NEW JERSEY SCHOOL LAW DECISIONS

Indexed

January 1, 1979 to December 31, 1979

vol. 1

New Jersey
State Department of Education
225 West State Street
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New Jersey
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FRED G. BURKE
COMMISSIONER OF EDUCATION

DECISIONS RENDERED BY THE STATE BOARD OF EDUCATION
SUPERIOR COURT AND SUPREME COURT
1979

ROBERT S. DUNN,

PETITIONER,

V. : COMMISSIONER OF EDUCATION

BOARD OF VOCATIONAL EDUCATION OF CUMBERLAND COUNTY, : DECISION

RESPONDENT.

For the Petitioner, Ruhlman and Butrym (Cassel R. Ruhlman, Jr., Esq., of Counsel)

For the Respondent, Reuss, Spall and Cavagnaro (Carl W. Cavagnaro, Esq., of Counsel)

Petitioner, a tenure teacher in the Cumberland County Vocational-Technical Center, filed a Petition of Appeal before the Commissioner on May 4, 1978, contesting an action by the Board of Vocational Education, hereinafter "Board," which notified petitioner by letter dated March 22, 1978 (J-1) of his retirement effective sixty days after the date of the letter pursuant to Board policy P5-2.5 (R-2) and N.J.S.A. 18A:66-43(b).

The Board, conversely, denies that its action was contrary to its discretionary authority.

This matter is before the Commissioner of Education on Cross-Motions for Summary Judgment, Briefs, affidavit of petitioner and exhibits.

Subsequent to filing of the instant Petition of Appeal, petitioner received a letter dated May 16, 1978 (J-2) from the Board stating, "As a result of your petition filed in response to your notice of termination, the Board has authorized the extension of your termination from May 21, 1978 to June 30, 1978."

Petitioner states in an affidavit executed on July 3, 1978 that his date of birth is February 26, 1908 (P-1); that he is a member of the Teachers' Pension and Annuity Fund; that pursuant to N.J.S.A. 18A:66-43(b) and the rules of the Teachers' Pension and Annuity Fund, specifically N.J.A.C. 17:3-6.15(a), he cannot be compelled to retire until the first day of the month in which he reaches the age of 71; that the action of the Board herein controverted should be set aside; that he is entitled to continue in the employ of the Board as a teacher under tenure; that he cannot be compelled to retire from his teaching position until February 1, 1979; and that he should receive all salary and

emoluments therefor until February 1, 1979 or until his earlier voluntary retirement.

The statute N.J.S.A. 18A:66-43(b) reads as follows:

> "Each and every member who shall have reached 70 years of age shall be retired by the board of trustees for service forthwith, or at such time within one year thereafter as it deems advisable."

The rule N.J.A.C. 17:3-6.15(a) reads:

> "All members shall be required to terminate their active memberships as of the first of the month in which they attain age 71. The actual payment of retirement benefits will be subject to the regular filing requirements set forth in Section 1 (Applications) of this Subchapter."

The Board avers that the continuation of petitioner's employment from May 21 to June 30, 1978 was purely a courtesy to petitioner and not an effort to curb any possible defects in the earlier notice given. (J-1)

The Board avers further that its action with respect to petitioner was proper in light of N.J.S.A. 18A:66-43(b), prior practice of the Board and the Board's policy (R-2); the Board submits that N.J.S.A. 18A:66-112 clearly supports its position.

N.J.S.A. 18A:66-112, in its entirety, states:

> "Any member who shall have reached 70 years of age shall be retired by the board of trustees forthwith, except that an employee reaching 70 years of age may be continued in service until the end of the school year upon written notice to the board of trustees by the board of education where the member is employed."

The Commissioner has reviewed the complete record in the instant matter and has carefully balanced the arguments of the litigants. The Commissioner notices that the essential facts in this matter are not in dispute and that the parties differ only in the interpretation of the statutes and rules and regulations invoked.

The Board's reliance on N.J.S.A. 18A:66-112 is misplaced. The section cited is incorporated in Article 2 of Chapter 66. Article 2, which includes sections 94 through 126, addresses "Pension Fund of School District Employees in First-Class Counties." N.J.S.A. 18A:66-112, being within the ambit of Article 2, is inapplicable in the instant matter.

N.J.S.A. 18A:66-43(b) confers solely upon the board of trustees of the Teachers' Pension and Annuity Fund the power not only to retire a member who has attained the age of 70 years but also to determine when, within that year, it shall do so. No language in the section can be construed as conferring any such powers upon a local board of education.

The board of trustees of the Teachers' Pension and Annuity Fund has set forth in the Administrative Code the rules and regulations through which it administers the requirements placed upon it by the Legislature. Of direct bearing on the instant matter is N.J.A.C. 17:3-6.15(a) which provides for compulsory retirement. The rule embodied therein states unequivocally that "All members shall be required to terminate their active memberships effective as of the first of the month in which they attain age 71.***"

The Commissioner, upon reading N.J.S.A. 18A:66-43(b) and N.J.A.C. 17:3-6.15(a) together, can reach no other conclusion than that the Board had no power to retire petitioner on its own initiative. Accordingly, the Board of Vocational Education of the County of Cumberland is directed to reinstate petitioner to his tenured position and to provide him with any emoluments and salary which he otherwise would have received and to continue him in such position with no diminution of duties, emoluments or salary until February 1, 1979, or his earlier, voluntary retirement.

The Board is further directed to notify the board of trustees of the Teachers' Pension and Annuity Fund forthwith of petitioner's age and status and to do all things required of it by the board of trustees to effectuate the compulsory retirement of petitioner in an orderly and timely manner.

COMMISSIONER OF EDUCATION

January 5, 1979

ROBERT S. DUNN,	:	
PETITIONER-APPELLEE,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF VOCATIONAL EDUCATION OF CUMBERLAND COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, January 5, 1979

For the Petitioner-Appellee, Ruhlman and Butrym
(Cassel R. Ruhlman, Jr., Esq., of Counsel)

For the Respondent-Appellant, Reuss, Spall & Cavagnaro
(Carl W. Cavagnaro, Esq., of Counsel)

The State Board of Education affirms the decision of the Commissioner for the reasons expressed therein.

April 4, 1979

CAROLE R. LEVINE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

For the Petitioner, Dennis J. Quinn, Esq.

For the Respondent, Ernest A. Ferri (Steven E. Heath, Esq., of Counsel)

Petitioner, a member of the Board of Education of the Township of Willingboro, hereinafter "Board," alleges that the Board failed to notify her of a meeting which it scheduled and held on May 19, 1977 and that such failure constituted exclusion of her from effective participation. She requests the Commissioner of Education to declare the meeting null and void and to direct the Board to refrain from holding meetings without proper notification in the future. The Board denies that it failed to properly notify petitioner of the meeting or that it excluded her from participation. It requests dismissal of the Petition of Appeal.

A hearing was conducted October 4, 1977 at the Extension Services Building, Mt. Holly, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

The question for determination herein is whether the Board's meeting of May 19, 1977 was legally called in the context of the statutes and rules of the State Board of Education. It is petitioner's contention, not refuted at the hearing, that she received no prior written notice of the meeting and that an oral notice given to her by the Board President on May 12, 1977 was later rescinded. (See Tr. 6-7.) Thus, she avers, the Board effectively excluded her from participation.

Testimony at the hearing from petitioner and other Board members was concerned with such contentions.

Petitioner testified that her first notice of the special meeting of May 19, 1977 was given to her orally by the Board

President on May 12, 1977 but that she had then notified the President that the meeting conflicted with one already scheduled by the Burlington County School Boards Association which she had made plans to attend. (Tr. 6-7) She testified that she had subsequently discussed the conflict with another Board member on May 18 and that thereafter this Board member had relayed their joint complaint about the conflict by telephone to the Board President. Petitioner testified that this other Board member then relayed a message to her on the same date from the Board President which constituted notice that the meeting was cancelled. (Tr. 8) She testified that she received no further notice from the Board President or school administrators on May 19 with respect to the meeting and that on that evening she and two other Board members attended the meeting of the County Association. It was at that meeting, she testified, that she heard that there had been a change of plans and that the Board meeting she had been informed was cancelled was in fact being held. (Tr. 10) She testified that she was "surprised" by the information and that she stayed at the county meeting until its conclusion. Petitioner testified that she called the Superintendent's office the next morning and was told that the meeting had been held. She subsequently received a copy of the minutes of the meeting. (P-1; Tr. 10) She testified that thereafter she wrote a memorandum to the Board requesting a discussion of the meeting of May 19 and the events prior thereto but that the request was never set down as a Board agenda item. (Tr. 20)

The other Board member of reference testified essentially in confirmation of the testimony of petitioner concerned with the events of May 18. He said that he had called the Board President on that date to express his displeasure with the brevity and form of the notice of the meeting of May 19 afforded him on May 18 by a school official and that a conclusion had been reached namely:

> "***That the meeting would be cancelled and that I could act for Mr. Oliver [Board President] and call Mrs. Levine, and inform her that the meeting would be cancelled.***"
> (Tr. 34-35)

He testified he had then called petitioner and relayed the message and had also attended the County Association meeting with petitioner and a third Board member on May 19. He testified that on that date he had received no contrary notice with respect to the Board meeting he thought had been cancelled from school officials or the Board President. (Tr. 36) He testified that after hearing at the County Association meeting that the Board meeting was being held, he felt no obligation to attend since he had concluded the procedure and form of notice had been inadequate. (Tr. 39) He testified that he had never received a written notice of the May 19 meeting. (Tr. 44)

The acting assistant Board Secretary in May 1977 testified that she first learned on May 17 of the possibility of a meeting on May 19 but had had difficulty confirming it. She testified that the Board President then called her on May 18, told her of the meeting and asked her to inform the local newspaper and to call the Board members. (Tr. 47) She testified that she had carried out these instructions on May 18 but then was told by the Board President on the morning of May 19 that the meeting was cancelled and that he requested her again to call all Board members and relay this notice. She testified that she had then called seven of the nine Board members with notice of the cancellation but was unable to contact petitioner and did not call one other Board member because she knew he would attend the County meeting. (Tr. 49) The acting assistant Board Secretary testified that there then ensued a series of calls which resulted in still another reversal of position and a decision that the meeting would be held. She testified that she again called the seven members to tell them of this latest decision but was unable again to contact petitioner and did not contact the one other Board member. (Tr. 50)

The Board President testified that he had orally informed the Board on May 12 and May 16 that there would be a meeting on May 19 but had decided after receiving complaints from Board members with prior commitments to the County meeting that the meeting should be cancelled. (Tr. 56 et seq.) He testified that he subsequently cancelled the meeting but reversed this position on advice of counsel that the cancellation would be illegal. (Tr. 59) The Board President testified that one of the three Board members at the County meeting had left that meeting early and arrived shortly after the Board meeting here in question started and had complained that the meeting was being held. The President testified he then moved to adjourn the meeting but the motion failed to pass. (Tr. 63) The Board President testified he was not "aware" that petitioner was told of the meeting cancellation but admitted that he had not, as promised, called the member, with whom he had talked and to whom he had given the notice of cancellation for relay to petitioner, to apprise him on May 19 that the meeting would go forward as scheduled. (Tr. 64)

It is noted here that the principal topic for discussion at the special meeting of May 19, 1977 was to be Board procedures and the conduct of Board members in public meetings. The record of this meeting is in evidence as P-1. It is also noted that there was testimony at the hearing that the usual form of notice of Board meetings received by each member prior to the meeting was a written agenda together with a copy of a notice of the meeting sent to the local newspaper and/or a memorandum. (Tr. 43-44)

The hearing examiner has examined all such testimony and the complete record of the instant matter and finds that a strict adherence to the Board's usual notice procedure of special meetings was lacking herein. Such procedure was abandoned and the substituted procedure resulted in vacillation, confusion, recrimination and litigation. An announced meeting was cancelled and then reinstated. Written notice to all Board members was never afforded. Oral notice of the meeting, the cancellation and reinstatement was afforded to some but not to all. Such notice in the context of the rule of the State Board of Education (N.J.A.C. 6:3-1.9) and prior determination of the Commissioner was ultra vires. The hearing examiner so finds. Florence S. Evaul v. Board of Education of the City of Camden, 1959-60 S.L.D. 60, aff'd State Board of Education 64; John E. Cullum v. Board of Education of the Township of North Bergen, 1952-53 S.L.D. 62, aff'd State Board of Education 67

The rule of the State Board of Education enacted pursuant to the authority of N.J.S.A. 18A:4-15 with respect to special meetings of local boards of education provides:

> N.J.A.C. 6:3-1.9
>
> "In every school district of the State it shall be the duty of the secretary of the board of education to call a special meeting of the board whenever he is requested by the president of the board to do so or whenever there shall be presented to such secretary a petition signed by a majority of the whole number of members of the board of education requesting the calling of such special meeting."

This rule lacks specificity with respect to procedure but must be considered together with the decisions in Evaul, supra, and Cullum, supra, for a total view of the parameters which must encompass special meeting procedure. Rules for the call of special meetings should include a requirement that the call to the meeting contain a statement of purpose. Evaul Well established practice should be followed without deviation in order that important decisions may not be jeopardized by procedural defect. As the Commissioner said in Cullum:

> "***There seem to the Commissioner to be sound reasons why there should be strict conformance to the requirements for calling special meetings. Any other course can result only in confusion. A Board member should not have to heed a notice given improperly because he fears the meeting may

> later be held to be legal. Important business, such as calling district meetings for bond issues, is sometimes transacted at special meetings. Bond issues should not be jeopardized by failure to comply strictly with requirements for calling a special meeting. Endless litigation can result if requirements are not followed strictly.***" (Emphasis supplied.) (at 65)

The cautions of Cullum, if they had been heeded, would have obviated the difficulty.

The hearing examiner finds no evidence of any final action taken by the Board in its meeting of May 19, 1977 and concludes there is no practical reason to warrant a recommendation that the meeting be declared a nullity. It is recommended that the Commissioner direct the Board to formally adopt, and routinely employ, clear and specific policies with respect to special meetings which are in conformity to prior decisions of the Commissioner and the State Board and to also take full cognizance of the provisions of the Open Public Meetings Act. N.J.S.A. 10:4-6 et seq. This Act, while not the standard by which the instant Petition is measured, must be viewed in pari materia with all prior delineations concerned with the call to special meetings.

This concludes the report of the hearing examiner.

* * * *

The Commissioner, having examined the record of the controverted matter and having determined that the hearing examiner's findings and recommendations are consistent with the credible evidence therein, henceforth adopts those findings as his own. It is noted that no exceptions were filed by either party pursuant to the provisions of N.J.A.C. 6:24-1.17(b).

It is apparent that the manner in which the Board's May 19, 1977 meeting was called did not comply with required notice to Board members for failure to state the purpose for which the meeting was called. Evaul, supra; Cullum, supra; N.J.A.C. 6:3-1.9 That meeting was not precipitated by any emergent matter which required its being called in a manner wholly inconsistent with both the Board's usual practice of advance notice and with the requirements of existing law. The vacillation as to whether the meeting was to be called resulted in misunderstanding in the minds of some Board members who did not attend part or all of the meeting. The result may be viewed only as a decimation of the attendance which otherwise would have been expected. Such reduction in members present at a meeting is contrary to statutory

intent. Peter Contardo v. Board of Education of the City of Trenton, 1974 S.L.D. 650, 653

It must be recognized, however, that that which transpired at the May 19 meeting, while of importance, was not of sufficient moment nor of such conclusive nature to require a declaration that the meeting was null and void. No useful purpose would be served thereby. Accordingly, petitioner's prayer for such a declaration is denied.

Nevertheless, the Commissioner is constrained to direct this Board and all boards of education to review any existing policies on the calling of special meetings and make such revisions as may be necessary to bring those stated policies into full conformance with the procedures iterated by the courts in Evaul, supra, and Cullum, supra, by the State Board of Education in N.J.A.C. 6:3-1.9, and by the Legislature in N.J.S.A. 18A:17-7 and the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq. The calling of special meetings by board officers and board secretaries shall conform in every particular thereto. The Commissioner so holds.

COMMISSIONER OF EDUCATION

January 8, 1979

JACQUELINE NASUTI AND THE WEST AMWELL EDUCATION ASSOCIATION,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST AMWELL, HUNTERDON COUNTY,	:	
RESPONDENT.	:	

For the Petitioners, Rothbard, Harris & Oxfeld
(Sanford R. Oxfeld, Esq., of Counsel)

For the Respondent, Bernhard, Durst & Dilts
(Robert J. Durst II, Esq., of Counsel)

Petitioner is a teacher who was employed by the Board of Education of the Township of West Amwell, hereinafter "Board," for three consecutive academic years and not reemployed for a fourth, 1976-77. She avers that her non-reemployment was improper because the Board determined not to reemploy her solely on the negative recommendation of the school principal and the personnel committee and, further, that the Board was unaware of any reasons for non-reemployment at the time of its action.

The Board denies petitioner's allegations and states that in determining she would not be reemployed it acted for the reasons subsequently given to her on request.

A representative appointed by the Commissiner of Education conducted a hearing in the office of the Hunterdon County Superintendent of Schools, Flemington, on May 12 and June 20, 1977. The report of the hearing examiner follows:

Shortly after filing the Petition of Appeal, petitioner also filed an Order to Show Cause why she should not be reemployed immediately and the Board thereafter filed a Motion to Dismiss the Petition of Appeal. Both actions were held in abeyance pending a conference between the litigants and the hearing examiner.

At the conference of counsel on December 7, 1976, counsel for petitioner requested the aforementioned hearing. The hearing examiner stated that nontenure teachers are not entitled to a

hearing as a matter of law. Dee Foster and the Neptune Township Education Association v. Board of Education of the Township of Neptune, Monmouth County, 1976 S.L.D. 693 Nevertheless, conference agreements were issued which held in part that:

A hearing would be conducted solely to determine whether or not the "reasons" given petitioner by the Board were known by the Board prior to their being sent to petitioner, and

The hearing was not for the purpose of examining the validity of the reasons.

On March 18, 1977, more than three months after the agreements were reached, counsel for petitioner denied making such agreements and the hearing examiner responded by letter on March 18, 1977, accepting responsibility for the limited nature of the hearing, which was granted solely because of counsel's insistence that petitioner was terminated for constitutionally proscribed reasons. Counsel admits in his March 18, 1977 letter that he "***was informed that [the hearing examiner] would not hold a hearing for these [other] purposes.***" (See Conference Agreements, Nos. 3, 4.)

Counsel's assertion that he was denied an opportunity to present testimony on petitioner's behalf is true insofar as he stated that he would elicit testimony from parents and teachers to prove the Board's reasons lacked any foundation. (Tr. I-3-16, 81-85) In George Ruch v. Board of Education of the Greater Egg Harbor Regional High School District, 1968 S.L.D. 7, dis. State Board of Education 11, aff'd New Jersey Superior Court, Appellate Division, March 29, 1969 (1969 S.L.D. 202), the Commissioner commented as follows:

> "***The fact that respondent made available to petitioner the report of his supervisor which was adverse to petitioner's interest, does not open the door automatically to a plenary hearing on the validity of the 'reasons' for nonrenewal of employment. To hold that every employee of a school district, whose employment is not continued until he acquires tenure status, is automatically entitled to an adversary type hearing such as petitioner demands, would vitiate the discretionary authority of the board of education and would create insurmountable problems in the administration of the schools. It would also render meaningless the Teacher Tenure Act for the reason that the protections afforded thereby would

> be available to employees who had not yet qualified for such status.***" (at 10)

The record shows that petitioner was evaluated pursuant to the provisions codified in N.J.A.C. 6:1-1.19 and was thereafter notified pursuant to the relevant statutes that she would not be reemployed. N.J.S.A. 18A:27-10 et seq. Petitioner does not contend that there are procedural violations which resulted in her termination; rather, she alleges that the Board's actions were arbitrary and capricious. She demands a plenary hearing to prove her contentions and states that she is entitled to a due process, adversary hearing so that she can refute the substance of the statement of reasons offered by the Board to support its determination not to reemploy her. (Petitioner's Brief, at pp. 22, 27-30) Petitioner alleges, specifically, that when the Board voted not to reemploy her on April 12, 1976, it did not know the reasons which were given to her later. (R-1) Petitioner contends that the Board improperly relied on the recommendation of its three member personnel committee and the district's administrative principal when it determined not to reemploy her. At the hearing petitioner attempted to prove this allegation.

One Board member was called by petitioner to testify in her behalf. Although this Board member believed that petitioner should have been reemployed, his testimony reveals that the Board was aware of the reasons why it did not reemploy her prior to making its determination. That Board member, petitioner's own witness, testified as follows:

> Q. "***Well, did the Board ever agree that these were, in fact, the reasons?
>
> A. "There were no other reasons; so these had to be the reasons for which [petitioner] was not given that contract.***" (Tr. I-38)
>
> Q. "***Fine. But in fact there is no question in your mind then or now that they were in fact the reasons given and the reason for which [petitioner] was dismissed?
>
> A. "They are the only reasons that I've ever heard.
>
> Q. "Never heard anything else?
>
> A. "No.

Q. "They are the reasons that were given to her and the reasons upon which *** [petitioner was] dismissed?

A. "Yes. They are the only reasons I know.***" (Tr. I-45-46)

This witness also testified that he missed the March and April meetings of the Board and that he did not know what the other Board members had in front of them when they reached their determination. (Tr. I-32-34, 42-43, 58-59)

In the hearing examiner's judgment, petitioner did not sustain her burden of proof that the Board's action was arbitrary or capricious. Neither did she prove that the Board was unaware of the reasons when it voted not to reemploy her.

On the other hand the record discloses that the personnel committee discussed the substance of the reasons on March 8, 1976 and that the full Board discussed petitioner's reemployment in public session on April 12, 1976 at which time petitioner was present. (Tr. I-90-102; Tr. II-6; C-1-2) The Board member who testified in her behalf missed both of these meetings. Petitioner requested and was given a written statement of such reasons. (P-1) She was granted an informal appearance before the Board on June 1, 1976. At the conclusion of the meeting, the Board reaffirmed its determination made at the April 12 meeting by a vote of 8-1. (C-4)

The hearing examiner finds that petitioner was evaluated, notified, given a statement of reasons and an informal appearance before the Board, all in accordance with her rights codified in N.J.A.C. 6:3-1.19 and 1-20, and her statutory entitlement pursuant to N.J.S.A. 18A:27-10 et seq. There is no showing that the Board's action was arbitrary or capricious. Nontenure teachers' rights have been clearly set forth in many decisions of the Commissioner. See Kathleen Mullelly v. Board of Education of the Township of Maple Shade, Burlington County, 1976 S.L.D. 388; Phebe Baker v. Board of Education of the Lenape Regional High School District et al., 1975 S.L.D. 471; Claire Haberman v. Board of Education of the Borough of Morris Plains, 1975 S.L.D. 848; Foster, supra.

In accordance with the guidelines and directives set forth in these and other decisions, the hearing examiner concludes that there is no further relief to which petitioner is entitled.

For these reasons, the hearing examiner recommends that the Petition of Appeal be dismissed. This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the hearing examiner's report, the record, and examined with care the exceptions filed by petitioner pursuant to N.J.A.C. 6:24-1.17(b).

Although petitioner's exceptions are lengthy and cite many federal court decisions, as well as New Jersey court decisions and decisions of the Commissioner, essentially they set forth two contentions, i.e.

1. that the reasons given her as to why she would not be reemployed were not based on any facts which would enable the Board to reach its conclusion to terminate her; therefore, its reasons were arbitrary and capricious; (Petitioners' Exceptions, at pp. 1-3, 11-12)

2. that she is entitled to a due process hearing before an impartial body including the right to present witnesses in her behalf and cross-examine her accusors. (Petitioners' Exceptions, at pp. 3-4, 22-23)

I

The Commissioner and the courts have commented previously on the rights of nontenure teachers subsequent to their notice of non-reemployment and request for a "hearing." Prior to June 1974, determinations by boards of education not to reemploy nontenure teachers could be made for any reason or no reason at all. Zimmerman v. Board of Education of Newark, 38 N.J. 65 (1962) That law was changed by Donaldson v. Board of Education of North Wildwood, 65 N.J. 236 (1974) when the Court mandated that nontenure teachers be provided a statement of reasons for non-reemployment when requested. In Donaldson, the Court discussed the purpose of the statement of reasons in the following language:

> "***Perhaps the statement of reasons will disclose correctible deficiencies and be of service in guiding his future conduct; perhaps it will disclose that the nonretention was due to factors unrelated to his professional or classroom performance and its availability may aid him in obtaining future teaching employment; perhaps it will serve other purposes fairly helpful to him as suggested in Drown (435 F.2d at 1184-1185); and perhaps the very requirement that reasons be stated would, as suggested in Monks (58 N.J. at 249), serve as a significant discipline on the board itself against arbitrary

> or abusive exercise of its broad discretionary powers.***" (65 N.J. at 245)

In Donaldson, the Court cited George Ruch v. Board of Education of Greater Egg Harbor, 1968 S.L.D. 7, dismissed State Board of Education 11, aff'd New Jersey Superior Court, Appellate Division, 1969 S.L.D. 202, and in Ruch, as in the matter herein, the Commissioner and the Court were concerned with the subjective judgment made by a local board of education. In Ruch reasons for nonretention had been afforded a nontenure teacher, and an adversary hearing was requested to disprove their validity. The Commissioner, however, found no reason to order an adversary hearing and said:

> "***The fact that respondent made available to petitioner the report of his supervisor which was adverse to petitioner's interest, does not open the door automatically to a plenary hearing on the validity of the 'reasons' for nonrenewal of employment. To hold that every employee of a school district, whose employment is not continued until he acquires tenure status, is automatically entitled to an adversary type hearing such as petitioner demands, would vitiate the discretionary authority of the board of education and would create insurmountable problems in the administration of the schools. It would also render meaningless the Teacher Tenure Act for the reason that the protections afforded thereby would be available to employees who had not yet qualified for such status.***"
> (1968 S.L.D. at 10)

Petitioner insists that she was not asking the hearing examiner to conclude from the testimony of witnesses she would call that the reasons given her were wrong; rather, she asserts that there were no facts upon which any evaluator could rely to reach the conclusions set forth in the statement of reasons which were given to her. (Petitioner's Exceptions, at pp. 2-3)

The reasons given petitioner were based on supervisory evaluations by her principal. They are set forth in their entirety as follows:

> "You have asked the West Amwell Board of Education for a written statement of reasons to explain why your contract was not renewed for the 76-77 school year. Following is a list of those reasons:

"1. The major deficiency, noted on more than 50 visits to your room this year by Mr. Brown and recorded in written evaluations on December 11, 1975, February 19, 1976, and March 17, 1976, lies in the area of pupil-teacher relations. There was very little evidence during those visits that you genuinely enjoyed teaching children. For the most part you appear unhappy and show little enthusiasm and humor in your lessons. You smile infrequently and do not create a warm, cheerful and concerned atmosphere in your classroom. Your students are not caught up in the excitement and joy of learning during the time you instruct them.

In conferences with Mr. Brown and in a written response to his evaluation of December 11, 1975, you agreed with the problems as noted but explained that nervousness was the cause. However, Mr. Brown's many visits to your room has (sic) given you ample opportunity to become more comfortable and at ease during these periods of observation.

"2. A second deficiency, noted first in an evaluation on December 11, 1975, lies in the area of professional growth. Although there has been improvement in this area (e.g. participation on the Humanities Committee and as Art Curriculum Leader, etc.), you still contribute very little in general faculty sessions. You are, therefore, not making all the professional contributions you could make to foster continued growth in our school." (P-1)

Petitioner's assertion that she does not seek to show that the reasons are wrong is an expression of a distinction without a difference. The record shows that petitioner was observed and evaluated and she obviously disagreed with her over-all evaluation. She did present witnesses in her behalf when she appeared before the Board in an attempt to dissuade it from its earlier determination. The Board recessed between thirty and forty-five minutes before it returned and announced its determination. (Tr. I-26-27)

Pursuant to the mandate set forth in Donaldson, supra, the Commissioner established in Barbara Hicks v. Board of Education of Pemberton, 1975 S.L.D. 332 that nontenure teachers are entitled to an informal appearance before boards of education, upon request, after receipt of a statement of reasons for non-reemployment. Petitioner has had such an appearance.

The Commissioner has also commented previously on teachers' claims that their constitutional rights have been violated. When a teaching staff member alleges that a local board of education has refused reemployment for proscribed reasons (i.e. race, color, religion, etc.) or in violation of constitutional rights such as free speech, or that the board was arbitrary and capricious or abused its discretion, and is able to provide adequately detailed specific instances of such allegations, then the teaching staff member would be entitled to a full adversary proceeding. South Plainfield Education Association and Marilyn Winston v. Board of Education of Borough of South Plainfield, 1972 S.L.D. 323, aff'd State Board of Education 327, rev'd and rem. 125 N.J. Super. 131 (App. Div. 1973), aff'd 64 N.J. 582 (1974), dismissed with prejudice Commissioner of Education November 1, 1974

In the instant matter petitioner makes no specific allegation of arbitrary or capricious action by the Board. Neither does the record disclose a constitutional deprivation of petitioner's rights. She was understandably distraught by her principal's evaluations and she was unable to dissuade the Board that those evaluations were improperly based on what she perceived to be the actual practice, atmosphere and setting in her classroom.

The Commissioner concludes that the reasons are valid and based on the subjective professional judgment of petitioner's principal, who is her supervisor, charged with the responsibility of observing and evaluating teaching staff members, so that he may recommend to the Board as to reemployment, as part of the process of improving the instructional program received by the pupils.

II

In Claire Haberman v. Board of Education of Morris Plains, 1975 S.L.D. 848 the Commissioner quoted from Ruch, supra, as follows:

> "***'***While petitioner has charged respondent with arbitrary, frivolous and discriminatory conduct with respect to his further employment, such a bare allegation is insufficient to establish grounds for action.

> U.S. Pipe and Foundry Company v. American Arbitration Association, 67 N.J. Super. 384 (App. Div. 1961) Petitioner does not allege that race or religion or any other kind of unlawful bias influenced respondent's failure to reappoint him. Nor does he claim that respondent was motivated by frivolous considerations. Petitioner's charge of unreasonable and arbitrary action rests on the unfavorable report of his superior. But examination of the report, which petitioner attached to his pleadings, reveals that it is nothing more than his supervisor's written evaluation of petitioner's classroom performance and teaching competence. Supervisory evaluations of classroom teachers are a matter of professional judgment and are necessarily highly subjective. There is no allegation that the supervisor's report was made in bad faith, the result of personal animosity or bias, or in other ways improper. What is plain is that the supervisor, in the normal course of her duties, rendered a report of her evaluation of petitioner's competence as a teacher to the administration, that a copy was furnished to petitioner for his knowledge, that the administration and the Board of Education considered the report and, although it did not conduct an adversary type hearing such as petitioner demands, it did afford petitioner an opportunity to meet with the Board and express his point of view, and that as a result and with this information before it the Board simply chose not to reemploy petitioner. Under such circumstances the Commissioner finds no vestige of any unlawful, arbitrary or capricious motivation. The Commissioner cannot agree that because respondent made information underlying its decision not to place petitioner in a tenure status available to him, it bound itself to accord him a plenary hearing as a matter of right.***'
>
> (Id., at pp. 10-11)***"
>
> (at 853)

The Court in Donaldson, supra, commented favorably on the Commissioner's decision in Ruch, supra, and said that the dismissal of the petition by the Commissioner was grounded in an

> "***opinion by the Commissioner which set forth substantive and procedural principles which appear to have been well designed towards protecting the teacher's legitimate interests without impairing the board's discretionary authority and without unduly encumbering the administrative appellate process.***" (65 N.J. at 247)

Similarly the Commissioner reiterates that which he stated in Haberman, supra, as follows:

> "***If such a subjective judgment may trigger a request for, and the granting of, a plenary hearing before the Commissioner and require a subsequent decision concerned with the merits of the judgment, then the discretion of local boards to employ personnel is severely compromised. The distinction between the employment or the discharge of nontenured or tenured personnel is a distinction without a difference. In either case, the local board is left to its proofs--of reasons or charges--and, in effect, the mere status of employment confers on those who have not met the precise conditions for the privilege of a tenured accrual (N.J.S.A. 18A:28) all of the privileges of those who have.***" (at 852)

In the instant matter it can be assumed for the purpose of argument that petitioner's many proposed witnesses consisting of parents, fellow teachers and pupils would have all testified as to her positive abilities and good qualities (Tr. I-72-85) and that their testimony would be directly contrary to the Board's statement of reasons. (R-1) The Commissioner would obviously then be placed in a position of deciding whether or not he could accept their opinions as opposed to the Board's. In other words, the Commissioner would be asked to substitute his discretion for that of the Board.

In Sally Klig v. Board of Education of the Borough of Palisades Park, 1975 S.L.D. 168 and John J. Kane v. Board of Education of the City of Hoboken, 1975 S.L.D. 12 it was stated:

> "***The Commissioner will not substitute his judgment for that of a local board when it acts within the parameters of its authority. The Commissioner will, however, set aside an action taken by a board of education when it is affirmatively shown that the action was arbitrary, capricious or unreasonable.***" (at 174)

Finally, petitioner asserts that she had a clear liberty interest denied her by the failure of the Board (or the hearing examiner) to grant a full adversary hearing. (Tr. I-14) The Commissioner cannot agree. As set forth above, petitioner has been afforded all of her constitutional guarantees and rights pursuant to statute and relevant case law. Therefore, there is no relief to which she is entitled.

Accordingly, the Petition of Apppeal is dismissed.

COMMISSIONER OF EDUCATION

January 9, 1979

CATHERINE JONES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HADDON, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

For the Petitioner, Greenberg & Mellk (Arnold M. Mellk, Esq., of Counsel)

For the Respondent, Murray, Meagher & Granello (Robert M. Tosti, Esq., of Counsel)

Petitioner, a secretary in the employ since December 17, 1973 of the Board of Education of the Township of Haddon, hereinafter "Board," alleges that her termination of employment by the Board on October 21, 1976 was illegal. The Board contends that its action, with respect to petitioner's employment status, was proper in all respects. At issue is petitioner's claim of entitlement to reemployment as a secretary in the school system with the resulting emoluments ascribed to such a position. The matter is before the Commissioner of Education for adjudication based on the exhibits and Brief on behalf of the Board on the Motion for Summary Judgment or Motion to Dismiss with petitioner's Memorandum in Opposition and a subsequent letter memorandum from each party. The relevant facts are as follows:

At a meeting of the Board held December 20, 1973, the Board appointed petitioner to the position of secretary in the Haddon Township High School effective December 17, 1973 to June 30, 1974. She was subsequently reemployed by the Board for the school year 1974-75, 1975-76 and 1976-77 and received salary ratification letters. These letters stated as follows:

> "The Board of Education is pleased to announce that your salary for the next school year, 1974-75, beginning on July 1, 1974, is:
>
> | | |
> |---|---|
> | New Salary | $ 5,200.00 |
> | Present Salary | $ 4,700.00 |
> | Amount of Increase | $ 500.00 |

"If you have any questions, please contact this office as soon as possible."
(Respondent's Brief, Ex. 1b)

"The Board of Education is pleased to announce that your salary for the next school year, 1975-76, beginning on July 1, 1975, is:

New Salary	$ 5,720.00
Present Salary	$ 5,200.00
Amount of Increase	$ 520.00

"If you have any questions, please contact this office as soon as possible."
(Id., Ex. 1c)

"The Board of Education is pleased to announce that your salary for the next school year, 1976-77, beginning on July 1, 1976, is:

New Salary	$ 6,292.00
Present Salary	$ 5,720.00
Amount of Increase	$ 572.00

"In addition to the salary increase stated above, the Board of Education is pleased to announce that all contract employees will receive the new Prescription Program for 1976-77. Details about the program will follow.***" (Id., Ex. 1d)

On October 14, 1976, petitioner received a letter signed by the principal and the vice-principal, which reads in its entirety as follows:

"Through the course of time in which you served as a secretary in the high school under my direct supervision, there were several occurrences when it was necessary for me to verbally bring to your attention your unsatisfactory behavior and my displeasure with your response to the production duties to which you were assigned.

"Since as early as February 1976 it was imperative for me to discuss with you on seven or eight occasions that there were

> tasks that you failed to complete according to my instructions or within the required time limits. It was the observation of the administrative staff that this was not due to the burden of the task but rather to your tendency to be easily distracted for numerous irrelevant reasons such as concern for things occurring in the office that were unrelated to your task. Moreover, your inability to resist engaging yourself in excessive, unnecessary conversation, both on the phone and in the office, affected your capacity to be an effective secretary.
>
> "Likewise, it is the opinion of the administrative staff that on frequent occasions you did not use sound and discreet judgment in the handling of matters that affected the efficient operation of a complex high school office. You, also, failed to grasp a sense of the importance of the priority of jobs to be completed.
>
> "***[I]t is indeed difficult in the space of a single letter to state all the developing problems caused by your office conduct and work performance. In summary, it has to be said that it is impossible for the high school office to function in an efficient manner with your services as secretary.
>
> "Hence, I am recommending to the Superintendent and the Board of Education that effective as of October 15, 1976 you be dismissed from your position as the high school secretary." (Ex. A)

This was followed by a letter from the Superintendent of Schools, dated October 15, 1976, as follows:

> "As a result of your inability to function effectively as a secretary in the high school office, you are herewith notified that you are suspended, with pay, from your position effective immediately.
>
> "This action has been taken pending Board action on the Superintendent's recommendation to terminate your employment, which action will be taken at the Board's October 21, 1976 meeting." (Ex. B)

On October 15, 1976, petitioner was suspended from her position with pay. (Petition of Appeal, Exhibit A) At its meeting on October 21, 1976, her employment was terminated by action of the Board with sixty days' severance pay. (Board's Answer, Exhibit A) This concludes the recitation of the facts in the instant matter.

Petitioner contends that the Board refused to provide her with reasons for her termination and that this failure rendered her termination illegal. Petitioner makes no claim to tenure status. (Petitioner's Brief, at p. 6) Petitioner argues that her salary ratifications and letter from the Board are contracts and these contracts represent a property interest cognizable as such under the Fourteenth Amendment of the United States Constitution. She prays for reinstatement as a secretarial employee of the Board of Education of the Township of Haddon and relies on Endress v. Brookdale Community College, 144 N.J. Super. 109 (App. Div. 1976) and American Association of University Professors v. Bloomfield College, 129 N.J. Super. 249 (Chan. Div. 1974), aff'd 136 N.J. Super. 442 (App. Div. 1975).

The Board argues that petitioner held no contract, was a probationary employee and could be terminated for any reason without notice. The Board contends that its determination to grant petitioner sixty days' severance pay was prompted by "***the interest of fairness***" and not from contract terms. (Board's Brief, at p. 15) The Board contends that although petitioner was not entitled to a statement of reasons and an opportunity to be heard, she was afforded but refused the opportunity to be heard privately before the Board as enunciated in Donaldson v. Board of Education of North Wildwood, 65 N.J. 236 (1974) and Barbara Hicks v. Board of Education of the Township of Pemberton, 1975 S.L.D. 332. The Board relies on Canfield v. Board of Education of Pinehill Borough, 97 N.J. Super. 483 (App. Div. 1967), rev'd 51 N.J. 400 (1968). (Board's Brief, at pp. 4-6) Further, the Board contends that petitioner's salary notification letter did not establish a contractual relationship with the Board and cites Adam W. Martin v. Board of Education of the City of South Amboy, 1973 S.L.D. 496, aff'd State Board of Education 1974 S.L.D. 1412 and Marilyn Arzberger v. Board of Education of the Township of Neptune, 1976 S.L.D. 835, aff'd State Board of Education January 5, 1977, rem. Docket No. A-2093-76 New Jersey Superior Court, Appellate Division, October 31, 1977, cert. den. 75 N.J. 608 (1978).

The Board contends that the decision reached by the Commissioner in Martin, supra, should not apply in the instant matter as there was "***neither a contract nor rules and regulations of the Board of Education that would apply.***" (Board's Brief, at p. 12)

For the above stated reasons the Board contends that its action in terminating petitioner's employment was proper and prays for dismissal of the Petition.

In this case the precise issue for determination by the Commissioner are these: did or did not the Board act in a legal and proper manner in terminating petitioner's employment on October 21, 1976 and is petitioner entitled to monetary compensation for the period from October 21, 1976 through June 30, 1977 in addition to sixty days' severance pay already received.

In the first instance, the assumption is that if the Board improperly terminated petitioner, then she is entitled to reinstatement and would accordingly acquire a tenure status.

Local boards of education, subject to applicable law, have the authority to employ and dismiss staff members as an exercise of discretion. The controlling statute is N.J.S.A. 18A:16-1 which provides, inter alia, as follows:

> "Each board of education *** shall employ and may dismiss *** such principals, teachers, janitors and other officers and employees, as it shall determine, and fix and alter their compensation and the length of their terms of employment."

The acquisition of a tenure status by secretarial and clerical employees is controlled by the requirements of N.J.S.A. 18A:17-2 which provides in pertinent part that to achieve tenure, a person must hold

> "***[A]ny secretarial or clerical position or employment under a board of education of any school district or under any officer thereof, after
>
> 1. The expiration of a period of employment of three consecutive calendar years in the district or such shorter period as may be fixed by the board or officer employing him***."

The Commissioner observes that a board of education may make rules and regulations for the management of its schools and for the employment and discharge of its employees. N.J.S.A. 18A:11-1 and 16-1 There is no statutory provision by which a board of education is required to perform evaluations and serve notice of charges and to grant a subsequent hearing thereon to a nontenured clerical employee prior to discharge.

The Supreme Court of this State in Zimmerman v. Board of Education of the City of Newark, 38 N.J. 65, 75 (1962), cert. den. 371 U.S. 956, 83 S.Ct. 508 (1963) expressed the principle that "***it is axiomatic that the right of tenure does not come into being until the precise condition laid down in the statute has been met.***" In the instant matter petitioner's services were terminated prior to the 365th day of the third consecutive year. N.J.S.A. 18A:17-2

In the judgment of the Commissioner, petitioner was offered reasons for her termination. These reasons were set forth in the letter dated October 14, 1976 from the principal and vice-principal. (Ex. A) Further, the Superintendent of Schools in his letter to petitioner dated October 15, 1976 alluded to her inability to function effectively as a secretary in the high school office. (Ex. B) It is clear, therefore, in the Commissioner's judgment, that absent any proof that the Board's action terminating petitioner's employment in the middle of the school year was discriminatory or in violation of petitioner's constitutional rights, the Board's action was legal and proper and the Commissioner so holds. Accordingly, petitioner did not and could not acquire a tenure status.

The second issue of the instant matter concerns the questions whether petitioner is entitled to monetary compensation for the period from October 21, 1976 through June 30, 1977, additional to the sixty days' pay previously granted by the Board.

The Commissioner finds no merit in the Board's reliance on Martin, supra, in its argument that there existed no contractual relationship with petitioner. The Commissioner observes that in Canfield, supra, the Supreme Court adopted the reasoning expressed in the dissenting opinion of Judge Gaulkin of the Appellate Division as follows:

> "***If the contract contained no cancellation clause, and the board elected not to permit the teacher to teach beyond the date of notice of dismissal, it seems to me the teacher would, at most, be entitled to his salary for the full term of the contract, but not to tenure. If I am correct in this, I see no reason why the result should be different when the contract contains a cancellation clause but the board's notice of dismissal is not given in accordance with the cancellation clause. Suppose the board had simply discharged plaintiff and not even offered her the 60 days' pay? It seems to me that she would then be entitled to the 60 days' pay, under section 11, or, at most,

damages for the breach of the contract, but not to tenure.

"***But here we are concerned not with the contract or its breach, but with the status of the plaintiff -- i.e., tenure. It seems to me that the dismissal immediately stopped the running of the time to tenure. The burden of proving the right of tenure is upon plaintiff and ordinarily that right must be clearly proved. I do not think a municipality should be trapped into tenure by the construction of words which neither party expected to have that meaning.***"
(Emphasis supplied.) (97 N.J. Super. at 492-493)

The Commissioner finds that the principles enunciated in Canfield, supra, are controlling in the instant matter. At no time during her employment by the Board did petitioner have a written contract which contained a clause permitting either party to submit notice in writing sixty days prior to the anticipated date of termination. The whole of the contractual provisions concerning her employment is contained within the letter notifications heretofore cited. (Ex. 1b, 1c, 1d) Furthermore, the Board admits that it had no policy which provided for a sixty day notice of termination in writing. Accordingly, petitioner is entitled to receive the amount of salary which she would have been paid between October 21, 1976 and June 30, 1977 had her employment not been terminated by the Board. Martin, supra The Commissioner, therefore, orders the Board of Education of Haddon Township to pay to Catherine Jones the aforementioned sum of money less the amount previously paid to her for one week and sixty days following her termination, mitigated by any amount of salary earned by petitioner in any substituted employment between October 21, 1976 and June 30, 1977.

COMMISSIONER OF EDUCATION

January 17, 1979

CATHERINE JONES,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HADDON, CAMDEN COUNTY,	:	DECISION
RESPONDENT-APPELLEE.	:	

Decided by the Commissioner of Education, January 17, 1979

For the Petitioner-Appellant, Greenberg & Mellk
(Arnold M. Mellk, Esq., of Counsel)

For the Respondent-Appellee, Murray, Granello & Kenny
(Malachi J. Kenney, Esq., of Counsel)

In this case the Board of Education dismissed Petitioner, a clerical worker, because of inadequate performance of her duties. In so doing, the Board gave her 60 days' severance pay. The Commissioner held that although Petitioner had no tenure, she had a one year contract with the Board and that absent a provision therein for 60 days' notice of termination, Petitioner was entitled to receive remuneration until the end of the school year, mitigated by any amount of salary earned by her in substituted employment during that period.

The State Board affirms the Commissioner's decision solely on the ground that the Board of Education has acquiesced therein. The State Board's affirmance should not be construed as forbidding a local board from dismissing a nontenured employee at any time for cause, provided the proper procedures are followed.

May 2, 1979

MARY ALICE HANCOCK,

PETITIONER,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Mary Alice Hancock, Pro Se

For the Respondent, Casper P. Boehm, Jr., Esq.

Petitioner, a resident of Scotch Plains and the parent of P.H., a pupil formerly in the Scotch Plains-Fanwood High School, maintained and supervised by the Scotch Plains-Fanwood Board of Education, hereinafter "Board," avers that the school records of P.H. are incomplete and incorrect. Petitioner requests that the school record of P.H. be corrected and made whole as requested by her. Petitioner further requests the Commissioner of Education to investigate the record keeping practices in the Board's schools and impose an appropriate penalty for alleged failure to adhere to federal, state and local requirements. The Board avers that all record corrections requested by petitioner have been made rendering her claim moot. The Board further contends that changes requested by petitioner are not required to be made. Oral argument on the Board's Motion to Dismiss was heard on June 22, 1978 at the State Department of Education, Trenton, before a representative appointed by the Commissioner. Petitioner, although cautioned and admonished to appear by letter of June 8, 1978, chose not to do so. The matter is presently before the Commissioner for adjudication based on the transcript, pleadings, exhibits and letter memoranda submitted.

In her Petition of Appeal, petitioner refers to the school records of P.H. and requests in pertinent part:

> ***
>
> "1) a.) completion of the permanent record card: 'reason for leaving' and 'date left' ('transferred to' was corrected around the end of January) ***

b.) corrections of the elementary grade card to bring it in line with reports sent home to parents, as outlined in the appeal ***

c.) removal of the home telephone number from the permanent record card, the high school grade card, the health record card, and all places where it appears. (Since the student has withdrawn there would be no need for emergency contact by telephone. Student and parent can be reached by mail. The home telephone number is unlisted. ***

2) the Commissioner

a.) investigate pupil record keeping practices in the Scotch Plains-Fanwood School District to assure adherence to all federal, state, and local requirements, and

b.) compel enforcement where the local district fails to meet the requirements, and

c.) impose any/all penalties for non-adherence to both individuals and/or to groups or public bodies."

On June 4, 1978 petitioner sent to the Commissioner's representative a letter which said in pertinent part:

"***Please find enclosed Dr. Carpenter's letter to me of May 22, 1978, in which all points of my request are granted. I shall inspect the school records for verification as soon as possible.

"Therefore, assuming that Dr. Carpenter's letter is correct, items 1(a), (b), and (c) of my prayer have been completed, corrected, and granted as requested. If it should turn out that Dr. Carpenter's letter of May 22 is incorrect, then this letter (my letter to you dated 6/4/78) is null and void and I will notify you immediately. While points 1(a), (b), and (c) no longer require proof in a conference with you, items 2(a), (b), and (c) remain to be acted upon, i.e.:

'2) The Commissioner

a.) investigate pupil record keeping practices in the Scotch Plains-Fanwood school district to assure adherence to all federal, state, and local requirements, and

b.) compel enforcement where the local district fails to meet the requirements and

c.) impose any/all penalties for non-adherence to both individuals and/or to groups or public bodies.'

"In reference to the above I cite specifically the failure of the superintendent and of the school board to follow the procedure required by the N.J. Administrative Code, and their failure to meet the deadlines stipulated under NJAC 6:3-2.7(b). I also point out to you that between Nov. 8, 1977, and Jan. 30, 1978, one item in the school records was changed as requested but I was never notified of this change. My efforts to correct these records have taken from Nov. 21, 1977, to May 22, 1978, a period of six months.

"I request your prompt attention to the above and notify you that since I work full time, I am not able to meet with you June 22. Please proceed without me.***"

The Board argues that it has complied with petitioner's request concerning the changes to be made in the school record of P.H. and argues further that there is no basis for the relief requested by petitioner wherein she asks the Commissioner to investigate the record keeping practices of the Board and impose penalties where appropriate.

The rules and regulations governing pupil records are compiled by the State Board in N.J.A.C. 6:3-2.1 et seq., effective May 16, 1975. The local Board adopted its own rules and regulations regarding governance of pupil records on November 21, 1974, a copy of which has been submitted as part of the record. The Commissioner has carefully examined the local Board's rules and finds them in general compliance with N.J.A.C. 6:3-2.1 et seq.

Petitioner's letter of June 4, 1978 states "***[w]hile points 1(a), (b), and (c) no longer require proof *** items 2(a), (b), and (c) remain to be acted upon***." These items refer to petitioner's request for an examination by the Commissioner of the record keeping practices of the Board.

The Commissioner does not investigate general and non-specific allegations; rather, he responds to specific charges of some improper or illegal action allegedly perpetrated by a board of education employee as filed in a formal Petition of Appeal. Petitioner concedes that the school records of P.H. have been completed and corrected as requested. The remaining portion of petitioner's request is vague and provides no cause of action. Accordingly, the Commissioner finds that portion of the Petition of Appeal to be without merit and the Board's plea for dismissal is herein granted.

COMMISSIONER OF EDUCATION

January 18, 1979

MARY ALICE HANCOCK,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE SCOTCH PLAINS-FANWOOD REGIONAL SCHOOL DISTRICT, UNION COUNTY,	:	DECISION
RESPONDENT-APPELLEE.	:	

Decided by the Commissioner of Education, January 18, 1979

For the Petitioner-Appellant, Mary Alice Hancock, Pro Se

For the Respondent-Appellee, Casper P. Boehm, Jr., Esq.

The State Board of Education affirms the decision of the Commissioner for the reasons expressed therein.

May 2, 1979

IN THE MATTER OF THE CLOSING :
OF THE JAMESBURG HIGH SCHOOL, :
SCHOOL DISTRICT OF THE :
BOROUGH OF JAMESBURG, :
MIDDLESEX COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

For the Commissioner of Education, John J. Degnan, Attorney General (Alfred E. Ramey, Jr., Esq., Deputy Attorney General, of Counsel)

For the Jamesburg Board of Education, Rubin, Lerner & Rubin (David B. Rubin, Esq., of Counsel)

For the Ad Hoc Committee, Alfonso & Alfonso (Thomas P. Cutchall, Esq., of Counsel)

For the New Jersey Education Association, Greenberg & Mellk (William S. Greenberg, Esq. and Arnold Mellk, Esq., of Counsel)

By an order dated June 14, 1978, the Commissioner of Education directed that a hearing be conducted wherein interested parties would be afforded opportunity to show cause why, as official agent of the State Board of Education pursuant to N.J.S.A. 18A:4-22(b), the Commissioner should not issue an order directing that the recommendations of the Middlesex County Superintendent of Schools to close the Jamesburg High School and establish alternate sending-receiving relationships to provide for the educational needs of its enrolled pupils be made binding upon the Jamesburg School District.

The Jamesburg Board of Education, hereinafter "Board," and the municipal governing body of Jamesburg favor the closing of Jamesburg High School which was built in 1932 and, with subsequent additions, is now the smallest high school in New Jersey. The Ad Hoc Committee, composed of residents and certain property owners in Jamesburg, opposes its closing. The New Jersey Education Association, which was accorded status of an intervenor representing the interests of its member teachers who teach in the Jamesburg High School, opposes the issuance of such an order. (Tr. I-89-105)

Eight days of hearing were conducted at the State Department of Education, Trenton, the East Brunswick High School, East

Brunswick, and the Middlesex County Community College, Edison, on July 10, 17, 21, August 2, 3 and September 6, 7, 18, 1978. Witnesses were called by each party of record except the intervenor. Opportunity for interested citizens to express their viewpoint was announced early in the hearing and provided on September 18, 1978. (Tr. VIII-101-181) Those uncontroverted facts which form the contextual setting of the disputed matter are herewith set forth by the Commissioner's representative:

Enrollment of pupils in Jamesburg High School on the second day of school in September 1978, consisting of resident pupils from Jamesburg and tuition pupils from the contiguous Borough of Helmetta, was as follows:

Grade	Jamesburg	Helmetta	Totals
12	29	13	42
11	29	20	49
10	42	4	46
9	49	15	64
8	61	13	74
	210	65	275

(AH-14)

This enrollment represents an increase of five pupils from Jamesburg and fifteen pupils from Helmetta over the enrollments of September 1977.

Helmetta, whose ten year contractual sending-receiving contract with Jamesburg expired on June 30, 1978, is currently seeking to negotiate an alternative sending-receiving arrangement. (Tr. VIII-120) A prior sending-receiving agreement between Jamesburg and neighboring Monroe Township terminated in June 1976, after which Monroe Township pupils have attended their own district's high school. This loss of 172 sending district pupils from Monroe contributed to a decline from 447 pupils enrolled in Jamesburg High School grades nine through twelve during 1973-74 to the present enrollment of 201 in those same grades. This decline in enrolled pupils, which is also attributable, in part, to the nationwide decline in school age pupils, resulted in Jamesburg High School's adding eighth grade pupils to its operational program. (B-10) Graduating classes currently number fewer than fifty pupils. (Tr. II-80; AH-14)

Attempts by the Board to regionalize or establish alternative sending-receiving relationships with neighboring school districts have been unsuccessful.

On March 10, 1977 the Commissioner, in authorizing the Board of Education of Milltown to establish a sending-receiving relationship with the Board of Education of the Borough of Spotswood for a limited two-year period, directed the Middlesex County Superintendent of Schools to prepare and submit a report by January 1, 1978 on the general adequacy of high school programs in Middlesex County. (B-22) The County Superintendent in her report dated December 31, 1977 took notice of Helmetta's and Jamesburg's declining pupil populations and of Jamesburg's unsuccessful attempts to align itself with other districts in a regional or sending-receiving relationship. Therein she stated, inter alia, that:

> "***The Jamesburg Board of Education now operates the smallest high school in the State, and it has become increasingly difficult for the Board to justify such operation as economically or educationally viable. The pupil population continues to decrease. The high school building is old and needs extensive repair. The need to retain a skeletal program of essential offerings requires an ever-increasing per pupil cost.***
>
> "As a result, the Board of Education resolved at a meeting on December 20, 1977, to abandon the high school, effective June 30, 1978.***"
>
> (B-18, at p. 6)

And,

> "***Thus, it is apparent that the decision by the Jamesburg Board to abandon the high school will have far reaching implications and will require a provision for alternative placement. It may well be that the statute N.J.S.A. 18A:38-8 will have to be invoked. The statute provides:
>
> > 'The board of education of any school district having the necessary accommodations may receive, or may be required to receive by order of the state board, pupils from another district not having sufficient accommodations, at rates of tuition fixed as in this article provided.'
>
> "In any event, the situation with respect to a placement for high school pupils of Jamesburg and Helmetta has reached a crisis

> stage and recommendations which are subsequently set forth take cognizance of this fact.***" (B-18, at p. 8)

The County Superintendent stated that she perceived it advisable for Spotswood and/or Monroe to work out a long-term arrangement for their secondary pupils with Jamesburg and Helmetta. (B-18, at p. 14) She recommended that, pending completion of such long range plans, agreements be reached by local districts whereby pupils enrolled in Jamesburg High School would be educated at the North Brunswick High School beginning in September 1978 on a tuition basis. (B-18, at p. 15)

The Commissioner, by order dated February 1, 1978, directed that those Boards which could be affected by the County Superintendent's recommendation regarding alignment of school districts and the placement of Jamesburg High School pupils respond to her recommendations. (B-19)

The Helmetta Board responded that it found her recommendations unacceptable and that it preferred to independently seek out an alternative sending-receiving relationship with some other school district. The Monroe Board of Education declined voluntary acceptance of Jamesburg High School pupils and requested the Commissioner not to require it to enroll them or pupils from other districts. Similarly, the North Brunswick Board, in rejecting the recommendations on grounds that its growth patterns necessitated all available space in its high school for its own pupils in order to present an optimum program of education, suggested that more viable alternatives exist.

On February 14, 1978 the Jamesburg voters defeated by a vote of 297 to 350 the following referendum question:

> "Shall the Jamesburg Board of Education of the Borough of Jamesburg be authorized to close the Jamesburg High School for the purpose of educating grades 9 through 12"

At the same election they approved a school budget which, at the direction of the County Superintendent, included additional expense items of tuition and transportation for Jamesburg's pupils to attend a high school outside the district as tuition pupils. Thereupon, the Board responded to the Commissioner by requesting that he mandate that Jamesburg pupils be assigned as tuition pupils to Monroe High School, on a long-term basis, beginning September 1978. (B-17)

The Commissioner, on February 27, 1978, directed the County Superintendent to conduct an evaluation of Jamesburg High School and report her findings regarding its thoroughness and efficiency

by March 17, 1978. An evaluation was conducted by the County Superintendent's staff and twenty-two consultants and a report was made to the Commissioner. It was recommended in that report, inter alia, that because of the physical condition of the building it should be abandoned and that an order to show cause why the school should not be closed be issued by the Commissioner. In the alternative, it was recommended that the Board be directed to procure from a licensed architect preliminary plans and cost estimates for bringing the physical facilities of the school up to an acceptable standard. (B-13, at pp. 45-46)

In June 1978 the aforementioned order to show cause was issued by the Commissioner. A summary of relevant testimony and documentary evidence entered into the record ensues:

Two witnesses from the State Department of Education's Bureau of Facility Planning Services testified that they had visited the Jamesburg High School for approximately three hours on March 7, 1978 and compiled the Educational Evaluation and Safety Evaluation Report entered into evidence as C-1. The Assistant Architectural Supervisor who evaluated the conditions of the buildings and grounds without regard to their educational uses testified that he appraised the school's facilities utilizing an instrument which provides a scale from 0 (non-existent) to 3 (good). (C-2) He testified that the total score he assigned to the school's physical facilities was 459.6. He asserted that he always recommends abandonment of a school with a score of less than 500, although that recommendation is not a mandate to close the school. (Tr. I-10; Tr. II-34) He testified that he had observed safety violations of storage under a pupil exit, broken thermostats, non-functional exhaust units in classrooms and toilets, lack of uniform heating in classrooms, a substandard number of exits, unapproved hold-open devices on stairwell doors, exposed radiators, unapproved locks on exit doors, absence of emergency lights, windows and sashes in need of replacement, non-safety glass at pupil exits, absence of pupil restrooms on the second floor, and classroom lighting throughout the building which provided only twenty-one foot candles of lighting as compared to present-day requirements of fifty foot candles of illumination. (Tr. I-23, 45, 49, 56, 67, 72-73, 80; Tr. II-4, 12-14, 18-19, 22, 28, 30-31) He testified that certain of those were deficiencies when measured against today's more rigid standards but that existing law does not compel a school approved and built decades ago to add such items as additional exits, lavatories on the second floor, and certain types of emergency lights which are now required for approval of new school construction. He further testified that in contrast to his measurement of light intensity, by meter, his appraisals of heating and ventilation conditions were not made as the result of instrumentation readings but that he relied upon his senses to

note dysfunctions or lack of uniformity. (Tr. I-29, 39; Tr. II-18-19)

The Educational Facilities Consultant who was charged with evaluating the buildings and grounds in terms of their adequacy to provide a proper educational environment testified that, in his opinion, the physical plant of Jamesburg High School "***would fall into the poor of the very poorest of categories.***" (Tr. I-108) He testified that he perceives that not only extensive renovation and remodeling but also an extensive addition would be necessary to convert the existing high school into an adequate physical plant. (Tr. I-107) He testified that the school provides no cafeteria facilities and that the gymnasium which is the stage of the auditorium presents a safety hazard since a pupil could fall therefrom three feet to a lower level. (Tr. II-107) He testified that among other areas of deficiency were the size of the school site which is 10 acres, the library with only 700 square feet of space, a typing-office practice-shorthand room which was inadequate for multiple use, and absence of large group instruction classrooms. (Tr. I-110, 118, 171)

The Educational Facilities Consultant, in recommending abandonment of the facility as a high school also testified that:

> "***[T]he teachers in this particular school and the students and parents should be commended on the kinds of efforts that they are making because, in this particular instance, they must be making Herculean efforts in the limited facilities that they have.***"
> (Tr. I-143-144)

The Board's architect testified that he perceived no unique or insurmountable problems to renovate Jamesburg High School and that, with inflation, today's costs would exceed his prior estimates of renovation costs which were as follows:

1972 Estimate	$1,202,000
1976 Estimate	1,678,400

(Tr. I-190-194; B-2-4)

The School Program Coordinator, hereinafter "Coordinator," assigned on February 27, 1978 by the County Superintendent to organize the evaluation of Jamesburg High School testified that he utilized the services of 22 qualified Department of Education consultants from the Trenton office and various county superintendent's offices to conduct an evaluation during March 6 and 7, 1978. He stated that in advance of those dates he sent each consultant copies of the school's adopted goals and requested that each consultant submit an evaluation of the area assigned

within one day following the visit. He testified further that each consultant spent at least one half day visiting classes and examining courses of study and other materials in a room provided by the school administration for such purposes. (C-5; Tr. IV-4-9, 21-22, 87, 89) He testified that, after he and the consultant for secondary education from the Commissioner's office compiled and synthesized the consultants' findings and recommendations (I-3 through I-10), he assisted the County Superintendent in preparing her report to the Commissioner. (B-13) Therein, in addition to the previously reported recommendation to issue the within show cause order, the Jamesburg High School staff was complimented for their capability, concerns and dedication.

The Coordinator testified that it is his opinion, based upon the results of that evaluation, that the teachers, in spite of being hampered by availability of facilities and despite curricular limitations, are performing in an excellent manner and are maintaining good rapport with pupils. (Tr. IV-103, 131) He also testified that:

> "***[T]he curriculum that is offered is narrow. It's not broad enough, it can't be broad enough. The facility is one of the factors that inhibits***. It just is not the kind of facility that would permit a broad enough curriculum to meet the needs of all the students.***" (Tr. IV-132)

The Coordinator further stated that in his opinion the decline in school enrollment at Jamesburg High School would continue. In this regard the Superintendent and County Superintendent concurred. (Tr. II-156; Tr. VI-6-9, 19)

The County Superintendent testified that it is her opinion that Jamesburg High School's curricular offerings are currently insufficient to meet the minimum thorough and efficient requirements of N.J.S.A. 18A:7A-1 et seq. and that to maintain the limited program of essentials now offered "***requires an ever-increasing per-pupil cost.***" (Tr. V-130) See also Tr. V-127, 132. She testified further that she believes that, as long as Jamesburg High School remains open, Helmetta pupils should continue to be enrolled there and that possible jointure of Jamesburg with Monroe Township would have to be reevaluated in consideration of changes of alignments and attitudes which have occurred or may have occurred since she issued her December 1977 School District Alignments Report (B-18). (Tr. VI-50-53)

When asked why she did not recommend that the Cranbury Board of Education enter into an arrangement whereby its pupils would be educated at Jamesburg High School, the County Superintendent testified that she perceived that Cranbury (which has since

entered into an agreement to send its tuition pupils to Lawrence Township High School) had less than thirty-five pupils per grade and that those pupils "***would not make a significant difference in [Jamesburg High School's] student body.***" (Tr. V-94)

The Board Secretary who is also the Borough Clerk of Jamesburg, testified as follows:

> "***[Pupils] receive a good basic education at Jamesburg High School. However, there is so much more that I as a parent want for my children that cannot be provided***. [M]y daughter *** a sophomore this year ***[chose] drama *** [and] music appreciation. In the final analysis, both of these courses were denied to her because [of insufficient registration].***" (Tr. II-61-62)

And,

> "***I would say we are down to the bare number of teachers at the high school to make it economically feasible.***" (Tr. II-62)

The Superintendent testified that he perceives the limited enrollment as a contributing factor to curricular and cocurricular limitation and to excessive increases in per pupil costs. (Tr. II-85, 88, 91-92) He testified that he agrees with the assessment set forth in the Educational Evaluation and Safety Evaluation Report (C-1) with the exceptions that lighting has since been improved, unauthorized locks have been removed from exit doors, fire blankets have been provided and certain other hazardous conditions have been corrected. (Tr. II-93, 117, 123-128, 132, 156, 159) That such hazardous conditions have been corrected was corroborated by a member of the Board's maintenance committee. (Tr. III-94-95)

The Board President testified that as a parent of a pupil soon to enter high school he perceives that:

> "***It is coming to a decision point for me as to whether public education in Jamesburg can adequately provide her with a proper education and it's, therefore, imperative to me that improvements be made at our high school level by closing the high school and sending out our students to another high school so that I can keep my daughter in public education where I would really like her to be.***" (Tr. III-14)

And,

> "***I selected Jamesburg because it did have a small high school. I thought this would be an advantage and it was a growing awareness over a period of years *** that I realized there was such a thing as being too small.***" (Tr. III-41-42)

And,

> "***I did not feel that just improving the building would do the total job. I felt we had inadequate students to have a full curriculum.***" (Tr. VIII-46)

When asked what it was he desired that Jamesburg High School could not offer, the Board President specified art, music and other electives that Jamesburg High School cannot offer and are offered at surrounding high schools. (Tr. III-34, 71, 79) He testified, however, that he believes the teaching staff of the Jamesburg High School is performing well, considering the limitations of curriculum and facilities. (Tr. III-45)

The Board President also testified that the Board had sought but was denied a federal grant for $1,678,400 for renovation of Jamesburg High School in 1976. (AH-15) He testified that a later application by the Municipal Governing Body of Jamesburg was approved for $159,000 of which $55,000 was allocated and used for school improvements in the form of dropped ceilings in the High School at a cost of $8,000 and other improvements at the elementary and middle schools. (Tr. III-46-57) The Board President testified also that the Board's studies had convinced it that

> "***it was far more expensive to amortize 1.9 million [dollars for renovations] than to pay tuition to send our students out.***" (Tr. III-59)

Pupils of Jamesburg High School testified that they desire that their school remain open and that they exhibit strong loyalty to their school, appreciate its numerous activities, successful sports teams, emphasis on basic education and low drop-out rate. They also prize the individual attention given by teachers. (Tr. III-109-113, 127-129, 150) This testimony was corroborated by teachers and the principal who stated that, when he had polled the pupils in assembly on September 6, 1978, they had expressed a nearly unanimous preference that their school remain open. (Tr. VII-127-128) He testified that he believes the school should remain open and that sufficient renovation and operating funds should be provided to expand its curriculum and

cocurricular activities. (Tr. VII-140-141) He also testified that, by presenting electives on alternate years, curricular offerings, such as marine biology and geology have been added. (Tr. VIII-97; C-8-10)

The principal testified additionally that, although the March evaluation visit presented less lead time than other evaluations on which he had served, this presented no problem except for making hospitable arrangements for the visiting consultants. (Tr. VII-129)

The chairman of the Ad Hoc Committee, who had previously served on the Board for twenty-one years, testified that he believes that both Jamesburg and Helmetta, as well as Monroe and Cranbury, are faced with dramatic increases in population which will result from development of vacant land and asserted that the closing of the Jamesburg High School would be a grave mistake. (Tr. VI-107-115, 121-126; AH-7-10, 13; Tr. VII-60) He averred that amortization of a bond issue coupled with increased pupil enrollment would not only be more economical than paying tuition and transportation costs for Jamesburg's pupils, but would also restore and sustain community confidence "***in the ability of our [high] school to provide a good education.***" (Tr. VI-138) See also Tr. VI-135-139, 164. He testified also that his survey of pupil opinion revealed their overwhelming desire that their school remain open but with improvements to the physical plant and increased opportunities for studies in such areas as languages, journalism, mechanical drawing and advanced sciences. (Tr. VI-138-139, 149-151; AH-1, 12)

The Ad Hoc Committee Chairman also testified that he had vigorously protested the use for municipal roads of $104,000 of a $159,000 Federal Economic Development Administration grant to Jamesburg which left only $55,000 for urgent school renovations. (Tr. VII-5-6; AH-16, 21; Tr. VIII-95)

The Superintendent of the Helmetta Public Schools testified that, in contrast to the $1,500 per pupil tuition which the Helmetta Board had been billed for the 1976-77 school year, the actual audited cost per pupil for which the Helmetta Board is now responsible was $2,345.94 per pupil. He testified that the Helmetta Board not only views the present tuition arrangement as inordinately costly but also considers the curricular offerings of Jamesburg High School as inadequate. He testified that for these reasons the Helmetta Board had refused to enter into a proposed five-year extension of the sending-receiving contract with the Jamesburg Board. (Tr. VIII-111-112, 119-120)

The Mayor of Jamesburg testified that 85 percent of the residential land in Jamesburg is already developed thus limiting potential population growth. He estimates that the present

population of 4,800 will increase to 5,314 by 1985 which figure would be far less than the 1969 Master Plan population projection of 6,300 to 7,000 for the year 1980. (Tr. VIII-142-143; B-5, at p. 6)

The Commissioner's representative, having carefully reviewed and considered the exhibits in evidence, testimony and demeanor of witnesses, the pleadings and Briefs, sets forth the following findings of fact in addition to those uncontroverted facts previously set forth:

1. Jamesburg High School has declined in pupil population until it is now the smallest public high school in New Jersey.

2. Curricular and cocurricular offerings are severely limited by the fact that grades nine through twelve have an average of only fifty pupils enrolled per grade. The resultant class sizes are small and class enrollments of under ten are commonplace. The High School has extremely limited electives with no music, mechanical drawing or vocational offering and only one period per day of art. (C-10)

3. The cost per pupil of maintaining such small size classes has increased at a substantial rate.

4. The establishment of a broader based curriculum without a companion increase in pupil enrollment would inevitably lead to more smaller classes with a corresponding increase in per pupil cost over and beyond that which inflation continues to cause in all schools.

5. There is, currently, no viable prospect of regionalization or other sending-receiving agreement which the Board as a result of its efforts has been able to develop in an effort to solve its dilemma of low enrollment and high per pupil cost. Nor are there near term prospects that population growth within Jamesburg and Helmetta will result in sufficient growth of pupil enrollment to relieve per pupil costs or allow for a broader based curriculum with additional electives such as are common to New Jersey high schools.

6. The resultant narrowness of curriculum and co-curricular offerings severely limits the education of pupils who desire secondary school instruction in such disciplines as music, art, drafting, vocational education, drama, acrobatics and advanced placement courses in mathematics and science.

7. The rapport between teachers and pupils is strong with ready availability of teacher assistance when needed.

8. The physical shortcomings of the school plant are apparent but the hazards revealed by recent safety inspections have been corrected. Nevertheless, the school is in noncompliance with ventilation requirements which have continuously been in effect since 1932 when the edifice was erected. See Green Village Road School Association et al. v. Board of Education of the Borough of Madison, 1976 S.L.D. 700, 714-715, aff'd State Board of Education 716, aff'd Docket No. A-1411-76 New Jersey Superior Court, Appellate Division, October 13, 1977.

9. The physical shortcomings of the existing school are remediable but would cost approximately $2,000,000 to meet today's standards for new construction. The schoolhouse by reason of size would still remain inadequate to accommodate many aspects of a broad-based curriculum.

10. Absent a dramatic rise in enrollment, it would be less expensive to educate Jamesburg and Helmetta pupils by sending them as tuition pupils to another high school with an existing broad-based curriculum.

11. There is in the record insufficient credible evidence on which to base a conclusion that the Board acquiesced to political pressure of the governing body or otherwise abused its discretionary authority in seeking the assistance of the Commissioner when faced with the aforementioned educational and financial dilemmas.

In summarization of the foregoing findings of fact, the Commissioner's representative perceives insufficient enrollment to be the inescapable fact which prevents the Board from providing a viable program to improve either its curricular offerings, cocurricular program or improve its schoolhouse facility at reasonable cost.

N.J.S.A. 18A:33-2.1, which became effective in the laws of 1967, provides that:

> "***No board of education of a school district providing high school education in its own high school shall propose to close its high school and to contract with another district or districts to provide high school education for pupils of the district, unless and until a public question as to whether or not the board may enter into such a contract or contracts shall be submitted to and approved by the majority of the voters of the district voting thereon at an annual or special school election."

The Legislature thereafter promulgated the Public School Education Act of 1975, effective July 1, 1975, which sets forth the major elements of a thorough and efficient system of free public schools. Therein it was specified, inter alia, that the following shall be included:

> "***A breadth of program offerings designed to develop the individual talents and abilities of pupils***."
>
> (N.J.S.A. 18A:7A-5(d))

That same act provides that the Commissioner shall evaluate the performance of each school to determine pupil status and needs and, when necessary, conduct a plenary hearing pursuant to N.J.S.A. 18A:6-9 on proposals to take corrective action such as ordering in-service training programs and budgetary changes. N.J.S.A. 18A:7A-10, 14, 15 The statute, N.J.S.A. 18A:7A-15, also provides that:

> "***If he determines that such corrective actions are insufficient, he shall have the power to recommend to the State Board that it take appropriate action. The State Board, on determining that the school district is not providing a thorough and efficient education, notwithstanding any other provisions of law to the contrary shall have the power to issue an administrative order specifying a remedial plan to the local board of education, which plan may include budgetary changes or other measures the State Board determines to be appropriate.***"

Intervenor argues that no order may legally be issued to close the Jamesburg High School absent voter approval of such action pursuant to N.J.S.A. 18A:33-2.1 and cites in this regard Central Regional Education Association et al. v. Board of Education of the Central Regional High School District, Ocean County, 1977 S.L.D. _____ (decided May 6, 1977). Therein, despite numerous unsuccessful referenda to provide facilities that would allow a high school to resume single session scheduling and alleviate overcrowding, the Commissioner determined that yet another building referendum proposal should be submitted to the voters. Central Regional, however, is importantly distinguishable from the instant matter in that the proposed closing of the Jamesburg High School would not result in a debt obligation which would become the obligation of the taxpayers of Jamesburg.

The Commissioner, even in the absence of specific statutory directive, possesses authority to take corrective action in compliance with constitutional mandates. Jenkins et al. v.

Township of Morris School District et al., 58 N.J. 483 (1971); Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966); Booker v. Plainfield Board of Education, 45 N.J. 161 (1965) That authority was exercised In the Matter of the Application of the Upper Freehold Regional Board of Education, Monmouth County, 1978 S.L.D. ____ (decided March 22, 1978) wherein the Commissioner, after two unsuccessful district referenda to fund a supplementary budget, conducted a plenary hearing and certified additional tax revenues for a district which would otherwise have had to close its schools months prior to the completion of the 1977-78 school year. That action was taken in the absence of a court order or specific statutory authority granting the Commissioner authority to take such action.

The Commissioner's representative, in full consideration of the facts hereinbefore set forth, recommends to the Commissioner that, in the absence of any showing that an alternate viable plan exists to broaden the curricular offerings and increase the enrollment of Jamesburg High School, he determine under his authority pursuant to N.J.S.A. 18A:7A-1 et seq. that Jamesburg High School does not presently meet the test of providing a thorough and efficient system of education as defined by the Legislature and by the State Board of Education. It is further recommended that the Commissioner recommend to the State Board pursuant to N.J.S.A. 18A:7A-15 that Jamesburg High School be closed beginning July 1, 1979, that pupils now enrolled therein from Helmetta and Jamesburg be thenceforth designated as tuition pupils to attend an appropriate high school in Middlesex County, such high school to be designated by the Commissioner after consultation with the County Superintendent with full consideration to any preferences expressed by local districts and to any relevant changes which have occurred since the County Superintendent's December 1977 report on school district alignments. (B-18)

The Commissioner's representative commends to the attention of the Commissioner all legal arguments set forth in Briefs of the parties with special reference to intervenor's contention that a further hearing is required to guarantee the public expression of opinions regarding any proposed implementation of a sending-receiving relationship for Jamesburg High School's enrolled pupils. It is recommended by the Commissioner's representative that such a hearing be held.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has carefully examined the entire record of the controverted matter and notices that no exceptions were filed to the hearing examiner report pursuant to the provisions of N.J.A.C. 6:24-1.17(b). The findings of fact set forth by the hearing examiner are consistent with the record and are henceforth held by the Commissioner as his own. Both the New Jersey Constitution and N.J.S.A. 18A:7A-1 et seq. require that the Board provide for its enrolled pupils a thorough and efficient program of education.

While in no way denigrating the commendable performance of the Board or its teaching staff members, the Commissioner determines that Jamesburg High School is not operating and shows no early promise of operating in full compliance with thorough and efficient requirements.

The curriculum available to pupils at Jamesburg High School is so limited that it must be considered less than thorough within the contemplation of the Legislature and the State Board of Education as set forth in N.J.S.A. 18A:7A-1 et seq. and N.J.A.C. 6:8-2.2. Assuming the renovation of the schoolhouse to correct its present deficiencies, it would still be inadequate to house an expanded high school curriculum such as that contemplated as being consistent with thorough and efficient requirements. Nor is the school with its unusually small classes and correspondingly high per pupil costs, fiscally efficient. Already high per pupil costs would be yet further escalated by ordering the Board to expend large sums to effect major repairs and renovations which have been deferred in anticipation of the closing of the school. Such action would be imprudent. The Commissioner so holds.

Given the factual context hereinbefore set forth, the Commissioner concludes that the Board's request for an order directing that it close its high school is a sound exercise of its discretionary authority. The Board placed before the electorate a referendum proposing that Jamesburg High School be closed pursuant to N.J.S.A. 18A:33-2.1. That referendum failed to pass.

The need for corrective action, however, is so imperative that a directive to the Board to return to the voters for another referendum would be unreasonable. The Commissioner so holds. N.J.S.A. 18A:20-36 provides that:

> "The commissioner may direct the entire or partial abandonment of any building used for school purposes and may direct the making of

> such changes therein as to him may seem proper." (Emphasis supplied.)

Pursuant to that authority the Commissioner determines that Jamesburg High School shall be closed and directs the Board to close the school as an operating high school effective June 30, 1979.

A proper educational setting for Jamesburg High School pupils must, of course, be provided. The Board's attempts to negotiate an agreement for a sending-receiving relationship with another district have been unsuccessful. It is duly noticed, also, that the Helmetta Board of Education is in the process of attempting to negotiate an agreement for a sending-receiving relationship with another district.

It has been suggested that the Commissioner should act under his implied powers as supervisor of the schools of the State, N.J.S.A. 18A:4-23, to direct that pupils of Jamesburg High School be designated as tuition pupils at another high school. Jenkins, supra The Commissioner, however, is reluctant to exercise such broad powers when a statutory course of action is provided which can accomplish the desired result.

The Legislature, in its wisdom, has provided an avenue for such corrective action by the provisions of N.J.S.A. 18A:38-8 which states that:

> "The board of education of any school district having the necessary accommodations may receive, or may be required to receive by order of the state board, pupils from another district not having sufficient accommodations, at rates of tuition fixed as in this article provided." (Emphasis supplied.)

Similarly, the Legislature by the Public School Education Act of 1975 provided that when the Commissioner determines, after a plenary hearing, that corrective action is necessary, and recommends to the State Board appropriate action, that:

> "***The State board, on determining that the school district is not providing a thorough and efficient education, notwithstanding any other provision of law to the contrary, shall have the power to issue an administrative order specifying a remedial plan to the local board of education, which plan may include budgetary changes or other measures the State board determines to be appropriate.***"
> (N.J.S.A. 18A:7A-15)

The Commissioner, having directed that Jamesburg High School be closed effective June 30, 1979, gives notice herein that in the near future he will confer with the Middlesex County Superintendent of Schools and restudy enrollments, schoolhouse capacities and curricula of high schools in the vicinity of Jamesburg and Helmetta. Thereafter, he will issue a supplemental order specifying that the pupils of grades nine through twelve who would otherwise have attended Jamesburg High School during the 1979-80 school year be designated as tuition pupils to another high school for an indeterminate period of time beginning September 1, 1979. N.J.S.A. 18A:38-8; N.J.S.A. 18A:7A-15

The Commissioner further determines that in the event an affected party protests the designation of those pupils as tuition pupils at a given high school, a plenary hearing shall be conducted to afford opportunity to such party to demonstrate why the terms of the order should not be implemented. Subsequently, the Commissioner will submit a final recommendation to the State Board for action under N.J.S.A. 18A:38-8.

COMMISSIONER OF EDUCATION

January 19, 1979

IN THE MATTER OF THE CLOSING :
OF THE JAMESBURG HIGH SCHOOL : STATE BOARD OF EDUCATION
DISTRICT OF THE BOROUGH OF : DECISION
JAMESBURG, MIDDLESEX COUNTY. :
:

Decided by the Commissioner of Education, June 14, 1978 and January 19, 1979

For the Commissioner of Education, John J. Degnan, Attorney General (Alfred E. Ramey, Jr., Esq., Deputy Attorney General, of Counsel)

For the Jamesburg Board of Education, Rubin, Lerner & Rubin (David B. Rubin, Esq., of Counsel)

For the Ad Hoc Committee, Alfonso & Alfonso (Thomas P. Cutchall, Esq., of Counsel)

For the New Jersey Education Association, Greenberg & Mellk (William S. Greenberg, Esq., and Arnold M. Mellk, Esq., of Counsel)

In this case the Board of Education proposed to close its high school in Jamesburg. The building was erected in 1932. It is now the smallest high school in New Jersey and is in need of extensive repair. At the Board's request the Commissioner investigated and held extensive hearings. It was found that even if the schoolhouse were renovated to correct its present deficiencies it would still be inadequate for a thorough and efficient education because of its limited curriculum, decreasing enrollment and escalating costs. The Commissioner directed that the school be closed effective June 30, 1979. The Commissioner acted pursuant to N.J.S.A. 18A:20-36, which authorizes him to "***direct the entire or partial abandonment of any building used for school purposes.***"

The Commissioner has broad discretion in such matters, and his action here was well within the bounds of reasonable exercise of that discretion. The State Board sees no need for oral argument; therefore, request for oral argument is denied and the Commissioner's decision is affirmed for the reasons expressed therein.

April 4, 1979

IN THE MATTER OF THE CLOSING OF :
THE JAMESBURG HIGH SCHOOL, SCHOOL :
DISTRICT OF THE BOROUGH OF :
JAMESBURG, MIDDLESEX COUNTY. :
:

COMMISSIONER OF EDUCATION

DECISION

For the Commissioner of Education, John J. Degnan, Attorney General (Alfred E. Ramey, Esq., Deputy Attorney General, of Counsel)

For the Jamesburg Board of Education, Rubin, Lerner & Rubin (David B. Rubin, Esq., of Counsel)

For the Monroe Township Board of Education, Busch & Busch (Bertram E. Busch, Esq., of Counsel)

For the Spotswood and Helmetta Boards of Education, Golden, Shore, Paley, Zahn & Richmond (Philip H. Shore, Esq., of Counsel)

For the New Jersey Education Association and the Jamesburg Education Association, Greenberg & Mellk (William S. Greenberg, Esq., and Arnold Mellk, Esq., of Counsel)

For the Monroe Township Education Association, Stephen E. Klausner, Esq.

The Commissioner of Education on January 19, 1979, pursuant to his authority under N.J.S.A. 18A:20-36, directed the Jamesburg Board of Education "***to close the [Jamesburg High School] as an operating high school effective June 30, 1979.***" In the Matter of the Closing of the Jamesburg High School, School District of the Borough of Jamesburg, Middlesex County, 1979 S.L.D. ____ (decided January 19, 1979), aff'd State Board of Education April 4, 1979 That opinion, incorporated herein by reference, set forth, inter alia, the Commissioner's determination that Jamesburg High School was unable to operate and showed no prospects of being able to operate in a thorough and efficient manner because of inadequate enrollment, limited curriculum and escalating costs. Therein the Commissioner also gave notice that, after consultation with the Middlesex County Superintendent of Schools, he would recommend that the State Board of Education, pursuant to N.J.S.A. 18A:38-8 and N.J.S.A. 18A:7A-15, direct that the pupils currently enrolled in Jamesburg High School be henceforth designated as tuition pupils at an alternate secondary school.

The County Superintendent on February 23, 1979 issued her recommendation to the Commissioner that "***Monroe Township [School District] should be designated as the receiving district for Jamesburg's grade 9-12 pupils.***" (J-1, at p. 7) Thereupon, a letter was sent by the Assistant Commissioner in Charge of Controversies and Disputes announcing that any affected party could request a hearing on the County Superintendent's proposal. When such request was made by the Monroe Township Board of Education, which opposes the proposal, and by the Jamesburg Education Association, a hearing was conducted on April 2-3, 1979 at the Middlesex County Court House, New Brunswick and the Middlesex County College, Edison. Post-hearing Briefs and Memoranda of Law were filed. The report of the hearing examiner follows:

Jamesburg High School currently enrolls in grades 9-12 approximately 152 resident pupils and 52 tuition pupils from the Township of Helmetta. The Helmetta Board of Education and the Spotswood Board of Education have conferred and adopted resolutions petitioning the Commissioner to sanction their signed agreement dated January 17, 1979 providing for the establishment of a five year sending-receiving relationship whereby Helmetta's seventh through twelfth grade pupils would be educated as tuition pupils at Spotswood High School. (Exhibit A) No opposition to the designation of Helmetta secondary pupils as tuition pupils at Spotswood has been entered into the record. In consideration of the voluntary entry by the parties into that agreement and the stated opinion of the County Superintendent that that agreement "***provide[s] satisfactorily for the high school education of Helmetta pupils.***" (J-1, at p. 1), it is recommended that the Commissioner terminate Helmetta's sending-receiving relationship with Jamesburg as of June 30, 1979 and authorize the establishment of a new sending-receiving relationship between Spotswood and Helmetta effective July 1, 1979.

The County Superintendent in her February 23, 1979 report to the Commissioner stated that in regard to the needs of Jamesburg's pupils she had considered revised data on school enrollments, held discussions with six school boards proximate to Jamesburg and considered numerous questions and comments of citizens, board members and teaching staff members. She reported, however, that no district in the county had expressed willingness to receive additional pupils from Jamesburg. She reported to the Commissioner that, in consideration of the options now available, her recommendation was that Jamesburg secondary pupils be designated as tuition pupils at the Monroe Township High School. (J-1) She further reported the September 30, 1978 enrollment of Monroe Township and Jamesburg pupils to be as follows:

Grade	Monroe	Jamesburg
K	164	59
1	176	56
2	221	58
3	190	72
4	183	39
5	187	51
6	182	62
7	188	45
8	176	61
9	191	42
10	159	40
11	156	42
12	128	28

(J-1, at p. 5)

The County Superintendent also set forth in her report straight line projections of enrollment at Monroe Township High School if it were converted from an 8-12 school to a 9-12 school incorporating Jamesburg pupils. Those projections are as follows:

Year	Jamesburg	Monroe	Totals
1979-80	185	682	867
1980-81	188	714	902
1981-82	210	737	947
1982-83	219	733	952
1983-84	197	740	937

The County Superintendent testified at the hearing that although Jamesburg High School currently enrolls one hundred fifty-two resident pupils, she estimates that additional Jamesburg resident pupils now in private, vocational or parochial schools may enroll in a high school which offers a diversity of curricular offerings. She testified also that she estimates that continued residential growth in Monroe Township will result in an increased pupil enrollment of approximately fifteen pupils per grade. (Tr. I-92; J-1, at p. 6)

The County Superintendent testified that her recommendation was based on recent studies and analysis of current enrollments, functional capacity of schools considered and the geographic proximity of Jamesburg which is surrounded by Monroe Township. She testified that she had altered her prior recommendation of December 1977 that Jamesburg pupils be assigned to North Brunswick High School for the following reasons:

> "***North Brunswick can still accommodate Jamesburg, but it is no longer the closest school with available space and there are now other options***." (Tr. I-118)

The County Superintendent testified that the geographic proximity of the communities and the close affinity she perceives between the citizens and pupils of Jamesburg and Monroe who jointly utilize shopping facilities, churches and community organizations such as scouts and first aid squads provides sound reason that they should once again be joined in educational endeavors. (Tr. I-93, 119-120, 130, 136)

She testified that one factor in her latest recommendation was the increased capacity of Monroe's Applegarth Elementary School at which is being completed two additional classrooms, a home economics room and an industrial arts room which facilities will increase the present pupil capacity of 350 at that school to 450. The County Superintendent testified that it is her opinion that Monroe's eighth grade pupils, all of whom are now housed in the high school, could be relocated at the Applegarth School with some shifting of fifth and sixth grade pupils to other district elementary schools which are operating at less than full capacity. (Tr. I-121, 123) She testified also that other alternatives exist whereby Monroe could minimize the impact of an estimated 180 additional pupils from Jamesburg by staggered scheduling or by renting facilities at the Jamesburg High School to accommodate elementary classes.

