was granted an annual leave during the early 1970s for active duty training for two weeks during the school year and that no independent verification of any claim of prior teaching experience was required, had the obligation to justify its rejection of his military service credit, or is now equitably estopped from doing so.* For the reasons which follow I believe that

*Following the close of the hearing Matula submitted a certification to the effect that although he assumed that Superintendent Phillips independently verified out-of-district employment claims by job applicants, no third party verification was to be found in the Jabour, Specht or DiLullo personnel files. That certification will be marked Court Exhibit 2.

in the particular circumstances of this case it was the petitioner, not the Board, who had the burden of confirming the military service claim and Jabour's failure to do so in 1991 is fatal to his claim.

First, I agree with the observation made by the Board in its post hearing brief that it was not required to accept without question an employee's undocumented claim of prior military service and reasonably could require that employee to independently provide appropriate documentation of the same where, as in this case, the issue was highly pertinent to a seniority determination. I further agree with the Board that the obligation or burden to come forward and produce the pertinent documentation in situations of this sort rests upon the employee and not the employer.

A case which I believe is analogous to the instant situation (although it did not involve a military service-seniority claim) is the case of *Nealy v. Board of Education of Roselle*, 1987 *S.L.D.* 1598. As the administrative law judge who heard and decided that matter I am particularly familiar with it. In *Nealy*, the petitioner had taken additional courses in order to obtain a regular teaching certificate and upon completion of those courses was eligible for the same. However, before she submitted official transcripts for those courses in order to obtain the certificate, the certification laws were changed and a testing requirement was added. Nealy took and failed the test, was denied her regular certificate and subsequently was terminated. On appeal from that termination she claimed, *inter alia*, that she became tenured when she was eligible for the certificate upon passing the additional courses and that possession of the certificate was not required. I determined that it is the obligation of the employee, not the board, to act with appropriate dispatch and to provide official documentation when asked to do so. I noted that although Nealy actually had completed her courses in 1984, and had been reminded twice to follow up and obtain necessary transcripts, she inexplicably and inexcusably neglected to do so. Thus, the adverse consequences which flowed from the untimely production of the necessary information was a result of her own inaction. *See also, Sydnor v. Board of Education of Englewood*, 1976 *S.L.D.* 113.

The cases cited by Jabour in support of his contention that he had performed all that was required of him do not support his claim. Certainly, no one disputes that pursuant to *N.J.S.A.* 18A:28-11.1, *N.J.S.A.* 18A:28-12 and *N.J.A.C.* 6:3-1.10(c), full

recognition is to be given for seniority purposes to appropriate military service time. However, that principle simply is not pertinent in this case since the dispute centers not upon applying the credit, but upon the particular circumstances of trying to turn back the clock and attach culpability for the absence of the information. None of the cases cited by Jabour have any bearing on that issue. While courts should avoid exalting form over substance, *see, e.g., Kane v. Board of Education of Hoboken*, 1975 *S.L.D.* 12, and eligibility for certification is provable by means other than actual production or physical possession of a piece of paper, in this case there was an uncorroborated claim but no documentation to support Jabour's military service assertion. Access to the necessary information clearly was more easily available to Jabour than to the Board and he was asked about the matter once, and then reminded again by Matula, and then perhaps reminded for even a third time at his meeting with the personnel committee. There simply is no excuse for the inexplicable and incredible laxity which Jabour demonstrated. The fault was his, not that of the respondent, and the adverse outcome insofar as his seniority is concerned should not under those circumstances be ameliorated at substantial public expense.

With respect to the equitable estoppel argument raised by Jabour, I reject that contention as well. The case cited in support of the argument, *Miller v. Board of Trustees*, TPAF, 179 *N.J. Super.* 473 (App. Div. 1980), certif. denied 88 *N.J.* 502 (1981), is not apposite. The court in *Miller* noted that estoppel may be invoked where conduct, either express or implied, reasonably misleads another to his prejudice so that a repudiation of the conduct would be unjust. Nothing that the Board did in this case was calculated to or did in fact "mislead" Jabour. Furthermore, application of an estoppel defense against a public body, such as a board of education, particularly where public funds are involved, rarely is granted and normally is reserved for those remarkably few situations which clearly warrant such equitable relief at public expense in order to prevent a manifest injustice.

Accordingly, for the reasons set forth herein, petitioner's claim of seniority for 1991-92 based upon his military service, and his demand for back pay is **REJECTED** and his petition of appeal is **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 5, 1993
Date

Stephen G. Weiss
STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

10/7/93
Date

Maureen C. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 12 1993
Date

OFFICE OF ADMINISTRATIVE LAW

amr/e

WITNESS LIST

For Petitioner:

Thomas Jabour

For Respondent:

William F. Muhs

Dr. Martin J. Matula

EXHIBIT LIST

Court Exhibit 1 - Joint stipulation of facts with attached exhibits

Court Exhibit 2 - Certification of Dr. Matula, May 17, 1993

P-1 (For identification) Form DD-214 ("duplicate" original)

P-2 Memorandum from Dr. Matula to certified staff, September 23, 1992

P-3 Report of the superintendent of schools

P-4 Jabour personnel file form

P-5 Specht personnel file form

P-6 Letter to Jabour from Richard C. Williams, assistant board secretary, July 1, 1991

P-7 (For identification) Honorable discharge certificate

P-8 Request for leave of absence for National Guard training

R-1 (For identification) Interrogatories

R-2 Board policy no. 302A, April 29, 1991

OAL DKT. NO. EDU 7975-91

THOMAS JABOUR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE DELAWARE VALLEY REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon a careful and independent review of the record in this matter, the Commissioner finds petitioner's exceptions unpersuasive. She agrees with findings and conclusion of the ALJ that, under the particular circumstances existing in this case, the petitioner rather than the Board had the responsibility of substantiating the claimed military service and his failure to do so in 1991 is fatal to his claim.

Accordingly, the Commissioner adopts the recommended decision of the Office of Administrative Law and dismisses the instant Petition of Appeal.

NOVEMBER 18, 1993

DATE OF MAILING - NOVEMBER 18, 1993

COMMISSIONER OF EDUCATION

282-93

EDU #7975-91
C # 282-93
SB # 72-93

THOMAS JABOUR,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE DELAWARE VALLEY REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, November 18, 1993

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

For the Respondent-Respondent, Carroll & Weiss
(Russell Weiss, Jr., Esq., of Counsel)

The decision of the Commissioner of Education to dismiss the instant petition is affirmed substantially for the reasons expressed therein. We direct, however, that the Board credit the petitioner with his eligible military service in any future seniority determinations. N.J.S.A. 18A:28-11.1, 18A:28-12; N.J.A.C. 6:3-5.1(c).

April 13, 1994

Date of mailing APR 15

283-93

BARBARA BRENNER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLESEX, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT,	:	
AND	:	
BARBARA BRENNER,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLESEX, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner, former Director of Project Climb who served as principal for 1991-92 school year and was subsequently transferred back to position of Director of Project Climb, sought determination that she was tenured in position of principal and entitled to retroactive compensation.

ALJ granted partial summary judgment finding that mere possession of requisite certificate does not entitle holder to a separately tenurable position enumerated in N.J.S.A. 18A:28-5 when the criteria expressly specified in statute have not been met. (Dennery; Ellicott) ALJ found petitioner had no tenure rights to position of principal.

Commissioner adopted findings and determination in initial decision and ordered remaining issues to proceed to hearing.

NOVEMBER 18, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
CONSOLIDATED CASES

BARBARA BRENNER,
Petitioner,
v.
BOARD OF EDUCATION
OF THE TOWNSHIP OF MIDDLESEX,
Respondent,

OAL DKT. NO. EDU 6112-92
AGENCY DKT. NO. 314-7/90

AND

BARBARA BRENNER,
Petitioner,
v.
BOARD OF EDUCATION
OF THE TOWNSHIP OF MIDDLESEX,
Respondent.

OAL DKT. NO. PRC 2464-93
AGENCY DKT. NO. TI-93-1

Malachi J. Kenney, Esq., for petitioner, before the Commissioner of Education (Kenney, Gross & McDonough, attorneys)
Wayne J. Oppito, Esq., for petitioner, before Public Employment Relations Commission
Ellen S. Bass, Esq., for respondent (Rand, Alageier, Tosti & Woodruff, attorneys)

Record Closed: July 21, 1993 Decided: September 7, 1993

BEFORE **M. KATHLEEN DUNCAN**, ALJ:

These matters were commenced on July 14, 1992, when Barbara Brenner (hereinafter petitioner) filed a petition of appeal with the Commissioner of Education seeking a determination that she was tenured in the position of principal in the District, assigning her to the position of principal of Hazelwood School for the 1992-1993 school year and retroactively compensating her for the Board's failure to assign her to said position pursuant to N.J.S.A. 18A:6-10. An answer was filed on

behalf of the Board of Education of the Township of Middlesex (hereinafter respondent) on August 4, 1992, and on August 10, 1992, the matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 to 13.

A prehearing conference was conducted on November 10, 1992, at which time the following were identified as issues for determination at hearing:

1. Is petitioner tenured in the position principal?
2. If the answer to the previous question is yes, when did she obtain tenure in the position?
3. Did respondent violate N.J.S.A. 18A:6-10 when it fixed petitioner's salary for 1992-1993?
4. Did respondent enter into a settlement agreement with petitioner on or about July 9, 1991?
5. If the answer to the previous question is yes, what were the terms of the agreement?
6. If the answer to question number 4 hereinabove is yes, did respondent breach the agreement?
7. Was respondent's statement of reasons for non-renewal willfully false and in bad faith?
8. Was respondent's action in failing to renew petitioner's contract as principal arbitrary, capricious and unreasonable?
9. If the answer to any of the previous questions is yes, what are the appropriate remedies?

In addition, petitioner filed a petition for a contested transfer determination with the Public Employment Relations Commission wherein she alleges that she was transferred from principal at Hazelwood to Director of Project Climb in violation of N.J.S.A. 34:13A-25. The parties jointly moved to consolidate the petitions and for designation of the Commissioner of Education as having the predominant interest. On January 22, 1993, the undersigned issued an order consolidating the cases and determining predominant interest. On March 1, 1993, the Commissioner of Education and the Chairman of the Public Employment Relations Commission issued a joint order consolidating the cases for hearing, determining that the predominant interest rested with the Commissioner of Education, who would issue a final decision on all the issues raised in the prehearing order, dated December 2, 1992, and further providing that if resolution of the issues over which the Commissioner has predominant interest does not moot the issues raised by the petition for contested transfer determination, the matter would, thereafter, be transmitted to the Public Employment Relations Commission for a final determination, pursuant to N.J.S.A. 34:13A-27. Trial dates, which had been scheduled for April 26, May 11, May 12, May 14 and May 18, 1993, were adjourned when petitioner filed a petition for

declaratory judgment with the Commissioner of Education and requested that if the Commissioner determined to forward the matter to the Office of Administrative Law that it be consolidated with the above-captioned matters. By letter dated May 7, 1993, the Commissioner advised the parties that she declined to entertain the petition. New trial dates were scheduled for July 20, 23, 27, and 28, 1993. On June 21, 1993, respondent filed a motion for partial summary decision together with supporting papers. In response, petitioner filed a notice of cross-motion for partial summary decision and papers in opposition to respondent's motion, and petitioner filed responding papers on July 6, 1993. Oral argument was heard by telephone conference call on July 20, 1993, and the hearing was adjourned for that date. By letter order entered the same day, the undersigned advised the parties that petitioner's motion was denied and respondent's motion was granted. On July 21, 1993, petitioner advised of her intention to seek interlocutory review of the July 20, 1993 order, and during a conference call on the same date, the parties and the undersigned determined that an initial decision should be issued pursuant to N.J.A.C. 1:1-12.5(e) to replace the letter order issued on July 20, 1993, because the present determination involves interpretation of new case law, and if the Commissioner should reverse the decision of the undersigned administrative law judge, the remaining issues in both cases would become moot.

FINDINGS OF FACT

The facts relevant to a determination of the cross-motions for partial summary decision are not in dispute, and I therefore **FIND** the following as uncontested facts.

Petitioner commenced employment with the Respondent on September 1, 1974, in the position of teacher. She was appointed to the position of Director, Project CLIMB, effective July 1, 1979. At that time "Director" was an unrecognized position title and pursuant to N.J.A.C. 6:11-3.6 respondent submitted a request to the county superintendent of schools for approval of the title and designation of the appropriate certification endorsement. Virginia L. Brinson, Middlesex County Superintendent of Schools, advised respondent that based upon her review of the responsibilities listed in the job description provided for Director of Project CLIMB, the holder of that position should possess an administrative certification with a supervisor endorsement and upon the attainment of tenure in the position would accrue seniority under the legal title, supervisor. In October 1981, the State Board of Examiners issued petitioner an administrative certificate with both principal and

supervisor endorsements.* Petitioner continued to perform the duties of Director of Project CLIMB through November 30, 1990.

Project CLIMB is a federally funded project dealing with basic skills instruction. Respondent serves as a host district for the project. The project director is responsible for monitoring, supervising and evaluating a district-wide basic skills program. The director is also required to interface with educators nationwide regarding approaches to and programmatic philosophies of basic skills instruction and to work toward installing the Project CLIMB program in other local school districts. Petitioner worked with teachers in respondent's district in coordinating and implementing her program goals, however, she did not formally evaluate staff, nor was she involved in the hiring or termination process for staff members. Her personnel-related responsibilities were limited to directing a small staff who assisted her in her duties. Petitioner's job duties as director did not require her to communicate regularly with either children, parents or other members of the community. Her job duties did involve extensive travel and for many days at a time she would be away from the district.

In September 1990, respondent posted an advertised vacancy which had occurred in the principal-ship at Hazelwood Elementary School. Petitioner applied for this position by letter dated September 14, 1990. She became the successful candidate and was appointed principal of the Hazelwood School, effective December 1, 1990. A building principal in respondent's district has full responsibility for administering a school and its programs. The building principal is responsible for the day-to-day operation of the building, including staff evaluation, assignment, and making recommendations for the hiring and/or discharge of professional personnel. In addiiton, the building principal supervises all clerical, custodial and other non-professional members of the building staff and is responsible fo ensuring that the school plant is properly cared for and maintained. The building principal interacts on a daily basis with students and parents and other members of the school community. A salary increase accompanied petitioner's appointment to the position principal. Her compensation for the 1991-92 school year was $68,800. By resolution,

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* Accordingly, when N.J.A.C. 6:11-9.3 became effective on October 15, 1990, requiring the holder of the position director to possess either a principal or school administrator endorsement, petitioner had the proper endorsement.

dated April 15, 1992, respondent determined to return petitioner to her position as Director of Project CLIMB, effective July 1, 1992. Her salary for the 1992-93 school year as Director, Project CLIMB, was $66,655. Petitioner then filed a petition of appeal with the Commissioner of Education challenging respondent's April 15, 1992, actions, inter alia, as a violation of her tenure rights, commencing the within action.

APPLICABLE LAW AND DISCUSSION

Neither party challenges any fact material to the tenure issue and each party claims entitlement to a decision on this issue as a matter of law. Accordingly, this issue, which encompasses issues one, two and three in the Prehearing Order, is ripe for summary decision. N.J.A.C. 1:12-1, New Jersey Court Rules, R. 4:46-2, Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67, 73-75 (1954). Determination of the parties' motions depends upon interpretation of the most recent in a series of cases which refine the definition of tenure rights. Specifically at issue is the language used by the Supreme Court in the preliminary paragraphs of its opinion in Dennery v. Board of Educ., 131 N.J. 626, 634 (1993), wherein, prior to addressing the specific issues in the case, they described the legislative scheme and current case law:

> An educator who has attained tenure by virtue of the requisite service in a specific position will have tenure with respect to all positions under the particular certificate. Ellicott v. Board of Educ., 251 N.J. Super. 342, 349, 598 A.2d 237 (App. Div. 1991). Tenure under any one endorsement entitles an educator to tenure under all endorsements obtained under his or her certificate. Id. at 350, 598 A.2d 237; Bednar v. Westwood Bd. of Ed., 221 N.J. Super. 239, 534 A.2d 93 (App. Div. 1987) (holding that tenured teacher with instructional certificate and endorsement in art also entitled to tenured post requiring secondary art endorsement), certif. denied, 110 N.J. 512, 541 A.2d 1371 (1988); Capodilupo v. West Orange Township Bd. of Ed., 218 N.J. Super. 510, 528 A.2d 73 (App. Div.) (holding that teacher teacher with both elementary and secondary physical education endorsements was tenured under both endorsements), certif. denied, 109 N.J. 514, 537 A.2d 1300 (1987); Grosso v. Board of Educ., 1990 S.L.D. 1750.
>
> Thus, an educator with tenure in any endorsement that he or she possesses can, in effect, extend or transfer that tenure to other endorsements that are subsumed under the same certificate. . . .

The Court went on to hold that Ms. Dennery could not "transfer" her tenure earned in a position under one certificate to a position under a different certificate, a certificate that she had acquired but under which she had not accrued any relevant

work experience. It is not the holding of Dennery upon which petitioner relies in claiming tenure to the position principal, however, but rather the Court's description of the holding in Ellicott v. Board of Educ., supra. Although in general, Ellicott stands for the proposition that a teaching staff member who has obtained tenure in any position under a particular certificate may extend his or her tenure rights to all other positions under that certificate for which they hold the appropriate endorsement, the Dennery Court's abbreviated description of the holding omits the crucial exception described in footnote one of the Appellate Division opinion (251 N.J. Super. 345) and in greater detail at pages 1717 through 1718 of the State Board Opinion:

> Similarly, principal, assistant principal, vice principal, superintendent and assistant superintendent, although all within the purview of the administrative and supervisory certificate, are separately tenurable positions by virtue of the express language of N.J.S.A. 18A:28-5.[5] Capodilupo, supra. See, e.g., Schienholz v. Board of Education of the Township of Ewing, decided by the State Board of Education, February 7, 1990, appeal pending (App. Div.). In Schienholz, we reiterated that tenure was achieved in the position of "principal," rather than in the specific assignments of elementary or high school principal, stressing that "principal" was a separately tenurable position under N.J.S.A. 18A:28-5. Since petitioners therein were authorized by virtue of their principal endorsements to serve at all grade levels, they were entitled to tenure protection in all assignments within that tenurable position for which that certification qualified them.

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5 We note that such status as separately tenurable positions is not based upon the various endorsements on the administrative certificate. An endorsement as principal, for example, authorizes service in both the separately tenurable positions of principal and vice principal. N.J.A.C. 6:11-10.4(b). Thus, while the Commissioner stresses, as an analogy to the instant case, the irrationality of a tenured vice principal displacing a non-tenured principal following a RIF, under regulations promulgated by the State Board, an individual serving as a vice principal is required to possess an endorsement as principal, and would, therefore, be authorized and qualified for service as a principal. Id. However, by virtue of the fact that principal and vice principal are, pursuant to N.J.S.A. 18A:28-5, separately tenurable positions, a tenured vice principal who has no tenure as a principal would have no statutory entitlement by virtue of tenure to assignment as a principal following a RIF.

> With the exception of school nurse, assignments within the purview of the educational services certificate are not enumerated in N.J.S.A. 18A:28-5 as separately tenurable positions. Under regulations promulgated by the State Board, moreover, teaching staff members holding an educational services certificate are authorized and qualified for service in any assignment under that certificate for which they possess the appropriate endorsement. N.J.A.C. 6:11-12.1 et seq. Consequently, we conclude that, with the exception of school nurses, who are separately tenured by statute, staff members serving under educational services certificates achieve tenure in "educational services" and are entitled to tenure protection in all assignments within that tenurable position for which the endorsements on their certificates qualify them.[6]

---

6 We emphasize that, by virtue of the fact that the scope of the position to which tenure protection attaches is limited by the scope of the staff member's certification, individuals tenured in educational services would have no entitlement by virtue of tenure to assignments under that certificate for which they do not possess the appropriate endorsement.

Accordingly, I interpret Dennery and Ellicott to mean that teaching staff members who have obtained tenure in any position under a particular certificate, may extend their tenure rights to all other State Board-created positions under the certificate for which they hold the appropriate endorsement. The only way to obtain tenure in a position specifically enumerated in N.J.S.A. 18A:28-5, however, is by fulfilling the criteria specified in that statute or in N.J.S.A. 18A:28-6. Because respondent returned petitioner to her position Director, Project CLIMB, before the expiration of the two-year period specified in N.J.S.A. 18A:28-6, I **CONCLUDE** that she has no tenure rights to the position principal. Her acknowledged tenure as a Director in respondent's district does not make her a tenured principal simply because she holds the principal endorsement anymore than it makes her a tenured assistant superintendent for curriculum and instruction simply because she holds an endorsement appropriate for that position. Petitioner's assertion that "director" equals "principal" for tenure entitlement purposes, is simply not borne out by the undisputed facts in this matter; the job duties are separate and distinct, those of principal requiring the additional tasks of formal staff evaluation and interaction with parents and students. The endorsement "principal" also permits the holder to serve in the positions "assistant superintendent for curriculum and instruction,"

"assistant principal," and "vice principal;" to say that "director" equals "principal" is no more supportable than to say "director" equals "assistant superintendent for curriculum and instruction" or any of the other designated position titles.

The within conclusion is supported by the Dennery Court's explanatory language at 637, cited by petitioner herself:

. . .

> Endorsements under a single certificate represent a related combination of qualifications, reflecting the common or related skills that are required for the satisfactory performance of educational responsibilities under that certificate. Certificates, by contrast, represent distinct and separate areas spanning the entire field of public education, and the different certificates relate to discrete and distinctive categories of functions, duties, and responsibilities of educators.
>
> The Legislature clearly and pointedly has vested responsibility in the State Board to fashion standards and promulgate guidelines concerning the qualification and certification of public educators within the State. Ellicott, supra, 251 N.J. Super. at 350, 598 A.2d 237. The Legislature intended that the State Board "promulgate specifications concerning the categories of 'certification'" and that courts not intervene "unless the State Board's decision is palpably arbitrary." Id. at 350, 598 A.2d 237. Agency regulations are accorded substantial deference based on the recognition that "certain subjects are within the peculiar competence of the agency." In re Amendment of N.J.A.C. 8:31B-3.31, 119 N.J. 531, 575 A.2d 481 (1990). The delegation of regulatory and administrative responsibility over tenure to the State Board is based on the complexity and specialize nature of the subject of teacher tenure. Ellicott, supra. 251 N.J. Super. at 350, 598 A.2d 237. Our courts have long recognized the importance of allowing the State Board to devise requirements governing both students and teaching staff. See, e.g., Shelton College v. State Bd. of Educ., 48 N.J. 501, 517-18, 226 A.2d 612 (1967).

Clearly, the Legislature has delegated the responsibility for the regulation and administration of public education tenure to the State Board. The Legislature itself created a finite number of separately tenurable positions, which are enumerated in N.J.S.A. 18A:28-5. All other positions are created by the State Board of Education, which has grouped those positions according to qualifications reflecting common or related skills under either the Educational Services Certificate or the Administrative Certificate. In doing so, the State Board of Education has identified those positions to which a tenured staff member may extend his or her tenure rights. The State Board has also clearly stated that tenure rights obtained in a State Board created

position may not be extended to those specifically enumerated tenurable positions described by the Legislature. For the foregoing reasons, petitioner's motion for partial summary decision is **HEREBY DENIED** and respondent's motion for partial summary decision is **HEREBY GRANTED**. I **CONCLUDE** that petitioner has no tenure rights to the position principal.

Although this determination resolves only issues one, two and three in the Prehearing Order, if the Commissioner of Education should disagree with this determination, the remaining issues will be moot, and accordingly, this decision is being transmitted at the request of the parties pursuant to N.J.A.C. 1:1-12.5(e) for a final decision on this issue prior to proceeding to hearing on the remaining issues.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

September 7, 1993
Date

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

9/8/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 10 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

cc

BARBARA BRENNER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLESEX, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT,	:	
AND	:	
BARBARA BRENNER,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLESEX, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	

The record of these consolidated matters and the initial decision of the Office of Administrative Law have been reviewed. Following grant of an extension of time at the parties' request pursuant to N.J.S.A. 52:14B-10(c), exceptions were filed by petitioner and replies by the Board of Education ("Board").

In her exceptions, petitioner contends that the ALJ erred in finding "director" to be a separately tenurable position, distinct from "principal" under N.J.S.A. 18A:28-5, as "director" is listed neither in tenure statutes nor seniority regulations prior to

1993 and is not the subject of its own specific certificate or endorsement. To the contrary, the only place "director" is mentioned prior to the 1993 seniority regulations is as an illustrative example of the positions for which the principal endorsement on the administrative certificate qualifies its holder. Moreover, given the manner in which districts have employed the previously unrecognized "director" title over the years, to hold that "director" is separately tenurable from "principal" is to abandon the longstanding holding that tenure rights are based on the substance of positions rather than their local nomenclature. (Petitioner's Exception No. 1)

Petitioner also excepts to the ALJ's having ruled on a summary basis, contending that there is a dispute of material fact with respect to petitioner's supervisory duties and that the ALJ wrongfully relied on facts as related by the Board in its motion for summary judgment. Factual allegations set forth in a verified complaint cannot be summarily dismissed, Winston v. South Plainfield Board of Education, 64 N.J. 582 (1973), and the facts cited by the ALJ cannot be viewed as immaterial to her determination in that the fundamental issue in this case requires a careful examination of the similarities and differences between the positions of director and principal. (Petitioner's Exception No. 2)

Finally, petitioner argues that failure to fully litigate the question of petitioner's tenured status could leave her "bumping" rights uncertain in the event the Director of Project CLIMB position is abolished, as petitioner believes is likely to occur in the foreseeable future. (Petitioner's Exception No. 3)

In reply, the Board references its submissions before the ALJ and urges support of the initial decision. The Board further notes in specific response to petitioner's exceptions that the central question of this matter is petitioner's entitlement to tenure as a principal, not the tenurability of the director position; that petitioner's claim of disputed facts is belied by her own motion for summary decision and her failure to file any opposition to the facts stated in the Board's cross-motion; and that petitioner has not been riffed from her position as director, nor did she raise the issue of potential "bumping" rights in her initial pleadings. (Board's Reply Exceptions, at pp. 1-5)

Upon review, the Commissioner finds petitioner's exceptions to be without merit and affirms the opinion of the ALJ.

Initially, the Commissioner rejects petitioner's exception to the decision having been rendered on a summary basis, both because petitioner herself moved for summary judgment on grounds that no material facts were in dispute and because the matter herein was decided by the ALJ on facts which were uncontested either in the initial pleadings or on the Board's motion for summary judgment, to which petitioner was obliged to respond pursuant to N.J.A.C. 1:1-12.5 if she believed that material issues of fact precluded such disposition. The Commissioner further rejects petitioner's notion that her "bumping" status must be determined herein, as she has not been subjected to a reduction in force and any determination of her seniority rights in a RIF situation must await the event and face challenge, if she believes her rights to have been violated, as a new cause of action.

As to petitioner's substantive claim, the Commissioner concurs with the ALJ's careful analysis of Dennery, supra, and Ellicott, supra, and specifically with her holding that mere possession of the requisite certificate does not entitle the holder to a separately tenurable position enumerated in N.J.S.A. 18A:28-5 when the criteria expressly specified in that statute have not been met. As aptly stated by the ALJ at page 7 above, "[petitioner's] acknowledged tenure as Director in respondent's district does not make her a tenured principal simply because she holds the principal endorsement any more than it makes her a tenured assistant superintendent for curriculum and instruction simply because she holds an endorsement appropriate for that position.***"

Accordingly, the initial decision of the Office of Administrative Law granting partial summary judgment to the Board and ordering the remaining issues to proceed to hearing is affirmed for the reasons expressed therein.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 18, 1993

DATE OF MAILING - NOVEMBER 18, 1993

* In order to avoid potential confusion, the Commissioner notes that the ALJ's statement at the beginning of the first full paragraph at page 7 above must be read consistent with the Commissioner's holding in Stanley Halpern v. Board of Education of the Township of Delran, Burlington County, decided October 20, 1993, i.e., that service under the supervisory endorsement on the administrative certificate would not entitle the holder to claim a position, even State Board created, that requires a principal's endorsement unless the holder has also obtained tenure in a position requiring the principal endorsement.

283-93

EDU # 6112-92
C # 283-93
SB # 74-93

BARBARA BRENNER,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLESEX, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, November 18, 1993

For the Petitioner-Appellant, Kenney, Gross & McDonough (Carol Scott Stevens, Esq., of Counsel)

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

On December 17, 1993, the appellant, a tenured teaching staff member, filed a notice of appeal to the State Board of Education from a determination of the Commissioner of Education granting partial summary decision to the Board and dismissing appellant's claim that she had achieved tenure as a principal. On January 12, 1994, the appellant requested the State Board to hold this matter in abeyance pending the completion of a hearing scheduled in the Office of Administrative Law ("OAL") on the remaining issues in the case. By letter dated January 13, 1994 from the Counsel to the State Board, appellant was notified that her request had been granted and that the briefing schedule was being stayed pending the proceedings in

Oct. 5, 1995

OAL. She was further advised that it was her responsibility to notify the State Board immediately upon conclusion of those proceedings so that the briefing schedule could be reestablished.

On August 19, 1994, appellant, in response to a status request from the Counsel to the State Board, requested that this matter remain in abeyance, indicating that a decision from the Commissioner was expected by December.

By letter to appellant dated February 17, 1995, the Counsel for the State Board, observing that the Commissioner had forwarded a copy of a decision he had rendered in this matter on December 12, 1994, requested the status of the case. Appellant did not respond to that request. Nor were responses received to telephone messages left with appellant's counsel on July 18 and 20, 1995. As a result, appellant was notified by letter dated July 27, 1995 that this matter was being referred to our Legal Committee for review of her failure to perfect the appeal. By letter dated August 17, appellant was advised that in view of her failure to respond to the written status requests of February 17 and July 27 or to the telephone inquiries of July 18 and 20, the Legal Committee had determined to re-establish the briefing schedule in this matter. Appellant was advised that her appeal brief was due on September 5 and that failure to file in a timely manner would result in dismissal of the appeal.

Appellant has still failed to file a brief. Nor has she requested an extension for such filing or provided any explanation for the delay.

The State Board of Education therefore dismisses the appeal in this matter for failure to perfect. N.J.A.C. 6:2-1.12(a).[1]

October 5, 1995

Date of mailing OCT 10 1995

[1] On September 19, 1995, the Board provided us with a copy of a stipulation of dismissal which was submitted to the Office of Administrative Law by the appellant on September 18 with regard to proceedings therein. We note that that the appellant has not provided a stipulation to the State Board with regard to the instant appeal.

284-93

BOARD OF EDUCATION OF THE TOWN OF HACKETTSTOWN, PETITIONER, V. MAYOR AND COUNCIL OF THE TOWN OF HACKETTSTOWN, WARREN COUNTY, RESPONDENT. - - - - - - - - - - - - - - - - - - IN THE MATTER OF THE CAP WAIVER APPEAL OF THE BOARD OF EDUCATION OF THE TOWN OF HACKETTSTOWN, WARREN COUNTY.	COMMISSIONER OF EDUCATION DECISION

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of $104,210 made by governing body following voter rejection of proposed budget on April 20, 1993.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore $50,660.

Board also appealed General Fund cap waiver in the amount of $124,814 rejected by voters.

Upon review of the record, Commissioner determined to order the increase of $124,814 in cap waiver monies for a total General Fund tax levy of $6,182,330 for 1993-94 school year.

NOVEMBER 18, 1993

BOARD OF EDUCATION OF THE TOWN OF HACKETTSTOWN, PETITIONER, V. MAYOR AND COUNCIL OF THE TOWN OF HACKETTSTOWN, WARREN COUNTY, RESPONDENT. - - - - - - - - - - - - - - - - - - IN THE MATTER OF THE CAP WAIVER APPEAL OF THE BOARD OF EDUCATION OF THE TOWN OF HACKETTSTOWN, WARREN COUNTY.	COMMISSIONER OF EDUCATION DECISION

David A. Wallace, Esq. (Stiles & Wallace), for Petitioner

Thomas K. Thorp, Esq. (Thorp & Thorp), for Respondent

This consolidated matter was opened before the Commissioner of Education on June 14, 1993 through the filing of a Petition of Appeal of a defeated school budget by the Board of Education of the Town of Hackettstown (Board) pursuant to the provisions of N.J.A.C. 6:24-7.1 et seq. and a Petition of Appeal of its defeated cap waiver. On June 23 the respondent Hackettstown Town Council (Council) filed its Answer to the petitioner regarding the budget appeal. On July 16, 1993 the Board submitted a combined Position Paper dealing with both the cap waiver appeal and the regular budget appeal. By way of a letter dated August 9, 1993 from Dr. Maureen Keller, Director of the Bureau of Controversies and Disputes, the Council was informed that it had not filed either its position

statement relative to the budget appeal nor its response to the cap waiver appeal. The Council was informed that failure to respond within 10 days would result in the Commissioner considering the record closed in both matters as to submissions prescribed by N.J.A.C. 6:24-7.8 and that the Commissioner would deem that the Council would be relying on papers already filed. No response was forthcoming and the Commissioner has so determined.

Further, as a result of the State Board of Education's July 7, 1993 decision in the Board of Education of the Borough of Rutherford v. Mayor and Council of Rutherford wherein the State Board ruled that decisions in defeated voter cap waiver appeals must determine whether or not reallocation within the district's maximum permissible budget is possible and whether and to what extent the specific programs at issue are essential in order to enable the Board to meet its constitutional obligation to provide a thorough and efficient system of education, a letter was sent to the parties by the Director of the Bureau of Controversies and Disputes informing them of the need to supplement the record to document the reallocation and cap waiver review conducted by the county superintendent pursuant to N.J.S.A. 18A:7D-27. The county superintendent was accorded thirty (30) days from receipt of the letter to submit a sworn affidavit setting forth an explanation and documentation of that review, including the bases for concluding that (1) reallocation within the district's maximum permissible budget for the 1993-94 school year was not possible and (2) the specific programs at issue were essential for the Board to provide a thorough and efficient system of education to its students.

The governing body and Board were provided twenty (20) days from receipt of the county superintendent's submission to file a response thereto. Neither party filed any additional papers.

The county superintendent's affidavit with supportive documentation was received on September 10, 1993 and the record was formally closed on October 4, 1993.

On April 20, 1993 the voters of the Town of Hackettstown defeated the Board's 1993-94 proposed General Fund tax levy of $6,111,066. The voters also defeated a proposed cap waiver of $124,814 which was approved on March 23, 1993 by the Warren County Superintendent of Schools as being necessary for the provision of a thorough and efficient system of education.

The specific line item accounts of the T&E cap waiver were as follows:

Account No.	Description	Amount
11-130-100-101	Grades 6-8 - Salaries of Teachers	$ 6,000
11-190-100-610	General Supplies	3,434
11-000-218-320	Purch. Prof. - Educational Services	800
11-000-222-600	Supplies and Materials	380
11-000-230-339	Other Purch. Prof. Services	60,000
11-000-260-420	Cleaning, Repair and Maintenance	200
	Subtotal Current Expenses	$ 70,814
12-140-100-730	Grades 9-12	$ 12,000
12-000-230-730	Undistributed Exp. - Gen. Admin.	37,000
12-000-400-450	Construction Services	5,000
	Subtotal Capital Outlay	$ 54,000
	Total Cap Waiver	$124,814

Subsequent to the defeat of the budget by the voters, the Board and Council pursuant to the requirements of N.J.S.A. 18A:22-37 consulted on the defeated budget whereupon the Council reduced the General Fund tax levy by $104,210. Therefore the funds in dispute between the parties set forth below:

Proposed Tax Levy Adopted by Board		Amount of Tax Levy Certified by Governing Body	
General Fund	$6,111,066	General Fund	$6,006,856
Amount of Reduction By Governing Body		**Amount in Dispute Before Commissioner**	
General Fund	$104,210	General Fund	$104,210
		Cap Waiver	124,814
		Total	$229,024

The specific line item reductions and the reasons for such reductions as contained within the Council's Answer are set forth below:

Account	Description	Amount of Reduction	Reason for Reduction
11-401-100-100	Drama Advisor	$1,000	This is a new position. A drama program has existed previously without these positions.
11-401-100-100	Drama Assistant	800	
11-140-100-10	CIE	4,000	This is a new position that can be filled at a lower starting salary.
11-140-100-10	CIE Coordinator	2,000	This new part time summer position can be cut back and still allow the new CIE program to be ready for full use in September.
11-000-218	Testing Guidance	4,000	This is a stipend for instructions for a function they are already performing.
11-000-21	Summer help Sec'y/Guidance	500	This is a minor reduction of wages that will allow for guidance to catch up on paperwork. Someone can be hired at a lower starting salary of reduced hours.

Account	Description	Amount of Reduction	Reason for Reduction
11-000-21	Overtime Sec'y CST	$3,245	A new full time CST secretary is included in the budget and is not being cut; with the new position overtime can be reduced.
11-000-230-10	Treasurer	605	A new treasurer is being hired. A lower salary can be negotiated for this mostly ceremonial position.
11-000-240-105	Summer help H.S. Sec'y	1,000	This is a new part-time position. The hours or salary can be adjusted.
11-000-290-100	Overtime (other support services)	200	Employees already receiving $168,013 in salaries must be supervised, so that they complete their work without the need for overtime.
11-190-100-610 (163)	General Supplies	5,000	A cut of 1.8% of the amount of the line item will have no impact on school programs.
11-190-100-640 (164)	Textbooks	5,000	A review of the publication dates of the text books revealed that the older books are on subjects such as Latin that do not become outdated.
11-401-100-600 (374)	Cocurricular supplies	1,000	A very minor cut in an area that although important is not neces--sary for a thorough and efficient educational system.
11-401-100-500 (373)	Cocurricular services	2,000	A very minor cut in an area that although important not necessary for a thorough and efficient educational system.

Account	Description	Amount of Reduction	Reason for Reduction
11-402-100-500 (379)	School sponsored athletics purchased services	$ 1,500	The cost of services such as referees, umpires, etc. should be renegotiated.
11-402-100-600 (380)	Athletic supplies	2,500	The reductions can be made without reducing programs by reusing uniforms and equipment.
11-000-221-320 (441)	Purchased Prof.	6,000	The number of paid workshops can be reduced and internal self guided workshops encouraged.
11-000-230-890 (461)	Miscellaneous Expenditures Administrator	750	Dues, conferences and other expenses can be closely monitored to absorb these reductions.
11-000-240-600 (469)	Supplies & Materials	5,000	The cost of office supplies, copies can be reduced by closely monitoring spending.
11-000-260-420 (475)	Cleaning, repair and maintenance	$ 2,000*	The annual cost of copiers, typewriters, computers, boilers and service contracts can easily be reduced by $2,000.
	TOTAL	$48,100	

* This line item reduction is listed at $5,000 in Council's original resolution causing a discrepancy of $3,000 between this version and the original. Further, it is to be noted that this version of the reductions also omits $53,110 in reductions in teachers' salaries found in Council's original resolution of reduction. No explanation is provided by Council.

DEFEATED BUDGET

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

Before reviewing the instant matter line item-by-line item, the Commissioner must point out for the record that the New Jersey Supreme Court in East Brunswick, supra, has addressed the proper standard of review by a governing body after defeat of a budget by the voters. It reads in pertinent part:

> ***But its determinations must be independent ones properly related to educational considerations rather than voter reactions. In every step it must act conscientiously,

> reasonably and with full regard for the State's educational standards and its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community.*** (at 105-106)

Moreover, it is clear that the New Jersey Supreme Court in Deptford, supra, has unequivocally ruled that the statement of reasons for each reduction effectuated by a governing body must be done at the time the municipality make its certification of the reduced budget to the county board of taxation and that if there is a failure to do so, there can be a heavy presumption against the educational validity of the proposed cuts.

> ***The board of education should be furnished with reasons in order to respond quickly and intelligently and to act constructively in preserving educational interests. The advantages of such a process would be dissipated if the reasons were not available until an appeal has been filed. Hence, we conclude that these regulations do not exempt the municipality from a duty to file a statement of reasons in a timely fashion in conjunction with any proposed budget cuts, which, we now determine, must be done at the time the municipality makes it (sic) certification of the reduced budget to the county board of taxation.
>
> ***We now hold that statements must be provided for any line-item reductions. This will not be unduly inconvenient or burdensome.*** Further, a uniform rule that calls for the submission of explanatory reasons for all budget cuts will encourage municipalities to be specific and conscientious in their consideration of educational concerns, and will serve to make such considerations an integral part of their decision-making process. (at 315-317)

And,

> ***[W]e want to stress that if the municipality fails to submit reasons contemporaneously with its certification of budget cuts, the Commissioner of Education in the course of an ensuing appeal is entitled to invoke a heavy presumption against the educational validity of the proposed budget cuts. Hence, the greater the

> delay in the submission of detailed reasons in support of such cuts, the stronger will be the presumption against their validity and the heavier will be the municipality's burden on appeal to establish the validity of the reduced budget. In that posture, the Commissioner will be entitled initially to presume that such cuts have been made purely for extra-educational reasons or for political expediency without specific cognizance taken of their educational effects.*** (at 320-321)

Mindful, then, of the balance to be applied in the standard of review, the Commissioner makes the following determination with respect to the reductions in the General Fund tax levy effectuated by Council.

Initially it should be noted that the Board argues persuasively relative to the standard established in Deptford, supra, that the requirement that the reasons for the reductions proposed by a governing body be provided at the time the reductions are made have not been met in the instant matter. (See Exhibit B, Board's Position Statement.) Not only did the Council wait until it filed its Answer to the budget appeal, it further omitted $53,110 of reductions for teachers' salaries contained within its original reduction effectuated by its resolution of May 10, 1993. Consequently, pursuant to the standard of review in budget matters as propounded in Deptford, supra, "***the Commissioner of Education***is entitled to invoke a heavy presumption against the educational validity of the proposed budget cuts.***" (ante)

Notwithstanding the above, Deptford likewise requires that the Commissioner review the budget reductions and consider the positions of the parties. Those positions and the Commissioner's determination relative to those arguments are set forth below.

Account		Reduction
11-120-100-101	Teacher's Salary Grades 1-5	$ 2,000
11-130-100-101	Teacher's Salary M.S.	2,000
11-140-100-10	Teacher's Salary H.S.	34,070
11-000-21	Salaries/Clerical	15,040
	TOTAL	$53,110

As noted above, the Council provided no reason as to why the above salary accounts should be reduced in its original reduction resolution, other than that two positions should be eliminated and the salaries of two other reduced. Its purported statement of reasons for the reductions imposed omits these line items entirely. Given the circumstances described above, the Commissioner concludes that the actions of the Council in this area were arbitrary and without any concrete basis and that the $53,110 reduction was unwarranted. Notwithstanding the determination above, the Commissioner notes that the Hackettstown Board of Education by way of letter to John C. Ericson, Warren County Superintendent of Schools, dated May 18, 1993 conceded $38,000 in teachers' salaries due to the unexpected retirement of several experienced teachers to be replaced by less experienced teachers at lower salary levels. Accordingly, the Commissioner directs that only $15,110 be restored to the appropriate teacher salary accounts. (See Exhibit H of the County Superintendent's September 10, 1993 submission.)

11-401-100-100 - Drama Advisor and Assistant $1,800

The Council argues that the drama program had existed in the past without the additional positions. The Board contends that in previous years the above positions were filled by unpaid volunteers. The person who in the past had volunteered has left the district and without these positions the drama program would have to be abandoned.

Based upon the aforesaid, the Commissioner finds that the Board has met its burden and that the reduction imposed by the Council was arbitrary. The Commissioner directs the restoration of the $1,800 reduction.

Account	Reduction
11-140-100-10 - CIE Coordinator	$4,000

The Council argues that this new position can be filled at a lower salary. The Board contends that its minimum salary is $26,000 and that an experienced CIE coordinator would require at least the $35,000 originally projected considering benefits and the fact that negotiations were still pending.

The Commissioner finds the Council's position to be arbitrary and inflexible leading to the possible result of denying the Board the ability to hire an appropriately certified individual. The Board presents a rational basis for filling a position which adds to the comprehensiveness of its program. The $4,000 reduction is restored.

11-140-100-10 - CIE Coordinator/Summer Employment	$2,000

The Council contends that the summer employment of the CIE coordinator can be reduced without injury to the program.

The Board contends that summer employment on a part-time basis is required in order to contact employers and evaluate pupils. It is during the summer period, contends the Board, when most of the work to prepare for the school year is done.

The Commissioner finds that the Council offers no firm basis for its conclusion that the new program can be installed with the reduction imposed. The Board's position is consistent with accepted practice in the area of work program coordination. the $2,000 for summer work is restored.

Account	Reduction
11-000-218 - Testing Guidance	$4,000

The Council argues that this is a stipend for a function already being performed. The Board's position is set forth in Exhibit C of its Position Statement in an excerpt from its Guidance Director's year-end report in which he reports the existence of an increasing workload in dealing with crisis intervention involving students with personal and family problems. The director indicates that the guidance counselors regularly work several hours of overtime per day and that the demands on their time reduces their time spent on counseling students.

Upon review of the respective positions, the Commissioner finds that the Board has met its burden of demonstrating its need to provide additional assistance to the guidance staff in order to permit them to effectively contribute to a thorough and efficient system of education. The reduction of $4,000 is restored.

11-000-21 - Secretarial/Guidance	$ 500

The Council argues that someone could be hired at a lower salary to provide summer secretarial help. The Board contends that salaries are not dictated by the Board's desires but by negotiated agreement.

The Commissioner finds that the argument of the Council fails to consider the fact that negotiated agreements, and not the employer's whim, dictate salaries. The $500 reduction is restored.

11-000-21 - Secretarial Overtime	$3,245

The Council argues that since a new full-time secretary is included within the budget, overtime can be reduced. The Board argues that the additional secretary was approved as part of a cap

waiver request and that the overtime requirement here is for a contingency fund to provide overtime for the Child Study Team.

The Commissioner determines that the Board has not responded directly as to the need for overtime. The Board argues that the overtime is necessary to supplement an understaffed area of services. The Board further argues that its administration is in a better position of determining the needs in this area than the Council.

The Commissioner finds that the Council's argument of better supervision to be facile. The Board, however, offers no firm basis for determining what its needs in this area have been in the past. Consequently, due to the burden imposed by the law, the Commissioner finds that the Board has failed to meet this burden and the $3,245 reduction is sustained.

Account	Reduction
11-000-230-10 - Treasurer	$ 605

The Council suggests that, since a new treasurer is being hired, a lower salary figure can be negotiated for what it contends is a ceremonial position. The Board contends that it has hired the new Town Treasurer and that it will need the additional funds to train her.

The Commissioner is not convinced that the Board has adequately explained the need for additional funds for training nor the nature of such training. The $605 reduction is sustained.

11-000-240-105 - Summer Help H.S. Secretarial	$1,000

The Council contends that since this is a new position the hours and salaries can be adjusted. The Board responds with the same rationale as provided above relating to the treasurer. The

Commissioner, as she did above, finds the Board's position unresponsive and therefore directs the sustaining of the $1,000 reduction in this account.

Account	Reduction
11-000-290-100 - Overtime Support Services	$ 200

The Council argues that improved supervision would eliminate the need for overtime pay for a group of employees earning $168,013 in the aggregate. The Board argues that the funds are necessary to supplement an understaffed area which it is in a better position to monitor and control than the Council.

The Commissioner, upon review of the Board's argument and in consideration of the standard required to meet in budget appeals, determines that the Board has failed to meet the burden of providing sufficient substantiation to support its need. The $200 reduction is sustained.

11-190-100-610 - General Supplies	$5,000

The Council contends that a 1.8% cut will have no effect upon the district. The Board argues that the Council's actions are arbitrary and unsubstantiated.

The Commissioner determines that utilization of fixed rate reductions without accompanying rationale are arbitrary by nature and therefore impermissible. The $5,000 by which this account was reduced is restored.

11-190-100-640 - Textbooks	$5,000

The Council argues that its review of the publication dates of the textbooks revealed that the older books were in subjects like Latin that do not become outdated. The Board contends that the Council's argument is arbitrary and that it is its policy to

maintain a five-year revision cycle. Even with such policy many of its books are more than five years old.

The Commissioner's review of the foregoing arguments leads her to conclude that the Council's arguments are overly simplistic. Even if one were to conclude that some books do not become outdated, which is to be doubted even in subjects like Latin, books deteriorate with use and a five-year replacement cycle is clearly reasonable. The $5,000 reduction in this account is restored.

Account	Reduction
11-401-100-600 (374) - Cocurricular Supplies	$1,000

The Council contends that a minor cut in this area is not necessary for a thorough and efficient educational system. The Board merely refers to its argument in the previous account.

The Commissioner finds the argument of the Council to be without any supporting basis; however, the Board offers no rebuttal which would satisfy the standard of meeting the burden of proof required for restoration. The Commissioner therefore sustains the reduction of $1,000.

11-401-100-500 (373) - Cocurricular Services	$2,000

Both parties repeat the arguments described in the account immediately above. The Commissioner finds no basis for determining that the Board has met its burden. The $2,000 reduction is sustained based upon the burden of proof required to be placed upon the Board to demonstrate necessity.

11-402-100-500 (379) - Purchased Athletic Services	$1,500

The Council urges renegotiating the cost of referees and umpires, while the Board points out that the cost of such services are negotiated and determined by the league in which the district is a member.

The Commissioner finds the Board's argument convincing and consistent with existing practice in obtaining athletic services. The $1,500 reduction is restored.

Account	Reduction
11-402-100-600 (380) - Athletic Supplies	$2,500

The Council argues for reusing of uniforms to meet the reduction. The Board reiterates its position stated earlier that the Council's position is arbitrary and that it already utilizes its equipment to the fullest extent possible.

The Commissioner finds that the Council's position is simplistic yet the Board offers no documentary basis upon which to make a determination as to the necessity for the equipment and supplies. The reduction of $2,500 is sustained. Once again the Commissioner reiterates that the Board must bear the burden of demonstrating its need.

11-000-221-320 (441) - Purchased Professional Services	$6,000

The Council argues that the number of paid workshops can be reduced and replaced by internal self-guided workshops. The Board argues for the essential nature of staff development and points out that the reduction represents a significant portion of its staff development budget. The Board likewise points out the essential nature of staff development.

The Commissioner in considering the arguments of the parties concludes that the logic of the Board relative to the importance of staff development far outweighs the argument of the Council. While undoubtedly some staff members may well be able to serve as mentors to the rest of the staff, that fact does not obscure the necessity for an adequately funded program of staff development. The $6,000 in this account is to be restored.

Account	Reduction
11-000-230-890 (461) - Miscellaneous Adm./Expenditures	$ 750

The Council argues that the funds in this account for administrative dues and conferences can be more closely monitored. The Board's argument that these amounts are determined by negotiations is compelling. The $750 is restored.

11-000-240-600 (469) - Supplies and Materials	$5,000
11-000-260-420 (475) - Cleaning, Repair and Maintenance	$2,000

The Council argues that supplies and material costs can be reduced by closer monitoring and that the annual maintenance/service cost of copiers, typewriters, etc. can easily be reduced by the $2,000 indicated. The Board responds by indicating its supplies and maintenance budget has been slashed to the bone and that its service contracts had already been cut. Further, the Board argues that elimination of service contracts will result in greater future costs.

The Commissioner finds that the Board offers little in the way of specific data regarding its need for supplies and materials, other than its contention that its budget has been severely cut. However, the Commissioner finds merit in the Board's argument relative to its service and repair contracts. Accordingly, the Commissioner directs that the $5,000 reduction in the materials and supplies account be sustained. Additionally, the Commissioner directs that the $2,000 in the repair and maintenance account be restored, as well as the $3,000 discrepancy in this account in the itemized reductions contained within Council's Answer for which Council provided no explanation.

SUMMARY OF BUDGET APPEAL FINDINGS

Account	Description	Amount Not Restored	Amount Restored
11-120-100-101	Tchrs. Sals.	$ -0-	$ 2,000
11-130-100-101	Tchrs. Sals.	-0-	2,000
11-140-100-10	Tchrs. Sals.	-0-	34,070
11-000-21	Sals., Clerical	-0-	15,040
11-401-100-100	Drama Advisor/Ass't.	-0-	1,800
11-140-100-10	CIE	-0-	4,000
11-140-100-10	CIE Coord., Summer	-0-	2,000
11-000-218	Testing, Guid.	-0-	4,000
11-000-21	Sec'y/Guid.	-0-	500
11-000-21	Sec'y Overtime	3,245	-0-
11-000-230-10	Treasurer	605	-0-
11-000-240-105	Summer/H.S. Secy.	1,000	-0-
11-000-290-100	Overtime Support Servs.	200	-0-
11-190-100-610	General Supplies	-0-	5,000
11-190-100-640	Textbooks	-0-	5,000
11-401-100-600	Cocurric. Supplies	1,000	-0-
11-401-100-500	Cocurric Servs.	2,000	-0-
11-402-100-500	Purch. Ath. Servs.	-0-	1,500
11-402-100-600	Athletic Supplies	2,500	-0-
11-000-221-320	Purch. Prof. Servs.	-0-	6,000
11-000-230-890	Misc. - Admin.	-0-	750
11-000-240-600	Suppls./Mat.	5,000	-0-
11-000-260-420	Clean., Maint.	-0-	5,000
	TOTAL	$15,550	$88,660
Adjustment per Board's letter to County Superintendent, May 18,1993 (Exhibit H)			- 38,000
			$50,660

In summary, the Commissioner finds and determines that of the $104,210 tax reduction imposed by the Council on the Board's 1993-94 budget appropriation a sum of $15,550 has been sustained. The Commissioner further finds that $50,660 be restored as essential to the provision of a thorough and efficient system of education, the difference between that amount and the full total proposed reduction of $104,210 being $38,000 conceded by the Board as a result of the retirement of several experienced teachers and their replacement by lower salaried teachers.

CAP WAIVER

In considering the appeal of the Board on its cap waiver request of $124,814, the Commissioner notes that neither the Board nor the Council have chosen to submit additional position statements relative to the waiver. The Commissioner's determination, therefore, shall be based solely upon the documentation submitted by the Board to the Warren County Superintendent and the County Superintendent's submissions to the Commissioner at the direction of Director Keller.

The submission of September 10, 1993 by the Warren County Superintendent to the Commissioner which is incorporated herein by reference indicates that the cap waiver request was thoroughly scrutinized by him as well as by a panel from the Department of Education including three member of the Division of County and Regional Services as well as two members from the Division of Finance.

Both the County Superintendent and the other panel members after a line item-by-line item scrutiny of the budget to determine whether further reallocations could be effectuated agreed that the cap waiver submitted to the voters was required for the provision of a thorough and efficient system of education.

Upon the filing of the affidavit of September 30, 1993 from the Warren County Superintendent, the Commissioner carefully scrutinized the County Superintendent's Budget Review and Reallocation Analysis. Based upon the aforesaid analysis which indicated that the County Superintendent had conducted a line-by-line review of the budget to determine the need for the increases in the specific areas set forth, ante, and whether reallocation could

be effectuated to meet those needs, the Commissioner finds and determines that the $124,814 cap waiver request is necessary in order to ensure a thorough and efficient system of education for the pupils of the Hackettstown Public Schools. The Commissioner therefore directs the Warren County Board of Taxation to increase the 1993-94 General Fund tax levy for the Hackettstown School District to reflect a restoration of $50,660 in reductions effectuated by the Council and an additional $124,814 in cap waiver appropriations which sums reflect a total General Fund tax levy of $6,182,330 for the 1993-94 school year.

Tax Levy Certified by Council		$6,006,856
Restored by Commissioner (Defeated Budget)		50,660
Cap Waiver Ordered by Commissioner		124,814
	TOTAL	$6,182,330

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 18, 1993

DATE OF MAILING - NOVEMBER 18, 1993

285-93

BOARD OF EDUCATION OF THE BOROUGH OF EDGEWATER, PETITIONER, V. MAYOR AND COUNCIL OF THE BOROUGH OF EDGEWATER, BERGEN COUNTY, RESPONDENT. - - - - - - - - - - - - - - - - - - IN THE MATTER OF THE CAP WAIVER APPEAL OF THE BOARD OF EDUCATION OF THE BOROUGH OF EDGEWATER, BERGEN COUNTY.	COMMISSIONER OF EDUCATION DECISION

Board appealed General Fund tax levy reductions in the amount of $387,127 made by governing body following voter rejection of proposed budget on April 20, 1993.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore $319,650.

Board also appealed General Fund cap waiver in the amount of $218,941 rejected by voters.

Upon review of the record, Commissioner determined to order the increase of $218,941 in cap waiver monies for a total General Fund tax levy of $3,898,623 for 1993-94 school year.

NOVEMBER 18, 1993

BOARD OF EDUCATION OF THE BOROUGH OF EDGEWATER, PETITIONER, V. MAYOR AND COUNCIL OF THE BOROUGH OF EDGEWATER, BERGEN COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION
IN THE MATTER OF THE CAP WAIVER APPEAL OF THE BOARD OF EDUCATION OF THE BOROUGH OF EDGEWATER, BERGEN COUNTY.	:	

For the Petitioner, Steven J. Zaben, Esq.

For the Respondent, Robert T. Regan, Esq.

This is a consolidated matter submitted for adjudication before the Commissioner of Education. On June 10, 1993, the Board of Education of the Borough of Edgewater (Board) appealed from an action taken by the Mayor and Council of the Borough of Edgewater (Council) pursuant to N.J.S.A. 18A:22-37, certifying to the Bergen County Board of Taxation a lesser amount for General Fund costs for the 1993-94 school year than the amount proposed by the Board in its budget which was rejected by the voters. On June 18, 1993, the Board filed its cap waiver appeal. Answers to the petitions were filed on June 28, 1993 and July 2, 1993, respectively.

At the annual school election held on April 20, 1993, the Board submitted to the electorate a proposal to raise $3,747,159 by local taxation for General Fund costs of the school district in addition to the approval of a cap waiver in the amount of $218,941. After voter rejection of both matters, the Board submitted its proposal to Council for its determination of the amounts it deemed necessary for the operation of a thorough and efficient school system in the Borough of Edgewater for the 1993-94 school year pursuant to the mandatory obligation imposed on Council by N.J.S.A. 18A:22-37.

After consultation with the Board, Council made its determination and certified to the Bergen County Board of Taxation an amount of $3,360,032 for General Fund costs as shown below:

	Proposed Tax Levy Adopted by Board	Original Certification	Amended Certification
General Fund	$3,747,159	$3,170,032	$3,360,032
Cap Waiver	218,941	-0-	-0-
TOTAL	$3,966,100	$3,170,032*	$3,360,032*

* It is noted that Council subsequently amended its original certification to reflect elimination of the amount of $190,000, Debt Service Fund, from the list of itemized reductions. The amount certified was therefore changed to $3,360,032 and the itemized reductions to $273,748. (See June 21, 1993 Certification of Borough Clerk, Exhibit B.)

Table of Itemized Reductions

Line	Account	Description	Board's Budget	Council's Reduction
461	11-000-230-890	Misc. Exp.	$ 16,730	$ 6,500
163	11-190-100-610	General Supls.	29,492	14,492
164	11-190-100-640	Textbooks	35,477	7,977
418	11-000-218-104	Sals. Other Prof. Staff	45,000	45,000

Line	Account	Description	Board's Budget	Council's Reduction
155	11-110-100-101	Sals. Teachers		
156	11-120-100-101	"		
157	11-130-100-101	"	831,291	40,365
396	11-000-100-561	Tuition Reg. Prog.	1,440,000	100,736
204	11-205-100-106	Other Sals., Instr.	8,078	8,078
208	11-205-100-610	Percept. Impaired	3,637	1,000
280	11-213-100-610	Resource Room	3,669	1,000
5	11-218-100-610	Speech	1,529	500
342	11-220-100-800	Special Ed.	14,500	3,500
358	11-230-100-610	At Risk	7,332	2,500
359	11-240-100-610	Bilingual	2,835	500
375	11-401-100-800	Cocurric.	7,094	2,000
415	11-000-213-600	Health	1,861	200
445	11-000-221-800	Improve. Instruct.	18,142	5,300
450	11-000-222-600	Library	6,448	1,800
459	11-000-230-600	Admin.	4,999	800
479	11-000-260-610	Plant Servs.	65,433	11,000
506	11-000-270-290	Employee Benefits	337,000	13,500
570	11-000-290-220	Soc. Sec. Contribs.	28,829	2,000
688	40-701-510-830	Debt Serv. Funds	190,000*	190,000*
	100 Series	Administration	183,297	5,000
		TOTAL LINE ITEM REDUCTIONS		$463,748*

* As previously noted, the Debt Service Funds amount was subsequently eliminated by Council, thereby changing the amount of itemized reductions to $273,748.

In addition to the itemized reductions of $273,748 and the cap waiver reduction of $218,941, Council reduced an additional $113,379 by declaring Adjustments to Revenue a revenue and not an expenditure. This transfer effected the additional reduction.

Itemized Reductions	$273,748
Cap waiver	218,941
Revenue	113,379
TOTAL REDUCTION	$606,068

Therefore $606,068 is the amount of reduction in dispute before the Commissioner.

DEFEATED BUDGET

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

Mindful, then, of the balance to be applied in the standard of review, the Commissioner makes the following determination with respect to the reductions in the General Fund tax levy effectuated by Council.

The Commissioner has reviewed the respective Position Statements and written summations filed by the parties which are incorporated herein by reference unless specifically relied upon for

the purpose of further clarification of any particular item as examined in the body of this decision.

In the instant matter, Council established the aforesaid tax levy by imposing the following line item reductions:

Account	Reduction
11-000-230-890 (line 461) Miscellaneous Expenditures	$6,500

Council asserts that this account includes expenses for travel, conferences and workshops for Board members and central administration and since the monies are not for classroom instruction, the reduction will not adversely affect the education of pupils. Additionally, Council is critical of overexpenditures in this account in prior years, which it maintains the Board had to cover with transfers from other accounts.

The Board argues correctly that activities undertaken in this account, including the district's newsletters to the community, have a direct effect on the education of the pupils in the district. It is necessary to spend money on the training of Board members, notwithstanding the fact that there are no new members on the Board. Board members need training in the basics of finance, curriculum development and personnel management. They should also have a thorough understanding of education law as embodied in Title 18A and the New Jersey Administrative Code. Further, the amount budgeted is less than the amount expended in 1992-93.

Based on the Board's rationale, the Commissioner determines that the $6,500 reduction will be restored to the budget.

Account	Reduction
11-190-100-610 (line 163) General Supplies	$14,492

According to Council, the amount budgeted in this line item for 1993-94 represents a 17% increase over the 1992-93 budget. It contends that the cost per pupil ($103.48) for supplies is relatively high for a K-6 school district with an enrollment projection of 285 pupils. The average cost per pupil has remained at this high level for several years and this could lead to unnecessary or wasteful purchases; the district should have built up some supply inventory over the years which it could draw upon now. However, should some situation arise which results in the need for some greater purchase not within the budget because of reductions, then reserve funds held in contingency areas generated from free balance can easily be appropriated by the Board.

According to the Board, the 1990-91 Cost of Education Index, Level I Report prepared for Edgewater, by the N.J. School Boards Association, 1989-90 Expenditure Data shows that the expenditure for school districts within the same enrollment group and region to be $131.00. The Board's 1993-94 budgeted per pupil expenditure is $103.48. This figure is within the same range when compared to the state, county, socioeconomic status and enrollment group factors for 1989-90. The Board maintains that the Edgewater School District has a significantly higher percentage of pupils from homes where parents cannot afford the every day support supplies (paper, pencils, learning aids) that children in neighboring communities acquire more easily.

The Commissioner finds that the record does not support the Board's position. However, a reduction of approximately 50% in this

line item is too severe. Therefore, a reduction of $5,000 will be allowed and $9,492 will be restored to the budget.

Account	Reduction
11-190-100-640 (line 164) Textbooks	$7,977

The 1993-94 budget represents a 96% increase over the amount expended in 1992-93 and an expenditure of $124.50 per pupil for new textbooks. Council considers this an extremely high expenditure for a K-6 school district with a projected enrollment of 285 pupils. Council suggests the phasing in of new textbooks. Notwithstanding its reduction, there is still an increase in this line item over the expenditure in 1992-93 which will permit the acquisition of some of the new textbooks.

The Board asserts that it is in the process of phasing in a "whole language" program. Since the language arts program utilizes inter-grade grouping, all grades need to begin the program at the same time.

The Commissioner finds that the reduction in this line item will still allow for a significant increase. Further, the Board did not show that it would be unable to provide a thorough and efficient system of education for its pupils despite this modest reduction. Therefore, the $7,977 reduction will be sustained.

11-000-218-104 (line 418) Salaries, Other Prof. Staff	$45,000

This line item is designated for the hiring of a new guidance counselor, part time. The purpose of this position is to provide vocational guidance services for Edgewater pupils attending Leonia Middle and High Schools. The Board and administration consider it necessary to supplement the vocational guidance services

provided for their pupils by the Leonia guidance staff since they believe the staff's services are concentrated on college bound pupils. Since a smaller percentage of Edgewater's pupils attend college than do pupils from Leonia, it is felt that their need for vocational counseling is being neglected. The proposed solution is for Edgewater to hire a counselor to work with Edgewater pupils attending school in Leonia.

Council rejects the Board's position, particularly its statement that the new counselor would be housed in the Edgewater district and would be present after hours when office space is available. Council states that if this were implemented, the new counselor would be working in a different school district from the one the prospective counselees attend, would be remote from the teachers and counselors in Leonia and would work at a time when neither Leonia's teachers nor Edgewater's 7-12 pupils were in school and when pupil records would be unavailable.

While the Commissioner understands the Board's position on this expenditure, the solution to any perceived or actual problem in the quality of vocational guidance should be resolved with the Leonia Board of Education. Leonia, as the receiving district for Edgewater pupils, is responsible for providing them with a thorough and efficient education. Therefore, the $45,000 reduction by Council will be sustained.

Account	Reduction
11-110-100-101 (line 155) 11-120-100-101 (line 156) 11-130-100-102 (line 157) Salaries of Teachers	$40,365

The Board states that the amount reduced was budgeted for 1.5 potential new teachers. Based on its survey and enrollment

patterns of past years, it concluded that there may be a need for an additional English as a Second Language (ESL) teacher. The Board contends that it has made a written commitment to the Bureau of Bilingual Education to provide the extra instructor if the number of Asian or Latino pupils increases in number to twenty. Presently, the district has 19 Latinos and 16 Korean pupils in the ESL program. The Board asserts that the need for this extra teacher is almost a certainty; therefore, the line item must remain budgeted as presented.

Council disagrees with the Board's rationale although it concedes that there may be a need for an additional aide at the kindergarten level; nevertheless, it argues that any additional pupils can be accommodated by the present staff. As far as a need for an ESL teacher is concerned, the Board's own records show that no additional ESL teacher is needed at present. Should such an additional ESL teacher be necessary, there remains $13,926 for a part-time teacher, with any additional need being available from free balance.

The Commissioner finds that the Board's position is prudent. It is entirely proper to plan ahead of anticipated enrollment. The current data supports that there has been a steady increase in ESL enrollment over the last three years. (See Exhibit C of Board's Supplemented Position Statement and Reply of August 30, 1993, at pp. 3-4.) Based on the above, Council's reduction of $40,365 is therefore restored.

Account	Reduction
11-000-100-561 (line 396) Tuition - Regular Program	$100,736

Council based its reduction on what it considers to be a pattern of overbudgeting this line item in prior years and the statement made by the superintendent concerning the maximum number of Edgewater pupils expected to attend Leonia schools in 1993-94.

The Board asserts that Council failed to take into account a projected increase in tuition rates as well as its contractual obligation to Leonia. In this regard, the Board presented a document from the Superintendent of the Leonia schools estimating tuition payments due from Edgewater at $1,450,000. The Board budgeted $1,440,000.

The Commissioner finds that the evidence supports the Board's position. The amount budgeted by the Board is reasonable; therefore, the $100,736 reduction will be restored to the budget.

11-205-100-106 (line 204) Other Salaries, Instruct.	$ 8,078

Council contends that this proposed aide position budgeted by the Board is not mandated by statute or code and, therefore, is not needed. Further, the Board should fill this position by appropriate deployment of existing personnel.

The Board asserts that the position is for an instructional aide in the primary, perceptually impaired class, which program was approved with the requirement of an aide. The program was established to keep pupils in Edgewater so that the district could provide these educational services locally at lower costs than the same services could be provided on a tuition basis.

The Commissioner finds that the Board's rationale is valid. The educational services offered must be provided either locally or in another school district. The Board has determined that it is more efficient to provide these services in Edgewater. This is a decision reached within the statutory authority granted to the Board to do all things not inconsistent with the school laws to provide for the education of its pupils and to provide special education programs in the least restrictive environment. Accordingly, the $8,078 reduction will be restored to the budget.

Account	Reduction
"Special" Supply Accounts	$30,100

The following twelve listed accounts were grouped and recognized by Council as "General Supplies" or "Other Objects." Their aggregate reduction is $30,100. Except for the last item (Plant Services), they will be considered together because the rationale for and against each of the items is similar.

Account #	1993-94 Budget Amount	Reduction
11-205-100-610 P.I. (line 208)	$ 3,637	$ 1,000
11-213-100-610 Resource Room (line 280)	3,669	1,000
11-218-100-610 Speech (line 5)	1,529	500
11-220-100-800 Special Ed. (line 342)	14,500	3,500
11-230-100-610 At Risk (line 358)	7,332	2,500
11-240-100-610 Bilingual (line 359)	2,835	500
11-401-100-800 Cocurric. (line 375)	7,094	2,000
11-000-213-600 Health (line 415)	1,861	200
11-000-221-800 Improve. Instr. (line 445)	18,142	5,300

Account #	1993-94 Budget Amount	Reduction
11-000-222-600 Library (line 450)	6,448	1,800
11-000-230-600 Admin. (line 459)	4,999	800
11-000-260-610 Plant Servs. (line 479)	65,433	11,000

Council asserts that each line item represents a very high level of expense when compared to the number of pupils in each program. In addition, these pupils also have access to regular classroom supplies. Council further maintains that when budgeting for Bilingual and Basic Skills, the administrators should consider the fact that these areas receive a significant amount of State Compensatory Education, Chapter I, Chapter II and ESL funding. These state and federal monies are provided directly to these programs and pupils. Therefore, the reduction, spread over twelve budget line items, is moderate and prudent; consequently, the quality of the programs should not be affected.

The Commissioner has examined these budgeted items individually and finds that Council's reductions in many of the line items are modest. Nevertheless, the Board vigorously defended each of the line item reductions asserting its need for the funds as budgeted. Based on the Commissioner's analysis the Board has demonstrated the necessity for these funds to provide a thorough and efficient system of schools to its special needs student population, i.e. special education, bilingual, gifted and talented. Therefore, the $19,100 cut by Council is restored.

Regarding line item 11-000-260-610 (line 479) Plant Services, Council's reduction is $11,000. The Board submitted a list of its Comprehensive Maintenance Plan, pursuant to N.J.A.C.

6:8-4.9(a)7, itemizing its planned maintenance for the coming school year. However, in addition to this repair schedule, the Board asserts that it must address an unanticipated roof repair to prevent any structural damage. Any work not completed this year will add an additional cost to the taxpayer in the following year. In other words, if the roof repair is not attended to on a timely basis, it will adversely affect the maintenance of the building. The Board contends that Council has not analyzed the work that needs to be done, but rather has made a general reduction without any consideration of the impact this reduction will have on the schedule for maintenance and repair.

Council avers that the extent of any roof repair and the cost thereof is purely speculative since the Board is relying on a single proposal from a contractor, not an engineering report. Further, since the district is required to have a long-range plan for building maintenance, this need should not have been unanticipated. Council concludes that sufficient funds will remain in the budget despite its reduction; therefore, the reduction should be sustained.

The Commissioner cannot agree. Unanticipated or unusual occurrences are a fact of life and, despite the best efforts in preparation, from time to time emergencies occur which must be handled prudently and immediately. In the Board's judgment this is such a case. While the Board may not have provided Council with an engineering report Council believes is necessary before any work is done, the Board has presented a preliminary estimate. A repair to a roof is certainly not the kind of maintenance to delay until the following year. Accordingly, the $11,000 reduction for roof repairs will be restored to the budget.

Account	Reduction
11-000-270-290 (line 506) Employee Benefits	$13,500

The Commissioner observes that this reduction is for the fixed benefits required for three positions proposed in the Board's budget. Each position required an expenditure of $4,500. The Commissioner has sustained the reductions in Account 11-000-218-104 (line 418) but restored the reductions to Account 11-110-100-101 (lines 155, 156 and 157). Consequently, $9,000 in fixed costs for these items is necessary and a reduction of $4,500 will be sustained.

11-000-290-220 (line 570) Social Security Contributions	$ 2,000

This reduction represents the fixed cost for the instructional aide approved above; consequently, the $2,000 reduction will be restored to the budget.

100 Series - Administration Salaries	$ 5,000

The Board states that the proposed increase of $10,243 in this account represents a 6% increase for administrative salaries. The three-year contract for faculty includes a 5.5% increase in the 1993-94 school year and the Board feels that it needs the flexibility to increase administrators' salaries at the same level as teachers, if earned as demonstrated by job performance.

Council contends that salaries for administrators are very competitive considering the district's size and comparable Bergen County districts. Council asserts that the percentage increase remaining in the line item is not inconsistent with increases for administrators in other districts.

The Commissioner concurs with Council's observations. The Board offered no comparisons with salaries in similar districts in the area or the county, whereas Council offered one comparison which

was not favorable for the Board. Further, there is no showing by the Board that this reduction would impair its ability to provide a thorough and efficient system of schools in Edgewater; therefore, the $5,000 reduction will stand.

Account	Reduction
11-4xx-100-100 (line 384) and 11-4xx-100-600 (line 386) 1993-94 Adjustments to Revenues	$113,379

The Board asserts that it has been the Local Education Agency (LEA) for the Region VI Life Skills Program for the past 13 years. The program has been housed in the Leonia School District for all but the last two years. Most tuition payments from member districts arrive in the spring after the Board has expended its revenues for personnel and instructional materials. Revenues are put back into surplus and applied to the following year's budget to reduce the tax levy accordingly. The Board's auditors have recommended that this procedure remain in place since the revenue from sending districts arrives late and, once received, goes back into the following year's budget.

Council contends that this $113,379 is in fact an anticipated revenue; therefore, it should be included as Revenue in the 1993-94 budget thereby reducing local taxes by this identical amount. Council questioned the auditor's recommendation since the Board did not submit any affidavit or other supporting documentation in that regard.

Council is correct in stating that this item represents a revenue and should be carried on the revenue side of the budget and that operating costs for the Life Skills Program should be funded by tuition payments from participating districts; however, the Board has explained that the tuition received from member districts of

Region VI in the late spring is put back into surplus and applied to the following year's budget to reduce the tax levy accordingly. To include the $113,379 as revenue results in a $113,379 reduction to the Board's General Fund budget. This, in the Commissioner's judgment, would be detrimental to the Board's ability to provide a thorough and efficient education to its pupils, given the low surplus level maintained by the Board.

Based on the above, the reduction of $113,379 will be restored.

The following table shows the amounts restored and not restored to the budget.

TABLE II

Line	Account	Description	Amount Restored	Amount Not Restored
461	11-000-230-890	Misc. Exp.	$ 6,500	$ -0-
163	11-190-100-610	General Supplies	9,492	5,000
164	11-190-100-640	Textbooks	-0-	7,977
418	11-000-218-104	Sals. Oth. Prof. Staff	-0-	45,000
155	11-110-100-101	Sals. Teachers		
156	11-120-100-101	"		-0-
157	11-130-100-101	"	40,365	
396	11-000-100-561	Tuition Reg. Prog.	100,736	-0-
204	11-205-100-1-6	Oth. Sals., Instruct.	8,078	-0-
208	11-205-100-610	Percept. Impaired		
280	11-213-100-610	Resource Room		
5	11-218-100-610	Speech		
342	11-220-100-800	Special Ed.		
358	11-230-100-610	At Risk		
359	11-240-100-610	Bilingual		
375	11-410-100-800	Cocurric.		
415	11-000-213-600	Health		
445	11-000-221-800	Improve. Instr.		
450	11-000-222-600	Library		
459	11-000-230-600	Admin.	19,100	-0-
479	11-000-260-610	Plant Servs.	11,000	-0-
506	11-000-270-290	Emp. Benefits	9,000	4,500
570	11-000-290-220	Soc. Sec. Contribs.	2,000	-0-
	100 Series	Administration	-0-	5,000
		TOTAL	$206,271	$67,477

As shown above, the Commissioner determines that $206,271 must be restored to the budget; therefore, this amount is ordered restored to the local tax levy for school purposes in the 1993-94 school year. It is also ordered that the amount of $113,379 be restored, as explained previously.

CAP WAIVER

By letter dated April 6, 1993, the Bergen County Superintendent of Schools conditionally approved the 1993-94 school district budget subject to the advertisement of the budget cap waiver proposal in the amount of $218,941.

As a result of the State Board of Education's July 7, 1993 decision in Board of Education of the Borough of Rutherford v. Mayor and Council of Rutherford wherein the State Board ruled that decisions in defeated voter cap waiver appeals must determine whether or not reallocation within the district's maximum permissible budget is possible and whether and to what extent the specific programs at issue are essential in order to enable the Board to meet its constitutional obligation to provide a thorough and efficient system of education, a letter was sent to the parties by the Director of the Bureau of Controversies and Disputes informing them of the need to supplement the record to document the reallocation and cap waiver review conducted by the county superintendent pursuant to N.J.S.A. 18A:7D-27. The county superintendent was accorded thirty (30) days from receipt of the letter to submit a sworn affidavit setting forth an explanation and documentation of that review, including the bases for concluding that (1) reallocation within the district's maximum permissible budget for the 1993-94 school year was not possible and (2) the

specific programs at issue were essential for the Board to provide a thorough and efficient system of education to its students.

The governing body and Board were provided twenty (20) days from receipt of the county superintendent's submission to file a response thereto.

The county superintendent's affidavit and supportive documentation was received on September 1, 1993. Written replies to the petition and the cap waiver, position papers and summations were filed by the respective parties. On September 10, 1993, Council's Reply Statement to Petitioner's Supplemented Position Statement was filed. The record closed on September 24, 1993 following expiration of the period for receipt of the parties' response to the county superintendent's submission.

The Board's request for a cap waiver and its conditional approval by the Bergen County Superintendent of Schools is set forth in the County Superintendent's affidavit, filed September 1, 1993, as follows:

> The following information and material are being submitted to represent our compliance with the decision of the New Jersey State Board of Education dated July 7, 1993.
>
> Furthermore, this information and material shall also serve as my affidavit that establishes the reallocation of resources process used by my County School Business Administrator and me to arrive at a decision during the cap waiver review of the 1993-94 Edgewater District budget.
>
> This district filed a Commissioner's Cap Waiver request in the amount of $435,467 for increased enrollment and a Commissioner's Cap Waiver request for Special Education in the amount of $117,122. The Cap Waiver request for increased enrollment was reduced by $11,000 because the PERS budget appropriation was over budgeted. Final Cap approvals were $424,467 and $117,122 for a total of $[5]41,589.

Also a Voter Cap Waiver request in the amount of $218,941 was filed in this office. In order to determine if any reallocation of resources could be made, the County School Business Administrator utilized the reallocation document developed by a committee of County Superintendents. A series of questions were raised by the County School Business Administrator, of the local Superintendent and the local Business Administrator.

In addition, at a scheduled conference, the County Superintendent questioned the local Superintendent about the need for a voter cap waiver. The local superintendent's explanation was as follows:

Account Title	Account Number	Amount
Salaries for Teachers Grades 1-5	11-120-100-101	$180,000
Salaries for Teachers Grade 6	11-130-100-101	$ 38,941

The local Superintendent explained that the Board of Education was able to fund the salaries of the five teachers mentioned above in previous years by a transfer of free balance monies to the budgets. For the year 1993-94, however, he stated that there would not be sufficient funds in free balance to effect such a transfer and therefore put this amount in his Voter Cap Waiver.

The County Superintendent endorsed the voter cap waiver and issued a letter to the district granting a conditional approval for the voter cap waiver.

Enclosed please find copies of the reallocation document and the letter of conditional approval.

The Board asserts that the failure of the voters of the district to approve the cap waiver in the amount of $218,941 will interfere with its ability to provide a thorough and efficient education to its pupils in Edgewater, wherein the Board will be unable to provide tuition for the district's middle and high school pupils in its sending/receiving relationship with the Leonia Board

of Education as well as being unable to provide for teachers' salaries to enable pupil instruction. The Board states, further, that the deprivation of school services by virtue of the lack of monies to pay tuition would deprive its pupils of a thorough and efficient education.

Council states that no evidence has been presented to show that the rejection of the cap waiver will deny pupils in the Edgewater school district a thorough and efficient education. Further, citing N.J.S.A. 18A:7D-28(f), Council avers that once a cap waiver has been rejected by voters, it may not be subject to further review or appeal.

The Commissioner cannot agree. An opinion by the Attorney General dated July 8, 1991, set forth the Commissioner's responsibility concerning cap waivers which have been defeated by the voters. That opinion is reproduced in pertinent part as follows:

> The QEA and subsequent amendments have not relieved the Commissioner of this constitutional responsibility. Thus, based on this delegation and the court's expansive interpretation of the Commissioner's authority and obligation to meet the constitutional mandate, it is reasonable to conclude that the Legislature did not intend to restrict the Commissioner's ability to fulfill his constitutional responsibilities. The recently enacted provision, therefore, does not preclude the Commissioner from entertaining a petition from a local school district whose budget -- without the cap waiver -- is determined to be inadequate to provide a thorough and efficient education to the child in that district. Those districts should be readily identifiable since the county superintendent should approve their budgets conditioned on the district receiving approval of a cap waiver.

The Commissioner has made a thorough review of the Board's line items, together with its reasons for requesting a cap waiver in the amount of $218,941. The Commissioner adopts as his own those

reasons advanced by the Board with ample supporting documentation in its cap waiver position statement and for each of the line item appropriations previously approved.

The Commissioner finds the record is sufficiently developed to establish, through the review conducted by the Bergen County Superintendent of Schools and those Department of Education officials who participated in the review and approval of the Board's conditionally approved budget and cap waiver, that the reallocation of funds within the permissible budget could not be accomplished without a cap waiver approval.

Accordingly, the Commissioner finds and determines that Council's arguments against her review and determination with respect to the Board's cap waiver appeal are totally without merit.

Having reached this determination, the Commissioner concludes that the $218,941 in current expense cap waiver funds requested by the Board are necessary for the district to provide a thorough and efficient system of schools in the Borough of Edgewater for the 1993-94 school year.

Therefore, the Commissioner directs the Bergen County Board of Taxation to increase the 1993-94 General Fund tax levy for the Borough of Edgewater School District to reflect a restoration of $206,271 in the itemized reductions effectuated by Council, as well as $113,379 restored by the Commissioner, and an additional $218,941 in Cap Waiver Appropriations which sums reflect a total General Fund tax levy increase of $538,591. Accordingly, the total 1993-94 General Fund tax levy shall be $3,898,623.

Amended Tax Levy Certified by Council	$3,360,032
Line Items Restored by Commissioner	319,650
Cap Waiver Ordered by Commissioner	218,941
	$3,898,623

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 18, 1993

DATE OF MAILING - NOVEMBER 18, 1993

285-93

32-94M
(285-93)

BOARD OF EDUCATION OF THE BOROUGH OF EDGEWATER,

PETITIONER,

V.

MAYOR AND COUNCIL OF THE BOROUGH OF EDGEWATER, BERGEN COUNTY,

RESPONDENT.

IN THE MATTER OF THE CAP WAIVER APPEAL OF THE BOARD OF EDUCATION OF THE BOROUGH OF EDGEWATER, BERGEN COUNTY.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

FEBRUARY 7, 1994

BOARD OF EDUCATION OF THE BOROUGH OF EDGEWATER,

PETITIONER,

V.

MAYOR AND COUNCIL OF THE BOROUGH OF EDGEWATER, BERGEN COUNTY,

RESPONDENT.

IN THE MATTER OF THE CAP WAIVER APPEAL OF THE BOARD OF EDUCATION OF THE BOROUGH OF EDGEWATER, BERGEN COUNTY.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

For Movant-Respondent, Robert T. Regan, Esq.

For Respondent-Petitioner, Steven J. Zaben, Esq.

This matter came before the Commissioner of Education on January 13, 1994 by way of a Motion for Stay, filed by the respondent Mayor and Council ("Borough"), of the Commissioner's decision of November 18, 1993 under the same caption. In that decision, the Commissioner had ordered restoration of $319,650 in line-item reductions made by the Borough to the petitioning Board of Education's budget pursuant to N.J.S.A. 18A:22-37, and in addition had directed that the school tax levy for 1993-94 be increased by $218,941 in cap waiver monies. The Board filed a response on January 24, 1994 in opposition to grant of a stay.

In its moving papers, the Borough argues that the decision in question is on appeal to the State Board, where the Borough is likely to prevail on the merits of its arguments that the

Commissioner employed the wrong standard of review in making line-item budget restorations and acted beyond the scope of her authority in directing inclusion in the tax levy of cap waiver monies rejected by the voters pursuant to N.J.S.A. 18A:7D-28(f). The Borough further argues that the Board would incur no harm by grant of a stay, in that the State Board's decision is likely to be rendered within the next two months and temporary withholding of the disputed amounts would not impair the district's ability to provide a thorough and efficient education ("T & E") given a total budget exceeding $4.6 million.