The County Superintendent testified that increased pupil enrollment in Monroe Township schools had not occurred as rapidly as had been predicted as evidenced by the fact that there has been no appreciable increase in the September enrollments in the district since 1976. She testified that she believes the impact of approximately 180 Jamesburg pupils on planning and programs at Monroe Township would be minor. (Tr. I-180)

The County Superintendent testified that she relies on the computations of the Bureau of Facilities Planning of the Department of Education which, as the result of studies conducted in 1977 and 1979, rates the Monroe Township High School at a functional pupil capacity of 1057. (Tr. I-132, 142)

A member of the Monroe Township Board of Education testified that at five meetings in 1977 he had chaired a joint committee composed of Jamesburg and Monroe Township Board members which had not only explored the possibility of receiving Jamesburg secondary pupils but also such possibilities as rental of the Jamesburg High School building as an adjunct facility to accommodate increased enrollment. He testified that criteria used by his Board included such items as quality of education, effect on staff, effect on taxes and input into Jamesburg's elementary program. He testified further that the Monroe Township Board estimated that acceptance of Jamesburg secondary pupils would accelerate Monroe's need for additional building facilities by three years. No agreement was reached by the joint committee and his committee recommended to the Monroe Board on December 19, 1977 that the Jamesburg Board be informed that a sending-receiving relationship was not agreed upon. (J-3-4)

The Monroe Superintendent of Schools testified that he anticipates continued enrollment growth in his school district as the result of issuance of building permits for additional residences in Monroe Township which consists of 44 square miles much of which is available for residential development. (Tr. II-11-13; J-8) He testified that in his opinion the functional capacity of Monroe Township High School is 961 when calculated in consideration of the type of program now operative in the building. (Tr. II-18) He testified that adding Jamesburg pupils to the present eighth through twelfth grades therein would impact on the limited specialized facilities and reduce the availability of electives now offered. (Tr. II-19-20, 49-52) The high school principal offered corroborative testimony in this regard. (Tr. II-105-109) The Superintendent also testified that, in his opinion, there is insufficient space in the four elementary schools of the district to house the eighth grade pupils now in the high school and that attempts to do so would necessitate giving up rooms now assigned as specialized facilities such as art rooms.

The Superintendent testified further that his studies had revealed that acceptance of Jamesburg pupils without renting or building additional facilities would have resulted in a savings to Monroe but that either rentals or building additions would have an adverse impact on costs for Monroe. (Tr. II-28) He testified also that he believes double sessions or rented facilities will be necessary if Monroe is required to accept Jamesburg pupils. (Tr. II-161-162)

Both the Superintendent and the principal of Monroe Township High School testified that they believe there is insufficient time before September 1979 to conduct planning and orientation sessions for pupils and staff necessary to the smooth transition which should accompany the formation of a new sending-receiving relationship. (Tr. II-128-134) Both also testified that they have no reason to believe that any of Jamesburg High School's tenured teachers are unqualified to participate in their program of instruction should they be entitled to do so by reason of seniority in the event Jamesburg High School is closed and Jamesburg pupils are assigned to Monroe Township.

The Monroe Township High School principal also testified that he believes his school building was designed for grades nine through twelve and that there have been numerous parent complaints that eighth grade pupils who are now located in one wing must at times mingle with the older pupils. In this regard he testified that the moving of all eighth grade pupils to the Applegarth School with the seventh grade would solve many of those problems. (Tr. II-143-150)

Two members of the Monroe Township Education Association testified that, while they support the idea of Jamesburg pupils becoming tuition pupils at Monroe Township High School, they

believe there should be a year's delay in the interest of an orderly transition. (Tr. I-156, 162, 165-170) They testified also that they believe that all of the members of the MTEA should be retained as teachers for at least one year without loss of salary at State expense should a new sending-receiving relationship be ordered for 1979-80. (Tr. I-157; J-5)

The hearing examiner, having carefully considered the documentary and parol evidence in the record and the arguments of law and factual interpretations set forth in Briefs of counsel, herewith sets forth his findings of fact and recommendations to the Commissioner in the two principal remaining areas of concern, namely, where resident secondary pupils of Jamesburg shall be educated and the tenure and seniority rights to continued employment of Jamesburg High School teachers upon discontinuance of the Jamesburg High School.

Where Jamesburg Pupils Shall Be Educated After July 1, 1979

A. Findings of Fact

1. Monroe Township High School could accommodate for at least one year, albeit under crowded conditions, its own eighth through twelfth grade resident pupils together with an additional 180 pupils expected from Jamesburg in grades nine through twelve.

2. Monroe Township High School, absent gross acceleration of the construction of new homes, can accommodate for at least five years its 9-12 resident pupils and pupils from Jamesburg in those same grades. This finding is based on the reality that some pupils do drop out of school during their secondary years and others included in the straight line projections, ante, will choose to attend vocational schools operated by Middlesex County. These factors may be expected to offset in part the growth factors resulting from residential construction in Monroe Township.

3. Monroe Township has available the additional options of combining its seventh and eighth grades at the Applegarth School which now will have shop and home economics facilities and additional classrooms. While it is apparent that those fifth and sixth grade classes now housed at Applegarth could not then remain at Applegarth, any overflow of classes which cannot be provided for in other elementary schools can be accommodated by renting from the Jamesburg Board as many classrooms as are necessary. Another, but less desirable option which can be utilized, is the creation of an overlapping or staggered schedule for an elementary grade.

4. Monroe Township High School is the closest high school to Jamesburg which is totally surrounded by Monroe Township. Accordingly, it may be concluded that transportation costs per pupil will be less if Jamesburg pupils attend that school.

5. While it is clear that the designation of Monroe as the receiving district would necessitate much additional organization and planning for administrators and other teaching staff members, imaginative and competent staff members are available and can rise to the occasion. Similar time constraints have been met in other instances including, inter alia, In the Matter of the Deficient and Overcrowded High School Facilities of the South Amboy School District, 1977 S.L.D. 488.

B. Recommendation

The hearing examiner, in consideration of the aforementioned determination to close Jamesburg High School on June 30, 1979 and the above findings of fact, recommends that the Commissioner propose to the State Board of Education that it designate the Monroe Township School District as the receiving district for Jamesburg's tuition pupils effective July 1, 1979 pursuant to the statutory authority set forth in N.J.S.A. 18A:7A-15 and N.J.S.A. 18A:38-8.

Jamesburg Tenured Teachers Rights to Continued Employment

A. Findings of Fact

1. At least thirteen tenured teaching staff members spend at least a majority of their time in the Jamesburg High School in grades 9-12.

2. In addition, a tenured nurse assigned to the high school and now on leave of absence has the option to return to her tenured position.

3. Certain tenured Jamesburg teaching staff members perform more than the majority of their time in daily assignments in grades K-8 and less than a majority of their time in assignments in the Jamesburg High School.

4. Certain tenured Jamesburg teaching staff members are assigned to instruct eighth grade pupils in the Jamesburg High School. There is, however, no plan by the Jamesburg Board to discontinue its eighth grade program of studies. Nor has the Commissioner ordered that it do so.

B. Recommendation

The hearing examiner has considered the above findings of fact, the arguments of law set forth in Briefs of counsel and the statute of reference, which follows in its entirety:

> N.J.S.A. 18A:28-6.1
>
> "Whenever, heretofore or hereafter, any board of education in any school district in this state shall discontinue any high school,

> junior high school, elementary school or any one or more of the grades from kindergarten through grade 12 in the district and shall, by agreement with another board of education, send the pupils in such schools or grades to such other district, all teaching staff members who are assigned for a majority of their time in such school, grade or grades and who have tenure of office at the time such schools or grades are discontinued shall be employed by the board of education of such other district in the same or nearest equivalent position; provided that any such teaching staff member may elect to remain in the employ of the former district in any position to which he may be entitled by virtue of his tenure and seniority rights by giving notice of said election to the boards of education in each of the school districts at least three months prior to the date on which such school, grade, or grades are to be discontinued. Teaching staff members so employed in such other district shall have their rights to tenure, seniority, pension and accumulated leave of absence, accorded under the laws of this state, recognized and preserved by the board of education of that district. Any periods of prior employment in such sending district shall count toward the acquisition of tenure in the other district to the same extent as if all such prior employment had been in such other district."

The Monroe Township and Spotswood Boards argue that they are not obligated to accept any tenured teaching staff members from Jamesburg High School. They reason that the discontinuance of Jamesburg High School has been ordered by the Commissioner rather than by action by the Jamesburg Board pursuant to statutory procedure as set forth in N.J.S.A. 18A:33-2.1 which envisions that the closing of a school shall be approved by referendum vote (which in Jamesburg was unsuccessful). In re Closing of the Jamesburg High School, supra

Spotswood argues further that, since it entered into an agreement to receive only Helmetta pupils, and Helmetta did not have or discontinue a high school, it is not obligated by N.J.S.A. 18A:28-6.1 to accept any of the Jamesburg High School tenured teaching staff members. Both Spotswood and Monroe contend that, since N.J.S.A. 18A:7A-1 and N.J.S.A. 18A:38-8 do not mandate the acceptance of tenured teaching staff members and since neither has entered into a voluntary agreement with the Jamesburg Board to establish a sending-receiving relationship they are not obligated by N.J.S.A. 18A:28-6.1 to employ any of Jamesburg's tenured teaching staff members.

The hearing examiner recommends that the Commissioner determine that these arguments, while they are not totally devoid of logic when one considers the precise wording of N.J.S.A. 18A:28-6.1, are contrary to the intent of the Legislature which, in its wisdom, sought to protect the employment rights of tenured teaching staff members upon the discontinuance of a school. It is further recommended that the Commissioner determine that, in the event the State Board directs that Jamesburg pupils shall become tuition pupils at Monroe Township High School, Jamesburg's teaching staff members who are assigned more than half time in grades nine through twelve have seniority rights to continued employment at Spotswood and Monroe Township High Schools. Accordingly, it is recommended that the Commissioner determine that Spotswood, which will receive twenty-five percent of the pupils who would otherwise have been enrolled at Jamesburg High School, shall be obligated to similarly honor those seniority rights and must employ twenty-five percent of Jamesburg's eligible tenured secondary teaching staff members whose seniority exceeds that of Spotswood's secondary teaching staff members. It is further recommended that the Commissioner determine that the remaining 75 percent of Jamesburg High School's eligible tenured teaching staff members have seniority rights to employment at Monroe Township High School which must be similarly honored.

The hearing examiner commends to the Commissioner the full text of all Briefs and Reply Briefs of counsel and reminds the parties that all exceptions to the hearing examiner report, by agreement, are to be filed in the hands of the Commissioner three days after receipt of this report. This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the entire record of the matter, including all Briefs of counsel and those exceptions to the hearing examiner report filed pursuant to N.J.A.C. 6:24-1.17(b) and makes the following determinations in the principal areas which must be resolved:

A. The Proposed Sending-Receiving Relationship Between Helmetta and Spotswood

Notice is taken of the resolutions and the proposed five-year sending-receiving agreement duly approved and signed by both the Helmetta and Spotswood Boards. (Exhibit A) Similar notice is taken that the County Superintendent of Schools verifies that Spotswood is able to provide satisfactorily for the educational needs of Helmetta's seventh through twelfth grade pupils. The Commissioner views this proposed sending-receiving relationship voluntarily entered into by the parties as an appropriate and desirable arrangement which can provide a wholesome educational program for one fourth of the pupils who would otherwise have been enrolled in the Jamesburg High School had the school not

been ordered closed on June 30, 1979, and who must be provided for as a result of the directive set forth In re Closing of Jamesburg High School.

Accordingly, and in the absence of expressed opposition to the proposed agreement, the Commissioner determines and orders that the sending-receiving relationship between Jamesburg and Helmetta shall terminate effective at the end of the day on June 30, 1979 and that a new sending-receiving relationship between the Boards of Education of Helmetta and Spotswood is authorized to become effective on July 1, 1979.

B. The Education of Jamesburg Pupils After July 1, 1979

The Commissioner takes notice of the respective positions taken by the parties to the proposal by the County Superintendent that Jamesburg pupils of grades nine through twelve be assigned as tuition pupils to Monroe Township High School. The Jamesburg and Spotswood Boards and the Jamesburg Education Association support the County Superintendent's proposal and urge that it be given effect July 1, 1979. The Monroe Township Teachers Association does not oppose the proposal but requests that it not be implemented until September 1980 in order to provide additional time for orientation and planning in the interests of a smooth transition. Monroe, conversely, opposes the establishment of a sending-receiving relationship with Jamesburg on grounds, inter alia, that it is a growing district, that it has insufficient facilities to accommodate its own and Jamesburg's pupils, that an adverse impact on curricular offerings would result, and that it has insufficient time to plan for a proper transition.

The Commissioner also takes notice of the relevant exceptions filed by the Monroe and Spotswood Boards wherein numerous arguments are set forth contending that the hearing examiner should have reached factual determinations and made recommendations other than those set forth in his report. The Commissioner, prior to reaching his determinations, post, has carefully considered those exceptions and balanced all arguments of fact and law set forth in the Briefs of all parties.

Monroe avers in the exceptions that it is unlikely that approval would be granted for the rental of classrooms in Jamesburg High School which has been ordered closed. It must be recognized, however, that Jamesburg High School, although it exhibits certain physical deficiencies, has not been condemned. That building has numerous classrooms, some with specialized facilities, which with necessary renovations including repair or replacement of unit ventilators will meet requirements for standard classroom approval.

The Commissioner will neither accept nor rely upon those enrollment figures which any party has sought to enter into the record following the hearing and thus were not subject to cross-

examination in that proceeding. This includes but is not limited to those enrollment figures of Helmetta submitted by Spotswood in the exceptions. Such will not be used as the basis for the determination, post. Rather, it is the September 30, 1978 enrollment figures or others already in the record on which the Commissioner relies.

The serious charge set forth in exceptions by counsel for Monroe alleging that the report of the hearing examiner was contrived to reach a predetermined opinion is totally unfounded. The hearing examiner is in no way beholden to the County Superintendent. Nor has the Commissioner nor his chief subordinates at any time issued a directive or so much as intimated to the hearing examiner that his report should support or espouse any such predetermination.

The determination has been made that Jamesburg High School shall close on June 30, 1979 for the reason that it can no longer operate fiscally in an efficient manner and is unable to provide curricular offerings that comport with a thorough program of education. That determination has been affirmed on appeal by the State Board of Education. In re Closing of Jamesburg, supra

A review of the record in the instant matter is corraborative of the facts as set forth by the hearing examiner. The Commissioner henceforth holds them as his own. The options available, which include the rental of classrooms from the Jamesburg Board, are such that Monroe with normal anticipated growth will be able to accommodate Jamesburg's ninth through twelfth grade pupils for at least a five year period without further building programs.

The geographic proximity of Jamesburg which is surrounded by Monroe Township speaks eloquently for the reasonableness of reuniting these two districts for educational purposes. Similarly, the normal civic and social contacts of the populace provides further basis for such alignment. The Commissioner also is aware that Jamesburg's High School's precipitate decline in enrollment which led to its closing was accentuated by the withdrawal of 172 of Monroe's secondary tuition pupils from Jamesburg High School upon the termination of the then existing sending-receiving relationship in 1976. In the opinion of the Commissioner there are compelling reasons for the reestablishment of a sending-receiving relationship between Monroe and Jamesburg.

The courts have spoken eloquently of the validity of using geographic proximity and community interrelationships as a basis for bridging governmental subdivisions in order to effectuate state constitutional rights and policies. In Jenkins et al. v. Morris Township School District et al., 58 N.J. 483 (1971) the Court stated, with regard to the then existing Morris Township School District which surrounded the Morristown School District, the following:

> "***Despite their official separation, the Town and the Township have remained so interrelated that they may realistically be viewed as a single community, probably a unique one in our State. The Town is a compact urban municipality of 2.9 square miles and is completely encircled by the Township of 15.7 square miles.***
>
> "***The Township has no business center or so-called 'downtown' area but the Town's substantial shopping center serves in that aspect for both the Township and the Town. Most of the associations, clubs, social services and welfare organizations serving the residents of both the Town and the Township are located within the Town and, as members of the aforementioned organizations, the Town and Township residents are routinely together at both work and play.***"
>
> (at 485-486)

> "***As the Supreme Court pointed out in Reynolds v. Sims, 377 U.S. 533 *** (1964), political subdivisions of the state whether they be 'counties, cities or whatever' are not 'sovereign entities' and may readily be bridged when necessary to vindicate federal constitutional rights and policies. See Gomillion v. Lightfoot, 364 U.S. 339, 347 *** (1960); United States v. State of Texas, 321 F.Supp. 1043, 1050-58 (E.D. Texas 1970); cf. Jackman, et al. v. Bodine, et al., 55 N.J. 371 (1970). It seems clear to us that, similarly, governmental subdivisions of the state may readily be bridged when necessary to vindicate state constitutional rights and policies. This does not entail any general departure from the historic home rule principles and practices in our State in the field of education or elsewhere; but it does entail suitable measures of power in our State authorities for fulfillment of the educational and racial policies embodied in our State Constitution and in its implementing legislation.***"
>
> (at 500-501)

While the Commissioner does not perceive from his review of the record the same degree of affinity between Monroe and Jamesburg as the Court found to exist in Morris, supra, the similarities of community involvement between citizens in the two communities are unmistakable. The geographic relationship, which is identical, is also an important factor which must be con-

sidered when reviewing the convenience, efficiency and economy of busing pupils in this age when fuel supplies are becoming increasingly crucial.

The Commissioner is not unaware of the burden of planning and orientation which will devolve upon the professional administrators and other educators of Monroe should the district be designated by the State Board to receive Jamesburg pupils. That only four months remain from the date of this decision until the opening of school in September is evident. It is, however, apparent that Monroe over the last two years has conducted numerous and continuing studies and discussions, some in conjunction with the County Superintendent of Schools. These will serve as a basis for more detailed planning.

The Commissioner rejects the requests of the Board and the Monroe Township Education Association to delay the closing of Jamesburg School for one year. The provision of a broader based curriculum to Jamesburg's secondary pupils is and must be the focus of paramount importance. The Commissioner so holds. Accordingly, it is recommended that the State Board take prompt action to direct that a sending-receiving relationship be established effective July 1, 1979 designating that Jamesburg's pupils of grades nine through twelve shall, pursuant to all provisions of existing education law, become for an indeterminate period tuition pupils at Monroe Township High School. The legal authority for the action recommended is statutorily based as follows:

> N.J.S.A. 18A:38-8
>
> "The board of education of any school district having the necessary accommodations may receive, or may be required to receive by order of the state board, pupils from another district not having sufficient accommodations, at rates of tuition fixed as in this article provided." (Emphasis supplied.)
>
> N.J.S.A. 18A:7A-15
>
> "***The State board, on determining that the school district is not providing a thorough and efficient education, notwithstanding any other provision of law to the contrary, shall have the power to issue an administrative order specifying a remedial plan to the local board of education, which plan may include budgetary changes or other measures the State board determines to be appropriate.***"

The Commissioner will not further complicate the intricate issues raised herein by recommending or directing that any of Helmetta's secondary pupils be allowed, in a phasing out procedure, to complete their high school education with their present classmates from Jamesburg at Monroe Township High School. If such ends are desired, they should be explored between the Helmetta, Spotswood and Monroe Boards when and if the State Board approves the recommendation, ante.

C. Rights of Jamesburg's Tenured Teaching Staff Members to Continued Employment

Spotswood and Monroe argue that, even if Jamesburg and Helmetta pupils are to attend their schools, they are under no obligation to employ any of the Jamesburg tenured teaching staff members. They predicate this contention on the fact that the Commissioner, rather than the Jamesburg Board, ordered the discontinuance of Jamesburg High School and on the further fact that Spotswood and Monroe have not voluntarily entered into an agreement with Jamesburg to receive tuition pupils.

While it cannot be disputed that no such agreement was entered into by Jamesburg, Spotswood and Monroe, the result would be the same to Jamesburg's tenured teaching staff members from the closing of Jamesburg High School, the simultaneous establishment of a new sending-receiving relationship between Helmetta and Spotswood, ante, and the ordering by the State Board of Jamesburg pupils to Monroe. To hold that N.J.S.A. 18A:28-6.1 does not provide the same protection to tenured teaching staff members upon this discontinuance of a school could only be the result of a strained and narrow statutory interpretation. The Commissioner holds, rather, that it was the implicit legislative intent to grant protection in employment rights to teaching staff members with long and satisfactory service in such circumstances as here presented. Accordingly, it is determined that N.J.S.A. 18A:28-6.1 does control in the instant matter and that, contingent upon the implementation of the recommended State Board action, ante, twenty-five percent of Jamesburg's eligible tenured teaching staff members (rounded to the nearest whole number) shall have seniority rights to employment at Spotswood High School. The remaining eligible tenured teaching staff members who have similarly served in Jamesburg working a majority of their assignment with grades nine through twelve shall have seniority rights at Monroe Township High School.

The record, while sufficient to arrive at the above determination, does not rely on the best evidence which must be the official employment records maintained by the three aforementioned school districts. Nor can this determination encompass where the talents of Jamesburg's teachers may best be utilized to augment teaching staffs. In this regard, the Commissioner directs that the County Superintendent, in the event of affirma-

tive action by the State Board, call an early meeting of the administrators of the affected districts in order to effectuate a fair and equitable solution to any seniority questions which may arise. Should the parties be unable with her help to determine the comparative seniority rights of any individuals, an advisory opinion may be sought as provided by prevailing education law.

The Commissioner rejects the application of the NJEA and the MTEA to guarantee continued employment to any teacher in the Monroe Township High School whose seniority is less than that of a Jamesburg tenured teacher. No statutory basis is established for such a proposal. Nor will the Commissioner, in the face of the constitutional mandate that educational programs must be efficient, reach out, as suggested, to bind either the Monroe Board or the State to pay the salaries of any employee whose services are not required to furnish a thorough educational program to pupils.

Finally, the Commissioner takes note of Monroe's contention that, if it is forced to accept Jamesburg tuition pupils, the district should also receive additional financial aid from the State. The Commissioner takes note that Monroe has filed for financial aid from special funds provided for school districts with special needs and emergencies. In the event that the State Board orders Monroe to accept tuition pupils from Jamesburg, the application of Monroe will be reevaluated in consideration of the altered data which will then pertain. This will then be evaluated and considered in comparison to the needs and emergencies of other school districts which have applied. Distributions, of course, must be equitable in terms of relative need.

In summary the Commissioner has

1. Determined that the sending-receiving relationship between Jamesburg and Helmetta shall terminate on June 30, 1979.

2. Determined that a new sending-receiving relationship shall exist between Helmetta and Spotswood for grades 7-12 effective July 1, 1979.

3. Recommended to the State Board that it direct that Jamesburg's resident pupils in grades 9-12 shall, effective July 1, 1979, be designated as tuition pupils at Monroe Township High School.

4. Determined that eligible Jamesburg teaching staff members have seniority rights to employment at Spotswood and Monroe contingent on action by the State Board designating Jamesburg pupils as tuition pupils at Monroe Township High School.

5. Rejected the proposal that all of Monroe Township High School teaching staff members shall be guaranteed continued employment for one or more years at district or State expense.

COMMISSIONER OF EDUCATION

May 1, 1979

IN THE MATTER OF THE CLOSING :
OF THE JAMESBURG HIGH SCHOOL, :
SCHOOL DISTRICT OF THE : STATE BOARD OF EDUCATION
BOROUGH OF JAMESBURG, : DECISION
MIDDLESEX COUNTY. :
_____:

Decided by the Commissioner of Education, June 14, 1978, January 19, 1979 and May 1, 1979

Decided by the State Board of Education, April 4, 1979 and May 2, 1979

For the Commissioner of Education, John J. Degnan, Attorney General (Alfred E. Ramey, Jr., Esq., Deputy Attorney General, of Counsel)

For the Jamesburg Board of Education, Rubin, Lerner & Rubin (David B. Rubin, Esq., of Counsel)

For the Ad Hoc Committee, Alfonso & Alfonso (Thomas P. Cutchall, Esq., of Counsel)

For the New Jersey Education Association, Greenberg & Mellk (William S. Greenberg, Esq. and Arnold M. Mellk, Esq., of Counsel)

For the Spotswood and Helmetta Boards of Education, Golden, Shore, Paley, Zahn & Richmond (Philip H. Shore, Esq., of Counsel)

For the Monroe Township Education Association, Stephen E. Klausner, Esq.

For the Monroe Board of Education, Busch & Busch (Bertram E. Busch, Esq., of Counsel)

Pursuant to the decision of the Commissioner of Education rendered January 19, 1979 ordering the closing of Jamesburg High School effective June 30, 1979, and said decision having been affirmed by the State Board of Education on April 4, 1979, the Commissioner determined on May 1, 1979 that high school students from Jamesburg should in the future attend high school in Monroe Township, and students from Helmetta should go to high school in Spotswood. The ratio between the two groups turned out to be approximately 75% to Monroe and 25% to Spotswood. He further ordered that tenured teaching staff members of Jamesburg High School be likewise transferred to the receiving districts on

the foregoing 75% to 25% basis. Both receiving districts challenged the authority of the Commissioner to issue this last order.

We believe the Commissioner does posses the requisite authority, although it is not expressly set forth in any statute. The legislative intent to grant such authority may be found, in our view, in several sections of the school law, the most pertinent of which is N.J.S.A. 18A:28-6.1, which reads:

> "Whenever, heretofore or hereafter, any board of education in any school district in this state shall discontinue any high school, junior high school, elementary school or any one or more of the grades from kindergarten through grade 12 in the district and shall, by agreement with another board of education, send the pupils in such schools or grades to such other district, all teaching staff members who are assigned for a majority of their time in such school, grade or grades and who have tenure of office at the time such schools or grades are discontinued shall be employed by the board of education of such other district in the same or nearest equivalent position; provided that any such teaching staff member may elect to remain in the employ of the former district in any position to which he may be entitled by virtue of his tenure and seniority rights by giving notice of said election to the boards of education in each of the school districts at least three months prior to the date on which such school, grade, or grades are to be discontinued. Teaching staff members so employed in such other district shall have their rights to tenure, seniority, pension and accumulated leave of absence, accorded under the laws of this state, recognized and preserved by the board of education of that district. Any periods of prior employment in such sending district shall count toward the acquisition of tenure in the other district to the same extent as if all such prior employment had been in such other district."

We note that the foregoing section applies whenever the sending-receiving relationship is established "by agreement with another board of education." Here, there has been no agreement between Jamesburg and two receiving districts designated by the Commissioner. It is our view, however, that when N.J.S.A. 18A:28-6.1 is read, as it must be, in conjunction with other statutes on the subject, there emerges a plain legislative intent that tenured teachers should not lose their jobs merely because

of changes in the organization of the educational agencies of the State. N.J.S.A. 18A:28-15, for example, provides as follows:

> "No teaching staff member in the public schools shall be in any manner affected, in relation to his tenure of service or tenure of service rights, heretofore obtained or hereafter to be obtained, under this or any other law, because of any change in the method of government of the school district or school districts by which he was employed on the date of such change, or by reason of any change of name or title of the position, so held by him on said date, resulting from any such change of government, but he shall continue in said position by its original or changed name or title, as the case may be, with the same tenure of service and the same tenure of service rights which he would have had if such change in the method of government had not occurred."

Similar concern for tenured professional staff is manifested in N.J.S.A. 18A:13-42, which directs newly created regional boards to recognize and preserve the tenure and pension rights of high school or junior high school teachers in the constituent districts. Likewise, Section 18A:13-49 provides that when a local district is dissolved upon the creation of a regional:

> "All principals, teachers and employees in the employ of any dissolving local district shall be transferred to and continue in their respective employments in the employ of the regional school district and their rights to tenure, pension and accumulated leave of absence accorded under the laws of the state shall not be affected by their transfer to the employ of the regional school district."

The public policy demonstrated by these laws is to protect teaching staff members in their tenure, seniority and pension rights as far as practicable.

We therefore believe that in construing N.J.S.A. 18A:28-6.1, we should not limit its application to cases where there has been an agreement between a sending and a receiving district; the clause in the statute which refers to such an agreement should not be deemed exclusionary. Such construction would accord with the doctrine that where the letter of the law appears incompatible with the evident intent of the legislature, the spirit of law prevails over the letter. The classical expression of this doctrine appears in the decision of the New Jersey Supreme Court in Wright v. Vogt, 7 N.J. 1, 6 (1951) as follows:

> "The inquiry in the final analysis is the true intention of the law; and, in the quest for the intention, the letter gives way to the obvious reason and spirit of the expression. It is the settled rule that the construction may be enlarged or restrained according to the evident sense of the law-giver. The words used, even in an exception, may be expanded or limited to effectuate the manifest reason and obvious purpose of the law. The spirit of the legislative act will prevail over the literal sense of terms."

To the same effect, see San-Lan Builders, Inc. v. Baxendale, 28 N.J. 148, 155 (1958); N.J. Builders Owners and Management Association v. Blair, 60 N.J. 330 (1962). In the last cited case, the Supreme Court made a statement which is most pertinent here. (60 N.J. at page 339):

> "The emergence after enactment of problems and situations not anticipated by the legislative imagination calls upon the judiciary for a sympathetic response consonant with what one may presume the legislature would have said had it indeed spoken."

The foregoing leads to the conclusion that the Commissioner's order in question should be affirmed, but with one proviso: the Jamesburg Board should review its professional staff organization to ascertain what positions might be offered to its present high school teachers who would be qualified to accept positions in the elementary grades, and such teachers should then be afforded the opportunity to elect to remain in the employ of Jamesburg in such positions, pursuant to the provision of such election as set forth in N.J.S.A. 18A:28-6.1.

Request for oral argument was granted; however, the oral request for a Stay of both the Commissioner's and State Board decisions was denied.

June 6, 1979

IN THE MATTER OF THE CLOSING :
OF THE JAMESBURG HIGH SCHOOL, :
SCHOOL DISTRICT OF THE : SUPERIOR COURT OF NEW JERSEY
BOROUGH OF JAMESBURG, : APPELLATE DIVISION
MIDDLESEX COUNTY. :
_____:

Argued June 4, 1979 -- Decided June 14, 1979

Before Judges Allcorn, Seidman and Botter

On appeal from final determinations of the State Board of Education dated April 4, 1979, and May 2, 1979

Mr. Bertram E. Busch argued the cause of appellant Monroe Township Board of Education (Messrs. Busch and Busch, attorneys; Mr. Bertram E. Busch, of counsel and on the brief)

Mr. David B. Rubin argued the cause for respondent Jamesburg Board of Education (Messrs. Rubin, Lerner & Rubin, attorneys; Mr. David B. Rubin, of counsel and on the brief)

Mr. John J. Degnan, Attorney General of New Jersey, filed a Statement in Lieu of Brief on behalf of respondent State Board of Education (Mr. Alfred E. Ramey, Jr., Deputy Attorney General, of counsel and on the brief)

Mr. William S. Greenberg appeared on behalf of intervenors New Jersey Education Association and Jamesburg Education Association (Messrs. Greenberg & Mellk, attorneys)

Messrs. Golden, Shore and Paley filed a letter in lieu of brief on behalf of Spotswood Board of Education and Helmetta Board of Education

Mr. Stephen E. Klausner filed a letter in lieu of brief on behalf on Monroe Township Education Association

PER CURIAM

Monroe Township Board of Education appeals from a determination of the State Board of Education dated April 4, 1979, ordering the closing of Jamesburg High School effective June 30, 1979; and also from a further determination of the State Board dated May 2, 1979, designating the resident 9th through 12th grade pupils of the Borough of Jamesburg "as tuition pupils for an indeterminate period effective July 1, 1979, at the Monroe Township High School operated by the Board of Education of Monroe Township, Middlesex County." Because of the urgency of the matter, we heard the appeal on an accelerated basis. For that reason, there is no need for us to consider appellant's motion for leave to appeal, filed as a precautionary measure because another controversy arising out of the closing of Jamesburg High School is still pending before the State Board of Education. Appellant's further motion for a stay of the State Board's orders pending the outcome of this appeal is likewise moot.

A study of school districts in the southern portion of Middlesex County conducted by the county superintendent of schools led to her report dated December 31, 1977, in which, among other things, she questioned whether the continued operation of Jamesburg High School was "economically or educationally viable." The Jamesburg Board of Education determined to abandon the high school, but the voters of the municipality, at a special board election, defeated the proposal. Pursuant to instructions from the Commissioner of Education, the county superintendent undertook an evaluation of Jamesburg High School. She submitted a detailed report in March 1978 in which she recommended that the Commissioner order the Jamesburg Board of Education to show cause why the high school should not be closed. Such order was issued and hearings were conducted before a hearing examiner betwen July 10 and September 18, 1978.

The hearing examiner recommended in his report dated December 1, 1978, that the Commissioner recommend to the State Board pursuant to N.J.S.A. 18A:7A-15 that the high school should be closed effective July 1, 1978, and the pupils designated as tuition pupils to attend an appropriate high school in Middlesex County "to be designated by the Commissioner after consultation with the County Superintendent with full consideration to any preferences expressed by local districts and to any relevant changes which have occurred since the County Superintendent's December 1977 report on school district alignments." The Commissioner adopted the hearing examiner's findings of fact, directed the Jamesburg board to close the school effective June 30, 1979, and gave notice that after conferring with the county superintendent and restudying enrollments, schoolhouse capacities and curricula of high schools in the vicinity of Jamesburg and Helmetta, he would issue a supplemental report designating the Jamesburg pupils as tuition pupils at another high school for an indeterminate period of time, and would accord any protesting affected party a plenary hearing thereon.

Subsequently, a final recommendation would be made to the State Board.

The county superintendent reviewed the school districts in the vicinity of Jamesburg and submitted a report on February 23, 1979 recommending that Monroe Township, for geographic, social and economic reasons, be designated as the receiving district for Jamesburg pupils. The Township of Monroe and the Borough of Spotswood, as well as the New Jersey Education Association, requested a hearing, which took place in April 1979.

The hearing examiner submitted a report containing findings of fact and a recommendation that Monroe Township be designated as the receiving district. The remainder of his report, dealing with the right of Jamesburg High School tenured teachers to continued employment at Monroe and Spotwood High Schools (Spotswood having entered into a sending-receiving relationship with the Borough of Helmetta for pupils from Helmetta who are attending Jamesburg High School), is not before us on this appeal.

After reviewing the record and giving consideration to the exceptions which had been filed, the Commissioner, to the extent pertinent here, recommended to the State Board "that it direct that Jamesburg's resident pupils in grades 9-12 shall, effective July 1, 1979, be designated as tuition pupils at Monroe Township High School."[1] The State Board, after a hearing, accepted the Commissioner's recommendation and made the determination which is encompassed within this appeal.

It is to be noted, preliminarily, that since the Monroe Township Board of Education did not participate in any of the hearings relating to the closing of Jamesburg High School, or file any exceptions to the hearing examiner's report, or intervene before the State Board, it has no standing at this time to challenge the State Board's determination of April 4, 1979. We therefore reject Monroe's contention on this appeal that it was unreasonable for the State Board to close Jamesburg High School effective June 30, 1979, "when a receiving district had not yet been designated by the hearing officer." To the extent that it relates to the State Board's determination of April 4, 1979, the appeal is dismissed.

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1. No appeal has been taken from the Commissioner's further determination terminating the existing sending-receiving relationship between Jamesburg and Helmetta on June 30, 1979, and establishing a new sending-receiving relationship between Helmetta and Spotswood for grades 7-12 effective July 1, 1979.

The Commissioner also determined that eligible Jamesburg teaching staff members should have seniority rights to employment at Spotswood and Monroe contingent on action by the State Board assigning Jamesburg pupils to Monroe Township High School. Appeals from this determination were filed with the State Board by Spotswood and Monroe and are pending.

As to the State Board's further determination of May 2, 1979, Monroe does not dispute the statutory authority of the State Board to order a school district having the necessary accommodations to receive pupils from another district not having sufficient accommodations. N.J.S.A. 18A:38-8. It contends that the findings and conclusions of the hearing examiner were not supported by sufficent evidence in the record. The arguments advanced are that (a) it does not have the necessary accommodations to receive the pupils from Jamesburg, (b) the hearing examiner should have considered the negative financial and educational impact upon Monroe and accordingly should have determined that Jamesburg students could not be sent to Monroe, and (c) there is no basis for finding that Monroe and Jamesburg constitute one community, nor were there any significant racial factors which would justify reliance upon Jenkins v. Township of Morris School District, 58 N.J. 483 (1971). Alternatively, Monroe suggests that if it is ordered to accept Jamesburg students, the effective date of the transfer should be deferred to September 1980.

The scope of our review in an administrative proceeding such as the one here involved is thoroughly settled. It is whether the findings made by the administrative body could reasonably have been reached on sufficient credible evidence present in the record, considering the proofs as a whole, with due regard to the opportunity of the one who heard the witnesses to judge of their credibility, and with due regard also to the agency's expertise where such expertise is a pertinent factor. Mayflower Securities v. Bureau of Securities, 64 N.J. 85, 92-93 (1973), Close v. Kordulak Bros., 44 N.J. 588, 598 (1965).

The findings of fact of the hearing examiner were that (1) Monroe could accommodate for at least one year, though under crowded conditions, its own 8th through 12th grade resident pupils together with an additional 180 pupils expected from Jamesburg in grades 9 through 12; (2) absent gross acceleration in the construction of new homes, Monroe could accommodate for at least five years its 9 through 12 resident pupils and pupils from Jamesburg; (3) Monroe has available the additional option of combining its 7th and 8th grades at another school which will have shop and home economic facilities and additional classrooms, subject to accommodating elsewhere the 5th and 6th grades at that school, (4) Jamesburg is totally surrounded by Monroe, the high school of which is the closest to Jamesburg; and (5) "imaginative and competent staff members are available" to do the organization and planning entailed in receiving the students.

Our careful review of the record satisfies us, as it evidently did the Commissioner and the State Board, that it contains sufficient credible evidence to sustain the findings and conclusions in the hearing examiner's report and the determination made by the State Board. The latter's determination is further bolstered by the Commissioner's additional remarks, also largely supported by the record, that

the geographic proximity of Jamesburg to Monroe "speaks eloquently for the reasonableness of reuniting these two districts for educational purposes," that the "normal civic and social contacts of the populace provides further basis for such alignment," and that the geographic relationship "is also an important factor which must be considered when reviewing the convenience, efficiency and economy of busing pupils in this age when fuel supplies are becoming increasingly crucial."

Monroe's alternate request to delay the closing of Jamesburg High School was rejected by the Commissioner. We discern no mistaken exercise of discretion on the part of the Commissioner in doing so. While recognizing the limited amount of time remaining until the opening of school in September, he nevertheless took note of the fact that Monroe over the past two years had "conducted numerous and continuing studies and discussions, some in conjunction with the County Superintendent of Schools," which would serve as a basis for more detailed planning. He emphasized that the "provision of a broader based curriculum in Jamesburg's secondary pupils is and must be the focus of paramount importance." It is to to noted, moreover, that Monroe's familiarity with Jamesburg stems from its sending-receiving relationship under which its pupils attended Jamesburg High School until 1976, when Monroe built its own high school. The withdrawal of its pupils was undoubtedly a substantial contributing factor in the subsequent inability of Jamesburg to furnish a thorough and efficient system of education for its relatively few remaining pupils.

The State Board's determination of May 2, 1979, is affirmed.

IN THE MATTER OF THE CLOSING :
OF JAMESBURG HIGH SCHOOL, :
SCHOOL DISTRICT OF THE : SUPERIOR COURT OF NEW JERSEY
BOROUGH OF JAMESBURG, : APPELLATE DIVISION
MIDDLESEX COUNTY. :
_____:

Argued July 2, 1979--Decided July 2, 1979

Before Judges Allcorn, Seidman and Botter

On appeal from New Jersey State Board of Education

Bertram E. Busch argued the cause for appellant Monroe Township Board of Education (Busch and Busch, attorneys)

Philip H. Shore argued the cause for appellant Spotswood Borough Board of Education (Golden, Shore, Zahn & Richmond, attorneys)

William S. Greenberg argued the cause for respondents New Jersey Education Association and Jamesburg Education Association (Greenberg & Mellk, attorneys; Dennis Daly, on the brief)

Stephen E. Klausner, attorney for respondent Monroe Township Education Association, filed a statement in lieu of brief for said respondent

John J. Degnan, Attorney General, filed a statement in lieu of brief for respondent, State Board of Education (Alfred E. Ramey, Jr., Deputy Attorney General, of counsel and on the statement)

No appearance for the Jamesburg Board of Education

PER CURIAM

By motion previously granted we consolidated these two appeals taken by the Board of Education of Monroe Township and the Board of Education of Spotswood Borough from a decision of the State Board of Education dated June 6, 1979, affirming the decision of the Commissioner of Education dated May 1, 1979. The State Board ordered that tenured teaching staff members of Jamesburg High School who do not elect to claim teaching positions in the elementary grades in Jamesburg shall be transferred and employed by the boards of education of Monroe

Township and Spotswood Borough in the ratios of 75% and 25%, respectively, in accordance with the provisions of N.J.S.A. 18A:28-6.1. We granted appellants' motion for a stay pending appeal and accelerated these appeals sua sponte. To our knowledge the issue raised on this appeal has not been decided previously by our courts or the administrative agencies involved.

In a prior related appeal, Docket No. A-3257-78, we upheld a determination of the State Board ordering the closing of Jamesburg High School effective June 30, 1979 and designating resident pupils of Jamesburg in the 9th through 12th grades as tuition pupils at the Monroe Township High School effective July 1, 1979. The closing of Jamesburg High School displaced students from Helmetta Borough who had been attending that high school. However, Helmetta and Spotswood have entered into a sending-receiving relationship which will permit those pupils to attend high school in Spotswood. Since the Jamesburg and Helmetta pupils at Jamesburg High School bore a ratio of approximately 3 to 1, the Commissioner determined that three-fourths of the tenured teachers in Jamesburg High School should be transferred to Monroe Township and one-fourth to Spotswood. We are told that there are approximately 16 tenured teaching staff members at Jamesburg High School who will be affected by the order and that only one has expressed a preference to remain in Jamesburg.

The decision of the State Board recognizes that the power of the Commissioner to order Monroe and Spotswood to accept and employ Jamesburg's tenured high school teachers, "is not expressly set forth in any statute." However, the State Board, as well as the Commissioner, concluded that several sections of the school laws expressed a legislative intent to protect tenured teachers in employment despite various changes in the organization of a school district. The brief filed on behalf of the Jamesburg Education Association and New Jersey Education Association refers to tenure protection when there is a change in the method of government of a school district, N.J.S.A. 18A:28-15, when a state agency assumes operation of a school district, N.J.S.A. 18A:28-16, when a local board of education assumes operation of a school district previously under operation of state agency, N.J.S.A. 18A:28-17, and when smaller school districts are consolidated or dissolved to form regional school districts, N.J.S.A. 18A:13-42 and N.J.S.A. 18A:13-49. None of these statutes, however, involve the transfer of pupils from one district to another without the consent of the receiving district.

N.J.S.A. 18A:28-6.1 deals with the discontinuance of a school in one district and the establishment of a sending receiving relationship "by agreement with another board of education***." In such event tenured teachers in the grades that are discontinued, "***shall be employed by the board of education in such other district in the same or nearest equivalent position***." A teaching staff member may elect to remain in the

employ of the former district in any position which he can claim by virtue of his tenure and seniority rights. The statute further provides: "Teaching staff members so employed in such other district shall have their rights to tenure, seniority, pension and accumulated leave of absence, accorded under the laws of this state, recognized and preserved by the board of eduction of that district."

Appellants contend that the rights of teachers in Jamesburg High School to continued employment in grade at the high schools of Monroe and Spotswood is accorded by statute only in the event Monroe and Spotswood had entered into a sending-receiving relationship with Jamesburg "by agreement." We agree. The words, "by agreement with another board of education," should be accorded their plain meaning. The legislative history shows that this statute was derived from Assembly Bill No. 604, 1967. The bill as originally drated did not limit its scope to pupils transferred "by agreement with another board of education." However, these words were added to the bill before it was enacted. In our view the addition of these terms limits the application of N.J.S.A. 18A:28-6.1. While a school district may be compelled to become a receiving district, N.J.S.A. 18A:38-8, there is no provision in the law which compels a receiving district against its will to also accept the transfer of teachers from a school which has closed in another district. The desirability of such a provision is clearly for the legislature and not for the courts to determine. See Burlington County Evergreen Park Mental Hosp. v. Cooper, 56 N.J. 579, 598 (1970). Administrative officers may exercise only such authority as is conferred by statute expressly or by unavoidable implication. Id.

Moreover, as to Spotswood, no sending-receiving relationship was entered into by agreement or otherwise between the Spotswood Board of Education and the Jamesburg Board of Education, which is the board whose school was discontinued. Thus, in no case can N.J.S.A. 18A:28-6.1 apply to Spotswood whose school will be receiving students from Helmetta, not from Jamesburg. Lastly, we find no inherent power in the Commissioner to transfer teachers from one school district to another without the consent of the receiving district. No statute has been cited which gives this power to the Commissioner.

Accordingly, we reverse and set aside the determination of the State Board of Education dated June 6, 1979 and so much of the Commissioner's determination of May 1, 1979 as is encompassed by this appeal.

FRANK J. MORRA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

For the Petitioner, Chamlin, Schottland, Rosen & Cavanagh (Michael D. Schottland, Esq., of Counsel)

For the Respondent, Russo & Courtney (James P. Courtney, Jr., Esq., of Counsel)

Petitioner, who is certified as a principal and an administrator, challenges the legality of his unilateral transfer on July 13, 1977 from his tenured position as principal of Jackson High School to the position of "Director of Community Services" by the Jackson Township Board of Education, hereinafter "Board." The Board denies that petitioner's unilateral transfer to that newly created position at a commensurate salary was other than a reasoned exercise of its discretionary authority.

A hearing to establish the relevant facts was conducted on January 10 and 23, 1978 at the office of the Ocean County Superintendent of Schools, Toms River, and the Monmouth County Superintendent of Schools, Freehold. Post-hearing Briefs were filed. The hearing examiner report follows setting forth first the uncontroverted factual context of the dispute.

Petitioner, who had been employed by the Board as principal of its approximately 2000 pupil high school since 1967 was given written notice on July 14, 1977 that on the previous day the Board had authorized his transfer, effective July 15, to the Superintendent's office to fill the newly created position of "Director of Community Services," hereinafter "director." (P-1) The job description for the post specified, inter alia, that certification as a school administrator was required and that the holder of the position was responsible directly to the Superintendent as a member of his office staff. It further detailed that the director should serve as a member of the Superintendent's office team, as chairman of the community services council, and that he would have administrative authority over

work study programs, vocational-technical programs and pupil job placement programs, as well as vocational school program development and articulation.

The job description delineated that the director would also be responsible for liaison with community organizations, agencies and senior citizens, development of a file on community human resources, compilation of demographic data on pupil employment opportunites, and "***such other related tasks as directed by the Superintendent of Schools." (P-4)

Petitioner notified the Board Secretary on July 15 in writing that he protested the Board's assignment but was reporting for duty to avoid a charge of insubordination. (P-2)

Petitioner testified at the hearing that he had at no time applied for a transfer from his post as principal and that he considered his reassignment to the office of the Superintendent a demotion. Petitioner testified regarding his numerous duties as principal when he had been responsible for the budget preparation and supervision of a large high school with 150 professional and nonprofessional staff members, as well as the coordination of related community-school activities. He contrasted his former busy schedule as principal to his present duties in which few, if any, staff members report regularly to him concerning the projects which he now supervises. (Tr. I-26-30, 40-41, 49-50) In this regard he testified:

> "***I don't like it because I feel it's a waste of taxpayers' money. *** I never was interested in the job***. [I]t isn't an educational job. It's a public relations job***." (Tr. I-55-56)

Petitioner testified further that in his present capacity he had coordinated transportation of pupils to the county library, participated in weekly meetings of the Superintendent's staff, analyzed thoroughly a curriculum guide for implementation of vocational programs and resources, attended a meeting of the National Conference of Christians and Jews and, in the absence of another employee, placed four pupils in vocational school. He testified that he has no ongoing projects and that he no longer has a private secretary but utilizes secretarial pool services. He related also that he has made no contacts with community agencies or senior citizens and that, as contrasted to his former busy office schedule, his telephone now seldom rings. (Tr. I-50-58)

The Superintendent, testifying that as early as 1972 he had perceived that the Board should expand its offerings in evening

school, extended day school, summer school, equivalency and public relations programs, stated:

> "***[W]e were concerned about public information to the Senior Citizens Committee which was growing in our community, cultural [and] vocational programs, health services, remedial education, basically, adult education programs.***" (Tr. II-10)

See R-1 and R-2. The Superintendent testified that, when on August 1, 1975 the Board accepted his formal recommendation that certain services be expanded and that petitioner be appointed as "Director of Special Services and Programs," petitioner had declined, whereupon another principal accepted that appointment and continues to serve in that capacity. (Tr. II-12-20; R-3 (a, b, c))

The Superintendent testified that, when the Board on July 13, 1977 created the new position of director, he concurred that the need for such a position still existed, that petitioner was highly qualified to fill that position, and recommended that the job description be considered to be an emerging one requiring a school administrator's certificate. (Tr. II-31-33, 77) He testified that petitioner continued to be employed with the same salary, fringe benefits and emoluments which he received as a principal and that changes in such benefits would be the subject of negotiations as for all other directors in the district. (Tr. II-35-36)

The Superintendent testified at the hearing that, pending the outcome of petitioner's litigation of his transfer, he had declined to assign him numerous duties which, absent such uncertainty, he would otherwise have required. (Tr. II-51, 69) Subsequent to the aforementioned hearing, an oral argument was conducted at the Department of Education on Notice of Motion by petitioner who sought an order of the Commissioner directing the Board to desist from assigning him additional duties, pendente lite. By an order dated September 18, 1978 the Commissioner determined that during the pendancy of litigation the Board retains its legal authority to assign reasonable duties in keeping with petitioner's present job description.

When asked whether application had been made to the County Superintendent of Schools pursuant to N.J.A.C. 6:11-3.6 and 11-10.5 for prior approval of petitioner's certification to fill a position with an unrecognized title, both the Superintendent and the County Superintendent responded in the negative. (Tr. II-73; P-6)

The executive secretary of the New Jersey Association of Secondary School Principals testified that although he was aware that the position of director existed elsewhere in school districts of this State, he did not perceive that a school administrator's certificate, which petitioner does hold, coincides with the Board's job description for that post. (Tr. I-132-135)

The hearing examiner finds, in addition to those uncontroverted facts heretofore set forth, the following facts which must also be considered by the Commissioner in his determination of the controversy:

1. Petitioner's unilateral transfer by the Board, under protest, was to a position with an unrecognized title requiring approval of the County Superintendent of Schools pursuant to N.J.A.C. 6:11-10.5 which states:

> "School districts are urged to assign to administrative or supervisory personnel titles that are recognized in these regulations. If the use of the unrecognized titles is necessary, a job description should be formulated and submitted to the county superintendent of schools in advance of the appointment, on the basis of which a determination will be made of the appropriate certificate for the position."
> (Emphasis supplied.)

2. The Board did not comply with this rule of the State Board of Education of which the Commissioner has previously determined that

> "***should in the context of its use in the rule must be interpreted as mandatory whenever an 'unrecognized' title is considered for adoption.***" (Emphasis in text.) Samuel E. Appel v. Board of Education of the City of Camden et al., 1975 S.L.D. 562, 568

This requirement was expanded by the amendment of N.J.A.C. 6:11-3.6, effective November 10, 1977. The record is also clear that the Board did not formally adopt the job description for the unrecognized title prior to its unilateral appointment of petitioner to the post. No determination has ever been sought by the Board from the County Superintendent or the New Jersey State Board of Examiners of the proper certificate for the job description of that position.

3. Petitioner's involuntary transfer was to a position which had been recommended by the Superintendent for a number of

years. Although the job descriptions of his position and that of the director of special services and programs minimally overlap in certain areas, they differ markedly in that petitioner's job description calls for far greater involvement with community agencies and organizations. (P-4; R-3 (a, b, c))

4. Petitioner's salary and attendant emoluments as director are identical to those which he would have received had he been continued as high school principal. The Board continued to pay petitioner from the time of his transfer until June 30, 1978 at the same annual salary of $29,243 which he had been paid immediately prior thereto. Salary data incorporated into the record pursuant to the Commissioner's order of September 18, 1978, ante, reveals that the negotiated agreement between the Board and the Jackson Township Administrators Association for the 1978-79 school year established a maximum salary of $29,500 and that petitioner is being paid that amount. (Superintendent's Affidavit, dated August 7, 1978)

The hearing examiner having carefully considered the arguments of law set forth in Briefs of respective counsel recommends that the Commissioner find for petitioner.

In recent decisions, the Commissioner has held that a tenured teaching staff employee may not be unilaterally and involuntarily transferred to a position of lesser expectancy from a position which continues to exist in a school system. George Gamvas v. Board of Education of the Township of Lakewood, 1976 S.L.D. 509; Dominick DiNunzio v. Board of Education of the Township of Pemberton, Burlington County, 1977 S.L.D. ___ (decided January 21, 1977); Marjorie S. Payne v. Board of Education of the Village of Ridgewood, 1976 S.L.D 605

In Gamvas, supra, it was held that a principal who, on the basis of assurances of comparable salary expectations, had accepted a position as Director of Occupational Education was entitled to receive at least the amount of salary he would have received had he remained a principal. The holding in Payne, supra, was that a regular classroom teacher may not involuntarily be transferred to a position which was essentially one of a substitute and clerk and "***may not be assigned to responsibilities less than those responsibilities similarly assigned to other teaching staff members***." (1976 S.L.D. at 610) Finally, in DiNunzio, supra, it was determined that a principal who was unilaterally and involuntarily assigned as administrative assistant to the superintendent had been improperly assigned to a position with lesser salary expectation. It was also noted by the hearing examiner, therein, that the unrecognized title, "Administrative Assistant to the Superintendent," was for a position in which tenure would not accrue with passage of time.

In the instant matter there is insufficient showing to conclude that petitioner's transfer was to a position of lesser salary expectation. Accordingly, it is recommended that the Commissioner refrain from intruding into that segment of the Board's responsibilities of negotiating salary agreements with its employees. While petitioner argues that he would have received a higher increment had he remained as high school principal, such argument enters a realm of conjecture in an area of terms and conditions of employment over which the Commissioner does not have primary jurisdictional review authority.

Nevertheless, it is recommended that the Commissioner set aside the Board's transfer of petitioner and reinstate him to his tenured position as principal on grounds that the position to which he was transferred was not one in which he could gain tenure or seniority rights with the passage of time. To be forced to serve in such position to which comparable benefits of tenure and seniority could not accrue, as they could and did in his prior assignment as principal, in the opinion of the hearing examiner renders that position one of lesser expectation. Payne, supra; DiNunzio, supra

It is further recommended that the Commissioner issue a caveat to this Board and all boards of education to use recognized titles or, when such is not possible, to follow those procedures set forth in N.J.A.C 6:11-3.6, ante, to assure that proper determination is made, in advance of appointment, of the certificate required and the appropriate title in order to avoid needless and costly litigation.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record of the controverted matter and has considered those exceptions filed by the parties pursuant to N.J.A.C. 6:24-1.17(b).

Respondent asserts in its exceptions that the hearing examiner found that it was a requirement that the appointee to the position of Director of Community Services be the holder of a school administrator's certificate. (Respondent's Exceptions, at pp. 2-6) This assertion is inconsistent with the language of the hearing examiner report which states only that it was the job description promulgated by the Board or its designated administrative agent which specified that an administrator's certificate was a requirement.

Neither the Board nor its administrative agent had authority to make that determination. The clear language of both N.J.A.C. 6:11-3.6 and N.J.A.C. 6:11-10.5 which were then in effect and the

interpretation thereof in Appel, supra, makes it clear that, when the Board proceeded to create a position with an unrecognized title, it was under mandate to submit the job description for that position to the County Superintendent in advance of the appointment in order that a determination be made of the certificate required for that position. This the Board did not do, however well intentioned it may have been. While the Board and any board of education has authority to make a lateral transfer of teaching staff members pursuant to the provisions of N.J.S.A. 18A:25-1, that authority must be considered in pari materia with the protected rights of tenured employees as set forth in N.J.S.A. 18A:28-4 which states that tenured employees "***shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause***." As was stated by the Commissioner in Gamvas, supra:

> "***[I]f a position continues to exist the tenured holder thereof may not be transferred to a position with lesser expectancy.***"
> (1976 S.L.D. at 515)

Petitioner was transferred to a position without a determination by the County Superintendent upon consultation with the State Board of Examiners of what certificate, if any, was required for that position. It is not possible without that determination to know whether that transfer was a lateral transfer, a demotion, or a promotion to which he did not give his assent. See N.J.S.A. 18A:28-6. Unless and until that determination was made utilizing the procedures mandated by the rules of the State Board of Education, the Board's right to transfer him to that position could not be ascertained.

Accordingly, it is determined that the Board's unilateral transfer of petitioner on July 13, 1977 from his tenured position of high school principal to the position of Director of Community Services was an ultra vires act. It is hereby set aside with the direction that petitioner be restored forthwith to his position as high school principal.

The Board thereafter may transfer petitioner to a position outside the category of secondary principal only with his assent. If no alternate position in that category exists in the district, the Board's sole alternative recourse to remove petitioner from his tenured position is to proceed, pursuant to N.J.S.A. 18A:6-10 et seq., with tenure charges. The Commissioner notes that such charges have been filed and will be the subject of further litigation between these parties.

The Commissioner is further constrained to caution local boards of education that they should endeavor to utilize recog-

nized titles in staffing their schools. Furthermore, in those instances where a board believes it necessary to establish an unrecognized title, that board must follow the procedures set forth herein prior to appointment of an employee to that position. Appel, supra; N.J.A.C. 6:11-3.6

COMMISSIONER OF EDUCATION

January 26, 1979

FRANK J. MORRA,	:	
PETITIONER-APPELLEE,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, January 26, 1979

Decided by the State Board of Education, February 7, and March 7, 1979

For the Petitioner-Appellee, Chamlin, Schottland, Rosen, Cavanagh & Kelly (Michael D. Schottland, Esq., of Counsel)

For the Respondent-Appellant, Russo & Courtney (James P. Courtney, Esq., of Counsel)

For Amicus Curiae, New Jersey Association of Secondary School Principals and Supervisors, Harper & O'Brien (John J. Harper, Esq., of Counsel)

For Amicus Curiae, New Jersey School Boards Association (David W. Carroll, Esq., of Counsel)

In this case the Petitioner, who was certified as a principal and administrator, was involuntarily transferred from his position as high school principal to a newly created position entitled "Director of Community Services." Before making the transfer the Board of Education failed to comply with N.J.A.C. 6:11-3.6, which states that if the Board wishes to create an unrecognized title, a job description must be formulated and submitted to the County Superintendent of Schools "in advance of the appointment", in order that the County Superintendent may determine what special certificate, if any, is necessary for the position. The Commissioner held that since no determination had been made pursuant to N.J.A.C. 6:11-3.6 as to the nature of the new position, he could not determine the legality of the transfer, which would depend upon whether the same was a lateral one or a demotion. The Commissioner accordingly directed that the transfer be set aside as an ultra vires act of the Board and the Petitioner be restored to his position as high school principal.

The State Board affirms the Commissioner's decision. It concurs with the Commissioner's statement that where the Board believes it necessary to establish an unrecognized title, the Baord must follow the procedures set forth in N.J.A.C. 6:11-3.6 prior to appointment of an employee to such a position.

We are constrained, however, to disapprove the Commissioner's dictum that "the Board thereafter may transfer petitioner to a position outside the category of secondary principal only with his assent." Such limitation on the Board's authority is not correct. We believe the law to be well established that a board of education, acting pursuant to N.J.S.A. 18A:25-1, may transfer a principal or administrator to any position comparable to the one he already holds and which his certificate qualifies him to fill, provided that the transfer does not constitute a demotion or leave the staff member with a lower salary or lesser expectancy than pertains to his existing position. Greenway v. Board of Education of Camden, 129 N.J.L. 46 (Sup. Ct. 1942), affirmed 129 N.J.L. 461; Agress v. Board of Education of Hamilton Township, 1975 S.L.D. 605, 610; DiNunzio v. Board of Education of Pemberton Township, 1977 S.L.D. 24 In the case last cited, for example, the Commissioner properly held that a high school principal could not refuse assignment as an elementary school principal where he held a school administrator's certificate and was also eligible to hold a principal's certificate. So in the instant case, there may well be positions other than secondary principal to which the Petitioner could involuntarily be assigned within the scope of his certificates.

Attorney Exceptions are Noted.

DAVID BRANDT OPPOSED IN THE MATTER

July 11, 1979

Pending N.J. Superior Court

KLAUS G. RUCKER ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF KINNELON, MORRIS COUNTY,	:	ORDER
RESPONDENT.	:	

For the Petitioners, American Civil Liberties Union of New Jersey (Anne Nelson, Attorney at Law)

For the Respondent, Rowe, McMahon, McKeon & Curtin (Thomas R. Curtin, Esq., of Counsel)

This matter having been opened before the Commissioner of Education by Anne Nelson, counsel for petitioners by an Amended Petition of Appeal on July 28, 1978 and a Motion for Summary Judgment having been filed on October 20, 1978, after receipt of the Answer filed by the Board of Education of the Borough of Kinnelon, hereinafter "Board," Thomas R. Curtin, Esq., counsel for the Board; and

It appearing that petitioners seek to have the Commissioner declare that the class rank policy utilized by the Board is arbitrary, capricious, unreasonable, in violation of the Fourteenth Amendment to the United States Constitution and in violation of the tenor of the Commissioner's Order on this same subject (Klaus G. Rucker, Marion J. and James W. Andriola v. Board of Education of the Borough of Kinnelon, decided June 9, 1978); and

It appearing that petitioners will rely on Briefs previously submitted on July 26 and August 16, 1978 and the affidavits, memoranda and pleadings in the record; and

It appearing that oral argument was conducted in this matter on November 3, 1978 at the State Department of Education, Trenton; and

It appearing that the arguments of the parties have been heard regarding petitioners' contention that the class rank policy utilized by the Board is discriminatory; and

It appearing that the Commissioner's representative then sitting recommended that the matter proceed to hearing concerning the Board's newly adopted class rank policy (J-1-2); and

It appearing that the Commissioner's representative now assigned notices that petitioners do not take issue with any reason the Board may have for its new policy, challenging only the validity of the new policy for whatever reasons the Board ascribes; and

It appearing to the Commissioner's representative that no useful purpose would be served by proceeding with a hearing; and

It appearing that the Board's philosophy and rationale for the implementation of its new policy was filed on December 7, 1978 as requested by the Commissioner's representative; and

It appearing that the Commissioner's Order in Rucker and Andriola, supra, decided only the emergent matter of Andriola who was then a high school senior; and

It appearing that the Rucker matter was determined by the Commissioner to be moot because he was, at the time, a high school junior and that the Board's then unwritten class rank policy was being developed as a written policy; and

It then appearing inappropriate to the Commissioner to make any determination about Rucker based upon a new policy which had not yet been developed; and

It appearing that the Commissioner has determined that the utilization of grades earned in private summer school as a factor in determining a pupil's class rank is discriminatory to those pupils who could not or did not attend (Rucker and Andriola, supra); and

It appearing that the Board's new policy is applicable only to the freshman class beginning September 1979 and that the sophomores, juniors and seniors now attending school will have grades earned outside the school district and during the summer utilized for the purpose of individual, or percentage group, rank for those three classes (J-1-2; Exhibits A, B, C; Tr. 23, 26-27); and

It appearing that the Board has construed too narrowly the Commissioner's Order dated June 9, 1978 in the matter which held, inter alia, that:

> "***the unwritten class rank policy has been utilized since either 1962 or 1964 *** [and] the policy as it has existed for the past

> fourteen or sixteen years has been unfair to pupils as evidenced by the Board's willingness to change it***"; and

It appearing that the Board's consideration of change in its class rank policy preceded the filing of the initial Petition of Appeal and was not triggered by the Commissioner's Order; and

It appearing that the policy now in effect as it applies to the sophomores, juniors and seniors is as unfair and discriminatory now as it was when the Commissioner decided Rucker and Andriola, supra, on June 9, 1978; now therefore

IT IS ORDERED that the Board modify its new policy so that it is applicable to all pupils attending ninth through twelfth grade, and that the class rank policy as modified may not consider grades earned outside the Kinnelon High School.

The Commissioner notices that the Board's objective of full recognition of its pupils for grades and awards earned outside its high school may easily be met by including that information on the pupil's individual transcripts.

Petitioners' Motion for Summary Judgment is granted.

Entered this 26th day of January 1979.

COMMISSIONER OF EDUCATION

JOSEPH R. BOLGER,

PETITIONER,

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF KEANSBURG, MONMOUTH COUNTY, : DECISION

RESPONDENT.

For the Petitioner, Carl J. Kerbowski, Esq.

For the Respondent, Peter P. Kalac, Esq.

Petitioner alleges that the Board of Education of the Borough of Keansburg, hereinafter "Board," has refused to pay him in accordance with the terms of his contract. He alleges further that the Board is in violation of the law regarding administrators' salary policies and he seeks relief in the form of an Order from the Commissioner of Education directing the Board to pay him the salary to which he claims entitlement. Petitioner demands a plenary hearing on the merits of his claim.

The Board denies that it is in violation of the law regarding administrators' salary policies or that a valid contract with petitioner was authorized, executed and adopted. The Board states that it simply adopted a resolution setting petitioner's salary for one year. The Board's Answer, also, sets forth a counterclaim seeking reimbursement of moneys from petitioner according to the terms of the purported contract.

A Motion for Summary Judgment dismissing the Petition of Appeal was filed together with relevant documents and supporting affidavits. Oral argument on the Motion was held at the State Department of Education, Trenton. Petitioner filed an affidavit in opposition to the Motion and the litigants submitted Briefs.

Petitioner is the Superintendent of Schools in the district who enjoys a tenure status, having been continuously employed there since July 1, 1967. He asserts that during November and December 1975 he and the Board negotiated, in good faith, an eleven point contract providing for certain performance by him and the payment of his salary through its "parity clause." He asserts further that the negotiations resulted in the execution of a contract which the Board incorporated by resolution even though its resolution refers to its parity clause only. (Exhibit B; Superintendent's Affidavit) Petitioner asserts, also, that the Board is in violation of N.J.S.A. 18A:29-4.3 which reads as follows:

> "The board of education of every school district employing one or more teaching staff members having full-time supervisory or administrative responsibilities shall adopt salary schedules for each school year that begins after the effective date of this act for all such members, except that for a superintendent of schools the board may adopt a salary schedule.***" (Emphasis added.)

Petitioner contends that the parity clause in his contract (Exhibit A) establishes the salary schedule pursuant to the aforementioned statute by which the Board is compelled to pay him in perpetuity. (Tr. 29-30)

The Board argues that it never authorized the execution of the purported contract and that it never adopted any contract by resolution. It submits in evidence a copy of minutes of the special meeting of the Board held December 9, 1975 in which it adopted the following resolution:

> "Motion made by Mr. John J. Callinan, seconded by Mr. Joseph M. Rossetti that in consideration of a 26.995% of a parity above the top administrative guide we hereby employ Joseph R. Bolger as Superintendent of Schools effective the first day of July 1975 to 30 June 1976." (Exhibit B)

At this juncture, the Commissioner is constrained to comment about the purported contract (Exhibit A), Exhibit B and the application of the tenure statutes in regard to petitioner's employment. It is not questioned that petitioner is a tenure employee and, therefore, no employment contract is required. N.J.S.A. 18A:28-5 Tenure employees do not require a statement of reemployment; therefore, Exhibit B is not an employment contract, but merely a statement of salary. That resolution clearly set forth petitioner's salary for the July 1, 1975 to June 30, 1976 school year.

The purported "Superintendent's Contract" (Exhibit A) which is dated December 9, 1975, the same day as the public meeting of the Board which set petitioner's salary, was never acted upon by the Board in any meeting. The only evidence regarding petitioner's "contract" is found in the Board minutes of December 9, 1975. (Exhibit B) Petitioner has not come forth with any proofs that his "contract" was adopted by the Board. He contends that its parity clause, once adopted, incorporated the entire provisions of his contract since the parity clause could not "come out of thin air." (Tr. 37)

Two affidavits submitted by the Board Secretary state that he signed "The Superintendent's Contract" (Exhibit A) approximately a year after the date affixed thereon based on the Superintendent's contention that that was the document to which he and the Board agreed concerning the terms and conditions of petitioner's employment and that the purported contract had never been presented to the Board at a public meeting. (Exhibits D, E)

Further, an affidavit filed by the president of the Board who was also a Board member in 1975 during the time the December 9 resolution was adopted, disclaims any knowledge of the "contract" (Exhibit A) until September 1977. (Exhibit F)

In his review of the record herein, the Commissioner finds that the Board has not established a salary guide for the Superintendent; however, it is not required to do so. The pertinent statute, N.J.S.A. 18A:29-4.3, does not mandate a salary schedule for superintendents and nothing in the record shows the existence of any salary schedule for petitioner. He asserts that the Board's adoption of the parity clause by resolution on December 9, 1975 effectively established a salary guide, if not in perpetuity, for at least two years pursuant to N.J.S.A. 18A:29-4.1 (Tr. 29; Petitioner's Brief, at pp. 4-5)

The Commissioner does not agree. The action the Board took at its meeting on December 9, 1975 was an adoption of a salary for petitioner for one year. That adoption is not a salary schedule and it cannot be binding on future boards.

The Commissioner finds further that there is no affidavit by the Superintendent which states that the Board adopted "The Superintendent's Contract" (Exhibit A) at a public meeting of the Board. Neither does he make that argument in the transcript or in his Brief.

N.J.S.A. 18A:18-1, repealed by L.1977, c.114 § 1, but in effect at the time the purported contract was developed, reads, in part, as follows:

> "No board of education shall enter into a contract until the same has been presented and passed upon at a regularly called meeting of the board***."

Finally, since there is no contract, there can be no counterclaim by the Board to the non-existent contract.

Petitioner's argument and Exhibits in their best light show:

1. A contract signed by a former Board president, the Board Secretary and himself. (Exhibit A)

2. The Board's adoption of his salary for the 1975-76 school year. (Exhibit B)

Irrespective of the signatures on the contract, it is not valid unless adopted by the Board. In Robert and Barbara Foote v. Board of Education of the Township of Wall and the Old Wall Historical Society, Monmouth County, 1977 S.L.D. ____ (decided April 19, 1977), aff'd State Board of Education July 6, 1977, the Commissioner stated that:

> "***The courts have held that a local board of education is not a continuous body and, unless it is specifically provided [authorized] by statute, a board may not enter into a contract which would commit a subsequent board.***" (at ____)

The Supreme Court of New Jersey in Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67 (1954) developed the standards that are to be applied when a Motion for Summary Judgment is sought, to wit:

> "It [summary judgment] is designed to provide a prompt, businesslike and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion clearly shows not to present any genuine issue of material fact requiring disposition at a trial.***
>
> "***[T]he moving party sustains the burden of showing clearly the absence of a genuine issue of material fact. At the same time, the standards are to be applied with discriminating care so as not to defeat a summary judgment if the movant is justly entitled to one. (at 74)

And,

> "***All inferences of doubt are drawn against the movant in favor of the opponent of the motion.***

And,

> "***[I]f the opposing party offers no affidavits or matter in opposition, or only facts which are immaterial or of an insubstantial nature, a mere scintilla, 5 Vanderbilt L.

> Rev. 607, 613 (1952), 'fanciful, frivolous, gauzy or merely suspicious,' 6 Moore, Federal Practice, par. 56.13(3), he will not be heard to complain if the court grants summary judgment, taking as true the statement of uncontradicted facts in the papers relied upon by the moving party, such papers themselves not otherwise showing the existence of an issue of material fact.***" (at 75)

Having determined that there is no valid contract which has been adopted by the Board and having further found that the Board is not in violation of any statute regarding the establishment of a salary schedule for the Superintendent, the Commissioner concludes that there is no genuine issue of material fact and, therefore, no need for a plenary hearing.

Having reached these determinations the Board's Motion for Summary Judgment is granted and the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

February 1, 1979
Pending State Board of Education

JOSEPH R. BOLGER,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF KEANSBURG, MONMOUTH COUNTY,	:	DECISION
RESPONDENT-APPELLEE.	:	

Decided by the Commissioner of Education, February 1, 1979

For the Petitioner-Appellant, Chamlin, Schottland, Rosen, Cavanagh & Kelley (Michael D. Schottland, Esq., of Counsel)

For the Respondent-Appellee, Peter P. Kalac, Esq.

The State Board of Education affirms the Commissioner's Decision for the reasons expressed therein.

July 11, 1979

Pending New Jersey Superior Court, Appellate Division

IN THE MATTER OF THE :
APPLICATION OF THE BOARD OF :
EDUCATION OF THE EAST WINDSOR :
REGIONAL SCHOOL DISTRICT FOR :
THE TERMINATION OF THE :
SENDING-RECEIVING RELATIONSHIP:
WITH THE SCHOOL DISTRICT OF :
THE BOROUGH OF ROOSEVELT, :
MONMOUTH COUNTY. :
:

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Turp, Coates, Essl & Driggers
(Henry G. P. Coates, Esq., of Counsel)

For the Respondent, Joyce M. Usiskin, Attorney at Law

Petitioner, the Board of Education of the East Windsor Regional School District, hereinafter "East Windsor Board," request the Commissioner of Education to sever the sending-receiving relationship for the education of high school pupils, grades nine through twelve, between it and the Board of Education of the Borough of Roosevelt, hereinafter "Roosevelt Board." Such request is grounded in a series of enrollment projections developed by the East Windsor Board. The Roosevelt Board opposes the request and avers that the East Windsor Board has not provided good and sufficient reasons for the severance.

A hearing in this matter was conducted by a hearing examiner appointed by the Commissioner on August 14 and October 13, 1978 at the State Department of Education, Trenton. The report of the hearing examiner is as follows:

The East Windsor Board and the Roosevelt Board have been associated in a sending-receiving relationship for decades and have completed a ten year contractual agreement which was effective September 1, 1966. A brief recital of the present controverted matter is herein stated as follows:

In 1975 the East Windsor Board filed a Petition of Appeal before the Commissioner to request that he sever the sending-receiving relationships for the education of pupils in grades

nine through twelve from the Borough of Roosevelt and the Township of Cranbury. In the Matter of the Application of the Board of Education of the East Windsor Regional School District for the Termination of the sending-receiving relationship with the School Districts of the Borough of Roosevelt, Monmouth County, and the Township of Cranbury, Middlesex County 1976 S.L.D. 479, the Commissioner granted respondent's Motion for Dismissal and retain jurisdiction in the controverted matter to the date of January 1, 1977 (at p. 484) On January 26, 1977 the East Windsor Board's Petition of Appeal was dismissed without prejudice and a conference of counsel between the parties.

On January 17, 1978, the East Windsor Board filed two Petitions before the Commissioner seeking severance of the sending-receiving relationships with the Roosevelt Board and the Board of Education of the Township of Cranbury, hereinafter "Cranbury Board." On February 9, 1978 the Roosevelt Board filed its Answer to the Petition and advanced a Notice of Motion for Consolidation of the two Petitions and a Motion for Interim Restraints to enjoin the East Windsor Board from excluding respondents eighth grade pupils from petitioners' nineth grade orientation process. Board of Education of the Township of Cranbury, Middlesex County, and Board of Education of the Borough of Roosevelt, Monmouth County v. Board of Education of the East Windsor Regional School District, Mercer County 1978 S.L.D. ___ (decided March 6, 1978), the Commissioner entered an Order which required the East Windsor Board to provide an orientation program tot he eighth grade pupils of the Roosevelt Board and the Cranbury Board.

Subsequently, on May 31, 1978, the Commissioner entered an Order which provided for the phased withdrawal of Cranbury pupils from the East Windsor Board's Hightstown High School with the termination of the sending-receiving relationship between the East Windsor and Cranbury Boards, and the establishment of a sending-receiving relationship between the Cranbury Board and the Board of Education of the Township of Lawrence. In the Matter of the Application of the East Windsor Regional School District, Mercer County, for the Termination of the Sending-Receiving Relationship with the School District of the Township of Cranbury, Middlesex County, and the Application of the Board of Education of the Township of Cranbury to Establish a Sending-Receiving Relationship with the Board of Education of the Township of Lawrence, Mercer County, 1978 S.L.D. ____ (decided May 31, 1978)

On June 26, 1978, the Roosevelt Board filed a Notice of Motion to Restrain the East Windsor Board from a denial to accept and enroll Roosevelt tuition pupils in the East Windsor Board's approved 1978 summer school program. The Commissioner granted the Roosevelt Board's Motion and Ordered the East Windsor Board to accept and enroll Roosevelt pupils in its approved 1978 summer

school program. In the Matter of the Application of the East Windsor Regional School District for the Termination of the Sending-Receiving Relationship with the School District of the Borough of Roosevelt, Monmouth County, 1978 S.L.D. ____ (decided June 27, 1978)

On August 14, 1978, a hearing was conducted by a representative of the Commissioner at the State Department of Education, whereby the East Windsor Board advanced its arguments, proofs, witnesses and documents in support of its Petition. It asserted that the school district had experienced a building and population expansion in the recent past and that such expansion was projected into the future. With such an expansion it had projected its high school population to exceed the functional capacity of its high school which triggered the instant application to terminate the sending-receiving relationship. The Petition, which considered present pupil enrollment, is grounded more on the anticipated enrollments in future years at its high school. (Tr. I) (P-1)

On October 5, 1978, the Roosevelt Board filed a Notice of Motion to Dismiss the herein Petition with an accompanying memorandum of Law in support thereto. Oral argument on the Motion was heard on October 13, 1978, whereby the Roosevelt Board advanced the argument that the East Windsor Board failed to prove "good and sufficient" reason to terminate a sending-receiving relationship pursuant to N.J.S.A. 18A:38-13. It argued that the Petition was not grounded in present overcrowded conditions but rather by projections of anticipated enrollments within the school district. In support of its argument, the Roosevelt Board relied upon documents in evidenc eproffered by the East Windsor Board. The first of which was a letter dated March 16, 1978, addressed to the East Windsor Board's Superintendent, from a representative of the Commissioner which stated that the East Windsor Board's Hightstown High School pupil capacity was computed at 1,394 pupils. (C-1) The Roosevelt Board asserted that the Commissioner must now consider the instant Petition in view of the phased withdrawal of the Cranbury Board's pupils as the result of the termination of the sending-receiving relationship with the East Windsor Board, ante. The Roosevelt Board relied upon the East Windsor Board's pupil enrollment projections showed that the Hightstown High School would not exceed its pupil capacity until the 1982-83 school year as follows:

Year	All 3 Districts (P-1)	Less Cranbury (p. 153)	Total
1978	1,396	120	1,276
1979	1,453	124	1,329
1980	1,474	128	1,346
1981	1,521	132	1,389
1982	1,588	136	1,452

(Roosevelt Board's Brief, at p. 6)

The Roosevelt Board projected its pupil enrollment projections for its ninth through twelfth grade pupils for the next five years as follows:

1978	51
1979	36
1980	34
1981	31
1982	32

(Roosevelt Board's Brief, at p. 6)

The East Windsor Board disputed its own pupil enrollment projections as set forth by respondent. It offered, over the objection of the Roosevelt Board, the actual pupil high school enrollment as of September 30, 1978 and its modified enrollment projections for the school years 1979 through 1983. (Tr. II-5-6, 14) (P-1) (East Windsor's Memorandum of Law at p. 5) It argues that the implementation of the "Thorough and Efficient" Law (N.J.S.A. 18A:7A-1 et seq.) cannot be ignored nor could the East Windsor Board provide a thorough and efficient education to its pupils on Rossevelt pupils in over crowded conditions.

The East Windsor Board urged the Commissioner to deny Roosevelt's Motion to Dismiss and, in the alternative, maintain jurisdiction in the instant matter through the 1981-82 school year. (Tr. II-16) (East Windsor Memorandum of Law, at pp. 5-6)

The hearing examiner, having held respondent Roosevelt Board's Motion to Dismiss in abeyance, required that respondent move forward with its affirmative defenses. Thereafter, the Roosevelt Board moved to accept the East Windsor Board's offer to have the Commissioner retain jurisdiction of the matter until the 1981-82 school year. (Tr. II-23-24)

The hearing examiner recommends that the Commissioner retain jurisdiction in this matter until January 1, 1982. He further recommends that the Roosevelt Board proceed to explore alternative arrangements for the education of its ninth through twelfth grade pupils subsequent to the 1981-82 school year.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and concurs with the report and the recommendations contained therein.

Accordingly, the Commissioner retains jurisdiction in this matter to the date of January 1, 1982 at which time new data with

respect to pupil enrollment may be assessed. In the interim, the Roosevelt Board is free to pursue possible alternatives and to submit a recommended alternative sending-receiving relationship to the Commissioner for review and consideration.

COMMISSIONER OF EDUCATION

February 5, 1979

"J.G.," by his parents,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF POMPTON LAKES, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

For the Petitioners, Jeffer, Walter, Tierney, DeKorte, Hopkinson & Vogel (Reginald F. Hopkinson, Esq., of Counsel)

For the Respondent, McCarter & English (Steven B. Hoskins, Esq., of Counsel)

Petitioners are the parents of "J.G.," a pupil formerly attending school in the district operated by the Board of Education of Pompton Lakes, hereinafter "Board." Petitioners seek reimbursement for tuition and transportation costs incurred when they placed their son in a private school for the academic years 1976-77 and 1977-78.

Petitioners contend that the Board has neglectfully ignored expert medical diagnoses of their son's neurological impairment and its educational implications. They indicate that because of the Board's improper handling of this matter they sought suggestions from professionals outside the public school district and as a result placed J.G. in the nonpublic Wilson School, Kinnelon, New Jersey. Petitioners seek to have the Board's child study team's findings corrected to indicate that J.G. is neurologically impaired.

A Motion for Summary Judgment was filed with the Commissioner of Education subsequent to a decision rendered on July 7, 1977 (C.O. Decision) by a classification officer employed by the State Department of Education. (Schedule A) The authority for such a decision is found in N.J.A.C. 6:28-1.9(j)(6).

Petitioners filed a Brief in support of their Motion for Summary Judgment and the Board filed a Brief in opposition to the Motion. Thereafter, petitioners submitted a Reply Brief.

Oral Argument on the Motion was held on May 12, 1978 at the State Department of Education, Trenton, before a representative appointed by the Commissioner.

The facts of the matter as reported in the decision of the State's classification officer and certain other facts not disputed by the litigants are as follows:

J.G. attended private school for four years prior to his enrollment in September 1973 in grade two in the school district of Pompton Lakes. (Board's Brief, at p. 4) He was a poor reader and was given supplemental instruction four hours per week in reading. J.G. made significant gains in academic achievement and his parents praised the program and the staff because of the progress their son had made in academic studies and the improvement of his self-image. The supplemental instruction was continued in grade three (1974-75) and was increased to five hours per week. (C.O. Decision, at p. 2)

In August 1975 J.G. suffered an attack of literally blinding headaches and his family physician recommended that he be examined by a neurologist. J.G. was examined by a neurologist and has been medicated for seizure, rather than pain, since that time. He returned to school in grade four (fall, 1975) and was noticed to have changed seriously in behavior and learning style. (C.O. Decision, at pp. 2-3) Because of this behavioral change at school and his activities at home, J.G. was referred by his principal to the Board's special services group for a full case study. He was tested by the Board's school psychologist who submitted his report to the principal. (C.O. Decision, at p. 3) J.G. was tested, also, at a private clinic employed by his parents, and they subsequently met with the Superintendent of Schools on December 12, 1975 to discuss J.G. The Superintendent thereafter directed that a complete child study team (CST) evaluation be done immediately. (C.O. Decision, at p. 3)

On January 9, 1976 the CST concluded that regular class placement with continued supplemental assistance in reading would meet J.G.'s needs. Petitioners sought further assistance as advised by the CST and subsequently J.G. was examined by a psychiatrist at Columbia University Hospital. The CST met on March 23, 1976 to discuss the report of that psychiatrist and determined that no change in status would be necessary. (C.O. Decision, at pp. 3-4)

Petitioners then contacted the New Jersey Department of Education, Passaic County Office, to inform that office's child study supervisor of the psychiatrist's report and recommendations as to classification and placement of their son. Having failed in their attempts to get the Board to classify J.G. as a handicapped pupil pursuant to N.J.S.A. 18A:46-1 et seq., and, further, due to the failure to secure a response to their complaints from the New Jersey Department of Education, Passaic County Office, and the regional office, Bureau of Special Education and Pupil Personnel Services, petitioners enrolled J.G. in the nonpublic Wilson School, Mountain Lakes, for the fall term beginning

September 1976. The Wilson School has a special program for neurologically impaired pupils. On August 30, 1976 the Board at petitioners' request sought a formal hearing before a State classification officer pursuant to N.J.A.C. 6:28-1.11(d), now 6:28-1.9(j)(6) (effective August 11, 1978). (C.O. Decision, at p. 4) That hearing was conducted on December 17 and 20, 1976 and January 13, 1977.

The classification officer decision was rendered on July 7, 1977 subsequent to three days of hearing, de novo, and the classification officer's review of the testimony and evidence he gathered. His decision made findings of fact and he rendered directives and conclusions as follows:

1. The classification officer found that the "***judgment of the team [CST] was made unilaterally by the psychologist/director when he placed J.G. in a supplemental instruction program in October 1973 and continued that program through June 1976.***" (C.O. Decision, at p. 9)

2. The psychologist/director, who headed the CST "***perjured himself and discredited himself to the classification officer" by falsely swearing about his academic credentials. He testified that he held a Ph.D. degree in school psychology from New York University, when, in fact, he did not. (C.O. Decision, at p. 10)

3. The psychologist/director testified that upon request for J.G.'s records a meeting of the principal, Superintendent and himself was held and that all records available to the school district were duplicated for petitioners. During the de novo hearing, however, it became known that several records were missing, which when examined were found by the classification officer to be "***important records describing the educational difficulties J.G. was experiencing." (C.O. Decision, at p. 11)

4. The principal's referral of J.G. of October 10, 1975 for full CST involvement received only the attention of the psychologist/director. (C.O. Decision, at p. 11)

5. The principal testified that the first report he received which he believed would help plan instructional strategies for J.G. was an educational evaluation done at petitioners' expense. (C.O. Decision, at p. 12)

6. Reports of professionals were found unsigned and in some instances undated in violation of N.J.A.C. 6:3-2.2(g). (C.O. Decision, at p. 12)

7. Records on J.G. were stored in a variety of locations in violation of N.J.A.C. 6:3-2.4(b). (C.O. Decision, at p. 13)

8. Names of more than one pupil were frequently listed on reports or anecdotal records thereby breaching the confidentiality of pupil records since one pupil's name appears in another pupil's file. (C.O. Decision, at p. 13)

9. The classification officer's principal finding was, after a review of all testimony and evidence, that the Board's

> "***basic child study team acted improperly in its determination of an appropriate classification for J.G. *** [and] neglected to delineate its decision-making process and failed to consult with its school physician in an effort to fully weigh the medical implications of J.G.'s educational progress." N.J.A.C. 6:28-1.3 (C.O. Decision, at p. 13)

The classification officer stated that because the county office of the New Jersey Department of Education and the regional office of the Bureau of Special Education and Pupil Personnel Services failed to respond to petitioners' request for intervention, they sought to have J.G.'s educational needs met in a school recommended by professionals they privately employed. The classification officer stated further, however, that there was neither testimony nor evidence to support the specific school chosen by petitioners and "***[i]ndeed, the nonpublic school for handicapped pupils has not been demonstrated as the least restrictive environment in which J.G. can best achieve success in learning.***" N.J.A.C. 6:28-3.2(b) (C.O. Decision, at pp. 14-15)

The classification officer concluded that petitioners had cooperated in every way with the Board, J.G.'s teachers, school administrators and CST members, and "[o]nly after serious contradiction of advice***" did they seek a hearing in accordance with N.J.A.C. 6:28-1.11. (C.O. Decision, at p. 15) "Petitioners' requests were handled slowly and delayed beyond the start of the new school year, September 1976. This delay caused petitioners to place their son in the nonpublic Wilson School and assume the tuition responsibilities." (C.O. Decision, at p. 15)

A board of education is required by law to provide an educational program for those enrolled in its schools, including handicapped pupils. Concerning the classification of such pupils, the Commissioner stated in "K.K." v. Board of Education of Town of Westfield, 1971 S.L.D. 234, decision on remand 1973 S.L.D. 30, aff'd Docket No. A-1125-73 New Jersey Superior Court, Appellate Division, February 13, 1975 (1975 S.L.D. 1086), the following:

> "***It is clear from a reading of this statute [N.J.S.A. 18A:46-6] that there is a judgment involved prerequisite to classifica-

> tion, namely, whether or not the child under study can, or cannot, 'be properly accommodated through the school facilities usually provided.' It is also clear that the task of judging the severity of handicap is one that is delegated specifically by statute (N.J.S.A.18A:46-11) to the 'psychological examiner' and 'special education personnel' employed by each board of education in the State.
>
> "Admittedly, this is a difficult task, but in order to insure that it is carried out properly, the State Board of Education has required each district to employ highly-qualified personnel representing many disciplines. The certification standards for these team members are high.***"
> (Emphasis supplied.) (at 239-240)

See also John Scher v. Board of Education of West Orange, 1968 S.L.D. 92 for further enunciation of a board's proper reliance on reports of its specialized personnel.

Accordingly, when a board of education has reason to believe that a responsible classification has been made by its child study team, with their several areas of expertise, it is required by law to effect an appropriate placement either within its own school or another public school or, if such do not provide an appropriate educational program, in a qualifying private educational institution. The appropriate educational program is to be determined by administrators and educational program specialists who must give proper consideration to the recommendations of the child study team. Such classification and prescribed program will be effective until, on appeal, it is determined that either the procedures of classification, the classification itself or the educational program for a pupil, or any combination thereof, is contrary to statute, the rules of the State Board of Education or otherwise flawed by unreasonable interpretation. As was stated by the New Jersey Superior Court in Board of Education of Plainfield v. Plainfield Education Association, 144 N.J. Super. 521 (App. Div. 1976):

> "***It is elementary that a grant of authority to an administrative agency is to be liberally construed so as to enable the agency to discharge its statutory responsibilities. In re Promulgation of Rules of Practice, 132 N.J. Super. 45, 48-49 (App. Div. 1974). In short, the authority delegated to an administrative agency should be construed so as to permit the fullest accomplishment of the legislative intent. Cammarata

> v. Essex Cty. Park Comm'n, 26 N.J. 404, 411 (1958). Moreover, when construing a statutory enactment it is fundamental that the general intention of the act controls the interpretation of its parts. Hackensack Water Co. v. Ruta, 3 N.J. 139, 147 (1949). All statutory provisions are to be related and effect given to each if such be reasonably possible. Jamouneau v. Harner, 16 N.J. 500, 513 (1954).***" (at 524)

A parent or pupil, however, has the right pursuant to N.J.A.C. 6:28-1.9 et seq. to appeal a classification and/or placement and, if it is believed irreparable harm could attach, to file a Motion for Interim Relief, pendente lite, before the Commissioner. Their rights to appeal any impartial hearing examiner's decision to the Commissioner are likewise guaranteed.

In such a sensitive area as pupil classification the appellate review capacity of the Commissioner must be exercised with thoroughness in view of the far-reaching ramifications which affect both individual pupils and the operation of school systems.

After the de novo hearing, the classification officer decided that the CST had acted improperly in its determination of an appropriate classification for J.G. (See No. 9, ante.)

He concluded that he lacked jurisdiction to award tuition payments to parents of handicapped children and suggested that petitioners seek that relief before the Commissioner. (C.O. Decision, at p. 15) No appeal was taken from the C.O. Decision; rather, petitioners, relying on that decision, seek further relief from the Commissioner in the form of transportation and tuition costs to the nonpublic Wilson School.

In the instant matter, the Commissioner determines that there was an abuse of discretion by teaching staff members employed by the Board. The callous disregard of the rules embodied in the Administrative Code, Title 6, Education, regarding handicapped pupils by the psychologist/director was part of the root cause of the frustration and the conflicting reports given to petitioners. The Commissioner will inquire further into the reasons why inadequate attention was given this matter by State Department of Education officials and see that corrective measures are taken to avoid such an absence of responsibility in future appeals.

The Commissioner has previously held that:

> "***While parents have a right to make a choice between private and public school placement, they do not have a right to require that public school districts pay tuition costs to private schools in the event that this is the parental choice.***"

See Malcolm and Ina Woodstein v. Board of Education of the Township of Clark, 1970 S.L.D. 220, 224, aff'd State Board of Education 1971 S.L.D. 662 and K.K., supra. Nevertheless, in the matter herein controverted, petitioners were faced with a situation posing possible harm to their child and they acted in the face of conflicting professional opinion and the absence of further assistance from State officials. In view of all the factors in the instant matter, petitioners' action withdrawing their son from the public school was justified.

Under these special circumstances the Commissioner directs the Board to pay petitioners' tuition and transporation costs to send J.G. to the Wilson School for the 1976-77, 1977-78 and 1978-79 school years to date. The Board is further directed to assume such costs henceforth as required by law and regulation.

No liability for such payments attaches to the State Department of Education. The responsibility for classification of pupils is that of local boards of education. N.J.S.A. 18A:46-1 et seq.

COMMISSIONER OF EDUCATION

February 12, 1979

LODI EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LODI AND ANTHONY QUATRONE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent, Gerald Lo Proto, Esq.

Petitioner, the Lodi Education Association, alleges that the Board of Education of the Borough of Lodi, hereinafter "Board," acted illegally and in bad faith when it adopted a policy which extends a tenure status to principals and vice-principals upon completion of a six-month period of employment. Petitioner demands an Order from the Commissioner of Education declaring the controverted policy ultra vires. The Board denies the allegations and asserts that its action is in all respects proper and legally correct. The Board seeks dismissal of the action.

A hearing was conducted in the matter at the office of the Middlesex County Superintendent of Schools by a hearing examiner appointed by the Commissioner. Thereafter, the parties filed Briefs in support of their respective positions. The report of the hearing examiner is as follows:

Initially, it is observed that the Board seeks dismissal of the action on the grounds that an authorized representative of the Association did not appear at the hearing to testify in support of the allegations. The Board complains that it was denied an opportunity to cross-examine such a representative. The hearing examiner has reviewed the Board's Brief in support of this contention and the cases cited in support thereof and finds no basis upon which to recommend that a Motion to Dismiss be granted. The Association, as one of two primary parties of interest herein, carries the burden of proof to establish the truth of the allegations through the testimony of witnesses it chooses. Petitioner did call two witnesses in its behalf, each of whom was subjected to cross-examination by the Board. There is no requirement that a specific person must testify at a hearing, unless subpoenaed by a party for such purpose. The Board subpoenaed no one.

The relevant facts are as follows:

During November 1975 the principal of the Board's Lincoln School died. The Superintendent testified that he recommended to the Board that it appoint one of several candidates he interviewed to the resulting vacancy. The Board, at a meeting conducted on November 12, 1975, adopted the following resolution:

> "BE IT RESOLVED by the Board of Education of the Borough of Lodi, New Jersey, as follows:
>
> "1. That ANTHONY QUATRONE, upon the recommendation of the Superintendent of Schools, Louis A. Ingenito, be and is hereby appointed Principal in the Lodi School System, to be assigned to the Lincoln School, at an annual salary of $22,308, to be prorated for the current School Year, effective December 1, 1975.
>
> "2. That said appointee shall perform such duties as may be assigned to him by the Superintendent of Schools, Louis A. Ingenito.
>
> "3. That said appointee be and is hereby granted Tenure in said position as of January 1, 1976." (J-1)

The resolution was adopted by the Board on a vote of six ayes and two nays with one member absent. One of the two dissenting Board members made a public statement opposing the granting of tenure to the newly-appointed principal after the expiration of one month.

Thereafter, on November 19, 1975 the following memorandum giving notice of a special meeting to be convened by the Board was prepared by the Board Secretary and reads in pertinent part as follows:

> "TO: Newspapers
> All Board Members
> Louis A. Ingenito, Superintendent of Schools
> Gerald P. LoProto, Board Attorney
>
> FROM: Lawrence M. Paparozzi
> School Business Administrator-Secretary
>
> SUBJECT: SPECIAL MEETING
>
> Time: - 6:00 p.m.
>
> Date: - Friday evening, November 21, 1975

Place: - Board of Education Meeting Room
Lincoln School
South Main St.
Lodi, NJ

Agenda: - (1) Personnel
(2) Bills
(3) Communications" (J-2)

On November 21, 1975 the Board held its special meeting and by way of the following resolution rescinded its earlier resolution (J-1) granting early tenure to the principal in question, and in its stead resolved:

"***WHEREAS, a Board of Education is empowered under NJSA and legally authorized to establish a shorter probationary period for acquiring tenure, AND

"WHEREAS, the Board has determined that in the appointment of Principals and Vice Principals to the Lodi School System, it is imperative to shorten the period to acquire tenure as required by law, AND

"WHEREAS, this determination is based upon the Board's desire to attract prospective employees in this category or classification who are exceptionally qualified and experienced, and who have attained tenure in our school district or in any other school district, AND

"WHEREAS, it is the opinion of the Board that this action is in the best interests of our School System, NOW THEREFORE,

"BE IT RESOLVED by the Board of Education of the Borough of Lodi, New Jersey, as follows:

"1. That any person appointed to the position of principal or vice principal shall acquire and be granted tenure 6 months after the effective date of said appointment.

"2. That this Resolution shall apply to any person or persons whose appointment in said category or classification shall take effect after the date of this Resolution, and such person or persons shall acquire tenure in said position 6 months after said effective date.

> "3. That this section taken under this Resolution shall constitute Board Policy.
>
> "4. That any prior action of the Board, inconsistent herewith, be and is hereby rescinded." (J-3)

Petitioner argues that the Board's notification of its special meeting is fatally defective on two counts:

1. There is no specific reference on the Board agenda regarding the action it took pertaining to its early tenure resolution. The agenda item is merely listed as "Personnel."

2. The notification of such special meeting was untimely, improper and thereby precluded public attendance in violation of N.J.S.A. 18A:10-6.

The above statute of reference upon which petitioner relies reads as follows:

> "All board meetings shall be public and each board shall hold a meeting at least once every two months during the period in which the schools in the district are in session.
>
> "All meetings shall be called to commence not later than eight P.M. of the designated day but, if a quorum be not present at the time for which the meeting is called, the member or members present may recess the meeting to a time not later than nine P.M. of said day and, if no quorum be present at that time, the member or members present may adjourn the meeting to commence not later than eight P.M. of another day, not more than seven days following the date for which the original meeting was called, but no further recess or adjournment of the meeting shall be made.
>
> "Public announcements of time and day to which any meeting is so recessed or adjourned shall be made at the time of the recess or adjournment." (N.J.S.A. 18A:10-6)

More specifically, the hearing examiner also observes that the regulation promulgated by the State Board of Education regarding special meetings holds:

> "In every school district of the State it shall be the duty of the secretary of the board of education to call a special meeting of the board whenever he is requested by the president of the board to do so or whenever

> there shall be presented to such secretary a petition signed by a majority of the whole number of members of the board of education requesting the calling of such special meeting." (N.J.A.C. 6:3-1.9)

The hearing examiner has reviewed the testimony of the Board Secretary and the Superintendent regarding the notice (J-2, ante) and finds no evidence that such notice was not distributed to the parties named therein prior to the special meeting. Moreover, it is important to note that although the Legislature enacted into law the provisions of N.J.S.A. 10:4-6 et seq. also known as the "Open Public Meetings Act," on October 21, 1975, the provisions of this act were effective ninety days thereafter and are not the subject of the matter controverted herein.

The hearing examiner finds that while the controlling statute (N.J.S.A. 18A:10-6) requires all meetings of local boards of education to be public, there is no requirement in this statute or the State Board regulation (N.J.A.C. 6:3-1.9) that such meetings must be publicly advertised in advance or that persons other than members of the local board of education must be present to make the meeting official and legally correct.

It is further found upon review of the notice (J-2, ante) that, while the general category of "Personnel" on the agenda under which the resolution giving rise to the policy (J-3, ante) was adopted was vague, it is not sufficient to declare the meeting invalid.

Petitioner further contends that while a board of education may properly fix a shorter period of time for the acquisition of tenure by virtue of N.J.S.A. 18A:28-5(a), it may do so only for those categories of employees who are employed on a twelve month basis. Petitioner maintains that, because the newly appointed principal is employed on a ten month basis, any benefits provided by the Board's policy may not extend to him.

The hearing examiner observes that three time periods exist for the acquisition of a tenure status by teaching staff members. These are set forth in N.J.S.A. 18A:28-5 as follows:

> "***after employment in such district or by such board for:
>
> (a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
>
> (b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or

> (c) the equivalent of more than three academic years within a period of any four consecutive academic years***."

Petitioner argues that the Board's authority to shorten the period of time for the accrual of tenure is limited to those persons employed on a calendar year (twelve month) basis because such authority is statutorily prescribed on a calendar year basis only. Petitioner also grounds this argument on the fact that the authorizing statute for the acquisition of tenure for clerical employees is identical. That statute, N.J.S.A. 18A:17-2, provides the required time for the acquisition of tenure to be as follows:

> ***
>
> "b. Any person holding any secretarial or clerical position or employment under a board of education of any school district or under any officer thereof, after
>
> 1. The expiration of a period of employment of three consecutive calendar years in the district or such shorter period as may be fixed by the board or officer employing him, or
>
> 2. Employment for three consecutive academic years, together with employment at the beginning of the next succeeding academic year, an academic year being the period between the time when school opens in the district after the general summer vacation and the beginnning of the next succeeding summer vacation***."

The hearing examiner disagrees with petitioner in this regard. In order for an eligible employee to acquire a tenure status, either pursuant to N.J.S.A. 18A:28-5(a) (b) or (c), or N.J.S.A. 18A:17-2(b)(1) or (2), a period of time must elapse. To hold as petitioner argues would result in treating the passage of thirty-six months differently in each instance. A calendar year, meaning twelve months, as well as an academic year, basis of employment is established by a local board of education for the proper management of its schools. The hearing examiner recommends that the Commissioner affirm the authority of local boards of education to shorten the period of time for the acquisition of tenure for categories of employees who are appointed either on a twelve month basis or an academic year basis.

Next, petitioner contends that the sole and exclusive purpose of the controverted policy was to benefit the newly appointed principal, contrary to the holding of the Court in Rall

v. Board of Education of the City of Bayonne, 104 N.J. Super. 236 (App. Div. 1969), reversed on other grounds 54 N.J. 373 (1969). There, the Appellate Division held that an employee may not be selected from a category of employees and granted tenure in a shorter period of time than that prescribed by statute. Such a policy, the Court held, would have to apply to all members within the same category.

The Board Secretary testified that all other principals and vice-principals had acquired a tenure status before November 21, 1975, when the Board adopted its controverted policy. (J-3, ante; Tr. 39-40) The Board Secretary also testified that, prior to that time, the Board had no policy, written or unwritten, with respect to granting early tenure to any employee. The Superintendent testified that in 1935 the Board had granted early tenure to one of its principals. (Tr. 38, 80)

To properly consider this precise allegation, the initial action of the Board on November 12, 1975 must be considered together with the resolution adopted on November 21, 1975 and the intervening events.

One of the two Board members who voted against the granting of early tenure to the newly appointed principal on November 12, 1975 testified that he received a telephone call on November 15 from another Board member who voted in the affirmative. The Board member testified that he was asked if he would cease his continuing opposition to the early tenure if the period of time was expanded from one month to a six month period. The Board member testified that he rejected such request. (Tr. 61)

The Superintendent, in the meantime, testified that he recommended Mr. Quatrone be appointed principal and that he receive tenure on January 1, 1976. (Tr. 81) The Superintendent testified that this person was a teacher in the Board's employ between 1957 and 1967. The record establishes that the newly appointed principal, while teaching in another school district, had also been President of the Lodi Board of Education in 1971.

The Superintendent testified that, following the adoption of the November 12 resolution with tenure accruing to the principal in question on January 1, 1976, he then recommended that the Board adopt the controverted resolution (J-3, ante) on November 21, 1975 by which tenure was to have been acquired by the principal on June 1, 1976. The Superintendent explained that the six month period was recommended so that he might fairly evaluate the performance of the newly appointed principal. (Tr. 81, 109) The Superintendent is explicit in his denial that the intent of the controverted policy was for the exclusive benefit of one person as alleged. (Tr. 90)

The vice-president of the Board testified, however, that the controverted policy (J-3, ante) was adopted precisely for the reason of affording the newly appointed principal the benefits of early tenure. (Tr. 129)

The hearing examiner finds that, inasmuch as Mr. Quatrone, at the time the Board adopted its early tenure policy, was the only principal without a tenure status, he was, in fact, the only person who could benefit by such policy after a six-month probationary period. The policy in question (J-3, ante) does afford the benefits of early tenure after a six-month probationary period to all persons whom the Board may employ in the categories of principal or vice-principal.

The hearing examiner finds that the Board's action regarding its early tenure policy (J-3, ante) must be viewed in light of the determination of the New Jersey Supreme Court in Rall, supra, wherein it was held in pertinent part that:

> "***Under the circumstances we think the legislative act of the Board - the resolution - should be construed broadly to do what it was intended to do, i.e., meet and satisfy the requirement of the statute. [N.J.S.A. 18A:28-5 et seq.] Therefore we hold that the resolution shortened the period for acquisition of tenure for superintendents of schools generally - not just for Dr. Rall - to six and one-half months of service. That rule now prevails and will continue to do so unless and until a board of education adopts another rule of general application fixing a different tenure qualifying period.***" (at 377)

The hearing examiner has reviewed the remaining arguments of petitioner that every succeeding board of education must adopt each specific policy created by the former board at its annual reorganization meeting and that the notice of the special meeting conducted on November 21, 1975 was defective.

The hearing examiner observes that it has been the past practice of many boards of education to make some determination at their reorganization meeting as to whether or not the policies of the preceding board will remain in effect unless or until specific action is subsequently taken to rescind or revise a particular policy. In this instance it is found that the succeeding Board took no such acton at its reorganization meeting but rather, those policies, including the early tenure policy for principals and vice-principals, remained in effect. To find that such lack of action by the newly appointed Board of Education is fatal to the matter controverted herein would, in the hearing examiner's judgment, place form over substance.

Finally, the hearing examiner finds no merit in the Board's argument that the matter must be dismissed for failure of petitioner to serve the principal with notice of the complaint herein. The Petition of Appeal is filed against an action taken by the Board and it is that action which is in dispute. Mr. Quatrone is not the principal party to the action, although it is acknowledged that he has an interest herein. The issues herein address only the actions of the Board and if the principal's interests are affected by the Board's action, and such action is found to be improper, then his recourse would lie against the Board. He is not a party of interest, however, which demanded notice to be served by petitioner.

In summary the hearing examiner finds as follows:

1. There is no evidence to show that the Board did not distribute the notice of its special meeting (J-2, ante) November 21, 1975, according to existing law and State Board of Education regulations.

2. It is found that while the category of "Personnel" on the agenda notice (J-2, ante) under which the Board adopted its resolution (J-3, ante), controverted herein, was vague, it was not sufficiently vague to declare the special meeting invalid.

3. It is concluded that the applicable section of N.J.S.A. 18A:28-5(a) grants authority to local boards of education to fix a shorter period for the acquisition of tenure for specific categories of teaching staff members who are employed on either an academic year or calendar year basis.

4. It is further found that while the Board's resolution (J-3, ante), granting early tenure after six months to the categories of principal and vice-principal, presently affects only Mr. Quatrone, who is the only nontenured principal, the application of this policy is prospective unless or until future Board action is taken rescinding such policy.

5. Additionally, it is found that the early tenure policy adopted by the preceding Board continues to remain in effect, notwithstanding the fact that the succeeding Board took no official action to approve it as a policy at its reorganization meeting in March 1976.

6. It is found that Mr. Quatrone, although named in the Petition of Appeal against the Board, is not a party of interest in a challenge to the action taken by the Board and therefore was not required to be named and served as a party of interest herein.

For the reasons and findings set forth above, the hearing examiner recommends that the instant Petition of Appeal be dismissed. This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter including the exceptions of petitioner filed thereto pursuant to N.J.A.C. 6:24-1.17(b).

Petitioner asserts that the hearing examiner erred in his finding that Principal Quatrone is eligible to acquire early tenure by virtue of the resolution adopted by the Board on November 21, 1975. (J-3, ante) It is noticed that the aforementioned resolution provides that persons who are appointed to the positions of principal and vice-principal acquire tenure after serving six months of employment. Petitioner asserts that the resolution (J-3, ante) is prospective in nature and the benefits to be derived therefrom do not apply to Principal Quatrone. Petitioner argues that Principal Quatrone was appointed on November 12, 1975 prior to the Board's resolution and therefore he is not eligible for early tenure six months hence.

The Commissioner does not agree. While the resolution was adopted by the Board subsequent to Principal Quatrone's appointment, the fact is that his employment did not begin until December 1, 1975. Even if his employment began prior to adoption of said resolution, the Board's action in adopting that resolution applies to all persons in the categories of principal and vice-principal. Consequently, by virtue of Principal Quatrone being in the category of principal, he is entitled to the benefits as specifically set forth in the Board's early tenure resolution. (J-3)

The Court in Rall, supra, stated in pertinent part that:

> "***the statute authorizing the grant of tenure by a board of education in a shorter period *** does not contemplate grant of tenure to an individual employee alone *** the statute can be satisfied only by a board's adoption of a rule of general application to all employees covered thereby, or to all employees of a group who could properly be considered as a separate class, or to a distinct class which might reasonably consist of a single employee.***"
>
> (54 N.J. 376)

Accordingly, for the reasons expressed herein the Commissioner finds and determines that the Board's early tenure resolution of November 21, 1975 (J-3) may not be construed to deprive Principal Quatrone from acquiring the same early tenure

protection which is afforded to all persons who may be appointed and employed within the category of principal or vice-principal.

Finally, the Commissioner has reviewed the record with respect to the testimony and arguments raised by petitioner pertaining to the Board's actions prior to the adoption of its early tenure policy controverted herein. In this regard, the Commissioner concurs with the findings and recommendations of the hearing examiner and adopts them as his own. Accordingly, the instant Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

February 22, 1979

FRANCES BIGART,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PARAMUS, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent, Winne, Banta, Rizzi & Harrington
(Robert M. Jacobs, Esq., of Counsel)

Petitioner, a teaching staff member who had acquired a tenure status in the employ of the Board of Education of the Borough of Paramus, hereinafter "Board," alleges that the change in her duty assignment for the 1977-78 school year, from regular classroom teacher of English to that of unassigned teacher, was invalid. Petitioner prays that the Commissioner of Education issue an order restoring her to a regular classroom teaching position, commensurate with and comparable to that of other teaching staff members. The Board avers that petitioner's assignment for the 1977-78 school year was fully in accord with all applicable statutory requirements and denies petitioner's allegations that the assignment was improper.

A hearing in this matter was conducted on November 18, 1977 by a hearing examiner appointed by the Commissioner at the office of the Bergen County Superintendent of Schools, Wood-Ridge. The report of the hearing examiner follows:

Petitioner has been employed by the Board as a high school English teacher for over eighteen years. (Tr. 4) In June of 1977, petitioner was notified by the principal that her assignment for the 1977-78 school year would be that of unassigned teacher in the English Department. (P-2; Tr. 5) Petitioner protested the assignment by letter dated June 9, 1977. (P-3) Despite her protest, petitioner was assigned to and assumed the duties of unassigned teacher of English in September 1977. On September 8, 1977, petitioner filed a formal Petition of Appeal with the Commissioner.

Petitioner's appeal, consisting of a two-pronged attack on the actions of the Board, alleges that such actions were invalid both substantively and procedurally. Procedurally, petitioner invokes N.J.S.A. 18A:25-1 which provides that:

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

Petitioner avers that her assignment was affected by the principal, rather than the Board, and is thus contrary to law. Petitioner also charges that the Board

> "***failed and neglected to submit a job description of the duties of that position to the County Superintendent of Schools for approval prior to such assignment which invalidates the action.***"
> (Petition of Appeal, at p. 2)

(It should be noted that N.J.A.C. 6:11-3.6 was amended effective November 10, 1977 after the bringing of this complaint.)

Substantively, petitioner alleges that she now functions as a substitute teacher, rather than as a regular classroom teacher, and that her duties entail less responsiblity than those of a regular classroom teacher. (Petition of Appeal, at pp. 1-2) Petitioner claims that her seniority as a regular classroom teacher of English entitles her to continue in that position. Each of these allegations is considered, post.

Subsequent to petitioner's filing of a Petition of Appeal with the Commissioner in this matter, the Board adopted certain resolutions which later formed the basis for objection at the hearing. (Tr. 10-23) The sequence of events pertinent to this discussion is as follows:

1. On June 1, 1977, petitioner was notified by the principal that her "***assignment for the 1977-78 school year would be as an unassigned teacher in the English Department.***" (P-2)

2. Three days after petitioner started the 1977-78 school year (Tr. 6) she received the following job description:

> "TITLE: UNASSIGNED TEACHER - HIGH SCHOOL
>
> QUALIFICATIONS: A regular or standard teaching certificate which authorizes holder to teach at least one area in grades 9-12; demonstrated familiarity with school, department, philosophy, program and policies.

REPORTS TO: Department Chairperson/ Principal

JOB GOAL: To enable each student to pursue his education as smoothly and completely as possible in the absence of his regular teacher, as well as to give individualized assistance to students in the departmental resource center.

PERFORMANCE RESPONSIBILITIES:

1. Reports to department chairperson for daily assignment in departmental resource center or for coverage of an absent member of the department.

2. Reviews with department chairperson or principal or vice-principal all plans and schedules to be followed during the teaching day.

3. Assumes responsibility for overseeing pupil behavior in class, departmental resource center or in any assigned hall area.

4. Communicates in writing to regular classroom teacher about work completed with class upon return of regular classroom teacher from an absence.

5. Accepts and performs all daily or long term teaching assignments in areas of certification.

6. Assumes all other professional responsibilities such as curriculum development, participation in departmental meetings, co-curricular activities, as any other full-time member of the department.

TERMS OF EMPLOYMENT: Ten Months - Terms and conditions of employment to be specified in the negotiated Agreement between the Board of Education and the Education Association of Paramus.

EVALUATION: Performance of this job will be evaluated annually in accordance with the Board's policy on Evaluation of Professional Personnel."
(P-1)

3. On September 8, 1977, the Petition of Appeal was filed with the Commissioner.

4. On September 19, 1977, the Board formally adopted a job description entitled "Departmental Teacher-High School." (R-1, R-3, R-4A) That job description differs only in title. (Tr. 16) Also on the same date, the Board adopted a resolution by recorded roll call majority vote of its full membership confirming petitioner's assignment as departmental teacher-high school. (R-2, R-3, R-4A, B; Board's Answer)

5. On September 22, 1977, the Board's Answer to the Petition of Appeal was filed with the Commissioner. That Answer incorporated, as its second and fourth defenses, the Board's resolutions of September 19, 1977, referred to in paragraph number four, ante.

To complete the sequence of events, the hearing examiner recommends that the Commissioner take official notice of State Department of Education records showing that the Bergen County Superintendent of Schools approved a job description for the position "Departmental Teacher-High School," Paramus Public Schools, by letter dated October 11, 1977.

Based on the sequence of events enumerated, ante, petitioner argues that the Board realized its "***initial act, that is the act of creating the position of assigning this Petitioner to [the] position of 'unassigned teacher,' [was] invalid***" (Tr. 12) and that the Board then attempted to take supplemental corrective measures after petitioner had instituted proceedings before the Commissioner. At the hearing, petitioner moved to strike the Board's subsequent corrective measures from consideration. (Tr. 12) In response, the Board argued that its subsequent actions were entirely appropriate (Tr. 18) relying on Gregory Cordano v. Board of Education of the City of Weehawken, 1974 S.L.D. 316. Additionally, the Board argued that the legitimate concern of the hearing should focus on the concept of the position itself. (Tr. 22-23) In the interest of avoiding piecemeal litigation and in an effort to join all related claims in one proceeding, the hearing examiner denied petitioner's motion and directed that the hearing proceed.

At the hearing, petitioner testified regarding her duties in the newly assigned position. (Tr. 7-8) She testified that she reported to the English department chairman at the beginning of the day for her assignment. She testified that, if a teacher in the English department were absent, petitioner then

assisted in supervising the English Resource Center. Petitioner testified that the majority of her time was spent substituting for teachers in the English department. (Tr. 38)

The English Resource Center consists of instructional materials in a large room set aside for English pupils, as a study center. When assigned to the Center, petitioner worked with the instructional materials (such as checking records and stamping books), performed assignments for the department chairman and assisted pupils. (Tr. 35-38) Generally, in addition to their regular classes, classroom teachers of English are assigned to the Center one period a day for selected marking periods of ten weeks each. (Tr. 36, 55) A secretary is available in the Center in which the English department chairman's office is also located. (Tr. 37-38)

The Deputy Superintendent of Schools, testifying on behalf of the Board, explained that the role of unassigned teacher had first been formulated in 1970 or 1971 in an effort to solve pupil absentee problems. Among the Board's concerns at that time was the high rate of pupil absenteeism from classes covered by substitute teachers. (Tr. 42-44) He testified that, as a means of solving the pupil absentee problem and providing continuity of instructional activity, a "permanent full-fledged teaching staff member" was assigned to each major department as an unassigned teacher. (Tr. 44) He testified that, as it has evolved to the present time, the position of unassigned teacher requires a teaching staff member who has "a broad view of the entire department." (Tr. 49) The Deputy Superintendent enunciated the dimensions of the position as follows:

> "***(1) To provide help in the departmental center to students***; (2) To assist in any curriculum related projects that may be undergoing (sic) at that particular time; and (3) To serve as coverage for any absent teacher.***" (Tr. 51-52)

In the opinion of the Deputy Superintendent, the duties of an unassigned teacher are extremely important to the success of the instructional program. (Tr. 57) Presently, three unassigned teachers function in the English, math, science and social studies areas. (Tr. 64) Selection of individuals for these positions is based upon their certification, expertise, length of service, and familiarity with the curriculum, the school, the department and the program. (Tr. 64, 128) All three individuals presently serving have tenure and extensive experience in the district. (Tr. 64) The Deputy Superintendent testified that petitioner "***had demonstrated more than satisfactory performance in the district***." (Tr. 67)

The Deputy Superintendent outlined petitioner's duties as follows:

> "***to supervise the departmental center, to provide assistance to students who come in, to cover teachers on days when teachers may be out in the English Department, to cover the classes of teachers who may during the day have an emergency and have to leave after [they] come to school. She or any of the other departmental teachers would be asked to go in and cover people in their department, to assist the department chairman in the orderly functioning of the department research center, to participate in any curriculum writing tasks***." (Tr.74)

He testified that petitioner participates in all activities of the English Department, attends English Department faculty meetings and in-service programs, is evaluated in accordance with the district's evaluation policy, and has suffered no reduction of salary. (Tr. 75-80) At the time of the hearing, school had been in session a total of 45 days during which petitioner had substituted for 25 1/2 days. (Tr. 81)

Based on the testimony and the documentary evidence produced, the hearing examiner finds that petitioner teaches those classes from which their regular teachers are absent approximately fifty percent of the time. Petitioner's assignment as Departmental Teacher-High School was premised upon the Board's determination that the Paramus High School instructional program would benefit from assignment of a teacher whose competency was known and who had intimate familiarity with school procedures. The Board presented bona fide reasons in support of the assignment and petitioner has not claimed the assignment was motivated by bad faith.

The purpose of the tenure statutes is to protect tenured teaching staff members from dismissal or reduction in compensation. N.J.S.A. 18A:6-10 In this instance, it is clear that petitioner has not been subjected to either. Thus, the ultimate issue remaining for determination by the Commissioner is whether petitioner's tenure status precludes her assignment as Departmental Teacher-High School and entitles her to specific assignment as a regular classroom teacher of English. The Commissioner in reaching a determination may, in addition to the statutory reference cited, post, wish to consider Marjorie S. Payne v. Board of Education of the Village of Ridgewood, 1976 S.L.D. 605 and Nicoletta Biancardi v. Waldwick Board of Education, 73 N.J. 37 (1977).

It is recommended that, absent a showing of bad faith or duplicity on the part of the Board, the Commissioner determine that the Board's decision to assign petitioner to the teaching duties as hereinbefore described in an attempt to upgrade the effectiveness of its instructional program was a legal exercise of its managerial prerogative wholly within the bounds of its statutorily conferred discretionary authority. N.J.S.A.

18A:11-1; N.J.S.A. 18A:27-4; N.J.S.A. 18A:7A-1 et seq. It is further recommended that the Commissioner declare that such assignment and petitioner's performing therein results neither in diminution of her accumulated seniority rights nor the continued accrual of additional years of seniority as a secondary school teacher of English.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter including the hearing examiner's report and the exceptions filed thereto by petitioner pursuant to N.J.A.C. 6:24-1.17(b).

Petitioner preliminarily objects to acts of the Board subsequent to the filing date of the Petition of Appeal in this matter. At the hearing, petitioner moved for an adjudication on the facts and situation existing prior to the filing of the Petition and moved to strike the Board's subsequent measures from consideration. (Tr. 10-23) In an effort to settle in a single proceeding all of the aspects of the controversy, the hearing examiner denied petitioner's motion. The Commissioner observes that the generative facts giving rise to petitioner's appeal had occurred and matured and petitioner had received due and adequate notice prior to the hearing date set down in November 1977. The substantive aspects of the controversy were unchanged. Multiplicity of legal actions, on matters arising from the same cause of action, does not promote an efficient or effective resolution of controversies and disputes. The denial of the motion was intended to prevent multiplicity of suits, not to encourage litigation, and the Commissioner hereby sustains the denial.

There is no dispute that petitioner comes within the terms of the Teachers' Tenure Law and is entitled to its protection. N.J.S.A. 18A:28-1 et seq. "***The question to be decided is the measure of such protection.***" Walter G. Davis v. Board of Education of the Township of Overpeck, 1938 S.L.D. 464 (1912), rev. State Board of Education 466 (1913), aff'd New Jersey Supreme Court 468 (1913). Davis dealt with a principal who attained tenure and was unlawfully reduced to the rank of teacher in violation of the Tenure of Office Act of 1909. The State Board of Education described the reduction in rank as tantamount to a dismissal.

> "***When a principal is reduced to the rank of a teacher he is dismissed as a principal just as surely as is an officer in the army dismissed as such when he is reduced to the ranks and another assigned to his place or as would a teacher be dismissed as such if made a truant officer or a janitor.***" (at 467)

Tenure is a status granted to a class or category of employees upon the fulfillment of a precise set of conditions. Ahrensfield v. State Board of Education, 126 N.J.L. 543 (E.&A. 1941) The statute N.J.S.A. 18A:28-5 provides in part that

> "The services of all teaching staff members including all teachers *** and such other employees as are in positions which require them to hold appropriate certificates issued

> by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title***."

Petitioner holds a tenure status as teacher and achieved that status by serving as a classroom teacher of English. At issue is petitioner's reassignment to Departmental Teacher-High School. If the reassignment constitutes a demotion, a reduction in rank from teacher to substitute teacher, it would be considered tantamount to a dismissal and in contravention of petitioner's tenure rights.

The purpose of the Teachers' Tenure Law is to give employment security to those employees coming within its provisions, to protect them in the ranks they hold, and to prevent dismissal without cause. It was stated in Viemeister v. Board of Education of Prospect Park, 5 N.J. Super. 215, 218 (App. Div. 1949):

> "***The tenure provisions in our school laws were designed to aid in the establishment of a competent and efficient school system by affording to principals and teachers a measure of security in the ranks they hold after years of service.***"
>
> (Emphasis supplied.)

No teacher, in acquiring a tenure status, is guaranteed continuity of assignment or thereby acquires a vested right to any particular assignment, class, or school. The Legislature has clearly so provided boards of education with the power of transfer under N.J.S.A. 18A:25-1 as follows:

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

In Josephine DeSimone v. Board of Education of the Borough of Fairview, 1966 S.L.D. 43, the petitioner claimed protection in her position as a half-day kindergarten teacher, so long as the position continued to exist in the district. The Commissioner held:

> "***The protection afforded petitioner by the tenure laws is in her position as teacher. As a teacher she has no claim to a particular class or grade or school but may be assigned by her employer to teach within the scope of her certificate. Greenway v. Camden Board of Education, 1939-49 S.L.D. 151, affirmed State Board of Education 155, affirmed New Jersey Supreme Court 129 N.J.L. 46 (1942) As a teacher under tenure she could not be dismissed or suffer a reduction in salary without cause, but she could be transferred to other teaching positions for which she was qualified. A transfer is not a demotion or a dismissal. Cheeseman v. Gloucester City Board of Education, 1 N.J. Misc. 318 (Sup. Ct. 1923); Downs v. Hoboken Board of Education, 12 N.J. Misc. 345 (Sup. Ct. 1934), affirmed 113 N.J.L. 401 (E.&A. 1934).***"
>
> (at 47)

While boards of education have the power and right to assign and reassign teachers in accordance with their judgment, the power must be reasonably and properly exercised in good faith and for the best interests of the school district; the work assigned must be of a rank equivalent to that by which the tenure status was acquired; the assignment must be one for which the teacher is properly certified; the board must not seek to evade the plain intention of the tenure statute. Evasion and subterfuge in defeating the legislative purpose of the tenure statute have been condemned by the courts. Schulz v. State Board of Education, 132 N.J.L. 345, 353 (E. & A. 1945)

In Marjorie S. Payne v. Board of Education of the Village of Ridgewood, Bergen County, 1976 S.L.D. 605 the Board argued that petitioner's performance was of such poor quality that she could not be assigned to work with pupils on a continuous basis. The Commissioner stated: "***If petitioner's performance is of such low quality the Board has appropriate options it may take. N.J.S.A. 18A:6-10***" (at 610)

In the instant matter, the hearing examiner found petitioner's assignment was

> "***premised upon the Board's determination that the Paramus High School instructional program would benefit from assignment of a teacher whose competency was known and who had intimate familiarity with school procedures. The Board presented bona fide reasons in support of the assignment and petitioner has not claimed the assignment was motivated by bad faith.***"
>
> (Hearing Examiner's Report)

Petitioner has excepted to the Hearing Examiner's Report, asserting that the true reason for petitioner's reassignment was dissatisfaction with her performance. (Exceptions, at p. 6) This assertion has no support in the record. It is noted that the Deputy Superintendent of Schools gave detailed testimony regarding the justification for and importance of the position (Tr. 44-46, 52-53, 57) and regarding the factors which were considered in the selection of departmental teachers. (Tr. 49, 51, 64, 67) With respect to petitioner's performance, the Deputy Superintendent commended her as "very satisfactory" and "more than satisfactory." (Tr. 67)

In our system of jurisprudence, petitioner has the burden of proving that the underlying reasons for the Board's actions are improper. Such an allegation requires substantial proof that the Board acted improperly and to the exclusion of all other bona fide reasons. Thelma Bradley v. Board of Education of the Borough of Freehold, 1976 S.L.D. 596 Petitioner has failed to sustain this burden of proof. (See Tr. 7.)

There was a variation in testimony between petitioner and the Deputy Superintendent regarding the amount of substitute duty required of petitioner. (Tr. 38, 81) Petitioner testified that the "majority" of her time was spent substituting for teachers in the English Department. (Tr. 38) The Deputy Superintendent specifically testified that petitioner had substituted 25½ days out of a total of 45 days during which school had been in session at the time of the hearing. (Tr. 81) It was only in in response to counsel's leading question that petitioner testified as follows:

> Q. "When you say majority, what do you mean by that, would it be 95 percent of the time?
>
> A. "I would say 95 percent of the time." (Emphasis supplied.) (Tr. 38)

The hearing examiner made the following finding of fact:

> "***Based on the testimony and the documentary evidence produced, the hearing examiner finds that petitioner teaches those classes from which their regular teachers are absent approximately fifty percent of the time.***"
>
> (Hearing Examiner's Report)

The Commissioner has not hesitated to make his own findings of fact when in his judgment the interests of justice so require. Such is not the situation here. The hearing examiner's finding of fact is adopted as the Commissioner's own, as amply supported in the record.

Petitioner has been reassigned to a position which she is qualified to hold. (Ex. R-1) The requirements of that position include an appropriate certificate to teach, a certificate likewise required in petitioner's previous assignment as classroom teacher of English. There is no attempt here to mislead as to the nature of the position. The job description is clear on its face. (Ex. R-1) Seniority rights, as set forth in N.J.S.A. 18A:28-9 et seq., give a right to priority of employment where there has been a reduction in force, and have no application here. Wilton D. Greenway v. Board of Education of the City of Camden, 1939-49 S.L.D. 151 (1941), aff'd State Board of Education 155, aff'd 129 N.J.L. 46, aff'd 129 N.J.L. 461 (1943) Petitioner's salary has not been reduced. Thus, we come to the ultimate issue and the crux of this case: whether by performing substitute duties for absent teachers in the English Department, petitioner has been reduced in rank--in effect, from teacher to substitute teacher.

It was held in Schulz, supra:

> "***There are fundamental differences between the status of persons employed as substitute teachers and that of persons employed in regular teaching positions.***"
> (Emphasis in text.) (132 N.J.L. at 347)

This is not to say there are fundamental differences between the duties of persons employed as substitute teachers and the duties of persons employed in regular teaching positions.

> "***[A]ll substitutes do the work of regulars when the need to perform those duties arises.***" Nicoletta Biancardi v. Waldwick Board of Education, 1974 S.L.D. 360, aff'd State Board of Education 368, 139 N.J. Super. 175 (App. Div. 1976), aff'd 73 N.J. 37
> (139 N.J. Super. at 179)

In Biancardi, supra, the petitioner was designated a substitute teacher, but "***did in all respects perform the work of a regular teacher***." 1974 S.L.D. 360, 366 Nevertheless, the New Jersey Superior Court, in reversing the State Board of Education substantially for the reasons stated in the dissenting opinion, found Biancardi had not acquired a tenure status. The nature of duties performed is not dispositive nor necessarily determines whether a teacher is working as a substitute teacher or holds the status of a regular teacher. 139 N.J. Super. at 178; 1974 S.L.D. at 371

Petitioner was employed to teach. Because she provides substitute services for other teachers and supervises the English Resource Center are not, taken together, sufficient to deprive petitioner of her tenure status as a teacher. Petitioner will continue to be a teacher and to perform the duties of a teacher

in her new assignment. Teaching duties are not restricted to classroom instruction. "***The day in which the concept was held that teaching duty was limited to classroom instruction has long since passed.***" Parrish v. Moss, 106 N.Y.S.2d 577 (1951), affirmed 107 N.Y.S.2d 580

The Commissioner finds and determines that the reassignment of petitioner from the position of regular classroom teacher of English to Departmental Teacher-High School does not constitute a violation or impairment of petitioner's tenure rights and was an act within the discretionary power of the Paramus Board of Education.

COMMISSIONER OF EDUCATION

February 23, 1979

SOMERSET HILLS SCHOOL,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY, AND THE NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES,	:	COMMISSIONER OF EDUCATION
	:	DECISION
RESPONDENT.	:	

For the Petitioner, Emery C. Duell, Esq.

For the Respondent Ewing Township Board of Education, Abbotts and Abbotts (John Abbotts, Esq., of Counsel)

For the Respondent Division of Youth and Family Services, John J. Degnan, Attorney General of New Jersey (Richard S. Weiner, Deputy Attorney General, of Counsel)

Petitioner, Somerset Hills School, a New Jersey corporation in Warren Township and a nonprofit school for children with behavioral problems, hereinafter "School," alleges that the Ewing Township Board of Education, hereinafter "Board," jointly with the New Jersey Division of Youth and Family Services, hereinafter "DYFS," owes the School $9,510 for the tuition of the pupil, D.D., for the period April 1972 to June 1974. The Board denies any fiscal responsibility to the School for D.D.'s tuition because D.D. was never enrolled in the Ewing Public Schools. The DYFS contends that its responsibility to D.D. and the School was discharged by the payment of monthly maintenance costs for food and lodging and further contends that the Board is responsible for D.D.'s education and also invokes the equitable doctrine of laches.

A conference of counsel was held May 26, 1977 where it was agreed that a period of sixty days for discovery be set down with a stipulation of facts and submission to the Commissioner of Education for adjudication by Summary Judgment. On January 13, 1978 oral argument was held on the Motion for Dismissal by the DYFS at which time a stipulation of facts and forty-five joint exhibits were admitted into evidence. Subsequently, two additional exhibits were admitted into evidence. The facts of the matter as stipulated are these:

At the voluntary request of his natural parents because of the mother's emotional problems D.D. was placed in the custody of the DYFS in December 1962. From that time he resided in numerous foster homes until September 15, 1971 when he was placed in the School by the DYFS. At the time of his placement in the School it was not certified as a school for classified pupils. At the time of his enrollment D.D. was not known to the Board nor had he been classified by the Board's child study team or the County Office of Special Education. D.D. remained at the School until June 1974. The tuition for the period of his attendance at the School remains unpaid. The parents of D.D. have not provided any support for him.

The School contends that the Board is responsible for D.D.'s tuition or alternatively the DYFS. Petitioner relies on Board of Education of Little Egg Harbor v. Boards of Education, etc., 145 N.J. Super. 1, 11 (App. Div. 1975), rev'd 71 N.J. 537 (1976). The DYFS asserts responsibility only for D.D.'s maintenance costs, places responsibility for tuition with the Board and invokes the doctrine of laches. The Board denies the applicability of Little Egg Harbor and argues that it had no knowledge of D.D. who was removed from its district prior to attaining school age. The Board argues further that only after the Little Egg Harbor decision did the School take any action to hold the Board responsible for the tuition of D.D. and invokes the doctrine of laches.

The Commissioner observes that there is nothing in the record to show that the School billed the Board for the tuition of D.D. during the 1971-74 period.

In Flammia v. Maller, 66 N.J. Super. 440 (App. Div. 1976), the Court said:

> "***The rationale of the doctrine of laches is said to be the policy which requires, for the peace of society, the discouragement of stale demands. 19 Am. Jur., Equity, § 492, p. 340 (1939). It is the equitable counterpart of statutes of limitation. The adjudicated cases 'proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless or have been abandoned; and that, because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him now to assert them.' Galliher v. Cadwell, 145 U.S. 368, 372, 12 S.Ct. 873, 36 L.Ed. 738 (1891).

> "We had occasion to discuss the doctrine of laches in Auciello v. Stauffer, 58 N.J. Super. 522, 529 (App. Div. 1959), where we quoted from Bookman v. R.J. Reynolds Tobacco Co., 138 N.J. Eq. 312, 406 (Ch. 1946):
>
> > 'It is the rule that the defense of laches depends upon the circumstances of each particular case. Where it would be unfair to permit a stale claim to be asserted, the doctrine applies.***'
>
> Laches can be a defense only where there is a delay, unexplained and inexcusable, in enforcing a known right and prejudice has resulted to the other party because of such delay. Mitchell v. Alfred Hofmann, Inc., 48 N.J. Super. 396, 403 (App. Div. 1958), certification denied 26 N.J. 303 (1958).***"
>
> (at 453)

In Dorothy L. Elowitch v. Bayonne Board of Education, 1967 S.L.D. 78, aff'd State Board of Education 86, aff'd New Jersey Superior Court, Appellate Division, October 14, 1968 (1968 S.L.D. 260), the Commissioner in considering the question of laches wrote:

> "***Justice Heher said in the case of Marjon v. Altman, 120 N.J.L. 16, at page 18:
>
> > 'While laches, in its legal signification, ordinarily connotes delay that works detriment to another, the public interest requires that the protection accorded by statutes of this class be invoked with reasonable promptitude. Inexcusable delay operates as an estoppel against the assertion of the right. It justifies the conclusion of acquiescence in the challenged action. *** Taylor v. Bayonne, 57 N.J.L. 376; Glori v. Board of Police Commissioners, 72 Id. 131; Drill v. Bowden, 4 N.J. Misc. 326; Oliver v. New Jersey State Highway Commission, 9 Id. 186; McMichael v. South Amboy, 14 Id. 183.'***" (at 85)

Petitioner did not move to acquaint the Board with the existence of D.D. until after the Little Egg Harbor decision. The Commissioner finds petitioner's case is barred by the operation

of laches. For the aforestated reasons the Commissioner finds and determines that the School's Appeal is without merit and is accordingly dismissed.

COMMISSIONER OF EDUCATION

February 23, 1979

THERESE M. DONLAN, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF MERCHANTVILLE AND ERNEST H. BARLOW, JR., SUPERINTENDENT OF SCHOOLS, CAMDEN COUNTY, : DECISION

RESPONDENTS. :

:

For the Petitioner, Therese M. Donlan, Pro Se

For the Respondents, Brown, Connery, Kulp, Wille, Purnell & Greene (Paul Mainardi, Esq., of Counsel)

Petitioner, a resident of the Borough of Merchantville and the parent of a son enrolled in the ninth grade of the Bishop Eustace Preparatory School, Pennsauken, alleges that the Board of Education of the Borough of Merchantville, hereinafter "Board," has violated her son's statutory rights by refusing to provide transportation for him to and from school. Petitioner alleges that the Board has subjected her son to invidious discrimination by providing transportation to pupils similarly situated who attend private schools. The Board denies the allegations and asserts that its actions denying him transportation are proper and legally correct.

A hearing was conducted in the matter on November 22, 1976 and January 31, 1977 at the office of the Camden County Superintendent, Pennsauken, by a hearing examiner appointed by the Commissioner of Education. Thereafter, the Board filed supplemental documents as directed by the hearing examiner. The report of the hearing examiner is as follows:

The Board conducts a school program consisting of grades kindergarten through eight. Since the school year 1971-72, it has engaged in a sending-receiving relationship with the Board of Education of Pennsauken Township for the high school education of its pupils. The Board sends its ninth grade pupils to Pennsauken Junior High School and its tenth, eleventh and twelfth grade pupils to Pennsauken Senior High School.

The Board provides transportation for all pupils who attend either of the Pennsauken schools. The Superintendent testified that no pupil who attends the ninth grade at the Pennsauken Junior High School lives remote from the schoolhouse. (Tr. I-8) All pupils who attend Pennsauken Senior High School

live remote from the schoolhouse. The hearing examiner observes that for the purpose of State reimbursement for statutorily required pupil transportation, remote is defined at N.J.S.A. 18A:58-7 and N.J.A.C. 6:21-1.3 for a high school pupil, i.e. a pupil in grades nine through twelve, as a distance between home and school of more than two and one-half miles. Remote for an elementary school pupil, i.e. grades kindergarten through eight, is defined as a distance between home and school of more than two miles.

The Superintendent testified that while it has been the practice of the Board to transport all its pupils, remote and not remote, to the Pennsauken Schools, the Board provided transportation to private school pupils enrolled in grades nine through twelve only to those who live remote from their designated schools.

Petitioner requested the Board to provide her son transportation for the 1976-77 academic year to the Bishop Eustace Preparatory School while he was enrolled in the ninth grade. The Board refused petitioner's request because her son does not live remote from that school. Thereafter, petitioner filed the instant Petition of Appeal against the Board. It is also observed that the Commissioner granted petitioner's Motion for Interim Relief by which the Board was directed to provide transportation for petitioner's son pending a determination of this matter. Therese M. Donlan v. Board of Education of the Borough of Merchantville et al., Camden County, order of the Commissioner, October 15, 1976

Subsequent to petitioner's filing of the instant complaint, the Board reduced its heretofore unwritten pupil transportation policy to writing on September 14, 1976. The written policy (C-4) provides that the Board shall transport all pupils who attend Pennsauken Junior and Senior High Schools. It also provides that the Board may, in its discretion, provide transportation to any pupil who attends a private school so long as such pupil lives remote from the designated schoolhouse. The policy further provides transportation on an individual basis for hardship cases or for any pupil whose residence does not meet the criteria for remote. The implementation of the policy results in the following factual circumstances: the Board provides transportation to all its pupils who attend ninth grade at Pennsauken Junior High School, even though none of the pupils reside remote from the schoolhouse; the Board provides transportation to private school pupils enrolled in the ninth grade only if they live remote from the schoolhouse; the Board provides transportation to all pupils attending tenth, eleventh and twelfth grades at Pennsauken Senior High School since all pupils live remote from the schoolhouse; the Board provides transportation to all private school pupils enrolled in tenth, eleventh and twelfth grades who live remote from their respective schoolhouses.

The hearing examiner finds that the Board's policy with respect to pupil transportation is discriminatory on its face.

In James P. Beggans et al. v. Board of Education of the Town of West Orange, 1974 S.L.D. 829, aff'd State Board of Education 1975 S.L.D. 1071, aff'd New Jersey Superior Court 1071 petitioners complained that their children were discriminated against by the board for its failure to provide them transportation to the private school they attended. It was conceded that petitioners did not live remote from the schoolhouse. The board did have a policy for busing private school pupils residing less than remote from the schoolhouse, which was applied to pupils who resided on five hazardous streets which had no sidewalks, and the policy was applicable to both public and private school pupils. The Commissioner dismissed the petition, citing Howard Schrenk et al. v. Board of Education of the Village of Ridgewood, 1960-61 S.L.D. 185 which held:

> "***In the Commissioner's judgment, a board of education may, in good faith, evaluate conditions in various areas of the school district with regard to conditions warranting transportation. It may then make reasonable classifications for furnishing transportation, taking into account differences in the degree of traffic and other conditions existing in the various sections of the district. Such differences need not be great in classification, but no classification may be unreasonable, arbitrary or capricious. Guill, et al. v. Mayor and Council of the City of Hoboken, 21 N.J. 574 (1956); Pierro v. Baxendale, 20 N.J. 17 (1955); DeMonaco v. Renton, 18 N.J. 352 (1955); Borough of Lincoln Park v. Cullari, 15 N.J. Super. 210 (App. Div. 1951).***" (at 188)

In the instant matter, there is no showing that the Board evaluated any conditions which would have warranted the transportation of its less than remote pupils to Pennsauken Junior High School to the exclusion of private school pupils similarly situated.

In the hearing examiner's judgment the State Board of Education's classification of two distinct categories of pupils, elementary and high school, must be adhered to. Consequently, if a board of education decides to transport any less than remote pupils within one of the categories, then all pupils similarly situated must be extended the same benefits.

In William A. Pepe v. Board of Education of the Township of Livingston, 1969 S.L.D. 47, the Commissioner held as follows:

> "***Boards of education must provide for the transportation of pupils who live remote from school. N.J.S.A. 18A:39-1 In their discretion they may provide such services to children who are not remote. N.J.S.A. 18A:39-1.1 Such transportation may not be furnished on a discriminatory basis. Klastorin v. Scotch Plains Board of Education, 1956-57 S.L.D. 85; Dorski v. East Paterson Board of Education 1964 S.L.D. 36, affirmed State Board of Education, 39***"
>
> (at 49)

The hearing examiner finds that the policy (C-4) of the Board by which it transports public school pupils enrolled in the ninth grade of Pennsauken schools who reside less than remote from the schoolhouse, while refusing transportation to similarly situated private school pupils, is discriminatory and contrary to law.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter, including the report of the hearing examiner and the exceptions of the parties filed thereto.

Petitioner asserts that the hearing examiner, in the first paragraph of this report, wherein it is stated at the end of the second sentence, "***who attend private schools***" should have also used the adjective "public." The Commissioner, subsequent to a review of the entire record, finds that the hearing examiner should have used solely the adjective public so that that portion of the sentence would read "***who attend public schools***."

Petitioner complains that notwithstanding the hearing examiner's presentation of the Superintendent's testimony at the fifth paragraph of the report which reads:

> "***the Board provided transportation to private school pupils *** only to those who live remote from their designated schools."

that there are four exceptions to that statement. Petitioner asserts that one of the four pupils is being transported because of medical reasons, another pupil is being transported by the Board with a promise by the parents to reimburse the Board two hundred dollars a year for such transportation, and the remaining two pupils transported to private schools may or may not live remote from their designated schools.

The Commissioner observes with respect to these four exceptions, which petitioner asserts should have been addressed by the hearing examiner, that only one of the four deserves consideration.

It is well established that boards of education must, in certain circumstances, provide transportation to its public and private school pupils. N.J.S.A. 18A:39-1 In certain instances, a board may, in lieu of providing actual transportation, reimburse parents up to a maximum of two hundred fifty dollars for the cost of such transportation. The parents would provide their own means of transportation. There is no authority however, for a local board of education to collect reimbursement from parents for pupil transportation it is required to provide, or for transportation it elects to provide.

The Commissioner is well aware that the issue of whether the Board does, in fact, collect reimbursement from parents was not the subject of proofs in the instant matter. This is so, for petitioner, who is not an attorney, represented herself and her interests only. As such petitioner may not represent other persons before this administrative tribunal.

The Commissioner, however, would urge the Board to consider the foregoing. If, in fact, it does engage in collecting reimbursement from parents for pupil transportation, such practice should cease immediately.

Petitioner finally complains that the hearing examiner failed to address her allegation that a Board member has shown bias and prejudice by his opposition to the use of public funds in private schools or by private school pupils. The Commissioner has reviewed the Board member's letter dated August 25, 1976 which was addressed to petitioner, and upon which petitioner relies in support of her allegation of bias and prejudice. In the Commissioner's judgment a board member has the duty and responsibility to take positions on issues. While his/her position may not be accepted by everyone, differing views are the essence of a democratic society.

The Commissioner finds no merit in petitioner's allegation that the hearing examiner failed to address her claim of bias and prejudice on the basis of the letter dated August 25, 1976.

The Commissioner observes that the Board's objections are based upon the finding set forth in paragraph eight of the hearing examiner's report, which states:

> "The hearing examiner finds that the Board's policy with respect to pupil transportation is discriminatory on its face."

The Board asserts that petitioner failed to bring forth affirmative proof that her son was improperly subjected to discrimination; that it has the statutory authority of N.J.S.A. 18A:39-1.1 to establish differing transportation policies affecting public and private school pupils, and without proof that the Board actually discriminated against petitioner's son, the Commissioner may not set aside a Board policy solely on the hearing examiner's finding that, on its face, it is discriminatory. Additionally the Board asserts that N.J.S.A. 18A:39-1.1 requires transportation of private school pupils only if the private school is not operated for profit in whole or in part. The Board in its exceptions to the hearing examiner's report, contends that petitioner failed to establish whether Bishop Eustace Preparatory School is a nonprofit institution.

The Commissioner in this regard has inquired as to the status of the Bishop Eustace Preparatory School. Official notice is taken through information received from the Coordinator of Education for the New Jersey Catholic Conference that the Bishop Eustace Preparatory School is, in fact, a nonprofit private school in the Diocese of Camden. This information appears in the Official Catholic Directory and has been subsequently verified by the Commissioner through information received upon further inquiry through the office of Corporate Information, New Jersey Department of State.

Finally, the Board asserts that petitioner's son is now in the tenth grade and, accordingly, is not entitled to transportation because he does not live remote from Bishop Eustace Preparatory School. The Commissioner notices that this assertion is based on the Board's position that all of its public school pupils who attend Pennsauken Senior High School do live remote from school. Therefore, the Board reasons that it is not required to transport non-remote private school pupils in the tenth, eleventh and twelfth grades.

The Commissioner having considered the entire matter adopts as his own the finding of the hearing examiner that the Board's pupil transportation policy on its face is discriminatory. It is also determined that petitioner's son was improperly subjected to discrimination. The Board's compliance with the Commissioner's order for Interim Relief dated October 15, 1976, by which it was directed to provide petitioner's son with transportation, does not negate the fact that petitioner required legal action to secure that which the Board was otherwise unwilling to provide. Accordingly, the controverted policy must be viewed in the absence of such an Order.

The policy, simply stated, provides in pertinent part that:

> "1. ***[A]ll [public school] students attending the Pennsauken Junior High School [will be transported].

> "2. ***[A]ll tenth, eleventh and twelfth grade students attending the Pennsauken Senior High School [will be transported].
>
> ***
>
> "4. The *** Board *** shall have the option to provide transportation of [private school pupils] *** or reimburse the parent *** [only if the pupil lives remote].***" (C-4)

In the Commissioner's judgment, this policy does not exclude any public school pupil who attends either of the Pennsauken public schools from transportation benefits by reason of distance. Had that been the intent of the Board in the adoption of its pupil transportation policy, the inclusive word "all" in regard to public school pupils would not have been used. No provision is made in the policy to exclude any public school pupil from being transported to either the Pennsauken Junior or Senior High Schools who lives less than remote from these public schools.

For the same policy, however, to limit transportation of private school pupils similarly situated in grades nine through twelve, on the basis of distance, is in the Commissioner's judgment discriminatory on its face. N.J.S.A. 18A:39-1.1 does not, as argued by the Board, tolerate the adoption of a policy which discriminates improperly among and between pupils. (See Board of Education of the Township of Hazlet v. Earl B. Garrison, County Superintendent of Schools, 1972 S.L.D. 296.)

It may be that every public school pupil who attends Pennsauken Senior High School, in fact, lives remote from the schoolhouse. It may also be that a number of public school pupils who attend Pennsauken Junior High School live less than remote from the schoolhouse. The facts as presented in this case, however, in the Commissioner's judgment, establish that the Board improperly adopted its controverted policy to exclude private school pupils from receiving equal or similar benefits for public school pupils. Public school pupils enrolled in grades nine through twelve receive the benefits of transportation by the Board without regard to the distances which they reside from the respective public schools. Private school pupils enrolled in grades nine through twelve, however, and who are also residents of the same municipality, namely the Borough of Merchantville, receive transportation only if they live remote from the designated private schools they attend.

It is recognized herein that the Board had the option, as it now insists, of exercising its authority to

> "***evaluate conditions in various areas of the school district with regard to conditions warranting transportation. It may then make reasonable classifications for furnishing transportation***." (1960-61 S.L.D. at 188)

In the instant matter, the Board attempts to create classifications of (1) ninth grade pupils attending Pennsauken Junior High School and (2) tenth through twelfth grade pupils attending Pennsauken Senior High School. The Commissioner views this attempt as an artificial classification, to the exclusion and detriment of private school pupils. The Board, in its defense to petitioner's allegations, has failed to bring forth any proof of an evaluation of conditions by which it created these distinct classifications of non-remote public and private school pupils with respect to pupil transportation.

Accordingly, the Commissioner adopts as his own the recommendation of his hearing examiner (ante at paragraph eleven) that:

> "***the State Board of Education's classification of two distinct categories of pupils [for purposes of pupil transportation policies and absent proof of an evaluation of conditions to create other classifications] elementary and high school, must be adhered to***."

Thus, if the Board is to continue to transport non-remote public school pupils enrolled in the ninth grade, it must provide a similar benefit to all pupils who reside in grades nine through twelve. Should the Board decide to establish classifications between ninth grade pupils and tenth, eleventh and twelfth grade pupils, it must evaluate its own conditions which would necessitate and justify such classifications.

The Commissioner, having found that the Board's transportation policy (C-4) is improperly discriminatory, hereby directs the Board to provide school transportation to petitioner's son, forthwith, as such transportation is provided to its public school pupils who attend Pennsauken Senior High

School. The Board may alter, amend, and adopt a new pupil transportation policy to replace its existing policy (C-4) provided that such alteration, amendment or adoption of such policy and the policy itself is proper and consistent with law.

COMMISSIONER OF EDUCATION

February 26, 1979

"M.M." ET AL.,	:	
PETITIONERS,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF PLAINFIELD AND RONALD H. LEWIS, SUPERINTENDENT OF SCHOOLS, UNION COUNTY,	:	COMMISSIONER OF EDUCATION
	:	DECISION
RESPONDENTS.	:	

For the Petitioners, Rowand H. Clark, Esq.

For the Respondents, King, King & Goldsack
(Victor E. D. King, Esq., of Counsel)

The Petition was filed on behalf of four children who reside within the school boundaries under the jurisdiction of the Board of Education of the City of Plainfield, hereinafter "Board." All petitioners attend a nonprofit private school which has been approved by the New Jersey Department of Education for the placement of handicapped children and is located outside of respondents' school district.

The Board denied the request of petitioners to provide daily transportation to and from the private school.

Petitioners now request the Commissioner of Education to order the Board to provide daily transportation as mandated in N.J.S.A. 18A:46-23 and N.J.A.C. 6:28-3.20 (revised as N.J.A.C. 6:28-3.4(a), effective August 11, 1978).

The Board avers that none of the petitioners has been placed in the private school by it, that all have been placed there by parents or guardians and that none of the petitioners is entitled to transportation at public expense pursuant to N.J.A.C. 6:28-3.20.

The infant petitioners will be identified as M.M., L.L., M.L. and R.B.

At the conference of counsel the following was stipulated:

1. None of the petitioners was placed in the private school by the Board.

2. The parents of M.M. would not accept the Board's placement and withdrew him from respondents' school and placed him in the private school.

3. The parents of L.L. would not accept the Board's placement and withdrew her from respondents' school and placed her in the private school.

4. M.L. was not in the classification and placement process long enough for her to be assigned a placement by the Board. She was subsequently withdrawn from respondents' school by her parents and placed in the private school.

5. R.B. was placed in respondent's school by the Board which placement was refused by his parents.

6. The parents of each of the petitioners were offered the statutory limit of $250 in cash in lieu of public transportation as the bids for said transportation exceeded the statutory limit. The offer was refused.

Counsel for petitioners and respondent filed Briefs in support of Motions for Summary Judgment.

It is appropriate to reproduce in pertinent part the letter under date of October 5, 1977 from the Superintendent of Schools to one of the petitioners (who was to share it with the others):

> "***After reviewing your comments and the law, the Board has concluded that it is unable to provide your children with transportation as handicapped children to and from the *** [private] school. If, on the other hand, you wish to get in contact with our Special Services Department and request a Child Study Team classification, your child could conceivably be placed in the *** [private] school consistent with law and, thereupon, receive transportation.
>
> "On the other hand, if there is an adequate educational program for your child, as classified by the Plainfield Child Study Team, and you choose not to place your child in that program, but to place your child in the *** [private] school in spite of the availability of an educational program in our district, the Board will be unable to provide your child with transportation as a handicapped child.***"

Counsel for petitioners, as well as counsel for respondents, cited the statute, code and Commissioner's decisions in pertinent parts with dissimilar interpretations in support of their arguments. After careful and thorough review of the pleadings and Briefs of the litigants, the Commissioner will address the controverted matter.

> N.J.S.A. 18A:39-1 states in pertinent part:
>
> "***When any school district provides any transportation for public school pupils to and from school pursuant to this section, transportation shall be supplied to school pupils residing in such school district in going to and from any remote school other than a public school, not operated for profit in whole or in part, located within the State not more than 20 miles from the residence of the pupil provided the per pupil cost of the lowest bid received does not exceed $250.00 and if such bid shall exceed said cost then the parent, guardian or other person having legal custody of the pupil shall be eligible to receive said amount toward the cost of his transportation to a qualified school other than a public school regardless of whether such transportation is along established public school routes.***"
>
> N.J.A.C. 6:21-15.2(a) states:
>
> "The board of education reserves the right to reject any or all bids."

Since all petitioners were voluntarily placed in the private school by their parents in the instant matter, the Commissioner holds that N.J.S.A. 18A:46-1 et seq. is not applicable. Because the Board transports its pupils to and from remote public schools, the Commissioner holds that the Board's offer of $250 in lieu of transportation services was proper and in accord with N.J.S.A. 18A:39-1. The refusal of petitioners to accept transportation reimbursement absolves the Board of any further trans-

portation responsibilities so long as the circumstances in the instant matter continue unchanged. Petitioners' Motion for Summary Judgment is denied while the Board's Motion is granted.

COMMISSIONER OF EDUCATION

February 26, 1979

IN THE MATTER OF THE TENURE	:	
HEARING OF ARLENE DUSEL,	:	
SCHOOL DISTRICT OF THE BOROUGH	:	COMMISSIONER OF EDUCATION
OF SAYREVILLE, MIDDLESEX	:	SUPPLEMENTAL DECISION
COUNTY.	:	
	:	

For the Complainant, Casper P. Boehm, Jr., Esq.

For the Respondent, Rothbard, Harris & Oxfeld
(Sanford R. Oxfeld, Esq., of Counsel)

A decision in the above matter was rendered by the Commissioner of Education on June 5, 1978. Both litigants appealed to the State Board of Education and respondent requested clarification of that decision on August 25, 1978. The complainant also seeks clarification and has been granted a temporary stay by the State Board until such clarification is issued.

Oral argument on that portion of the decision in question was conducted by a representative of the Commissioner on September 18, 1978 at the State Department of Education, Trenton. The specific issue in question and the positions of the litigants are addressed in reaching the conclusions, post.

Respondent was suspended without pay subsequent to the filing of tenure charges against her by the Board of Education of the Borough of Sayreville, hereinafter "Board," which the Board labeled as conduct unbecoming a teacher. The Commissioner made a limited determination that the Board's charge of possession of marijuana was true, in fact, but not "sufficiently flagrant" in the criterion of the Court in Redcay v. State Board of Education, 130 N.J.L. 369 (Sup. Ct. 1943), aff'd 131 N.J.L. 326 (E.&A. 1944) to justify respondent's dismissal from her tenured position.

The litigants agree that the only portion of the Commissioner's decision which they find unclear is the concluding sentence which reads as follows:

> "[The Commissioner] directs therefore that respondent be restored forthwith to her position but that there shall be a forfeiture of her salary and other emoluments retroactive to the day of her suspension without pay by the Board."

Excluding the time period subsequent to the Commissioner's decision in this matter on June 5, 1978, the

salary withheld from respondent was that salary due her for 120 days following her suspension without pay.

The record shows that respondent has been paid her full salary beginning on the 121st day following her suspension by the Board pursuant to N.J.S.A. 18A:6-14. The Board has not reinstated respondent subsequent to the Commissioner's decision and has refused to continue her salary since that decision was rendered. (Tr. 3-5)

The Board's refusal to reinstate respondent is grounded on its appeal to the State Board pressing for respondent's dismissal and its assertion that even if respondent were reinstated she must first repay the Board nearly two years' salary during which time this matter was in litigation. (Tr. 13, 16)

The Commissioner has examined the contested portion of his decision and the arguments posed by the litigants and will clarify his earlier determination as to the penalty to be assessed respondent. The record shows that charges were certified against respondent by the Board on October 14, 1976. Accordingly, respondent is entitled to her full salary up to and including that date. N.J.S.A. 18A:6-14 On October 15, 1976 the 120 day period began to toll so that respondent became eligible for her full salary less the ordinary off-sets beginning on the 121st day following her suspension. The record does not disclose any delay attributable to respondent by reason of her appeal to the Superior Court of New Jersey, Middlesex County, Law Division - Criminal, Complaint SB23863 and WA82637. Rather, the processing of these tenure charges continued without delay. (See Conference Agreements, January 11, 1977.) Even if some delay could be attributable to respondent's Court appeal such delay would be minimal, from the end of the 120 day period in mid February to March 7, 1977, the date of the Court order dismissing the criminal charges. The Commissioner reiterates, therefore, that he finds no delay in these proceedings attributable to respondent.

Accordingly, the appropriate penalty assessed is the forfeiture of respondent's entire salary and all the attendant emoluments for the 120 day period during which she was suspended without pay by the Board. The Commissioner directs the Board to restore respondent to her position as previously set forth in his decision dated June 5, 1978.

COMMISSIONER OF EDUCATION

April 25, 1979

IN THE MATTER OF THE TENURE	:	
HEARING OF ARLENE DUSEL,	:	STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
BOROUGH OF SAYREVILLE,	:	
MIDDLESEX COUNTY.	:	
_____	:	

Decided by the Commissioner, June 5, 1978 and April 25, 1979

For the Petitioner-Appellant, Casper P. Boehm, Jr., Esq.

For the Respondent-Appellee, Rothbard, Harris & Oxfeld (Sanford R. Oxfeld, Esq., of Counsel)

The State Board affirms the Commissioner's decision for the reasons expressed therein.

August 8, 1979

MADELINE H. HUBBARD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MANSFIELD, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

For the Petitioner, Rothbard, Harris & Oxfeld (Barry A. Aisenstock, Esq., of Counsel)

For the Respondent, Wayne Dumont, Jr., Esq.

Petitioner, formerly employed as a teaching staff member by the Board of Education of the Township of Mansfield, hereinafter "Board," alleges that the Board's determination not to reemploy her for the 1976-77 academic year was grounded upon reasons which are not true and/or reasons which violate her constitutional right to free speech and that such determination was made in violation of N.J.A.C. 6:3-1.19(e). The Board denies the allegations and asserts that its action with respect to petitioner's non-reemployment is proper and legal in all respects.

A hearing was conducted in the matter on January 31, 1978 at the office of the Warren County Superintendent of Schools by a hearing examiner appointed by the Commissioner of Education. Thereafter, the parties filed Briefs in support of their respective positions. The report of the hearing examiner is as follows:

Petitioner was first employed by the Board for the 1973-74 academic year and assigned to teach pupils in the third grade. Petitioner was reemployed by the Board for the 1974-75 and 1975-76 academic years.

Petitioner was notified by the Board by letter dated April 13, 1976 (P-1) over the signature of the Board Secretary, that it determined at a special meeting held on April 8, 1976 not to offer her employment for the 1976-77 school year.

Petitioner, by letter dated April 15, 1976 requested a written statement of reasons from the Board why her employment was not to be continued. (R-1)

The Board, through its Board Secretary, advised petitioner by letter dated April 29, 1976 that her employment was not to be continued for the following reasons:

> ***
>
> "1. [Petitioner] does not evidence enthusiasm in her style of teaching when communicating with her students. She has not attained the level of teacher dynamics expected by Administration necessary to motivate students highly.
>
> "2. [Petitioner] has demonstrated defensive attitudes toward Administration when given constructive criticism. She has actually become argumentative rather than listening.
>
> "3. Administration contends that [petitioner] has not used good judgment in determining what information should be treated as confidential, especially pertaining to evaluations.
>
> "Due to the above reasons, it is felt that a person can be hired who would be better qualified to meet the needs of the children and also be capable of maintaining a professional attitude with administration towards this goal." (C-14)

Subsequent to the receipt of the written statement of reasons, petitioner requested the Board to provide her an informal opportunity to be heard. (R-2) The Board granted petitioner's request and petitioner appeared before it on May 24, 1976. (R-5) Thereafter, the Board notified petitioner by letter dated May 26, 1976 that it affirmed its earlier determination not to offer her reemployment for the 1976-77 academic year. (P-2)

Petitioner denies that her style of teaching lacks enthusiasm or that she failed to motivate her pupils. Petitioner denies that she has exhibited a defensive attitude toward administration or that she was argumentative. Petitioner explains that during conferences with administrators in regard to evaluations of her teaching performance, she would explain her points of view. Finally, petitioner explains that she did, in fact, discuss certain evaluations of her teaching performance with her colleagues which, she asserts, is her constitutional right to free expression.

During 1975-76, petitioner's teaching performance was evaluated five times by the Board's administrative principal, hereinafter "principal," and assistant principal. (P-3; C-6) (C-8) (C-9) (C-10) (C-11, C-11a)

The assistant principal evaluated petitioner's performance on September 30, 1975 and prepared a written report which petitioner refused to sign. (P-3) Petitioner requested the principal to attend a meeting between her and the assistant principal to discuss that evaluation. Petitioner testified that she wanted the meeting because she disagreed with the assistant principal's written comment in regard to her failure to provide adequate instructions to her pupils. (Tr. 15-16)

The meeting was held on October 10, 1975. The principal testified that the assistant principal attempted to explain the evaluation (P-3) but, through constant interruption, petitioner would not allow him to finish. The principal testified that petitioner became aggressive towards the assistant principal's attempted explanation. The principal explained that he felt the conference was accomplishing nothing so he ended the meeting. (Tr. 69-70) The assistant principal explained that he prepared another evaluation (C-6) by which the offending comment to petitioner was excised. Petitioner then signed the second evaluation. The assistant principal testified that he excised the comment petitioner found offensive not as a correction, but as a conciliatory gesture towards her. (Tr. 93)

The principal testified that he observed petitioner's teaching performance on November 5, 1975 at which time he asked her to prepare a self-evaluation. The principal explained that he wanted to discuss with her his evaluation of her performance in light of her own evaluation of her performance at the conference scheduled for November 7, 1975. (Tr. 72) Petitioner testified that she was shocked and surprised at the principal's request of her to prepare a self-evaluation. (Tr. 40)

The former president of the Mansfield Education Association testified that petitioner, subsequent to the principal's request of her to prepare a self-evaluation, asked of her colleagues in the teachers' room whether such request was administrative harassment. In fact, the former president testified she had reminded petitioner sometime thereafter that she did, in fact, ask such a question. (Tr. 105-106)

The principal testified that at the evaluation conference conducted on November 7, 1975 he asked petitioner whether she referred to his request for her to prepare a self-evaluation as administrative harassment. The principal testified that petitioner denied referring to his request as harassment. (Tr. 72) He further testified that he felt such an allegation was a personal attack on him. (Tr. 80)

The principal also testified that his evaluation (C-8) and petitioner's self-evaluation (C-7) were discussed at the conference on November 7, 1975. The principal testified that he discussed with petitioner her need to express herself before her

pupils in a more interesting fashion, to motivate her pupils to be interested in the lessons through the possible use of illustrations. (Tr. 75)

The principal evaluated petitioner's performance on January 14, 1976 which evaluation is best described as positive in nature. (C-9) The assistant principal evaluated petitioner's performance on February 25, 1976 which evaluation is best described as constructively critical. (C-10)

The principal prepared a final evaluation report upon petitioner's teaching performance on March 19, 1976 which is best described as negative. (C-11) Petitioner alleges that she was not allowed to file a disclaimer to this evaluation as required by N.J.A.C. 6:3-1.19(e). Petitioner's own testimony is that her disclaimer (C-12), though not filed for twelve days following the evaluation conference, was still accepted by the principal. (Tr. 40)

The hearing examiner, having considered petitioner's assertions that the reasons afforded her by the Board are not the real reasons for her non-reemployment, and/or that her constitutional right to freedom of expression has been violated because she discussed her evaluations and request for a self-evaluation, and/or that the Board violated N.J.A.C. 6:3-1.19(e) in the context of the facts established herein, finds such assertions to be wholly without merit.

The evidence adduced by petitioner herein fails to support her allegations of impropriety by the Board with respect to her non-reemployment. To the contrary, the Board has come forward to offer proofs that its determination not to reemploy petitioner was based upon the total evaluation of her performance as a professional employee by its administrators.

The hearing examiner finds that petitioner has failed to establish that the Board's reason of not continuing her employment based on her discussion of her evaluations and/or requested self-evaluation violates her constitutional right to free expression. The Board, to the contrary, has established that petitioner attempted to categorize the principal's request for a self-evaluation as administrative harassment.

Finally, petitioner's own testimony that her disclaimer was accepted by the administration, albeit two days late, belies her allegation that the Board violated N.J.A.C. 6:3-1.19(e) nor does petitioner's Brief, by way of argument of law or cases cited, offer any support to her allegations.

The fact that petitioner disagrees with the reasons given by the Board for her non-reemployment is abundantly evident. Mere disagreement, however, does not raise a cognizable issue. As was

stated by the Commissioner in Donald Banchik v. Board of Education of the City of New Brunswick, 1976 S.L.D. 78 wherein a principal disagreed with reasons for non-reemployment:

> "***The reasons given, related as they are to the broad areas of responsibility of a principal, are not frivolous and are entitled to a presumption of correctness. Absent a detailed listing of specific instances wherein the Board acted arbitrarily, capriciously or unreasonably, the Commissioner will not direct that the Board's determination be subjected to further review.***
>
> "Petitioner has no property right, as a nontenured employee, to continued employment. Nor does his termination or the reasons given therefor deprive him of the liberty to seek employment elsewhere. ***[Board of Regents of State Colleges v. Roth, 408 U.S. 564, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972); Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694 (1972)] See Sallie Gorny v. Board of Education of the City of Northfield et al., Atlantic County, 1975 S.L.D. 669.***"
>
> (at 82)

It is recommended that the Commissioner determine that the Board's decision not to reemploy petitioner was a valid exercise of its authority to decide who shall teach in its schools and that it is entitled to a presumption of correctness. Schinck v. Board of Education of Westwood Consolidated School District, 60 N.J. Super. 448 (App. Div. 1960); Sally Klig v. Board of Education of the Borough of Palisades Park, 1975 S.L.D. 168; Boult and Harris v. Board of Education of Passaic, 135 N.J.L. 329 (Sup. Ct. 1947), aff'd 136 N.J.L. 521 (E.& A. 1948) As was stated by the Court in Schinck:

> "***We are mindful of the general principle that on appellate review we should not substitute our judgment for the specialized and expert judgment of the Commissioner and the Board, and also of the local school board, all of whom have been entrusted with the fulfillment of the legislative policy.***"
>
> (60 N.J. Super. at 476)

Finally, it is recommended that the Commissioner determine that neither petitioner's constitutional nor statutory rights were violated and that she is not entitled to any relief.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter including the report of the hearing examiner and the exceptions and objections filed thereto by petitioner pursuant to N.J.A.C. 6:24-1.17(b).

Petitioner asserts that the principal and assistant principal harbored ill will and hostility towards her because the principal perceived her as challenging his authority and the assistant principal had to change his evaluation of her performance of September 30, 1975 (P-3) on October 10, 1975. (C-6) Petitioner asserts that in both instances hostility resulted from her exercising her right to free speech and, as a result, she was not reemployed by the Board. Thus, petitioner reasons, her constitutional right to free speech was violated.

Firstly, there is no evidence that the principal was hostile toward petitioner. Rather, the record does establish that petitioner pursued a policy of confrontation with the assistant principal, in the presence of the principal, on October 10, 1975 and with the principal when he requested her to prepare a self-evaluation on November 5, 1975.

Secondly, the assistant principal did not change his evaluation (P-3) of petitioner's performance of September 30, 1975 because, as she asserts, she established that the evaluation wrongfully criticized her. Rather, the assistant principal, unable to discuss that evaluation with petitioner in the presence of the principal on October 10, 1975 because of her constant interruption, did modify the evaluation as a conciliatory gesture toward her. The Commissioner so holds.

The Commissioner finds and determines that the hearing examiner's finding that petitioner failed to establish that the Board violated her constitutional right to free speech is fully supported by the record. At the least, petitioner established that she disagrees with the reasons afforded by the Board for her non-reemployment. The hearing examiner, in this regard, properly relied on the Commissioner's ruling in Banchik, supra, wherein it was held that mere disagreement with reasons given for non-reemployment by a board is not sufficient to set aside such a controverted action.

The Commissioner, finding that petitioner failed to establish that the Board acted illegally or in any fashion improperly with respect to her non-reemployment, hereby dismisses the Petition of Appeal.

COMMISSIONER OF EDUCATION

April 24, 1979
Pending before the State Board of Education

MADELINE H. HUBBARD, :

PETITIONER-APPELLANT, : STATE BOARD OF EDUCATION

V. : DECISION

BOARD OF EDUCATION OF THE TOWNSHIP OF MANSFIELD, WARREN COUNTY, :

RESPONDENT-APPELLEE. :

:

Decided by the Commissioner, April 25, 1979

For the Petitioner-Appellant, Rothbard, Harris & Oxfeld (Barry A. Aisenstock, Esq., of Counsel)

For the Respondent-Appellee, Wayne Dumont, Jr., Esq.

The State Board affirms the Commissioner's decision for the reasons expressed therein.

August 8, 1979

Pending N.J. Superior Court

IN THE MATTER OF THE TENURE HEARING OF MALCOLM BROWN, SCHOOL DISTRICT OF THE BOROUGH OF LAWNSIDE, CAMDEN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

For the Complainant Board, Theodore Z. Davis, Esq.

For the Respondent, Camden Regional Legal Services, Inc. (Herbert O. Brock, Jr., Esq., of Counsel)

The Lawnside Board of Education, hereinafter "Board," certified to the Commissioner of Education on September 28, 1976 a series of charges against respondent, a janitor with a tenure status in its employ who was suspended without pay. The Board believes that such charges, if true in fact, warrant dismissal of respondent who denies the allegations herein and asserts that the Board in making its determination to certify charges against him acted in an improper manner and without justification. At a conference of counsel held on January 17, 1977 at the State Department of Education, Trenton, it was agreed that the Board would file an amended petition which was done on January 24, 1977. Respondent answered the amended petition on January 24, 1977 and subsequently a period of discovery ensued including the filing of interrogatories.

A hearing in this matter was conducted on July 11, 1977 at the office of the Camden County Superintendent of Schools, Pennsauken, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

The specification of charges against respondent, certified by the Board to the Commissioner, were preferred by the administrative principal and are summarized as follows:

1. Respondent was insubordinate in that he failed to sweep a floor until several hours after being directed to do so.

2. Respondent failed to intervene in a fight between two pupils, called one of the pupils a "faggot" and struck that pupil.

3. Respondent assaulted a teacher by his pushing trash and debris towards that teacher.

4. Respondent not only failed as directed to report to the administrative principal, but also threatened and directed vulgarities at him.

5. Respondent was observed by the administrative principal on September 8, 1976 not performing work which he had previously been advised to do.

The hearing examiner will consider the charges seriatim.

CHARGE NO. 1

The administrative principal testified that he directed respondent to clean the gymnasium side of the multipurpose room before a class of pupils entered the area (Tr. 165), but two hours later found the floor still had not been cleaned. (Tr. 38)

Respondent testified that he never refused to sweep the floor on the gymnasium side of the multipurpose room. (Tr. 77) He testified that as soon as he completed his cleaning of the luncheon side he tried to clean the other side but was prevented from doing so by a girls' gym class already there. (Tr. 73) He testified that, because the class had a double period, he did not clean this room until approximately ninety minutes after the initial request. (Tr. 75) He stated that he did not believe he should sweep the floor while pupils were actively engaged in the room. (Tr. 104)

The hearing examiner observes the conflicting testimony of the administrative principal and respondent concerning the time of the initial request to clean the gymnasium area but also observes that the Board did not bring forward the gym teacher or any member of the class to testify. The hearing examiner does not agree that respondent's action may be classed as "absolute insubordination." He finds that respondent was faced with difficult cleaning conditions because of rainy weather which necessitated indoor recess and, in turn, created considerable debris. (Tr. 76, 107) Thus, the cleaning of the gymnasium area was delayed by conditions beyond his control. When he first attempted to do the required cleaning he found the room occupied by the gym class which he did not interrupt. (Tr. 104) He then cleaned the area at the end of the double class period. (Tr. 106)

The hearing examiner finds that respondent had justifiable reason for delaying his cleaning of the multi-purpose room floor. He recommends that the Commissioner dismiss this charge because of lack of credible evidence in support of the charge.

CHARGE NO. 2

R.S., a pupil in the Lawnside School, testified that he had a fight with another pupil, A.F., and that when he stopped fighting and started to walk away, respondent called him a faggot. R.S. testified that he responded by calling respondent a dope pusher and some other names whereupon respondent chased him

and held him by his throat and slapped him. R.S. testified further that when he stood up respondent punched him in the lower lip. R.S. stated that he then reported the incident to the administrative principal. (Tr. 10) The father of R.S. testified that he was made aware of the incident by his wife and that he subsequently went to the school with his son where he met with the administrative principal and respondent who apologized to him. (Tr. 83)

Respondent denied grasping R.S. by the neck or hitting him, alleging that when he intervened in the fight he separated the boys by holding each of them by the arm. He denied calling R.S. improper names. (Tr. 80-82)

The hearing examiner finds that respondent was imprudent in his manner of action when intervening in the altercation between the pupils. R.S. in a forthright manner admitted to calling respondent names, but there is sharp conflict between the testimony of R.S. and respondent in the description of the physical contact between them. The hearing examiner finds that respondent did make physical contact with R.S. and admitted his anger. (Tr. 111) The hearing examiner finds that the weight of credible evidence proves that Charge No. 2 is true in part in that respondent did grasp the arms of pupils when he separated them. It is not true to the extent that he is charged with failure to intervene in a fight between pupils. It is recommended that such charge, standing alone, be determined insufficient reason to order the dismissal of respondent.