In response, the Board states that notwithstanding the Commissioner's having issued the decision in question well over two months ago, the Borough has steadfastly refused to comply with the Commissioner's directive. The Board further argues that, contrary to the Borough's contentions, the Borough does not have a likelihood of success on the merits of its appeal, and that continued failure to provide the monies due the Board will result in the district's inability to provide T & E, indeed, even to continue daily operations, absent borrowing of money at unnecessary added expense to taxpayers. Moreover, the Board avers, the Borough will suffer no irreparable harm by the Commissioner's refusal to grant a stay, as any increase in tax levy would be offset by a concomitant decrease should the Borough prevail on appeal. Finally, the Board notes that financial problems over and above the need for monies owed it by the Borough, relating to an unanticipated increase of $149,775 in tuition payments due its receiving district of Leonia, will

compound the problem caused by the Borough's actions and result in staff layoffs and early closure of schools if relief is not provided by enforcement of the Commissioner's decision.

Upon consideration of the arguments of the parties, and mindful of the standards to be applied in deciding requests for stay as established in Crowe v. DeGioia, 90 N.J. 126 (1982), the Commissioner determines to deny the Borough's request.

Initially, the Commissioner notes that the monies in question, that is, the amounts ordered by the Commissioner over and above the tax levy certified by the Borough pursuant to N.J.S.A. 18A:22-37, are adjustments to the tax levy already struck for 1993-94 and as such will not appear in tax bills until the following tax cycle; therefore, pursuant to N.J.S.A. 54:4-75 and 54:4-76, the Borough is obliged neither to pay over these amounts nor to borrow so as to permit their payment prior to the tax cycle in which they are to be raised through the local levy. Thus, there is no immediate harm to the Borough by holding the Commissioner's decision in force, particularly in view of its claim that a prompt State Board ruling on appeal is anticipated. For the Board, on the other hand, staying of the Commissioner's decision would negatively impact on its ability to borrow the funds the Commissioner found necessary for T & E pending the raising of those funds through tax levy.*

*The Commissioner notes that the Board herein appears to presume that it should not be the one to borrow money and that the Borough should be obliged to pay adjusted amounts upon issuance of the Commissioner's decision. That presumption, however, is contrary to N.J.S.A. 54:4-75 and 54:4-76. By analogy with regard to governing body payment of, and board of education borrowing against, taxes to be raised in a subsequent cycle, see also N.J.S.A. 18A:22-42 et seq.

With respect to any harm to the Borough being irreparable, the Commissioner notes that, should the appeal before the State Board not be resolved prior to striking of the tax levy for the 1994-95 school year, any downward adjustment to the 1993-94 tax levy directed by the Commissioner would be reflected in a concomitantly lower levy in the following tax cycle. In contrast, students adversely affected by insufficient funding for programs or services comprising T & E cannot recover their loss even if monies to fund such programs should later be restored. Thus, the balance of interests in this matter, as well as the primary obligation of the Commissioner, clearly lies with the Board. Under these circumstances, although the Borough's arguments on likelihood of success on the merits of appeal have been reviewed and considered, the Commissioner passes no express judgment on such arguments herein, as anything less than an unequivocal showing of error in the prior decision would not be sufficient to overcome the Commissioner's concerns about the negative impact on students of any stay granted while appeal is pending.

Accordingly, for the reasons expressed herein, the Motion for Stay is DENIED and, pursuant to N.J.S.A. 18A:6-25, the Commissioner's decision remains in full force and effect unless and until reversed on appeal.

IT IS SO ORDERED.

FEBRUARY 7, 1994

DATE OF MAILING - FEBRUARY 7, 1994

COMMISSIONER OF EDUCATION

285-93

C #285-93 (consolidated)
32-94M
SB # 76-93
APP. DIV. #A-2235-93T3
#M-2483-93

BOARD OF EDUCATION OF THE BOROUGH OF EDGEWATER,

PETITIONER-RESPONDENT,

V.

MAYOR AND COUNCIL OF THE BOROUGH OF EDGEWATER, BERGEN COUNTY,

RESPONDENT-APPELLANT,

AND

IN THE MATTER OF THE CAP WAIVER APPEAL OF THE BOARD OF EDUCATION OF THE BOROUGH OF EDGEWATER, BERGEN COUNTY.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, November 18, 1993

Order of the Appellate Division, December 23, 1993

Decision on motion by the Commissioner of Education, February 7, 1994

Order of the Appellate Division, February 14, 1994

For the Petitioner-Respondent, Steven J. Zaben, Esq.

For the Respondent-Appellant, Robert T. Regan, Esq.

This is an appeal by the Mayor and Council of the Borough of Edgewater (hereinafter "Borough") from a decision of the Commissioner of Education which: 1) directed restoration of certain line item reductions made by the municipal governing body pursuant to N.J.S.A. 18A:22-37 after the voters had defeated the education budget proposed by the Board of Education of the Borough of Edgewater (hereinafter "Board") and 2) directed an additional increase in the District's net current expense budget in the amount sought by the Board in a cap waiver proposal that had been placed

June 6 1994

before and defeated by the voters as provided by N.J.S.A. 18A:7D-28(f).

In the course of reviewing this matter, we have identified fundamental flaws in the budget review process as it is currently implemented. In view of our responsibilities in this area, we must assure that these flaws are eliminated from the process. To accomplish this, we must clarify the standard which a district board of education must meet before the Commissioner may direct amounts reduced by a municipal governing body pursuant to N.J.S.A. 18A:22-37 be restored to the local education budget. We must also insure that district boards of education and all officials of the State Department of Education involved in the budget review process understand that the conditions under which the Commissioner of Education may direct an increase in a district's education budget after the voters have defeated a cap waiver proposal made pursuant to N.J.S.A. 18A:70-28(f) are very limited. We are therefore compelled to once again delineate them.

I

Before submitting its proposed current expense budget for the 1993-94 school year to the voters at the annual school election on April 20, 1993, the Board of Education of the Borough of Edgewater sought and obtained the approval of the Bergen County Superintendent as required by N.J.S.A. 18A:7D-27.[1]

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1 N.J.S.A. 18A:7D-27 provides that:
Annually, on or before February 1, local boards of education shall submit to the commissioner a copy of their proposed budgets for the next school year. The commissioner shall review each item of appropriation within the current expense and capital outlay budgets and shall determine the adequacy of the budgets with regard to the annual reports submitted pursuant to section 11 of P.L. 1975, c 212 (C. 18A:7A-11) and such other criteria as may be established by the state board.

The District's CAP REVIEW SUMMARY (hereinafter "Summary") signed by the Bergen County Superintendent on April 5, 1993, indicates that the District's proposed net budget totalled $4,667,712 and that this amount was $760,530 above the District's maximum permitted budget (hereinafter "base budget") for 1993-94.[2] The summary shows that the District requested a cap waiver from the Commissioner, specifically requesting $424,467 because of an annual increase in the district's enrollment greater than 2% and $117,122 due to an increase of more than 5% in the cost for special education students.[3] Its TAX LEVY SUMMARY SHEET indicates that the District also planned to make a cap waiver request to the voters for $218,941.[4]

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2 N.J.S.A. 18A:7D-28 provides the method by which a district's maximum permissible budget is calculated.

3 N.J.S.A. 18A:7D-28(e) provides that:

> A board of education of a school district which: (1) for the two years prior to the prebudget year, has had an annual average increase in the district's resident enrollment which is greater than two percent; or (2) between the prebudget year and the year prior to the prebudget year, has had an increase in the district's local cost for special education pupils which is greater than five percent; or (3) during the 1990-91 school year but prior to April 1, 1991, has entered into a lease purchase agreement, may apply to the Commissioner of Education for waiver of the expenditure limitation established pursuant to this section. A board of education of a school district that sends pupils and pays tuition to a special needs district may apply to the Commissioner of Education for a waiver of the expenditure limitation established pursuant to this section. Any waiver granted by the commissioner pursuant to this subsection shall not be included in the question on excess expenditures which is to be submitted to the voters of the district pursuant to subsection f. of this section.

4 In contrast to N.J.S.A. 18A:7D-28(e), N.J.S.A. 18A:7D-28(f) provides:

> Any school district may submit a proposal to raise the amount of tax levy necessary to exceed the maximum permissible net budget

The District's revised Budget Statement dated April 5, 1993 reflects that, as authorized by N.J.S.A. 18A:7D-28(e), the Commissioner had approved a cap waiver (hereinafter "Commissioner's cap waiver") for $541,589. The revised Budget Statement indicates that this increased the District's base budget to $4,448,771.

By letter dated April 6, 1993, the County Superintendent "conditionally approved" the District's 1993-94 budget. In so doing, he instructed that the District present the additional $218,941 to the voters pursuant to N.J.S.A. 18A:7D-28(f) as a separate proposal to raise the amount of tax levy necessary to exceed the District's permissible budget (hereinafter "voter requested cap waiver").

At the annual school election, the voters defeated both the proposed current expense budget, which included the Commissioner's cap waiver, and the separate proposal for a voter requested cap waiver.

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permitted by this section to the legal voters of the district for type II school districts without a Board of School Estimate and to the Board of School Estimate for those school districts with a Board of School Estimate as required during the school budget approval process pursuant to chapters 22 and 54 of Title 18A of the New Jersey Statutes and section 13 of P.L. 1971, c.271 (C. 18A:46-41). The proposal to raise additional tax levy to exceed the maximum permissible net budget shall be in addition to the amounts required to be approved for each school district in accordance with chapters 22 and 54 of Title 18A of the New Jersey Statutes and section 13 of P.L. 1971, c.271 (C. 18A:46-41). In the event that a school district's proposal to raise the tax levy to exceed the maximum permissible net budget is not approved in accordance with the budget approval process set forth in chapter 22 and Title 18A of the New Jersey Statutes to type II districts and for type I districts, chapter 54 of Title 18A of the New Jersey Statutes for county vocational school districts and section 13 of P.L. 1971, c.271 (C. 18A:46-41) for county special services school districts, that disapproval shall be deemed final and shall not be subject to further review of appeal.

The Borough's governing body then acted pursuant to N.J.S.A. 18A:22-37[5] and reduced the current expense budget by making $273,748 in line item reductions, incorporating an increase in revenue of $113,379, and eliminating $190,000 for debt service. By the Borough's action, the Board's base budget was reduced by $577,127. Because the items that were to have been funded by the voter requested cap waiver proposal for $218,941 were not before it, the Borough did not consider any of those items.

By two separate petitions filed with the Commissioner, one on June 10, 1993, and the other on June 18, the Board appealed both the Borough's reduction of its current expense budget and the voters' defeat of the cap waiver amounts.[6]

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5 N.J.S.A. 18A:22-37 provides in pertinent part that:

> If the voters reject any of the items submitted at the annual school election, the board of education shall deliver the proposed school budget to the governing body of the municipality, or of each of the municipalities included in the district within 2 days thereafter. The governing body of the municipality, or of each of the municipalities, included in the district shall, after consultation with the board, and by April 28, determine the amount which, in the judgment of said body or bodies, is necessary to be appropriated, for each item appearing in such budget, to provide a thorough and efficient system of schools in the district, and certify to the county board of taxation the totals of the amount so determined to be necessary for each of the following:
>
> a. Current expenses of schools;
> b. Vocational evening schools or classes;
> c. Evening schools or classes for foreign-born residents;
> d. Appropriations to capital reserve fund; or
> e. Any capital project...
>
> The statute further provides for appeal from that determination to the Commissioner of Education.

6 We note that there are no procedural regulations with respect to such appeals and that the Board apparently proceeded pursuant to a memorandum issued on April 14, 1992, by Charles P. Mitchel, then Assistant Commissioner for the Division of County and Regional Services, to all County Superintendents.

The Department of Education consolidated the two appeals.

The Commissioner directed restoration of $206,271 of the line item reductions effectuated by the Borough and eliminated the $113,379 which the Borough had added as revenue. The Commissioner also directed an increase in the tax levy to include "an additional $218,941 in Cap Waiver Appropriations." The resulting general fund tax levy was $3,898,623.

The Borough appealed both of the Commissioner's determinations to the State Board of Education.

II

The responsibility for reviewing and acting on the budget of a local school district following its defeat by the voters and reduction by the municipal governing body is not a new one for our agency. E.g., Bd. of Ed., E. Brunswick Tp. v. Tp. Council, E. Brunswick, 48 N.J. 94 (1966). Consequently, the standard which the Commissioner must apply in reviewing the line item reductions made by a governing body pursuant to N.J.S.A. 18A:22-37 is one that is well established.

In East Brunswick, the New Jersey Supreme Court carefully delineated that standard, stressing that when the Commissioner is reviewing such reductions,

> ...his function is not to sit as an original budget-making body, as he would had the governing body failed to make any certification...his function is admittedly to sit as a reviewing body which, however, is charged with the overriding responsibility of seeing to it that the mandate for a thorough efficient system of free public schools is being carried out. [citations omitted.]
>
> ...if he finds that the budget fixed by the governing body is insufficient to enable compliance with mandatory legislative and administrative educational requirements or is

> insufficient to meet minimum educational standards for the mandated "thorough and efficient" East Brunswick school system, he will direct appropriate corrective action by the governing body or fix the budget on his own within the limits originally proposed by the board of education. On the other hand, if he finds that the governing body's budget is not so inadequate, even though significantly below what the Board of Education had fixed or what he would fix if he were acting as the original budget-making body under R.S. 18:7-83, then he will sustain it, absent any independent showing of procedural or substantive arbitrariness.

East Brunswick, supra, at 106-107.

The Court has repeatedly adhered to and reiterated this standard. In Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989), the Court not only reaffirmed the standard, but also eliminated any doubt that the Commissioner had a responsibility to the taxpayers as well as to the school district when he reviewed budgets on appeal. As expressed by the Court, when reviewing the reductions made by the municipal governing body

> ...the Commissioner cannot ignore completely the municipality's political concerns and indeed may not override them without some necessity strictly related to the constitutional mandate to provide for a thorough and efficient school system.

Deptford, supra, at 314 (emphasis added).

In this case, the Commissioner recognized that it was her responsibility to apply this standard when she articulated it in the introductory comments to her decision. At that point, the Commissioner acknowledged that her task was to determine

> ... whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by a governing body is necessary for the provision of a thorough and efficient education.

Commissioner's decision, at 4.

However, when the Commissioner directed that the reductions which the Borough had made be restored to the budget, she failed to explicitly apply that standard of review. Instead, the Commissioner decided the case without any evident consideration of whether either the items at issue or the level of funding she was directing to support those items was necessary in order for the Edgewater School District to provide a thorough and efficient education to its students.

For example, the Commissioner directed restoration of a $6,500 reduction to Account 11-000-230-890 (line 461) Miscellaneous Expenditures for travel, conferences and workshops for Board members and central administration. The rationale she offered for restoring this amount was that

> ... activities undertaken in this account, including the District's newsletters to the community, have a direct effect on the education of the pupils in the district. It is necessary to spend money on the training of Board members on the Board. Board members need training in the basics of finance, curriculum development and personnel management. They should also have a thorough understanding of education law as embodied in Title 18A and the New Jersey Administrative Code. Further, the amount budgeted is less than the amount expended in 1992-93.

While providing specific training to board members may well be related to a district's ability to provide a thorough and efficient education in a particular case, the rationale offered by the Commissioner does no more than indicate that there is a general need to train board members. The Commissioner did not indicate any specific training programs which the members of this Board needed, and the documents submitted by the Board in support of its appeal to the Commissioner did not specify even one training session for which

this money had been budgeted. Rather, the Commissioner supported restoration on the basis that the amount proposed was less than that expended in the prior year. Consequently, there is no factual support for the Commissioner's determination that the Board needed $6,500 for training, let alone that such training was essential in order for the district to provide a thorough and efficient education.

The Commissioner's determinations with respect to the other amounts she restored are similarly deficient. She directed that $9,492 be restored to General Supplies (Account 11-190-100-610: line 163) solely because "a reduction in this line item is too severe." Commissioner's decision, at 6-7. She restored $100,736 to Tuition-Regular Program (Account 11-000-100-561: line 396) because "the amount budgeted by the Board is reasonable." Commissioner's decision, at 10.

She directed that $8,078 be restored to fund an aid position in a new program by which the Board planned to provide services to its perceptually impaired students. The Commissioner directed this restoration because the statutes "grant the Board the authority to do all things not inconsistent with the school laws to provide for the education of its pupils" and this was the way the Board had determined to provide the services. Commissioner's decision, at 11.

The Commissioner directed restoration of $19,100 for general supplies, acknowledging that the reductions in these items were moderate, but finding under her analysis that: "the Board has demonstrated the necessity of these funds...." Commissioner's decision, at 11-12. The record, however, does not include the documentation needed to support this conclusion. For example, the only support provided by the Board to establish the need for the

amounts budgeted for library materials were general statements that the district was committed to upgrading its library, Edgewater School District, 1993-1994 Budget Appeal, May 26, 1993, Verified Petition, Exhibit D, and that its curriculum emphasizes research skills at the 4, 5 and 6 grade levels. Verified Supplemented Position Statement and Reply, August 24, 1993.

Similarly, the record does not include the documentation to support the Commissioner's determination to restore $11,000 to plant services. The Borough had reduced this account from $65,433 to $54,433. The Commissioner directed restoration of $11,000 for roof repairs, reasoning that "a repair to a roof is certainly not the kind of maintenance to delay until the following year." Commissioner's decision, at 13. Again, the fact that it may need to repair a roof and general nature of the repair does not establish that the Board needed $65,433 in order to fulfill its maintenance plan and to make any repairs, including roof repairs, that might be required during 1993-94. Nor does the Board's documentation establish that it needs $65,433 to accomplish this. Id. at Exhibit H.

Despite the fact that the Commissioner agreed with the Borough that $113,379 "should be carried on the revenue side of the budget," the Commissioner restored this amount solely because

> ...the Board has explained that the tuition received from member districts of Region VI in the late spring is put back into surplus and applied to the following year's budget ... To include the $113,379 as revenue results in a $113,379 reduction to the Board's General Fund budget. This, in the Commissioner's judgment would be detrimental to the Board's ability to provide a thorough and efficient education to its pupils, given the low surplus level maintained by the Board.

Commissioner's decision, at 15-16.

Such cursory reasoning can not support a conclusion that these moneys are needed to provide a thorough and efficient education. Hence, the Commissioner's determination to restore the moneys reduced by the Borough cannot be sustained. Nor, upon our independent review, is the record a sufficient one upon which we could sustain her decision. The lack of factual support for the restoration of budget items sought by the Board and directed by the Commissioner is highlighted by the Borough's documentation which supports each of its reductions with extensive analysis relating the amount of each such reduction to the District's ability to educate its students. Mayor and Council Borough of Edgewater Resolution, May 11, 1993.

In view of our responsibility to assure that the District's students are provided with a thorough and efficient education, we remand this matter to the Commissioner for further proceedings to determine whether the amounts at issue are necessary in order for the Board to provide its students with a constitutionally adequate education. In the event that there is a dispute as to any fact which is material to this determination, it will be necessary to conduct a hearing to resolve it. We stress that it is the Board's burden to demonstrate that the particular items for which the moneys are sought are specifically related to the provision of a thorough and efficient education and that the level of funding it seeks is the <u>minimal</u> level required to support each of those items.

III

In addition to the amounts which she directed be restored to the Board's base budget, the Commissioner directed that the

District's budget be increased by another $218,941. This was the amount which the District had sought through the proposal it had submitted to the voters pursuant to N.J.S.A. 18A:7D-28(f) (voter requested cap waiver). As previously stated, the voters had rejected this proposal.

This is not the first time we have reviewed a proposal by a local school district to exceed its maximum permissible budget. Under the Public School Education Act of 1975, which was the statutory scheme in place prior to 1990, such appeals were not uncommon. E.g., Bd. of Ed. of East Windsor Regional School Dist. v. State Bd. of Ed., 172 N.J. Super. 547 (App. Div. 1980).

In 1990, the Legislature made significant changes in our State's system of financing its public schools by enacting the Quality Education Act of 1990 (QEA I). Further changes were made in 1991 when QEA I was amended (QEA II).

None of those changes altered the standard under which the Commissioner was required to measure the adequacy of a local education budget. They did, however, have a major impact on the process by which our agency must assure such adequacy.

The change most relevant to this case was a basic change in the method by which a local district could exceed its maximum permissible budget ("cap waiver"). Under the previous law, the Commissioner was authorized to approve a request for a cap waiver whenever he judged that it was necessary in order for the district to provide a thorough and efficient education. Board of Ed. of East Windsor Regional School Dist., supra. See N.J.S.A. 18A:7A-25 (repealed by L. 1990, c.52).

The entire cap waiver approval process took place before the district's budget was advertised. If approval was granted, the additional amount was incorporated into the district's net current expense budget which was then submitted to the voters. Thus, in cases where the budget was defeated, the entire amount that the school district had proposed to spend for current expenses, including the amount in excess of its cap, was automatically reviewed by the municipality and, if necessary, subject to appeal to the Commissioner pursuant to N.J.S.A. 18A:22-37.

Under the Quality Education Act as now in effect, the Commissioner's statutory authority to approve cap waivers is limited to three specific circumstances. N.J.S.A. 18A:7D-28(e). See supra note 3. This change theoretically makes it more difficult for a school district to exceed its maximum permitted budget without submitting the proposed increase to the voters.

At the same time, the statutory scheme makes it far easier for a school district to exceed its maximum permissible budget if the voters want to do so. Quite simply, all that is required in order for a local school district to exceed its budget cap is that the district's voters approve a proposal to do so made to them pursuant to N.J.S.A. 18A:7D-28(f). See supra note 4.

The effect of the current statutory structure is to divide the budget proposal submitted to the voters at the annual school election into two separate questions: one encompassing the budget developed pursuant to N.J.S.A. 18A:22-7 et seq., and a second question presented under authority of N.J.S.A. 18A:7B-28(f), which includes any amounts over that budget proposal.

Careful examination of the terms of the current statutes reflects the Legislature's intent that the portion of the proposed education budget placed before the voters pursuant to N.J.S.A. 18A:22-7 et seq. include all of the amounts that are essential for a given school district to provide a thorough and efficient education and that none of these amounts should be included in proposals made under authority of N.J.S.A. 18A:7D-28(f).

In point of fact, the terms of N.J.S.A. 18A:7D-28(f) expressly require that proposals to raise the amount of tax levy necessary to exceed the maximum permissible budget (voter requested cap waiver) be in addition to the amounts required to be approved for each district in accordance with N.J.S.A. 18A:22-7 et seq. N.J.S.A. 18A:22-8 enumerates the specific items which must be included in a district's current expense budget. It is this budget proposal which the County Superintendent reviews for adequacy on behalf of the Commissioner of Education pursuant to N.J.S.A. 18A:7D-27.[7]

The Legislature's intent is further demonstrated by the fact that N.J.S.A. 18A:7D-28(f) provides that voter defeat of a proposal for additional amounts "shall be deemed final and shall not be subject to further review or appeal." Such appeal is not necessary if the amounts included in the proposal for a voter cap waiver are not essential to providing a constitutionally adequate education.

These limitations in no way alter the Commissioner's ultimate constitutional obligation, and that of this Board, to

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[7] Again, the statutory provision places on the Commissioner the affirmative responsibility to assure that the budget of each district is adequate.

insure that the budget of a local school district is sufficient to provide a thorough and efficient education. As the State Board emphasized in Board of Education of the Borough of Rutherford v. Mayor and Council of Rutherford, decided by the State Board, July 7, 1993:

> The starting point for resolving this matter is arriving at a proper appreciation of the Commissioner's obligation to assure that each school district has sufficient fiscal resources to provide a thorough and efficient education to its students. Robinson v. Cahill, 69 N.J. 2[illegible] (1981). Given the nature of the responsibility entrusted to the Commissioner we have no doubt that the authority to fulfill it must embrace the power to direct an increase in a district's education budget in any case where such increase is necessary to satisfy the constitutional mandate, including a case where voters have defeated a proposal to exceed its statutory budget limitation. See Administrative Agency Advice (AAA) 91-0036 (July 8, 1991).

Rutherford, supra, slip op. at 4-5, quoting Lincoln Board of Education of the Borough of Lincoln Park v. Borough Council of the Borough of Lincoln Park (hereinafter "Lincoln Park"), decided by the State Board, December 2, 1992, slip op. at 5.

However, as we further emphasized:

> the power to direct such increase may properly be exercised only where an increase is necessary to enable the district to provide a thorough and efficient education. Upper Freehold, [86 N.J. 265 (1981).] Further, any increase must be limited to those amounts the district needs in order to provide a thorough and efficient education. Id. Consequently, it is necessary to assess the adequacy of the budget as advertised and to determine whether it is possible to reallocate amounts within that budget before directing any increase. See AAA 91-0036, supra, at 6.

Id. at 5-6 (emphasis added).

The circumstances that would warrant directing an increase in a district's education budget beyond its statutory limitation where the voters have defeated a proposal to do so are extremely limited. In In re Upper Freehold Reg'l School Dist., 86 N.J. 265 (1981), which presented an analagous situation, the New Jersey Supreme Court affirmed an order of the Commissioner and State Board to direct a local school district to issue bonds for a capital project after voters had rejected referenda to finance the project. In that case, the roof of the district's high school had deteriorated to the point where dripping water had to be collected in 55 gallon drums placed throughout the school and students had to navigate puddles stretching for hundreds of feet. Sagging roof planks created the danger that tiles or pieces of concrete would fall from the ceiling. Despite the obvious safety hazards, the district's voters twice rejected bond issues to repair the roof. The board therein then sought emergency funding from the Commissioner to fund the repairs. The Commissioner did not provide the funds. Instead he referred the matter to the Office of Administrative Law for evidentiary hearings. The facts established by these hearings provided the basis for the order to issue bonds which was ultimately affirmed by the Court.

Upper Freehold affirms the vast power granted the Commissioner to meet the mandate of the New Jersey Constitution. It also shows the kind of circumstances that must be present to justify exercising that power by compelling a district's taxpayers to raise additional monies. Those circumstances are rarely presented. Moreover, even in the extreme circumstances in Upper Freehold, the

Court endorsed the remedial action taken by the Commissioner only after the due process provided by an evidentiary hearing.

As we stressed in Rutherford, supra, the power to direct an increase such as involved here must be exercised only where it is necessary to enable the district to provide a thorough and efficient education. We conclude that this limitation requires that such increases be directed only in circumstances where it has been established that the district's base budget does not include the minimal amount needed to provide a constitutionally adequate education.

We recognize that the current budget review process is not required to and is not aimed at establishing the minimal amount necessary in order for a given school district to provide a thorough and efficient education. Nor does the statutory framework require this kind of review in all cases. However, the current statutory framework does require that a determination be made as to the minimal amount necessary to provide a constitutionally adequate education where a district is seeking to exceed its maximum permissible budget. Quite simply, such a determination is a necessary prerequisite to a conclusion that reallocation within the district's permissible budget is not possible. Rutherford, supra.

In this case, the Commissioner indicated that, as a result of our decision in Rutherford, supra, the Bureau of Controversies and Disputes had required the Bergen County Superintendent of Schools to submit an affidavit and documentation for his conclusions that reallocation of the district's maximum permissible budget had not been possible and that the specific programs "at issue" were essential to a thorough and efficient education. Commissioner's

decision at 17-18. Then, relying on her understanding of an Attorney General's opinion issued on July 8, 1991, see AAA 91-0036, supra, and indicating that she had reviewed both the line items and documentation in support of the Board's "cap waiver" proposal, the Commissioner

> [found that] the record is sufficiently developed to establish, through the review conducted by the Bergen County Superintendent of Schools and those Department of Education officials who participated in the review and approval of the Board's conditionally approved budg[illegible] and cap waiver, that the reallocation of funds within the permissible budget could not be accomplished without a cap waiver approval....

We disagree.

Review of the documents submitted by the Bergen County Superintendent do no more than show that the County Superintendent reviewed the Board's budget proposal including its cap waiver request for adequacy. CAP WAIVER REQUEST: COUNTY SUPERINTENDENT'S BUDGET REVIEW AND REALLOCATION ANALYSIS, appended to notarized letter dated August 24, 1993, from Anthony C. Scalzo, Bergen County Superintendent of Schools. While the cap waiver review sheet asks a series of questions relating to reallocation, the County Superintendent's responses are cast solely in terms of the adequacy of funding for items in the Board's base budget. Id.

Nothing in the record indicates that the County Superintendent attempted to make reallocations in the Board's budget by identifying those amounts included in the base budget that were not absolutely essential to a thorough and efficient education. Had this been accomplished prior to approving the budget for advertising, the voters would have been presented with two proposals: one which was a proposal for a base budget within permissible limits at least minimally sufficient to provide a

thorough and efficient education and another under N.J.S.A. 18A:7D-28(f) for the additional amounts. In this case, however, as reflected by the Commissioner's decision that some of the line item reductions the Borough made should be sustained, amounts that were not necessary to provide a thorough and efficient education were, in fact, included in the Board's base budget when it was presented to the voters.

Given this fact and upon review of the record, we can not avoid the conclusion that, as was the case in Rutherford, the County Superintendent did not review the Board's base budget either before or after it was defeated for the purpose of reallocating amounts within that budget so as to incorporate into it the cap waiver moneys the Board sought from the voters. Nor, in deciding this case, did the Commissioner extend her review beyond the reductions made by the Borough so as to ascertain whether any additional reallocation was possible. Rutherford, supra, slip op. at 6.

We recognize that review of the voter requested cap waiver moneys was not within the scope of the review with which the Borough was charged by N.J.S.A. 18A:22-37. In this appeal, however, the Borough has questioned whether those amounts were necessary in their entirety to the provision of a through and efficient education. As delineated in our decision in Lincoln Park, decided by the State Board, December 2, 1992, the fact that the County Superintendent had designated the moneys as necessary for a thorough and efficient education when he "conditionally" approved the District's budget and directed that a cap waiver question be presented to the voters does not insulate those amounts from review by the Commissioner.

In short, the Commissioner's decision established a budget which, despite voter defeat of the proposal made pursuant to N.J.S.A. 18A:7D-28(f), exceeds the "maximum permissible budget" allowed by the statutes. The Commissioner directed that the additional amounts be added to the District's budget without a determination either of whether it was possible to make reallocations within the Board's base budget or whether the voter requested cap waiver amounts were needed in their entirety in order for the District to provide a thorough and efficient education. To permit this result, given defeat of the proposal made to the voters pursuant to N.J.S.A. 18A:7D-28(f), would be to contravene the express terms of that statutory provision without the assurance that the Commissioner needed to do so in order to fulfill her constitutional obligations.

The record is not sufficiently developed to permit us to determine whether reallocation within the District's permissible budget is possible so as to provide support for those programs which the District originally proposed to fund by the voter requested cap waiver monies. Consequently, we have no recourse but to remand this matter for such determination. In so doing, we also direct that the Commissioner determine whether, or to what extent, the specific items which the Board sought to fund with the voter requested cap waiver amounts are in fact essential in order to enable the Board to meet its constitutional obligations.

IV

The decision resulting from our remand should resolve this particular case. This, however, does not eliminate the flaws in the budget review process that are, at least, partially responsible

for the situation which is confronting us. Those flaws must be addressed through the regulatory process.

This is not the first time that we have directed the Commissioner to propose such rules to us. As expressed in our decision in Abbott v. Burke,

> ... in that it is the State's responsibility to assure that each district raises the funds required to provide a thorough and efficient education and given that it is the responsibility of this agency to ensure that every district properly fulfills the fiscal responsibility that has been delegated to it, we conclude that it is critical that a budget review process expressly designed to implement the requirements of N.J.S.A. 18A:7A-28 be adopted through the regulatory process. We therefore direct that the Commissioner propose to us rules that provide for "review of each item of appropriation within the current expense and budgeted capital outlay budgets," and for determination of "the adequacy of the budgets with regard to the annual reports submitted pursuant to [N.J.S.A. 18A:7A-11]," as required by N.J.S.A. 18A:7A-28.

Abbott v. Burke, decided by the State Board, April 13, 1989, slip op. at 40 (prior and subsequent history omitted).[8]

In Abbott, we also recognized that our rules had to provide for situations where it might be necessary to compel a municipality to raise additional amounts:

> Given our responsibility to assure that local districts allocate sufficient funds to provide a thorough and efficient education, we direct that the rules proposed by the Commissioner for review of annual budgets also include procedures to provide for review for adequacy of the budget in any case where a municipality reduced the budget, regardless of whether the local board appeals.

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[8] In its decision in Abbott v. Burke, 119 N.J. 287 (1990), the New Jersey Supreme Court reversed the State Board's determination that the State's system for financing public education was not unconstitutional as it had been applied to poorer urban school districts. The Court did not disturb any of the State Board's administrative directives aimed at correcting identified weaknesses in the system. Id. at 300.

> We further direct that the proposed rules specify the standards that the Commissioner will apply in the event that it is necessary to compel a municipality to raise any additional amounts required.

Abbott, supra, slip op. at 42.

Our focus in Abbott was to ensure that the budgets developed by district boards of education and approved by the Commissioner were adequate to provide a thorough and efficient education. Our obligations to the taxpayers, now expressly embodied in the current statutory scheme, do not negate the need we identified in Abbott. To the contrary, our responsibility to the taxpayers makes it all the more essential that we act now to formalize the budget review process.

Because the process now being used has not been formalized, unequivocally it is not possible for us to review it in any detail. This case has however demonstrated unequivocally that the process is convoluted, inefficient, and that it fails to satisfy the requirements of the statutory framework now in place.

We therefore direct that the Commissioner propose to us a new system that would correct the deficiencies of the process now in place. Such a system should provide district boards with clear notice of exactly what is required of them. It should insure that all items necessary for a thorough and efficient education are included in each district's current expense budget proposal developed pursuant to N.J.S.A. 18A:22-7 et seq. It should provide assurance that the level of funding proposed by the district board for each item is sufficient. It should guarantee that no amounts included in a cap waiver proposal made pursuant to N.J.S.A. 18A:7D-28(f) are essential to the provision of a thorough and

efficient education. It should require that before an increase beyond a district's maximum permissible budget is directed, the district board must demonstrate that every item in its proposed budget and the amount it has budgeted to support each of those items is essential to providing a thorough and efficient education and that the additional amounts are necessary in order for the board to provide a constitutionally adequate education.

In this respect, we emphasize that while the Commissioner is entitled to rely on his county superintendents when fulfilling his responsibilities to review the education budgets proposed by district boards, such reliance may not be absolute. Where a district board seeks administrative review to increase its budget beyond the amount established by the governing body following voter defeat, the record must provide sufficient factual support for the level of funding sought before the Commissioner can direct such increase.

Finally, we are not insensitive to the limitations on the Commissioner's resources or the constraints such limitations place on him. However, "such constraints can excuse neither the Commissioner nor the State Board from fulfilling the responsibilities with which we have been charged by the Legislature." Abbott, supra, slip op. at 41.

We are convinced that the effects of such limitations would best be ameliorated by developing and formalizing an effective budget review process. This has been repeatedly demonstrated by the amount of resources that our agency has increasingly been required to commit in order to decide budget appeals. Fewer resources would be required to resolve such cases if the deficiencies in the current

review process were corrected and the process formalized by the adoption of administrative rules.

We therefore direct that the Commissioner present a proposal for a budget review process within a time frame which will permit the State Board to consider the proposal and adopt regulations before February 1, 1995, by which date all district boards must submit their proposed budgets for 1995-96 for approval pursuant to N.J.S.A. 18A:7D-27.

Finally we deny the Borough's request of June 29 that we defer action on this matter because the parties are in the process of attempting to settle the case. In the event that the parties ultimately do reach an agreement which is consistent with this decision, they may submit it to the Commissioner of Education for his review and approval.

July 6, 1994

Date of mailing JUL 08 1994

286-93

IN THE MATTER OF THE CAP WAIVER :

APPEAL OF THE SCHOOL DISTRICT OF : COMMISSIONER OF EDUCATION

THE BOROUGH OF STONE HARBOR, : DECISION

CAPE MAY COUNTY. :

:

SYNOPSIS

Board appealed General Fund cap waiver in the amount of $59,264 rejected by voters.

Upon review of the record, Commissioner determined to order the increase of $50,217 in cap waiver monies for a total General Fund tax levy of $1,144,147 for 1993-94 school year.

NOVEMBER 18, 1993

IN THE MATTER OF THE CAP WAIVER	:	
APPEAL OF THE SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
THE BOROUGH OF STONE HARBOR,	:	DECISION
CAPE MAY COUNTY.	:	
	:	

Paul W. Dare, Esq., for Petitioner

William M. Balliette, Jr., Esq. (Cafiero & Balliette and Balliette), for Respondent

This matter was opened before the Commissioner on June 11, 1993 through the filing of a Petition of Appeal of a defeated cap waiver proposal of $59,264 by the Stone Harbor Borough Board of Education (Board). The Board sought restoration of the cap waiver, on the basis of necessity to provide a thorough and efficient educational system, after its defeat by the voters on April 20, 1993. The budget presented to the voters was also defeated and, pursuant to N.J.S.A. 18A:22-37 and N.J.A.C. 6:24-7.2(b)2, the Board and the Borough Council of the Borough of Stone Harbor (Council) consulted on the defeated budget. The Council reduced the General Fund tax levy by $6,782, but this reduction has been accepted by the Board and is not under appeal. On May 25, 1993, prior to the filing of the cap waiver appeal, the Cape May County Superintendent submitted a letter to the Commissioner stating that she had reviewed the reduction of $6,782 made to the budget by the Council and determined that this reduction would not have a negative impact on

the district's ability to provide a thorough and efficient education. She states that the reductions, which are in the area of administrative salaries, were not considered at the time of the budget review and possible reallocation since they were not known to exist as an alternative at that time.

Consequently, the monies in contention in this matter are as follows:

Proposed Tax Levy Adopted By Board of Education		Amount of Tax Levy Certified By Governing Body	
General Fund	$1,100,712	General Fund	$1,093,930
Cap Waiver	59,264	Cap Waiver	-0-
Amount of Reduction By Governing Body		**Amount of Reduction In Dispute Before Commissioner**	
General Fund	$ 6,782	General Fund	-0-
Cap Waiver	59,264	Cap Waiver	$59,264

It must be noted that the Petition of Appeal submitted by the Board did not include the tax levy chart recorded above as required by N.J.A.C. 6:24-7.5(c). The amounts listed above were verified, however, by the documents submitted.

On June 21, 1993, Council submitted its Answer to the Petition, denying the allegation of the Board regarding the necessity of the cap waiver for a thorough and efficient educational system and requesting that the Commissioner not restore the cap waiver of $59,264. On July 19, 1993, Council submitted a letter stating that it had determined not to participate in the cap waiver appeal except "***as a conduit in order to forward to [the Commissioner of Education] for [her] consideration, writings from the members of the general public together with any documentary evidence they wish to submit." Council was advised by the Director of the Bureau of Controversies and Disputes in a letter dated

July 21, 1993 that the Commissioner can consider only documents submitted to the record by the parties in this case and, given Council's decision not to participate, the letters attached to the correspondence of July 16, 1993 cannot be considered in the disposition of the case. Council responded on July 30, 1993 with a request to ignore the letter of July 16, 1993 and to ask for an extension for the filing of its position statement. These requests were granted in a letter dated August 2, 1993 from the Director of the Bureau of Controversies and Disputes. On August 4, 1993 the Board filed its Position Statement. On August 20, 1993, Council filed its Position Statement which recommended reductions in five of the cap waiver line items for a total reduction of $15,547. Council did not challenge the cap waiver requests in the twelve other areas.

As a result of the State Board of Education's July 7, 1993 decision in the Board of Education of the Borough of Rutherford v. Mayor and Council of Rutherford wherein the State Board ruled that decisions in defeated voter cap waiver appeals must determine whether or not reallocation within the district's maximum permissible budget is possible and whether and to what extent the specific programs at issue are essential in order to enable the Board to meet its constitutional obligation to provide a thorough and efficient system of education, a letter was sent to the parties by the Director of the Bureau of Controversies and Disputes informing them of the need to supplement the record to document the reallocation and cap waiver review conducted by the county superintendent pursuant to N.J.S.A. 18A:7D-27. The county superintendent was accorded thirty (30) days from receipt of the letter to submit a sworn affidavit setting forth an explanation and

documentation of that review, including the bases for concluding that (1) reallocation within the district's maximum permissible budget for the 1993-94 school year was not possible and (2) the specific programs at issue were essential for the Board to provide a thorough and efficient system of education to its students.

The governing body and Board were provided twenty (20) days from receipt of the county superintendent's submission to file a response thereto.

The county superintendent's affidavit with supportive documentation was received on September 10, 1993.

No additional documents were filed by either party and the record of this matter was closed on October 4, 1993.

The cap waiver amounts under appeal are as follows:

Account No.	Description	Amount	Recommended Reduction by Council
11-110-100-101	Kindergarten Aide Salary	$ 7,380	
11-120-100-101	Grades 1-5 Salaries	3,500	
11-130-100-101	Grades 6-8 Salaries	3,500	
11-190-100-601	Teaching Supplies	1,500	$ 500
11-219-100-101	Homebound Instruction	1,000	
11-401-100-100	Student Activities Salaries	2,253	
11-000-222-104	School Librarian Salary	7,547	7,547
11-000-222-610	Library Books	584	
11-000-230-331	Legal Fees	2,000	
11-000-230-530	Telephone	1,000	
11-000-230-590	Liability Insurance	1,000	
11-000-260-300	Servicemaster	1,500	1,500
11-000-260-420	Building/Equipment Repair	16,000	5,000
11-000-260-620	Electric/Gas	2,000	1,000
11-000-270-593	Transportation Insurance	1,000	
11-000-290-241	Employee Retirement	1,000	
11-000-290-290	Hospitalization	6,500	
	Total	$59,264	$15,547

Account No.		Amount
11-110-100-101	Kindergarten Aide Salary	$7,380

The Board states that the budget for this line item in 1992-93 was $11,880 and that only $4,500 will be available in 1993-94 without the cap waiver. The Board continues that there were 29 kindergarten students in 1992-93 and 24 anticipated in 1993-94 at the time of the petition filing. It is a State mandate that there must be an aide assigned to a kindergarten class with an enrollment greater than 25 students. This district also has had increased enrollment from 1991-92 to 1992-93 and projects continued increase in 1993-94.

Based on those facts and the necessity for a district to realistically and reasonably estimate budgetary expenditures, the Commissioner determines that funds of $7,380 for the kindergarten aide salary are essential for a thorough and efficient educational system.

11-120-100-101	Grade 1-5 Salaries	$3,500
11-130-100-101	Grade 6-8 Salaries	$3,500

The Board states that these funds were proposed to introduce an instrumental music program to the district. The Board continues that its district students are at a disadvantage when they enter the receiving high school because other students attending the high school have had the benefit of an elementary school music program. It is recognized that one of the difficulties in sending-receiving relationships between school districts is to ensure that all students are similarly prepared with equal educational opportunities.

Based on that fact, the absence of protest on this item by Council, and a review of the data submitted, the Commissioner approves the cap waiver totaling $7,000.

Account No.		Amount
11-190-100-610	Teaching Supplies	$1,500

The Board states that the cap waiver in this area is essential to provide funds which are close to the 1992-93 budgeted level. The Council recommended a reduction of $500 for this item and stated that the amount budgeted of $14,250 plus the cap waiver of $1,500 would exceed the 1991-92 expenditure of $10,319 by 49.6%. Although that percentage of increase is significant, it must be recognized in this issue that the period of comparison covers two years and that the student enrollment in the district has increased almost 10% in that period.

It is indisputable that provision of sufficient teaching supplies such as paper, pencils, workbooks, etc. is essential to a thorough and efficient educational system. Therefore, the Commissioner determines that these funds of $1,500 are approved for 1993-94.

Account No.		Amount
11-219-100-101	Homebound Instruction	$1,000

The Board states that $1,500 was budgeted for this item in 1992-93 and that only $500 would be budgeted in 1993-94 without the cap waiver. The Board adds that, although there were no students needing this service in 1992-93, it must budget because of the possibility of such need in 1993-94.

Again, as stated above, there is a necessity for a district to realistically and reasonably estimate budgetary expenditures for services that are required, if the situation arises, for a thorough and efficient education. The Commissioner determines that these funds of $1,000 are approved for 1993-94.

Account No.		Amount
11-401-100-100	Student Activities Salaries	$2,253

The Board states that this cap waiver would provide the same amount of funding for extracurricular activities for students as was available in 1992-93. The Board adds that these activities are an integral part of the total education of the pupils in the district.

As the Commissioner finds that these supervised activities are an integral part of the educational program, as stated by the Board, the $2,253 cap waiver is approved for 1993-94.

11-000-222-104	School Librarian Salary	$7,547

The Board states that the services of the school librarian would have to be reduced from four days to three days if the cap waiver funds are not approved. The Board agrees that the library could function with a librarian only three days a week, but states that having the librarian for four days a week as in the past provides better library opportunities for the students. The Board also states that the amount needed for four days in 1993-94 would be less than in 1992-93 because of the employment of a new librarian at a lower level on the salary guide.

The Council recommends disapproval of the $7,547 cap waiver on the basis that the amount budgeted is sufficient for three days of librarian service. The Council also states that library science can be taught by regular teachers and that monitoring in the library for the two days without a librarian can be handled by regular teachers and/or parent volunteers.

In reaching a decision on this issue, the Commissioner must note the very low projected enrollment for 1993-94 in this district of 85 pupils. Based on that fact and the arguments presented,

including the Board's statement that the library can function with a librarian for only three days a week, the Commissioner determines that these cap waiver funds of $7,547 are not approved.

Account No.		Amount
11-000-222-610	Library Books	$ 584

The Board states that the budgeted amount of $916 for library/reference books would be, without the cap waiver, less than the $1,500 budgeted in 1992-93 and would be insufficient to maintain the library with books and reference materials.

The Commissioner agrees that the provision of current and appropriate library books and reference materials is an annual necessity for school districts and is essential for a thorough and efficient educational program. The cap waiver of $584 is therefore approved.

11-000-230-331	Legal Fees	$2,000

The Board states that the budgeted amount of $1,000 will be inadequate in 1993-94 because the Board will have legal fees specifically for the current contract negotiations, as well as for this cap waiver appeal. Since legal fees are very often essential to the efficient operation of a school district, and since the Board has cited two specific issues which will require such fees, the Commissioner approves the cap waiver of $2,000 for this item.

11-000-230-530	Telephone	$1,000

The Board again states that the amount of $5,000 budgeted in 1993-94 would be, without the cap waiver, less than the amount budgeted in 1992-93 and will not be sufficient to fund this item. In reviewing the data presented, the Commissioner determines that these funds are essential and therefore approves the cap waiver of $1,000.

Account No.		Amount
11-000-230-590	Liability Insurance	$1,000

The Board states that the amount of $7,000 budgeted in 1993-94 would be, without the cap waiver, less than the amount budgeted in 1992-93 and may be insufficient to pay for the district's liability insurance. Since sufficient insurance coverage is an essential responsibility of a school district, the Commissioner approves this cap waiver amount of $1,000.

11-000-260-300	Servicemaster	$ 1,500

The Board states that the budgeted amount is sufficient to pay the contracted amount for this service, but the cap waiver of $1,500 is necessary for any contingencies or additional services which might be required in 1993-94. The Council, on the other hand, recommends disapproval of this cap waiver on the basis that the budgeted amount is sufficient to pay the contracted amount. Since this line item only includes the contractual payment for Service-master and is sufficient to meet the obligation, the Commissioner determines that the need for additional funds in this line item has not been documented. The cap waiver of $1,500 is not approved.

11-000-260-420	Building/Equipment Repair	$16,000

The Board states that these funds are necessary to perform deferred maintenance on the school building and cites specifically the necessity for roof repair. The Council recommends disapproval of this cap waiver on the basis of its comparison of 1991-92 expenditures with 1993-94 budgeted amounts and its belief that no "substantial" repair is anticipated for 1993-94.

The Council's comparison is somewhat flawed, however, because the 1991-92 expenditure of $33,366 which is cited is only a

sub-item in this account which had total expenditures of $39,966 in 1991-92. It is this figure that can be compared to the $18,900 Council cites as approved in the budget for 1993-94. In any case, the 1993-94 budgeted figure without the cap waiver is significantly less than prior expenditures. Based on the obvious need and mandate for continued repair of school buildings and equipment and the documentation presented, the Commissioner approves the cap waiver of $16,000.

Account No.		Amount
11-000-260-620	Electric/Gas	$2,000

The Board states that the cap waiver would provide the same funding as in the 1992-93 budget and that the requested funding is an estimate since the intensity of the 1993-94 winter is unknown. The Council recommends a reduction in the cap waiver of $1,000 based on 1991-92 expenditures of $18,230 and an approved budget for 1993-94 of $22,000. This is again an area where a Board must reasonably and realistically estimate budget appropriations since the cost can vary significantly with the intensity of the weather and the extent of building use. Based on these facts, the Commissioner approves the cap waiver in this area of $2,000.

11-000-270-593	Transportation Insurance	$1,000

The Board states that the cap waiver funds are necessary to provide the same budgeted amount for 1993-94 as in 1992-93. Since the expenditures in this area in 1991-92 were $2,675, it is reasonable to estimate that the premiums for transportation insurance in 1993-94 could exceed the budgeted amount of $3,000. The Commissioner approves the cap waiver in this area of $1,000.

Account No.		Amount
11-000-290-241	Employee Retirement	$1,000

The Board states that the cap waiver funds are essential to provide for potential contingencies with rising costs in the area of employee benefits. Since the expenditures in this line item are primarily mandated or contractual obligations, the Commissioner approves the cap waiver of $1,000.

11-000-290-290	Hospitalization	$6,500

The Board states that spiraling hospitalization insurance costs necessitated an increase in the approved budget amount for this obligation and the request for the cap waiver. Since this is an obligation which must be estimated by the Board and since the current hospitalization insurance climate is in flux, the Commissioner approves the cap waiver of $6,500.

In summary, upon review of the documentation submitted on this matter, the Commissioner finds and determines that the record amply establishes that $50,217 in cap waiver monies are necessary for the district to provide a thorough and efficient educational system. Of the total $59,264 cap waiver monies sought by the Board, the $7,547 for School Librarian Salary and $1,500 for Servicemaster are not approved for the reasons stated above. The Commissioner also finds and determines, based on documentation submitted, that reallocation of funds within the district's maximum permissible budget is not possible. (Board of Education of the Borough of Rutherford v. Mayor and Council of Rutherford, Bergen County, decided by State Board of Education, July 7, 1993)

Accordingly, the Cape May County Board of Taxation is directed to make the necessary adjustments as set forth below to

reflect a total of $1,144,147 to be raised in tax levy for General Fund purposes by the Borough of Stone Harbor for the 1993-94 school year.

	General Fund
Tax Levy Certified By Council	$1,093,930
Cap Waiver Ordered by Commissioner	50,217
Total	$1,144,147

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 18, 1993

DATE OF MAILING - NOVEMBER 18, 1993

287-93

BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG,

PETITIONER,

V.

TOWN COUNCIL OF THE TOWN OF PHILLIPSBURG, WARREN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of $142,500 made by governing body following voter rejection of proposed budget on April 20, 1993.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore $142,500 for a total General Fund tax levy of $6,311,450 for 1993-94 school purposes.

NOVEMBER 22, 1993

BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG, PETITIONER, V. TOWN COUNCIL OF THE TOWN OF PHILLIPSBURG, WARREN COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

Donald W. Morrow, Esq. (Morrow and Curzi), for Petitioner

Anita B. Kartalopoulos, Esq. (Novak and Kartalopoulos), for Respondent.

This matter was opened before the Commissioner on June 4, 1993 through the filing of a Petition of Appeal of a defeated budget by the Town of Phillipsburg Board of Education (Board) pursuant to the provisions of N.J.A.C. 6:24-7.4. The Board sought restoration, on the grounds of necessity for a thorough and efficient education, of reduction by the Town Council of the Town of Phillipsburg (Council) following voter rejection on April 20, 1993 of the Board's proposed budget. Subsequent to the defeat, the Board and Council pursuant to N.J.S.A. 18A:22-37 and N.J.A.C. 6:24-7.2(b)2, consulted on the defeated budget and the Council reduced the General Fund tax levy by $142,500. Consequently, the monies in contention in this matter are as set forth below:

Proposed Tax Levy Adopted by Board of Education	Amount of Tax Levy Certified by Governing Body
General Fund $6,311,450	General Fund $6,168,950
Amount of Reduction by Governing Body	Amount of Reduction in Dispute Before Commissioner
General Fund $142,500	General Fund $142,500

The Director of the Bureau of Controversies and Disputes sent a letter on July 15, 1993 to the Council advising it that an Answer to the Petition of Appeal had not been filed pursuant to N.J.A.C. 6:24-1.4. On July 27, 1993 Council filed a copy of the resolution approved by it on the budget reduction with rationale. The Director of the Bureau of Controversies and Disputes sent another letter to Council on August 18, 1993 advising it that an Answer to the Petition was still required, pursuant to N.J.A.C. 6:24-1.4, admitting or denying the specific allegations of the Petition and including the documentation necessary pursuant to N.J.A.C. 6:24-7.7. Council was asked to file the required material within five days of the telefaxed letter. Council requested and was granted an extension of the filing date to September 3, 1993. The Answer, although dated September 3, 1993, was received on September 7, 1993 and did not include the certification and budget copy required by N.J.A.C. 6:24-7.7. The Director of the Bureau of Controversies and Disputes again wrote to Council on September 9, 1993 advising it of the lack of required documentation. The letter also notified both parties that Position Statements must be filed by September 27, 1993. The Board filed its Position Statement on September 27, 1993, but it did not follow the format of reductions in the Council resolution. The Director wrote to the Board on

October 4, 1993 informing it that it must submit a Position Statement related to the Council resolution to enable the Commissioner to undertake a proper review of each line item reduced by Council. The Council submitted its Position Statement on October 8, 1993 and it must be noted that it was dated October 1, 1993, but even that date was past the filing deadline of September 27, 1993. It must also be noted that Council did not include with its Position Statement the certification and budget copy which were missing from Council's Answer and about which it had been notified on September 9, 1993. The Board filed its amended Position Statement on October 19, 1993. On October 20, 1993, Council submitted a letter confirming a telephone conversation on the receipt of the Position Statement and stating that the required certification and budget copy would be submitted under separate cover. The certification was received on October 21, 1993. The Director of the Bureau of Controversies and Disputes advised both parties on October 21, 1993 that Responses to the Position Statements must be submitted within ten days of the receipt thereof and final Summations within five working days of the receipt of Responses. The Director also stated that no extension for these filings would be granted in view of the length of time already passed and the status of Phillipsburg as a special needs district. The Director requested that the parties notify her office as soon as possible if they did not intend to submit Responses or Summations. The Director also again requested the required submission of the budget copy. The budget copy was submitted by the Board on November 3, 1993. No additional documents were filed by either party and the record of this matter was closed on November 3, 1993.

The specific reductions in the General Fund tax levy include 28 individuals line items which were allocated to four specific areas by both parties. These reductions with the allocated headings and rationale by heading are as follows:

Early Childhood Education

Rationale: $397,096 budgeted, which is a $95,000 increase, for a non-mandated program, so reduction of $7,795 is recommended.

Line Item #	Description	Reduction
11-000-240-103-110	Principal Salaries	$ 526
11-000-290-290-110	Principal Benefits	216
11-000-221-102-110	Curriculum Coordinator's Salary	525
11-000-290-290-110	Curriculum Coordinator's Benefits	217
11-110-100-101-110	Teacher Salaries - Foundation	1,174
11-000-290-290-110	Teacher Benefits - Foundation	525
11-190-100-106-110	Aide Salaries - Foundation	526
11-000-290-290-110	Aide Benefits - Foundation	526
12-110-100-730-110	New Equipment - Foundation	216
11-230-100-101-110	Teacher Salaries - At Risk	526
11-230-100-106-110	Aide Salaries - At Risk	526
20-231-100-101-110	Teacher Salaries - Chapter 1	526
20-231-100-101-110	Teacher Benefits - Chapter 1	526
20-231-290-290-110	Aides Benefits - Chapter 1	526
11-190-100-610-110	Instructional Supplies - Foundation	526
11-190-100-340-110	Consultant	526
		($8,133)
		$7,795

It must be noted that the total for this area of reductions is $8,133, not $7,795 as listed in Council's resolution. However, $7,795 was the amount included in the total tax levy reduction.

It is also noted that the item identified as Teacher Benefits - Chapter 1 is not correct because the line item/account number is not the one used for benefits. The Board believes this item should be Aide Salaries - Chapter 1, but this description would still require a one-digit change in the line item/account number.

Attitudes, Disposition, Etc.

Rationale: $319,105 budgeted for a new program, so reduction of $19,105 is recommended since $300,000 should be sufficient for first year.

Line Item #4	Description	Reduction
11-000-240-103-415	Principal Salaries - Foundation	$ 1,915
11-120-100-101-415	Teacher Salaries - Foundation	1,910
11-230-100-101-415	Guidance Salary - At Risk	1,910
11-230-100-101-415	SAC Salary - At Risk	1,910
20-280-100-101-415	Teacher Salaries - DFSCA	1,910
11-000-290-290-415	Principal Benefits - Foundation	1,910
11-000-290-290-415	Teacher Benefits - Foundation	1,910
11-130-100-101-415	Teacher Salaries - Foundation	1,910
11-140-100-101-415	Teacher Salaries - Foundation	1,910
11-230-100-101-209	Teacher Salaries - At Risk	1,910
		$19,105

School-Team (Site-Based) Planning Allocation

Rationale: $215,600 is budgeted which is a $55,600 increase which is excessive, so reduction of $15,600 is recommended.

11-190-100-800-506	School Site-Team Allocation	$15,600

Capital Outlay

Rationale: Recommend reduction of $100,000 for purchase of computers for use by administrative personnel and general business use by the Board.

12-XXX-XXX-73X	Computers	$100,000
	TOTAL REDUCTIONS	$142,500

Again, it must be noted that the individual reduction total $142,838 because of Council's error in the first category of reductions, but the amount listed here of $142,500 is the total amount by which Council reduced the tax levy and under appeal in this matter.

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

In this instant matter, the record on documentation submitted indisputably reflects the failure of Council to submit correctly and timely the required materials pursuant to N.J.A.C. 6:24-7.6 et seq. This neglect by Council, however, does not eliminate the burden on the Board to justify the necessity for the funds under appeal to provide a thorough and efficient system of education.

Mindful, then, of the balance to be applied in the standard of review, the Commissioner makes the following determination with respect to the reduction in the General Fund tax levy effectuated by Council.

Program	Reduction
Early Childhood Education	$7,795

The Council cites this as a non-mandated program and recommends a reduction of $7,795 to the budgeted amount for this program. As noted above, the individual line item reductions listed by the Council total $8,133, not $7,795. The Board argues that, as a designed "Special Needs District," it is required by N.J.A.C. 6:8-9.1 et seq. to develop annually an Educational Improvement Plan (EIP) which must, among other requirements, be adequately funded. The Board submits a notice which indicates that "a minimum of $1,481,369" must be budgeted to implement the district's EIP. (See October 19, 1993 Position Statement, Schedule C.) The Board also submits the approved plan which includes eight objectives for a total budgeted cost of $1,880,141. Objective 1 provides for the Early Childhood Program with a budgeted cost of $397,096. In addressing the individual line item reductions, the Board states that the salaries and benefits listed for reduction are prorated amounts of total salaries and benefits and are necessary to meet the contractual obligations of the Board. The Board questions the reductions relative to Chapter 1 funds since these federal entitlement moneys do not impact the local tax levy. The Board states that the equipment and instructional supplies included in this program are essential to meet the priorities of the program and to provide key materials. The Board also states that the consultant

fees included in this program are essential for staff development and are in response to the recommendations of the External Review Team. Council did not address the individual line items but stated the rationale for reduction in the program as in the above.

In reviewing the data presented, the Commissioner determines that the Council's basis for reductions is faulty since this program has been identified as an essential component of the district's EIP which is required by code. The Commissioner therefore orders the restoration of the $7,795 reduction.

Program	Reduction
Attitudes, Disposition, Etc.	$19,105

The Council states that this is a new program and that the reduction will provide sufficient funds for the first year. The Board again states this program area in part of the district's EIP as Objective 4 and is designed to provide an array of student support services to decrease the number of out-of-school suspensions and truancies. In addressing the individual line item reductions, the Board again states that the salaries and benefits listed for this program are prorated amounts of total salaries and benefits and are necessary to meet the contractual obligations of the Board. The Board also again questions the reduction of federal entitlement funds, DFSCA. The Board cites statistics on child abuse cases and juvenile court cases in Phillipsburg which, it asserts, verify the need for an expansion of student support services and programs. The Council again did not address individual line item reductions but stated, as noted above, that the overall reduction in this area was warranted because it is a new program.

The Commissioner finds it difficult to understand how the implementation of a new program is sufficient basis for reduction

without consideration of the necessity and potential value of that program. A critical factor in this issue is again that the program is an objective in the district's EIP which has been developed and approved because of district needs. The Commissioner finds that these funds are essential to the provision of a thorough and efficient educational system and orders the restoration of the reduction of $19,105.

Description	Reduction
School-Team Planning Allocation	$15,600

Council recommended a reduction in this area based on the rationale that the amount budgeted reflected an increase of $55,600 which it felt was excessive. The Board states that the original budgeted amount of $161,450 was mandated for building level improvement plans based on $50 per student and that the reduction would put the Board in violation of N.J.A.C. 6:8-9.4. The Board also states that the development of school-team planning is part of the district's EIP and therefore must be completed. It must be noted that the Board incorrectly identified this item as Objective 8 when it appears to be part of Objective 5.

The Commissioner determines that the funds for this item have been budgeted to address a need identified by the district as an objective in its EIP and approved upon review by the Warren County Superintendent and staff of the Division of Urban Education and Field Services. The Commissioner orders the restoration of the reduction of $15,600.

Capital Outlay	$100,000

Council states in its resolution that this reduction is for the purchase of computers for use by administrative personnel and

general business use by the Board. The Council adds in its Position Statement that there was no reduction for computers to be used by students. The Board states that the funds are necessary for two specific areas: (1) the administrative computer system for the mandated conversion to the GAAP accounting system and (2) student data software and equipment to provide a wide variety of student-related data. The Board notes that these proposed expenditures are in response to two specific recommendations of the External Review Team.

The Commissioner, in making a determination in this area, notes that it is recognized that the conversion to the GAAP accounting format was mandated for every school district with the realization that there would be some associated conversion expenses. The Commissioner also finds that other critical factors in this matter are the increasing enrollment in the district and the many district objectives regarding student behavior and academic performance. Based on these facts, the Commissioner determines that these funds are essential for the provision of a thorough and efficient educational system and orders the restoration of the reduction of $100,000.

Thus, for the reasons set forth above, the Commissioner determines to restore the entire $142,500 in the General Fund appealed herein, as summarized by program area in the chart below and to be applied to the 28 specific line items as reduced by Council:

Program	Reduction	Restored
Early Childhood Education	$ 7,795	$ 7,795
Attitudes, Disposition, Etc.	19,105	19,105
School-Team Planning Allocation	15,600	15,600
Capital Outlay - Computers	100,000	100,000
Total	$142,500	$142,500

Accordingly, the Warren County Board of Taxation is directed to make the necessary adjustments as set forth below to reflect a total of $6,311,450 to be raised in tax levy for General Fund purposes by the Town of Phillipsburg for the 1993-94 school year.

	General Fund
Tax Levy Certified by Council	$6,168,950
Restored by Commissioner - Defeated Budget	142,500
Total	$6,311,450

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 22, 1993

DATE OF MAILING - NOVEMBER 22, 1993

288-93

CITY COUNCIL OF THE CITY OF PATERSON, PETITIONER, V. STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

SYNOPSIS

City appealed General Fund tax levy certified by State District Superintendent and sought a reduction of $5,912,287 for 1993-94 school purposes.

Upon review of the appeal herein, Commissioner determined that City failed to demonstrate that entire amount budgeted was not necessary in order to provide a thorough and efficient system of education in the District. Commissioner found that the District needed full amount of $38,784,796 as originally projected and previously certified by the State District Superintendent.

NOVEMBER 22, 1993

CITY COUNCIL OF THE CITY OF PATERSON, PETITIONER, V. STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

Susan E. Champion, Esq., for Petitioner

Russell J. Schumacher, Esq., for Respondent

This matter was opened before the Commissioner by way of a Petition of Appeal filed on April 23, 1993 by the City of Paterson (City) seeking a reduction of the General Fund tax levy for school purposes in the City of Paterson of $5,912,287. On May 13, 1993 the State-Operated School District of the City of Paterson (District) filed its Answer to the Petition of Appeal. By way of joint request from the parties, two extensions were granted for the filing of position statements. Position statements were filed by the City and the District on August 31 and September 1, 1993, respectively. Replies to such statements were filed by the parties on September 10, 1993.

Pursuant to N.J.S.A. 18A:7A-52(a) the State district superintendent of a State-operated district is required to "***fix and determine the amount of money necessary to be appropriated for

the ensuing school year and *** certify the amounts to be raised by special district tax for school purposes *** to the county board of taxation and the amount or amounts so certified shall be included in the taxes assessed, levied and collected in the municipality or municipalities comprising the district.***"

Unlike other budget appeal processes in the State of New Jersey, it is the municipality which must appeal the determination of the amount necessary to be raised for school purposes setting forth those specific line items which it believes can be reduced without obstructing the district's ability to provide a thorough and efficient system of education. Based upon the statutory language summarized above, the City proposed the following tax levy reduction:

Tax Levy Certified By State District Superintendent		Amount of Tax Levy Proposed By Governing Body	
Current Expense:	$38,784,796	Current Expense:	$32,872,509
Capital Outlay:	-0-	Capital Outlay:	-0-

Amount of Proposed Reduction In Dispute before Commissioner

Current Expense: $5,912,287

In rendering judgment relative to budget appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education.

However, by way of the statutory scheme established for State-operated school districts, the Legislature has authorized the State district superintendent to fix and determine the amount of tax

levy necessary for the provision of a thorough and efficient system of education.

Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17, 22-37 and N.J.S.A. 18A:7A-52(a) has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies or, as in the instant matter, an appeal from a municiaplity seeking a reduction in the tax levy certified by a State district superintendent of a State-operated school district. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals the Commissioner must determine whether a district board of education, or in this case a municipality, has demonstrated that the amount by which a specific line item has been reduced is necessary for the provision of a thorough and efficient system of education.

In the instant matter, the City petitioned the Commissioner seeking reduction of the following specific line items, the reasons for which were included with the Petition of Appeal but which shall be delineated in detail elsewhere in this decision:

Account	Title	Budget	Recommended Reduction
110N	Other Administrative Expenses	$ 1,097,920	$ 66,936
120B	Legal Fees	300,000	50,000
130I	Expenses/Business Admin.	273,625	173,625
130M	Printing/Publishing	187,690	67,690
212	Salary Supervisors	3,091,343	422,970
213	Teachers' Salaries	64,271,849	2,006,810
214	Other Instructional Staff	9,623,269	299,430
220	Textbooks	2,207,956	257,500

Account	Title	Budget	Recommended Reduction
240	Supplies	2,628,151	650,000
250	Other Expenses, Instruction	1,241,119	250,000
650	Supplies/Operation of Plant	351,705	26,705
720	Contracted Servs./Maintenance	2,800,618	1,000,000
740	Maintenance of Plant	377,000	102,000
810	Employee Retirement Contrib.	2,347,901	5,064
820	Employee Insurance	23,388,900	8,000
830	Lease Purchase - Principal	1,093,057	8,057
900	Food Services	600,000	135,000
904	Basic Skills, Other Expenses	507,500	382,500
	Total Proposed Reductions		$5,912,287

CITY'S POSITION

Initially, the City argues that its actions in proposing reductions in the 1993-94 budget of the Paterson School District are in full conformity with Deptford, supra. The City acknowledges its cognizance of past deficiencies in the District and of the previous admonitions of the Commissioner against making expenditure comparisons with previous budgets of the local board of education. In this regard, the City contends that it has therefore limited its comparisons of previous expenditures to the 1992-93 budget prepared by the Superintendent under State operation.

The City submits that its decisions relative to the budget have been taken in full recognition of the District's status as a "special needs" district. However, its concern for the need to provide other citizen services should not be regarded as being politically motivated or inappropriate.

The City's line item-by-line item reasoning is set forth below:

Account	Reduction
110N - Other Administrative Salaries	$66,936

The salary involved here is that of the District ombudsman which position the City contends was budgeted for in 1992-93 but

never filled. The City claims that to budget for it in 1993-94 is duplicative since it was already included in the previous year's budget.

Additionally, the City argues $15,000 in this account is allocated for overtime payments to an Assistant State Superintendent whom the City claims should not be paid overtime for it is a management position.

Account	Reduction
120B - Legal Fees	$ 50,000

The City contends that of the $312,400 for legal fees budgeted in 1992-93 only $266,281 was expended with the remaining $46,118 being transferred to other line items.

130I - Expenses for Business Administrator	$173,625

The City points out that $61,539 was budgeted in this account for 1992-93 with only $29,342 actually expended. The City contends that an expenditure of $100,000 as it proposes would cover expenses and permit $75,000 for the purchase of the software which the Business Administrator contends is necessary.

130M - Expenses for Printing and Publication	$ 67,690

Once again the City contends that the District expended only $45,684 out of the amount of $116,838 budgeted for 1992-93. The City argues that no explanation is given by the District as to why it budgeted over 50% more than the 1992-93 budget which was not fully expended. The City argues that the District's history of overbudgeting in this account justifies its decision to request the reduction and will not adversely affect students.

Account	Reduction
212 - Supervisory Salaries	$422,970

The City contends that this account was overbudgeted by $400,000 in 1992-93. In reaching its proposed reduction, the City contends that it used the actual 1992-93 expenditure figure of $2,029,654 multiplied by a 7% raise. Allowing an additional $74,202 for the District's providing incentives brings the revised suggested appropriation to $2,245,931, over $400,000 less than budgeted by the District. The City claims that these calculations were based upon the District's own figures.

213 - Teachers' Salaries	$2,006,810

As in the previous account, the City contends it utilized the actual figures or expenditures in this account for 1992-93 ($53,158,309) x 7%. Additionally, the City contends it allowed $1,072,275 for incentives and additional compensation as well as $280,000 for 7 new teachers arriving at a total of $58,231,665, thus justifying the $2,006,810 reduction recommended in this account.

214 - Other Instructional Staff	$ 299,430

Once again, the City based its recommended reduction upon the actual expenditure of $8,357,349, which in this case was larger than the 1992-93 budgeted amount. Utilizing the same formula as above, the City multiplied the District's actual expenditure times a 7% raise plus $160,614 for incentives and $308,400 for new hires to reach a total proposed appropriation of $9,411,377.

220 - Textbooks	$ 257,500

The City contends that the actual expenditures in this account as of June 30, 1993 were $767,032 out of a revised budgeted amount of $1,761,024, approximately $1,000,000 less than

appropriated. Notwithstanding having overbudgeted by $1,000,000 the City points out that the District increased its 1993-94 appropriations to $2,207,956.

Upon inquiry the City contends it learned that $835,000 of the budgeted amount was for new math textbooks for grades 1-12. The City points out that utilizing the enrollment figures of 21,000 pupils in these grades the amount budgeted is $39.76 per book, an amount which it deems to be incredible for the lower grades. Upon further inquiry it learned that the actual range was from $20 to $35. Utilizing the above figures and a $27.50 average cost per book, the City concluded that the actual cost of the math textbooks for 21,000 students would be $577,500, thus justifying the $257,500 reduction proposed by the City.

The City urges the Commissioner to consider the $1,000,000 overbudgeting in 1992-93 and the inflated costs for the 1993-94 purchases of math textbooks.

Account	Reduction
240 - Supplies	$650,000

Once again the City compares the budgeted amounts for 1992-93 to the actual expenditures for that year even including what it claims to be a questionable encumbrance of $68,501 for testing materials. Even giving the District the benefit of the doubt concerning its 1992-93 expenditures, this account was overbudgeted by $600,000.

Despite such overbudgeting, the City contends no explanation has been provided by the District to explain the $500,000 increase in the 1993-94 budget.

Account	Reduction
250 - Other Expenses, Instruction	$250,000

The City argues that a review of 1991-92 and 1992-93 shows expenditures of $154,723 and $365,118, respectively, both significantly less than the amount appropriated.

Despite what it contends to be overbudgeting of almost $200,000 in 1992-93, the City points out that the District proposed an increase in its appropriations in this account of an additional $700,000 without any justification as to why such an amount was necessary.

650 - Supplies for Operation of Plant	$ 26,705

While the City acknowledges that the amount expended in 1992-93 was greater than the amount budgeted, the City contends that no explanation is provided as to why $113,000 was expended in April, May and June.

720 - Contracted Services/Maintenance	$1,000,000

As in the previous account, the City points out that expenditures in the months of April, May and June resulted in this account being underbudgeted for 1992-93 by almost $700,000. Such miscalculation by the District raises question as to the validity of budgeting in this account in the view of the City.

740 - Maintenance of Plant	$ 102,000

The City cites the following information:

Budget Year	Budgeted Amount	Expenditures
1991-92	$278,000	$223,879
1992-93	$390,700	$354,916
1993-94	$377,000	

Based upon the above-cited figures the City points out the tendency of the District to underexpend the amount budgeted. The

City once again questions the District's practice of making large expenditures in the last three months of the fiscal year thereby casting doubt on the validity of the budgeting process.

Account	Reduction
810 - Employee Retirement Contributions	$5,064

The reduction proposed here represents the social security and pension allocation for the Ombudsman's position which the city claims is duplicative.

820 - Employee Insurance	$ 8,000

The reduction represents insurance coverage for the Ombudsman position which the City claims is duplicative.

830 - Lease Purchase - Principal	$ 8,057

The City contends that the actual Lease Purchase Agreement payment of principal is $1,085,000 as reflected by the District's audit, thus it proposes reducing the amount appropriated in this account by the $8,057 difference.

900 - Food Services	$135,000

The City contends that this account was overbudgeted by $140,000 in 1992-93, yet the 1993-94 budgeted amount shows an additional increase of $135,000 over last year's budgeted amount. The City contends no explanation is provided for this increase.

904 - Basic Skills - Other Expenses	$382,500

The City contends that the District has disclosed that it has reduced its basic skills program by 67 teachers, thus the City has proposed reducing expenditures accordingly.

The amount budgeted in this account for 1992-93 was $483,225, yet only $124,096 was expended as of April 15, 1993. By the end of the year the actual expenditures in this account were

$368,206 with over $95,000 of the expenditures in the last 3 months being for teaching supplies and $97,000 for technical services. The City questions the expenditures of an such large amounts for services and supplies which would normally be purchased during the school year as needed.

DISTRICT'S POSITION

Initially, the District points out that the current expense budget for 1993-94 is $14 million under the amount permitted under the cap ban. It also argues that the City in reaching its conclusion as to the $5,912,287 proposed reduction in the 1993-94 budget relied solely upon the recommendations of its hired consultant, Dr. Frank Marlow, and did not discuss the itemized reductions at the special Council meeting at which it voted to appeal.

The District contends that the 1993-94 budget was developed under a zero-based budget approach which required justification for each individual line item. The District points out that the 1992-93 budget which was the first budget formulated under the District's State operation was the subject of an appeal by the City. The District notes that the Commissioner of Education by decision dated January 7, 1993 directed that 1992-93 budget not be reduced.

The District argues that the 1993-94 budget contains many appropriations in furtherance of objectives contained in its Corrective Action Plan (CAP), its Educational Improvement Plan (EIP), and the initiatives of Community task forces.

The District's general arguments conclude by pointing out that the Commissioner in her decision on the 1992-93 budget took note of the fact that in reviewing Paterson's budget, consideration

must be given to the District's special needs status and to the legislative mandate that special needs districts are required to annually increase expenditures so as to reach a point within five years equal to the average expenditures of the most affluent districts. Both the Commissioner and the State Board of Education, the District argues, have concluded that it is improper to rely solely upon previous year's expenditures in determining the amount necessary for a thorough and efficient system when dealing with special needs districts. The District argues that the City has the right to seek tax relief from the Department of Community Affairs pursuant to N.J.S.A. 18A:7A-52(b) if it believes that the school tax needs place an undue burden on the city.

The District's line item-by-line item position on the recommended reductions is set forth below:

Account	Reduction
110N - Other Administrative Salaries	$66,936

The District argues that the City is mistaken in its argument that no Ombudsman was hired in 1992-93 and therefore the amount for such position in 1993-94 is duplicative. The District points out that the position in question did exist for 1992-93 and will continue in 1993-94.

Further, the District contends that the overtime pay which the City mistakenly believed to be for the Assistant Superintendent is in fact for overtime for secretaries in that office.

120B - Legal Fees	$50,000

The District contends that the proposed reduction would leave it without sufficient funds to meet its legal obligations. The District argues that it employs only one attorney on its staff

and therefore requires outside legal counsel to meet all of its labor, personnel and other needs.

The District points out that it has been unsuccessful in obtaining renewal of it errors and omissions policies, thus necessitating providing its own outside counsel in defending itself against pending claims.

Account	Reduction
130I - Expenses for Business Administrator	$173,625

The District points out that it has been required to reorganize and correct many deficiencies in its business services. This reorganization has required additional expenditures to support the implementation of efficient business processes in finance, facilities, transportation and field services.

The District estimates the cost of the upgraded computer software and training to implement these new systems at $202,000 and points out that the remedial steps taken in this area are a major objective of the State-operated District.

130M - Expenses for Printing and Publishing	$ 67,690

The District contends that the sole basis for the recommended reduction in this account is the expenditures for 1992-93 without concern for the its needs in 1993-94.

The District points out that additional needs for 1993-94 include expenditures for the following:

1. $7,000 for a new procedures manual required under the CAP.

2. Increased opportunities for the Office of Public Information to meet a district objective of providing increased communications with parents, community and staff.

3. Printing and publication of the collective bargaining agreements with the District's five bargaining units.

4. Increased printing costs for bid specifications and public advertisements.

Account	Reduction
212 - Supervisory Salaries	$ 422,970

The District points out that based upon the actual number of positions in this category and the salaries for such positions as contained on page 18 of Exhibit D of the District's Position Statement, the total of such salary needs is $3,010,846.78.

213 - Teachers' Salaries	$2,006,810

Based upon its figures of the actual number of teachers as contained in Exhibit E, the District contends that its entire appropriation is justified and that it is unable to accept the reduction recommended by the City without the necessity of reducing staff.

214 - Other Instructional Staff	$ 299,430

As in the above salary accounts, the District relies upon the actual salaries listed in Exhibit F of its position statement.

220 - Textbooks	$ 257,500

The District contends that Dr. Marlow's speculation as to the cost of textbooks, workbooks and teachers' materials is without merit in that it has already expended the $835,000 appropriated for the purchase of the new mathematics materials.

240 - Supplies	$ 650,000

The District contends that the sole basis for the City's recommended reductions in this account is its analysis of expenditures in 1992-93 without reference to the needs of the District for 1993-94. This account, contends the District, includes expenditures for items such as $275,000 for new school desks and chairs, $240,000 for small instructional equipment which costs less

than $500 per unit. The District points out that new GAAP accounting procedures require equipment under $500 per unit to be included as supplies.

Further, the District argues that this account includes allocation for supplies for reading and math of $100,000 in furtherance of the CAP; task force needs in the amount of $5,100 and $240,000 for at-risk programs. These expenditures are detailed in Exhibit C of the District's Position Statement on pages 51-54.

Account	Reduction
250 - Other Instructional Expenses	$250,000

The District contends that it must budget for the various initiatives recommended by the task forces. Included within the 1993-94 budget in this account are over $600,00 for such initiatives.

650 - Supplies for Operation of Plant	$ 26,705

The District points out that the only justification presented by the City is the history of previous years' expenditures. The District points out that this account includes small equipment under $500 as required by GAAP principles as well as additional supplies for custodians to upgrade the school facilities in terms of health and appearance.

720 - Contracted Services	$1,000,000

Once again, the District points out that the City's recommendations are based exclusively upon past expenditures without consideration of future needs. The District contends that this account will be overexpended by year's end due to its need to spend in excess of $2,000,000 to replace decertified boilers. Further, the District contends that this account contains $500,000 to eliminate substandard rooms and $500,000 for health and safety remediation. (See Exhibit C, at pp. 42 - 43)

Account	Reduction
740 - Other Expenses for Maintenance of Plant	$102,000

Again, the District points out that the sole basis for the City's position is past history. The District contends that the reduction recommended by the City would impede the progress made in maintaining its schools which are deteriorating and antiquated structures.

810 - Employee Retirement Contributions	$ 5,064

Since the reduction here is the result of the City's erroneous assumption that the District failed to hire an Ombudsman in 1992-93, the District argues no reduction is justified.

820 - Employee Insurance	$ 8,000

The same argument is presented by the District in regard to this account since the reduction here is also based upon the erroneous assumption by the City in regard to the Ombudsman position.

830 - Lease Purchase - Principal	$ 8,057

The District points out that this account not only includes the payment of principal on the Lease Purchase Agreement but the repayment of a loan in the amount of $8,057 to the United States Environmental Protection Agency. Thus the reduction in this account is based upon error on the City's part.

900 - Food Services	$135,000

This account provides for anticipated deficits in the food services operation. While the District contends that the exact amount of the deficit is difficult to calculate it argues that the $600,000 appropriation for this contingency is reasonable based upon increased expenditures incurred by the District in enhancing its food services program and expanding of the offering of breakfast.

Account	Reduction
904 - Basic Skills, Other Expenses	$382,500

The District admits that it underexpended this account in 1992-93; however, it submits that such underexpenditure in 1992-93 does not justify a reduction in 1993-94. This includes an affidavit from Dr. Hoover, Assistant Superintendent for Curriculum, which alleges the underexpenditure was due to accounting error. This account, contends the District, is for materials and supplies; training and professional development of teachers; upgrading of the Basic Skills Instructional program computer lab and the purchase of software as learning tools; and purchase of equipment, materials and training for parents so that they may assist their children.

COMMISSIONER'S DECISION

The Commissioner has carefully reviewed the arguments of the parties in reference to the reductions recommended by the City in this appeal. As previously recited, appeals from the educational budget established under N.J.S.A. 18A:7A-52(a) relating to State-operated districts differ from budgetary appeals established under law for districts governed by elected or appointed boards of education. Pursuant to N.J.S.A. 18A:7A-52(a) it is the governing body rather than the board of education which must initiate the appeal. Further, it is the burden of the governing body to demonstrate that the appropriations established by the State District Superintendent in a State-operated school district are in excess of what is necessary for the provision of a thorough and efficient system of education. In meeting that difficult burden, the Commissioner is mindful of the finding of the State Board of

Education in Mayor and Council of the City of Jersey City v. State-Operated School District of the City of Jersey, 92 N.J.A.R. 2d (EDU) 474, wherein the Board stated:

> ***[G]iven this district's history of educational inadequacy and fiscal mismanagement which resulted in our decision to order the creation of a State-operated school district [cite omitted], we find that the historical spending patterns of this particular district cannot be used to conclude that amounts in its 1991-92 budget have been over-budgeted. Rather, in reviewing this district's budget, we must be particularly attentive to whether the District's financial resources will be sufficient to enable it to meet the educational needs of its students.*** (at 475)

While the Commissioner notes that the City in this matter seeks to distinguish its reasoning in this appeal from that of Jersey City, supra, and from its own unsuccessful budgetary appeal of the 1992-93 budget, City of Paterson v. State-Operated School District of the City of Paterson, decided January 7, 1993, on the grounds that the 1992-93 budgetary appropriations represented the first budget adopted by the State District Superintendent and thus represent a base point from which prior year appropriations can be used as a comparison, the Commissioner finds such reasoning without merit. To adopt such rationale presumes that the initial year's budget is capable of addressing both the myriad problems and deficiencies which prompted the State takeover and the fiscal underfunding which the New Jersey Supreme Court's decision in Abbott v. Burke, 119 N.J. 287 (1990) found to exist in the 30 special needs districts. As the District correctly points out in its position statement, the Quality Education Act of 1990 (N.J.S.A. 18A:7D-1 et seq.) seeks to provide a funding mechanism for special needs districts, such as Paterson, sufficient to enable those districts to achieve an expenditure level which shall reach a point within five

years equal to the average expenditures of the most affluent districts. Clearly, recommending reductions in the Paterson School District budget based solely on a comparison of the expenditure levels of the 1992-93 budget year with the 1993-94 appropriations without thorough examination of what those appropriations are for violates the admonitions of the Commissioner and the State Board of Education and the intent of both the QEA and the Supreme Court in Abbott, supra.

Consequently, the Commissicner finds and determines that the City has failed to meet its burden of demonstrating that the reductions recommended by it based solely upon prior year expenditure levels can be effectuated without impairing the District's ability to provide a thorough and efficient system of education. The line item accounts in which such reasoning is rejected are as follows:

Account	Title	Reduction
120B	Legal Fees	$ 50,000
130I	Expenses/Business Administrator	173,625
130M	Printing and Publication	67,690
240	Supplies	650,000
250	Other Expenses, Instruction	250,000
650	Supplies for Operation Plant	26,705
720	Contracted Services Maintenance	1,000,000
740	Maintenance of Plant	102,000
900	Food Services	135,000
904	Basic Skills, Other Expenses	382,500
	Total	$2,837,520

Account	Reduction
110N - Other Administrative Expenses	$ 66,936

The City concluded that the increase in this account was a result of the District's having duplicated the salary of an Ombudsman which it did not hire in 1992-93 but which position had been budgeted for in that year. Further, it concluded some $15,000

was allocated for overtime pay for an Assistant State Superintendent. The District has argued that both assumptions are in error and that the Ombudsman was hired and did serve in 1992-93 and that no duplication in salary existed. Further, the District points out that the overtime pay is for secretaries, not an assistant superintendent. In the absence of further demonstration by the City of a reason for reducing this line item account, the Commissioner rejects the recommended reduction of $66,936 in this account.

Account	Reduction
212 - Supervisory Salaries	$ 422,970

The District's figures as set forth in Exhibit D of its Position Statement by name and actual salary clearly demonstrate the need for the entire appropriation. The City's calculation based solely upon the previous year's appropriation multiplied by a 7% increase factor cannot refute the actual payroll. The recommended reduction of $422,970 is rejected.