CHARGE NO. 3

The hearing examiner observes that the Board presented no competent evidence to support this charge wherein the Board alleged that respondent assaulted teacher since the teacher in question did not testify. Accordingly, the hearing examiner recommends that this charge be dismissed by the Commissioner.

CHARGE NO. 4

The administrative principal testified that on August 18, 1976 respondent failed to report to his office although notified twice. He stated that he observed respondent drive away at about 11:30 A.M. The administrative principal testified that when he returned from lunch he observed respondent in the hallway and asked him to enter his office. The administrative principal testified further that respondent refused his invitation and said he did not want to sit down and listen to conversation which he characterized by the use of a profane term. The administrative principal testified that later in the day he observed respondent in the teachers' lounge with two other summer employees seated at a table with cards in their hands and that when he remonstrated with them respondent laughed in his face. (Tr. 46-48) He testified that about ten minutes later he observed respondnet in a different area of the building,

still not working, whereupon after consulting with the vice-president of the Board, he suspended respondent for five days. He further testified that respondent then threatened him physically in the presence of a summer employee. (Tr. 48-51)

Respondent testified that he did not go immediately to the administrative principal's office because he was late in getting to his lunch hour and decided he should first store the tractor and tools he was using in a safe place. (Tr. 86-87) Respondent testified that, upon his return from lunch, he went to the office where he was suspended by the administrative principal. Respondent testified he then went to the teachers' lounge where he saw one of the workers with some cards in his hand, though no card game was in progress. (Tr. 89) Respondent denied that he had at any time laughed at or been belligerent or hostile to the administrative principal. (Tr. 87-88, 90)

A student worker, a summer employee of the Board, testified that he was in the teachers' lounge but denied that anyone was playing cards or that respondent laughed at the administrative principal. (Tr. 148-149) The summer employee also testified that respondent did not threaten the administrative principal in any way.

The hearing examiner finds a sharp conflict between the testimony of the administrative principal and the testimony of respondent. In consideration of the forthright corroboration of respondent's testimony by the summer employee, the hearing examiner finds that the Board has failed to prove the truth of Charge No. 4. Accordingly, he recommends that the Commissioner dismiss this charge.

CHARGE NO. 5

The hearing examiner observes that the Board presented no evidence in support of this charge wherein the Board alleged that respondent on September 8, 1976, failed to do assigned work. Accordingly, he recommends that this charge also be dismissed by the Commissioner.

The hearing examiner calls to the attention of the Commissioner the testimony of the supervising custodian in which he characterized respondent as a good worker with no disciplinary reports in his record. (Tr. 163)

In summation the hearing examiner finds that the Board has failed to prove Charges Nos. 1, 3, 4 and 5. Charge No. 2 was found to be proven substantially true in fact.

The hearing examiner observes that respondent has been suspended without pay for a period in excess of 120 days. The applicable statute, N.J.S.A. 18A:6-14, requires that:

> "***if the determination of the charge by the Commissioner of Education is not made within 120 calendar days after certification of the charges, *** the full salary (except for said beginning on the one hundred twenty-first day until such determination is made. *** However, the board of education shall deduct from said full pay or salary any sums received by such employee *** by way of pay or salary from any substituted employment assumed during such period of suspension.***"

In this instance the Board did not resume payment of respondent's salary on the 121st day. The hearing examiner recommends that the Commissioner direct the Board to award respondent, beginning on the 121st day after the certification of charges, his full salary and emoluments less any sum received by him by way of pay or salary from any substitute employment assumed after the initial 120 calendar days.

The hearing examiner has found Charge No. 2 to be true, to the extent that respondent did make physical contact with a pupil. He finds that this charge, standing alone, is not sufficient reason to order the dismissal of respondent.

The hearing examiner recommends that the Commissioner restore respondent to his original position minus remuneration for the initial 120 day period of his suspension.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record of the instant matter including the report of the hearing examiner and observes that exceptions have been filed by the Board pursuant to N.J.A.C. 6:24-1.17(b).

The Board's exceptions are addressed solely to a refutation of the findings in Charge No. 4 of insubordination and assault wherein the Board states that the alleged assault by respondent on the administrative principal took place inside the building without witness. The Commissioner observes that there is nothing in the record to support this contention, he finds only the sharply conflicting testimony of the administrative principal and respondent. The Commissioner has reviewed the record carefully and finds the hearing officer was not convinced by the demeanor and testimony of the administrative principal that respondent attacked him in the privacy of his office as alleged.

The Commissioner finds and determines that as stated in Charge No. 2 respondent did make physical contact with a pupil but that such contact was not of a punitive nature and standing alone is not sufficient reason to order the dismissal of respondent. He concurs in the finding that the Board has failed to prove Charges Nos. 1, 3, 4, 5 and orders their dismissal.

The Commissioner observes that whereas respondent was a tenured employee of the Board he is to be restored to his original position as of the date of his suspension with his full salary and emoluments less any sum received by him by way of pay or salary from any substitute employment.

COMMISSIONER OF EDUCATION

April 26, 1979

RONALD C. KYLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF VOORHEES, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

For the Petitioner, Rudd, McDonough & Feeley
(Donald V. Feeley, Esq., of Counsel)

For the Respondent, Peter W. Reilly, Esq.

Petitioner, a school custodian, employed on an annual basis by the Board of Education of Voorhees Township, hereinafter "Board," alleges in an amended Petition of Appeal filed before the Commissioner of Education, that the Board's action in terminating his employment during the 1977-78 school year was illegal, improper and contravenes the terms and conditions of his employment contract with the Board absent any notice of termination clause. Petitioner alleges further that the Board may not, absent a notice of termination clause in his employment contract, dismiss him from employment during the 1977-78 contract year without filing charges against him with a hearing on the merits of such charges before the Commissioner.

The Board denies petitioner's allegations and avers that its action in terminating his employment was in all ways proper and legally correct. The Board maintains that petitioner's request for relief before the Commissioner is without foundation in law and, further, that petitioner is barred by laches from instituting these proceedings. Additionally, the Board avers that petitioner's dismissal from employment was for just cause resulting from his conduct which constituted a threat of injury to other school district employees.

This matter has been submitted directly to the Commissioner for Summary Judgment on the pleadings, exhibits and Briefs of the parties as per agreement of counsel.

The Commissioner observes that the record establishes petitioner's periods of employment to be as follows:

1974-75 Employed as custodian September 1, 1974 - June 30, 1975
(R-4, Board Minutes of May 4, 1974, p. 8)

1975-76 Employed as custodian July 1,1975 - June 30, 1976
(R-5, Board Minutes of April 28, 1975)

1976-77 Employed as custodian July 1,1976 - June 30, 1977
(R-6, Board Agenda of May 26, 1976)

1977-78 Employed as custodian July 1,1977 - June 30, 1978
(R-7, Board Agenda dated May 20, 1977)

It is further observed that petitioner was notified in writing by the Superintendent on April 30, 1975 (R-1), on May 28, 1976 (R-2), and on May 26, 1977 (R-3) that he was to be employed on a twelve month basis with two weeks' vacation by virtue of Board actions of April 28, 1975, May 26, 1976 and May 25, 1977, respectively.

While the record is barren of any exhibits pertaining to petitioner's employment contracts for each of the above-cited employment periods, it is undisputed by the parties that such employment contracts were, in fact, executed between the Board and petitioner. Additionally, the Board admits in its Brief that petitioner's employment contracts for each of these years contained no notice of termination clause. (Board's Brief, at p. 2)

On July 22, 1977, petitioner received a written notice from the Board Secretary/School Business Administrator that his employment would be terminated as of August 15, 1977. Such notice did not specify the reasons for his termination nor did it notify him of any rights with respect to the Board's action. (Amended pleadings as joined, para. 5)

The Commissioner observes that the letter of reference dated July 22, 1977 to petitioner from the Board Secretary/School Business Administrator is not disputed, and is attached to the original Petition of Appeal as petitioner's Exhibit #1. It reads in pertinent part as follows:

> "Your service as a custodian with the Voorhees Township Board of Education is terminated as of August 5, 1977.
>
> "You will receive two weeks severance pay and one weeks vacation pay.

> "Friday, July 22, 1977, is your last day of work in our district." (C-1)

The Commissioner observes from the amended pleadings of petitioner that his tenure claim to his position of employment has been withdrawn. (Count #1, Amended Petition of Appeal) Petitioner's sole claim herein is reinstatement to his position of custodian for the 1977-78 contract year, with back pay and emoluments due him by virtue of the fact that his employment contract for that year contained no termination clause. In this regard, petitioner argues that absent such termination clause, the Board could not terminate his employment without filing charges against him and requesting a hearing on the merits of those charges before the Commissioner.

In support of this contention petitioner relies on Frank Giandomenico v. Board of Education of the Township of Winslow, 1975 S.L.D. 258, aff'd Docket No. A-2970-74 New Jersey Superior Court, Appellate Division, November 9, 1976 (1976 S.L.D. 1139); Frederick Olley v. Board of Education of Southern Regional High School, 1968 S.L.D. 20; Luther McLean v. Board of Education of the Borough of Glen Ridge et al., 1973 S.L.D. 217, aff'd State Board of Education 1974 S.L.D. 1411; John McKeown et al. v. Board of Education of Gateway Regional High School District, 1968 S.L.D. 210, aff'd State Board of Education 213.

Petitioner specifically relies on the Commissioner's ruling in McLean, supra, wherein he held in pertinent part:

> "***In McKeown, supra, the Commissioner stated the requirement for charges and a hearing, in order to terminate such a regular employment status as petitioner in this matter possesses. As was previously stated, petitioner possesses this status as the result of the absence of a provision for notice of termination in petitioner's one-year contract. Furthermore, the Board has no authority to conduct such a hearing for a nontenured employee such as petitioner in the circumstances of the matter herein controverted. The only proper dismissal procedure for a local board of education to follow in these circumstances is to file charges and request a hearing by the Commissioner.***" (at 227) (Emphasis supplied by Petitioner; Brief, at p. 5)

Petitioner contends that the only remedy for such breach of contract by the Board herein is reimbursement for back salary from the time of his dismissal and reinstatement to his former position pursuant to the terms of his 1977-78 employment contract.

The Board maintains, on the other hand, that since petitioner was employed during the 1977-78 contract year for a fixed term, he therefore is not protected by the Tenure Employees' Hearing Act. N.J.S.A. 18A:6-10 et seq. Petitioner's reliance upon Giandomenico, supra, McLean, supra, and McKeown, supra, is rejected by the Board on the grounds that he threatened a fellow employee with a knife. Such conduct by petitioner, the Board maintains, constitutes a material breach of contract and is determinable just cause to deny him reinstatement or salary reimbursement pursuant to the provisions of his 1977-78 employment contract. (Board's Brief, at p. 5) In this regard the Board relies on prior case law in Dennis v. Thermoid Co., 128 N.J.L. 303 (E.& A. 1942); In the Matter of the Tenure Hearing of Joseph McDougall, School District of the Borough of Northvale, 1974 S.L.D. 170. The Board maintains that petitioner herein has likewise demonstrated behavior "***far short of acceptable standards of conduct for a janitor in a public school.***" (McDougall, at 179)

Additionally, the Board asserts that petitioner is barred by the doctrine of laches from proceeding with this matter before the Commissioner. It is the Board's contention that six months had elapsed from the time the Board took action on July 22, 1977 to terminate petitioner's employment contract until the time he filed his original Petition of Appeal with the Commissioner on January 10, 1978. The Board avers that petitioner knew or should have known that his appeal to the Commissioner had to be prompt or within a reasonable period of time. In this regard the Board contends that it is ludicrous for petitioner to suggest that it had an obligation to inform him of his right to appeal or of the procedures to perfect such appeal. The Board claims that it is unreasonable and inequitable to allow a policy making body, such as itself, to remain continually subject to allegations of improper conduct long after the matter was thought to have been concluded.

In support of this position, the Board relies on John Gregg v. Board of Education of Camden County Vocational and Technical School District, 1977 S.L.D. 120; Gloria Ulozas v. Board of Education of the Matawan Regional School District, 1975 S.L.D. 598, aff'd State Board of Education 604, aff'd Docket No. A-1183-73 New Jersey Superior Court, Appellate Division, February 3, 1977 (1977 S.L.D. 1307), cert. den. 74 N.J. 279

(1977); Dorothy L. Elowitch v. Board of Education of the City of Bayonne, 1967 S.L.D. 78, aff'd State Board of Education 1967 S.L.D. 86.

Petitioner argues that he lacked knowledge of his rights to appeal this matter to the Commissioner and that the lack of such knowledge cannot be considered fatal in the application of the doctrine of laches. Elowitch, supra Moreover, petitioner contends that as an affirmative defense, the Board must not only prove unexcusable delay, but also show prejudice to itself. Clark v. Judge, 84 N.J. Super. 35 (Chan. Div. 1964), aff'd 44 N.J. 550 (1965) Petitioner asserts that it was the Board, in fact, that caused the delay in the proceedings by virtue of not having filed charges against petitioner before the Commissioner in connection with its determination to terminate his 1977-78 employment contract. Petitioner maintains that he attempted to seek legal advice shortly after his termination of employment by the Board; however, he was referred to other attorneys and to other agencies of State Government in pursuing his appeal. (Petitioner's Brief, at pp. 7-9)

The Commissioner observes from the record including petitioner's affidavit and exhibits attached to his Brief that there is sufficient cause to believe that he tried to proceed in a timely manner in seeking appropriate relief in this matter. Accordingly, the Commissioner finds and determines that the doctrine of laches may not be applied against petitioner in the matter herein controverted.

What remains to be determined is whether the Board's action in terminating petitioner's employment on July 22, 1977 for the 1977-78 contract year, constitutes an illegal and improper action of the Board so as to grant petitioner the relief he seeks herein. The Commissioner is constrained to notice that petitioner had applied for special unemployment assistance on July 24, 1977. Such claim was denied; however, upon appeal to the New Jersey Division of Unemployment and Disability Insurance on August 16, 1977, he was granted Special Unemployment Assistance Benefits from July 24 through August 27, 1977. The above finding is grounded on a fact report and opinion of the appellate tribunal of that Division, attached to petitioner's original Petition of Appeal. This report states in pertinent part as follows:

> "FINDINGS OF FACT:
>
> "The claimant was last employed as a custodian by the above employer from 1974 through July 22, 1977, when he was discharged.

"The employer reported to the Division that the claimant threatened a co-worker with bodily harm. The claimant denied that he had ever threatened a co-worker. He was standing outside of the school cleaning his nails with a pen-knife, which he always used to clean his nails. He did not threaten a co-worker with the knife.

"From July 24, 1977 through August 27, 1977, the claimant was able and available for work and contacted various employers in an effort to find work.

"The Director's Order modifying the active search for work requirement was in effect during the period at issue.

"OPINION:

"In the absence of any contrary testimony, there is no evidence that the claimant conducted himself in a manner that was unbecoming a school employee. The claimant was discharged for reasons which did not constitute misconduct connected with the work and he is not subject to disqualification under R.S. 43:21-5(b).

"The claimant has met the requirements to be eligible for benefits and he is eligible for Special Unemployment Assistance benefits from July 24, 1977 through August 27, 1977." (C-2)

In the Commissioner's opinion it is clear that the Board's determination to unilaterally terminate petitioner's 1977-78 employment contract is based on its contention that it had just cause for doing so by virtue of alleged acts of threatening behavior by him. The Commissioner cannot ignore the fact, however, that the Board has admitted that petitioner's employment contract for the year in question contained no notice of termination clause. Accordingly, the Commissioner finds that the circumstances herein with respect to the Board's action against petitioner are analogous to those in McLean, supra. Having so found and determined, the Commissioner is constrained to observe that while the Board is not required to employ petitioner beyond the 1977-78 contract year, inasmuch as said contract was for a fixed term pursuant to the provisions of N.J.S.A. 18A:17-3, such contract contained no termination clause and, therefore, could not be unilaterally terminated by the Board without the filing of

charges against petitioner before the Commissioner for his adjudication. It is clear herein, as is McLean, that although petitioner did not enjoy a tenure status, the Board lacked the authority to conduct such hearings for nontenured employees. Accordingly, the Commissioner finds and determines that the Board erred in its action against petitioner when it failed to seek redress before the Commissioner in this matter. In the Commissioner's judgment the Board's contention that it had just cause for its actions against petitioner could only be adjudicated through impartial hearing on the merits of its allegations before the Commissioner.

Accordingly, the Commissioner hereby orders the Board of Education of Voorhees Township to pay petitioner the sum of money he would have received in uninterrupted service from the date of his improper dismissal until the end of the 1977-78 contract year. Such sum of money shall be mitigated by the amount of salary earned by petitioner in other employment from the date of his dismissal until the end of the 1977-78 contract year.

Since petitioner's employment contract expired June 30, 1978, the question of reinstatement of petitioner to his former position is moot.

COMMISSIONER OF EDUCATION

April 27, 1979

DAVID L. MOORE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEWARK AND JAMES BARRETT, JR., PRINCIPAL, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

For the Petitioner, David L. Moore, Pro Se

For the Respondent, Cecil J. Banks, Esq.

Petitioner, a tenure teacher employed by the Board of Education of the City of Newark, hereinafter "Board," alleges that he was assaulted by his school principal. He alleges also that he was improperly reassigned by his principal from his position teaching social studies in Weequahic High School to a non-teaching position.

In a second Petition of Appeal petitioner alleges that he was improperly assigned to teach social studies at Barringer High School. He filed a demand for interrogatories to be answered by the Board.

From his review of the moving papers and the cumulative record in these matters, the Commissioner of Education concludes that both Petitions of Appeal, where relevant, concern the same subject and they are hereby joined as a single matter for adjudication. N.J.A.C. 6:24-1.12, 1.19

The record shows that conferences between the litigants and a representative appointed by the Commissioner were held on June 13, 1978 and January 24, 1979. Procedural matters were discussed on both occasions and oral argument was scheduled on the latter.

Several Motions to Dismiss the Petitions and to Vacate the Motions to Dismiss have been filed. Additionally, Memoranda of Facts and Law have been filed and there are no salient facts in dispute. The matter is submitted to the Commissioner for Summary Judgment.

Charges against tenure employees may be filed only by a board of education pursuant to statute. N.J.S.A. 18A:6-11 Petitioner's "charges" against his principal must be presented to the Board for its consideration and not filed with the Commissioner. The charges of assault by the principal as filed are hereby denied because they are not properly before the Commissioner.

The record shows that petitioner was in fact transferred by his principal from his teaching position to a non-teaching position. (Principal's Letter, November 15, 1977) While transfers of teaching staff members are permissible, they must be made by the Board pursuant to statute. No statutory authority exists permitting such a transfer by a principal. Marjorie S. Payne v. Board of Education of the Village of Ridgewood, 1976 S.L.D. 605

Petitioner's transfer was illegal and must be set aside. However, in his second Petition of Appeal, he asserts that he has been reassigned as a high school social studies teacher, but in a different high school. He asserts that no action in that regard is memorialized in the Board's minutes; therefore, his transfer is illegal. (Second Petition of Appeal, paragraphs 2-4)

Absent any proof to the contrary, the Commissioner concludes that petitioner's transfer to Barringer High School is illegal unless authorized by action of the Board. N.J.S.A. 18A:25-1

In Payne, supra, the Commissioner stated that:

> "***Local boards of education are empowered to transfer tenured teaching staff members from one position to another subject only to the limitation of the statute N.J.S.A. 18A:25-1***."
>
> (Emphasis added.) (at 609)

A reassignment from one schoolhouse to another while the teaching staff member is engaged teaching the same subject within the scope of his certificate is a transfer within the meaning of the statute. The Commissioner so holds.

Petitioner has not been reduced in compensation and there is no showing that he has been caused any irreparable harm. Nevertheless, the Board must take official action effecting his transfer or assign him, as he requests, to a teaching position in Weequahic High School.

Except for the relief designated, the Board's Motions to Dismiss are granted and both Petitions of Appeal are dismissed.

COMMISSIONER OF EDUCATION

May 2, 1979
Pending before the State Board of Education

DAVID L. MOORE,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF NEWARK AND JAMES BARRETT, JR., PRINCIPAL, ESSEX COUNTY,	:	
RESPONDENT.	:	

For the Petitioner, David L. Moore, Pro Se

For the Respondent, Cecil J. Banks, Esq.

A decision in this matter was rendered by the Commissioner of Education on May 2, 1979. That decision is hereby amended to provide that David L. Moore was properly transferred by recorded roll call majority vote of the full membership of the Board of Education of the City of Newark pursuant to N.J.S.A. 18A:25-1. (Board's Agenda and Supportive Material, November 14, 1978, at p. 97)

It is so Ordered on the 14th day of August 1979.

COMMISSIONER OF EDUCATION

DAVID L. MOORE,	:	
PETITIONER-APPELLANT,	:	STATE BOARD OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF NEWARK AND JAMES BARRETT, JR., PRINCIPAL, ESSEX COUNTY,	:	
RESPONDENT-APPELLEE.	:	

Decided by the Commissioner of Education, May 2, 1979 and August 14, 1979

For the Petitioner-Appellant, David L. Moore, Pro Se

For the Respondent-Appellee, Cecil J. Banks, Esq.

The State Board denies oral argument and affirms the Commissioner's actions of May 2, and August 14, 1979.

September 6, 1979

DAVID J. FIOL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WOODCLIFF LAKE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent, Wittman, Anzalone, Bernstein, Dunn & Lubin (Walter T. Wittman, Esq., of Counsel)

Petitioner, a teaching staff member in the employ of the Board of Education of the Borough of Woodcliff Lake, hereinafter "Board," alleges that since the 1972-73 academic year the Board has failed to award him proper recognition on its salary guide for his years of military service contrary to the provisions of N.J.S.A. 18A:29-11. Petitioner has moved for Summary Judgment in his favor by which the Commissioner of Education would direct the Board to compensate him the moneys he claims are his due. The Board denies the allegations and asserts that petitioner's salary, at all times, was established in a proper and legal fashion and consistent with N.J.S.A. 18A:29-11. The Board opposes the Motion for Summary Judgment and seeks dismissal of the Petition. In the alternative, the Board demands the matter move to a plenary hearing.

Oral argument of the parties on the Motion for Summary Judgment was heard before a representative of the Commissioner on August 25, 1978 at the State Department of Education. The matter is referred directly to the Commissioner on the record, including the pleadings, Briefs of the parties in support of their respective positions, and the transcript of the oral argument.

The essential facts necessary for an adjudication of the matter are not in dispute and are as follows:

Petitioner served in the United States Army from December 1, 1961 through November 29, 1963, a period of two years. Subsequent thereto, petitioner acquired a baccalaureate degree and began his career as a teacher in a Pennsylvania school system in 1967. Petitioner completed two years in the Pennsylvania school system and was then employed by the Board for the 1969-70 academic year.

Petitioner's salary for this initial year of employment was based upon his two years' experience as a teacher in Pennsylvania and upon his two years' military experience. (Board's Brief, at pp. 1-2) Petitioner's salary for the subsequent academic years was calculated on the same bases until the 1972-73 year.

The Board adopted a salary guide for 1972-73. Petitioner's salary for 1972-73 was determined according to the sixth step of the appropriate salary scale of the guide. The Board explains that petitioner was given credit for his three years' experience in its employ, in addition to his two years' experience in the Pennsylvania school system. Petitioner no longer was given credit with respect to salary for prior military service. (Board's Brief, at p. 2)

The Board admits that in 1972 petitioner protested its determination not to recognize thereafter his prior military service for salary purposes. The Board further admits that it denied petitioner's protest based on advice it received from its then legal counsel.

Petitioner filed the instant complaint on March 7, 1978. Petitioner is still in the employ of the Board and seeks compensation he claims his due since the 1972-73 year.

Petitioner argues that the statute of reference, N.J.S.A. 18A:29-11, is clear on its face that the Board must recognize his two years of military service for salary purposes as if he had two additional years of experience in its employ.

The Commissioner observes that N.J.S.A. 18A:29-11 reads in pertinent part as follows:

> "Every member who, after July 1, 1940, has served or hereafter shall serve, in the active military or naval service of the United States *** shall be entitled to receive equivalent years of employment credit for such service as if he had been employed for the same period of time in some publicly owned and operated college, school or institution of learning in this or any other state or territory of the United States, except that the period of such service shall not be credited toward more than four employment or adjustment increments.***"

Petitioner also cites the following cases decided by the Commissioner and by the Court in support of his demand for Summary Judgment. Dominick F. Colangelo v. Board of Education of the City of Camden, 1956-57 S.L.D. 62, aff'd State Board of Education 66; Louis Alfonsetti et al. v. Board of Education of

the Township of Lakewood, 1975 S.L.D. 297; Michael J. Watsula v. Board of Education of the Township of Plumsted, 1977 S.L.D. 692; Lester Bernardo v. Board of Education of the Township of Ewing, 1978 S.L.D. ___ (decided July 28, 1978); and Howard J. Whidden, Jr. v. Board of Education of the City of Paterson, 1976 S.L.D. 356, modified Docket No. A-3305-75 New Jersey Superior Court, Appellate Division, January 28, 1977 (1977 S.L.D. 1312)

The Board argues that petitioner is not entitled to military service credit as a matter of law, that petitioner is barred by laches from now seeking relief on a claim that originated in the 1972-73 academic year, and that Summary Judgment must be denied.

Firstly, the Commissioner observes that the New Jersey Superior Court, in its affirmation with modification of the Commissioner's ruling, in Whidden, supra, held that the word "shall" in N.J.S.A. 18A:29-11 mandates that boards of education must award military service credit for salary purposes, to a maximum of four years, at the time of employment and thereafter.

The Court said in these respects that:

> "***In construing a statute, full force and effect must be given, if possible, to every word, clause and sentence. State v. Canola, 135 N.J. Super. 224, 235 (App. Div. 1975), certif. den. 69 N.J. 22 (1975). A construction that will render any part of a statute inoperative, superfluous or meaningless is to be avoided. State v. Sperry & Hutchinson Co., 23 N.J. 38, 46 (1956); Hoffman v. Hock, 8 N.J. 397, 406-407 (1952).***"
>
> (Slip Opinion, at p. 3)

And,

> "***N.J.S.A. 18A:29-9 authorizes a school district to place a newly employed teacher at an initial place on the salary schedule as may be agreed upon between the member and the employing board of education. Nothing in the language of that section, however, suggests that the legislature intended to authorize a waiver of or a departure from the requirement of N.J.S.A. 18A:29-11 that credit be given for military service. See Bd. of Ed. Englewood v. Englewood Teachers, 64 N.J. 1, 7 (1973).***"
>
> (Id., at p. 4)

Subsequent to the Court decision in Whidden, supra, the Commissioner held in Watsula, supra, that:

> "***The words of the Court are clear and the Commissioner holds that all teaching staff members who have served in the armed forces are entitled to count the years of such service to a maximum of four years of employment increments within the scope of the Board's adopted salary schedule.***"
>
> (at _____)

Consequently, as a matter of law petitioner is entitled to recognition by the Board of his two years' military service for salary purposes in the same manner as if he had two additional years of experience in its employ. The Commissioner, in regard to the Board's assertion that petitioner is barred by laches from now seeking relief, finds no merit in such a view. The determination that petitioner is not barred by laches from advancing the instant claim is grounded in the nature of the claim and in a judgment that the Board has not been prejudiced. This is not a case wherein a decision in favor of petitioner will result in the payment of two salaries for one position by the Board as the result of petitioner's delay. (See William Gleason v. Board of Education of the City of Bayonne, 1938 S.L.D. 138, aff'd State Board of Education 140 (1933).) It is a case in which it is alleged that a statutory entitlement to placement on or movement within an adopted salary schedule was ignored. As was said in Edna Aeschbach v. Board of Education of the Town of Secaucus, 1938 S.L.D. 598, aff'd State Board of Education 604 (1934):

> "***'I do not understand that mere delay in bringing a suit will deprive a party of his remedy, unless such neglect has so prejudiced the other party by loss of testimony or means of proof or changed relations that it would be unjust to now permit him to exercise his right.' Tyman vs. Warren, 53 N.J. Eq. 313.***" (Emphasis in text.)

Further,

> "***'If, however, upon the other hand, it clearly appears that lapse of time has not in fact changed the conditions and relative positions of the parties, and that they are not materially impaired, and there are peculiar circumstances entitled to consideration as excusing the delay, the Court will not deny the appropriate relief, although a strict and unqualified application of the rule of limitations would seem to require it. Every case is governed chiefly by its own circumstances.' Wilson vs. Wilson, 41 Or. 459. Quoted in 4 Pomeroy's Equity Jurisprudence, page 3423.'***"
>
> (at 604)

Consequently, the Commissioner rejects the Board's affirmative defense of laches to the claim herein. Laches is an equitable defense but it is not available in what is purely legal as differentiated from an equitable demand. (See John Sousa, et al. v. Board of Education of the City of Rahway, 1970 S.L.D. 140.) The Commissioner so holds.

Finally, the fact that petitioner acquired his military service prior to entering the teaching profession, or in fact prior to entering college to acquire a baccalaureate degree to be certified to teach, does not negate his claim to the benefit conferred by the statute.

The Commissioner in the similar case of Colangelo, supra, held that a teacher who had not taught prior to his military service was not barred from the benefits of this law. Therein he said:

> "***On the contrary, it is the opinion of the Commissioner that the Legislature intended section 6, Chapter 249 *** to apply to persons who had served in the military service and who are teachers, whether they become teachers before or after entering into such military service. Accordingly, the petition is granted and the respondent Board of Education is hereby directed to adjust the salary of the petitioner in accordance with the provisions of Chapter 249, P.L. 1954."
> (1956-57 S.L.D. at 66)

Accordingly, the Commissioner finds and determines that petitioner was and is entitled to recognition for salary purposes for his two years of military service. Summary Judgment is hereby entered on his behalf and the Board is directed to retroactively compensate him since 1972-73 the amount of money he would have received had the Board properly recognized his military service for salary purposes.

COMMISSIONER OF EDUCATION

May 4, 1979

HIGHTSTOWN EDUCATION ASSOCIATION and JOHN SCHNEDEKER,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF EAST WINDSOR REGIONAL SCHOOL DISTRICT, and DEMPSEY DIXON, MERCER COUNTY,	:	DECISION
RESPONDENTS.	:	

For the Petitioners, Paul T. Koenig, Jr., Esq.

For the Respondents, Turp, Coates, Essl and Driggers
(Henry G. P. Coates, Esq., of Counsel)

This is a continuation of a matter which was originally opened before the Commissioner of Education on April 7, 1978 by the Hightstown Education Association and its President, hereinafter "petitioners." Petitioners complained that the Board of Education of East Windsor Regional School District, hereinafter "Board," was in violation of N.J.A.C. 6:29-6.3 by employing and assigning Dempsey Dixon to coach an indoor track team and a girls' track team. Dempsey Dixon was not otherwise employed by the Board as a teaching staff member nor was he in possession of any certificate to teach.

The Commissioner found in favor of petitioners and directed the Board to

> "***immediately refrain from assigning any person to the position of coach who does not meet the requirements of N.J.A.C. 6:29-6.3 and to immediately terminate the assignment of Dempsey Dixon [as coach] in its athletic program.***" (See Hightstown Education Association and John Schnedeker v. Board of Education of East Windsor Regional School District et al., 1978 S.L.D. ___ (decided June 6, 1978) (Slip Opinion, at p. 7)

Thereafter, petitioners reopened the matter through the filing of a verified Petition of Appeal, with supporting affidavit, which alleges that the Board continued Dempsey Dixon

in its employ as a coach thereby disregarding the Commissioner's ruling. The Commissioner, on the strength of the affidavit in support of the allegation, executed an Order to Show Cause against the Board on January 19, 1979 in regard to why the Board should not cease and desist from continuing Dempsey Dixon's employment immediately. The return date of the Order was set for January 26, 1979.

The Acting Superintendent of Schools, on the day before the return date of the Order, advised Dempsey Dixon by letter dated January 25, 1979 that, notwithstanding efforts to retain him, his employment as a coach must be terminated. (C-1)

Subsequent to petitioners' being informed of this action, it was agreed between the parties and the Commissioner's representative that the Order to Show Cause argument scheduled for January 26, 1979 be adjourned. Petitioners then were to withdraw the instant Petition of Appeal without prejudice.

In the meantime, a teaching staff member in the employ of the Board, in response to a notice of vacancy for the position of coach of the girls' track team, discussed the vacancy with the athletic director who is in charge of all athletic programs for the Board. Petitioners applied to reschedule the argument on the Order to Show Cause based on the substance of the conversation between the teaching staff member, also a member of the Association, and the athletic director. The application was granted by the Commissioner's representative and oral argument of the parties was heard at the State Department of Education, Trenton, on February 1, 1979. The Order to Show Cause, however, was considered by the Commissioner's representative, under the circumstances, to be a Motion for Restraint against the Board which caused petitioners to carry the burden of proof.

The Commissioner observes that the essential facts are as follows:

The Board initially attempted to employ Dempsey Dixon as a coach. The Board was advised that such action was contrary to the provisions of N.J.A.C. 6:29-6.3 because Dempsey Dixon was not employed by it as a teaching staff member, nor did he possess certification as a teacher.

The Board continued Dempsey Dixon's employment, but changed his title to teacher's aide. The Association filed the original Petition of Appeal by which it complained that notwithstanding Dempsey Dixon's title of teacher's aide, he was, in fact, employed as a coach. The Commissioner agreed and issued the original directive to the Board, hereinbefore recited.

Notwithstanding that directive, the Board continued Dempsey Dixon's employment into the 1978-79 academic year but changed his title to that of consultant to the girls' track team. Petitioners then reopened the original matter by filing the

instant complaint by which it asserts that the Board, contrary to the Commissioner's earlier ruling, was continuing Dempsey Dixon's employment as a coach, although under the title of consultant.

Subsequent to reopening the matter, the Acting Superintendent advised Dempsey Dixon that his employment as a coach had to be terminated. (C-1)

Brian Masello, a certificated teaching staff member employed full time by the Board, was informed by the athletic director that he would be considered for appointment to the vacancy of coach of the girls' track team on the condition that he would agree to work in that capacity with a community volunteer. The community volunteer, Brian Masello explains, is Dempsey Dixon. Brian Masello further explains that he was informed by the athletic director if no candidate, properly certificated, for the position of coach of the girls' track team agreed to work with Dempsey Dixon as the community volunteer, the girls' track team would be disbanded.

The Commissioner is cognizant that his representative had ruled that the Order to Show Cause, originally executed against the Board on January 19, 1979, and which was subsequently adjourned by agreement of the parties because of the Superintendent's letter (C-1) to Dempsey Dixon, but which was later reopened because of the conversation between Brian Masello and the athletic director, was to be considered a Motion for Restraint. The Commissioner agrees with and affirms that ruling. The Commissioner is also aware that Motions for Restraint are granted only on the basis of stipulated facts and/or on the basis of a clear showing by the moving party, petitioners, that its adversary violated a specific statute which violation would result in irreparable harm if the restraint is not granted.

The circumstances herein do not establish a basis for granting such relief. Firstly, there are no stipulated facts. Secondly, even if the conversation did occur between Brian Masello and the athletic director as alleged, the athletic director has no authority whatever to place such provisions upon properly qualified applicants for the position of coach of the girls' track team. Consequently, the asserted requirement that applicants to be successful for appointment to the position of girls' track team coach must agree to work with Dempsey Dixon as a community volunteer is invalid and wholly without merit. Thirdly, petitioners brought forward no substantive offer of proof that the Board violated a specific statute which would result in irreparable harm to them, or their membership. Brian Masello avers that his conversation with the athletic director was in the form of an inquiry to the position of coach and not a formal application for the vacancy. Thus, the Commissioner holds that petitioners' Motion for Restraint is denied on the grounds that such Motion is premature.

The Commissioner is constrained by the nature of this case, however, to offer some comments with respect to the use of noncertificated personnel in cocurricular and/or extracurricular activities. Such dicta in the circumstances is not inappropriate. John F. Kennedy Memorial Hospital v. Heston, 58 N.J. 576 (1971)

It is clear that local boards of education in this State are responsible for the "government and management" of their respective school districts (N.J.S.A. 18A:11-1) and that such responsibility embraces the employment and the services to be performed by such school employees. As the Court said in Michael A. Fiore v. Board of Education of the City of Jersey City, 1965 S.L.D. 177:

> "***The Legislature has committed the operation of local schools to district boards of education. ***The powers of boards of education in the management and control of school districts are broad. Downs v. Board of Education, Hoboken, 12 N.J. Misc. 345, 171 A. 528 (Sup. Ct. 1934), aff'd sub nomine Flechtner v. Board of Education of Hoboken, 113 N.J.L. 401 (E.&A. 1934). Subject to statutes relating to tenure, they are vested with wide discretion in determining the number of employees necessary to carry out the program, the services to be rendered by each and the compensation to be paid for such services. Where a board, in the exercise of its discretion, acts within the authority conferred upon it by law, the courts will not interfere absent a showing of clear abuse. 78 C.J.S., Schools and School Districts, §128, p. 920; Boult v. Board of Education of Passaic, 135 N.J.L. 329 (Sup. Ct. 1947), aff'd 136 N.J.L. 521 (E.&A. 1948). Where, however, the board's action is patently arbitrary, without rational basis, or induced by improper motives, the rule is otherwise. Kopera v. West Orange Bd. of Education, 60 N.J. Super. 288, 294 (App. Div. 1960); East Paterson v. Civil Service Dept. of N.J., 47 N.J. Super. 55, 65 (App. Div. 1957); cf. Moore v. Haddonfield, 62 N.J.L. 386, 391 (E.&A. 1898); Peter's Garage, Inc. v. Burlington, 121 N.J.L. 523, 527 (Sup. Ct. 1939).***"
>
> (at 178)

The powers of a local board of education are thus "broad" and encompass the authority to determine the "services to be rendered" by staff employees. Such authority must include

also the entitlement of local boards to assign teaching staff members to positions they are certificated to fill. N.J.S.A. 18A:1-1 Such authority and its exercise thereof is, however, not without limitation. The Commissioner observes that N.J.S.A. 18A:26-2 and 18A:27-2 expressly prohibit a board of education to enter into contract with or engage a teaching staff member who is not the holder of an appropriate certificate for such employment.

The Commissioner has held that under certain circumstances noncertificated personnel may contribute to the educational process in the public schools as in the matter of Arthur Jones et al. v. Board of Education of the Borough of Leonia et al., 1976 S.L.D. 495, modified State Board of Education, July 6, 1978, wherein he said:

> "***The Commissioner is not unmindful of the great effort that has been expended by community resource persons who, possessing recognizable knowledge and expertise, have unselfishly shared their talents and enthusiasm with the youth of Leonia. This they have done gratuitously, their only recompense being that intangible, satisfying recognition imparted by a pupil to one who teaches, which is perhaps the ultimate reward to one who gives of himself in the educational process.***"
>
> (at 506)

And,

> "***The concept of a visiting lecturer who is not necessarily a certificated teacher gratuitously bringing to the classroom a dimension that cannot be provided by a teaching staff member is not new. It has been successfully used in both the traditional and alternative schools of our State for many decades. There is need in our programs of education for such added dimension. In this instance, the Leonia Board has evolved a program wherein community resource persons have in certain instances replaced, rather than supplemented, the teaching expertise of the certificated instructor. Such is violative of N.J.S.A. 18A:26-2 and N.J.A.C. 6:11-3.4. A harmonious reading of the statutes and the rules of the State Board supports the conclusion that a person who assumes the full responsibility for instructing a class of pupils for a designated course of study for credit must be the holder of a teaching certificate from the State Board of Examiners. The Commissioner so holds.***"
>
> (Emphasis in text.) (at 507)

Thus, the Commissioner has held that noncertificated community resource persons may gratuitously contribute to the educational process under the direct supervision of a certificated teaching staff member. A board of education may not, to the contrary, subject a certificated teaching staff member to the supervision of a noncertificated community resource person.

In certain instances, the contributions of noncertificated personnel to cocurricular programs have also been recognized and as the Commissioner stated in the matter of Clinton F. Smith et al. v. Board of Education of the Borough of Paramus et al., 1968 S.L.D. 62, aff'd State Board of Education 69, as follows:

> "***Such [cocurricular] pupil activities require leadership, participation, and supervision by members of the professional staff. While lay persons with particular skills or knowledge may be called upon to contribute, it is properly the duty of professionally trained and licensed teachers to plan, guide, direct, evaluate and supervise the extracurricular activities of pupils. These are functions of teachers which cannot be delegated. If, therefore, there is to be an effective extracurricular program, it must be staffed by teachers.***"
> (at 66)

Contributions of noncertificated community resource persons to the curricular and cocurricular programs advanced by local boards of education may provide a level of expertise not held by the teaching staff members in their employ. Such contributions are to be gratuitous, without contract or compensation in any manner, and under the direct supervision of a teaching staff member who holds an appropriate certificate issued by the State Board of Examiners. The Commissioner is constrained to emphasize that the utilization of such volunteer and gratuitous services from community resource persons may not become a guise for an assignment to the duties, either curricular or cocurricular, which may be performed only by an employed, properly certified teaching staff member.

In summary, petitioners' Motion for Restraint against the Board is denied. Petitioners, however, may move to reopen the matter should the Board or any of its agents take action contrary to the principles expressed herein.

COMMISSIONER OF EDUCATION

May 4, 1979

IN THE MATTER OF THE TENURE :

HEARING OF DONALD ROMEO, :

SCHOOL DISTRICT OF THE BOROUGH : COMMISSIONER OF EDUCATION

OF HAWTHORNE, PASSAIC COUNTY. : DECISION

:

For the Complainant Board, Jeffer, Walter, Tierney, DeKorte, Hopkinson & Vogel (Reginald D. Hopkinson, Esq., of Counsel)

For the Respondent, Goldberg & Simon (Theodore M. Simon, Esq., of Counsel)

Written charges by the Board of Education of the Borough of Hawthorne, hereinafter "Board," were certified to the Commissioner of Education pursuant to N.J.S.A. 18A:6-10, stating that the charges would be sufficient if true in fact to constitute conduct unbecoming a teaching staff member through the misuse of pupil funds and warrant the dismissal of Donald Romeo, hereinafter "respondent," a guidance counselor with a tenure status. Pursuant to a resolution dated May 16, 1978 the Board suspended respondent without pay as provided by N.J.S.A. 18A:6-14.

A hearing was held in the office of the Morris County Superintendent of Schools, Morris Plains, on December 18, 1978 before a hearing examiner appointed by the Commissioner. Briefs were filed by the parties subsequent to the hearing. The report of the hearing examiner follows:

CHARGE NO. 1

"DONALD ROMEO, teacher and professional staff member assigned to the Guidance Department at the Hawthorne High School, was for nine years employed in the capacity of Director of Guidance. As Director of Guidance, he is responsible for the administration of school testing programs. Each year, one test given to students is the National Educational Development Test, which, though not a part of the regular school testing program, is offered as a special service to high school sophomore students who wish to take the test to identify special aptitudes. Each student remits the sum of $3.50 to cover the cost of taking the test. DONALD ROMEO, as was the

prior Guidance Director, is in charge of the purchase and administration of the test with the duty to collect the money from each student, purchase the necessary number of tests, and remit payment for said tests. School officials became aware for the first time that the vendor of the National Educational Development Tests, Science Research Associates, Inc., for the years 1974, 1975, 1976 and 1977 had invoiced the 'Hawthorne High School' and the amount billed for these tests to the Hawthorne High School has not been paid for four years. Said DONALD ROMEO alleged that he had paid all of the invoices (attached hereto as Schedule A) through postal money order but was unable to produce evidence of having paid for the tests and stated that due to his lack of judgment in keeping a copy of the receipt for payment he would accept responsibility to satisfy the four unpaid invoices. Subsequent thereto, it appeared that payment of the invoices had been made to the vendor by a personal check written by said DONALD ROMEO and thereafter it was reported by Mrs. Richmond of said Science Research Associates, Inc., that said check has been returned for insufficient funds."

CHARGE NO. 2

"Said DONALD ROMEO, in the same capacity as Guidance Director at the Hawthorne High School, was to process and administer the Preliminary Scholastic Aptitude Test which high school juniors take in preparation for their college entrance test. The Educational Testing Service, Princeton, New Jersey, upon investigation by the Principal and Vice Principal of the Hawthorne High School, indicated non-payment of invoices from 1974 through 1977 inclusive. Said DONALD ROMEO related his failure to produce evidence of payment to said testing agency with funds collected from students taking said examinations was again similar to what is set forth in Charge One in that he made payment by postal money order and said DONALD ROMEO neglected to retain receipts for these payments. Said DONALD ROMEO, stated he desired to make financial restitution by personal check.

- - - -

"Said charges reflect the receipt of funds from students for the important and vital purpose of administering educational tests and required immediate use of said funds for the payment to the agencies that provide said tests in order to assure that providing the testing services would not be jeopardized and the students of Hawthorne High School will be assured of these vital services being provided by the Guidance Department. The fact that moneys have been received from students for the specific purpose of completing the examinations and the said funds were to be immediately forwarded to said testing agencies to assure that said organizations shall continue to provide their services to students and the fact that said invoices have remained unpaid for four years, if accurate and true, constitutes misuse of students' funds and comprises conduct that is unbecoming, improper, seriously jeopardizes the welfare of the students and school district and is totally inexcusable and intolerable."

CHARGE NO. 3

"The allegations of Charge One and Charge Two are repeated as if set forth herein at length.

"Said DONALD ROMEO failed to utilize the internal fund account in depositing moneys and paying invoices submitted for payment.

"Discovery of the unpaid invoices were deliberately obscured by said DONALD ROMEO intercepting mail addressed to the Hawthorne High School which should have been forwarded directly to the office of the Principal.

"Said charges, if accurate and true, comprise conduct that is unbecoming, improper, seriously jeopardizes the welfare of the students and school district and is totally inexcusable and intolerable."

Respondent admits to these charges.

The Board waived the calling and examination of its witnesses based upon the representation that respondent had chosen not to contest the essential aspects of the charges filed against him. (Tr. 3)

Respondent testified that he was aware and understood that the essential content of the charges brought against him involved the co-mingling of pupil funds with his own between the years 1974-1977. He testified that he collected money from pupils for the National Educational Development Test and the Preliminary Scholastic Aptitude Test and failed to pay the vendors for such tests for the years 1974 through 1977. (Tr. 4-6) He testified that the total amount of all the money he collected from pupils and failed to pay to the appropriate vendor represented $468 for Science Research Associates and $1,068 for the Educational Testing Service. (Tr. 11) Respondent testified that in April 1978 he had paid the vendors in the full amount due them and that there were no proceedings brought against him by the vendors. (Tr. 5-6)

Respondent testified that he had serious financial problems which concluded in a divorce, the loss of foreclosure proceedings on his house and medical expenses. He testified that he had used poor judgment and that it was not his intention to permanently keep the money but rather to pay the vendors when he had straightened out his own problems. (Tr. 7-9)

Respondent testified that he did not tell the truth to the principal and vice-principal when he was first confronted by them with regard to the non-payment of the tests to Science Research Associates, Inc. A subsequent inquiry of Educational Testing Service revealed that payment for the Preliminary Scholastic Aptitude Test had not been received for the years 1974, 1975, 1976 and 1977 in the total amount of $1,068. (Tr. 10-11) Respondent testified that he had access to the school's mailroom and intercepted the monthly bills of the vendors in order that the school administrators would not know about them until such time as he had an opportunity to repay the debts to the vendors. (Tr. 15)

Petitioner asserts that he has been in the employ of the Board for approximately twenty years, the last nine of which he has served in the capacity of Director of Guidance at Hawthorne High School. He concedes that his actions were improper and a poor exercise of judgment. He urges, in light of his long career of unblemished service to the district and the mitigating circumstances of personal financial difficulties, that the ultimate sanction of dismissal not be imposed. In the Matter of the Tenure Hearing of Frederick L. Ostergren, School District of Franklin Township, 1966 S.L.D. 185, 188; In the Matter of the Tenure Hearing of William H. Kittel, School District of the Borough of Little Silver, 1972 S.L.D. 535, 542; In the Matter of

the Tenure Hearing of Jacque L. Sammons, School District of the Black Horse Pike Regional, 1972 S.L.D. 302

The Board avers that the undisputed facts in the instant matter show that the misappropriation of pupil moneys was not an isolated incident but, rather, a series of incidents which continued for a period of more than four years. It argues that in other instances in which the Commissioner found "deviations from minimal moral conduct" were far less striking than the instant matter, the circumstances mandated dismissal. (Board's Brief, at p. 4) In the Matter of the Tenure Hearing of Joseph Criscenzo, School District of the City of Paterson, 1976 S.L.D. 1000

The issue to be resolved is whether or not respondent's action to misappropriate pupil moneys, and subsequently restore said misappropriated moneys, constitutes a finding of conduct unbecoming a teacher.

The hearing examiner finds that the record and respondent's admissions clearly reveal that he knowingly misappropriated pupil moneys for his own use and failed to reimburse vendors for testing materials ordered by him and with such collected pupil moneys for the years 1974, 1975, 1976 and 1977. Respondent also admitted that during said four year period he did intercept the vendor's monthly billing to the school to prevent the school's administrators from knowing of his actions. Respondent admits that he lied to his superiors when he was confronted with certain allegations with regard to the non-payment of invoices to one of the two vendors. Finally, the record shows that respondent did not make restitution to the two vendors in the total amount of $1,536 until after such time as he was confronted with the alleged non-payment.

The hearing examiner observes that in similar matters where a teaching staff member was found to have misappropriated school funds, the Commissioner dismissed the employee. In the Matter of the Tenure Hearing of Martin Groppi, School District of Passaic County Manchester Regional High School, 1970 S.L.D. 159; In the Matter of the Tenure Hearing of Abraham Altschuler, School District of the Township of Neptune, Monmouth County, 1978 S.L.D. ____ (decided April 25, 1978), aff'd State Board of Education September 6, 1978

The Commissioner has held that a single incident of conduct unbecoming a teacher was sufficient grounds to cause dismissal. In the Matter of the Tenure Hearing of Emma Matecki, School District of New Brunswick, 1971 S.L.D. 566, aff'd State Board of Education 1973 S.L.D. 773, aff'd Docket No. A-1680-72 New Jersey Superior Court, Appellate Division, November 28, 1973 (1973 S.L.D. 773) In the instant matter, however, there are many instances of unbecoming conduct during the course of the school

years 1974 through 1977. In Redcay v. State Board of Education, 130 N.J.L. 369 (Sup. Ct. 1943), aff'd 131 N.J.L. 326 (E.&A. 1944) it was held that:

> "***Unfitness for a task is best shown by numerous incidents. Unfitness for a position under a school system is best evidenced by a series of incidents. Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but it may also be shown by many incidents.***"
>
> (130 N.J.L. at 371)

The hearing examiner finds, therefore, that respondent's actions in this matter constitute conduct unbecoming a teacher and recommends that he be dismissed from his tenured employment with the Board.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has carefully reviewed the record in the instant matter, including the report of the hearing examiner, and observes that neither party has filed exceptions thereto pursuant to N.J.A.C. 6:24-1.17(b).

The Commissioner concurs with the hearing examiner's findings of fact and determines that the charges, established as true by respondent's admission, demonstrate conduct unbecoming a teaching staff member. The Commissioner, on several occasions, has been constrained to observe that teachers share an enormous responsibility with respect to their behavior, decorum and conduct in the educational process. As he commented in Sammons, supra:

> "***[Teachers] are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. As one of the most dominant and influential forces in the lives of the children, who are compelled to attend the public schools, the teacher is an enormous force for improving the public weal.***" (at 321)

It was also stated In the Matter of the Tenure Hearing of Herman B. Nash, School District of the Township of Teaneck, 1971 S.L.D. 284 that:

> "***A teacher, as any citizen, who decides to take any form of action or inaction does so at his own risk. No matter what the ultimate objective sought, the individual must accept the responsibility for his actions***." (at 296)

The State Board of Education said in George R. Good v. Board of Education of the Township of Union, 1938 S.L.D. 354 (1935), aff'd State Board 357, that:

> "***[The board of education] may reasonably require of one holding the important position of principal of its high school conduct in conformity with commonly accepted ethical standards. He is, in a measure, a guide and pattern for the adolescent boys and girls

> under his charge. He should teach by example as well as by precept. The inculcation of those qualities and attributes which we call 'character' is a responsibility of our schools.***" (at 359)

In Ruth Schroeder v. Board of Education of Lakewood, 1960-61 S.L.D. 37 the Commissioner quoted the Supreme Court of Wyoming in Tracy v. School District No. 22, 70 Wyo. 1, 243 P.2d 932 (1952) with respect to the relationship between a teacher and pupil:

> ***'The peculiar relationship between the teacher and his pupils is such that it is highly important that the character of the teacher be above reproach.*** The Court of Appeals of Kentucky has said that both parents and pupils regard the teacher as an exemplar whose conduct might be followed by his pupils and the law by necessary intendment demands that he should not engage in conduct which would invite criticism and suspicions of immorality. (Gover v. Stovall, 237 Ky. 172, 35 S.W. 2d 24). Even charges of or reputation for immorality, although not supported by full proof, might in some cases be sufficient ground for removal. Not merely good character but good reputation is essential to the greatest usefulness of the teacher in the schools.' (at p. 937)***" (at 45)

It has long been held by the Commissioner and the courts of this state that unfitness to hold a teaching position may be shown by a series of incidents or by one incident, if sufficiently flagrant. Redcay, supra; Matecki, supra Similarly, in matters where it has been found that teaching staff members misapply, misappropriate and/or convert moneys or property entrusted to their care for their own use, the Commissioner has been compelled to dismiss such teaching staff members from their positions of employment and trust. Groppi, supra; Altschuler, supra

The Commissioner finds that respondent's behavior herein was unconscionable, inexcusable and violative of the trust the community placed in him as a teaching staff member. Respondent exhibited gross misconduct which is conduct unbecoming a teaching staff member. N.J.S.A. 18A:28-5 Thus, he must forfeit his tenure status.

Accordingly, respondent is hereby dismissed from his position as a teaching staff member as of the date of his suspension by the Board.

COMMISSIONER OF EDUCATION

May 17, 1979

RICHARD MC GUIRE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NORTHFIELD, AND DAVID LLOYD, ACTING SUPERINTENDENT, ATLANTIC COUNTY,	:	DECISION
RESPONDENTS.	:	

For the Petitioner, Edward P. Kozmor, Esq.

For the Respondents, Gibson, Previti & Todd
(Daryl F. Todd, Esq., of Counsel)

Petitioner, a tenured teaching staff member who was employed by the Board of Education of the City of Northfield, hereinafter "Board," contests the actions of the Acting Superintendent in suspending him without pay from his teaching position during the sixty day period in which his resignation previously accepted by the Board was to become effective.

Petitioner alleges that the actions of the Acting Superintendent are contrary to the provisions of applicable education law protecting his rights and privileges as a tenured teaching staff member.

Petitioner seeks a favorable determination of this matter by the Commissioner of Education setting aside the Acting Superintendent's decision and granting the following relief:

1. That he be paid any moneys due him and owed him by the Board.

2. That he be paid for any sick leave time which he had accumulated and was not allowed properly to utilize.

3. That the Acting Superintendent prepare a written apology and have it placed in petitioner's personnel file.

4. That legal fees and costs incurred by petitioner as a result of these proceedings be assessed against the Board and the Acting Superintendent for the alleged illegal acts committed by them.

5. That he be given a vote of confidence by the Board for his years of teaching in its employ.

The Board, in seeking dismissal of the instant Petition, avers that the Acting Superintendent's determination regarding petitioner's suspension without pay, as well as its subsequent approval of same, was in all ways proper and legally correct. The Board further maintains that petitioner failed to exhaust those administrative remedies available to him in resolving this matter at the local level.

These proceedings have been submitted directly to the Commissioner for Summary Judgment on the pleadings, exhibits, petitioner's affidavit, and Briefs of counsel.

The relevant undisputed facts pertaining to the instant matter are as follows:

Petitioner was a tenured teaching staff member who had served in the Board's employ for six consecutive academic years. Petitioner notified the Board and Acting Superintendent in writing that he was tendering his resignation from his teaching position as of November 7, 1976, to become effective sixty days hence. (J-1) The Board met on November 9, 1976 and acted, inter alia, to accept petitioner's letter of resignation. The minutes regarding such action read in pertinent part as follows:

> "Mrs. Hampton made a motion, seconded by Mr. Patrick, that the resignation of Mr. Richard McGuire be accepted, effective 60 days from November 7, 1976. After discussion, a voice vote unanimously approved the motion. The motion is carried." (R-1)

On December 1, 1976 the Acting Superintendent sent a letter to petitioner which reads:

> "Your excessive absences are having a deleterious effect upon your colleagues, the program and most importantly, the children. You have missed an important workshop, a scheduled articulation meeting, and an important testing program. Mrs. Sukin has discussed these absences with you and tried to reiterate her concerns.
>
> "You have neglected your responsibilities in many ways and therefore I am suspending you without pay effective Friday, December 3, 1976, until your effective resignation date January 5, 1977." (J-2)

Thereafter, on December 2, 1976 another letter was written by the Superintendent to petitioner which states that:

> "I will accept your resignation to be effective at the end of the day, Friday, December 3rd, and at the signing of this letter, in agreement with those terms, your suspension is revoked and stricken from all records." (P-1)

The Commissioner observes that a typed paragraph at the bottom of the letter contained a space for petitioner's signature and the date. These spaces are unsigned and undated. The paragraph of reference reads:

> "I wish to resign effective Friday, December 3, 1976, and understand that the suspension is revoked and the record expunged." (P-1)

Petitioner filed the instant Petition with the Commissioner on December 9, 1976, with proof of service. Thereafter, the Board met in executive session after its public meeting on December 14, 1976. The minutes of this meeting pertaining to the Board's action regarding the Acting Superintendent's determination to suspend petitioner without pay read as follows:

> "Mr. Gibson [Board attorney] discussed another subject - the termination of Mr. Richard McGuire, a tenured teacher. Mr. McGuire had submitted his resignation, with the contracted 60-day notice, on November 7, 1976, effective January 7, 1977. After repeated absences and other alleged reasons of Mr. McGuire, Mr. Lloyd had suspended him, effective December 3, 1976, without pay. Mr. McGuire has engaged an attorney and filed an appeal with the Commissioner of Education. Mr. Gibson explained to the Board that they had two options - (1) to uphold the actions of Mr. Lloyd, in which case Mr. Gibson would proceed with his usual practice of representing the Board in matters such as this, or (2) reinstate Mr. McGuire as of December 3, 1976 until his 60-day termination date of January 7, 1977, and reimburse him one month salary. After considerable discussion, Mr. Patrick made a motion, seconded by Mr. Blumenauer, that the Board uphold the actions of Mr. Lloyd and allow the matter to follow its usual course. A voice vote unanimously approved the motion. Motion carried.

> "The Acting Superintendent was asked to offer an Exit Interview to Mr. McGuire. The Acting Superintendent felt it was not his obligation to offer this - rather, it was the Board's obligation. After discussion, the interview will be offered by the Secretary.
>
> "Mr. Patrick made a motion, seconded by Mr. Blumenauer, that the meeting be adjourned. A voice vote unanimously approved the motion. Motion carried." (R-5)

The Board Secretary/Business Manager by way of a letter dated December 16, 1976 informed petitioner of the following:

> "In accordance with Board policy and your personal request, you are invited to a hearing regarding your suspension. The hearing is scheduled for Tuesday, January 4, at 7:00 p.m. in the Kresge School library.
>
> "Though this is an informal hearing, you are free to obtain counsel to represent you." (C-1)

A letter reply to the above correspondence was directed to the Board Secretary/Business Manager by counsel for petitioner on December 17, 1976. (C-2) The Commissioner observes that although petitioner acknowledged receipt of the Board's correspondence of December 16, 1976 (C-1), he denies having requested an informal hearing before the Board. Rather, he contests the Board's action as it pertains to his status as a tenured teaching staff member.

The Commissioner is constrained to point out at this juncture that the instant Petition filed on December 9, 1976 solely contested the determination of the Acting Superintendent in suspending petitioner without pay on December 3, 1976. The Board, however, officially upheld the determination of its Acting Superintendent when it met on December 14, 1976 (R-5) prior to the time its Answer was filed on December 22, 1976, joining the pleadings herein. In view of these circumstances, the Commissioner finds that it is essential to the outcome of these proceedings to consider the actions of the Acting Superintendent and the Board in connection with the allegations raised by petitioner as hereinbefore set forth.

In the Commissioner's judgment, the central issue is whether or not the actions taken by the Acting Superintendent and the Board in suspending petitioner without pay on December 3, 1976, prior to the effective date of his resignation on January 7, 1977, were proper and legal pursuant to the applicable provisions of education law affecting tenured teaching staff members.

The Commissioner will first consider the initial determination of the Acting Superintendent when he notified petitioner in writing on December 1, 1976 that he was suspended without pay from his teaching position as of December 3, 1976. (J-2) The controlling statute which authorizes a Superintendent of Schools to suspend a teaching staff member is set forth in N.J.S.A. 18A:25-6 which reads in part as follows:

> "The superintendent of schools may, with the approval of the president or presidents of the board or boards employing him, suspend any *** teaching staff member, and shall report such a suspension to the board or boards forthwith. The board or boards, each by a recorded roll call majority vote of its membership, shall take such action for the restoration or removal of such person as it shall deem proper, subject to the provisions of Chapter 6 [N.J.S.A. 18A:6-1 et seq.] and Chapter 28 [N.J.S.A. 18A:28-1 et seq.] of this Title."
> (Emphasis supplied.)

The Commissioner finds and determines that the Acting Superintendent exceeded his authority pursuant to the above-cited statute by virtue of the fact that he suspended petitioner without pay as evidenced in his letter to petitioner dated December 1, 1976. (J-2) See In the Matter of the Tenure Hearing of Ison Stephenson, School District of the City of Bridgeton, 1976 S.L.D. 869. The Board's action of December 14, 1976 (R-5) which upheld the Acting Superintendent's determination to suspend petitioner without pay must also be carefully weighed pursuant to statutory prescription. It has been factually established herein that petitioner was a tenured teaching staff member in the Board's employ when it took action against him. The Commissioner points out in the first instance that the provisions of N.J.S.A. 18A:6-10 provide the legal framework pertaining to the dismissal and reduction in compensation of persons under tenure in a public school system. This statute reads in pertinent part:

> "No person shall be dismissed or reduced in compensation,
>
> (a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state,***
>
> except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held
>
> pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a

> written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.***"

Moreover, a local board of education is constrained to adhere to the statutory provisions of N.J.S.A. 18A:6-11 which set forth the procedural requirements which must be followed when charges are filed against a tenure teaching staff member.

The Commissioner has carefully reviewed those actions of the Acting Superintendent and the Board in connection with petitioner's suspension without pay. The Commissioner finds and determines that such actions constitute improper and illegal violations of petitioner's lawfully protected status as a teaching staff member pursuant to the above cited statutory mandate and must therefore be set aside.

The Board is directed to compensate petitioner, forthwith, in the amount of his 1976-77 contractual salary for the period commencing with his suspension without pay until such time as his resignation from the Board's employ became effective. Such salary earnings by way of compensation are mitigated by the amount of petitioner's earnings, if any, in alternate employment for the period in question. The Commissioner further directs the Board to expunge any reference to petitioner's illegal suspension without pay from its records and petitioner's personnel file. To this extent the relief sought by petitioner is granted. The other relief which he seeks in the form of a written apology from the Acting Superintendent, a vote of confidence by the Board, and payment for unused accumulated sick leave is denied.

Finally, the remaining relief which petitioner seeks in the form of counsel fees for litigating the matter, which was argued at some length in Briefs of counsel, is denied as being without the authority of the Commissioner in his quasi-judicial capacity as the determiner of controversies and disputes pursuant to N.J.S.A. 18A:6-9 et seq. Raymond Winter v. Board of Education of the Township of North Bergen, 1975 S.L.D. 236

COMMISSIONER OF EDUCATION

May 24, 1979

BOARD OF EDUCATION OF THE SUSSEX COUNTY VOCATIONAL SCHOOL DISTRICT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF CHOSEN FREEHOLDERS, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	
V.	:	
SUSSEX COUNTY VOCATIONAL-TECHNICAL TEACHERS ASSOCIATION.	:	

For the Petitioner, Honig & Honig (Emanuel A. Honig, Esq., of Counsel)

For the Respondent, Donald E. Kovach, Esq.

For the Intervenor, Saul R. Alexander, Esq.

The Sussex County Vocational Board of Education, hereinafter "Board," petitions the Commissioner of Education to certify to the Sussex County Board of Taxation the additional amount of $125,000 to be raised by public taxation for current expenses to operate the Sussex County Vocational School for the 1978-79 school year. The Board asserts that in the event such additional certification of tax revenue is not ordered by the Commissioner it will have insufficient funds to continue the normal operation of its school between June 1 and June 22, 1979.

The Sussex County Board of Freeholders opposes the certification of additional taxes for current expenses of the Board for the 1978-79 school year on grounds that the relief sought is not warranted and would unduly increase the tax burden in Sussex County.

A hearing before a representative of the Commissioner was conducted on an emergent basis on May 15, 1979 at the Department of Education, Trenton. The Sussex County Vocational-Technical Teachers Association was granted leave to participate at the hearing as an intervening party whose members would be vitally affected should the Board close its school effective June 1, 1979. The report of the hearing officer follows setting forth first those uncontroverted facts which reveal the context of the disputed matter.

The Board which had been an appointed Board until 1978 has since been elected by the voters of Sussex County. When a review of its financial accounts during the summer of 1978 revealed that the financial records were in disarray, the Board employed accounting consultants to ready its records for the 1977-78 school year audit, the report of which was furnished to the Board on October 13, 1978. (P-1) That audit revealed that the Board had appropriated to revenue for the 1978-79 school year $169,000 from its unappropriated current expense balance. It also revealed that the current expense balance available for the Board's use on June 30, 1978 was only $39,809.45, thus creating a deficit in the revenue portion of the Board's 1978-79 budget of $129,190.55. (P-1, at p. 9)

That audit report commented on numerous aspects of the Board's fiscal procedures including but not limited to recommendations that:

1. Federal and State reports be timely filed.

2. Account books be maintained and posted on a current and detailed basis with trial balances.

3. Board Secretary reports of financial condition be filed monthly with the Board.

4. Expenditures be limited to those authorized by the Board.

5. Bound records be maintained of all Board meetings on a current basis.

6. No expenditures be made in excess of available funds. (P-1)

The current Business Administrator-Acting Board Secretary who has been employed by the Board since October 1, 1978 testified at the hearing that on the basis of his examination of the Board's records he had not only informed the Board of the shortfall in revenue, ante, but had advised that numerous line items, including that which provides for teachers' salaries, were underbudgeted. He testified that the Board then directed that all possible economies be effected short of eliminating educational programs then being offered at the school. He also testified that, after the Board conferred with the County Superintendent to explore what alternatives existed to solve its financial dilemma, it was decided to petition the Commissioner for a cap increase and present a referendum question to the voters at the annual school election on April 3, 1979 proposing to raise an additional $125,000 by public taxation for current expense needs for the 1978-79 school year. He testified further that that referendum question was decisively defeated by the voters. When queried why the referendum was not held earlier,

the Board President testified that it was estimated that a separate referendum in all polling districts of the county would cost at least $10,000.

The Business Administrator and the Board's auditor testified that they had found the Board's financial records and minutes totally inadequate to conduct a proper audit until completion of postings and transcription of recorded meetings into proper minutes. They testified that they then perceived that the Board faced an impending year-end deficit resulting from underbudgeting of accounts of $117,000 and the aforementioned shortfall of revenue from unappropriated balances of $129,190.55.

The Business Administrator and the Board President testified that following the Board's order that expenditures be sharply curtailed, economies have been effected by reducing custodial staff, placing a freeze on hiring of professional staff, curtailing purchases of supplies and texts, deferring all but crucial maintenance, eliminating some pupil activities, a vice-principalship and all field trips. They testified that these and other austerity measures have reduced the impending deficit to $125,000.

The Board President and the Superintendent testified that in their opinion further economies could not be effected without reducing the school's offering to a level which would not meet the statutory and constitutional requirement of providing pupils a thorough and efficient system of education. They testified that, although the Board has given sixty days' notice to most of its professional staff that they will not be employed during June 1979, the resultant morale of staff, pupils and public would have a markedly adverse effect upon the school as a viable educational institution in this and ensuing years. They testified that if relief in the form of certification of the additional $125,000 in taxes is not forthcoming, the school will graduate its seniors but will be forced to cancel nearly all of its regular classes since only a skeletal staff would be retained to meet minimal essential obligations.

The foregoing forthright testimony of witnesses is not rebutted within the record and is, in part, documented with written exhibits in evidence. (P-1 through P-6) The hearing examiner, accordingly, ascertains this evidence to be fully credible and relies thereon in setting forth the following findings of fact:

1. The Board's financial records as maintained by the former Business Administrator and the former Board Secretary were so woefully inadequate as to contribute to the Board's present dilemma.

2. The present Board members, all of whom have served only since their election in March 1978, were not responsible for the confused state of the records with which they were faced

after being seated. When that gross inadequacy of records was recognized, the Board took appropriate action by replacing personnel in key positions with employees who obtained competent consultant services and instituted proper methods of maintaining records and minutes and reporting the same to the Board and its financial team which now bears special responsibility for ongoing fiscal review. Those actions of the Board have effected compliance with those recommendations of the auditor, ante.

3. The Board, in addition to the economies which it has already effected totaling over $100,000, will be forced to implement a massive lay-off of its professional and non-professional employees on June 1, 1979 unless the controverted $125,000 is authorized.

4. The result of such reduction in force would be that the Board could not meet its approved goals under N.J.S.A. 18A:7A-1 et seq. and would fail to meet its constitutional obligation to provide a thorough and efficient system of education by reducing by sixteen its calendar of instructional days. Ancillary complications and costs which could also result from such curtailment of offerings include the specter of reduced credibility in the eyes of the public and pupils and litigation by affected parties.

The Commissioner was faced with a similar fiscal dilemma of a Board In the Matter of the Application of the Upper Freehold Regional Board of Education, Monmouth County, 1978 S.L.D. ___ (decided March 22, 1978). Therein, where that Board because of insufficient funds faced the necessity of terminating its school year in March rather than June, the Commissioner stated that:

> "***The Board, having twice been unsuccessful in seeking approval of the electorate to raise funds necessary to complete the academic year, has properly appealed to the Commissioner to exercise such powers as are at his disposal to meet its fiscal crisis. There exist, however, no directives of the courts and no specific statutory delegation of power which directs the Commissioner to review and certify to a county board of taxation any or all of a supplemental budget appropriation proposed by a board at a special school election and defeated by the voters. Nevertheless, the courts have held in certain instances that, despite a lack of specific statutory provision, the Commissioner's authority as delegated by the Legislature was sufficiently broad to require that he act in compelling circumstances to effectuate the constitutional and statutory mandates as applied to the public schools.

> Booker v. Board of Education of the City of Plainfield, 45 N.J. 161 (1965); Jenkins et al. v. Morris Township School District et al., 58 N.J. 483 (1971); Board of Education of East Brunswick et al. v. Township Council of East Brunswick et al., 48 N.J. 94 (1966); Board of Education of Elizabeth v. City Council of Elizabeth, 55 N.J. 501 (1970)***"
> (at _____)

And,

> "***The Supreme Court, in passing on the validity of the 1975 Act, in Robinson v. Cahill, 69 N.J. 449, 463 (1976), confirmed that the State, in order to meet its constitutional obligation, must have available the authority to compel a local school district to raise necessary funds to conduct a thorough and efficient program of education.
>
> "In the instant matter it has been concluded that sufficient necessary funds have not been provided. The purpose of the Legislature to anticipate and take action to forestall deficiencies in a given educational program would surely be frustrated if the program in toto were to be allowed to become nonexistent for nearly one third of the scheduled academic year. It is precisely such impermissible result that the 1975 Act and the decisions in Robinson, supra, were intended to prevent. The fact that the instant matter results from voter reluctance to approve necessary expenditures does not render the Commissioner powerless to take corrective action. To conclude otherwise would be to arrive at an absurd and anomalous result. State v. Madewell, 117 N.J. Super. 392 (App. Div. 1971), aff'd 63 N.J. 504 (1973) Accordingly, the Commissioner determines that he has authority and does hereby certify to the Monmouth County Board of Taxation the amount of $298,469 as the additional sum to be raised by local taxation for current expenses of the Board in order to insure a thorough and efficient educational program throughout the remainder of the 1977-78 school year.***"
> (at _____)

It is evident that the Board herein is faced with terminating its viable program of instruction approximately three

weeks early as contrasted to the three month period in Upper Freehold Regional, supra. Nevertheless, it must be recognized that the conclusion of vocational programs of instruction and their ancillary studies would be grievously curtailed if the Board were compelled to effect a massive reduction in force and close its school to most of its 1100 pupils on June 1. Accordingly, it is recommended that the Commissioner determine that such action would render the Board's program less than thorough and exercise his broad power and authority pursuant to N.J.S.A. 18A:7A-1 et seq., as in Upper Freehold Regional, by certifying to the Sussex County Board of Taxation the additional amount of $125,000 to be raised by public taxation in the County of Sussex for current expenses of the Board for the 1978-79 school year.

The parties are reminded that in consideration of the emergent nature of the matter, at the direction of the hearing officer and with the consent of the parties, exceptions to this report are to be filed within three days of receipt of this report.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record of this controverted matter including the exceptions filed by the Sussex County Board of Freeholders pursuant to N.J.A.C. 6:24-1.17(b). No exceptions were filed within the designated time period by petitioner or the intervenor Teachers Association.

The Freeholders contend in the exceptions that the austerity practiced by the Board when it learned of its fiscal problems fell short of instituting all economies which should have been effected. The Freeholders further contend that the vocational school courses for pupils other than seniors can be completed in ensuing years and that the necessary instruction of seniors for graduation can be completed by limited staff after June 1, 1979.

The Commissioner does not agree. A thorough and efficient education could not be afforded to pupils by the cancellation of classes that were regularly scheduled and operating in the fall of 1978. Had the Board cancelled those operating classes when it learned of its fiscal crisis in the fall of 1978 it would have been in violation of N.J.S.A. 18A:7A-1 et seq. for failure to maintain viable programs of vocational education for its pupils. Nor can it now reduce those programs by shortening the school year by sixteen school days. To do so could further aggravate the fiscal problem by jeopardizing the Board's eligibility for full allocation of 1978-79 State aid. Nor may those pupils who wish to transfer to other schools, who must move from the area, or who have entered advanced educational programs be handicapped by incomplete grades and withholding of approved credits. Such action as is proposed by the Freeholders in the exceptions does not comport with the constitutional mandate of a thorough and efficient education. The Commissioner so holds.

The Freeholders contend also that Upper Freehold, supra, is inapplicable to the factual context of the instant matter. The Commissioner, conversely, finds the essential facts in these cases to be substantially the same. The fiscal crisis in Upper Freehold resulted, inter alia, from underbudgeting of line items and appropriation of revenue from unappropriated current expense balances which did not in fact exist in the amount of the appropriation. Upper Freehold mounted an austerity program and was unsuccessful in its attempts to gain voter approval of a supplemental budget appropriation. The factual context herein is the same.

While the Commissioner understands the Board's desire not to add to its fiscal deficit by conducting a county-wide special election at an estimated cost of $10,000, it must be recognized that the moving of the annual school elections to April severely reduces the effective time for such litigation as is presented in this contested matter. Accordingly, in the future, any board

faced with such a fiscal crisis necessitating a special referendum for a supplemental budget is advised not to delay the referendum thereby creating the necessity for emergent litigation.

A thorough review of the record, with full consideration of the remaining exceptions iterated by the Freeholders, establishes the validity of the hearing examiner's findings which the Commissioner henceforth holds as his own.

The Board has met its burden of proof that despite its austerity program it must have additional funds for completion of the 1978-79 school year in the amount of $125,000. The Commissioner, pursuant to his responsibility and the authority conferred upon him by the Legislature, is empowered to adjust school budgets. As was stated in N.J.S.A. 18A:7A-15:

> "If, after a plenary hearing, the commissioner determines that it is necessary to take corrective action, he shall have the power to order necessary budgetary changes within the school district***."

Pursuant to that authority as set forth more fully in Upper Freehold, supra, the Commissioner certifies to the Sussex County Board of Taxation the additional amount of $125,000 to be raised by public taxation for the current expenses of the Board for the 1978-79 school year.

The Board has presented convincing evidence that it has instituted prudent fiscal monitoring procedures and reporting. The Commissioner not only supports such action but directs that those periodic reports of fiscal practices which it has instituted be maintained and reviewed by the entire Board in order that the fiscal chaos which it "inherited" from the former appointed Board and its employees shall not recur. In this regard, the Commissioner stands ready to make available from his staff such consultants as the Board may request to review its fiscal procedures and records.

COMMISSIONER OF EDUCATION

May 30, 1979

BOARD OF EDUCATION OF THE SUSSEX COUNTY VOCATIONAL SCHOOL DISTRICT,	:	
PETITIONER-APPELLEE,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF CHOSEN FREEHOLDERS, SUSSEX COUNTY,	:	DECISION
RESPONDENT-APPELLANT,	:	
V.	:	
SUSSEX COUNTY VOCATIONAL-TECHNICAL TEACHERS ASSOCIATION.	:	
	:	

Decided by the Commissioner of Education May 30, 1979

For the Petitioner-Appellee, Honig & Honig (Emanuel A. Honig, Esq., of Counsel)

For the Repondent-Appellant, Donald E. Kovach, Esq.

For the Intervenor, Saul R. Alexander, Esq.

The State Board affirms the decision of the Commissioner of Education.

November 8, 1979

Pending N.J. Superior Court

CAMDEN EDUCATION ASSOCIATION, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY, : DECISION

RESPONDENT. :

For the Petitioner, Joel S. Selikoff, Esq.

For the Respondent, Murray, Granello & Kenney
(Malachi J. Kenney, Esq., of Counsel)

Petitioner, Camden Education Association, hereinafter "Association," the majority representative of, inter alia, all non-supervisory teaching staff members employed by the Board of Education of the City of Camden, hereinafter "Board," seeks a Summary Judgment Order from the Commissioner of Education by which the Board would be directed to schedule seventeen make-up days for pupil instruction by the close of the 1978-79 academic year for seventeen days during the year when pupils were allegedly not afforded instruction. The Board opposes the Association's application for such an Order and asserts that it kept its schools open during the seventeen days at issue herein and seeks dismissal of the Association's second count of its Petition upon which its prayer for relief is grounded.

Oral argument on the Association's Motion for Summary Judgment and the Board's Motion to Dismiss the Second Count of the Petition was heard on April 11, 1979 at the Department of Education, Trenton before a representative of the Commissioner. Thereafter, the parties filed Briefs in support of their respective positions. The matter is referred directly to the Commissioner for adjudication on the record, including the pleadings, exhibits, Briefs, and transcript of the argument.

The Commissioner observes that the Association grounds its prayer for relief on its allegation that more than ninety percent of its membership determined not to report to their duties in the employ of the Board for seventeen regularly scheduled school days between October 6 and November 1, 1978, inclusive. The Association contends, and the Board admits, that the Board refused and continues to refuse to schedule make-up days for those seventeen days.

The Association alleges that between the period October 6 through November 1, 1978 ninety percent of enrolled pupils were absent from school and that those pupils who were present were

not under the guidance and direction of a teacher for a minimum of four hours per day engaged in the educative process. Thus, the Association concludes that pupils enrolled in the Camden schools were deprived of their constitutional right to a thorough and efficient program of education during that period of time.

The Association further argues that the Board must schedule the requested make-up school days in order for it to have provided a minimum one hundred eighty days of instruction necessary for it to be eligible for state aid pursuant to N.J.S.A. 18A:58-16. The Association also relies in this regard upon the State Board rules and regulations at N.J.A.C. 6:20-1.3 which set forth certain standards in regard to what constitutes school attendance.

Finally, the Association asserts that unless the Board is required to schedule make-up days to meet the minimum one hundred eighty days of possible school attendance for pupil instructional services it would stand in violation of the New Jersey Constitution which requires a thorough and efficient system of free public schools, of the New Jersey Supreme Court's series of rulings in Robinson v. Cahill, concluded at 69 N.J. 449 (1976), and of the legislative expression in regard to its mandate at N.J.S.A. 18A:7A-1, et seq for the assurance of a system of thorough and efficient programs of education.

The Board opposes the Association's application for an Order by which it would be required to schedule make-up days on the grounds that the Association itself engaged in an illegal stoppage of work during the period of time controverted herein, that the Association ought to be barred from seeking such relief through the application of the Doctrine of Unclean Hands; that notwithstanding the illegal work stoppage by the Association it did keep its school days open for those teaching staff members and pupils who desired to attend school during that time; that it complied with its responsibility to offer the opportunity for public school instruction to those who elected to take advantage of it; and that between now and June 30, 1979, the close of the 1978-79 academic year, it is impossible to schedule seventeen make-up days as the Association requests.

Finally, the Board moves to dismiss the allegation that it has failed to provide a thorough and efficient program of education on the grounds that such an allegation may not be considered in a summary proceeding as herein. Rather, the Board asserts that an allegation it failed to provide a thorough and efficient program of education must be subject to proofs after the Commissioner himself executes an Order to Show Cause against it in the manner prescribed at N.J.S.A. 18A:7A-1, et seq.

The Commissioner agrees with the Board that a summary proceeding is an inappropriate manner in which to consider an allegation of failure to provide a thorough and efficient program

of education. Consequently, the Association's complaint with respect to whether the Board provided a thorough and efficient program of education for 1978-79 is dismissed.

The Commissioner will address the association's prayer for relief compared to the number of days the Board is now scheduled to keep its schools open for instruction for 1978-79 in light of data submitted by the Camden County Superintendent of Schools. (C-1) These data, compiled through the principals of each of the Camden schools, sets forth the numbers of pupils in attendance, the numbers of teaching staff members who reported to their responsibilities, and the hours the schools were open for each of the seventeen days in question.

The data discloses that of the Board's thirty one schools, four were kept open each day a minimum of four hours albeit with minimal pupil and teacher attendance. Five schools were kept open a minimum four hours per day for thirteen of the seventeen days, two schools were kept open the minimum time for fourteen of the seventeen days, twelve schools were kept open for fifteen of the seventeen days, while the remaining eight schools were kept open the minimum time for sixteen of the seventeen days. It is noticed that in each of the instances that the schools were kept open during the seventeen day period, pupil and teacher attendance was negligible.

The Commissioner observes that N.J.S.A. 18A:58-16 provides that state aid shall not be provided to any district which has not provided public school facilities for at least one hundred eighty days. N.J.A.C. 6:20-1.3 defines a school day as a day in which the school is open and pupils are under the guidance and direction of a teacher engaged in the teaching process. The rule also provides that a school day shall consist of not less than four hours of actual school work.

In the Commissioner's judgment, and absent any proof to the contrary, the Board in the circumstance herein made an effort to comply with N.J.S.A. 18A:58-16 and N.J.A.C. 6:20-1.3 during the controverted period of time by requiring its schools to be kept open a minimum period of four hours per day. That the pupils or its teaching staff members elected not to attend to their duties and responsibilities during that period of time cannot inure to the detriment of the Board.

Thus, the Commissioner finds and determines that the Board's schools were kept open during the period October 6 to November 1, 1978 for a minimum four hour per day. Accordingly, any relief to be granted the Association would be limited to those days the individual schools were not kept open a minimum period of four hours per day.

The Board's existing school calendar for 1978-79 provides one hundred eighty two days for pupils, including the controverted seventeen days. Three days were used for inclement weather. The Board added one day to reach one hundred eighty days according to its existing calendar and counted the seventeen days as days in session. The fact is that pupils will now be in attendance until June 22, 1979. (C-3) (Tr. 41-42) Thus, any make-up days would have to be scheduled for the last week of June, namely June 25, 26, 27, 28, or 29.

The Board, however, pursuant to N.J.S.A. 18A:58-16, applied for a waiver of the one hundred eighty day requirement at the time of oral argument should it be determined that any of its schools were not properly in session on any of the days controverted herein.

The Commissioner, under the total circumstance of the matter herein, can discern no reason why the Board should not be granted a waiver for those schools which were kept open for less than the minimum four hours per day. The Board did not, of its own action, close its school doors or suspend its school program. The Board did what it could under the circumstance to keep its schools open, and the record shows no clear evidence that the total school program offered during this 1978-79 school year was inadequate.

The Commissioner of Education hereby denies the Association's requested relief and the Petition of Appeal is dismissed. The Commissioner also, pursuant to his authority at N.J.S.A. 18A:58-16, for good cause shown, grants the Board of Education of the City of Camden a waiver of the one hundred eighty school day requirement.

COMMISSIONER OF EDUCATION

May 30, 1979

CAMDEN EDUCATION ASSOCIATION,	:	
PETITIONER-APPELLANT,	:	STATE BOARD OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	
RESPONDENT-APPELLEE.	:	
	:	

Decided by the Commissioner of Education, May 30, 1979

For the Petitioner-Appellant, Joel S. Selikoff, Esq.

For the Respondent-Appellee, Murray, Granello & Kenny (Malachi J. Kenny, Esq., of Counsel)

The State Board of Education affirms the Commissioner's decision.

June 22, 1979

JEANNETTE A. WILLIAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

For the Petitioner, Rothbard, Harris & Oxfeld (Emil Oxfeld, Esq., of Counsel)

For the Respondent, King and King (Victor E.D. King, Esq., of Counsel)

Petitioner, a tenured teaching staff member employed as a high school principal to the month of February 1976 by the Board of Education of the City of Plainfield, hereinafter "Board," alleges she was transferred illegally during that month and on one occasion thereafter and that the Board's actions constitute harassment and discrimination against her in violation of her tenured status. She requests reinstatement in the position of high school principal and a restoration of all the emoluments to which she is entitled. The Board admits that petitioner was transferred on two occasions but denies that such transfers were illegal and maintains that the actions challenged herein by petitioner were taken within its statutory authority and are entitled to a presumption of correctness. It requests the Commissioner of Education to dismiss the Petition of Appeal with prejudice.

A hearing was conducted by a hearing examiner appointed by the Commissioner at the office of the Union County Superintendent of Schools on June 14, 1977 and continued on August 16 and 18, 1977. Thirty-three exhibits were admitted in evidence at the hearing. Counsel have filed Briefs. Brief submission was completed on December 1, 1977. The report of the hearing examiner is as follows:

Petitioner was first employed on February 1, 1972 by the Board as high school principal and attained tenure in such position pursuant to law on the date of February 2, 1975. Thereafter she continued in the position of high school principal through the date of February 22, 1976 (Tr. I-5), but on February 23, 1976 she was transferred to a position in the school district's central office. (Tr. I-7) This position, which petitioner testified she later learned was one entitled "administrative assistant," continued as the position of her assignment until September 1, 1976 when she was transferred to a

position of elementary school principal. She testified she first learned of this latter transfer in a conversation with the Superintendent on June 18, 1976. (Tr. I-11) She has continued in the position of elementary principal to the present day.

Such basic facts with respect to petitioner's transfer are not challenged by the Board. The challenge herein arises from petitioner's contention that the transfers were effected arbitrarily and without proper notice and that the Board's actions with respect to her assignments constitute a penalty without the preferment of charges. She avers that such penalty is contrary to law. N.J.S.A. 18A:6-10 et seq. In practical effect she maintains that her present assignment to a lesser salaried position, on a ten month rather than a twelve month basis, is a demotion which the Board is not authorized to impose. She also questions the propriety of the assignment, in terms of certification, since she avers she possesses only a secondary principal's certificate and is assigned as principal of an elementary school. (Tr. I-30) The testimony of petitioner, the Superintendent, and Assistant Superintendent and the documentation contained in the record will now be examined.

Petitioner testified that in February 1976 she had requested and received an appointment time to meet with the Superintendent. She said she had intended to discuss a purported meeting the Superintendent had had with high school staff members, but without her attendance as principal, to review high school conditions. (Tr. I-6-7) She testified that to her surprise the Superintendent told her at the beginning of their conference that she was to be transferred the following day to the school district's central office. (Tr. I-7) She said she had had no prior knowledge of a transfer and had no idea what her new position would be. She testified that to the best of her knowledge there was no job vacancy in the central office. She testified she was in a "state of shock" at the Superintendent's announcement but did report to the central office about a week later. (Tr. I-8) She testified she subsequently learned the new position was that of "administrative assistant" and that while serving in this position she continued to receive the same $32,560 salary she had received as high school principal. She testified that in both of these positions she was a twelve month employee. (Tr. I-9) She testified that her duties in the new position were those of an assistant to the Superintendent and to Assistant Superintendents. (Tr. I-10) She testified she was the only woman administrator in the central office. (Tr. I-11) She testified there had been no preferment of charges against her prior to transfer.

Petitioner's employment as principal of the Emerson Elementary School began the following September and she testified her salary remained the same as that of the prior year. She testified that this position is a ten month assignment and that she is uncertain of the term of her future employment. (Tr. I-14) She testified that her salary entitlement as high

school principal for the 1976-77 year would have been approximately $34,000. (Tr. I-34)

The Superintendent testified that he had been newly appointed to his position in July 1975 and had requested that Board to apprise him of its collective view of the needs of the school system. He said that in the Board's response to his request there were many expressions of "concern" about the operation of the Plainfield High School. (Tr. III-28) He testified that as a result he had visited the high school several times a week in the fall of 1975, met with petitioner on a weekly or biweekly basis during that period and on January 9, 1976 wrote a letter (R-12) to petitioner wherein he detailed a phased plan of action for change at the high school. (Tr. III-28-29) He testified that according to his recommendation phase one of the plan was to be completed by February 1, 1976 and phase two was to be completed later in the year. (Tr. III-30) He testified that he continued to visit the high school during the period January 9 - February 23, 1976 and conferred with an Assistant Superintendent of Schools about monitoring reports the Assistant Superintendent wrote on February 6, 20 and 23. (Tr. III-33) The Superintendent testified he then decided that in the "best interest" of the school system petitioner should be transferred and scheduled a meeting with her on February 23, 1976 to tell her. (Tr. III-34) The Board then approved his recommendation to this effect on February 25, 1976 and again by formal resolution on March 16, 1976. (See Tr. III-36, 65 and R-14-15.) The Superintendent testified that the position of "administrative assistant" had existed prior to February 1976 but had been vacant for a period of time. He further testified that there was a job description for it which was later revised. (Tr. III-43, 59; R-15) He admitted that at the time of petitioner's transfer to the position there was no specific budget allocation for it and that he had had no prior approval from the Board to fill it. (Tr. III-62) The Superintendent testified that there was no specific certificate requirement or possible coverage for the position of administrative assistant in rules of the State Board but he testified that in his opinion the transfer was educationally sound (Tr. III-49) and that petitioner was qualified to carry out the educational tasks assigned her. (Tr. III-43)

The Assistant Superintendent was assigned by the Superintendent to monitor the work of the high school staff and petitioner in efforts to comply with the Superintendent's letter to petitioner of January 9, 1976. (R-12) He testified that as a result of such assignment he visited the high school two or three times a week in the period January 9 - February 23, 1976, conferred with petitioner, and wrote three reports to the Superintendent which contained his observations. (Tr. II-9) These reports, R-9, 10, 11 were lengthy recitals of observations, and contained both complementary and critical statements. They were forwarded by the Assistant Superintendent to the Superintendent on February 6, 20 and 23, 1976, and the last of

the three reports set forth an opinion that"***new leadership would be necessary***" at the high school. (Tr. II-11) The Assistant Superintendent testified that this recommendation was grounded in

> "***a multitude of reasons***. ***The need for the cooperation of the faculty itself was essential in order to bring off this particular operation, and that cooperation was not forthcoming.***" (Tr. II-11)

It may be noted here that the testimony of the Assistant Superintendent was concerned in large measure with the criticisms contained in his reports (R-9-11) of the operation of the high school. Such criticisms, recited in part, were that faculty meetings were not started on time, that responsibility was not properly delegated, that there was need for a greater effort to improve pupil attendance, or that meeting agendas were not distributed prior to the time of meeting, etc. There was extensive cross-examination with respect to all such criticisms which petitioner categorizes as "charges." She avers that as a result of such "charges" she suffered, in effect, "***a reduction in salary by a change in expectancy and category, and without any [preferment of] charges or proper disciplinary proceedings.***" (Petitioner's Brief, at p. 9)

The hearing examiner concludes, however, that no finding of fact on the merits of the criticisms of petitioner, or "charges," is required in this report. Petitioner has not been the subject of proceedings under the Tenure Employees Hearing Law. (N.J.S.A. 18A:6-10 et seq.) Neither has a salary increment been withheld, which action would be appealable to the Commissioner on its merits (N.J.S.A. 18A:29-14), although her controverted transfer is one to an administrative position with a lesser salary maximum. This lower maximum results from the application of a lower ratio to the applicable teacher salary guide (1.7 as high school principal v. 1.4 as elementary principal) but there is no contention herein that, if the transfers are held to be legal, petitioner is presently being paid less than the salary specified for an elementary principal with her years of training and experience.

The finding of fact that is required is concerned, as petitioner correctly states it, with the legality and propriety of two transfers, one to a position for which there was and is no recognized certificate and the other to a position with a ten month, rather than a twelve month, year and with a lesser salary potential. (Tr. I-30)

Petitioner avers that the initial transfer to the position of administrative assistant "***was not ordered by the Board, and its ratification [was] clumsily bungled.***" (Petitioner's Brief, at p. 4) She also avers that the position of administrative assistant was "non-existent" at the time of her

transfer to fill it and that such a transfer is a violation of the Tenure Law. N.J.S.A. 18A:28-1 et seq. In this request she cites Marjorie S. Payne v. Board of Education of the Village of Ridgewood, Bergen County, 1976 S.L.D. _____ (decided June 16, 1976) wherein there had been a transfer of a teaching staff member to the position of substitute teacher, a position not equated as equal. Petitioner also cites George Gamvas v. Board of Education of Lakewood, Ocean County, 1976 S.L.D. _____ (decided May 4, 1976) in support of an avowal that "***one may not be transferred to a position with lesser expectancy, where the tenured position from which the person is transferred continues to exist.***" (Petitioner's Brief, at p. 7)

The Board maintains that its actions to transfer petitioner were within its discretionary authority and, absent evidence of gross abuse, may not be set aside by the Commissioner. It further maintains that petitioner has failed to show that the Board has acted illegally and that petitioner is not entitled to continue to receive compensation payable to a high school principal while assigned an elementary school responsibility.

The hearing examiner has reviewed all such arguments and the total record in this matter and concludes that it is necessary to consider the two transfers of petitioner here in question seriatim.

The principal facts with respect to the first transfer of petitioner are not in dispute. It was made, in effect, by the Superintendent as an administrative action on February 23, 1976 without prior notice to petitioner or prior approval by the Board. The transfer was from the recognized position of Plainfield High School principal to the position titled administrative assistant to the Superintendent, a position not covered by certification requirements of the State Board of Examiners. Subsequently on February 25 and on March 16, 1976 the Board ratified the action of transfer, with no reduction in compensation to petitioner. The question for determination is whether such transfer was a legal exercise of discretion by the Board.

The hearing examiner finds that the transfer was procedurally faulty since N.J.S.A. 18A:25-1 clearly provides that:

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

No such roll call vote was ever taken prior to the time of the Superintendent's action of February 23, 1976 but was taken subsequent thereto. Thus, while there was clear procedural fault, actions of ratification similar to that herein have been

ruled to be valid in the past. Gregory Cordano v. Board of Education of the City of Weehawken, 1974 S.L.D. 316, dis. State Board of Education 323 (for failure to perfect the appeal) The hearing examiner finds similarly herein. He further finds that the assignment to an unrecognized position is not proscribed by rules of the State Board of Education (N.J.A.C. 6) contrary to the Tenure Act (N.J.S.A. 18A:28) if the position is adjudged comparable. The rule of the State Board at issue and in effect in February 1976 is N.J.A.C. 6:11-10.5 which provides:

> "(a) School districts are urged to assign to administrative or supervisory personnel titles that are recognized in these regulations. If the use of unrecognized titles is necessary, a job description should be formulated and submitted to the county superintendent of schools in advance of the appointment, on the basis of which a determination will be made of the appropriate certificate for the position." (Emphasis supplied.)

Thus, the rule has clearly envisioned the possibility of "unrecognized titles." The Commissioner has determined that the performance of duties in positions with unrecognized titles is, if of a professional nature, countable toward tenure accrual as a "teaching staff member" as defined in law. N.J.S.A. 18A:1-1 Michael Keane v. Board of Education of the Flemington-Raritan Regional School District, 1970 S.L.D. 162, 176 Accordingly, in the context of the fact that petitioner was not reduced in salary while assigned as an administrative assistant, the hearing examiner finds the assignment not improper or illegal. He finds no reason, absent proofs that the Board acted to transfer petitioner for a proscribed reason, i.e., race, the exercise of religion, sex discrimination, etc., and there are no such proofs herein, to consider the Board's motivation or cause for the action of transfer to a comparable position is not a demotion or a dismissal. Lascari v. Board of Education of the Borough of Lodi, 36 N.J. Super. 426 (App. Div. 1955)

There remains the assignment of petitioner in June 1976 to the position of elementary principal. It may be noted initially in this regard that petitioner, as recited ante, maintained at the hearing and states in her Brief, that she was not qualified by training or experience to hold such a position. She testified specifically:

> "***I am not certified as an elementary school teacher, or administrator. My certificate reads secondary administration, secondary school teacher. So, I feel that I was being transferred to a position for which I did not study.***" (Tr. I-30)

And

> "***[M]y background is such that it is specifically secondary***." (Tr. I-31)

If such statement were true, it would be clear that petitioner has been, and is, assigned to a position covered by a specific certificate which she is not qualified to fill. It would be equally clear that the assignment and its approval by the County Superintendent would be required to be rescinded.

The hearing examiner has determined, however, that the testimony and the avowals in this respect represent less than the whole truth of the matter, since in October 1970 petitioner was issued the School Administrator's Certificate through the Essex County Office by the State Board of Examiners and such certificate is on file with the Union County Superintendent of Schools. This certificate is

> "***required for the position of superintendent of schools. The holder of this endorsement may also serve as assistant superintendent of schools, principal, or supervisor." (N.J.A.C. 6:11-10.4(a)) (Emphasis supplied.)

Indeed this certificate is the one of greatest rank among administrative certificates and requires professional education concerned with all levels of the educational program. Accordingly, petitioner is qualified for the position of elementary principal despite the avowals in this regard. The hearing examiner so finds.

The hearing examiner finds further that for the reasons expressed in Dominick DiNunzio v. Board of Education of the Township of Pemberton, Burlington County, 1977 S.L.D. ___ (decided January 21, 1977) the assignment is not inappropriate. In DiNunzio, as herein petitioner had been a high school principal who was later assigned as an administrative assistant and then as an elementary principal. He possessed, as does petitioner in the instant matter, a secondary principal's certificate and a certificate as school administrator. At the time of his transfer to the position of administrative assistant, DiNunzio's salary was reduced. The Commissioner considered all such facts and determined that he was entitled while serving in the position of administrative assistant to be compensated at the "***high school principal's rate***" but that subsequent to his transfer to an elementary principalship he was entitled only to compensation at the appropriate level of the elementary principal's salary guide except that his salary could "***not be reduced by the Board.***" The Commissioner cited N.J.S.A. 18A:29-4.1 in support of this latter determination. This statute provides that local boards of education may adopt budgets containing funds which are adequate to fund salary policies and

schedules for that budget year. (It should also be noted that N.J.S.A. 18A:28, Tenure, provides that the salary of tenure teaching staff members may not be reduced except as provided in the Tenure Employees Hearing Law. (N.J.S.A. 18A:6-10)

The facts of the instant matter are almost identical to those of DiNunzio, supra, except that petitioner herein did not suffer a reduction in salary at the time of her transfer to the position of administrative assistant and so no salary restoration for the time she spent in that position is required. Similarly, no salary restoration is required to be made for the time of her service as an elementary principal since the salary she has received for that ten month position exceeds the scheduled amount "***in the elementary principal category***" on the Board's salary guide and since there has been no reduction in the salary she received prior to transfer.

Finally, the hearing examiner distinguishes the facts of the instant matter from those in Gamvas, supra, since in Gamvas there was, in effect, a finding that petitioner had been led to believe at the time of voluntary transfer that a salary ratio would be maintained at a time subsequent to transfer. There is no parallel finding herein but a finding instead that petitioner has been transferred to another comparable position within a specific category and that such a transfer is within the parameter of discretion which may be exercised by the Board.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record of the controverted matter, the report of the hearing examiner and the exceptions filed thereto by petitioner pursuant to N.J.A.C. 6:24-1.17(b). Those exceptions may be succinctly summarized as disagreement with the hearing examiner's findings that petitioner's unilateral transfer to the position of administrative assistant on February 23, 1976 and her subsequent unilateral transfer effective September 1, 1976 to a ten month elementary principalship were within the legal discretionary authority of the Board. Those exceptions are meritorious. The hearing examiner's finding that petitioner's transfers were within the legal discretionary authority of the Board is insupportable, post.

The Superintendent's transfer of petitioner was clearly violative of N.J.S.A. 18A:25-1 since it was without the scope of his jurisdictional authority. Nor did the Board have authority to validate the transfer to a position with an unrecognized title. It was stated, in reference to the interpretation of N.J.A.C. 6:11-10.5 in Samuel E. Appel v. Board of Education of the City of Camden et al., 1975 S.L.D. 562 that:

> "***[T]he Commissioner holds that should in the context of its use in the rule must be interpreted as mandatory whenever an 'unrecognized' title is considered for adoption.***" (Emphasis in text.)
>
> (at 568)

More recently it was stated in Frank J. Morra v. Board of Education of the Township of Jackson, Ocean County, 1979 S.L.D. ____ (decided January 26, 1979) that:

> "***[W]hen the board proceeded to create a position with an unrecognized title, it was under mandate to submit the job description for that position to the County Superintendent in advance of the appointment in order that a determination be made of the certificate required for that position. This the Board did not do, however well intentioned it may have been.***
>
> "Petitioner was transferred to a position without a determination by the County Superintendent upon consultation with the State Board of Examiners of what certificate, if any, was required for that position. It is not possible without that determination to know whether that transfer was a lateral transfer, a demotion, or a promotion to which he did not give his assent. See N.J.S.A.

> 18A:28-6. Unless and until that determination was made utilizing the procedures mandated by the rules of the State Board of Education, the Board's right to transfer him to that position could not be ascertained.
>
> "Accordingly, it is determined that the Board's unilateral transfer of petitioner on July 13, 1977 from his tenured position of high school principal to the position of Director of Community Services was an ultra vires act. It is hereby set aside with the direction that petitioner be restored forthwith to his position as high school principal.
>
> "The Board thereafter may transfer petitioner to a position outside the category of secondary principal only with his assent. If no alternate position in that category exists in the district, the Board's sole alternative recourse to remove petitioner from his tenured position is to proceed, pursuant to N.J.S.A. 18A:6-10 et seq., with tenure charges.***
>
> "The Commissioner is further constrained to caution local boards of education that they should endeavor to utilize recognized titles in staffing their schools. Furthermore, in those instances where a board believes it necessary to establish an unrecognized title, that board must follow the procedures set forth herein prior to appointment of an employee to that position. Appel, supra; N.J.A.C. 6:11-3.6."
>
> (at ____)

In the instant matter petitioner was transferred to a position with an unrecognized title. The record fails to show that a job description had been submitted to the County Superintendent with a request that a determination be made of what certificate, if any, was required for that position. Absent such determination, it could not be known whether the post to which she was transferred was a tenure-eligible position. A certificated tenure employee may not be unilaterally transferred without consent to other than a tenure-eligible position. The Commissioner so holds. Accordingly, it is determined that the transfer of petitioner to a position in which it was not known that she could attain tenure was an ultra vires act.

The Commissioner, similarly, determines that the Board's subsequent unilateral transfer of petitioner over her

protests to a ten month principalship in an elementary school which position had a grossly disproportionate salary expectation was improper and and must be set aside.

N.J.A.C. 6:3-1.10(k) sets forth the categories within which individuals attain seniority rights to continued employment by reason of their years of service as tenured teaching staff members. Therein, high school principal (6) is recognized as a category separate and apart from that of elementary principal (8). N.J.A.C. 6:3-1.10(j) states unequivocally that an individual

> "***shall be entitled to employment in any one or more such categories whenever a vacancy occurs to which his seniority entitles him."

While the hearing examiner has correctly related the historical changes which have occurred in the issuance by the State Board of Examiners of principals' certificates, he has overlooked the essential consideration that individuals gain seniority in the enumerated categories as set forth in the rules of the State Board of Education, ante. It is a fundamental canon of legal interpretation that:

> "***[A] rule of an administrative agency is subject to the same canons of construction and the same constitutional imperatives as is a statute.***" Essex County Welfare Board v. Kline, 149 N.J. Super. 241, 247 (App. Div. 1977)

The instant matter is distinguishable in part from DiNunzio, supra, in that DiNunzio continued to receive substantial annual increments ranging from $800 per year to $3,000 per year and continued to work in a twelve month position, as contrasted to petitioner's transfer, herein, to a ten month assignment.

It is apparent that the Board's transfer of petitioner to a ten month elementary principalship was to a position of lesser expectation since its salary ratio was 1.4 as compared to the 1.7 ratio which pertained to the high school principalship. While the Board has not reduced petitioner's 1975-76 salary, it is apparent that her salary expectation as a ten month elementary principal was grossly disproportionate and that she could anticipate no increments for several years to come. It must be concluded, therefore, that from the important standpoint of salary expectancy the transfer was to a position of lesser expectancy. This is contrary to that which was iterated by the Commissioner in Gamvas, supra, as follows:

> "***[I]f a position continues to exist the tenured holder thereof may not be transferred to a position with lesser expectancy. The Commissioner so holds.
>
> "Accordingly, the Commissioner directs the Board of Education of the Township of Lakewood to compensate petitioner for the difference in compensation between his position and the position from which he was [voluntarily] transferred retroactive to the date when the disparity commenced and to continue the comparability in the future."
> (at 515)

In summary, the Board's unilateral transfers of petitioner were violative of her protected tenure rights not only by reason of failure to follow the directives of the State Board of Education when appointing an individual to a position with an unrecognized title, but also by reason of failure to recognize her tenure and seniority rights to continue and be properly compensated in the position of high school principal.

Accordingly, the Board is directed, forthwith, to reinstate petitioner to her position as high school principal together with any salary increments to which she would have been entitled, pursuant to the Board's salary policies, had she continued to serve in that position.

COMMISSIONER OF EDUCATION

June 1, 1979

Pending State Board of Education

RALPH BOGUSZEWSKI, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF DEMAREST, BERGEN COUNTY, :

DECISION

RESPONDENT. :

:

For the Petitioner, Goldberg & Simon (Theodore M. Simon, Esq., of Counsel)

For the Respondent, Kiefer, Bollermann & Kaplowitz (Christian Bollermann, Esq., of Counsel)

Petitioner, a teaching staff member formerly employed by the Board of Education of the Borough of Demarest, hereinafter "Board," seeks an order from the Commissioner of Education restoring him to his former position. He alleges that the Board's refusal to employ him is violative of his tenure and seniority rights granted by the statutes, Title 18A, Education.

The Board denies petitioner's allegations and states that he has waived any rights he may have had subsequent to a reduction in force by his refusal to accept a part-time position.

A hearing was conducted on August 22, 1977 in the office of the Bergen County Superintendent of Schools before a hearing examiner appointed by the Commissioner. Several documents were submitted in evidence and Briefs were filed after the hearing. The report of the hearing examiner follows:

Petitioner was employed for seventeen years, beginning September 1958, as a full-time teacher of music in grades one through eight. His certification is in music instruction and he conducted an instrumental program, the school band and chorus. (Tr. 1-3)

At a special meeting held April 23, 1975, the Board adopted a resolution which abolished seven full and/or part-time teaching positions for reasons of economy. One of these positions was petitioner's music position. (P-1B) He was notified by letter dated April 24, 1975. (P-1A)

Petitioner found a new position and signed a contract on June 26, 1975 as a full-time teacher in the employ of the Board of Education of Woodcliff Lake at a salary of $15,000 per annum. (P-2) Thereafter, by letter dated August 13, 1975, petitioner was notified by the Demarest Board that .6 of his former position had been restored and because petitioner held tenure and seniority rights in the district he was entitled to the new position at a salary of $11,340. (P-3)

On August 20, 1975 petitioner notified the Board as follows:

> "In reply to your letter of August 13, 1975, I would like to state that I cannot accept your offer for a part-time music position in the Demarest district at this time, since I am a breadwinner.
>
> "However, if the full-time position is reinstated, I could reconsider."
> (Emphasis in text.) (P-4)

When his employment terminated with the Woodcliff Lake Board, petitioner notified the Demarest Board on July 9, 1976 that he was available to resume his teaching duties. (P-5; Tr. 8-10) Petitioner was not employed by either Board for the 1976-77 school year. (Tr. 10)

By letter of February 3, 1977, petitioner demanded reinstatement in the .6 music position stating that he held tenure and seniority rights in his former position. (P-6; Tr. 11-12) The Board denied this request on February 10, 1977 stating that petitioner had waived his rights by declining employment in the .6 position offered to him in August 1975. (P-7)

The hearing examiner finds in the testimony and the facts presented that the resolution of the instant dispute is a matter of law and rules promulgated by the State Board of Education regarding reduction in force and seniority rights. The question stated in another way is:

Pursuant to tenure and seniority rights, may petitioner whose position has been abolished reject the Board's later offer of part-time employment because he has acquired a full-time position elsewhere, then demand reinstatement a year later after his new employment is terminated?

There is no question of petitioner's tenure status as of June 1975 or the abolishment of his position by the Board. (P-1B) The relevant statute regarding tenure teachers' rights under that circumstance reads as follows:

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

> "Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils *** or for other good cause***."

The hearing examiner finds that the Board's action abolishing petitioner's position was made in good faith. (P-1B) Nothing in the record indicates otherwise. When a teaching staff member's position has been abolished the staff member is entitled to be placed on a preferred eligibility list on the basis of his/her seniority and reemployed when a vacancy occurs. In that regard, the relevant statute reads in pertinent part:

N.J.S.A. 18A:28-12

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

In the instant matter petitioner was offered a part-time position in August 1975 because he held seniority. (P-3) He refused that offer for his own personal reasons and the Board appointed the next eligible teacher. The Board's defense is that petitioner waived his rights by refusing the part-time position.

Petitioner concedes that "***no waiver can be established except as to the 1975-76 school year only.***" (Emphasis added.) (Petitioner's Brief, at p. 10) He states further that "***[i]t would be the height of injustice to rule that the letter [declining the part-time position] destroyed petitioner's rights *** for all time.***" (Id., at p. 11)

In the hearing examiner's judgment, petitioner waived his rights to tenure and seniority in the .6 music position by refusing that position which was offered by the Board. Although the statutes clearly establish a procedure which protects the employment rights of teaching staff members, such persons may not

decline that protection because of a more lucrative job offer, then later lay claim to seniority rights when the new position is terminated. This contention portends a convolution of the relevant statutes and if interpreted by petitioner's logic would allow a teaching staff member to forever opt between his alleged tenure entitlement and a more lucrative position, returning to his old position only when all other job opportunities have been exhausted. (Tr. 8, 10)

It is unfortunate that petitioner had to choose between a new position at $15,000 and his tenured entitlement, part-time, at $11,340. Nevertheless, this was the decision he had to make and, as a result, he waived his tenure to the .6 position just as surely as if he had resigned his position.

Black's Law Dictionary 1751 (rev. 4th ed. 1968) defines waiver as follows:

> "The intentional or voluntary relinquishment of a known right *** or such conduct as warrants an inference of the relinquishment of such right***. The renunciation, repudiation, abandonment, or surrender of some claim, right, privilege, or of the opportunity to take advantage of some defect, irregularity, or wrong.***"

See also Adele Vexler v. Board of Education of the Borough of Red Bank, Monmouth County, 1977 S.L.D. 625; Josephine DeSimone v. Board of Education of the Borough of Fairview, 1966 S.L.D. 43.

Although petitioner has waived his right to the .6 position, he must remain on a preferred eligibility list for the full-time music position and be offered such position in the event that it is reestablished by the Board. N.J.S.A. 18A:28-12 This procedure, authorized by statute, ante, will avoid the possible evil of creating a part-time position as a ruse utilized to eliminate a teacher only to reestablish the position after the teacher has accepted employment elsewhere.

For the above reasons the hearing examiner finds that petitioner waived his tenure and seniority rights to the .6 music position. Accordingly, and except for the relief described if a full-time music position is reestablished, the hearing examiner recommends that the Petition of Appeal be dismissed.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the letter memorandum exceptions filed by petitioner pursuant to N.J.A.C. 6:24-1.17(b).

The Commissioner finds nothing in the exceptions to alter the conclusions of law and the ultimate recommendation of the hearing examiner. As a result, the Commissioner adopts the report and conclusions of the hearing examiner as his own. Although petitioner rejected the part-time position offered him by letter date August 13, 1975, he notified the Board on August 20, 1975, that he "could reconsider" if the full time position were reinstated. (P-4) In this regard, he waived his right to tenure and seniority in the .6 music position.

As earlier determined, petitioner remains on a preferred eligibility list for the full-time music position. In all other respects, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

June 6, 1979

MARJORIE A. LAVIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HACKENSACK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

For the Petitioner, Goldberg & Simon (Gerald M. Goldberg, Esq., of Counsel)

For the Respondent, E. Gerard McGovern, Esq.

Petitioner, a tenured teaching staff member first employed in September 1968 by the Board of Education of the Borough of Hackensack, hereinafter "Board," alleges that the Board has failed and refused to give recognition on the salary scale for the military service credit to which she is entitled under N.J.S.A. 18A:29-11.

The Board avers that petitioner's claim is barred by the Statute of Limitations and that she is barred from relief because of laches.

A conference of counsel was held on October 18, 1978 at which time it was agreed that the matter would be briefed and submitted to the Commissioner of Education for Summary Judgment.

The military service of petitioner totals two years, nine months and nineteen days, which has not been credited to petitioner on respondent's salary scale.

The Commissioner observes that N.J.S.A. 18A:29-11 reads in pertinent part as follows:

> "Every member who, after July 1, 1940, has served or hereafter shall serve, in the active military or naval service of the United States *** shall be entitled to receive equivalent years of employment credit for such service as if he had been employed for the same period of time in some publicly owned and operated college, school or institution of learning in this or any other state or territory of the United States, except

> that the period of such service shall not be credited toward more than four employment or adjustment increments.***"

The Court considered this statute in Howard J. Whidden, Jr. v. Board of Education of the City of Paterson, 1976 S.L.D. 356, modified Docket No. A-3305-75 New Jersey Superior Court, Appellate Division, January 28, 1977 (1977 S.L.D. 1312), and determined that the word "shall" as contained therein mandated that military service credit must be awarded to a maximum of four years at the time of employment.

Subsequent to the Court decision in Whidden, supra, the Commissioner held in Michael J. Watsula v. Board of Education of the Township of Plumsted, Ocean County, 1977 S.L.D. 692 and reiterated in Lester Bernardo v. Board of Education of the Township of Ewing, Mercer County, 1978 S.L.D. ___ (decided July 28, 1978):

> "***The words of the Court are clear and the Commissioner holds that all teaching staff members who have served in the armed forces are entitled to count the years of such service to a maximum of four years for employment increments within the scope of the Board's adopted salary schedule.***"
>
> (at ____)

The Commissioner determines, therefore, that petitioner is not barred by the equitable defense of laches or the statute of limitations from advancing the instant claim. As was stated in Whidden, supra:

> "***The determination***is grounded in the nature of the claim and in a judgment that the Board has not been prejudiced. This is not a case wherein a decision in favor of petitioner will result in the payment of two salaries for one position by the Board as the result of petitioner's delay. (See William Gleason v. Board of Education of the City of Bayonne, 1938 S.L.D. 138.) It is a case in which it is alleged that a statutory entitlement to placement on or movement within an adopted salary schedule was ignored.***"
>
> (at 359)

The Court also said that:

> "*** In construing a statute, full force and effect must be given, if possible, to every

> word, clause and sentence. State v. Canola, 135 N.J. Super. 224, 235 (App. Div. 1975), certif. den. 69 N.J. 22 (1975). A construction that will render any part of a statute inoperative, superfluous or meaningless is to be avoided. State v. Sperry & Hutchinson Co., 23 N.J. 38, 46 (1956); Hoffman v. Hock, 8 N.J. 397, 406-407 (1952).***"

And,

> "***N.J.S.A. 18A:29-9 authorizes a school district to place a newly employed teacher at an initial place on the salary schedule as may be agreed upon between the member and the employing board of education. Nothing in the language of that section, however, suggests that the Legislature intended to authorize a waiver of or a departure from the requirement of N.J.S.A. 18A:29-11 that credit be given for military service. See Bd. of Ed. of Englewood v. Englewood Teachers, 64 N.J. 1, 7 (1973).***"
>
> (Emphasis added.) (at __)

The Commissioner determines that the Board illegally denied petitioner entitlement established by the Legislature when it failed to grant her salary credit for her military service.

The Commissioner must now address a concomitant issue in the instant matter. Petitioner has two years, nine months and nineteen days of military service. Is she entitled to two or three years of credit on the salary guide?

In a matter concerning a teacher's leave of absence for military service and a board's obligation to "re-hire" said teacher upon his or her application for employment after discharge from military service, the Commissioner did indeed express applicable impressions as follows:

> "***The legislative intent in New Jersey to protect the veteran is thus clearly expressed and unambiguous and a direct parallel to the expressed intent of the U.S. Congress. Both the Federal and State laws rest, in the Commissioner's judgment, on the premise that the basic freedoms which we in the United States enjoy were not idly won or easily preserved and that those who have won them or helped to preserve them should not be penalized, but rewarded, for their deeds. Consequently, the Commissioner believes that

> disputes such as the matter herein controverted should be adjusted and adjudged in a spirit of 'fair play.'***" (See Donald P. Boublis v. Board of Education of the Borough of Hawthorne, 1973 S.L.D. 417, 426.)

In the interest of fair play the Commissioner cannot justify penalizing a teaching staff member for all military service that falls short of a full year, which could be eleven months and twenty seven days. There is similar concern in forcing a Board to grant salary credit for a year of military service not fully earned. The Commissioner envisions insignificant disagreement in denying one year of salary credit for one day of military service or granting one year of salary credit for military service of one day short of a full year. But where is the line to be drawn?

The Commissioner believes that the whole number concept has been and is accepted by society in the American way of life. It has been and is in practice in many forms, perhaps most noteworthy by our State and Federal Income Tax Services.

It is the Commissioner's determination that military service of six months or more shall be construed to be one year of salary credit. Conversely, military service of less than six months shall not be recognized.

The Board is hereby directed to adjust petitioner's placement on the salary guide by granting credit for three years of military service and is further directed to compensate petitioner forthwith for back salaries due her in the amount of $20,575.

COMMISSIONER OF EDUCATION

June 6, 1979

Pending State Board of Education

LUCILLE CHAUMP,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF BELLEVILLE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

For the Petitioner, Goldberg & Simon
(Gerald Goldberg, Esq., of Counsel)

For the Respondent, Gaccione, Pomaco, Patton & Beck
(Frank Pomaco, Esq., of Counsel)

Petitioner, a regularly employed full-time teacher, alleges an improper placement on the salary guide by the Board of Education of the Town of Belleville, hereinafter "Board," and that said action was violative of N.J.S.A. 18A:29-5 et seq. in requesting the Commissioner of Education to order the proper placement and salary adjustment and reimbursement. The Board avers that its action was proper and legal and consistent with previous practice.

A conference of counsel was held on November 2, 1978 at which time counsel agreed to submit the matter directly to the Commissioner for Summary Judgment as no essential facts were in dispute. The Commissioner has carefully reviewed the entire record, including the pleadings and Briefs of the parties.

The uncontested facts in this controverted matter follow:

Petitioner was initially employed by respondent to teach half days for the 1974-75 school year and was compensated at one half the salary in effect at Step 1 of the salary guide. She was reemployed to teach half-days for the 1975-76 school year and was also compensated at one half the salary in effect at Step 2 of the salary guide. Petitioner was again reemployed to teach half days for the 1976-77 school year and again compensated at one half the salary in effect at Step 3 of the salary guide. During the 1976-77 school year the teaching status of petitioner was changed to full time and she received the full salary in effect at Step 3 of the salary guide for the remainder of the year.

Petitioner was reemployed as a full-time teacher for the 1977-78 school year, which represented her fourth contract and fourth year of employment as a teaching staff member in respondent's school district. The controverted matter was triggered by the placement of petitioner on Step 3 of the salary guide for 1977-78. The Board's rationale for this action was the granting of one year's credit on the salary guide for the two years she had taught half days which was based on the Board's previously established practice.

A review of the Board's past practice reveals a single occasion when the Board acted in a similar instance. That occasion involved a teacher who had taught full time for four years and had attained placement on Step 4 of the salary guide for her fourth year of employment. The status of employment then changed to half day teaching for the next three years and the teacher was compensated at one half the salary in effect at Steps 5, 6 and 7. The status of employment reverted to full time for her eighth year of teaching. She was then compensated at the full salary in effect at Step 6 of the salary guide on the basis of Board action granting her one and one half years' salary credit for her three years of half day teaching. The Commissioner notices the absence in the pleadings and Briefs of any reference to the propriety of the Board's action in the matter having been contested.

The Commissioner is compelled to refer to the laws of this State and interpret the intendment of the Legislature.

The statutes that relate to the instant matter provide, in pertinent part, as follows:

> N.J.S.A. 18A:29-4.1
>
> "A board of education of any district may adopt a salary policy, including salary schedules***." (Emphasis added.)
>
> N.J.S.A. 18A:29-6
>
> "'Year of employment' shall mean employment by a member for one academic year in any publicly owned and operated college, school or other institution of learning for one academic year in this or any other state or territory of the United States***."
>
> N.J.S.A. 18A:29-8
>
> "Any member holding office, position or employment in any school district of this state, shall be entitled annually to an

> employment increment until he shall have reached the maximum salary provided in the appropriate training level column in the preceding section."
>
> N.J.S.A. 18A:29-14
>
> "Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education.***"

In the process of interpreting the statutes and intendment of the Legislature, the Court stated in State v. Canola, 135 N.J.Super. 224, 225 (App. Div. 1975), cert. den. 69 N.J. 82 (1975) that:

> "***[In construing a statute,] full force and effect must be given, if possible, to every word, clause and sentence***."

N.J.S.A. 18A:29-4.1 unquestionably provides the Board the authority to adopt and implement salary policies and schedules. The Commissioner has reviewed the evidentiary documents of salary guides and all policies related thereto during the period of time of the controverted matter and notices the absence of any policy for equating experience credit for salary guide placement of teaching staff members employed for less than a full day.

N.J.S.A. 18A:29-6 provides no reference of equating experience credit for salary guide placement of teaching staff members employed for less than a full day. The Commissioner must conclude therefore that the Legislature had no intention of usurping the authority it granted to local boards in N.J.S.A. 18A:29-4.1.

The Commissioner recognizes that boards of education have the statutory authority to adopt a policy statement equating less than full-time service to appropriate steps on the salary guide. The Board's failure to adopt policy to equate less than full day teaching for salary purposes makes it sequentially necessary to determine if the Board exercised its authority to withhold an increment under N.J.S.A. 18A:29-14. Finding no such proceedings by the Board, the Commissioner determines that N.J.S.A. 18A:29-8 is dispositive.

The Commissioner is constrained to reveal inconsistency in the Board's rationale for its action. The Board indeed placed petitioner on Step 3 of the salary guide after two years of half day teaching and appears to have made no attempt to equate those

two years as one year of salary credit and place petitioner on Step 2 in her third year of teaching half days.

In the absence of dispositive Board policy and in consideration of the Board's inconsistent treatment of petitioner in assigning her to steps on the salary guide, petitioner's Motion for Summary Judgment is granted. The Board of Education is hereby directed to place petitioner on Step 5, forthwith, and to compensate petitioner at her next pay period for salary denied due to improper guide placement since September 1977.

COMMISSIONER OF EDUCATION

June 6, 1979

CHARLES J. LANG,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF PRINCETON REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

For the Petitioner, Ruhlman and Butrym (Cassel R. Ruhlman, Jr., Esq., of Counsel)

For the Respondent, McLaughlin & Cooper (James J. McLaughlin, Esq., of Counsel)

This matter is concerned solely with the applicability of military service in determining the seniority status of a teaching staff member. All essential facts have been stipulated and the controverted matter is submitted to the Commissioner of Education for Summary Judgment by agreement of both parties.

It is noted that the conference of counsel was held on April 6, 1978 at which time a schedule was determined for the submission of Briefs. Petitioner was to submit his Brief within thirty days. Respondent's Brief was due thirty days thereafter. Petitioner's Brief was received on June 27, 1978. On September 12, 1978, counsel for respondent requested and was granted a two week extension for filing his reply Brief, which has not been received to date.

There have been numerous decisions by the Commissioner, State Board of Education and the courts concerning the applicability of military service for salary purposes. There appear to be no decisions relating directly to the applicability of military service for seniority status. The Commissioner will therefore address this Petition as a matter of first impression.

Petitioner has been continuously employed by the respondent Board of Education since the commencement of the 1972-73 school year. Prior to the commencement of such employment, petitioner served in the United States Navy from October 1961 to October 1963, a period of two years. The respondent Board of Education has failed to credit the tenured petitioner with this period of military service in determining his seniority status.

The pertinent statute is N.J.S.A. 18A:28-12 which provides as follows:

> "If any teaching staff member shall be dismissed as a result of such reduction [of force], such person shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified *** and in determining seniority, and in computing length of service for reemployment, full recognition shall be given to previous years of service, and the time of service by any such person in or with the military or naval forces of the United States or of this state, subsequent to September 1, 1940, shall be credited to him as though he had been regularly employed in such a position within the district during the time of such military or naval service." (Emphasis supplied.)

In the judgment of the Commissioner the above statute is clear and unambiguous. See Duke Power Co. v. Edward J. Patten et al., 20 N.J. 42 (1955) and Peterson v. Edison Township Board of Education, 137 N.J. Super. 566 (App. Div. 1975).

In a matter concerning a teacher's leave of absence for military service and a board's obligation to "re-hire" said teacher upon his or her application for employment after discharge from military service, the Commissioner stated the following:

> "***The legislative intent in New Jersey to protect the veteran is thus clearly expressed and unambiguous and a direct parallel to the expressed intent of the U.S. Congress. Both the Federal and State laws rest, in the Commissioner's judgment, on the premise that the basic freedoms which we in the United States enjoy were not idly won or easily preserved and that those who have won them or helped to preserve them should not be penalized, but rewarded, for their deeds. Consequently, the Commissioner believes that disputes such as the matter herein controverted should be adjusted and adjudged in a spirit of 'fair play.'***" (See Donald P. Boublis v. Board of Education of the Borough of Hawthorne, 1973 S.L.D. 417, 426.)

It is clear that a teaching staff member is afforded seniority rights only when a tenure status has been acquired and further that a teacher's right to tenure does not come into being until the precise conditions laid down in N.J.S.A. 18A:28-1 et seq. have been met. See Ahrensfield v. State Board of Education, 126 N.J.L. 543 (E.&A. 1941) and Zimmerman v. Board of Education of Newark, 38 N.J. 65 (1962). In the instant matter petitioner was not entitled to a seniority status until his first day of employment in September 1975 when he acquired a tenure status.

The Commissioner hereby directs the Princeton Regional Board of Education to fix the seniority status of petitioner by adding his two years of military service to his total years of teaching service in respondent's school district since September 1972.

COMMISSIONER OF EDUCATION

June 6, 1979

IN THE MATTER OF THE TENURE :
HEARING OF FRED J. GAUS III, :
SCHOOL DISTRICT OF THE :
TOWNSHIP OF CHESTER, MORRIS :
COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

For the Complainant Board, Schenck, Price, Smith & King
(David B. Rand, Esq., of Counsel)

For the Respondent, Saul R. Alexander, Esq.

Charges that Fred J. Gaus III, a teacher under tenure, hereinafter "respondent," demonstrated conduct unbecoming a teacher were certified to the Commissioner of Education by the Board of Education of the Township of Chester, hereinafter "Board," by resolution of the Board adopted at a public meeting held June 8, 1976. The Board certified that the charges would be sufficient, if true in fact, to warrant dismissal of respondent and suspended him without pay. Respondent moved for dismissal of charges and oral argument was heard before a representative appointed by the Commissioner in Trenton on March 18, 1977. Subsequently a hearing was held in the office of the Morris County Superintendent of Schools on May 24, August 16, November 1 and November 2, 1977. Numerous exhibits were accepted in evidence and Briefs were filed. The report of the hearing examiner follows:

The principal of Bragg School filed a series of charges with the Board against respondent on May 16, 1976 and the Board at a meeting held June 8, 1976, certified the charges and suspended respondent without pay beginning June 9, 1976. The written charges, in pertinent part are summarized as follows:

1. Respondent inflicted corporal punishment on pupils because he:

   1a. choked a girl, February 13, 1974

   1b. pulled hair of pupil, April 14, 1975

   1c. threw a book, striking a pupil on the arm, November 5, 1975

   1d. knocked a pupil against a wall, March 29, 1976

1e. squeezed a pupil's face, causing his lip to bleed, January 9, 1976

1f. seized a pupil by the hair, March 22 and March 23, 1976

2. Respondent engaged in conduct unbecoming a teacher because he:

2a. used vulgarities in addressing a pupil, November 5, 1975

2b. embarrassed a pupil by reference to her use of toilet facilities, November 5, 1975

2c. kicked pupils' desks, November 5, 1975

2d. left his classroom unattended, January 23, 1976

2e. maintained an untidy room and did not change the blackboard display during the school year 1975-76

3. Respondent was insubordinate because he:

3a. failed to teach penmanship and a new handwriting course as directed in November 1975

3b. improperly retained pupil records in his desk and did not take them to the office as directed

3c. left his classroom unattended, January 23, 1976

3d. failed to follow principal's admonishment not to touch pupils

3e. did not properly supervise pupils at the end of the school day and failed to see them safely onto the school buses, March 9, 1976.

Initially the hearing examiner finds that Charges Nos. 2d and 3c, "left his classroom unattended," are one and the same and shall be so considered. He also determines Charge No. 2e, wherein it is alleged that respondent maintained an untidy room and did not change the blackboard display, to be one of inefficiency wherein the Board must comport with N.J.S.A. 18A:6-11. The Board having failed to do so, the hearing examiner

finds that this charge must be dismissed. The hearing examiner will consider the charges seriatim and will accordingly make his recommendations to the Commissioner.

CHARGE NO. 1 - Respondent inflicted corporal punishment on pupils because he:

1a. choked a girl, February 13, 1974

The principal of Bragg School testified that some pupils told him respondent had choked a girl. The principal said that when he asked respondent about the charge the teacher answered that he might have put his hands on them but not as described. The principal testified he warned respondent to keep his hands to himself and to use less threatening voice tones with children. He said he did not pursue the matter with the Superintendent. (Tr. IV-70-71) The Board chose not to call the pupils as witnesses.

Respondent testified that he had reached out and "grabbed" the arms of two girls who had been running down the hall. He stated that he forced them back into line. (Tr. IV-33-35) Respondent admitted he was told not to lay his hands upon pupils. (Tr. IV-36) The hearing examiner finds that respondent did touch the girls but there is no credible evidence in the record to show that he choked a girl or that his action was punitive in nature. The hearing examiner recommends the dismissal of this charge. As the Commissioner said in Evangeline Craze v. Board of Education of Allendale, 1938 S.L.D. 585 (1930), rev'd State Board 587:

> "***It is conceivable that a teacher might lay hands upon a pupil in order to restrain his progress *** without being considered to have inflicted *** corporal punishment***."
> (at 586)

1b. pulled hair of pupil, April 14, 1975

The Board submitted a conference report held between respondent and a deceased principal. (P-3) The Board further submitted a written reprimand to respondent, dated April 23, 1975, referring to his difficulties with discipline and withholding his increment for the school year 1975-76. (P-4)

Respondent testified that he pulled a boy from beneath a table, put him down in a chair and scolded him. (Tr. IV-50)

The hearing examiner observes that there is a direct conflict between the allegations of the conference report prepared by the deceased principal and respondent's testimony regarding the charge that he pulled the hair of a pupil. The Board chose not to call the pupil as a witness. The hearing examiner finds the record inconclusive as to this charge and accordingly recommends its dismissal.

1c. threw a book, striking a pupil on the arm, November 5, 1975

The principal testified initially that respondent tossed a book at a pupil, hitting him in the chest. (Tr. I-109) When questioned on cross examination as to the discrepancy between the charge wherein the allegation was made that the book struck the pupil on the arm, the principal stated there were two separate incidents. (Tr. II-87) The principal testified that the pupil wrote a statement four months after the event wherein he stated "***he threw a *** book at me, it slid on the desk and hit me in the chest.***" (Tr. II-106; P-10) No further explanation of the discrepancy was proffered.

Respondent admitted that he lobbed a book over several empty desks to a boy who did not have the proper text. He stated that the book did not touch the boy, nor had the book been thrown in anger. (Tr. III-98-100) The Board chose not to call the pupil as a witness.

The hearing examiner finds that respondent did throw a book to a pupil but finds the record inconclusive as to the contact of the book with the pupil. He determines that the throwing of the book was neither a prudent nor proper action but was not of a punitive nature and cannot be considered as corporal punishment. He therefore recommends dismissal of this charge.

The principal testified that in March 1976 certain fifth grade pupils came to his office complaining that respondent had caused injury to one of them. He said this was the basis for his knowledge of previous incidents involving other pupils. (Tr. I-90) The principal testified that the pupils came to him as a group and that he listened to them as a group and then decided that each should write his/her version of the specific incidents in sequestration. (Tr. I-97) The hearing examiner observes that the following three charges fall within the time frame thus established.

1d. knocked a pupil against a wall, March 29, 1976

A statement from the pupil involved in the incident reads in pertinent part, "***We were coming in from a fire drill. *** I was going through the double doors. He came rushing through the door. We went through at the same time. He pushed me into the door hand[le].***" (P-7) The Board chose not to call the pupil as a witness.

Respondent testified that when the pupils were marching back into the building from a fire drill he observed two pupils at the head of the line engaged in a fight. He testified that they did not stop fighting when he ordered them to do so. He said he quickly ran into the schoolhouse and inadvertently bumped into a pupil, pushing that pupil against a door frame. (Tr. III-101-102) This testimony of respondent was not refuted by the Board, nor was the pupil called as a witness.

The hearing examiner finds nothing in the record to show that this incident was in any way punitive in nature. Accordingly, it was not corporal punishment. He finds the incident regrettable, but recommends that this charge be dismissed.

1e. squeezed a pupil's face, causing his lip to bleed, January 9, 1976

The principal testified that, at a conference with respondent on March 31, 1976, he advised him that a complaint had been lodged by a pupil that respondent had squeezed the pupil's lip, causing it to bleed. The principal testified that respondent's reaction at that time was neglible, he made no specific response other than a look of astonishment. (Tr. I-100-101) The Board chose not to call the pupil as a witness.

Respondent testified that, because the boy had been misbehaving, he took him into the hallway and while verbally admonishing him respondent said he wagged his finger in the boy's face. He testified that the boy was nervous and rocked (on his feet) and because of this respondent's finger "got him in the lip" whereupon the boy exclaimed, "[Y]ou made my lip bleed." Respondent testified he then "took his lip and pushed up" and determined that the lip was not bleeding. (Tr. III-105-106) The boy did not ask to go to the nurse or principal and his statement of the incident was written in March 1976, more than two months after the incident occurred on January 9, 1976. The hearing examiner finds that respondent's finger did contact the boy's lip and respondent did push the boy's lip up with his fingers without the boy's permission. The hearing examiner finds such conduct unbecoming a teacher and recommends that the Commissioner consider and weigh this charge in context with, and in light of, all other charges.

1f. *** seized a pupil by the hair March 22 and March 23

The principal testified that he did not recall if he had talked with respondent concerning this charge. (Tr. I-102) The written statement of the pupil (P-8) states in pertinent part "I was sitting down doing my work[.] I must have been talking, and then he started pulling my hair and it hurt so I told him to stop it, and the next day he did it again.***" The Board chose not to call the pupil as a witness.

Respondent testified that while talking with a pupil, J.F., the pupil started to walk away and failed to stop when asked to do so. Respondent testified that he placed his hand on the boy's head and J.F. walked from beneath his hand giving J.F. the impression that respondent was pulling his hair. Respondent denied actually pulling the boy's hair and testified that he had not acted in anger nor with any intent to hurt the pupil or punish him. The hearing examiner finds the record inconclusive and accordingly recommends that this charge be dismissed. As the State Board said in Craze, supra:

> "***We are of opinion that what appellant did when she 'pulled' or 'nipped' the hair of Daniel Phair was not 'corporal punishment.' The act was not done with any intent to punish, to inflict pain as a penalty for an infraction, but merely to direct the attention of a pupil; it was no more a battery than if she had put her hand upon the boy's shoulder or upon his head for the same purpose. We are not impressed by the boy's statement 'that it hurt a little while.' What he probably meant was that he felt the slight pull of his hair. For such an act to be unlawful there must be an unlawful intent, and this is absent in the present case. To support a judgment involving such serious consequences to the appellant, the proof against her should be clear, positive and convincing, and we do not believe it is.***"
> (at 588)

CHARGE NO. 2 - Respondent engaged in conduct unbecoming a teacher because he:

2a. used vulgarities in addressing a pupil and

2b. embarrassed a pupil by reference to her use of toilet facilities.

These incidents are combined for consideration because they involve the same pupil on the same date, November 5, 1975. Respondent admitted that he had used the terms "damn" and "hell" in talking with a female pupil and testified that he had also said to the pupil in response to her request to use the lavatory "***you should take your books to the bathroom." (Tr. IV-75, 85-87) The hearing examiner finds such language improper and determines that its usage to a pupil was conduct unbecoming a teacher.

2c. kicked pupils' desks

Respondent admitted that, in order to attract pupils' attention, he kicked on an empty desk. (Tr. III-122) The hearing examiner finds respondent's action to be true, as charged.

2d. left his classroom unattended on January 23, 1976

The principal testified that on January 23, 1976 he observed a fifth grade teacher, Mrs. M., supervising her own room and that of respondent's directly across the corridor. When the principal questioned her for a reason she said respondent had asked her to cover his room while he went to the teachers' room.

The principal said he immediately checked the teachers' room and found respondent there. (Tr. I-153-154) The principal testified that any teacher arrangement regarding pupils had to be approved by the principal as specified in the teachers' manual. (Tr. IV-164) The principal testified that he sent respondent a memorandum indicating that such arrangements could not be made without his permission. (P-20)

Respondent testified that he and a fellow teacher across the hall had agreed that for purposes of supervision they would combine the remainder of their classes when either sex went to physical education classes. He testified that on January 23, 1976, he had felt unwell and had asked the teacher to supervise the remainder of his class to enable him to go to the teachers' room. (Tr. III-123-124)

The hearing examiner finds that respondent did go to the teachers' room on January 23, 1976 as alleged but had asked a fellow teacher to supervise his pupils. The hearing examiner finds that respondent's pupils were not left unattended although he finds that the arrangements made by respondent were not sound classroom procedure. The hearing examiner also finds that respondent had been previously warned about such unauthorized procedure. Accordingly, the hearing examiner finds respondent's action in leaving his classroom on that date to be conduct unbecoming a teacher.

CHARGE NO. 3 - Respondent was insubordinate because he:

3a. failed to teach penmanship and a new handwriting course as directed in November 1975

Respondent testified that he was directed by the principal in November 1975 to use a certain penmanship book. He said he found the new book difficult to use, so he continued using the old one. (Tr. III-130-131) When ordered by the principal in January 1976 to use the new penmanship book, respondent said he did so. (Tr. IV-146)

The Commissioner said In the Matter of the Tenure Hearing of Mary E. Cummings, R.N., School District of the Camden County Vocational and Technical High School, 1974 S.L.D. 323:

> "***Webster's Third New International Dictionary characterizes an insubordinate person variously as mutinous, rebellious, seditious, contumacious, intransigent, persistent, willful, defiant, and unwilling to submit to authority.***" (at 329)

The hearing examiner finds that respondent's behavior did not comport with such terms; rather, he finds that respondent displayed unbecoming conduct by unilaterally deciding to continue the use of an old penmanship book as an easier procedure rather than using the new method of penmanship instruction.

3b. improperly retained pupil records in his desk and did not take them to the office as directed

The principal of Bragg School testified that, on January 13, 1976 he discovered certain pupil referral records which were properly kept in the central office, were in respondent's possession in his classroom. The principal said he directed respondent to bring the records to the office immediately but respondent failed to do so until he sent him a memorandum the following day. (Tr. II-12; P-15)

Respondent testified that he attempted to return the records as requested on January 13, 1976 at about 5:30 p.m. but found the office closed. He stated he therefore locked them in his desk and, not having an opportunity to return them early the following day, he returned them at the end of that school day. (Tr. III-137-138)

The hearing examiner finds this charge to be true in fact in that respondent did not return the records until the day after the principal directed him to do so.

3d. failed to follow principal's admonishment not to touch pupils

The hearing examiner finds that this charge involves matters specifically covered under the various incidents listed under Charge No. 1(a) through (e) and need not be repeated here.

3e. did not properly supervise pupils at the end of the school day and failed to see them safely onto the school buses, March 9, 1976

The principal testified of his concern because respondent did not dismiss pupils on time at the end of the school day and in an orderly manner on March 9, 1976. (Tr. III-150) He stated further that on March 9, 1976 respondent had kept pupils after school without advance notice to parents which caused him to send a memorandum to respondent drawing the matter to his attention. (P-18) Respondent testified that with their parents' prior knowledge and permission he kept three children after school for extra help and put them on late buses. (Tr. IV-3-7) The hearing examiner finds only conflicting testimony concerning this charge and accordingly recommends its dismissal.

For the convenience of the Commissioner the hearing examiner summarizes his findings and recommendations as follows:

He recommends that the Commissioner dismiss all charges of corporal punishment. The hearing examiner finds that the weight of credible evidence produced by the Board, without corroborating testimony from the pupils involved, is insufficient to prove the charges as stated.

He recommends that the Commissioner find respondent guilty of conduct unbecoming a teacher wherein respondent touched a pupil's lip without permission, used improper language in addressing a female pupil and left his class on January 13, 1976 to go to the teachers' room without prior arrangement for approval of the principal.

He recommends that the Commissioner dismiss charges of insubordination 3a, 3c, and 3e for the reasons stated and leaves to the Commissioner the determination of the severity of charge 3b wherein respondent held office records in his possession for a day after being requested by the principal to return them.

To assist the Commissioner in his adjudication of this matter the hearing examiner sets down the following information. On February 23, 1975 the principal of Dickerson School where respondent was then assigned, in his evaluation of him stated, "***I have discussed with him the areas he needs to improve in. He is very accepting of suggestions and recommendations and I feel refinement and improvement will take place. [He] is a fine man who is interested in children." (R-6) On November 6 and on December 8, 1975 in observation lessons of respondent by the principal of Bragg School every item in the principal's report of respondent received the top rating of "good." (R-8-9) In March 1976 certain fifth grade pupils came to the principal of Bragg School with complaints about respondent. The principal, on April 5, 1976 wrote of respondent as follows:

> "I request that any contractual increments be denied [respondent], for I have not seen satisfactory progress to warrant such consideration. I request his mental and physical health be checked before we continue employment. I would be willing to provide student documentation on the charges of corporal punishment." (R-10)

There is nothing in the record to show that the Board had respondent examined by any medical authority.

The hearing examiner recommends that the Commissioner give consideration to the relative severity of the charges found to be true in fact. Accordingly, he further recommends that the Commissioner find the charges as supported by the evidence to be of insufficient nature to warrant the dismissal of respondent. He recommends that respondent's suspension of 120 days without pay stand on the record. He leaves to the judgment of the Commissioner the determination of further penalty, if any, in light of the substantiated charges of conduct unbecoming a teacher.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record of the instant matter including the report of the hearing examiner and observes that exceptions have been filed by both parties pursuant to N.J.A.C. 6:24-1.17(b).

The Board argues for the dismissal of respondent and avers that he is guilty of the use of corporal punishment as charged in Charge No.1. In Charge 1a the Board states that respondent committed an act of corporal punishment by using physical force against a pupil by choking her. The Commissioner finds that the record is devoid of any evidence that respondent choked the girl. The Board has not proved its charge and to now argue that respondent "used excessive physical force" begs the issue. (Board's Exceptions, at p. 3) The Commissioner further observes that the principal did not find the incident of sufficient severity to warrant its report to the Superintendent. The Commissioner dismisses this charge.

The Board protests that the hearing examiner ignored the document P-3, prepared by a deceased administrator in his consideration of the "hair-pulling" incident (1b). The Commissioner finds no merit in such pleadings and observes that the pupil involved in the alleged incident was not called as a witness by the Board. The Commissioner dismiss this charge.

The Commissioner cannot agree with the Board's argument that respondent's act of throwing a book be supportive of the charge of corporal punishment (1c). There is nothing in the record to support such a conclusion; nothing in the record shows that such action was done in anger or was done to punish a pupil by causing hurt or anguish. The Commissioner dismisses this charge.

The Board avers that Charge 1e wherein respondent squeezed a pupil's face causing his lip to bleed is true in fact because respondent did contact the boy's lip with his finger without the pupil's permission. The boy did not ask to go to the nurse or the principal. The Commissioner finds such conduct unbecoming a teacher but finds that such unpremeditated action does not rise to the level of corporal punishment.

The Board argues the seriousness of Charge 1f wherein respondent "seized a pupil by the hair." The Commissioner observes that the principal did not recall if he had talked with respondent concerning this charge. The Commissioner observes further that the principal become aware of this incident, as he did the previous two charges, only through the report of a group of pupils who came to him subsequent to the incident. (Tr. I-90) The Commissioner accordingly dismisses this charge.

The Board's argument that respondent was insubordinate because he failed to teach penmanship and a new handwriting course as directed in November 1975 must fall. Respondent did comply with the principal's directive, albeit tardily, in January 1976. The record shows that the teacher included time for the teaching of penmanship in his planbook (P-16) in January 1976 as observed by the principal wherein he wrote:

> "Fred, this is adequate planning, however, your plans for Penmanship are missing. Plan for approximately 100 minutes per week. Thank you. R.C."

The Commissioner does not agree with the Board's argument that the issue of respondent's health expressed by the principal in R-10 was unfairly raised by the hearing examiner. Therein the principal stated, "***I request his mental and physical health be checked before we continue employment.***" The Board avers that respondent never requested such an examination. The Commissioner finds such argument superfluous; the principal was not addressing respondent when he stated "***before we continue employment." (Emphasis supplied.)

In summary the Board makes the following statement:

> "***The incidents which gave rise to these charges occurred over a period of three years and evidenced a continuous pattern of unbecoming conduct even when viewed in a light most favorable to Gaus. The evidence in this case exhibited a continuous pattern of unfitness to teach children of the tender years such as those entrusted to the care of Gaus as an elementary teacher.***"
>
> (Board's Exceptions, at pp. 15-16)

The Commissioner cannot agree in view of the following facts:

1. Within the three year period so established by the Board, respondent was accorded tenure as a teaching staff member in the employ of the Board.

2. On February 23, 1975 the principal of Dickerson School, where respondent was then assigned, in his evaluation of him stated:

> "***I have discussed with him the areas he needs to improve in. He is very accepting of suggestions and recommendations and I feel

> refinement and improvement will take place. [He] is a fine man who is interested in children." (R-6)

3. On November 6 and December 8, 1975 in observation lessons of respondent by the principal of Bragg School every item in the principal's report of respondent received the top rating of "good." (R-8-9)

The Commissioner finds such facts to be at variance with the Board's contention that respondent is unfit to teach.

Respondent's exceptions largely reiterate the contention that the charges against him involve trivial incidents, arguing "***that this is a classic example of a Board 'searching for charges'.***" (Respondent's Exceptions, at p. 1)

Respondent in summary states:

> "***[W]e take the position that the examiner afforded all parties wide latitude and gave them every opportunity to advance their respective causes. The factual findings should not lightly be disturbed since the examiner had the benefit of observing the witnesses and the Commissioner should not substitute his judgment for that of the examiner unless the evidence is patently erroneous, which it is not.
>
> "As to the severity of the recommended penalty, ***forfeiture of 120 days' pay,*** though not harsh, is ***excessive.***"
> (Respondent's Exceptions, at pp. 2-3)

The Commissioner has reviewed the report of the hearing examiner and the record in the instant matter and concurs with the findings of fact and recommendations set forth therein.

The Commissioner's practice in previous cases controverted before him has been to assess a proper penalty after taking into account the nature and gravity of the offense under all the circumstances involved. As he said In the Matter of the Tenure Hearing of Frederick L. Ostergren, School District of Franklin Township, 1966 S.L.D. 185:

> "***As has been his practice in other cases *** brought before him, the Commissioner has taken into account the nature and circumstances of the incident, the teacher's prior record and present attitude, the expressed

> concerns of the parents, and the likelihood of such behavior recurring in determining appropriate penalties.***" (at 187)

Also he said In the Tenure Hearing of William H. Kittell, School District of the Borough of Little Silver, 1972 S.L.D. 535

> "***In the Commissioner's opinion each such matter must be judged in the light of its particular circumstances. The kind and degree of penalty will necessarily vary according to the specific problem.***" (at 541)

The Commissioner has examined the record carefully and finds the charges proven to be true to be of insufficient weight to order respondent's dismissal. This does not mean that the Commissioner countenances respondent's action in touching a pupil's lip without permission. As the Commissioner held In the Matter of the Tenure Hearing of Pauline Nickerson, Peapack-Gladstone, 1965 S.L.D. 130

> "***Parents have a right to be assured that their children will not suffer physical indignities at the hands of teachers *** who resort to unnecessary and inappropriate physical contact with those in their charge***." (at 132)

Respondent admits to using improper language in addressing a pupil. The Commissioner cannot condone such action on the part of any teacher. In a previous decision In the Matter of the Tenure Hearing of Jacque Sammons, School District of Black Horse Pike Regional, 1972 S.L.D. 302, the Commissioner issued the following caveat:

> "***He is constrained to remind the teachers of this State *** that they are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. As one of the most dominant and influential forces in the lives of the children, who are compelled to attend the public schools, the teacher is an enormous force for improving

> the public weal. Those who teach do so by choice, and in this respect the teaching profession is more than a simple job; it is a calling.***" (Emphasis added.) (at 321)

Respondent's action in leaving his classroom on January 23, 1976 when he felt unwell was imprudent and improper even though he asked a fellow teacher to supervise his pupils. Proper action on his part would have been to notify his principal of his illness and request appropriate relief. The Commissioner so holds.

The Commissioner observes that respondent admits the delay of a day in returning school records to the office when requested. The Commissioner cannot condone such carelessness and finds such action, though trivial in nature, one not to be repeated.

The Commissioner concludes after careful study of this matter that the dismissal of respondent is an unnecessarily harsh penalty and not warranted in the light of all the circumstances herein. The teacher has suffered mental anguish over possible loss of his livelihood and the damage sustained to his professional reputation and the efforts which he will have to exert to re-establish himself in his work are all significant aspects of the appropriate penalty for his error.

Accordingly the Commissioner herewith determines that Fred J. Gaus III be returned to the employ of the Board as a tenured teaching staff member and that respondent's suspension of 120 days without pay stand in the record.

COMMISSIONER OF EDUCATION

June 6, 1979

Pending State Board of Education

CONSTANTINE CHESTON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

For the Petitioner, Constantine Cheston, Pro Se

For the Respondent, Davis & Reberkenny, (Kenneth D. Roth, Esq., of Counsel)

For the Intervenor, Joel S. Selikoff, Esq.

Petitioner is a teacher who was formerly employed by the Board of Education of the Township of Cherry Hill, hereinafter "Board," who was charged with certain actions of lewdness and improper conduct by two Cherry Hill East High School girls. His employment was terminated by the Board subsequent to a hearing given him by the Board's Employee Relations Committee to ascertain whether or not just cause could be determined which would demand his dismissal.

An application for intervention by the Cherry Hill Education Association (intervenor) was granted. (N.J.A.C. 6:24-1.7; Conference Agreements of June 13, 1978)

Petitioner seeks reinstatement with full back salary asserting that his rights to due process have been violated. If reinstatement is not ordered by the Commissioner of Education, intervenor's admittance in this matter is for the limited purpose of seeking 60 days' termination pay to which it asserts petitioner is entitled pursuant to the terms of his contract with the Board.

This matter is submitted to the Commissioner for adjudication on the pleadings, Briefs, memoranda, exhibits and the transcript of the hearing held by the Board's Employee Relations Committee. The following facts are not in dispute:

Petitioner was employed as a high school teacher for the 1974-75, 1975-76 and 1976-77 academic years. He was notified by the Superintendent regarding the salary he would receive for the

1977-78 academic year. (Exhibit A, attached to Intervenor's Brief) Had he served in the district in September 1977 petitioner would have earned a tenure status; however, two high school girls made certain allegations about petitioner on or about May 27, 1977 which culminated in his suspension with pay by the Superintendent by letter dated August 16, 1977. Petitioner received his full salary until he was terminated by the Board on November 1, 1977.

Subsequent to his termination, petitioner requested 60 days' pay pursuant to the termination clause embodied in his contract which reads in pertinent part:

> "It is hereby agreed by the parties hereto that this contract may at any time be terminated by either party giving to the other 60 days notice in writing of intention to terminate the same***."
> (Intervenor's Brief, at p. 1)

The Board does not deny that this contractual relationship existed with petitioner; nevertheless, it asserts that when a teaching staff member is terminated for cause, there exists no further entitlement to salary. (Board's Brief, at pp. 2-3; Conference Agreements)

The Commissioner has reviewed the record regarding petitioner's allegation that his right to due process has been violated. When the two girls' allegations were brought to the Superintendent's attention, he suspended petitioner with pay pursuant to his statutory authority. (N.J.S.A. 18A:25-6) Thereafter, petitioner was afforded a lengthy hearing by the Committee with three other Board members in attendance wherein testimony was taken and transcribed. (Tr. 4-5) Procedures set forth prior to the testimony were that petitioner would have an opportunity to seek an adjourned hearing after the Board presented its witnesses and, later, after he completed his defense. No such requests were made. (Tr. 28-31, 116, 169)

The six Board members in attendance examined the testimony and evidence presented and they believed, and so recommended to the entire Board, that sufficient cause had been demonstrated so that petitioner should not be reemployed. (R-1)

In his review of the transcript, the Commissioner is satisfied that every decent and equitable consideration was given to petitioner. He was not entitled to any hearing before the Board; nevertheless, he was granted a full hearing before six of its members and failed to convince the Board that the allegations made against him were untrue. Neither did he seek additional time as the Board offered, ante, to refute those allegations. (Board's Letter Memorandum, October 3, 1978, at p. 2)

The Commissioner finds no violation of due process as charged by petitioner and determines that petitioner has no right to reinstatement in his position.

Having determined that petitioner was dismissed properly, with good cause, the Commissioner must address next the question of his entitlement to 60 days' salary.

Intervenor argues that the 60 day termination clause in petitioner's contract must be honored. (Intervenor's Brief, at p. 8) The Board asserts that petitioner was not terminated; rather, he was dismissed with cause and is not entitled to 60 days' pay. (Respondent's Reply Brief, at pp. 3-4)

There is no question that a board of education must pay a teaching staff member pursuant to the termination clause in his/her contract when that person is terminated on notice. In that regard, N.J.S.A. 18A:27-9 reads as follows:

> "If the employment of a teaching staff member is terminated on notice, pursuant to a contract entered into with the board of education, it shall be optional with the board whether or not the member shall continue to perform his duties during the period between the giving of the notice and the date of termination of employment thereunder."
>
> (Emphasis added.)

Both the contract clause, ante, and the statute mention termination on notice. However, another statute, N.J.S.A. 18A:6-30.1, reads as follows:

> "When the dismissal of any teaching staff member before the expiration of his contract with the board of education shall be decided, upon appeal, to have been without good cause, he shall be entitled to compensation for the full term of the contract, but it shall be optional with the board whether or not he shall continue to perform his duties for the unexpired term of the contract."
>
> (Emphasis added.)

Thus, the statutes recognize that there is a distinction between termination on notice and dismissal with cause.

In the Commissioner's judgment that distinction assumes that when a teaching staff member is terminated, a board of education has an option of allowing that person to teach for the remaining 60 days pursuant to the contract, or to terminate immediately

giving 60 days' salary. Where a person is dismissed with cause, as in the instant matter, there is no option of continuing that person's services. In effect this teaching staff member has, in the eyes of the board, rendered himself incapable of performing his duties, causing the contract to be impossible of performance.

The Commissioner has previously held that a teacher under contract may not be summarily dismissed without notice and without good cause. In Leon Gager v. Board of Education of Lower Camden County Regional High School District No.1, 1964 S.L.D. 81, the Commissioner found that the board, dissatisfied with petitioner's work, attempted to dismiss him summarily. The Commissioner held that the evidence did not establish good cause for such dismissal and that petitioner was entitled to compensation for the 60 day period of notice of termination provided in his contract. In Anthony Amorosa v. Board of Education of Jersey City, 1964 S.L.D. 126, the Commissioner distinguished even more sharply between the rights available in R.S. 18:13-11 and 18:13-11.1 (now N.J.S.A. 18A:6-30.1 and 18A:27-9). As in Gager, the board had attempted to "dismiss" petitioner rather than terminate a contract which provided for a 60 day notice of intention to terminate. In finding that Amorosa was entitled to compensation for 60 days following his purported dismissal, the Commissioner said, at page 128:

> "***In Gager ***, for example, the Commissioner held that when a board determines that a teacher's work is unsatisfactory to the degree that it does not wish to continue his employment, it may terminate such employment only under the conditions of the contract. Such a course was open to respondent in the instant matter; it could have, for any reason or no reason, given petitioner 60 days' notice in writing of its intention to terminate his contract, and, pursuant to R.S. 18:13-11.1, elected not to have him teach during the period of notice. The Commissioner recognizes the possibility of circumstances constituting good cause within the contemplation of R.S. 18:13-11, supra, under which the summary dismissal of a teacher could be upheld.***" (Emphasis added.)

Thus "dismissal" as used in N.J.S.A. 18A:6-30.1 contemplates that "good cause" must exist therefor. Given the status of the law today regarding the non-reemployment of nontenure teachers (N.J.S.A. 18A:27-10 et seq.), the Commissioner holds that termination - which is equally available to both employee and employer - must be for reason given to the employee if requested.

The Commissioner concludes from his review of the relevant statutes, the cited decisions and the record in the instant matter that summary dismissal is a proper exercise of the Board's statutory authority where due process has been carefully observed and "good cause" has been determined.

Where summary dismissal is exercised for good cause, as was done here, the teaching staff member forfeits his contractual claim to 60 days' termination pay. As stated earlier, petitioner rendered his own contract impossible of performance; therefore, the Board has no further obligation to him.

The Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

June 6, 1979

IN THE MATTER OF THE TENURE HEARING OF WILLIAM LEE JOHNSON, SCHOOL DISTRICT OF CLEARVIEW REGIONAL, GLOUCESTER COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

For the Complainant Board, Rowland B. Porch, Esq.

For the Respondent, Richard F. Berkey, Esq.

The Board of Education of the Clearview Regional School District, Gloucester County, hereinafter "Board," certified a charge of unbecoming conduct on December 20, 1977 to the Commissioner of Education for adjudication against William Lee Johnson, a teaching staff member with a tenure status in its employ.

A hearing was conducted in the matter on April 21 and May 26, 1978 at the office of the Gloucester County Superintendent of Schools by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

The gravamen of the charge, which respondent admitted during the hearing, is that he allowed an approximate three-minute film (C-3) featuring a scantily-clad female to be shown his twelfth-grade pupils on or about September 29, 1977 during a regularly scheduled physics class. The class is comprised of eleven male and twelve female pupils and the film was brought to class by one of the male pupils.

The Superintendent and the principal testified individually that they had no knowledge that the film had been shown until they both received complaints during October 1977. In the meantime, respondent was on leave of absence for corrective surgery. The Superintendent testified that he elected not to immediately telephone respondent in regard to the complaint because he was still recuperating. The principal testified that, in the meantime, he secured the film from the pupil who had brought it to school on September 29, 1977 and viewed it with the Superintendent. In the hearing examiner's judgment, the film may be fairly described as follows:

The film consists solely of a female figure, attired in a strapless bra and bikini pants, moving about on a divan in prone, semi-prone, and sitting positions each of which are assumed by the subject in what may be characterized as a fluid motion. The film, at various times, focuses on specific areas of

her anatomy including, but not limited to, her breasts and derrierre both of which areas, it is noted, are covered by undergarments. During the course of the heretofore described movements, her bra slips a bit which causes a portion of her left aureola to show momentarily. She then adjusts her bra, stands, smiles at the camera, waves, and walks away. The film ends.

The Superintendent testified that he and the principal telephoned respondent at his home around the second week of November 1977 and inquired of him whether he did, in fact, allow the film to be shown. The Superintendent testified that respondent initially could not recall the film being shown, but that he then stated that the film had in fact been shown.

The hearing examiner observes that respondent's own testimony establishes without doubt that the film (C-3), as hereinbefore described, was shown in his classroom on or about September 29, 1977 to a physics class of eleven male and twelve female pupils. (Tr. II-19) In his own defense, respondent explained that on that particular day the regular schedule of classes was shortened by minutes each period because of a rock concert which was to occur at the high school in the afternoon. Respondent testified that the pupils were excited and eager with anticipation for the scheduled concert and, consequently, were less than enthusiastic about applying themselves to physics. One of the male pupils had brought to school that day movies of a trip he and his parents had taken to France the prior summer. When the film on France was completed the pupil asked respondent whether he could show another film. Respondent testified that he asked the pupil whether the film was such that it could be shown in a classroom. Respondent contends that the pupil responded by stating that the film could be shown to his classmates because there was nothing wrong with it. The film (C-3) was then shown.

The pupil, contrary to respondent's testimony, maintains that he characterized the film to respondent as a "flick." The pupil also testified that he specifically told respondent that the film was "pornography" and that the film consisted of "***some girl in lingerie, small lingerie.***" (Tr. I-36)

Respondent denies that the pupil told him prior to showing the film that it was pornographic. (Tr. II-17) Rather, respondent specifically testified that he asked the pupil whether the film was "***an okay movie***" to which the pupil was to have replied, "Sure, it is not too bad, Mr. Johnson." (Tr. II-16) Respondent's pertinent testimony with respect to the actual showing of the film is as follows:

> "***Well, [the pupil] put the [film] on the projector and the next thing I knew, God, there is a woman in a bra and pants on and I said, 'Gee, what am I into now?' But [the pupil] is a real nice kid, like clean cut, and these are pretty nice kids in this class, and so [the pupil] says [the film is] all right, and [consequently] it's all right***.

says, 'Now, there is a part coming up that we [the pupils] can't see.' So he put his hands in front of the projector and held it there for a period of time and then took it away. I think he may have done that a couple of times during the course of the film.

> "So then [the film] was over. That was the end of it. No one made any comments or anything.***" (Tr. II-17)

Respondent testified that he did announce to the class during the film when the girl with "***the bra and panties came on***" that if anyone was offended by the film they might leave the room. (Tr. II-18)

The hearing examiner finally observes that, subsequent to the Board's certification of charges herein, a conference of counsel was conducted at which time the hearing examiner took custody and control of the film. The hearing examiner provided respondent, with counsel and with the agreement of Board counsel, the opportunity to view the film prior to the scheduled hearing. Respondent did view the film (C-3) and denied that that was the film shown. Respondent, as noted earlier, admitted by way of testimony in his own defense at the hearing, that the film (C-3) was the one, in fact, shown.

This concludes the factual presentation of respondent's conduct with respect to the charge herein. In the hearing examiner's judgment, respondent committed an incredible error in judgment by tolerating the film to be shown in the classroom for several reasons. Firstly, the hearing examiner finds the pupil's testimony credible that respondent was told the film featured a female in "small lingerie" prior to the film being shown. The hearing examiner, however, simply does not believe that the pupil actually said the film was pornographic. Secondly, even if respondent does not and did not hear the pupil explain the nature of the film to be a female in lingerie, surely as soon as he saw the beginning of the film he should have stopped it. This is not a matter to determine what is legally pornographic or a matter which involves improper censorship imposed upon a teacher. Rather, it is a matter of whether the events established to be true herein constitute conduct unbecoming a teacher. Thirdly, respondent did initially deny that a film of questionable merit was shown in his classroom.

Under the totality of all the circumstances established herein, the hearing examiner finds that respondent did allow the film (C-3) to be shown his class on or about September 29, 1977 and that such action does constitute conduct unbecoming a teacher.

While it is found that the charge of unbecoming conduct against respondent has been proven to be true, it must be noted that respondent has an otherwise unblemished record of twenty years as a teacher, ten of which have been spent in the employ of

the Board. Respondent has been assigned by the Board to teach chemistry, physical sciences, and biology and his performance has always been rated as satisfactory. Respondent has attended, by invitation and otherwise, various summer science institutes sponsored by the National Science Foundation, and has worked with Montclair State College in preparing a program for teacher education. Notwithstanding the incredible lack of judgment displayed by respondent in this one incident, the hearing examiner is impressed with respondent's credentials and his desire to improve himself and to help his pupils.

Dr. Benjamin Wolfson, a practicing psychiatrist who was qualified as an expert and who evaluated respondent's mental comptence as the result of the incident herein, testified that he found respondent to be an individual within normal range who does not manifest any evidence of a pattern of psychopathologic thinking or behavior. Dr. Wolfson explained respondent's denial that the film (C-3) was the one shown as stemming from panic on his part. Dr. Wolfson testified that respondent displays no indication whatever of a personality disorder or psychiatric disorder.

The hearing examiner recommends to the Commissioner that a penalty less than dismissal be imposed upon respondent for the unbecoming conduct established to be true herein.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the matter including the report of the hearing examiner and the exceptions and objectives filed thereto by the parties pursuant to N.J.A.C. 6:24-1.17(b).

The Board asserts that because the hearing examiner found the charge herein to be true, in fact, the appropriate penalty to be imposed upon respondent by the Commissioner is his dismissal as a teaching staff member in its employ. The Board, in support of this position, contends that the proofs it offered in support of the charge establish that respondent allowed a pornographic film to be shown to pupils in his classroom and that he denied to the Superintendent and his own attorney that the film in question was, in fact, the film shown. Finally, the Board points out that by virtue of N.J.S.A. 18A:6-14 it has been paying respondent his regular salary since the one hundred twenty-first day of his suspension and has received no services from him in return.

Respondent's exception is limited to his contention that the amount of money paid him during his suspension is a statutory right and that such payment of money to him by the Board is not relevant to the charge against him or to the penalty, if any, to be assessed by the Commissioner. Respondent argues that the hearing examiner's report be adopted in full by the Commissioner including the imposition of a penalty less than dismissal.

The Commissioner notices in the first instance that his jurisdiction to hear and determine controversies and disputes pursuant to N.J.S.A. 18A:6-9 which arises under Title 18A, Education Law does not confer upon him authority to determine what is legally pornographic. That is a matter reserved for the courts. There is nothing in the record to establish that the film in question has been declared to be pornographic.

The Commissioner, having considered the hearing examiner's report and the exceptions filed thereto in light of the total record herein, adopts as his own the findings of fact and recommendations of the hearing examiner that a discipline less than dismissal should be imposed.

Respondent was suspended from his teaching position without pay on December 21, 1977. The Board, pursuant to its obligation at N.J.S.A. 18A:6-14, did not resume his salary payments until April 21, 1978, or one hundred twenty days after his suspension. Consequently, four months' salary has been withheld for respondent.

The Commissioner finds and determines that respondent, by allowing the film to be shown as described by the hearing examiner herein to which no exceptions were taken, did in fact

display poor judgment and failed in that instance to exhibit proper conduct expected of teaching staff members. Respondent's otherwise exemplary record does, however, preclude dismissal from his position of employment.

The Commissioner hereby directs the Board of Education of Clearview Regional School District to reinstate William Lee Johnson to his position of teaching staff member in its employ at his appropriate place on the salary scale. It is further directed that no remuneration shall be made by the Board to William Lee Johnson for the first one hundred twenty days of his suspension.

COMMISSIONER OF EDUCATION

June 11, 1979

IN THE MATTER OF THE TENURE HEARING OF WILLIAM LEE JOHNSON, SCHOOL DISTRICT OF CLEARVIEW REGIONAL, GLOUCESTER COUNTY.	:	STATE BOARD OF EDUCATION DECISION

Decided by the Commissioner of Education June 11, 1979

For the Petitioner-Appellant, Rowland B. Porch, Esq.

For the Respondent-Appellee, Richard F. Berkey, Esq.

The State Board affirms the Commissioner's decision with the deletion of the first paragraph on page nine of the Commissioner's decision, which reads as follows:

> "The Commissioner notices in the first instance that his jurisdiction to hear and determine controversies and disputes pursuant to N.J.S.A. 18A:6-9 which arises under Title 18A, Education Law does not confer upon him authority to determine what is legally pornographic. That is a matter reserved for the courts. There is nothing in the record to establish that the film in question has been declared to be pornographic."

September 6, 1979

LESLIE BREESE ET AL.,	:	
PETITIONERS,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF JAMESBURG, MIDDLESEX COUNTY,	:	COMMISSIONER OF EDUCATION
		DECISION
RESPONDENT.	:	

For the Petitioners, Rothbard, Harris & Oxfeld (Sidney Birnbaum, Esq., of Counsel)

For the Respondent, Rubin, Lerner & Rubin (David B. Rubin, Esq., of Counsel)

Petitioners allege that the action of the Jamesburg Board of Education, hereinafter "Board," in terminating the employment of petitioners was arbitrary, unreasonable and made in bad faith. The Board denies that its actions were other than an exercise of exclusive management prerogative specifically delegated to the Board by statute.

A hearing was conducted on October 19 and 24, 1978 by a hearing examiner appointed by the Commissioner of Education.

The Petition of Appeal was filed by seven tenured teaching staff members. At the outset of the hearing, the Petition was amended to reduce the number of petitioners to three, all certified elementary teachers.

Petitioners were notified by letter from the Superintendent of Schools under date of April 14, 1978 that the Board was contemplating a reduction in force, that they were among those teachers affected, and were further advised to consult N.J.S.A. 18A:28-12 and the Open Public Meetings Act concerning their rights in connection with the Board's disposition in this matter. (P-1)

At a special meeting on April 24, 1978 the Board unanimously terminated the employment of petitioners by resolution due to declining enrollment and uncertain Federal and State funding. (P-2) Petitioners were notified of the Board's action in a letter sent by the Superintendent under date of April 25, 1978, who also indicated that "***you will be placed on a preferred eligibility list in order of seniority for re-employment whenever a vacancy occurs in a position for which you have certification." (P-1)

Petitioners supported their contention of the Board's bad faith by disputing the rationale of declining enrollment. Pupil enrollment in grades kindergarten through sixth did indeed increase from 1977-78 to 1978-79. Kindergarten enrollment for 1978-79 was eleven pupils more than the 1977-78 outgoing sixth showed a gain of one pupil over the 1977-78 enrollment in kindergarten through grade five, for a total increase of twelve pupils. (P-3)

The president of the Jamesburg Education Association testified on behalf of petitioners. She stated, "I don't think that the Jamesburg Board of Education reduced the size of their teaching staff for any educationally sound reason whatsoever." (Tr. I-41) When asked by respondent in cross-examination "Is it fair to say that the basis for that conclusion is a comparison by you of pupil enrollment as of September 1977 with pupil enrollment as of September, '78?", her reply was, "Yes." (Tr. I-42) She indicated also that her conclusion was not based on enrollment data prior to the 1975-76 school year. (Tr. I-44)

The Superintendent testified that the rationale of declining enrollment for the reduction in force was the decrease of 307 pupils from 1970-71 to 1977-78. (Tr. I-113; P-2) His recommendation for a reduction in force resulted from his grade by grade analysis of enrollment and "***there had not been any reducation in force over the years 1970 through 1978***." (Tr. I-141; II-20) He also testified that the reduction of elementary teachers was three in number, not six, due to the return of three tenured teachers on maternity leave. (Tr. I-135)

The hearing examiner has reviewed the 1978-79 enrollment data after the reduction in force. (P-3) There is one grade five section of 27 pupils, one grade three section of 25 pupils and all other grade sections have enrollments of fewer than 25 pupils. The average class size is as follows:

GRADE	AVERAGE GRADE SIZE
K	19.6
1	18.6
2	19.3
3	24
4	19.5
5	25.5
6	20.6

Two petitioners are employed by respondent, one as a full-time compensatory education teacher and the other as a full-time classroom teacher replacing a teacher on leave for the 1978-79 school year. The only unemployed petitioner testified that she had no direct indication that the Board's action was aimed at her personally. (Tr. I-72)

Counsel waived Briefs but each attorney submitted a letter memorandum of summary and waived responses. This concludes the hearing examiner's report of relevant evidence and testimony.

Counsel for petitioners states in his letter memorandum under date of November 7, 1978, "There was never the slightest suggestion by the Board in its public meetings or in its letters to petitioners that its action related to enrollments in 1971." (at p. 3) The hearing examiner observes that page 4 of the minutes of the regular meeting of the Board on April 18, 1978 states that "***Mr. Kaniper [Superintendent] noted a decreased enrollment of 515 students since the 1970-71 school year, while our teaching staff has increased from 53 to 54 members.***" (P-2)

The hearing examiner finds that petitioners failed in meeting their burden of proving that the Board's action in terminating their employment was arbitrary, unreasonable or made in bad faith, and recommends that the Petition be dismissed.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has carefully reviewed the pleadings, testimony of witnesses, exhibits in evidence and letters of summary from counsel in lieu of Briefs. It is noted that no exceptions to the hearing examiner's report were filed and the Commissioner holds the findings of the hearing examiner as his own.

N.J.S.A. 18A:11-1 provides authority to local boards of education to exercise broad general mandatory powers and duties in their government and management of the public schools. Included therein is the requirement that employment and discharge of employees be "***not inconsistent with [Title 18A, Education] or with the rules of the state board***." N.J.S.A. 18A:28-9 provides that:

> "Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils *** or for other good cause***."

Minutes of the special meeting of the Board on April 24, 1978 clearly established the decrease in elementary pupil enrollment from 1970-71 to 1977-78 to be 307 pupils. (P-2)

The 1971-72 staff directory lists 23 elementary classroom teachers in grades K-6. (R-1) The 1976-77 roster lists 22 classroom teachers in grades K-6 and the 1977-78 roster lists 21 teachers employed in those same grades. (P-4)

The Commissioner is cognizant of the fact that two of the three petitioners in this matter have been reemployed by respondent. One was reemployed as a compensatory education teacher and the other to replace a tenured teacher on leave. The remaining petitioner, still unemployed, testified that the seniority list had been adhered to and further that she had no indication or belief that her termination was personal. (Tr. I-71-72)

The Commissioner concludes that petitioners have failed in their burden of presenting a sufficient quantum of credible evidence upon which to base a conclusion that the Board acted arbitrarily, capriciously, or in bad faith when it reduced the number of elementary teaching staff members. The Board's determination must therefore stand and must be accorded a presumption

of correctness. Thomas v. Morris Township Board of Education, 89 N.J. Super. 327 (App. Div. 1965), aff'd 46 N.J. 581 (1966); Boult and Harris v. Board of Education of the City of Passaic, 1939-49 S.L.D. 7, aff'd State Board of Education 15, aff'd 135 N.J.L. 329 (Sup. Ct. 1947), aff'd 136 N.J.L. 521 (E.& A. 1948) As was said by the Commissioner in Boult and cited in Mary Ann Popovich v. Board of Education of the Borough of Wharton, 1977 S.L.D. 440:

> "***[B]oards of education are responsible not to the Commissioner but to their constituents for the wisdom of their action.***"
> (1939-49 S.L.D. at 13)

The Commissioner is constrained to note the lack of clarity in the conference on declining enrollment and reduction in force between the Superintendent of Schools and the Jamesburg Education Association president. The president believed the declining enrollment was for the most recent one or two years. (Tr. I-30) The Superintendent's reference to declining enrollment was for the past eight years. (Tr. I-141) The Commissioner opines that this controverted matter might have been avoided if the president had clearly understood that the Superintendent was relating staffing and enrollment for the eight year period.