213 - Teachers' Salaries	$2,006,810

The formula utilized by the City in recommending its reduction in this area is the same as that utilized above. The District's actual salary needs set down by teacher name and grade level is $64,271,849, over $2,000,000 more than that calculated by the City. The reduction of $2,006,810 recommended by the City is rejected.

214 - Other Instructional Staff	$ 299,430

As in the other salary accounts reduced by the City, the figures set forth by the District in Exhibit F demonstrate the need for the entire amount appropriated. The City's recommended reduction of $299,430 is rejected.

Account	Reduction
220 - Textbooks	$257,500

Based upon a review of the arguments presented by the City the Commissioner concludes that the City's position fails to consider the cost of related instructional materials such as workbooks, manuals and audiovisuals. Consequently, the City has failed to meet its burden and its recommended reduction of $257,500 is denied.

810 - Employee Retirement Contributions	$ 5,064

Inasmuch as the Ombudsman's position has been demonstrated to actually exist, a reduction of $5,064 as recommended by the City is not warranted and is therefore denied.

820 - Employee Insurance	$ 8,000

Since the recommended reduction in this account is based upon the City's erroneous assumption relative to duplication of the Ombudsman's salary, the recommended reduction of $8,000 in this account for that individual's insurance coverage is denied.

830 - Lease Purchase - Principal	$ 8,057

While the City questions the budgeting for repayment of a loan to the Environmental Protection Agency in this account, it does not question or rebut the existence of such a loan. The City's recommended reduction of $8,057 is rejected.

In conclusion, the Commissioner finds and determines that the City of Paterson has failed in its burden to demonstrate that the entire amount budgeted by the State-operated School District of the City of Paterson was not necessary to provide a thorough and efficient system of education to the pupils of Paterson. The

Commissioner further finds and determines that for the 1993-94 school year the School District of the City of Paterson is in need of the full $38,784,796 as originally projected and previously certified by the State District Superintendent.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 22, 1993

DATE OF MAILING - NOVEMBER 22, 1993

289-93

BOARD OF EDUCATION OF THE BOROUGH OF BLOOMSBURY,

PETITIONER,

V.

MAYOR AND COUNCIL OF THE BOROUGH OF BLOOMSBURY, HUNTERDON COUNTY,

RESPONDENT.

IN THE MATTER OF THE CAP WAIVER APPEAL OF THE BOROUGH OF BLOOMSBURY SCHOOL DISTRICT, HUNTERDON COUNTY.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of $32,092 made by governing body following voter rejection of proposed budget on April 20, 1993.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore $8,039.

Board also appealed General Fund cap waiver in the amount of $22,354 rejected by voters.

Upon review of the record, Commissioner determined to order the increase of $22,354 in cap waiver monies for a total General Fund tax levy of $783,244 for 1993-94 school year.

NOVEMBER 22, 1993

BOARD OF EDUCATION OF THE BOROUGH OF BLOOMSBURY, PETITIONER, V. MAYOR AND COUNCIL OF THE BOROUGH OF BLOOMSBURY, HUNTERDON COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION
IN THE MATTER OF THE CAP WAIVER APPEAL OF THE BOROUGH OF BLOOMSBURY SCHOOL DISTRICT, HUNTERDON COUNTY.	:	

Richard Dieterly, Esq. (Gebhardt & Kiefer, for Petitioner

William J. Caldwell, Esq. (Carter, Van Rensselaer & Caldwell), for Respondent

This consolidated matter was opened before the Commissioner on June 14, 1993 through the filing of a Petition of Appeal of a defeated budget by the Bloomsbury Borough Board of Education (Board) pursuant to the provisions of N.J.A.C. 6:24-7.4. The Board also included its defeated cap waiver in the Petition of Appeal. The Board sought restoration, on the grounds of necessity for a thorough and efficient education, of reductions by the Mayor and Council of Bloomsbury Borough (Council) following voter rejection on April 20, 1993 of the Board's proposed budget and cap waiver. Subsequent to the defeat, the Board and Council, pursuant to N.J.S.A. 18A:22-37

and N.J.A.C. 6:24-7.2(b)2, consulted on the defeated budget and the Council reduced the General Fund tax levy by $32,092. Consequently, the monies in contention in this consolidated matter are as set forth below:

Proposed Tax Levy Adopted By Board of Education		Amount of Tax Levy Certified by Governing Body	
General Fund	$784,943	General Fund	$752,851
Cap Waiver	$ 22,354	Cap Waiver	$ -0-

Amount of Reduction By Governing Body		Amount of Reduction in Dispute Before the Commissioner	
General Fund	$32,092	General Fund	$32,092
Cap Waiver	$22,354	Cap Waiver	$22,354

On June 18, 1993, a letter was received from the Hunterdon County Superintendent of Schools stating that a compromise had been reached between the Board and Council regarding the budget reduction of $32,092, with both parties accepting the reduction of $24,053 and restoration of $8,039. The Hunterdon County Superintendent stated that he objected to the reductions and believes that the restoration of the entire $32,092 and $22,354 cap waiver monies are essential for the district to provide a thorough and efficient educational system. The Director of the Bureau of Controversies and Disputes wrote on June 22, 1993 to Board counsel stating that an appropriately amended petition must be filed if such an agreement with partial restoration of prior reductions had been certified by Council. A response from Board counsel was received on June 28, 1993 stating that no formal restoration of prior reductions had been made and that taxes were struck based on the total reduction. The Director of the Bureau of Controversies and Disputes in a letter of July 7, 1993 confirmed to Board counsel that, based on the representations proffered by him as an officer of the court, an

amended petition was not required. On July 29, 1993, Council submitted a letter advising that it would not participate in the appeal process.

As a result of the State Board of Education's July 7, 1993 decision in the Board of Education of the Borough of Rutherford v. Mayor and Council of Rutherford wherein the State Board ruled that decisions in defeated voter cap waiver appeals must determine whether or not reallocation within the district's maximum permissible budget is possible and whether and to what extent the specific programs at issue are essential in order to enable the Board to meet its constitutional obligation to provide a thorough and efficient system of education, a letter was sent to the parties by the Director of the Bureau of Controversies and Disputes informing them of the need to supplement the record to document the reallocation and cap waiver review conducted by the county superintendent pursuant to N.J.S.A. 18A:7D-27. The county superintendent was accorded thirty (30) days from receipt of the letter to submit a sworn affidavit setting forth an explanation and documentation of that review, including the bases for concluding that (1) reallocation within the district's maximum permissible budget for the 1993-94 school year was not possible and (2) the specific programs at issue were essential for the Board to provide a thorough and efficient system of education to its students.

The governing body and Board were provided twenty (20) days from receipt of the county superintendent's submission to file a response thereto.

The county superintendent's affidavit and supportive documentation was received on September 3, 1993.

A Position Statement was filed by the Board on September 8, 1993. In this Statement, the Board notes that an agreement was reached with Council to accept reductions for Health Services and Benefits and seek restoration, with no objection by Council, for $8,039 for the preschool program. No additional documents were filed by either party, and the record of this consolidated matter was closed on September 27, 1993.

The specific reductions in the General Fund tax levy are as follows:

Account	Title	Rationale	Reduction
11-000-213-100	Salaries - School Nurse	Full-time nurse not required	$16,539
11-110-100-101	Preschool Kinder. Salaries of Teachers	Preschool program not warranted	8,039
11-000-290-290	Benefits	Achieve savings through competitive market	7,514
		TOTAL	$32,092

The cap waiver amounts under appeal are as follows:

Account	Title	Amount
11-110-100-101	Teacher Salaries - Pre K-K	$ 3,492
11-120-100-101	Teacher Salaries - Grade 1-5	9,221
11-130-100-101	Teacher Salaries - Grade 6-8	5,868
11-218-100-101	Teacher Salaries - Speech Instr.	3,773
	TOTAL	$22,354

DEFEATED BUDGET

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and

efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

In this particular matter, the budget review by and recommendations of the Hunterdon County Superintendent must also be carefully weighed since there is an objection to the position filed by the Board.

Mindful, then, of the balance to be applied in the standard of review, the Commissioner makes the following determination with respect to the reduction in the General Fund tax levy effectuated by Council.

Account	Reduction
11-000-213-100 - Salaries - School Nurse	$16,539

The proposed budget included funds to increase nursing services from part-time to full-time. Council states that the part-time services provided prior to this proposed budget are sufficient. The Board in its Position Statement does not appeal

this item because of the compromise agreement with the Council. The Hunterdon County Superintendent in his affidavit stated that increased services of the school nurse were approved in the budget based on the district superintendent's concern regarding the increase in life-threatening student conditions such as asthma and various allergic reactions. He also noted that regulations require that all medicines be administered by a certified school nurse and, in the absence of the nurse in Bloomsbury, this duty is assumed by the superintendent and/or school secretary.

This issue was a difficult one to resolve, since statute and code mandate very specific health and safety services for students but do not require a full-time nurse in each building. Moreover, the advantages of full-time nursing services, as approved by the Hunterdon County Superintendent, are indisputable. However, it is clear that the Board has chosen to retreat from its previously proffered position espousing the necessity for increasing the nurse's time. When coupling this with the fact that the projected on-roll population is only 125 pupils and given the Board's about-face on the need for the monies, the Commissioner cannot make an independent finding to restore the monies. It is thus determined that the reduction of $16,539 will be sustained.

Account	Reduction
11-110-100-101 - Preschool/Kindergarten Salaries of Teachers	$8,039

Council in its resolution stated that this reduction was based on its determination that a taxpayer supported preschool program is not warranted or required by law and that ample facilities exist within the community to meet this need. As noted above, Council apparently agreed informally at a later date to the

In summary, upon review of the documentation submitted on this matter, the Commissioner finds and determines that the $22,354 in cap waiver monies sought by the Board are essential for the district to provide a thorough and efficient educational system and that reallocation of funds within the district's maximum permissible budget is not possible. (Board of Education of the Borough of Rutherford v. Mayor and Council of Rutherford, Bergen County, decided by State Board of Education, July 7, 1993.)

Accordingly, the Hunterdon County Board of Taxation is directed to make the necessary adjustments as set forth below to reflect a total of $783,244 to be raised in tax levy for General Fund purposes by the Borough of Bloomsbury for the 1993-94 school year.

	General Fund
Tax Levy Certified by Council	$752,851
Restored by Commissioner (Defeated Budget)	8,039
Cap Waiver Ordered by Commissioner	22,354
TOTAL	$783,244

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 22, 1993

DATE OF MAILING - NOVEMBER 22, 1993

290-93

BOARD OF EDUCATION OF THE TOWNSHIP OF MILLSTONE,

PETITIONER,

V.

TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MILLSTONE, MONMOUTH COUNTY,

RESPONDENT.

- - - - - - - - - - - - - - - - - -

IN THE MATTER OF THE CAP WAIVER APPEAL OF THE MILLSTONE TOWNSHIP SCHOOL DISTRICT, MONMOUTH COUNTY.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of $172,490 made by governing body following voter rejection of proposed budget on April 20, 1993.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore $172,490.

Board also appealed General Fund cap waiver in the amount of $593,956 rejected by voters.

Upon review of the record, Commissioner determined to order the increase of $593,956 in cap waiver monies for a total General Fund tax levy of $7,347,199 for 1993-94 school year.

NOVEMBER 22, 1993

BOARD OF EDUCATION OF THE TOWNSHIP OF MILLSTONE,

PETITIONER,

V.

TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MILLSTONE, MONMOUTH COUNTY,

RESPONDENT.

IN THE MATTER OF THE CAP WAIVER APPEAL OF THE MILLSTONE TOWNSHIP SCHOOL DISTRICT, MONMOUTH COUNTY.

COMMISSIONER OF EDUCATION

DECISION

William R. Mayer, Esq. (Cohen, Shapiro, Polisher, Shiekman & Cohen), for Petitioner

James E. Madden, Esq. (Lomurro, Davison, Eastman & Munoz, P.A.) for Respondent

This consolidated matter was opened before the Commissioner on June 11, 1993 through the filing of a Petition of Appeal of a defeated budget by the Millstone Township Board of Education (Board) pursuant to the provisions of N.J.A.C. 6:24-7.4. The Board also filed on June 11, 1993 a Petition of Appeal of its defeated cap waiver. The Board sought restoration, on the grounds of necessity for a thorough and efficient education, of reduction by the Millstone Township Committee (Township) following voter rejection on April 20, 1993 of the Board's proposed budget and cap waiver.

Subsequent to the defeat, the Board and Township, pursuant to N.J.S.A. 18A:22-37 and N.J.A.C. 6:24-7.2(b)2, consulted on the defeated budget and the Township reduced the General Fund tax levy by $172,490. Consequently, the monies in contention in this consolidated matter are as set forth below:

Proposed Tax Levy Adopted by Board		Amount of Tax Levy Certified by Governing Body	
General Fund	$6,753,243	General Fund	$6,580,753
Cap Waiver	593,956	Cap Waiver	-0-
Amount of Reduction By Governing Body		**Amount of Reduction In Dispute Before Commissioner**	
General Fund	$172,490	General Fund	$172,490
Cap Waiver	593,956	Cap Waiver	593,956

On June 21, 1993, the Township submitted its Answer to both Petitions. Position Statements on both matters were filed by the Board on July 9, 1993 and by the Township on July 16, 1993. A summation was filed by the Board on July 30, 1993.

As a result of the State Board of Education's July 7, 1993 decision in Board of Education of the Borough of Rutherford v. Mayor and Council of Rutherford wherein the State Board ruled that decisions in defeated voter cap waiver appeals must determine whether or not reallocation within the district's maximum permissible budget is possible and whether and to what extent the specific programs at issue are essential in order to enable the Board to meet its constitutional obligation to provide a thorough and efficient system of education, on August 10, 1993 a letter was sent to the parties by the Director of the Bureau of Controversies and Disputes informing them of the need to supplement the record to document the reallocation and cap waiver review conducted by the county superintendent pursuant to N.J.S.A. 18A:7D-27. The county

superintendent was accorded thirty (30) days from receipt of the letter to submit a sworn affidavit setting forth an explanation and documentation of that review, including the bases for concluding that (1) reallocation within the district's maximum permissible budget for the 1993-94 school year was not possible and (2) the specific programs at issue were essential for the Board to provide a thorough and efficient system of education to its students.

The governing body and Board were provided twenty (20) days from receipt of the county superintendent's submission to file a response thereto.

The county superintendent's affidavit with supportive documentation was received on September 13, 1993. No additional documents were filed by either party and the record of this consolidated matter was closed on October 4, 1993.

The specific reductions in the General Fund tax levy are as follows:

Account No.	Title	Rationale	Reduction
11-000-230-331	Legal Services	Based on 1992-93 expenditures and no referendum	$ 25,000
11-000-270	Salaries for Pupil Transp.	No need for two new drivers	13,300
11-000-270-600	Supplies and Materials	Based on 1992-93 expenditures	21,000
11-000-270-511	Contracted Services	Faulted student enrollment projections	21,000
11-000-260-100	Salaries for Custodians	No need for additional half-time employee	11,000

Account No.	Title	Rationale	Reduction
12-000-270-733/ 734	Purchase of Vehicles	Faulted student enrollment projections	31,190
11-000-230-590	Other Purchased Services	Faulted student enrollment projections	40,000
11-000-290-290	Other Employee Benefits	Proposed reduction of staff	10,000
		TOTAL	$172,490

The cap waiver amounts under appeal are as follows:

Additional Teachers - Grades 1-5	$112,380
Additional Teachers - Grades 6-8	41,982
Additional Teacher - Resource Center	18,470
High School - Tuition Payback	184,725
High School - Additional Students	181,084
High School - Resource Room	55,315
TOTAL	$593,956

DEFEATED BUDGET

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East

Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

Mindful, then, of the balance to be applied in the standard of review, the Commissioner makes the following determination with respect to the reduction in the General Fund tax levy effectuated by the Township.

Account	Reduction
11-000-230-331 - Legal Services	$25,000

The Township based this reduction on its determination that 1992-93 expenditures in this area were only $13,210 and its belief that there was no referendum scheduled in 1993-94 and thus there was no need for budgeted legal fees for that item. The Board states that the actual amount spent in 1992-93 for legal fees was $44,923 and that $40,000 was budgeted for 1993-94.

Since legal fees are very often essential to the operation of a school district and since the Board has certified that the amount budgeted in 1993-94 is less than the 1992-93 expenditures, the Commissioner orders the restoration of the $25,000 reduction.

11-000-270 - Salaries for Pupil Transportation $13,300

The Township states that two additional bus drivers included in the 1993-94 budget are not necessary because the Board's enrollment projections are faulty. The Township's position that the

Board increased the enrollment projection for 1993-94 over the 828 students estimated by the Board's consultant is accurate. However, this increase is warranted, since the Board certifies that the enrollment as of July 30, 1993 was 868, with additional enrollment anticipated prior to the opening of school. Even without any additional enrollment, the certified enrollment of 868 represents an increase of more than 11% over the prior year.

The Commissioner determines that the Board has justified the need for two additional bus drivers based on increased enrollment and orders the restoration of the $13,300 reduction.

Account	Reduction
11-000-270-600 - Supplies and Materials	$21,000

The Township based this reduction on 1992-93 expenditures which it states for gasoline and replacement parts totalled $57,271. It reduced what it states is the budgeted figure of $90,000 by $21,000 to $69,000. The Board states that the Township did not consider the last three months of the school year expenses for fuel consumption and vehicle use which are traditionally higher toward the end of the school year due to field and athletic trips. The Board states that $90,104 was spent in 1991-92 for this account, and $89,294 was spent in 1992-93. There is some discrepancy over the amount budgeted for this account, since the amounts listed by the Township total $90,000. The Board's Position Statement has a figure of $81,000, and the 1993-94 budget has $102,000 for this line item. However, a reduction of $21,000 from even the greater number of $102,000 would leave a balance less than the amount spent in the two prior years. Based on this fact, the Commissioner orders the restoration of the $21,000 reduction.

Account	Reduction
11-000-270-511 - Contracted Services	$21,000

The Township reduced this line item because of its belief that the Board had faulty student enrollment projections. The Board states that these funds are necessary for private bus contractors to cover routes unable to be maintained by the in-house operation and are essential based on projected student enrollment.

Since it has been determined previously that the district's student enrollment has increased significantly and is greater than that assumed by the Township, the Commissioner orders the restoration of the $21,000 reduction.

11-000-260-100 - Salaries for Custodians	$11,000

The Township states that the additional half-time custodian proposed in the 1993-94 budget is unnecessary because the very little increase in the areas to be maintained can be accomplished with the current personnel. The Board argues that the position is necessary because of the addition of four portable classrooms.

It is indisputable that the proper care and maintenance of school facilities are essential to the health and safety of students and the provision of a thorough and efficient educational system. It is determined that the additional classes do warrant the addition of a part-time custodian. The Commissioner orders the restoration of the $11,000 reduction.

12-000-270-733/734 - Purchase of Vehicles	$31,190

The Township states that the purchase of additional vehicles is based on faulty enrollment projections and is therefore unnecessary. The Board states these funds were budgeted for a lease on a van for special education students and the purchase of two new

buses and that these vehicles are needed to accommodate the projected student enrollment.

Again, since it has been determined previously that the district's student enrollment has increased significantly, the Commissioner orders the restoration of the $31,190 reduction.

Account	Reduction
11-000-230-590 - Other Purchased Services	$40,000

The Township based its reduction in this area on faulty enrollment projections. The Board states that the increase in this account is not due to enrollment projections but is necessary because of the transition in accounting principles from the single - entry accounting style to the GAAP accounting format.

The conversion to the GAAP accounting format was mandated for every school district with the realization that there would be some associated conversion expenses. Based on this fact and the Township's erroneous basis for the reduction, the Commissioner orders the restoration of the $40,000 reduction.

11-000-290-290 - Other Employee Benefits	$10,000

This reduction by the Township was based on the savings in benefits that would result from its proposed reduction in staff. Since it has been determined above that the proposed reduction in staff is not reasonable based on the data presented, the Commissioner orders the restoration of the $10,000 reduction.

Thus, for the reasons set forth above, the Commissioner determines to restore the entire $172,490 in the General Fund appealed herein, as summarized by the chart below:

Account No.	Title	Reduction	Restored
11-000-230-331	Legal Services	$ 25,000	$ 25,000
11-000-270	Salaries for Pupil Trans.	13,300	13,300
11-000-270-600	Supplies and Materials	21,000	21,000
11-000-270-511	Contracted Services	21,000	21,000
11-000-260-100	Salaries for Custodians	11,000	11,000
12-000-270-733/ 734	Purchase of Vehicles	31,190	31,190
11-000-230-590	Other Purchased Services	40,000	40,000
11-000-290-290	Other Employee Benefits	10,000	10,000
	TOTAL	$172,490	$172,490

CAP WAIVER

The Board had presented to the voters a cap waiver in the amount of $593,956 for additional teachers in the district and tuition and resource room expenses to be paid to the receiving high school. In his letter of March 23, 1993, the county superintendent informed the Board that, as a result of the budget review, the 1993-94 budget received only conditional approval subject to the cap waiver proposal of $593,956, and that, if the cap waiver were rejected by the voters, the Board must file an appeal.

The Board had received a Commissioner's cap waiver pursuant to N.J.S.A. 18A:7D of $546,440, based on $436,256 for enrollment increases and $110,184 for special education increases. At the time the Commissioner's cap waiver was approved, the Board stated that the approved amount would not be sufficient to provide for the district's enrollment increase and that a voter cap waiver would be sought. This voter cap waiver was reviewed by the county superintendent and, as noted above, determined to be necessary for the provision of a thorough and efficient education. (See also September 10, 1993 Affidavit of County Superintendent and Requests, County Superintendent's Budget Review and Reallocation Analysis for Cap Waiver, March 9, 1993.)

The Board states that the projected enrollment increase in 1993-94 for grades 1-8 is 129 students. The Board also states that the transition from resource room to resource center will require increased periods to service special education students, and that it anticipates an increase of ten additional students in the resource center in 1993-94. The Board asserts that these factors necessitate additional teaching staff for grades 1-5, grades 6-8 and the resource center. Monies were included in the voter cap waiver for this additional teaching staff.

The Board further explains that 21 additional students are expected at the high school level which will increase the tuition obligation for the district. The Board also has a tuition payback charge for 1990-91 which is due in 1993-94. The Board states that monies were also necessary for resource room charges which will be billed per hour for an anticipated 25 students. Monies were included in the voter cap waiver for these high school tuition and resource room charges.

In summary, upon review of the documentation submitted on this matter, the Commissioner finds and determines that the record amply establishes that the $593,956 cap waiver monies sought by the Board are necessary because of significantly increased enrollment and essential for the district to provide a thorough and efficient educational system. The Commissioner also finds and determines, based on documentation submitted, that reallocation of funds within the district's maximum permissible budget is not possible. (Board of Education of the Borough of Rutherford v. Mayor and Council of Rutherford, Bergen County, decided by State Board of Education, July 7, 1993)

Accordingly, the Monmouth County Board of Taxation is directed to make the necessary adjustments as set forth below to reflect a total of $7,347,199 to be raised in tax levy for General Fund purposes by the Township of Millstone for the 1993-94 school year.

	General Fund
Tax Levy Certified by Council	$6,580,753
Restored by Commissioner (Defeated Budget)	172,490
Cap Waiver Ordered by Commissioner	593,956
TOTAL	$7,347,199

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 22, 1993

DATE OF MAILING - NOVEMBER 22, 1993

291-93

VINCENT J. BASILE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE PARK, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

NOVEMBER 23, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT
OAL DKT. NO. EDU 9243-93
AGENCY DKT. NO. 335-9/93

VINCENT J. BASILE,
Petitioner,
v.
ROSELLE PARK
BOARD OF EDUCATION,
Respondent.

Michael T. Barrett, Esq., for petitioner
(Bergman & Barrett, attorneys)

Stephen Glickman, Esq., for respondent
(Rudderman & Glickman, attorneys)

Record Closed: October 8, 1993 Decided: October 8, 1993

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

This matter was transmitted to the Office of Administrative Law on September 28, 1993 for hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.*. 52:14F-1 to -

13. The OAL held a hearing on petitioner's application for emergent relief on October 1, 1993.

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

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

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

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Oct. 4, 1993
Date

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

10/13/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 19 1993
Date

OFFICE OF ADMINISTRATIVE LAW

al

BERGMAN & BARRETT
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Skillman, New Jersey 08558
(609) 921-0512
Attorneys for Plaintiff

Oct 8 12 PM '93

VINCENT J. BASILE Petitioner, v. ROSELLE PARK BD. OF EDUCATION Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OAL DOCKET NO. 9243-93 AGENCY REFERENCE NO. 535-9/93 CONSENT ORDER

THIS MATTER having come before the Commissioner of Education, before the Office of Administrative Law, the Honorable Ken R. Springer, A.L.J. presiding, by way of the application of petitioner VINCENT J. BASILE, by and through his attorneys BERGMAN & BARRETT, Michael T. Barrett, Esq. appearing, and in the presence of respondent, the Roselle Park Board of Education, by and through their attorney, RUDDERMAN & GLICKMAN, Steven S. Glickman, Esq. appearing, and the parties having amicably adjusted their differences, the parties hereby stipulate and agree as follows:

1. The petitioner shall return to employment with the Roselle Park Board of Education as soon as possible, at his regular salary upon approval of this Consent Order by the Board of Education, Administrative Law Judge, Springer and the Commissioner of Education.

2. The parties shall agree upon the identity of and together appoint a psychiatrist who shall confer with and examine and monitor petitioner's condition on a periodic basis.

3. The date of the first examination shall be agreed to mutually by the physician and the parties and the dates of examinations, thereafter, shall be set by physician, and the petitioner agrees to adhere to this schedule as set by the physician.

4. Medical bills resulting from this treatment shall be submitted to petitioner's medical insurance carrier and any excess not covered by paid insurance shall be paid by the Board.

5. Should the physician chosen determine that petitioner is medically disabled from continuing to perform his duties as an employee of the Roselle Park Board of Education, petitioner shall agree to resign from employment and join the Board of Education in filing for a disability retirement.

6. The petitioner agrees to waive any physician-patient privilege associated with this monitoring and agrees that the Board of Education is entitled to review records and reports emanating from this monitoring.

7. The Board agrees to pay petitioner 50% of all petitioner's back wages from the date he was last paid until the date of his reinstatement.

8. During the pendancy of this agreement, the Board shall not be foreclosed from pursuing any other legal remedies against the petitioner should there be an appropriate legal basis for same.

9. Both parties agree to pay their own counsel fees and the costs of this application.

Ken R. Springer

KEN R. SPRINGER, A.L.J.

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

MICHAEL T. BARRETT

STEVEN S. GLICKMAN

OAL DKT. NO. EDU 9243-93

VINCENT J. BASILE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE PARK, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

NOVEMBER 23, 1993

DATE OF MAILING - NOVEMBER 23, 1993

292-93

IN THE MATTER OF THE TENURE :
HEARING OF JEFFRON CROCKETT, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF : DECISION
PASSAIC, PASSAIC COUNTY. :

SYNOPSIS

Board certified tenure charges of other just cause (excessive absenteeism) against respondent, tenured custodian in Board's employ.

ALJ concluded Board proved that charges of excessive absenteeism existed. Moreover, respondent chose not to defend against these charges. ALJ ordered respondent dismissed from his position as custodian pursuant to N.J.S.A. 18A:6-10.

Commissioner adopted findings and determination in initial decision.

NOVEMBER 23, 1993

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9752-92
AGENCY DKT. NO. 503-11/92

IN THE MATTER OF THE TENURE HEARING OF JEFFRON CROCKETT, SCHOOL DISTRICT OF THE CITY OF PASSAIC, PASSAIC COUNTY.

Matthew J. Michaelis, Esq., for petitioner

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

Record Closed: September 21, 1993 Decided: October 12, 1993

BEFORE **MARYLOUISE LUCCHI-McCLOUD,** ALJ:

This matter concerns tenure charges brought against the respondent, Jeffron Crockett, which were certified by Dr. Henry J. Lee, Secretary of the Passaic Board of Education, on November 18, 1992. An answer was filed by the respondent on December 10, 1992. The matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13 on December 15, 1992. On March 2, 1993 the matter was transmitted to Mumtaz Bari-Brown, ALJ, and was set down for a prehearing on March 9, 1993. After the prehearing the matter was set down for hearing on September 21 and 22, 1993. Prior to the time of the hearing the matter was transferred to Marylouise Lucchi-McCloud, ALJ for disposition on the hearing date. On September 21, 1993 a hearing took place at the OAL, 185 Washington Street, Newark, New Jersey. At this time, the respondent, Jeffron Crockett did not appear

to contest the tenure charges against him although counsel for respondent did appear. As a result the school board put in its proofs and the record closed.

ISSUE

The question in this case is whether or not the charges against Jeffron Crockett, a tenured custodian in the Passaic Board of Education's employ, can be sustained. The charges as outlined are for excessive absenteeism and the Board requests the discharge of respondent. This request is made pursuant to *N.J.S.A.* 18A:17-3 and *N.J.S.A.* 18A:6-10.

UNCONTESTED FACTS

At the time of the hearing respondent did not appear to contest the charges. Notice had been sent by the Office of Administrative Law as well as certified mail by his attorney (R-1). During the hearing the school board presented documents which show the period of time for which the respondent was absent. Those documents (P-1 through 4) were admitted into evidence without objection. Those documents reveal the following:

Year	Personal Illness Days	Leave of Absence Days	Total
1979-80	16		16
1980-81	16		16
1981-82	18-1/2		18-1/2
1982-83	15-1/2		15-1/2
1983-84	23-1/2		23-1/2
1984-85	28		28
1985-86	14-1/2		14-1/2
1986-87	18-1/2		18-1/2
1987-88	54-1/2		54-1/2
1988-89	33	64	97
1989-90	52-1/2		52-1/2
1990-91	37	31	68
1991-92	26	55	81
1992-93 (Through June 22, 1993)	37	52	89

For that period of time ending June 22, 1993 the respondent had a total of 390-1/2 personal illness days and 202 leave of absence days, making a total of 592-1/2 days absent for the period from 1979 until June 1993.

From the time period of June 22, 1993 on the respondent has been on leaves of absence continuously, making an additional 41 days of absence through the date of the hearing. This brings the current total as of the date of the hearing to 633-1/2 days of absence during 14 school years of employment.

At the time of the hearing, due to the fact that respondent did not appear, no evidence was presented contrary to the number of absences which the school board has indicated. In addition to the respondent having received notice it should also be noted that attorney for respondent indicated on the record, as well as through his letter to respondent (R-1), that his client also failed to appear in his office for a meeting prior to the hearing on September 14, 1993. Counsel's letter indicated that a failure to appear at the hearing would result in the respondent's abandoning his rights to defend against the tenure charges which could result in his dismissal as a school custodian.

DISCUSSION

The Commissioner of the Department of Education has jurisdiction to hear and determine controversies and disputes arisIng under the school laws. *N.J.S.A.* 18A:6-9. Every public school janitor of a school district shall, unless appointed for a six-year term, hold his office, position or employment under tenure under good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except as a result of a reduction of the number of janitors in the district or except for neglect, misbehavior or other offense, pursuant to the manner prescribed in *N.J.S.A.* 18A:6-10. *N.J.S.A.* 18A:17-3.

No person shall be dismissed if he is under tenure of office, position or employment in a public school system except for inefficiency, incapacity, unbecoming conduct, "or other just cause." Such action can only be taken after a hearing pursuant to applicable statutory provision, after written charges of the cause of complaint. *N.J.S.A.* 18A:6-10.

In this case, the respondent has chosen not to defend against the charges against him of excessive absenteeism. At the time of the hearing the petitioning school board provided proofs that in a 14-year period of employment the

respondent has been absent a total of 633-1/2 days. The question in this case whether or not that constitutes excessive absenteeism and if so, is dismissal appropriate. While there is no specific and clear cut delineation of when absenteeism becomes excessive, it is clear in this case when looking at a totality of the circumstances that 633-1/2 days absent in a 14-year period is extraordinarily high. Another important factor to be looked at is the pattern of these absences. In this case in the initial years the absence rate was lower than it is in the most recent years. In the 1992-93 school year, as of the date of the hearing, the respondent had amassed 130 days absent. The rate of absence over the years has gradually increased to an unmanagable level.

The question here is not whether or not the absences were excused or by way of granted leaves of absence, but instead, whether or not excused, the question turns upon whether or not the school district is adversely affected by these absences. In previous cases high absenteeism has been deemed sufficient grounds for disciplinary action even with the existence of legitimate medical excuse. *Montville Township Education Association v. Board of Education of the Township of Montville*, OAL Dkt. No. EDU 8247-83, Commissioner's Decision at 10 (April 16, 1984); *Angelucci v. West Orange Board of Education*, 180 S.L.D. 1066. In this case the respondent has had a significant period of time in which to improve his attendance. Apparently he has been unable to do so and his absence pattern has increased year by year. It is now at the point when respondent is not present at work for extraordinarily high amounts of time. During these periods of time it is necessary for the board of education to obtain other individuals to take on the respondent's job responsibilities. Although this is not a case of a teacher, where absence causes an interruption of teaching continuity, custodians are necessary to the efficient running of any school. To have to obtain other individuals to do Mr. Crockett's job on an almost ongoing basis does not contribute to the efficient running of a school system.

CONCLUSION

Based upon the foregoing, I **CONCLUDE,** that respondent has waived his right to defend against the tenure charges of excessive absenteeism posed in this case. I further **CONCLUDE** that both the number of absences as well as the pattern of absences in this case clearly and convincingly establishes the charge of excessive

absenteeism. I further **CONCLUDE** that just cause exists as delineated in *N.J.S.A.* 18A:6-10 for the dismissal of Jeffron Crockett, a tenured custodian with the Passaic public schools.

ORDER

It is hereby **ORDERED** that Jeffron Crockett, a tenured custodian with the Passaic schools, be and hereby is dismissed from his position as a custodian pursuant to *N.J.S.A.* 18A:6-10.

I hereby **FILE** my Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

10/12/1993
Date

MARYLOUISE LUCCHI-McCLOUD, ALJ

Receipt Acknowledged:

10/14/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 19 1993
Date

OFFICE OF ADMINISTRATIVE LAW

am

APPENDIX

Witnesses

For petitioner:

None

For respondent:

None

Evidence

P-1 Statement of personal illness days and leaves of absence for Jeffron Crockett, September 1, 1979 through June 22, 1993

P-2 June 15, 1993 (page 2) listing of leaves of absence for Jeffron Crockett from May 17, 1993 to July 31, 1993

P-3 Leave days for Jeffron Crockett from May 19, 1993 through September 21, 1993

P-4 September 20, 1993 (page 3) leaves of absence for Jeffron Crocket from August 30, 1993 through December 31, 1993

R-1 Copy of letter dated September 15, 1993 from Louis P. Bucceri to Jeffron Crockett and certified mail return receipt (copy) P 261 704 1023

IN THE MATTER OF THE TENURE	:	
HEARING OF JEFFRON CROCKETT,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
PASSAIC, PASSAIC COUNTY.	:	

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

Upon review, the Commissioner concurs with the ALJ that just cause exists for respondent's dismissal pursuant to N.J.S.A. 18A:6-10 and N.J.S.A. 18A:17-3, in that the Board has demonstrated a clear pattern of excessive absenteeism and respondent has waived, by his conduct during the instant proceedings, his right to defend against the Board's charge.

Accordingly, the initial decision of the Office of Administrative Law is affirmed for the reasons expressed therein and respondent is dismissed from his tenured employment as of the date of this decision.*

IT IS SO ORDERED.

NOVEMBER 23, 1993

COMMISSIONER OF EDUCATION

DATE OF MAILING - NOVEMBER 23, 1993

* To avoid any potential confusion, the Commissioner notes that in the initial decision's discussion of N.J.S.A. 18A:17-3 at p. 3 above, the phrase "six-year term" should read "fixed term."

293-93

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

PETITIONER,

V.

NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Board contested New Jersey State Interscholastic Athletic Association's decision (NJSIAA) to exclude Elmwood Park football team from State Football Play-offs. Board sought Emergent Relief declaring that NJSIAA's power point penalty due to an opponent's forfeiture of football games because of use of ineligible player was void, declaring that exclusion of petitioner from State Play-offs was void and ordering NJSIAA to schedule a semi-final play-off game between Elmwood Park and Ridgefield Park. At oral argument, petitioner sought alternative relief of cancelling the Thanksgiving Day football games of three schools, Elmwood Park, Ridgefield Park and Pascack Hills to allow for a runoff game between Elmwood Park and Pascack Hills.

Commissioner denied emergent relief finding Petitioner failed to meet the standards for such extraordinary remedy as established by Crowe v. DeGioia. On the merits of the matter, Commissioner upheld application of NJSIAA rules noting she will not upset Association's determination in the absence of patent arbitrariness. Commissioner also observed that Petitioner failed to make a showing of irreparable harm in that participation in extracurricular sports is a privilege not a right. (Burnside)

NOVEMBER 23, 1993

BOARD OF EDUCATION OF THE BOROUGH OF ELMWOOD PARK, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	

For Petitioner, Matthew P. DeMaria, Esq.
(James L. Plosia, Esq., Special Counsel)

For Respondent, Picco, Mack, Herbert, Kennedy, Jaffe & Yoskin (Michael J. Herbert, Esq., of Counsel)

For Intervenor, Fogarty & Hara (Rodney T. Hara, Esq., of Counsel)

This matter has come before the Commissioner of Education by way of Petition of Appeal with Motion for Emergent Relief filed by Petitioner on November 19, 1993 seeking a declaration that the New Jersey State Interscholastic Athletic Association's (NJSIAA or Association) imposition of a power point penalty due to an opponent's forfeiture of games is void; a declaration that NJSIAA's November 17, 1993 decision to exclude it from the State Football Play-offs is void, and an order compelling NJSIAA to schedule, as soon as practicable, a semi-final play-off game between it and Ridgefield Park. In the alternative, Petitioner seeks a runoff game between it and Pascack Hills to be played on Saturday, November

27, 1993, which game would necessitate cancellation of the scheduled Thanksgiving games.

By oral notice provided Respondent, oral argument on the Emergent Relief Motion was scheduled for November 22, 1993. Respondent was directed to submit its Answer and Reply Brief by the close of business on the same date, with a decision to be rendered on November 23, 1993. Pursuant to N.J.S.A. 18A:4-34, the Commissioner designated her authority to hear and decide this matter to Elena J. Scambio, Assistant Commissioner.

By faxed transmission received after the close of business on November 22, 1993, Pascack Valley Regional High School District sought and was granted Intervenor status in this matter. It had no previous knowledge of the oral arguments held earlier that day.

Citing Crowe v. DeGioia, 90 N.J. 126 (1982) for the standard applicable in a request for emergent relief, Petitioner's moving papers acknowledge in its filing that decisions of the Association, as a voluntary organization, are normally entitled to deference by the Commissioner, and will not be overturned absent arbitrariness or capriciousness. Petitioner contends it has met the standard. It claims, first, the harm to the students and community at large of Elmwood Park is a given, in that, without such relief, the football team will be denied an opportunity to participate in the State Football Play-offs, in that, the play-offs will be concluded by the middle of December.

It further submits it has a strong probability of ultimate success on the merits because NJSIAA's interpretation of the power ranking system is without support in the Association's own rules, because the decision to exclude Elmwood Park from the play-offs is

arbitrary and capricious and because it was made after the cutoff date for determination of eligibility in the State Play-offs, which was November 15, 1993.

Petitioner further argues that consistent with Crowe, supra, injunctive relief is appropriate because the material facts of this matter are not disputed: the Association has agreed through its counsel's letter of November 17, 1993 that it belatedly decided to exclude it from the play-offs based upon Paterson Catholic's forfeiture of previously played football games.

Petitioner adds that the public interest is served if it is permitted to participate in the State Play-offs in that such a determination would require the Association, which is voluntary, to administer its own regulations in a fair and reasonable manner, which Petitioner claims it has not done in this matter.

Finally, Petitioner argues that a weighing of the relative hardships favors Elmwood Park because no hardship will inure to the Association if it is directed to rescind its decision to exclude Elmwood Park from the State Football Play-offs. By contrast, Petitioner claims its plight is a "classic example of hardship" if relief is not granted. (Petitioner's Brief on Motion for Emergent Relief, at p. 11)

At oral argument, Petitioner recited its understanding of the chronology of events in this matter. First, it notes that NJSIAA widely circulated among its membership that the cutoff date for the announcement of teams in play-off football competition was November 15, 1993. It submits that on November 13, 1993 Pascack Hills and Elmwood Park both lost their football games. On Sunday, November 14, 1993 Elmwood Park was on notice of power points

sufficient for it to practice for and participate in play-off competition. On November 16, 1993 Elmwood Park became aware that Paterson Catholic, one of its rival teams, forfeited three games due to participation of an ineligible player in violation of NJSIAA rules. Petitioner advances that such forfeitures reduced Paterson Catholic's record from 5-3 to 4-4, but that it maintained its understanding from NJSIAA that Elmwood Park would remain in the play-off competition due to its power points and win-loss record. Thereafter, on November 16, 1993 Petitioner contends it was apprised that NJSIAA had recalculated the standings following discovery that Paterson Catholic's ineligible player had participated in a fourth game under a different shirt number, which resulted in a reduction of that school's standing to 3-5. Said recalculation eliminated both Paterson Catholic from play-off competition, because it's win-loss record was thus reduced to 3-5, as well as Elmwood Park because it lost an additional power point due to such forfeiture.

Based upon such factual recitation, Petitioner advanced two arguments on the merits of its case. First, Petitioner argued that no rule or regulation issued by NJSIAA exists that forfeiture of games by a team shall be calculated as losses for schools that played against the forfeiting in assessing power points. To do so, Petitioner submits, unfairly disadvantages the school playing against the forfeiting school. Petitioner suggests that the purpose of the play-off and eligibility rules is to punish those members of the Association who violate the rules, not innocent parties like Petitioner. Hence, it claims, the laudable purpose of establishing rules for the purpose of deterrence is not advanced by the play-off rule in contest herein, because a disincentive is created for schools such as Petitioner, which was penalized as an innocent party

through the subtraction of power points, merely for having played a football game against a team that forfeited due to the opposing team's having played an ineligible player. Petitioner submits that the power points subtracted from its record as a result of having played against a forfeiting team thus constitute arbitrary action on the Association's part.

Second, even assuming arguendo that the rules of the Association make plain that power points will be deducted from teams playing against a forfeiting team, and also assuming arguendo that such rule is not arbitrary and capricious, Petitioner submits that any such calculation could not have been done after the widely advertised cutoff date of November 15, 1993. Petitioner submits that the purpose of the cutoff date is to provide repose to the membership and also to provide for exchange of game tapes and practice time for teams selected for the play-offs. Petitioner submits that if the Association seeks to bend its own rules by extending the cutoff to take into account the discovery of violations by teams thereafter, it should accommodate Elmwood Park by permitting it to participate in the play-offs because it did no wrong and therefore should not be penalized by the violations of another team.

As a final thought at oral argument, Petitioner contended that to uphold Respondent's elimination of Elmwood Park from the football play-offs is unfair to the pupils not only because it did no wrong, but also because it sends the message to students that "snitching" on another team (as it claims Pascack Hills is guilty of in reporting to the Association that the ineligible player from Paterson Catholic played in a fourth game, which discovery resulted

in its rival, Elmwood Park, being eliminated from play-off competition) is appropriate sportsmanship.

Based upon such arguments, Petitioner adds an alternative remedy to that advanced in its Petition. Petitioner seeks cancellation of its Thanksgiving football game and instead substitution of a runoff game between it and Pascack Hills on November 27, 1993.

Respondent rebuts Petitioner's claims that it has met the standards for the granting of Emergent Relief. It urges that there is an absence of irreparable injury, contending that the cases in New Jersey are legion which establish the principle that participation in interscholastic sports is a privilege, rather than a right. Burnside et al. v. N.J.S.I.A.A., 1984 S.L.D. 1677, aff'd N.J. Superior Court 1695, cert. den. 101 N.J. 236 (1985) Participation in such sports is subject to the requirements and other pre-conditions established by the Association. In the instant matter, participation in the play-off is totally voluntary and there is no protectable expectation for any school that it would be allowed to participate in championship competition.

Respondent further argues that until the week of November 15, 1993, there could be no expectancy on the part of Petitioner that it would be assured placement in the football championship. As to this, it stresses that participation in the championships is subject to the promulgated rules of the Association and that even if the most liberal interpretation is given to the term "irreparable harm," it would be impossible to conclude that the replacement of Petitioner by Intervenor constituted that requisite condition for Emergent Relief. It is Respondent's position that the

sum total of any "harm" visited on Petitioner was the disclosure of an ineligible player by an opponent two days after the announcement of NJSIAA on November 15, 1993 that it had qualified for the play-offs.

Respondent also avers that Petitioner has no substantial likelihood of success on the merits, emphasizing that the Commissioner and the courts have uniformly held that they will not interfere with decisions by the NJSIAA, unless there is a violation of its controlling bylaws or rules and regulations. It contends that the case law stands for the proposition that the Commissioner will not substitute her judgment for the Association's "unless compelling reasons are provided in the record for her to do so." Board of Education of the Township of Verona v. N.J.S.I.A.A., 1990 S.L.D. 287

Respondent cites numerous case law which have upheld the application of its rules relative to forfeitures for the playing of ineligible players with resultant changes to the power rankings. Board of Education of Northern Highlands Regional High School District v. N.J.S.I.A.A. et al., decided by Commissioner November 18, 1982, aff'd N.J. Superior Court October 17, 1984; Board of Education of North Arlington et al.. v. N.J.S.I.A.A., 1983 S.L.D. 1221; Board of Education of Greater Egg Harbor Regional High School District v. N.J.S.I.A.A., 1983 S.L.D. 649; Board of Education of Hunterdon Central Regional High School District v. N.J.S.I.A.A. et al., decided by the Commissioner November 22, 1985. It also points to Board of Education of the South Orange-Maplewood School District v. N.J.S.I.A.A., 1986 S.L.D. 2765, wherein the Commissioner's ruling that exclusion of a soccer team from championship competition for

violation of rules by an assistant coach was stayed by the Appellate Division and the Supreme Court.

Respondent deems as most controlling the decision in Cliffside Park Public High School District v. N.J.S.I.A.A., decided by the Commissioner November 16, 1984, which contested the interpretation of the football regulations by NJSIAA. In reaching his decision sustaining NJSIAA, the Commissioner took note of the fact that the challenging school had signed a Verification Card, accepting the very regulations and interpretations which it challenged. The Verification Card referred to in Cliffside Park contains the identical language as that signed by Elmwood Park High School.

It is Respondent's further contention that Petitioner would have the Commissioner provide an entirely different interpretation to page 1 of the football regulations which reads:

> Games forfeited for any reason will count as wins or losses for the respective schools.
> (Respondent's Exhibit A, at p. 1)

As to this, Respondent contends that to accept Petitioner's interpretation of the application of forfeitures would lead to an absurd result of according Paterson Catholic a 5-3 win/loss record for purposes of power ranking, but only a 3-5 record for purposes of Paterson Catholic's own qualification for championship play. It avers that Petitioner's argument that its power ranking should be unaffected by Paterson Catholic's forfeitures is both contradictory and illogical.

As to the argument that "innocent third parties" should not be affected by forfeitures uncovered after the cutoff date, Respondent urges that such date is only intended to establish the

calendar framework by which time at least eight regular season games must be played to qualify for championship play. As set forth in the Affidavit of Executive Director Sands, the date is also intended to allow at least one week for schools competing in the semi-finals to prepare to play each other by exchanging game films, etc. Respondent further urges that to argue that the announced contestants on November 15 cannot be in any way affected by uncovering even egregious violations of the rules is likewise absurd.

Respondent emphasizes that it acted promptly in enforcing the football regulations and its eligibility rules. Of this, it states:

> In this case, the NJSIAA acted promptly in enforcing both the Football Championship Regulations and its own eligibility rules. When it was advised as of November 15 that Paterson Catholic had used an ineligible player in its win on October 16 against Saddle Brook, it adjusted Paterson Catholic's win/loss record from 5-3 to 4-4. When the use of an ineligible player for Paterson Catholic's October 23 win against Waldwick was uncovered two days later, it properly adjusted Paterson Catholic's record win/loss record from 4-4 to 3-5. On the very day that Sister Gloria Perez was writing the NJSIAA about this latest development (Exhibit D and E), the NJSIAA was providing a detailed explanation by telefax to Elmwood Park (Exhibit G and H). Because of the belated change in the contestants for the North Jersey, Section One, Group II championship, the NJSIAA postponed the contests between the number one seed (Ridgefield Park) and the number four seed (Pascack Hills, replacing Elmwood Park) until December 4, 1993, with a championship contest for the Group to be conducted on December 11.
>
> (Respondent's Brief, at p. 21)

Respondent avers that to grant Petitioner's request to expand the number of qualifying teams would be both unprecedented and in violation of the championship regulations. It points out that the regulations allow for such an expansion only in the event

there is a team with an untied and undefeated record which has a power ranking that places it in a fifth position or below.

Respondent further urges that if preliminary relief is granted, it will harm Pascack Hills and other NJSIAA member schools. It vehemently rejects any suggestion of ill motivation on the part of Intervenor and argues that to remove Pascack from the play-offs would be unjust and in violation of the football regulations, which require that the four schools with the highest power ranking qualify within each section and group.

Finally, Respondent urges that the extraordinary relief sought by Petitioner would disserve the public interest. It points to the strong policy for the Commissioner not to interfere with the conduct of NJSIAA championships in the absence of an express violation of a statute or rules and avers that to alter that strong policy would be to open the flood gates to similar challenges as herein. It believes that this would destabilize a voluntary system of sports regulation for parochial and public schools which has been functioning effectively for decades.

During the conference call of November 23, 1993, Pascack Hills' counsel indicated its accord with the arguments advanced by Respondent. It also stressed, among other things, that in no way can improper motivation be impuned to it as a result of reporting the fourth violation to NJSIAA.

COMMISSIONER'S DETERMINATION

Upon careful review of the record of this matter, the Assistant Commissioner denies emergent relief finding Petitioner has failed to meet the standards for such extraordinary remedy as established by Crowe v. DeGioia, supra. At the outset, she stresses that it is well-established that participation in extracurricular sports is a privilege, not a right, which is subject to requirements and other pre-conditions established by NJSIAA. Burnside, supra As noted in Respondent's brief, participation in football play-offs is totally voluntary, with no protectable expectation for any school to participate in championship competition. Thus, the Assistant Commissioner finds Petitioner has advanced no showing of irreparable harm in this matter warranting the extraordinary relief sought.

Moreover, Petitioner has demonstrated no likelihood of prevailing on the merits of this case. The regulations are clear that forfeitures count as losses. To suggest that the losses are not counted in calculating power points is ludicrous. The fact that there is no explicit language in the regulations to this effect is of no moment because no other interpretation of the regulation is possible other than that advanced by NJSIAA.

Moreover, the Assistant Commissioner fully concurs that the Commissioner and the courts have long held that she cannot substitute her judgment for that of NJSIAA with respect to its rules and regulations unless there is a clear violation of the bylaws, rules or regulations or NJSIAA has acted in a patently arbitrary manner in interpreting or enforcing its regulations, factors which are not present in this matter.

As to the issue of being informed after November 15, 1993, the Assistant Commissioner is in full agreement with Respondent that to do as Petitioner suggests, i.e., no altering of power ranking if violations are ascertained after the cutoff date, would permit the Association to turn a blind eye to violation of the very rules which member districts have agreed to abide by and uphold. Moreover, in terms of championship play-off participation, member districts -- including Petitioner -- also signed the Verification Card which further attests to schools' agreement to abide by the football regulations. If Petitioner feels aggrieved with the rules as interpreted by NJSIAA with respect to forfeitures on calculating power ranking, its recourse is to seek change to those regulations through the appropriate procedures agreed to by the membership. Cliffside Park, supra

Also, the Assistant Commissioner agrees that ill motivation by Pascack Hills has not been shown. All member districts have an obligation by their voluntary participation in NJSIAA to report alleged violations of the Association's bylaws, rules and regulations whenever learning of such allegations.

Finally, as to the alternative relief sought by Petitioner, i.e., a runoff game, such relief is denied, given Petitioner's failure to meet the standards for the grant of the extraordinary relief Petitioner seeks herein.

Accordingly, the Motion for Emergent Relief is denied. Further, there being no outstanding issues remaining to be resolved, the motion and petition are hereby dismissed, with prejudice.

ASSISTANT COMMISSIONER OF EDUCATION

294-93

IN THE MATTER OF THE SPECIAL	:	
SCHOOL CONSOLIDATION REFERENDUM	:	COMMISSIONER OF EDUCATION
ELECTION HELD IN THE BOROUGH OF	:	DECISION
CLOSTER, BERGEN COUNTY.	:	
	:	

NOVEMBER 24, 1993

OAL DKT. NO. EDU 5366-93

IN THE MATTER OF THE SPECIAL	:	
SCHOOL CONSOLIDATION REFERENDUM	:	COMMISSIONER OF EDUCATION
ELECTION HELD IN THE BOROUGH OF	:	DECISION
CLOSTER, BERGEN COUNTY.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before her and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 24, 1993

DATE OF MAILING - NOVEMBER 24, 1993

295-93

BARBARA BURGHARDT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MAHWAH, BERGEN COUNTY AND BRUCE SEGALL, MAHWAH HIGH SCHOOL PRINCIPAL,	:	DECISION ON MOTION
RESPONDENTS.	:	

NOVEMBER 29, 1993

OAL DKT. NO. EDU 10875-93

BARBARA BURGHARDT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MAHWAH, BERGEN COUNTY AND BRUCE SEGALL, MAHWAH HIGH SCHOOL PRINCIPAL,	:	DECISION ON MOTION
RESPONDENTS.	:	

For Petitioner, Barbara Burghardt, pro se

For Respondent Segall and the Board, Mark G. Sullivan (Sullivan & Sullivan)

This matter was opened before the Commissioner by way of a Petition of Appeal and request for Emergent Relief filed by petitioner on November 12, 1993.

Petitioner seeks a formal reprimand from the Commissioner to the Mahway Board of Education and Principal Segall for activities they have undertaken in connection with the upcoming December 1, 1993 $25 million referendum involving construction of public school space and additionally seeks an immediate stay of any further activities in this regard. Specifically, petitioner objects to a series of four published Referendum Advisorys, a letter from the high school principal which contained an absentee ballot application and voter registration form along with an excerpt from the first

Referendum Advisory, and materials of a parents' organization, BEST (Building an Educationally Sound Tomorrow), which has been utilizing school children to deliver flyers home which inform parents of its meetings. Petitioner contends these activities/materials have constituted an impermissible use of public funds for the purpose of promoting the passage of the referendum in contravention of the law, public policy, and the public trust.

This matter was transmitted to the Office of Administrative Law on November 12, 1993 and heard by the ALJ on November 17, 1993. Board's response papers were received at OAL and included an Answer, Brief in opposition to Motion for Emergent Relief and an affidavit of Stuart D. Salkin, Assistant Superintendent of Schools in Mahwah Township. Such documents denied the allegations of petitioner and maintained that the four issues of the Referendum Advisory which were published are overwhelmingly factual in nature and because of the large amount of money actually involved in the capital school project referendum, $24,950,610, the Board has an obligation to expend reasonable time, effort and money to provide taxpayers with the relevant facts concerning the proposed referendum question. Further, the Board avers that petitioner has not met the burden imposed by Crowe v. DeGioia, 90 N.J. 126 (1982) as she has not established irreparable harm.

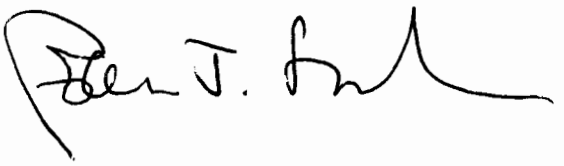
On November 18, 1993 the initial decision was faxed to the Commissioner and on November 22, 1993 the record, including the audiotapes, was received from OAL. Petitioner filed no exceptions. The Board's exceptions were timely filed by midday Wednesday, November 24, 1993. Pursuant to N.J.S.A. 18A:4-34, Assistant

Commissioner Elena Scambio was designated by the Commissioner to decide the matter.

The Board's exceptions argued that it believed that at the hearing the ALJ indicated that three of the four Referendum Advisorys issued by the Board, Issues 1, 2, and 3, really did not cross the line between advocacy and informational literature as established by Citizens & c., Public Funds v. Board of Education of Parsippany-Troy Hills, 13 N.J. 172 (1953). The Board additionally recalls that the ALJ's decision on Advisory Issue 4 was a "close call." It argues that this Advisory which contained certain statements dealing with real estate values and schools does nothing more than tell the taxpayer that the quality of the school system affects more than just those taxpayers whose students are being educated therein. Consequently, the Board urges that the ALJ erred when he issued a restraining order.

Upon independent review of the record in this matter of injunctive relief, including the audiotapes of the proceedings before the Administrative Law Judge, the Assistant Commissioner concurs with the finding of the ALJ in his initial decision that this is a very close call and that only by erring on the side of preserving the integrity of the system can one come to the conclusion that the Board acted improperly. She, therefore, finds and determines as did the ALJ that the Board's four Referendum Advisorys, although not of the egregious nature of Fenton et al. v. Sullivan et al., 1991 S.L.D. 677, they do, taken in totality, go beyond a mere factual presentation and create the impression that voters should vote for the school budget.

Accordingly, the recommended initial decision granting emergent relief in this matter is adopted. The Board is hereby enjoined from using public money to publish or distribute any materials which have the appearance of advocating a particular position on the upcoming bond referendum.



ASSISTANT COMMISSIONER OF EDUCATION

NOVEMBER 29, 1993

DATE OF MAILING - NOVEMBER 29, 1993

296-93

BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER,

PETITIONER,

V.

MAYOR AND COUNCIL OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY,

RESPONDENT,

IN THE MATTER OF THE CAP WAIVER APPEAL OF THE BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of $494,110 made by governing body following voter rejection of proposed budget on April 20, 1993.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore $371,500.

Board also appealed General Fund cap waiver in the amount of $1,072,749 rejected by voters, $79,410 of which was reduced by the governing body.

Upon review of the record, Commissioner determined to order the increase of $52,000 in cap waiver monies for a total General Fund tax levy of $10,519,210 for 1993-94 school year.

NOVEMBER 29, 1993

BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, PETITIONER, V. MAYOR AND COUNCIL OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY, RESPONDENT, - - - - - - - - - - - - - - - - - - IN THE MATTER OF THE CAP WAIVER APPEAL OF THE BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

Robert A. Blanda, Esq., for Petitioner

Frank J. Paprota, Jr., Esq., for Respondent

This consolidated matter was opened before the Commissioner of Education on June 3, 1993 through the filing of a Petition of Appeal of a defeated school budget by the South River Board of Education (Board) pursuant to the provisions of N.J.A.C. 6:24-7.1 et seq. and a Petition of Appeal of its defeated cap waiver. An Answer to the petitions was filed on June 23 by the Mayor and Council (Council). An amendment to the Petition of Appeal setting forth the amounts in dispute both as to the General Fund tax levy and the cap waiver was filed by the Board on June 15, 1993 with an Answer to same being received by the Commissioner on July 28, 1993.

Position papers were filed by the respective parties and the Board filed a response to the aforesaid position statement by the Council. Further, as a result of the State Board of Education's July 7, 1993 decision in Board of Education of the Borough of Rutherford v. Mayor and Council of Rutherford wherein the State Board ruled that decisions in defeated voter cap waiver appeals must determine whether or not reallocation within the district's maximum permissible budget is possible and whether and to what extent the specific programs at issue are essential in order to enable the Board to meet its constitutional obligation to provide a thorough and efficient system of education, a letter was sent to the parties by the Director of the Bureau of Controversies and Disputes informing them of the need to supplement the record to document the reallocation and cap waiver review conducted by the county superintendent pursuant to N.J.S.A. 18A:7D-27. The county superintendent was accorded thirty (30) days from receipt of the letter to submit a sworn affidavit setting forth an explanation and documentation of that review, including the bases for concluding that (1) reallocation within the district's maximum permissible budget for the 1993-94 school year was not possible and (2) the specific programs at issue were essential for the Board to provide a thorough and efficient system of education to its students.

The governing body and Board were provided twenty (20) days from receipt of the county superintendent's submission to file a response thereto.

The county superintendent's affidavit and supportive documentation was received on September 14, 1993 and the Council filed a response to the county superintendent's affidavit on

October 15, 1993, which also responded to the Board's filing of September 13. On October 18, 1993 an addendum to the October 15, 1993 response was filed by Council. These latter two filings were received well beyond the designated submission date so that they are consequently deemed untimely and barred from consideration herein. On October 22, 1993 a copy of the complete line item budget was received at which time the record closed. Subsequent to the close of the record a letter from the Board objecting to any consideration being given to the October 15 and October 18 filings, which were both out of time and not properly served on the Board, was received on November 17, 1993.

On April 20, 1993 the voters of the Borough of South River defeated the Board's General Fund tax levy and a proposed cap waiver which had been approved by the Middlesex County Superintendent as being necessary for the provision of a thorough and efficient system of education.

The specific line item accounts for the T&E cap waiver were as follows:

Account	Account Number	Amount
Administration:		
Purch. Technical Services	11-000-230-340	$ 39,000
Misc. Expenditures	11-000-230-890	30,000
	ST Administration	$ 69,000
Health Services:		
Purch. Prof. & Tech Services	11-000-213-300	$ 25,000
Supplies and Materials	11-000-213-600	13,699
	ST Health Services	$ 38,699

Account	Account Number	Amount
Transportation:		
Cleaning, Repair & Maintenance	11-000-270-420	$ 10,000
Misc. Purchased Services	11-000-270-593	8,000
Supplies and Materials	11-000-270-600	15,000
Misc. Expenditures	11-000-270-890	8,000
	ST Transportation	$ 41,000
Operation and Maintenance:		
Salaries	11-000-260-100	$ 124,455
Purch. Prof. & Tech Services	11-000-260-300	67,811
Cleaning, Repair & Maint. Serv.	11-000-260-420	81,116
Misc. Purchased Services	11-000-260-590	15,000
General Supplies	11-000-260-610	75,000
Other Objects	11-000-260-800	7,500
	ST Oper. & Main't	$ 370,882
Regular Programs-Undistrib. Instruction:		
Purch. Prof. Services	11-190-100-320	$ 3,000
Purch. Tech. Services	11-190-100-340	5,000
Other Objects	11-190-100-800	11,000
	ST Reg. Instr.	$ 19,000
Other Support Services, Regular:		
Supplies and Materials	11-000-218-600	$ 15,000
	ST Support Serv. Reg.	$ 15,000
Other Support Services, Special:		
Supplies and Materials	11-000-219-600	$ 2,000
	ST Support Serv. Spec.	$ 2,000
Improvement of Instruction:		
Supplies and Materials	11-000-221-600	$ 3,000
	ST Improve Instruct.	$ 3,000
Support Services School Administration:		
Supplies and Materials	11-000-240-600	$ 3,000
	ST Support School Adm.	$ 3,000

Account	Account Number	Amount
Student Body Activities:		
Salaries	11-402-100-100	$ 213,150
Supplies and Materials	11-402-100-600	2,700
Transfers to Cover Deficit	11-402-100-930	62,052
	ST Student Body Act.	$ 277,902
Special Education:		
N.I. General Supplies	11-204-100-610	$ 10,000
P.I. General Supplies	11-205-100-610	10,000
Res. Rm. General Supplies	11-213-100-610	2,000
Pre School General Supplies	11-215-100-610	1,000
Speech General Supplies	11-218-100-610	1,000
	ST Spec. Education	$ 24,000
Bi-Lingual =		
General Supplies	11-240-100-610	$ 6,000
	ST Bi-Lingual	$ 6,000
Capital Outlay:		
Equip-Grades 1-5	12-120-100-730	$ 21,000
Equip-Grades 6-8	12-130-100-730	35,000
Equip-Grades 9-12	12-140-100-730	43,000
Equip-Basic Skills	12-230-100-730	3,660
Equip-Bi-Lingual	12-240-10-730	519
Undistrib. Exp-Support Services:		
Instructional Staff	12-000-220-730	12,000
Undistrib. Exp-Gen'l Admin.	12-000-230-730	61,087
School Buses-Special	12-000-270-734	27,000
	ST Equipment: Capital Outlay	$ 203,266
	TOTAL VOTER'S T&E CAP WAIVER	$1,072,749

Subsequent to the defeat of the budget by the voters, the Board and Council pursuant to the provisions of N.J.S.A. 18A:22-37 consulted on the defeated budget whereupon the Council reduced the basic budget General Fund tax levy by $494,110. In addition to the aforesaid reduction in the basic budget tax levy, the Council also reduced the $1,072,749 proposed cap waiver by $79,410, an action

which is outside the scope of the authority of the Council to consider and carry out since the authority to authorize appropriations above and beyond the maximum permitted budget lies exclusively with the Commissioner of Education. The net effect of the Council's unauthorized action was to certify an amount for the General Fund tax levy which was actually in excess of the General Fund tax levy proposed by the voters as set forth below:

General Fund Tax Levy Proposed to Voters:	$ 9,596,481
T&E Cap Waiver Question:	$ 1,072,749
Total Proposed Tax Levy:	$10,669,230
Tax Levy Certified by Governing Body:	$10,095,710
Less Reductions to Budget	$ 494,110
Less Reductions to Cap	79,410
Total	$ 573,520

As a result of the unauthorized actions by the Council in this matter, the Commissioner shall only consider the Council's $494,110 reduction in the basic budget as part of the budget appeal in this consolidated matter. The total $1,072,749 cap waiver proposal also defeated by the voters will be reviewed by the Commissioner along with the basic budget to determine whether all items as recommended by the County Superintendent in authorizing the cap waiver proposal are required for the provision of a thorough and efficient education and whether reductions in the cap waiver proposals can be accomplished through reallocations in the basic budget as required by the standards established by the State Board of Education in Rutherford, supra. The reductions in the cap waiver proposal recommended by the Council shall be considered as that body's input into the Commissioner's cap waiver review.

DEFEATED BUDGET

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

The specific line item reductions and the reasons for such reductions as contained in the Council's Answer are set forth below:

Account Number	Item	Board's Proposal	Governing Body's Recommendation
11-000-230-331	Legal Services	$60,000.00	Reduce $13,800.00

This budget item is based upon the Board Attorney being paid at an hourly rate of $130.00. Based upon a review of available legal services and the prevailing hourly rate, this amount appears excessive and unjustified. The governing body believes that more than adequate legal [counsel] can be obtained at an hourly rate not

in excess of $100.00. The above reduction will allow for the provision of the same number of hours of legal services at this hourly rate. This reduction would not deprive the students within the district from a thorough and efficient education.

11-190-100-640 Textbooks $188,610.00 Reduce $118,610.00

The amount budgeted in this line item is not justified based upon the data submitted to the governing body by the school board or by the Board's previous expenditures. Although the Board has made reference to a 5 year replacement program, prior budgets do not support a commitment by the Board to such a program. Additionally, the amount appropriated in this budget would allow every student to receive a new textbook. Accordingly, the governing body recommends that this item be increased over 10% of the 1992-93 expenditures, which amount would adequately account for present inflation, and which would not deprive the students within the district from a thorough and efficient education.

11-000-310-600 Food Services: Supplies & Materials $10,000.00 Reduce $4,000.00

The Board has consistently appropriated more than it has expended in this line item. Based upon the data supplied to the governing body by the Board, it appears that the Board has again significantly over-budgeted for this item. In light of the history of expenditures in this line item and the Board's current data as to anticipated expenditures, the current appropriation is unjustified. Therefore, the governing body recommends a 5% increase in this item over the 1992-93 expenditures. This reduction would not deprive the students within the district from a thorough and efficient education.

11-000-290-242 Other Retirement Contributions $138,000.00 Reduce $89,000.00

The Board has budgeted the sum of $89,000.00 for funding an Early Retirement Incentive Program. The Board has indicated that such a program is not currently in effect in the district, nor does the Board anticipate instituting such a program in the future. Accordingly, the budgeting of this sum is unjustified. This reduction would not deprive the students within the district from a thorough and efficient education

11-000-290-250 Unemployment Comp. $35,000.00 Reduce $35,000.00

The Board has not appropriated any sums for this item in previous years. The Board had also indicated that in the 1993-94 school year there are no plans for layoffs. In addition, the Board has indicated that there are sufficient funds in its Trust Fund to cover any unanticipated expenditures in this area. Accordingly, an appropriation in this category is unjustified. This reduction would not deprive the students within the district from a thorough and efficient education.

Account Number	Item	Board's Proposal	Governing Body's Recommendation
11-000-260-520	Insurance	$416,668.00	Reduce $36,000.00

The Board has provided the governing body with data concerning all of the Board's lines of coverage, together with its estimates of premium costs. Based upon this data, $36,000.00 of the budgeted amount is unaccounted for, and therefore, appears unjustified. Therefore, the governing body recommends that this item be reduced accordingly. This reduction would not deprive the students within the district from a thorough and efficient education.

11-000-100-566 11-000-100-568	Tuition Payments	$825,000.00	Reduce $33,500.00

Based upon the data provided by the Board, the current tuition rate per student is a maximum of $21,161.00. Assuming a 10% increase in tuition rates for the 1993-94 school year, and given the Board's projection of the number of students to be sent out of district, the appropriate sum to be budgeted for this item is $791,421.00. Therefore, a reduction of $33,500.00 is recommended. This reduction would not deprive the students within the district from a thorough and efficient education.

11-140-100-101	Instruction-Regular Program	$1,814,150.00	Reduce $48,000.00
11-000-290-290	Other Employee Benefits	$1,504,800.00	Reduce $15,000.00

This item includes appropriation for two (2) new teachers at the South River High School. Based upon the enrollment and class size projections given the governing body by the board, it appears that the existing faculty can provide all students with a thorough and efficient education. Therefore, it is recommended that the High School faculty not be expanded. This reduction would not deprive the students within the district from a thorough and efficient education.

11-120-100-101	Instruction-	$1,461,456.00	Reduce $27,600.00
11-130-100-101	Regular Program	$1,062,034.00	Reduce $73,600.00

The governing body's recommendation is based upon a review of the Board's existing rosters of personnel, for which the Board indicated that are no planned changes. Factoring in raises at each step grade, a reasonable contract rate increase, and a liberal allowance for absenteeism, the amounts budgeted in the above two items should be reduced by the amount recommended. This reduction will allow for all reasonable and anticipated salary increases and an absentee rate of six (6) teachers per day throughout the school year. This reduction would not deprive the students within the district from a thorough and efficient education.

Total Reductions to Basic Budget	$494,110

COMMISSIONER'S DETERMINATION

The Commissioner has carefully reviewed all the evidence and arguments submitted by the parties in support of their respective positions. The Commissioner's review of the arguments relative to line item reductions and her conclusions on each are set forth below:

Account	Reduction
11-000-230-331 - Legal Services	$13,800

The Council argues that the reduction imposed in this account is based upon a proposed savings of $30 per hour for legal services which the Council believes can be effectuated by hiring legal counsel at a rate of $100 per hour as opposed to the current rate of $130 per hour. The Council contends that the $60,000 budgeted for legal services in 1993-94 exceeds the amount appropriated in 1992-93 ($24,000) by 150%, nor could the 1993-94 proposed appropriation be justified by the Board through a listing of projected litigation.

The Board argues that it has expended $52,000 in legal fees in 1992-93 with $16,000 still outstanding representing $68,000 already encumbered for 1992-93 with two months remaining in the school year. In response to the Council's argument relating to previous appropriations, the Board points out that the amount appropriated in 1991-92 was $24,000 but actual audited expenditures were $62,565.

In light of the actual expenditure experience of the Board, the Commissioner finds that the amount appropriated for legal services in 1993-94 is consistent with past expenditures. The $13,800 reduction in this account is restored.

Account	Reduction
11-190-100-640 - Textbooks	$118,610

The Council contends that it has urged the Board to expend its full appropriations for textbooks after defeat of the 1992-93 budget. The Council sets forth the following expenditures for textbooks by the South River Board:

1990-91	$44,382
1991-92	$62,776
1992-93	$46,903

Given the figures cited above, the Council contends that the $118,610 proposed expenditure in 1993-94 constitutes a 267% increase over the three year coverage.

Council contends that previous budget deliberations with the Board revealed an alleged five year replacement cycle yet the Board's submission in its Statement of Position would seem to indicate that no such practice was in place.

The Council further argues that the need to budget for such a large increase indicates past mismanagement of this account for which the taxpayers should not be required to bear the burden. The Council also points out that the value of a textbook, not its copyright date, should be the determination in a replacement decision.

The Council also disputes the Board's contention that the textbook account increase is justified by the increased enrollment acknowledged by the Commissioner in granting a Commissioner's Cap Waiver. Using such logic, contends the Council, would attribute a 302% increase in textbook expenditures to a 4% increase in student population resulting in a $141,707 per pupil expenditure for the 64 student increase.

The Board contends that the textbook account was cut by almost $16,000 in 1992-93 from the 1991-92 actual audited amount purchased. It further contends it had imposed spending moratoriums in each of the past two years disrupting the district's five year replacement cycle. It believes that any further extension of the revision cycle would negatively impact on the elementary and middle school programs. The Board also offers a list of textbooks with copyright dates as evidence that 57% of its textbooks exceed the five year replacement cycle policy. (See Exhibit 3C of Board's Reply to Council's position.)

The Commissioner after carefully reviewing the arguments of the parties directs the restoration of $50,000 of the $118,610 by which the Council has reduced this account. While the Council's argument as to the value of a book as a learning tool being the most significant measure of whether it should be replaced is not without merit, said argument ignores the fact that books wear out and must be replaced regardless of their copyright date. It is a well established practice in school administration to replace books on a five year cycle since such period of time represents the average life of a textbook before it totally disintegrates from use and abuse. Therefore, while books may have continued value beyond five years, they do not physically last for longer periods of time. However, the Commissioner also concludes that to do the entire revision in the 1993-94 school year is not required, especially in light of the fact that to do so means nearly tripling the appropriation in this account.

Account	Reduction
11-000-310-600 - Food Services: Supplies and Materials	$4,000

The Council sets forth the following Board expenditure figures as justification for the reduction in this account:

	Budget	Expended
1990-91	$ 5,000	$4,635.34
1991-92	10,000	3,552.00
1992-93	10,000	Unknown

The Council contends it is unaware of any new supplies or materials contemplated for 1993-94. The Council argues that, in the absence of justification for the increase in proposed appropriations by the Board, the $6,000 appropriation remaining after the reduction imposed is more than sufficient based upon past expenditures.

The Board argues that it has operated its Food Service program on a "band aid" basis putting off needed repairs. The $10,000 proposed appropriation for 1993-94 is designed to meet existing supply and repair needs neglected in the past.

The Board further argues that since neither its elementary schools nor its middle school have cafeteria facilities, food has to be transported from the high school requiring equipment to maintain proper temperature. Since there has been no money in the past to meet replacement requirements of heating and food storage equipment, repairs have been the only alternative. The Board offers as evidence of the tightness of its budgetary situation a series of letters under Exhibit X of its Reply Statement which indicate moritoria on all purchase orders without specific authorization from the School Business Administrator and the Superintendent.

After careful consideration of the arguments of the parties, the Commissioner concludes that the Board has failed to

meet its burden of demonstrating that it is unable to appropriately meet its needs to provide for food services for its student population with the $6,000 appropriation remaining. The $4,000 reduction in this account is sustained.

Account	Reduction
11-000-290-242 - Other Retirement Contributions	$89,000

The Council argues that, since the Board has not adopted the early retirement incentive, nothing should have been budgeted in this account except contributions to the retirement funds for persons not under TPAF. The Council contends that the only justification provided by the Board was a $49,000 expenditure for retirement, vacation and sick pay to the superintendent and to pay accumulated vacation and sick pay to any other retiring personnel. No list was provided to the Council.

The Council contends that its cut of the balance of $89,000 in this account was predicated on its belief that the payments to other retiring staff members could be accommodated through the general salary accounts since all staff were accorded raises called for in the 1993-94 salary guide at existing staffing levels. The Council contends that the Board provides no indications of savings due to retirement nor does it identify specific costs for sick or vacation pay. Further, the Council contends that earlier representations by the Board make no mention of suits pending which could result in retroactive salary payments.

The Board concedes that it did not adopt an early retirement plan. The Board identifies the superintendent, the superintendent's executive secretary, three teachers and a field person as those to whom sick and vacation pay would be allocated

from this account. Additionally, the Board asserts that per diem payments owed to the superintendent and his executive secretary are to be paid from this account. The Board additionally contends that this account also contains money set aside for retroactive pay which may result from two law suits with which it is involved.

After careful consideration of the arguments of the parties the Commissioner, while finding merit in the Council's argument as to what should appropriately be budgeted in this account, directs the restoration of the $89,000 reduction in this account with admonishment to the Board for its failure to appropriately designate the specific amounts which are owed to each of the persons involved and the nature of the law suits pending. Despite such admonishment, the Commissioner recognizes that the Board must provide for pension contributions for all of its non-professional staff not included under TPAF even if the Board has done a poor job in delineating the specific amounts of such contributions, as well as the specific amounts of its other obligations. Given those circumstances and the tight nature of the surplus available, it would be irresponsible to reduce this account by $89,000.

11-000-290-250 - Unemployment Compensation $35,000

The Council contends that the Board's arguments in this area miss the mark and contends that the quarterly payments which accompany form UC-27 are not the Board's money but the money withheld from employees. It further argues that the decision of the Board as to the necessity of including appropriations in the 1993-94 budget should have been based upon a review of the sufficiency of the Trust Fund balance to cover reimbursements through June 30,

1991. The Trust Fund Balance as of 1990-91 was $225,610.14 which the Council contends is sufficient to pay 17.28 years of benefits at maximum rates without any appropriations for 1993-94.

The Board argues that Unemployment Compensation was not a previous budget item because the district was on the reimbursement method but recent changes in the unemployment laws include coverage for job retraining and health care funding. The Board contends it has been remitting money to unemployment on a quarterly basis. The laying off of 19 lunchroom aides, two special education teachers and three aides negatively impacts the district's unemployment compensation rate. The Board offers a memo from Assistant Commissioner for Finance Davis as its justification for providing an increase in the employer appropriations in the operating budget to replace the depletion of the balances in its Trust Fund.

Notwithstanding the arguments raised by the Council, the Commissioner directs the restoration of the $35,000 appropriation in this account based upon the advice provided to local districts by Assistant Commissioner Davis and the Commissioner's recognition that the layoffs delineated above would seriously deplete the unemployment reserve fund.

Account	Reduction
11-000-260-520 - Insurance	$36,000

The Council sets forth a listing on page 11 of its Position Statement of the composition of this line item. It points out that $36,000 of the approximate $416,000 proposed as an appropriation in this account was for creating a surplus to add to its purported slim surplus of $19,000. The Council expresses astonishment that a governmental body would deliberately budget to build a surplus.

The Board acknowledges its budgeting of $36,000 specifically for the purpose of building a surplus to guard against contingencies.

Upon review of the arguments of the parties and the special circumstances which prevail in this matter, the Commissioner has determined to restore the $36,000 by which this account has been reduced by the Council. While the Commissioner would normally view the practice of specifically budgeting for the creation of surplus as being unfair to the taxpayers of the community, she must recognize in this case that the position in which the Board finds itself at present is an outgrowth, as admitted by the Council, of having been so solicitous of taxpayer sentiment as to have unwisely appropriated virtually all its surplus, save $19,000, in order to keep down the tax rate. In good conscience, the Commissioner cannot leave the district in such dire circumstances.

Account	Reduction
11-000-100-566 - Tuition Payments 11-000-100-568	$33,500

The Council based its proposed reduction in this account by using the 1992-93 tuition expenditures estimated by the School Business Administrator at $656,000 and currently enrolled out-of-district placements of 31 students. This calculation yielded an average tuition rate of $21,161 per student which the Council increased by 10%.

The Board contends that it has, as of April 30, 1993, transferred into this account an additional $70,000. The Board further points out that the amount budgeted on line 11-000-100-568 is for students in state facilities, tuition for which is set by the State and deducted from state aid. The Board points out the

difficulty of projecting the number of students who might be placed during the 1993-94 school year beyond the 34 already projected.

Given the unpredictability of special education placements and tuition, this account is one fraught with potential danger if underbudgeted. In light of this factor and the Board's past experience of having to transfer money into this account in the past, the Commissioner directs the restoration of the $33,500 in this account.

Account	Reduction
11-140-100-101 - Salaries of Teachers 9-12	$48,000
11-000-290-290 - Other Employee Benefits	$15,000

The Council contends that its review of class size indicates that English class sizes ranged from 9-27 and math class between 6-26. The Council argues that, given the wide range existing between class sizes, more effective scheduling coverage could be achieved without increasing staff.

The Board contends that increasing enrollment necessitates the hiring of two additional teachers. Its enrollment for 1993-94 based upon what it claims to be actual schedules for grades 9-12 is 494, some 33 more than projected by the Council. The Board contends that enrollment in English and mathematics classes has increased by 61 and 52 students respectively between 1991-92 and 1992-93. Without the two projected teachers the Board contends that these programs would have to accommodate 37 students in each set of classes.

After review of the respective arguments presented by the parties the Commissioner directs the restoration of $48,000 for two additional teachers and $15,000 in benefits attendant thereto. The Commissioner finds the argument as to the range of class size as

presented by the Council to be based upon lack of understanding that certain extremely small class sizes may be either the result of classes such as advanced placement or remedial classes mandated by law. Given the need for the Board to meet the needs of all of its students, mere rescheduling cannot relieve the problems created by classes of such nature.

Account	Reduction
11-120-100-101 - Instruction	$27,600
11-130-100-101 - Regular Program	73,600

The Council contends that the Board has provided for an amount in excess of the 3% found in the salary account for teacher raises. The Council justifies its salary reductions by virtue of the following projections:

	1-5	6-8	Total
1993-94 Sal. Before Neg. Adj.	$1,336,072 103%	$919,620 103%	$2,255,363
1992-94 Sal. With 3% Provision for Substitutes	1,376,154 57,700	947,209 41,225	2,323,363 98,925
Total Deemed Necessary	$1,433,854	$988,434	$2,422,288
Amount Budgeted	1,461,456	1,062,034	2,523,490
Cuts	$ 27,602	$ 73,600	$ 101,202

It points out that the Board provided for raise amounts in addition to the 3% in its insurance account.

The Council further projects that the district has 57 teaching slots in its elementary and middle schools. Using a rate for substitutes of $90 per day and a 180 day school year, the provision for substitutes comes out to six substitutes per day or an absentee rate of 10%.

The Board argues that its substitute rate is actually 12.5 substitutes per day and presents as Schedule 12A and 12B of its position statement records of two days purportedly selected at random to support its contentions.

The Commissioner upon review of the arguments of the parties finds that the Board has failed to adequately document what its actual experience relative to substitutes has been. The two dates which it uses are not really randomly selected but are two consecutive dates. Further, had the Board attempted to do so, it could have provided data from previous years as to its average daily teacher absentee rate. Failure to do so calls into question the validity of its contentions as to the average rate which it purports to be almost twice that projected by the Council. Notwithstanding the above, the Commissioner is deeply aware of the precarious nature of this district's surplus, therefore she directs that a reduction of $50,000 be sustained and $51,200 be restored.

Summary

Account		Reduction Sustained	Restoration
11-000-230-33	Legal Services	$ -0-	$ 13,800
11-190-100-640	Textbooks	68,610	50,000
11-000-310-600	Food Services	4,000	-0-
11-000-290-242	Other Retirement Contrib.	-0-	89,000
11-000-290-250	Unemployment Compensation	-0-	35,000
11-000-260-520	Insurance	-0-	36,000
11-000-100-566 & 11-000-100-568	Tuition	-0-	33,500
11-140-100-101	Salaries Teacher 9-12	-0-	48,000
11-000-290-290	Other Employee Benefits	-0-	15,000
11-120-100-101 & 11-130-100-101	Instruction Regular Programs	50,000	51,200
	Total	$122,610	$371,500

In summary the Commissioner finds and determines that of the $494,110 General Fund tax levy reduction imposed by the Council

on the 1993-94 budget appropriation, a sum of $122,610 has been sustained. The Commissioner further finds and determines that the remaining amount of $371,500 is essential to enable the Board to provide a thorough and efficient system of education.

It is therefore ordered that the Middlesex County Board of Taxation increase the local school tax levy for the 1993-94 school year in South River by $371,500.

CAP WAIVER

In setting forth its position with respect to the cap waiver monies in the amount of $1,072,749, the Board relies on the fact that its cap waiver was thoroughly scrutinized by the county superintendent and the existing cap waiver review process of the Department of Education. Further the Board relies on the fact that the March 26, 1993 letter from Mary Jean Guidette, Middlesex County Superintendent of Schools, granted conditional approval of the 1993-94 budget as being sufficient to provide a thorough and efficient system of education contingent upon inclusion of the amount contained within the voter cap waiver and mandating that any defeat of such cap waiver by the voters be appealed to the Commissioner.

The Council by virtue of its certification of a General Fund tax levy amount greater than that which was requested by the Board, as explained elsewhere in this decision, and by its reduction of only three line items in the cap waiver for a total of $79,410 has actually acceded to the need for the remaining $993,339 cap waiver request.

While the Commissioner notes that final determination as to the adequacy of the cap waiver review process pursuant to Rutherford, supra, rests with her notwithstanding the input of the parties in this matter, she has, as is pointed out earlier in this decision, afforded both parties and the county superintendent opportunity to provide further input. In this regard, the reductions recommended by the Council in its Answer in the cap waiver portion of the budget are set forth below:

Account Number	Item	Board's Proposal	Governing Body's Recommendation
11-402-100-100	Student Body Activities: Salaries	$213,150	Reduce $27,410

The amount proposed by the Board in this line item includes salaries for assistants in various school sponsored athletic programs. Several such programs provide for two (2) or more assistants per program. The governing body has reviewed all such programs having two (2) or more assistants and believes that given the number of students participating in each program, a reduction in one assistant in each such program would not deprive the students within the district from a thorough and efficient education.