There being no relief which may legally be afforded to petitioners, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

June 11, 1979

LOUISE WARD,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF VOORHEES AND CLAUDIO E. ARRINGTON, SUPERINTENDENT, CAMDEN COUNTY,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Forkin & Dugan (David Dugan, Esq., of Counsel)

For the Respondents, Hyland, Davis & Reberkenny (William C. Davis, Esq., of Counsel)

Petitioner charges that her unilateral transfer on July 1, 1975 to the principalship of a smaller elementary school by the Voorhees Township Board of Education, hereinafter "Board," was arbitrary, capricious, contrary to her constitutional and statutory rights, violative of the Board's stated policies and an abuse of its discretionary authority. She claims entitlement to reinstatement to her former position together with additional salary and compensatory and punitive damages.

The Board denies that its action transferring petitioner to the principalship of a smaller elementary school was other than a reasoned exercise of its authority to operate its schools in the best interests of its pupils, the teaching staff and the community.

The record consists of the Petition of Appeal, an Amended Petition of Appeal filed May 5, 1978, Answers, petitioner's pre-hearing Brief, transcripts of the hearing conducted on April 25 and June 20, 1978 and exhibits in evidence. Post-hearing briefing was waived by both parties. (Tr. I-148) The report of the hearing examiner follows setting forth first those uncontroverted facts which provide the contextual setting of the dispute:

Petitioner taught for the Board from April 1966 until June 1971 when she was promoted to the position of principal of the Kresson Elementary School. She held that post until 1973 when the Board transferred her to the principalship of its newly opened Upper Elementary School which enrolls pupils in grades six through eight. On June 30, 1975, the Board by a vote of 6-2 transferred petitioner to the principalship of the Kresson School

with a smaller enrollment of pupils in grades four and five. Concurrently, the Board transferred a male principal from the Kresson School to the Upper Elementary School.

Petitioner protested that action by letter dated July 3, 1975 and requested that she be granted a hearing by the Board and be provided written reasons for the unexpected transfer. Therein she charged that the transfer was an unfair, discriminatory act and stated, inter alia, the following:

> "***My rights have further been violated by voting to transfer me without a roll call majority vote of the full membership of the Board of Education, *** and by denying me a salary increment equal to that of all Principals who happen to be males. *** [A]ll the male Principals will receive $1,600-$1,775 in increments but my increment would be $300.***" (Emphasis in text.)(P-3)

The Board denied petitioner a hearing (Tr. II-143) but responded by letter dated July 14, 1975 stating that it had during the past year received numerous complaints from parents, teachers and others about the administration of the Upper Elementary School and that it had not seen any effort on petitioner's part to resolve those concerns which had originated during the 1973-74 school year. The Board stated further the following reasons for its action:

> "***1. Evaluations of teachers are to serve as an instrument to improve instruction. We do not see the merit of a staff member being evaluated twice in a one-week period.
>
> "2. Failure to carry out administrative details as scheduled.
>
> "3. Lack of rapport with staff.
>
> "4. Staff members having feeling of mistrust.
>
> "5. The Board considers your letter writing to members as inappropriate.***" (P-5)

Additionally, therein, the Board expressed concern over petitioner's handling of teacher concerns and complaints, the number of suspensions of pupils, parent complaints, scheduling of physical education classes and charges by her subordinates that she was biased, unpredictable and inconsistent in her evaluations of their performance. In conclusion the Board stated the

following:

> "***In light of the situation in the school, the Board feels you have not performed [at] the highest level of professionalism. Therefore, the Board instructs you to develop positive community-school relations, good staff relations, to be cooperative and responsive to suggestions, and to exhibit a proper attitude toward routine responsibilities.
>
> "It is the intent of the Board, through this letter, to improve the Voorhees Township educational system and to eliminate the many problems felt to exist by the staff, community and the Board. The Board of Education hopes you will accept this criticism and instruction in a positive and constructive spirit. We are all looking forward to a better year in 1975-76."
>
> (P-5)

Petitioner thereafter wrote a lengthy letter of response to the Board contesting the accuracy of a number of the reasons given for her transfer. (P-6)

The Board's salary guides for principals during 1975-77 provided that principals of schools with more than twenty teachers would be eligible to receive $500 more than those such as petitioner who was transferred to the Kresson School which had fewer than twenty teachers. (J-1-a) Petitioner and the principal who succeeded her at the Upper Elementary School were paid the following salaries:

	1974-75	1975-76	1976-77
Ward	$17,500	$17,800	$19,046
Brittingham	15,525	18,300	19,546

(J-1-a, b, d, e, f)

The testimony of witnesses is herewith succinctly summarized.

Petitioner testified that she had been advised on June 30, 1975 by the Superintendent that the Board would probably transfer her to the Kresson School at its meeting that evening. She testified also that the Superintendent had told the principals as early as April 1975 that the Board had discussed the possibility of transferring all principals to different buildings for the ensuing school year. (Tr. I-11) She testified that she believed her transfer "***without notice of anything being wrong with

[her] work, without any opportunity to be heard by the Board *** was unfair***." (Tr. I-27)

Petitioner testified that during the 1973-74 school year difficulties arose between her and her teaching staff when certain teachers, instead of bringing problems to her, went directly to the Superintendent, whose office was in the Upper Elementary School. She averred that his direct acceptance of their complaints and the alleged favoritism that he showed undercut her authority. (Tr. I-39-40, 48-51) The Superintendent corroborated that she had raised this complaint and stated that she had suggested that he move out of the Upper Elementary School. (Tr. II-41)

Petitioner also testified that, when in March of 1974 the president of the Voorhees Township Teachers Association, hereinafter "Association," wrote and posted material which she considered libelous, she instituted a civil suit against him. She testified that when the Superintendent and the Board subsequently urged that she withdraw the suit, she refused. (Tr. I-44, 58, 79, 85-86; R-2) Petitioner testified that she was then beset by numerous grievances filed by at least five or six Association members, an Association resolution charging her with unfair labor practices, and a further resolution by the Association calling for her resignation or dismissal. (Tr. I-93; R-3-5)

One teacher who had taught under petitioner's supervision for three years testified that those who pressed grievances against her were limited to no more than seven teachers. That testimony was corroborated by the Superintendent. The teacher testified that he believed the Superintendent had attempted to arbitrate and compromise the disputes rather than "***attack the problem at its roots and handle it.***" (Tr. I-120) In this regard he testified that:

> "***Mrs. Ward in most of her dealings with the teachers, students, was honest, frank, blunt, I would even term it aggressive***. [The Superintendent] many times being well meaning was a compromiser, an arbitrator, a placator***."
>
> (Tr. I-119)

The Superintendent testified of numerous meetings he and Board members had held with petitioner, her attorney and members of the Association to attempt to resolve the aforementioned grievances and restore harmony to the professional staff. (Tr. I-131-133, 136-140, 145) He testified that he believed petitioner's refusal to withdraw the law suit against the president of the Association was the single most important reason why the acrimony persisted throughout the 1974-75 school year. (Tr. I-151-153) He testified that he believed that those who had

filed grievances felt intimidated by petitioner's persistence in pressing the court action. (Tr. I-156-157; II-47-48) The Superintendent testified that he believed petitioner's concerns to be unfounded and that whether true or not, they had become concerns of the entire school system giving rise to fear of reprisals among the teaching staff members. He testified also that he had attended a public meeting at the Community Center on October 11, 1974 sponsored by the Association at which Association leaders stated their position concerning the court action brought by petitioner. (Tr. II-24, 35-37, 44-46)

The Superintendent testified that, when the acrimony between petitioner and the Association persisted through the spring of 1975, the Board determined to transfer her to the Kresson School.

The then Board President testified that when the Board had been unable to mediate the problems which persisted, a Board committee was formed which held numerous discussions over a lengthy period. (Tr. II-111-119) He testified that he believed that numerous grievances were so petty that they should have been resolved at their first level by petitioner and that:

> "***I don't think the majority of the Board members thought Mrs. Ward was entirely right, but I don't think she was entirely wrong either and I think the Board attempted to find the middle ground. That's why no action was taken, why it took us almost 18 months to really take some action. There was an attempt to try to work things out***."
> (Tr. II-126)

And,

> "***I think the Board recognized for several months that something had to be done. The situation could not continue for another school year.***" (Tr. II-128)

The Board President testified that, while he and the Board recognized that petitioner had every right to file suit in court during the summer of 1974 against the Association president, they perceived it as an unwise action on her part which resurrected the tensions and animosities of the previous months. (Tr. II-114, 136-137)

The hearing examiner, having carefully considered both the documentary evidence and the demeanor and testimony of witnesses at the hearing, makes the following findings of fact in addition to those facts stipulated by the parties:

1. The record is devoid of credible evidence on which to base a conclusion that the Board's unilateral transfer of petitioner from the Upper Elementary School to the Kresson School on June 30, 1975 was in violation of her constitutional or statutory rights as a woman or that the Board or the Superintendent discriminated against her by reason of her sex.

2. The Board's decision to transfer petitioner was not taken in haste but was made after a lengthy but fruitless period of attempts by the Board and its Superintendent to assuage the animosities which continued between certain members and leaders of the Association and petitioner. Nor was petitioner without advance notice that the Board was considering transferring its principals. (Tr. I-11)

3. Petitioner's salary increment of $300 for the 1975-76 school year was less than that received by the Board's other principals all of whom received increments that year of at least $1,600. It was, however, in conformity with the Board's established maximum salary for the principal of the Kresson School or any school which had fewer than twenty-one teachers. (J-1-a) The increment which petitioner received for 1976-77 was $1,246. This increment and the increments which she has since received are not in contest here except that her salary for those years is predicated on her 1975-76 salary which she contends should have been higher. (Petitioner's Brief, at p. 12) At no time was petitioner's salary reduced.

4. The record is devoid of evidence on which to base a conclusion that the Board acted contrary to its own stated policies.

The hearing examiner, with full consideration to these established facts and those uncontroverted facts previously set forth, recommends that the Commissioner make the following determinations:

1. That the Board's unilateral transfer of petitioner to the Kresson School was a reasoned exercise of its statutory authority to do so pursuant to N.J.S.A. 18A:25-1, N.J.S.A. 18A:11-1 et seq. in conformity with that which was iterated by the Commissioner in Thelma Bradley v. Board of Education of the Borough of Freehold, 1976 S.L.D. 590, 600, as follows:

> "***A board of education may transfer teaching staff members pursuant to N.J.S.A. 18A:25-1. Such a transfer may be based upon the Board's determination that the teaching staff member, or the individual school, or the entire community or a combination thereof may individually or collectively benefit by such a transfer. For a teaching staff member

> who is transferred to establish that the underlying reasons for such an action are improper or illegal requires substantial proof that the board acted in a manner which was illegal, or improper, and to the exclusion of all other bona fide reasons.***"

2. That petitioner has failed to sustain her burden of proof that the Board acted arbitrarily, capriciously, discriminatorily, prejudicially, in violation of its own stated salary policies, or in contravention of her statutory or constitutional rights.

3. That petitioner was not entitled to a hearing before the Board and that the reasons the Board voluntarily chose to give petitioner for her transfer were not a sham as petitioner charges but legitimately based on its perception of a continuing divisive controversy which, the Board believed, required corrective action in the public interest. See Mary C. Mihatov v. Board of Education of the Borough of Woodcliff Lake, Bergen County, 1977 S.L.D. ___ (decided January 5, 1977).

4. That petitioner's transfer was legal in that it was a transfer within both the scope of her certificate and the category of elementary principal as defined in N.J.A.C. 6:3-1.10(k)(9) and ordered by a 6-2 vote by a majority of the full membership of the Board. Bradley, supra

5. That petitioner is not entitled to the relief which she has requested.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record of the controverted matter, the Briefs of counsel, the hearing examiner report and the exceptions filed by petitioner pursuant to N.J.A.C. 6:24-1.17(b). No exceptions were filed by respondent.

Petitioner argues in her exceptions that the increase of $300 which she received for the 1975-76 school year, when contrasted to the increments of $1,600 or more which male principals in the district received in that year, constitutes discrimination on the basis of sex. Petitioner further asserts that the Board's salary schedule for 1976-77 was not in compliance with N.J.S.A. 18A:29-4.3 which requires that a board of education employing one or more administrative staff members must adopt a salary schedule for all such members subject to the provisions of N.J.S.A. 18A:29-4.1. The statute provides, inter alia, that:

> "***[Such] salary schedules *** shall not be less than those required by law *** [and] shall be binding upon the adopting board and upon all future boards in the district for a period of two years***.

Petitioner's reliance on these statutes for the relief which she seeks is misplaced. The record is clear that petitioner was at the maximum of her entitlement as a principal in 1974-75. She remained at the maximum of her entitlement as principal of the smaller school to which she was transferred in 1975-76. The Commissioner perceives no requirement which mandates that the Board must pay her a salary greater than its established maximum for that year. The record is similarly clear that in 1976-77 she was again accorded the same maximum salary status for a principal. There is no obligation on a board requiring that maxima for two years in the future be projected in a salary schedule. Nor will the Commissioner disturb the negotiations process or its results when petitioner was properly and legally represented in that forum.

The Board's transfer of petitioner to the principalship of a smaller school was an act within its statutory authority. N.J.S.A. 18A:25-1; Bradley, supra. The Commissioner perceives within the above factual context no abuse of discretion or intent to discriminate by sex on the part of the Board. The Board's remuneration of an additional $500 to principals with more than twenty professional subordinates is not unreasonable. Nor was petitioner's salary as a tenured principal at any time reduced.

Within the factual context presented in the record the Commissioner perceives in the Board's action no abuse of discretionary authority, arbitrary or capricious action, or violation

of petitioner's constitutionally protected rights. Rather, the Commissioner concludes that the Board made the determination to transfer petitioner to the smaller elementary school in the interests of promoting a more peaceful atmosphere within its educational system. That action has not been proven with this record to have been an act of bad faith. Mihatov, supra.

Accordingly, it is determined that petitioner has not proven her allegations of impropriety against the Board. Since this is so, the relief which she seeks is denied.

COMMISSIONER OF EDUCATION

June 11, 1979

JOHN F. COULTER, JR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF CALDWELL-WEST CALDWELL, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

For the Petitioner, Harper & O'Brien (John J. Harper, Esq., of Counsel)

For the Respondent, McCarter & English (Steven B. Hoskins, Esq., of Counsel)

Petitioner, who since 1966 has been a teaching staff member employed by the Caldwell-West Caldwell Board of Education, hereinafter "Board," alleges that the Board's determination not to reemploy him as vice-principal of the James Caldwell High School for the 1977-78 school year was illegal. He petitions the Commissioner of Education to declare that determination null and void and to direct the Board to reinstate him as vice-principal with all rights and privileges, together with costs of legal fees. The Board, conversely, avers that its action was none other than a legal exercise of its discretionary authority to determine who shall serve as vice-principal in its high school.

The matter comes before the Commissioner for summary judgment in the form of the pleadings, a stipulation of facts with exhibits, Briefs of counsel and reply Letter Memorandum of petitioner. The relevant facts are as follows:

Petitioner, a tenured teacher employed by the Board, was promoted effective July 1, 1975 to high school vice-principal in which position he served until June 23, 1977. During the 1975-76 school year he was provided one written evaluation in which his principal highly recommended his reemployment as vice-principal, together with numerous commendations and suggestions for improvement. (Exhibit B) During the ensuing school year petitioner received his first written evaluation on February 28, 1977. (Exhibit D) That document recognized petitioner's satisfactory progress in some areas of responsibility but criticized him for indecision and lack of promptitude in handling pupil discipline and attendance problems. His principal, making reference to three conferences with petitioner during September and October, further criticized him for insufficient improvement in overcoming

a penchant for displays of anger and resentment, requiring too much supervision, lack of perspective, reluctance to accept criticism and inability to identify and solve problems.

On March 24, 1977 petitioner's principal in a written evaluation asserted that he had observed no significant improvement especially in situations requiring progressive, fair and firm discipline, adequate support for teachers and identification of and response to potential problems. The principal concluded that written evaluation as follows:

> "***Mr. Coulter and I have discussed his performance on a number of occasions since September and he has not made satisfactory progress. Therefore I do not recommend that John Coulter be granted tenure as a vice principal at James Caldwell High School."
> (Exhibit E)

At a special meeting on March 28, 1977 the Board went into executive session to discuss personnel appointments for the 1977-78 school year. Petitioner was present during the executive session during the Board's discussion of his own employment status. Thereafter, at 11:30 p.m. the Board reconvened in public session and passed a motion directing that petitioner

> "***be given immediate notice that his contract is being terminated 88 days from March 28, 1977, at the conclusion of the work day on June 23, and that he revert at that time to his permanent tenure status as a teacher***." (Exhibit F)

Petitioner was notified of this action in writing on the following day. (Exhibit G) Thereupon, he requested a statement of reasons and an informal appearance before the Board to attempt to convince the Board to reemploy him as a vice-principal. (Exhibit H) The Board advised petitioner that the three aforementioned evaluations contained the reasons for its action and granted petitioner an informal appearance on May 12, 1977. (Exhibit I) On May 18 the Board reviewed the matter and by a 5-0 vote sustained its prior determination. On May 19 the Board advised petitioner in writing that it had reaffirmed its prior decision of March 28 to terminate his contract as vice-principal, effective June 23. On June 23 petitioner ceased to perform the duties of vice-principal and reverted to his former position as a teacher. Thereafter on July 20, 1977 the within Petition of Appeal was filed.

The Commissioner, having considered the legal arguments advanced by the parties in the light of applicable education law, addresses first petitioner's contention that the Board failed to

comply with requirements of the Open Public Meetings Act in calling and conducting certain meetings at which petitioner's employment status as vice-principal was discussed and acted upon.

The Legislature has vested jurisdiction over such matters in the Superior Court by the promulgation of N.J.S.A. 10:4-15(a) which provides that:

> "Any action taken by a public body at a meeting which does not conform with the provisions of this act shall be voidable in a proceeding in lieu of prerogative writ in the Superior Court, which proceeding may be brought by any person within 45 days after the action sought to be voided has been made public; provided, however, that a public body may take corrective or remedial action by acting de novo at a public meeting held in conformity with this act and other applicable law regarding any action which may otherwise be voidable pursuant to this section; and provided further that any action for which advance published notice of at least 48 hours is provided as required by law shall not be voidable solely for failure to conform with any notice required in this act."

Petitioner, having failed to avail himself of his right to challenge the legality of those meetings of the Board before the Superior Court, improperly seeks such a declaration from the Commissioner who is not clothed with original or concurrent jurisdictional authority over matters arising under the Open Public Meetings Act. Accordingly, this request for such declaration is denied. Committee to Save Bayard School v. Board of Education of the City of New Brunswick, Middlesex County, 1978 S.L.D. ____ (decided May 1, 1978)

Petitioner, while serving as a nontenured vice-principal, was entitled, pursuant to N.J.S.A 18A:27-3.1, to be evaluated while continuing in that position at least once each semester and a total of at least three times during each year he served as vice-principal. The Board and its agents failed to provide three evaluations during 1975-76. The record is devoid of evidence that petitioner protested that he received only one evaluation, requested any additional evaluations or disagreed with the generally favorable content of his one evaluation. The State Board of Education's regulations that the evaluations must be in writing (N.J.A.C. 6:3-1.19) were not, however, promulgated until January 16, 1976. In any event, petitioner accepted continuing employment as a vice-principal for the ensuing 1976-77 school year during which he was evaluated twice during the second

semester and was given opportunity to read and sign those evaluations. (Exhibits D, E) The Board, however, was remiss in not providing the required evaluation during the first semester of 1976-77. Its later action on March 28, 1977 giving a period in excess of sixty days notice of termination in no way absolved it of responsibility to evaluate petitioner, in compliance with N.J.S.A. 18A:27-3.1 and N.J.A.C. 6:3-1.19, at least one time during the first semester of 1976-77.

It is evident that the Board was in more substantial compliance, however, than that which was found to prevail in Louis A. Foleno v. Board of Education of the Township of Bedminster, Somerset County, 1978 S.L.D. ____ (decided February 22, 1978) Therein, Foleno was found to have been observed for a total of ten minutes and evaluated only once by his principal during the entire 1975-76 school year. The Commissioner determined that Foleno, because of the Board's violation of N.J.S.A. 18A:27-3.1, while not entitled to reinstatement, merited a monetary award consisting of sixty days' salary with attendant emoluments. Therein the Commissioner stated:

> "***The Legislature of this State has delegated to local boards of education the authority to determine who shall teach in the public schools. As was stated by the Court in Porcelli et al. v. Titus et al., 108 N.J. Super. 301 (App. Div. 1969), cert. den. 55 N.J. 310 (1970):
>
> > '***We endorse the principle, as did the court in Kemp v. Beasley, 389 F. 2d. 178, 189 (8 Cir. 1968), that 'faculty selection must remain for the broad and sensitive expertise of the School Board and its officials'***.' at 312)***"
>
> (at ____)

And,

> "***In the instant matter, the fault lay in the dilatory evaluation of petitioner by the Board's administrative officer, rather than in an improper act of the Board itself. It may validly be argued, however, that the Board failed to cause its principal to carry out the statutory mandate of providing three evaluations during the 1975-76 school year. While that failure to fulfill the statutory mandate may not be lightly regarded, it does not strip the Board of its yet more weighty statutory responsibility of determining who shall teach in its classrooms. Nor did the

> Board disregard other pertinent statutory mandates as witnessed by its notification to petitioner of his employment status in timely fashion in compliance with N.J.S.A. 18A:27-10.
>
> "In such matters the canons of statutory interpretation require that pertinent statutes bearing on the reemployment of nontenured teachers be read in pari materia. No one statute may be considered to the total exclusion of others.***" (at _____)

And,

> "***The Board, however, had valid reasons for his non-reemployment. Thus, the single element calling for redress is the Board's failure to cause him to be evaluated a second and third time pursuant to N.J.S.A. 18A:27-3.1. This violation neither lulled petitioner into complacency by issuance of a successor contract nor perpetrated on him the disadvantage of having to seek alternate employment at the end of the academic year***. Nevertheless, the disregard of statutory mandate demands equitable redress.***" (at _____)

And,

> "***Accordingly, the Board is directed to pay petitioner sixty days' salary and attendant emoluments in accordance with the terms of his 1975-76 contract.***" (at ____)

In the instant matter petitioner received two evaluations during the second semester of the 1976-77 school year. They not only identified deficiencies in his performance of duty and extended valuable suggestions to assist him to improve his professional competence, but also made reference to three conferences which the evaluator had conducted with petitioner during the first semester of that year when petitioner's deficiencies had been discussed. Within that factual context, petitioner's argument that the two evaluations by his principal, less than one month apart, constitute bad faith is rejected.

Nor does the Commissioner view the Board's delay of seven days following petitioner's informal appearance to be a substantive violation of existing education law. The Board had acted on March 28, 1977 to terminate petitioner's services as vice-principal effective June 23, 1977. This action clearly

advised petitioner that his employment status for the ensuing academic year reverted to that of a tenured teacher. (Exhibit F) Accordingly, petitioner knew his employment status and the Board was not compelled to act under the time limitations set forth in N.J.S.A. 18A:27-10 et seq. and N.J.A.C. 6:3-1.20(i). It is commendable that the Board gave petitioner its reasons and chose to allow him an informal appearance in order that he have opportunity to attempt to dissuade it from its prior determination. Donaldson v. Board of Education of North Wildwood, 65 N.J. 236 (1974) That the Board waited a period of seven days to advise him of its decision to reaffirm its prior decision, however, was neither violative of N.J.A.C. 6:3-1.20(i) nor unreasonable. The Commissioner so holds.

Reinstatement of petitioner to his position of vice-principal is not warranted. Porcelli, supra; Foleno, supra It remains to determine whether the molding of a financial remedy should be ordered.

The Commissioner is fully cognizant of the determinations of the State Board of Education and the Court in Margaret Pelose v. Board of Education of the Township of South Brunswick, Middlesex County, 1977 S.L.D. ___ (decided March 10, 1977), aff'd in part/rev'd in part State Board of Education, August 3, 1977, aff'd Docket No. A-271-77 New Jersey Superior Court, Appellate Division, June 29, 1978. Therein the State Board affirmed the Commissioner's determination not to order Pelose reinstated but reversed his directive that she be awarded a sum of money in excess of six months' salary for failure of the Board to provide her with explicit reasons for nonreemployment. The Appellate Court in affirming the State Board's opinion stated that it noted "***no provision, either expressed or fairly to be implied, in N.J.S.A. 18A:27-3.2 which provides a basis for penalizing a board of education for failure to comply with its terms.***" (Slip Opinion, at p. 3)

The instant matter is, however, importantly distinguished from Pelose, supra, in that there was no factual finding therein that appropriate evaluations had not been made and timely furnished to Pelose. By contrast, petitioner herein, during the 1976-77 school year, was not provided an evaluation of his performance until March 24. This date was only four days prior to the Board's action on March 28 terminating his employment as vice-principal, effective June 23. Four days obviously provided insufficient time for him to demonstrate to his superiors improved performance in identified deficiencies. Accordingly, the Commissioner concludes that the Board and its agents were in substantive noncompliance with N.J.S.A. 18A:27-3.1 which states that the purpose of the evaluations of nontenured teaching staff members is

> "***to recommend as to reemployment, identify any deficiencies, extend assistance for their correction and improve professional competence."

Local boards may not with impunity ignore either the provisions or stated purposes of the statute or the State Board of Education's rules promulgated pursuant thereto. Were such noncompliance countenanced the result would be to render the statute unenforceable. The Commissioner so holds. As was stated in Louis A. Foleno v. Board of Education of the Township of Bedminster, Somerset County, 1978 S.L.D. ___ (decided February 22, 1978) wherein it was determined that adequate evaluations were not made but that viable reasons for nonreemployment existed:

> "***[T]he disregard of statutory mandate demands equitable redress.*** Accordingly, the Board is directed to pay petitioner sixty days' salary***." (at ____)

After carefully reviewing the relevant facts, ante, and balancing the arguments of law set forth in Briefs and memoranda of counsel, the Commissioner determines that the Board's failure to provide two evaluations of petitioner during the 1975-76 school year and one during the first semester of the 1976-77 school year constitutes sufficient noncompliance with N.J.S.A. 18A:27-3.1, which became effective July 1, 1975, to order a financial award to petitioner. This determination is grounded in the realization that, even with the aforementioned three conferences with his principal, petitioner was to some degree disadvantaged by not receiving any formal written evaluation especially during the entire first semester of 1976-77.

This violation, however, is viewed as minimal. Accordingly, the Board is directed to compensate petitioner a sum of money equal to the difference between the salary which he was paid for teaching during the month of September 1977 and the amount which he would have received in accordance with the Board's salary policies had he been continued as vice-principal for that month. To this limited extent petitioner's prayer for relief is granted. His prayers for reinstatement with or without tenure, additional salary, emoluments and legal fees are denied.

COMMISSIONER OF EDUCATION

June 11, 1979

JOHN F. COULTER, JR. :

PETITIONER-APPELLANT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF CALDWELL-WEST CALDWELL, ESSEX COUNTY, : DECISION

RESPONDENT-APPELLEE. :

:

Decided by the Commissioner of Education June 11, 1979

For the Petitioner-Appellant, Harper & O'Brien
(John J. Harper, Esq., of Counsel)

For the Respondent-Appellee, McCarter & English
(Steven B. Hoskins, Esq., of Counsel)

In this case a tenured teacher who served for almost two years in the position of Vice Principal was terminated in that position pursuant to a 60-day notice provision in his employment contract. In his first year he received only one written evaluation, but with numerous suggestions for improvement. He was given no evaluation during the first semester of his second year, although the Principal held three conferences with him in September and October. Thereafter he received written evaluations on February 28 and March 24. At the March 28th meeting the Board gave the teacher notice that he would not be re-employed as Vice Principal. After the end of the school year, the teacher filed a petition seeking reinstatement to his former position as Vice Principal.

The Commissioner found the Board remiss in its failure to comply with N.J.S.A. 18A:27-3.1, which calls for at least three observations and evaluations during each school year and not less than one during each semester. The Commissioner refused, however, to order reinstatement of Petitioner, ruling that violation of the statute did not strip the Board of its responsibility to decide who shall teach in its classrooms. The Commissioner did nevertheless affix a small monetary penalty, directing the Board to pay Petitioner the difference between what he received as a classroom teacher and what he would have received during the month of September of the ensuing school year if he had been Vice Principal.

The State Board affirms the Commissioner's refusal to reinstate Petitioner, but sets aside his directive for payment of monetary compensation. We believe this result to be mandated by the decision of the Appellate Division in Pelose v. South Brunswick Board of Education, Docket No. A-271-77, decided

June 29, 1978. That case arose from the failure of the local board to provide Petitioner with a timely statement of reasons for its determination not to continue her in its employ, contrary to the mandate of N.J.S.A. 18A:27-3.2. The State Board of Education affirmed the Commissioner's determination not to order reinstatement, but reversed his directive that Petitioner be awarded a sum of money on account of the violation. As related in the Commissioner's decision in the instant case, the Appellate Division affirmed the State Board's decision, noting the absence of any provision, either expressed or implied, in N.J.S.A. 18A:27-3.2 which provides a phrase for penalizing a board of education for failure to comply with its terms. The statute here involved, N.J.S.A. 18A:27-3.1 is part of the same legislative act as 18A:27-3.2. Hence we feel that the Appellate Division in Pelose controls here.

Such a holding does not imply that these statutes may be violated with impunity; intentional or frequent non-compliance may result in prosecution for non-performance of governmental duties or in action by the State Department of Education pursuant to the enforcement powers granted to the Commissioner and the State Board under Title 18A.

We also believe that the Commissioner erred in his opinion below in declining to rule upon Petitioner's contention that the local board failed to comply with the Open Public Meetings Act. Upon the reasoning of the Appellate division in Shop-Rite of Hunterdon County v. Township Committee of Raritan, 131 N.J. Super. 428 (App. Div. 1974) and in Schults v. Board of Education of Teaneck, 86 N.J. Super. 29 (App. Div. 1964), we think the Commissioner has concurrent jurisdiction with the Superior Court to determine in the first instance factual questions which may arise under the Open Public Meetings Act when these are interwoven with other questions arising under the school laws. In the instant case, however, we see no need to remand this matter to the Commissioner for further consideration.

November 8, 1979

Pending N.J. Superior Court

BASIL M. CASTNER, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP OF PLUMSTED, OCEAN COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Basil M. Castner, Pro Se

For the Respondent, Kessler, Tutek and Gottleib
(Henry G. Tutek, Esq., of Counsel)

Petitioner, a tenured, professionally certificated employee of the Board of Education of the Township of Plumsted, hereinafter "Board," alleges the impropriety of the administrators' salary guide established by the Board and his placement on it and claims entitlement to back military pay for the school years 1958-59 to 1968-69. The Board asserts that its establishment of an administrators' salary guide and petitioner's placement on it were legal and proper actions and denies petitioner's claim to back military pay by invoking the doctrine of laches.

A conference of counsel was held on April 7, 1978 at the State Department of Education, Trenton, by a representative for the Commissioner. It was agreed that the concerns of petitioner be dealt with as one Petition and the matter be submitted to the Commissioner for summary judgment. The matter is presently before him for adjudication based on the pleadings, documents and Briefs as submitted.

Petitioner, a military service veteran and tenured professionally certificated employee, has been in the employ of the Board for twenty years, twelve years as a teacher and eight years as a principal. Petitioner alleges that the Board improperly established a salary guide for administrators at its meeting of July 12, 1977 which stated in its entirety:

> "***[P]ursuant to 18A:29-4.3 (administrator's salary schedule), the Plumsted Board of Education adopted on July 12, 1977, the following salary guide for 1977-78.
>
> > Elementary School Principal-$17,000 to $21,000 (12 months)
> > Coordinator (T&E) Compensatory Education and Community Education-$16,000. to $19,000. (10 months)"

Petitioner argues that the Board improperly established his salary as principal for the 1977-78 school year as $21,000, the same salary as the 1976-77 school year. Petitioner contends that his salary based on the negotiated teachers' salary guide plus twenty percent by reason of his twelve month contract should be $23,226 for the school year 1977-78. Petitioner argues further that such action of the Board constitutes the withholding of a increment as established by N.J.S.A. 18A:29-14. He contends that the Board acted improperly because it did not follow the mandate of N.J.S.A. 18A:29-14 which states:

> "Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned. The member may appeal from such action to the commissioner under rules prescribed by him. The commissioner shall consider such appeal and shall either affirm the action of the board of education or direct that the increment or increments be paid. The commissioner may designate an assistant commissioner of education to act for him in his place and with his powers on such appeals. It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment."

Petitioner, in claiming entitlement to back pay for military service, contends that the Board, in violation of N.J.S.A. 18A:29-11, failed to adjust his salary fully and accordingly as per the following schedule:

Year	Salary Guide Step Without Military Pay	Salary Paid	Salary Guide Step with 4 Years Military	Revised Salary	Unpaid Military
1958-59	1	$ 4,000	5	$ 4,800	$ 800
1959-60	2	4,300	6	5,000	700
1960-61	7	5,200	7	5,200	---
1961-62	7	5,600	8	5,800	200
1962-63	9	6,000	9	6,000	---
1963-64	10	6,400	10	6,400	---
1964-65	11	7,150	11	7,250	100
1965-66	max.	7,700	max.	7,700	---
1966-67	max.	8,200	max.	8,700	500
1967-68	max.	8,950	max.	9,850	900
1968-69	max.	10,550	max.	10,750	200
				TOTAL	$3,400

Petitioner claims entitlement to $3,400 of back military pay citing Howard J. Whidden v. Board of Education of the City of Paterson, 1976 S.L.D. 356, modified Docket No. A-3305-75 New Jersey Superior Court, Appellate Division, January 28, 1977.

The Board argues that its adoption of an administrators' salary guide at its meeting of July 12, 1977 for the 1977-78 school year was legal, proper and not violative of any statutory provision. (Board's Brief, at p. 1) The Board argues further that petitioner cannot base any salary claim for his position as principal on the negotiated teachers' salary guide, as he is not a member of that negotiating unit. The Board contends that petitioner's salary is determined by statutory requirement of N.J.S.A. 18A:29-4.3 which states in its entirety:

> "The board of education of every school district employing one or more teaching staff members having full-time supervisory or administrative responsibilities shall adopt salary schedules for each school year that begins after the effective date of this act for all such members, except that for a superintendent of schools the board may adopt a salary schedule. Such salary schedules shall be subject to the provisions of N.J.S. 18A:29-4.1. Nothing contained in this section of the act shall authorize a board to pay an amount of salary less than the amount such member would be entitled to under any other law. The schedules adopted pursuant to this section shall be filed with the Commissioner of Education within 30 days after the adoption of each such schedule and the adoption of each subsequent revision of each schedule."

The Board avers that it has discharged its duty pursuant to the aforestated statute by its action on July 12, 1977 to establish the requisite administrators' salary guide. The Board denies that its action, establishing $21,000 as the guide maximum and fixing petitioner's salary for 1977-78 at the same level at which he received recompense for the 1976-77 school year, constituted the withholding of an increment. The Board denies the applicability of N.J.S.A. 18A:29-7 and 8 and states that petitioner was placed at the maximum level of the administrators' salary guide, the position on the guide to which he was entitled. (Board's Brief, at pp. 2-3)

The Board denies petitioner's claim for military service credit for the school years 1958-59 to 1968-69 relying on N.J.S.A. 2A:14-1, the Statute of Limitations, which provides:

> "Every action at law for trespass to real property, for any tortious injury to real or personal property, for taking, detaining, or converting personal property, for replevin of goods or chattels, for any tortious injury to the rights of another not stated in sections 2A:14-2 and 2A:14-3 of this Title, or for recovery upon a contractual claim or liability, express or implied, not under seal, or upon an account other than one which concerns the trade or merchandise between merchant and merchant, their factors, agents and servants, shall be commenced within 6 years next after the cause of any such action shall have accrued.***"

The Board avers that petitioner's claim for military service back pay is barred as not timely under this statute, as the last date for making such claim on the Board would have been June 30, 1975, not May 2, 1977 when he made such claim. (Board's Brief, at p. 5)

The Commissioner deems it proper to now restate petitioner's concerns

1. that the Board by action on July 12, 1977 to establish an administrators' salary guide with a $21,000 maximum acted improperly;

2. that by placing petitioner at this maximum the Board withheld his salary increment because he received the same salary for two successive years and would have received a greater amount if his salary had been based on the negotiated teachers' salary guide;

3. that the Board failed to properly remunerate petitioner for his military service credit for the school years 1958-59 to 1968-69.

The Commissioner will address himself to the matter, seriatim. Boards of education have broad powers and responsibilities vested in them by virtue of N.J.S.A. 18A:11-1 which states in its entirety:

> "The board shall --
>
> a. Adopt an official seal;
>
> b. Enforce the rules of the state board;
>
> c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees, subject, where applicable, to the provisions of Title 11, Civil Service, of the Revised Statutes***; and
>
> d. Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district."

Further, the Board must adopt salary schedules for employees having full-time supervisory or administrative responsibilities. N.J.S.A. 18A:29-4.3

The Commissioner finds that the Board fulfilled its statutorily mandated responsibility when it adopted an administrative salary guide on July 12, 1977. Further, the Commissioner finds petitioner's placement on that guide to be a proper placement in view of his years of service in the system. Such placement, although not pleasing to petitioner in terms of total remuneration, was a proper action of the Board and did not constitute the withholding of an increment. The Commissioner observes that although petitioner complains that his salary was identical for two successive years, there is no statute that mandates that a board of education must offer a salary increase every year to its employees where the requirements of N.J.S.A. 18A:29-1 et seq. have been satisfied. Petitioner is a properly certificated full-time administrator holding a twelve month contract with the Board. He is not a member of the teachers' negotiating unit recognized by the Board, nor can he claim recompense based on the teachers' salary guide unless such

agreement has been successfully negotiated with the Board and reflected in the administrators' salary guide adopted by the Board pursuant to N.J.S.A. 18A:29-4.3.

For the aforestated reason the Commissioner finds that petitioner's contention of the impropriety of the Board's action in establishing a salary guide and placing him at its maximum level is without merit.

The Commissioner does not agree with the Board that N.J.S.A. 2A:14-1, the Statute of Limitations, denies petitioner's eligibility for military service credit to determine his proper remuneration by the Board. This is so because the Commissioner determines that the military service credit benefit bestowed upon staff members in the employ of a local board, by N.J.S.A. 18A:29-11, is the result of legislative fiat and not a contractual status. It is, accordingly, not subject to mutually established agreement between the Board and its staff members.

> As was said in Whidden, supra:
> "***The operative language of N.J.S.A. 18A:29-11, insofar as it relates to this appeal, is as follows: 'Every member who *** hereafter shall serve, in the active military or naval service in the United States *** shall be entitled to receive equivalent years of employment credit for such service as if he had been employed for the same period of time. ***' The clear import of the section of the statute is that petitioner's starting salary should have been fixed by the local school district at the minimum step he would have attained had he been employed for the three years he served in the military forces. The legislative use of the word 'shall' ordinarily indicates that the statute is intended to have an imperative rather than a permissive effect; the intent of the legislature is to be gathered from the context in which the words appear. Harvey v. Essex County Board of Freeholders, 30 N.J. 381, 391-392 (1959). It is true, as the Commissioner observed, that N.J.S.A. 18A:29-9 authorizes a school district to place a newly employed teacher at an initial place on the salary schedule as may be agreed upon between the member and the employing board of education. Nothing in the language of that section, however, suggests that the legislature intended to authorize a waiver of or a departure from the requirement of N.J.S.A. 18A:29-11 that credit be given for military service. See Bd. of Ed. Englewood v. Englewood Teachers, 64 N.J. 1, 7 (1973).***" (Slip Opinion, at pp. 3-4)

This is a logical conclusion because it must be borne in mind that another statutory benefit, the acquisition of tenure, has been conferred on staff members pursuant to statutory prescription. N.J.S.A. 18A:6-10 Such benefits have been previously defined by the courts as a legislative status rather than contractual and such rights may not be waived by staff members while they are employed in such positions. Greenway v. Board of Education of Camden, 129 N.J.L. 46 (Sup. Ct. 1942), aff'd 461 (E.&A. 1943); Lange v. Board of Education of the Borough of Audubon, 26 N.J. Super. 83 (App. Div. 1953) Similarly another benefit conferred by legislative fiat is the matter of allowable sick leave and its accumulation. N.J.S.A. 18A:30-1 et seq.

As the Commissioner said in Ruth Z. Yanowitz et al. v. Board of Education of the City of Jersey City, 1973 S.L.D. 57:

> "***It is elemental that a municipal corporation, such as a local board of education, cannot make an illegal or ultra vires act legal on any principles of estoppel. As the Court stated in Gruber et al. v. Mayor and Township Committee of Raritan Township, 73 N.J. Super. 120 (App. Div. 1962) at p. 126: '***A municipality is not totally exempt from the principles of fair dealing.***' The Court quoted Howard D. Johnson Company v. Township of Wall, 36 N.J. 443, 446 (1962) as follows:
>
> > '***Indeed, government itself is created to provide justice; its agent, a municipality, should be loath to succeed upon a mere tactical advantage.***'
>
> See also City of East Orange v. Board of Water Commissioners of East Orange, 73 N.J. Super. 440 (Law Div. 1962).
>
> "Public policy demands that the mandate of the law should override the doctrine of estoppel. No amount of misrepresentation can prevent a party, whether a citizen or an agency of government, from asserting as illegal that which the law declares to be such. Montgomery v. Wilmerding, 26 N.J. Super. 214, 220 (Chan. Div. 1953), 31 C.J.S. Estoppel § 138, p. 685.***" (at 78)

Accordingly, the Commissioner finds and determines that the Board did not properly remunerate petitioner for his military service credit and directs the Board to pay petitioner an additional $3,400. In all other matters the Commissioner finds petitioner's pleadings to be without merit and are accordingly dismissed.

COMMISSIONER OF EDUCATION

June 11, 1979
Pending before State Board of Education

BASIL M. CASTNER,	:	
PETITIONER-APPELLEE,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PLUMSTED,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, June 11, 1979

For the Petitioner-Appellee, Starkey, Kelly, Cunningham, Blaney and Ward (James M. Blaney, Esq., of Counsel)

For the Respondent-Appellant, Kessler, Tutek and Gottlieb (Henry G. Tutek, Esq., of Counsel)

This controversy involves two compensation claims by a tenured teaching staff member of the Respondent School District: (1) that the Board improperly adopted an administrator's salary guide which fixed Petitioner's salary at the same level for two years; and (2) that the Board failed to pay Petitioner the amounts he was entitled to for military service credit for the years 1958-59 to 1968-69. Since the petition herein was not filed until 1977, the Board invoked the six-year statute of limitations with respect to the second claim.

The Commissioner upheld the Board on the first issue, determining that the salary guide had been lawfully adopted. On that point the State Board affirms the Commissioner for the reasons stated in his opinion.

The Commissioner ruled in favor of Petitioner on the claim for military service credit, holding that the statute of limitations did not apply. We direct that the Commissioner be reversed on that issue, since we believe that the claim for military service credit was barred by the statute of limitations.

The Petitioner here is seeking to obtain additional pay to which military service entitled him between the years 1958 and 1969. This claim was not asserted, however, until 1977 - eight years after the last alleged underpayment and 18 years after accrual of the initial cause of action. The pertinent language of N.J.S.A. 2A:14-1 reads as follows:

> "Every action at law . . . for recovery upon a contractual claim or liability, express or implied, not under seal . . . shall be commenced within 6 years next after the cause of any such action shall have accrued."

Although the instant proceeding has initially been brought before the Commissioner pursuant to N.J.S.A. 18A:6-9, the substance of the claim is still a suit by a public employee to recover compensation -- a matter cognizable in a court of law. Thus this case constitutes an "action at law" within the meaning of N.J.S.A. 2A:14-1. Biddle v. Board of Education of Jersey City, 1939-49 S.L.D. 51 (State Bd. of Ed.); Sousa v. Board of Education of Rahway, 1979 S.L.D. 140.

The central question we now face is whether the fact that military service credit is prescribed by a statute removes the instant claim from the foregoing statute of limitations. In our view, the New Jersey Supreme Court has already decided the question in the negative.

In Miller v. Board of Chosen Freeholders of Hudson County, 10 N.J. 398 (1952), two jail guards, employees of Hudson County, brought actions for compensation allegedly due under a statute increasing their salaries. In each case the suit was commenced more than six years after the cause of action had accrued. The Appellate Division held that the defense of the statute of limitations was not available to the County because the Plaintiffs' claims were based upon a statutory direction and therefore were not barred. The Supreme Court reversed. The opinion of Justice Burling noted that "a statute of limitations is one of repose", which does not extinguish a right but does operate on the remedy. After an exhaustive review of the law on the subject, the Court reached the following conclusion (10 N.J. at page 415):

> ". . . the claim of the plaintiffs in the present case rested not in statute but upon the contractual status of their intestates as employees of the county, the substance of their action was one for compensation for services rendered raising the implied contract to pay the reasonable value thereof as established by statute . . . "

Elaborating the proposition that public employment is a contractual relationship between the public employer and the employee, the Court further stated (p. 409):

> "In actions such as these, the substantive right stems from the rendition of the services; the statutory rate of pay is the measure by which the true value of the service performed is proved, and this is the more apparent by virtue of the fact that these legislative enactments make no provision for their enforcement, a clear legislative recognition of the availability of ordinary legal remedies. The only conclusion to be reached, therefore, is that the

> six-year statute of limitation, R.S. 2:24-1, supra, clearly applies to such actions and was a valid defense in this case . . . "
> (Emphasis in text)

The Supreme Court's decision in the Miller case was cited with approval by the same Court in State v. Atlantic City Electric Co., 23 N.J. 259, 270 (1957), where the court reiterated that the running of the statute of limitations is suspended "only when the liability is dependent solely upon statutory provisions." In public employment cases, liability of the governmental body is not dependent solely upon statutory provisions; it depends upon the rendition of services by the employeee, as the Court said in Miller; the statute regarding military service credit measures in part the compensation to be paid but does not change the basic nature of a claim for underpayment.

We further note the recent decision of the Chancellor of Higher Education in Keeler v. County College of Morris, precisely in point, where petitioner's claim for unpaid military service credit was not brought unitl seven (7) years after the cause of action accrued. The Chancellor held that the cause of action was barred by the statute of limitations.

The case of Whidden v. Board of Education of Paterson, 1976 S.L.D. 356, modified by Appellate Division 1977 S.L.D. 1312, does not apply here because it did not involve the statute of limitations; the petition was filed approximately 4½ years after the first year in which occurred the failure to pay in accordance with the military service credit requirement.

The Commissioner's decision herein cites authorities to the effect that a governmental body is not exempt from the principles of fair dealing. By the same token, we believe that in fairness a Board of Education should be protected from the assertion of stale monetary claims which an employee has failed to prosecute within the period of limitations deemed reasonable by the legislature.

For the foregoing reasons, the State Board reverses the Commissioner's decision insofar as it awarded military service credit to the Petitioner, but in all other respects the decision is affirmed.

Attorney Exceptions are noted

December 5, 1979

Pending New Jersey Superior Court

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK,

PETITIONER,

V.

BOARDS OF EDUCATION OF THE BOROUGHS OF BELMAR AND MANASQUAN, MONMOUTH COUNTY,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, McOmber & McOmber
(Richard D. McOmber, Esq., of Counsel)

For the Respondent Belmar Board of Education,
Sim, Sinn, Gunning & Fitzsimmons (Kenneth B. Fitzsimmons, Esq., of Counsel)

For the Respondent Manasaquan Board of Education,
Joseph N. Dempsey, Esq.

The petitioning Asbury Park Board of Education alleges that the Belmar Board of Education has failed to comply with the provisions of N.J.S.A. 18A:38-12 by allowing the percentage of its pupils which in 1977-78 were sent to Asbury Park High School as tuition pupils to drop below the 44.3 percent ratio which prevailed during the 1943-44 school year. The Asbury Park Board requests a directive from the Commissioner of Education to the Belmar Board to send all of its high school pupils to Asbury Park High School until the 44.3 percent level is reached. It further requests the Commissioner to terminate the sending-receiving relationship between Belmar and Manasquan, whose high school is on double sessions, and direct that all Belmar secondary pupils be designated as tuition pupils at Asbury Park High School.

The respondent Belmar Board asserts that it has met its legal obligations by consistently sending 44.3 percent of its graduating eighth grade pupils to Asbury Park High School and that any imbalance which has occurred has resulted from dropout of its pupils enrolled in the Asbury Park High School.

The respondent Manasquan Board, which also receives Belmar tuition pupils, contends that the allegations set forth in the Amended Petition of Appeal fail to disclose good and sufficient reason to alter or terminate the existing sending-receiving relationship between Manasquan and Belmar.

A plenary hearing was conducted on June 1, 1978 at the office of the Somerset County Superintendent of Schools, Somerville, by a hearing examiner appointed by the Commissioner.

A stipulation agreement was entered into by the parties prior to the hearing. Therein it was agreed, inter alia, that the Asbury Park Board would agree to ask for no greater than 44.3 percent of the Belmar pupils entering as ninth grade pupils for the 1978-79 school year and also agree not to seek to disturb the assignments of any Belmar pupils enrolled at Manasquan High School. (Tr. 7-11) Briefs of counsel were filed subsequent to the hearing.

The hearing examiner report follows setting forth first the undisputed relevant facts which reveal the contextual setting of the dispute:

Asbury Park High School with a total functional capacity of 1,339 pupils currently enrolls tuition pupils in grades nine through twelve from seven sending districts, including Belmar. The high school, which had been on double sessions with as many as 2,144 enrolled pupils in 1964-65 prior to the termination of certain other sending-receiving district relationships, was operating on a single session with 1,134 pupils actively enrolled at the time of the hearing. Between 1973 and 1978 pupil enrollment in the high school declined by 42. During this same period resident enrollment increased by 77 while non-resident enrollment decreased by 119. (P-3)

A similar dispute by the same parties was previously determined by the Commissioner and is reported in Board of Education of the City of Asbury Park v. Board of Education of the Borough of Belmar and Board of Education of the Borough of Manasquan, 1967 S.L.D. 275. Therein, it was found that Belmar in fifteen of twenty years had violated R.S. 18:14-7 (now N.J.S.A. 18A:38-11, 14, 19) by allowing its percentage of tuition pupils sent to Asbury Park to fall below 44.3 percent as fixed by statutory prescription. N.J.S.A. 18A:38-12 provides that:

> "Whenever the board of education of a district shall designate two or more high schools without the district for the attendance of its high school pupils it shall, by resolution, allocate and apportion such pupils among the designated high schools and if no such allocation and apportionment has been made prior to the academic year 1943-44, the actual allocation and apportionment of pupils among said high schools in effect in said academic year shall be effective as such allocation and apportionment but if any board of education of any district which is not now sending pupils to a high school or high schools without the district shall hereafter so designate two or more high schools for said purpose and shall fail to allocate and apportion them by resolution among said high schools, the actual allocation and apportionment of high school pupils made in the first

> academic year of the designation shall be effective as the allocation and apportionment of such pupils."

N.J.S.A. 18A:38-13 reads as follows:

> "No such designation of a high school or high schools and no such allocation or apportionment of pupils thereto, heretofore or hereafter made pursuant to law shall be changed or withdrawn, nor shall a district having such a designated high school refuse to continue to receive high school pupils from such sending district except for good and sufficient reason upon application made to and approved by the Commissioner, who shall make equitable determinations upon any such applications."

In Asbury Park, supra, the Commissioner determined, inter alia, that Asbury Park was entitled to receive 44.3 percent of Belmar's secondary pupils in the absence of approval of an application to alter that ratio and that Manasquan had no entitlement to receive more than 55.7 percent of Belmar's high school pupils. (1967 S.L.D. at 279) Following that determination until the 1977-78 school year, Belmar deviated by less than .14 percent from the Commissioner's directive to reinstate and maintain a sending-receiving ratio of 44.3 percent with Asbury Park. (R-1-2; Tr. 149-150)

During 1977-78, however, Belmar sent to Asbury Park only 78 or 34.4 percent of its total of 227 secondary tuition pupils. Asbury Park contended that at a tuition cost of $2100 per pupil this caused a shortfall of $48,300 which shortfall was further increased by dropouts during the school year. (Tr. 60-62; P-8) Thereafter, the Asbury Park and Belmar Boards and their agents engaged in dialogue but failed to resolve their differences. (P-9-13)

On March 30, 1978 the Belmar Board passed a resolution which provided for the assignment of 44.3 percent of its eighth grade graduates to Asbury Park High School for the 1978-79 school year. It further provided that siblings be assigned to the same high school currently attended by their older brothers and sisters. That resolution also directed that a lottery be the means by which school assignments would be made and that late enrollees and those who did not complete a certain questionnaire in a timely fashion would be assigned to Asbury Park High School. (P-15)

The Asbury Park Superintendent of Schools testified that the aforementioned loss of tuition revenue coupled with other budgetary problems resulted in a deficit of $126,640

necessitating an appeal to the Commissioner for an increased cap waiver and certification of additional revenues to be raised in Asbury Park from local tax revenues in order to complete the 1977-78 school year. (Tr. 60-67) That appeal was granted. See Board of Education of the City of Asbury Park, Monmouth County v. Commissioner of Education, 1978 S.L.D. _____ (decided State Board March 1, 1978), Commissioner's order June 2, 1978.

The Superintendent also testified that he believes that Belmar's lottery, sibling policy and policy on late enrollment and late filing of questionnaires promotes a divisive feeling that losers go to Asbury Park. (Tr. 78-83) He testified further that if all Belmar pupils were assigned to Asbury Park they would all be on single session and the ratio of whites to minorities would increase in Asbury Park High School from the present 37 percent to 42 percent. (Tr. 85-87, 92-93, 122, 130)

Called as a witness by petitioner, the Director of the Office of Equal Educational Opportunity of the State Department of Education testified that, in her opinion, the addition of all of Belmar's pupils could improve the racial balance in Asbury Park High School. (Tr. 32-39) She testified, however, that a difference of approximately four percentage points might not be significant in forestalling such undesirable effects as white flight. (Tr. 34)

The Belmar principal testified that in May 1978 sixteen non-white pupils were in attendance at Asbury Park High School as compared to nineteen non-white pupils at Manasquan High School. (Tr. 153) These figures are at variance with documentary evidence submitted by the Board which show only sixteen non-white pupils enrolled at Manasquan as of March 31, 1978. These statistics are sufficiently accurate for the purposes which must be resolved here but, because of the methods utilized in computation, they are less than totally authoritative. (P-4, 6, 16)

The hearing examiner, after careful review of the oral and documentary evidence, the pleadings and Briefs of counsel, sets forth his findings of fact to be considered in pari materia with those uncontroverted facts heretofore recited:

1. Belmar was in compliance from September 1969 through June 1977 with an overall deviation of only one-seventh of one percent from the 44.3 percent of its tuition pupils which it was required by N.J.S.A. 18A:38-12 and Asbury Park, supra, to send to Asbury Park High School.

2. During the 1977-78 school year Belmar was in substantial noncompliance with N.J.S.A. 18A:38-12 and Asbury Park, supra, having deviated by 23 pupils and 10 percent from the ratio it was required to send to Asbury Park.

3. The Belmar Board by its resolution of March 30, 1978 sought to perpetuate that noncompliance by resolving that only 44.3 percent of the freshmen for the ensuing year would be sent as tuition pupils to Asbury Park High School.

4. The record presents insufficient evidence on which to base a conclusion that the Belmar Board's sibling policy and random drawing procedure by which pupils select their high school has contributed to divisiveness, racial imbalances or negative attitudes toward Asbury Park High School.

5. The termination of Belmar's sending-receiving relationship with Manasquan and assignment of all Belmar pupils to Asbury Park High School would increase the percentage of white pupils from approximately 37 percent to 42 percent. The resultant effect at Manasquan High School would be an increase of white pupils from approximately 93.6 percent to 94.4 percent.

6. The record has insufficient evidence to support a conclusion that pupils attending Manasquan High School on double session receive less than a thorough and efficient education.

7. The noncompliance by Belmar with its obligation to send 44.3 percent of its secondary pupils to Asbury Park contributed to Asbury Park's shortfall in tuition revenues to the extent of $48,300. Additional shortfall resulting from dropouts during the 1977-78 school year may not reasonably be blamed on the Belmar Board.

8. Assignment of all Belmar secondary pupils to Asbury Park High School would not reduce the numbers of pupils at Manasquan High School sufficiently to allow for termination of double sessions at that school.

9. Assignment of all Belmar secondary pupils to Asbury Park High School would not cause the enrollment at that school to exceed the functional capacity of the physical plant.

The hearing examiner recommends that the Commissioner, in consideration of the Belmar Board's noncompliance with the provisions of N.J.S.A. 18A:38-12, direct that a sufficient number of Belmar's graduating eighth grade pupils be assigned to Asbury Park High School for the 1979-80 school year and each ensuing school year to establish the required 44.3 percent of all of Belmar pupils in grades nine through twelve.

It is further recommended that the Commissioner declare ultra vires that portion of the Belmar Board's March 30, 1978 resolution limiting the number of graduating pupils to be assigned to Asbury Park High School to 44.3 percent.

It is also recommended that the Commissioner deny petitioner's request for a directive that would hold the Belmar Board's policies on siblings and random drawing selection to be improper.

It is further recommended that the Commissioner direct the Belmar Board to assign late enrollees and those who fail to comply with deadlines for questionnaires to either Manasquan High School or Asbury Park High School in such fashion as will most closely approximate the required ratio of Belmar pupils at those schools.

It is also recommended that, in consideration of the heretofore mentioned stipulation agreement, the Commissioner not assign monetary payment to be paid to the Asbury Park Board by the Belmar Board.

In conclusion, the hearing examiner commends to the Commissioner the arguments of counsel set forth in Briefs relative to a determination of whether the fact of double sessions at Manasquan presents sufficient cause pursuant to N.J.S.A. 18A:38-13 to order all of Belmar's secondary pupils to attend, henceforth, the Asbury Park High School as tuition pupils. In this regard it must be recognized that the Belmar Board as a sending district opposes such an order. This contrasts to the factual context in Board of Education of the Borough of Bradley Beach v. Board of Education of the City of Asbury Park, 1959-60 S.L.D. 159. Therein, the Bradley Beach Board successfully petitioned the Commissioner to designate twenty additional secondary pupils, who were then on double sessions at Asbury Park High School, as tuition pupils at Neptune High School which operated on a single session school day.

This concludes the hearing examiner report.

* * * *

The Commissioner has reviewed the entire record of the controverted matter including the exhibits in evidence, the parol evidence entered at the hearing and the Briefs of counsel. The Asbury Park Board filed exceptions to the hearing examiner report pursuant to the provisions of N.J.A.C. 6:24-1.17(b). The thrust of those exceptions has been considered in the determinations set forth, post.

A review of the record confirms the hearing examiner's findings of fact which the Commissioner henceforth holds as his own. They are further substantiated by the March 20, 1979 affidavit of the Superintendent of Belmar submitted at the direction of the hearing examiner with full knowledge of the parties. That affidavit reveals that the following numbers of ninth grade pupils were selected by Belmar to attend the two receiving districts beginning in September 1978:

Manasquan High School - 32
Asbury Park High School - 29

It further reveals that the following numbers actually attended in September 1978:

Manasquan High School - 29
Asbury Park High School - 27

These figures reveal that there was no adjustment in 1978-79 to compensate for the 1977-78 deficient number of tuition pupils sent to Asbury Park.

Belmar had been in compliance with its responsibility to send 44.3 percent of its secondary pupils to Asbury Park until the 1977-78 school year. During that year, however, it sent only 78 or 34.4 percent of its pupils to Asbury Park High School. It further compounded the inequity by a resolution directing that only 44.3 percent of freshmen be sent to Asbury Park in the ensuing school year, thus barring in 1978-79 any compensatory action for the deficiency of 23 pupils sent to Asbury Park in 1977-78.

Elemental principles of equity and fairness demand that compensating adjustment should be made. Accordingly, the Commissioner directs the Belmar Board to send in 1979-80 six ninth grade pupils in addition to the 44.3 percent it is obligated to send on an annual basis to Asbury Park. Assuming that those pupils remain in school for four years this will restore to the Asbury Park Board the tuition lost during 1977-78 for the twenty-three additional tuition pupils from Belmar who in that year should have attended Asbury Park High School to maintain the 44.3 percent ratio. It is also directed that in 1979-80 the Belmar Board shall take similar compensatory action for any deficiencies in percentage of total pupils attending Asbury Park in 1978-79 in order that the 44.3 percent shall be restored and maintained. The computation to effect the directed restoration to that percentage is to be calculated by the Belmar Board and forwarded to the Asbury Park and Manasquan Boards by November 15, 1979 in order that they may make proper budgetary preparations.

These directed adjustments are spread over a period of years in order to avoid excessive impact upon the Asbury Park and Manasquan tuition receivable line items in their current expense budgets at the inception and conclusion of the adjustment period. The end result, however, will be the same as if the adjustments were effected in one year. Asbury Park's application for relief in the form of an immediate cash payment by Belmar is denied.

The Commissioner perceives in the Belmar Board's sibling policy and lottery procedure for selecting pupils no deleterious educational result or abuse of the Board's statutory discretionary authority. Accordingly, petitioner's request that they be declared ultra vires is also denied. The Belmar Board's March 30, 1978 resolution fixing at 44.3 percent the number of pupils to be sent to Asbury Park, however, allows for no adjustments as have herein been found necessary and as may be found necessary in future years. Accordingly, the Belmar Board is directed to rescind that policy, forthwith.

There remains for determination petitioner's further request that an order be entered directing that all of Belmar's secondary tuition pupils be sent to Asbury Park. That request is denied. The matter is importantly distinguished from the factual context presented in Bradley Beach, supra, in which the Bradley Beach Board requested the Commissioner to alter the number of tuition pupils it sent to Asbury Park. By contrast, herein, the Belmar Board has made no such request to alter or terminate its sending-receiving relationship with Manasquan. Conversely, it opposes such action. Nor has there been entered within the record of this controversy evidence on which to base a conclusion that Manasquan High School is unable to continue to provide, as it has for many years, a thorough and efficient system of education for a portion of the secondary pupils of Belmar. Absent such proof, required pursuant to N.J.S.A. 18A:38-13, the Commissioner finds no reason to interpose his judgment for that of the Belmar Board which desires to continue to send a part of its secondary tuition pupils to Manasquan High School. Accordingly, petitioner's request that the Commissioner terminate the existing sending-receiving relationship between the Belmar and Manasquan Boards is denied.

COMMISSIONER OF EDUCATION

June 11, 1979

BOARD OF EDUCATION OF THE BOROUGH OF KEANSBURG,	:	
PETITIONER,	:	
V.		COMMISSIONER OF EDUCATION
BOROUGH COUNCIL OF THE BOROUGH OF KEANSBURG, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

For the Petitioner, Peter P. Kalac, Esq.

For the Respondent, David Zolkin, Esq.

The Board of Education of the Borough of Keansburg, hereinafter "Board," petitions the Commissioner of Education to certify to the Monmouth County Board of Taxation the additional amount of $26,625 to be raised by public taxation for current expenses to operate its schools for the 1978-79 school year. The Board asserts that in the event such additional certification of tax revenue is not ordered by the Commissioner it will not be able to meet all of its financial obligations that it will incur for the 1978-79 school year.

A hearing before a representative of the Commissioner was conducted on an emergent basis on May 21, 1979 at the office of the Monmouth County Superintendent of Schools, Freehold. Respondent Mayor and Council of the Borough of Keansburg failed to file its Answer to the Petition of Appeal pursuant to N.J.A.C. 6:24-1.4. Prior to opening the record for the hearing, the hearing examiner therefor conducted a conference of counsel and set forth a single issue and certain stipulations of fact in the instant matter. The report of the hearing officer follows setting forth first those uncontroverted facts which reveal the context of the disputed matter.

In the matter of Board of Education of the Borough of Keansburg v. Borough Council of the Borough of Keansburg, Monmouth County, 1979 S.L.D. ___ (decided February 21, 1979) the Board, on February 14, 1978, submitted to the electorate a proposal to raise $1,238,495 by local taxation for current expenses for the 1978-79 school year. This item was rejected by the voters and thereafter the Board submitted its budget to Borough Council, hereinafter "Council," which made its determination and certified to the Monmouth County Board of Taxation an amount of $1,043,428, a reduction of $195,067 of the Board's original proposal. The Board appealed Council's reduction to the Commissioner pursuant to N.J.A.C. 6:24-7.1 et seq. Subsequent to a plenary hearing held on September 8, 1978, the Commissioner certified the additional sum of $167,923 to the Monmouth County

Board of Taxation. Thus, the additional certification of $167,923, together with the original certification of $1,043,428 made by Council, resulted in a total amount of local tax levy for current expenses of the school district for the 1978-79 school year of $1,211,351. Keansburg, supra

During the pendency of the appeal, ante, the Board determined that it faced a considerable deficit in its 1978-79 current expense budget. It met with Council and requested financial aid pursuant to N.J.S.A. 18A:22-45, which Council rejected. Thereafter, the Board caused to have an independent audit of its line item accounts by the Division of Finance and Regulatory Services, New Jersey Department of Education. (P-3) It was recommended that the Board apply $92,422 of its unappropriated balance to the 1978-79 current expense budget. This amount, together with the restoration of $167,923 in Keansburg, supra, resulted in a projected deficit of approximately $103,000 for the 1978-79 school year. The Board, therefore, placed certain restrictions upon purchases and spending with a net result that, as of March 31, 1979, the projected deficit for the 1978-79 annual budget was approximately $25,000.

Subsequently, at the annual school election held on April 3, 1979, the Board placed a special question on the ballot to seek authorization to raise by special taxation the amount of $26,625 needed to cover its projected deficit. The amount of $26,625 represented a combination of the $25,000 projected deficit together with an amount of $1,625 which was the interest payment to borrow the $25,000 for the remainder of the 1978-79 school year. The proposition was defeated at the polls.

The Board's auditor testified that he reviewed the independent audit conducted by the representatives of the Department of Education and determined that the Board had a deficit of $21,774 in its state aid revenues. (P-5) He testified that he then referred to the Board Secretary's Financial Report for the month ending April 30, 1979 (P-4) which revealed a projected deficit of $106,430.70, and added the two deficits together to arrive at a total projected deficit of $128,204.70. Thereafter, he applied the amount of $92,422.48 of the unappropriated free balance which then totaled a projected deficit of $35,782.22 for the 1978-79 school year, rather than the amount of $26,625. (P-5-6)

The Board advanced a motion to amend its Petition of Appeal to seek an additional certification of tax revenue in the total amount of $35,782, rather than the amount of $26,625 as set forth in its original petition. The Board's argument to seek the additional certification of tax revenue was grounded upon the Commissioner's decision In the Matter of the Application of the Upper Freehold Regional Board of Education, Monmouth County, 1978 S.L.D. _____ (decided March 22, 1978). Council opposed the Board's motion.

The foregoing testimony of witness was not rebutted within the record and was documented with written exhibits in evidence. (P-1 through P-6) The hearing examiner, accordingly, ascertains the evidence to be fully credible. He finds the following to be true in fact:

1. Subsequent to the close of the hearing and prior to the Commissioner's determination with regard to the Board's 1978-79 budget appeal in Keansburg, supra, the Board determined that it had a shortfall in its state aid revenues in the amount of $21,774.

2. It additionally ascertained that it had over-expended or committed its current expense appropriations in an amount of $106,430.

3. The Board, upon such knowledge and information, applied $92,422 of its unappropriated free balance to its 1978-79 current expense budget and curtailed all but the necessary purchases and expenditures.

It is evident that the Board is confronted with the prospect of not being able to meet its financial obligations for the remainder of the 1978-79 school year. After a careful review of the testimony and the documents in evidence the hearing examiner, however, recommends that the Commissioner deny the Board's motion to amend its Petition. Such a recommendation is not made lightly but, rather, it is the hearing examiner's belief and opinion that the Board can make the necessary adjustments to meet such current expense obligations with an additional amount of $26,625.

Accordingly, it is recommended that the Commissioner determine that the Board's request for additional funds is necessary to maintain a thorough and efficient system of education and through the broad power and authority invested in him, pursuant to N.J.S.A. 18A:7A-1 et seq., certify to the Monmouth County Board of Taxation the additional amount of $26,625 to be raised by public taxation for current expenses of the Board for the 1978-79 school year.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the entire record in the instant matter including the report of the hearing examiner and observes that the parties have waived receipt of the hearing examiner's report pursuant to N.J.A.C. 6:24-1.17(b). The Commissioner adopts the findings and conclusions set forth therein.

It is evident to the Commissioner that the Board has met its burden of proof for the additional funds to meet its financial obligations for the 1978-79 school year. Pursuant to his responsibility and the authority conferred upon him by the Legislature, the Commissioner is empowered to adjust school budgets. N.J.S.A. 18A:7A-15 provides that:

> "If, after a plenary hearing, the commissioner determines that it is necessary to take corrective action, he shall have the power to order necessary budgetary changes within the school district***."

Accordingly, the Commissioner certifies to the Monmouth County Board of Taxation the additional amount of $26,625 to be raised by public taxation for the current expenses of the Board of Education of the Borough of Keansburg for the 1978-79 school year.

COMMISSIONER OF EDUCATION

June 15, 1979

"M.H.," a minor by his parents and natural guardians,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,	:	
RESPONDENT.	:	

For the Petitioner, Morris Starkman, Esq.

For the Respondent, Davis & Reberkenny (William C. Davis, Esq., of Counsel)

"M.H.," hereinafter petitioner, is a sixteen year old eleventh grade pupil enrolled in the Cherry Hill High School-West, hereinafter "high school," who was suspended from school attendance for a period of ten days from May 7 to May 18, 1979 and excluded from participation in the Chemistry 1-B class with the resulting loss of credit for the remainder of the 1978-79 school year by action of the Cherry Hill Board of Education, hereinafter "Board," for his alleged participation with another pupil in throwing a paper plate covered with whipped cream at a teacher at the high school. Petitioner filed a Petition of Appeal accompanied by a Motion for Interim Relief in the instant matter on May 17, 1979 before the Commissioner of Education. Petitioner asserts therein that the Board's action to exclude him from participation in the Chemistry 1-B class for the remainder of the 1978-79 school year is not fair, equitable or just since he believes that he has completed more than a sufficient portion of said course of study to warrant a passing grade and the receipt of credit. He prays that the Commissioner reverse the decision of the Board in order that he may return to said course immediately to receive a grade and credits applicable thereto.

Oral argument on the Motion was presented by counsel to a hearing examiner at the State Department of Education, Trenton, on May 30, 1979 and the Board's Answer, together with exhibits and affidavit, are herewith submitted to the Commissioner for his determination.

At this juncture the Commissioner finds that the following relevant facts giving rise to the instant matter are not in dispute.

On May 4, 1979 at approximately 8:45 a.m. two masked individuals appeared at the doorway of a chemistry classroom and threw an object at the teacher therein who was instructing a first period chemistry class. A portion of the thrown object struck the teacher on his back and the remainder fell to a chemistry demonstration table which had a bottle of a solution of potassium permanganate placed upon it. The teacher pursued the two individuals without success. Subsequently, petitioner and the other pupil were apprehended in the high school and petitioner admitted to his participation in the incident. Thereafter, the teacher filed with the assistant principal a Disciplinary Report and a four page written report of the incident and the assistant principal suspended both pupils for three days.

On May 7, 1979 the assistant principal conducted a suspension hearing and recommended a long term suspension for both pupils. The principal supported such a recommendation that petitioner and the other pupil be suspended from the high school for the balance of the 1978-79 school year.

The parents were advised that petitioner was suspended and by a letter dated May 9, 1979 the principal stated, inter alia, as follows:

> "***After being informed of the results of the Child Study Team's determination, a recommendation will be made to the Board of Education that, unless there is indication that [M.H.] has problems requiring special classification under Chapter 46 of the state education laws, he be suspended for the remainder of the school year.***"

Petitioner's mother addressed a letter to the assistant principal dated May 8, 1979 wherein she objected to an evaluation of petitioner by the Board's Child Study Team. Thus, no such evaluation was carried out. On the same day, the mother also addressed a three page handwritten letter to the teacher involved in the alleged incident.

On May 10, 1979 the principal of the high school forwarded a memorandum to the Superintendent in which he recommended that M.H. "***be suspended from school for the remainder of the academic year with the attendant loss of any academic credit which may have been earned."

On May 11, 1979 the Superintendent addressed a letter to M.H.'s parents to inform them that a suspension hearing before the Board had been scheduled for Monday, May 14, 1979 at 7:00 p.m. The Superintendent also enclosed copies of M.H.'s school records which pertained to the suspension.

On May 14, 1979 the Board held an executive session, the purpose of which was set forth in its minutes as follows:

> "The purpose of the executive session was to provide a hearing to permit the Board of Education to review the incidents leading to a recommendation by [the principal] for a long term suspension of [M.H.] and [M.H.] and to provide an opportunity for [M.H.] and [M.H.] and their attorney, Mr. Starkman to respond.***"

Subsequent to the hearing, in which the teacher, assistant principal, principal, the two charged pupils, their parents, their legal counsel and Board members participated, the Board made its determination which was set forth in its minutes as follows:

> "***After deliberation, the Board directed [the Superintendent] to continue the suspension of [M.H.] and [M.H.] from all classes until May 21, 1979 and to continue the suspension from Chemistry for the remainder of the school year."

On May 15, 1979 the Superintendent addressed a letter to the principal to advise him of the Board's decision and a directive to carry out its order and on May 17, 1979, the Superintendent advised M.H.'s parents of the Board's decision.

Petitioner admits to the charge that he and another pupil wore hoods over their heads and interrupted a first period chemistry class to throw whipped cream on a paper plate at a teacher. He asserts that he had no previous disciplinary problems in the high school. He contends that he had requested a transfer out of the teacher's chemistry classroom but that his guidance counselor had suggested that he "stick it out." (Board's Minutes, May 14, 1979, at p. 2)

Petitioner asserts that while he accepted the ten day suspension from school, he believes that the Board's decision to exclude him from the Chemistry 1-B class for the remainder of the 1978-79 school year with the resultant loss of credit to be excessive punishment. He requests that he be reinstated immediately and that the Board provide him with appropriate tutorial instruction in order for him to make up such work lost while under suspension and during the pendency of this litigation.

The Board relies upon the record, documents in evidence and the uncontroverted facts in support of its position. It asserts that its actions in the instant matter were fair, equitable and just and requests that the Commissioner consider the rights and responsibilities of all the parties involved and uphold the Board's decision.

The Commissioner has carefully reviewed the complete record in the instant matter and is satisfied that petitioner's procedural due process rights were observed and not violated by the Board. The issue now before the Commissioner for consideration is whether or not petitioner's exclusion from the Chemistry 1-B class for the remainder of the 1978-79 school year represents excessive punishment for his admitted offense.

While petitioner may consider his action of throwing whipped cream at a teaching staff member to have been a harmless prank, serious consideration must be given to the inherent danger of such an action. The chemistry teacher's report to the assistant principal indicated that a bottle of a highly toxic solution of potassium permanganate was situated on a demonstration table within a few feet of pupils seated in the classroom. The potential for this bottle of toxic solution to have been broken, either by the flying object or the teacher in his attempt to avoid being struck, and contaminating the teacher and pupils was obvious. Classrooms such as chemistry, biology, woodworking, machine shop, electronics, home economics and others where machinery and/or volatile solutions are in evidence are to be treated with the highest degree of respect and caution. So-called harmless pranks or practical jokes have no place in such settings and may not be tolerated. The Commissioner finds that under the circumstances, petitioner's actions had the potential for danger to the safety and well-being of the teacher and the pupils. In the Commissioner's judgment actions of pupils who perpetrate such incidents cannot go unpunished. A board of education has the statutory authority and the responsibility to deal swiftly and effectively with pupils who wittingly or unwittingly jeopardize the safety and well-being of pupils and school staff members. All pupils are accountable for their actions to school authorities and the authority for the school administration to require such accountability of pupils is clearly set forth at N.J.S.A. 18A:25-2 which provides as follows:

> "A teacher or other person in authority over such pupil shall hold every pupil accountable for disorderly conduct in school and during recess and on the playground of the school and on the way to and from school.***"

As the Commissioner stated in the matter of Rebecca Mayes v. Board of Education of the City of Bridgeton, 1971 S.L.D. 575, at page 578:

> "***A high school is a controlled institution composed of adolescent pupils. As such, it requires compliance with reasonable rules and regulations for deportment and conduct in order to function efficiently. It is clear that the actions of petitioner were that of willful disobedience. *** When viewed against the threatening atmosphere of disruption, ***

> it can only be concluded that such action further imperils the safety and welfare of the school population, and therefore cannot be tolerated.***"

In the instant matter, the Commissioner observes that the nature of the Board's suspension action against petitioner does not constitute his permanent suspension from school, but rather the Board has by its action permitted him to return to all of his school activities except Chemistry 1-B for the remainder of the 1978-79 school year. The Board minutes of May 14, 1979 show, moreover, that it was fully cognizant that such a punishment for the committed infraction meant that petitioner would forfeit all credits he may have earned in the chemistry course for a full academic year. For the Commissioner to obviate the ultimate decision in the instant matter would constitute a substitution of his judgment for that of the Board. In such matters he is guided by the holding in Boult and Harris v. Board of Education of Passaic, 1939-49 S.L.D. 7, aff'd State Board of Education 15, 135 N.J.L. 329 (Sup. Ct. 1947), aff'd 136 N.J.L. 521 (E.&A. 1948) wherein it was stated

> "***[I]t is not a proper exercise of a judicial function for the Commissioner to interfere with local boards in the management of their schools unless they violate the law, act in bad faith (meaning acting dishonestly) or abuse their discretion in a shocking manner. Furthermore, it is not the function of the Commissioner in a judicial decision to substitute his judgment for that of the board members on matters which are by statute delegated to the local boards. Finally, boards of education are responsible not to the Commissioner but to their constituents for the wisdom of their actions.***" (at 13)

The Commissioner observes that the Board of Education of the Township of Cherry Hill has been approved to operate a 1979 summer school program. He directs, therefore, that the Board provide petitioner the opportunity to enroll in such approved summer school in a chemistry course of study similar to the course from which he was excluded for the 1978-79 school year.

For the reasons stated, the Motion for Interim Relief is denied.

Accordingly, the Commissioner finds and determines that no further relief can be accorded petitioner in this regard. Consequently the Petition is dismissed.

COMMISSIONER OF EDUCATION

June 14, 1979

CAROL A. PATRICK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MAINLAND REGIONAL HIGH SCHOOL DISTRICT AND ROBERT A. OLDIS, SUPERINTENDENT, ATLANTIC COUNTY	:	DECISION
RESPONDENTS.	:	

For the Petitioner, Carol A. Patrick, Pro Se

For the Respondents, Gerard C. Gross, Esq.

Petitioner is a teacher who was employed by the Board of Education of the Mainland Regional High School District, hereinafter "Board," during the 1976-77 school year as a long term substitute and was not thereafter reemployed. Petitioner alleges that the Board's action in not reemploying her was procedurally defective because she received only one evaluation and prays for reinstatement together with any back pay to which she is entitled. The Board admits that petitioner was entitled to at least one more evaluation during the 1976-77 school year but absent statutory or administrative authority denies that any sanctions against the Board should be imposed by the Commissioner of Education.

At a conference of counsel held February 15, 1978 at the State Department of Education, Trenton, by a representative of the Commissioner it was agreed to submit the matter to the Commissioner for adjudication based on the pleadings, exhibits and Briefs of counsel.

The facts of the matter are these:

Petitioner, a teacher certificated in secondary school English, was employed by the Board as a long-term substitute teacher from October 18, 1976 to June 30, 1977 at the pay scale of a regular teacher. (Exs. A,B,E,I)

Petitioner taught regularly from October 18, 1976 to the last day of school, June 16, 1977, in her position of long-term substitute. She was evaluated for classroom performance on November 9, 1976 by the head of the English department. (Ex. C) She received no further evaluations. On April 12, 1977

petitioner was notified by the Superintendent of Schools that her contract would not be renewed. (Ex. D) Petitioner did not request a statement of reasons within fifteen days after such notice as prescribed in N.J.S.A. 18A:27-3.2.

This concludes the recitation of relevant facts in this matter.

Petitioner argues that the Board's determination not to reemploy her for the 1977-78 academic year was in violation of N.J.S.A. 18A:27-3.1 which provides that:

> "Every board of education in this State shall cause each nontenure teaching staff member employed by it to be observed and evaluated in the performance of her or his duties at least three times during each school year but not less than once during each semester. Each evaluation shall be followed by a conference between that teaching staff member and his or her superior or superiors. The purpose of this procedure is to recommend as to reemployment, identify any deficiencies, extend assistance for their correction and improve professional competence."

Petitioner argues that being a teaching staff member as defined in N.J.S.A. 18A:1-1 she was wrongfully denied an opportunity to be properly evaluated and improperly denied employment by the Board for the ensuing school year. (Petitioner's Brief, at p. 4) She asks for restoration for the academic year 1977-78 in the form of the difference between what her salary would have been had she been employed by the Board for the year and what she actually earned; absent this, she asks for restoration to a position for the 1977-78 academic year. (Petitioner's Brief, at p. 18)

The Board argues that nothing in the New Jersey Administrative Code discloses any rules established by the State Board of Education regarding teacher evaluations. (Board's Brief at p. 2) The Board contends that, absent sanctions imposed by the Legislate, their imposition by the Commissioner would be unfair. The Board alleges that the filing of the Petition of Appeal has provided the remedy in the instant matter by placing the Board on notice as to the required number of evaluations. (Board's Brief at p. 5)

The Commissioner calls to the attention of the Board the rules promulgated as N.J.A.C. 6:3-1.19 which were approved January 16, 1976 and provide, inter alia, the following:

"(a) For the purpose of this Section, the term 'observation' shall be construed to mean a visitation to a classroom by a member of the administrative and supervisory staff of the local school district, who holds an appropriate certificate for the supervision of instruction, for the purpose of observing a nontenured teaching staff member's performance of the instructional process:

1. Each of the three observations required by law shall be conducted for a minimum duration of one class period in a secondary school, and in an elementary school for the duration of one complete subject lesson.

"(b) The term 'evaluation' shall be construed to mean a written evaluation prepared by the administrative/supervisory staff member who visits the classroom for the purpose of observing a teaching staff member's performance of the instructional process.

"(c) Each local board of education shall adopt a policy for the supervision of instruction, setting forth procedures for the observation and evaluation of nontenured teaching staff members, including those assigned to regular classroom teaching duties and those not assigned to regular classroom teaching duties. Such policy shall be distributed to each teaching staff member at the beginning of his/her employment.

(d) Each policy for the supervision of instruction shall include, in addition to those observations and evaluations hereinbefore described, a written evaluation of the nontenured teaching staff member's total performance as an employee of the local board of education.

"(e) Each of the three observations required by law shall be followed within a reasonable period of time, but in no instance more than 15 days, by a conference between the administrative/supervisory staff member who has made the observation and written evaluation and the nontenured teaching staff member. Both parties to such a conference will sign the

written evaluation report and retain a copy for his/her records. The nontenured teaching staff member shall have the right to submit his or her written disclaimer of such evaluation within ten days following the conference, and such disclaimer shall be attached to each party's copy of the evaluation report.

"(f) The purposes of this procedure for the observation and evaluation of nontenured teaching staff members shall be to identify deficiencies, extend assistance for the correction of such deficiencies, improve professional competence, provide a basis for recommendations regarding reemployment, and improve the quality of instruction received by the pupils served by the public schools."

The Commissioner's concern for the supervisor and evaluation of teaching staff members has been expressed in Sallie Gorny v. Board of Education of the City of Northfield, David Lloyd, Principal and Douglas Hatchsins, Superintendent of Schools 1975 S.L.D. 669 in pertinent part:

"Although adequate scholarship of teachers is without question a vital component for competent and effective instruction, it is not the sole factor. Brilliant scholars have been known to be poor teachers. Teaching is an art, not a science. The successful teacher is one who is not only a competent scholar, but possesses a keen desire to teach, and acquires through training and experience a great variety of methods, skills, understanding of the learning process, and effective means of motivation. The teaching process is complex. Indeed, whole libraries are devoted to the subject. It is not unusual then to find that beginning teachers, even those who are excellent scholars, experience much difficulty in achieving effectiveness during their first several years in the classroom setting. Some never are able to reach a satisfactory level of competence, and others only after much trial and error and a long period of experience. For these reasons systems of supervision and evaluation evolved as a means of improving the performance of teachers and, most importantly, to provide the best possible instructional programs for the

> children entrusted to the care of the public schools. (at p. 681)

The Commissioner is mindful of Margaret Pelose v. Board of Education of the Township of South Brunswick, Middlesex County, 1977 S.L.D. ____ (decided March 10, 1977), aff'd in part/rev'd in part State Board of Education, August 3, 1977, aff'd Docket No. A-271-77 New Jersey Superior Court, Appellate Division, June 29, 1978. Therein the Commissioner found that the board failed to comply with the requirements of N.J.S.A. 18A:27-3.2 but found no authority to grant the request for reinstatement. The board was directed to compensate petitioner her salary entitlement from September 1, 1976 to the date of the decision. (March 10, 1977) The State Board affirmed that part of the Commissioner's decision which states there is not authority in law to grant petitioner's request for reinstatement and reviewed that part of the Commissioner's decision ordering the Board to compensate petitioner from September 1, 1976 to March 10, 1977. The Court in affirming the decision of the State Board, said "***we note that there is no provision either expressed or fairly implied in N.J.S.A. 18A:27-3.2 which provides a basis for penalizing a board of education that fails to comply with its terms***"

In the judgment of the Commissioner the implication which would evolve from a similar interpretation of N.J.S.A. 18A:27-31 ante could virtually that statute and destory the system of observation and evaluation for all nontenured teaching staff members. If local boards can ignore with impurity N.J.S.A. 18A:27-3.1 there would be no means by which the statutory presumption for the supervision of nontenured teacher could be enforced.

The Commissioner has previously addressed himself to a similar situation in Louis A. Foleno v. Board of Education of the Township of Bedminster, Somerset County, 1978 S.L.D. ____ (decided February 22, 1978) wherein he said:

> "***the single element calling for redress is the Board's failure to cause him to be evaluated a second and third time pursuant to N.J.S.A. 18A:27-3.1. This violation neither zulled petitioner into complacency by issuance of a successor contact nor perpetrated on him the disadvantage of having to seek alternative employment at the end of the academic year***. Nevertheless, the disregard of statutory mandate demands equitable redress***. Accordingly, the Board is directed to pay petitioner sixty days' salary

and attendant emoluments in accordance with the terms of his 1975-76 contract.***"
(at ___)

In the instant matter the Board admits that petitioner received only one evaluation occurring on November 9, 1976. The Commissioner opines that the Board had ample time to complete the requisite evaluations of petitioner as mandated in N.J.S.A. 18A:27-3.1. As in Foleno supra, the Commissioner views the Board's omission of the statutorily mandated evaluations as requiring similar equitable relief. Accordingly, the Board is directed to pay petitioner sixty days' salary and attendant emoluments in accordance with the terms of her 1976-77 contract. The remaining prayers for relief in the Petition of Appeal are dismissed.

COMMISSIONER OF EDUCATION

June 19, 1979

SUSAN R. STACHELSKI, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF OAKLYN, CAMDEN COUNTY, : DECISION

RESPONDENT. :

:

For the Petitioner, Joel S. Selikoff, Esq.

For the Respondent, Davis and Reberkenny
(William D. Hogan, Esq., of Counsel)

Petitioner taught for a period of two years, four months and four days as an employee of the Oaklyn Borough Board of Education, hereinafter "Board," and immediately thereafter was granted an unpaid maternity leave for the 1976-77 school year. Petitioner then taught during the entire 1977-78 school year.

At this juncture petitioner demands judgment that she has attained a tenure status as a teacher in the Oaklyn Borough School District. The Board denies that petitioner has attained a tenure status, has refused to employ her for the 1978-79 school year and demands dismissal of the Petition of Appeal.

This matter is submitted on an agreed set of stipulated facts, Cross-Motions for Summary Judgment, transcripts of oral argument and on Briefs of counsel in support of their respective Motions.

The parties have put forth the following set of stipulated facts:

> "Petitioner, Susan R. Stachelski was, at all relevant times in question, fully certified to perform the duties of a teacher of elementary education in the public schools of New Jersey.
>
> "Respondent Board issued an employment contract to petitioner on February 18, 1974, and petitioner commenced work as a teacher of

> elementary education in the Oaklyn School District on February 25, 1974, and continued as such for the remainder of the 1973-74 school year.
>
> "Pursuant to properly issued employment contracts, petitioner was also employed as a teacher of elementary education in the Oaklyn School System for the entire 1974-75 and 1975-76 school years.
>
> "On April 28, 1976, respondent Board offered petitioner an employment contract for the 1976-77 school year, which offer was accepted in writing by petitioner on April 30, 1976.
>
> "On May 10, 1976, petitioner applied to respondent Board for an unpaid maternity leave of absence during the entire 1976-77 school year. Petitioner's request was granted by respondent Board on May 17, 1976. Petitioner thereafter remained on unpaid maternity leave of absence during the entire 1976-77 school year.
>
> "Pursuant to a properly issued employment contract, petitioner was employed as a teacher of elementary education for the entire 1977-78 school year up to the present date.
>
> "On April 17, 1978, respondent Board voted, at a regular meeting of respondent Board, not to renew petitioner's employment contract for the 1978-79 school year. By letter dated April 18, 1978, signed by the Board Secretary, petitioner received notice of the action of respondent Board not to renew her contract for the 1978-79 school year taken at its meeting of April 17, 1978."

This concludes the recital of essential facts.

The issue with respect to such facts was determined at a conference of counsel conducted on September 25, 1978, as follows:

> "Does or does not petitioner meet the requirements for tenure contained in N.J.S.A. 18A:28-5?"

This issue depends for determination on the interpretation of one principal statute, N.J.S.A. 18A:28-5, wherein the

requirements for acquisition of tenure by teaching staff members are set forth. Recited in its entirety, N.J.S.A. 18A:28-5 states as follows:

> "The services of all teaching staff members including all teachers, principals, assistant principals, vice principals, superintendents, assistant superintendents, and all school nurses including school nurse supervisors, head school nurses, chief school nurses, school nurse coordinators, and any other nurse performing school nursing services and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title, *** after employment in such district or by such board for:
>
> a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
>
> b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
>
> c) the equivalent of more than three academic years within a period of any four consecutive academic years;
>
> provided that the time in which such teaching staff member has been employed as such in the district in which he was employed at the end of the academic year immediately preceding July 1, 1962, shall be counted in determining such period or periods of employment in that district or under that board but no such teaching staff member shall obtain tenure prior to July 1, 1964 in any position in any district or under any board of education other than as a teacher, principal, assistant

> superintendent or superintendent, or as a school nurse, school nurse supervisor, head school nurse, chief school nurse, school nurse coordinator, or as the holder of any position under which nursing services are performed in the public schools."

The term "academic year" is defined by N.J.S.A. 18A:1-1 to mean:

> "***'Academic year' means the period between the time school opens in any school district or under any board of education after the general summer vacation until the next succeeding summer vacation***."

Petitioner, in her Brief, places great reliance on the interpretation of N.J.S.A. 18A:28-5 made by the Commissioner in John Mountain v. Board of Education of the Township of Fairview, 1972 S.L.D. 526, aff'd State Board of Education 1973 S.L.D. 777. Therein, the Commissioner determined what effect the granting of a leave of absence by a local board of education to a teaching staff member had upon the member's entitlement to a tenure status pursuant to N.J.S.A. 18A:28-5. Noting that the Commissioner's own conclusions and findings in Dorothy Mateer v. Board of Education of the Borough of Fairlawn, 1950-51 S.L.D. 63, aff'd State Board of Education 1951-52 S.L.D. 62, in which he spoke to the relationship between leaves of absence and the acquisition of tenure, had been modified by subsequent court decisions, specifically, Zimmerman v. Board of Education of Newark, 38 N.J. 65 (1962) and Canfield v. Board of Education of Pine Hill Borough 51 N.J. 400 (1968), the Commissioner in Mountain found:

> "***An examination of the instant matter, in the context of the two Supreme Court decisions discussed, ante, discloses that petitioner has a total of only two years 'on the job' experience or service in the employ of the Board. Such experience, or service, in the Commissioner's judgment must be credited toward the acquisition of a tenure status for petitioner, beginning at the time he actively resumes 'on the job' employment in the Board's employ, but there is no parallel entitlement for petitioner to count his 'leave of absence' from his on-the-job experience or service in similar fashion. In this latter respect, in the Commissioner's judgment, Mateer, supra, has been overruled.***"
>
> (at 530)

Thereupon, the Commissioner directed the local board to issue to Petitioner Mountain a new contract and further directed that "***service under the new contract shall be added to petitioner's previous accrual of two years of service toward a tenure status." (at 530)

In the instant matter, petitioner argues that the Commissioner's decision in Mountain, supra, while indicating that a teaching staff member may not count any time on leave status toward the acquisition of tenure status, also establishes that when a local board of education grants a temporary leave of absence to a teaching staff member in its employ, the period of absence covered by said grant of leave shall not be counted as a portion of the four consecutive academic years' requirement contained in N.J.S.A. 18A:28-5(c). In petitioner's view, when a grant of temporary leave of absence, voluntarily entered into by both parties, is preceded and followed by periods of active employment, the two periods must be considered as continuous for the purpose of counting service toward the acquisition of tenure status.

It is the Board's primary contention that petitioner has failed to attain tenure under subsection (c) of N.J.S.A. 18A:28-5 since she has not complied with the precise terms of the statute. The Board also cites Zimmerman, supra:

> "***In order to acquire the status of a permanent teacher under a tenure law and with it the consequent security of permanent employment, a teacher must comply with the precise conditions articulated in the statute.***"
>
> (at 72)

The Board asserts that in no four consecutive academic years has petitioner accrued more than three years of on the job service and, thus, the right to claim tenure status. The Board's argument rests squarely on the propositions that the language it cites in Zimmerman, supra, may in no circumstances be tempered and that the sole question, sub judice, is whether petitioner has attained tenure status under N.J.S.A. 18A:28-5(c) by being employed for the equivalent of more than three academic years within a period of four consecutive academic years.

In its Brief, the Board also invokes Mountain, supra, and avers that a period of leave may not be counted when calculating the time of on the job service necessary to meeting the requirements of N.J.S.A. 18A:28-5. The Commissioner agrees and points out that petitioner makes no assertion that any part of her period of leave can or should be so counted.

The Board contends that petitioner cites Mountain, supra, for the proposition that she has in fact been employed for the equivalent of more than three academic years within a period

of four consecutive academic years. The Board concedes that in Mountain, supra, the Commissioner indicated that a period of actual employment prior to a leave of absence must be credited toward the acquisition of tenure status upon the active resumption of on the job employment. The Board does not deny that petitioner in the instant matter is entitled to credit her actual employment in the school years 1973-74, 1974-75 and 1975-76 toward the attainment of tenure status, but states she must necessarily still acquire tenure status by fulfilling the precise criteria set forth in the controlling statute and again asserts that in no combination of four consecutive academic years can petitioner show on the job service for more than three academic years.

The Commissioner has carefully considered the arguments put forth by both parties in the instant matter. It is clear that the instant matter is similar to and, in fact, turns upon the Commissioner's holdings in Mountain, supra. In that matter, the Commissioner scrutinized the judicial history of the issue, sub judice. The events pertinent thereto may be recited, in precis, as follows:

In Mateer, supra, it had been held that periods during which properly certified teaching staff members were on approved leaves of absence must be considered as continued employment for tenure purposes. Subsequently, as the Commissioner has noted, ante, the New Jersey Supreme Court modified that holding by its rulings in Zimmerman, supra, and Canfield, supra, wherein the Court clarified the definition of "employment" in its pertinence to the tenure statutes by enunciating that on the job or active service was deemed a necessary prerequisite to tenure acquisition.

Mountain, supra, then came before the Commissioner. In light of the foregoing Supreme Court rulings, the Commissioner could not apply the principle set forth in Mateer, supra. He therefore set aside that part of Petitioner Mountain's argument claiming entitlement for service credit during periods of leave. The Commissioner did hold that the Board's grants of leave to petitioner entitled him to return as a teacher in the Board's employ upon the cessation of leave. A "leave of absence" as defined by Black's Law Dictionary 1036 (rev. 4th ed. 1968) is

> "Temporary absence from duty with intention to return during which time remuneration is suspended***."

The Commissioner held further that Mountain's previous accrual of service toward a tenure status was to be added to service under the new contract ordered by the Commissioner, thus removing from consideration in the calculation of service necessary to fulfillment of the requirements of N.J.S.A. 18A:28-5 the time during which Mountain was on leave.

In the instant matter, the Commissioner reaches a similar conclusion. Time spent by a probationary teaching staff member on approved leave shall not be counted toward the acquisition of tenure. Neither shall it be considered in the calculation of service necessary to fulfillment of the requirements of N.J.S.A. 18A:28-5 when, as herein, the parties have entered voluntarily into a leave agreement, the terms of the agreement have been honored by both parties and the employee has resumed active service. Accordingly, the Commissioner determines that petitioner's service in the 1973-74, 1974-75, 1975-76 and 1977-78 school years shall be treated as seamless and finds therefrom that petitioner achieved tenure status on February 27, 1978. Having achieved a tenure status, petitioner may not be dismissed or reduced in compensation unless and until charges against her are certified to the Commissioner and then only after such charges are proven to be true in fact, whereupon any penalty to be imposed is solely within the discretion of the Commissioner. In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967) The action of the Board in refusing employment to petitioner for the 1978-79 school year was, therefore, ultra vires.

Petitioner's Motion for Summary Judgment is granted. The Board of Education of the Borough of Oaklyn is directed to reinstate Susan R. Stachelski to her former position effective retroactively to September 1, 1978. The Commissioner further directs the Board to pay petitioner all back salary and emoluments accrued from that date. Such back pay shall include pension contributions and all other benefits to which she is entitled mitigated only by any moneys earned by her in other employment since September 1, 1978.

COMMISSIONER OF EDUCATION

June 21, 1979

Pending before State Board of Education

SUSAN R. STACHELSKI,	:	
PETITIONER-APPELLEE,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF OAKLYN, CAMDEN COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education June 21, 1979
and September 11, 1979

For the Petitioner-Appellee, Joel S. Selikoff, Esq.

For the Respondent-Appellant, Davis and Reberkenny
(William D. Hogan, Esq., of Counsel)

The State Board affirms the Commissioner's decision for the reasons expressed therein.

David S. Brandt abstained in the matter.

November 8, 1979

SUSAN R. STACHELSKI,	:	
PETITIONER-APPELLEE,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF OAKLYN, CAMDEN COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education June 21, 1979 and September 11, 1979

Decided by the State Board of Education November 8, 1979

For the Petitioner-Appellee, Joel S. Selikoff, Esq.

For the Respondent-Appellant, Davis and Reberkenny (William D. Hogan, Esq., of Counsel)

The respondent Board's motion for reconsideration of the State Board's decision on this appeal is denied. We can find no authority to support Respondent's contention that it should not pay the back salary awarded to Petitioner upon her reinstatement pursuant to the Commissioner's decision. On the contrary, N.J.S.A. 18A:28-5 prohibits a tenured teacher from being reduced in compensation except through proceedings under the Tenure Employees' Hearing Act. Since Petitioner has tenure, the granting of the relief requested by the Board with respect to back pay would contravene the statute. This determination is reinforced by N.J.S.A. 18A:6-14, which requires that if charges in a tenure case are dismissed, the suspended employee "shall be reinstated immediately with full pay from the first day of such suspension."

The unfortunate situation in which the local Board was placed by the delay of the decision-making process in the Commissioner's office will not recur in the future. The Legislature in enacting N.J.S.A. 52:14B-10 has now required that the preliminary decision of the administrative law judge shall be filed not later than 45 days after the hearing is concluded, and the Commissioner must make his final decision no later than 45 days after the receipt of the decision of the administrative law judge.

S. David Brandt abstained in the matter.

December 5, 1979

Pending N.J. Superior Court

JOHN W. GRIGGS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

For the Petitioner, Stephen E. Klausner, Esq.

For the Respondent, Richard J. Murray, Esq.

Petitioner, a teacher with a tenure status employed by the Board of Education of the Borough of Somerville, hereinafter "Board," alleges that the Board's action to suspend him from his teaching duties with pay pending a psychiatric examination was improper, unreasonable, discriminatory and designed to humiliate him. Petitioner prays that the Commissioner of Education issue an order to restrain and enjoin the Board from petitioner's suspension with pay and, further, to restrain the Board from requiring petitioner to subject himself to a psychiatric examination.

The Board denies that its determination requiring petitioner to submit to a psychiatric examination is in any respect improper, unreasonable or discriminatory. The Board asserts that its action was reasonable and required by its mandated duties under the statutes and Constitution of the State of New Jersey.

Oral argument was held on February 2, 1979 at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner. Petitioner filed a letter Memorandum of Law in lieu of a Brief in support of his Notice of Motion to restrain and enjoin the Board's action. The Board filed a Brief, affidavit and exhibits in opposition to the Petition of Appeal and in opposition to petitioner's request for restraint of its action.

Petitioner argues that the Board's action was based upon two isolated instances which had allegedly occurred some months prior to his suspension. He asserts that neither incident directly or indirectly involved pupils and that subsequent thereto, he was required to conduct his daily professional affairs as if the incidents had never occurred. He contends that for a period of two months he continued to teach pupils, work with and under the supervision of the department chairperson whom he allegedly verbally abused after the Board became aware of the alleged incident.

Petitioner argues that the Board's action was legally defective in that its resolution to require him to submit to a psychological examination did not proffer as a reason his inability to teach, discipline and associate with pupils as set forth by the courts in Kochman v. Keansburg Board of Education, 124 N.J. Super. 203 (Chan. Div. 1973) and Gish v. Board of Education of Paramus, 145 N.J. Super. 96 (App. Div. 1976), cert. den. 74 N.J. 251 (1977), cert. den. 434 U.S. 879 (1977). He contends that in both matters the courts addressed the statute's (N.J.S.A. 18A:16-2) purpose as to protect children from "***evidence of deviation from normal mental health which may affect his ability to teach, discipline and associate with students.***" (Gish, at 104) Petitioner asserts that he attended to his classroom affairs subsequent to the first alleged incident and two months subsequent to the second incident, the alleged verbal abuse of his deparment chairperson.

Petitioner admitted that he and his legal counsel appeared before the Board on January 3, 1979 to respond to and/or refute the Board's allegations. Petitioner, however, remained mute under instruction of his attorney due to the possibility of a criminal charge which might be lodged against him as a result of the alleged verbal abuse. Petitioner contends that any statements made by him relative to the incident with his department chairperson could have been deemed a waiver of his Fifth Amendment right to remain silent.

Petitioner alleges that his suspension by the Board was designed to humiliate him before his peers and pupils and to force his resignation and/or retirement. He requests the Commissioner to enjoin the Board from continuing his suspension with pay and from subjecting him to a psychiatric examination pending a plenary hearing on the merits of his Petition.

The Board, by way of affidavit of its Superintendent, recited incidents in which petitioner was alleged to have been involved commencing on or about March 20, 1978. Attached to the Superintendent's affidavit are nineteen documents of correspondence, reports and memoranda, one of which was the Superintendent's letter to petitioner dated January 16, 1979 which reads as follows:

> "Please be advised that I recommended to the Board and the Board decided that you are hereby suspended, with pay, from all of your duties, and you are to submit to a psychiatric examination by a physician designated by, and paid for by the Board of Education. This physician is Douglas H. Robinson, M.D. a psychiatrist with offices at the corner of State Street and Murray Avenue, Trenton, New Jersey. Your suspension from all duties, with pay, will continue pending an analysis by the Board of Education of the results of Dr. Robinson's examination. This is to give you notice that pursuant to N.J. 18A:16-2 and Gish v. Board of Education of the Borough of Paramus, Bergen County, 145 N.J. Super. 96,

366 A.2nd 1337 (1976), the reason for the psychiatric examination is that in the judgment of the Board, your behavior showed a 'deviation from normal physical or mental health' to wit:

1. The incident which took place and for which a complaint was made on November 15, 1978, by your department chairman, Dr. Clare Meredith, indicates that your behavior was reprehensible, disruptive, unprofessional, and by its severity and considering the fact that you were dealing with your female department chairman, indicates some instability on your part which would merit further investigation by a psychiatrist. We call your attention to the fact that this incident occurred in the presence of other members of the English department. Part of the reason also was that you were given an opportunity to explain, and contradict the complaint and that you offered no apologies or remorse, but to the contrary, you were apparently proud that you 'acted as a man should.' Certainly, this is not 'normal' in that this is not what is expected of a tenured teacher of long-standing, nor anyone else.

2. On March 20, 1978, you wrote two letters in which you used the following language. 'You did not suspend Hammond when she made an [expletive deleted] out of me. You did not suspend Saunders when she made an [expletive deleted] out of me 1st.' From an English teacher, the Board concluded that this is highly improper, shocking, and certainly not what would be expected as 'normal' behavior. There were several letters written with regard to this incident and you received a letter from our Board Attorney, Richard Murray, dated April 10, 1978, in which it was stated: 'It was the conclusion of those who attended this meeting that Mr. Griggs' answers were evasive and unresponsive, that he did not in any way substantiate or corroborate the accusations that he made in these letters of March 20, and further observation was made that at no time during this meeting did he retract or recant any of the statements that he made in the letters.' You offered no rebuttal, explanation, apology, remorse, or anything which the Board could consider a 'normal' reaction.

3. The letters of March 20, 1978 referred to an incident in which you chose to categorize one of your students as 'not a stable person.' It was pointed out to you that your conduct during the hearing was substantially the same as the conduct you complained about from one of your students.

4. In your letter of March 20, 1978, you stated that: I have been lied to, slandered, harassed, coerced, had my courses rigged so that I was physically and mentally dead', and you offered no explanation. You were not responsive to the people who spoke to you. You apparently had a feeling that people were plotting against you and that you were being picked on. The supervisors had tried to explain to you that your classes were chosen by the computer and you refused to accept this and felt that your classes were 'rigged'.

"The Board concludes that these actions taken individually or severally indicate a necessity for a psychiatric examination because they are not what could be considered 'normal' behavior. There are other incidents going back as far as 1975, however, the Board does not feel that it is necessary, at this time, in ordering a psychiatric examination to specify them. However, it might be helpful for the psychiatrist to have this record.

"You are suspended from all of your duties and responsibilities, with pay, pending the results of a psychiatric examination. These are the reasons for ordering such examination and you have a right for a hearing before the Board, if requested before a period of thirty days to explain or refute the grounds for the Board's action. Board policy #311 indicates details relating to this request.

"You are directed to provide to Mr. Michael Crisci, High School Principal, before you leave school January 16, 1979, your grade record book, your lesson plan books or other records requested by Mr. Crisci.

"If you need any assistance in arrangements for an appointment with Dr. Robinson, please contact me so that I may help in any way that you desire."

The Board contends that petitioner is not entitled to the remedy of preliminary injunction and cites the matter of Fred J. Hoffman v. Board of Education of the City of Asbury Park, 1975 S.L.D. 929, wherein the Commissioner determined that no injunctive relief should issue and sustained the Board's request for a psychiatric examination of petitioner. It asserts that petitioner, in the instant matter, has failed to show irreparable harm. Gish, supra

The Board argues that petitioner failed to exhaust his administrative remedies by not requesting an appearance before the Board subsequent to the Board's request for a psychiatric examination. It contends that it went out of its way to be fair to petitioner before it considered its resolution and would have allowed him a preliminary hearing to question complainants to ascertain the credibility of the complainants. Emil Scachetti v.

Board of Education of the Township of Rockaway, 1977 S.L.D. 142, aff'd State Board of Education 153 The Board argues that petitioner failed to avail himself of such administrative remedy as set forth in the Superintendent's letter of January 16, 1979. It further asserts that its position is entitled to a presumption of correctness where petitioner has failed to show that its action was arbitrary, capricious, contrary to State statute or constitutional protection. John C. Saccenti v. Board of Education of the Township of North Brunswick, 1977 S.L.D. 265

Finally, the Board avers that petitioner erroneously asserted that his actions did not involve pupils and that he further erroneously asserted that the involvement of pupils was the only basis for a psychiatric examination. The Board contends that the incidents of March 20, 1978 did include and involve school children. It argues, however, that the involvement of children is not the sole test for the Board to require a psychiatric examination.

The Commissioner has reviewed all such arguments of the parties and the total record in this matter and determines that petitioner's Motion for an Order to Show Cause with Restraints is, in part, without merit. The Commissioner finds the documentation in support of the Board's action to invoke the statute, N.J.S.A. 18A:16-2, is more than adequate to support such action taken by the Board. Scachetti, supra The Commissioner further finds that petitioner's due process rights were protected and that the Board met the requirements of the courts and the Commissioner to safeguard such procedural requirements as set forth in Kochman, supra; Gish, supra; Scachetti. The Commissioner determines, therefore, that the procedure was adequate in the instant matter.

The question that remains is whether petitioner's suspension with pay pending the psychiatric examination was within the Board's authority. N.J.S.A. 18A:25-6 provides as follows:

> "The superintendent of schools may, with the approval of the president***of the board*** employing him, suspend any ***teacher, and shall report such a suspension to the board***forthwith. The board***, each by a recorded roll call majority vote of its membership, shall take such action for the restoration or removal of such person as it shall deem proper, subject to the provisions of chapter 6 and chapter 28 of this title."

The statutes with respect to suspension of tenured employees are clear. N.J.S.A. 18A:6-11 provides the procedure to certify charges against a tenured teaching staff member to the Commissioner. N.J.S.A. 18A:6-14 provides that upon certification of any charge against a tenured teaching staff member, the Board may suspend the person, with or without pay. There has been no such certification by the Board in the instant matter. The Commissioner determined in Scachetti, supra:

> "***that petitioner has been afforded appropriate rights of due process, and that the Board's action to require a psychiatric examination of petitioner was a proper exercise of its discretion based upon sufficient credible evidence. Petitioner's suspension without pay pending receipt of the results of the required psychiatric examination cannot be sustained and is hereby set aside.***"
>
> (Slip Opinion, at pp. 19-20)

The Commissioner finds the plea of petitioner to be well-founded and therefore directs the Board to immediately reinstate petitioner to his employment. The Commissioner leaves to the discretion of the Board the appropriate duty assignment of petitioner which may include a designation of work location outside the classroom. Scachetti, Slip Opinion, at p. 20

Finally, the Commissioner directs that petitioner John W. Griggs immediately present himself to the appropriate medical authority designated by the Board to undergo a psychiatric evaluation pursuant to N.J.S.A. 18A:16-2. The Commissioner determines that there is no basis for further hearing.

COMMISSIONER OF EDUCATION

June 21, 1979

Pending State Board of Education

IN THE MATTER OF THE APPLICATION :
OF THE HENRY HUDSON REGIONAL :
SCHOOL DISTRICT, MONMOUTH COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Peter Kalac, Esq.

The Board of Education of the Henry Hudson Regional School District, hereinafter "Board," petitions the Commissioner of Education to certify to the Monmouth County Board of Taxation the additional amount of $66,699.76 to be raised by local taxation for current expenses to operate the Henry Hudson Regional Schools for the 1978-79 school year. The Board asserts that in the event such additional certification of tax revenue is not ordered by the Commissioner it will have insufficient funds to continue the operation of its school between June 1 and June 30, 1979.

A hearing was conducted in the matter on May 22, 1979 at the Monmouth County Board of Freeholders' hearing room, Freehold, by a hearing examiner appointed by the Commissioner. The uncontroverted testimony and documentary evidence adduced at that time results in the following finding of fact by the hearing examiner:

The Board had appropriated $18,000 into its 1978-79 current expense budget from what it believed to be an unexpended current expense balance from its 1977-78 current expense budget. The statutorily required audit of the Board's accounts for 1977-78, which was completed and filed with the Board on November 13, 1978, revealed that the 1977-78 unexpended current expense balance had a deficit of $8,805.05. (P-1) That deficit, together with the $18,000 the Board had appropriated into its 1978-79 current expense budget, resulted in a true deficit at that time of $26,805.05.

The audit report asserts that this deficit was caused by two factors, neither of which, in the judgment of the hearing examiner, was caused by the action or inaction of the Board. Those two factors are: (P-1, at p. 7)

1. A prolonged illness of the Board Secretary from her duties during which time expenditures and revenues of the Board's financial accounts were not carefully monitored; and

2. A lesser amount of $10,292 in State aid received than anticipated for 1977-78.

Consequently, the Board began the 1978-79 school year with a deficit of $26,805.05 in anticipated expenditures.

The Board, upon receipt of the audit report on November 13, 1978, requested its auditing firm to prepare an interim report with respect to its 1978-79 school budget which was prepared and submitted to the Board on November 30, 1978. (P-6) This report advised the Board that its deficit had increased from $26,805.05 to a projected $82,842.05.

The interim audit report advised the Board that the deficit amount of $82,842.05 was projected in the following fashion: (See P-6, at p. 4)

I.	1977-78 Budget Deficit		$ 8,805.05
II.	Deficit of Anticipated Revenue		
	(1) Unexpended balance appropriated into 1978-79 from 1977-78 which did not exist	$18,000	
	(2) Lesser amount of State Aid received than anticipated	7,832	
	(3) Lesser amount of interest on investments than anticipated	8,500	34,332.00
III.	Necessary Increases in Account Appropriations		46,265.00
	Gross Deficit		$89,402.05
	Less: Title One - Salaries (A payback to the Board's salary account for use of its funds for a Title One ESEA program)		6,560.00
	Net Projected Deficit		$82,842.05

The Board, in early December 1978 directed its Superintendent to curtail purchases in an effort to reduce the projected deficit. The Board also eliminated ten extracurricular staff positions and field trips and allowed one teaching staff position to remain vacant following the midyear retirement of the incumbent.

These efforts on the part of the Board reduced its projected deficit for 1978-79 from $82,842.05 to $66,699.76, the amount the Board petitions the Commissioner to certify to the Monmouth County Board of Taxation so that it may conclude the current school year with its accounts in balance.

The hearing examiner finds on the basis of the uncontroverted testimony and documentary evidence adduced that the former Board Secretary's illness placed the Board in a position of not having a person to monitor its accounts on a day-to-day basis. The Superintendent of Schools, who in that position had full time duties and responsibilities, could not perform the duties of Superintendent and Board Secretary simultaneously as the Board requested. In fact, the Superintendent also became ill.

The Board, after appointing a guidance counselor in its employ to assume the duties of Board Secretary on a temporary basis, finally engaged the full-time services of a person to replace its former Board Secretary.

Thus, the Board not only began the 1978-79 school year with a deficit from the preceding year, it also began the year with a budget which did not realistically reflect what its total current expense costs would be. In this regard, the Department of Education's Division of Finance and Regulatory Services examined the Board's financial accounts for the period July 1, 1978 through November 30, 1978 and found, inter alia, that "***expenditures for the 1978-79 budget are proving to be heavier than budgeted, particularly in Tuition, Heating, Employer's share of Social Security [accounts]***." (P-2, at p. 2) This under-budgeting, coupled with a prior year deficit, in addition to overanticipation of state aid is found by the hearing examiner to be a direct result of the absence of the former Board Secretary from her duties, and the futile attempts by the Board to assign such responsibility to its Superintendent.

A board of education may not incur obligations in excess of its appropriation. N.J.S.A. 2A:135-5 Should the relief requested herein not be granted, the Board would stand in violation of that statute and, in addition, it would not have the necessary financial means to continue the operation of its schools consistent with its approved goals under N.J.S.A. 18A:7A-1 et seq., thereby failing to meet its constitutional obligation to provide a thorough and efficient system of education.

The hearing examiner recommends under the unique circumstances of this case that the Commissioner certify to the Monmouth County Board of Taxation an additional amount of $66,699.76 to be raised by local taxation for current expenses of the Board for the 1978-79 school year.

The parties are reminded that in consideration of the emergent nature of the matter, at the direction of the hearing officer and with the consent of the parties, exceptions to this report are to be filed within three days of receipt of this report.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter including the report of the hearing examiner. The Henry Hudson Regional School District is comprised of the Borough of Atlantic Highlands and the Borough of Highlands. Each municipality was served with the application herein; each municipality was notified of the hearing date which neither attended; and, each municipality was served with a copy of the hearing examiner's report. Neither municipality, nor petitioner, filed exceptions or objections to the hearing examiner's report.

The Commissioner adopts the hearing examiner's report as his own and finds that the Board has established its need for additional funds for the completion of the 1978-79 school year in the amount of $66,699.76. The Commissioner, pursuant to his responsibility and the authority conferred upon him by the Legislature, is empowered to adjust school budgets. N.J.S.A. 18A:7A-15 provides, in pertinent part:

> "If, after a plenary hearing, the commissioner determines that it is necessary to take corrective action, he shall have the power to order necessary budgetary changes within the school district***".

The Commissioner, pursuant to that authority, certifies to the Monmouth County Board of Taxation the additional amount of $66,699.76 to be raised by local taxation in the municipalities of the Borough of Highlands and the Borough of Atlantic Highlands for the current expenses of the Henry Hudson Regional School District for the 1978-79 school year.

COMMISSIONER OF EDUCATION

June 22, 1979

IN THE MATTER OF THE	:	
APPLICATION OF THE BOARD OF	:	
EDUCATION OF THE TOWNSHIP OF	:	COMMISSIONER OF EDUCATION
HAMPTON, SUSSEX COUNTY, TO	:	ORDER
ABOLISH THE POSITION OF	:	
SUPERINTENDENT OF SCHOOLS.	:	
_____	:	

For the Petitioner, Morris, Downing & Sherred (Craig U. Dana, Esq., of Counsel)

This matter having been opened by the Board of Education of the Township of Hampton, hereinafter "Board," on June 1, 1979 by the filing of a Petition of Appeal asking for a declaratory judgment of the Commissioner of Education with regard to the application of N.J.S.A. 18A:17-15 and N.J.A.C. 6:3-1.3 et seq., to request that the Commissioner and the State Board of Education abolish the office of Superintendent of Schools for the school district and reclassify the position as an Administrative Principal.

The matter comes before the Commissioner in the form of a resolution with relevant facts and memoranda in support of the Board's Petition as follows:

On or about September 27, 1978 the Board, by a unanimous roll call vote, adopted a resolution to request that the Commissioner and the State Board of Education abolish the office of Superintendent of Schools for the District and reclassify the District as an Administrative Principal's District based upon the following reasons:

The Board operates one school which until 1975 included grades kindergarten through eight. In September 1975 the Kittatinny Regional High School was opened as a grade seven through twelve regional high school and, as a result thereof, the Board's only school became a kindergarten through grade six school.

The school pupil population decreased from approximately 510 pupils in June 1975 to approximately 380 pupils in September 1978. The decrease in pupil population was a result of the fact that the seventh and eighth grades were no longer enrolled in the Board's school and the fact that there has been a general school age population decrease in the Township of Hampton.

The staff consisted of thirty-two full-time certificated staff members including the administrator in June 1975 when the Board's school contained kindergarten through grade eight. In September 1978 it had decreased to twenty-seven full-time certificated staff members including the administrator.

The Board opines that it is not necessary to have a Superintendent for such a small school district and believes that it can obtain a highly satisfactory administrative principal at a lower salary.

The Board asserts that it had considered the abolishment of the position of Superintendent approximately two years prior to its adoption of the resolution on September 27, 1978 but did not do so because such action would have demoted the then superintendent in office. It further asserts that the then superintendent resigned his position on September 18, 1978 and that it subsequently appointed a teaching staff member as an acting superintendent pending resolution of the within Petition.

The Board avers that its resolution of September 27, 1978 was submitted to the Sussex County Superintendent of Schools who, on or about October 6, 1978, forwarded said resolution to the State Department of Education with a recommendation that it be approved.

The Board asserts that no action was taken on its request between October 6, 1978 and May 17, 1979, however, subsequent thereto it was in receipt of a letter dated May 17, 1979, wherein it was advised that its request was denied and that it would not be placed upon the State Board of Education's agenda.

The Board asserts that it is aware that the provisions of N.J.A.C. 6:3-1.3 et seq. were modified on or about May 2, 1979, and observes that N.J.A.C. 6:3-1.11(c) provides a "grandfather" clause to protect school districts with administrative principals until July 1, 1982. It further asserts that when its request of September 27, 1978 was denied, it was informed that such "grandfather" clause was not applicable.

The Board avers that since September 18, 1978 to the present, it has had a teaching staff member acting as an administrative principal for the school district. The Board opines that the new rules and regulations adopted by the State Board of Education modifying N.J.A.C. 6:3-1.3, subsequent to its action of September 27, 1978, was intended to provide boards of education, which presently do not have a fully certificated chief school administrator, three years within which to meet the said requirements. It argues that to deny the appointment of the present administrative principal serves to prejudice and punish him and the Board.

The Board argues that if the relief sought is not granted, it will be forced to seek the services of a new administrator, the third within a one year period, and will be precluded from considering the present administrator as a candidate.

The Board prays for the Commissioner to construe the provisions of N.J.S.A. 18A:17-15 and N.J.A.C. 6:3-1.3 and determine that its request for the abolishment of the position of Superintendent of Schools be granted nunc pro tunc to December 31, 1978.

The Commissioner has carefully reviewed the factual circumstances and the legal arguments advanced by the Board in seeking approval of its application to abolish the position of Superintendent in the Hampton Township School System and to create in its stead the position of administrative principal thereby employing its Acting Superintendent in such position.

In the Commissioner's judgment the changes in school district organization which occurred as of September 1975, coupled with the subsequent decline in pupil enrollment and staff reduction in the remaining elementary school operated by the Board, must be considered in conjunction with the Board's request herein. The Commissioner also observes that this matter has been thoroughly reviewed by the Sussex County Superintendent of Schools and that it was recommended by him for approval as early as October 1978.

In view of the special circumstances hereinbefore set forth, the Commissioner finds and determines that there is no legal impediment nor justiciable reason to deny the Board's application as recommended by the Sussex County Superintendent of Schools herein. The Commissioner so holds.

Accordingly, the Board's application is hereby approved by the Commissioner as of the time these proceedings were instituted and approved by the Sussex County Superintendent of Schools in October 1978.

In compliance with the provisions of N.J.A.C. 6:3-1.11(c) the administrative principal shall be required to hold a school administrator's certificate as of July 1, 1982.

In granting such approval the Commissioner shall forthwith forward this determination with his recommendation to the State Board of Education for approval pursuant to the provisions of N.J.A.C. 6:3-1.11(b) as amended.

COMMISSIONER OF EDUCATION

June 27, 1979

WOODSTOWN-PILESGROVE REGIONAL BOARD OF EDUCATION, SALEM COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
JOHN J. KETAS,	:	DECLARATORY JUDGMENT
RESPONDENT.	:	

For the Petitioner, Jordan & Jordan (John D. Jordan, Esq., of Counsel)

For the Respondent, Acton & Point (Lawrence W. Point, Esq., of Counsel)

This matter having been filed as a Petition for Declaratory Judgment before the Commissioner of Education on April 16, 1979; and

The Woodstown-Pilesgrove Regional Board of Education, hereinafter "Board," having asserted therein that respondent, who was formerly the Board's Secretary and Business Administrator and who on April 3, 1979 was elected to a seat on the Board, is ineligible by reason of his assertion of a counterclaim against the Board from being seated as a qualified member of the Board (N.J.S.A. 18A:12-2); and

It appearing that the Board on January 8, 1979 authorized the filing of a legal suit against respondent which suit was filed on March 2, 1979 before the Superior Court, Law Division, Salem County, seeking recovery of Board funds which the Board alleges were improperly paid to respondent contrary to existing Board policy at his retirement in connection with respondent's unused vacation time; and

It appearing that respondent thereupon filed the aforementioned counterclaim against the Board seeking, inter alia, indemnification from financial loss together with compensatory and punitive damages; and

Opportunity having been provided at a conference of counsel conducted May 18, 1979 for the litigants to file letter memoranda supplementing the legal arguments set forth in the pleadings and memoranda previously submitted to the Commissioner; and

The Board's Motion for Temporary Restraint to prevent respondent from being sworn into office on May 21, 1979 having been procedurally denied at the aforementioned conference of counsel; and

The Commissioner having considered the Board's contention that respondent may not legally serve as a Board member by reason of a conflict of interest arising from the counterclaim and by reason of N.J.S.A. 18A:12-2 which provides that:

> "No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board." (Emphasis supplied); and

The Commissioner having also considered respondent's contentions that neither the Board's assertion of a claim against him nor the resultant counterclaim that he has filed against the Board may be properly construed as claims contemplated by the Legislature when it promulgated N.J.S.A. 18A:12-2; and

The Commissioner having also considered respondent's argument that his counterclaim was initiated only as a proper legal defense against the suit which the Board instituted against him in March after he had already, in February, filed as a candidate for election to the Board; and

The Commissioner having in the light of existing education law, carefully balanced these and all other legal arguments set forth by the litigants; and

The Commissioner having noticed that the dispute which has arisen between respondent and the Board by whom he was formerly employed is before a court of competent jurisdiction; and

The Commissioner having noticed that respondent has stipulated that he has agreed in all proceedings of the Board to abide by the doctrine of abstention with respect to any discussion or determination pertaining to the aforementioned dispute; and

The Commissioner having concluded that the limited scope of the litigation between respondent and the Board is not of a continuing nature since it arose solely over an interpretation of entitlement to benefits resulting from his former employment and will be determined by a court of competent jurisdiction; and

The Commissioner having determined that this limited dispute constitutes no continuing inconsistent interest, contract or claim against the Board and that the doctrine of abstention, to which respondent has agreed and by which he shall in all Board

proceedings be bound, is an appropriate safeguard to the interest of the public (In the Matter of the Election of Dorothy Bayless to the Board of Education of the Lawrence Township School District, 1974 S.L.D. 595, rev'd State Board of Education 603); and

The Commissioner having further determined that the record discloses no inconsistent interest or conflict which would legally prevent respondent from performing his duties in the position of a Board member to which he has been elected by the voters; now therefore

The Commissioner orders and declares that John Ketas, having been legally elected as a member of the Board, may legally perform all duties and responsibilities as a member of the Board with the single exception that he shall and must abstain from entering into discussions or voting on any aspect of the aforementioned dispute over his separation benefits.

Entered this 24th day of July 1979.

COMMISSIONER OF EDUCATION

Pending State Board of Education

IN THE MATTER OF THE TENURE :
HEARING OF DONALD HENLEY, :
SCHOOL DISTRICT OF THE CITY :
OF CAMDEN, CAMDEN COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

For the Complainant Board, Supnick, Mitnick, Cutler & Vogelson (M. Allan Vogelson, Esq., of Counsel)

For the Respondent, Michael P. Mullen, Esq.

The Board of Education of the City of Camden, hereinafter "Board," certified charges of unbecoming conduct against respondent, a teaching staff member with a tenure status in its employ, to the Commissioner of Education for determination pursuant to N.J.S.A. 18A:6-10. The Board simultaneously suspended respondent from his teaching duties, without pay, on April 12, 1977. Respondent denies the allegations and demands immediate reinstatement to his position of employment together with recovery of all salary and emoluments otherwise withheld from him.

Five days of hearing were conducted in this matter between August 18 and November 15, 1977 at the office of the Camden County Superintendent of Schools by a hearing examiner appointed by the Commissioner. Subsequent thereto, respondent filed a letter memorandum in regard to the quantum of proof necessary to establish the truth of charges pursuant to N.J.S.A. 18A:6-10. The report of the hearing examiner is as follows:

The total record in the matter was not completed until June 9, 1978 when a transcript of depositions taken of witnesses was submitted by the parties pursuant to their agreement and stipulation at the time of hearing. (Tr. I-107; II-109, 147, 166)

Respondent has been employed by the Board as a teaching staff member since the 1964-65 academic year. Respondent has been assigned, at various times, to the Camden High School, Pyne Poynt Junior High School, Hatch School and, since the 1975-76 academic year, to the Morgan Village Middle School. Respondent was assigned to teach science at the seventh grade level during 1975-76, and in 1976-77 he was assigned to teach science at the eighth grade level.

The charges of unbecoming conduct herein are based upon a series of pupil and parental complaints registered against respondent during his two years at the Morgan Village Middle School between 1975-76 and 1976-77 until the time of his sus-

pension. The hearing examiner shall consider the testimony and documentary evidence offered by the parties in support of their respective positions on each of the pupil and/or parental complaints. In weighing the evidence offered by the Board in support of the charges, the hearing examiner is mindful that the quantum of necessary proof in matters which involve charges against employees with a tenure status is the preponderance of believable evidence. (See In the Matter of the Tenure Hearing of John Orr, School District of the Township of Wyckoff, 1973 S.L.D. 40 and In the Matter of the Tenure Hearing of Edward J. Quinn, School District of South Orange-Maplewood, 1975 S.L.D. 397.) The hearing examiner, in setting forth his findings on the charges, is also mindful of the testimony of character witnesses produced by respondent in his own behalf. (Tr. III-51-52; 74-98)

CHARGE NUMBER ONE

K.D., a female pupil in respondent's eighth grade science class, complains that on February 17, 1977 while she was standing in the doorway with her friend, T.C., waiting for class to begin, respondent walked behind her and rubbed the lower front part of his body against the lower posterior of her body. (Tr. I-13-14) It is noticed that K.D., in her statement filed by the Board, asserts that respondent was "***pumping on my butt***". (P-1)

K.D. testified that she told respondent she was going to inform her father of what he had done and then asked for a pass to go to the Dean of Women. K.D. testified that respondent denied her the pass and told her she could go after class.

K.D. explained that she did go to the Dean of Women after class but the Dean was busy. K.D. testified that she then went to her aunt's house and told her what had happened. Her aunt contacted her father and informed him regarding the incident. K.D. testified that she and her father went to the vice-principal in the afternoon in regard to the incident.

The vice-principal by way of deposition (PR. I) testified that prior to K.D.'s father appearing at his office that day, K.D.'s aunt telephoned him and filed a verbal complaint. The vice-principal testified that he also talked with K.D. on the telephone at the same time and she stated that respondent "pumped up against her behind." (PR. I-25)

The vice-principal testified that K.D., her father, and her aunt appeared at his office in the afternoon in regard to the complaint. Respondent was also present. K.D. repeated the assertion in regard to respondent's conduct. The vice-principal testified that respondent neither admitted nor denied the allegation. Rather, the vice-principal explained, respondent was repeating that K.D. was angry because he had denied her the requested pass.

The vice-principal testified that he then called T.C., K.D.'s friend who had been standing at the doorway with her. The vice-principal testified that T.C. told him that she saw the incident and that respondent deliberately brushed against K.D. (PR. I-28)

T.C., testified at the hearing that respondent brushed against K.D. on his way out the door and that she did not see him "grind on her butt." (Tr. I-84) T.C. testified that while respondent was in back of K.D. for about two seconds she did not see his body move at all. (Tr. I-59)

Respondent testified that on the day of this alleged incident the class prior to the one K.D. attended had failed to clean up their science equipment. Consequently, in preparation for K.D.'s class respondent was in the rear of the room cleaning the science equipment. The period following the one to which K.D. is assigned is the lunch period for pupils and for respondent. Approximately eight to ten minutes after the bell had rung to commence K.D.'s class, he decided to close the door. He walked toward the door, with his roll book in hand to record the names of pupils who were late in reporting to class. Respondent testified that he intended to record the names of pupils who were late and detain them after class and into their lunch period. (Tr. III-63)

Respondent testified that as he approached the door to close it he noticed several pupils in the doorway. He walked through the pupils, to get to the doorknob which was on the outside, and he may have "bumped" into one of the pupils because he was in a hurry to get the door closed to start the class. Respondent testified that he was in a hurry because he did not want to keep the pupils after class which, if he did, would interfere with his lunch period. (Tr. III-65) This latter testimony is directly opposite to respondent's earlier testimony that he intended to close the door and record the names of pupils who arrived late in order to detain them into their lunch period.

The hearing examiner has considered the testimony of K.D., T.C., and respondent and has reviewed respondent's written statement (R-1) in opposition to the complaint of K.D. The hearing examiner recognizes that there is conflicting testimony between K.D. and T.C. in regard to whether respondent, in his approach to the door, had a briefcase in his hand or, as he testified, a roll book. There is also conflicting testimony in regard to whether K.D. immediately requested a pass from respondent after the alleged incident or at a later time after she had taken her seat at her desk.

The hearing examiner has also considered respondent's testimony that K.D. was a discipline problem in his class, as was T.C. (Tr. IV-78-79), and that K.D. received an F as a grade for her conduct on February 17, 1977, the day when the incident allegedly occurred.

The hearing examiner observes that there are conflicts in the testimony of K.D. and T.C. in regard to whether respondent had a briefcase or roll book in his hand, the time when K.D. asked for a pass, and whether respondent actually "pumped" against K.D.'s posterior. Nevertheless, the hearing examiner finds that respondent did, in fact, improperly touch K.D.'s posterior by brushing against her for at least two seconds. Had respondent accidentally and unavoidably brushed against K.D., the lapse of time would have been no more than a fraction of a second. The hearing examiner so finds.

CHARGE NUMBER TWO

The next pupil complaint to be considered is that of M.S., which complaint is supplemented by her father whose testimony was taken by way of deposition. (PR. 1)

M.S. testified that sometime during the 1975-76 academic year, while she was in respondent's seventh grade science class, respondent, contrary to her protestation, hugged her on one occasion and on another elbowed her in her chest and called her "bitch". (Tr. I-115, 117) M.S. testified that she went to respondent's desk on one occasion for help and several other pupils were also there. M.S. testified that when she tapped respondent on his shoulder to get his attention, he turned around, elbowed her in the chest, and called her "bitch." She testified that she fell against the chalkboard as the result of the impact of his elbow. (Tr. I-115-117) After this occurrence, M.S. testified, she would not go to respondent's desk for assistance.

M.S. also testified that on a prior occasion respondent came to her desk to check her work. On this occasion, she testified, he put his arms around her neck. M.S. testified that when this occurred, she got up from her chair and moved to another desk.

M.S. testified she told her father about these occurrences who, in turn, had conferences with the school principal and the Superintendent. The father also submitted a letter complaint (P-11) dated May 17, 1976 to the Superintendent in regard to respondent's alleged actions and remarks to his daughter.

Respondent testified in regard to the alleged hugging of M.S. that, on the particular day, M.S. came to his desk for help. There were other pupils there and when her turn for help came, he put his arm on her shoulder to get her attention. He then discussed her work with her, but denied hugging her. (Tr. IV-33) Respondent testified in regard to the allegation that he elbowed M.S. in the chest and called her "bitch" that M.S. had the habit of coming to his desk, standing behind him and

making gestures to the class. On this particular occasion, he looked up from the work with which he was engaged, saw the pupils in the class laughing, turned around to see what was causing the laughter and "bumped" into M.S. He testified that M.S. laughed and returned to her seat. (Tr. IV-35) Respondent denies referring to M.S. as "bitch."

Respondent testified as follows in regard to the allegation that he put his arms on her neck at her desk. Respondent stated that when he got to M.S.'s desk, she hid her book because, in his judgment, her work was not completed. When asked to see her book, M.S. jumped out of her seat and went to another desk. Respondent testified that the only reason he then placed his arm, not on or around her neck, but on her shoulder, was to keep her in her seat so she could not move. (Tr. IV-37)

The hearing examiner, having considered all the testimony in support of the complaint by M.S. and her father, as well as respondent's testimony in refutation thereof, finds respondent's testimony incredible. Respondent testified that he did not hug M.S., but that he did place his arm on her shoulder. He testified he did not elbow her in the chest; rather, he bumped her accidentally. This testimony is incredible in light of the uncontroverted testimony of M.S. that, as a result of being elbowed, she hit the blackboard. This would not occur from an accidental bump. Respondent testified he did not place his arms around M.S. at her desk; rather, he testified he put his arm on her shoulder to restrain her from leaving her chair. No reason is discernible from his testimony why M.S. would want to leave her chair except that, by his actions, he was annoying her. Respondent's testimony is not convincing in light of all the testimony with respect to this complaint.

The hearing examiner finds that the believable evidence establishes that respondent did improperly hug M.S., elbow her in the chest, refer to her as "bitch" and improperly place his arms around her neck.

CHARGE NUMBER THREE

The complaint of J.R. and his mother shall be discussed next. J.R. testified that on particular occasions in respondent's seventh grade science class, respondent threw a bottle, about the size of a small aspirin bottle, at him and two other pupils. The bottle allegedly contained nitric acid. (Tr. I-139) J.R. also testified that on another occasion during 1975-76 respondent threw a book at him and, additionally, wrote a derogatory remark about his mother in J.R.'s workbook. J.R. also testified in regard to respondent's conduct with other pupils who themselves filed complaints herein and which shall be discussed separately, post.

J.R. testified in regard to the bottle throwing incident that he and two other pupils, S.M. and A.W., were sitting on

the window sill during class. Respondent told them to get off the window sill. J.R. testified he failed to hear that command and did not comply after which respondent threw the bottle at them which hit the window. (Tr. I-141) J.R. testified that another pupil told him later that respondent had directed the pupils to get off the window sill. J.R. also testified that he did not see respondent throw the bottle, but another pupil told him that respondent threw the bottle. J.R. testified that on an earlier occasion respondent had thrown a book at him.

S.M. corroborated J.R.'s allegation that respondent threw a bottle, which contained nitric acid, at them. (Tr. II-84-85) S.M. also testified that the three boys were sitting at a desk near the window, not on the window sill. (Tr. II-89) S.M. also testified that the bottle did hit J.R. after it bounced off a desk. (Tr. II-84-85)

A.W. testified that he and S.M. were sitting near the window, while J.R. was sitting on the air-conditioning unit which abuts the window sill. A.W. testified he saw respondent throw the bottle at them. J.D., a pupil witness called by respondent, also testified that he saw respondent throw the bottle at the three boys. (Tr. II-122-123, 144)

J.R. also testified that he saw, in respondent's handwriting, in his workbook which had been corrected by respondent, a derogatory comment about his mother. J.R. testified that he knew respondent wrote the comment because it was made in red ink and that respondent was the only one who used red ink.

The hearing examiner observes, with respect to the latter complaint, that the workbook is not now available for review. Furthermore, J.R. testified on cross-examination that he was not sure whether any of his classmates used red ink. (Tr. I-153) J.R. testified that he showed the workbook to his mother who filed a letter complaint with the principal dated March 19, 1976. (P-10A)

Respondent admitted J.R. had shown him the written comment in his workbook and that he "sloughed" off the incident because pupils generally wrote in each others' workbooks. Respondent denied writing the derogatory comment in J.R.'s workbook. (Tr. III-117-118)

The hearing examiner, not being afforded the opportunity to review the workbook, finds that the Board failed to establish the truth of this portion of J.R.'s complaint.

Respondent testified in regard to the alleged bottle throwing incident that the class in which the three boys were assigned was the "worst class" in the school in terms of discipline and academic achievement. (Tr. III-111) Respondent testified he could not recall the bottle throwing incident. Respondent testified that no acids were used in that seventh grade, but

he could not recall whether the same classroom was also used for eighth grade science in which acids were used. (Tr. III-113)

Respondent denied J.R.'s allegation that he threw a book at him. Respondent testified that he did not throw any objects in his class, because he did not want to set a bad example for the pupils. (Tr. III-137)

The hearing examiner finds that the weight of believable evidence in regard to the bottle throwing incident establishes that respondent did throw a bottle at J.R., S.M. and A.W.

The hearing examiner, finds that respondent (1) threw a bottle at three boys and (2) threw a book at J.R. during the 1975-76 academic year. The hearing examiner finds the evidence insufficient to establish that respondent wrote a derogatory comment about J.R.'s mother in the pupil's workbook.

CHARGE NUMBER FOUR

S.M. filed an independent complaint against respondent. S.M. testified that during 1975-76 at the conclusion of a particular class with respondent, and subsequent to S.M.'s departure from the classroom, respondent chased him in the corridor. S.M. testified that respondent accused him of slamming the classroom door. Respondent allegedly placed his hands around S.M.'s neck and began choking him. S.M. also testified that respondent threw a book at him in class on another occasion. (Tr. II-86-87) J.R. testified that he witnessed respondent choking S.M. near the classroom door. (Tr. II-116-117)

Respondent testified that while he would grab pupils by the nape of the neck for running in the corridors, he did not recall grabbing S.M. by the throat. Respondent further testified that while it is possible he could have grabbed S.M. by the neck, if the incident did occur, which he denied, he would not have grabbed his neck in the fashion described by S.M. (Tr. III-114) Respondent also denied throwing a book at S.M. at any time during class. (Tr. III-115)

The hearing examiner finds the testimony of S.M. and J.R. believable that respondent did improperly grab S.M. by the throat during 1975-76 as alleged. The hearing examiner further attaches credibility to the testimony of S.M. that respondent, on another occasion, threw a book at him.

S.M. also testified, in regard to the book throwing incident, that on the same day, respondent allegedly stated to the pupils that he could not stand the "damn" class and that the pupils got on his nerves. (Tr. II-102) Respondent testified that, although he could not recall the exact language in regard to this incident, it is possible he did state he could not stand the "damn" class and that the pupils got on his nerves. (Tr. III-143)

CHARGE NUMBER FIVE

B.C., a pupil in respondent's class for seventh and eighth grade, during 1975-76 and 1976-77 respectively, testified that in 1976-77 he requested permission to go to the boys' lavatory. Respondent denied him such permission whereupon B.C. testified he left the classroom to go to the lavatory. The pupil was about to enter the lavatory when he heard respondent, who was standing at the top of the stairs, yell at him that "***you [B.C.] better not come back, you little son of a bitch.***" (Tr. II-6) B.C. testified that he reported this incident to the vice-principal after he left the lavatory.

Respondent denied referring to B.C. as alleged. Respondent testified that when he learned B.C. had left the room after being denied permission three times, he did go to the top of the stairs and told B.C. to stay down there unless he got a pass from the office to return to class. (Tr. III-99)

The hearing examiner finds the testimony of B.C. believable. The hearing examiner finds respondent did refer to B.C. as a "son of a bitch" as alleged.

CHARGE NUMBER SIX

The complaints of W.J., O.L.N. and R.T. shall be treated simultaneously because the three boys were involved in the same incident. Although the testimony of the pupils varies on minor points, the following major facts may be discerned from their collective testimony.

On a day in May 1976 the three pupils were sitting together in respondent's classroom. (Tr. II-13, 32) A pupil, R.T., testified that O.L.N. was in the back of the room. (Tr. II-48) Their testimony is that another pupil threw an object at respondent. Respondent believed, they testified, that it was done by one of them. W.J. testified that, in retaliation, respondent threw a small scale at them and that the scale hit him in the leg. Respondent allegedly walked to their table, turned the table over and began pushing W.J. in the chest. W.J. testified that he told respondent to stop pushing and when he continued to push him in the chest, W.J. testified he picked up a chair and hit respondent. (Tr. II-12) R.T. testified that when respondent picked up the table, it hit him on the chin. O.L.N. testified he saw the table hit R.T. in the chin and that he saw respondent push W.J. R.T. also testified that respondent attempted to punch him during this incident. (Tr. II-48-51)

O.L.N. also testified that during this incident he saw respondent swing at R.T., and that respondent told the class he did not care about his job, that if he hurt any one of them he would be out of jail before they would be out of the hospital. (Tr. II-36) The incident was ended by the arrival of the vice-principal who, by way of deposition, testified that the classroom was in chaos. (PR. I-9)

Respondent testified that all the pupils in the class on this particular day were unruly. Objects were being thrown around, one of which passed him. Respondent testified that he saw W.J., O.L.N. and R.T. in the back of the room. Respondent explained that he was convinced one of the three had thrown the object and directed them to leave the room and report to the vice-principal which they refused to do. Respondent pulled the table away from them and it tipped over. Respondent testified that he grabbed one pupil by the arm to pull him toward the door and an argument ensued. The pupil began running around the room, knocking some desks over. Respondent denied throwing a scale, pushing R.T., and swinging at any pupil. (Tr. IV-53-57) Respondent testified that it was possible he told the whole class on that day he was in a bad mood and that if he hurt anyone he would be out of jail before they would be out of the hospital. (Tr. IV-60-61)

The hearing examiner finds that the testimony of the pupils is believable in regard to the allegations that respondent threw a scale, tipped over their table, pushed R.T. and attempted to punch him and, finally, that he did tell the class that if he hurt one of them that he would be out of jail before they would be out of the hospital.

CHARGE NUMBER SEVEN

There remain three pupil complaints filed by K.J., T.M.R. and E.J., three girls assigned to respondent's classroom. K.J. testified that respondent uttered "fresh" remarks to her on several occasions, such as asking her to kiss him and telling her he was waiting for her to get older so he could take her home. (Tr. II-69)

T.M.R. testified that respondent was fresh with her by putting his hands on her waist, asking her to come to his house or asking if he could come to her house and, on another occasion, asking her if she "***ever let a boy get over [her]." (Tr. III-10) J.R., whose complaint was addressed earlier, testified that he heard respondent pose a similar question to T.M.R. (Tr. I-145)

E.J. testified that respondent was fresh with her by asking her to kiss him, generally, when she would ask him for permission to go to the lavatory. (Tr. III-40-42) E.J. also testified that respondent asked a lot of girls to kiss him.

Respondent testified that he never told K.J. he wanted to take her home. Rather, he testified, he did tell her he would send her home because of her constant requests to go to the lavatory. Respondent testified that he did refer to K.J. as "sweetie" until he learned at a conference that K.J. did not like to be called "sweetie."

Respondent testified in regard to T.M.R. that she misquoted him in regard to the question of whether she "***ever let a boy get over [her]." Respondent explained that T.M.R. was involved, impliedly sexually, with several boys. Respondent testified that when T.M.R. would get herself into a situation she could not handle with a boy then she would come to him for help to keep the boy away from her. Respondent testified that in this kind of circumstance, he would say to T.M.R. that:

> "***[Y]ou let the boys get all over you and then when you can't handle the situation, you come running to me.***" (Tr. IV-105)

Respondent denied ever asking T.M.R. to kiss him. (Tr. IV-106)

Respondent testified that he absolutely never asked E.J. to kiss him and denied the general allegation of E.J. that he asked a lot of girls to kiss him. Respondent, in support of his claim that he never asked any girl to kiss him, called C.C., another female pupil in his class, on his behalf.

C.C. testified in regard to E.J. that on a particular occasion E.J. went to respondent's desk to have her work corrected. She testified that respondent told E.J. that for once her work was correct and to E.J., "***I'll give you a kiss for that." (Tr. V-22) C.C. testified that E.J. jumped back and declined respondent's offer.

C.C. further testified that she witnessed respondent put his arms on the shoulders and waists of female pupils and that other girls complained that respondent would say that he was going to kiss them. (Tr. V-31)

Respondent testified, in regard to the complaints that he was to have told girls he would kiss them, that the entire matter was a misunderstanding on their part. Respondent testified in this regard that he had an honors table in his class. This honors table would be designated by him at the conclusion of each class in order to recognize the pupils who were best behaved and who accomplished the most. Respondent explained that as a reward for being designated the honors table, the pupils at that table would receive from him tootsie rolls and candy kisses.

One day, respondent testified, he had run out of candy. The pupils of the designated honors table asked him what their reward was to be. Respondent replied, realizing he had no tootsie rolls or candy kisses that:

> "***girls get kisses***, boys get handshakes***."
> (Tr. V-33)

The hearing examiner finds the testimony of K.J., T.M.R. and E.J. believable in support of their collective allegations that respondent had asked them to kiss him, had suggested he go home with K.J. and T.M.R. or that he go home with them for no reason emanating from his duties as a teacher, and that in regard to T.M.R. he did ask her specifically whether she "***ever let a boy get over [her]." The hearing examiner finds respondent's testimony to be absolutely incredible, filled as it is with inconsistencies and rationalization for the acts he committed.

In summary, the hearing examiner finds that respondent's conduct during 1975-76 and 1976-77, based on a preponderance of believable evidence adduced by the Board, was as alleged in Charge No. One, in regard to improperly touching the person of K.D. with his body; in Charge No. Two in regard to improperly hugging M.S., referring to her as "bitch" and elbowing her in the chest; in Charge No. Three in regard to throwing a bottle and a book at J.R.; in Charge No. Four in regard to choking S.M. and throwing a book at him; in Charge No. Five in regard to referring to B.C. as a "son of a bitch"; in Charge No. Six in regard to throwing a scale, tipping over a table, pushing and attempting to punch a pupil, and his comment to the class that if he hurt one of them he would be out of jail before they would be out of the hospital, as complained by W.J., O.L.N. and R.T.; in Charge No. Seven in regard to comments made by respondent to K.J., T.M.R. and E.J. with respect to kissing him, to going home with him and, finally, his asking T.M.R. whether she ever let a boy get over her.

It is recognized that respondent unsuccessfully demanded, as part of his defense, to produce testimony from four teachers to establish that the complaining pupils herein were, generally, instigators and trouble-makers. (Tr. IV-4-31)

The hearing examiner is aware that the pupils who testified herein may not be exemplary pupils totally without behavior problems. Notwithstanding any difficulties respondent may have experienced with the class, individually or as a whole, he had the on-going responsibility to treat every pupil with dignity. Pupils are not to be subjected to name-calling, threats, or comments that cause embarrassment to them by a teacher.

Finally, the hearing examiner observes that in his two years at the Morgan Village Middle School respondent was observed and evaluated only once, and by a science supervisor. Even then, no conference was held or written report on the evaluation prepared. Furthermore, neither the principal nor vice-principal ever evaluated respondent's teaching performance. The hearing examiner, realizing that the administration of the school is not

the subject of these charges, does point out, however, that M.S. had testified that another science teacher, not respondent, taught the pupils "bad words" and told the pupils that they were ignorant. (Tr. I-123)

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the matter including the report of the hearing examiner and the exceptions and objections filed thereto by respondent pursuant to N.J.A.C. 6:24-1.17(b).

Respondent contends, contrary to the findings of the hearing examiner, that the Board failed to produce sufficient credible evidence to support the charges against him. Respondent asserts that even if the Commissioner finds that the Board did in fact produce sufficient evidence to support the charges, the hearing examiner erred in prohibiting him from establishing circumstances which would mitigate the gravity of any of the charges considered to be proven true. Respondent complains in this regard that the hearing examiner prohibited him from establishing that several of the pupils who testified against him were disobedient to his classroom commands, untrustworthy and, in general, disciplinary problems.

The Commissioner finds that the record in the matter fully supports the findings of fact reached by the hearing examiner in his report. The Commissioner further finds that the hearing examiner has set forth in sufficient detail the testimony and evidence adduced by the parties upon which he arrived at such findings.

The Commissioner agrees with the ruling of the hearing examiner by which respondent was prohibited, in essence, from attacking the credibility of the pupil witnesses through their school records. The charges against respondent address his conduct with respect to several of his pupils and how his behavior, in the judgment of the Board, reached the level of conduct unbecoming a teacher. The hearing examiner, as the trier of fact, had the responsibility to determine whether the charges certified against respondent with respect to the incidents were true. The past behavior or achievement of the pupils involved was immaterial to those precise incidents.

The Commissioner finds no merit in respondent's exceptions and objections to the hearing examiner report. The Commissioner adopts as his own the findings of fact with respect to the charges against respondent. Such conduct, in the Commissioner's view, demonstrates that respondent did in fact display conduct unbecoming a teacher. The fact that several of the acts were committed prior to the 1976-77 academic year does not render the charges stale as respondent contends. Nor does the Commissioner find it necessary to remand the matter to the hearing examiner, as respondent urges, for an explanation of his statement that:

> "The hearing examiner finds respondent's testimony to be absolutely incredible, filled as it is with inconsistencies and rationalization for the acts he committed."

Respondent asserts that the hearing examiner failed to specify any inconsistencies in his testimony. The Commissioner disagrees.

The hearing examiner reported that respondent testified with respect to Charge No. One that he intended to record the names of pupils who were late and detain them after class and into their lunch periods. Then, respondent testified he was in a hurry because he did not want to keep the pupils after class which, if he did, would have interfered with his lunch period.

The hearing examiner reported that respondent testified with respect to Charge No. Three that he did not throw any objects in his class, because he did not want to set a bad example for the pupils. But respondent's testimony for Charge No. Four is that it is possible he stated to his pupils he could not stand the "damn" class and that they got on his nerves. And, in Charge No. Six, respondent testified that it is possible he told his class he was in a bad mood and that if he hurt anyone he would be out of jail before they would be out of the hospital.

The Commissioner agrees with the hearing examiner and adopts as his own the view that respondent's testimony was inconsistent.

It has been long held that unfitness to hold a teaching position may be shown by a series of incidents or by one incident, if sufficiently flagrant. Redcay v. State Board of Education, 130 N.J.L. 369 (Sup. Ct. 1943), aff'd 131 N.J.L. 326 (E. & A. 1944); In the Matter of the Tenure Hearing of Emma Matecki, 1971 S.L.D. 566, aff'd State Board of Education 1973 S.L.D. 773, aff'd Docket No. A-1680-72 New Jersey Superior Court, Appellate Division, November 28, 1973 (1973 S.L.D. 773)

The Commissioner holds that such conduct by respondent is sufficiently flagrant to warrant his dismissal and that by his own actions he has forfeited the tenure protection which is afforded by the statutes to teaching staff members who have otherwise complied with minimum requirements. (See In the Matter of the Tenure Hearing of Herman B. Nash, School District of the Township of Teaneck, 1971 S.L.D. 284; In the Matter of the Tenure Hearing of Francis Bacon, School District of the Township of Monroe, 1971 S.L.D. 387, aff'd State Board of Education 1972 S.L.D. 663; In the Matter of the Tenure Hearing of Joseph Maratea, Township of Riverside, 1966 S.L.D. 77, aff'd State Board of Education 106, aff'd Docket No. A-515-66 New Jersey Superior Court, Appellate Division, December 1, 1967 (1967 S.L.D. 351); In the Matter of the Tenure Hearing of Kathleen M. Pietrunti, Township of Brick, 1972 S.L.D. 387, aff'd in part/rev'd in part State Board of Education 1973 S.L.D. 782, aff'd in part/rev'd in part 128 N.J. Super. 149 (App. Div. 1974) (1974 S.L.D. 1418), cert. den. 65 N.J. 573 (1974), cert. den. United States Supreme Court 419 U.S. 1057 (1974).)

Accordingly, the Commissioner directs that respondent be dismissed from his position as a teacher in the City of Camden School System as of the date of his suspension by the Board of Education.

COMMISSIONER OF EDUCATION

July 31, 1979

FRANK ALBANESE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

For the Petitioner, Richard F. Berkey, Esq.

For the Respondent, Davis & Reberkenny (William D. Hogan, Esq., of Counsel)

Petitioner appeals the action of the Board of Education of Washington Township, hereinafter "Board," in withholding a salary increment for the 1977-78 school year. He avers that the Board has adopted no rules governing the withholding of increments for any reason and has failed to provide any objective standard against which to measure performance thereby rendering the Board's decision to withhold petitioner's increment patently arbitrary, capricious and unreasonable. He also avers he was denied elemental requirements of due process since he did not receive adequate notice of the Board's hearing, was not given an opportunity to respond to the charges before the Board, was not given proper notice of the deficiencies in his work, was not given reasonable opportunity to speak in his own behalf, nor was he given the opportunity to have a representative of his own choosing speak in his behalf. He further states that the Board has not provided written notice of the reasons for its action.

The Board seeks dismissal of the Petition based upon its complete denial of petitioner's pleadings and the doctrine of laches and has filed a Motion to Dismiss.

A conference of counsel delineated the issues as follows:

1. Does the doctrine of laches or the provisions of N.J.A.C. 6:24-1.2 bar relief for petitioner in this matter?

2. Did the Board violate the provisions of N.J.S.A. 18A:29-14 with respect to the withholding of petitioner's increment for the 1977-78 school year?

3. Was the Board's action in withholding the increment arbitrary, capricious and unreasonable?

Copies of evaluations, memoranda and Board minutes were submitted. Oral argument was waived on the Board's Motion and the parties filed Briefs on the matter. The controverted matter is now ripe for the Commissioner to review and decide on the basis of pleadings, exhibits, affidavits and Briefs.

Copies of memoranda to petitioner from his superiors were submitted, the substance of which follows:

November 21, 1975 - did not report to scheduled meeting at 1:30 p.m. and could not be found in school building.

November 25, 1975 - left staff meeting without permission and made a telephone call to call another teacher from the same meeting.

April 9, 1976 - reprimanded for being uncooperative and not graciously accepting constructive criticisms and/or suggestions from area specialist.

May 10, 1976 - did not apply for personal absence on that date or notify anyone; emergency plans were inadequate and had not been approved by area specialist.

June 29, 1976 - notified of eleven separate deficiencies and was advised that unless improvement was forthcoming in 1976-77 it would be difficult to be recommended for an increment and/or reemployment.

July 15, 1976 - a review of the June 29 memorandum with specific suggestions for improvement, and with receipt for certified mail attached.

December 20, 1976 - sent a pupil from his class to buy his lunch.

Evaluations dated September 29, 1976, February 10, 1977 and March 23, 1977 were also submitted and included suggestions for improvement in areas negatively assessed.

A memorandum was sent to petitioner from his principal under date of April 21, 1977 advising of the latter's recommendation that the Board withhold an increment for 1977-78 "[i]n keeping with the reasons stated in your Summary Evaluation***."

Copies of a memorandum under date of June 1 and a letter under date of June 16, 1977, both from the Superintendent to petitioner, clearly outline reasons for the withholding of the increment and also summarize and respond to petitioner's concerns at the May 11, 1977 non-adversary hearing on the matter which was held at petitioner's request. Petitioner was also advised in the June 16, 1977 letter that the Board discussed the matter again at its June 13 meeting and reaffirmed its original decision.

Addressing the first issue, the Commissioner finds that that petitioner was properly notified of the Board's action to withhold his increment for 1977-78, as well as the reasons for same. However, the doctrine of laches or the provisions of N.J.A.C. 6:24-1.2 do not bar relief automatically.

In Barbara Witchel v. Peter Cannici and Board of Education of the City of Passaic, 1967 S.L.D. 1, aff'd State Board of Education 3, the Commissioner commented as follows:

> "***The Commissioner has consistently held that where the doctrine of laches as an equitable defense has been raised, he will consider all the circumstances to determine whether there has been unreasonable and inexcusable delay which would bar action.***"
>
> (at 3)

In Hazel Harenberg v. Board of Education of the City of Newark et al., 1960-61 S.L.D. 142, aff'd New Jersey Superior Court, Appellate Court, July 7, 1961 (1961-62 S.L.D. 203), cert. den. Supreme Court, the Commissioner stated that:

> "***[H]e has established no specific period of time after which an appeal is barred. Thus in Gleason v. Bayonne Board of Education, 1938 S.L.D. 138, nine months' delay by a dismissed mechanic was laches; Carpenter v. Hackensack Board of Education, 1938 S.L.D. 593, six months' delay by dismissed teacher held laches; Aeschbach v. Secaucus Board of Education, 1938 S.L.D. 598, fourteen months between teacher's dismissal and appeal in this case did not constitute laches; Wall v. Jersey City Board of Education, 1938 S.L.D. 614 and 618, eleven months' delay of protest by teacher held laches; Gilling v. Hillside Board of Education, 1950-51 S.L.D. 61, nine months' delay by re-assigned janitor was laches. That the period of time constituting laches varies with the nature of the issue is also apparent. Thus, in Jackson v. Ocean Township Board of Education, 1939-49 S.L.D. 206, a delay of two months in protesting the award of a transportation contract was unreasonable; while in Duncan, et al. - In re Annual School Election, East Rutherford, 1939-49 S.L.D. 89, a delay of only three weeks constituted laches in contesting the results of an election.***"
>
> (at 144-145)

In Blanche Beisswenger et al. v. Board of Education of the City of Englewood, 1971 S.L.D. 489, rev. State Board of Education 1972 S.L.D. 583, aff'd Docket No. A-3225 New Jersey Superior Court, Appellate Division, June 3, 1974 (1974 S.L.D. 1368), the Commissioner quoted from Dorothy L. Elowitch v. Bayonne Board of Education, 67 S.L.D. 78, aff'd State Board of Education 86, aff'd New Jersey Superior Court, Appellate Division, October 14, 1968 (1968 S.L.D. 260):

> "***Implicit in the doctrine of laches is the inaction of a party with respect to a known right for an unreasonable period of time coupled with detriment to the opposing party. Pomeroy, Equity Jurisprudence, V. II, Sec. 419, pp. 171-2; 27 Am. Jur. 2nd, Sec. 162, p. 701; Atlantic City v. Civil Service Commission, 3 N.J. Super. 57 (App. Div. 1949); Park Ridge v. Salimone, 36 N.J. Super. 485 (App. Div. 1955), aff'd 21 N.J. 28 (Sup. Ct. 1956) Respondent, on June 10, 1965, 11 months after terminating petitioner, contracted to fill the vacancy created, prior to receiving any notice that petitioner contested the propriety of its action. Under all the circumstances, respondent's action constituted a sufficient detriment, in the face of petitioner's implied acquiescence, to invoke the bar of laches.***"
>
> (at 492)

He concluded, therefore, that the matter was out of time and that petitioners in Beisswenger were guilty of laches.

The Commissioner's role in the review of decisions by local boards of education to withhold salary increments was set forth in Francis Filardo v. Board of Education of the Township of Mahwah, 1975 S.L.D. 830 as follows:

> "***The hearing examiner has carefully reviewed such testimony and documentary evidence in the context of petitioner's allegations and applicable law with respect to the withholding of his salary increment. The primary question for decision is whether or not such testimony and evidence refutes or supports a judgment that the Board acted reasonably and with justification when it acted in 1973 to withhold petitioner's salary increment for the 1973-74 school year.***"
>
> (at 840)

The parameters of the responsibility of the Commissioner with respect to such a question was set forth by the Court in Kopera v. Board of Education of West Orange, 1958-59 S.L.D. 96, aff'd State Board of Education 98, rem. to Commissioner, 60 N.J. Super. 288 (App. Div. 1960), decision on remand 1960-61 S.L.D. 57, aff'd Docket No. A-632-58 New Jersey Superior Court, Appellate Division, January 10, 1963 (1961-62 S.L.D. 223). In its remand to the Commissioner the Court specifically defined the Commissioner's role in the review of decisions by local boards of education to withhold salary increments. The Court stated the following:

> "***Under this view of the substantive law, the Commissioner could not properly redetermine for himself whether petitioner had in fact been unsatisfactory as a teacher; that issue would be irrelevant as a matter of law. The only question open for review by the Commissioner would be whether the Board had a reasonable basis for its factual conclusion.***
>
> "***[W]e think the Commissioner should have determined (1) whether the underlying facts were as those who made the evaluation claimed, and (2) whether it was unreasonable for them to conclude as they did upon those facts, bearing in mind that they were experts, admittedly without bias or prejudice, and closely familiar with the mise en scene; and that the burden of providing unreasonableness is upon the appellant.***"
>
> (60 N.J. Super. at 295-296)

In his decision on remand in Kopera, supra, the Commissioner added a further dimension of consideration in such matters when he said:

> "***To withhold an increment on such a salary schedule, it is not necessary to show shortcomings on the part of a teacher sufficient to justify dismissal under the Teacher's Tenure Act.***"
>
> (1960-61 S.L.D. at 62)

The Commissioner was also concerned with the withholding of a salary increment in William Myers v. Board of Education of the Borough of Glassboro, 1966 S.L.D. 66. He said:

> "***The evaluation of a teacher's performance is often a matter of total impression, based upon both objective evidence and subjective judgment. No generalization concerning the amount and type of classroom observation

required for a valid evaluation is possible; frequently, as in the present case, the responsiveness of the teacher to suggestions for improvement of his teaching becomes more significant than the number of classroom visits made by the evaluator. See Haspel v. Board of Education of Metuchen, 1963 S.L.D. 78, affirmed State Board of Education, October 9, 1964, affirmed Superior Court, Appellate Division, June 10, 1954; Charen v. Board of Education of Elizabeth, decided by the Commissioner October 27, 1965. Similarly, justification for withholding a salary increment for unsatisfactory performance may be found in a single, serious infraction of the rules of the school, or in many incidents. In the context of dismissal, but with equal force here, it was said in Redcay v. State Board of Education, 130 N.J.L. 369, 371 (Sup. Ct. 1943), affirmed 131 N.J.L. 326. (E.&A. 1944):

> '***Unfitness for a task is best shown by numerous incidents. Unfitness for a position under the school system is best evidenced by a series of incidents. Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but it might also be shown by many incidents. Fitness may be shown either way.***'

"The quantum of proof required to sustain a decision to withhold a salary increment is less than that required to establish cause for dismissal of a teacher under tenure.***"
(at 68)

See also Charles Coniglio v. Board of Education of the Township of Teaneck, 1973 S.L.D. 449 and Westwood Education Association v. Board of Education of the Westwood Regional School District, Docket No. A-261-73 New Jersey Superior Court, Appellate Division, June 21, 1974, cert. den. 66 N.J. 313 (1974).

In Filardo, supra, it was held:

"***In such a context of applicable consideration the hearing examiner finds no reason to hold that the Board acted herein in an arbitrary, unreasonable, or capricious manner or in contravention of any of the rights of petitioner. The whole conduct of petitioner during the period 1971-73 was scrutinized by the Board with respect to

> salary increment entitlement. Such scrutiny of a series of incidents was not inappropriate (Redcay, supra) and, even if petitioner's repeated criticisms of superiors and expressions of opinion are disregarded, the hearing examiner finds sufficient reason in the findings, ante, to provide necessary support of the action the Board took. School administrators and the Board had a reasonable basis for concluding that on at least two occasions in the 1972-73 school year petitioner's teaching was unsatisfactory. Petitioner did leave his post of duty in a school bus drill in 1971 in a precipitate manner. Petitioner did, by his own admission, affix the name of another teacher to a nomination of petitioner as a teacher to receive special notice. These findings are set, moreover, in the context of a record of petitioner's truculence and repeated assertions of his own correctness of judgment as opposed to the judgment of those with whom he worked which can hardly be held to contribute to an improvement of education for young pupils but can be held to be deleterious to it.***"

In the instant matter, after careful review of the pleadings, exhibits, affidavits and Briefs, the Commissioner finds that the Board did not violate the provisions of N.J.S.A. 18A:29-14. Nor was the Board's action in withholding the increment arbitrary, unreasonable or capricious. The Commissioner does find the petitioner guilty of laches and in violation of N.J.A.C. 6:24-1.2.

For the reasons stated above, the petition is hereby dismissed.

COMMISSIONER OF EDUCATION

August 6, 1979

ADRINNE LOGANDRO,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF CINNAMINSON, BURLINGTON COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Joel S. Selikoff, (Steven R. Cohen, Esq., of Counsel)

For the Respondent, Murray, Granello & Kenney (James P. Granello, Esq., of Counsel)

Petitioner, a tenured teaching staff member in the employ of the Board of Education of the Township of Cinnaminson, hereinafter "Board," opened this matter by appealing the Board's denial of the use of her annual and accumulated sick days during the period she was disabled due to pregnancy.

The following stipulations were agreed to at the conference of counsel held on November 17, 1978:

1. Petitioner is a properly certificated teacher and has been employed as such by respondent for seven years and has a tenure status.

2. Petitioner requested a maternity leave of absence for the 1978-79 school year and the use of her accumulated sick days during the period she would be disabled due to pregnancy.

3. Petitioner was granted the maternity leave of absence for the 1978-79 school year by letter under date of July 20, 1978, but was denied the use of accumulated sick days "in keeping with Board practices."

4. The Board was advised by petitioner in a letter under date of August 13, 1978 of her intention to appeal the Board's denial of the use of accumulated sick days as its action was contrary to the Commissioner's decision in Board of Education of the Township of Cinnaminson v. Laurie Silver, 1976 S.L.D. 738, aff'd State Board of Education April 4, 1979.

Petitioner filed a Motion to Compel Compliance with the Commissioner's decision in Cinnaminson, supra, and an oral argument was heard on November 17, 1978.

Petitioner argues that the Board has refused to comply with the Commissioner's decision in Cinnaminson, supra, and as the party petitioner in that matter, the Board has failed to make an application for a stay during the pendency of its appeal before the State Board of Education pursuant to N.J.A.C. 6:2-1.6. (Tr. 2-3) Petitioner further argues that the Board has violated the decision of the Court in Castellano v. Linden Board of Education, 158 N.J. Super. 350 (App. Div. 1978). (Tr. 3)

The Board avers that a maternity leave is a child-rearing leave and is to be distinguished from a disability leave which is granted at a time when an individual is disabled for some particular reason and that Cinnaminson, supra, dealt with a disability leave. (Tr. 16) The Board further argues that since petitioner was granted a leave without pay, a suspension of remuneration results in a suspension of emoluments, including sick leave benefits. (Tr. 17) The Board also argues that the instant matter concerns itself with terms and conditions of employment and should be submitted to grievance arbitration procedures which have primacy over any other form of relief. (Tr. 19-20) The Board requests deferral of the instant matter pending a New Jersey Supreme Court decision in Castellano, supra, and a State Board of Education decision in Cinnaminson, supra.

The Commissioner finds no evidence to indicate that the Board exercised its right to request and/or require a physician's certification of disablement as per N.J.S.A. 18A:30-4. The Commissioner's representative at the conference of counsel called for such a certification and received the following from Courtney M. Malcarney, M.D., under date of November 29, 1978:

> "This is to certify that Adrinne Logandro has been a maternity patient under our [Garra & Malcarney, M.D.'s, P.A.] care from April 21, 1978 through the present. The approximate date of conception was Jan. 15, 1978 and she was delivered on November 19, 1978 at about 43 weeks. As her doctor, I consider she was unable to work from Oct. 1, 1978 until Jan. 2, 1979."

Petitioner countered the Board's argument for a suspension of emoluments during a suspension of remuneration by citing the Commissioner's decision in John Mountain v. Board of Education of the Township of Fairview, 1972 S.L.D. 526, aff'd State Board of Education 1973 S.L.D. 777 which states that a teacher on leave of absence is still an employee of the Board. The Commissioner concurs and is constrained to point out that the plight of accident victims would be tragic when all accumulated sick leave days were used, and if medical and hospitalization coverage were to be terminated with the last day of remuneration.

The Board's argument that the controverted matter should be submitted to grievance arbitration procedures as it concerns itself with terms and conditions of employment is without merit. The Commissioner notices that petitioner has filed no claim of contract violation (Tr. 12), and further that petitioner appeals the Board's action as contrary to statute and prior decisions of the Commissioner and the courts.

The Commissioner addressed this same Board's request for deferrment of decision in Delores Shokey v. Board of Education of the Township of Cinnaminson, 1978 S.L.D. ____ (decided November 29, 1978), aff'd State Board of Education April 4, 1979:

> "***The Commissioner similarly rejects the Board's request to hold the instant matter in abeyance until such time as the State Board of Education renders its determination of the Board's appeal in the matter of Cinnaminson, supra. The Commissioner has not arrived at this determination lightly. Quite the contrary, he has thoroughly researched the controverted matter and observes that the courts of this State have determined that the use of sick leave benefits for pregnancy related disability is stare decisis. Indeed, in the matter of Castellano v. Linden Board of Education, 158 N.J. Super. 350 (App. Div. 1978), the Court said:
>
> '***We are convinced that to deprive a pregnant employee of sick leave benefits for an absence occasioned by childbirth does indeed constitute discrimination on account of sex. We must 'be mindful of the clear and positive policy of our State against discrimination as embodied in N.J. Const., Art. I, par. 5.' Levitt & Sons, Inc. v. Div. Against Discrimination, etc., 31 N.J. 514, 524 (1960). 'Effectuation of that mandate calls for liberal interpretation of any legislative enactment designed to implement it.' Id.
>
> 'The Board's concept that pregnancy is not an illness or injury in the usual sense of those words and thus must be excluded from sick leave benefits is far too restrictive and literal and not in accord with the clearly enunciated policy of this State against discrimination on account of sex. Sick leave benefits are intended to alleviate economic losses resulting from inability to work because of disability. This salutary purpose would not be furthered by excluding

> pregnancy-related absences merely because the condition may not be an illness by strict definition. In this regard, it is worthy of comment that the Temporary Disability Benefits Law, N.J.S.A. 43:21-29, as amended by L.1961, c.43, in providing compensation for disability resulting from accident or sickness not compensable under the Workers' Compensation Law, deems pregnancy 'to be a sickness during the 4 weeks immediately preceding the expected birth of child and the 4 weeks immediately following the termination of pregnancy.' See N.J. Bell Tel. Co. v. Board of Review, 78 N.J. Super. 144 (App. Div. 1963), aff'd 41 N.J. 64 (1963).***"
> (at 361-362)

The Commissioner observes that the Court, in the matter of Castellano, supra, upheld his determination in the matter of Cinnaminson, supra, when it stated:

> "***It is also significant that the Commissioner of Education has refused to give to N.J.S.A. 18A:30-1 the narrow interpretation urged by the board, taking the position that there is no impediment against construing the statute in favor of a tenured teacher who sought, but was denied, sick leave benefits during a period of absence for maternity reasons. [Cinnaminson, cited ante] While an appellate tribunal is in no way bound by an agency's interpretation of a statute, Service Armament Co. v. Hyland, 70 N.J. 550, 561 (1976), the Commissioner's construction of this statute coincides with our own view thereof.***" (at 362)

The Commissioner notices in passing that the Congress of the United States has amended Title VII of the Civil Rights Act which concurs with the Commissioner in Cinnaminson, supra. Pregnancy-related disabilities may no longer be distinguished from non-pregnancy-related disabilities.

In the instant matter, the Commissioner grants petitioner's Motion and directs the Board forthwith to allow petitioner the use of her accumulated sick days during the period of her pregnancy-related disability from October 1, 1978 to January 2, 1979.

COMMISSIONER OF EDUCATION

August 6, 1979

Pending State Board of Education

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
744 BROAD STREET, ROOM 410
NEWARK, NEW JERSEY 07102
(201) 648-6186

HOWARD H. KESTIN
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

PETITION OF: "J.P." and "S.P.", parents and natural guardians of "W.P.",	)	INITIAL DECISION
	)	DKT. # EDU 806-79

APPEARANCES:

For the Petitioners, Education Law Center, Inc.
(Jacquelyn R. Rucker, Attorney at Law, of Counsel)

For the Respondent, DeMaio and Yacker
(Vincent C. DeMaio, Esq., of Counsel)

BEFORE THE HONORABLE LILLARD E. LAW, A.L.J. c/b:

Petitioners, parents of a seventeen (17) year old male pupil, "W.P.", who was enrolled in the high school of the Board of Education of the Matawan - Aberdeen Regional School District, hereinafter "Board", until his expulsion on November 27, 1978, requests, inter alia, a Stay of the Boards' expulsion action and immediate reinstatement to the Matawan Regional High School pending an expedited hearing on the merits of the Petition of Appeal. Petitioners allege that "W.P." received no home instruction or other alternative educational program between November 1, and November 27, 1978. The period of his suspension from school pending the Board's decision on the recommendation for his expulsion. John Scher v. Board of Education of the Borough of West Orange, Essex County, 1968 S.L.D. 92. Petitioners further allege that "W.P." was not evaluated by the Board's Child Study Team, hereinafter, "C.S.T.", prior to its decision to expel him from school in violation of N.J.A.C. 6:23-1.5 (e). Petitioners pray for relief in the form of an Order to Stay the Board's action of expulsion, immediate reinstatement to the Matawan Regional High School, immediate supplemental help necessary to enable "W.P." to make up all classwork and examinations missed since his suspension - expulsion in order that he might be graduated from the high school in June 1979, remove all indications of the expulsion from "W.P. s" academic transcripts and school records and, an expedited plenary hearing of the instant matter.

The Board admits that, subsequent to certain incidents which occured at its high school on October 30, 1978, "W.P." was afforded a hearing before the board and as a result of said hearing, it adopted a resolution to exclude "W.P." from participation in its regular school program. The board denies that it failed or refused to offer "W.P." an alternative educational program as alleged by petitioners. In lieu of Brief, the board filed four (4) exhibits attached to its answer to

the petition. Thereafter, it filed an affidavit of the Board's Director of Special Services and the original transcript of the proceedings IN THE MATTER OF THE EXPULSION HEARING OF ("W.P."), dated November 21, 1978, hereinafter "E.H.Tr.".

On April 17, 1979, oral argument was conducted on petitioner's Motion to Stay the board's action at the Monmouth County Courthouse, Freehold, New Jersey, by an Administrative Law Judge c/b appointed by the Director and Chief Administrative Law Judge of the Office of Administrative Law.

The essential facts are not in dispute. On the morning of October 30, 1978, a pupil informed the high school's dean of students that there was to be a disturbance between pupils at the school on that day and that weapons might be involved. The dean of students reported the rumor to his superiors and the local police. Thereafter, the dean of students and the school's truant officer patrolled a wooded area adjacent to the school where it was rumored that the disturbance would occur. Having determined that there were no pupils in the wooded area, the two (2) Board employees proceeded to the rear of the school building, where they encountered two (2) detectives seated in a police vehicle. At approximately 11:30 a.m., a school employee emerged from the school building, informed the dean of students that a confrontation between pupils had occured in the school's cafeteria and requested his immediate assistance. The dean of students then observed a number of pupils emerging from the school building fighting, which he and other board employees attempted to stop. During the course of the disturbance, the dean of students noticed a pupil lying face down on the macadem area outside of the cafeteria, and observed "W.P." leaping upon the pupil's back with both feet, heels extended. (E.H.Tr.-5-6).