11-000-230-890	Administration Misc. Expenditures	$60,000	Reduce $5,000

The amount appropriated by the Board includes the sum of $5,000.00 for Board member attendance at out-of-state conventions and seminars. Although the governing body recognizes the value of attendance at conventions and seminars, it appears to the governing body that those conventions and seminars offered within State are more than sufficient to keep Board members abreast of current events in the field of education, and are sufficient to enable the Board to meet its mandate of providing the students within the district with a thorough and efficient education.

Accordingly, the governing body recommends that the amount budgeted for attendance of out-of-state conventions and seminars should be omitted from the budget.

12-120-730 12-130-730 12-140-730	Equipment 1-5 Equipment 6-8 Equipment 9-12	$99,000	Reduce $47,000

The amount budgeted for equipment purchases in the 1993-94 school year represents a substantial increase in the amount budgeted in this category in previous years. Although the governing body does

not question the desirability of having the equipment which the Board contemplates purchasing, the Board has not demonstrated that the purchase of this equipment in the 1993-94 school year is necessary to a thorough and efficient education. Therefore, the governing body recommends that the Board establish a program whereby the desired equipment may be purchased over a period of several years, thereby evenly distributing the cost of same. This reduction would not deprive the students within the district from a thorough and efficient education.

Further, the Commissioner notes that both parties have addressed these line items in their submissions. The positions of the parties and the Commissioner's determination by line item are set forth below:

Account	Reduction
11-402-100-100 - Salaries Student Body Activities	$27,410

The Council concedes that student body activities are an integral part of the learning experience and disapproves of the Board's decision to place the entire account in the cap waiver portion of its budget.

The Council notes that there are 69 positions in the area of student activities, 21 of which it contends have nothing to do with athletics. The Council contends that the total salaries for such 69 positions amounts to $142,155 leaving a balance of $70,995 still remaining from the total appropriation of $213,150. After deducting the salary of the Athletic Director, the Council claims an unexplained balance of $23,666.

The Board argues for restoration on the basis of the need to guarantee safety of those students engaged in athletics claiming that previous years' budgets had reduced the number of assistant coaches.

After review of the arguments presented by the parties, the Commissioner determines that the Council has presented a persuasive

argument for reduction of this account by $27,410. While the Board addresses only the issue of assistant coaches, the Council presented superior statistical support for its position.

11-000-230-890 - Administration Misc. Expenditures	$5,000

The Council predicates its recommendation that the reduction is justified on the argument that the Board of Education can obtain the needed orientation and education by attendance at in-state conferences.

The Board counters by contending that the monies are needed for payment to have new Board members attend orientations required by law and presented by the New Jersey School Boards Association. It further contends the $5,000 involved in this account is for attendance by Board members at the New Jersey School Boards Association annual workshops.

Based upon the positions presented and the Commissioner's recognition of both the mandate for orienting new board members and the value of educating all board members in their duties and responsibilities, the arguments of the Council are rejected.

Accounts	Reduction
12-120-730 - Equipment Grades 1-5 12-130-730 - Equipment Grades 6-8 12-140-730 - Equipment Grades 9-12	$47,000

While the Council acknowledges the need for equipment in the educational process, the Council contends that the Board failed to provide adequate detail to assure that the equipment purchased was truly designed to meet the district's needs.

Further, the Council expressed concern that the Board has not pursued a phased policy of purchasing equipment rather than presenting a large request in a single year.

The Board argues that in 1992-93 only $3,000 was spent on new equipment for one school. It contends that its computer lab in its middle school has computers which are so old that parts can only be obtained by cannibalizing other computers. The Board also argues that its computers are so old that they cannot use modern instructional software.

Based upon the specifics forwarded by the Board and the fact that the county superintendent examined this requested expenditure, the Commissioner finds that the Council's position is unpersuasive. The Board cannot be faulted on the one hand for raising the tax rate too high for the 1993-94 year and at the same time be faulted for failure to buy equipment in earlier years because it wished to keep the tax rate within bounds.

As to the balance of the line item accounts within the Board's request, the Commissioner has thoroughly reviewed the specific line items and the amounts which are set forth, ante, in conformity with the standards advanced by the State Board of Education in Rutherford, supra. Based upon that review and the recommendations of the Middlesex County Superintendent which are set forth in the budget review documents submitted in response to the request of Director Keller, as well as the Department of Education's review process, the Commissioner is convinced of the necessity for the cap waiver requested herein, save for the $27,410 referred to earlier, and is likewise convinced that reallocation to achieve the funding of the items that are part of the cap waiver request is not possible within the context of the basic budget. Consequently, the Commissioner finds and determines that a cap waiver in the amount of $1,045,339 for the South River Public Schools be approved as necessary to provide a thorough and efficient system of education.

The Commissioner therefore directs the Middlesex County Board of Taxation to increase the 1993-94 General Fund tax levy from the $10,095,710 originally certified by the Mayor and Council of the Borough of South River to reflect an increase of $423,500 resulting in a total General Fund tax levy for the 1993-94 school year of $10,519,210.*

Tax Levy Certified by Council	$10,095,710
Restored by Commissioner (Defeated Budget)	371,500
Cap Waiver Ordered by Commissioner	52,000
TOTAL	$10,519,210

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 29, 1993

DATE OF MAILING - NOVEMBER 30, 1993

* This figure reflects the fact that the Council actually certified all but $79,410 of the cap waiver request in its original certification.

297-93

BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
DIVISION OF COMPLIANCE, NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning District appealed audit exception of $2.97 million based on audit of Transportation Program by Department of Education Division of Compliance. Department sought to recover monies by reduction of state aid. Audit exception was taken because bus contracts were not bid in accord with regulations.

ALJ found District failed to comply with the requirements for the proper award of transportation contracts for the 1988-89 school year and should be subject to sanctions. (N.J.A.C. 6:21-19.1(b)) However, since there was no evidence of an improper or dishonest motive for noncompliance, services were provided and District did attempt to remedy its past noncompliance, ALJ found aid should be adjusted rather than withheld. District should not be punished 5 years later by withholding reimbursement in its entirety. ALJ ordered reimbursement of $1.8 million of the $2.97 million withheld.

Commissioner set aside initial decision. Commissioner determined that District admitted its noncompliance which persisted from 1983 through 1991. Noting that the total amount owing for the year in question, 1988-89, was $2,968,953, which represented only slightly more than one half of one percent of the District's budget of nearly a half billion dollars for school year 1993-94, approximately $400,000,000 of which was state aid, Commissioner ordered withholding of the overpayment in state aid for 1994-95. Commissioner further ordered Board to immediately conform its policy concerning busing of special education pupils and its bidding specifications to dictates of law.

NOVEMBER 29, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1941-92
AGENCY DKT. NO. 42-2/92

BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,
Petitioner,
v.
DIVISION OF COMPLIANCE, NEW JERSEY DEPARTMENT OF EDUCATION,
Respondent.

Marvin L. Comick, General Counsel, for petitioner

Arlene G. Lutz, Deputy Attorney General, for respondent (Frederick P. DeVesa, Acting Attorney General of New Jersey, attorney)

Record Closed: August 31, 1993 Decided: October 12, 1993

BEFORE **EDITH KLINGER**, ALJ:

On February 14, 1992, the Board of Education of the City of Newark (Board) filed a petition with the Commissioner of the New Jersey Department of Education (Department) seeking reimbursement for pupil transportation provided by the Board during the 1988-89 school year. A Department audit of the Board's pupil transportation program for the 1988-89 school year resulted in an audit exception of $2,968,953 which the Department sought to recover by the reduction of state aid to the Newark school district for the 1992-93 school year. In its answer filed on March 10, 1992, the Department responded that the bidding procedures which the Board used to purchase busing services were in violation of the law and, therefore, the Board is not entitled to reimbursement.

On March 16, 1992, the Department of Education transmitted the matter to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

A hearing was held on June 21, 22, and 23, 1993. The record was held open to permit the parties to submit briefs. The record closed when the last submission was received from the parties on August 31, 1993.

BACKGROUND INFORMATION

Under the *Education for All Handicapped Children Act of 1975* (EAHCA), 20 *U.S.C.A. Sections* 1400 to 1485 (*P.L.* 94-142), now known as the *Individuals with Disabilities Education Act* (IDEA), handicapped children are entitled to a free and appropriate public education, Federal case law interprets that statutory right as the guarantee of a basic floor of opportunity.

20 *U.S.C.A.* 1400(c) states that the purpose of the statue is to see that all handicapped students are provided with special education and related services designed to meet their unique needs. 34 *C.F.R.* 300.13 defines a "related service" as a supportive service as required to assist a child with disabilities to benefit from special education. Transportation is included as a related service.

New Jersey is a recipient of federal funds, available pursuant to the EAHCA, to assist it to fulfill its obligation to provide for the education of its handicapped children. In order to receive the federal grant, a state must adopt "a policy that assures all handicapped children the right to a free and appropriate public education." 20 *U.S.C.A. Section* 1412(i); *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 *U.S.* 176, 181 (1982). Receipt of funds is conditioned upon the State's compliance with EAHCA requirements. *Lascari v. Bd. of Educ. Ramapo Indian Hills Reg. Sch. Dist.*, 116 *N.J.*30, 33 (1989). Under the federal regulations, the state educational agency, that is, the Department, is responsible for insuring that the right to education for all handicapped children is carried out.

New Jersey codified its obligations under the EAHCA by amending *N.J.S.A.* 18A, Chapter 46, Classes and Facilities for Handicapped Children. Many of the state's obligations, including the provision of related services, were delegated by statute to the local school districts for implementation. Regulations were promulgated in *N.J.A.C.* 6, Chapter 28, to clarify the statutory requirements and responsibilities.

Through the statutory and regulatory scheme, the local school districts became, at least in part, subgrantees of the state with respect to federal funds available pursuant to the EAHCA.

STATEMENT OF FACTS

Most of the material facts in this matter are not in dispute. The parties disagree mainly as to the consequences that should follow from the undisputed facts.

N.J.S.A. 18A:58-7, repealed effective July 1, 1990, required the state to pay 90% of the cost of pupil transportation to a district "when the necessity for such transportation and the cost and method thereof have been approved by the county superintendent" of the county in which the district is located.

In 1990, the Department conducted an audit of the Board's Pupil Transportation District-Wide Program Cost Report for the 1988-89 school year. This report determines how much state transportation aid the district will receive. The auditors, in their report dated January 9, 1991, took exception to $2,968,953 in expenditures. The audit determined that this would result in a downward adjustment in the same amount to state aid to the Newark school district for the fiscal year 1992-93.

A school district must award contracts for pupil transportation by advertising for bids. The policy of the state, which has not changed since 1988, is that there be "open, free and competitive bidding" for contracts. *N.J.A.C.* 6:21-13.1(b). *N.J.S.A.* 18A:18A-37 states that "contracts which require public advertisement for bids shall be awarded to the lowest responsible bidder." In order to insure that the lowest bid is received, the district is supposed to attract the maximum number of bidders possible for each contract. In the area of pupil transportation, this is achieved by advertising for bids on a "route" rather than on a "bus" basis. If there are a large number of routes to be covered, fewer carriers will have a sufficient number of buses to service all of them. If the routes are advertised individually for bidding, smaller bus companies will be able to compete for the contracts. The competition produced by the increased number of bidders should insure the lowest possible cost of pupil transportation to the district. The Department's requirement that transportation specifications for bidding be prepared to include separate route specifications was first embodied in *N.J.A.C.* 6:21- 19.1 as amended, effective November 22, 1989.

In the present case, the audit exception was taken because, in 1988, the Newark school district renewed two contracts for busing, which were originally advertised for bidding and awarded in 1983 on a "bus" rather than a "route" basis. With respect to the relevant routes, only two contracts were advertised for bids. The first contained specifications for 82 separate routes; the second contained 30 separate routes. This precluded any bus contractor, who was unable to provide at least 82 or 30 buses respectively, from bidding on the two contracts. The district was, therefore, unable to determine that it had received the most advantageous price because of the limited number of vendors who could submit bids.

All of the bus routes in question were for the transportation of the district's special education students. There is no dispute that the district actually furnished the services for which it seeks reimbursement. There has been no allegation that the transportation services were not required to assist these children with disabilities to benefit from special education.

The Board does not deny that the bids were advertised incorrectly. It does, however, deny that anything improper took place. It explains that the procedure that was used in 1988 had been in use continuously through the years and had not been disapproved by any county or state employee who reviewed it. The District had always been reimbursed by the state for the cost of transporting special education students.

Thomas King, Manager of Internal Audits for the Department, discovered no evidence of fraud, no unjust enrichment of any Board member, and no willful disregard of the statutes or regulations relating to pupil transportation. He testified that he found nothing egregious. The audit exception was taken because the contracts were not bid in accord with the regulations and were, for this reason, illegal.

Linda Welles, Manager of the Bureau of Pupil Transportation since 1988, testified that the district transports no less that 2500 special education students, more than twice as many as any other district in the state.

Paul O'Donohue, Executive Director of Purchasing and Warehousing for the Board since September 1987, testified that there is a major problem in developing the specifications for bus routes for the children receiving special education in the district. He

tries to prepare the routes in June or July, however, the district may not even know which children will need transportation services until late in September of the school year. Changes occur on a frequent basis throughout the school year. There are problems in organizing the bus routes for this particular student population: children are newly classified as being in need of special services on a continuous basis, classified students have their programs or placements changed and many of the classified students change their addresses frequently (due to homelessness, *etc.*).

Students who are not in need of special education may be provided with transportation by the district, however, under the regulations they may be picked up at various stops along a bus route to school. It is not a problem for the district to develop routes for these children.

O'Donohue testified that he thought the special education regulations required that special education children be picked up and returned portal-to-portal from home to school. Changes in the children's origins and destinations make it extremely difficult to design bus routes which are not subject to continual modification. Since bidders estimate their costs, and base their bids, upon the number of stops and the distance a bus will be traveling, the situation makes it difficult to advertise specifications for routes which are not subject to change and which provide bidders with reliable information. In order to avoid this problem, the district advertised for bids based upon the number of buses needed rather than on the routes traversed.

The version of *N.J.A.C.* 6:21-13.2 in effect at the time prescribed that the transportation specifications contain the following notice to prospective bidders: "If any change of route results in increased or decreased mileage, adjustment in the contract price will be made accordingly. The basis for any adjustment will be the separate and distinct per mile cost in the bid." This type of provision would have probably have resolved some of the district's problem, but nothing in the record shows that the original contracts contained the prescribed language. Only the 1988 renewal of the 82-bus contract is in evidence. There is nothing in the record to show that those who prepared the specifications were aware that the regulations allowed for some flexibility. It appears that few of the employees who were responsible for preparing the specifications in 1983 are still employed by the district. The contracts were automatically extended annually with an increase as allowed by *N.J.S.A.* 18A:39-3(a)(2).

Welles testified that a district may provide transportation services to its students and decide which students to transport but, in effect, Newark had created its own problems by electing to transport its special education students from portal to portal. She said that nothing in the regulations requires such transport.

This is not an accurate statement of the special education regulations. Every district board of education must provide educational programs and related services "for pupils with educational disabilities required by the individualized education programs of those pupils for whom the district board of education is responsible." *N.J.A.C.* 6:28-4.1(a). A "related service" is one which is required to assist a child with disabilities to benefit from special education. Transportation is a related service pursuant to *N.J.A.C.* 6:28-3.8(a)5. Under this regulation:

> i. The district board of education shall provide transportation as required in the individualized education program or as prescribed by the school physician. Such services shall include special transportation equipment, transportation aides and special arrangements for other assistance to and from and in and around the school.

From the regulations, I **CONCLUDE** that the district did not elect to provide portal-to-portal transportation for its special education students but was required to do so as a "related service" to its special education program in accord with the children's individualized education programs.

Witnesses for the Board testified that the same contracts had been in effect since 1983 and had been reviewed annually by the Bureau of Pupil Transportation, the Auditor General, the County Superintendent of Schools, the Bureau of Auditing and the Division of Compliance. One might suspect that a even a casual review of the original 1983 contracts for form could have revealed that there were two contracts for transportation for 82 and 30 buses respectively, that is, the contracts were not for individual routes, as required. This state of affairs might also be obvious from the subsequent extension contracts.

Welles testified that her reviews were for form only and did not constitute approval of the contracts. George Butman, the state Assistant Auditor General, had an office at the Newark Board of Education. He saw the original contracts and knew that the bids were advertised improperly but stated that he had no responsibility to inform the district of the

problem; his only duty was to report his observations to the Auditor General or the Department and follow instructions.

The transportation contracts and their renewals had to be submitted to the County Superintendent annually for review. *N.J.S.A.* 18A:58-7 required the County Superintendent to check them for necessity, cost and method. A review of the contracts for compliance with the provisions of *N.J.A.C.* 6:21-13 through 17 (which includes the route requirement provision) has been one of the duties of the County Superintendent, at least since *N.J.A.C.* 6:21-19.2(a) became effective on September 3, 1991. Actually, the County Superintendent apparently checked the contracts yearly only for compliance with respect to insurance and bonding.

At least since 1986, the contracts, whether original or renewal, were supposed to be accompanied by the bid specifications when submitted to the County Superintendent for review. There were probably no separate route specifications to attach to the contracts in question, since the bids were awarded by bus. The contract in evidence shows 74 bus routes at the same per diem amount. If bid correctly, the per diem amount for each route should have been related to the route mileage and it is highly unlikely that 74 out of 82 routes would have the same mileage. These things might have caused a reviewer to speculate.

The District passed both Level 1 and Level 2 monitoring with respect to transportation. No recommendations were made in regard to transportation by the Level 3 analysis teams. There was no testimony as to what aspects of pupil transportation were monitored.

The Department had never denied reimbursement for special education transportation in prior years, even though it was provided under extensions of the same contracts since 1983.

Before the district received the audit report in 1991, it was not aware that there was a problem. After it received the audit, it attempted to bring itself into compliance with the requirements, although it was too late to do so for the 1991-92 school year. At first it tried to get some relief from the monumental task of developing the specifications for bus routes for its special education students by seeking a waiver of the bidding requirements in the regulations. Several unproductive meetings and conversations were held with various

members of the state education staff, who expressed their desire to help but assured the district they were powerless to do so. Those that testified asserted that they had no responsibility to offer help or insisted that they had never been asked. The county superintendent did not consider the district's request for a waiver to be a request for help. He referred the request to the state and, ultimately, the district never received a final response.

The district also tried to comply with the requirements by attaching route descriptions to all existing contracts which did not have them. An attempt was made to attach route descriptions to contracts for which bids were then being solicited. O'Donohue said that this was difficult because of the number of students involved and because he had only one part time employee in his section to work on transportation contracts. For 112 contracts, he had to obtain a copy of the contract, modify it, write an agenda item for the Board to consider the modification, write a resolution for the Board and obtain Board approval. Andrew Swain, who became the district's Director of Transportation in June 1991, ultimately requested and received a computer program that could handle the task of preparing the bus routes and the district expects to be in full compliance for the 1993-94 school year.

The district is also struggling with other problems involving the quality of education which it is providing to its students. The state monitors have recommended, among other things, that the district increase the number of kindergarten and prekindergarten classes and increase the amount it spends for staff development. Bessie White, Executive Director of Management and Budget for eight years, testified that, if approximately $3,000,000 is cut from the 1993-94 budget, it will mean the loss of about 60 teachers and staff members. "Chapter 1" funds have already been cut for this school year. There is no excess in the line item budget which will make up for the loss of the aid. She also pointed out that Newark has problems not seen in suburban districts. It has a large student population requiring special education, basic skills, and bilingual education. It spends more to provide food for its children than comparable districts.

The Department argues that the requirement that transportation contracts be bid by route had been in existence since the 1960's and the district was advised of this requirement in the regulations, in the transportation manual and in workshops held by the Bureau of Transportation to acquaint transportation personnel with regulatory

requirements. No evidence with respect to the manuals or workshops was submitted by either party.

N.J.A.C. 6:21-15.2(a), effective November 22, 1989, directs the district boards to request bids for pupil transportation on a per route basis. *N.J.A.C.* 6:21-13.2(b), effective November 22, 1989, specifically requires that a separate route description be prepared for each individual bus route. The prior regulations, in effect at the time the bids were advertised, are not this clear. The prior *N.J.A.C.* 6:21-12.1 contains a "recommended form for advertising for bids" by routes. The requirement upon which the Department relies, that "separate specifications should be prepared for each route requiring a separate bus," appears only in a footnote to the heading of the prior *N.J.A.C.* 6:21-13.2.

N.J.A.C. 1:30-1.7 governs the use of headings in the interpretation of regulations. They are "not part of the rule, but are intrinsic parts of the publication. As such, these headings may be used in interpreting the rule." Since this is the case, the footnote to the heading can have no greater effect than the heading itself and may be considered for informational purposes only. The body of the regulation contains a form for prescribed transportation specifications, whose content, including a route description, is mandated by *N.J.A.C.* 6:21-13.2(b). The footnote in question might be conceivably read to advise, not direct, that separate specifications should be prepared for each route requiring a separate bus.

Both parties have referred to the statute *N.J.S.A.* 18A:58-16 as the one governing the ability of the commissioner to withhold all or part of "such apportionment [of state aid] for failure to comply with any rule or standard." This statute, repealed effective July 1, 1990, has no bearing upon the remedy which the commissioner may impose for failure to comply with bidding requirements. The rules and standards it refers to are those governing "equalization of opportunity." The statute was designed to promote equality of educational opportunity by providing the commissioner of education with the power to sanction the continued existence of *de facto* segregation in school districts by withholding state funds. *See Antidiscrimination Laws in Action in New Jersey: A Law-Sociology Study*, Alfred W. Blumrosen (1965), 19 *Rutgers L. Rev.* 189. (It had also been cited as the only statutory reference to the requirement that New Jersey schools remain open for not less than 180 days in the school year. *See Atty. Gen.*, F.O. 1975, No. 19.)

The commissioner's authority to impose sanctions for improper awards of transportation contracts is contained in *N.J.A.C.* 6:21-19.1(b), effective September 3, 1991, which provides:

> The Commissioner may withhold or adjust transportation aid for district boards of education which are noncompliant with the provisions set forth in this chapter [Pupil Transportation]. For example, transportation aid may be adjusted or withheld for the improper award of contracts...

This is the regulation which will be applied in the present matter.

FINDINGS OF FACT AND CONCLUSIONS

Based upon the evidence presented, I **FIND** that the district failed to comply with the requirements for the proper award of transportation contracts for the 1988-89 school year. For this reason, I **CONCLUDE** that it should be subject to the sanctions which the Commissioner may impose pursuant to *N.J.A.C.* 6:21- 19.1(b).

Under this regulation, the Commissioner may withhold or adjust transportation aid for the improper award of contracts. It is the argument of the Department that the aid should be withheld entirely for this noncompliance.

I **CONCLUDE** that circumstances dictate that the aid should be adjusted, rather than withheld, for the following reasons:

I **FIND** the evidence shows that, in 1988, the district was guilty of a lack of knowledge of the regulations relating to transportation contracts and/or a lack of interest in their content.

I **FIND** that there was no evidence of an improper or dishonest motive for this noncompliance.

I **FIND** that the district was permitted to extend this improperly bid contract and receive reimbursement for five years without intervention, although, at the very least, the County Superintendent should have been aware that there was a problem.

I **FIND** that when the district discovered its noncompliance, it made a good faith attempt to rectify the situation, although it suffered from a lack of experienced personnel and little interest on the part of state and county staff.

I **FIND** that a total withholding of reimbursement will adversely affect the district's ability to improve the quality of education which it is able to provide to its students; and this will happen at a time when it is already severely stressed by the necessity for improvement.

I **FIND** that the total withholding of reimbursement because of the errors and omissions of the prior administration of the district will adversely affect the children of the district; the present administration, which is trying to cure the problem, will be hampered if an attempt is made to punish its predecessors.

I **FIND** that the district actually provided and paid for the services for which the reimbursement is sought. (There has been no allegation that the services were not provided or were provided improperly.)

I **CONCLUDE** that under the federal and state regulatory and statutory schemes governing the education of handicapped students, the responsibility for providing this "related service" ultimately belongs to the Department. This responsibility has been delegated to the local school districts for implementation. I **FIND** that the Newark school district fulfilled this delegated responsibility for the 1988-89 school year: the Board provided and paid for the transportation of special education students within the district as it was required to do under the applicable regulations.

The Department argues that it should not be required to reimburse the district in any amount for providing this transportation since it received no benefit from the transportation contracts. This is not strictly accurate because the district, as subgrantee, performed services which were ultimately the responsibility of the state education agency, as grantee of funds under the FAHCA.

I **CONCLUDE** that it is inequitable, given the district's attempts to remedy its past noncompliance, its present plight, and the fact that it expended the funds to fulfill a delegated state responsibility, to punish the district five years later by withholding the reimbursement in its entirety.

THE ADJUSTMENT

I **CONCLUDE** that, if the district may not be reimbursed for the full amount of the transportation services it provided because those services were not purchased at the lowest available cost, it should at least be reimbursed for the reasonable value of these services.

The problem with this remedy is that there is no accurate measure of what the reasonable value might be. The contracts were originally bid in 1983. They were extended each year with a percentage increase in the per diem rate per bus in accord with the appropriate statutory and regulatory provisions. If the contracts had been advertised for bids for the 1988-89 school year, even incorrectly, there might be some parameters to use for guidance toward a reasonable value. It also appears that no relevant data can be obtained from state sources or from vendors providing bus transportation to other schools districts for the 1988-89 school year.

The 1983 cost of the two transportation contracts, although not obtained by the use of the appropriate bidding method, provides a starting point for consideration. The original 1983 dollar amount of the two contracts, before the annual increases, is not in the record but should be readily ascertainable. (If the contracts were extended through 1988 and were increased 22 percent each year, the original reimbursement on the two contracts must have been in the neighborhood of $1,340,000. Only the contract rate of increase from 1987 to 1988 is in evidence. The assumption is made that the same increase was applied during the other extension years.)

O'Donohue testified that 20 firms bid on the original contracts and their prices were relatively comparable. This being the case, the 1983 contract amounts may not be too far out of line with what the cost per route might have been if bid properly. If the Board were to be reimbursed at the 1983 rate with a nominal annual increase, say eight percent, for the five extension years it might be a reasonable adjustment. This would lead to a reimbursement amount of about $1,800,000 for the two contracts for the 1988-89 school year.

If it is assumed that the Board could have gotten a more favorable price had the contracts been bid in 1988 in compliance with the regulations, that price, in all likelihood, would not be less than two thirds to one half of what they actually paid for the

transportation. If it is arbitrarily decided that the cost would be about 40 percent less, this would also lead to a reimbursement of about $1,800,000.

I, therefore, **CONCLUDE** that the Board should be reimbursed $1,800,000 based upon an estimate of the reasonable value of the transportation contracts for the 1988-89 school year.

ORDER

It is hereby **ORDERED** that the Department restore $1,800,000 of the $2,968,953 withheld from the Board because of its failure to comply with the bidding regulations when it awarded contracts to provide bus transportation for special education students for the 1988-89 school year.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

APRIL 2, 1993
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

10/13/93
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 19 1993
DATE

OFFICE OF ADMINISTRATIVE LAW

md/e

APPENDIX

WITNESSES

For Petitioner:

Andrew Swain
Paul O'Donohue
Eugene C. Campbell
Bessie White
George Butman
Peter Carter
Thomas King
Linda Wells

EXHIBITS

F-1 *N.J.A.C.* 6:21-12.1 through 15.3 (prior version)

P-1 Pupil Transportation Aid Audit
P-4 Letter, Carter to Campbell, March 5, 1992

R-1 Bus contract, 1988 renewal
R-2 Letter, Welles to Campbell, February 24, 1993

BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
DIVISION OF COMPLIANCE, NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

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

Respondent urges the Commissioner to reverse the findings of the ALJ and determine that because the Board admits it was in violation of the regulation regarding bidding for school transportation for the years in question, it has no entitlement to reimbursement for the contracts at issue. Respondent claims an illegality in the bidding process is a fatal error which precludes state aid. It suggests there was no evidence that the State at any time was aware that the District was bidding improperly and that it acquiesced in the noncompliance, as found by the ALJ.

Moreover, respondent submits the District's attempts to ameliorate the problem after the District learned of the noncompliance is irrelevant, but it adds that "its halfhearted measures to come into compliance are instructive because they show the district was unable to correct its problems." (Exceptions, at p. 15)

Respondent contends the initial decision is factually and legally flawed, noting in particular the ALJ's order to the Department to pay the Board $1,800,000. Respondent contends the testimony and brief demonstrates that the District has retained the $2,968,953 claimed by the Department. Thus, respondent notes, if the ALJ's determination is adopted, the District must refund $1,168,953 to the Department, although it submits that the District should be compelled to refund the entire amount with interest. On the issue of interest the State argues additionally that the ALJ failed to address its motion regarding interest.

Further, respondent contends that while it may be understandable that the ALJ did not wish the District to lose $3,000,000 out of its more than half billion dollar budget, she failed to realize that her relief rewards, by use of taxpayer monies, a District for incompetence, ineptitude, negligence and carelessness. It claims the ALJ erred in allowing testimony regarding the effect on the District of the loss of the state aid.

Second, respondent avers the ALJ erred in permitting evidence of what the District did in its attempts to cure the problems. In this regard, respondent contends the testimony proved it should not be reimbursed for invalid contracts because although it was advised several months before January 1991 that it had bid its contracts improperly, the District continued to bid them improperly for two more years. Respondent claims that when it did ask for assistance from the State in March 1992, approximately a year and a half after it was advised that its transportation contracts were in noncompliance, it asked for a waiver of the regulation in question, which the Department has no legal authority to do. The State submits the ALJ wrongly viewed the Department's

failure to waive the regulation as an example of disinterest by the State and county staff. Respondent concludes that with so much state aid at stake, it was incumbent upon the District to employ sufficient experienced staff and to obtain the assistance of the Department in order to come into compliance, regardless of its size.

Respondent also excepts to the ALJ's conclusion that the State was obligated to reimburse the District for these contracts because they involved special education students. Suggesting that N.J.A.C. 6:28-3.8(a)5 mandates transportation services only as required in a pupil's Individualized Education Program (IEP), respondent submits that the Board's policy of transporting all special education students portal-to-portal violates special education law, first, because the law requires that related services, such as transportation, must be embodied as part of the pupil's IEP, and second, because it violates the requirement that special education children have the least restrictive environment. Respondent suggests that the District's blanket policy of transporting all special education pupils, regardless of individualized need, removes from many pupils their right to be mainstreamed.

Arguing that this is not a special education case but rather one questioning whether transportation contracts have been bid improperly, respondent says the ALJ's attempt to hold the State responsible because special education pupils were being transported is an attempt to find ways to rationalize payment for noncompliant contracts.

As factual exceptions, respondent contends that contrary to the ALJ's findings of fact, the Bureau of Pupil Transportation does not review and approve contracts, the Auditor General never audited

the transportation contracts, the Bureau of Auditing and the Division of Compliance in the Department of Education never audited transportation contracts until 1990, when it audited the contracts at issue herein, and Mr. Butman, Assistant Auditor General, at no time reviewed transportation contracts. Conceding that the county superintendent does review the contracts, respondent refers to the testimony of the Essex County Superintendent of Schools for the fact that his review was for form only. Respondent thus concludes that until the 1990 audit of the contracts, no one from the State was aware that the District was in violation of a long-standing regulation, and it excepts to the ALJ's implicit and erroneous belief that the State was aware of the problem and failed to take action. Instead, respondent contends the ALJ cannot fault the Department for its alleged failure to catch the error or its alleged refusal to assist the District.

Moreover, respondent submits that the ALJ erred when she stated that N.J.A.C. 6:21-16.1 requires that the bid specification be submitted when a contract is renewed, and that she erred in implying that the county superintendent should have observed that the specifications were improper. Rather, respondent submits that N.J.A.C. 6:21-16.1 was amended effective November 16, 1989, after the bidding at issue, to include the requirement that the specification be forwarded to the county superintendent. (Exceptions, at p. 8) Until the amendment, the District was required to submit only a copy of the certified minutes, the State avers. Respondent notes that the District did not place into this record exhibits proving that it submitted the specifications to the county superintendent in 1983 for his review. Since the specifications were not submitted when the contract was bid

initially or when it was renewed, there was no way for the county superintendent to have known they were bid improperly. With the above factual errors corrected, respondent claims the District has no entitlement to the funds at issue.

Noting that the original contracts were not brought into evidence in this case, respondent contends the ALJ may not speculate whether the county superintendent should have been alerted to any alleged bidding irregularities. Neither could she speculate as to the subsequent extension contracts in order to calculate for the adjustment she orders, because no evidence is in the record regarding the cost of the contracts had they been bid properly. Respondent further excepts to the ALJ's reliance on Mr. O'Donohue's testimony that 20 firms bid on the original contract and that their prices were relatively comparable in assessing the worth of such contracts because Mr. O'Donohue was not employed by the District at the time of the original bid, and his testimony is "self-serving." Neither, respondent claims, were there any documents brought to the record showing what the bids were. Respondent strongly contends that the fundamental flaw with the ALJ's adjustment, notwithstanding that all is based on assumptions, is that when the firms bid on the original contract, they were bidding on contracts that were improperly established. Thus, it claims, only companies that were bidding on the entire package, either the 82 routes or the 30 routes, could bid. The record does not reflect what the bids would have been if the contracts had been correctly bid, so that all potential contractors could bid on the number of routes that they had vehicles for, respondent argues. Thus, respondent submits, the ALJ's calculations are faulty in that they are improperly predicated

on how much the bids were when the contracts were improperly bid, and not on how much they would have been worth if they had been bid properly.

Finally, respondent contends the regulation at issue, N.J.A.C. 6:21-13.2, has been in effect since at least 1974, the transportation manual given to all districts reiterated the requirement to bid by route and the procedure was further discussed in workshops given to transportation coordinators, as testified to by Linda Wells, Manager, Pupil Transportation, New Jersey State Department of Education. The District's defense of ignorance of the law, therefore, must fail, as must its contention that it had problems in making changes to the contract as children either left or were added to the route. Under the initial contract in 1983, and therefore in each renewal thereof, including the year in question, the District was not required to do an addendum each time the route changed, respondent submits. Thus, the District's rationalization for its failure to abide by the regulations is without merit.

Accordingly, respondent seeks reversal of the initial decision and interest on the $2,968,953 it claims is due and owing the State Department of Education.

Upon careful and independent review of the record of this matter, the Commissioner rejects the initial decision for the reasons which follow.

As noted by the ALJ, the Board of Education of the City of Newark concedes that it failed to comply with the requirements for the proper award of transportation contracts for the 1988-89 school year. As such, the Commissioner agrees that it is subject to the sanctions which the Commissioner is empowered to impose pursuant to

N.J.A.C. 6:21-19.1(b). However, the Commissioner parts from the ALJ's determination in adjudging the appropriate penalty for the District's noncompliance.

The Commissioner agrees with the ALJ's finding that in 1988, when the District first bid the contracts in question, it was guilty of a lack of knowledge of the regulations relating to transportation contracts and/or a lack of interest in their content. She also concurs with the Office of Administrative Law that there was no evidence brought to the record of any improper or dishonest motive for this noncompliance. However, the record suggests that both the District and the ALJ herself misconstrue the regulation which is the linchpin of this controversy, N.J.A.C. 6:28-3.8(a)(5), which states:

> i. The district board of education shall provide transportation as required in the individualized education program or as prescribed by the school physician. Such services shall include special transportation equipment, transportation aides and special arrangements for other assistance to and from and in and around the school. (emphasis supplied)

Contrary to both the ALJ's interpretation of this regulation and the Board's policy, which state that the District was required to transport all of its special education students portal-to-portal, the Commissioner finds that the above regulation mandates transportation only to those special education students whose IEPs require it or as prescribed by the school physician.

Nevertheless, the District's rationale for choosing to bid these contracts by numbers of buses it deemed were required to serve the student need instead of based on routes, as required by N.J.A.C. 6:21-13.2, is that it bused all of its special education students, which, it claims, involved too many routes and too many variations

in routes based on pupil mobility to be practical. Because she has determined that the District's policy of busing all of its special education students is not a requirement of law, the Commissioner cannot sustain a determination by the ALJ to compel the State to adjust the monies owing due to a policy that is not supported by N.J.A.C. 6:28-3.8(a)5, and which thereby led the District to wrongly bid its contracts for transportation.

As to the ALJ's factual determinations concerning whether the State was accountable for reviewing the instant contracts and the bidding procedures that resulted in those contracts, the Commissioner notes that she is without the benefit of the transcript of the proceedings below. However, while the Commissioner has the authority pursuant to N.J.A.C. 6:21-19.1(b) to either withhold or adjust transportation aid for the improper award of contracts, she deems it unnecessary to delve into testimony regarding the effects on the District of the loss of the state aid due under the facts of this matter, that is, $2,968,953. Similarly, she finds no basis for the ALJ's having expanded the scope of the hearing to include testimony on the District's failed attempts to cure its noncompliance in the face of the undisputed evidence of a systemic failure by the District to assure that its bidding procedures and transportation contracts were in accord with law. She so finds noting the bidding violation is an admitted one, and was based on a special education transportation policy within the District that is insupportable. The Commissioner thus finds such contracts to have been fatally flawed from the time they were put out for bid, and in violation of public policy requiring bidding specifications and procedures that encourage varied and competitive bidding.

Rather, in assessing the appropriate sanction in this matter, the Commissioner need only observe that the District admits its noncompliance, which persisted from 1983 through 1991, and that the total amount owing for the year in question, 1988-89, that is, $2,968,953, represents only slightly more than one half of one percent of the Distict's budget of nearly a half billion dollars for school year 1993-94, approximately $400,000,000 of which is state aid. As such, it is the Commissioner's view that the children of the District will not suffer in exacting from the District the overpayment in aid it received. Hence, the Commissioner finds and determines that no adjustment is appropriate under the circumstances of this matter.

Finally, the Commissioner denies respondent's request for pre-judgment interest on the amount due because the record does not support a finding of bad faith on the District's part, pursuant to the requirements of N.J.A.C. 6:24-1.16(c).

Accordingly, the initial decision is rejected. The Board of Education is hereby directed to immediately conform its policy regarding busing of special education pupils to the dictates of law, and to likewise conform its bidding specifications on bus transportation by routes, not by numbers of buses required to perform the service. The Commissioner further directs the withholding of transportation aid in the amount of $2,968,953 from the 1994-95 state aid.

IT IS SO ORDERED.

NOVEMBER 29, 1993

DATE OF MAILING - NOVEMBER 30, 1993

COMMISSIONER OF EDUCATION

297-93

EDU #1941-92
C # 297-93
SB # 11-94

BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
DIVISION OF COMPLIANCE, NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION ON MOTION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, November 29, 1993

For the Petitioner-Appellant, Brown & Brown (Raymond A. Brown, Esq., of Counsel)

For the Respondent-Respondent, Arlene G. Lutz, Deputy Attorney General (Deborah T. Poritz, Attorney General of New Jersey)

An audit by the Department of Education of the pupil transportation program of the Board of Education of the City of Newark (hereinafter "Board") for the 1988-89 school year resulted in an audit exception in the amount of $2,968,953 which the Department sought to recover by the reduction of State aid to the Board in 1992-93. The Board filed a petition with the Commissioner of Education challenging such action. On November 29, 1993, the Commissioner of Education, finding that the Board had failed to comply with requirements for the proper award of transportation contracts for the 1988-89 school year, directed the withholding of $2,968,953 in State aid for 1994-95.

On February 17, 1994, the Board filed a notice of appeal to the State Board of Education, along with a motion to file the appeal nunc pro tunc. In a certification filed therewith, the counsel for

May 4 1994

the Board related that he had filed an appeal from the Commissioner's decision directly to the Appellate Division of the Superior Court. Counsel stated therein: "It is respectfully submitted that the State Department of Education is a party Defendant in this matter. Accordingly, it is our view that the State Board should recuse itself and permit this matter to proceed directly to the Superior Court." He related that the Department of Education had filed a motion in the Appellate Division to dismiss the appeal filed therein by the Board on the ground of failure to exhaust administrative remedies. Counsel requested that if such motion were granted, the Board be permitted to file its appeal to the State Board nunc pro tunc.

On March 1, 1994, counsel for the Board was advised that his motion was deficient in that it did not include a brief in support of the motion as required by N.J.A.C. 6:2-1.18(a). He was given until March 14 to correct such deficiency. He was also advised to file a substitution of attorney by that date since he was not the attorney of record in this matter.

Counsel for the Board filed a substitution of attorney on March 14. However, he did not file a brief in support of the motion until April 7. He provided no explanation for the late filing. Nor did he request further extension for such filing.

Pursuant to N.J.S.A. 18A:6-28, appeals to the State Board must be taken "within 30 days after the decision appealed from is filed." The State Board may not grant extensions. N.J.A.C. 6:2-1.5(a). In contrast to the period for filing petitions to the Commissioner of Education, see N.J.A.C. 6:24-1.2; N.J.A.C. 6:24-1.15, the time limit within which an appeal must be taken to the State Board is statutory, and, given the jurisdictional nature

of the statutory time limit, the State Board lacks the authority to extend it. Mount Pleasant-Blythedale Union Free School District v. New Jersey Department of Education, Docket #A-2180-89T1, slip op. at 5 (App. Div. 1990).

We conclude that the statutory filing requirement with which the Board failed to comply is of such significance that we deny the instant motion and dismiss the appeal. In Yorke v. Board of Education of the Township of Piscataway, decided by the State Board of Education, July 6, 1988, aff'd, Docket #A-5912-87T1 (App. Div. 1989), the Court upheld the dismissal of an appeal by the State Board where it found that the notice of appeal had been filed one day late by appellant's counsel who alleged that he had misread or misunderstood the applicable regulations. The Court added that even if the statute could be construed to permit enlargement of the time for filing an appeal, the appellant therein had failed to establish good cause.

In this case, the Commissioner's decision was rendered on November 29, 1993 and mailed to the parties on November 30. Accordingly, pursuant to N.J.A.C. 6:2-1.4, the decision appealed from was deemed filed on December 3. Therefore, as mandated by N.J.S.A. 18A:6-28, see N.J.A.C. 6:2-1.3(a); N.J.A.C. 6:2-1.4(a), as computed under N.J.A.C. 6:2-1.4(b), the Board was required to file its notice of appeal to the State Board on or before January 3, 1994.[1] The Board's instant notice of appeal and motion to file nunc pro tunc were dated February 17, 1994 and filed on that date.

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[1] We note that the Board's appeal to the Appellate Division from the decision of the Commissioner was apparently filed on January 14, 1994.

Even if N.J.S.A. 18A:6-28 can be construed to provide us with the authority to enlarge the time limit for filing an appeal, we find no substantive basis to warrant doing so in this particular instance. The contention by counsel for the Board that "the State Board should recuse itself and permit this matter to proceed directly to the Superior Court" does not excuse his failure to comply with the statutory filing requirement. The law is clear and unambiguous that "[a]ny party aggrieved by any determination of the Commissioner may appeal from his determination to the state board." N.J.S.A. 18A:6-27. Moreover, counsel for the Board was expressly advised in a cover letter accompanying the Commissioner's decision in this matter that "[a]ppeals of decisions rendered by the Commissioner must be filed with the State Board of Education pursuant to N.J.A.C. 6:2-1.1 et seq. except for matters relative to the New Jersey State Interscholastic Athletic Association and State Department of Education employee contractual matters." Nor does the misdirection of the notice of appeal to a court with a 45-day period to appeal alter the result. Vogel Bus Company, Inc. v. Union County Regional Bd. of Ed., Docket #A-4645-87T1, slip op. at 2 (App. Div. 1989).

Accordingly, we deny the Board's motion to file its appeal in this matter nunc pro tunc and dismiss the appeal for failure to file notice thereof within the statutory time limit as computed under the applicable regulations.

May 4, 1994

Date of mailing MAY 06 1994

298-93

A.G., by his mother and guardian, M.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BOONTON AND PARSIPPANY-TROY HILLS SCHOOL DISTRICT, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

NOVEMBER 29, 1993

OAL DKT. NO. EDU 7171-93

A.G., by his mother and guardian, M.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BOONTON AND PARSIPPANY-TROY HILLS SCHOOL DISTRICT, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before her and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 29, 1993

DATE OF MAILING - NOVEMBER 30, 1993

299-93

IRIS BERNSTEIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

NOVEMBER 29, 1993

OAL DKT. NO. EDU 6098-93

IRIS BERNSTEIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before her and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 29, 1993

DATE OF MAILING - NOVEMBER 30, 1993

300-93

D.W., on behalf of her minor son, G.L.,

PETITIONER,

V.

BOARD OF EDUCATION OF GREATER EGG HARBOR REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

NOVEMBER 29, 1993

OAL DKT. NO. EDU 5476-93

D.W., on behalf of her minor son, G.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF GREATER EGG HARBOR REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before her and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 29, 1993

DATE OF MAILING - NOVEMBER 30, 1993

301-93

MARIE KIMES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

NOVEMBER 29, 1993

OAL DKT. NO. EDU 4919-93

MARIE KIMES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before her and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 29, 1993

DATE OF MAILING - NOVEMBER 30, 1993

302-93

IN THE MATTER OF THE TENURE	:	
HEARING OF HARRY CARAVELLO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF SOUTH PLAINFIELD, MIDDLESEX	:	
COUNTY.	:	
	:	

SYNOPSIS

Board certified tenure charges of unbecoming conduct and other just cause against respondent, tenured custodian who tested positive for cocaine. Respondent contended drug testing was flawed.

Initial decision determined urine sample was collected in accordance with reasonable medical office and laboratory practice and thus could serve as basis for respondent's dismissal.

Commissioner adopted findings and determination in initial decision noting that results of testing established Board's tenure charges particularly in light of respondent's existing agreement with district as an outgrowth of prior charges of drug abuse. Respondent was ordered dismissed from his position as lead custodian.

DECEMBER 1, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8920-92
AGENCY DKT. NO. 416-9/92

IN THE MATTER OF
HARRY CARAVELLO

Robert J. Cirafesi, Esq., on behalf of petitioner, South Plainfield Board of Education (Wilentz, Goldman & Spitzer, attorneys)

Stephen E. Klausner, Esq., on behalf of respondent, Harry Caravello (Klausner, Hunter, Cige & Seid, attorneys)

Record Closed: July 19, 1993 Decided: October 14, 1993

BEFORE **SOLOMON A. METZGER**, ALJ:

This matter arises out of tenure charges filed by petitioner, the South Plainfield Board of Education, against respondent Harry Caravello seeking his dismissal pursuant to *N.J.S.A.* 18A:6-9. The Commissioner of Education transmitted the matter to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13. A hearing was conducted on May 18, 1993, and certain testimony was repeated on June 16, 1993.[1] The last brief was received on July 19, 1993, after which the record closed. An order of extension was issued pursuant to *N.J.S.A.* 52:14B-10(c).

Certain basic facts are undisputed. Respondent was arrested in May 1990, and charged with conspiracy to possess and distribute cocaine. These charges were dismissed following his completion of pretrial intervention (PTI). As a condition of reinstatement to his former position with petitioner as lead custodian,

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1 This was necessary because of a recording equipment malfunction and was done with the consent of the parties.

respondent consented to random urine testing for a period of one year, commencing on November 4, 1991. A sample taken on June 29, 1992, proved positive for cocaine. Respondent was provided with a copy of the test results on July 2, 1992 (P-13).

The question presented is whether the protocols used to collect and test this sample were sufficiently trustworthy to allow the result to form the exclusive basis for respondent's dismissal.

Petitioner presented the testimony of Ms. Deborah Bender, a laboratory technician employed at the South Plainfield Primary Care Center by Dr. Yogi Bakshi, respondent's medical examiner. Ms. Bender testified that she administers urine tests regularly and that she followed her usual procedure with respondent on the morning of June 29, 1992. Ms. Bender was familiar with respondent because she had collected urine samples from him on three or four prior occasions.

Ms. Bender testified that she escorted respondent to the bathroom, which contains plastic cups with the "MetPath" logo for collection of urine specimens (P-1). While respondent urinated into a cup, the door remained ajar; Ms. Bender stood no more than three or four feet away. When respondent had finished he handed the cup to her. She asked whether he had been on medication in the last two weeks and he responded in the negative. Ms. Bender testified that she then took the cup into the office laboratory a few feet away, and transferred the contents into a more secure specimen container (P-2). She screwed the cap shut and wrote respondent's name on the cap with indelible marker. Ms. Bender then placed a temperature strip onto the cup, which registered urine temperature in an appropriate range (P-3). She prepared a MetPath requisition form for a drug screen with confirmation (P-4). The form and sample were placed into a MetPath plastic pouch (P-5) and sealed. Ms. Bender testified that she then set the pouch on a counter in the laboratory where it was out of the sight of patients. She recalled that respondent was the only person in the office that day for urine drug screening. At 4:30 p.m., the end of the work day, the pouch was placed in the MetPath pick-up box outside the office door, from which it was to be retrieved by a courier. The box is not locked, and MetPath generally makes its pick-up between 6:30 and 7:00 p.m.

Ms. Bender acknowledged that she did not ask respondent whether he had undergone recent medical or dental treatment, and she had no documentation to show that she asked him whether he was taking medication. She did not wear

surgical gloves while handling the specimen, nor was respondent asked to wash his hands before providing the specimen. Respondent was not asked to observe the transfer to a secure cup. Ms. Bender's office does not receive a receipt from the courier documenting that a pouch has been picked up.

Dr. John E. Heveran is the director of clinical chemistry and toxicology at MetPath, the laboratory which tested the sample in question. He is certified by the American Board of Clinical Chemistry, and is licensed in New Jersey as a laboratory director. MetPath itself is also certified by the National Institute on Drug Abuse (NIDA), a federal agency, and it is licensed by the State of New Jersey. Dr. Heveran manages the laboratory and develops its testing procedures. Dr. Heveran testified that MetPath tests biological specimens for the medical profession. Once the courier delivers a specimen to his facility, it is deposited into the building through a door opening and is placed onto a sorting table. An "accessioner" opens the MetPath pouch, examines the paperwork and enters the information into a computer. A number is assigned to the specimen and that number is then placed on the specimen bottle, on the paperwork and into the computer. The specimen is then brought into the laboratory and tested. In this instance, the specimen was received on June 29, 1992, and tested within twelve hours. Instructions called for a ten-drug panel using the Enzyme Multiplied Immunoassay Technique (EMIT), and then if there were any positives, for a separate immunoassay confirmation. MetPath uses a test called Florescence Polarization Immunoassay (FPIA) for this purpose. The first test resulted in a positive for cocaine and the second test detected a high level of benzoylecgonine, the major metabolite of cocaine, thus confirming the first test result. Dr. Heveran testified that EMIT is 95 percent accurate and, in combination with FPIA, approaches an accuracy rate of 99 percent; the two tests together are highly reliable. A gas chromatography/mass spectrometry (GC/MS) test was not used for confirmation; the accuracy of confirmation with this test exceeds 99 percent. Dr. Heveran testified that this sample was not handled as a "chain of custody" case, because it was not requested. Based on his review, the integrity of the specimen was maintained while at MetPath.

Dr. Heveran testified also that he is certified as an inspector by NIDA, and is familiar with federal workplace drug testing standards. These do contain requirements which were not followed in this case. He testified, however, that these standards have not been adopted in New Jersey and that the methods used by MetPath are commonly relied upon by the medical community.

Cynthia L. Schaffer, is a doctor of osteopathy, and she is also a medical review officer certified to do drug testing for federal government agencies. Dr. Schaffer testified that she regularly conducts drug screens; she has never operated a drug-testing laboratory and her criticisms focused on the collection process used here. Dr. Schaffer testified that federal guidelines (R-3 through R-8) impose a strict regime for urine testing and that although she had no evidence that the sample here was switched, tampered with or tainted, the collection procedure was unreliable. She testified initially that persons using cocaine often exhibit behaviors that give evidence of addiction, such as irritability, faulty decision-making, and the like and there are no such indications here. Dr. Schaffer testified that respondent was not asked to wash his hands before donating a specimen and that she requires this routinely in her practice to avoid any residue contaminating the sample. The lab technician should wear gloves for this same reason. The cup should be sterile, and sealed in plastic before it is used. Donors must present identification and should be asked to remove outer garments to limit the possibility of tampering once they are in the bathroom. Donors should witness the entire collection process and sign a receipt to that effect. The sample must be placed in a tamperproof bottle. Most importantly, the specimen must be secured until it is transported to the laboratory. Dr. Schaffer testified that respondent's sample was destroyed after thirty days, which is improper under federal guidelines. A sample should be kept for at least a year and, where there is litigation, longer.

Dr. Schaffer testified that she has rarely been involved in a non-chain-of-custody urinalysis. She acknowledged that the procedures followed here are used routinely by doctors to collect specimens from their patients for analysis of disease.

Respondent testified in his own behalf. He has been a custodian for petitioner for twelve years. After being arrested in May of 1990, he entered PTI because his legal fees were becoming excessive. He denied any involvement in the distribution or consumption of cocaine. Nevertheless, respondent agreed to petitioner's random-drug-testing demands and, until the test in question, had no problem. He testified that on June 29, 1992, he was not asked to identify himself at the South Plainfield Primary Care Center, he simply went down the hall, filled the cup and told Ms. Bender when he was finished. He was not required to wash his hands and he did not see Ms. Bender take the sample out of the bathroom. When he learned the results of the June 29 test, he contacted counsel within a few days. This is the substance of the record.

Respondent has not attempted to show that the sample in question was tainted. Nor does he cite any authority which imposes federal workplace drug testing standards in the case at bar. Respondent's counsel did suggest at hearing, in response to an objection to any discussion of these standards, that his posthearing brief would support a legal conclusion that petitioner had an obligation to apply federal workplace drug testing standards as a recipient of federal funds. This argument was never made. Nevertheless, the suggestion created an opening through which the federal standards entered the record. Respondent now holds these out as a model by comparison with which, the procedures used here suffer. He buttresses this with Dr. Schaffer's testimony that she uses the federal standards in her practice, and that they more carefully protect samples. There is no question that federal workplace drug testing standards are careful to protect samples, in everything from requiring a bluing agent in toilet water to mandating GC/MS as the confirming laboratory test. It should be clear, however, that any debate about the costs and benefits of the federal standards is more appropriate to a policy-making forum. Here respondent must show more than that further precautions are possible; he must show that the methods used were insufficiently cautious.

The procedures used by MetPath were not seriously attacked at hearing and Dr. Heveran's testimony was persuasive to the effect that MetPath's protocols are relied upon widely by the medical community in the State and reflect the industry standard. The two tests conducted by MetPath have a combined accuracy approaching 99 percent, and if this is something less than is available through GC/MS confirmation, then the risk differential is small. Apparently there is no uniform State practice or standard governing the way medical offices are to conduct urine testing for drug screening, and herein lies some difficulty. There is little against which to measure the steps Ms. Bender took to collect the specimen on June 29, 1992. We are left to the standards of due process and to general notions of fairness.

Ms. Bender was a credible witness and I adopt her testimony as factual. The procedures which she used appear, on the whole, reasonably calculated to protect specimens. Respondent was asked to donate a sample while Ms. Bender stood nearby. After taking the sample from him, she transferred the urine to a more secure specimen cup, screwed the cap shut, and wrote respondent's name on the cap with indelible marker. She completed a MetPath requisition form and inserted it and the specimen cup into a plastic pouch, which was in turn sealed and stored in the laboratory away from patient traffic. The pouch was then placed in a MetPath box outside the office door. A courier retrieved it and delivered it to MetPath, which

undertook its testing. There is no indication that there was anything awry when the specimen arrived at MetPath.

Respondent seeks further support for his theory that the collection process here was flawed from a line of federal cases involving urinalysis to detect drug use. In *Capua v. City of Plainfield*, 643 *F. Supp.* 1507 (D.N.J., 1986), the district court struck down a program of surprise mass drug testing for firefighters as offensive to Fourth Amendment protections against illegal searches and seizures, as well as Fifth Amendment due process protections. As part of this analysis the court expressed concern with the city's refusal to afford plaintiffs access to their samples for independent testing. In this connection it commented that urinalysis may not be all that reliable. Our circumstances do not involve surprise mass testing and, thus, in the main, *Capua* is off point here. To the extent that the court was concerned with access to samples for independent testing, respondent here was tested on June 29, 1992, and informed of the results on July 2, 1992. He saw counsel within a few days. Thus, he had close to a month to request an independent test before the sample was destroyed, and did not do so. He was not refused access to his sample. It should also be noted that EMIT with confirmation has won general approval in the federal courts, *see, e.g., Spence v. Farrier*, 807 *F. 2d.* 753, 756 (8th Cir. 1986); *Wykoff v. Resig,* 613 *F. Supp.* 1504 (D.C. Ind. 1985). It is not clear from the opinion in *Capua* whether confirmation was part of the procedure. In any case, it is undisputed that the combined tests conducted here have an accuracy rate approaching 99 percent. Respondent simply suggested that the GC/MS confirmation is even more accurate.

Other federal courts have commented on standardless urine testing. In *Lovvorn v. City of Chattanooga, Tenn.*, 647 *F. Supp.* 875 (E.D. Tenn. 1986), a district court again rejected mass drug testing for firefighters without an individualized suspicion on Fourth and Fifth Amendment grounds. The court found *inter alia* that testing procedures varied from one employee to the next. Some firefighters were "patted down," others were not, some were observed while urinating and others not, sometimes EMIT was followed by confirmation and sometimes not. *Lovvorn, supra*, 647 *F. Supp.* at 881. This, again, is not our situation; there is no indication that procedure at Dr. Bakshi's office varies.

In *Egloff v. New Jersey Air National Guard*, 684 *F. Supp.* 1275 (D.N.J. 1988), the district court had before it defendant's motion for summary judgment. A factual dispute developed concerning the procedure that would have been used to

administer the test - plaintiffs had refused to submit - and as is required, all facts and reasonable inferences were found for plaintiffs. In that context the court wrote:

> Applying these principles to the case at hand renders this court unable to sanction the manner in which the proposed urinalysis was to be performed on the plaintiffs. Taking (as we must) all of plaintiffs' allegations as true, it appears that the testing was marked by a conspicuous absence of the most rudimentary non-procedural safeguards and guidelines. Plaintiff James Egloff was simply given an opened, unlabelled bottle and told to fill it; there were no apparent provisions for insuring nonadulteration of the sample or protecting its chain of custody. It is utterly unclear as to which method of testing would be performed, or whether a confirmatory test would be conducted. We are equally troubled by plaintiffs averment that they were never informed of the purpose of the testing; indeed James Egloff contends that he was actively misled as to the reason for the testing. At least one court has demanded that urine testing which is performed on the basis of "reasonable suspicion, based on specific, objective facts and reasonable inferences drawn from those facts" may be ordered only if the "specific, objective facts [are] disclosed to the employee at the time the demand is made." *McDonell v. Hunter*, 809 F.2d at 1309. Also disturbing is plaintiff James Egloff's claim that there existed no provision for retesting his sample at a civilian lab. In *Von Raab*, the Court of Appeals for the Fifth Circuit approved a testing procedure, in large measure because it provided that an employee could "resubmit a specimen pronounced positive to a laboratory of his own choosing for retesting." 816 F.2d at 181. We do not imply that Federal Courts are uniquely qualified to set out specific technical guidelines as to proper methods for urinalysis testing. *But see, McDonell v. Hunter*, 809 F.2d at 1309 (Court prescribing equipment and procedure to be employed in urine screenings). However, we think it beyond doubt that our duty to scrutinize urinalysis testing methods under the Fourth Amendment requires satisfaction that the methods contain at least some modicum of reliability to pass the threshold of reasonableness.
> [*Egloff, supra*, 684 *F. Supp.* at 1281]

It is plain that the court was looking at the totality of protocol errors alleged by plaintiffs when it made its comments. The court directed that a trial go forward on these points of difference.

In *Wykoff* the District court questioned some of the procedures utilized by prison authorities to collect specimens. Most relevant to our case were the court's criticisms of sealing the sample outside the presence of the inmate, failing to maintain a written chain of custody, and storage of samples in unlocked refrigerators. *Wykoff, supra.*, 613 *F. Supp.* at 1514. Nevertheless, the court approved the test result, and denied the relief sought by the inmate.

While these federal authorities make clear that collection and testing must be scrutinized, none map a step-by-step procedure and, indeed, the court in *Egloff, supra.* 684 *F. Supp.* at 1282, acknowledged that such technical guidelines should probably come from other sources. In struggling to find minimum standards of acceptability, these courts have looked to the totality of the procedures used. While some have suggested additional precautions in one or another detail, no overall rule of procedural due process emerges against which to measure our facts. It would be easy to criticize the placement of samples outside the door in an unlocked box, where they remain for at least a few hours, and the failure to utilize a written-chain-of-custody procedure. Yet, there is no evidence that anyone had an interest or motive with respect to respondent's urine other than respondent, and no inquiry was made of Ms. Bender whether to her knowledge her practice had ever caused a problem. Thus, the most that we can suggest from these federal cases is that additional precautions might be prudent and should be considered. This is not enough, however, to void respondent's sample.

Respondent also relies on two state cases, which, in my view, offer him little support. He quotes first from *State v. Brown*, 99 *N.J. Super.* 22 (App. Div. 1968), a case involving the use of certain physical evidence at trial which the police failed to seal and properly identify. The court wrote:

> [W]here the incriminating object has passed out of the possession of the original receiver and into the possession of others, the "chain of possession" must be established to avoid any inference that there has been substitution or tampering. [*Brown, supra*, 99 *N.J. Super.* at 27]

Respondent fails to note, however, that the court went on to say that it is not necessary for the party introducing such evidence to negate every possibility of substitution or error and that the question is one of reasonable probability that no tampering has occurred. The court found no irregularities in the record and, while suggesting that improvements in procedure were warranted, held that gaps in the chain of custody did not warrant overturning the conviction. I would note only that *Brown* was a criminal case, which if anything suggests a higher standard than would be applicable here.

State v. Matulewicz, 101 *N.J.* 27 (1985), is generally cited in connection with the business-entries exception to the rule against hearsay. The Court set out certain factors by which to measure the admissability of a state police chemist's report, *i.e.*,

the relative degree of objectivity and subjectivity in the analysis, the routine quality of the analysis, the regularity with which it is done, and the presence of any motive to single out a specific analysis for purposes of rendering an untrustworthy report. The laboratory reports here were entered in evidence without objection on any of these points. It is not entirely clear how respondent uses this case, although he appears to argue that the failure to utilize a chain-of-custody procedure makes the test sample and thus the reports inherently unreliable. The test results, of course, are only as good as the sample that arrived at MetPath, but I have found no reason to seriously question the collection process, and thus do not view this as a basis for undermining the MetPath results.

Respondent argues also that Dr. Bakshi, the courier who picked up this sample, and any MetPath employee who did actual testing, should have been called by petitioner to testify and that the failure to do so raises an adverse inference. *State v. Clawans*, 38 *N.J.* 162 (1962); *Wild v. Roman*, 91 *N.J. Super.* 410 (App. Div. 19676). I do not agree. While it may have been useful to have Dr. Bakshi's testimony about the origins of the procedure used in his office, Ms. Bender supervised this sampling and explained the procedure. Couriers pick up numerous pouches and would have no cause to remember this one. So too, the specific technician who performed the drug tests at MetPath would have nothing but an identification number to distinguish this sample, and it is unlikely that he or she would have much to add. This is not to say that these individuals could not have been called, or that they had nothing to contribute, rather that the failure to elicit their testimony does not make evident that petitioner feared calling them. It is only under such circumstances that an adverse inference can be drawn about what they might have been expected to say.

Based on the foregoing, it is my conclusion that petitioner has established that the urine sample collected from respondent on June 29, 1992, was collected in accordance with reasonable medical office and laboratory practice. It is **ORDERED** that respondent be dismissed from his position as lead custodian.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

10/14/93
Date

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

10/18/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 21 1993
Date

OFFICE OF ADMINISTRATIVE LAW

/cae

LIST OF WITNESSES

On behalf of petitioner:

Deborah Bender
Dr. John E. Heveran

On behalf of respondent:

Cynthia L. Schaffer
Harry Caravello

LIST OF EXHIBITS

On behalf of petitioner:

P-1 MetPath Urine Cup
P-2 Specimen container
P-3 Specimen container with strip
P-4 Requisition form
P-5 Specimen Envelope
P-6 Resumé of John E. Heveran
P-7 MetPath requisition for Caravello, no. 901262
P-8 Clinical Laboratory Report
P-9 Instrumental printout from EMIT
P-10 Sterilized Specimen Container
P-11 MetPath Forensic Toxicology Report
P-12 MetPath Forensic Toxicology Report
P-13 Letter dated July 2, 1992

On behalf of respondent:

R-1 Resumé of Dr. Cynthia L. Schaffer
R-2 Letter to Cynthia Schaeffer, dated January 6, 1993
R-3 Part of Regulations, Department of Health and Human Services, dated April 11, 1988, Part IV
R-4 Part of Regulations, Department of Transportation, dated December 1, 1989, Part III
R-5 Part of Regulations, Department of Transportation, dated February 1, 1990
R-6 Medical Review Officer Manual
R-7 Medical Review Officer Guide
R-8 Employer's Guide to 49 CFR Part 40, Procedures for Transportation Workplace Drug Testing Programs
R-9 Interrogatories
R-10 Individual Test Parameters (page 2)
R-11 Labels
R-12 Collector's Checklist for Non-Witnessed (unobserved) Collections
R-13 Chain of Custody form, private industry
R-14 Chain of Custody form, public-Federal National Institution of Drug Abuse

IN THE MATTER OF THE TENURE HEARING OF HARRY CARAVELLO, SCHOOL DISTRICT OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Respondent's exceptions were timely filed in accordance with N.J.A.C. 1:1-18.4.

Respondent's exceptions essentially recast and reiterate arguments presented to the ALJ which the Commissioner determines were fully and fairly considered and addressed by the ALJ in his initial decision.

Upon a full review of the record in this matter, the Commissioner concurs with the findings and conclusion of the initial decision that the protocols utilized to collect and test respondent's June 29, 1992 urine sample were in accord with reasonable medical office and laboratory practice. As such, although not specifically stated by the ALJ in his decision, the results of such testing, i.e., positive for cocaine -- particularly in light of respondent's existing agreement with the district as an outgrowth of prior charges of drug abuse -- establishes the Board's tenure charges of unbecoming conduct and other just cause in this matter, warranting respondent's dismissal from his position as lead custodian.

Accordingly, the Commissioner adopts the decision of the Office of Administrative Law as modified herein as the final decision in this matter. Respondent is hereby dismissed from his tenured position with the School District of the Borough of South Plainfield.

COMMISSIONER OF EDUCATION

DECEMBER 1, 1993

DATE OF MAILING - DECEMBER 1, 1993

302-93

EDU #8920-92
C # 302-93
SB # 73-93

IN THE MATTER OF THE TENURE :
HEARING OF HARRY CARAVELLO, :
SCHOOL DISTRICT OF THE BOROUGH : STATE BOARD OF EDUCATION
OF SOUTH PLAINFIELD, MIDDLESEX : DECISION
COUNTY. :
:

Decided by the Commissioner of Education, December 1, 1993

For the Petitioner-Respondent, Wilentz, Goldman & Spitzer
(Robert J. Cirafesi, Esq., of Counsel)

For the Respondent-Appellant, Klausner, Hunter, Cige & Seid
(Stephen E. Klausner, Esq., of Counsel)

The decision of the Commissioner of Education dismissing respondent from his tenured employment is affirmed, as modified herein. The tenure charges certified by the Board in this case for unbecoming conduct and other just cause were based exclusively on the results of a urine analysis test indicating the presence of cocaine in respondent's system. The sole issue was whether the protocols used in collecting and testing the sample were sufficiently trustworthy in this particular case to allow the results thereof to form the exclusive basis for respondent's dismissal. The Commissioner, concurring with the findings and conclusions of the Administrative Law Judge ("ALJ") that the protocols used were in accord with reasonable medical office and laboratory practice, added that:

March 2, 1994

> although not specifically stated by the ALJ in his decision, the results of such testing, i.e., positive for cocaine -- particularly in light of respondent's existing agreement with the district as an outgrowth of prior charges of drug abuse -- establishes the Board's tenure charges of unbecoming conduct and other just cause in this matter, warranting respondent's dismissal from his position as lead custodian.

Commissioner's Decision, slip op. at 12.

Although respondent had been indicted on charges of conspiracy to possess and distribute controlled dangerous substances, such charges had been dismissed following his completion of a pretrial intervention program ("PTI"). However, "an agreement to enter PTI does not conclusively establish the truth of the underlying charges...because...a plea of guilty is not a condition to entering the program....Indeed, [the] completion of PTI signifies nothing concerning the truth of the charges...." In the Matter of the Revocation of the Teaching Certificate of Thadeus Pawlak, Docket #A-3298-87T7, slip op. at 8-9 (App. Div. 1989). In this case, the respondent completed PTI, resulting in dismissal of the criminal charges, and those charges were not a basis for the instant tenure charges. As a result, it was improper for the Commissioner to consider the criminal charges in determining whether the instant tenure charges had been established.

However, after a thorough review of the record, we agree that respondent has failed to demonstrate that the collection and testing procedures followed in this instance were such that the results of such testing could not be relied upon. Given these results, we concur with the ALJ that the appropriate penalty is the dismissal of respondent from his tenured employment. See In the

Matter of the Tenure Hearing of David Fulcomer, 93 N.J. Super. 404 (App. Div. 1967).

March 2, 1994

Date of mailing MAR 04 1994

303-93

THOMAS FITZPATRICK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

DECEMBER 1, 1993

OAL DKT. NO. EDU 4326-92

THOMAS FITZPATRICK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before her and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

DECEMBER 1, 1993

DATE OF MAILING - DECEMBER 1, 1993

304-93

MARLENE UNTERBERGER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF METUCHEN, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

DECEMBER 1, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 792-93
AGENCY DKT. NO. 4-1/93

MARLENE UNTERBERGER,
Petitioner,
v.
BOARD OF EDUCATION OF
THE BOROUGH OF METUCHEN,
Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Zazzali, Fagella & Nowak, attorneys)

James E. Stahl, Esq., for respondent (Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, attorneys)

Record Closed: October 14, 1993 Decided: October 15, 1993

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

STATEMENT OF CASE

This matter was transmitted to the Office of Administrative Law on January 29, 1993 for a hearing pursuant to N.J.S.A. 52:14B-1 through -15 and N.J.S.A. 52:14F-1 through -13.

Counsel informed me that they believed the matter could be resolved without plenary hearing. Accordingly, counsel were provided time and, with notable diligence, produced an agreement that is equitable and embraces all issues in the matter but reaches no farther than it must.

The parties prepared the attached stipulation indicating the terms of settlement.

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

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

2. The settlement fully disposes of all issues in controversy and is consistent with the law and public policy.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** who by law is authorized to make a final decision in this matter. If the **COMMISSIONER** does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

15 OCTOBER 1993
Date

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

10/20/93
Date

Maureen M. Keller
DEPARTMENT OF EDUCATION

MAILED TO PARTIES:

OCT 25 1993
Date

Joyce LaVecchia
OFFICE OF ADMINISTRATIVE LAW

km

BORRUS, GOLDIN, FOLEY, VIGNUOLO, HYMAN & STAHL, P.C.
2875 U.S. Highway 1
P.O. Box 7463
North Brunswick, NJ 08902
(908)422-1000
Attorneys for Respondent

MARLENE UNTERBERGER, Petitioner, v. BOARD OF EDUCATION OF THE BOROUGH OF METUCHEN, MIDDLESEX COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY OAL DKT. NO: EDU-1771-92 AGENCY DKT. NO: 283-9/89 AND 126-5/90 ON REMAND FROM OAL DKT. NO: EDU-7252-89, AGENCY DKT. NO: 283-9/89, OAL DKT. NO: EDU-4216-90, AGENCY DKT. NO: 126-5/90, AND OAL DOCKET NO: EDU-792-93 AGENCY DKT. NO: 4-1/93

SETTLEMENT AGREEMENT AND STIPULATION OF SETTLEMENT AND DISMISSAL

WHEREAS, Respondent, as of June 30, 1989, reduced the full time employment of Petitioner to part time employment, and thereafter on or about April 24, 1990 instituted a second reduction in force and abolished petitioner's then part time teaching position, both reductions on the basis that petitioner lacked the requisite seniority to have a superior claim to a full time teaching position; and

WHEREAS, Respondent, prior to the 1992-1993 school year abolished the course known as Tools for Life; and

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WHEREAS, the Petitioner filed three Petitions of Appeal with the Commissioner of Education alleging a superior claim to the positions abolished by Respondent, including a claim that the Respondent has improperly abolished the Tools for Life course following the Commissioner's decision ordering reinstatement; and

WHEREAS, the Commissioner of Education did adopt the recommended decision of the Administrative Law Judge that Respondent be reinstated to a position as teacher of Tools for Life; and

WHEREAS, Respondent filed an Appeal of the decision of the Commissioner of Education; and

WHEREAS, Petitioner filed a Notice of Cross Appeal of the decision of the Commissioner; and

WHEREAS, subsequent to the Appeal and Cross Appeal to the Commissioner of Education, Petitioner filed the Petition appealing the abolition of Tools for Life; and

WHEREAS, both Petitioner and Respondent have agreed as to what they believe to be a settlement which is in the best interest of all concerned;

IT IS HEREBY AGREED that the entire controversy and dispute is to be settled and resolved in the following manner:

1. Respondent shall pay to Petitioner the sum of $45,000.00 as back pay and back emoluments due to Petitioner. This figure represents the amount of monies Petitioner would have earned had her employment not been reduced and terminated

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by Respondent, including the cost of those fringe benefits Respondent did not receive as a result of the reduction and termination and was, therefore, required to purchase herself. This sum also includes deductions for other earnings and unemployment benefits received by Petitioner (mitigation). The parties acknowledge and agree that this sum represents salary (and fringe benefits) which would have been paid had Petitioner been employed as a full time teacher for the school year 1989-1990, 5/6ths teacher for the school year 1990-1991, a 2/3rds teacher for the school year 1991-1992, and a 2/3rds teacher for the school year 1992-1993, minus mitigation.

Petitioner will be responsible for the payment of all employee contributions for federal withholding tax, New Jersey income tax, social security, and pension contributions. Respondent will be responsible for all employer contributions for social security and for providing that the appropriate contribution is paid for Petitioner's New Jersey pension.

2. The parties agree that the monies to be paid, pursuant to paragraph 1 above, represents compensation for back pay, back emoluments and interest pursuant to the decision of the Commissioner of Education, which was appealed by Respondent, and for the purpose of resolving this long-standing litigation which will result in an amicable resolution of long-standing dispute and be in the best interests of both Respondent and Petitioner.

3. Respondent shall re-employ Petitioner for the school year beginning September 1, 1993 as a full time, teaching staff

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member, with assignments to be made as permitted under Petitioner's Certification and allowed by regulation, by the Superintendent of Schools or his designee. Respondent shall employ Petitioner for a two year period through June 30, 1995 provided in all events that Petitioner complies with all the rules and regulations governing teaching staff members under the laws of the State of New Jersey.

4. Respondent, as of June 30, 1995, shall have no further obligation to continue the employment of **Petitioner** and as of and after that date, Petitioner shall have no further entitlement to that position, nor to any other position in the Metuchen school district by virtue of tenure, seniority or otherwise, upon completion of the two year period of employment (June 30, 1995).

5. Petitioner, upon executing this Agreement, releases ar and all claims of any nature whatsoever that Petitioner has, had, or may have to and including the date of the settlement with regard to health benefits, pension benefits, wages, counsel fees, and other emoluments of her employment, which claims arose out of or are relating to three separate Petitions which were filed with the Commissioner of Education, except as provided in this Agreement.

6. Those individuals executing this agreement on behalf of the Respondent have been formally authorized by the Board of Education of said school district to enter into this agreement.

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FOLEY, VIGNUOLO,
HYMAN & STAHL
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7. Petitioner and Respondent believe that this agreement is consistent with the public interest and public policy and is in their and the public's best interest because:

A. Petitioner made good faith efforts to mitigate the loss caused by the reduction and termination of her employment and this agreement compensates her for the differences between those monies and fringe benefits she would have earned had she been employed by Respondent on the date of reduction through June 30, 1993.

B. Respondent has a need for a full time teaching staff member to provide services as permitted under her certificate and as allowed by regulations.

C. This agreement will terminate a long period of litigation between the parties, thereby saving both parties expense and effort and resulting in an amicable resolution of a long-standing dispute.

8. For the reasons as set forth above, Petitioner and Respondent believe that an amicable and expeditious settlement of the dispute based upon the foregoing terms is in the interest of themselves and the public. In consideration of these terms and subject to the approval of the Commissioner of Education, Petitioner and Respondent hereby agree that the dispute between them shall be resolved based upon the terms and conditions as set forth herein. It is further agreement that should the Commissioner of Education of the State of New Jersey reject this settlement agreement, all provisions thereof shall be null,

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void, and of no further effect and the parties shall retain all the legal rights they had prior to their agreeing to this settlement agreement.

Marlene Unterberger 9/9/93
Marlene Unterberger, Petitioner

ZAZZALI, ZAZZALI, FAGELLA & NOWAK, P.C.

By: _____
Richard A. Friedman
Attorney for Petitioner

METUCHEN BOARD OF EDUCATION

By: _____, President

BORRUS, GOLDIN, FOLEY,
VIGNUOLO, HYMAN & STAHL, P.C.

By: _____
James E. Stahl
Attorney for Respondent

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OAL DKT. NO. EDU 792-93

MARLENE UNTERBERGER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF METUCHEN, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

COMMISSIONER OF EDUCATION

DECEMBER 1, 1993

DATE OF MAILING - DECEMBER 1, 1993

305-93

NORTH BERGEN FEDERATION OF TEACHERS, LOCAL 1060, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, AN UNINCORPORATED LABOR ASSOCIATION, AND ELIZABETH MUSTILLO,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, tenured high school English teacher, contested her reassignment by Board to Elementary School Librarian/Media Specialist position. Claiming retaliation for union activities, petitioner sought reinstatement to her position which was filled by a nontenured teacher when petitioner was involuntarily transferred.

ALJ concluded matter was within Commissioner's jurisdiction provided hearing was restricted to issues of whether transfer violated tenure and seniority rights of petitioner and what relief was warranted. ALJ concluded involuntary transfer was violation of petitioner's statutory tenure rights. (Kratt, Childs) Petitioner was involuntarily transferred from a tenured position within the scope of one certificate to a separately tenurable position within the scope of another. Although Board asserts that involuntary transfer is recognized under the collective bargaining contract between the parties, Board cannot claim that the contract authorizes an unlawful act. If there is truly a real dispute with respect to the contract provision such must be determined before PERC rather than the Commissioner. ALJ ordered petitioner reinstated as high school English teacher with compensation.

Commissioner adopted findings and determination in initial decision emphasizing that N.J.S.A. 18A:28-5 and 28-6, when read together, prohibit transfer or reassignment between separately tenurable positions without consent of affected individual. Commissioner ordered reinstatement of petitioner with compensation.

DECEMBER 1, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 3699-93
AGENCY DKT. NO. 46-3/93

NORTH BERGEN FEDERATION OF TEACHERS, LOCAL 1060, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, AN UNINCORPORATED LABOR ASSOCIATION, AND ELIZABETH MUSTILLO,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, A BODY CORPORATE AND POLITIC,
Respondent.

Victor P. Mullica, Esq., for petitioners (Mullica & Mullica, attorneys)

Joseph J. Ryglicki, Esq., for respondent (Hanly & Ryglicki, attorney)

Record Closed: October 14, 1993 Decided: October 20, 1993

BEFORE **EDITH KLINGER**, ALJ:

On March 22, 1993, petitioners filed a verified petition with the Commissioner of Education alleging that the North Bergen Board of Education (Board) violated the tenure rights of Elizabeth Mustillo when it transferred her involuntarily from a position of classroom teacher of English at the high school level to the position of librarian/media specialist at the Horace Mann Elementary School. They further allege that the transfer was not in the best interests of the district and was made because of Mustillo's actions as a union representative and as a teacher. Petitioners seek to have Mustillo restored to her classroom position, which is presently occupied by a nontenured teacher. They also seek to have a letter, dated December 21, 1992, from Peter J. Fischbach, assistant superintendent of the district, notifying her of the pending reassignment, removed from her file. Allegedly the letter was placed in her file illegally and contains information which is not true.

Respondent filed its answer on April 15, 1993, denying the allegations of the petition. The Board also challenged the jurisdiction of the Commissioner of Education (Commissioner) to decide the issues raised in the petition. On April 22, 1993, the matter was transmitted to the Office of Administrative Law for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The case was assigned to the undersigned on May 20, 1993. A telephone conference was held with the parties on June 17, 1993, at which time the Board was directed to make a motion for summary decision based upon the threshold issue of its challenge to the jurisdiction of the Commissioner.

The Board's motion was filed on July 16, 1993. Based upon the allegation in the petition that the Board's transfer of Mustillo was "motivated and precipitated by the fact that (a) Mustillo is a union representative, (b) action and conduct on her part as a union representative and a teacher," the Board argued that the petition actually alleges an unfair labor practice and not a controversy arising under the school laws. The Public Employment Relations Commission (PERC) and not the Commissioner has the exclusive jurisdiction to resolve unfair labor practices.

On August 5, 1993, petitioners responded that irrespective of the Board's motivation Mustillo's tenure and seniority rights were violated when she was involuntarily transferred. Petitioners filed a separate motion for summary decision based upon the wrongful transfer. The Board responded on September 9, 1993. It asserted its right to transfer a teacher from one tenured position to another in the best interests of the students.

Following a review of the papers submitted by the parties, it became apparent that the matter could be decided without the need for hearing. However, if relief were granted to Mustillo, it would affect the employment of the teacher who was filling her former position.

For this reason, a telephone conference was held with the parties on September 13, 1993. The attorney for petitioners was directed to send notice to any teacher whose employment might be affected by the outcome of this proceeding and give him or her the opportunity to intervene.

On September 24, 1993, the attorney for petitioners served all eight persons who might be affected with a notice to intervene in the proceeding. They were informed that, if they wished to be heard, they were to notify the administrative law judge within ten days of receipt of the notice. The record was closed on October 14, 1993, when no one requested to intervene.

THE JURISDICTION MOTION

Mustillo's complaint, that she was transferred involuntarily in violation of her tenure and seniority rights, arises under *N.J.S.A.* 18A:28-5 and the regulations promulgated thereunder. These issues are squarely within the jurisdiction of the Commissioner. The Board has correctly stated that any issue of anti-union *animus* must be brought before PERC, not the Commissioner, and therefore, may not be heard in this forum. Consequently, I **CONCLUDE** that the present matter is within the jurisdiction of the Commissioner provided that the hearing is restricted to the issues of whether the transfer violated the tenure and seniority rights of Mustillo and the relief, if any, to which she may be entitled.

I further **CONCLUDE** that there is no reason why the North Bergen Federation of Teachers, Local 1060, AFL-CIO (union), may not remain as a party to this appeal. The union has been involved in this dispute from the outset. Both Mustillo and the union have been represented throughout by the same attorney and the union has agreed to restrict its participation only to the issues available to Mustillo. *See Winston v. Bd. of Ed. of So. Plainfield*, 64 *N.J.* 582, 587 (1974).

STATEMENT OF FACTS

Elizabeth Mustillo has been employed by the Board for twenty- five years. According to petitioners and not disputed by respondent, Mustillo has a Secondary School Teacher of English certificate since June 1968 and an Educational Media Specialist certificate since July 1990. Between September 1968 and February 1974, she was employed as a classroom teacher of language arts at the seventh and eighth grade level. From March 1974 to the date of her transfer in February 1993, she was a teacher in the English department at the North Bergen High School.

On December 21, 1992, Mustillo received a letter from Assistant Superintendent of Personnel Peter Fischbach informing her that "as a result of [a review by Robert Peirano, District Supervisor of Media,] of all eligible applicants, he has recommended you for the position of Elementary Media Specialist at Horace Mann School. Therefore, I am pleased to inform you that you will be reassigned to the Media Specialist position at Horace Mann School effective January 11, 1993." The Board passed a resolution adopting the reassignment at its January 1993 meeting.

The Board did not contest petitioners' assertion that Mustillo never applied for this position. There is no dispute that Mustillo's second certificate is the proper one for the new position.

According to Fischbach, the position of elementary media specialist at the Horace Mann School had been vacant for about a year. Attempts to fill the position with a qualified individual had proved unsuccessful. The district searched through its own personnel and found that Mustillo possessed the required certification to fill the position. In what the Board characterizes as an act of managerial discretion, it transferred her into the position on December 21, 1992, effective January 11, 1993.

Mustillo grieved Fischbach's letter of December 21, 1992, through the union. A letter from Ralph Fedele, Grievance Director, NBFT Local 1060, dated January 8, 1993, to Leo Gattoni, Jr., Superintendent of Schools, states that the transfer of Mustillo was involuntary and insists that Fischbach's letter, which describes Mustillo as an "applicant" for the position, be removed from her personnel file.

Mustillo also requested that the effective date of transfer to the new position be postponed to February 1, 1993, the beginning of the new term. Fischbach notified her by letter, dated January 8, 1993, that the effective date of her transfer was changed to February 1, 1993, subject to Board approval.

On January 26, 1993, Mustillo wrote a letter to Fischbach stating in relevant part:

> At the Board of Education meeting on Wednesday, January 20, 1993, the members of the Board of Education approved an involuntary transfer concerning me into a position in which I hold my Master's degree. However, no resolution was read to approve the $1350 annual stipend (prorated) I should receive based upon the current contract agreement, Paragraph 35, Schedule A, Differential.

The increase in compensation was approved.

She was replaced in her classroom by a nontenured teacher.

Mustillo signed her petition appealing the transfer on March 19, 1993, and filed it with the Bureau of Controversies and Disputes of the Department of Education, on March 22, 1993.