"W.P." admitted that he did indeed jump upon the back of a pupil during the disturbance, but contended that he did so because the pupil had a friend of his on the ground (E.H.Tr.-51-52).

Subsequent to the incident reported by the dean of students, ante, a teaching staff member was inside of the school building attempting to disperse fighting pupils and while doing so, observed "W.P." strike and kick a pupil on the head. (E.H.Tr.-11-12).

"W.P." also admitted that he had kicked a pupil on the head several times"...because the (pupil) was beating up on a girl..."W.P." contended that during the disturbance and while he was fighting with a another pupil, someone he could not identify struck him on the head with a metal pipe. (E.H.Tr.-51, 53-54).

Subsequently, on October 31, or November 1, 1978, "W.P." was suspended from school for the acts he allegedly committed on October 30, 1978. On or about November 1, 1978, a parent-principal conference was held at which time the principal informed petitioners that "W.P."'was suspended from school from November 1, to November 14, 1978. On or about November 8, 1978, a second parent conference was held at which time the principal informed petitioners that "W.P!"'s two-week suspension would be changed to a recommendation for his expulsion from the high school. Petitioners contended that while in attendance at the two conferences conducted by the

principal, they were not afforded the opportunity to confront or question teachers and pupils who allegedly provided information with regard to "W.P.'s" actions during the disturbance on October 30, 1978.

On November 21, 1978, the board held a full plenary expulsion hearing with regard to "W.P.'s" alleged involvement in the disturbance on October 30, 1978, and pursuant to N.J.S.A. 18A:37-1 et seq. Petitioners and "W.P." appeared at the hearing without legal counsel, and were informed that the hearing would be adjourned in order for them to retain counsel. Petitioners, however, declined the invitation to have legal counsel represent them at that time. (E.H.Tr.-2-4).

Subsequently, on November 27, 1978, the Board passed a resolution to exclude "W.P."....from participation in the regular school program ..." and directed the school's administrative staff to "...make arrangements with the student and his parents for the structuring of a substitute educational program..."

(Board's answer, Schedule "A.")

On December 4, 1978, the Superintendent responded in writing to a letter he had received from petitioners dated November 30, 1978. Therein, the Superintendent outlined to petitioners the substitute educational program available to "W.P." to complete the required academic program for his twelfth (12th) year. He also informed petitioners that "W.P." would be awarded a diploma from the high school upon the successful completion of the substitute educational program. (Board's answer, Schedule "B"). The record shows that "W.P." was only required to successfully complete courses in English and Health, Safety and Physical Education to be eligible to graduate from the high school.

Petitioners decline to pursue the substitute educational program afforded "W.P." by the Board and instead, filed the instant petition on February 20, 1979.

Petitioners allege that the board failed to offer "W.P." home instruction or an alternative education program from November 1, to November 27, 1978, during the period of his suspension and prior to the board's action to exclude him from the regular school program. Petitioners further allege that the Board's C.S.T. failed to evaluate "W.P." prior to its action to expel him pursuant to N.J.A.C. 6:28-1.5 (e).

The Board argues, by way of affidavit of its Director of Special Services, that it was in direct contact with petitioners with regard to arrangements for home instruction during the pendanacy of "W.P.'s" suspension and the alternative educational program available to him subsequent to the board's action to exclude him from the regular school program. In his affidavit, the Director of Special Services asserted that "W.P.'s" parents refused the offers for home instruction, the alternative educational program and to provide their consent to have "W.P." evaluated by the Board's C.S.T. pursuant to N.J.A.C. 6:28-15 (e), which provides as follows:

> "A pupil shall be referred to the basic child study team to determine if the pupil is eligible for the services described in these regulations as a prerequisite to any Board of Education action on expulsion from the public schools."

The board's authority to suspend and/or expel "W.P." from its schools is set forth in N.J.S.A. 18A:37-1 et seq. Specifically, N.J.S.A. 18A:37-2 provides, inter alia, as follows:

> "Any pupil who is guilty of continued and willful disobedience, or of open defiance of the authority of any teacher or person having authority over him, or of the habitual use of profanity or of obscene language, or who shall cut, deface or otherwise injure any school property, shall be liable to punishment and to suspension or expulsion from school."
>
> "Conduct which shall constitute good cause for suspension or expulsion of a pupil guilty of such conduct shall include, but not be limited to, any of the following:"
>
> "...c. Conduct of such character as to constitute a continuing danger to the physical well being of other pupils;"
>
> "...d. Physical assault upon another pupil or upon any teacher or other school employee;..."

and;

> N.J.S.A. 18A:37-5 further provides that: "No suspension of a pupil by a teacher or a principal shall be continued longer than the second regular meeting of the Board of Education of the district after such suspension unless the same is continued by action of the board, and the power to reinstate, continue any suspension reported to it or expel a pupil shall be vested in each board."

The fundamental fact in the instant matter is that the board and its administrators were faced with a disturbance of the highest magnitude on October 30, 1978, wherein the safety and well-being of the pupils under its jurisdiction was threatened. The incident, in which approximately 200 pupils were involved, school administrators and staff members experienced a dangerous occurence of incalculable dimension with respect to the imminent peril of injury, potential d struction and loss of life. Under such circumstances the actions of pupils who perpetrate such disturbances cannot go unpunished. A board of education has the authority and the responsibility pursuant to the aforementioned statutes to deal swiftly and effectively with pupils who wittingly jeopardize the safety and well-being of a pupil population and school staff. All pupils are accountable for their actions to school authorities and the authority for the school administration to require such accountability of pupils is clearly set forth at N.J.S.A. 18A:25-2 which provides, inter alia, as follows:

> "A teacher or other person in authority over such pupils shall hold every pupil accountable for disorderly conduct in school and during recess and on the playgrounds of the school and on the way to and from school...."

Thus, the boards' administrative staff held "W.P." accountable for his alleged actions on October 30, 1978 and, appropriatly suspended him from school for his alleged "disorderly conduct." This action was consistent with the law.

After a careful review of the relevant statutes, decisional law and the contentions of the parties as set forth herein, I cannot agree with the position advanced by petitioners that the board failed to offer "W.P." home instruction during the period of his suspension or that the board failed to provide an alternative educational program subsequent to its action to exclude him from the regular school program. Quite the contrary. I find that the board, through its Director of Special Services and Superintendent, made every effort to protect "W.P.'s" position as a pupil enrolled in its schools and provided him with a suitable alternative setting to insure his education progress through to his graduation from its high school. Petitioner's refusal to accept or abide by the board's determination was in error and cannot be condoned. No harm would have come to petitioners, had they accepted the alternate educational program during the pendency of this litigation. Moreover, "W.P." would have benefited from such an educational program without the loss of approximately six (6) months of instruction.

Nor is it found that the board was in error when it neglected to have its C.S.T. evaluate "W.P." prior to its action to exclude him from its regular school program. Although the Commissioner held in Scher, supra, and the New Jersey Administrative Code sets forth prescribed pre-expulsion pupil evaluations, petitioner's refusal to grant their consent for such an evaluation cannot now be used to claim that the board was in violation of N.J.A.C. 6:28-1.5(e). Thus, petitioners

assertion with respect to this issue is without merit.

In another matter which involved the expulsion of a pupil from the public schools the Commissioner held in "H.A." an infant by his parents and natural guardians v. Board of Education of Warren Hills Regional School District, Warren County, 1976 S.L.D. 336, that:

> "In the instant matter, the Commissioner is constrained to observe that the nature of the boards' expulsion action against petitioner does not constitute his permanent expulsion from school, but rather the board has by its action effectively excluded him from school for the remainder of the 1975-76 school year for the infraction committed. In this regard, petitioner has failed to substantiate that the board was required to adhere to the Commissioner's ruling in Scher, supra, prior to arriving at a determination to expel him from school for the period of time controverted herein. Having found no legal reason to impose another judgement in this matter, the Commissioner is constrained to remind the board as he did in Scher that ...while such an act (of expulsion) may resolve an immediate problem for the school, it may likewise create a host of others...' (1968 S.L.D. at p. 97). Not the least of these problems are those created for both petitioner and the community at large if his educational program is discontinued for the period of time set forth herein without some alternative method of insuring his educational future in school. To obviate this ultimate result, the Commissioner finds and determines that petitioners exclusion from school for a period of approximately five (5) months is sufficient to impress upon him the seriousness of his actions and that to deny him an education for the remainder of the school year will accomplish no useful purpose " (at p. 341).

Similarly, it is determined that no useful purpose would be served to continue to deny "W.P." an educational program.

Accordingly, petitioners are directed to present "W.P." to the board's C.S.T. for an evaluation forthwith. The board, therefore, is directed to immediately accept "W.P." in its alternative educational program and to provide him with all of the necessary supplemental

instruction to make up for the time lost since his suspension from school on October 31, 1978. It is further determined that the need for further hearing in the instant matter is not necessary. The Petition of Appeal is therefore, DISMISSED.

This decision does not become final until forty-five (45) days from agency receipt of this order unless the agency head acts to affirm, modify or reverse during the forty-five (45) day period, N.J.S.A. 52:14B-10.

I HEREBY FILE with the Commissioner of Education, Fred G. Burke, my Initial Decision in this matter and the record in these proceedings.

DATE

LILLARD E. LAW, A.L.J. c/b

"J.P." AND "S.P.," parents and natural guardians of "W.P.,"	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MATAWAN-ABERDEEN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the initial decision in the instant matter. It is observed that no exceptions were filed by the parties regarding the above determination pursuant to N.J.A.C. 6:24-1.17(b).

In the Commissioner's judgment it is clear that the actions of W.P. as revealed in the record were most serious when viewed against the atmosphere of disruption and the impending near-riot condition, which immediately followed. It can only be concluded that such action imperiled the safety and welfare of a segment of the school population, and therefore cannot be tolerated.

Additionally, the Commissioner, upon review of the record herein, finds no merit in petitioners' claim that the Board violated the provisions of N.J.A.C. 6:28-1.5(e) which required the Board to have W.P. undergo an evaluation by the Child Study Team prior to its expulsion action against him. It is clear from the affidavit of the Director of the Child Study Team that petitioners had refused to allow such an evaluation prior to the expulsion action taken by the Board.

Accordingly, the Commissioner concurs with the findings and determinations in the instant matter. Such determination provides for an evaluation of W.P. by the Board's Child Study Team forthwith and for him to be permitted to be enrolled in an alternative educational program with supplemental instruction. The Commissioner so holds. The Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

August 6, 1979

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF EASTAMPTON,	:	DECISION
BURLINGTON COUNTY.	:	
	:	

Pursuant to a letter request filed on April 12, 1979 by Candidate Linda S. Atkinson, alleging irregularities in the conduct of the annual school election held on April 3, 1979, in the Eastampton Township School District, an inquiry was conducted by a representative of the Commissioner of Education at the office of the Burlington County Superintendent of Schools on April 26, 1979. The specific allegations of improper conduct of the election are set forth as follows:

> "1. [T]he poll list and the county voter registration books were approximately 8 to 10 feet apart, on separate ends of a table, no verification was made of signature.
>
> 2. [P]eople were allowed to congregate at the polls for long periods of time, talking to election board members and voters. The judge of elections did not request that they leave.
>
> 3. I [Candidate Atkinson] also question the legality of signing the poll list in pencil. I feel that anything signed in pencil is not a legal signature and may be changed.
>
> 4. [T]here was a ballot taken from the [ballot] box with the number [coupon] still attached to the top and was counted by the judge of election *** but was finally voided.***
>
> 5. Pre-printed stickers were used to elect a[n] unpetitioned candidate and *** I [Candidate Atkinson] feel that by just placing a sticker *** does not signify a vote, the ballot says you must cast a vote by placing an X by the name [on the sticker/paster]***."

In regard to the first complaint it is observed that Eastampton Township is a Type II constituent school district of the Rancocas Valley Regional High School District. Consequently, as a result of those recently enacted legislative amendments to N.J.S.A. 18A:14-1 et seq., all regional and constituent Type II school districts were required to conduct their annual school elections on April 3, 1979 at the same locations during the same time periods; however, the polling places at these locations were to be separate. These are the circumstances which prevailed in the instant matter. The Eastampton Township school election officials required the voters who entered the polling place to identify themselves to a school election official who was in charge of the respective set of signature copy registers pertaining to the municipal voting district in which they resided. Thereafter, the voter would proceed to the end of a table on which the signature copy registers and the school poll list were located. The voter then signed the poll list before obtaining a paper ballot.

The Commissioner's representative has reviewed a copy of the school poll list (C-5) and finds that the signatures of the voters appear in numerical order; however, the address of each of the voters does not appear on the school poll list.

The Commissioner's representative finds and determines that the system used to identify each voter at the school polling place was procedurally defective on two counts:

1. A separate school poll list should have been placed beside each set of signature copy registers so that there would have been no question regarding the manner in which the voters identified themselves and signed the school poll list.

2. Each voter should have been instructed by the school election official to write his/her address, as well as name, on the school poll list in compliance with the provision of N.J.S.A. 18A:14-48.

The Commissioner's representative has reviewed the testimony of Candidate Atkinson, as well as that of the judge of elections, in regard to the second complaint raised herein. Such testimony fails to conclusively establish that certain persons were permitted to loiter at the polling place in violation of school election laws.

The third complaint with respect to the conduct of the election pertains to whether or not the signatures which appear on the school poll list (C-5) may be written in black lead pencil. The Commissioner's representative has researched the school election statutes and numerous school election decisions rendered by the Commissioner and finds no express ruling or statutory proscription regarding the use of black lead pencil to inscribe the voters' signatures on the school poll list. Accordingly, it is found and determined that absent such language

in law, the use of black lead pencil for such purposes is permissible pursuant to the provisions of N.J.S.A. 18A:11-1.

The Commissioner's representative has reviewed the testimony regarding the fourth complaint raised herein by Candidate Atkinson. While there was some discussion about whether or not the ballot (C-4) which had been placed in the paper ballot box with the coupon attached should have been counted, the Commissioner's representative finds and determines that it was proper to void such ballot since the voter who cast the ballot could have been identified through the number of the ballot contained on the coupon if such coupon were compared with the signature copy register.

Finally, the fifth complaint relates to whether a cross, plus or a check mark should have been placed to the left of the name of a write-in candidate, or a candidate whose name appeared on the ballot by virtue of a paster, as stated on the instructions of the ballot.

The Commissioner's representative is convinced by the testimony of the Administrative Assistant to the Burlington County Superintendent of Schools that advance notification was issued to all local boards of education that such requirement was unnecessary by virtue of N.J.S.A. 18A:14-36, as amended. This statute no longer requires that such designations be placed to the left of a candidate's name that is either written in or pasted on the ballot.

In the instant matter the Commissioner's representative finds and determines that while there were certain procedural violations solely in connection with the first complaint herein, it is logical to conclude that such violations resulted from the recently amended statutes requiring that regional high school districts and the constituent school districts be held simultaneously at the same locations.

It is further found and determined that the confusing procedural aspects giving rise to such circumstances could have been avoided by the Board had school election officials been given adequate instruction with respect to the conduct of the election.

The Commissioner's representative recommends that the Eastampton Township Board of Education be directed to provide such instruction to its school election officials in the future so that complaints of this nature may be avoided.

In view of the above, the Commissioner's representative finds that the procedural violations which did, in fact, occur were not sufficient to adversely affect the outcome of the annual school election in question.

* * * *

The Commissioner has reviewed the findings and recommendations of his representative in the instant matter and adopts them as his own. The Commissioner cannot condone the fact that the school election officials of Eastampton Township procedurally erred by not having a school poll list available next to each set of the municipal district's signature copy registers. It is determined, however, that the circumstances giving rise to this complaint were caused by a lack of awareness by the school officials regarding the recently amended statutory provisions pertaining to the conduct of simultaneous regional and constituent school district elections.

The Commissioner in this regard, cautions the Eastampton Township Board of Education to take the necessary measures in the future to inform their school election officials of such changes in school election law procedures prior to the annual school election so as to insure the integrity of the election and thereby eliminate complaints of the nature described herein.

COMMISSIONER OF EDUCATION

August 9, 1979

KATHLEEN BREEN,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF CALDWELL-WEST WEST CALDWELL, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Goldberg & Simon (Gerald Goldberg, Esq., of Counsel)

For the Respondent, McCarter & English (Steven B. Hoskins, Esq., of Counsel)

Petitioner was employed for a period of three academic years from September 1974 through June 1977 as a teaching staff member by the Board of Education of the Borough of Caldwell-West Caldwell, hereinafter "Board," and accepted a contract to teach for the 1977-1978 school year. The Board acted at its meeting on March 28, 1977 to offer the fourth year contract to petitioner which would grant tenure and so notified petitioner on March 29, 1977. (Exhibit A) She was notified on June 16, 1977 that Board action at its meeting on June 13, 1977 terminated her services as a teacher as of June 23, 1977 due to her failure to improve her punctuality as recommended by her immediate supervisor and granted petitioner sixty days' salary as per the notification clause in her contract. (Exhibit C) Petitioner alleged that the Board's action was arbitrary, capricious and in violation of applicable law.

The Board averred that it acted within its rights in electing to terminate petitioner's employment, that petitioner has failed to state a cause of action upon which relief can be granted and has also failed to set forth accurately detailed and corroborated allegations which would be sufficient to require consideration of her complaint by way of plenary hearing, and moved that the Petition be dismissed. Oral argument on the Motion to Dismiss was held on April 5, 1978. At this juncture, the views advanced at the oral argument, the pleadings, exhibits and Briefs of counsel have been presented directly to the Commissioner of Education for determination with respect to respondent's Motion to Dismiss.

Exhibits E and F are written evaluations of petitioner by the principal under dates of February 24, 1975 and February 16, 1977, respectively. In Exhibit E the principal suggested that "***I appreciate your efforts to arrive to school on time - continue to make improvements in this area.***" The principal stated in Exhibit F that "***[t]he suggestions listed below, although a problem, are easily correctable and I feel do not detract from her overall performance. I am confident that she will be able to make the necessary changes so they will not interfere with her performance. I, therefore, recommend Kathleen Breen for tenure.***" Also, in Exhibit F the principal suggested that "***I expect you to arrive to class on time and to spend the full period working directly with the students. Conversations with friends during class time certainly detract from your efficiency in the class. I am confident that there will not be a recurrence.***"

Exhibit D is entitled "General Policies Relating to Staff Members" and states that "The school day for teachers, as defined by the Board of Education, is 8:10 A.M. to 3:30 P.M. Teachers should sign in in the General Office by 8:10 A.M.***." It also states that "***If there are any questions concerning this work schedule, will you please discuss the matter with your building principal or administrator." The Commissioner cannot find anything in the entire record to indicate that petitioner initiated any conference related to the policies and procedures of the work schedule.

Exhibit B is a memorandum under date of June 3, 1977 from the principal to petitioner and is reproduced in its entirety:

> "The following is a list of the dates you have been late to work this year. You will also find the time and the dates on which the problem was discussed with you by a member of the administration. Unfortuantely there has not been an improvement in your punctuality and this is unacceptable. Therefore, I am forwarding a copy of this memo to Mr. McKeon [Assistant Superintendent] and recommending to him that action be taken because of your failure to comply with school regulations.
>
> 9/28 - 8:18
> 10/1 - 8:17
> 10/8 - 8:20
> 10/12 - 8:18
> 10/14 - 8:17
> 10/18 - 8:17-Contacted by Mr. Neigel--
> 10/22 - 8:19 [Vice-Principal]

11/17 - 8:17
3/17 - 8:17
3/18 - 8:17-Conference with Principal
4/27 - 8:17
5/3 - 8:17
5/16 - 8:17
5/18 - 8:17
5/26 - 8:18-Conf. w/Frank [Principal]"

The Commissioner observes that three of the above incidents followed the evaluation of February 16, 1977 when petitioner was advised that she would be recommended for tenure and preceded the Board's action on March 28, 1977 to offer a fourth year contract and, further, that four additional incidents followed the Board's action on that date.

The Commissioner finds it noteworthy that the affidavits of the vice-principal and petitioner are in conflict. The vice-principal states that:

> ***
> "(3) I remove the list [check in] regularly at 8:15, providing the teachers with five minutes grace time.
>
> "(4) If a teacher has not indicated his or her presence by checking-off the sign-in sheet, that teacher is instructed to contact me when he or she does arrive.
>
> "(5) If I am not contacted by a teacher, I contact that teacher by means of the intercom system to ascertain whether the teacher has arrived.
>
> ***
> "(7) Mrs. Breen failed to check the attendance sheet by 8:15 a.m. on several occasions and had to report to me to announce her presence as a result."
>
> Petitioner states that:
>
> ***
> "2. The Caldwell-West Caldwell Public School District has a general staff policy which provides that teachers should sign in in the General Office by 8:10 a.m.
>
> ***
> "4. In reference to the aforementioned sign-in policy, I categorically deny the assertions set forth in the affidavit of Keith Neigel, to wit:

(a) that Neigel removed the teacher sign-in list at 8:15 a.m.;

(b) that if a teacher arrived late to school, he/she was instructed to contact Neigel upon arrival;

(c) that Neigel used the intercom system to ascertain whether a teacher, who failed to contact him, had arrived in school;

(d) that I had to report my presence to Neigel on any occasion on which I was allegedly late to school.

"5. There was no established policy, during my employ with the respondent, to the effect that tardy teachers had to contact the Vice-Principal, or anyone else, upon arrival to school.

"6. ***

(a) the dates listed in Mr. Gambelli's [principal] memorandum, on which I was allegedly late to work, are dates on which I was in the school building by 8:10 a.m. My not signing in in the General Office by 8:10 a.m. was the result of students and other teachers stopping me in the hallway to ask questions." (Emphasis in text)

Albeit the conflicts in the affidavits, the Commissioner observes that petitioner acknowledges the sign-in policy. There is no evidence in the entire record to show that petitioner disputed her noncompliance with said policy on the dates indicated in Exhibit B.

The Commissioner also observes that a non-adversary hearing was held by the Board in executive session on July 11, 1977. The Board listened to petitioner, her representative and others on her behalf, received written materials presented by petitioner and reaffirmed its decision to terminate the employment of petitioner after review and discussion of the matter. (Answer to Petition, at p. 2)

N.J.S.A. 18A:11-1 lists certain mandatory powers and duties of boards of education providing, inter alia, that:

"The board shall -

a. Adopt an official seal;

b. Enforce the rules of the state board;

c. Make, amend and repeal rules *** for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees***;

d. Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district."

(Emphasis supplied.)

The Commissioner holds that the Board has not only the right but the responsibility to review the performance of its tenured or nontenured teaching staff members at any time.

Petitioner argues that she held a property interest as the result of the Board awarding her a fourth year contract, and that the Board's action terminating the contract violated her constitutional right to due process. (Tr. 18)

The Commissioner finds nothing within the record which leads to the conclusion that the Board's reversal of its prior determination was either motivated by bad faith or violative of petitioner's constitutional rights. Petitioner, as a nontenured teacher, had no property rights to continued employment. Petitioner had served a total of three consecutive academic years but had not begun employment at the beginning of the next succeeding academic year as required for tenure by N.J.S.A. 18A:28-5(b). Tenure accrues only by action of a board or by the passage of time in actual employment. In Margaret A. White v. Board of Education of the Borough of Collingswood, 1973 S.L.D. 261, the Commissioner stated that:

"***If petitioner's name had been included on the list of teachers awarded employment contracts for the 1972-73 academic year by the Board at its May 8, 1972 meeting, she would not have acquired a tenure status at that point in time, because she would still have been subject to a notice of termination clause in the employment contract. Tenure does not accrue for teaching staff members employed on an academic year basis until a teaching staff member completes three consecutive academic years of employment together with employment at the beginning of the next succeeding year.***" (at 270)

Petitioner also argues the applicability of the Commissioner's comment in George A. Ruch v. Board of Education of the Greater Egg Harbor Regional School District, 1968 S.L.D. 7, dis. State Board of Education 11, aff'd New Jersey Superior Court, Appellate Division, March 24, 1969 (1969 S.L.D. 202), when he stated that:

> '***[B]oards of education may not act in an unlawful, unreasonable, frivolous, or arbitrary manner in the exercise of their powers with respect to the employment of personnel.***" (Emphasis supplied.) (at 10)

Petitioner further argues the applicability of exceptions to the general rule that the Commissioner should not normally substitute his discretion for that of a board, and refers to John J. Kane v. Board of Education of the City of Hoboken, 1975 S.L.D. 12, where the Commissioner stated that:

> "***[T]he Commissioner will not substitute his judgment for that of a local board when it acts within the parameters of its authority. The Commissioner will, however, set aside an action taken by a board of education when it is affirmatively shown that the action was arbitrary, capricious, or unreasonable. See Eric Beckhusen et al. v. Board of Education of the City of Rahway et al., Union County, 1973 S.L.D. 167; James Mosselle v. Board of Education of the City of Newark, Essex County, 1973 S.L.D. 197, aff'd State Board of Education [1974 S.L.D. 1414]; Luther McLean v. Board of Education of the Borough of Glen Ridge et al., Essex County, 1973 S.L.D. 217, affirmed State Board of Education [1974 S.L.D. 1411].***" (Emphasis supplied.) (at 16)

In the instant matter, the principal cited problems of punctuality on the part of petitioner in his written evaluations. (Exhibits E and F) He advised petitioner that he recommended her for tenure in the latter, made reference to her punctuality problem and indicated confidence "***that there will not be a recurrence."

Briefs by counsel made reference to the Commissioner's decision in David Payne v. Board of Education of the Borough of Verona, 1976 S.L.D. 543, aff'd State Board of Education 554, aff'd Docket No. A-1543-76 New Jersey Superior Court, Appellate Division, October 3, 1977 (1977 S.L.D. 1303), cert. den. 75 N.J. 602 (1978). In Payne it was determined that the board and its administrators acted in a capricious manner in terminating the employment of the teacher due to insufficient testimony or written evidence to support a conclusion that petitioner's teaching performance deteriorated from the time he was issued a

contract on March 26, 1974 until he was terminated on June 25, 1974. The instant matter is distinguishable in that the principal advised petitioner in his evaluation and recommendation of tenure notice that he expected improvement in petitioner's pattern of punctuality which did not occur.

The Commissioner said in Sallie Gorny v. Board of Education of the City of Northfield et al., 1975 S.L.D. 669, and reiterated in Payne, supra, that:

> "***'One of the most significant of all factors which comprises a thorough and efficient system of education is a well-trained, scholarly, and highly competent faculty, described in the school law as teaching staff members. In the judgment of the Commissioner, the overall competence and effectiveness of the faculty, in any local school district, is a primary factor, more so than the schoolhouse, the library, and all other instructional materials and equipment, which directly and positively correlates with the quality of the educational program received by the pupils. Indeed, since the very inception of the institution known as the free public schools, or common schools as they were originally called, professional practitioners of the art of teaching have recognized that the system cannot function without the services of competent teachers, principals, and other educational specialists. This sound educational principle has, over the years, been cited with approval by the courts of this State. See Redcay v. State Board of Education, 130 N.J.L. 369 (Sup. Ct. 1943), aff'd 131 N.J.L. 326 (E.&A. 1944); Kopera v. West Orange Board of Education, 60 N.J. Super. 288 (App. Div. 1960)***.' (at 680-681)***" (at 551)

The Commissioner has thoroughly reviewed the pleadings, exhibits, Briefs, the contentions of the parties and the various views set forth in oral argument in the instant matter and determines that respondent's action was not arbitrary, capricious, unreasonable or violative of any applicable law. The Motion is granted. The Petition is hereby dismissed.

COMMISSIONER OF EDUCATION

August 10, 1979

HOWARD K. WORRELL, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY, :

DECISION

RESPONDENT. :

:

For the Petitioner, William B. Hutchinson, Jr., Esq.

For the Respondent, Hyland, Davis & Reberkenny
(William C. Davis, Esq., of Counsel)

STATEMENT OF THE CASE

Petitioner is an employee of the Board of Education of the Township of Cherry Hill, hereinafter "Board," who was suspended without pay from his employment as Supervisor of Maintenance for the time period from August 10, 1977 to September 1, 1977 and reassigned to a non-supervisory position at a substantially lower salary. Petitioner brings this matter before the Commissioner of Education alleging that the Board's actions were arbitrary, unfair, harsh, without just cause and constitute an abuse of discretion. Petitioner prays for an order reinstating him in his previous supervisory position with reimbursement of wages withheld during the period of his suspension. Respondent Board has denied petitioner's allegations.

A hearing was conducted in this matter on February 22, 1978, at the office of the Camden County Superintendent of Schools by a hearing examiner appointed by the Commissioner. Several exhibits were received in evidence and a post-hearing summation in letter form was filed by petitioner. The report of the hearing examiner follows:

Petitioner's suspension and reassignment stem from events occurring on and about July 28 and August 3, 1977. (Petition of Appeal, at pp. 1-2) On each of those days, petitioner, using vacation leave time, and Jack Eggleston, a subordinate employee using sick leave time, participated in a game of golf together. By letter dated August 9, 1977 (R-2) the School Business Administrator suspended and reassigned petitioner. The full text of that letter is recited as follows:

> "Mr. Gerald M. Turpenen, Director of Maintenance, has recommended you be dismissed from your position as Operational Supervisor. The

recommendation is based on the grounds that you knowingly authorized sick leave pay for Mr. Eggleston on July 28 and August 3, 1977, when in fact, Mr. Eggleston was playing golf with you at the time.

"In view of the facts presented and your own admission that you had indeed played golf with Mr. Eggleston on the days indicated and had authorized sick leave payment for him by written approval of his time card for the week ending August 3, 1977, I must agree with Mr. Turpenen that the seriousness of the offense is such to warrant dismissal.

"However, having considered your long years of service to the District and your appeal for leniency, it has been decided not to recommend termination of your contract to the Board of Education. Instead, you are hereby suspended, without pay, effective August 10, 1977 until September 1, 1977. Upon your return to work on September 1, 1977, you will be re-assigned to a non-supervisory position at a salary commensurate with the level of the position and your years of service in the District.

"In accordance with Board of Education Policy GAE you have the right to appeal this decision within thirty (30) days of this date."

(R-2)

On August 15, 1977, the Board adopted a resolution approving the suspension and reassigned petitioner to the position of Senior Maintenance Man. (R-3) Petitioner appealed to the Board, and a hearing was conducted by the Board's Employee Relations Committee on August 25, 1977. (R-4) The Committee found that petitioner had improperly authorized two days' sick leave for Eggleston and attempted to conceal Eggleston's absence from work on August 3, 1977. The Committee summarized and concluded as follows:

"SUMMARY

"Mr. Worrell improperly authorized sick leave to Mr. Eggleston on July 28, 1977 and attempted to cover-up for Mr. Eggleston's absence on August 3, 1977 while he was still on the clock by crossing out the August 3, 1977 clock-in time on the morning of August 4, 1977 but claiming that he had done it on the previous day when he had authorized a sick day for Mr. Eggleston.

"CONCLUSION

"Based on these findings, and with deep personal regret, it is our opinion and recommendation to the Board of Education that the Board action taken on August 15, 1977 regarding Mr. Worrell was appropriate and should be sustained." (R-4)

The full Board approved the Committee's Report (R-4) at its meeting on September 6, 1977. An appeal to the Commissioner followed.

Petitioner testified on his own behalf and was the first witness called. Petitioner was employed by the Board as Supervisor of Maintenance for approximately ten years before his suspension and reassignment. (Tr. 8) Working directly under petitioner's supervision was Jack Eggleston, a plumber, who had been employed by the Board for over a year before the events leading to this cause of action arose. (Tr. 8-10, 87) Petitioner testified he has been acquainted with Eggleston since 1964, through their mutual membership in a civic organization. (Tr. 40-41) Eggleston has psoriasis of the hands, a condition known to petitioner at the time he recommended Eggleston for employment with the Board, and which he observed during the course of their working together. (Tr. 10, 42)

Petitioner testified that he had received prior approval from his supervisor, Gerald M. Turpenen, to take a vacation day on July 28, 1977. (Tr. 13) On that morning, and even though scheduled for a vacation day, petitioner stopped in at the office "***to see that the mail was taken care of and the men were on the road." (Tr. 13) After doing so, petitioner left work and went golfing. (Tr. 13) In petitioner's words, Eggleston "***ended up going with me." (Tr. 14)

Petitioner testified that Eggleston had requested sick leave for July 28, 1977. (Tr. 14) During cross-examination petitioner could not recall how or when the sick leave request was made, or whether Eggleston had rung in on the time clock that morning. (Tr. 14, 90; but see Tr. 101-102.) Nor could petitioner recall the circumstances of how he and Eggleston came to play golf on July 28. (Tr. 92-95) To the best of petitioner's recollection, they met each other at a local diner that morning. (Tr. 41, 92-93)

Petitioner did recall that the backs of Eggleston's hands were raw, had "broken out," and had been in that condition for a two or three week period while he was engaged in the construction of a new sewer line. (Tr. 14-15, 97) When questioned as to how he reconciled Eggleston's ability to play golf with his sick leave request, petitioner responded:

> "Well, the backs of his hands were raw. But the palms of his hands were all right. Of course, I'm not a doctor. I can't say yes or no whether he could or he couldn't. But I know he shouldn't be working in water, especially sewage water with his hands in that condition." (Tr. 15)

Petitioner then testified as to the events of August 2, 1977, a day on which the Board's new sewer line was connected, and a day when Eggleston was "***almost knee deep in sewage water working with his hands, making this connection." (Tr. 16) On the following day, August 3, 1977, petitioner was again scheduled to take a vacation day, having received the prior approval of his supervisor. (Tr. 17, 89) As on the morning of July 28, petitioner stopped in at work, attended to the mail and checked work assignments. After doing so, petitioner went golfing. Eggleston went with him. (Tr. 18)

Petitioner testified as to how he came to play golf with Eggleston on August 3. (Tr. 19) Eggleston had reported to work that morning and had rung in on the time clock, located by petitioner's desk and the door to his office. (Tr. 18-19, 38) At some time prior to 7:45 a.m. (Tr. 36), Eggleston came to petitioner's office, said his hands didn't feel good, were "broken out," and "he was going to take a sick day instead of staying in work." At some time after 7:45 a.m., petitioner entered the shop area; Eggleston was there. Petitioner testified as follows:

> "***I came out in the shop and Jack [Eggleston] said, where are you going and I said, I'm going on a vacation day. I'm going to go and play golf and he says, do you mind if I go with you? I said, well, it's all right with me. It doesn't matter whether you go home or go with me. It doesn't make any difference. So he said, well, I'll go get my golf clubs and put them in the car. He had golf clubs in the car all the time, except in the winter and I didn't know--I wasn't sure whether he had rung out after he told me he was going to take the sick day. So I went back to the office and the time clock was right there by the door. So I saw his card and I just pulled it up and I saw he didn't ring out. So I just took it and marked the time out and put it back in the rack. Then I finished what I was doing and went on out and we went on to play golf." (Tr. 19)

Petitioner was asked where Eggleston was at the time he marked Eggleston's time card. His response to the question was, "He was probably out in his car getting his golf clubs out and putting them in my car." (Tr. 39) He was then asked if Eggleston

was anywhere near the time clock at this time. Petitioner testified that Eggleston was not anywhere near the time clock. (Tr. 39) Petitioner had previously testified that the time clock is "***right there by my desk. I see most everyone that comes in and goes out." (Tr. 38) Petitioner claimed he marked the time out on the time card at approximately 8:30 a.m., "Just before we left***." (Tr. 17, 32, 37-38) So far as petitioner knew, Eggleston never saw petitioner's alleged mark on the time card that day. (Tr. 40) On August 4, 1977, both men returned to work.

During cross-examination, petitioner identified the mark he claims he made on Eggleston's time card before leaving the building on August 3, 1977. (Tr. 32) Petitioner testified he drew a "blue pen line" on the time card before leaving. (Tr. 32) Petitioner also identified other notations which he made on the time card sometime during the morning of the next day, August 4, 1977, when he summarized the payroll information for the pay period beginning July 28 and ending August 3, 1977. (Tr. 32-33) A red marker pen line appears on the time card, directly under the last time clock stamping. (See R-6; Tr. 31.) It was petitioner's testimony that he first saw the red marker pen line at the Board hearing held later in the month. Petitioner claims the red line was not on the time card when he summarized the payroll information and turned the card in on August 4. (Tr. 33)

Petitioner testified on direct examination that some time during the morning of August 4, an assistant informed him that Turpenen, petitioner's supervisor, wished to see petitioner and Eggleston. (Tr. 20) On cross-examination, petitioner seemed to recall that the meeting with Turpenen was arranged via a note appended to Eggleston's time card. (Tr. 29, 34; but see Tr. 103.) In any event, petitioner and Eggleston met with Turpenen in his office at approximately noontime on August 4, 1977. (Tr. 20, 104)

Petitioner testified that Turpenen inquired if the men had played golf on the previous day and, after receiving their affirmative response, asked them to resign or be fired. (Tr. 21, 102) Petitioner and Eggleston then requested a meeting with James F. Walsh, the School Business Administrator. (Tr. 22) That meeting took place later during the afternoon of August 4, with Walsh, Turpenen, petitioner, Eggleston, and William Laub, Administrative Assistant for Personnel, present. Walsh asked for petitioner's resignation, which petitioner refused, intending an appeal to the Board. (Tr. 23) Petitioner claims he was given no opportunity to provide an explanation at either the meeting with Turpenen or Walsh. (Tr. 22, 105)

Petitioner testified as to his years of service with the Board. He had "never had any complaints" with regard to his work. (Tr. 23) Turpenen had been his supervisor for approximately five months prior to these incidents and petitioner had encountered no problem with him prior to this action. (Tr. 23) On redirect, petitioner referred to a time shortly after Turpenen became petitioner's supervisor, when Turpenen allegedly suggested

they bury the "hatchet" between them. (Tr. 222) Petitioner claims he was unaware of any "hatchet" between them and speculated as to Turpenen's meaning. (Tr. 222)

Petitioner explained his understanding of the Board's sick leave policy, a policy which requires a doctor's excuse after two consecutive days' absence. (Tr. 25) As petitioner explained, he would not otherwise question an employee's representation of sickness, since he was in no position to make such a judgment. (Tr. 26)

After all other witnesses had completed their testimony, petitioner was recalled to the witness stand for redirect examination. On redirect, petitioner testified concerning discrepancies appearing on an auto expense voucher he had submitted to the Board for reimbursement. (Tr. 183, 220) The voucher indicated travel expenses for a day when petitioner was not working. (Tr. 224) Petitioner explained he had made a mistake of memory and this had not happened before. (Tr. 220) During recross-examination, petitioner was presented with an analysis of his 1976-77 expense vouchers. (Tr. 225) On August 20, September 15, October 8, December 8, 9, 10, 13 of 1976, April 11, 12, 13, 14, 15 and June 8, 1977, petitioner admitted, he recorded mileage for days when he was not working. (Tr. 225-226) Petitioner's explanation was that the Board's voucher system had been changed; he was accustomed to using the system in effect previously. (Tr. 226-227) Petitioner conceded he had been lax in keeping his mileage. (Tr. 227-228)

Dr. Philip J. LoPresti was petitioner's next witness. (Tr. 43) Dr. LoPresti has been a practicing dermatologist for eleven years. (Tr. 45) He is a diplomate of the American Board of Dermatology, an instructor in dermatology at the University of Pennsylvania Hospital, and chief of dermatology at Lady of Lourdes Hospital. (Tr. 44) He first treated Eggleston for his psoriasis condition in 1966. In 1977, he treated Eggleston on May 28, June 21, and early July for "thick encrusted masses, primarily on the hands." (Tr. 50)

Dr. LoPresti outlined some basic information concerning psoriasis, a skin disease which is often aggravated by harsh water compounds. (Tr. 45-50) "Patients are advised to avoid exposure to water." (P-1) Dr. LoPresti testified that it was not inconsistent or contrary to medical advice for Eggleston to have played golf on a sick day, considering the fact that the patient is a plumber. (Tr. 55) "***On the contrary, it probably would have been detrimental for the patient to work with fissuring (cracking) of his skin since this probably would have caused secondary infection." (P-1)

On direct examination, Dr. LoPresti testified that he would not want Eggleston handling wrenches where he would be hitting into a pipe (Tr. 54), or hitting his wrists or knuckles (Tr. 55), and would not want him working in a sewage area where

he might "***get anything under his gloves***" or the gloves might break, allowing bacteria to enter the area. (Tr. 54) It was Dr. LoPresti's opinion that Eggleston could have worked on August 3, 1977, if he had been assigned to a dry work area and free from hitting contact. (Tr. 56)

The next two witnesses presented by petitioner were Robert Holl, the district's former superintendent of schools (Tr. 58), and William Thorpe, the former assistant superintendent in charge of support services. (Tr. 61) Both of these witnesses gave opinion testimony as to petitioner's character, based upon their perceptions of him over the years of their employment relationship. Holl found petitioner's character to be, without question, "excellent" (Tr. 60); Thorpe found his manner and method of work to be "superior." (Tr. 62)

Norman Lovelace was petitioner's next witness. He has been employed by the Board for over four years, working directly under petitioner's supervision in the plumbing department. He and Eggleston worked together as a team during the year prior to this controversy. (Tr. 68) They also traveled back and forth to work together in Eggleston's automobile. (Tr. 69) Lovelace knew of Eggleston's psoriasis condition (Tr. 71), had seen him wearing gloves on several occasions while working (Tr. 77), and described the salve and tape which he had observed on Eggleston's hands. (Tr. 77 and 83) He corroborated that Eggleston was actively engaged in hooking up a sewer line into the main sewer on August 2, 1977. (Tr. 70)

Lovelace testified that he rode to work with Eggleston on the morning of August 3, 1977. (Tr. 70) Eggleston's golf clubs were on the back seat of his automobile, as they "always" were. (Tr. 73) On the way to work that morning, Eggleston asked whether Lovelace could find another means of transportation home that evening, since he might "take off" because of the condition of his hands. Lovelace saw that Eggleston's hands were "real red." (Tr. 71) The men arrived at work and Eggleston remained on the premise for a time. Lovelace received his work assignment for the day and left the shop between 8:30 and 8:45 a.m. Lovelace testified that Eggleston had gone by then. (Tr. 72) This was elaborated on cross-examination as follows: (Tr. 80)

> "Q Now, Mr. Lovelace, I understand in your testimony you said you left the shop about 8:30 or 8:35 on August the 3rd. You left the shop about 8:30 or 8:45?
>
> "A Yes.
>
> "Q And at that time, Mr. Eggleston was not there?

"A No.

"Q Is that correct?

"A That's correct.

"Q He had already left?

"A They had left, yes.

"Q Did you see who he left with?

"A Mr. Worrell.***" (Tr. 80)

Lovelace did not know where Eggleston had gone. (Tr. 72) He did not see Eggleston remove his golf clubs from his automobile. (Tr. 81) When Lovelace clocked out at the end of the workday on August 3, Eggleston's time card was in the rack, with a note attached to it. (Tr. 78)

On cross-examination, Lovelace testified that he did not ride to work with Eggleston on July 28, 1977, since Eggleston had informed him on the previous night that he would not be driving to work the next day and asked Lovelace to make other commuting arrangements. (Tr. 85)

Jack Eggleston was the last witness called by petitioner. (Tr. 108) Eggleston has been a plumber all of his working years. (Tr. 109) He has had psoriasis for approximately the last 20 years. (Tr. 110) On and about July 28 and August 3, 1977, Eggleston testified that lesions on his hands "did open and crack" as a result of his work on the Board's sanitary sewer project in process at that time. (Tr. 111-112) Because of the condition of his hands, Eggleston testified that he notified petitioner, and/or his assistant on July 27, that he would not be in to work the following day. (Tr. 113, 132-134) On July 28, 1977, Eggleston used sick leave. (Tr. 132, 137-138)

Eggleston's version of how he and petitioner came to play golf on July 28, 1977, supports petitioner's testimony. (Tr. 135-138) On that morning, Eggleston, who was enroute to the golf course, had stopped at a local diner for coffee. (Tr. 135, 137) Petitioner entered the diner, and the two men engaged in conversation. Learning of each other's intention to play golf, they decided to go together. (Tr. 137) They had done so on two or three previous occasions that year, and on those occasions they had met at the same diner before proceeding to the golf course. (Tr. 135-136) It was Eggleston's testimony that even though he may have anticipated petitioner's appearance at the diner on July 28, he did not specifically know that petitioner would be arriving, or that petitioner planned to play golf. (Tr. 116, 137)

On August 3, 1977, Eggleston reported to work and stamped his time card at 7:27 a.m. (R-6) He testified that due to the sewer work of the previous day, he was not feeling well that morning, and as time went by his condition did not improve. (Tr. 119-120) Within the span of approximately an hour (Tr. 146), he made the determination to take a sick day (Tr. 120, 141) and notified petitioner sometime during that hour. (Tr. 151-152) Eggleston also testified that sometime within that time span, he and petitioner had a conversation during which he learned petitioner was taking a vacation day. They decided to play golf together. (Tr. 145) Upon leaving to obtain his golf clubs (Tr. 122) between 8:30 and 8:45 (Tr. 120, 152), Eggleston testified that he pulled his time card from the rack intending to "punch out." He observed that his morning check-in time had been crossed over with a singular line, obviating the need for him to punch out, so he returned the time card to the rack. On direct examination, Eggleston described the line as a "singular light but dark" line. (Tr. 122) On cross-examination, he described it as a "singular black line." (Tr. 152) He testified further that no other markings appeared on his time card at that time. (Tr. 122, 152-154) Eggleston also testified that he saw Turpenen in the parking lot at approximately 8:30 or 8:45 a.m. on August 3, 1977. Eggleston was carrying his golf clubs to petitioner's car at the time. (Tr. 120-121) After returning to work on August 4, Eggleston and petitioner met with Turpenen (Tr. 156), and subsequently with the School Business Administrator.

Gerald M. Turpenen has been employed by the Board since 1961. Until March 1977, he held a position comparable to petitioner's, as Supervisor of Construction. In March 1977, he was promoted to the position of Director of Maintenance, and became petitioner's immediate supervisor. (Tr. 158-159) Thus, he was petitioner's supervisor for approximately five months before this controversy arose.

At a few minutes after eight o'clock on the morning of August 3, 1977, Turpenen testified that he observed petitioner and Eggleston in the school parking lot. "***Eggleston was within a few steps of Mr. Worrell's car with his golf bag over his shoulder." (Tr. 159) Petitioner "was standing by the trunk of his car." (Tr. 160) Later that morning, at approximately 10:00 or 10:30 a.m., Turpenen testified he needed the services of a plumber and inquired of petitioner's assistant as to Eggleston's whereabouts. Turpenen claims petitioner's assistant responded that he did not know. In complete contradiction with petitioner's and Eggleston's testimony, it was Turpenen's testimony that no markings appeared on Eggleston's time card at that time, other than the stampings of the time clock. (Tr. 161)

At approximately 11:00 or 11:30 a.m. on August 3, Turpenen met with James F. Walsh, the School Business Administrator. (Tr. 162) Turpenen testified that following the meeting with Walsh he marked a red line on Eggleston's time card, and

attached a note to it. The note was addressed to petitioner and contained the message that "***Eggleston is clocked in *** and that he was not available to work***." (Tr. 163) Turpenen testified that he replaced the time card in Eggleston's time card slot. (Tr. 163)

Turpenen testified he next saw the time card in the timekeeper's office at approximately 9:30 or 10:00 a.m. on the morning of August 4, 1977. Turpenen claims the August 3 date had been crossed out on the time card and written payroll summary notations appeared on the card. (Tr. 165, 172-173) July 28 and August 3, 1977 were authorized for sick leave payment. (R-6)

Turpenen claims he took the time card (R-6) to Walsh. Walsh indicated that Turpenen should ask for petitioner's and Eggleston's resignations. (Tr. 166) Turpenen then left a note on petitioner's desk requesting a meeting with petitioner and Eggleston. Petitioner, Eggleston and Turpenen met at approximately noontime on August 4, 1977 in Turpenen's office. (Tr. 167)

At the meeting, Turpenen asked if the men had played golf on the previous day. Petitioner and Eggleston acknowledged they had. Turpenen also asked if they had played golf on July 28. Petitioner and Eggleston freely admitted they had. Based on those responses, Turpenen testified that he then asked for their resignations. (Tr. 167, 180) Turpenen did not inquire as to why Eggleston had taken a sick day; he did not ask for an explanation; he testified he had no reason to know there was "anything wrong" with Eggleston. (Tr. 180-181) The men refused to resign, and a subsequent meeting was arranged with Walsh for 3:30 p.m. that afternoon. (Tr. 167) It was at this subsequent meeting that Turpenen testified he first heard of "any type of sickness." (Tr. 168, 186)

Turpenen explained it is neither policy nor general practice of the Board that supervisors inquire into an employee's claim of sickness when the employee requests a single sick day. (Tr. 181-182) "Most of the time" he would accept an employee's statement of illness and not pursue it further. (Tr. 182)

Turpenen classified petitioner's previous work record as satisfactory; his skills as excellent. (Tr. 182)

James F. Walsh is the Board's School Business Administrator/Board Secretary. (Tr. 188) He testified that Turpenen came to his office during the late morning of August 3, 1977, and informed him that Eggleston had "punched in" on the time clock that morning, but was not available for work. Walsh said Turpenen "felt" petitioner and Eggleston went to play golf. (Tr. 189) Walsh testified that after some discussion, he and Turpenen decided to place a note on Eggleston's time card in an effort to obtain an explanation. (Tr. 190)

On the morning of August 4, Turpenen returned to Walsh and brought Eggleston's time card (R-6) for his examination. Walsh testified the "punched in" time (7:27 a.m.) had been crossed out, and August 3 and July 28 were marked as sick days. (Tr. 191) Walsh suggested that Turpenen discuss the matter with petitioner and Eggleston. As Walsh testified,

> "***if, in fact, they had played golf on the previous day and had reported it as a sick day and *** [petitioner] approved this, then we had a serious situation with abuse of sick time and that we would have to take some sort of action and suggest that he offer an opportunity to resign before we had to take such action." (Tr. 192)

Walsh testified that a "hearing" was held later in the afternoon of August 4, at the request of petitioner and Eggleston. (Tr. 192) Walsh gave his recollection of that "hearing": (Tr. 193-194) the time card was reviewed; petitioner and Eggleston "indicated" they had played golf; petitioner had approved the sick leave requests; at no time was psoriasis mentioned; "hypertension" or a similar illness was mentioned; the Board's sick leave policy was reviewed. As a result of that meeting, Walsh took the matter under advisement for several days, and on August 9, 1977, wrote the suspension and reassignment letter to petitioner which has been marked in evidence as Exhibit R-2. (See R-2, reproduced ante.)

Walsh testified that petitioner then appealed to the Board. (Tr. 195) A hearing was held before the Employee Relations Committee of the Board on August 25, 1977. (R-4) The Committee's Report was approved by the full Board at its meeting on September 6, 1977. (R-5)

Walsh agreed with Turpenen that petitioner's overall work record was satisfactory. He classified petitioner as an excellent craftsman. (Tr. 199) Walsh did not feel petitioner was justified in taking Eggleston's word that he was sick (Tr. 201) and agreed with Turpenen that the "offense" was such as to warrant dismissal. (Tr. 204)

This concludes the summary of the testimony presented.

FINDINGS OF FACT

1. Prior to this controversy, petitioner was employed by the Board for approximately ten years in the capacity of Supervisor of Maintenance. He is held in high regard by previous Board supervisors and considered to have had a satisfactory work record by his present supervisors. He is rated as an excellent craftsman.

2. Petitioner was the direct supervisor of Jack Eggleston, a plumber. Eggleston has the skin disease of psoriasis, a condition which is aggravated by prolonged exposure to water and hard surface contact.

3. During the last week in July and the first week in August 1977, a new sewer line was under construction by the Board's Maintenance Department. Eggleston was actively engaged in that project, and his psoriasis condition became aggravated. Eggleston used two days of sick leave--July 28 and August 3, 1977.

4. On the morning of July 28, 1977, Eggleston stopped at a local diner. He intended to play golf later. Petitioner entered the diner.

5. Petitioner was scheduled for a vacation day on July 28, 1977, and intended to play golf. He had gone to the office that morning to check work assignments and attend to the mail, before leaving to play golf. Enroute to the golf course, petitioner stopped at the diner. He saw Eggleston. The men engaged in conversation, learned of each other's intention to play golf, and decided to play golf together. Petitioner had been notified that Eggleston was using sick leave that day and knew of Eggleston's psoriasis condition. He did not question Eggleston's use of sick leave.

6. Board policy requires a doctor's excuse after two consecutive days' absence for illness. Petitioner is not and was not qualified to make a medical judgment concerning Eggleston's use of sick leave, or Eggleston's ability or inability to perform his work because of his psoriasis. Based on the circumstances as presented by petitioner and Eggleston, and the medical testimony of Dr. LoPresti, the hearing examiner finds that petitioner has effectively rebutted the adverse inferences flowing from the fact that the men participated in a game of golf together on July 28, 1977.

7. On August 3, 1977, petitioner was again scheduled for a vacation day. He went to the office that morning to check work assignments and attend to the mail. Eggleston, although not feeling well, had reported to work and clocked in at 7:27 a.m. Before 7:45 a.m., Eggleston came to petitioner's office and notified petitioner that he was going to take a sick day.

8. At some time after 7:45 a.m., but before 8:30 a.m., petitioner entered the shop area. Eggleston was there. The men engaged in conversation. Petitioner spoke of his intention to play golf, Eggleston asked to join him, and petitioner agreed. Petitioner and Eggleston left the shop together.

It is at this point that the testimony conflicts as to whether or not Eggleston's time card was corrected to accurately represent his work status on August 3, 1977. There is a complete

contradiction between the testimony of Turpenen, and that of petitioner and Eggleston, his supporting witness. Petitioner claims he crossed out Eggleston's check-in time of 7:27 a.m. at approximately 8:30 a.m. on August 3. The time card, then, would have properly shown that Eggleston was not available for work when Turpenen saw it later that morning. Turpenen, however, claims no mark appeared on the card when he sought the services of a plumber later in the morning of August 3, 1977. Thus, whether or not the time card was marked on August 3, 1977, is essential to a resolution of the Board's charge that an attempted cover-up of Eggleston's absence occurred on August 4, 1977. A detailed account and analysis of the conflicting testimony is presented for an understanding of the basis for the hearing examiner's finding in this regard.

According to petitioner, following his conversation with Eggleston in the shop, he returned to his office and Eggleston went to his car to obtain his golf clubs. It is important to note here that the time clock is located by petitioner's desk and the door to petitioner's office. Petitioner testified he is in a position to see almost everyone who goes in and comes out. Petitioner contends he drew a blue pen line on the time card just before he left the building to play golf, at approximately 8:30 a.m. on August 3. Petitioner testified that Eggleston was not anywhere near the time clock at that time. Eggleston testified he was.

Eggleston testified that upon leaving to obtain his golf clubs between 8:30 and 8:45 a.m., he stopped at the time clock and pulled his time card from the rack in order to punch out. Eggleston claimed he found his 7:27 a.m. check-in time had been marked out on the card, the mark petitioner claims to have made.

Turpenen testified he saw petitioner in the parking lot that morning standing by the trunk of his car at a few minutes after eight o'clock. Eggleston was within a few steps of petitioner's car with his golf bag over his shoulder. Turpenen testified no mark appeared on the time card at approximately 10:00 or 10:30 a.m. on the morning of August 3. Turpenen reported to Walsh that Eggleston was punched in on the time clock, but was unavailable to work. For Turpenen to have fabricated his report to Walsh is highly improbable to the hearing examiner. Granted, Turpenen is not a disinterested witness in this matter, and petitioner did allude to a "hatchet" between them; however, that bare statement, standing alone, is insufficient to show bad motive of Turpenen.

Lovelace, who was petitioner's witness, testified he left the shop between 8:30 and 8:45 a.m. on August 3. He testified that Eggleston had gone by then. He saw Eggleston leave with petitioner.

To summarize, the two men conversed in the shop together. They were seen leaving the shop together before 8:30

or 8:45 a.m. They intended to participate in a game of golf. Petitioner testified he went to his office and Eggleston to his car. The time clock is located by petitioner's desk and the door to his office and within his view. Eggleston testified he stopped at the time clock on his way out of the building. The men were seen in the parking lot together at a few minutes after eight o'clock according to Turpenen. Petitioner testified that Eggleston was not present when he marked the time card just before "we left" at approximately 8:30 a.m. (see Tr. 17, 32, 37-40) and Eggleston testified he saw the marked time card as he was leaving.

To reconstruct the episode as petitioner and Eggleston testified, in the interim between the shop and the parking lot, petitioner would have left the shop, reached his office, and marked the time card before Eggleston arrived. Unbeknownst to petitioner, Eggleston would then arrive, observe the time card, and proceed on his way out of the building to the parking lot. Finding the testimony of petitioner and Eggleston to be completely inconsistent and incredible in this regard, the hearing examiner finds that the 7:27 a.m. check-in time on Eggleston's time card was not marked out by petitioner on August 3, 1977, before the men left to play golf.

9. Petitioner and Eggleston returned to work on August 4, 1977. Eggleston's time card was in its slot with Turpenen's note attached to it. Since the payroll period ended on August 3, 1977, petitioner prepared the time cards for the timekeeper. Petitioner authorized sick leave payment on Eggleston's time card for the two days on which Eggleston played golf--July 28 and August 3, 1977. The time cards were transferred to the timekeeper.

10. At Turpenen's request, petitioner and Eggleston met with Turpenen on August 4 at approximately noontime. In response to Turpenen's inquiry, petitioner and Eggleston acknowledged they played golf on August 3, and freely admitted they had also done so on July 28. Without any further inquiry, Turpenen requested their resignations. Petitioner and Eggleston refused to resign.

11. A meeting was held at 3:30 p.m. on August 4 with Walsh, petitioner, Eggleston, Laub and Turpenen present. Eggleston's skin disease was not mentioned at the meeting with Walsh. Some other illness, similar in nature to hypertension, was mentioned. Walsh took the matter under advisement, and by letter dated August 9, 1977, suspended and reassigned petitioner on the grounds that petitioner knowingly authorized sick leave pay for Eggleston on July 28 and August 3, days when Eggleston played golf.

12. On August 15, 1977, the Board approved Walsh's suspension and reassignment of petitioner. A hearing was held before the Employee Relations Committee of the Board on

August 25, 1977. The Committee found that petitioner improperly authorized sick leave payment for July 28, and concluded that on August 4, petitioner improperly authorized sick leave for Eggleston for the previous day, in an attempt to cover-up Eggleston's absence from work. The cover-up issue occupied the Committee's attention, as can be seen from its findings and summary based on those findings. (R-4) The full Board approved the report of the Committee on September 6, 1977.

The Committee makes no mention of Eggleston's skin disease, suggesting that the Committee considered it not at all, or as inconsequential, in making its findings. Exhibit P-1, Dr. LoPresti's letter of August 23, 1977, was offered to the Committee by petitioner's counsel. (Tr. 217-219) The Committee, then, was at least made aware of the proffered letter and whatever evidentiary arguments were posed by counsel.

RECOMMENDATIONS

The question first posed in this case is whether under N.J.S.A. 18A:6-8.3, petitioner is entitled to full compensation during the period of his suspension. N.J.S.A. 18A:6-8.3 provides as follows:

> "Any employee or officer of a board of education in this State who is suspended from his employment, office or position, other than by reason of indictment, pending any investigation, hearing or trial or any appeal therefrom, shall receive his full pay or salary during such period of suspension, except that in the event of charges against such employee or officer brought before the board of education or the Commissioner of Education pursuant to law, such suspension may be with or without pay or salary as provided in chapter 6 of which this section is a supplement.[1]
>
> [1]Sections 18A:6-1 to 18A:6-74."

The record shows that petitioner was initially suspended on August 10, 1977, by letter of the School Business Administrator. (R-2) The School Business Administrator's action was approved by the Board on August 15, 1977. Petitioner's appeal to the Board was not heard by the Employee Relations Committee until August 25, 1977, and was not formally and finally resolved by the Board until its meeting on September 6, 1977. Notice of the Board's formal and final action was received by petitioner on or about September 8, 1977. (Petition of Appeal)

The hearing examiner finds that the Board did not comply with the pay provisions of N.J.S.A. 18A:6-8.3, and recommends that petitioner be compensated at the salary he would have

received during the period of his suspension beginning August 10, 1977 to his receipt of Notice of the Board's final action on September 8, 1977, mitigated by any earnings during that time. Without intending to raise issues at variance with the pleadings, and finding no need to discuss the issue here in light of the above recommendation, the hearing examiner merely mentions that, in accordance with previous rulings of the Commissioner, a school business administrator lacks the authority to effectuate an employee's suspension and reassignment. See John Melone v. Board of Education of the Borough of Rutherford, 1977 S.L.D. ___ (decided July 29, 1977).

The question now posed is whether the reassignment of petitioner in light of the facts presented was an abuse of the Board's discretion. Petitioner has presented sufficient evidence showing that his approval of Eggleston's use of sick leave on July 28, 1977, and his authorization of sick leave payment for that day, cannot be considered improper. Based on the record, the hearing examiner can make no such finding with regard to August 3, 1977. Contrary to petitioner's and Eggleston's testimony, the hearing examiner has found that the time card inaccurately represented Eggleston as available for work on August 3.

It is difficult to conceive that the two men deliberately planned a golf outing on Eggleston's work time, as the Employee Relations Committee found. It would appear foolhardy for the men to have planned to meet at work and thence to proceed from the parking lot in view of staff and supervisors. The inaccuracy of the time card on August 3 might very well have been attributable to human error, or inadvertent omission of duty. Whatever the motive, there was a concealment, or a "cover-up" in the words of the Committee. The concealment, whether its purpose was to cover for Eggleston's absence or petitioner's omission of duty, was improper. Eggleston's absence from work on August 3, without proper recordation, was the basis for the Committee's recommendation and ultimately the Board's determination to reassign petitioner.

The authority to employ, dismiss, assign and reassign school personnel rests solely in the Board. N.J.S.A. 18A:11-1 A board of education's discretionary authority is not unlimited, however, and it may not act in ways which are arbitrary, unreasonable, capricious or otherwise improper. In George A. Ruch v. Board of Education of the Greater Egg Harbor Regional High School District, 1968 S.L.D. 7, dis. State Board of Education 11, aff'd New Jersey Superior Court, Appellate Division, March 24, 1969 (1969 S.L.D. 202), the Commissioner commented as follows:

> "***The Commissioner agrees that boards of education may not act in an unlawful, unreasonable, frivolous, or arbitrary manner in the exercise of their powers with respect

> to the employment of personnel. Thus a board of education may not resort to statutorily proscribed discriminatory practices, i.e., race, religion, color, etc., in hiring or dismissing staff. Nor may its employment practices be based on frivolous, capricious, or arbitrary considerations which have no relationship to the purpose to be served. Such a modus operandi is clearly unacceptable and when it exists it should be brought to light and subjected to scrutiny.***"
>
> (1968 S.L.D. at 10)

Based on the facts presented, and taking into account the credibility issue discussed ante, the hearing examiner finds the Board's reassignment of petitioner was within its discretionary authority and a legal exercise of its managerial prerogative. N.J.S.A. 18A:11-1

When the Board formally acted on September 6, 1977, it chose to employ petitioner in another capacity, rather than dismiss him. Under the terms of its contract with petitioner, the Board had a contractual right to terminate petitioner upon 15 days' notice. (R-1) Petitioner had, in fact, reasonable notice when he received the School Business Administrator's letter reassigning him effective August 10, 1977. Accordingly, the hearing examiner recommends that the Commissioner determine petitioner had due and adequate notice, and that his reassignment to the position of Senior Maintenance Man was not an abuse of the Board's discretionary authority.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has carefully and thoroughly reviewed the entire record in the instant matter including the exceptions submitted by counsel for petitioner and respondent. Attention will focus on the agreed-upon issue at the conference of counsel:

> Was the action of the Board in suspending and demoting petitioner warranted in the circumstances of this matter?

The matter of suspension without pay will first be addressed. In the instant matter, petitioner was suspended without pay by the School Business Administrator from August 10, 1977 until September 1, 1977. The Board's action on August 15, 1977 approving the suspension does not negate the impropriety of the Administrator's action. Due process had not been afforded petitioner until the Board acted on September 6, 1977 to affirm its August 15, 1977 action following a review of a hearing in the matter before a committee of the Board held on August 25, 1977. This final action took place five days after the suspension period had ended and petitioner was notified on September 8, 1977. Consequently, petitioner is entitled to his full salary mitigated by outside earnings during the suspension period ending September 8. N.J.S.A. 18A:6-8.3

Regarding the reasonableness of the Board's action demoting petitioner, the Commissioner observes that local boards of education are granted broad authority by the Legislature to operate their schools. The relevant statute reads:

> N.J.S.A. 18A:11-1
>
> "The board shall -
>
> a. Adopt an official seal;
>
> b. Enforce the rules of the state board;
>
> c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees, subject, where applicable, to the provisions of Title 11, Civil Service, of the Revised Statutes***; and
>
> d. Perform all acts and do all things, consistent with law and the rules of the

> state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district."

The Commissioner has previously said in Boult and Harris v. Board of Education of the City of Passaic, 1939-49 S.L.D. 7 (1946), aff'd State Board of Education 15, 135 N.J.L. 329 (Sup. Ct. 1947), aff'd 136 N.J.L. 521 (E. & A. 1948):

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

The Commissioner does not find that the Board violated the law, acted in bad faith or abused its discretion in demoting petitioner. He, therefore, dismisses that segment of the Petition and adopts as his own the findings and recommendations of the hearing examiner.

The Commissioner, however, is constrained to suggest that the Board review the harshness of its action with the thought of possible reinstatement of petitioner to his former position at some future date.

COMMISSIONER OF EDUCATION

August 13, 1979

DEBRA MATRICK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF SPRINGFIELD,	:	
UNION COUNTY,	:	
RESPONDENT	:	
	:	

For the Petitioner, W. William Hodes, Esq.

For the Respondent, Brigadier & Margulies

(Seymour Margulies, Esq., of Counsel)

Petitioner, on behalf of three of her children enrolled as pupils in the Springfield Public Schools, alleges that the Board of Education of the Township of Springfield, hereinafter "Board," charges its pupils a fee for participation in school field trips contrary to the provisions of the New Jersey State Constitution, Art. VIII, Sec. IV and contrary to the ruling of the Commissioner of Education in Melvin C. Willett v. Board of Education of the Township of Colts Neck, Monmouth County, 1966 S.L.D. 202, aff'd State Board of Education, 1968 S.L.D. 276. Petitioner seeks a declaration from the Commissioner that the Board's existing policy with respect to field trips is improper and further seeks an Order by which the Board would be directed to comply in the future with the aforementioned constitutional provision and the prior ruling of the Commissioner in Willett. The Board denies the allegations and asserts that its actions with respect to field trips conducted by its schools are in all respects proper.

Subsequent to other proceedings which shall be discussed, post, oral agrument on petitioner's demand that the Commissioner direct the Board to act properly and consistent with law in the future was heard by a respresentative of the Commissioner on September 1, 1977 at the State Department of Education, Trenton. Because limited testimony was elicited from petitioner at that time, the following hearing examiner's report is submitted.

The instant Petition of Appeal was filed on May 13, 1976. Petitioner alleges that the Board had charged pupils fifty dollars to participate in a People-to-People program scheduled to

occur at the YMHA/YMHA camp facilities at Milford, Pennsylvania, that the Board on prior occasions charged pupils fees for participation in school field trips, that the Board would continue to assess pupils fees unless the Commissioner intervened, and that many unnamed boards of educationl similarly charge pupils fees for participation in school field trips.

The Commissioner granted petitioner's request for a restraint against the Board from its assessment of the fifty dollar fee for pupil transportation in the People-to-People program. (See Debra Matrick v. Board of Education of the Township of Springfield, Union County, decision on Motion, May 26, 1976). The Commissioner rules, inter alia, that

> "***the Board *** is hereby directed to immediately refrain from collecting any fees from its pupils for participation in the planned People-to-People, 1976 programs and is further directed to return to its pupils any moneys collected for participation therein.***" (at _____)

The hearing examiner observes that the third allegation, that many unnamed boards of education similarly charge pupils fees for participation in school field trips, is the basis upon which petitioner sought to have the entire matter certified as a class action against all boards of education. The hearing examiner, subsequent to the receipt of the parties' Briefs in this regard, procedurally denied petitioner's application for such certification. (See Conference of Counsel Statement, June 6, 1977.)

Thereafter, petitioner filed an interlocutory appeal of the hearing examiner's procedural ruling with the State Board of Education. The interlocutory appeal with withdrawn while preserving the right to appeal pending the Commissioner's final determination on the whole of the matter.

Thus, the sole issue which remains from the original Petition of Appeal is grounded on the second factual allegation, ante, that the Board on prior occasions charged pupils fees for participation in school field trips and that the Board would continue to assess pupils fees unless the Commissioner intervenes. The issue to be addressed hereafter, and for which the parties presented oral agurment and petitioner's limited testimony on September 1, 1977, is whether the Commissioner should grant prospective relief for alleged future violations by the Board of its constitutional mandate or of the Commissioner's priro ruling in Willett, supra.

The hearing examiner observes that the Commissioner is charged with the responsibility to hear and determine controversies and disputes which arise under the school laws. N.J.S.A. 18A:6-9 The Commissioner's quasi-judicial authority to hear and determine controversies and disputes may be invoked by a person aggrieved by an action taken by a local board of education by filing a Petition of Appeal pursuant to N.J.A.C. 6:24-1.3. The appeal must state specific allegations and essential facts in support thereof. Here, there are no such specific allegations. Instead, petitioner merely alleges that the Board may violate the constitutional mandate to provide a free public education or it may violate the Commissioner's ruling in Willett, supra, by imposing fees on pupils for participation in school field trips.

The hearing examiner knows of no authority nor of any instance whereby the Commissioner has granted prospective relief for alleged future violations of law. To the contrary, in matters where such relief has been requested the Commissioner has denied the party's request on the basis that such relief would be purely speculative. (See Mary Ann Mesics v. Board of Education of the East Windsor Regional School District et al., 1977 S.L.D. ___ (decided March 3, 1977).)

While there is no basis to recommend that the Commissioner grant the requested prospective relief, it is critial for a thorough understanding of the matter that the following facts be presented.

The New Jersey State Constitution, Article VIII, Section IV, paragraph 1 states:

> "The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years."

In this regard, the complaint in the Willett, supra, matter addressed a board policy which required transportation costs and admission charges attendent to field trips it approved for its pupils to be borne by the parents of the participating pupils. The controverted policy also provided that if the parent could not afford to bear such cost, its school administrators had authority to contribute that pupil's fee from a school petty cash fund.

The Commissioner, in arriving at a determination in the Willett matter, defined a field trip as:

> "***a journey by a group of pupils away from the school premises under the supervision of a teacher for the purpose of affording a first-hand educational experience as an integral part of an approved course of study. ***Such a field trip is a proper and desirable element of the school curriculum. It is not a holiday, a reward or a vacation from school work***."
> (at 205) (Emphasis supplied.)

And,

> "***A field trip is, or should be, a valuable learning experience, planned, carried out, and followed up as an integral part of the course of study with clearly understood objectives in terms of learning. If the trip does not meet such criteria, it is to be questioned whether it has any place in the school program.***
> (at 206) (Emphasis supplied.)

The Commissioner, relying on the referenced article of the New Jersey State Constitution, ante, and upon the then existing statute, R.S. 18:14-1 (now N.J.S.A. 18A:38-2), which provides, inter alia, that "Public schools shall be free***" and R.S. 18:12-1 (now N.J.S.A. 18A:34-1) which provides, inter alia, free of cost for use by all pupils***", and R.S. 18:11-1 (now N.J.S.A. 18A:33-1) which provides, intra alia, that "Each school district shall provide*** suitable educational facilities *** and courses of study *** for all pupils***" concluded that

> "***these laws indicate a clear intent to provide public education at no cost to partents.***" (at 205)

the Willett, supra, matter

> "***inconsistent with the school laws of New Jersey to the extent that it requires that the costs of such field trips shall be borne by parents of the participating children***." (at 206)

In the instant matter, there is no written Board policy with respect to field trips. Consequently, no such written policy may be examined by the Commissioner, as was the case in Willett, supra.

The hearing examiner finds that the lack of a Board policy in the instant matter is not conclusive in regard to the completeness of this report. This is so far, during the pendency of the litigation, the Board did adopt a resoluation on July 29, 1977 which states in pertinent part as the follows:

> "***Whereas the Board has determined that, on advice of Counsel, and reserving its right at such time or times, if any, as future changed circumstances may warrant, to challenge the jural efficacy of the said Willett decision, it is obligated to recognize and comply with the Willett decision to the extent, if any, that it may be applicable, and,
>
> "Whereas the Board has been informed by Counsel of the suggestion of Assistant Director Daniel B. McKeown to consider and take under advisement the prospect of conducting such surveys, inquiries, research, and investigation as may assist in dtermining whether to adopt a Board policy relating to the subject matter of field trips, as that term is used in the Willett decision, if the Board comtemplates participating in the future in such field trips as so defined, and
>
> "Whereas although the Board considers that all matters concerning local Board policy including the determination of whether there should be a policy on any given subject matter, is primarily if not exclusively a matter of local Board concern, nevertheless
>
> "NOW THEREFORE BE IT RESOLVED, that the School Government Committee together with the Superintendent give serious consideration to the suggestions of Assistant Director McKeown and conduct such surveys, inquiries, research, and investigations as may assist the Board to determine whether to adopt a Board policy relating to the subject matter of field trips; and be it futher
>
> "Resolved, that the Commissioner be informed that the Board has never done or sanctioned any act or thing which it has considered violative of the Commissioner's order of May 26, 1976 or the decision in the Willett case, and more particularly that the Commissioner shall have no cause to fear threat of any prospective unlawful conduct, and to this

> this Board will publicly announce in advance of any actions to be taken by it, any advance of any actions to be taken by it, any determinations which it may make with respect to field trips for the school year 1977-78.***" (C-1

The Board's intent not to violate the ruling of the Commissioner set forth in Willett, supra, is clear. The absence of a written Board policy in regard to field trips does preclude knowledge of the Board's future action. The absence of a policy is more critical in light of the aforementioned People-to-People program which necessitated intervention by the Commissioner (see Debra Matrick, supra) and the uncontradicated testimony of petitioner that in prior years she was assessed fees by the Board for her children to participate in field trips. (Tr. 28, 29, 34, 41) There is no evidence in the record that the Board has charged parents fees for educational field trips since the issuance of the Commissioner's Order on May 26, 1976.

The hearing examiner recommends that the Commissioner, pursuant to his authority at N.J.S.A. 18A:4-23, direct the Board to adopt a written policy in regard to field trips and further direct that such policy be consistent with the previously cited provisions of law and the Commissioner's prior ruling in Willett, supra.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the matter, including the report of the hearing examiner and the exceptions and objections filed thereto by petitioner pursuant to N.J.A.C. 6:24-1.17(b).

Petitioner asserts, contrary to the recommendation of the hearing examiner, that the Commissioner does have authority to grant prospective relief and that on prior occasions prospective relief has been granted. Petitioner contends that the Commissioner's authority to grant prospective relief in matters litigated before him flows from the New Jersey Supreme Court's ruling in East Brunswick Board of Education v. East Brunswick Township Council, 48 N.J. 94 (1966). Petitioner contends that the Commissioner has granted such prospective relief in E.H. v. Board of Education of the Town of Boonton, 1975 S.L.D. 455; Ruth Ann Singer v. Board of Education of the Borough of Collingswood, 1971 S.L.D. 594; and Theodore C. Seamans et al. v. Board of Education of the Township of Woodbridge, 1968 S.L.D. 1.

The Commissioner disagrees. Firstly, the Court in East Brunswick, supra, addressed the authority of the Commissioner with respect to school budget disputes after a governing body imposed reductions thereto following a defeat of the proposed budget by the voters at the polls. Any relief which was granted by the Commissioner in the other matters cited was granted only after the respective boards of education took a certain action.

There is no showing here that the Board has taken action to contravene either the prior ruling in Willett, supra, or the New Jersey Constitution, Article VIII, Section IV, par. 1. When, earlier in the litigation, petitioner established that the Board did take such improper action, the Commissioner granted relief in that instance in the form of a restraint applied against the Board from carrying out that action. (See Debra Matrick, supra.)

The Commissioner does adopt the hearing examiner's report and recommendation as his own and directs the Board to adopt a written policy with respect to field trips. Such policy shall be consistent with decisional law (Willett, supra) and a more recent ruling set forth in Board of Education of the Borough of Fair Lawn, Bergen County v. Harold F. Schmidt, 1978 S.L.D. ____ (decided September 19, 1978), aff'd State Board of Education, March 7, 1979.

The Commissioner finds and determines that no justiciable issue exists before him for which relief could be granted. Accordingly, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

August 14, 1979

ALICE SCATURRO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTAGUE, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

For the Petitioner, Busche, Clark, Leonard & Honig
(R. Webb Leonard, Esq., of Counsel)

For the Respondent, LaCarrubba, Mattia & Meltzer
(Robert A. Mattia, Esq., of Counsel)

Petitioner, who had taught as an elementary teacher for three academic years for the Montague Township Board of Education, hereinafter "Board," alleges, inter alia, that the Board failed to evaluate her pursuant to N.J.S.A. 18A:27-3.1, arbitrarily and unlawfully refused in April 1977 to reemploy her for the ensuing school year and denied her the due process of law to which she was entitled.

She seeks a determination by the Commissioner of Education that the Board's termination of her employment was null and void, together with a directive to the Board to reinstate her to her former position with lost salary and emoluments.

The Board admits that its administrative officer did not present petitioner with her written evaluations and allow her to sign them but denies that its determination not to reemploy her was other than a reasoned exercise of its discretionary authority.

A hearing was conducted on March 29 and 31, 1978 at the office of the Sussex County Superintendent of Schools and the Sussex County Court House, Newton, by a hearing examiner appointed by the Commissioner. Memoranda of Law were filed by the parties. A hearing examiner report follows, setting forth first those uncontroverted facts which reveal the contextual setting of the dispute:

Petitioner taught grade three during the period from September 1974 through June 1976. During the ensuing 1976-77 school year she taught a fourth grade which was comprised primarily of pupils she had taught during 1975-76. During those three years petitioner was observed and evaluated on numerous occasions by the administrative principal, hereinafter

"principal." With the exception of one evaluation (J-1) she was not offered the opportunity either to read and sign the written evaluation or to confer with the principal concerning that which was recorded thereon. The record is devoid of proof that she made such request of the principal. Those evaluations generally show that the principal observed her to be a satisfactory teacher in need of occasional suggestions for improvement. (J-1-3, 7-10; Tr. II-44) During each of petitioner's years of employment the principal recommended that the Board offer her a successor contract.

The Board on April 11, 1977 rejected the principal's recommendation to reemploy petitioner when a motion to renew her contract for the 1977-78 school year was unanimously defeated. (R-3) Petitioner was duly notified of the Board's action by letter dated April 13. (R-1)

Thereafter, by letter dated April 20 petitioner requested written reasons for the Board's decision. (J-5) Reasons were provided by letter of the principal stating that:

> "***It seemed to be the judgment of the Board that while there were no serious objections to the teaching service obtained from you, there persisted a feeling that another teacher could be obtained who would avoid the accumulation of negative parental associations and clear the way for a more positive learning atmosphere. 'We think that we can find a better staff member for that price or less.' seem [sic] to be the feeling of the various Board members.
>
> "We hope that this explanation will help you understand that for that reason and that reason alone, that [sic] the Board felt that it could obtain a more successful staff member.***" (J-4)

To this letter petitioner responded on May 24, 1977 as follows:

> "In response to your letter of April 23, 1977, which was hand delivered to me on May 9, 1977, I am requesting a Public Hearing***." (J-6)

The Board refused to grant petitioner a public hearing but offered to schedule an informal appearance in closed session. (P-1) Petitioner refused that offer and on September 19, 1978 filed the within Petition of Appeal.

ir problems which was on occasion interpreted by others as weakness.

2. Neither the principal's less-than-candid statements to petitioner, as he sympathetically sought to assist her, nor

The testimony of witnesses is succinctly summarized as follows:

The principal testified that during each year petitioner taught under his supervision he had some concern over discipline problems which she encountered. He testified that, when Board members questioned the advisability of renewing petitioner's contract for the 1976-77 school year, he had persuaded them to do so with the understanding that she be allowed to continue teaching in the fourth grade the same class of pupils which she had taught in the third grade during 1975-76. (Tr. I-6-18, 20, 23, 36) He testified that he later advised petitioner of the Board's concerns over adverse parental comments on the effectiveness of her teaching performance and that both he and the Board's reading specialist had on numerous occasions conferred with petitioner offering suggestions and literature to assist her in coping with the classroom noise level, parental complaints and discipline problems. The reading specialist and petitioner both corroborated that testimony. (Tr. I-29-30, 41, 43, 55, 66-67, 75-76, 109, 111-112, 114-124; Tr. II-7, 37, 44)

The principal testified that, although he recognized that petitioner had not corrected her problems in the areas of classroom management, discipline and parent relationships, he had recommended her reemployment on the assumption that these problems could ultimately be resolved and that she would become an acceptable staff member. (Tr. I-54) He also testified that, while he had failed, through nescience, to confer with petitioner and to allow her to read and sign each evaluation, he had on a weekly basis sought to assist her with the enumerated problems which she was encountering. That such sessions were held is corroborated by petitioner's own testimony. She testified, however, that on only one occasion did the principal discuss and allow her to read and sign an evaluation form. (Tr. I-25-26, 29-30, 66-67, 86-90; Tr. II-37-44)

The principal also testified that he believed that, since certain parents had developed an opinion that petitioner did not deal with discipline and other matters properly, their lack of confidence affected pupils' attitudes by reinforcing problems that already existed. (Tr. I-49-51) He testified that he had been somewhat less than candid with petitioner concerning her continuing problems. (Tr. I-86-90) He also testified that Board members rejected his recommendation that she be reemployed for 1977-78 on the basis that:

> "***[I]f there is difficulty or potential difficulty,*** they would rather not have the teacher on the staff because it would be too difficult to remove the teacher***."
>
> (Tr. I-55)

Four parents of pupils enrolled in petitioner's class during 1976-77 testified that they had refused overtures by other

parents inviting them to sign petitions of complaint such as those ten petitions entered into evidence which accuse petitioner, inter alia, of lack of classroom discipline, partiality, general incompetence, vagueness and failure to teach grammar and current events. (J-11-22) Those four parents who testified, however, averred that they had no complaints about petitioner's performance and were satisfied with her instruction of their children. (Tr. I-130-147)

Petitioner's testimony characterized her 1975-76 class as energetic, rambunctious, very active and noisy. She testified that she had developed satisfactory control of her class by June 1976 but that when she returned to the class in September "***they were back at the same point that they were when [she] had started with them at the beginning of the third grade***." (Tr. II-7) She testified that discipline problems were then further accentuated by two new pupils in her class who exhibited strong tendencies to be aggressive, abusive and disrespectful. Of one such child she testified:

> "***Most of the time I dealt with her in a very quiet manner because that's what she needed more than anything, I felt. Our relationship as I challenged her and got to know her became much, much better. She was a good student, but an unhappy child that really needed a good deal of attention.***"
> (Tr. II-10)

Petitioner testified of conditions in her classroom during September 1976 as follows:

> "***I did not feel as if it was completely out of control, but I knew there were things that had to be corrected.***" (Tr. II-33)

The following findings of fact are set forth based upon the testimony adduced at the hearing:

1. Petitioner as a teacher chose not to utilize harsh confrontations to achieve classroom control and reduce the noise level in her classes. She exhibited a high degree of empathy with her pupils and their problems which was on occasion interpreted by others as weakness.

2. Neither the principal's less-than-candid statements to petitioner, as he sympathetically sought to assist her, nor her own efforts achieved the degree of classroom control which the Board or the principal ultimately expected of teaching staff members.

3. The Board's announced reason for not reemploying petitioner was that she had become the center of a factional dispute among members of the community. The record confirms that

such factions existed and that this was the Board's principal reason for not reemploying her for 1977-78 during which year she would have acquired tenure.

4. Petitioner was given but one opportunity to read, sign and confer with the principal about her seven written evaluations from January 1976 through April 1977.

5. There is no credible evidence within the record on which to base a conclusion that petitioner was other than a conscientious teacher who sought to instruct her pupils in a manner she believed to be in their best interests.

6. Petitioner received a timely statement of reasons for nonreemployment on May 9, 1977 and did not request an appearance before the Board to contradict that statement until fifteen days later on May 24, 1977.

The following recommendations are made to the Commissioner for his consideration in rendering a determination of the matter. It is recommended that the Commissioner determine:

1. That the Board's announced reason for not reemploying petitioner was not frivolous but within that contemplated by the Court in Donaldson v. Board of Education of North Wildwood, 65 N.J. 236 (1974) wherein it was stated that:

> "***The board's determination not to grant tenure need not be grounded on unsatisfactory classroom or professional performance for there are many unrelated but nonetheless equally valid reasons why a board, having had the benefits of observation during the probationary period, may conclude that tenure should not be granted.***" (at 241)

(In this regard see also Mary C. Mihatov v. Board of Education of the Borough of Woodcliff Lake, Bergen County, 1977 S.L.D. ___ (decided January 5, 1977) wherein the Commissioner refused to set aside that board's determination not to reemploy a teacher who had become the center of public controversy, even though that teacher had been recommended for a successor contract by its superintendent.)

2. That petitioner in waiting fifteen days from receipt of the Board's statement of reasons for nonreemployment failed to comply with the time period of ten days specified for requesting an informal appearance before the Board as provided by N.J.A.C. 6:3-1.20, as follows:

> "(a) Whenever a nontenured teaching staff member has requested in writing and has received a written statement of reasons for

> nonreemployment pursuant to N.J.S.A. 18A:27-3.3, he/she may request in writing an informal appearance before the local board of education. Such written request must be submitted to the board within ten calendar days of receipt of the board's statement of reasons.***" (Emphasis supplied.)

3. That, although the Board failed to provide, through its principal, opportunity for petitioner to read, sign, and discuss in conferences her written evaluations, she was fully apprised by the principal of the concerns he had noted thereon, as well as the Board's continuing concerns over parental reactions. In any event, the principal forthrightly recommended her for employment for 1977-78 which recommendation was rejected by the Board. There is nothing within the record on which to base a conclusion that the Board acted on the basis of any adverse criticism in those written evaluations.

4. That petitioner as a nontenured teacher had no property right to continued employment which required additional due process procedures beyond those accorded by the Board. Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann 408 U.S. 593 (1972)

In conclusion it is recommended that the Commissioner issue an opinion that the Board's determination not to reemploy petitioner was an act within its discretionary authority to determine who should teach in its schools. Porcelli et al. v. Titus et al., 108 N.J. Super. 301, 312 (App. Div. 1969), cert. den. 55 N.J. 310 (1970) It is further recommended that the Commissioner determine that the Board was in substantial compliance with N.J.S.A. 18A:27-3.1 and N.J.A.C. 6:3-1.19 and that petitioner's prayer for reinstatement and/or monetary award should be denied. Cf. Louis A. Foleno v. Board of Education of the Township of Bedminster, 1978 S.L.D. ___ (decided February 22, 1978) Therein Foleno, who had been observed only one time for a few minutes and had been without benefit of adverse criticism of his superior who had not recommended his reemployment, was awarded sixty days' salary as the result of noncompliance with N.J.S.A. 18A:27-3.1.

This concludes the hearing examiner report.

* * * *

The Commissioner has reviewed the entire record of the controverted matter and determines that there is ample supporting evidence validating the hearing examiner's findings of fact. These findings the Commissioner henceforth holds as his own. It is noticed that no exceptions were filed by either party pursuant to the provisions of N.J.A.C. 6:24-1.17(b).

Absent a showing that the Board acted in bad faith, capriciously, arbitrarily, contrary to statutory or decisional law, or otherwise abused its discretionary authority, there are no grounds on which to grant the relief sought by petitioner.

Petitioner as a nontenured teacher had no property right to continued employment. Roth, supra Nor were the Board's reasons for nonreemployment frivolous or without factual basis. Mihatov, supra; Donaldson, supra Accordingly, the Commissioner determines that the Board's decision not to reemploy petitioner for the 1977-78 school year was a legal exercise of its discretionary authority to decide who should teach in its schools. Porcelli, supra; N.J.S.A. 18A:11-1 There being no basis on which the relief sought can be granted, the matter is dismissed.

COMMISSIONER OF EDUCATION

August 17, 1979

New Jersey
State Department of Education
225 West State Street
Trenton, N.J. 08625