The Board opposes Mustillo's motion for summary decision by claiming that the communications between the Board and Mustillo show that her transfer was not involuntary because she allegedly accepted the position, subject only to a change in the starting date and the compensation. These communications, it argues, create a question of material fact which requires a hearing. Consequently, summary decision should not be granted. The Board's argument is based solely upon these communications which were attached to their responses.

I **FIND** this assertion to be totally without merit. At all times, Mustillo and the union have referred to her transfer as "involuntary." Just because Mustillo requested that she, at least, be allowed to complete the last few weeks of the marking period in her classroom and insisted that she be paid at the rate to which she was entitled in the new position, does not in any way signify her consent to the transfer. She was not required to accept a severe disruption and inadequate pay in order to avoid the appearance of consent. I **FIND** that the Board's argument, that the communications raise the question of Mustillo's consent, is not supported by the documents themselves, and therefore, there is no genuine issue of material fact which requires a hearing. *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 ***N.J.*** 67, 74-5 (1954).

DISCUSSION OF LAW AND CONCLUSIONS

Based upon the above, I **CONCLUDE** that summary decision is appropriate in this matter, pursuant to *Judson v. Peoples Bank & Trust Co. of Westfield, supra*, since there are no genuine issues of material fact.

The issue is whether the Board lawfully transferred Mustillo to an equivalent position. A lateral transfer to an equivalent position is within the managerial discretion of the Board. It does not require the petitioner's consent because the status quo is not

interrupted and the public policy underlying the tenure laws is not violated. *See, Viemeister v. Prospect Park Bd. of Ed.*, 5 *N.J. Super.* 215, 218 (App. Div. 1949); *Childs v. Union Tp. Bd. of Ed..*, 3 *N.J.A.R.* 163 (Comm'r of Ed. 1980); 1982 *S.L.D.* 1456 (App. Div. July 19, 1982); *see, R.* 2:2-3(a)(2).

However, when a tenured teaching staff member is transferred into a different position or promoted, consent is required and the applicable time period for tenure may begin to run anew. In the present case, Mustillo did not consent to being transferred and alleges that the transfer violates her tenure rights because her new assignment is a separately tenurable position.

In support of her argument, Mustillo cites *Kratt v. Bd. of Ed. of the Tp. of Randolph*, 1985 *S.L.D.* 1567, *aff'd*, State Board, 1986 *S.L.D.* 3075, for the proposition that *N.J.S.A.* 18A:28-5 and *N.J.S.A.* 18A:28-6, when read together, prohibit the transfer of an individual without consent between separately tenurable positions. Kratt held both an instructional certificate with an endorsement in social studies (*N.J.A.C.* 6:11-6.2(a)22) and an educational services certification with an endorsement as an educational media specialist (*N.J.A.C.* 6:11-12.21). Both the Commissioner and the State Board held that since the two positions required different certifications, they were clearly separately tenurable positions. As such, Kratt could not be moved between them without his consent. 1986 *S.L.D.* at 3075 (State Board agreeing with the Commissioner that *Childs v. Union Tp. Bd. of Ed.*, 1982 *S.L.D.* 1456, is controlling). *See also*, 3 *N.J.A.R.* 163 (Comm'r of Ed. 1980). Mustillo also holds both an instructional certificate and an educational services certificate. She was involuntarily transferred from a tenured position within the scope of one certificate to a separately tenurable position within the scope of the other. I **CONCLUDE** that, pursuant to *Kratt, supra,* and *Childs, supra*, this involuntary transfer was in violation of her statutory tenure rights.

The Board cannot claim that an unlawful act is within its managerial prerogative. Paragraph 15(e) of the Contractual Agreement in effect between the Board and the union provides for involuntary transfers of a member of the teachers' collective bargaining unit "in the best interests of the individual or the system." However, this provision can only refer to the involuntary lateral transfer of a unit member to an equivalent position. It will not be read here to confer upon the Board the right to freely violate the tenure rights of the unit members. If there is any real dispute between the union and the Board as to the

meaning of this contract provision, it must be determined before PERC and not the Commissioner.

Accordingly, I **CONCLUDE** that Mustillo must be reinstated immediately to her former position as a teacher of English at the high school level. She may be expected to replace a nontenured teacher. I further **CONCLUDE** that, because she was improperly placed in a position for which a higher salary was appropriate, upon reinstatement her salary should be restored immediately to the level it would have been for the 1993-94 school year but for the unlawful transfer. No other relief is appropriate.

ORDER

It is hereby **ORDERED** that Elizabeth Mustillo be immediately reinstated in a position of English teacher at the North Bergen High School. It is further **ORDERED** that, upon reinstatement, her salary be restored to the level it would have been for this position, if the improper transfer had not taken place.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

Oct 22 1993
DATE

EDITH KLINGER, ALJ

10/22/93
DATE

Receipt Acknowledged:

Maureen L. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 26 1993
DATE

Grace LaVecchia
OFFICE OF ADMINISTRATIVE LAW

md/e

APPENDIX

EXHIBITS

Letter, Fischbach to Mustillo, December 21, 1992
Letter, Fedele to Gattoni, January 8, 1993
Letter, Fischbach to Mustillo, January 8, 1993
Letter, Mustillo to Fischbach, January 26, 1993
Contract Agreement
Certification of Peter Fischbach
Certification of Leo Gattoni, Jr.
Certification of Robert Peirano

NORTH BERGEN FEDERATION OF TEACHERS, LOCAL 1060, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, AN UNINCORPORATED LABOR ASSOCIATION, AND ELIZABETH MUSTILLO,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Respondent filed timely exceptions in accordance with N.J.A.C. 1:1-18.4.

The crux of the Board's exceptions is the recasting and reiteration, albeit in a variety of ways, of one of its arguments presented to the ALJ. Essentially, it contends that summary decision in this matter is inappropriate since whether petitioner's transfer constitutes a dismissal remains a matter of factual controversy. The Board argues that such transfer was in the best interest of the educational system and, therefore, recognized as a legitimate act by virtue of the contract agreement between the Board and the North Bergen Federation of Teachers.

The Board lastly urges that in the event the Commissioner upholds the ALJ's initial decision, immediate reinstatement not be

the remedy accorded. It requests, instead, that petitioner continue in her current position as Media Specialist/Librarian until the vacancy created by her transfer back to the classroom is filled.

Upon a careful and independent review of the record in this matter, the Commissioner agrees with the findings and conclusion of the ALJ that under Childs, supra, and Kratt, supra, petitioner's involuntary transfer in the instant matter was a violation of her statutory tenure rights.

The Commissioner finds and determines that the law, under the circumstances in this matter, is clear. N.J.S.A. 18A:28-5 and 28-6, when read together, prohibit transfer or reassignment between separately tenurable positions without the consent of the affected individual. Such transfer is effectively a "dismissal" from the former position which requires compliance with the tenure laws regarding transfer.

The Commissioner is also in full accord with the ALJ's determination with respect to the impact of the Board's contract with the Teachers Association in this matter.

> The Board cannot claim that an unlawful act is within its managerial prerogative. Paragraph 15(e) of the Contractual Agreement in effect between the Board and the union provides for involuntary transfers of a member of the teachers' collective bargaining unit "in the best interests of the individual or the system." However, this provision can only refer to the involuntary lateral transfer of a unit member to an equivalent position. It will not be read here to confer upon the Board the right to freely violate the tenure rights of the unit members. If there is any real dispute between the union and the Board as to the meaning of this contract provision, it must be determined before PERC and not the Commissioner.
>
> (Initial Decision, at pp. 6-7)

Accordingly, the recommended decision of the Office of Administrative Law is adopted as the final decision in this matter.

The Commissioner hereby orders that petitioner be immediately reinstated in a position of English teacher at the North Bergen High School and, upon such reinstatement, her salary be restored to the level it would have been for this position if the improper transfer had not taken place.

COMMISSIONER OF EDUCATION

DECEMBER 1, 1993

DATE OF MAILING - DECEMBER 1, 1993

306-93

JOHN DOLINAJ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE UNION COUNTY VOCATIONAL-TECHNICAL SCHOOLS, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

DECEMBER 1, 1993

OAL DKT. NO. EDU 7796-92

JOHN DOLINAJ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE UNION COUNTY VOCATIONAL-TECHNICAL SCHOOLS, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before her and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

DECEMBER 1, 1993

DATE OF MAILING - DECEMBER 1, 1993

307-93

BOARD OF EDUCATION OF THE CITY OF ORANGE TOWNSHIP, ESSEX COUNTY, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE, RESPONDENT.	:	DECISION

SYNOPSIS

Petitioning District sought return of $818,486 of Level III state aid monies which were recalled by State as surplus, alleging that surplus situation arose as a result of delays in disbursement of state funds and an expenditure freeze undertaken in consequence thereof. Monies had been given for 1989-90 school year.

ALJ concluded no genuine issues of material fact existed and that it was clear that District did not need the funds in the first place since it had a substantial surplus which according to statute (N.J.S.A. 18A:7A-14) should have been applied to reallocate funds in order to support corrective action plan. Moreover, District was advised of condition that would govern the grant -- if money was not needed, it would be recovered by the State. Respondent's application for summary judgment was granted and petition was dismissed.

Commissioner adopted findings and determination in initial decision.

DECEMBER 2, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
ORDER ON MOTION FOR
SUMMARY DECISION
OAL DKT. NO. EDU 9668-91
AGENCY DKT. NO. 332-9/91

BOARD OF EDUCATION OF THE
CITY OF ORANGE TOWNSHIP,
ESSEX COUNTY,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT
OF EDUCATION, DIVISION OF FINANCE,
Respondents.

Ronald C. Hunt, Esq., for petitioner (Ashley & Charles, attorneys)

Arlene G. Lutz, Deputy Attorney General, for respondent
(Frederick P. DeVesa, Acting Attorney General of New Jersey, attorney)

Record Closed: September 10, 1993 Decided: October 22, 1993

BEFORE **ARNOLD SAMUELS**, ALJ:

The petitioner, Board of Education of the City of Orange (Board), appeals from a determination by the respondent, Division of Finance in the New Jersey State Department of Education (Department), seeking return of $818,486 in Level III State-aid money, which was paid to the petitioner to fund a Level III corrective action plan for the 1989-90 school year.

PROCEDURAL HISTORY

In June 1991, the Department reduced the 1990-91 State aid due to the Board by $818,486, in order recover or recoup an alleged overpayment of Level III aid given to the Board for the previous school year, 1989-90. The Board filed a petition of appeal on September 3, 1991, claiming that the State's action, taking back Level III monies which were properly expended, was unfair and unjustified.

The Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) on October 16, 1991, for hearing and determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13.

Several unsuccessful settlement conferences were held thereafter, and on October 27, 1992, the respondent filed a motion for summary decision. Papers in opposition were filed by the petitioner on January 4, 1993, and the Department filed a reply brief on February 10, 1993. Oral argument on the motion was heard for several days between October 27, 1992 and August 4, 1993. The record closed on September 13, 1993, when the parties advised that no further papers would be filed.

DISCUSSION

A summary decision may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. *N.J.A.C.* 1:1-12.5(b).

This rule is substantially similar to the summary judgment rule in the New Jersey Court Rules, *R.* 4:46-2.

A summary judgment proceeding is designed to allow the judge quickly and inexpensively to dispose of any case which does not present any genuine issue of material fact requiring disposition at a hearing. *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 *N.J.* 67, 74 (1954). The role of the judge in such a motion is to

determine whether there is a genuine issue of material fact, but not to decide the issue if such an issue exists. *Judson* at 73.

The standards governing the grant or denial of a summary decision emphasize that a party opposing a motion is not to be denied an evidential hearing unless the moving party sustains his or her burden of clearly showing the absence of a genuine issue of material fact. Thus, it is the movant's burden to exclude any reasonable doubt as to the existence of any material fact. All inferences of doubt are to be drawn against the movant and in favor of the party against whom the motion is directed. The papers supporting the motion are closely scrutinized and the opposing papers are indulgently treated. *Judson* at 75.

This dispute involves the respondent's recovery of $818,486 in Level III State aid that was given to the petitioner in the 1989-90 school year for implementation of a corrective action plan. The respondent claims that the additional funds were not needed by the district because the final audit for the year, once completed, revealed the existence of a 1989-90 current expense-free balance (surplus), which was not known to exist when the additional funds were granted.

The procedures involved in funding a corrective action plan, formulated after failure by a school district to correct deficiencies, are set forth in *N.J.S.A.* 18A:7A-14. Subsection (d) of this statute authorizes the Commissioner of Education to identify aspects of the corrective action plan already contained in the district's current expense budget, and where appropriate, to reallocate funds within the district's budget to support the plan. The Commissioner is then further empowered to determine the amount of additional revenue, if any, needed to implement the corrective action plan.

The statute authorizes the State to then provide the needed additional aid to the district at the district's State support level. In the 1989-90 school year, the State support level for the petitioner's district was 70.41 percent.

This procedure was followed in the City of Orange Township School District for the 1989-90 school year. However, the district did not complete its application for additional funds early in the school year, and the financial information available in the Spring of 1990, indicated that a deficit might result. This was concurred in by

the Essex County Superintendent of Schools, who had been assisting the district and the Commissioner's office in evaluating the situation.

Fearing the possibility of a deficit before being assured that additional State aid was forthcoming, the district instituted a budgetary freeze.

At that time, in March and April 1990, no definitive budgetary information was available in the district relating to its actual financial condition at the time, with any degree of reliability; nor was any such information available to the County Superintendent or the Commissioner of Education.

Based on the foregoing, the Essex County Superintendent of Schools certified that, following the reallocation of the district's known funds, the budget contained $1,454,555 in new expenditures for implementation of the Level III corrective action plan.

On April 30, 1990, Robert J. Swissler, Assistant Commissioner in the Department of Education, wrote a letter to the Board secretary of the City of Orange Board of Education stating that the County Superintendent's certification had been approved, and it was recommended that the district be provided with State aid, at its 1989-90 State support ratio (70.41 percent), in the amount of $1,024,152. The letter further indicated that the funds would be included in the district's June aid payment.

Since the above action had been based on preliminary estimates of financial condition only, a caveat was included in Mr. Swissler's letter, as follows:

> In the event that the additional funds certified to implement the Level corrective action plan were overestimated and result in a current expense (J-1) free balance at June 30, 1990, the district's 1990-91 State aid payments will be reduced by the product of said free balance multiplied by the district's 1989-90 State support ratio, and the district will be required to reduce the amount of free balance accordingly in order to fully fund the 1990-91 budget.

In effect, this meant that, if it were subsequently discovered that the district in fact had a surplus, rather than a deficit, for the 1989-90 year, the Department of Education would recoup the additional State aid that had been paid by reducing the

following year's aid accordingly. Such an action would have the effect of retroactively requiring the district to appropriate and use its surplus in the same manner as would have been the case if the surplus was known at the time of the initial reallocation of funds.

Sometime in May of 1990, Edward D. Kent, Chief of Auditing in the Bureau of Compliance of the Department of Education, reviewed the district's financial records to determine if the concerns relating to a possible deficit were correct. According to Mr. Kent's certification in lieu of affidavit, he did not do a comprehensive audit of the district's finances. He stated that, "Rather, I did a quick budget projection to see if the district would conclude the year with a deficit. I determined that it would not." However, he also said that there was no way at that time, based on records available to him as of May 4, 1990, how much year-end surplus the district would have as of June 30, approximately two months later. He stated that "Until the fiscal year is concluded and all expenditures and revenues are accounted for, there is no way to project how much the district will have as a free balance on June 30."

The required final audit was more than seven months overdue. It was filed in June 1991. Only then did the Department of Education first become aware of the amount of the district's surplus for the previous school year. The district itself did not know the extent of its surplus or the fact that any surplus existed at all, until the final audit was completed.

At that point, the Department of Education moved to take back or recoup the 1989-90 additional State aid that had been paid to the district in June 1990.

The recoupment does not attempt to recover the entire amount paid, $1,024,152. Instead, the amount to be recovered applies the same formula that was used when the funds were given: the amount of the free balance (surplus) multiplied by 70.41 percent, the district's 1989-90 State support ratio. The district's 1990-91 State aid was therefore reduced by $818,486. This method nevertheless permitted the district to retain $205,666 of the money that had been previously paid, notwithstanding the fact that the final audit disclosed a surplus in the amount of $1,162,456.

All of the foregoing facts have been established without contradiction, and none of the factual material recited above was challenged or controverted by the petitioner. In its brief, and in oral argument, the petitioner has stated that there are numerous issues of material fact still in dispute. However, when asked for a more specific showing of such disputed facts, the petitioner identified only two areas of concern.

First, the district contends that the statutory responsibility attributed to the Commissioner is a factual dispute, based on the language of *N.J.S.A.* 18A:7A-14(d). It is concluded that this concern is a legal question, not an issue of material fact. Moreover, the petitioner did not follow this contention with any argument calculated to demonstrate that the Commissioner of Education is not empowered by statute to control the operation of Level III monitoring and financing in the manner that was done in this case.

Secondly, the petitioner argues that the State should be estopped from recovering the funds sought because of Mr. Kent's audit, which did not show the amount of the surplus, but predicted that no deficit would result. This contention again is not evidence of a disputed fact. Nothing was produced to rebut Mr. Kent's certification, which was attached to the respondent's moving papers. It is clear that Mr. Kent performed a preliminary projection, without benefit of final figures or knowledge of what the district would spend in its operations during the last two months of the year. (The preliminary audit used figures supplied as of May 4, 1990.) The grant was committed, in Mr. Swissler's letter, even before the results of Mr. Kent's audit were filed. The Orange Board of Education was undoubtedly given the benefit of the doubt, with a clear condition attached. Therefore, responsibility for the district's unknown financial condition cannot be shifted to the respondent based on Mr. Kent's audit. The district itself was not aware of its own physical condition, because of its failure to file reports on time, its failure to perform timely audits and failure to keep its own financial house in order. There is no justification for the district to have expected the State to do that for them.

Clearly, the condition under which the Department forwarded the additional aid was reasonable. Mr. Swissler's letter clearly points out that if later audits indicate that the money was not needed, it would be recovered.

It is therefore clearly **CONCLUDED** that no genuine issues of material fact exist. The respondent has successfully excluded any reasonable doubt as to the existence of any material fact, even after all reasonable inferences of doubt have been drawn against the Department.

It is clear that the district did not need the funds in the first place, since it had a substantial surplus, which, according to the statute, should have been applied to reallocate funds in order to support the corrective action plan. The fact that the district was unaware of this does not change the situation. Additionally, the district was clearly advised of the condition that would govern the grant. This condition was met when a surplus was shown, and the excess State aid, in accordance with the appropriate formula, was taken back pursuant to the terms contained in Mr. Swissler's letter. No facts have been shown to justify the district's attempt to retain the funds that should not have been given. The money was paid because the petitioner was given the benefit of the doubt, in the absence of definitive financial information, and to enable the district to complete the corrective action plan for the year if a deficit was forthcoming.

ORDER

It is therefore **ORDERED** that the respondent's application for summary judgment be **GRANTED,** and the petition DISMISSED.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

October 22, 1993
Date

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

OCTOBER 26, 1993
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 03 1993
Date

OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

LIST OF EXHIBITS

The exhibits attached to the parties' briefs and memoranda of law are incorporated herein by reference.

OAL DKT. NO. EDU 9668-91

BOARD OF EDUCATION OF THE CITY OF ORANGE TOWNSHIP, ESSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions by both parties and reply exceptions to petitioner's exceptions by respondent were timely filed in accordance with N.J.A.C. 1:1-18.4.

Upon a careful and independent review of the record in this matter, the Commissioner finds petitioner's exceptions unpersuasive.* She agrees with the findings and conclusion of the ALJ for the reasons articulated by her in the initial decision.

Accordingly, there being no genuine issues of material fact existing in the instant matter, the Commissioner adopts the recommended decision of the Office of Administrative Law. Respondent's application for summary decision is hereby granted and the within petition is dismissed.

DECEMBER 2, 1993

COMMISSIONER OF EDUCATION

DATE OF MAILING - DECEMBER 2, 1993

* Respondent's exceptions and reply exceptions urged adoption of the initial decision in its entirety.

307-93

EDU #9668-91
C # 307-93
SB # 15-94

BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION ON MOTION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, December 2, 1993

For the Petitioner-Appellant, Ashley & Charles (Ronald C. Hunt, Esq., of Counsel)

For the Respondent-Respondent, Arlene G. Lutz, Deputy Attorney General (Deborah T. Poritz, Attorney General of New Jersey)

On December 2, 1993, the Commissioner of Education rendered a decision in this matter dismissing the petition filed by the Board of Education of the City of Orange (hereinafter "Board") challenging action by the Division of Finance of the State Department of Education to recoup $818,486 which had been paid to the Board to fund implementation of a Level III corrective action plan for the 1989-90 school year. The Commissioner adopted the findings and conclusions of an Administrative Law Judge ("ALJ") that a final audit completed subsequent to the grant revealed a substantial surplus in the district which, according to statute, should have been applied to reallocate funds in order to support the corrective action plan. The Commissioner agreed with the ALJ that no facts had

May 4, 1994

been shown to justify the Board's attempt to retain funds it had been given, in the absence of definitive financial information, to enable it to complete the corrective action plan.

On March 10, 1994, the Board moved to file a notice of appeal to the State Board of Education nunc pro tunc. In a certification filed therewith, the counsel for the Board averred that on December 23, 1993, the Board, "operating under the mistaken belief that all administrative remedies had been exhausted, filed a Notice of Appeal to the Superior Court Appellate Division....The [Board] thereafter withdrew the appeal and now seeks to have their exceptions to the Commissioner of Education's decision considered by the State Board of Education."

Pursuant to N.J.S.A. 18A:6-28, appeals to the State Board must be taken "within 30 days after the decision appealed from is filed." The State Board may not grant extensions. N.J.A.C. 6:2-1.5(a). In contrast to the period for filing petitions to the Commissioner of Education, see N.J.A.C. 6:24-1.2; N.J.A.C. 6:24-1.15, the time limit within which an appeal must be taken to the State Board is statutory, and, given the jurisdictional nature of the statutory time limit, the State Board lacks the authority to extend it. Mount Pleasant-Blythedale Union Free School District v. New Jersey Department of Education, Docket #A-2180-89T1, slip op. at 5 (App. Div. 1990).

We conclude that the statutory filing requirement with which the Board failed to comply is of such significance that we deny the instant motion. In Yorke v. Board of Education of the Township of Piscataway, decided by the State Board of Education, July 6, 1988, aff'd, Docket #A-5912-87T1 (App. Div. 1989), the Court

upheld the dismissal of an appeal by the State Board where it found that the notice of appeal had been filed one day late by appellant's counsel who alleged that he had misread or misunderstood the applicable regulations. The Court added that even if the statute could be construed to permit enlargement of the time for filing an appeal, the appellant therein had failed to establish good cause.

In this case, the Commissioner's decision was rendered on December 2, 1993 and mailed to the parties on that date. Accordingly, pursuant to N.J.A.C. 6:2-1.4, the decision appealed from was deemed filed on December 5. Therefore, as mandated by N.J.S.A. 18A:6-28, see N.J.A.C. 6:2-1.3(a); N.J.A.C. 6:2-1.4(a), as computed under N.J.A.C. 6:2-1.4(b), the Board was required to file its notice of appeal to the State Board on or before January 4, 1994. The Board's motion to file nunc pro tunc was dated March 8, 1994 and filed on March 10.

Even if N.J.S.A. 18A:6-28 can be construed to provide us with the authority to enlarge the time limit for filing an appeal, we find no substantive basis to warrant doing so in this particular instance. Notwithstanding counsel for the Board's "mistaken belief" that administrative remedies had been exhausted, the law is clear and unambiguous that "[a]ny party aggrieved by any determination of the Commissioner may appeal from his determination to the state board." N.J.S.A. 18A:6-27. Such appeal process is reiterated in our regulations: "Final decisions of the Commissioner...are appealable to the State Board of Education." N.J.A.C. 6:2-1.1(a). Moreover, counsel for the Board was expressly advised in a cover letter accompanying the Commissioner's decision in this matter that "[a]ppeals of decisions rendered by the Commissioner must be filed

with the State Board of Education pursuant to N.J.A.C. 6:2-1.1 et seq. except for matters relative to the New Jersey State Interscholastic Athletic Association and State Department of Education employee contractual matters." Thus, even if counsel for the Board had not been aware of his statutory obligation, he was expressly notified that his appeal from the Commissioner's decision was required to be filed with the State Board.

Accordingly, we deny the Board's motion to file its appeal in this matter nunc pro tunc.

May 4, 1994

Date of mailing MAY 06 1994

308-93

FRANCIS J. CLANCY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LACEY, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

DECEMBER 6, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 8319-93
AGENCY DKT. NO. 293-8/93

FRANCIS J. CLANCY,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF LACEY, OCEAN COUNTY,
Respondent.

Michael A. Tier, Esq., on behalf of petitioner

Arthur Stein, Esq., on behalf of respondent

Record Closed: November 3, 1993 Decided: November 5, 1993

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

This matter concerns the verified petition filed by Francis J. Clancy, the petitioner alleging he was improperly terminated from his position as Director of Plant Operations for the respondent, the Board of Education of the Township of Lacy. The matter was transmitted to the Office of Administrative Law on September 1, 1993, for a hearing pursuant to N.J.S.A. 52:14F-1 to -13.

The petitioner, with the concurrence of the respondent, has withdrawn the request for a hearing and asks that the matter be dismissed with prejudice (see attached letter). Based on this representation, I **CONCLUDE** that the matter is no longer a contested case before the Office of Administrative Law and it is **DISMISSED** with **PREJUDICE**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 5, 1993
Date

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

11/9/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 15 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

cad

EXHIBITS ADMITTED INTO EVIDENCE:

For the Petitioner:

None

For the Respondent:

None

WITNESSES:

For the Petitioner:

None

For the Respondent:

None

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STATE OF N.J.
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8040AS
ARTHUR STEIN & ASSOCIATES, P.C.
1041 W. Lacey Road
P.O. Box 131
Forked River, New Jersey 08731
(609) 693-6200
Attorneys for Respondent

FRANCIS J. CLANCY,	:	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY OCEAN COUNTY #293-8/93
Petitioner,	:	
vs.	:	
BOARD OF EDUCATION OF LACEY TOWNSHIP, OCEAN COUNTY,	:	STIPULATION OF DISMISSAL WITH PREJUDICE
Respondent.	:	

The matter in difference in the above entitled action having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the same be and it is hereby dismissed with prejudice.

Dated: October 20, 1993

ARTHUR STEIN & ASSOCIATES P.C.
Attorneys for Respondent

By _____

MICHAEL A. TIER, ESQ.
Attorney for Petitioner

By _____

AS:ar
8040stip.dis

OAL DKT. NO. EDU 8319-93

FRANCIS J. CLANCY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LACEY, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal based on a joint stipulation of dismissal of the parties transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before her and is dismissed with prejudice.

IT IS SO ORDERED.

M Fitzgerald

COMMISSIONER OF EDUCATION

DECEMBER 6, 1993

DATE OF MAILING - DECEMBER 6, 1993

309-93

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

DECEMBER 6, 1993

OAL DKT. NO. EDU 1110-93

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

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal, given that criminal charges against respondent, which formed the sole basis for the tenure charges, resulted in acquittal. Consequently, the matter is no longer deemed to be a dispute before her and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

DECEMBER 6, 1993

DATE OF MAILING - DECEMBER 6, 1993

310-93

AUDUBON EDUCATION ASSOCIATION, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF AUDUBON, CAMDEN COUNTY, RESPONDENT.	:	DECISION

DECEMBER 6, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
WITHDRAWAL
OAL DKT. NO. EDU 4389-93
AGENCY DKT. NO. 129-5/93

AUDUBON EDUCATION ASSOCIATION,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF AUDUBON, CAMDEN COUNTY,
Respondent.

Kenneth A. Sandler, Esq., on behalf of petitioner (Selikoff & Cohen, attorneys)

Stephen J. Mushinski, Esq., on behalf of respondent

Record Closed: October 19, 1993 Decided: November 3, 1993

BEFORE **STEVEN C. REBACK,** ALJ:

This matter was transmitted to the Office of Administrative Law on May 12, 1993, for a hearing pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

On October 14, 1993, Kenneth A. Sandler, attorney for petitioner, submitted a letter (copy attached) withdrawing its petition of appeal with prejudice. Pursuant to N.J.A.C. 1:1-19.2, the withdrawal is granted. Therefore, I **ORDER** the Clerk to return this matter to the agency for appropriate disposition.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to

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make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

11/3/93
Date

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

11/4/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 08 1993
Date

OFFICE OF ADMINISTRATIVE LAW

tmp

Selikoff & Cohen, P.A.

Counselors at Law
Suite #314
307 Fellowship Road
Mount Laurel, New Jersey 08054-1233
(609) 778-6055
Telefax: 609-778-6056

Joel S. Selikoff
Member of NJ and DC Bars
Steven R. Cohen
Member of NJ, PA and DC Bars

* Kenneth A. Sandler
* Carol H. Sapakie
* Michael C. Damm

* Members of NJ and PA Bars

October 14, 1993

HONORABLE STEVEN REBACK, ALJ
Office of Administrative Law
9 Quakerbridge Plaza
CN 049
Trenton, New Jersey 08625

RE: AUDUBON EDUCATION ASSOCIATION
vs. AUDUBON BOARD OF EDUCATION
OAL DKT NO. EDU 04389-93 S
AGENCY REF. NO. 129=-5/93
Our File No. 3274-01

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OFFICE OF ADMINISTRATIVE LAW

Dear Judge Reback:

As counsel for Petitioner, I am writing to advise that it hereby withdraws with prejudice its Petition of Appeal at the above docket number.

Thank you for your courtesy and cooperation throughout.

Respectfully,
SELIKOFF & COHEN, P.A.

BY: Kenneth Sandler
KENNETH A. SANDLER

KAS:kaz
cc :Frank J. Cavallo, Jr., Esq.
Wayne J. Oppito, Esq.
Jack Kinner, AEA President
Paul Leahy, NJEA UniServ Rep.

2a

OAL DKT. NO. EDU 4389-93

AUDUBON EDUCATION ASSOCIATION, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF AUDUBON, CAMDEN COUNTY, RESPONDENT.	:	DECISION

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before her and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

DECEMBER 6, 1993

DATE OF MAILING - DECEMBER 6, 1993

311-93

GARY ANGEL, RONALD PAYNE ET AL. AND ENGLEWOOD TEACHERS ASSOCIATION,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, 35 custodial employees and their bargaining representative (Teachers Association), alleged Board's decision to subcontract custodial services violated their tenure rights, Open Public Meetings Act (OPMA) and pertinent bidding laws.

ALJ concluded that petitioners demonstrated a sufficient stake in the outcome and substantial likelihood of financial harm from the Board's decision to subcontract custodial services and, therefore, had standing to challenge the Board's award of the bid to Control Building Services, Inc. She further concluded that Board's decision to subcontract was a legitimate exercise of managerial prerogative done in good faith based on economic reasons and its dissatisfaction with the work performance of custodians and that petitioners' tenure rights were not violated by the Board's decision to subcontract custodial services and terminate their employment. (Hunterdon State Board decision and N.J.S.A. 18A:17-3) Moreover, ALJ concluded Board committed no violations of OPMA and bidding process was open to Association. ALJ affirmed Board's decision to subcontract custodial services and to terminate its custodial employees. Petition was dismissed.

Commissioner adopted findings and determination in initial decision.

DECEMBER 10, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6425-92
AGENCY DKT. NO. 394-8/92

GARY ANGEL, RONALD PAYNE, ET ALS.
AND ENGLEWOOD TEACHERS ASSOCIATION,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY
OF ENGLEWOOD, BERGEN COUNTY,
Respondent.

Alfred F. Maurice, Esq., for petitioners (Springstead & Maurice, attorneys)

George L. Vitureira, Esq. for respondent (Siff Rosen, attorneys)

Suzanne E. Raymond, Esq., for respondent (Gutfleish & Davis, attorneys)

Record Closed: September 21, 1993 Decided: November 5, 1993

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

STATEMENT OF THE CASE

Petitioners, Gary Angel and Ronald Payne, et als.,[1] custodial maintenance employees and their collective bargaining representative, the Englewood Teachers' Association (Association), challenge the validity of the action by the respondent, Englewood Board of Education (Board), terminating their employment and awarding a contract to Control Building Services, Inc. (Control Services) to provide custodial services. Petitioners allege that the Board's decision to subcontract the custodial services was not done in good faith or for reasons of economy. Petitioners also allege that the Board's decision to subcontract the custodial services violated their tenure rights.

---

[1]There are thirty-five custodial petitioners.

Respondent argues that petitioners/custodians were terminated based on reasons of economy and the Board's dissatisfaction with their performance. Respondent also argues that petitioners do not have standing, either as taxpayers or potential bidders, to challenge the Control Services' bid. It is also argued that only five custodians out of thirty-five may have acquired tenure, and their tenure rights were not violated.

PROCEDURAL HISTORY

On August 19, 1992, the matter was transmitted to the Office of Administrative Law for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A prehearing conference was held on October 27, 1992. On October 26, 1992, the Board filed a Motion To Dismiss, contending that there was no genuine issue of any material fact. Thus, it was entitled to a summary decision as a matter of law. On February 22, 1993, I issued an order granting the Board partial summary decision. I concluded that the Board committed no violations of the Open Public Meetings Act, and therefore, granted the Board's motion on these issues. However, I also concluded that there existed genuine issues of fact on whether Control Services met the bid specifications; whether the Board's decision to subcontract the custodial services was undertaken in good faith; and whether petitioners' tenure rights were violated. Therefore, summary decision was denied on these issues.

On March 2, 1993, the Board filed a Motion for Interlocutory Review before the Commissioner of Education on that portion of the administrative law judge's (ALJ's) order denying summary decision. On March 19, 1993, the Commission affirmed the ALJ's order with one modification: "that the question of petitioners' standing to raise a claim under school bidding laws be determined as a threshold matter before their allegation regarding Control Services' meeting the Boards' specification shall proceed to hearing on the merits, if appropriate" (Decision on Motion at 20).

A second prehearing conference was held on April 14, 1993, incorporating the Commissioner's Decision on Motion. Also, on April 13, 1993, petitioners withdrew their Motion for Predominate Interest Determination filed on January 4, 1993.

Hearings were held on June 15, 16, 17, and August 2, 1993. Petitioners presented four witnesses and respondent presented seven witnesses. The parties submitted posthearing briefs, and the record closed on September 21, 1993.

ISSUES

1. Whether petitioners have standing to claim that the Board's acceptance of Control Services' bid violated the school bidding laws?

2. Whether the Board acted in good faith when it decided to subcontract the custodial services and terminate petitioners; and if so, whether the bid submitted by Control Services conformed to bid specifications?

3. Whether petitioners have tenure, and if so, were their tenure rights violated by the Board's decision to terminate their employment?

JOINT STIPULATION OF FACTS

The following stipulated facts are adopted as **Findings of Fact**:

1. The Collective Bargaining Agreement covering the period from July 1, 1989 to June 30, 1992, contains the terms and conditions of petitioners' employment and covers the period when this cause of action arose.

2. During the 1991-92 school year and for several years proceeding, the Board had subcontracted for custodial management services with Service Master.

3. There was a reduction of $387,545 in state aid to the Board for transportation, special education, at-risk pupils, bilingual education, and county vocational program for the 1992-93 school year.

4. On March 6, 1992, the Board published a Notice to Bidder in *The Record* newspaper inviting public bidding for the subcontracting of services for plant operation, custodial and maintenance, which bids were to be opened on March 19, 1992.

5. At its March 19, 1992 official public meeting, the Board adopted a resolution rejecting all bids and directing a rebid at the recommendation of the Board attorney.

6. Because the Association was the exclusive representative for collective negotiations concerning the custodial maintenance employees, the Board notified the Association by letter of March 24, 1992, as set forth below:

> This is to advise you that the Board is exploring contracting either the managerial services or the total services for the custodial and building emergency services for the school district.
>
> We have sent out bid notices for these two areas of work. We have not determined, at the present time, which of the possibilities we will contract. However, we will keep you informed as to our intent in this matter.
>
> If you have any questions, please do not hesitate to call.

7. On March 25, 1992, another Notice to Bidder was published in *The Record* inviting rebidding for the subcontracting of custodial and maintenance services. The revised bids for management and staff were designated separately as "M-2, Contracted Services for Plant Management and Personnel for Custodian and Maintenance & Pickup Mail Services" and as "M-3, Contracted Services for Plant Management."

8. The bids received pursuant to the March 25, 1992 Notice to Bidder were opened. At its April 16, 1993 meeting, the bid submitted by Control Services was the lowest responsive bid for the M-2 bid.

9. The bid specifications state in relevant part that the bidder

> 4. Must presently be providing Maintenance and Custodial Operations in the State of New Jersey for an educational institution(s).
>
> 5. Must provide a reference list of six (6) currently served clients.

10. Neither petitioners nor its agents ever contacted the Solomon Schecter Day School to investigate the employment history and qualifications of Control Services at that institution.

11. During 1992, the parties met to negotiate a successor collective bargaining agreement for teachers, secretaries, professional assistants, and custodians and maintenance staff on March 25, April 15, May 5, and July 2, 1992. At the May 5, 1992 meeting, petitioners presented their proposals for a severance package for the custodial employees. The only contractual proposal proposed by petitioners at the May 5th meeting with respect to custodial and maintenance employees was the above-referenced written severance package. On or about April 14, 1992, the Board negotiator, John Miraglia, met with the Association's negotiator, Evan Goldman, and advised him of the Board's intent to subcontract management and custodial and maintenance services.

12. At the April 16, 1992 official public Board meeting, there was discussion by the public with respect to the M-2 and M-3 bids prior to the introduction of the resolutions. Subsequent to the public discussion, the Board adopted Resolution "25a" awarding the M-2 bid to Control Services for management and personnel services and adopted Resolution "25b" rejecting all of the M-3 bids for management services only.

13. On April 16, 1992, the Board individually notified all custodial and maintenance personnel by certified letters that the termination of their employment would be discussed at the April 21, 1992 special public meeting.

14. At the April 21, 1992 special public meeting, Carol Feinstein, president of the Association, read a statement asking the Board to reconsider the bid awarded to Control Services and the termination of all custodians. No other person spoke on behalf of the custodians although many custodians were in the audience. After public discussion, the Board adopted Resolution No. 44 which abolished all custodial and building emergency service positions and terminated the employees holding those positions as of June 30, 1992.

15. By letters of April 22, 1992, the Board notified all of the affected individuals that their employment would be terminated as of June 30, 1992, which was the last day of the Collective Bargaining Agreement.

16. At the May 7, 1992 Board special public meeting, there was a lengthy discussion by the public regarding the dismissal of the custodial staff and the approval of the contract with Control Services with approximately 36 members of the public making statements. After the special public meeting ended, the Board reconvened for its closed executive session meeting at approximately 11:00 p.m. that evening.

17. At the May 21, 1992 Board public meeting, there was another lengthy public discussion regarding the dismissal of custodians as well as teachers whose contracts had not been renewed. Teachers, custodians and representatives of the Association spoke in support of the teachers and custodians.

18. At the June 1, 1992 special public meeting, the business manager/Board secretary, Ronald Piliere, presented to the Board various items involving the bid and contract with Control Services, including the economic savings to the district and a history of the budget problems involved. Thereafter, many members of the public, including representatives of the Association, the custodians and Englewood residents, engaged in lengthy discussion. Following the public discussion, the Board adopted a resolution approving the contract with Control Services by a vote of 5 to 2.

I

Standing

Petitioners contend that they have standing to challenge the bid award to Control Services. The individual petitioners, Angel and Payne, were residents, citizens, property owners, and taxpayers of the City of Englewood when the cause of action arose, and thus, have standing to bring this action. Also, it is contended that petitioner, Englewood Teachers Association, stands in the same position as a bidder. Thus, it was directly affected by the award of the bid to Control Services when it resulted in the termination of an entire member unit. Therefore, the Association has standing to bring this action.

Respondent argues that individual petitioners do not have standing to challenge whether the Control Services' bid met the specifications. Petitioners cannot assert taxpayer status because they are not alleging public misdoing or compelling the Board to perform its public duty. Instead, petitioners are contesting the bid for personal gain--they want their jobs back. Respondent submits that taxpayers may seek to force the Board to accept the lowest qualified bid, but the remedy of reinstatement or monetary damages are not available to taxpayers. Thus, petitioners are "mere intermeddlers or merely interlopers" and do not have standing as taxpayers (repondent's brief at 10).

Respondent also argues that petitioners do not qualify as potential bidders. It is asserted that petitioners never claimed this status nor did they submit any evidence that they could have qualified as bidders under the bid specifications. Although petitioners could have presented their economic proposal to the Board, they did not. Moreover, petitioners never challenged the bidding procedure, but instead, claimed that the Control Services' bid did not meet the specifications.

Respondent further argues that petitioners, through their collective bargaining agreement, stood in the shoes of a bidder whose bid was not successful. It is asserted that while the Board was investigating subcontracting, petitioners were contemporaneously negotiating a new contract with the district. The Board, however, decided to accept Control Services' bid over the other bids including the "bid" of the collective bargaining unit. Thus, it is submitted that unsuccessful bidders have no standing to contest the specifications of a bid.

Finally, respondent argues that a challenge to a bid award by a public body must be made promptly or review of the bid will be denied. It is submitted that petitioners did not timely complain.

Discussion

Standing requires, at a minimum, a detrimental impact on a right or interest of the complaining party. The New Jersey Supreme Court, in *Crescent Park Tenants Ass'n v. Realty Equities Corp. of N.Y.*, 58 *N.J.* 98 (1971), set forth the threshold requirements allowing a person to institute an action:

> [W]e will not render advisory opinions or function in the abstract [citation omitted] nor will we entertain proceedings by plaintiffs who are "mere intermeddlers" [citations omitted] or are merely interlopers or strangers to the dispute [citation omitted]. Without ever becoming enmeshed in the federal complexities and technicalities, we have appropriately confined litigation to those situations where the litigants' concern with the subject matter evidenced a sufficient stake and real adverseness.
>
> [*Id.* at 107.]

Thus, two requisites must be shown to sustain a finding of standing to bring an action: (1) petitioner must demonstrate a sufficient stake in the outcome of the proceedings; and (2) his or her position must be truly adverse to that of respondent. The Court's holding is consistent with the *Administrative Procedure Act* which defines who may be considered an interested person to initiate administrative proceedings before the Commissioner of Education. *N.J.A.C.* 6:24-1.1.

The individual petitioners assert standing as taxpayers. Taxpayer standing has been recognized as a basis for standing where the public interest is involved. In *Silverman v. Bd. of Ed. of the Tp. of Millburn*, 134 *N.J. Super.* 253 (Law Div. 1975), *aff'd,* 136 *N.J. Super.* 435 (App. Div. 1975). Replacing public employees with private employees solely to save money is a matter of great public interest. *In IFPTE Local 195 v. State*, 88 *N.J.* 393, 410 (1982). However, in the absence of showing that the matter impacts the public interest, the courts will look to some measurable amount of detrimental impact on the complaining party's personal rights but will not permit a litigant standing to assert the rights of a third party. *Jersey Shore Med. Center v. Estate of Baum*, 84 *N.J.* 137, 144 (1980).

Although taxpayer status has been recognized to confer standing upon plaintiffs in some cases, it has been routinely rejected by the Commissioner of Education as a basis for standing in cases involving challenges to personnel decisions made by school boards. *See, e.g., Huetteman v. Bd. of Ed. of the Boro. of East Rutherford,* OAL DKT. EDU 4100-86 (July 25, 1986), *adopted*, Comm'r of Ed. (Sept. 3, 1986) (where taxpayers/parents held not to have standing because they were not "interested persons" under *N.J.A.C.* 6:24-1.1 for purpose of challenging the transfer of principals); and *Kenwood v. Montclair Bd. of Ed.*, OAL DKT. EDU 8858-81 (April 23, 1982), *adopted*, Comm'r of Ed. (June 14, 1982) (where petitioner failed to demonstrate sufficient stake in outcome or substantial likelihood of harm). In cases involving substantial public interest, petitioner must have additional private interest, *i.e.*, some measurable detrimental impact. *Salorio v. Glaser, 82 N.J.* 482,

491 (1980). *See also Ricciardelli v. Bd. of Ed. of the City of Newark*, OAL DKT. EDU 1894-79 (Sept. 26, 1979), *adopted,* Comm'r of Ed. (Nov. 16, 1979) (petitioner must be affected in a direct and meaningful way; taxpayer status insufficient to confer standing to challenge transfer of personnel).

Here, petitioners are taxpayers and were performing custodial services to the Board until the Board subcontracted the custodial services of someone else. These issues would concern petitioners as taxpayers because increased costs of operating a school are often reflected in increased taxes. Also, petitioners have an interest in the Board's decision to subcontract custodial services from a private organization. Indeed, the Board recognized that petitioners stood in the shoes of a bidder through their collective bargaining unit and thus became competitors with other bidders.

The New Jersey Supreme Court has held that the competitors have sufficient interest to afford them standing in a cause of action. In *Elizabeth Federal Savings & Loan Ass'n v. Howell*, 24 *N.J.* 488 (1957), the Commission of Banking and Insurance granted Roselle Park Savings and Loan permission to buy out an operation in Elizabeth and move that operation to another Elizabeth location. The competitors of the outside savings and loan, who were already established in Elizabeth, challenged the action. The court stated that standing inheres to "all persons who are directly affected by and aggrieved as a result of the particular action sought to be brought before the courts for review." *Id.* at 500. Therefore, petitioners had standing due to their status as competitor financial institutions, rather than as taxpayers.

Based on the above, I **CONCLUDE** that petitioners, Angel and Payne, have demonstrated a sufficient stake in the outcome and substantial likelihood of financial harm from the Board's decision to subcontract custodial services. Thus, I also **CONCLUDE** that petitioners have standing to challenge the Board's award of the bid to Control Services.

Teachers' associations have standing to challenge board actions when those actions intimately and directly affect the associations' members. *Winston v. Bd. of Ed. of So. Plainfield*, 125 *N.J. Super.* 131, 142 (App. Div. 1973), *aff'd,* 64 *N.J.* 582 (1974); *Wyckoff Ed. Ass'n v. Wyckoff Bd. of Ed.*, OAL DKT. EDU 5174-80 (Aug. 21, 1981), *adopted*, Comm'r of Ed. (Oct. 5, 1981), *aff'd*, St. Bd. of Ed. (Sept. 5, 1982). Moreover, an association may have standing in its own right to seek judicial relief from injury to itself. *Warth v. Seldin*, 422 *U.S.*

490, 95 *S. Ct.* 2197, 45 *L. Ed.* 2d 343 (1975). In the absence of injury to itself, an association may have standing solely as representative of its members if it is alleged that its members or any one of them "are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *Id.* at 511, 45 *L. Ed.* 2d at 362.

The individual petitioners in this matter are members of the association who were affected by the Board's action--their employment was terminated when the Board awarded the bid to Control Services. Consequently, the issue of the association's standing that has been routinely applied in *Winston* is applicable here. Therefore, I **CONCLUDE** that Englewood Teachers Association has standing to challenge the Board's decision to award the bid to Control Services.

I further **CONCLUDE** that petitioners' challenge to the bid award by the Board to Control Services was timely. The record reflects that on April 15, 1992, the Board awarded a bid to Control Services to provide custodial and managerial services and on April 21, 1992, the Board adopted a resolution abolishing all custodial and building emergency service positions as of June 30, 1992. Thereafter, petitioners were sent notices dated April 22, 1992, that their employment had been terminated. On June 11, 1992, the Board adopted a resolution approving the contract with Control Services. On May 28, 1992, petitioners filed an Action in Lieu of Prerogative Writ before the Superior Court, Bergen County, challenging the validity of the Board's termination of their employment as school custodians and the Board's award of a contract to Control Services to provide custodial services. The record also reflects that respondent's answer to petitioners' Complaint in Lieu of Prerogative Writ, dated June 10, 1992, failed to assert that petitioners "sat on its rights and should not be permitted to complain" (respondent's brief at 12). On or about August 12, 1992, the Honorable James T. Murphy, J.S.C., transferred the matter to the Commissioner of Education.

II

Whether the Board Acted in Good Faith in Subcontracting the Custodial Services

Payne conceded that the custodians had problems keeping the buildings and grounds clean. But he believed that Service Master, the custodial management company, was the root of the problem. Service Master, contracted by the Board to supervise the custodians, also supplied the cleaning and repair equipment to the custodial staff. Often Service

Master failed to provide the cleaning supplies to the custodians or did so in an untimely manner. Payne also stated that there was friction between Service Master employees and the custodians. One incident resulted in the suspension of two custodial workers.

Evan Goldman, a contract negotiator for the Association for 23 years, testified that contract renewal negotiations for July 1, 1992, began on February 25, 1992. During the two and one-half hour meeting, the subject matter of subcontracting custodial workers was not raised by the Board. At the March 25, 1992 negotiation meeting, Goldman saw the letter dated March 24 about the Board's intent to consider subcontracting custodial services. Although other members of the custodial association were present, there was no discussion on the subject. During another contract negotiation meeting on April 15, 1992, there were no discussions between the Board and the Association on the subcontracting issue. On April 21, 1992, the Board acted to accept the bid of Control Services and thereby to terminate the custodial staff. On May 5, 1992, at a regularly scheduled negotiation meeting, the Association, on behalf of the custodians, submitted a severance package to the Board; this was the only proposal offered by the Association. The proposals contained in the severance package were not discussed.

Regarding the bid specifications, Goldman testified that the bids had two major specifications: (1) that the company must presently service an educational institution and (2) that the company submit a list of six current references. Goldman believed that Control Services did not meet the requirements. Specifically, he contended that the Solomon Schecter Hebrew Day School, a Yeshiva, was not an educational institution under the bid specifications. Also, Control Services had listed a school, Fairleigh Dickson University, which it no longer serviced.

Regarding the Board's bad faith conduct, Goldman believed that true reason the Board decided to subcontract the custodial services and terminate petitioners was the unsuccessful attempt to fire two custodians. Goldman did not believe that the Board's decision was based on reasons of economy.

Carol Feinstein, Association president in 1992, was part of the negotiation team for the custodians. In February 1992, the Board informed the Association that there would be no staff cuts. Then, at the April 14 meeting, John Miraglia stated that the Board had made up its mind to subcontract all custodial services.

John Miraglia, labor consultant, represented the Englewood district at the contract negotiations. Prior to March 24, he discussed the subcontracting issue with Angel. At the April 14 meeting, he also discussed the subcontracting issue with those present. Although he did not believe that it was his obligation to make the "first move," he did ask the custodians if they had any proposals for the Board to consider. Then he told the custodians about the Board's options to either privatize the total custodial services or the management services.

Mary Ann Jandoli, the Associate Director of Research and Economic Services for the New Jersey Education Association (NJEA), testified for petitioners. Jandoli provides services to the NJEA in the areas of fiscal analysis, financial services regarding school district budgets, school funding changes, and statistical data used in collective bargaining.

Jandoli performed an analysis of the Board's financial condition for 1992-93. Based on a comparative analysis, she found a pattern of surplus in the unappropriated free balance. The 1992-93 advertised budget was underestimated by $632,228. While the audited surplus of $1,752,564 is 6.7 percent of the budget, the "rule of thumb" common in school districts is to retain 3 percent (P-5). She stated that

> The district opted to award a contract to Control Services for $946,443 which, when compared to current custodial cost including a management contract with Service Master, realized a cost savings of $1,124,640. This choice, it is important to note, was made in March 1992, three months before $1,752,564 was certified as free balance.
>
> [Exhibit P-5.]

Jandoli also believed that the Board had alternative choices to subcontracting the custodial services. For example, specific budgeted items could have been tapped for revenues: terminating the Service Master contract; appropriating the surplus to within 3 percent margin; budget at the cap limit; declaring the desegregation aid revenue; challenging the cut in transportation aid, or expending the additional current expense increase. Additionally, the Board's decision to elect a premium delay of their aggregate State Health Benefits bill resulted in a cost savings of $148,170 to the 1992-93 budget. Jandoli concluded that the Board had access to revenues of $2,952,614 (P-5). Thus, she believed that the Board had no economic need to terminate the custodial employees.

Ronald Piliere, Board secretary/business administrator, testified that when the Board prepared its tentative budget in March 1991, it realized that the district was in poor financial condition. Also, because it believed that it was facing a shortfall, the Board issued a freeze on purchases and considered privatizing the custodial services.

In April 1991, Piliere submitted a report to Dr. Henry Oliver, the superintendent of schools, showing a cost analysis of the facility management plans (J-1). Piliere proposed three alternatives to save money in the custodial/maintenance area: (1) in-house management team; (2) retain Service Master (or the Service Master concept) and contract labor force; and (3) and establish in-house supervision and contract labor force. *Ibid.* Piliere believed that the second proposal--using a private company for all cleaning and maintenance--reflected the trend favored by school districts, *e.g.*, privatizing cafeteria and transportation operations. Consequently, he favored privatizing the full custodial services. However, he also noted that other alternatives existed and that the district might want to look into this matter in greater depth. *Ibid.*

In March 1992, the Board advised the custodians and the Association that it was exploring contracting either the managerial services or the total services for the custodial and building emergency services for the district (J-7). Piliere's prior position was with the Clifton school district in Passaic County. Control Services also provided custodial and maintenance services to Clifton. Thus, when Piliere recommended privatizing custodial services for Englewood, he had some familiarity with the work performance of Control Services.

Regarding the bidding process, the Board looked at bidders who offered the lowest price, quality performance/qualifications, and a performance bond. With regard to the bid specifications, Exhibit J-6, required that the bidder must presently be providing maintenance and custodial services for a New Jersey educational institution(s). Thus, Piliere believed that for bid purposes, there was no distinction between a private and a public school. It would suffice that the institution need only be a school which taught children.

Arthur Rawl, a former Board member (1983-1993), testified about the Board's budget process. Generally, the Board focuses on the district's educational goals, receives recommendations from the administrators, and then develops the budget. During the past four or five years, the Board faced several problems including local tax issues and reduced funding. Nevertheless, the Board's primary goal is to educate children and when making

decisions, it must act prudently. Thus, when it needed to economize and focus on savings, it considered the business administrator's recommendation to privatize the custodial operations. Rawl also testified that the Board would have considered a reasonable proposal from the Association had one been submitted; but no proposals were submitted.

Russell Major, also a former Board Member (1975-1993), testified about the budget process and the Board's experience with Service Master. Some of the custodian employees held tenured positions and over the years the Board had developed a "paternal" feeling towards them. Despite poor job performance, the Board took no action to terminate the custodians. Instead, in 1985-86, the Board, dissatisfied with the unkempt condition of the buildings and grounds, subcontracted Service Master to supervise the custodian employees. Initially, conditions improved but then, during the last two or three years, the Board began to receive complaints from the parents and staff; the buildings were again dirty. Moreover, the attendance problems with the custodial employees resulted in a substantial amount of overtime. For example, in 1988-89, maintenance costs reached more than $600,000. The Board determined that although it was paying high maintenance costs, they were getting poor performance. Thus, in April 1991, the Board reviewed Piliere's report, Exhibit J-1, and considered the available alternatives.

During the bidding process in 1992, the Board was undecided about privatizing the custodial work. Although the Board's primary goal was to educate children, not to "employ grown-ups," it was also obligated to reduce costs and improve services. Thus, the "bottom line" would be a determinative factor in deciding which way to go. Further, the bidding process was open to the Association.

William Trepicchio, assistant superintendent, testified that on April 14, 1992, he called a meeting with the Association and the custodians to inform them about the subcontract issues being considered by the Board. Also, when he asked the Association if it had any offers to present to the Board, there was no response. Thereafter, the Board, in public session, voted on a resolution to subcontract the custodial work from Control Services.

Dr. Henry Oliver, superintendent of the Englewood School District, testified about the budget cuts and the Board's decision to subcontract the custodial services. In 1990-91, he was concerned about overall expenditures. Faced with expanding classes and reduced

funding, the Board looked for alternative cost savings in support areas such as food services and transportation. However, in 1991-92, the Board cut 27 staff positions which included 15 teachers and 12 professional assistants.

Regarding the custodial costs, Oliver was concerned about the poor quality of management services provided by Service Master, high custodial absenteeism, and the high level of overtime salaries for custodial employees. Consequently, the memorandum on Facility Management Plans, Exhibit J-1, was used to address the budget issues on the custodial costs. Oliver believed that subcontracting the custodial services was cost effective and feasible. Thus, he recommended to the Board that it subcontract the custodial services.

Based on a careful review of the whole of the record, including the opportunity to observe the demeanor of the witnesses, I **FIND**:

1. In 1990-91, the Board began looking at ways to reduce costs in its overall expenditures. It considered alternative cost savings in support areas such as food services, transportation and custodial costs.

2. Prior to 1991, the Board seeking to improve the cleanliness of the schools and grounds and the job performance of its employees, subcontracted Service Master to manage and supervise the custodial employees.

3. The custodial services performed by Board employees under the supervision of Service Master had not improved significantly by 1991. However, the expenditures and related costs for custodial services, *e.g.*, overtime, increased.

4. In April 1991, the Board investigated the cost savings of subcontracting total and partial custodial services.

5. In a letter dated March 24, 1992, the Board informed the custodians that it was investigating options to subcontract custodial services.

6. Prior to the March 24 letter, respondent's labor representative, John Miraglia, and petitioner, Gary Angel, discussed the subcontracting issue and that the custodians may lose their jobs.

7. During meetings on March 25 and April 14, 1992, between the Board and the Association, the Association had an opportunity to initiate discussions and propose alternatives to privatizing the custodial services but it did not.

8. Prior to to the Board's resolution adopting the bid of Control Services on April 16, the Association did not initiate discussions or make alternative proposals to the subcontracting issue.

9. Prior to the Board's special meeting on April 21, the Association did not initiate discussions or submit a proposal on the subcontracting issue; however, at the meeting, it did ask the Board to reconsider the bid awarded to Control Services.

Discussion

Petitioners contend that the Board's duty to save taxpayers money is a legitimate goal. However, in pursuing this goal, the Board cannot be motivated by bad faith or the desire to substitute private workers for public employees. Petitioners rely on *IFPTE Local 195* and *Hunterdon Central H.S Ed. Ass'n v. Hunterdon Regional H.S. Bd. of Ed.*, OAL Dkts. 4555-85 and 1447-86 (Nov. 17, 1986), Comm'r of Ed. (Dec.26,1986), State Board (May 6,1988) aff'd, A-5036-87T2 (App Div, June 28, 1989), certif. den., 118 *N.J.* 212 (1989).

It is asserted that Board did not justify the economic reasons for terminating the custodians and subcontract those services. Thus, the Board's act is invalid. But assuming, *arguendo*, that it did have legitimate reasons to consider subcontracting, petitioners assert that the Board failed to carry out its legal obligation to communicate its intentions to the Association and to give the Association adequate notice so that an alternative proposal could be presented. Had it done so, the Association would have proposed a competitive economic alternative. Thus, it is submitted that the Board acted in bad faith to defeat the tenure and seniority rights of the custodial employees.

Respondent argues that petitioners failed to meet the burden that the Board subcontracted in bad faith. It is asserted that petitioners had ample advance notice of the Board's intent to investigate subcontracting. The Board's letter, Exhibit J-7, provided petitioners notice that the custodians could lose their jobs. Moreover, it is argued that the

Board had no legal or moral obligation to provide such notice but did so as a matter of courtesy. Further, absent an existing contractual requirement, the Board had no legal obligations to initiate negotiations on the subcontracting issue. The Collective Bargaining Agreement between petitioners and the Board does not contain any provision requiring the Board to negotiate or discuss subcontracting with the petitioners. Indeed, there is a provision permitting the parties to discuss subcontracting, but not a clause requiring the parties to negotiate subcontracting, as recognized under *In IFPTE Local 195* at 408-9. Thus, respondent submits that petitioners have the burden to demand negotiations over severance, recall rights and related matters. Notwithstanding the Board's notice dated March 24, 1992, and the meeting called by Miraglia on April 14, to discuss the issue, it was petitioners who failed to carry out their legal obligation to initiate negotiations or discussions over the subcontracting issue.

Respondent also argues that petitioners assertions that the Board had money in its budget to retain the custodians are erroneous and merely cloud the issues. Respondent asserts that the manner in which the Board expends monies is not an issue in this case nor can it be questioned by the petitioners. Moreover, respondent argues that the Board's decision to subcontract is a nonnegotiable matter of managerial prerogative. Further, it is argued that decisions to reduce the work force based on reasons of economy or efficiency are nonnegotiable subjects.

Respondent also denies any allegations that the Board considered subcontracting as a pretense to discharge employees who could not be removed through the arbitration process. Indeed, in April 1991, the Board began to look into subcontracting as an alternative and a potential economic savings (J-1). However, the arbitrations did not occur until January and March 1992. Thus, it is submitted that there is no connection between the arbitrations and the subcontracting.

For the reasons discussed herein, I **CONCLUDE** that petitioners failed to establish by a preponderance of the evidence that the Board's decision to subcontract the custodial services and terminate the employees constituted bad faith.

The Board is not required to perform all of its necessary functions in-house, but may contract or subcontract those functions with private companies or individuals. *In IFPTE Local 195*, the court considered the negotiability of proposed provisions of public employee collective bargaining agreements, including requirements of negotiation or discussion of

contracting out or subcontracting where layoffs or displacement might result. The court held that the decision to contract out work or to subcontract is a nonnegotiable matter of managerial prerogative. *Id.* at 408. The court then noted, however, that discussions between public employers and employees were valuable and should be encouraged because they may promote labor, peace, and harmony. Moreover, they may even result in greater efficiency or economy. *Id.* at 409. "If a public employer is considering subcontracting as a means to achieve these goals, employees may be motivated to suggest changes in working conditions that could accomplish the same or better results." *Ibid.* However, the court also stated that:

> For these reasons, we fully expect that discussion between public employers and employees will be undertaken by the State. It is clearly in the interest of State to do so. . . We do not mean to stifle discussion. We encourage it. State officials would be derelict in their public responsibilities if they did not pursue such discussions.
>
> While the public employees have no right to negotiate on the ultimate decision to subcontract, they may have a procedural right to present their position on the economic issue.
>
> [*Id.* at 409.]

The court further noted that:

> the contract provision would be acceptable if it limited discussion to occasions of subcontracting or contracting likely to result in job layoffs only when the subcontracting is done solely for fiscal or economic reasons. . . .[But], [p]lacing a legal duty on the State to discuss subcontracting when proposed for broader policy purposes would place too great a burden on the determination of governmental policy. Only when the contracting out is proposed for purely economic reasons does the employee interest in the discussion of alternative solutions become dominate.
>
> [*Id.* at 410.]

The court also cautioned that:

> our holding today does not grant the public employer limitless freedom to subcontract for any reason. The State could not subcontract in bad faith for the sole purpose of laying off public employees or substituting private workers for public workers. State action must be rationally related to a legitimate governmental purpose. Our decision today does not leave public employees vulnerable to arbitrary or capricious substitutions of private workers for public employees.
>
> *[Id.* at 411.]

I have considered the parties' dispute over whether petitioners or respondent had a legal duty to initiate discussions on alternative options, subcontracting. Petitioners do not refute the Board's assertion that there was no provision in the contract to discuss the Board's decision to subcontract. Further, it was not disputed that there were problems with the custodians work performance before and after Service Master was hired to supervise the custodians. Consequently, I **CONCLUDE** that the Board decided to subcontract the custodial services based on economic reasons and because it was dissatisfied with the custodians work performance. I further **CONCLUDE** that it had no legal duty to initiate discussions with the Association about alternatives to subcontracting. However, I am also mindful that whenever it is reasonably possible, it is appropriate and perhaps expected that the Board in good faith encourage open discussions about any matter which could lead to layoffs. Although the Board did not extend a verbal invitation to the Association to discuss the issue, I **FIND** and **CONCLUDE** that the Association had several opportunities to submit or to inform the Board that it intended to submit alternative proposals. However, the record reflects that the Association did not avail itself of these opportunities. Instead, it only submitted a severance package to the Board and thereafter it requested that the Board reconsider its decision to award the custodial contract to Control Services and terminate the custodians.

I also **CONCLUDE** that the Board's testimony about its fiscal management and its projected savings from privatizing the custodial services was straightforward and credible. The evidence also supports that when the Board hired a management company to supervise the custodians, it showed a good faith attempt to retain the custodians despite their poor performance.

Based on the whole of the record, I **CONCLUDE** that the Board reasonably determined that it would be irresponsible to taxpayers to continue to expend monies on public custodial employees when privatizing those services would result in a more efficient operation of the school system.

I also **CONCLUDE** that petitioners allegations that Control Services failed to meet the bid specification are not supported by the evidence. The specifications required that the bidder "[m]ust presently be providing maintenance and Custodial Operations in the State of New Jersey for an educational institution(s)" (J-6 at 4). Solomon Schecter Hebrew Day School is an educational institution located in New Jersey.

III

Were Petitioners' Tenure Rights Violated?

The parties have stipulated that five of the Association members may have acquired tenure. The Board asserts that the balance of the thirty custodians have annual employment contracts for each year of employment and thus, could not have acquired tenure.

The applicable tenure statue for janitorial employees provide that:

> Every public school janitor of the school district shall, unless he is appointed for a fixed term, hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except as a result of the reduction in the number of janitors in the district made in accordance with the provisions of this title or except for neglect, misbehavior or other offense and only in the manner prescribed by subarticle 2 of article 2 of chapter 6 of this title.
>
> [*N.J.S.A.* 18A:17-3.]

Thus, in order to be considered a tenured employee, petitioners must demonstrate that they are janitors in the general sense and were appointed for an indefinite term. Respondent asserts that thirty custodians have annual employment contracts for each year of employment, and thus could not have acquired tenure.

Assuming, *arguendo*, that they are all tenured custodians, *N.J.S.A.* 18A:17-3 and *N.J.S.A.* 18A:17-4 permit the reduction in work force of janitors except "by reason of residence, age, sex, race, religion, or political affiliation." *N.J.S.A.* 18A:17-4.

Further, the Board's subcontracting decision must be based on a legitimate governmental purpose and done in good faith; not for the purpose of replacing public employees with private ones. In *Hunterdon*, the State Board explicitly stated that:

> In the absence of statutory or regulatory prohibition of subcontracting for such services, we conclude that a reduction resulting from subcontracting does not in itself violate custodial tenure rights.
>
> [*Hunterdon*, State Board of Education, May 4, 1988, at 13.]

However, noting *IFPTE Local 195*'s holding that the state could not subcontract in bad faith, the State Board also stated that:

> In light of the tenure protection afforded custodians by *N.J.S.A.* 18A:17-3, we conclude that where subcontracting results in termination of tenured custodians, the propriety of a board's actions must be carefully examined so as to assure that the decision to subcontract was made in good faith and not for the sole purpose of laying off tenured employees.
>
> [*Hunterdon*, State Board of Education, May 4, 1988, at 14.]

The State Board then found that the *Hunterdon* Board's ultimate subcontracting decision, a choice from among several options, had been made in good faith as a result of long-standing dissatisfaction with the level of cleanliness and maintenance throughout the school, and that the termination of petitioners' employment was not in contravention of their tenure rights under the education laws, but was a legitimate exercise of managerial prerogative. *Id.* at 17, 18.

Based on the whole of the record and consistent with the above conclusions that the Board acted in good faith, I **CONCLUDE** that petitioners' tenure rights have not been violated by the Board's decision to subcontract custodial services and terminate their employment.

ORDER

Based on the above, it is hereby **ORDERED** that the Board's decision to subcontract the custodial services to Control Services and to terminate its custodial employees be **AFFIRMED**. Also, it is **ORDERED** that the petition of appeal be and is hereby **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** who, by law, is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time

limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Nov 5, 1993
DATE

Mumtaz Bari-Brown
MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

11/9/93
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 12 1993
DATE

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

md/e

APPENDIX

WITNESSES

For Petitioner:

Ronald Payne
Evan Goldman
Mary Ann Jandoli
Carol Feinstein

For Respondent:

Ronald Piliere
Arthur J. Rawl
William Trepicchio
Russell Major
Allan Gutfleish
John Miraglia
Henry Oliver

EXHIBITS

J-1	Letter, Piliere to Oliver, April 16, 1991
J-2	Notice to Bidder, March 6, 1992
J-3	Notice to Bidder, March 25, 1992
J-4	Bid M-2 draft, March 20,1992
J-5	Bid M-2 draft, March 24, 1992
J-6	Notice to the Bidder and Bid M-2, March 25, 1992
J-7	Letter, Piliere to Rimmer and Angel, March 24, 1992
J-8	Memorandum, Miraglia to Oliver, et als., April 13, 1992
J-9	Memorandum, Trepicchio, et als. to Oliver, et als., April 15, 1992
J-10	Memorandum from Piliere, April 16, 1992
J-11	Memorandum by Piliere, April 16, 1992
J-12	Building and Grounds Fact Sheet, April 16, 1992
J-13	Resolution 25a Bid Award Recommendation M-2, April 16, 1992
J-14	Letter, Trepicchio to Angel, April 16, 1992
J-15	Letter, Turen to Piliere, April 20, 1992
J-16	Resolution 44, April 21, 1992
J-17	Letter, Trepicchio to Angel, April 22, 1992
J-18	Proposal for Severance Package, May 5, 1992
J-19	Memorandum, Piliere to Oliver and Trepicchio, May 11, 1992

J-20 Memorandum, Oliver to File, May 14, 1992
J-21 Memorandum by Oliver to File,May 18, 1992
J-22 Letter, Lopez to Piliere, May 19, 1992
J-23 Letter, Piliere to Oliver, et als., May 19, 1992
J-24 Minutes of Board's Special Public Meeting, June 11, 1992
J-25 Tough Challenges/New Strategies by Piliere, June 11, 1992
J-26 Collective Bargaining Agreements for 1989-90, 1990-91, and 1991-92
J-27 Report of Audit for the Year Ended June 30, 1992,
J-28 Contract for Bid M-2, April 4, 1992

P-1 Arbitration Award
P-2 Decision and Award
P-3 Memorandum, Jandoli to Maurice, June 14, 1993
P-4 Memorandum re: Position Description for Associate Director of Research
P-5 Memorandum, Jandoli to Goldman, June 11, 1993

R-1 Not admitted
R-2 Request for Admissions, May 11, 1993
R-3 Demand for Answers to Interrogatories, May 11, 1993
R-4 Petitioner's Admissions
R-5 Petitioners' Answers to Interrogatories
R-6 Petitioners' Amended Admissions and Answers to Interrogatories, June 10, 1993
R-7 Black's Law Dictionary, page 461.
R-8 Not admitted
R-9 Not admitted
R-10 Certification of Evan Goldman, November 12, 1992
R-11 Supplemental Certification of Evan Goldman, December 7, 1992
R-12 Chart drawn by Arthur Rawl

OAL DKT. NO. EDU 6425-92

GARY ANGEL, RONALD PAYNE ET AL. AND ENGLEWOOD TEACHERS ASSOCIATION,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by petitioners. Respondent's exceptions, received on November 30, 1993, were untimely filed pursuant to N.J.A.C. 1:1-18.4 and are, therefore, not considered herein.

Upon a careful and independent review of the record in this matter, the Commissioner agrees with the findings and conclusions of the Administrative Law Judge in her initial decision for the reasons well expressed therein.

Accordingly, the Commissioner adopts the recommended decision of the Office of Administrative Law as the final decision in this matter and hereby dismisses the within petition.

DECEMBER 10, 1993

DATE OF MAILING - DECEMBER 10, 1993

COMMISSIONER OF EDUCATION

311-93

EDU #6425-92
C # 311-93
SB # 2-94

GARY ANGEL ET AL. AND ENGLEWOOD TEACHERS ASSOCIATION,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, December 10, 1993

For the Petitioners-Appellants, Springstead & Maurice
(Harold N. Springstead, Esq., of Counsel)

For the Respondent-Cross/Appellant, Siff & Rozen
(George L. Vitureira, Esq., of Counsel)

For the Respondent, Gutfleish & Davis
(Suzanne E. Raymond, Esq., of Counsel)

The petitioners in this case are two individual custodians and the collective negotiations representative for all of the custodians (hereinafter "Association"). They challenged the validity of actions taken by the Board of Education of the City of Englewood (hereinafter "Board") to subcontract for the provision of custodial services and to terminate the custodians. Petitioners alleged that the decision to subcontract was not made in good faith and that it violated the custodians' tenure rights. They also alleged that the bidder who had been awarded the contract to provide the custodial services had not met the bid specifications so that the Board's decision to award the contract to that bidder was invalid.

The Board contested the petitioners' allegations and also asserted that petitioners lacked the standing to challenge its award

June 1, 1994

of the contract to the successful bidder.

The Administrative Law Judge (ALJ) determined that the individual petitioners had the standing to challenge the bid award because the issue would concern them as taxpayers and because they were likely to suffer financial harm as a result of the Board's decision to subcontract custodial services. She also found that the Association had the standing to challenge the Board's action in awarding the bid because the action affected its members.

The ALJ then concluded that the petitioners had failed to establish that the Board's actions in subcontracting custodial services were in bad faith, finding instead that those actions were taken for economic reasons and because of dissatisfaction with the custodians' work performance. She also concluded that the Board had no legal duty to initiate discussions with the Association with respect to alternatives to subcontracting, but that it had provided the Association with several opportunities to submit alternatives. She found that the Board's evidence relating to the fiscal aspects of its decision was credible and determined that the Board's decision to privatize was a reasonable one. She further found that the evidence did not support petitioners' allegations that the successful bidder had failed to meet the bid specifications and that the Board had not violated the tenure rights of any of the individual custodians when it terminated their employment as a result of subcontracting for custodial services. The ALJ therefore recommended that the Commissioner dismiss the petition.

The Commissioner adopted the ALJ's recommended decision as her final decision and dismissed the petition.

Petitioners appealed to the State Board. The Board

cross-appealed the ALJ's determination that petitioners had standing to challenge the bid.

We reject the ALJ's determination that petitioners had standing to challenge whether the bidder who was awarded the contract met the bid specifications. As the Board argues, the interest of the individual petitioners involved here was clearly in saving their jobs rather than in correcting public misdoing or compelling performance of a public duty. Garrou v. Teanick Tryon Co., 11 N.J. 294 (1953). Consequently, they can not be considered as taxpayers for purposes of this litigation.

Furthermore, neither the individual petitioners nor the Association were potential bidders on the contract and their challenge to the qualification of the successful bidder could not provide them with any remedy. Hence, under the bidding laws, they did not have standing to make this challenge. Capasso v. Pucillo 132 N.J. Super. 542 (Law Div. 1974). In essence, it was the Board's decision to subcontract, not its determination of which bidder would be awarded the contract, that had affected petitioners.

On examination of the record and for the reasons expressed by the ALJ, we reject petitioners' claims that the Board acted in bad faith in determining to subcontract for custodial services or that the resulting termination of their employment violated the tenure laws. Therefore, as modified herein, we affirm the decision of the Commissioner.

Orlando Edreira opposed.

June 1, 1994

Date of mailing JUN 03 1994

312-93

312-93

A.T., on behalf of her minor children, P.T., D.T. AND N.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

DECEMBER 10, 1993

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11141-91
AGENCY DKT. NO. 416-11/91

A.T. on behalf of her minor children, P.T., D.T., and N.T.

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE,

Respondent.

Jonathan H. Rosenbluth, Esq., for petitioner

Stephen J. Christiano, Esq., for respondent

Record Closed: November 16, 1993 Decided: November 16, 1993

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

This matter was transmitted to the Office of Administrative Law on December 11, 1991 for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

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

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded. I further note that the parties have agreed to waive the right to file exceptions and cross-exception.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Nov. 16, 1993
Date

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

11/17/93
Date

Maureen K. Kiley
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 18 1993
Date

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

al

SETTLEMENT AGREEMENT
OAL Docket No. EDU 11141-91
AGENCY DKT. NO. 416-11/91

A.T.
on Behalf of her Minor
Children, P.T., D.T. and
N.T.
Petitioner

v.

BOARD OF EDUCATION OF THE
TOWNSHIP OF WEST ORANGE
Respondent

The parties in this matter have voluntarily resolved all disputed matter and enter into the following settlement agreement:

1. Petitioner withdraws her claims with prejudice and Respondent withdraws its counterclaim for reimbursement of past tuition expenses with prejudice.

2. The parties stipulate and agree that there is no dispute that the petitioner's family is presently domiciled in West Orange and that all of the petitioner's children are entitled to be enrolled in the West Orange public school system, and further, that any of petitioner's children who may be classified as special education students will be afforded such programs as are made available to children domiciled in West Orange.

3. Petitioner agrees to pay the sum of $1,000.00 in settlement of this matter which sum represents a payment for the period during which petitioner has alleged to have been living at 24 Llewellyn Avenue, West Orange in September, 1990. This sum is being paid in settlement of all claims herein and the parties mutually release each other and any agents, servants, successors and/or representatives from all claims and causes of action which may have arisen prior to the entry of this agreement. Said sum shall be paid no later than 30 days from the date the Commissioner of Education approves this settlement.

4. Each party will bear its own counsel fees and costs of litigation.

5. This agreement will only become effective when it is approved by the West Orange Board of Education and the Commisioner

of Education. Rejection by the Board or the Commisioner shall not interfere with the rights of either party to pursue this matter further.

6.This settlement constitutes the sole agreement between the parties and disposes of the entire dispute between them.

Angela Maria Tourtounis
Individually and on behalf
of her minor children

Stephen J. Christiano, Esq.
for respondent

ATTEST:

Secretary

BOARD OF EDUCATION OF THE
TOWNSHIP OF WEST ORANGE

By: _____
President

OAL DKT. NO. EDU 11141-91

A.T., on behalf of her minor children, P.T., D.T. AND N.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

COMMISSIONER OF EDUCATION

DECEMBER 10, 1993

DATE OF MAILING - DECEMBER 10, 1993

313-93

NORTH BERGEN FEDERATION OF TEACHERS, LOCAL 1060, AMERICAN FEDERATION OF TEACHERS, AFL-CIO AND EILEEN WENDE,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

DECEMBER 14, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8922-92
AGENCY DKT. NO. 470-10/92

NORTH BERGEN FEDERATION OF TEACHERS, LOCAL 1060, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, AND EILEEN WENDE,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY,
Respondent.

Victor P. Mullica, Esq., for petitioners (Mullica & Mullica, attorneys)

John L. Schettino, Esq., for respondent (Giblin & Giblin, attorneys)

Record Closed: November 3, 1993 Decided: November 9, 1993

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

This matter was transmitted to the Office of Administrative Law on November 16, 1992, as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A hearing was scheduled on October 13, 14, and 15, 1993, at the Office of Administrative Law in Newark.

After the first day of the hearing on October 13, 1993, the parties settled the matter and then placed the terms of setttlement on the record. On November 3, 1993, they submitted the attached Settlement indicating the terms of agreement which are fully incorporated herein.

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

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

2. The settlement disposes of all issues in controversy and is consistent with law.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Nov. 9, 1993
DATE

Mumtaz Bari-Brown
MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

11/12/93
DATE

Maureen R. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 18 1993
DATE

Joyce LaVecchia
OFFICE OF ADMINISTRATIVE LAW

md/e

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

NORTH BERGEN FEDERATION OF TEACHERS, LOCAL 1060, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, an Unincorporated Labor Organization, and EILEEN WENDE, Petitioners, vs. BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, a Body Corporate and Politic, Respondent.	SETTLEMENT OAL DOCKET NO. EDU 08922-92N AGENCY REF. NO. 470-10/92

The Petitioners, North Bergen Federation of Teachers, Local 1060, American Federation of Teachers, AFL-CIO and Eilee Wende, and the Respondent, the Board of Education of the Township of North Bergen, have voluntarily resolved all disputed matters and enter into the following settlement which fully disposes of all issues in controversy between the petitioners and the respondent.

1. The petitioner withdraws her verified petition filed on or about October 13, 1992 with the Commissioner of Education.

2. The petitioner further agrees to release and give up any and all claims and rights which she may have against the North Bergen Board of Education, the Township of North Bergen and each of their respective Board members, officers and employees with respect to the abolishment of the position of Supervisor of data control operators and with respect to her discharge from the

position of data control operator, it being specifically understood and agreed that the petitioner retains any and all tenure, seniority and other rights and entitlements she may have arising from her employment with the North Bergen Board of Education commencing with September, 1985, and this agreement does not effect any rights that she may have concerning duties performed by her as a Type "A" Clerk, which may arise from future actions and conduct taken by the North Bergen Board of Education, which may have occasions to take into consideration her employment commencing with September, 1985.

3. The Petitioner further releases any and all claims including those of which she may not be aware and those not specifically mentioned in this settlement with respect to the allegations contained in her Petition filed on or about October 13, 1992. The Petitioner releases the North Bergen Board of Education, the Township of North Bergen and each of their respective Board members, officers and employees from any and all claims resulting from anything which has happened up to this date, specifically with respect to the abolishment of the position of Supervisor of data control operators and with respect to her discharge from the position of data control operator, save as outlined in the preceding paragraph.

4. The Petitioner will be paid a total of $17,500.00 as full payment for releasing her claims and entering into this settlement. The Petitioner shall not seek any further relief including other payments from the North Bergen Board of Education, the Township of North Bergen and each of their respective Board

members, officers and employees.

5. The Petitioner shall remain in her tenured position as a Type A Clerk in the North Bergen School System. Petitioner shall continue to receive and be entitled to all benefits and rights attached to her position as set forth in the Collective Bargaining Agreement and as may be provided by law. The said rights, benefits and entitlements are to in no way be decreased or affected by her temporary separation from employment covering the period from July 1, 1992 to September 8, 1992, but rather to continue uninterrupted as if said separation had never occurred.

6. The Petitioner agrees that in consideration of the foregoing settlement, she knowingly and voluntarily releases forever whatever claims she may have against the North Bergen Board of Education, the Township of North Bergen and each of the respective Board members, officers and employees based upon the allegations contained in Petitioner's Petition filed on or about October 13, 1992 or any other manner relating to her employment by the North Bergen Board of Education prior to the date of this settlement agreement.

This release and waiver includes, but is not limited to any rights or claims under Federal, State or local law, statutory or decisional, for wrongful or abusive discharge, for breach of any contract, or for discrimination based upon political affiliation, race, color, ethnicity, sexual orientation, age, national origin, religion, disability, or any other unlawful criterion or circumstances, including rights or claims under the Age Discrimination in Employment Act of 1967 ("ADEA") that m

have accrued up to the signing of the settlement. The signatures of the Respondents' representatives and the Petitioner's signature to this agreement constitute confirmation that the Respondent and the Petitioner had the opportunity to consider this agreement and its consequences, and that they have been advised prior to the signing of this agreement to consult with an attorney, or personal or financial advisor of their choosing. The parties further acknowledge that this release and waiver does not in any way or at any time ever release the Respondent from defending any indemnifying Petitioner should Petitioner be made a defendant in an action based upon any matter, cause or thing relating to her employment by the North Bergen Board of Education.

7. The Respondent, its members, officers and employees, agree that, in consideration of the foregoing settlement, it knowingly and voluntarily waives and releases forever whatever claims that may have accrued against Petitioner prior to executing this Agreement based upon any matter, cause or thing relating to her employment by the North Bergen Board of Education as outlined in the within litigation.

8. This Agreement has been approved by the North Bergen Board of Education on October 20, 1993.

9. Nothing herein should be construed as preventing or precluding Petitioner from <u>in futuro</u> applying for any position to which her experience and qualifications do entitle her; such positions to include, but not be limited to, those of data control operator and Supervisor of data control operators, the latter should the same, or its substantial equivalent, be revived or

created pursuant to Board action or resolution.

10. This Agreement will become effective when it is approved by the Office of Administrative Law and the Commissioner of Education. Any disapproval shall not interfere with the rights of the Petitioner or Respondent to pursue this matter further.

Dated: October 28, 1993

VICTOR P. MULLICA
as to Eileen Wende

EILEEN WENDE

DATED: NOVEMBER 1, 1993

NORTH BERGEN BOARD OF EDUCATION

JOHN J[redacted] DUFFY, as to
North Bergen Board of Education

President

OAL DKT. NO. EDU 8922-92

NORTH BERGEN FEDERATION OF TEACHERS, LOCAL 1060, AMERICAN FEDERATION OF TEACHERS, AFL-CIO AND EILEEN WENDE,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

COMMISSIONER OF EDUCATION

DECEMBER 14, 1993

DATE OF MAILING- DECEMBER 14, 1993

314-93

GARDEN STATE SOFT PRETZEL COMPANY, t/a GARDEN STATE PROVISIONS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF IRVINGTON, ESSEX COUNTY, JOSEPHINE CICALESE, AND COUNTRY FARM FOODS,	:	DECISION
RESPONDENTS.	:	

DECEMBER 14, 1993

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER
293 Eisenhower Parkway
Suite 300
Livingston, New Jersey 07039
(201) 740-1600
Attorneys for Respondents

GARDEN STATE SOFT PRETZEL CO., INC. t/a GARDEN STATE PROVISIONS, a corporation of the State of New Jersey, Petitioner, vs. BOARD OF EDUCATION, TOWN OF IRVINGTON, a public entity; JOSEPHINE CICALESE, an individual; and COUNTRY FARMS FOODS, a business entity, Respondents.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW DOCKET NO. EDU-04132-92N **ORDER** **DISMISSING PETITION**

on 9/22/93

This matter having been open to the court by Denise P. Coleman, Esq. of the law firm Schwartz Simon Edelstein Celso & Kessler, attorneys for the Board of Education of the Town of Irvington and Josephine Cicalese in the above-captioned matter, for an Order dismissing the Petition on the grounds that the Petitioner has failed to diligently prosecute its case; and the Court having considered this matter, the Respondents' Letter Brief in support of this motion and there being no response of the Petitioner, and for good cause shown;

IT IS on this 26th day of October, 1993,

ORDERED, that the within Petition is hereby dismissed.

[redacted] JAMES A.OSPENSON, ALJ

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 26, 1993
Date

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

11/3/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 16 1993
Date

OFFICE OF ADMINISTRATIVE LAW

EXHIBIT LIST

R-1 Board attorney's letter memorandum of law with attachments, dated September 12, 1993

OAL DKT. NO. EDU 04132-92N

GARDEN STATE SOFT PRETZEL COMPANY, t/a GARDEN STATE PROVISIONS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF IRVINGTON, ESSEX COUNTY, JOSEPHINE CICALESE, AND COUNTRY FARM FOODS,	:	DECISION
RESPONDENTS.	:	

The record and Order Dismissing Petition transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-14.14 have been reviewed. The Commissioner approves the dismissal on the grounds of petitioner's failure to prosecute. Consequently, the matter is no longer deemed to be a dispute before her and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

DECEMBER 14, 1993

DATE OF MAILING - DECEMBER 14, 1993

315-93

JOHN ASTIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MATAWAN-ABERDEEN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

DECEMBER 14, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4650-93
AGENCY DKT. NO. 84-4/93

JOHN ASTIN,
Petitioner,
v.

BOARD OF EDUCATION OF MATAWAN-ABERDEEN REGIONAL SCHOOL DISTRICT,
Respondent.

Thomas W. Cavanagh, Jr., Esq., for petitioner (Chamlin, Rosen, Cavanagh & Uliano, attorneys)

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

Record Closed: October 6, 1993 Decided: November 3, 1993

BEFORE **CAROL F. LASKIN**, ALJ, T/A:

This matter was transmitted to the Office of Administrative Law on May 18, 1993, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Notice of Withdrawal indicating the terms of the settlement with a copy of the Matawan-Aberdeen Regional School district Board of Education action Meeting minutes of July 19, 1993 attached. The Notice of Withdrawal is attached and fully incorporated herein.

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

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

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Nov 3, 1993
Date

Carol F Laskin / RWS
CAROL F. LASKIN, ALJ, T/A

Receipt Acknowledged:

11/9/93
Date

Rosanne M. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 15 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

gjb

CHAMLIN, ROSEN, CAVANAGH & ULIANO
A Professional Corporation
268 Norwood Avenue
P.O. Box 38
West Long Branch, New Jersey 07764
(908) 229-3200
Attorneys for Petitioner

OCT 3 10 25 AM '93

STATE OF
OFFICE

JOHN ASTIN,

Petitioner,

vs.

MATAWAN-ABERDEEN BOARD OF EDUCATION,

Respondent.

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
OAL DOCKET NO.: EDU 4650-93S
AGENCY DOCKET NO. 84-4/93

Civil Action

NOTICE OF WITHDRAWAL

This matter having come before the Office of Administrative Law based upon a Verified Petition of Appeal filed on April 23, 1993 by the Petitioner which challenged the discontinuance of his pension and health benefits; and,

WHEREAS, an Answer was filed on behalf of the Matawan-Aberdeen Board of Education; and,

WHEREAS, the parties have been able to successfully negotiate an amicable resolution of the controversy wherein the Board of Education of the Matawan-Aberdeen Regional High School has agreed to cooperate in the reinstatement of the Petitioner in the pension plan as well as to reinstate the Petitioner and his family in the State Health Benefits Plan by which he was covered before his termination; and,

WHEREAS, the Board has accepted the financial responsibility for pension plan contributions retroactive to the date of severance

and discontinuance of the Petitioner in that plan as well as has agreed to the retroactive responsibility for fiscal reimbursement to the Petitioner for payments made to the State Health Benefits Plan retroactive to the date of his termination; and,

WHEREAS, the Board has acknowledged the responsibility to maintain the Petitioner in both plans and accept financial responsibility in connection therewith on a prospective basis until he become eligible to vest his pension and he effectuates the aforementioned vesting through the appropriate provisions within the pension plan; and,

WHEREAS, the Board has formalized its agreement in a resolution dated July 19, 1993, a copy of which is attached hereto and made a part of this settlement;

The parties do hereby agree that the Petition should be withdrawn and ask the Administrative Law Judge to accept the document submitted herein as a termination of proceedings in connection with the above Docket Number.

THOMAS W. CAVANAGH, JR., ESQ.
Attorney for Petitioner

VINCENT C. DeMAIO, ESQ.
Attorney for Matawan-Aberdeen
Board of Education

COST: As indicated. Budgeted

EFFECTIVE DATE: July 1, 1993. Retroactive

A brief discussion was held on the need for additional hours needed to complete the work.

VOTE: Ayes 7 Noes 0 Absent 2 Abstain 0

Note: The following item was held for Executive Session but no action was taken after the session was held.

b. THE SUPERINTENDENT RECOMMENDS: That the Board of Education approve the job descriptions for the individuals listed below as per Attachment E :

GLASTEIN, JOEL - Board Secretary/School Business Administrator
PIESZCYNSKI, BARBARA - Assistant School Business Administrator

RATIONALE: Board approved change in positions for both individuals at the July 1, 1993 Board meeting. It was indicated that the job descriptions would be adopted at the July 19, 1993 Board meeting.

EFFECTIVE DATE: October 1, 1993

COST: None to the Board of Education.

Motion by Ms. Horl, seconded by Ms. Brenner,

c. RECOMMEND: That the Board of Education direct the Board Secretary to comply with the directive from N.J. Division of Pension and Benefits regarding former employee #112857 (ASTIN)

RATIONALE: The Board Attorney has advised that the matters at issue (i.e. pension and health benefits contributions) must be remitted by the Board for this former employee until such time as he/she becomes eligible to vest his/her pension.

EFFECTIVE DATE: July 1, 1993. Retroactive.

VOTE: Ayes 7 Noes 0 Absent 2 Abstain 0

CERTIFIED TRUE COPY OF THE MATAWAN-ABERDEEN REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION ACTION MEETING MINUTES JULY 19, 1993.

Barbara A. Pieszcynski
Board Secretary/School Finance
and Budget Administrator

OAL DKT. NO. EDU 4650-93

JOHN ASTIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MATAWAN-ABERDEEN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

DECEMBER 14, 1993

DATE OF MAILING - DECEMBER 14, 1993

316-93

MARYANN PEIFLY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SPECIAL SERVICES SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

DECEMBER 14, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 5120-93
AGENCY DKT. NO. 81-4/93

MARYANN PEIFLY,
Petitioner,
v.
BOARD OF EDUCATION OF THE SPECIAL SERVICES SCHOOL DISTRICT,
Respondent.

Michael J. Herbert, Esq., for petitioner (Picco, Mack, Herbert, Kennedy, Jaffe & Yoskin, attorneys)

Dennis M. DeSantis, Esq., for respondent (Destribats, Campbell, DeSantis & Magee, attorneys)

Record Closed: October 25, 1993 Decided: November 3, 1993

BEFORE **CAROL F. LASKIN**, ALJ, T/A:

This matter was transmitted to the Office of Administrative Law on June 1, 1993, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties now seek to have the matter withdrawn and dismissed with prejudice (see attached Stipulation of Dismissal with Prejudice). Based on this representation, I **CONCLUDE** that the matter is no longer a contested case before the Office of Administrative Law and it is **DISMISSED WITH PREJUDICE.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

November 3, 1993
Date

Carol F. Laskin, ALJ by Jaynee LaVecchia ALJ
CAROL F. LASKIN, ALJ, T/A

Receipt Acknowledged:

11/10/68
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 16 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

Stip.02

Oct 28 10 13 AM '93

STATE OF NEW JERSEY

OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 5120-93S

AGENCY DKT. NO. 81-4/93

MARYANN PEIFLY, Ed.D., Petitioner, V. **THE BOARD OF EDUCATION OF THE SPECIAL SERVICES SCHOOL DISTRICT OF MERCER COUNTY, ET AL,** Respondent	STIPULATION OF DISMISSAL WITH PREJUDICE

The matter in difference in the above entitled action having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the same be and it is hereby dismissed with prejudice without costs against either party.

Dated: October 19, 1993, 1993

Destribats, Campbell, DeSantis & Magee
247 White Horse Avenue
Trenton, N.J. 08610
(609) 585-2443
Attorneys for Respondent

By: _____
Dennis M. DeSantis, Esq.
Attorney for Defendant

Picco Mack Herbert Kennedy Jaffe & Yoskin
P.O. Box 1388
Trenton, N.J. 08607-1388
(609) 393-2400
Attorneys for Petitioner

By: _____
Michael Herbert, Esq.
Attorney for Plaintiff

DESTRIBATS, CAMPBELL, DESANTIS & MAGEE
COUNSELLORS AT LAW
247 WHITE HORSE AVENUE
TRENTON, NEW JERSEY 08610

OAL DKT. NO. EDU 5120-93

MARYANN PEIFLY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SPECIAL SERVICES SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal based on a joint stipulation of dismissal of the parties transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before her and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

DECEMBER 14, 1993

DATE OF MAILING - DECEMBER 14, 1993

317-93

BOARD OF EDUCATION OF THE TOWNSHIP OF LYNDHURST,

PETITIONER,

V.

BOARD OF COMMISSIONERS OF THE TOWNSHIP OF LYNDHURST, BERGEN COUNTY,

RESPONDENT.

IN THE MATTER OF THE CAP WAIVER APPEAL OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF LYNDHURST, BERGEN COUNTY.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of $700,000 made by governing body following voter rejection of proposed budget on April 20, 1993.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore $669,000.

Board also appealed General Fund cap waiver in the amount of $2,973,296 rejected by voters.

Upon review of the record, Commissioner determined to order the increase of $2,973,296 in cap waiver monies for a total General Fund tax levy of $15,115,357 for 1993-94 school year.

DECEMBER 15, 1993

BOARD OF EDUCATION OF THE TOWNSHIP OF LYNDHURST, PETITIONER, V. BOARD OF COMMISSIONERS OF THE TOWNSHIP OF LYNDHURST, BERGEN COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION
IN THE MATTER OF THE CAP WAIVER APPEAL OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF LYNDHURST, BERGEN COUNTY.	:	

Allan C. Roth, Esq. (Scarinci & Hollenbeck), for the Board

George O. Savino, Esq., for the Township of Lyndhurst

This consolidated matter was opened before the Commissioner of Education by the Board of Education of the Township of Lyndhurst (Board) on June 3, 1993 by way of a Petition of Appeal of a defeated school budget pursuant to the provisions of N.J.A.C. 6:24-7.1 et seq. and a Petition of Appeal of its defeated cap waiver. On August 9, 1993 the Board of Commissioners of the Township of Lyndhurst (Commission) filed its Answer to the Board's budget appeal. In response to a letter from Dr. Maureen Keller, Director of the Bureau of Controversies and Disputes in the Department of Education, the Commission through its counsel notified the Commissioner by way of a letter dated September 21, 1993 that it

would play no active role in the cap waiver appeal save "***to point out*** that $1,500,000 of the $2,973,296 cap waiver represents the transfer back to the Township of Lyndhurst ordered by the State Board of Education on April 7, 1993." (See In the Matter of the Rescinding of Supplemental State Aid Awarded to the Lyndhurst School District, Bergen County, April 7, 1993.)

Subsequent to the filing of the original Petition of Appeal of the defeat of the cap waiver requested by the Board, on July 6, 1993 the Board, after having conferred with the Bergen County Superintendent of Schools and Assistant Commissioner Scambio regarding the need to promptly commence the implementation of the program components of the original cap waiver request, requested that a transfer be made of $867,793 from the General Fund budget to the cap waiver request pursuant to N.J.A.C. 6:20-2.13(e) and that a similar amount be transferred from the cap waiver to General Fund budget. The aforesaid transfer was accomplished by way of a amended cap waiver Petition of Appeal.

Position statements on the budget appeal were filed on September 13, 1993 and October 13, 1993 by the Board and the Commission, respectively. The Board filed a Position Statement on the cap waiver appeal on September 29, 1993. As indicated above, the Commission declined to participate in the cap waiver appeal review. On October 29, 1993, the Board filed a reply to the Commission's Position Statement. The record closed on November 8 after expiration of the period for submission of summations.

On August 10, 1993, Dr. Maureen Keller dispatched the following letter to the parties:

> In light of the July 7, 1993 decision of the State Board of Education in Board of Education of

> the Borough of Rutherford v. Mayor and Council of Rutherford, Commissioner's Decision #297-92, wherein the State Board ruled that decisions in defeated voter cap waiver appeals must determine whether or not reallocation within the district's maximum permissible budget is possible and whether and to what extent the specific programs at issue are essential in order to enable the Board of Education to meet its constitutional obligation to provide a thorough and efficient system of education, it is necessary to supplement the record in the above-captioned cap waiver appeal. Accordingly, the county superintendent is to submit to this office, the Board and the governing body within thirty (30) days of receipt of this letter a sworn affidavit setting forth an explanation and documentation of the budget review conducted by him or her pursuant to N.J.S.A. 18A:7D-27, including the bases for concluding that (1) reallocation within the district's maximum permissible budget for the 1993-94 school year was not possible and (2) the specific programs at issue were essential for the Board to meet its constitutional obligation.
>
> The Board and governing body shall each have twenty (20) days from receipt of the county superintendent's affidavit and supportive documentation to submit a reply thereto. These submissions shall be in addition to the position statement, reply and summation provided for in N.J.A.C. 6:24-7.8.

On September 7, 1993 the Bergen County Superintendent filed a response to the above request. The Board included a response to this filing with its September 29, 1993 position statement.

On April 20, 1993 the voters of the Township of Lyndhurst defeated the Board's 1993-94 General Fund tax levy proposal amounting to $12,173,061. The voters also defeated a proposed cap waiver of $2,973,296 which had been approved for presentation to the voters by the Bergen County Superintendent as being necessary for the provision of a thorough and efficient system of education. The specific line item accounts for the T&E cap waiver were as follows after the transfer of items described above:

ACCOUNT TITLE		
Preschool/Kdgn, Salaries Teachers	11-110-100-101	$ 129,571
Grades 1-5 Salaries of Teachers	11-120-100-101	471,275
Grades 6-8 Salaries of Teachers	11-130-100-101	262,575
Grades 9-12 Salaries of Teachers	11-140-100-101	262,866
Health Services Salaries	11-000-213-100	49,924
Salaries of Other Professional Staff	11-000-218-104	112,910
Salaries of Supervisors of Inst.	11-000-221-102	66,920
Salaries of Principal/Asst. Principal	11-000-240-103	154,273
Salaries of Secretarial & Cler. Asst.	11-000-240-105	58,394
Other Employee Benefits	11-000-290-290	308,962
Maint. & Operation of Plant Sals.	11-000-260-100	58,833
School Sponsored Cocurr. Activ. Sals.	11-401-100-100	60,000
TUITION		
LEAS State Regular	11-000-100-561	4,700
LEAS State Special	11-000-100-562	113,840
County Vocational Regular	11-000-100-563	30,400
County Vocational Special	11-000-100-564	25,790
CSSD & Regional Day Schools	11-000-100-565	95,900
Private School for Handicapped	11-000-100-566	18,370
IMPROVEMENT INSTRUCTIONAL SERVICES		
Other Objects	11-000-221-800	10,700
SUPPORT SERVICES GENERAL ADMINISTRATION		
Communications/Telephone	11-000-230-530	21,700
OPERATION OF PLANT SERVICES		
Cleaning, Repair and Maint. Serv.	11-000-260-420	30,000
General Supplies	11-000-260-610	30,000
Energy (Heat & Electricity)	11-000-260-620	50,000
STUDENT TRANSPORTATION		
Contracted Services (Spec. Ed.) Joint	11-000-270-515	98,000
BUSINESS AND SUPPORT SERVICE		
Social Security Contracted Other	11-000-290-220	46,000
Other Retirement Cont. Reg.	11-000-290-241	60,000
Unemployment Compensation	11-000-290-250	40,000
Other Employee Benefits	11-000-290-290	192,393
CONSTRUCTION SERVICES	12-000-400-450	109,000
Total Cap Waiver		$2,973,296

Subsequent to the defeat of the budget by the voters of Lyndhurst, the Board and Commission consulted pursuant to the provisions of N.J.S.A. 18A:22-37 whereupon the Commission reduced the General Fund tax levy by $700,000. Therefore, the General Fund tax levy funds in contention between the parties in this consolidated matter are as follows:

Proposed Tax Levy Adopted by Board of Education		Amount of Tax Levy Certified By Governing Body	
General Fund	$12,173,061	General Fund	$11,473,061
Amount of Reduction in the Budget by Governing Body		Amount of Reduction in Dispute Before Commissioner	
General Fund	$700,000	General Fund	$700,000

In the instant matter, the Commission upon defeat of the 1993-94 budget established the aforesaid tax levy by resolution dated May 14, 1993 setting forth the following reductions:

Line	Account No.	Item	Reduction
163	190-100-610	General Supplies	$ 12,500
164	190-100-640	Textbooks	12,500
340	220-100-320	Purchase Prof.-Ed. Servs.	2,070
392	800-330-600	Supplies and Materials	8,000
431	000-219-390	Oth. Purch. Prof. & Tech. Servs.	5,400
445	000-221-800	Other Objects	10,000
453	000-230-100	Salaries	500
454	000-230-331	Legal Services	25,000
455	000-230-339	Other Purchased Prof. Servs.	14,000
457	000-230-530	Communications/Telephone	2,500
458	000-230-590	Other Purchased Services	14,600
461	000-230-890	Miscellaneous Expenditures	16,841
472	000-260-100	Salaries	10,000
474	000-260-420	Clean., Repair & Maint. Serv.	3,000
477	000-260-520	Insurance	6,399
480	000-260-620	Energy - Heat and Electricity	21,460
489	000-270-512	Contracted Serv. (other than betw. Home and School) Vend.	10,000
492	000-270-515	Contr. Serv. (Spec. Ed.) Joint	6,027
500	000-290-220	Social Security Contrib. Other	10,984
506	000-290-290	Other Employee Benefits	161,504
508	000-290-340	Purchased Technical Services	46,715
			$400,000
		Anticipated and Unanticipated Free Balance	300,000
			$700,000

The resolution concluded as follows:

> Whereas the above mentioned reductions in the 1993-94 School Budget are in excess and equal the amount which the Budget is over the State Mandated CAP Limitations, and based upon the expenditures of this year's budget, these reductions could be realized by utilizing a more efficient Cost Control System and in no way [affect] a thorough and efficient system of schools for the Lyndhurst School District for the School Year 1993-94, and
>
> Now, therefore be it resolved that the governing body of the Township of Lyndhurst does hereby certify to the Bergen County Board of Taxation that the amount necessary to be appropriated for the Current Expense Budget to provide a thorough and efficient system of schools for the Lyndhurst School District for the School year 1993-94 is $11,473,061.00 . . . . (Emphasis supplied)

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the

amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

Before reviewing the instant matter line item by line item, the Commissioner must point out for the record that the New Jersey Supreme Court in East Brunswick, supra, has addressed the proper standard of review by a governing body after defeat of a budget by the voters. In reads in pertinent part:

> But its determinations must be independent ones properly related to educational considerations rather than voter reactions. In every step it must act conscientiously, reasonably and with full regard for the State's educational standards and its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community.
>
> (at 105-106)

Moreover, it is clear that the New Jersey Supreme Court in Deptford, supra, has unequivocally ruled that the statement of reasons for each reduction effectuated by a governing body must be done at the time the municipality make its certification of the reduced budget to the county board of taxation and that if there is a failure to do so there can be a heavy presumption against the educational validity of the proposed cuts. It determined that

> The board of education should be furnished with reasons in order to respond quickly and intelligently and to act constructively in preserving educational interests. The advantages of such a process would be dissipated if the reasons were not available until an appeal has been filed. Hence, we conclude that these regulations do not exempt the municipality from a duty to file a statement of reasons in a timely fashion in conjunction with any proposed budget cuts, which, we now determine, must be done at the time the municipality makes it (sic) certification of the reduced budget to the county board of taxation.

> ***We now hold that statements must be provided for any line-item reductions. This will not be unduly inconvenient or burdensome.*** Further, a uniform rule that calls for the submission of explanatory reasons for all budget cuts will encourage municipalities to be specific and conscientious in their consideration of educational concerns, and will serve to make such considerations an integral part of their decisionmaking process. (at 315-317)

And,

> ***[We] want to stress that if the municipality fails to submit reasons contemporaneously with its certification of budget cuts, the Commissioner of Education in the course of an ensuing appeal is entitled to invoke a heavy presumption against the educational validity of the proposed budget cuts. Hence, the greater the delay in the submission of detailed reasons in support of such cuts, the stronger will be the presumption against their validity and the heavier will be the municipality's burden on appeal to establish the validity of the reduced budget. In that posture, the Commissioner will be entitled initially to presume that such cuts have been made purely for extra-educational reasons or for political expediency without specific cognizance taken of their educational effects.*** (at 320-321)

Mindful, then, of the balance to be applied in the standard of review, the Commissioner makes the following determinations with respect to the reductions in the General Fund tax levy effectuated by the Commission.

DEFEATED BUDGET

Initially, the Commissioner takes note of the Board's argument that the Commission's actions in imposing the aforesaid reductions were arbitrary and capricious in that that body failed to provide specific reasons for each line item reduction imposed at the time such reductions were made. The Commission in its Answer to the Petition of Appeal states that it "***carefully reviewed the Board

of Education's Budget and did in fact give specific reasons for each and every proposed reduction of petitioner's budget***" (See Commission's Answer.)

In response to the initial issue raised by the Board, the Commissioner notes that the Commission has failed to satisfy the initial requirement of the standard of review laid down by the New Jersey Supreme Court in Deptford, supra, in that the general reason of better cost control does not meet the test of providing specific reasons by line item as to why the reductions were made at the time such reductions are imposed. While such omission on the part of the Commission, pursuant to Deptford, supra, is not irreparable, it does create a strong presumption against the educational validity of the cuts.

In the instant matter, such presumption is further enhanced by virtue of the failure of the Commission to address each and every line item reduced in favor of a general position illustrated by examples selected from among those reductions. For the sake of clarity and illustration, the entire position of the Commission is set forth below:

> Respondent, the Board of Commissioners of the Township of Lyndhurst, by way of response to the Statement of Position of the Lyndhurst Board of Education wishes to go on record as objecting strongly to the characterization of its actions as capricious and arbitrary as stated in the Position Statement of the Lyndhurst Board of Education.
>
> With regard to the $700,000 in cuts made in the Board of Education budget, the Lyndhurst Governing Body acted only after a careful review of the Board of Education budget while always bearing in mind an overriding concern not to hurt the children of Lyndhurst.

By way of example of the Governing Body's thorough thought processes please refer to Line Item 164, Textbooks, of the Board of Education's budget. The Governing Body had learned that at the end of the 1992-1993 year, the Board of Education purchased a large number of textbooks for the 1993-1994 school year. The Board of Education, in effect, prepurchased the textbooks for the upcoming year which had the effect of creating an artificially high expense in that line item in the 1992-1993 budget. And while they noted the listed retail prices of the books in their budget, they neglected to point out that they get a discount when they buy in volume. This example shows the detailed type of study made by the Governing Body before making reductions.

The primary reason the Governing Body reduced the legal expense Line Item (454) was because the Board of Education took a public position that their then attorney was billing too much and, in fact, changed attorneys. The new attorney [publicly] stated he would charge a lower hourly rate. The Board of Education has told the new attorney that he does not have to appear at many of the meetings and work sessions that the prior attorney did. Therefore, the estimate of a significant reduction in legal expenses is a fairly safe and conservative one.

Another example is Line Item 453 salaries, the Board of Education says in its Position Statement that it has a contractual obligation to pay the Treasurer of the School Monies an extra $500. That person is the Township Tax Collector and had advised the Board of Commissioners that she had no formal contract with the Board of Education.

As to the Unanticipated Free Balance, which the Governing Body reduced by $300,000, the Governing Body obviously did not have the 1992 statutory audit at the time it made its reduction but did review prior audits which show that the Board of Education has repeatedly returned about $700,000 over the years.

As to the elimination of the public relations budget Line Item (392) no response is needed from the Board of Commissioners other than to say, "how dare they?" This is a Board of Education that is arguing before the State in this matter and in its Cap waiver appeal that it desperately needs money to save programs while at the same time is creating a new position. The Board of Education's priorities are becoming unfathomable.

> It is clear from a reading of the Board of Education's Position Statement that they are not justifying the needs for the money they requested with any explanation as to the use the funds will be put to. There seems to be no attempt, as there is in Zero Base Budgeting, to create a priority ranking of all their programs and activities in successfully increasing levels of performance and funding. There seems to be no attempt to justify the dollars that were spent in prior years. The Board of Education is merely saying, "we spent this much last year so we need that amount plus more for this year." They criticize the Governing Body for reducing line items below what was spent the year before. If this is in fact the position of the Board of Education, [then] rather than call each other names it would seem that it would be appropriate to merely wait for the completion of the 1992-1993 statutory audit which will tell us all exactly what was in fact spent and what exactly the Unanticipated Free Balance is.
>
> (Statement of Position, at pp. 1-2)

The Board seeks in general to justify its allegedly shaky fiscal circumstances by pointing out the fact that it has many capital improvements which it must undertake to keep its schools serviceable. While such improvements are not included in the general budget but are part of the cap waiver request, their existence, contends the Board, magnifies the effect of the budget reductions imposed by the Commission.

The Board contends that the need to commence the implementation of these and other projects which are part of the cap waiver required a transfer of $867,793 from the cap waiver to the general budget with a commensurate transfer of a like amount from the general budget to the cap waiver budget which funds, it contends, are needed to continue to provide a thorough and efficient system of education.

The second argument by the Board to justify its precarious budgeting circumstance involves the rescission of $1,500,000 in

discretionary aid received in 1991 directed by the State Board of Education. Although the $1,500,000 rescission was accomplished through a reduction in State aid in 1992-93, the Board was further ordered by the State Board on April 7, 1993 to repay the Lyndhurst Board of Commissioners, by September 1, 1993, the $1,500,000 which that body had advanced to the Board to replace the $1,500,000 loss in State aid in 1992-93. (By April 7, 1993 letter from Robert H. Davis, Assistant Commissioner of Financial Services to Bergen County Superintendent Anthony C. Scalzo Exhibit D of County Superintendent's September 7, 1993 Submission, the Board was directed to include this amount in its 1993-94 General Fund budget. Thus, the Board contends, this required repayment further exacerbates its budgetary crisis.

Before proceeding with a line item-by-line item analysis and determination as required by Deptford, supra, the Commissioner observes that the Commission in this matter must be considered as having acted in an arbitrary and capricious manner in imposing at least the bulk of the reductions which are the subject of this controverted matter in that it failed to provide specific reasons for each reduction imposed at the time of certification and further compounded that shortcoming by selectively providing reasons for only a handful of those reductions in its Position Statement.

The following represents the Commissioner's item-by-item determination as it relates to the reductions imposed:

Account	Reduction
000-260-520 - Insurance	$6,399

The Board contends that its actual costs for 1992-93 were $107,356. The reduction imposed by the Commission would result in

an appropriation of $103,601 for 1993-94 which is actually less than the amount expended in 1992-93. The Commission offers no specific reason for this reduction. In light of the foregoing, the Commissioner directs the restoration of the $6,399 in this account.

Account	Reduction
000-260-620 - Heat and Electricity	$21,460

The Board contends that the reduction in this account would result in an amount remaining which is less than the $180,550 actually expended in 1992-93. The Commission offers no specific reason for reductions in this account beyond its general contention of cost control. In light of the Commission's failure to specifically address the item, the Commissioner directs a restoration of $21,460.

000-290-290 - Other Employee Benefits	$161,504

This account consists of payments for workers' compensation, hospitalization, and dental and prescription coverages. The Board contends these are expenses which it must meet for its employees but the Commission has not indicated how these costs can be reduced. The Commission offers no explanation of its reasoning. The $161,504 is therefore restored.

000-290-220 - Social Security Contributions	$10,984

The Board contends it increased this account by $10,984 necessitated by an increase in social security rates. The Commission offers no explanation as to its reasoning. The Commissioner directs the restoration of the $10,984 in this account.

000-230-100 - Salaries	$500

The salary in this account is for the salary of the school treasurer. The Board concedes that its contract with this

individual calls for a $250, not a $500 increase, as budgeted by the Board. The Commission contends that no contractual obligation exists for the individual in question, who is also the Township Tax Collector. Upon review of the arguments of the parties, the Commissioner determines to sustain the reduction, given that such minimal amount ($250) should be able to be absorbed by the Board.

Account	Reduction
000-230-339 - Other Purchased Professional Services	$14,000

The Board contends that its capital improvement projects which must be undertaken cannot be accomplished with the reduction imposed herein since those reductions freeze the amounts available at 1992-93 amounts. The Commission does not address this item. The Commissioner directs the restoration of $14,000.

000-230-331 - Legal Services	$25,000

The Board contends that the action of the Commission reduces the amount available for legal services by one-third, despite the need for additional services necessitated by the appeal in this matter and its capital projects expenses which it did not have in 1992-93.

The Commission contends that the Board has hired a new attorney whose rates are less and whose duties have been reduced which should produce a significant decrease in legal expenses.

After careful consideration of the arguments of both parties, including the Board's unrebutted reply that its attorney rate dropped only from $75.00 an hour to $65.00 an hour, a reduction of about 13%, the Commissioner agrees that the Board should see some cost reduction in this area, but that it cannot absorb a cut of 33%. Accordingly, $10,000, or 13%, of this reduction is sustained and $15,000 restored.

Account	Reduction
190-100-640 - Textbooks	$12,500

The Board argues that the reduction imposed in this account reduced the money available for textbook purchases to the $84,251 budgeted for 1992-93 despite its actual expenditure of $93,285 in that year.

The Commission contends that the Board purchased a large number of textbooks at the end of the 1992-93 school year for use in 1993-94.

After considering the arguments by the parties, including the Board's reply argument regarding its year-end textbook expenditures, the Commissioner determines that the Board has failed to identify the specific textbooks which this reduction would deny it and thus has not met the standard of demonstrating the necessity for the full amount in order to provide a thorough and efficient system of education. The $12,500 reduction is sustained.

190-100-610 - General Supplies	$12,500

The Board contends that the 1992-93 expenditure was $165,885 for teaching supplies and that the reduction of $12,500 in this account would reduce the amount available for 1993-94 to $152,334, an amount less than actually expended in 1992-93. The Commission does not address this line item at all. Consequently, the Commissioner directs the restoration of the $12,500 by which this account was reduced.

220-100-320 - Purchased Professional Ed. Services	$ 2,070

The reduction here would reduce the amount available for health and therapy services to the 1992-93 amount which the Board contends would not account for the increasing cost of such services. The Commission does not address this account.

The Commissioner directs the restoration of the $2,070 in this account.

Account	Reduction
800-330-600 - Supplies and Materials	$ 8,000

This account provides for district public relations activities. The reduction would eliminate all such activity which the Board contends is badly needed. The Commission contends that this amount is to fund a new position which is inappropriate in its view considering the Board's alleged fiscal constraints.

Notwithstanding the Board's unrebutted reply observation that the Commission erroneously equated this money with a new position, the Commissioner, in the absence of more information as to the specific projects requiring the instant support materials, determines that the $8,000 reduction be sustained.

000-219-390 - Other Purchased Professional Services	$ 5,400

This reduction would eliminate the Board's ability to have a part-time learning disabilities teacher. The Commission offers no specific reason for its recommended reduction.

In light of the foregoing, the Commissioner directs the restoration of the $5,400.

000-221-800 - Other Objects	$10,000

This account contains funds for teacher in-service training. This reduction decreases the amount for such purposes 25% below the amount budgeted in the previous year. The Commission offered no specific reason for its reduction. The $10,000 reduction is, therefore, restored.

Account	Reduction
000-230-530 - Communications/Telephone	$ 2,500

The Board argues that the amount for legal advertisement which is contained in this account was already cut to 1/2 of its previous year's appropriation. The Board contends that it cannot operate on an amount which is 1/4 of the prior year's budgeted amount. The Commission does not address this account at all. The Commissioner, therefore, restores the $2,500 by which it was reduced.

000-230-590 - Other Purchased Services $14,600

The Board contends that the reduction in this account totally eliminates student liability insurance. The Commission provides no reason for its action. The Commissioner, therefore, restores the $14,600 reduction imposed.

000-230-890 - Misc. Expenditures $16,841

The amount reduced in this account removes the entire amount of the dues payment to the New Jersey School Boards Association mandated by law. The Commission offers no reason for its reduction. The Commissioner directs the restoration of $16,841.

000-260-100 - Salaries $10,000

The Board contends it has already cut the budget for custodial salaries below that of 1992-93. A further reduction of 25% as directed by the Commission would eliminate funds for custodial overtime and substitutes. The Commission does not address this issue.

The Commissioner directs the restoration of the $10,000 in this account.

Account	Reduction
000-260-420 - Cleaning, Repair & Maintenance Services	$ 3,000

The funds eliminated in this account would remove appropriations for payment of County Utility Authority tipping fees, licenses and uniforms for custodians. The Commission offers no reason for the reduction.

The Commissioner directs the restoration of the $3,000 in this account.

000-270-512 - Contracted Serv. Other than Between Home & School	$10,000

The amount budgeted in this account for transportation other than to and from school represents the same amount budgeted in the previous year. The reduction imposed would cut these services by 1/3. The Commission offers no specific reason.

In light of the Commission's failure to meet the minimal standard of providing a specific reason for its reduction, the Commissioner directs the restoration of the $10,000 in this account.

000-270-515 - Contracted Services (Spec. Ed. Students)	$ 6,027

The Board contends that the reduction imposed by the Commission freezes this account at the 1992-93 level even though the special education year has been extended. The Commission offers no reason for its action. Therefore, the Commissioner directs the restoration of the $6,027.

000-290-340 - Purchased Technical Services	$46,715

The Board contends that the amount of reduction in this account would result in providing an amount for technical services less than the previous year. The Commission offers no specific reason for its recommendation. In light of the Commission's failure to provide any cognizable reason for its reduction, the Commissioner directs the restoration of the $46,715 in this account.

Account	Reduction
Free Balance	$300,000

The Board argues that the reduction imposed in the free balance would leave it with less than the 3% of the total budget which is recommended by the State as a contingency for unanticipated emergencies, a factor which the Commissioner notes is borne out by the 1992-93 audit which is now available.

The Commission acknowledges the absence of any audited figures for 1992-93 on which to base its projection but argues that past audits indicate that the Board usually returns about $700,000 unanticipated free balance.

In light of both the 1992-93 audit and the thorough review by the county superintendent to determine potential reallocation, as well as the requirement imposed by Assistant Commissioner Davis that the Board include within its 1993-94 budget the $1,500,000 for return to the governing body which that body improperly provided to the Board to cover the $1,500,000 deducted from the district's 1992-93 state aid allocation (see p. 12, ante), the Commissioner directs that the $300,000 reduction in surplus be set aside.

Summary

Account		Sustained	Restored
000-260-520	Insurance	$ -0-	$ 6,399
000-260-620	Heat and Electricity	-0-	21,460
000-290-290	Other Employee Benefits	-0-	161,504
000-290-220	Social Security Contributions	-0-	10,984
000-230-100	Salary	500	-0-
000-230-339	Other Purch. Prof. Servs.	-0-	14,000
000-230-331	Legal Services	10,000	15,000
190-100-640	Textbooks	12,500	-0-
190-100-610	General Supplies	-0-	12,500
220-100-320	Purch. Prof. Ed. Services	-0-	2,070
800-330-600	Supplies and Materials	8,000	-0-
000-219-390	Other Purch. Prof. Servs.	-0-	5,400
000-221-800	Other Objects	-0-	10,000
000-230-530	Commun./Tel.	-0-	2,500

Account		Sustained	Restored
000-230-590	Other Purchased Services	-0-	14,600
000-230-890	Misc. Expenditures	-0-	16,841
000-260-100	Salaries	-0-	10,000
000-260-420	Cleaning, Maintenance	-0-	3,000
000-270-512	Contracted Services	-0-	10,000
000-270-515	Contr. Services - Spec. Ed.	-0-	6,027
000-290-340	Purchased Technical Servs.	-0-	46,715
	Free Balance	-0-	$300,000
	Total	$31,000	$669,000

In summary, the Commissioner finds and determines that of the $700,000 reduction imposed by the Board of Commissioners of the Township of Lyndhurst $669,000 be restored to the 1993-94 General Fund tax levy and $31,000 be sustained.

It is therefore ordered that the local school tax levy for the 1993-94 school year be increased by the above amount of $669,000 over the amount of $11,473,061 previously certified.

CAP WAIVER

In setting forth its position with respect to the $2,973,296 cap waiver request, the Board further relies upon its contended fragile fiscal circumstances covered by the necessity of carrying out a significant number of capital projects and the consequences of having to repay the $1,500,000 advanced to it by the governing body after the State Board rescinded the $1,500,000 in discretionary aid improperly awarded to the district in 1991-92 and recouped by the Department of Education through a reduction in state aid in 1992-93.

The result of these factors, contends the Board, was the necessity to transfer monies from the General Fund budget into the cap waiver request creating a circumstance whereby the General Fund budget would become insufficient to provide a thorough and efficient system of education unless the cap waiver is granted by the Commissioner.

In further support of its request, the Board points out that the county superintendent's review of the cap waiver request concluded that reallocation of funds within the General Fund budget could not be accomplished without causing injury to the district's ability to provide a thorough and efficient system of education.

The Board argues that without the cap waiver amount included within its general budget the district will not have the funds necessary to provide a thorough and efficient system of education for the entire 1993-94 school year. The Board posits the following effects of the failure to approve the cap waiver request:

> Petitioner estimates, on a best case scenario, that it will have depleted its budget by April 1, 1994 (more than two months short of end of the school year) if it continues with the current school configuration of the district. However, even before then the Petitioner will encounter negative cash flow because it receives its funds on a monthly basis from the Township. It is expected that the negative cash flow will begin by October 1993, and that the cash flow would remain negative until the budget is depleted in April. The negative cash flow expected to commence by October will necessitate the taking out of loans to cover the anticipated tax revenues, which loans will cause the Petitioner to incur additional legal and financial expenses which were not anticipated in the 1993-94 budget. However, even with such financing, all budget funds would be gone by April and the Petitioner would be forced to close the schools at that time.
>
> The only other option would be for the Petitioner to reconfigure the school district, which would need to be accomplished on or about December 1, 1993. To do this, prior notice would necessarily have to be given to the employees and students. Such a reconfiguration is expected to have a drastically negative impact on the education which could be provided. To reconfigure the district within the constraints of the reduced budget, the following changes are expected to be necessary:

1. The six presently operating elementary schools will have to be consolidated into three elementary schools.

2. The three elementary schools will be administered by only two principals.

3. All district supervisors and the director of curriculum positions would be eliminated.

4. The pre-kindergarten program will be eliminated as of December 1, 1993.

5. Kindergarten class size will increase to approximately 39 students per class.

6. Grades 1-5 class size will increase to approximately 41 students per class.

7. Grades 6-8 class size will increase to approximately 49 students per class.

8. Elementary school guidance will be eliminated.

9. The elementary art, physical education, and music pull-out programs will be eliminated.

10. Elementary nursing services will be reduced.

11. All high school co-curricular activities will be eliminated by November 1, 1993.

12. All high school winter and spring extra-curricular activities will be eliminated.

13. High school language, math, science, social studies, physical education, and music programs will be reduced, and related class enrollment will increase accordingly.

The above mentioned changes would have to implemented by approximately December 1, 1993 to enable the Petitioner to provide education through the end of the school year. The increase in the class sizes and the elimination of programs and student support services will prevent the Petitioner from achieving the mandate of providing a thorough and efficient education for the students in Lyndhurst.
(Board's Statement of Position, at pp. 7-8)

The county superintendent in his submission of August 30, 1993 sets forth the following in reference to the fiscal circumstances faced by the Lyndhurst district:

The following information and material regarding the 1993-94 Lyndhurst school budget are being submitted in compliance with the decision of the New Jersey State Board of Education dated July 7, 1993. [Rutherford, supra]

Furthermore, this information and material shall also serve as my affidavit to affirm the reallocation of resources process used by my County School Business Administrator and me to arrive at a decision on the request of the Lyndhurst School District for a conditional approval of the voter cap waiver.

The original voter cap waiver filed by the school district requested a total amount of $1,665,565. (Exhibit A)

This cap waiver was amended to include a reduction of $310,360 for salaries and employee benefits and also included an increase of $118,000 for masonry restoration and new roofing in the Columbus and Jefferson Schools. The new total for the voter cap waiver was $1,473,296. (Exhibit B) The County Superintendent conditionally approved the original voter cap waiver. (Exhibit C)

By letter of April 7, 1993, Mr. Robert Davis, Assistant Commissioner of Education, explained that the district would have to amend its cap waiver in an amount of $1.5 million higher to offset the new liability in the base budget for a new appropriation in the amount of $1.5 million enabling the Board of Education to return the amount of $1.5 million to its municipality. (Exhibit D)

The district complied with the above letter and submitted an amended cap waiver in the amount of $2,973,296 which was conditionally approved by the county superintendent. (Exhibits E&F)

After both the regular base budget and the voter cap waiver were defeated at the annual school election of April 20, 1993, the local governing body reduced the base budget by $700,000. This amount plus the defeated voter cap waiver of $2,973,296 caused a total shortage of anticipated funds of $3,673,296. The district filed separate Petitions of Appeal on the two defeated items. (See Exhibit G)

The local superintendent realizing that the decisions of the Commissioner of Education may be rendered in the fall of 1993, requested that the County Superintendent approve a hardship appeal.

> The County Superintendent convened a conference with the administrative staff of the Lyndhurst School District and with [him] and his staff to discuss the hardship concerns and if possible arrive at a remedial plan. A resolution of the district's concerns was effected.
>
> By letter of June 15, 1993, the Lyndhurst School district formally submitted the details of its hardship appeal. (See Exhibit H)
>
> The County Superintendent approved the Lyndhurst hardship appeal, in writing, with his letter of June 15, 1993. (See Exhibit I)
>
> Also enclosed please find a copy of the reallocation document used by the County School Business Administrator when reviewing the original voter cap waiver.
>
> (Letter of August 30, 1993, pp. 1-2)

In addition to the above-cited summary of the Board's fiscal condition, the county superintendent sets forth his own budget review and reallocation analysis in which he indicates an item-by-item review and his conclusion that reallocations were not possible. The aforesaid analyses are incorporated herein by reference.

Additionally, the Commissioner has made an independent review of the Board's line items together with its reasons for requesting a cap waiver in the amount of $2,973,296, the specific line items and amounts which are set forth, ante. The Commissioner adopts as her own those reasons advanced by the Board and the county superintendent.

In the Commissioner's judgment the record is sufficiently developed to establish by the review conducted by the Bergen County Superintendent and her own independent review that the reallocation of funds within the permissible budget could not be accomplished without cap waiver approval. The Commissioner so holds.

Accordingly, the Commissioner finds and determines that the $2,973,296 in cap waiver funds sought by the Board are necessary for the provision of a thorough and efficient system of education to the pupils of the Township of Lyndhurst.

The Commissioner therefore directs the Bergen County Board of Taxation to increase the 1993-94 General Fund Tax Levy for the Lyndhurst School District to reflect a restoration of $669,000 in reductions effectuated by the Board of Commissioners of the Township of Lyndhurst and an additional $2,973,296 in cap waiver which sums reflect a total General Fund Tax Levy increase of $3,642,296.

Accordingly, the 1993-94 General Fund Tax Levy for the Lyndhurst School District shall be $15,115,357.

Tax Levy Certified by Commission	$11,473,061
Restored by Commissioner (Defeated Budget)	669,000
Cap Waiver Ordered by Commissioner	2,973,296
	$15,115,357

IT IS SO ORDERED.

Mary Lee Fitzgerald
COMMISSIONER OF EDUCATION

DECEMBER 15, 1993

DATE OF MAILING- DECEMBER 15, 1993

317-93

C # 317-93
SB # 3-94

BOARD OF EDUCATION OF THE TOWNSHIP OF LYNDHURST, PETITIONER-RESPONDENT, V. BOARD OF COMMISSIONERS OF THE TOWNSHIP OF LYNDHURST, BERGEN COUNTY, RESPONDENT-APPELLANT, AND IN THE MATTER OF THE CAP WAIVER APPEAL OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF LYNDHURST, BERGEN COUNTY.	:	STATE BOARD OF EDUCATION DECISION

Decided by the Commissioner of Education, December 15, 1993

For the Petitioner-Respondent, Carella, Byrne, Gilfillan, Cecchi, Stewart & Olstein (John M. Agnello, Esq., of Counsel)

For the Respondent-Appellant, Scarinci & Hollenbeck (Allan C. Roth, Esq., of Counsel)

The Board of Education of the Township of Lyndhurst (hereinafter "Board") filed a petition of appeal with the Commissioner of Education challenging reductions in the amount of $700,000 made by the Board of Commissioners of the Township of Lyndhurst (hereinafter "Township"), pursuant to N.J.S.A. 18A:22-37, to the Board's proposed budget for the 1993-94 school year following voter rejection of that budget. The Board also filed a petition requesting a General Fund cap waiver in the amount of $2,973,296. On December 15, 1993, the Commissioner determined to restore $669,000

March 2, 1994

of the reductions effectuated by the Township to the Board's budget. The Commissioner also directed restoration of the cap waiver funds sought by the Board. Accordingly, she directed a total General Fund Tax Levy increase in the amount of $3,642,296.

By notice of appeal dated January 19, 1994, the Township appealed to the State Board of Education from the decision of the Commissioner. Such notice included proof of service signed by counsel for the Township certifying that it was mailed by overnight mail on January 19. By letter dated January 24, 1994, counsel for the Township was notified that the notice of appeal had been due on or before January 17[1] and that this matter was being referred to our Legal Committee for consideration of the effect of the Township's failure to file timely notice. Counsel for the Township was given until February 7 to file an affidavit setting forth the circumstances of his filing.

On February 5, 1994, counsel for the Township filed his affidavit. Therein, he attests that his office had in fact received the Commissioner's decision and that on or about December 27, 1993, the Township had authorized him to proceed with an appeal from that decision. He further avers that on or about Friday, January 14, 1994, his grandfather was hospitalized and subsequently passed away. He acknowledges that he "calculated the deadline on which to file the appeal of this matter to be January 17, 1994," but states his belief that by mailing it by overnight mail on January 19 and having the State Board receive it on January 20, a "three-day

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1 We note that since Monday, January 17, 1994 was a legal holiday, the Township's notice of appeal was actually due on January 18. See N.J.A.C. 6:2-1.4(b).

mailing rule" would operate to provide a filing date of January 17. He adds, however, that, but for the illness and sudden death of his grandfather, the notice would have been filed prior to January 17.

By letter dated February 7, 1994, the Board urged dismissal of the Township's appeal for failure to file in a timely manner.

Pursuant to N.J.S.A. 18A:6-28, appeals to the State Board must be taken "within 30 days after the decision appealed from is filed." The State Board may not grant extensions. N.J.A.C. 6:2-1.5(a). In contrast to the period for filing petitions to the Commissioner of Education, see N.J.A.C. 6:24-1.2; N.J.A.C. 6:24-1.15, the time limit within which an appeal must be taken to the State Board is statutory, and, given the jurisdictional nature of the statutory time limit, the State Board lacks the authority to extend it. E.g., B.W., a minor child by his parents, J.W. and B.W. v. Board of Education of the City of Brigantine and Safety Bus Service, decided by the State Board of Education, November 4, 1987.

We conclude that the statutory filing requirement with which the Township failed to comply is of such significance that we dismiss the appeal in this matter. In Yorke v. Board of Education of the Township of Piscataway, decided by the State Board of Education, July 6, 1988, aff'd, Docket #A-5912-87T1 (App. Div. 1989), the Court upheld the dismissal of an appeal by the State Board where it found that the notice of appeal had been filed one day late by appellant's counsel who alleged that he had misread or misunderstand the applicable regulations. The Court added that even if the statute could be construed to permit enlargement of the time for filing an appeal, the appellant therein had failed to establish good cause.

In this case, the Commissioner's decision was rendered on December 15, 1993 and mailed to the parties on that date. Accordingly, pursuant to N.J.A.C. 6:2-1.4, the decision appealed from was filed on December 18. Therefore, as mandated by N.J.S.A. 18A:6-28, see N.J.A.C. 6:2-1.3(a); N.J.A.C. 6:2-1.4(a), as computed under N.J.A.C. 6:2-1.4(b), the Township was required to file its notice of appeal on or before January 18, 1994. The Township mailed its notice of appeal dated January 19, 1994 to the State Board on that date. In that the appeal was filed late, the matter was referred to the Legal Committee for consideration of the effect of the Township's failure to file timely notice.

Even if N.J.S.A. 18A:6-28 can be construed to provide us with the authority to enlarge the time limit for filing an appeal, we find no substantive basis to warrant doing so in this particular instance. Counsel for the Township had three full weeks after the Township authorized him to proceed with this appeal in which to file the notice thereof. By allowing almost that entire period to pass without filing, counsel for the Township placed himself in the position from which he now seeks extrication. Moreover, there is no indication that the circumstances of the situation confronting him just prior to the filing deadline precluded him from making the appropriate arrangements to assure that his obligations to his client were fulfilled.

Nor may we, as counsel contends, apply our regulations so as to deem his notice of appeal to have been filed as of January 18 on the basis of the State Board's actual receipt thereof on January 20. N.J.A.C. 6:2-1.6 provides, in pertinent part:

(b) An appeal or cross appeal shall be considered filed upon receipt of notice of appeal by the Legal Committee if hand delivered or upon mailing if appended thereto is a proof of mailing including either:

1. An affidavit of the person mailing the appeal; or

2. A certificate of mailing signed by the attorney for the party filing the appeal.

(c) Where there is no accompanying affidavit or certificate of mailing, the appeal shall be deemed to have been mailed three days before receipt of the appeal by the State Board.

In this case, the notice of appeal included proof of mailing signed by counsel for the Township certifying that the notice was mailed on January 19. Consequently, pursuant to the clear and unambiguous language of N.J.A.C. 6:2-1.6(b), the appeal was considered filed upon its mailing on January 19. We reject as entirely without merit counsel for the Township's contention that his notice of appeal, which was dated and mailed on January 19, could be deemed to have been filed prior to that date.

Accordingly, we dismiss the appeal in this matter for failure to file notice thereof within the statutory time limit as computed under the applicable regulations.

March 2, 1994

Date of mailing MAR 04 1994

317-93

C #317-93
SB # 3-94
App. Div. #A-004100-93T1
#M-005405-93

BOARD OF EDUCATION OF THE TOWNSHIP OF LYNDHURST,

PETITIONER-RESPONDENT,

V.

BOARD OF COMMISSIONERS OF THE TOWNSHIP OF LYNDHURST, BERGEN COUNTY,

RESPONDENT-APPELLANT,

AND

IN THE MATTER OF THE CAP WAIVER APPEAL OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF LYNDHURST, BERGEN COUNTY.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, December 15, 1993

Decided by the State Board of Education, March 2, 1994

Remanded by the Appellate Division, June 8, 1994

For the Petitioner-Respondent, Carella, Byrne, Gilfillan, Cecchi, Stewart & Olstein (John M. Agnello, Esq., of Counsel)

For the Respondent-Appellant, Scarinci & Hollenbeck (Allan C. Roth, Esq., of Counsel)

The State Board of Education approves the settlement proposed by the parties to this case contingent on the review of said settlement by the Bergen County Superintendent and his assurance to us that the resulting amount will be adequate to provide a thorough and efficient education to the District's students.

August 3, 1994

Date of mailing AUG 04 1994

319-93

PATRICIA CASEY,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF CINNAMINSON, BURLINGTON COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner, tenured employee whose position as a library clerk was abolished, averred Board's action in reassigning her to another position as office clerk at a reduced monthly salary constituted a violation of her tenure rights.

ALJ found reduction in salary did not violate tenure laws. Since respondent's position was abolished in good faith, she thus properly bumped into a vacant clerk position at middle school -- her annual salary went up but she had to work 12 months instead of 10 months, resulting in a reduced monthly salary rate. Petition was dismissed.

Commissioner adopted findings and determination in initial decision with clarification. Commissioner relied on Kigerl not Bassett as position in question was that of a clerk, not one requiring certification as teaching staff member. When a person's position is lawfully abolished and that person is reassigned or transferred to another position with a lower salary structure, reduction in salary does not occur for purposes of N.J.S.A. 18A:17-2. (Kigerl) Commissioner found reduction in petitioner's monthly salary following her transfer to a 12-month position was permissible as she moved onto a different salary scale, that for 12-month employees.

DECEMBER 17, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8913-92
AGENCY DKT. NO. 419-9/92

PATRICIA CASEY,
Petitioner,
v.
BOARD OF EDUCATION OF CINNAMINSON,
Respondent.

Richard A. Friedman, Esq., and **Kathleen Naprstek,** Esq., for petitioner (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Stephen J. Mushinski, Esq., for respondent

Record Closed: September 15, 1993 Decided: November 1, 1993

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

Patricia Casey, petitioner, alleges and the Cinnaminson Board of Education, respondent, denies that the Board's action reassigning her to another position as clerk at a reduced salary after her clerk position was abolished constitutes a violation of her tenure rights.

This matter was opened before the Commissioner of Education by filing of a verified petition of appeal. The Department of Education transmitted the

matter to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14B-1 through -15 and N.J.S.A. 52:14F-1 through -13. The parties submitted a joint stipulation of facts in June and following a July 29, 1993 telephone conference agreed the matter would proceed on motions for summary decision. Moving and supporting papers were timely filed and the record closed on September 15, 1993.

STIPULATED FACTS

1. Petitioner, Patricia Casey, resides at 107 Maryland Avenue, Palmyra, New Jersey 08065.

2. Respondent, Board of Education of the Township of Cinnaminson, Burlington County, is a public school district with administrative offices located at Eleanor Rush School, P.O. Box 224, Cinnaminson, New Jersey 08077.

3. Petitioner, Patricia Casey, commenced employment with respondent on or about September 1, 1981, as a teacher's aide in the library.

4. Petitioner was assigned to the position of library clerk on or about January 2, 1984.

5. Petitioner held the position of library clerk until June 30, 1992.

6. Petitioner obtained tenure in her respective employment position with the respondent.

7. In April of 1992 there was a reduction in force within the respondent school district, which was effective June 30, 1992.

8. As a result of the reduction in force, petitioner, Patricia Casey's position as a library clerk was abolished.

9. Petitioner's position as a library clerk was a ten (10) month position.

10. There were two other library clerks in the respondent school district, one at each of the elementary schools within the school district. Both of the individuals holding the title of library clerk in the elementary schools are tenured and had more seniority than the petitioner, under the Collective Bargaining Agreement between Respondent and it's Teacher Association.

11. Petitioner, by virtue of her tenure, was entitled to bump into a vacant position or one held by a nontenured employee. The position of twelve (12) month clerk at the middle school was vacant due to transfers of other personnel and the petitioner was given that position.

12. For the 1991-92 school year petitioner was paid a salary of $1,378.20 per month. On July 1, 1992 petitioner was appointed to the position of a twelve (12) month office clerk at the middle school.

13. The petitioner was up-graded from Step 6 to Step 7 on the salary guide for twelve (12) month office clerks effective July 1, 1992 which represented an 11.1% pay increase or $1,530.00 per year.

14. The position of twelve (12) month office clerk entitled petitioner to two weeks paid vacation as well as two additional sick leave days per year, which she w as not entitled to as a ten (10) month library clerk.

15. Petitioner's salary as a twelve (12) month office clerk was $1,276.50 per month.

ARGUMENT

Petitioner's Argument

The petitioner alleges the Board violated her tenure rights when it reduced her monthly salary. N.J.S.A. 18A:17-5 sets forth the service required for an individual employed by a board in a secretarial or clerical position to obtain tenure in the position. The statute also provides that persons who have obtained tenure "shall not be dismissed or suspended or reduced in compensation except for neglect, misbehavior or other offense" and only in the manner set forth under N.J.S.A. 18A:6-9 et seq.

It is agreed that the petitioner gained tenure in her position under N.J.S.A. 18A:17-2. Therefore, when her ten-month position as a library clerk was abolished in a reduction in force (RIF) in the school district, effective June 30, 1992, she was placed in a vacant clerical position at a middle school. However, this position is a twelve-month position for which the petitioner receives $1,276.50 per month. She worked in this position through the entire 1992-93 school year. She has received $101.70 per month less than the salary she received in her prior, ten-month position.

Reduction of the petitioner's monthly salary contravenes the provisions of N.J.S.A. 18A:17-2 inasmuch as the reduction occurred without proceedings under the school employees tenure act.

What constitutes a reduction in compensation has been thoroughly discussed in Bassett v. Board of Education of Oaklyn, OAL DKT. EDU 8061-83 (Jan. 31, 1984), adopted in part, rev'd in part, Comm'r of Ed (Mar. 19, 1984), aff'd in part, St. Bd. (Feb. 4, 1987), aff'd 223 N.J. Super. 136 (App. Div. 1988). In Bassett, a tenured teacher returned from leave to find her full-time position eliminated pursuant to a RIF. She was assigned to a part-time position as a supplemental reading teacher. She was paid $10.80 per hour as established under the labor contract for supplemental teachers. Her compensation was considerably less than she was entitled to receive had she returned to a full-time teaching position. Although the Appellate Division acknowledged a board's authority through collective bargaining to adopt different salary schedules for different categories of employees, the court held that where the statutory mandate prevails over an inconsistent contractual position, the contractual position is unenforceable. 223 N.J. Super at 142. Bassett obtained tenure under N.J.S.A. 18A:28-5. She had statutory protection against the reduction in salary.

The facts are similar in the present case. Petitioner is tenured and she found herself reassigned within the same tenurable position but at a lesser salary. It is irrelevant that the position's compensation was established in the collective bargaining agreement. The law holds that a contract term may not contravene or supersede a specific term or condition established by statute. The Appellate Division has said that a negotiated salary position that results in the reduction of a tenured employee's salary even if it does not violate the public employment relations statutes, would violate the Tenure Act. N.J.S.A. 18A:17-2 provides that the petitioner may not suffer a reduction in compensation in her tenured clerical position. The Board, therefore, is legally obligated to pay her at least the same monthly salary she was receiving during the previous school year. The petitioner also makes arguments concerning benefits that need not be developed here.

Board's Argument

The Board argues that, as a result of a RIF, the petitioner's ten-month library position was abolished. There were two other library clerks in the district and both were more senior than the petitioner.

Because the petitioner was tenured, she was entitled to bump a less senior employee (of whom there were none), to bump into a vacant position or to take a position held by a nontenured employee. The twelve-month office clerk position at the middle school was vacant. The petitioner applied for and was given that position. She was appointed to the position and her salary was adjusted upward. As a ten-month clerk she received $13,782.00 per annum. As a twelve-month clerk, she received $15,318.00. The petitioner claims she is entitled to be paid at the same monthly salary that she received as a ten-month clerk despite the fact that she now is in a different position.

The Board asserts that if the petitioner's position in this case were upheld, she would be unjustly enriched and, in effect, would be at a higher salary level than twelve-month clerks who have been employed by the Board longer than she.

When an employee's position is eliminated, and the employee is rehired in a different position, the employee is not entitled to receive the same salary he/she formerly enjoyed. Rather, the employee is entitled to receive the salary assigned to the position the employee fills. A reduction in salary for purposes of the Tenure Act did not occur in this matter.

The Board properly exercised its rights under N.J.S.A. 18A:28-9 and 18A:6-10. Specifically, N.J.S.A. 18A:6-10, which prohibits the dismissal and reduction in compensation of tenured employees, also upholds the right of a board of education to implement a RIF. N.J.S.A. 18A:6-10 sates

> No person shall be dismissed or reduced in compensation . . . .
>
> Nothing in this section shall prevent the reduction of the number of any such persons holding such offices, positions or employments under the conditions and with the effect provided by law.

The petitioner was a tenured library clerk pursuant to N.J.S.A. 18A:17-2. Her position was abolished. She applied for and was hired for the position of twelve-month office clerk. The Board employed its statutory rights under N.J.S.A. 18A:28-9 and N.J.S.A. 18A:6-10 to implement a RIF.

Further, the Board's action abolishing the position of ten-month library clerk is presumed valid and will not be overturned unless the petitioner can establish that the Board acted in bad faith or in an arbitrary and capricious manner. That

cannot be demonstrated here. In fact, the opposite is true. The Board asserts it acted in good faith and in a reasonable and prudent manner.

A reduction in compensation under N.J.S.A. 18A:6-10 does not occur when, as a result of a RIF, a tenured employee is rehired in another position at a lower monthly salary. "When a person, whose position is lawfully abolished, is reassigned or is transferred to another position with a lower salary structure, a reduction in salary does not occur for purposes of N.J.S.A. 18A:17-2." Booth v. Board of Education of Salem, OAL DKT. EDU 1897-79 (Feb. 5, 1980), adopted, Comm'r of Ed. (Aug. 18, 1981), aff'd St. Bd. of Ed. (Dec. 2, 1981).

The provisions of N.J.S.A. 18A:17-2 and 18A:6-10 are similar. N.J.S.A. 18A:17-2 is designed to protect secretarial and clerical employees while the provisions of N.J.S.A. 18A:6-10 are designed to protect other tenured employees. However, the law is clear that the petitioner in this case was not reduced in compensation pursuant to N.J.S.A. 18A:17-2. Therefore, she is not entitled to receive the salary that she enjoyed prior to abolition of her former position.

DETERMINATION

The parties have well outlined the controversy. I adopt the jointly stipulated facts, above, as facts in this matter.

On the consideration of applicable law, I **FIND** and **CONCLUDE** that a reduction in salary does not violate tenure laws if based upon a transfer resulting from a good faith abolition of position. Schwarzkopf v. Board of Education of Camden, 1985 S.L.D. 130; Okin v. Board of Education of Oradell, Comm'r of Ed. (Apr. 21, 1980) (unpublished); Wilson v. Board of Education of New Brunswick, 1977 S.L.D. 555; Wilson v. Board of Education of Florham Park, 1977 S.L.D. 823.

The respondent abolished one or more positions. The petitioner's position was abolished. There were other library clerks in the district, but they, too, were tenured and had more seniority than the petitioner. There were no library clerks less senior than the petitioner. Therefore, she could bump into a vacant position or one held by a nontenured employee. There was a twelve-month clerk position vacant at the middle School. The petitioner was appointed to the position. Her annual salary went up, but her monthly salary went down. Other benefits and emoluments are not relevant to this discussion. Under the clear instruction of a long

line of cases, a reduction in salary violates no tenure law if it is based upon a transfer resulting from a good faith abolition of position. There is no challenge to the bona fides of the abolition in this case. Accordingly, as a matter of law, judgment must be entered for the Board and is not necessary to consider the salary per month versus salary per year argument -- for which no authority was cited.

For the reasons stated above, the petition of appeal is **DISMISSED.** It is so **ORDERED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

1 NOVEMBER 1993
Date

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

11/3/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 09 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

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PATRICIA CASEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CINNAMINSON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Petitioner asserts that the ALJ erred in concluding that her salary was not reduced in violation of N.J.S.A. 18A:17-2, relying on recent tenure case law such as Linda Bassett v. Board of Education of the Borough of Oakland, Bergen County, decided by the Commissioner March 19, 1984, State Board aff'd in part/rev'd in part February 4, 1987, aff'd 223 N.J. Super. 136 (App. Div. 1988) for the proposition that when a tenured school employee is transferred or placed in another position which falls within the employee's same tenured position, the employee's salary cannot be reduced, even if the new position encompasses different duties or is compensated at a different contractual rate. She claims that her transfer to a 12-month clerk position from a 10-month clerk position involved neither a change in her tenured position nor a change in the

type or volume of her duties, but rather was a transfer from one clerk position to another with a greater annual salary but an increase in the number of months worked, thereby causing an effective decrease in her monthly salary.

Consequently, petitioner seeks reversal of the initial decision and an order for the Board to compensate her at the same monthly salary rate retroactively that she enjoyed in her prior tenured clerk position.

Upon careful and independent review of the record of this matter, the Commissioner affirms the initial decision with the following clarification.

As petitioner is a tenured clerk, this situation is governed by N.J.S.A. 18A:17-2 and the case law construing that statute, which affords clerks protection against unreasonable discharge or reduction in salary absent the filing of tenure charges. Despite what appears to be conflicting case law on the issue of salary upon transfer or reassignment, in the Commissioner's judgment, Ann Kigerl v. Board of Education of the Borough of South Plainfield, Middlesex County, 1981 S.L.D. 889, aff'd State Board 896, is germane to this matter because it interprets the tenure law for clerks, stating that: "***when a person, whose position is lawfully abolished, is reassigned or is transferred to another position with a lower salary structure, a reduction in salary does not occur for purposes of N.J.S.A. 18A:17-2." (emphasis supplied) (Kigerl, at 892) By contrast, Bassett, supra, the case petitioner relies on, deals with transfers pursuant to N.J.S.A. 18A:28-5, the tenure law for teaching staff members.

Moreover, while the Commissioner recognizes that petitioner herein suffered a monthly reduction in salary as a result of her moving from a 10-month library clerk position to a 12-month office clerk position, such reduction was not an impermissible one pursuant to N.J.S.A. 18A:17-2 because she was moved onto a different salary guide, that for 12-month office clerks. See, Stipulation of Facts No. 13. As such, petitioner's proper salary must be determined by the guide for the class of employees to which she was newly placed. In this case, such class is that of 12-month employees. See Jeannette A. Williams v. Board of Education of the City of Plainfield, Union County, 1979 S.L.D. 220, aff'd in part/rev'd in part State Board 1980 S.L.D. 1552, aff'd N.J. Superior Court Appellate Division 1558. (Tenure rights do not include future salary expectations.)

Additionally, the Commissioner notes that Kigerl renders without merit the distinction between a transfer and a reassignment because the decision expressly accounts for both transfers and reassignments within the same position. Hence, in reliance on Kigerl, the Commissioner concurs with the ALJ that no violation of N.J.S.A. 18A: 17-2 occurred in the Board's action in placing petitioner in the 12-month position of office clerk, notwithstanding that her monthly, but not her annual, salary was reduced thereby.

However, it bears observing that the holding in Bassett, supra, reconciled a nearly 50% cut in pay sustained by Petitioner Bassett upon her being reassigned to a position as an hourly wage earner instead of a salaried employee of the district. Although the Commissioner recognizes that the facts of this case plainly suggest petitioner will sustain a reduction in pay rate monthly, neither N.J.S.A. 18A:17-2 nor analogy to Bassett, supra, supports her claim

to receive monthly salary equal to that which she received as a 10-month employee under circumstances where she remains salaried and at a yearly salary greater than that she received as a library clerk.

Accordingly for the reasons expressed in the initial decision as clarified herein, the initial decision is adopted as the Commissioner's own. The Petition of Appeal is therefore dismissed, with prejudice.

Mary Lee Fitzgerald

COMMISSIONER ~~OF~~ EDUCATION

DECEMBER 17, 1993

DATE OF MAILING - DECEMBER 17, 1993

319-93

EDU #8913-92
C # 319-93
SB # 1-94

PATRICIA CASEY,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CINNAMINSON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, December 17, 1993

For the Petitioner-Appellant, Zazzali, Zazzali, Fagella & Nowak (Richard A. Friedman, Esq., of Counsel)

For the Respondent-Respondent, Stephen J. Mushinski, Esq.

As stipulated by the parties, Patricia Casey (hereinafter "petitioner") commenced her employment with the Board of Education of the Township of Cinnaminson (hereinafter "Board") on September 1, 1981 as a teacher's aide in the library. In January 1984, she was reassigned as a library clerk, a 10-month position which was abolished by the Board in April 1992, effective June 30, 1992, as the result of a reduction in force ("RIF"). The Board then reassigned her to a vacant 12-month office clerk position, effective July 1, 1992. As a result of her extended work year, petitioner's annual salary increased, but the rate at which she was compensated decreased, causing her monthly salary to drop by $101.70. Petitioner alleged that the

OCT. 5, 1995

Board's action constituted an improper reduction in her compensation in violation of her tenure rights.

On November 1, 1993, an Administrative Law Judge ("ALJ") recommended dismissing the petition, asserting that "a reduction in salary violates no tenure law if it is based upon a transfer resulting from a good faith abolition of position." Initial Decision, slip op. at 7.

On December 17, 1993, the Commissioner of Education adopted, with clarification, the findings and conclusions of the ALJ and dismissed the petition. The Commissioner indicated that "when a person, whose position is lawfully abolished, is reassigned or is transferred to another position with a lower salary structure, a reduction in salary does not occur for purposes of N.J.S.A. 18A:17-2."[1] Commissioner's Decision, slip op. at 10, quoting Kigerl v. Board of Education of the Borough of South Plainfield, decided by the Commissioner, 1981 S.L.D. 889, 892, aff'd by the State Board, 1981 S.L.D. 896. The Commissioner rejected petitioner's reliance upon Bassett v. Board of Educ., 223 N.J. Super. 136 (App. Div. 1988), stressing that the facts of that particular case had dealt only with transfers pursuant to N.J.S.A. 18A:28-5 involving teaching staff members. Moreover, the Commissioner found nothing impermissible in the reduction of petitioner's monthly salary since it resulted from her being moved onto a different salary guide, that for 12-month office clerks. Consequently, the Commissioner concluded that

[1] N.J.S.A. 18A:17-2 provides, in pertinent part:

> c. Any person, who has acquired, or shall hereafter acquire, tenure in any secretarial or clerical office, position or employment under the board of education of a school district ... shall hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except for neglect, misbehavior or other offense and only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title.

the Board had not violated N.J.S.A. 18A:17-2 when it placed petitioner in the 12-month position, notwithstanding that her monthly salary was thereby reduced.

Petitioner filed the instant appeal to the State Board of Education.

After a thorough review of the record, we reverse the decision of the Commissioner. We agree with petitioner that the rate at which she was paid subsequent to her reassignment in 1992 constituted a reduction in her compensation in violation of N.J.S.A. 18A:17-2.

It is undisputed herein that, as a result of her service in the district, petitioner satisfied the precise statutory conditions for the achievement of tenure. N.J.S.A. 18A:17-2. Such tenure was achieved as a clerical employee. Id.; Cf. Given v. Bd. of Ed. of Windsor Regional School District, decided by the Commissioner, 1978 S.L.D. 43, aff'd by the State Board, 1978 S.L.D. 46, aff'd by the Appellate Division, 1979 S.L.D. 832. In Bassett, supra, the Appellate Division settled that a tenured teaching staff member who was reassigned within the same tenured position could not be reduced in compensation, notwithstanding that the reassignment resulted from a reduction in force. That determination was predicated on the express language of N.J.S.A. 18A:28-5, which prohibits the reduction in compensation of tenured teaching staff members for inefficiency, incapacity or unbecoming conduct. Like N.J.S.A. 18A:28-5, N.J.S.A. 18A:17-2, which grants the protection of tenure to clerical and secretarial employees who meet the precise statutory conditions, expressly provides that any employee achieving tenure thereunder may not be reduced in compensation

"except for neglect, misbehavior or other offense," and then only in the manner prescribed by the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq.

While the Commissioner correctly observed that the holding in Bassett, supra, "reconciled a nearly 50% cut in pay" sustained by the petitioner therein, Commissioner's decision, slip op. at 11, it is important to note that the petitioner in that case had been reduced from a full-time to a part-time position as the result of a RIF. Despite such reduction, however, the Court held that in order to preserve petitioner's salary level, the district board was required to compensate her proportionally, based on the number of periods she taught, at the full-time salary designated for her appropriate step on the salary guide, rather than at the lesser hourly rate provided for in the collective bargaining agreement. Thus, while petitioner's total compensation in that case was reduced as the result of her decreased hours, her rate of compensation was maintained.

As in Bassett, supra, the petitioner herein was not transferred from one tenurable position to another. Rather, she was reassigned within the same tenurable position, i.e., "clerk." Moreover in contrast to the instant matter, the facts in Kigerl, were such that, as stressed by the Commissioner therein, petitioner's reduction in compensation resulted from her "own choice of a [lesser paying] position rather than available higher paid assignments...." Kigerl, supra, at 895. No such circumstances exist in this case. Petitioner herein was not given a choice of positions, but rather was reassigned by the Board from a 10-month to a 12-month assignment within her tenured clerical position. As a consequence, while petitioner's annual salary increased as a result of her extended work year, the rate at which she was compensated decreased.

Such a reduction, in the absence of tenure proceedings, is expressly prohibited by N.J.S.A. 18A:17-2. Cf. Stockton v. Bd. of Educ. of City of Trenton, 210 N.J. Super. 150, 157 (App. Div. 1986) (district board's one-step reduction of staff member on salary guide after commencement of school year in order to correct an earlier overpayment appeared to be improper reduction in compensation notwithstanding that the adoption of a new contract resulted in a small increase in staff member's actual salary).

We therefore reverse the decision of the Commissioner and direct the Board to pay petitioner according to the rate of compensation to which she would have been entitled but for her reassignment in 1992, along with back pay.

S. David Brandt opposed.

Attorney exceptions are noted.

October 5, 1995

Date of mailing OCT 10 1995

320-93

320-93

JULIE NEALON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

DECEMBER 23, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8320-93
AGENCY DKT. NO. 295-8/93

JULIE NEALON,
Petitioner,
v.
PEQUANNOCK
BOARD OF EDUCATION,
Respondent.

Nancy I. Oxfeld, Esq. for petitioner
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Anthony P. Sciarrillo, Esq., for respondent

Record Closed: November 8, 1993 Decided: November 10, 1993

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

This matter was transmitted to the Office of Administrative Law on September 1, 1993 for a hearing pursuant to *N.J.S.A.* 52P:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

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

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Nov. 10, 1993
Date

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

11/16/93
Date

Maureen M. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 18 1993
Date

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

al

BALK, OXFELD, MANDELL & COHEN
50 Commerce Street
Newark, New Jersey 07102
(201) 642-0161
Attorneys for Petitioner

BEFORE THE COMMISSIONER OF EDUCATION

OAL DKT. NO. EDU-08320-93N
Agency Ref. No. 295-8/93

JULIE NEALON,

Petitioner,

-vs-

PEQUANNOCK BOARD OF EDUCATION,

Respondent.

SETTLEMENT

The above matter having been amicably resolved between the parties, it is hereby agreed as follows:

1. Petitioner, Julie Nealon, a tenured teacher of Business Education with the Respondent, filed the within petition claiming seniority rights to teach all courses offered in the Business Department of the Respondent in Marketing.

2. Respondent has produced for the Petitioner a copy of the existing class schedule of the Business Department. A review of that schedule confirms that were the Petitioner to prevail in this matter, she would not obtain full time employment from the Respondent. Rather,

Petitioner would obtain half time employment, in the middle of the day, teaching th Respondent's course offerings in Marketing, which are currently being offered to students in periods 4, 7 and 8.

3. Petitioner, as a result of her petition, is seeking full time employment with the Respondent, not the part time employment which would be available to her were she to prevail in the instant matter.

4. In reliance on Respondent's representations as to the schedule of marketing courses, Petitioner hereby withdraws her petition in this matter.

5. Petitioner and Respondent agree that the Petitioner's withdrawal of the within petition is without prejudice to her right to raise in the future claims to any full time teaching positions which become available with the Respondent in Business Education and without prejudice to Respondent's right to raise all available defenses.

BALK, OXFELD, MANDELL & COHEN
Attorneys for the Petitioner
By:

NANCY L. OXFELD, ESQ.

ANTHONY P. SCIARRILLO, ESQ.
Attorney for the Respondent
By:

ANTHONY P. SCIARRILLO, ESQ.

Dated: 10-29-93

OAL DKT. NO. EDU 8320-93

JULIE NEALON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

M. Christine Gittzgerald
COMMISSIONER OF EDUCATION

DECEMBER 23, 1993

DATE OF MAILING - DECEMBER 23, 1993

321-93

DIANE DALTON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF KINNELON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

DECEMBER 23, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7709-93
AGENCY DKT. NO. 268-7/93

DIANE DALTON,
Petitioner,
v.
BOARD OF EDUCATION, BOROUGH OF KINNELON
MORRIS COUNTY,
Respondent.

Richard A. Friedman, Esq., for petitioner
(Zazzali, Zazzali, Fagella & Nowak, attorneys)

Andrew M. Wubbenhorst, Esq., for respondent
(Johnson, Murphy, Hubner, McKeon & Wubbenhorst, attorneys)

Record Closed: November 3, 1993 Decided: November 10, 1993

BEFORE **IRENE JONES** , ALJ:

STATEMENT OF CASE AND PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law (OAL) as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -13 and *N.J.S.A.* 52:14F-1 to -15. The matter was scheduled for a prehearing telephone conference on November 3, 1993. On October 4, 1993, the undersigned was notified by letter that the matter had been resolved and that a consent order was forthcoming. On November 3, 1993, a

consent order was provided which indicates that the petitioner has been assigned to a full-time position, effective September 1, 1993.

Petitioner, Diane Dalton, has an instructional certificate issued by the State Board of Examiners, qualifying her as a teacher of ESL, K-12, and English, K-12. She has been employed since September 1, 1987 by the respondent, Board of Education, Borough of Kinnelon, as a tenured teacher. Her teaching position was subjected to a reduction in force, effective June 30, 1993, thereby reducing her full time employment to a part-time position. Petitioner sought reinstatement to a position commensurate with her endorsement, alleging that her tenure and seniority rights under *N.J.S.A.* 18A:28-5, *N.J.S.A.* 18A:28-12, and *N.J.S.A.* 18A:6-10 *et seq.* were violated.

I have reviewed the consent order and **FIND**:

1. The parties have voluntarily agreed to the terms contained therein as evidenced by their signatures.

2. The agreement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this consent order meets the requirements of *N.J.A.C.* 1:1-19.1 and that the terms therein should be approved. Petitioner has now been reassigned to a permanent position from her prior part-time job and therefore the matter is moot. I approve the consent order and therefore **ORDER** that the parties comply with its terms and **ORDER** that these proceedings be **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

11/10/93
Date

IRENE JONES, ALJ

Receipt Acknowledged:

11/16/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 18 1993
Date

OFFICE OF ADMINISTRATIVE LAW

njf

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
150 West State Street
Trenton, New Jersey 08608
(609) 392-8172
Attorneys for Petitioner

DIANE DALTON, Petitioner, v. BOARD OF EDUCATION OF THE BOROUGH OF KINNELON, MORRIS COUNTY, Respondent.	BEFORE THE OFFICE OF ADMINISTRATIVE LAW OAL DKT. NO. EDU 07709-93 CONSENT ORDER

This matter having been filed with the Commissioner of Education and transmitted to the Office of Administrative Law, challenging the reduction of Petitioner's employment from full-time to part-time for the 1993-94 school year, and Respondent having reassigned Petitioner to a full-time position, effective September 1, 1993, thereby rendering this matter moot, the parties hereby agree that the petition in this matter shall be dismissed on the grounds that it is moot, and that by consenting to this order, neither party shall be deemed to have waived or abandoned any claims, defenses or legal positions asserted in this matter.

ZAZZALI, ZAZZALI,
FAGELLA & NOWAK
PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
GATEWAY I
NEWARK, N.J. 07102

Irene Jones
Hon. , ALJ

JOHNSON, MURPHY, HUBNER, McKEON & WUBBENHORST

A Professional Corporation
COUNSELLORS AT LAW

RIVERDALE SOUTH
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RIVERDALE, NEW JERSEY 07457

(201) 835-0100
FAX
(201) 835-1732

WILLIAM F. JOHNSON (1911-1991)
JAMES L. McKEON, JR. (1922-1981)

WILLIAM F. JOHNSON, JR.[▲]
MARTIN F. MURPHY[■]
MICHAEL E. HUBNER
JAMES L. McKEON, III[■]
ANDREW M. WUBBENHORST

Of Counsel:
ARNOLD H. MINIMAN
KARIN H. SWANSON[▼]

ROBERT H. OOSTDYK, JR.
IRMA W. FRANCIS
JOHN J. GENOBLE, JR.[●]

[▲]N.J., N.Y. & Fla.
[■]N.J. & N.Y. Bar
[▼]N.J. & Ill. Bar
[●]N.J. & Pa. Bar

November 3, 1993

FACSIMILE TRANSMITTAL SHEET

DATE: November 3, 1993 **TIME:**

TO: The Honorable Irene Jones, ALJ

YOUR FAX NO: (201) 648-6124

FROM: Andrew M. Wubbenhorst, Esq.

RE: Diane Dalton v. Bd. of Ed. Kinnelon, Morris County

Number of Pages __3__including cover page. If there is trouble with the transmission, please call _____Cynthia Adelin_____at (201) 835-0100. Our Fax number is: (201) 835-1732.

MESSAGE:

The information contained in this facsimile message is attorney-privileged and confidential information intended only for the use of the individual or entity named as recipient. If the reader is not the intended recipient, be hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone and return the original message to us at the address above via the U.S. Postal Service. Thank you.

I hereby consent to the substance and form of this order.

Zazzali, Zazzali, Fagella
& Nowak Attorneys for
Petitioner Diane Dalton

By: _____
Richard A. Friedman, Esq.

Johnson, Murphy, Hubner,
McKeon & Wubbenhorst
Attorneys for Respondent
Board of Education of Boro
of Kinnelon

By: _____
Andrew M. Wubbenhorst, Esq.

Irene Dalton

ZAZZALI, ZAZZALI,
FAGELLA & NOWAK
OFESSIONAL CORPORATION
ATTORNEYS AT LAW
GATEWAY I
NEWARK, N.J. 07102

OAL DKT. NO. EDU 7709-93

DIANE DALTON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF KINNELON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

COMMISSIONER OF EDUCATION

DECEMBER 23, 1993

DATE OF MAILING - DECEMBER 23, 1993

322-93

BOARD OF EDUCATION OF THE BOROUGH OF RUTHERFORD, BERGEN COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
HERMES AND DORIS GALLIANI,	:	
RESPONDENTS.	:	
	:	

DECEMBER 23, 1993

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 2397-93
AGENCY DKT. NO. 488-11/92

BOARD OF EDUCATION OF THE BOROUGH OF RUTHERFORD,
Petitioner,
v.
HERMES AND DORIS GALLIANI,
Respondents.

Rodney T. Hara, Esq., for petitioner
(Fogarty & Hara, attorneys)

Hermes Galliani, *pro se*

Doris C. Galliani, *pro se*

Record Closed: October 8, 1998 Decided: October 15, 1993

BEFORE **RICHARD McGILL,** ALJ:

The Board of Education of the Borough of Rutherford filed a petition seeking payment of tuition for respondents' children who were enrolled in a school in Rutherford but allegedly were not residents of the Borough. The matter was transmitted to the Office of Administrative Law on March 18, 1993 for determination as a contested case.

Prior to hearing, the parties agreed to an amicable resolution of the matter and submitted the attached Stipulation of Settlement. Having reviewed the record and the settlement terms, I **FIND:**

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

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

I hereby **FILE** my Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

Oct. 15, 1993
Date

RICHARD McGILL, ALJ

Receipt Acknowledged:

10/18/93
Date

DEPARTMENT OF EDUCATION

OCT 28 1993
Date

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

am

RUTHERFORD BOARD OF EDUCATION, Petitioner, v. HERMES GALLIANI and DORIS GALLIANI, Respondents	BEFORE THE COMMISSIONER OF EDUCATION / OFFICE OF ADMINISTRATIVE LAW AGENCY REF. NO. 488-11/92 OAL DKT. NO. EDU 2397-93 N HONORABLE RICHARD McGILL, A.L.J. STIPULATION OF SETTLEMENT

WHEREAS, the Rutherford Board of Education filed a verified petition of appeal with the Commissioner of Education which sought an order compelling Hermes Galliani and Doris Galliani to pay tuition in the amount of $4,683.60 for their children, M.G. and E.G.; for the 1991-1992 school,

WHEREAS, the parties are desirous of settling the dispute without the necessity of conducting a formal hearing;

WHEREAS, the terms and conditions of the parties settlement have been requested to be memorialized and agreed to in writing;

NOW, WHEREFORE, based on the foregoing premises and the mutual promises and covenants contained herein, the parties agree as follows:

1. Hermes Galliani and Doris Galliani agree to pay the Rutherford Board of Education the sum of three thousand one hundred twenty two and 40/100 dollars ($3,122.40) in full satisfaction of the Rutherford Board of Education's tuition claim for the 1991-199

school year.

2. Payment shall be made in twelve equal monthly installments of two hundred sixty and 20/100 dollars ($260.20) a month, beginning on November 15, 1993 and ending on October 15, 1994.

3. Failure to make a timely monthly payment shall result in an obligation of Hermes Galliani and Doris Galliani to pay the Rutherford Board of Education tuition in the amount of four thousand six hundred eighty three and 60/100 dollars ($4,683.60) upon demand. This obligation shall be enforceable by the Rutherford Board of Education in a court of competent jurisdiction.

4. Hermes Galliani and Doris Galliani acknowledge their responsibility to pay the amounts set forth in this Stipulation of Settlement to the Rutherford Board of Education.

5. The undersigned attorney for the Rutherford Board of Education agrees to recommend the stipulation of settlement to the Rutherford Board of Education at its next meeting. A copy of the resolution approving the stipulation of settlement shall be sent to the respondents and

Judge McGill

Roberta Hara
Attorneys for Petitioner

HERMES GALLIANI

Doris C Galliani
DORIS GALLIANI

RODNEY T HARA

OAL DKT. NO. EDU 2397-93

BOARD OF EDUCATION OF THE BOROUGH OF RUTHERFORD, BERGEN COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
HERMES AND DORIS GALLIANI,	:	
RESPONDENTS.	:	

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

Upon review, it is noted that on November 15, 1993, by telefaxed letter to the Director of the Bureau of Controversies and Disputes, respondents claimed to have only received the initial decision on that date and sought permission to submit exceptions on grounds that the initial decision of the ALJ and the appended settlement document did not accurately reflect their understanding of what transpired at hearing and settlement proceedings. This request was granted, and respondents were advised by telephone and by letter dated November 16, 1993 that their exceptions were required to be submitted to the Commissioner, and served upon the Board of Education, no later than November 26, 1993. In view of respondents' request, an

extension of time for the Commissioner to render her own decision in this matter was also obtained.

However, respondents failed to submit any exceptions, a circumstance which was noted by the Board by letter of December 2, 1993, and accordingly, the Commissioner has reviewed the initial decision and duly executed settlement agreement pursuant to N.J.A.C. 1:1-19.1. Upon such review, the Commissioner approves the settlement terms and adopts the settlement agreement as the final decision in this matter, but admonishes the parties for drafting a term (No. 2) to be effectuated prior to the Commissioner's review and approval of the settlement.

Notwithstanding this qualification, the Commissioner accepts the within settlement as indicated above and this matter is accordingly dismissed, subject to compliance with the settlement terms.

M. L. Fitzgerald

COMMISSIONER OF EDUCATION

DECEMBER 23, 1993

DATE OF MAILING - DECEMBER 23, 1993

322-93

EDU #2397-93
C # 322-93
SB # 8-94

BOARD OF EDUCATION OF THE BOROUGH OF RUTHERFORD, BERGEN COUNTY,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
HERMES AND DORIS GALLIANI,	:	DECISION
RESPONDENTS-APPELLANTS.	:	

Decided by the Commissioner of Education, December 23, 1993

For the Petitioner-Respondent, Fogarty & Hara
(Rodney T. Hara, Esq., of Counsel)

For the Respondent-Appellant, Hermes & Doris Galliani,
pro se

This matter was initiated by the Board of Education of the Borough of Rutherford (hereinafter "Board") by the filing of a peititon with the Commissioner of Education seeking tuition payments from Hermes and Doris Galliani (hereinafter "appellants") whose children were enrolled in the Rutherford public schools, but who were allegedly domiciled outside the district.

On December 23, 1993, the Commissioner approved a proposed settlement of this matter. Appellants thereafter filed a pro se notice of appeal from the decision of the Commissioner to the State Board. The notice was dated January 15, 1994 and mailed by certified mail on January 26. Said notice was directed and sent to the Commissioner, along with another copy of appellants' exceptions to the Commissioner dated December 14.

August 3, 1994

On February 7, the Commissioner acknowledged the notice and advised appellants that the original exceptions had been received on December 23, "well out of time and would not have been considered in any event absent a compelling explanation warranting relaxation of rules." The Commissioner forwarded the notice of appeal to the State Board Appeals Office.

By letter dated February 14, 1994, the Counsel to the State Board advised appellants that their notice of appeal had been due on or before January 25, 1994 and that this matter was being referred to our Legal Committee for consideration of the effect of the appellants' failure to file timely notice. Appellants were given until February 24 to file an affidavit setting forth the circumstances of their filing. Appellants were also advised that there was no indication that opposing counsel had been served with a copy of their appeal. They were directed to correct such deficiency by February 24.

By letter dated February 17, the Board of Education of the Borough of Rutherford (hereinafter "Board") urged dismissal of appellant's appeal for failure to file in a timely manner.

Appellants thereafter filed a letter with the State Board dated February 24 and written in Spanish. On March 9, appellants requested that the Department of Education provide them with a Spanish speaking employee to assist them with their appeal. By letter dated March 10, appellants were informed that the staff of the State Board Appeals Office was not capable of providing them with assistance in Spanish and that the Department of Education was unable to provide Spanish translating services to litigants.

On March 21, appellants' February 24 letter was

acknowledged and they were advised that all papers filed in appeals to the State Board must be in English. They were reminded of the referral of this matter to the Legal Committee and, under the circumstances, were provided with the opportunity to submit an affidavit in English setting forth the circumstances of their filing. Appellants were given until April 4 to submit such an affidavit.

By letter dated April 1, appellants advised that they had been accepted by Bergen County Legal Services and would be meeting with an attorney in this matter on April 11. By letter dated April 6, appellants were advised that this case would be placed in abeyance until April 15 so as to permit them to meet with their attorney. They were also informed that it was their responsibility to ensure that Bergen County Legal Services notified the State Board by April 15 if it would be providing them with legal representation in this case. There have been no further communications from appellants or from any legal representative.

Pursuant to N.J.S.A. 18A:6-28, appeals to the State Board must be taken "within 30 days after the decision appealed from is filed." The State Board may not grant extensions. N.J.A.C. 6:2-1.5(a). In contrast to the period for filing petitions to the Commissioner of Education, see N.J.A.C. 6:24-1.2; N.J.A.C. 6:24-1.15, the time limit within which an appeal must be taken to the State Board is statutory, and, given the jurisdictional nature of the statutory time limit, the State Board lacks the authority to extend it. Mount Pleasant-Blythedale Union Free School District v. New Jersey Department of Education, Docket #A-2180-89T1, slip op. at 5 (App. Div. 1990).

We conclude that the statutory filing requirement with which the appellants failed to comply is of such significance that we have no choice but to dismiss the appeal in this matter. In Yorke v. Board of Education of the Township of Piscataway, decided by the State Board of Education, July 6, 1988, aff'd, Docket #A-5912-87T1 (App. Div. 1989), the Court upheld the dismissal of an appeal by the State Board where it found that the notice of appeal had been filed one day late by appellant's counsel who alleged that he had misread or misunderstood the applicable regulations. The Court added that even if the statute could be construed to permit enlargement of the time for filing an appeal, the appellant therein had failed to establish good cause.

In this case, the Commissioner's decision was rendered on December 23, 1993 and mailed to the parties on that date. Accordingly, pursuant to N.J.A.C. 6:2-1.4, the decision appealed from was filed on December 26. Therefore, as mandated by N.J.S.A. 18A:6-28, see N.J.A.C. 6:2-1.3(a); N.J.A.C. 6:2-1.4(a), as computed under N.J.A.C. 6:2-1.4(b), the appellants were required to file their notice of appeal on or before January 25, 1994. Although appellants' notice of appeal to the State Board was dated January 15, 1994, it was not mailed until January 26. As previously noted, their notice was received by the Commissioner on January 31 and forwarded to the State Board.

Pursuant to N.J.A.C. 6:2-1.6(b), an appeal is deemed filed upon receipt of the notice of appeal if hand-delivered or upon mailing if it includes a proof of mailing. If no such proof is attached, the appeal is deemed to have been mailed three days before receipt by the State Board. Id. In this case, the notice sent by

certified mail indicated a mailing date of January 26 and was received on January 31. In that the appeal was filed late, the matter was referred to the Legal Committee for consideration of the effect of the Township's failure to file timely notice.

Appellants were notified of such referral and provided with considerable opportunity to respond thereto. They have failed to provide an affidavit setting forth the circumstances of the filing. Nor have they alleged at any time that the notice of appeal was filed in a timely fashion.

Even if N.J.S.A. 18A:6-28 can be construed to provide us with the authority to enlarge the time limit for filing an appeal, appellants have failed to offer a substantive basis to warrant such enlargement in this particular instance. Despite being provided with repeated opportunities to do so, appellants have failed to provide any indication of the circumstances surrounding their filing or justification of any kind for filing beyond the statutory time limit. Nor do we find this case to present us with a matter of public importance or with substantive issues of transcendent importance warranting a determination on the merits.

Consequently, we dismiss the appeal in this matter for failure to file notice thereof within the statutory time limit as computed under the applicable regulations.

August 3, 1994

Date of mailing AUG 04 1994

323-93

LYNN CARHART,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

DECEMBER 23, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6848-92
AGENCY DKT. NO. 367-7/92

LYNN CARHART,
Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,
Respondent.

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

James T. Hundley, Esq., for respondent, (Hundley, Parry & Hopkins, attorneys)

Wayne J. Oppito, Esq., for intervenor, Sharon Saunders

Record Closed: November 9, 1993 Decided: November 12, 1993

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

This matter was transmitted to the Office of Administrative Law on September 4, 1992, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1to -13.

The parties have agreed to a settlement and have prepared a stipulation indicating the terms thereof, which is attached and fully incorporated herein.

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

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

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

November 12, 1993
Date

Lillard E. Law by FLS
LILLARD E. LAW, ALJ

Receipt Acknowledged:

Nov. 19, 1993
Date

Maureen A. Gibbs
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 23 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

lmh

HILLMAN, HUNDLEY, PARRY & FALLON, P.C.
35 Pilgrim Pathway
Post Office Box 488
Ocean Grove, New Jersey 07756
908-775-3100
James T. Hundley, Esq., for Respondent

LYNN CARHART,	:	BEFORE THE COMMISSIONER OF OF EDUCATION OF NEW JERSEY
Petitioner,	:	
v.	:	OAL DKT. NO. EDU 6848-92 AGENCY DKT. NO. 367-7/92
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	STIPULATION OF SETTLEMENT
Respondent.	:	

WHEREAS, on July 29, 1992 a Petition of Appeal was filed with the Commissioner of Education wherein the Petitioner alleged that the Respondent Board of Education failed to appoint her to the position of Magnet School Program Coordinator in violation of her tenure, seniority and reemployment rights; and

WHEREAS, on August 25, 1992, Respondent filed its Answer with the Commissioner of Education; and

WHEREAS, pursuant to N.J.A.C. 6:24-1.10(a), the Commissioner of Education transmitted the matter for hearing before the Office of Administrative Law; and

WHEREAS, on September 4, 1992, the matter was filed with the Office of Administrative Law; and

WHEREAS, on December 10, 1992, the Honorable Lillard E. Law, A.L.J., granted leave to Wayne J. Oppito, Esq. to

intervene in this matter on behalf of Sharon Saunders, the individual appointed by the Respondent to the contested position of Magnet School Program Coordinator; and

WHEREAS, the parties have entered into an agreement which settles all unresolved issues in this matter;

NOW, THEREFORE, be it agreed by and among the parties as follows:

1. Petitioner Lynn Carhart will be appointed to the position of High School Department Chairperson, a ten month supervisory position that carries the same salary as the ten month position of Magnet School Program Coordinator; teacher's salary guide plus $3,100.00 stipend.

2. Respondent will appoint Petitioner to the position of High School Department Chairperson effective May 19, 1993.

3. Petitioner's salary for the position of High School Department Chairperson will be adjusted retroactive to September 1, 1992, the first day of school for the 1992.

4. To the extent permitted by Title 18A of the New Jersey Statutes and Title 6 of the New Jersey Administrative Code, Petitioner's tenure and seniority in the position of High School Department Chairperson will be adjusted as if Petitioner had been appointed to that position as of September 1, 1992.

5. Sharon Saunders will remain in the position of Magnet School Program Coordinator pursuant to the terms of her contract with the Respondent Board of Education.

6. The parties consent to the terms of this Stipulation of Settlement being incorporated into an Initial Decision by the Administrative Law Judge.

We hereby consent and agree to the terms of this Stipulation of Settlement.

Date: 10/26/93

Stephen B. Hunter
Attorney for Petitioner
Lynn Carhart

Date: 11/3/93

James T. Hundley
Attorney for Respondent
Board of Education of the
Township of Neptune,
Monmouth County

Date: 11/1/93

Wayne J. Oppito
Attorney for Intervenor
Sharon Saunders

OAL DKT. NO. EDU 6848-92

LYNN CARHART,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. In so deciding, it is emphasized that the Commissioner passes no judgment on the appropriateness of paragraph 4 of the settlement terms insofar as no adjudication has been rendered on the merits of petitioner's tenure and seniority rights. The Commissioner stresses, therefore, that this settlement is not dispositive of anyone's tenure or seniority rights. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

DECEMBER 23, 1993

COMMISSIONER OF EDUCATION

DATE OF MAILING - DECEMBER 23, 1993

324-93

IN THE MATTER OF THE TENURE	:	
HEARING OF ANTHONY EARL	:	COMMISSIONER OF EDUCATION
CAMPBELL, SCHOOL DISTRICT	:	DECISION
OF THE CITY OF HOBOKEN,	:	
HUDSON COUNTY.	:	
	:	

DECEMBER 23, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
ADMINISTRATIVE RETURN
OF CONTESTED CASE
OAL DKT. NO. EDU 1322-93
Agency Dkt. No. 514-12-92

IN THE MATTER OF THE
TENURE HEARING OF
ANTHONY EARL CAMPBELL

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

On February 8, 1993, the Hoboken Board of Education certified a tenure charge of unbecoming conduct against respondent Anthony Earl Campbell. The certification alleged facts constituting a violation of the New Jersey Criminal Code, specifically burglary under *N.J.S.A.* 2C:18-2. Respondent filed a timely answer denying the charge. The matter was transmitted to the Office of Administrative Law on February 18, 1993 for a contested case hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. Meanwhile, on December 10 1992, a Hudson County Grand Jury indicted respondent on one count of burglary and a second count of theft.

On April 22, 1993, upon application of the respondent, the matter was placed upon the inactive list until October 22, 1993 or resolution of the underlying criminal matter, whichever occurred first.

On April 22, 1993, the respondent pled guilty to one count of burglary. Judgment was entered sentencing respondent to two years probation and 50 hours of community services. A copy of the indictment and the judgment of conviction is attached.

N.J.S.A. 2C:51-2 provides that any person holding public employment who is convicted of an offense of the third degree or above or of an offense touching or involving his employment shall forfeit his position; such forfeiture shall take effect either upon a finding of guilt, if the court so orders, or upon sentencing, unless the court orders its stay of such forfeiture. In the instant matter, respondent was sentenced on June 11, 1993 and the court did not stay the forfeiture. As of that date, Mr. Campbell no longer had any rights to his position as a school custodian with the Hoboken Board of Education.

There are no facts in dispute. The crime of burglary constitutes an offense of the third degree. Moreover, it is undisputed that the circumstances of this offense arose in a context involving or touching his position as school custodian. Therefore, I **FIND** there are no issues remaining to be decided in this contested matter at this time. Respondent has forfeited his position by operation of law.

Therefore, I **ORDER** the return of this file to the Commissioner of Education and that the tenure charges be dismissed without prejudice, as moot. In the event the criminal conviction is reversed on appeal, this matter may be retransmitted to the Office of Administrative Law for hearing.

Nov. 4, 1993
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

al

OAL DKT. NO. EDU 1322-93

IN THE MATTER OF THE TENURE	:	
HEARING OF ANTHONY EARL	:	COMMISSIONER OF EDUCATION
CAMPBELL, SCHOOL DISTRICT	:	DECISION
OF THE CITY OF HOBOKEN,	:	
HUDSON COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law in the form of an order returning a contested case have been reviewed.

Upon review, the Commissioner concurs that, inasmuch as respondent has undisputedly been convicted of a crime of the third degree which touches upon his office or employment, he has forfeited his position as custodian in the Hoboken School District by operation of N.J.S.A. 2C:51-2. Therefore, tenure proceedings against him have now been rendered moot.

Accordingly, as recommended by the ALJ, this matter is dismissed as moot without prejudice to refiling should respondent's conviction be reversed on appeal.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

DECEMBER 23, 1993

DATE OF MAILING - DECEMBER 23, 1993

325-93

MARGARET DE FREHN,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF WILDWOOD CREST, CAPE MAY COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner, tenured teaching staff member, appealed Board's refusal to permit her to return to her classroom teaching position following transfer to Learning Disabilities Teacher-Consultant (LDTC) position. Petitioner stipulated that transfer was voluntary, but argued that circumstances were such that it was more analogous to an involuntary transfer in terms of her employment rights.

ALJ found petitioner's transfer to LDTC position for the 1990-91 school year was in fact voluntary and that her reappointment to that position for 1991-92 was without objection. Therefore, there was no implication that the transfer was contemplated as temporary or that the Board agreed or intended to return petitioner to the classroom. Therefore, petitioner had no basis to claim violation of tenure rights by the Board's determination to keep her in the LDTC position after she requested a return to classroom teaching.

Commissioner adopted findings and determination of initial decision.

DECEMBER 30, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6109-92
AGENCY REF. NO. 299-7/92

MARGARET DeFREHN,
Petitioner,

v.

BOARD OF EDUCATION OF WILDWOOD CREST SCHOOL DISTRICT, CAPE MAY COUNTY,
Respondent.

Kathleen A. Naprstek, Esq., for petitioner (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Alan I. Gould, Esq., for respondent (Cooper, Perskie, April, Niedelman, Wagenheim & Levenson, attorneys)

Record Closed: October 6, 1993 Decided: November 9, 1993

BEFORE **EDGAR R. HOLMES, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Margaret DeFrehn filed a petition with the Commissioner of Education pursuant to *N.J.S.A.* 18A:6-9 in order to resolve a tenure dispute with the Wildwood Crest Board of Education. The matter was transmitted to the Office of Administrative Law (OAL) on August 10, 1992, for determination as a contested case pursuant to the Administrative Procedures Act, *N.J.S.A.* 52:14B-1 to -15; and the act creating the OAL, *N.J.S.A.* 52:14-1 to -13.

FACTS

The parties filed a stipulation of facts on or about July 23, 1993. Those facts are as follows:

1. Petitioner commenced employment as a teaching staff member with the Wildwood Crest (County of Cape May) Board of Education on September 1, 1965.

2. Petitioner holds an instructional certificate with an endorsement as an elementary teacher.

3. Petitioner served as a teacher, under her elementary endorsement, from September 1, 1965 through June 30, 1975 and consequently acquired tenure as an elementary teacher.

4. During the 1975-76 school year petitioner was granted a sabbatical leave to pursue her master's degree in learning disabilities at Glassboro State College.

5. Following the petitioner's return from sabbatical leave, petitioner wrote a letter thanking the Board for the sabbatical leave designed (sic) as joint exhibit PR2.

6. Petitioner received her Master of Arts Degree from Glassboro State College on October 12, 1976.

7. Petitioner received her educational services certificate with an endorsement as a learning disabilities teacher-consultant in October of 1976.

8. Petitioner returned to classroom teaching with the Wildwood Crest School District in September 1976 following her sabbatical leave, and served as a teacher under her elementary endorsement, from September 1976 through June 30, 1990.

9. On or about June of 1980, petitioner was approached by Keith Harper, then Superintendent of Schools to replace Rebecca Kona, who tendered

her resignation as LDTC for the Wildwood Crest School District. After extensive conversations with Mr. Harper and the principal, petitioner advised them that her interest was in teaching and declined the position.

10. On or about June or July 1986, petitioner was advised by Mr. Eugene Whelan, the Superintendent of Schools, that Sharon Stubbs resigned as the LDTC and was asked to accept that position. Petitioner declined the position, indicating that her interest was in teaching and not in the LDTC position.

11. On August 30, 1990, petitioner was informed by phone conversation with Eugene Whelan, Superintendent of Schools, that the Learning Disabilities Teacher-Consultant had tendered her resignation; Mr. Whelan asked petitioner to consider accepting the position. Petitioner requested time to consider it and contacted Mr. Whelan requesting to meet with him the following day.

12. On August 31, 1990, petitioner met with Mr. Whelan at his office to again discuss the Learning Disabilities Teacher-Consultant position.

13. Petitioner voluntarily transferred to the position of Learning Disabilities Teacher-Consultant for the 1990-91 school year.

14. Petitioner asked and was encouraged by Mr. Whelan to visit Glassboro College to update on the trends in the fields, although she did not take any courses and to meet with the Director of Special Education from the State Department of Education located in Cape May County and to meet with neighboring LDTC persons. She was encouraged to reach out for support with colleagues in the area.

15. Petitioner was reappointed to the position of Learning Disabilities Teacher-Consultant for the 1991-92 school year.

16. On or about May 22, 1992, petitioner made her first formal written request for a transfer from the position of Learning Disabilities Teacher-Consultant to a classroom teaching position. This followed a meeting on or about May 15, 1992 between the petitioner and Dennis Anderson, the Superintendent of Schools since August 8, 1991.

17. By letter dated May 28, 1992, Mr. Anderson on behalf of the Wildwood crest Board of Education denied petitioner's request for a transfer to a teaching position.

18. On July 7, 1992, petitioner filed an appeal of the Board's denial with the Commissioner of Education.

19. At the time petitioner made demand to return to the tenured teaching position, she was not tenured under the educational services certificate. Likewise, at the time of filing the appeal, she was not tenured under the educational services certificate. Petitioner obtained tenure under the educational services certificate on the first day of school of the 1992-93 school year, after being offered a tenure contract in April 1992.

20. On or about August 20, 1992, the Commissioner of Education approved petitioner's request for a hearing and the matter was referred to the Office of Administrative Law as a contested matter.

LAW AND DISCUSSION

The Board of Education characterizes the transfer as "voluntary" and within its discretion. The teacher claims that failure to return her to a tenured position from an nontenured one is a violation of her tenure rights.

A statute confers tenure upon certified teachers and other enumerated school board employees after three years (variously defined), during good behavior and efficiency, and prevents dismissal or reduction of compensation of tenured teachers except for certain enumerated causes and in a prescribed manner. *N.J.S.A.* 18A:28-5. Tenure has been described as a "legislative status." *Greenway v. Board of Education,* 29 *A 2d.* 890 (1943). The status of tenure "protects teachers from dismissal for unfounded, flimsy or political reasons." *Spiewak v. Board of Education of Rutherford,* 90 *N.J.* 63 (1982).

The statute has been interpreted by the Commissioner, reading it in *pari materia* with *N.J.S.A.* 18A:28-6, as preventing the transfer from one separately tenurable position to another without the individuals consent even though the

individual happens to have the requisite certificate in the second position. The Commissioner held that such a transfer without consent is a "dismissal" and a violation of tenure rights. *Stephen Knott v. Board of Education of the Township of Randolph,* 1985 *S.L.D.* 1567, aff'd State Board 1986, *S.L.D.* 3075. The Commissioner based the *Knott* decision on the Appellate Division opinion in *Madeline Childs v. Board of Education of the Township of Union,* 1980 *S.L.D.* 1134, aff'd State Board 1981 *S.L.D.* 1404, aff'd *N.J. Superior Court,* App. Div. 1982 *S.L.D.* 1456. The *Childs* court said that it was "pure sophistry to assert (Child's) 'transfer' is anything less than a dismissal from her clearly tenured position." p. 1460. The *Child's* case is factually similar to the instant case except for the issue of voluntariness.

The cases relied upon by the petitioner to support her assertion that she has an indefeasible and unilateral right to move back to her classroom teaching position from LDTC, all arose after an involuntary transfer was made by the Board, of a tenured teacher to another position. *Childs, supra; Kratt, supra.; Peter Melillo v. Board of Education of the Essex County Vocational School District,* 1987 *S.L.D.* 1493, *aff'd State Board* 1987 *S.L.D.* 1496; *Rosemary Gerdes v. Board of Education of the Borough of Spotswood,* OAL Dkt. No. EDU 386-91 (December 23, 1991), *Commr's Decision* (February 6, 1992), *aff'd State Board of Education* (July 1, 1992). This case, however, is not about an involuntary transfer since no involuntary transfer ever occurred. In this case, petitioner seeks an expansion of the tenure concept to include a right not contemplated by the legislature. The legislature sought to protect teachers from arbitrary or malicious dismissal. It did not seek to protect teachers from the consequences of their own acts. It is stipulated that this transfer was voluntary.

A motion for summary judgment was earlier denied in this matter. A basis of the denial was the assertion in briefs and the implication in affidavits that the petitioner only agreed to the transfer from classroom teacher to LDTC in 1990 to ease an emergency situation created at the last minute by the abrupt resignation of the prior LDTC. In that case, it would have been unconscionable to penalize her for stepping into the breach by refusing to allow the petitioner to return to her classroom when the emergency was abated.

The stipulation filed in this matter does not characterize the transfer in a manner consistent with the idea that this teacher was making only a temporary change. The stipulation clearly asserts that the original transfer in 1990 was voluntary and that her reappointment to the position in 1991 was without objection. There is no implication that the Board agreed to return the petitioner to the classroom or took any advantage whatsoever of petitioner in this period. Because the petitioner voluntarily accepted the position of LDTC, the Board has the authority under the general provisions and duties granted to it by the legislature to reassign qualified persons to their positions. *N.J.S.A.* 18A:11-1.

Petitioner's reappointment was consistent with the tenure law and did not violate it.

I **DISMISS** the petition filed herein.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

11/9/93
Date

EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

NOV 19 1993
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 23 1993
Date

OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

NONE

DOCUMENTS IN EVIDENCE

NONE

OAL DKT. NO. EDU 6109-92

MARGARET DE FREHN,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF WILDWOOD CREST, CAPE MAY COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by petitioner pursuant to the provisions of N.J.A.C. 1:1-18.4, as were replies by the Board of Education.

In her exceptions, petitioner essentially reiterates the arguments of her post-hearing filings, incorporating her primary brief by reference and contending that the ALJ, in accepting the arguments of the Board, erred in construing the facts of this matter in terms of applicable law. Specifically, petitioner argues that, in agreeing to be transferred to the separately tenurable position of Learning Disabilities Teacher-Consultant (LDTC) in response to a district emergency and in a spirit of cooperation, she in no way waived her statutory right to her tenured teaching position. These tenure rights, petitioner avers, take precedence over the managerial prerogatives enjoyed by the Board to assign personnel within

the scope of their certification, as it is preposterous to hold that, while a Board cannot forcibly transfer a tenured teacher from one separately tenurable position to another, it can refuse her request to return to her first tenured position following transfer to a second, thereby denying an entitlement which is hers by law.

In reply, the Board reiterates its earlier arguments and further objects to petitioner's attempt, in violation of N.J.A.C. 1:1-18.4(c), to introduce by way of exception a factual aspect altogether lacking in the stipulated facts on which the parties agreed this matter would be decided. This effort, the Board contends, is an attempt to mischaracterize petitioner's voluntary action as an involuntary one, so as to trigger application of laws governing involuntary transfer in what is actually a case about the consequences of voluntary transfer. Those consequences, the Board avers, were correctly understood and set forth by the ALJ and should not be disturbed herein.

Upon review of the record and consideration of this matter, the Commissioner determines to affirm the analysis and conclusion of the ALJ.

Specifically, the Commissioner concurs that, even accepting arguendo petitioner's contention that she decided to take the LDTC position only in response to the district's then-pressing need, the Board's action in refusing a request to return her to a teaching position did not violate petitioner's

tenure rights. These rights, as properly found by the ALJ, contemplate protection against loss of employment and salary (indeed, petitioner herein retains her entitlement to a teaching position should she be riffed from the position of LDTC), but are not intended to insulate an employee against the consequences of a transfer decision which is both voluntary in essence and lacking in any indication of temporary intent, notwithstanding that it may have arisen out of circumstances then at hand.

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

IT IS SO ORDERED.

Mary Lee Fitzgerald
COMMISSIONER OF EDUCATION

DECEMBER 30, 1993

DATE OF MAILING - DECEMBER 30, 1993

325-93

EDU #6109-92
C # 325-93
SB # 6-94

MARGARET DE FREHN,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE BOROUGH OF WILDWOOD CREST, CAPE MAY COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, December 30, 1993

For the Petitioner-Appellant, Zazzali, Zazzali, Fagella & Nowak (Kathleen A. Naprstek, Esq., of Counsel)

For the Respondent-Respondent, Cooper, Perskie, April, Niedelman, Wagenheim & Levenson (Alan I. Gould, Esq., of Counsel)

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

May 4, 1994

Date of mailing MAY 06 1994

326-93

326-93

IN THE MATTER OF THE TENURE :

HEARING OF FLORENCE TURNER : COMMISSIONER OF EDUCATION

RUCKER, SCHOOL DISTRICT OF THE : DECISION

CITY OF CAMDEN, CAMDEN COUNTY. :

:

SYNOPSIS

Board certified charges of unbecoming conduct and other just cause (excessive absenteeism) against respondent, tenured elementary teacher.

ALJ concluded that charges of chronic and excessive absenteeism were sustained. ALJ did not consider other six charges certified by Board. ALJ determined that although most of the absences were the result of legitimate medical problems, the magnitude of the numbers and the extensive time period encompassed negatively impacted the continuity of instruction. ALJ ordered respondent's removal from her tenured position and matter forwarded to State Board of Examiners for further appropriate action.

Commissioner adopted findings and determination in initial decision and concurred with ALJ that it was unnecessary to require further litigation of the six remaining charges certified by Board. Commissioner dismissed those charges without prejudice to preserve Board's right to move forward if adjudicated charge is reversed on appeal. Commissioner dismissed respondent from her tenured teaching staff position and forwarded matter to State Board of Examiners for review of only the one adjudicated charge.

DECEMBER 30, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
CONSOLIDATED CASES

BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY,
Petitioner,
v.
FLORENCE TURNER RUCKER,
Respondent,

OAL DKT. NO. EDU 4327-92
AGENCY DKT. NO. 175-5/92

AND

BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY,
Petitioner,
v.
FLORENCE TURNER RUCKER,
Respondent.

OAL DKT. NO. EDU 6204-92
AGENCY DKT. NO. 373-7/92

Karen A. Murray, Esq., for petitioner (Murray, Murray & Corrigan, attorneys)

Arnold Mellk, Esq., for respondent (Wills, O'Neill & Mellk, attorneys)

Record Closed: October 4, 1993 Decided: November 18, 1993

BEFORE **M. KATHLEEN DUNCAN**, ALJ:

These matters were commenced on April 29, 1992 (EDU 4327-92) and July 27, 1992 (EDU 6204-92) pursuant to N.J.S.A. 18A:6-11 when the Board of Education of the School District of the City of Camden (hereinafter petitioner) certified tenure charges against Florence Turner Rucker (hereinafter respondent) alleging conduct

unbecoming a teacher and chronic and excessive absenteeism. Answers to both sets of charges were filed on behalf of respondent and on June 11, 1992 and August 12, 1992, respectively, the matters were transmitted to the Office of Administrative Law for determination as contested cases, pursuant to N.J.S.A. 52:14F-1 to -13.

A prehearing conference was conducted on October 13, 1992, at which time the charges were consolidated for hearing and trial dates were set for February 25, March 2, 3, April 1, and 5, 1993. Because respondent failed to answer petitioner's interrogatores, an order permitting the deposition of respondent to be taken was entered, and at the request of both parties the trial dates of February 25, March 2, and 3, 1993, were adjourned for the purpose of permitting time for the deposition to take place. On March 17, 1993, current counsel for respondent was substituted for her previous attorney, Richard A. Friedman. The April 1, 1993 trial date was adjourned because petitioner's attorney, Ms. Murray, was ill. On Wednesday, April 7, 1993, the parties appeared and were ready to proceed to hearing; as the result of a settlement conference conducted prior to the commencement of the hearing, however, respondent agreed to pursue the possibility of filing an application for ordinary disability retirement with the Board of Trustees of the Teachers' Pension and Annuity Fund.

The parties agreed that respondent would be examined by physicans not employed by petitioner for the purpose of determining whether she is permanently and totally disabled from the performance of her regular and assigned duties. It was also agreed between the parties that if the examinations resulted in medical opinion(s) that respondent is permanently and totally disabled, respondent would file an application for disability retirement, and if her application were to be granted by the Board of Trustees, these matters would be settled, subject to approval by the Commissioner of Education. If the application for disability were to be denied, a hearing would be requested and the pension case would be consolidated with these matters for hearing. Additional hearing dates, which had been scheduled for June 3, June 10 and June 16, 1993, were adjourned at the request of both parties to permit time for the medical examinations to take place. Respondent thereafter was examined by John P. Motley, M.D., a physican who specializes in psychiatry. She declined to be examined by any of the other doctors recommended by petitioner and petitioner declined to allow respondent to select physicans of her own choice to perform the examinations. At a settlement conference conducted on August 24, 1993, respondent stated that she would not file a disability retirement application with the Board of Trustees of the Teachers'

Pension and Annuity Fund because she does not feel that she is disabled and she expressed displeasure that the hearing had not taken place as originally scheduled. She did not acknowledge that she had previously agreed to pursue a disability retirement and had subsequently changed her mind, although it is clear that this is what has happened. As a result of the psychiatric examination performed by Dr. Motley, he issued an opinion to petitioner that respondent is permanently and totally disabled from the performance of her duties on a psychiatric basis. The undersigned suggested that petitioner should file an application for disability retirement on respondent's behalf, pursuant to N.J.S.A. 18A:66-39, and simultaneously file a Motion for Partial Summary Decision on the chronic and excessive absenteeism charge. Petitioner's Motion for Partial Summary Decision and supporting papers were received on September 17, 1993. Respondent's reply was received on September 21, 1993. The application for disability retirement was filed by petitioner on respondent's behalf on September 24, 1993. Oral argument on the motion was conducted by telephone conference call on October 4, 1993, whereupon the record closed.

FINDINGS OF FACT

The following facts appear from the certification of Florence Gavin, who is employed by petitioner as the Principal of Davis Elementary School, and from the other papers submitted in support of the Motion for Partial Summary Decision by petitioner. Respondent has been employed by petitioner since 1977. During the time periods relevant to a determination of the within motion, respondent was assigned to teach fourth grade at Davis Elementary School. Respondent's attendance records for this time period, specifically between school years 1988-89 through March 11, 1992,* reveal that respondent was absent a total of 263 school days out of a possible 655 school days. In the 1988-89 school year respondent was absent on sixty-two of the 180 school days, or thirty-four percent of the time. In the 1989-90 school year respondent was absent on seventy-seven of the 180 school days, or forty-three percent of the time. In the 1990-91 school year respondent was absent on 92.5 of the 180 school days or fifty-one percent of the time. In the 1991-92 school year, between September 1991 and March 11, 1992, there were 115 school days; respondent was absent on 31.5 of those days or twenty-seven percent of the time. Attendance charts show that these absences were intermittent throughout each year.

* Respondent's suspension pursuant to the filed tenure charges was effective April 30, 1992; however, the calculations provided by petitioner in connection with this motion end with March 11, 1992.

The collective bargaining agreement between petitioner and its teachers permits teachers to use thirteen sick days and two personal days each school year. At the commencement of each of the years in question, respondent began the year with only those days allocated for that year and with no accummulation. Accordingly, in each year her absences vastly exceeded her paid leave days. Although the memorandum of law submitted by petitioner asserts that respondent was repeatedly counseled and admonished that her attendance had to improve and that it was having a serious, detrimental impact on her students, no such certification appears from Ms. Gavin. There is also no certification concerning petitioner's implication that respondent's increment was withheld for school years 1985-86 and 1986-87 as a result of excessive absenteeism.

In her certification in opposition to petitioner's motion, respondent states that she was absent 249 days, not 263 days, during the relevant time period. She further certifies that each of the 249 absences was either medically justified or was for personal days which were granted by the collective bargaining agreement, and petitioner does not dispute these allegations. Respondent denies that she was ever counseled by petitioner's administrators concerning her attendance record; "Any discussions concerning my absences with Dr. Webster, the Superintendant, and the three principals at Davis School were with regard to their hoping that my health would improve and not as a matter of absenteeism;"she certifies. She notes that her increments for 1985 through 1987 were restored, and that they had not been withheld for absenteeism. And finally, she certifies that she is ready, willing and able to return to her teaching duties because her medical problems have improved and have been brought under control.

Although it is apparent from the foregoing recitation that some factual disputes exist between the parties, as explained hereinafter, those factual disputes do not need to be resolved for purposes of deciding the within motion.

APPLICABLE LAW AND DISCUSSION

N.J.A.C. 1:1-12.5, the rule governing motions for summary decision, provides:

> (b) The motion for summary decision shall be served with briefs and with or without supporting affidavits. The decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there

> is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered.

The now classic statement of the standards for granting or denying summary judgment set forth in Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67 (1954), explains that the procedure is designed to provide a prompt businesslike and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion, clearly shows not to present any genuine issue of material fact requiring disposition at a trial. Although as previously noted, factual disputes exist herein, I **CONCLUDE** that those facts are not material facts requiring resolution following a full hearing. A material fact is any fact of consequence to the determination of the action. See New Jersey Rules of Evidence, Rule 401, and State v. Hutchins, 241 N.J. Super. 353, 359 (App. Div. 1990). Although respondent does not identify which of the fourteen days petitioner asserts she was absent with which she disagrees, whether the total number is 263 or 249 is inconsequential. If petitioner's numbers are correct, respondent was absent forty percent of the school days during the relevant time period; if respondent's numbers are correct, she was absent thirty-eight percent of the total school days.

While it is true, as respondent argues in her papers in opposition to this motion, that mere numbers standing alone may not support a determination of chronic and excessive absenteeism, it is clear that at some point the sheer magnitude of the absences can support a Board of Education's conclusion that continuity of instruction has been negatively impacted, regardless of the particular circumstances of the absences. In Meli v. Board of Ed. of the Burlington County Vocational-Technical Schools, Superior Court of New Jersey, Appellate Division (A-5820-85T7, May 21, 1987) (unreported), cited by respondent, the petitioner's salary adjustment and increment for the 1985-86 school year had been withheld because of absenteeism. She had been absent thirteen and one-half days (nine days sick leave, two and one-half personal days and two days because of death in her family) all within the statutory and contractual limits. The court found the Board of Education's stated reason of "Attendance" without more to be arbitrary and unreasonable under the circumstances, particularly since petitioner's attendance

had improved over the previous year (fourteen days) and her increment had been restored for that year. Meli v. Board of Ed. of the Burlington County Vocational-Technical Schools, Superior Court of New Jersey, Appellate Division (A-2237-85T7, March 4, 1987) (unreported). In Kuehn v. Board of Ed. of Teaneck, OAL DKT. NO. EDU 1077-81 (October 9, 1981), reversed New Jersey Commissioner of Education (November 25, 1981), reversed New Jersey State Board (February 1, 1983), the State Board was dealing with a broad policy of evaluation which it found to be arbitrary in its application. In that case the Teaneck Board of Education had in effect an unwritten personnel practice which required the withholding of a teacher's increment any time absence of more than ninety school days occurred during a school year. Because of serious illness petitioner Kuehn was absent more than ninety school days during the 1979-80 school year. The State Board concluded that to simply state that a teacher who exceeds the ninety-day maximum allowance for absence forfeits an increment, without considering the particular circumstances for absence, is not good cause for the withholding of an increment as required by N.J.S.A. 18A:29-14.

In the present matter, petitioner did consider the nature of the absences. It does not dispute that most of them were the result of legitimate medical problems and that the remaining days were personal days taken pursuant to contractual entitlement. Petitioner has, nevertheless, concluded that because of the magnitude of the numbers and the extensive time period encompassed, the students assigned to respondent's classroom could not have received the thorough and efficient education to which they were entitled. The Commissioner of Education came to the same conclusion in School District of the City of Jersey City, Hudson County v. Catherine Reilly, 1977 S.L.D. 403, wherein in spite of the Superintendent's testimony that he had no knowledge from personal observation of any adverse or detrimental effect respondent's absences (982.5 days over a twenty-year period, most as the result of legitimate medical problems) had upon the classes to which she had been assigned, concluded:

> Frequent absences of teachers from regular classroom learning experiences disrupt the continuity of the instruction process. The benefit of regular classroom instruction is lost and cannot be entirely regained, even by extra effort, when the regular teacher returns to the classroom. Consequently, many pupils who do not have the benefit of their regular classroom teacher frequently experience great difficulty in achieving the maximum benefit of schooling. Indeed, many pupils in these circumstances are able to achieve only mediocre success in their academic program. The entire process of

> education requires a regular continuity of instruction with the teacher directing the classroom activities and learning experiences in order to reach the goal of maximum educational benefit for each individual pupil. The regular contact of the pupils with their assigned teacher is vital to this process.
>
> . . .
>
> In view of respondent's record of chronic absence, the Commissioner is constrained to observe that the Board waited for an excessive period of time to resolve this matter. The Board's delay and inaction demonstrated an abrogation of its mandated responsibility to insure a thorough and efficient educational program for a segment of its pupil population. Redcay v. State Board of Education, 130 N.J.L. 369 (Sup. Ct. 1943), aff'd 131 N.J.L. 326 (E.&A. 1944). (Reilly, at 414-415)

The Commissioner upheld dismissal of the tenured teacher and ordered the School Board to file an involuntary application for disability retirement with the Teachers' Pension and Annuity Fund. In School District of the Township of Washington, Warren County, v. Elizabeth Merkooloff, 1980 S.L.D. 1370, the Commissioner noted that respondent had twice been absent for a year's leave of absence for health reasons and had been absent over 240 sick days. He upheld her removal from her tenured position, concluding:

> The Commissioner views with regret the personal problems and health difficulties that respondent has endured; they have truly been unfortunate. The Commissioner notes that her requested leaves were for reasons relating to her health and observes that these health problems were compounded by her own family problems which impacted severely on her function as a first or second grade teacher. The Commissioner believes that these young pupils in their formative years surely deserve the best education possible with as complete continuity as can be accorded them, recognizing that excessive teacher absenteeism has a deleterious effect on their education. Trautwein, supra; In the Matter of the Tenure Hearing of Catherine Reilly, School District of the City of Jersey City, 1977 S.L.D. 403.
>
> The Commissioner, while sensitive to the problems of teachers, must stress again that which he previously said in Clinton F. Smith et al. v. Board of Education of the Borough of Paramus, 1968 S.L.D. 62:
>
> > "***The principle enunciated by the Court in Bates v. Board of Education, 72 P. 907 (Calif. Sup. Ct. 1903), and quoted with approval in

> McGrath v. Burkhard, 280 P.2d 864 (Calif. App. 1955), bears repeating here:
>
> 'The public schools were not created, nor are they supported, for the benefit of the teachers therein, *** but for the benefit of the pupils and the resulting benefit to their parents and the Community at large.'***" (Merkooloff, at 1371)

I **CONCLUDE** that when absences are as numerous as respondent's herein, the principle of res ipsa loquitur applies. It is unnecessary to provide testimony of an administrator that the absences have adversely impacted the students. The conclusion is obvious; the situation speaks for itself.

Respondent also argues that petitioner may not prevail on tenure charges of chronic and excessive absenteeism because she was never given adequate warning concerning the seriousness of the continuing conduct, along with an opportunity to improve her attendance. Although the Commissioner has said on numerous occasions that a tenured employee should have some warning that his or her supervisors are dissatisfied with the attendance record, I **CONCLUDE** that in a case such as the present, an increment withholding or a formal warning is unnecessary as a prerequisite sanction because it is undisputed that the reasons for the absences were medically legitimate and therefore a sanction or a warning could not be expected to produce improvement in attendance. The law should not require frivolous acts. Furthermore, it would be absurd to conclude that respondent was unaware of petitioner's concerns with respect to the effect her absences had upon her students. As a trained professional, respondent must be aware that when a substitute teacher is in charge of her class intermittently more than one-third of the time, the continuity and quality of instruction is adversely affected.

For all the foregoing reasons, I **CONCLUDE** that the charges of chronic and excessive absenteeism certified by petitioner on April 30, 1992, have been sustained and I **CONCLUDE** that they warrant respondent's removal from her tenured position. Although this decision resolves only one of the seven charges certified by petitioner, because of the conclusion that removal is warranted and because an application for ordinary disability retirement benefits is currently pending before the Board of Trustees of the Teachers' Pension and Annuity Fund, this decision granting petitioner's Motion for Partial Summary Decision is being transmitted to the Commissioner of Education for immediate review as an initial decision, pursuant to N.J.A.C. 1:1-12.5(e), for the purpose of avoiding the necessity for extended testimony from parents and students and the associated expense by the parties of

unnecessary litigation. The remaining undecided charges should be forwarded to the Board of Examiners, who can make an independent determination concerning whether, if true, the allegations would warrant revocation of respondent's teaching certificate and whether under all the circumstances it wishes to proceed against respondent's certificate.

Accordingly, for all the foregoing reasons, it is **HEREBY ORDERED** that respondent is removed from her tenured position and the remaining tenure charges are **HEREBY DISMISSED** without an adjudication on the merits.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

Nov 18, 1993
Date

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

11/18/93
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 23 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

cc

IN THE MATTER OF THE TENURE	:	
HEARING OF FLORENCE TURNER	:	COMMISSIONER OF EDUCATION
RUCKER, SCHOOL DISTRICT OF THE	:	DECISION
CITY OF CAMDEN, CAMDEN COUNTY.	:	
	:	

The record and initial decision of the Office of Administrative Law have been reviewed. Respondent's exceptions were filed beyond the 13-day period permitted by N.J.A.C. 1:1-18.4, having been received on December 8, 1993 in response to an initial decision mailed on November 23, 1993. Consequently, these, and the Board's reply thereto, which was timely filed, are not considered herein.

Upon a careful and independent review of the record of this matter, the Commissioner agrees with the findings and conclusion of the Administrative Law Judge that the charge of chronic and excessive absenteeism certified by the Board on April 30, 1992 has been sustained and that such charge warrants respondent's removal from her tenured teaching position.

Further, in light of the determination that termination is the appropriate penalty with respect to this charge and also recognizing that there is currently an application for disability retirement benefits for respondent before the Board of Trustees of the Teachers' Pension and Annuity Fund, the Commissioner accepts the ALJ's recommended procedural decision that it is unnecessary to

require further litigation of the six remaining charges certified by the Board at this time. She does, however, dismiss these six charges without prejudice in order to preserve the Board's right to move forward in the event that her determination on the one adjudicated charge is reversed on appeal. The Commissioner finds this of particular import since this matter will be transmitted to the State Board of Examiners for its consideration under N.J.A.C. 6:11-.6(a)1 and, as such, this body's review will be limited solely to the one adjudicated charge.

Accordingly, for the reasons expressed by the ALJ, as modified herein, the Commissioner adopts the recommendation of the Office of Administrative Law and directs that respondent be dismissed from her tenured teaching position with the School District of the City of Camden. The remaining six tenure charges are hereby dismissed, without prejudice. The Commissioner further directs that this matter be forwarded to the State Board of Examiners in accordance with the above-referenced regulatory provision for any action it deems appropriate.

Mary Lee Fitzgerald
COMMISSIONER OF EDUCATION

DECEMBER 30, 1993

DATE OF MAILING - DECEMBER 30, 1993

326-93

EDU #4327-92
C # 326-93
SB # 4-94

IN THE MATTER OF THE TENURE :
HEARING OF FLORA TURNER RUCKER, : STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF : DECISION
CAMDEN, CAMDEN COUNTY. :
:

Decided by the Commissioner of Education, December 30, 1993

For the Petitioner-Respondent, Murray, Murray & Corrigan
(Karen A. Murray, Esq., of Counsel)

For the Respondent-Appellant, Franco & Franco
(Robert A. Franco, Esq., of Counsel)

The State Board of Education affirms the decision of the Commissioner of Education dismissing respondent from her tenured employment for the reasons stated therein.[1]

S. David Brandt opposed.

August 3, 1994

Date of mailing AUG 04 1994

[1] We note that, although an additional certification filed by respondent on July 15, 1994 was untimely, in reviewing this matter we have considered the representations contained in such certification and find nothing therein that would alter our determination.

327-93

327-93

WILLIAM J. SKOWRONSKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, riffed supervisor, alleged Board retained nontenured or less senior supervisors in violation of his rights. Petitioner also laid claim to the newly created position of assistant principal.

ALJ concluded that Board acted within its discretionary authority relative to the RIF and administrative reorganization. Because the RIF was effectuated on September 1, 1992, those who were granted supervisory positions were tenured on that date. Thus, petitioner's tenure rights were not violated by abolition of his position as a supervisor. Moreover, ALJ found petitioner had no tenure entitlement to position as assistant principal insofar as he had not served any period of time in the position of assistant principal and also because the riffed position and the new position were not equivalent for tenure purposes.

Commissioner affirmed in part/reversed in part the initial decision. Commissioner concurred with ALJ that petitioner had no tenure entitlement to a position as assistant principal insofar as he had not served any period of time in position of assistant principal which is separately tenurable pursuant to N.J.S.A. 18A:28-5 and Dennery. Commissioner reversed ALJ's finding that RIF was effectuated on September 1, 1992, instead Commissioner concluded that RIF was effective on date Board acted to abolish, in this case March 17, 1992. Commissioner found therefore that Supervisors Wetzel and Pollock were not tenured at time of RIF but that a remand was necessary to determine if additional certification was required by Board before determination could be made regarding whether petitioner was entitled to either of these supervisory positions. (Timko)

DECEMBER 30, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 6111-92
AGENCY REF. NO. 257-6/92

WILLIAM J. SKOWRONSKI,
Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY,
Respondent.

Wayne J. Oppito, Esq., for petitioner

Russell Weiss, Jr., Esq., for respondent, (Carroll and Weiss, attorneys) (Robert Merryman on the brief)

Record Closed: September 7, 1993 Decided: November 12, 1993

BEFORE LILLARD E. LAW, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, who was subject to a reduction in force (RIF), alleges that the Jackson Township Board of Education (Board) maintained nontenured and/or less senior supervisors in its employ in violation of petitioner's tenure and seniority rights. Petitioner also alleges that the newly created position of assistant principal performs the same duties and responsibilities as petitioner performed in his supervisor position and, therefore, lays claim to the position.

The matter was transmitted to the Office of the Administrative Law (OAL) for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J S.A.* 52:14F-1 to -13. On or about March 26, 1993, the Board propounded a Notice of Motion for Summary Decision, with supporting brief and the Certification of Dominic Cotugno, Superintendent of Schools. In response, petitioner filed a brief in opposition to the Board's motion and argued that the matter was not ripe for summary decision inasmuch as petitioner had not received answers to interrogatories he had served upon the Board. The Board, in reply, argued that the only issue remaining to be resolved were legal issues.

On July 6, 1993, this tribunal determined that since the interrogatories were outstanding, the matter would not be decided in a summary fashion. This tribunal held, however, that in the event the Board provided answers to petitioner's interrogatories, it had leave to reinstate its Motion for Summary Decision.

Ms. Jeanne Pollock and Mr. Richard Wetzel were granted leave to intervene in the instant matter as individuals who will be substantially, specifically and directly affected by the outcome the case in the event petitioner prevails. *N.J.A.C.* 1:1-16.1 to 16.5.

All interrogatories from both sides have been answered and the Board now renews its Motion for Summary Decision, in which Intervenors join.

LEGAL ARGUMENTS OF THE PARTIES

THE BOARD'S POSITION

STATEMENT OF FACTS

This matter arises out of the actions of the Board in reorganizing its administrative and supervisory staff. At a meeting on March 17, 1992, the Board voted to abolish eight supervisory positions including the position held by petitioner. The effective date of the elimination of these positions was September 1, 1992.

At the meeting on March 17, 1992 the Board also voted to created four new assistant principal positions with an effective date of hire of July 1, 1992. The four assistant principal positions were filled at a meeting on April 14, 1992. At the meeting on April 14, 1992 the effective date of the new positions was changed to September 1, 1992. All persons appointed as assistant principal had held one of the abolished supervisory positions.

As set forth in the certification of Dr. Dominic Cotugno, Superintendent of Schools, the organization and elimination of supervisory position was necessitated by budgetary constraints and increased student enrollment. Because of a significant loss of state aid for the 1992-93 school year, the district eliminated 24 teaching positions and reorganized its supervisory staff by eliminating eight supervisor titles and creating four assistant principal positions. This arrangement allowed the district to save money through a net elimination of four supervisory positions, while enhancing the district's ability to deal with the needs of its increasing student population by having additional assistant principals.

In accordance with his seniority rights petitioner was offered a teaching position. However, in a letter dated July 1, 1992, petitioner gave noticed that he declined the teaching position.

In his petition, petitioner alleges that at the time the Board acted to reorganize its supervisory staff and abolish petitioner's position the Board retained nontenured supervisors in the supervisor positions. Petitioner further alleges that the Board retained Supervisors of Instruction with less seniority than petitioner. Finally, petitioner alleges that the newly created positions of assistant principal have substantially the same duties as the Supervisor of Instruction position and the appointment of nontenured persons to the position of assistant principal was in violation of his tenure rights.

All persons retained in supervisor positions after September 1, 1992, were tenured as teachers and supervisors prior to that date; with two persons acquiring supervisory tenure after the Board meeting of March 17, 1992. These individuals are Richard Wetzel, Supervisor of Educational and Business Technology and Jeanne Pollock, Supervisor of Instruction - Basic Skills (K-12). Mr. Wetzel was appointed to his current position on September 1, 1990, and obtained tenure as a supervisor on August 31, 1992, while Ms. Pollock was appointed to her current position on June 1, 1992, and obtained tenure as a supervisor on May 31, 1992.

The duties of the assistant principal and the duties of the Supervisor of Instruction - Math/Science are set forth in the attached job description of both positions.

POINT I

PETITIONER MAY NOT ASSERT A TENURE RIGHT TO A SUPERVISORY POSITION BECAUSE ALL OF THE SUPERVISORS WHO REMAINED IN POSITIONS AFTER THE REDUCTION IN FORCE ARE TENURED.

Petitioner alleges, in paragraph 5 of Count I of his petition, that at the time of the Board's action to abolish his position, the Board retained nontenured supervisors in a supervisor position. While it may be true that on the date the Board voted to abolish some of the supervisory positions, March 17, 1992, two of the supervisors who were eventually retained were not tenured, that fact has no legal significance. Tenure and seniority rights must be determined as of the effective date on which the positions were abolished. In the instant matter that date was September 1, 1992. On that date all of the supervisors retained were tenured.

Richard Wetzel (Supervisor of Education Business Technology) and Jeanne Pollock (Supervisor of Basic Skills, Grades K-5) had not yet earned tenure on the date of the Board's action but both had acquired tenure prior to the effective date of the RIF, September 1, 1992. Pursuant to *N.J.S.A.* 18A:28-6 (a), any tenured teaching staff member who is transferred or promoted to a calendar year position shall obtain tenure in the new position after the expiration of a period of two consecutive calendar years. Mr. Wetzel has been employed by the district since 1970 and has held his supervisor position since September 1, 1990. Ms. Pollock has been employed by the Board since 1970 and has held her supervisor position since June 1, 1990. Therefore, by the time the Board's action took effect on September 1, 1992, both Mr. Wetzel and Ms. Pollock did in fact have tenure in their supervisor positions since they had both served in those positions for two consecutive calendar years.

In *Hill v. Board of Education of West Orange,* 1985 *S.L.D.* _____, OAL Dkt. No. EDU 4113-84 (December 5, 1984), aff'd Comm. of Education (January 21, 1985), aff'd State Board of Education (May 1, 1985), aff'd App. Div. A-4355-84TI (February 10, 1986), the Commissioner addressed a claim that the then recently enacted

regulations should not be applied to determine seniority rights. The petitioner argued that her seniority rights "accrued" prior to the enactment of the regulations. In rejecting this argument the Commissioner accepted the conclusion of the Administrative Law Judge that "[t]eachers possess inchoate seniority rights until such time as a dismissal actually occurs."

The reasoning of the Commissioner in *Hill* is applicable to the instant matter. Until the time when petitioner's position was actually abolished, any tenure or seniority rights were merely speculative. Up until that point, the Board was free to rescind its action and retain some or all of the supervisor positions which had been eliminated. The effective date of the abolishment would be the only logical point for determining employment rights. The Board must act in advance of the effective date in order to give notice to the affected employees and to give the administration the opportunity to make the necessary scheduling changes.

Respondent is aware of two recent decisions which addressed a similar issue. In *Francey v. Board of Education of the City of Salem,* 92 *N.J.A.R.* 2*d.* (EDU) 449 (July 22, 1992), (appeal pending), and *Johnstone v. Board of Education of the Township of Cinnaminson,* 92 *N.J.A.R.* 2*d.* (EDU) 506 (August 12, 1992) (appeal pending), the Commissioner addressed the issue of whether teachers who obtained additional endorsements after a RIF are entitled to positions that became available as a consequence of the RIF. The Commissioner concluded that an individual's tenure rights to recall are frozen on the date of the action of the Board to RIF. The effect of this holding was that the petitioners were not entitled to new positions for which they became certified after the date of the RIF.

These cases, however, are clearly distinguishable from the instant matter. In fixing the date for determining tenure rights, the Commissioner in *Francey* and *Johnstone* was concerned with the uncertainty and administrative burden on the school district inherent in permitting individuals to obtain new certification which would require a redetermination of tenure and seniority rights. In the instant matter there was no uncertainty as to the tenure rights of each supervisor. It was known on March 17, 1992, what the tenure rights of each supervisor would be as of the effective date of the RIF and no one is claiming additional rights based upon new certification.

It must also be recognized that both Mr. Wetzel and Ms. Pollock have clearly obtained tenure in their respective supervisor positions. "When service of a teaching

staff member has been rendered for the complete period required by statute a tenure status is accrued at the precise moment when the requisite period has expired." *McGlynn v. Board of Education of the Township of Lumberton,* 1972 *S.L.D.* 28, 33 (February 3, 1972). As long as an individual serves in the position for the requisite time period, tenure status can be obtained even where the individual was not officially appointed to the teaching staff position, *Givens v. Board of Education of the City of Newark,* 1974 *S.L.D.* 906 (0ctober 7, 1974), or where the individual served for a time period after not being renewed in the position *Makoski v. Board of Education of the Township of Woodbridge,* 1980 *S.L.D.* 374 (March 7, 1980). Therefore, there is no question that as of September 1, 1992, all the supervisors had obtained tenure status. No action can now be taken without circumventing the tenure rights of one or more of the supervisors.

Therefore, there is no merit to petitioner's claim that nontenured supervisors were retained after his position was abolished and Count I should be dismissed in its entirety.

POINT II

PETITIONER HAS NO SENIORITY RIGHTS TO THE OTHER SUPERVISOR POSITIONS SINCE THEY WERE IN SEPARATE CATEGORIES FROM HIS POSITION

In Count Two, petitioner claims a seniority entitlement to positions held by tenure supervisors who have shorter periods of service in supervisor positions.

Pursuant to *N.J.A.C.* 6:3-1.10(b) (now, *N.J.A.C.* 6:3-5.1(b)) seniority is determined by the number of years spent in "specific categories." The specific categories are set forth in *N.J.A.C.* 6:3-1.10 (1) (*N.J.A.C.* 6:3-5.1 (1)). Under that

section, the twelfth (now, tenth) category is Supervisor. However, in that category it is stated that:

> each approved supervisory title shall be a specific category. District boards of education shall adopt job descriptions for each supervisor position which set forth the qualifications and specific endorsements required for such position.[1]

It is clear from the language of this section that an individual will only obtain seniority in the specific supervisor title he or she holds. As set forth in the regulation, the specific titles and the requirements for each supervisory position are to be set by the board of education. In the instant matter petitioner would only obtain seniority in the specific supervisor position he held, Supervisor of Instruction - Math/Science.

Such a result has been reached in other seniority cases. In *Frissell vs. Board of Education of the Township of West Orange,* 1985 *S.L.D.* _____, OAL Dkt. No. EDU 20-85 (July 8, 1985), the petitioner, who held the supervisor title of Director of Art, claimed seniority rights in a newly created position of Director of Fine Arts which encompassed the duties of the Director of Art and Director of Music. In concluding that the petitioner had no seniority rights to the new position, the Commissioner held that petitioner's seniority accrued only in his old position. Since the new position was a separate category under *N.J.A.C.* 6:3-1.10 (1) (10), petitioner had no seniority entitlement to the position.

Similarly, in *Weinstein vs. Board of Education of the Township of Old Bridge,* 91 *N.J.A.R. 2d.* (EDU) 102 (November 1, 1991), the petitioner claimed that her seniority rights were violated when she was not appointed to a new supervisory position, Basic Skills Supervisor, after her position as Coordinator of the Gifted and Talented

[1] Section *N.J.A.C.* 6:3-5.1(1)10.1 provides that: "Each supervisory title shall be a specific category; and

ii District boards of education shall adopt a job description for each supervisory position which sets forth the qualifications and specific endorsements required for each position.

Program was eliminated. The petitioner claimed that she had more seniority as a supervisor than the tenured supervisor who was appointed to the new position. The Commissioner rejected this argument, holding that neither individual had obtained seniority in the position, since neither had served in that specific category.

In a more recent decision, *Notaro vs. Board of Education of the Township of Old Bridge,* 92 *N.J.A.R.* 2*d.* (EDU) 568 (September 17, 1992), the Commissioner concluded that the board did not violate the petitioner's seniority rights when it appointed individuals less senior to department chairmanships. The petitioner, who had held the position of chair of the Driver Education Department, claimed entitlement by reason of his seniority to the position of chair of five other departments after his position was abolished. *Id.* at 569. It was held that the positions in issue were essentially supervisor positions and that for purposes of seniority each supervisor title shall be a separate category. Since the petitioner did not serve in any of the other chair positions, he had no seniority to any of those positions. *Id.* at 571.

In the instant matter petitioner has no seniority rights in any of the other supervisory positions. Petitioner has not served in any other categories and, therefore, has no seniority right to any other supervisory title.

POINT III

PETITIONER HAS NO TENURE RIGHT TO A POSITION AS ASSISTANT PRINCIPAL

Petitioner was tenured in the position of Supervisor of Science/Math. His duties, as described in the job description for the position, primarily involved supervision of staff and curriculum in the areas of mathematics and science. The newly created position of assistant principal, while containing some staff supervision duties, also includes responsibilities for student supervision and discipline as well as responsibility for staff and curriculum on a school wide basis.

Petitioner claims that his tenure rights were violated when nontenured persons were appointed to the new assistant principal positions instead of him. It is asserted

that the duties of the assistant principal position are substantially the same as his duties as supervisor.

The argument presented by petitioner has been considered and rejected by the Commissioner in other cases. *In Miller v. New Providence Board of Education,* 1987 *S.L.D.* 23 (January 8, 1987), the petitioner, who was tenured as Supervisor of Physical Education, claimed that his tenure rights were violated when his position was eliminated and he was not assigned to the new position of Vice Principal/Supervisor of Physical Education. In denying that claim, the Commissioner concluded that while the duties of the two positions overlap, the new position contained duties not included in the Supervisor position. The Commissioner concluded that the petitioner had no tenure rights to the new position as he had never performed any of the major duties of Vice Principal, nor had he previously acquired tenure in the position of Vice Principal. (*Id.* at p.43).

In *DeCarlo v. Board of Education of the Borough of South Plainfield,* 1988 *S.L.D.* 1796 (August 20, 1988), the petitioner made essentially the same argument made by petitioner in the instant matter. In *DeCarlo* the petitioner claimed seniority to a newly created assistant principal position, arguing that there was effectively no difference between his supervisor position and the assistant principal position. The Commissioner concluded that "[b]ecause supervisors and assistant or vice principals are separately tenurable positions pursuant to statute, *N.J.S.A.* 18A:28-5, petitioner acquired tenure as a supervisor, not as a vice principal, notwithstanding the fact that he may have also held a principal's endorsement." *Id.* at 1810. Second, the Commissioner found that although the descriptions of the two positions demonstrated some overlap duties, there were "significantly distinguishing duties" between the two positions. *Id.*

In *DiSimoni v. Board of Education of the Passaic Reg. High School Dist.* 1990 *S.L.D.* 1249 (July 2, 1990), aff'd State Board, 1991 *S.L.D.* 2540 (April 2, 1991), the State Board of Education affirmed the holding of the Commissioner that a tenure supervisor, with a principal certificate, had no tenure rights to a newly created position of associate principal, which fell under the title of assistant/vice principal. The State Board concluded that the position of assistant principal is among those specifically enumerated in *N.J.S.A.* 18A:28-5 and, therefore, is separately tenurable from supervisory positions.

Most recently in *Kish v. Board of Education of the Borough of Elmwood Park,* 92 *N.J.A.R.* 2*d.* (EDU) 367, the Commissioner rejected the claim of a tenured supervisor, whose position had been eliminated, of tenure rights to the newly created position of Administrative Assistant to the Superintendent of Curriculum and Instruction and/or to a principal position. The petitioner had argued that the duties of the new position were similar to the duties she had performed as supervisor. It was held that the petitioner was tenured solely as a supervisor, which is a position separately tenurable from that of assistant superintendent. In addition, despite the fact that the petitioner had served as an elementary school principal for four months, she had no tenure rights to this position since any tenure petitioner obtained was solely as a supervisor. (*Id.* at 140) In affirming the Commissioner, the State Board noted that "tenure is achieved with in a 'position', and tenure protection as against nontenured individuals following a reduction in force extends only to assignments within that tenured position ..." 92 *N.J.A.R.* at 367.

The foregoing cases clearly demonstrate that petitioner's claim is without merit. A comparison of the job descriptions of Supervisor of Science/Math and assistant principal will show that there are "significantly distinguishing duties" between the two positions. As Supervisor, petitioner was not responsible for supervising the placement of students. Nor was he responsible for supervising student activities. While petitioner did have a duty to "assist in the maintenance and development of student control procedures and policies" he was not "responsible for student discipline." The descriptions of the two positions indicate that as Supervisor of Science/Math, petitioner was primarily responsible for the development and implementation of curriculum in his specific area of assignment. An assistant principal, on the other hand, is responsible for supervision of curriculum and personnel for the entire school as well as supervising student placement and activities. In addition, the assistant principal is expected to assume the duties of principal in the principal's absence. It is clear, therefore, that the duties of the assistant principal are much broader and significantly different from those of a supervisor position.

The positions in the instant matter are not only "substantially different," but also require different endorsements. While petitioner may in fact hold a principal endorsement, he has never served under this endorsement. In fact, the supervisor position in which petitioner served does not even require a principal endorsement.

In the instant matter any tenure rights accrued by petitioner were in his supervisor position. Since the position of assistant principal is a separately tenurable position, and is one which requires a certificate under which petitioner has never served, he had no tenure rights to the position. The assignment of nontenured individuals to the newly created positions of assistant principal did not violate petitioner's tenure or seniority rights. Each of the individuals appointed as assistant principal had the appropriate certificate and endorsements and had served as a supervisor in the school district. If the choice is between a group of qualified nontenured individuals, the Board can select the candidate it determines to be the most qualified for the position. *Weinstein,* 91 *N.J.A.R.* 2*d.* at 104.

PETITIONER'S POSITION

POINT I

PETITIONER IS ENTITLED TO THE NEWLY CREATED POSITION OF ASSISTANT PRINCIPAL

It is uncontroverted that respondent employed petitioner as a supervisor of instruction. For the purposes of this point only, it is not relevant as to whether this position was a position of general supervisor or supervisor Math/Science.

N.J.S.A. 18A:28-5 sets forth the requirements for attaining tenure and the positions in which tenure may be attained. In the list of positions in the statute in which tenure is attainable, the position of supervisor is not one of those enumerated. A person employed in said position attains tenure pursuant to the language in *N.J.S.A.* 18A:28-5 which states "in positions which require them to hold appropriate certificates issued by the board of examiners." The board of examiners issues three type of certificates: instructional, educational services and administrative (*N.J.A.C.* 6:11-2.3). In the instant matter, petitioner was required to have an administrative certificate with a supervisor endorsement (*N.J.A.C.* 6:11-9.3 (c)) and therefore has attained tenure under the administrative certificate.

The Supreme Court recently addressed the issued of tenure rights as they relate to the statutory language "in positions which require them to hold appropriate certificates issued by the board of examiners" in *Dennery v. Passaic Co. Reg. Board of Education,* Docket No. A-23/24-92, decided April 8, 1993. The Court found:

> Those endorsements coincide with the educational subjects or positions that share common attributes and thus are grouped under a particular certificate.
>
> An educator who has attained tenure by virtue of the requisite service in a specific position will have tenure with respect to all positions under the particular certificate. *Ellicott v. Board of Education,* 251 *N.J. Super.* 342, 349 (App. Div. 1991). Tenure under any one endorsement entitles an educator to tenure under all endorsements obtained under his or her certificate. *Id.* at 350; *Bednar v. Westwood Board. of Education,* 221 *N.J. Super.* 239 (App. Div. 1987) (holding that tenured teacher with instructional certificate and endorsement in art also entitled to tenured post requiring secondary art endorsement), *certif. denied,* 110 *N.J.* 512 (1988); *Capidolupo v. West Orange Township Board. of Education, 218 N.J. Super.* 510 (App. Div.) (holding that teacher with both elementary and secondary physical education endorsements was tenured under both endorsements), *certif. denied,* 109 *N.J.* 514 (1987); *Grosso v. Board of Education,* 1990 *S.L.D.* 1750.
>
> *Thus, an educator with tenure in any endorsement that he or she possesses can, in effect, extend or transfer that tenure to other endorsements that are subsumed under the same certificate. (emphasis supplied)* slip opinion at pp.7-9.

In the matter of *sub judice,* it is uncontroverted that petitioner has tenure in the endorsement of supervisor on the administrative certificate. *N.J.S.A.* 18A:28-5 does not list supervisor as a position in which to attain tenure. Rather tenure in the position of supervisor is attained in accordance with the language, "in positions which require them to hold certificates issued by the board of examiners." The board of examiners does not issue a supervisor certificate. The board of examiners

issues an administrative certificate with a supervisor endorsement. The Supreme Court in *Dennery, supra.* has determined that:

> Thus, an educator with tenure in any endorsement that he or she possesses can, in effect, extend or transfer that tenure to other endorsements that are subsumed under the same certificate. slip opinion at p. 9.

The administrative certificate with an endorsement of principal is required for the position of assistant principal. *(N.J.A.C.* 6:11-9.3 (b)) It is uncontroverted that respondent has employed nontenured persons in the position of assistant principal. According to the Supreme Court in *Dennery,* petitioner can transfer his tenure under the supervisor endorsement of the administrative certificate to the principal endorsement of the administrative certificate because both endorsements are subsumed under the same certificate, the administrative certificate. Furthermore, in accordance with *Bednar, supra.* and *Capidolupo, supra.,* petitioner is entitled by virtue of his tenure to the position of assistant principal rather than the nontenured persons currently employed as assistant principal.

POINT II

THE EFFECTIVE DATE OF SEPTEMBER 2, 1992 FOR THE REORGANIZATION OF ADMINISTRATIVE AND SUPERVISORY STAFF WAS INTENDED TO CIRCUMVENT PETITIONER'S TENURE AND SENIORITY RIGHTS

The Board acted on March 17, 1992 to eliminate certain supervisory positions, while retaining nontenured supervisors on that date, effective at the end of the workday on September 1, 1992, which in actuality and reality meant that the supervisor reorganization became effective September 2,1992. The creation of the new assistant principals positions, also at issue in this matter, became effective on July 1, 1992. July 1 is the commencement date of the school year and would be the logical starting date for the reorganization except that the supervisors work the 12 month calendar year and not the 10 month academic year.

The commencement date of September 2, 1992 was intended to circumvent petitioner's tenure rights. Between March 17, 1992 and September 2, 1992, nontenured supervisors attained tenure. One of the supervisors retained, attained

tenure on September 1, 1992. He would not have attained tenure if the reorganization became effective on September 1, 1992. Hence the reorganization became effective September 2, 1992. The board wished to retain a nontenured supervisor to the detriment of petitioner. In order to circumvent petitioner's tenure right, the board artificially created September 2, 1992 as the commencement date of the reorganization making its action arbitrary, unreasonable and/or capricious. Of further note, the teachers in the Jackson school district commenced work for the 1992-93 school year on September 1, 1992. On that date, petitioner was still employed as a supervisor. The reorganization became effective on September 2, 1992 after all the retained supervisors had attained tenure. Petitioner was reassigned as a teacher effective September 2, 1992, the day after all the other teachers commenced employment. It is clear that the effective date of September 2, 1992 for the reorganization was arbitrary, unreasonable and/or capricious and intended to circumvent petitioner's tenure rights.

In *Francey v. Salem Board of Education,* 92 *N.J.A.R.* 2*d.* (EDU) 449 (July 22, 1992) (appeal pending), the Commissioner determined that a teaching staff member's seniority rights commence at the time of a RIF:

> In applying the protections of the tenure statutes, which concededly confer a preferred status upon tenured employees who lose their employment through no fault of their own, the Commissioner must also balance the Board's legitimate need to be able to rely upon the determinations of individual employee entitlement made at the time of a RIF. Within the statutory scheme, it is clear that the act of reducing a tenured staff member's employment is the distinct and self-limited event that triggers the affected party's entitlement, the evaluation of his or her individual entitlement status and the consequent assignment to either another position in the district or the preferred eligibility list; nor is it of any importance that the latter is strictly speaking a creature of seniority entitlement, as the concept of a fixed list from which subsequent vacancies are to be filled is applicable to tenure entitlement as well.
>
> *In this context, the date of any employee's RIF can be the only reasonable date certain on which the employee's rights can be reckoned for future entitlement purposes.* (emphasis supplied) *Id.* at 453.

See also *Thomas S. Marshall v. Board of Education of Township of Neptune, Monmouth County,* Superior Court Appellate Division, Div. Dkt. No. A-2595-85T1,

unpublished, March 10, 1987; *Patrick Fitzpatrick et al. v. Board of Education of the Township of Weehawken,* 1982 *S.L.D.* 1500 (App. Div.); *Dorothy Godwin Davis v. Board of Education of the Township of Ewing, Mercer County,* decided by the Commissioner April 29,1 985, aff'd State Board September 4, 1985.

It is uncontroverted that the action to reorganize was on March 17, 1992. If this is the date of the RIF as set forth in Board minutes, then respondent clearly violated petitioner's tenure rights as a supervisor since it admits that there were nontenured supervisors on this date. As the State Board indicated in *Marshall v. Neptune Board of Education, supra.* 1986 *S.L.D.* 3087, 3089 (State Board) January 8, 1986):

> We emphasize that the reduction in force in this case occurred in April, 1984. Upon that reduction, the seniority rights of the affected teachers were triggered.

Even assuming *arguendo* that the reorganization was to be effective for the 1992-93 school year, the 1992-93 school year commenced July 1, 1992 and respondent has admitted that it had retained at least one nontenured supervisor on that date. Accordingly, the retention of a nontenured supervisor violated petitioner's tenure rights. See *Herbert v. Middletown Board of Education, (*Comm. dec. July 25, 1989), *Rogers v. Highland Park Board of Education,* (Comm. dec. May 10, 1990), *Brusky v. Neptune Board of Education,* (Comm. dec. February 1, 1990), *Schaeffer v. South Orange-Maplewood Board of Education, (*Comm. dec. March 14, 1988).

THE BOARD'S REPLY

POINT I

PETITIONER HAS NO TENURE RIGHT TO THE POSITION OF ASSISTANT PRINCIPAL

Petitioner argues in his brief that the dictum in the *Dennery* case controls the outcome of the instant matter and entitles petitioner to the position of assistant principal. *Dennery v. Board of Education,* 131 *N.J.* 626 (1993)

The basic difference between the arguments made by petitioner and the Board, hinges on the contrasting approaches to the use of precedent found in the briefs in this matter. Petitioner quotes dictum from the Supreme Court in the *Dennery* case (which addressed a different issue) and contends that the principles of that dictum are controlling of the instant matter, while completely ignoring the directly applicable decisions of the Commissioner and State Board cited in the Board's brief. The Board, on the other hand, relies on the clear precedent of the decisions of the Commissioner and State Board which specifically hold that tenure as a supervisor does not confer a tenure right to a position as assistant principal, while treating the dictum in the *Dennery* case as just that - dictum. The Board contends that its approach is clearly the more reliable of the two, particularly since the dispute in this case involves the problematic area of tenure rights.

As this Court is aware, the issue of the scope of tenure rights in the event of a RIF has been the source of great confusion and considerable litigation ever since the 1986 decision of the State Board in the *Capidolupo* case. One clear lesson that can be learned from this confusion is that the outcome in a particular case cannot be determined by simply looking to broad principles which appear to emerge from prior decisions, as witnessed by the numerous remands and reversals appearing in this line of cases.

Indeed, the *Dennery* case itself is a good example of how difficult it is to extend a principle from one case to another. The petitioner in *Dennery* obviously felt that the then existing case law would permit her tenure as a guidance counselor to give her an entitlement to a supervisory position. The Commissioner and State Board, of course, held that she had no such entitlement, and that determination was ultimately upheld by the Supreme Court. But the petitioner in *Dennery* cannot be faulted for having instituted that litigation. The precise issue in that matter had never been addressed and there were some general principles in the earlier decisions which, out of context, appeared to support her argument. But now that the *Dennery* issue has been decided, there is no need for additional litigation on broad principles where that issue is concerned, and it is easy to predict the outcome of the next case to raise the identical issue.

In the instant matter, the issue to be decided is not a new one and we need not resort to broad principles to reach a decision. The Commissioner and State Board of Education have already held that tenure in a supervisory position does not afford a person tenure rights to a position as assistant principal. *DiSimoni v. Passaic Regional*

High School District, 1990 *S.L.D.* 1249 aff'd St. Bd. 1991 *S.L.D.* 2540; *DeCarlo v. South Plainfield Board of Education,* 1988 *S.L.D.* 1796; *Miller v. New Providence Board of Education,* 1987 *S.L.D.* 23. See also, *Kish v. Elmwood Park Board of Education,* 92 *N.J.A.R.* 2*d.* (EDU) 134 (1/16/92) aff'd St. Bd. 92 *N.J.A.R.* 2*d.* (EDU) 367. As a result of these decisions the rule has now been established that a person with tenure in a supervisory position may not lay claim to a position as assistant principal. Thus, the outcome of a case such as the instant matter is easily predictable.

Wishing to avoid the certain dismissal which would result from these cases, petitioner ignores each of these cases and instead relies on an expansive interpretation of the broad policy discussion contained in the Supreme Court's dictum in *Dennery.* While dicta of the Supreme Court can have considerable, if not controlling weight in the area of the law which is undecided, we are not dealing here with an undecided issue. The Commissioner and State Board have determined that the type of tenure right claimed by petitioner does not exist, and there is not a shred of evidence in the *Dennery* decision to indicate that the Supreme Court intended to reverse that type of holding. To the contrary, the Supreme Court strongly asserts the deference which the courts should afford to decisions of the Commissioner and State Board.

> Although the Appellate Division has here concluded that the distinction between multiple endorsements under one certificate and multiple certificates is not "meaningful" for purposes of tenure, that judicial assessment cannot in this context displace the contrary administrative view.
>
> The Legislature intended that the State Board "promulgate specifications concerning the categories of certification" and that courts not intervene "unless the State Board's decision is palpably arbitrary." ... The delegation of regulatory and administrative responsibility over tenure to the State Board is based on the complexity and specialized nature of the subject of teacher tenure ... Our courts have long recognized the importance of allowing the State Board to devise the requirements governing both students and teaching staff. *Dennery, supra.* 131 *N.J.* at 636-37.

It is evident from the above passage that a key aspect of the holding in *Dennery* was the deference paid to the decisions of the Commissioner and State Board. There is no reason to conclude anything other than that the Supreme Court would also pay

equal deference to the decisions of the Commissioner and State Board in *DiSimoni, DeCarlo, Miller and Kish.*

POINT II

SEPTEMBER 1, 1992 IS THE PROPER DATE ON WHICH TO DETERMINE TENURE AND SENIORITY RIGHTS

Petitioner argues in his brief that the Board somehow circumvented his tenure rights by adopting a resolution in April 1992 to have a reorganization take affect on September 1, 1992. Petitioner asserts that since two of the Supervisors did not attain tenure until after the Board acted, but before the reorganization took effect, the tenure right he would have been able to assert in March 1992 should apply on September 1, 1992, when the reorganization took effect. Petitioner further maintains that the reorganization should have been effective either on the date of the Board action (March 17, 1992) or at the commencement of the following school year (July 1, 1992), a date which he declares to be the logical starting date for such a reorganization.

Petitioner's arguments are off the mark in several ways. First, a board of education clearly has the authority to eliminate positions and reorganize its administrative staff. In this instance, the Board decided that such a reorganization would take effect on September 1, 1992. Apparently, petitioner would have preferred the Board to have adopted its resolution to reorganize on September 1, 1992, with a simultaneous effective date. Had the Board done that, it would seem that petitioner would have no basis upon which to make a claim of circumvention of tenure rights. The problem, of course, with such a methodology is that none of the individuals involved would receive advance notice of the plan and no preparation for the transition could take place. While petitioner may feel that July 1 is a more logical date, his logic overlooks the fact that such a reorganization scenario would leave virtually no time after the close of the academic year for a transition, and would leave no opportunity for supervisors to take vacation time during the summer months. Can there be any logic to an interpretation of the tenure laws which would preclude a board of education from providing advance notice and time for planning and transition when effecting a reorganization?

Petitioner's arguments also fail to recognize the tenure rights of the other two supervisors involved, Jeanne Pollock and Richard Wetzel. Petitioner would have the

determination of tenure rights be made based on facts in existence on March 17, 1992. The problem with such an approach is that it ignores the fact that by the time the reorganization took effect (September 1, 1992) both Ms. Pollock and Mr. Wetzel earned tenure by serving two consecutive calendar years in the positions to which they were promoted from their prior tenured teaching positions. *N.J.S.A.* 18A:28-6 (a). Both Pollock and Wetzel served the requisite statutory time period for tenure, and it would be their rights that would be circumvented if the Board were to arbitrarily determine tenure rights based on the facts in existence on March 17, 1992. It should also be noted, that there is no significance to the fact that the Board's resolution indicated that the resolution was to take effect at the end of the work day on September 1, 1992, rather than at the beginning of the work day. That timing issue is truly of no significance, since Mr. Wetzel earned tenure at the end of the work day on August 31, 1992, by operation of statute, and already enjoyed tenure at the beginning of the work day on September 1, 1992. Hence, even without the language referring to the end of the work day, the result in this case would be no different.

Finally, the cases relied on by petitioner to support a claim that the March 17, 1992, date is the date for determining tenure rights are not applicable to the issue in this matter. The cases of *Francey* and *Johnstone* are fully discussed in the Board's original brief in support of the motion for summary decision. Those cases were decided in favor of the board of education in each instance, and simply stand for the proposition that an employee who is the subject of a RIF may not increase his or her seniority rights by acquiring additional certifications/endorsements after a board has adopted a resolution to bring about a RIF. In the instant matter, it is the tenure rights of Pollock and Wetzel which were acquired after the date of the Board's action and those are rights which may not be circumvented. Similarly, the *Marshall* case cited by petitioner is also inapplicable. *Marshall v. Neptune Board of Education,* 1986 *S.L.D.* 3087 (St. Bd.), dealt with the question of whether the new seniority regulations which took effect a few months after the board adopted a resolution riffing certain staff members, should be made retroactive in application. That case held that the regulations would not be made retroactive. Again, the issue in the instant matter is far different, since there was no question of statutory tenure acquisition at issue present in that matter.

DISCUSSION AND CONCLUSIONS

I

The Board seeks to dismiss the instant petition by way of summary decision, pursuant to *N.J.A.C.* 1:1-12.5. Petitioner opposes the Board's motion and cross-moves for summary decision in his favor.

The administrative rule *N.J.A.C.* 1:1-12.5, is substantially similar to New Jersey Court Rules, *R.*4:46-2, which has been subject to judicial interpretation and provides that upon motion duly filed, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

In *Judson vs. Peoples Bank & Trust Company of Westfield,* 17 *N.J.* 67 (1954), the Supreme Court set forth the purpose of the Summary Judgment Rule and established the standards a court should follow in applying the rule. The Court emphasized that the movant has a very heavy burden to clearly establish that no genuine issue of material fact exist. Justice William J. Brennan, writing for the Court observed, among other things, that the role of the judge on a motion for summary disposition is first to determine whether there is a genuine issue of material fact, but not to decide the issue if he/she finds it to exist. *Judson at 73.*

Justice Brenner continues in *Judson* to observe that summary judgment procedure is designed to provide for the prompt, businesslike and inexpensive method of disposing of any cause which clearly shows no genuine issues of material fact requiring disposition at a trial, after a discriminating search of the merits of the pleadings, depositions and admissions on file, together with affidavits submitted. *Id.* at 74. The Court also held, among other things, that where the party opposing a motion for summary disposition offers only facts which are immaterial or of an insubstantial nature, the court may grant summary judgment, "... taking as true the statement of uncontradicted facts in papers relied upon by the moving party, such papers themselves not otherwise showing the existence of any issue of material fact." *Id.* at 75.

More recently, the Supreme Court noted that "excessive caution would undercut the purposes of a motion for summary judgment, which provides a means for piercing the allegations in the pleadings to determine whether there are issues requiring disposition at trial." *Pierce v. Ortho Pharmaceutical Corp.* 84 *N.J.* 58, 65, (1980).

Having carefully examined the whole record before me, I **CONCLUDE** there are no genuine issues of material fact extant in the instant matter.

Accordingly, I **CONCLUDE** that the herein matter, pursuant to the Board's motion, meets the *Judson* criteria for summary disposition.

II

Under the provisions of Executive Order No. 66 (1978), the rules at *N.J.A.C.* 6:3 expired on July 8, 1993. The State Board of Education, therefore, considered the recommendations of the Department of Education, (25 *N.J.R.* 1095 to 1107). After Public comment, it repealed *N.J.A.C.* 6:3-1.7 and 1.16; and readopted and recodified the remainder of the chapter, with amendments (25 *N.J.R.* 2249 to 2260). The former *N.J.A.C.* 6:3-1.10 is now *N.J.A.C.* 6:3-5.1, *Standards for determining seniority.*

Pursuant to the regulations,"Each supervisory title shall be a separate category;" *N.J.A.C.* 6:3-5.1 (1) 10 i. In addition, "District boards of education shall adopt a job description for each supervisory position which sets forth the qualifications and specific endorsements required for such position." *N.J.A.C.* 6:3-5.1 (1) 10 ii. This recodified rule is substantially the same as the former *N.J.A.C.* 6:3-1.10.

The Board, on July 31, 1984, adopted a job description for Supervisor of Instruction -Science/Math for grades 9 through 12. Among the qualifications for the position is the requirement that the individual holding the position be in possession of a valid New Jersey Supervisor's Certificate. Under *N.J.A.C.* 6:11-9.3 (c) *Supervisor,* the regulation provides that:

> This endorsement is required for supervisors of instruction who do not hold a school administrator's or principal's endorsement. The supervisor shall be defined as any school officer who is charge with authority and responsibility for the continuing

> direction and guidance of the work of instructional personnel. This endorsement also authorizes appointment as an assistant superintendent in charge of curriculum and/or instruction.

Thus, the Board's Job Description for Supervisor of Instruction-Science/Math, met the former and current regulatory provisions as to qualifications for the position. The record demonstrates, therefore, that petitioner acquired a tenure status as a teaching staff member under *N.J.S.A.* 18A:28-5 with seniority as a Supervisor of Science/Math, pursuant to *N.J.A.C.* 6:3-5.1 (1) 10. Petitioner has been issued an Administrative Certificate by the State Board of Examiners. *N.J.A.C.* 6:11-2.3; *N.J.A.C.* 6:11-9.1 to 9.7.

III

Petitioner lays claim to the Board's newly created position of assistant principal grounded, in part, upon the New Jersey Supreme Court's opinion regarding tenure rights in *Dennery,* 131 *N.J.* at 634-635. The *Denney* Court observed, however, that:

> The Legislature clearly and pointed has vested responsibility in the State Board to fashion standards and promulgate guidelines concerning the qualification and certification of public educators within the State. *Ellicott, supra,* 251 *N.J. Super.* at 350, 598, *A.* 2*d.* 237. The Legislature intended that the State Board "promulgate specifications concerning the categories of 'certification'" and that courts not intervene "unless the State Board's decision is palpably arbitrary." *Id.* at 350, 598, *A.*2*d.* 237. Agency regulations are accorded substantial deference based on the recognition that "certain subjects are within the peculiar competence of the agency." *In re Amendment of N.J.A.C.* 8:31B-3.31, 119 *N.J.* 531 543, 575, *A.* 2*d.* 481 (1990). The delegation of regulatory and administrative responsibility over tenure to the State Board is based on the complexity and specialized nature of the subject of teacher tenure. *Ellicott, supra,* 251 *N.J. Super.* at 350, 598 *A.* 2*d.* 237. Our courts have long recognized the importance of allowing the State Board to devise requirements governing both students and teaching staff. *See, e.g. Shelton College v. State Board of Education,* 48 *N.J.* 501, 517-18, 226 *A.* 2*d. 612* (1967). *Id.* at 637.

The *Dennery* Court further recognized the State Board's contention that an individual must serve the requisite period of time in a position to meet the statutory and regulatory scheme governing tenure. In addressing this issue, the Court said:

> Pursuant to the current scheme, tenure accrues to a teaching staff member under a certificate only if he or she has also served in a position under that same certificate for a requisite period of time. In *Spiewak v. Board of Education of Rutherford,* 90 *N.J.* 63, 447 *A.* 2*d.* 140 (1982), we concluded that teachers who provided remedial instruction to educationally handicapped children qualified for tenure when they met all statutory qualifications governing tenure. We stated that the language of the statute concerning tenure requirements, *N.J.S.A.* 18A:28-5, was "clear and unambiguous." *Id.* at 74, 447 *A.* 2*d.* 140. We further concluded that by the *express* terms of the statute, an employee of a board of education would be entitled to tenure if "(1) she works in a position for which a teaching certificate is required; (2) she holds the appropriate certificate; and (3) she has served the requisite period of time. *Ibid.* The language of *Spiewak* points to a definitive requirement that a teacher actually perform duties under the relevant certificate in order to obtain tenure under that certificate. *Id.* at 638- 639.

Petitioner has not served any period of time in the position of assistant principal.

Petitioner contends that the duties performed by the assistant principal are similar to those petitioner performed as supervisor. The record demonstrates, however, that the job descriptions for the two positions are distinctly different and that petitioner has never performed all of those duties required of an assistant principal. The *Dennery* Court also addressed this issue when it said:

> When the duties of the position in which a teaching-staff member has acquired tenure are substantially identical to those of the position that the person seeks, a local school board may not sidestep an educator's tenure rights by simply renaming the position or tacking on additional meaningless requirements. The local board must extend the teaching-staff member's tenure rights to the newly-created position. (citations omitted). *Id.* at 639.

However, the Court further observed that:

> A mere overlap in duties, however, does not mean that two positions are equivalent for tenure purposes. If a newly created position is similar to a tenure holder's abolished position but also requires

> additional duties or different responsibilities, then the newly-created position is not considered to be substantially similar to the former position. (citations omitted) *Id.* at 640.

Thus, the Court recognizes that where additional duties or different responsibilities are extant in a newly-created position for which an individual claims tenure, the riffed position and the new position are not equivalent for tenure purposes. That is the precise condition in the instant matter.

Having considered the arguments of the parties, together with the decisional and case law with respect to petitioner's claim of tenure to the assistant principal position, I **CONCLUDE** that there is no basis in fact or law for petitioner's position.

Accordingly, I **CONCLUDE** that petitioner's claim is **DISMISSED AND SUMMARY DECISION** is entered on behalf of the Board with regard to this issue. *DiSimoni, supra.; DeCarlo, supra.; Miller, supra.; Kish, supra.*

IV

Petitioner contends that the Board's commencement date of September 1, 1992, as the effective date of the RIF and the Board's administrative reorganization was enacted to circumvent his tenure rights. The record demonstrates that on March 17, 1992, the date the Board voted to eliminate petitioner's supervisor position, Intervenors Ms. Pollock and Mr. Wetzel had neither acquired a tenure status in the position of supervisor. Both had, however, attained tenure status in the position on or before September 1, 1992.

Petitioner argues that the Board's 1992-93 school year commenced on July 1, 1992 and at least one of the supervisors retained by the Board had not achieved tenure by that date. Thus, he contends,the Board violated his tenure rights when it failed to retain him over the supervisor who had not yet acquired tenure.

The Board argues, among other things, that it has the authority to eliminate positions and reorganize its administrative staff. In this instance, the Board determined that such reorganization would take effect on September 1, 1992. It further asserts that both Intervenors had acquired tenure under the classification of supervisor on or before September 1, 1992.

Pursuant to *N.J.S.A.* 18A:11-1 the Board shall:

> ...
>
> b. Enforce the rules of the State Board:
>
> c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the State Board, for its own government and the transaction of its business and for the government and management of the public schools ... regulation of conduct and discharge of its employees ...
>
> d. Perform all acts and do all things, consistent with law and the rules of the State Board, necessary for the lawful and proper conduct ... of the public schools of the district.

Under the provisions of *N.J.S.A.* 18A:28-9 to -13, the Board is authorized to abolish petitioner's tenured position and cause a RIF. The RIF may not be arbitrary or capricious but, rather, for reasons of economy or because of a reduction in the number of pupils or of a change in the administrative or supervisory organization of the school district or for other good cause. *N.J.S.A.* 18A:28-9. The Board's action to effectuate a RIF with respect to petitioner's tenured supervisory was in compliance with the statute. The law is silent as to when the Board is to effectuate the RIF. Pursuant to such silence, the Board is, therefore, authorized to use its discretion as to when to impose the RIF "for its own government." *N.J.S.A.* 18A:11-1 c.

I **CONCLUDE** that the Board acted within is discretionary authority and the authority of law when it adopted its resolution to commence the RIF and its administrative reorganization on September 1, 1992.

I **CONCLUDE,** therefore, that petitioner's claim that the Board commenced its RIF and administrative reorganization on September 1, 1992 in order to circumvent petitioner's tenure rights is without merit and is hereby **DISMISSED.**

Having considered the totality of the legal issues set forth hereinbefore, and having given fair weight thereto; I **CONCLUDE** that the Board has prevailed with respect to its Motion for Summary Decision.

Accordingly, Summary Decision is hereby **ENTERED** on behalf of the Board of Education of the Township of Jackson and Petitioner's Cross-Motion for Summary Decision is **DENIED and DISMISSED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

12 November 1993
Date

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

Nov. 19, 1993
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 23 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

lmh

WILLIAM J. SKOWRONSKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Petitioner first excepts to the ALJ's conclusion that he may not lay claim to a position as an assistant principal arguing that in accord with the Supreme Court decision in Dennery, supra, petitioner can transfer his tenure under his supervisor's endorsement on his administrative certificate to the principal's endorsement because both endorsements are subsumed under the administrative certificate.

Second, petitioner submits that the ALJ erred in concluding that the reorganization date of September 1 was not intended to circumvent petitioner's tenure rights. He notes that the Board acted on March 17, 1992 to eliminate certain supervisory positions, while retaining nontenured supervisors on that date. Petitioner suggests that September 2, 1992 as the effective date of the RIF, as

found by the ALJ, was meant to circumvent his tenure rights in favor of retaining a nontenured supervisor. Petitioner submits that the artificially created September 2, 1992 effective date for the reorganization was therefore arbitrary, and he relies on Francey, supra; Marshall, supra; Fitzpatrick, supra; and Godwin Davis, supra, in support of this contention. Similarly, Petitioner claims that even if July 1, 1992 were the effective date of the RIF, his tenure rights would have been violated because the Board admits it retained a supervisor on that date who acquired tenure after that date.

For such reasons, petitioner seeks reversal of the initial decision and a finding that the Board violated his tenure rights.

Upon careful and independent review of the record of this matter, the Commissioner adopts in part and rejects in part the initial decision rendered by the Office of Administrative Law.

Contrary to the finding of the ALJ, the Commissioner concurs with petitioner that a RIF becomes effective on the date that the Board votes to abolish positions within the district. See, Francey, supra; Marshall, supra; and Fitzpatrick, supra. As such, the tenure and seniority rights of the employees affected by such a reduction, in this case, vested on March 17, 1992. At such time, it is is clear from the record that the Board retained certain nontenured employees in supervisory positions to the detriment of petitioner who was tenured as a supervisor. The Commissioner therefore finds and determines that the Board erred in appointing Richard Wetzel Supervisor of Educational and Business Technology and Jeanne Pollock Supervisor of Instruction - Basic Skills to positions as supervisors insofar as they had not yet acquired tenure as supervisors by March 17, 1992. In so finding, the Commissioner

notes what appears to be a typographical error on page 3 of the initial decision regarding Ms. Pollock's date of appointment, which reads June 1, 1992. In deciding that she was not tenured on March 17 1992, the Commissioner accepts as accurate her tenure date as a supervisor as May 31, 1992, given that her effective date of appointment as a supervisor was June 1, 1990. See Exhibit E, Respondent's Brief.

However, to conclude that the Board erred in appointing Mr. Wetzel and Ms. Pollock to supervisory positions before they acquired tenure does not end the inquiry as to whether petitioner is entitled by virtue of his tenure status as a supervisor to "bump" into either of the positions held by Mr. Wetzel and Ms. Pollock. Such a determination requires fact finding regarding the appropriate certification required for service in the positions of Supervisor of Educational and Business Technology and Supervisor of Instruction-Basic Skills and also "***whether the duties attending these positions are of such nature as to require possession of instructional certification in addition to certification as a supervisor in order to be authorized by statute and regulation to perform such functions, and for a resultant determination of the Petitioners' entitlement under the school laws to such positions." (Timko State Board, slip opinion, at pp. 9-10) (Michael Timko and John J. Mikush v. Board of Education of the Bridgewater-Raritan Regional School District, Somerset County, 1991 S.L.D. 967, aff'd in part/rev'd in part/rem'd State Board July 1, 1992) Hence, the Commissioner must remand this matter to the Office of Administrative Law for further fact finding and conclusions of law on the question of petitioner's entitlement to the herein noted supervisory positions.

Concerning the positions of assistant principal, the Commissioner concurs, however, with the findings and conclusions of the ALJ, supporting the Board's position, that petitioner has no tenure or seniority entitlement to the positions of assistant principal insofar as he has not served any period of time in the position of assistant principal which is separately tenurable pursuant to N.J.S.A. 18A:28-5. He, therefore, has no entitlement to such positions. See Initial Decision at pp. 22-24. See, also, Dennery, supra.

Accordingly, for the reasons expressed herein, the initial decision is affirmed in part and reversed in part. The Commissioner directs that the matter be remanded for further findings consistent with this decision on the question of petitioner's entitlement to the supervisory positions currently held by Mr. Wetzel and Ms. Pollock.

IT IS SO ORDERED.

Mary Lee Fitzgerald
COMMISSIONER OF EDUCATION

DECEMBER 30, 1993

DATE OF MAILING - DECEMBER 30, 1993

327-93

EDU #6111-92
C # 327-93
SB # 5-94

WILLIAM J. SKOWRONSKI,

PETITIONER-CROSS/APPELLANT,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY,

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, December 30, 1993

For the Petitioner-Cross/Appellant, Wayne J. Oppito, Esq.

For the Respondent-Appellant, Carroll & Weiss (Robert J. Merryman, Esq., of Counsel)

For the Intervenors-Cross/Appellants, Lake & Schwartz (Robert M. Schwartz, Esq., of Counsel)

On March 17, 1992, the Board of Education of the Township of Jackson (hereinafter "Board") voted to abolish eight supervisory positions in the district, including the position held by petitioner, a tenured teaching staff member, effective September 1, 1992. The Board also voted to create four additional assistant principal positions, effective July 1, 1992. Those positions were filled by the Board at its meeting of April 14, 1992, at which time the effective date of the new positions was changed to September 1. All individuals appointed as assistant principals had held one of the abolished supervisory positions.

Intervenors Richard Wetzel and Jeanne Pollock, who were retained in their respective positions as supervisor of educational and business technology and supervisor of instruction-basic skills,

JUNE 7, 1995

had not yet achieved tenure as supervisors at the time the Board acted to reduce its staff on March 17, 1992.[1] See N.J.S.A. 18A:28-5; N.J.S.A. 18A:28-6.

Petitioner filed a petition with the Commissioner alleging that the Board had violated his tenure and seniority rights in effectuating the reduction in force ("RIF"). Petitioner contended that the Board had retained non-tenured individuals in supervisory positions, retained supervisors with less seniority than he, and that the duties and responsibilities of the newly-created assistant principal positions were substantially similar to those petitioner had performed in his supervisory position.

On November 12, 1993, an Administrative Law Judge ("ALJ"), finding no genuine issues of material fact, recommended granting the Board's motion for summary decision. The ALJ rejected petitioner's tenure claim to the newly-created assistant principal positions, finding that petitioner had never served in such a position and that such positions were not substantially similar to his abolished supervisory position. The ALJ also rejected petitioner's assertion that the Board had commenced its reorganization on September 1, 1992 in order to circumvent his tenure rights.

On December 30, 1993, the Commissioner adopted in part and rejected in part the ALJ's recommended decision. The Commissioner agreed with the ALJ that petitioner had no entitlement to the assistant principal positions, stressing that assistant principal was a separately tenurable position pursuant to N.J.S.A. 18A:28-5. However, the Commissioner agreed with the petitioner that the rights

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[1] We note that Wetzel was appointed supervisor on September 1, 1990 and that Pollock commenced such employment on June 1, 1990.

of those individuals affected by the RIF were to be determined as of March 17, 1992, when the Board voted to abolish the supervisory positions. Consequently, she concluded that petitioner's tenure and seniority rights vested on that date and that the Board had improperly retained certain non-tenured employees in supervisory positions to the detriment of petitioner, who was tenured as a supervisor.

The Commissioner, however, found that she was unable to determine whether petitioner was entitled to either of the supervisory positions held by intervenors Wetzel and Pollock, neither of whom had achieved tenure as supervisors by the date of the RIF. Citing Timko and Mikush v. Board of Education of the Bridgewater-Raritan Regional School District, decided by the State Board, July 1, 1992, the Commissioner concluded that such a determination required:

> fact finding regarding the appropriate certification required for service in the positions of Supervisor of Educational and Business Technology and Supervisor of Instruction-Basic Skills and also "...whether the duties attending these positions are of such nature as to require possession of instructional certification in addition to certification as a supervisor in order to be authorized by statute and regulation to perform such functions, and for a resultant determination of the Petitioners' entitlement under the school laws to such positions."

Commissioner's Decision, slip op. at 29.

Accordingly, she remanded this matter to the Office of Administrative Law for further proceedings on the issue of petitioner's entitlement to the positions held by Wetzel and Pollock.

The Board filed the instant appeal to the State Board of Education. Petitioner and the intervenors filed cross-appeals.

After a thorough review of the record, we affirm in part and reverse in part the decision of the Commissioner.

We fully concur with the Commissioner that petitioner had no entitlement to the newly-created assistant principal positions. Since he had not achieved tenure in the position of "assistant principal," petitioner's tenure rights achieved as the result of his employment as a supervisor did not encompass those new positions. Nor does Dennery v. Board of Educ., 131 N.J. 626 (1993) confer such a right, as petitioner urges. Notwithstanding the fact that the principal and supervisor endorsements are both issued under the administrative certificate, the tenure laws expressly designate "assistant principal" as a separately tenurable position. N.J.S.A. 18A:28-5. Capodilupo v. West Orange Bd. of Ed., 218 N.J. Super. 510 (App. Div. 1987), certif. den., 109 N.J. 514 (1987). Having achieved no tenure rights in such "position," petitioner had no entitlement by virtue of tenure to any assignments within that tenured position.

Moreover, we agree with the Commissioner's determination that the duties and responsibilities of the newly-created positions differ substantially from those of petitioner's former position. "A mere overlap in duties...does not mean that two positions are equivalent for tenure purposes. If a newly-created position is similar to a tenure holder's abolished position but also requires additional duties or different responsibilities, then the newly-created position is not considered to be substantially similar to the former position." Dennery, supra, at 640.

We also concur with the Commissioner that the rights of the staff members affected by the reduction in force were to be

determined as of March 17, 1992, when the Board acted to abolish the supervisory positions. The rights emanating from the achievement of tenure are triggered at the time a district board determines to reduce its teaching force pursuant to N.J.S.A. 18A:28-9, rather than on the effective date of the RIF. Francey v. Board of Education of the City of Salem, decided by the State Board, August 3, 1994, appeal pending (App. Div.).[2] Consequently, district boards are required to recognize the tenure rights of affected parties as they existed at the time of such action. Id.

However, we conclude that the Commissioner erred in remanding this matter for further proceedings on the question of petitioner's entitlement to the supervisory assignments held by intervenors Wetzel and Pollock. By virtue of his possession of an administrative certificate with an endorsement as a supervisor, petitioner was authorized and qualified by the regulations promulgated by the State Board for assignment to any supervisory assignment within the scope of his certification. See Herbert v. Board of Education of the Township of Middletown, decided by the State Board, August 1, 1990, aff'd, Docket #A-318-90T1 (App. Div. 1991); N.J.A.C. 6:11-9.3.

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[2] In response to exceptions filed by the Board to the Report of our Legal Committee in this matter, contending that our decision in Francey, supra, established new law, we stress that Francey was expressly predicated upon decisions dating back to 1984 in which we determined that the rights emanating from the achievement of tenure are triggered at the time of a RIF, Edison Township Education Association v. Board of Education of the Township of Edison, decided by the Commissioner of Education, 1984 S.L.D. 1073, 1083, aff'd by the State Board of Education, 1984 S.L.D. 1085, aff'd, Docket #A-2030-84T7 (App. Div. 1986), and that district boards are required to recognize the tenure rights of affected parties as they existed at the time of its action, Parker and Pellegrino v. Board of Education of the Matawan-Aberdeen Regional School District, decided by the State Board of Education, May 2, 1990.

Contrary to the Commissioner's belief, our decision in Timko, supra, does not require a remand in this instance. It is now well established that a tenured teaching staff member subject to a reduction in force pursuant to N.J.S.A. 18A:28-9 has entitlement by virtue of tenure to an assignment within the scope of his or her certification as against non-tenured individuals. Bednar v. Westwood Bd. of Ed., 221 N.J. Super. 239 (App. Div. 1987), certif. den., 110 N.J. 512 (1988); Capodilupo, supra. In Timko, the job descriptions adopted by the district board for the supervisory assignments at issue therein expressly required dual certification, i.e., possession of instructional certification in addition to certification as a supervisor. There was no indication that the county superintendent had approved such unrecognized titles or determined the appropriate certification therefor. N.J.A.C. 6:11-3.3(b). Under those particular circumstances, we found a remand necessary in order to determine the appropriate certification, and, in particular, whether the specific duties attending those assignments were indeed of such nature as to require possession of a particular instructional endorsement in order to be authorized by statute and regulation to fulfill the duties thereof.

No such circumstances exist in this case. The record indicates that petitioner had achieved tenure as a supervisor by March 17, 1992, the date of the RIF, and that intervenors Wetzel and Pollock had not. The job descriptions adopted by the Board for the supervisory titles in which Wetzel and Pollock were retained did not include a requirement for an instructional certificate in addition to possession of an administrative certificate qualifying the individual to serve as a supervisor. Nor does the Board contend

that the duties are such as to require possession of a particular instructional endorsement. Consequently, inasmuch as petitioner was tenured as a supervisor and possessed the appropriate certification qualifying him for the supervisory assignments at issue herein, he had an entitlement based on his tenure status to be retained in those assignments following a RIF as against non-tenured individuals.

We therefore direct the Board to reinstate petitioner to one of the supervisory assignments held by intervenors Wetzel and Pollock, with back pay and other emoluments, less mitigation. Since neither Wetzel nor Pollock were tenured at the time of the RIF, the Board may reinstate petitioner to either of their assignments at its discretion. Cf. Schienholz v. Board of Education of the Township of Ewing, decided by the State Board, 1990 S.L.D. 1809, 1815, aff'd, Docket #A-2905-89T3 (App. Div. 1990).

Attorney exceptions are noted.

June 7, 1995

Date of mailing JUN 09 1995

327-93

EDU #6111-92
C # 327-93
SB # 5-94

WILLIAM J. SKOWRONSKI,	:	
PETITIONER-CROSS/APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, December 30, 1993

Decided by the State Board of Education, June 7, 1995

For the Petitioner-Cross/Appellant, Wayne J. Oppito, Esq.

For the Respondent-Appellant, Carroll & Weiss (Robert J. Merryman, Esq., of Counsel)

For the Intervenors-Cross/Appellants, Lake & Schwartz (Robert M. Schwartz, Esq., of Counsel)

The Board of Education of the Township of Jackson (hereinafter "Board") seeks a stay, pending determination of its appeal to the Appellate Division, of the State Board of Education's decision dated June 7, 1995 in this matter. In that decision, we concluded that the petitioner, William J. Skowronski, a tenured teaching staff member whose position as a supervisor in the district was abolished in a reduction in force ("RIF"), was entitled by virtue of tenure to reinstatement in either of two supervisory

OCT. 5, 1995

assignments held by individuals who had not been tenured as supervisors at the time of the RIF.

In support of its motion, the Board has submitted affidavits from its counsel and superintendent averring that the positions at issue are currently held by tenured supervisors,[1] and that replacing one of them with petitioner at this time would cause significant disruption to the school system. The Board contends that the number of personnel changes would be minimized by staying the State Board's decision pending appeal, and that petitioner's only loss would be monetary.[2] Petitioner does not oppose the motion.

Inasmuch as we find that the Board's application fails to meet the standards that would entitle it to relief under Crowe v. De Gioia, 90 N.J. 126 (1982), we deny its motion for a stay.

In our decision of June 7, we concluded that petitioner, by virtue of his tenure status, was entitled to be retained in a supervisory position as against non-tenured individuals when the Board acted to reduce its staff pursuant to N.J.S.A. 18A:28-9. We also determined that the staff members who were retained by the Board in the controverted assignments had not yet achieved tenure at the time of the RIF. The materials presented by the Board do not demonstrate that petitioner had not been entitled to those assignments or show a clear likelihood that the Board will prevail on the merits of its appeal. The fact that the assignments at issue are currently held by

[1] We note that Barbara Smith, who, according to the moving papers, has held one of the supervisory positions at issue herein since July 1, 1994, did not hold that assignment at the time of the RIF, and was not a party to the earlier proceedings in this matter.

[2] The Board indicates that petitioner is currently employed as a principal in another school district.

tenured staff members does not alter petitioner's entitlement thereto as against non-tenured individuals at the time of the RIF, when his rights were triggered. Nor does the Board's contention regarding personnel changes necessitated by our decision demonstrate irreparable harm justifying a stay. Thus, notwithstanding the fact that petitioner may currently be employed in another district and does not oppose the Board's motion, we find no basis for granting that application.

Accordingly, for the reasons stated, we deny the Board's motion for a stay of our decision dated June 7, 1995.

October 5, 1995

Date of mailing OCT 10 1995

328-93

BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE, PASSAIC COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
ALBERT W. TALIAFERRO,	:	
RESPONDENT.	:	

SYNOPSIS

Board sought disqualification of Board member pursuant to N.J.S.A. 18A:12-2 (conflict of interest).

ALJ found there was a disqualifying interest so as to warrant respondent's immediate removal from the Board, as his wife had civil rights and tort claims against the Board and sought monetary compensation for such. ALJ declared respondent's seat forfeit and vacant and ordered the vacancy to be filled consistent with law.

Commissioner adopted findings and determination in initial decision, ordering respondent removed from Board and vacancy filled by County Superintendent pursuant to N.J.S.A. 18A:12-15(a).

DECEMBER 30, 1993

OAL DKT. NO. EDU 4717-93

BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE, PASSAIC COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
ALBERT W. TALIAFERRO,	:	
RESPONDENT.	:	
	:	

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

Upon review of this decision and the accompanying record, the Commissioner fully concurs with the ALJ's analysis of the issues presented, as well as with his conclusion that the facts of this matter do indeed constitute a disqualifying conflict of interest pursuant to N.J.S.A. 18A:12-2 so as to warrant respondent's immediate removal from the Board of Education.

Accordingly, the initial decision of the Office of Administrative Law is affirmed for the reasons expressed therein, so that respondent is deemed removed from the Board of Education as of the date of this decision and the resultant vacancy is to be duly filled by the County Superintendent pursuant to N.J.S.A. 18A:12-15(a).

IT IS SO ORDERED.

DECEMBER 30, 1993

Mary Lu Fitzgerald
COMMISSIONER OF EDUCATION

DATE OF MAILING - DECEMBER 30, 1993

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

TRANSCRIPT
ORAL INITIAL DECISION
OAL DKT. NO. EDU 4717-93
AGENCY DKT. NO. 132-5/93

BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE, PASSAIC COUNTY,
Petitioner,
v.
ALBERT W. TALIAFERRO,
Respondent.

Brian N. Flynn, Esq., for petitioner
(DeMaria, Ellis, Hunt, Salsberg & Friedman, attorneys)

Kenneth F. Mullaney, Jr., Esq., for respondent
(Dwyer, Connell & Lisbona, attorneys)

This is a transcript of the administrative law judge's oral initial decision rendered pursuant to *N.J.A.C.* 1:1-18.2.

Record Closed: November 24, 1993 Decided: November 24, 1993

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

The case was transmitted to the Office of Administrative Law as a contested matter by the Department of Education on May 19, 1993 as a result of the filing with the Department by the Hawthorne Board of Education of a petition for declaratory judgment seeking a determination from the Commissioner with respect to the

qualifications of the respondent Albert W. Taliaferro, newly elected to the Board the previous April, to continue to serve as a Board member. The declaratory judgment provisions for reference purposes are *N.J.S.A.* 52:14B-8 and *N.J.A.C.* 6:24-2.1. Those provisions establish the authority of the Commissioner to render a declaratory judgment. After the petition was filed an answer was then filed by Mr. Taliaferro and the case was transmitted, as I noted, to the Office of Administrative Law for processing. A telephone prehearing conference was conducted by me on July 7, 1993. It was agreed at that time that the following issue should be resolved: "Does respondent have an interest in his wife's civil rights and tort claims against the Board of Education sufficient to require his disqualification as a Board member pursuant to *N.J.S.A.* 18A:12-2?" The prehearing order established November 8, 1993 as the date for a plenary hearing.

Thereafter, motions for summary decision were made by both sides. Following my review of the briefs and the supporting documents I determined to deny both and entered an order to that effect on October 19, 1993. The plenary hearing was held as scheduled on November 8, 1993 and the record closed on November 19, 1993, the date for final submission of post-hearing memoranda.

The following therefore constitutes my oral initial decision. I have attempted to expedite this decision in light of the fact that the decision is only an initial decision and the Commissioner has 45 days following its receipt to accept, modify or reject it, and pursuant to *N.J.S.A.* 18A:14-9, there is a deadline for the filing of nominating petitions for boards of education elections which I believe will be in early March 1994. So, regardless of what way I decide and/or the Commissioner decides, potentially there's an impact on the upcoming Board election and that's why I attempted to expedite it.

Although the Hawthorne Board of Education, having filed for a declaratory judgment, is the petitioner in this case, both counsel agreed that the respondent would put on its case first. However, as I noted on the record, the order of the presentation of proofs did not change the normal burden and the Board as the petitioner continues to be required to have to prove its case by a preponderance of the credible evidence. *See, N.J.A.C.* 1:1-14.6(l), which is the OAL rule with respect to presentation of proofs.

Two witnesses testified on behalf of the respondent, Patricia Taliaferro, the respondent's wife, and respondent himself. However, prior to the taking of the oral testimony counsel agreed to the introduction in evidence as Exhibit J-1 a joint stipulation of facts. At this juncture, rather than read the joint stipulation into the record, I'm making reference to it and the transcript of my oral decision will at this point set forth the stipulated facts, as slightly modified by counsel on the day of the hearing.

1. Al Taliaferro was elected to the Hawthorne Board of Education on April 20, 1993, and was sworn and seated as a member of the Hawthorne Board of Education on April 27, 1993.

2. Al Taliaferro and Patricia Taliaferro are husband and wife.

3. On November 27, 1991 and on June 16, 1993, Patricia Taliaferro instituted formal complaints against the Hawthorne Board of Education for her non-reappointment to certain coaching positions seeking reinstatement, as well as monetary damages against the Hawthorne Board of Education for alleged economic loss, humiliation and mental pain and suffering.

4. The aforesaid complaints are pending before the New Jersey Division on Civil Rights ("DCR") and the federal Equal Employment Opportunity Commission ("EEOC") and are separately annexed hereto as Exhibits "A" and "B" (the DCR and EEOC Notices and correspondence are annexed hereto as Exhibit "C").

5. On August 25, 1992, Patricia Taliaferro served a Notice of Tort Claim upon the Hawthorne Board of Education asserting a claim against the Hawthorne Board of Education and its members, both in their representative capacity and as individuals, for compensatory and punitive damages alleged to have resulted from her non-reappointment as girls' soccer coach at the Hawthorne Middle School for the Fall 1992 season. A copy of said Notice is annexed hereto as Exhibit "D."

6. Al Taliaferro and Patricia Taliaferro reside and cohabitate at 225 Bamford Avenue, Hawthorne, New Jersey 07506.

7. Al Taliaferro and Patricia Taliaferro jointly own their home at 225 Bamford Avenue, Hawthorne, New Jersey 07506, as tenants by the entirety.

8. Al Taliaferro and Patricia Taliaferro file joint federal and state income tax returns.

9. Al Taliaferro and Patricia Taliaferro own one or more joint banking accounts and revolving charge cards. See answers to interrogatories # 21 and # 22 (annexed as Exhibit E).

10. Al Taliaferro and Patricia Taliaferro share title and ownership of all marital assets as husband and wife.

Five separate exhibits were attached to that joint stipulation. Exhibit A is the verified complaint filed by Patricia Taliaferro against the Hawthorne Board of Education in the New Jersey Division on Civil Rights on November 27, 1991 wherein she alleged that she had been discriminated against in her employment by the respondent; namely, a failure to reappoint her to position of coach of girls' softball because of her sex, her age and as a reprisal. Mrs. Taliaferro requested whatever relief was provided by law including, but not limited to, compensatory damages for economic loss, humiliation, mental pain and suffering. Exhibit B attached to the joint stipulation was a second verified complaint filed by Patricia Taliaferro against the Board of Education in the New Jersey Division on Civil Rights on June 16, 1992 wherein she alleged that she had been discriminated against in her employment; namely, a failure to be reappointed to the position as head coach of girls' soccer, by virtue of her sex and as a reprisal. Again, the complainant sought whatever relief was provided by law including, but not limited to, compensatory damages for economic loss, and damages for humiliation, mental pain and suffering. Exhibit C attached to the joint stipulation included two notices of charge of discrimination filed by the New Jersey Division on Civil Rights with the Equal Employment Opportunity Commission wherein the Hawthorne Board was notified that the Division had sent to the EEOC for dual filing purposes the discrimination complaints lodged by Mrs. Taliaferro against the Board since they alleged employment discrimination in violation of Title VII of the Civil Rights Act of 1964, as well as the Age Discrimination in Employment Act of 1967. Exhibit C also included an April 9, 1993 letter from the enforcement manager of the Philadelphia District Office of the Equal Employment Opportunity Commission addressed to Mrs. Taliaferro advising her that the agency's jurisdiction did not extend to a charge of age discrimination under federal law since her complaint alleged she was 39 years old, and one must be at least 40 in order to have an actionable discrimination claim under the federal statute. However, the EEOC did advise Ms. Taliaferro that it continued to have jurisdiction over those charges alleging a violation of Title VII involving sex

discrimination. In that same letter the enforcement manager also advised Mrs. Taliaferro that the dismissal of the age discrimination portion of the charges by the EEOC did not interfere with the state agency's jurisdiction to investigate that same charge since there is no similar minimum age or jurisdiction requirement under New Jersey law.

Exhibit D attached to the joint stipulation was a letter dated August 25, 1992 from Ralph E. Faasse, Esq., an attorney in Ridgewood, to the then president of the Hawthorne Board, Mr. Garret Sinning, wherein the attorney advised Mr. Sinning that his firm represented Patricia Taliaferro and that pursuant to *N.J.S.A.* 59:8-1 *et seq.*, the letter constituted a notice of tort claim wherein she announces her intent to pursue a claim against the Board by virtue of its refusal in June 1992 to appoint her to the girls' soccer head coach position. In that letter the attorney also put the Board on notice that as a result of the alleged unlawful action exhibited toward his client by the Board, she had suffered damages for the following: (1) present and future economic loss, (2) humiliation, (3) embarrassment, (4) defamation, (5) mental pain and suffering, as well as damage to her professional reputation and her career. In addition to seeking compensatory damages for those alleged acts of misconduct, the attorney, Mr. Faasse, also alerted the Board that his client intended to pursue a claim for punitive damages as well. I will note at this point that on November 9, 1993, which was the day after the plenary hearing in this case, Ms. Taliaferro, acting *pro se*, filed a nine-count complaint in the New Jersey Superior Court, Law Division, Passaic County, against the Hawthorne Board of Education, its superintendent, four former members and four present members seeking unspecified compensatory and punitive damages stemming from her failure to be appointed to the coaching positions. That complaint was forwarded to me by counsel in this case and I have marked it as Court Exhibit 1.

Finally, Exhibit E to the joint stipulation was an excerpt from answers by the respondent to interrogatories served by the petitioner during the course of discovery in this matter.

With respect to the testimony Mrs. Taliaferro, as I noted, was the first witness called by the respondent. She testified she presently is 41 years of age and has resided for several years in Hawthorne with her husband of 19 years, the respondent, and their two children, a daughter age 15 and a son age 12. Presently

she holds part-time employment as a physical education teacher in a local parochial school where her gross annual salary is approximately $8,000 per year. Previously, in addition to that employment at the parochial school, she had served as head coach in Hawthorne High School and at the Hawthorne Middle School for girls' softball and girls' soccer. With respect to the girls' softball position, she had been made head coach in 1988 and served in that capacity until 1991 when the Board determined not to renew her employment in that respect. During her last year as the head coach of girls' softball, her stipend was $4,500. The Board's failure to reappoint her in 1991 gave rise, of course, to the civil rights complaint which she filed in November 1991.

Mrs. Taliaferro went on to testify that she coached Middle School girls' soccer for three years between 1988 and 1991 and was not renewed for 1992. Her stipend during her last year of coaching soccer was $3,400, and her nonrenewal to that head coach position led, of course, to the filing of the second civil rights complaint in June 1992. Mrs. Taliaferro confirmed that both nonrenewals were the subject of the claims that she was pursuing before the Division on Civil Rights and the EEOC and she emphasized that her husband is not a party to any of the proceedings. She also confirmed that Mr. Faasse had filed the notice of tort claim on her behalf and that the formal filing of the complaint would soon take place, and as I noted, it took place the following day. She again stressed that she would be the only plaintiff in that lawsuit, and she is the only one, and that her husband would not be a party to it. Again, I'll refer to Court Exhibit 1, which is the complaint and jury demand which she filed on November 9.

With respect to how the family's finances were managed, Mrs. Taliaferro characterized her husband as the major breadwinner since his income represented by far the substantial portion of the family unit's total annual income. Although she agreed that the couple have two home equity lines of credit, as well as other joint financial accounts, she stressed that payments are made solely and have always been made solely from her husband's salary contributions and she has never contributed any funds of her own that she earned toward those obligations. Also, although the couple maintains two joint checking accounts, she pointed out that the vast majority of the deposits made into them come from her husband's earnings, and the only time she deposits money into those accounts is from money she earns and only for reimbursement of expenses that she has incurred drawing against those accounts either for personal items for her children or for vacations that she took with her

children unaccompanied by her husband. Mrs. Taliaferro pointed out, as well, that she maintains two custodial savings accounts in the names of her children, which she contributes to strictly out of money she earns and essentially the purpose of those accounts is for the future education of the children. Again, she stressed that no money is deposited into those accounts from any earnings of her husband. It comes strictly from her earnings.

According to the witness, all or nearly all of the household expenses are paid out of her husband's salary alone. These would include such things as property taxes, insurance, maintenance on their home and their automobiles, repairs, food, medical bills, and the like. She maintained that if any monies were recovered by her in any of her lawsuits, it was her intention to deposit the entire proceeds into the custodial accounts maintained for her children and to be used strictly for the education of her children.

On cross-examination, Mrs. Taliaferro confirmed her direct testimony in essence. She did agree, however, that if a large amount was recovered as a result of the lawsuits, conceivably some of the proceeds would be contributed for general family use if needed.

Respondent then testified on his own behalf. He, too, is 41 years of age and is employed as a full-time science teacher in the Pascack Valley Regional High School District. His annual salary as a teacher is $72,000 per year. In addition, he receives a $4,500 stipend as coach of the Pascack Hills varsity girls' soccer team and a $4,500 stipend as coach of the girls' softball team. He also is employed during the summers as chief lifeguard at the municipal swimming pool, where he earns an additional $5,500. Finally, he noted that he sometimes serves as a referee at different interscholastic sporting events and estimated he earns about $1,500 per year in that capacity. Thus his total gross income is approximately $88,000 per year, which is about 11 times more than his wife's annual earnings.

According to Mr. Taliaferro, all of the household expenses and bills are, as his wife testified, paid for out of his salary alone and at no time are his wife's earnings used for those purposes except on very rare occasions, following which she would reimburse the account for any expenses she incurred for such items as clothing for the children or for vacations that she had separately taken with them. The

Taliaferro's as previously noted by Mrs. Taliaferro maintain two checking accounts, and although respondent noted that each have equal access to them, all of the household's normal expenses are paid out of his salary deposited into those accounts and no reliance is placed upon his wife's income to help pay any of the bills. Basically, according to Mr. Taliaferro, the money his wife earns is used for the children and for expenses which she incurs when she takes them on vacation. In that regard both testified that in 1989, 1990 and 1991 Mrs. Taliaferro and the children went to Disney World in Florida, and although the expenses of those vacations were charged by credit card, she reimbursed the charge accounts for them.

In April 1993 Mr. Taliaferro was elected as a member of the Hawthorne Board of Education and he noted that he serves on several committees. He has represented to his fellow Board members that he would take pains not to take part in any discussion concerning any of the claims that his wife may have against the Board. He stressed that he has abstained and will continue to abstain if and when any formal action has to be taken by the Board respecting those claims. He observed that when the Board unanimously adopted the resolution to authorize the filing of the instant declaratory judgment action, he, of course, abstained from participating in the vote on that resolution as well.

On cross-examination, Mr. Taliaferro reiterated that his salary pays for the family unit's expenses. However, he, too, agreed that the obligation to educate his children is the joint responsibility of his wife and he, and he did indicate that if the occasion should arise that he were unable to pay for the expenses himself and funds were not otherwise available, he would expect that his wife would do so, that is to say, pay for the education of the children. He also agreed that any money that his wife receives either actually or potentially from the litigation that she is pursuing could be used for the benefit of the family unit rather than be allocated exclusively for his wife or their children alone.

With respect to his activities as a Board member, although he does abstain from discussions on any subject which would impact upon his wife's pending cases, he agreed that he was involved in a discussion this past school year concerning renewal of the girls' softball coach position for 1993, one of the positions involved in one of his wife's discrimination complaints. He explained, however, that he had asked that the resolution concerning the hiring and the stipend of all coaches be

tabled, which it was. He did so because he had a question with respect to the girls' softball coach who had succeeded his wife in that position. However, he noted that the resolution under discussion in private session that I just mentioned had to do with salary which was not involved in his wife's case and which had been started two years earlier. Thus, he agreed that he did discuss that person with the Board and in private sessions but only in relation to the best interest of the Board as a board rather than any private interest that he might have in that matter. When it came time to vote in public on the hiring and salary of other coaches, he abstained with respect to both of the positions involved in his wife's cases. He may have even abstained from voting at all on the entire coaching salary structure. I'm not sure. But he certainly did abstain on those two.

On cross-examination, Mr. Taliaferro was questioned closely about an incident which took place at a June 8, 1993 Board meeting designated as student counterpart night. On that evening, it's my understanding, students act as the Board members and they vote on various items as if they were the individual Board member him or herself. On the night in question three resolutions came before the Board honoring three previous Board members, Mr. Sinning, the former Board president, a Mrs. Dykes and a Mr. Bosco. When it came time to vote on each resolution honoring those former Board members, and I believe providing them with a free pass to attend all future student events, the respondent instructed the student who was serving in his role to vote "yes" with respect to Mr. Bosco's resolution, but to vote "no" on the two resolutions pertaining to Mrs. Dykes and to Mr. Sinning. According to Mr. Taliaferro, he did this because he did not believe that Mrs. Dykes and Mr. Sinning had while Board members represented at all times the best interests of the children of Hawthorne. He said he felt differently about Mr. Bosco who, as he put it, was always doing his job. Although in the civil rights complaint, particularly in the first civil rights complaint, Mrs. Taliaferro specifically mentioned Ms. Dykes as having been instrumental in the alleged discrimination and reprisal, respondent in the hearing before me insisted that is not the reason he directed the student to vote no with respect to the resolution honoring her or Mr. Sinning.

Also, when questioned about an alleged incident whereby his wife was said to have stood up and turned her back to the podium at the June 8 meeting when the resolutions honoring Mr. Sinning and Ms. Dykes were acted upon, Mr. Taliaferro testified that he did not see that incident but he had been told about it later.

On cross-examination, the respondent insisted that he feels no hostility toward any present or former Board member who voted not to renew his wife in her coaching employments. He did concede, however, that he felt "hurt" and "disappointed" by the people who voted against her and noted that some of those same persons still are Board members. I would note here, by the way, that the recent Superior Court filing, Court Exhibit 1, names Sinning, Dykes and Bosco as individual defendants, and I believe a fourth former Board member, and also, I think I said, I may be wrong, three or four of the present Board members. So, in addition to the Board itself, there is the superintendent named individually and eight or so individual Board members, past and present.

The foregoing essentially represents the testimony offered at the hearing. Obviously, I couldn't cover everything. I tried to hit all of the substantial parts that were offered at the hearing as I indicated. When I denied the cross-motions for summary decision, I did so essentially on the basis that I felt it was important to make a record of the specifics of the management of the family finances and so forth since my decision is only an initial decision and it will be reviewed by the Commissioner and potentially beyond that. Therefore, it was important to give both sides an opportunity to lay their case out on direct- and cross-examination.

Following the conclusion of the presentation of the two witnesses by Mr. Taliaferro, the Board chose to present no oral testimony. However, counsel for the Board stated that he relied upon the contents of the stipulation of facts, the matters brought out on cross-examination of the Taliaferro's, and on the arguments made in the briefs previously submitted in connection with the motion for summary decision, as well as the post-hearing brief, which I directed ultimately that counsel would file. As I indicated at the conclusion of the testimony, I did provide counsel with the opportunity to file supplemental memoranda addressing whatever additional matters they felt might have arisen and which required comment as a result of the hearing we had. Those supplemental memoranda and replies were filed by last Friday, and the record therefore closed on that date.

At issue, then, is the question of whether the facts, largely undisputed, constitute a situation wherein pursuant to *N.J.S.A.* 18A:12-2 the respondent can be said to have a disqualifying direct or indirect interest in any claim or claims against

the Board filed by his wife. If his wife's litigation against the Board constitutes claims in which the respondent has such an interest, then by operation of law he should be disqualified from Board membership.

In the case of *S & L Associates, Inc. v. Washington Township*, 61 *N.J. Super.* 312 (App. Div. 1960), the court made the following salutary observation at page 329 which I believe is apropos here:

> A public officer has the duty of serving the public with undivided loyalty, uninfluenced in his official actions by any private interest or motive whatsoever. *Driscoll v. Burlington-Bristol Bridge Co.*, 8 *N.J.* 433. As we said in *Aldom v. Roseland*, 42 *N.J. Super.* 495, at pages 502, 503 and 507 (1956), the interest which disqualifies need not be a direct, pecuniary one: it may be indirect. Basically, the question is whether the public official, by reason of a personal interest in the matter, is placed in a situation of temptation to serve his own purposes, to the prejudice of those for whom the law authorizes him to act. The validity of his action does not rest upon proof of fraud, dishonesty, loss to the municipality, or whether he was in fact influenced by his personal interest.

So, too, I would refer counsel to the decision in *Cullum v. Board of Education of North Bergen*, 27 *N.J. Super.* 243, 248 (App. Div. 1953), where the court observed:

> The members of the board of education of a municipality are public officers holding positions of public trust. They stand in a fiduciary relationship to the people whom they have been elected or appointed to serve [and continuing on with a quote from the *Driscoll* case]
>
> As fiduciaries and trustees of the public weal they are under an inescapable obligation to serve the public with the highest fidelity. In discharging the duties of their office they are required to display such intelligence and skill as they are capable of, to be diligent and conscientious, to exercise their discretion not arbitrarily but reasonably, and above all to display good faith, honesty and integrity.

Those set forth some general propositions with respect to the duty of loyalty to be held by public officials. There have, of course, been several cases specifically dealing in the education context with the application of *N.J.S.A.* 18A:12-2 to a variety of different fact situations. No case exactly identical to the instant matter appears to have been decided in this state. None of these have been called to my

attention by counsel, and I was unable to find any. Perhaps the closest and most recent set of circumstances was the situation involved in *Board of Education of the Township of Jackson v. Acevedo* in which a declaratory judgment action was filed by the Board to determine whether a Board member had a disqualifying conflict of interest in light of the pendency of a lawsuit he had filed on behalf of his infant son for damages for injuries suffered by his son against the Board. The *Acevedo* case is reported at 92 *N.J.A.R.* 2d 163 (February 6, 1992). The administrative law judge in his initial decision in that case determined that a disqualifying conflict of interest under the statute did exist since the board member, his son and his wife were all plaintiffs in a civil action against the board for compensatory damages arising out of the injury as a result of a fall that the son had suffered on Board property. A settlement of $30,000 had been entered into about two months before the initial decision was rendered. In that case, of course, the board member was an actual party to the civil suit, whereas in the instant case respondent has not joined in any of his wife's lawsuits seeking either a derivative *per quod* recovery, assuming he has a *per quod* claim in the discrimination case, or for loss of services or any direct claim.

However, in analyzing the fact situation in *Acevedo*, it seems to me the administrative law judge did not place any particular stress on the fact that the board member himself was actually the litigant. Rather, he concentrated on what he characterized as the "pivotal issue"; whether the claim was intended to vindicate a public interest or, on the other hand, was one which was designed to accrue to the personal benefit of the board member and through the board member his family. In analyzing the facts in that context the administrative law judge immediately, of course, made reference to the decision in *In Re Bayless,* 1974 *S.L.D.* 595, reversed State Board of Education, 1974 *S.L.D.* 603. In that case, which involved a Board member whose husband was a Board employee, and in subsequent cases, both the State Board in *Bayless* and the Commissioner in the other cases focused on whether the claim giving rise to a personal-type interest was "substantial and material." In *Bayless* the State Board held that the interest involved there was not of that nature but cautioned that the holding was limited to the specific facts of that case. Thus, the law judge in the *Acevedo* case determined it was inevitable that where a board member was a party to a suit against the board seeking monetary damages, whether compensatory or punitive, the potential of a substantial and material benefit accruing to the Board member was clear. Even if the claim was a derivative *per quod* claim based on physical injury to the son, that would not erase the potential

personal financial benefit the board member would enjoy if the underlying suit were successful. It's not clear to me whether the administrative law judge in that case knew there had been a $30,000 settlement. That might have been referenced in the Commissioner's decision.

I would also direct counsel's attention to the decision in *Township of Holmdel v. O'Connell,* 1990 *S.L.D.* 674, decided May 10, 1990, which also involved a suit by a board member against the board for injuries to a family member; and the decision in *Woodstown-Pilesgrove Regional Board of Education v. Ketas*, 1979 *S.L.D.*, reversed by the State Board 1980 *S.L.D.* 1563, affirmed per curium by the Appellate Division 1980 *S.L.D.* 1507. The decision in those and other cases, as noted by the administrative law judge in *Acevedo,* focused upon the actual or potential financial benefit which would flow to a board member were he or she successful in a suit for damages against the board. In such circumstances the specter of a conflict of interest which could interfere with the duty of loyalty owed by the member to the board was readily apparent.

Thus, in *Acevedo* the administrative law judge concluded that the Board member did under *N.J.S.A.* 18A:12-2 have an interest which required automatic forfeiture of his or her seat since substantial material and personal benefit in the form of money would accrue if the suit were successful or settled successfully, which it was. Thus, the administrative law judge found that there was a conflict and ordered the seat forfeited. In his review the Commissioner affirmed the administrative law judge's initial decision in *Acevedo* in part and reversed it in part. While the Commissioner agreed with the legal analysis articulated by the administrative law judge with respect to the case law under the statute, the fact that the lawsuit had been settled meant that the member no longer had a conflict with the board since there were no allegations that Acevedo exercised any influence over the board regarding the litigation which had been settled, or that he would exercise any such influence in the future, or that he would be enriched in the future as a result of the settlement. Thus, the disqualification ordered by Judge Law, the administrative law judge, was set aside as moot.

In the 1990 decision in *O'Connell* cited by both the administrative law judge and the Commissioner in *Acevedo*, the Commissioner took pains to observe that the lack of a conflicting or inconsistent interest is a fundamental qualification for board

membership, citing the decision in the *Aldom* case which had been mentioned earlier. The *Aldom* case noted that the rule is intended to be prophylactic in nature and applies not only to a pecuniary interest, but to a psychological or a personal interest as well. Of course, *Aldom* involved, I think, a Planning Board, so we didn't have an education statute, but there was a conflict-of-interest issue which was similar to the kind of issue which *N.J.S.A.* 18A:12-2 was designed to address. In fact, in *O'Connell* the Commissioner quoted from the *Aldom* case to the effect that it is essential in order to maintain confidence in the actions of public bodies that the public be assured that their elected representatives judgments not only be correct, but that such judgments be rendered in such a manner as will beget no suspicion of the pureness and integrity of the action. Thus, in *O'Connell* the board member was disqualified since his participation as a litigant against the board arising out of a tort claim involving an alleged assault on his son represented a clear interest in a claim against the board which the statute prohibits.

The testimony in the instant case before me revealed that although the respondent is not himself a party to any of the claims filed against the Board and against both past and present Board members in the recent tort claim filed by his wife, he certainly has a future potential pecuniary benefit should she recover damages by virtue of the alleged acts of discrimination which she is pursuing in both the administrative and the judicial forums. As respondent himself noted during the course of his testimony, a major monetary recovery certainly would or could be used so as to benefit the entire family unit. Both respondent and his wife indicated that any such recovery would, in fact, be earmarked for the education and/or for other benefits to their two children, obligations which they bear as the parents in any event. Clearly, if respondent's income was substantially curtailed or even totally disrupted, the recovery of a judgment by his wife would represent potentially at least, if not actually, a major pecuniary benefit to the entire family unit, including Mr. Taliaferro. So, too, while we certainly hope this doesn't happen, if Mrs. Taliaferro predeceases the respondent in a context where the disposition of her estate would flow to him and thereby relieve him of financial obligations, such as home equity lines and so forth, a clear potential pecuniary benefit exists in that situation as well.

As I noted, in the *O'Connell* case the Commissioner touched upon the psychological aspect of claims against the Board in which a Board member had a

direct or indirect interest. To that end the testimony in this case concerning the events that took place at the Board meeting of June 8, 1993, while of no tremendous consequence insofar as Board policy is concerned, are in my judgment pertinent to the issue before me. While the respondent explained the "no" votes which he directed his student counterpart cast in connection with the resolution intending to honor two of the three Board members who had left the Board as of its reorganization the previous April, and stressed that he did vote "yes" with respect to one of those members, despite his protestations to the contrary I find that Mr. Taliaferro's admission that he does feel "hurt" and "disappointed" is essentially tantamount to a lingering hostility or resentment toward those two members. I don't think it can be avoided. Although they are no longer members of the Board, I believe the actions he took that night as a Board member on resolutions before a Board of which he is a member are indicative of the problem that we have here. Respondent did not dispute that although he claims not to have seen the incident, he did learn that his wife stood up in the audience with her back to the podium when the resolutions pertaining to the Board members were offered and acted upon. There is no escaping the conclusion that the pending lawsuits by Mrs. Taliaferro against the Board, against its present superintendent and against past and present Board members has given rise to a context which, at the very least, is unwholesome and demonstrably harmful I believe to the best interests of the Board and to the public which it represents. The specter which now has surfaced at least twice, that is to say at the student counterpart night and also with respect to whatever discussion took place on the person who succeeded his wife as coach, seems to me to involve precisely the sort of consequence which *N.J.S.A.* 18A:12-2 is designed to prevent. While Mr. Taliaferro is not a party to any of his wife's lawsuits, nonetheless I believe he certainly does have an indirect interest, at least, in the outcome sufficient in my view to come within the proscription of the statute.

None of the cases cited dictate a contrary result. In those decisions where the Commissioner found no conflict of interest to exist, even where the Board member patently had a direct claim against the Board, the absence of a substantial and material personal benefit to the member was of paramount concern. In this case there is no such absence of a personal benefit. In fact, there is just such a potential possibility. Moreover, in several of those cases, the interest sought to be vindicated was the interest of the public at large and again not, as here, potentially personal to the Board member.

Again, I return to the *Aldom* case, whose language I think is particularly noteworthy, and I quote from the case at page 502:

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

I do not charge or accuse Mr. Taliaferro of any overt direct action designed to benefit himself at the expense of the public. But I don't think that has to be proven in order to come within the confines of the statute for the reasons that I have indicated here. And as I did note, there have been two occasions where he has participated in a way which I think impacts adversely on the ability of the public to maintain confidence that he will retain and maintain strict impartiality at all times. And I do not believe that a recusal from participating in any matter which might even potentially involve his wife is adequate enough. I think the legislative intent in the statute was to introduce the strictest of barriers against even the potential of one's personal interest getting in the way of the interest of the public who one is elected to serve. It's one of the few areas where Board members are automatically disqualified, and I think there's a reason for that.

Accordingly, I herewith determine that pursuant to *N.J.S.A.* 18A:12-2, and for the reasons I have set forth in this oral initial decision, the respondent Albert W. Taliaferro has, at the very least, an indirect interest in his wife's damage claims against the Hawthorne Board of Education which I have found and conclude are sufficient to disqualify him by virtue of that interest from any further Board

membership. I therefore **ORDER** that his seat forthwith be declared forfeit and vacant. Such vacancy should be filled in a manner consistent with law.

Pursuant to *N.J.A.C.* 1:1-18.3, within 15 days this initial decision, orally rendered, will be transcribed, filed with the Commissioner of Education for her consideration, and will be mailed to the parties. This recommended decision is only an initial decision and is not final. It may be adopted, modified or rejected by the Commissioner who, by law, is authorized to make the final decision in this matter. If the Commissioner does not adopt, modify or reject this decision within 45 days, and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within 13 days from the date on which this recommended decision is mailed to the parties, any party may file written exceptions with the Commissioner at 225 East State Street, 8th Floor West, CN 500, Trenton 08652, marked: "Attention, Exceptions," and a copy of any exceptions filed must be sent to the judge and to the other parties.

END OF TRANSCRIPT

I, Angela M. Robinson, certify that the foregoing is a true and accurate transcript, to the best of my ability, of Judge Weiss' oral initial decision rendered in the above matter on November 24, 1993.

November 30, 1993
Date

Angela M. Robinson
Angela M. Robinson

Receipt Acknowledged:

Dec. 1, 1993
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 6 1993
Date

OFFICE OF ADMINISTRATIVE LAW

amr

329-93

329-93

NICHOLAS RAYMOND,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RIVER EDGE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, riffed lead custodian, alleged Board reduced him in rank without cause in violation of his tenure rights. Board contended that reduction was due to reorganization and, moreover, that petitioner failed to comply with 90-day filing requirement of N.J.A.C. 6:24-1.2.

Initial decision determined petition was untimely filed. ALJ concluded because petitioner proceeded to arbitration, he was not relieved from compliance with 90-day requirement. Decision of Public Employment Relations Commission did not have the effect of tolling the 90-day filing requirement. Petition was dismissed as untimely.

Commissioner adopted findings and determination in initial decision.

DECEMBER 30, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4122-93
AGENCY DKT. NO. 56-3/93

NICHOLAS RAYMOND,
Petitioner
v.
BOARD OF EDUCATION OF BOROUGH OF RIVER EDGE, BERGEN COUNTY,
Respondent.

Alfred F. Maurice, Esq., for petitioner
(Springstead & Maurice, attorneys)

Steven R. Fogarty, Esq., for respondent
(Fogarty & Hara, attorneys)

Record Closed: October 6, 1993 Decided: November 22, 1993

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

On March 29, 1993, petitioner, Nicholas Raymond, filed a petition of appeal with the Commissioner of Education (Commissioner) alleging that he had been reduced in rank without cause in violation of his tenure rights. He requested that the Commissioner award him the position of lead custodian and grant him back pay and any other benefits and emoluments denied as a result of the improper reduction in his employment status. On April 16, 1993, respondent filed an answer requesting that the Commissioner dismiss the petition with prejudice for failure to

state a claim upon which relief could be granted, for failure to present a case or controversy arising under the school laws and for failure to file a petition no later than ninety days from receipt of respondent's notice that petitioner would not be employed as the lead custodian for the 1991-92 school year.

In addition, on April 12, 1993, respondent filed a motion for summary decision based on petitioner's failure to comply with the ninety-day filing requirement of *N.J.A.C.* 6:24-1.2. By letter dated April 22, 1993, the Commissioner of Education advised counsel that she had received respondent's answer and motion for summary decision in this matter and was forwarding the matter to the Office of Administrative Law for disposition. On May 5, 1993, this matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

A telephone prehearing conference was held on June 29, 1993. At that time the issues were isolated, and a hearing was scheduled for January 3 and 4, 1994, at the Office of Administrative Law. In addition, a schedule was established for petitioner's response to respondent's motion for summary decision and respondent's reply thereto. Briefs were filed by both parties in regard to this issue, and upon request of the undersigned judge, counsel filed a joint stipulation of facts. The record closed on October 6, 1993, upon receipt of the executed stipulation of facts.

UNDISPUTED FACTS

At issue in regard to respondent's motion is whether petitioner is barred from bringing this action for failure to comply with the requirements of *N.J.A.C.* 6:24-1.2 (the 90-day rule). The parties have stipulated to the pertinent facts in regard to this issue. The stipulated facts are as follows:

1. Petitioner, Nicholas Raymond (hereinafter "Raymond") is a custodian who has been employed by the respondent, Board of Education of the Borough of River Edge (hereinafter "Board"), since on or about June 1, 1983.

2. Raymond, having commenced employment as a custodian with the Board in June 1983, is protected by tenure through *N.J.S.A.* 18A:17-3 and the collective negotiations agreement in effect between the Board and the River Edge Education Association (hereinafter "Association") which confers tenure under Article 17.10 upon the issuance of a fifth year contract.

3. On or about September 1, 1989, the Board implemented a change in the organizational structure of the custodial department. Prior to that time, the department consisted of one head custodian, one day custodian and one night custodian in each of two schools. The reorganization of the department resulted in a structure consisting of a supervisor of buildings and grounds responsible for both schools, one chief of maintenance who reported to the supervisor and was assigned to both schools, one day custodian in each school and one night custodian in each school.

4. Raymond applied for and was selected to fill the position of chief of maintenance.

5. On or about July 1, 1991, the positions of supervisor of buildings and grounds and chief of maintenance were eliminated and in their place the Board created two new positions called lead custodian.

6. Following the customary posting of vacancy notices for these positions, five members of the custodial staff, including Raymond, applied for and were interviewed for the two positions of lead custodian.

7. On or about July 22, 1991, the Board selected the individuals it believed to be most qualified for the two new positions of lead custodian. Raymond was not selected, and consequently, reverted to the position of day custodian.

8. On or about July 22, 1991, the Association grieved the Board's decision not to appoint Raymond to the position of lead custodian through the various stages of the grievance procedure contained in the parties' collective negotiations agreement.

9. The Board denied the grievance on January 7, 1992, on the basis that Raymond was not best qualified to be the lead custodian.

10. Since Raymond's then current salary as the chief of maintenance exceeded the appropriate salary on the day custodian guide, the Association requested that the grievant's salary not be reduced but rather "frozen" until such time as the salary established for his proper placement on the day custodian guide exceeded his salary.

11. On or about January 16, 1992, the Board and the Association entered into an agreement guaranteeing that Raymond's salary would not be reduced as a consequence of his reassignment to the position of day custodian following the abolishment of his position as chief of maintenance.

12. Notwithstanding the terms of the parties' agreement, the Association filed a demand for arbitration on January 29, 1992, challenging the Board's decision not to appoint the grievant to one of the two newly created lead custodian positions.

13. On or about August 25, 1992, the Board petitioned the Public Employment Relations Commission (hereinafter "PERC") for a scope of negotiations determination seeking a restraint of binding arbitration of the grievance filed by the Association. The Board contended that it had the prerogative to appoint the most qualified person to the new position, and therefore, the grievance was not legally arbitrable.

14. The arbitration was adjourned by mutual agreement pending an adjudication of the Board's petition by PERC.

15. On or about January 29, 1993, PERC issued a restraint of binding arbitration. *River Edge Bd. of Ed. and River Edge Educ. Ass'n.*, PERC No. 93-63, _____ N.J.P.E.R. _____ (¶ 1993), decided January 29, 1993.

16. On or about March 10, 1993, the Association filed a notice of appeal from PERC's decision to the Superior Court, Appellate Division, which appeal is now pending.

17. The instant petition was filed on or about March 30, 1993.

ARGUMENTS OF COUNSEL

Respondent argues that petitioner must be barred from bringing this action for failure to comply with the requirements of *N.J.A.C.* 6:24-1.2. Respondent points out that the instant petition was filed on or about March 30, 1993, more than one year and eight months after the Board acted on July 1, 1991, to appoint someone other than Raymond to the position of lead custodian. Raymond does not deny he had notice of the Board's action and the fact that he was affected by that action. As such, petitioner has plainly failed to comply with *N.J.A.C.* 6:24-1.2. Respondent asserts that petitioner's appeal to the Commissioner should have been filed within ninety days of July 22, 1991. Instead, petitioner gambled on a favorable arbitration award and failed to anticipate that his action would be enjoined by PERC because it involved a dispute which was not mandatorily negotiable or legally arbitrable. Having lost, petitioner is now trying to pursue a stale petition before the Commissioner.

In addition, respondent asserts that PERC's scope of negotiations determination did not relieve Raymond from complying with the ninety-day requirement of *N.J.A.C.* 6:24-1.2 nor did PERC's decision have the effect of tolling the ninety-day filing requirement. Since the instant dispute involves neither a teaching staff member nor the withholding of an increment, petitioner cannot rely upon the tolling provision contained in *N.J.S.A.* 34:13A-27(d).

In response, petitioner asserts that the circumstances of this case warrant the filing of the petition of appeal within ninety days of PERC's decision. Petitioner suggests that the same principle should be applied to his case as are codified in *N.J.S.A.* 34:13A-27(d) which permit teaching staff members ninety days to file a petition of appeal after an adverse scope determination. According to petitioner, the purpose of the ninety-day rule is to require parties to promptly raise their claims, so that there is no unfair disadvantage to the party defending the petition and so that the matter will be resolved expeditiously. Petitioner contends that these elements are not present here. Respondent was put on notice of petitioner's claim within ninety days of its occurrence when he filed his grievance on July 22, 1991. The

Board disputed arbitrability for the first time on January 7, 1992, well beyond the 90-day time limit which would have alerted petitioner to seek an alternative remedy. Based on its action, the Board should not be able to raise the ninety- day rule and thwart a hearing on the merits of petitioner's claim.

Citing *N.J.A.C.* 6:24-1.15 which provides for the relaxing of the rules "in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice," petitioner asserts that an apparent injustice will occur unless the Commissioner allows this action to be pursued on the merits. Petitioner points out that PERC deferred jurisdiction over this dispute to the Commissioner. Implicit in PERC's holding is PERC's understanding that an alternate remedy before the Commissioner was still available. According to petitioner, the delay in this matter was occasioned by the Board's failure to promptly raise the arbitrability defense to the grievance and the protracted nature of the proceeding before PERC. If the rule is not relaxed, the Board will be rewarded for delaying its answer to petitioner's grievance, enabling it to foreclose petitioner's remedy both contractually and before the Commissioner.

In response, respondent contends summary decision on its motion to dismiss the petition as untimely is appropriate since there is no genuine issue of fact. More particularly, respondent argues that PERC's scope of negotiations determination did not relieve Raymond from compliance with the ninety-day requirement of *N.J.A.C.* 6:24-1.2(c) for filing a petition of appeal with the Commissioner. Raymond should have filed his appeal with the Commissioner simultaneous with the filing of his grievance and demand for arbitration. In further argument, respondent contends that *N.J.S.A.* 34:13A-27(d) has no application to the facts of this case. Respondent points out that a tolling provision is expressly authorized by the Legislature in *N.J.S.A.* 34:13A-27(d); *N.J.S.A.* 34:13A-5.4(d) contains no such provision. If the Legislature had intended to toll the ninety-day filing requirement where a litigant incorrectly chooses to pursue arbitration, it would have done so. In fact, respondent asserts that the New Jersey Supreme Court and Appellate Division have addressed this issue stating that an employee who proceeds to arbitration is not relieved from compliance with the ninety-day filing requirements contained in *N.J.A.C.* 6:24-1.2(c) Noting that the Commissioner and the courts read *N.J.A.C.* 6:24-1.2 strictly and apply it almost without exception, respondent asserts that there are no circumstances surrounding petitioner's claim to warrant relaxation of the ninety-day filing

requirement under *N.J.A.C.* 6:24-1.15. More to the point, respondent asserts that the instant petition was filed on or about March 30, 1993, one year and eight months after the Board acted on July 22, 1991, not to reappoint Raymond to the position of lead custodian. Raymond does not deny he had notice of the Board's action and the fact that he was affected by that action. Indeed, petitioner even acknowledges that he was aware of the Board's arbitrability defense on January 7, 1992, and still he waited more than fourteen months after that to file his petition with the Commissioner. According to respondent, petitioner's suggestion that the Board should be blamed for his delay because it waited until January 7, 1992, well beyond the ninety-day time limit to raise its arbitrability defense is entirely specious. It was not the Board's responsibility to alert petitioner to seek an alternative remedy, but rather petitioner's responsibility to consider his alternatives. A cursory review of the facts should have revealed the Board's likely arbitration defense.

The Board notes that its position is buttressed by the Supreme Court's admonition in *Bernards Township Board of Education v. Bernards Township Education Association,* 79 *N.J.* 311, (1979), and the Appellate Division's determination in *Riely v. Hunterdon Central High Board of Ed.*, 173 *N.J. Super.* 109 (App. Div. 1980), where they cautioned that while arbitration was an appropriate intermediate procedural step for handling a dispute over the withholding of a teacher's salary increment, a matter otherwise within the managerial discretion of the Board of Education, a teacher who proceeds to arbitration is not thereby relieved from compliance with the ninety-day requirement of *N.J.A.C.* 6:24-1.2 for filing a petition of appeal with the Commissioner.

In summary, respondent asserts that the facts of this case do not present the exceptional circumstances that compel the Commissioner to waive the ninety-day limitation. The record fails to reveal any reasons, compelling or otherwise, warranting such relief under *N.J.A.C.* 6:24-1.15.

DISCUSSION

It is clear and undisputed that the instant petition was filed on or about March 30, 1993, more than one year and eight months after the Board acted on July 22, 1991, to select the individuals it believed to be most qualified for the two new positions of lead custodian. Raymond was not selected and consequently reverted

to the position of day custodian. On or about July 22, 1991, the association grieved the Board's decision not to appoint Raymond to the position of lead custodian through the various stages of the grievance procedure contained in the parties' collective negotiations agreement. As such, Raymond does not deny he had notice of the Board's action and the fact that he was affected by that action.

N.J.A.C. 6:24-1.2 provides in relevant part:

> (a)To initiate a contested case for the Commissioner's determination of a controversy or dispute arising under the school laws, . . .
>
> (c) The petitioner shall file a petition no later that the 90th day from the date of receipt of notice . . . or other action by the district board of education, . . . which is the subject of the requested contested case hearing..

It is clear that petitioner has failed to comply with this regulation.

Recently, the Commissioner of Education and the Courts have held that a petitioner's failure to comply with *N.J.A.C.* 6:24-1.2 will result in a dismissal of the appeal. *See Riely v. Board of Ed of Hunterdon Central High School,* 173 *N.J. Super.* 109 (App. Div. 1980); *Baley v. Board of Ed. of Mansfield,* OAL DKT. EDU 4997-79 (Feb. 6, 1980), rejected by Commissioner of Ed. (June 19, 1980), aff'd State Bd. of Ed. (Feb. 4, 1981); *Kallimanis v. Board of Ed. of Carlstadt,* OAL Dkt. EDU 868-80 (August 8, 1980), adopted Commissioner of Ed. (September 26, 1980), aff'd State Bd. of Ed. (March 4, 1981); *Stolte v. Board of Ed. of Willingboro,* OAL Dkt. EDU 2261-79 (Jan. 30, 1980), rejected by Commissioner of Ed. (March 17, 1980), aff'd State Bd. of Ed. (July 2, 1980). Moreover, this time limit has been strictly construed to mean that the ninety-day period runs from the time the initial cause of action accrued. *See Watchung Hills Regional Ed. Association v. Board of Ed. of Watchung Hills,* 1980 *S.L.D.* 356. More to the point, it seems clear that the proper time for filing a petition with the Commissioner is immediately after notification of board action, and not the completion of some other process such as arbitration. *See State Board of Ed. of Bernards Township v. Bernards Township Education Association,* 79 *N.J.* 311 (1979); *Riely v. Central High Board of Ed., supra., Wright and Sobanko v. Board of Ed. of Belleville*, OAL DKT. EDU 5299-80 (Dec. 5, 1980), aff'd by Commissioner of Ed. (Jan. 23, 1981).

As stated by respondent, Raymond chose to proceed to binding arbitration on his asserted grievance concerning the Board's alleged violation of his contractual rights when it refused to appoint him to the position of lead custodian. As it turned out, PERC determined that the issues raised in the grievance were not properly within the scope of mandatory arbitration. *River Edge Board of Ed. and River Edge Educ. Ass'n.*, PERC No. 93-63, -- (N.J.P.E.R. - January 28, 1993)). Although PERC concluded that Raymond was an employee with undisputed tenure rights, whose claims may be cognizable by the Commissioner of Education, its decision cannot be read to toll the ninety-day requirement of *N.J.A.C.* 6:24-1.2, for filing a petition of appeal with the Commissioner. Clearly, petitioner should have filed his appeal with the Commissioner simultaneously with the filing of his grievance and demand for arbitration. *See Bernards Township Board of Ed. v. Bernards Township Education Association, supra,* at 326-327, n.4, in which the Supreme Court cautioned that while advisory arbitration was an appropriate intermediate procedural step for handling a dispute over the withholding of a teacher's salary increment, a matter otherwise within the managerial discretion of the Board of Education, a teacher who proceeds to arbitration is not thereby relieved from compliance with the ninety-day requirement of *N.J.A.C.* 6:24-1.2. Clearly, Raymond's appeal to the Commissioner should have been filed within 90 days of July 22, 1991, when he knew that the Board had decided not to appoint him to either of the lead custodian positions.

Petitioner contends that since respondent did not challenge the arbitrability of petitioner's grievance until six-months past the date of filing, the ninety-day limitation period of *N.J.A.C.* 6:24-1.2(c) is not applicable. Respondent points to *Kaprow v. Board of Educ. of Berkeley Twp.,* 131 *N.J.* 572 (1993) as dispositive of this issue.

In *Kaprow* the plaintiff attempted to resolve his claim of tenure violation through unofficial and informal negotiations with the local board. As a consequence of the nature of the communications between the parties involved, a question arose as to whether the plaintiff had adequate notice of action by the board so as to trigger the ninety-day limitations period. *N.J.A.C.* 6:24-1.2(c). The Court concluded that adequate notice was received and explained that the limitations period begins to run when a teacher learns of "the existence . . . of facts that would enable him [her] to file a timely claim. To insist . . . that there be additional or more - specific

notice will not further the objectives of the regulatory scheme, and would only defeat the considerations of repose and interfere with the efficient administration of the school laws." *Kaprow, supra,* 131 *N.J.* at 588-89.

In essence, the facts and circumstances that trigger the running of the limitation period need not be such that require a petitioner to file with the Commissioner of Education but need only be such "that would enable him [her] to file a timely claim." *Ibid.* This particular analysis is applicable to the instant matter in that the crux of petitioner's argument is that respondent's delay in contesting the arbitrability of the grievance led petitioner to believe that filing a petition with the Commissioner was not required under the circumstances. Nevertheless, the facts and circumstance relating to the reorganization of custodial positions and alleged demotion of petitioner, which took place on July 1, 1991, clearly evidenced a nexus of conduct that would enable petitioner to file a petition with the Commissioner of Education for adjudication of his tenure rights. Petitioner, however, delayed filing the petition until one year and eight months after the date of the triggering conduct.

Petitioner cannot claim that he was unaware of the necessity to file even in light of the potential arbitration of his grievance. It was well established, even previous to the New Jersey Supreme Court's decision of April 8, 1993, *Kaprow, supra,* that a teacher who proceeds to advisory arbitration is not relieved from compliance with the ninety-day rule of *N.J.A.C.* 6:24-1.2(c). *Board of Educ. Bernards Tp. v. Bernards Tp. Educ. Ass'n.*, 79 *N.J.* 311, 326-27, n.4 (1979); *Riely v. Hunterdon Central High,* 173 *N.J. Super.* 109, 1993 (App. Div. 1980).

Petitioner argues that "the same principles should be applied [in the instant matter] as are codified in *N.J.S.A.* 34:13A-27(d), which permit teaching staff members ninety days to file a petition of appeal [with the Commissioner of Education]" if PERC determines that the reason for a pay increment withholding relates predominately to a negative evaluation of a teaching staff member. The relevant portion of *N.J.S.A.* 34:13A-27(d) reads as follows:

> d. If a dispute involving the reason for the withholding of a teaching staff member's increment is submitted to the commission pursuant to subsection a. of this section, and the commission determines that the reason for the

> increment withholding relates predominately to the evaluation of a teaching staff member's teaching performance, the teaching staff member may file a petition of appeal pursuant to *N.J.S.* 18A:6-9 and *N.J.S.* 18A:29-14, and the petition shall be deemed to be timely if filed within 90 days of notice of the commission's decision, or of the final judicial decision in any appeal from the decision of the commission, whichever date is later.

Clearly, section (d) of the above act is applicable only to teaching staff members when PERC determines that the pay increment was withheld predominately as a result of their "teaching performance." Petitioner is not a teaching staff member as defined by *N.J.S.A.* 34:13A-22. Nor is petitioner's argument of diminution in his pay, as a consequence of inflation, a withholding of pay increment predominately related to an evaluation of his teaching performance. Accordingly his argument of applicability of *N.J.S.A.* 13:13A-27(d) to the instant matter is without merit.

Petitioner next argues that pursuant to *N.J.A.C.* 6:24-1.15, the Commissioner may relax the ninety-day rule when "in his discretion, a strict adherence thereto may be deemed inappropriate or unnecessary, or may result in injustice." Petitioner apparently believes that he has presented a showing of sufficient reason for failure to timely file and that since there is no substantial prejudice to the public entity, the rule should be relaxed.

Clearly, the Commissioner can relax *N.J.A.C.* 6:24-1.2 if a strict application of the rule is inappropriate, unnecessary, or causes injustice, and has done so in the past. However, as was stated in *Davenport v. Butler Board of Ed.* 92 *N.J.A.R.* 2d (Vol. 4) 614 (EDU 1992); *Hall* v. *Board of Ed. City of Englewood*, OAL DKT. EDU 6899-80 (Dec. 11, 1981), aff'd Commissioner of Ed. (Jan. 26, 1982), aff'd State Bd. of Ed. (Oct. 6, 1982)) and *Wright and Sobanko, supra.,* the Commissioner and the Courts now read *N.J.A.C.* 6:24-1.2 very strictly and apply it almost without exception. *See Baley supra., Riely, supra., Kallimanis, supra*. *See* also, *Gordon v. Passaic Township Board of Ed.,* 1985 *S.L.D.* 1929, affirmed No. A-3294-84 (App. Div. May 27, 1986), certif. denied 105 *N.J.* 534 (1986). In fact, as pointed out by respondent, the Commissioner has found such "unusual and compelling circumstances to warrant such relief" in only a limited number of cases. *See, Polaha v. Board of Ed. of the Buena Regional School*

District., 212 *N.J. Super.* 628 (App. Div. 1986) in which relaxation of the rule was warranted because although petitioner was clearly notified concerning the abolishment of his position, he was unaware until two months later that a part-time position relating to his abolishment had been established by the Board.

Petitioner posits two arguments in support of his request for relaxation of the ninety-day rule. First, petitioner points out that the purpose of the ninety-day rule is to require litigants to raise their claims promptly so that their adversary will not be disadvantaged, and the matter can be resolved expeditiously. Petitioner goes on to explain that respondent was put on notice about petitioner's claim by the filing of the grievance on July 22, 1991; therefore, the purposes for which the ninety-day rule was adopted were met. As such, strict adherence to the strictures of the rule would preclude review of the merits of the instant matter, but not for the purposes of furthering the interests for which the rule is meant to serve.

Petitioner's assertion that respondent had constructive notice of the pendency of a filing with the Commissioner of Education and that the fundamental purposes for which the rule was adopted were met by such constructive notice is noteworthy. *See Kaprow, supra*, 131 *N.J.* at 582 in which the Court explains that the limitations period provides a measure of repose, an essential element in the proper and efficient administration of the school laws. Because education disputes frequently involve conflicting claims to one position, the remedy is to award the prevailing party the position with back pay. The limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety days. Moreover, because local school boards operate on a cash basis, claims must be filed promptly so that the local board can anticipate any back pay requirements. However, petitioner's argument fails to address the fact that a limitations period also serves as a punitive purpose, which " is to penalize dilatoriness . . . " *Kaprow, supra,* 131 *N.J* .at 587 [citing, Ochs v. Federal Ins., 90 *N.J.* 108, 112 (1982) citing, *Farrell v. Violator Div.*, 62 *N.J.* 111, 115 (1973)]. In essence, the penalty consequences of the limitations period actualizes the notice, efficiency, and budgetary considerations of the ninety-day rule by deterring dilatoriness where claims that are not timely filed are precluded from review. Thus, by strict adherence to the ninety-day rule, petitioners have an incentive to timely file their claims, and once timely filed, there is no doubt about the actualization of the interests and purposes which the limitations period is meant to further.

If constructive notice were to suffice for the purpose of meeting the requirement of *N.J.A.C.* 6:24-1.2(c), the dilatoriness-deterrence/penalty aspect of a limitations rule would be seriously undermined. Litigants who were not diligent and failed to file in a timely manner would nevertheless have an opportunity to argue that certain facts and circumstances constitute constructive notice, thus eroding the unequivocal precision of official timely notice which is not subject to dispute. In light of these considerations, petitioner's argument for relaxation of the ninety-day rule is without merit.

Second, petitioner argues that respondent's supposed failure to assert its contention that petitioner's grievance is not arbitrable, in effect, duped petitioner into not filing his petition with the Commissioner of Education. As stated above, petitioner had a duty to timely file his petition notwithstanding his pursuance of a grievance with the local board. *Kaprow v. Board of Educ. of Berkeley Tp.*, 131 *N.J.* 572 (1993); *Board of Educ. Bernards Tp. v. Bernards Tp. Educ. Assoc.*, 79 *N.J.* 311, 326-27, n.4 (1979); *Riely v. Hunterdon Central High Sch.* 173 *N.J. Super.* 109, 113 (App. Div. 1979).

Respondent was under no statutory or regulatory duty to enunciate its position on receipt of petitioner's claim. Nor did respondent engage in conduct calculated to mislead petitioner into believing that it was unnecessary to file a petition with the Commissioner of Education. Petitioner fails to point to any representations made by respondent calculated to lull petitioner into a false sense of security with respect to him not needing to file his petition. At best, petitioner establishes that respondent was slow in formulating its position on petitioner's grievance.

In fact, as pointed out by respondent the instant petition was filed on or about March 30, 1993, one year and eight months after the Board acted on July 22, 1991, not to appoint Raymond to the position of lead custodian. Raymond acknowledged that he was aware of the Board's arbitrability defense on January 7, 1992, and yet he waited more than fourteen months after that to file his petition with the Commissioner.

The instant matter is clearly distinguishable from *Friedman v. Friendly Ice Cream*, 133 *N.J. Super.* 333, 337-8 (App. Div. 1975), in which plaintiff was injured

while dining at the defendant's place of business. The defendant's insurer made a settlement offer to plaintiff, which he declined. Negotiations continued but were not productive and eventually broke down. As a consequence, the plaintiff filed his claim, and the defendant answered with a statute of limitations defense. The Appellate Division ruled in favor of the plaintiff, finding that the defendant's conduct in making the settlement offer led the plaintiff to believe that there was no immediate need to file his claim because the defendant's insurer was admitting liability, and the only issue in dispute was the quantum of damages, which was the subject of ongoing negotiations. In the instant matter there were no negotiations and/or admissions of fault that petitioner relied on in filing his petition with the Commissioner of Education.

Polaha v. Buena Regional High, 212 *N.J. Super.* 628, 635 (App. Div. 1986) is instructive. In *Polaha* the Appellate Division agreed with the administrative law judge's decision that because of ongoing negotiations between an educator and a local board, relaxation of the ninety-day rule " may be . . . appropriate." *Id.* at 635. Although, there was no indicia of conduct on the part of the board that was calculated to mislead or persuade the educator not to file a petition and miss the ninety-day limitation date, it appears that negotiations were <u>really taking place</u> and the board was making a good faith effort to find the educator a position.

It appears from a review *Polaha* that one test for relaxation of the ninety-day rule may be an inquiry into the nature of the parties dealings. In short, even if a board did not engage in conduct calculated to mislead, it may nevertheless be proper to grant a relaxation of the rule if the party seeking relaxation was led to believe, by the board's good faith efforts to solve the problem, it was not necessary and possibly imprudent to file a petition with the Commissioner of Education. Such is not the case here.

Having considered the above, I **CONCLUDE** that this tribunal has been presented with no good cause for petitioner's failure to timely file. Petitioner did not explain in any meaningful way why he did not file within the ninety days nor did he demonstrate in support of his legal position that there would be no substantial prejudice to respondent by the relaxation of the rule. Petitioner's suggestion that the Board should be blamed for his delay is of no help to him. It is clear that simply because petitioner proceeded to arbitration, he was not relieved from compliance

with the ninety-day requirement of *N.J.A.C.* 6:24-1.2 for filing a petition of appeal with the Commissioner.

Further, it does not appear that there was an absence of adversity and the presence of good faith negotiations between petitioner and respondent. In fact, by petitioner's own admission he filed a grievance with respondent on July 22, 1991, and did not hear from respondent until January 7, 1992. There were no meaningful negotiations taking place. By virtue of the fact that negotiations were not ongoing, and respondent made no good faith effort to ameliorate the dispute, petitioner cannot be said to have reason to believe there was no reason for him to file a petition with the Commissioner of Education. In fact, the absence of effort on the part of the respondent is sufficient indicia of adversity and lack of cooperation that warrants a timely and zealous filing of a petition.

CONCLUSION

I have considered the stipulated facts and the arguments of counsel and for the foregoing reasons, I **CONCLUDE** that petitioner's petition should be dismissed for failure to comply with the ninety-day limitation period of *N.J.A.C.* 6:24-1.2(c). I Further **CONCLUDE** that the circumstances do not warrant relaxation of the ninety-day rule pursuant to *N.J.A.C.* 6:24-1.15.

ORDER

It is hereby **ORDERED** that petitioner's appeal is dismissed and respondent's motion for summary decision is granted.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 22, 1993
Date

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

11/24/93
Date

DEPARTMENT OF EDUCATION

DEC 7 1993
Date

Mailed to Parties

OFFICE OF ADMINISTRATIVE LAW

ERR/dgi/e

OAL DKT. NO. EDU 4122-93

NICHOLAS RAYMOND,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RIVER EDGE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon a careful and independent review of the record in this matter, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge for the reasons well articulated by her in the initial decision.

Accordingly, the Commissioner adopts the recommended decision of the Office of Administrative Law as her final decision in this matter. The Board's motion for summary decision is hereby granted and the within Petition of Appeal is dismissed as untimely.

Mary Ann Fitzgerald

COMMISSIONER OF EDUCATION

DECEMBER 30, 1993

DATE OF MAILING - DECEMBER 30, 1993

329-93

EDU #4122-93
C # 329-93
SB # 7-94

NICHOLAS RAYMOND,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE BOROUGH OF RIVER EDGE, BERGEN COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, December 30, 1993

For the Petitioner-Appellant, Springstead & Maurice
(Alfred F. Maurice, Esq., of Counsel)

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

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

June 1, 1994

Date of mailing JUN 03 1994